

# DHS Proposes Rule to Secure “High-Risk” Chemical Facilities

January 10, 2007

On December 22nd, the Department of Homeland Security (DHS) released an advance notice of proposed rulemaking (NOPR) proposing regulations to improve security at “high-risk” chemical facilities. **Comments on the proposed rule are due by February 7, 2007.**

## The Chemical Facility Security Program

**Applicability:** Section 550 of the recently enacted Homeland Security Appropriations Act of 2007 (Act) provides that any chemical security regulations “shall apply to chemical facilities that, in the discretion of the Secretary, present high levels of security risk.” DHS proposes to define “chemical facility,” in part, as “any facility that possesses . . . a quantity of a chemical substance determined by the Secretary to be potentially dangerous or that meets other risk-related criterion identified by the Department.” The NOPR further explains that a chemical facility is not limited to a specific type of facility that uses or stores potentially dangerous chemicals. Instead, the question of what constitutes a chemical facility turns not on the name or type of facility at issue, but rather on whether, and in what amount, the facility uses, stores, or otherwise possesses dangerous chemicals.

**Initial “High-Risk” Determination:** DHS intends only to regulate “covered facilities,” *i.e.*, those chemical facilities determined to present high levels of security risk. To determine the security risk posed by chemical facilities, DHS may request information from chemical facilities to help identify potential vulnerabilities to a terrorist attack. In addition, DHS may require chemical facilities fitting certain risk profiles to complete a “Top-screen” risk assessment through a secure DHS website. DHS also contemplates drawing on many sources of available information to determine the risk level of chemical facilities, including, for example, the Environmental Protection Agency’s Risk Management Plan list. Based on the information gathered and the initial screening, DHS will determine whether a chemical facility poses a high security risk and proposes to then rank facilities into tiers.

**Obligations of “High-Risk” Facilities:** If a chemical facility qualifies as “high-risk,” the facility will be required to prepare and submit a Vulnerability Assessment (VA) and a Site Security Plan (SSP). The SSP must address each vulnerability identified in the facility’s VA, and explain how the security measures selected by the facility will address the applicable risk-based performance standards identified by DHS. The proposal, however, states that DHS may not require a chemical facility covered by the rule to select a specific measure to enhance its security. Facility owners and operators are thus afforded the opportunity to determine their own specific security measures to achieve certain performance standards. But even though DHS may not mandate that the covered facility implement one particular security solution, DHS may disapprove a SSP for failing to satisfy the risk-based performance standards.

**Preemption:** To avoid potential conflicts with state and local laws, the proposed rule preempts such laws, specifically providing that “No law or regulation of a State or political subdivision thereof . . . shall have any effect if such law, regulation, or decision conflicts with, hinders, poses an obstacle to or frustrates the purposes of these regulations.” The proposed rule does, however, contemplate providing state and local governments the opportunity to seek opinions on preemption directly from DHS.

**Penalties for Noncompliance:** DHS can issue an Order of Compliance for any instance of noncompliance, such as a chemical facility’s refusal to complete a “Top-screen,” failure to allow DHS to conduct an inspection, or failure to update a SSP. For repeated patterns of noncompliance or for egregious instances of noncompliance, DHS may issue civil penalties of not more than \$25,000 for each day during which the violation continues or order chemical facilities to cease operations.

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***Chemical-Terrorism Vulnerability Information:*** DHS proposes to establish a category of information – Chemical-terrorism Security and Vulnerability Information (CVI) – that will protect certain chemical security information from inappropriate public disclosure. The NOPR provides that CVI will include VAs, SSPs, and other sensitive information and documentation related to the development of security strategies.

### **Looking Forward**

As the rulemaking process moves forward, the proposed preemption of conflicting state laws will likely prove a divisive point. Indeed, several state and federal lawmakers have already voiced concern that the proposed regulations could preempt state and local regulations that impose stricter security requirements. Another contentious issue of note is that the NOPR does *not* propose to require “high-risk” facilities to switch to inherently safer technologies, as was favored by some legislators.

The Act requires DHS to complete the interim final rules by April 4, 2007. Once enacted, DHS is expected to aggressively implement its program in a phased manner, selecting certain chemical facilities for expedited initial processes under the final regulations and identifying other chemical facilities for additional phases of program implementation.

### **For Additional Information**

If you would like additional information on this proposed rule, or related issues affecting infrastructure protection in your sector, please contact Patrick Currier, Jay Ryan, or Bill Frick at (202) 298-1800. Additional infrastructure security resources can be found on our website at [www.vnf.com/security](http://www.vnf.com/security).

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