

Polytopics

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Department of Homeland Security to Establish New Chemical Plant Security Regulations

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After almost four years of debate, Congress passed legislation on chemical plant security and President Bush signed it on October 4, 2006. The new measure is part of the 2007 appropriations bill for the Department of Homeland Security ("DHS") and requires DHS to establish risk-based and performance-based standards for chemical plants to help protect against terrorist attacks. Specifically, DHS must promulgate regulations within six months for those chemical facilities that "present high levels of security risk."

Perhaps the most significant feature of this legislation is what it does not do. Virtually every one of the major issues that had hindered the passage of the numerous earlier bills has been deferred to DHS in the rulemaking process. For example, "high risk" chemical plants subject to the new law must conduct vulnerability assessments and create site security plans based on their vulnerabilities. In the legislation, DHS was given broad and largely undefined powers to define what it means to be a "high risk" chemical plant, and thus subject to the regulation. Similarly, other terms such as "risk-based performance standards" are not defined in the legislative language and must be defined by DHS in the new regulation.

While the chemical plant security legislation has finally passed, it is not yet clear what the impact of the new requirements will be on chemical facilities. DHS will have the task of determining which chemical plants shall be regulated and the standards that will have to be met to protect against terrorist attacks. Much of the debate that occupied Congress in addressing these issues will likely be protracted in the rule-making process. In addition, promulgating these regulations in just six months could prove to be very challenging for DHS.

In directing DHS to promulgate the chemical plant security regulations, Congress stipulated that these regulations were to establish interim standards and DHS's authority under the legislation would terminate in three years. Furthermore, the interim regulations may be superseded by any regulations promulgated in the future under other federal laws. As a result, how these new chemical plant security regulatory requirements will impact industry will depend in large part on the ultimate outcome of the rulemaking process.

Rulemaking aside, as a matter of good business practice and safe chemical handling, processors should be conducting and documenting vulnerability assessments and developing site security plans for their facilities.