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Chemical Security Anti-Terrorism Standards: Key questions raised by the Department of Homeland Security's New Regulations

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The key questions

- **Who**
 - Issued these regulations?
 - Will have to comply? Is Exempt?
- **What**
 - Is the purpose of the legislation and regulations?
 - Has to be done to comply with the regulations?
- **When**
 - Did the regulations go into effect?
 - Is compliance required?
- **What is happening with this rule?**
- **Where can facilities go for help?**



Who issued the regulations?

- **Department of Homeland Security (DHS)**
 - **October 2006, Congress passed 2007 DHS Appropriations Bill, which included legislation requiring that DHS issue:**



interim final regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities: Provided, that such regulations shall apply to chemical facilities that, in the discretion of the Secretary, present high levels of security risk...

-- Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 550.

Key aspects of the authorizing legislation

- Contained no definitions, even for such seemingly significant terms like "chemical facility"
- Deferred resolution of virtually every major issue that had prevented passage of previously proposed legislation to the DHS rulemaking process
- Required DHS to promulgate interim final regulations *within six months* (by April 9, 2007), a remarkably short period of time

The DHS regulations

- DHS met the six-month deadline for promulgating regulations
 - An "Advanced Notice of Rulemaking" issued on December 28, 2006
 - The interim final rule was published on April 9, 2007
 - The rules went into effect on **June 8, 2007**

See 72 Fed. Reg. 17668 (April 9, 2007) (to be codified at 6 C.F.R. § 27)

See 72 Fed. Reg. 17688 (April 9, 2007) (to be codified at 6 C.F.R. § 27)

Who must comply with the regulations?

- A "chemical facility" subject to the DHS regulations is considered:
 - any "establishment"
 - that "possesses or plans to possess"
 - at any "relevant point in time"
 - any of the "chemicals of interest" listed in Appendix A of the rule
 - in amounts greater than specified threshold quantities (STQ).



See 6 C.F.R. § 27.105.

Who must comply with the regulations?

- Any facility that manufactures, uses, stores or distributes any chemicals listed in Appendix A in amounts above the specified quantity may be regulated.
- DHS believes that facilities subject to the regulations will fall primarily into one of three categories:
 - chemical manufacturing, storage and distribution facilities;
 - petroleum refineries, and
 - liquefied natural gas storage (peak shaving) facilities.



See DHS website, http://www.dhs.gov/xprepro/programs/gc_1181765846511.shtm (last visited July 19, 2007).

Appendix A

- The chemicals and amounts listed in Appendix A will dictate who is covered by the new rules
 - Any facility that possess or plans to possess these chemicals in amounts above the threshold quantities will be subject to the new rule.
 - A final Appendix A has not been published as of July 23.
 - In April 2007, DHS published a draft Appendix A and solicited public comments on it for one month.
 - DHS received over 6,000 comments on the draft Appendix.
 - In mid-June 2007, DHS stated that a final Appendix A would be published in a few weeks.
- Rumor: There will be no "any amount" on Appendix A

Sample: Draft Appendix A

Chemical Facility Anti-Terrorism Standards Proposed Appendix A: DHS Chemicals of Interest

This proposed list of chemicals was open for comment through May 9, 2007.

Chemical of Interest	Chemical Abstract Service (CAS) Number	Screening Threshold Quantity (STQ) (lbs)
1,1,3,3,3-pentafluoro-2-(trifluoromethyl)-1-propene	302-21-8	Any Amount
1,1-Dimethylhydrazine	57-14-7	11,250
1,2-bis(2-chloroethyl)ethane	3563-36-8	Any Amount
1,3-bis(2-chloroethyl)propane	63905-10-2	Any Amount
1,3-Butadiene	106-99-0	7,500
1,3-Pentadiene	504-60-9	7,500
1,4-bis(2-chloroethyl)propane	142868-93-7	Any Amount
1,5-bis(2-chloroethyl)propane	142868-94-8	Any Amount
1-Butene	106-98-9	7,500
1-Chloropropylene	590-21-6	7,500
1H-Tetrazole	16681-77-9	2,000
1-Pentene	109-67-1	7,500
2,2-Dimethylpropane	463-82-1	7,500

Who is exempt?

- The October 2006 authorizing legislation included the following exemptions, which the DHS regulations incorporate:
 - Facilities regulated pursuant to the Maritime Transportation Security Act (MTSA);
 - Public water systems (as defined by Section 1401 of the Safe Drinking Water Act) (SDWA);
 - Water treatment works (as defined by Section 212 of the Federal Water Pollution Control Act, also known as the Clean Water Act, or CWA);
 - Facilities owned or operated by the Departments of Defense (DOD) or Department of Energy (DOE); and
 - Facilities subject to regulation by the Nuclear Regulatory Commission (NRC).

Scope of the Exemptions

- The scope of the exemptions appears to have been narrowed by DHS.
 - In some cases only a portion of a large "facility" – such as an operation comprised of multiple buildings on a large campus – may be exempt because only a portion of the facility is regulated by one of the listed laws or entities.
 - If a large facility possesses one or more "chemical(s) of interest" in an area of its site that is not specifically regulated by one of the exempt laws/entities, this "unregulated" portion of the facility may still be subject to DHS regulation.



If one building is exempt, is the entire campus exempt?

"Partial" Exemptions

- DHS has taken the position, at least in certain screening questions, that if only a portion of a facility is subject to the MTSA, or considered a CWA "treatment works" or SDWA "public water system," then that facility is only "partially" exempt from compliance.



See DHS "Top-Screen" questions and User's Guide, available at http://www.dhs.gov/xprepro/programs/gc_1189501486197.shtm (last visited July 19, 2007).

“Partial” Exemptions (continued)

- No such “partial” exemption appears to exist for facilities owned or operated by the DOD or DOE or regulated significantly by the NRC – the facility is either exempt entirely or not at all.
 - A facility qualifies for the NRC exemption only if “the facility is one where NRC already imposes significant security requirements and regulates the safety and security of most of the facility, not just a few radioactive sources.”



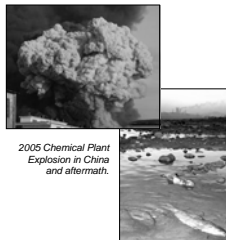
See DHS “Top-Screen” questions and User’s Guide, http://www.dhs.gov/xprevprot/programs/sgc_1169501486197.shtm, (last visited July 19, 2007).

Additional Exemptions are Possible

- The regulations indicate that the Assistant Secretary can provide for additional exemptions, waivers or a phase-in of the DHS requirements for various commercial or industrial sectors.
 - Although DHS states that it does not plan to add any exemptions via amendments to the regulations at this time, it has stated that it “presently does not plan to screen railroad facilities ...”
 - It is possible other such exemptions could be announced
 - Railroad Industry

What is the purpose of the regulations?

- DHS has stated that the purpose of these regulations is:
 - to enhance the security of our Nation by furthering the mission of the Department ... and by lowering the risk posed by certain chemical facilities.



2005 Chemical Plant Explosion in China and aftermath.

See 6 C.F.R. § 27.100

What has to be done to comply?

- The DHS regulations require facilities that may possess chemicals of interest to engage in a multi-step process:
 - Determine if the facility may be covered
 - Register the facility on the DHS website
 - Complete a “Top-Screen” self-evaluation
- And, if found to be a “high risk” facility:
- Prepare a Security Vulnerability Assessment (SVA); and
 - Prepare a Site Security Plan (SSP).

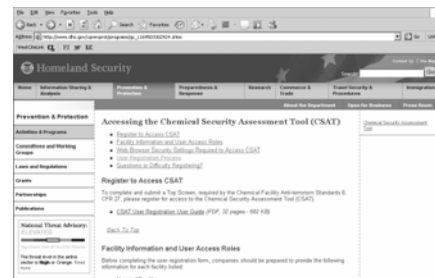


Register with DHS and Complete “Top-Screen”

- “Top-Screen” Questionnaire
 - This requires that each potentially covered facility register on the DHS website to gain access to DHS’s Chemical Security Assessment Tool (CSAT) tool, the interface used to complete the Top-Screen.
 - Facilities can register with DHS now.



Register with DHS and Complete “Top-Screen”



Detailed instructions are found at: <http://www.dhs.gov/chemicalsecurity>


- Each facility must designate "Preparer(s)," "Submitter(s)," "Authorizer(s)" and "Reviewer(s)."
 - The **Preparer** may enter the required data into the CSAT on-line screening tool but may not formally submit the data on the company's behalf.
 - The **Submitter** may formally submit the regulatory required data to the DHS.
 - The **Authorizer** is empowered by the facility parent company to provide assurance that the user account request for the Preparer and Submitter is valid
 - The **Reviewer**, an optional role, may review information entered into the CSAT but cannot enter, edit or submit information.
- One individual can have one or more of these roles (for example, the Authorizer could fulfill all roles).

Completing the "Top Screen"

- The "Top Screen" is the initial questionnaire on the DHS website that each potentially covered facility will have to fill out to determine if further compliance is required.
- The Top Screen is expected to assist DHS in
 - Determining whether a facility is "high risk," and thus subject to further regulation, and
 - Placing those facilities deemed "high risk" into preliminary tiers for purposes of compliance with the new regulations.


Top Screen Deadline

- Facilities will have **60 calendar days after the upcoming publication of the final Appendix A** in the Federal Register to complete the Top Screen.
Rumor: Higher learning will get more time!
- Failure to timely complete the Top Screen could result in:
 - Being classified by DHS as "presumptively high risk"
 - And, if there is additional delay, possible fines, shut-down orders and other penalties.



Completing the Top Screen

- Facilities will have to provide information such as:
 - A list of the "chemicals of interest" it possesses in quantities greater than the threshold quantities listed in Appendix A.
 - Whether the facility is subject to regulation by the DOE, DOD or NRC, or regulated under the MTTSA, SDWA or CWA.
 - Answers to questions relating to risk factors:
 - the potential for loss of life
 - the potential loss of the ability to execute a critical government function, should the facility be attacked.



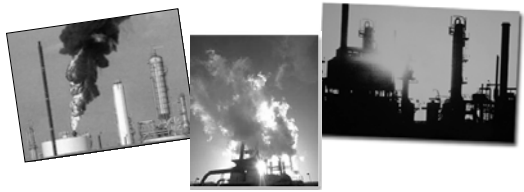
Screening "In" or "Out" of Further Compliance

- Answers to the Top-Screen analyzed BY DHS to determine if the facility should be considered a "high risk."
 - If the facility is found to be not "high risk," then the facility will have to do nothing more to comply with the rules, at least until further notice.
 - DHS "expect[s] the vast majority of facilities that do the Top Screen to screen out" of further compliance under the regulations.

See Transcript of discussion with Lawrence Stanton, Director, Chemical Security Compliance Division, Office of Infrastructure Protection at the Chemical Sector Security Summit June 13, 2007

Facilities found to be "high risk"

- If a facility is found to be "high risk," DHS will then make a preliminary determination and place the facility into one of four "risk-based" tiers.



Facilities found to be “high risk” (continued)

- Will be asked to complete, within 90 days of notification, a Security Vulnerability Assessment (SVA). The SVA will be used by DHS to refine the placement of facilities into the risk-based tiers.
- DHS will then require that each high-risk facility submit, within 120 days of notification, a Site Security Plan (SSP) that must address each security vulnerability set out in the SVA, describe security measures in place to address such vulnerabilities and describe how the facility's security measures meet applicable performance standards.

What is happening?

- DHS is trying to get the final Appendix A to OMB
- Higher learning represented in Congressional hearing
 - July 24, 2007
 - Dr. Ara Tahmassian, Boston University
- ACE, NACUBO & CSHEMA establishing work group with DHS
- Lawsuits a plenty!
 - Higher learning is not a lone voice

Where can you go for help?

- The DHS website may answer many basic questions
 - www.dhs.gov/chemicalsecurity
- Stay tuned to CSHEMA, NACUBO, ACE and others!

