

CLIENT ALERT

DHS Seeks Comments on Changes to Its CFATS Rule

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The Department of Homeland Security (DHS) published an Advanced Notice of Proposed Rulemaking (ANPRM) in the Federal Register on August 18, 2014, seeking comments on a broad range of topics related to its Chemical Facility Anti-Terrorism Standards, commonly known as "CFATS." [79 Fed. Reg. 48693](#) (Aug. 18, 2014). DHS's announcement provides an opportunity for early public input on key CFATS issues.

Under CFATS, codified at 6 CFR Part 27, U.S. companies producing, storing, or handling any of more than 300 chemicals listed in Appendix A to the CFATS rule, in quantities over DHS-designated levels, must submit chemical inventories, conduct security vulnerability assessments (SVAs), and develop site security plans (SSPs). The SSPs must address vulnerabilities identified in the SVAs by meeting 18 risk-based performance standards (RBPS) developed by DHS. Companies can decide what security measures to put in place in order to meet the RBPS, but they must get final approval of those measures from DHS. Before approving an SSP, DHS will conduct an on-site inspection. Penalties for violations of CFATS may include a civil fine, not to exceed \$25,000 per day, a stop-work order, or both.

The ANPRM was triggered in part by Executive Order 13650, which President Obama issued on August 1, 2013, in response to a chemical explosion at a fertilizer storage and distribution facility. The EO directed DHS — along with the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and other agencies with chemical safety and security programs — to lead a working group and determine, among other things, whether their respective chemical regulatory programs should be modified and enhanced to prevent similar accidents. Publication of the ANPRM was likely prompted also by recent Congressional debates over DHS's effectiveness in implementing the 8-year-old CFATS program and whether the program should be reauthorized.

The ANPRM provides stakeholders with an opportunity to address their concerns over DHS's implementation of the CFATS program and submit comments, data, or views on how DHS might improve it. DHS states that it is "most interested" in receiving specific comments on the following topics:

- **General Regulatory Approach** – DHS asks the public how it can improve its current approach to identifying CFATS covered facilities. Notably, DHS invites comments on whether it should consider deletions from, additions to, or modifications to the list of exempt facilities. The CFATS enabling legislation exempts the following from CFATS: facilities regulated under the Maritime Transportation Security Act of 2002 (MTSA); Public Water Systems; Treatment Works; facilities owned or operated by the Department of Defense or the Department of Energy; and facilities subject to regulation by the Nuclear Regulatory Commission. Unless the statute is amended, any modifications of the CFATS exemptions would necessarily be subject to these statutory provisions. Since DHS promulgated the CFATS rule, implementation of the exemptions has been subject to controversy as DHS has sought information from MTSA-regulated facilities and some in Congress have pushed to remove the exemptions.

- **Treatment of Nontraditional Chemical Facilities** – Recognizing that its current "one-size-fits-all approach" may not be optimal for the diverse group of stakeholders covered by CFATS (including, for example, those in the transportation, energy, education, health, industrial manufacturing, and mining sectors), DHS seeks comments regarding the applicability of existing CFATS requirements to nontraditional facilities covered under CFATS. It is likely that some stakeholders will be encouraged that DHS is thinking about a sector-by-sector approach to regulating CFATS facilities as some other agencies currently do so, including EPA under the Clean Air Act program.
- **Risk-Based Performance Standards** – DHS also seeks comments on whether and how it should clarify or modify the RBPS. The RBPS are the foundation of the CFATS program and drive the security performance and expectations for the SSPs. A covered facility has to meet the applicable RBPS with measures appropriate for the level (or tier) of risk presented by the facility, but as the standards evolve, covered facilities are being required to meet an increasingly wide array of standards. The ANPRM provides an opportunity for stakeholders to help DHS create a narrower and more targeted group of risk-based standards that can help companies secure their facilities more efficiently and economically.
- **Appendix A** – In Appendix A to the CFATS rule, DHS listed over 300 chemicals of interest (COI) that it considers toxic or hazardous enough to make any facility holding threshold amounts of any one of them subject to CFATS regulations. In the ANPRM, DHS seeks comments on possible additions to, deletions from, or modifications to the list, including the significant threshold quantities (STQs), which serve as applicability levels. In addition, DHS seeks comments on the CFATS "mixture rule," which DHS used to address one of the main concerns raised by the regulated community during the rulemaking — how to account for chemicals in mixtures. Some covered facilities find the mixture rule and long list of Appendix A chemicals confusing, inefficient, and duplicative of other federal regulatory programs. The ANPRM provides an opportunity for stakeholders to suggest an alternative approach that may improve efficiencies.
- **Small Business Considerations** – DHS seeks comments regarding considerations specific to small businesses.
- **Alignment with Other Regulatory Programs** – DHS understands that there are currently a web of chemical facility regulations, including those managed by EPA, OSHA, the Coast Guard and other federal and state agencies, that impose overlapping obligations on covered facilities. Many have argued that these requirements increase compliance and implementation costs on both the private and public sectors without a corresponding security benefit. The ANPRM provides an opportunity for stakeholders to weigh in on these issues and suggest a more efficient approach.

DHS encourages commenters to provide specific data documenting the potential costs of modifying the existing regulatory requirements, the potential quantifiable benefits, and the potential impacts on small businesses as well as other information or authority supporting the comments.

DHS indicates that it plans to hold public listening sessions to solicit public views on the ANPRM. Information on those sessions is available at DHS's [Chemical Security Website](#). The deadline for filing written comments is October 17, 2014.

Given the broad applicability of the CFATS rule across many industrial sectors, a rulemaking of the sort contemplated by the ANPRM could have major operational and economic effects. Affected companies and trade associations thus should give this ANPRM serious attention and consider submitting comments and other information to DHS.

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