



American Council on Education
Office of the President

May 9, 2007

IP/CSCD/Dennis Deziel
Mail Stop 8100
U.S. Department of Homeland Security
Washington, D.C. 20528-8100

Re: Docket Number 2006-0073; Submitted via Federal eRulemaking Portal

Dear Mr. Deziel:

On behalf of the undersigned higher education associations, the American Council on Education (ACE) and the National Association of College and University Business Officers (NACUBO) submit the following comments on the Department of Homeland Security's (DHS) Interim Final Rule: Chemical Facility Anti-Terrorism Standards (*72 Federal Register* 17688, April 9, 2007) and Appendix A thereto.

ACE is the major coordinating organization for the nation's higher education institutions. NACUBO is a nonprofit professional organization representing chief administrative and financial officers at more than 2,200 colleges and universities across the country. These organizations in combination with the signatory organizations represent the totality of the nation's accredited two- and four-year degree granting colleges and research universities.

Summary of Comments

The Interim Final Regulation imposes a multi-step process intended to give DHS information it needs to determine which chemical facilities present what level of risk from terrorist concerns. Based on that information, DHS would phase in requirements to perform facility assessments and prepare site security plans to address and prevent those risks. This phased in effort would require that those entities facing the greatest risk take action first. However, the first step in the process requires that every entity that might possibly possess or plan to possess any of 342 substances, complete what is called a "Top-Screen" analysis. To complete that analysis the entity must first inspect its operations to see which of the 342 chemicals are present, and in what amounts. If even one of 104 specified chemicals is present in even the smallest amount, the Top-Screen must be fully completed.

Colleges and universities have hundreds if not thousands of laboratories and classrooms that may well contain miniscule amounts of one or more of the substances listed in Appendix A (6 C.F.R. 27). In order to complete the Top-Screen analysis, each college, university, community college and other institution of higher education must inspect every building, laboratory and classroom where any science course is taught, to determine which one might contain just one of these substances. Even after this effort, it is almost certain that not a single college or university will be found to be a chemical facility that presents a high risk of terrorist attack. We urge the DHS not to divert its resources from the important task of ensuring that chemical facilities are protected, by converting a program intended to regulate chemical facilities into a program to regulate any facility where miniscule amounts of a single chemical might exist. Instead, DHS should phase in Appendix A by providing that it will not be effective as to the higher education sector until such time as it we can meet with DHS and provide specific suggestions to make its applicability more relevant and effective.

The higher education community recognizes the enormous challenge DHS faces in protecting the nation against chemical-based attacks. DHS must develop and implement a program to address the potential for a terrorist attack aimed at targets having chemical substances that, if released, could cause enormous injury and damage. Although it took four years for Congress to enact legislation authorizing this program, DHS is required to implement it in 180 days. Moreover, DHS must accomplish this task, yet not undermine or compromise the dozens of other federal, state and local efforts already in place or under way to address similar concerns. At the same time, it is the private businesses and organizations, including the higher education sector that are faced with the obligation to undertake reviews and create and implement plans to achieve these legislative ends. It is in this spirit that we offer the following comments to Appendix A and the Interim Final Regulations.

The Higher Education Sector Is Different from the Chemical Industry

Colleges and universities are different from other facilities with respect to chemical substances. The United States Environmental Protection Agency (EPA) and the Occupational Health and Safety Administration (OSHA), and others, have long recognized that the circumstances under which hazardous chemicals are present and handled on a college campus are qualitatively and quantitatively different from the manufacturing, chemical and industrial sectors. For example, our unique teaching and research laboratories typically work with hundreds of chemicals in very small volumes. Other differences are illustrated on the table below:

Chemical/Manufacturing/Industrial Facilities	Academic Institutions
Large quantities of chemicals used for manufacturing	Very small quantities of substances that are used by individual students/researchers
Large amounts of chemicals concentrated in relatively few locations	Academic campuses have many independent and dispersed points where chemicals might be

	used
Relatively little variability in what is generated from a consistent manufacturing process	Academic research and experimentation results in a wide variability of chemicals used in short time periods
Relatively continuous operations and usage of chemicals in ongoing processes	Academic semester cycle results in variable/sporadic use of chemicals
Few individuals involved in management of chemicals	Many students/researchers/faculty involved in use of small amounts of chemicals
Relatively stable work force directly involved in chemical use and management	Inherently transient student/faculty population involved in use of small amounts of chemicals

These differences prompted the OSHA and EPA to develop regulations governing the handling of certain types of chemical substances and wastes, particularly in the laboratory setting, which is inherent and pervasive in the higher education context. See 29 C.F.R. § 1910.1450 (Occupational Exposures to Hazardous Chemicals in Laboratories); Standards Applicable to Generators of Hazardous Waste; Subpart K--Standards Applicable to Academic Laboratories, 71 Fed. Reg. 29712 (2006) (proposed).

Unfortunately, the Top-Screen approach using Appendix A that is being implemented by DHS fails to account for these differences. As a result, colleges and universities now face the same threshold burdens and obligations as large chemical companies. In order to complete the Top-Screen, each institution must conduct inspections of potentially thousands of small laboratories in order to determine if even one milliliter of any of over 100 substances listed in Appendix A is present. The enormity of this burden is underscored by the fact that if a college or university “gets it wrong” it faces significant civil and criminal sanctions, including prison terms of up to eight years for those submitting this information. In light of these facts, DHS should carefully review its proposed procedures and the comments that are offered by the public.

1. *It is inappropriate and unnecessary to require higher education institutions to search thousands of small laboratories for the presence of any of the 342 substances listed on Appendix A.*

The proposed use of Appendix A as the mechanism for determining which entities will have to complete the Top-Screen process imposes extensive and unnecessary obligations on colleges and universities to demonstrate the obvious—they are not and should not be included in this program in the manner that has been proposed.

Section 550 of the Homeland Security Appropriations Act of 2007 (Section 550) granted DHS the authority to impose security plan obligations on chemical facilities. For more than four years, in hearings, debates and proposed legislation leading up to the enactment of this law, the focus has always been on facilities that possess such large amounts of chemical substances that they are potentially attractive targets for terrorists. See, e.g., *Conference Report on H.R. 5441, Department of Homeland Security Appropriations Act 2007*, 152 Cong. Rec. H7971 (Sept. 29,

2006) (Statement of Rep. Barton). Such facilities may be found in the chemical industry, the petroleum refining industry and certain manufacturing sectors.

With its issuance of the Interim Final Regulation, DHS now requires that any entity that possesses one or more of the 342 substances identified in Appendix A in quantities at or above the listed thresholds—or is in possession of any amount of over 100 of the listed substances—complete a Top-Screen. This mandate converts a program intended to bolster security at chemical facilities into one imposing extensive obligations on any location that has (or expects to have at some future, undefined “relevant point in time”) chemicals present in amounts so miniscule that they cannot be reasonably considered terrorist targets. Although the debate over chemical security never focused on colleges and universities, identifying covered facilities by implementing Appendix A in its current form will create such a result. In doing this, DHS will impose substantial and unnecessary costs on nonprofit colleges and universities to undertake reviews and analyses that will not provide protection against terrorist attacks of the sort envisioned by Section 550.

To complete a Top-Screen, each college and university must inspect every laboratory or classroom, and record the quantity present of every Chemical of Interest stored there (even though such chemicals may be present in extremely small amounts in each location). That is an enormous and unnecessary task. A typical mid-sized university may have hundreds of small laboratory sites to inspect.

In the Advanced Notice of Rulemaking (ANRM), DHS defined a “chemical facility” as any facility that possesses or plans to possess, at any relevant point in time, a quantity of a chemical substance determined by the Secretary to be potentially dangerous or that meets other risk-related criterion(sic) identified by the Department. 71 Fed. Reg. 78294 (2006).

Many commentators expressed concern that DHS’s proposed approach is vague and overbroad in terms of the goal of addressing and preventing terrorist attacks. 72 Fed. Reg. 17697 (2007). To address this, several commentators suggested that DHS adopt the chemical substance and quantity standards that have long been used by the United States Environmental Protection Agency (EPA) Risk Management Plan (RMP) program. *Id.* DHS rejected that approach and instead chose to publish a list of hundreds of chemicals that, if present, often in *any* amount, mandates completion of a comprehensive Top-Screen. DHS did not explain why the commentators’ more logical and understandable approach to screening for targeting entities was not appropriate.

This fundamental concern may be resolved in a variety of ways, including using a phased application of Appendix A. For example, DHS could begin by requiring that those entities in the chemical sector (using Standard Industrial Codes) complete the Top-Screen first. DHS could then determine what additional SIC code sectors must complete the Top-Screen process.

2. *Appendix A should be modified to correct technical errors and to comport with threshold quantities established by existing programs.*

The technical flaws noted in the comments submitted by the Campus Safety Health and Environmental Management Association (CSHEMA) are incorporated herein by reference. Additionally, CSHEMA proposes that, if a DHS Chemical of Interest is also listed as an Extremely Hazardous Substance in Appendix A of 40 C.F.R. §355, the Screening Threshold Quantities (STQs) should be set no lower than the Threshold Planning Quantity (TPQ) for that chemical. DHS should reconcile the STQs listed in Appendix A with the threshold quantities of those chemicals that are already recognized as problematic in existing programs. This approach would permit colleges and universities to use information they are already required to compile for the EPA to complete the Top-Screen.

By creating an entirely new set of screening criteria, the proposed Appendix A may actually undermine DHS's goal of expeditiously and reliably determining whether entities should be deemed high-risk facilities. Currently, there are no less than three government programs that identify chemicals and require inventories of them if they might present hazards if released for any reason (including accident, sabotage or theft). These include the EPA RMP program, federal and state "community right to know" laws, 42 U.S.C. § 11001, and the Public Health Security and Bioterrorism Preparedness and Response Act (PHSBPRA), Pub. L. 107-188 (June 12, 2002). DHS even acknowledged in the ANRM that the EPA RMP is a familiar program and could have been adopted by DHS for purposes of identifying the facilities that would need to complete Top-Screens. DHS rejected this approach, however, and created instead an entirely new list of chemicals and threshold quantities, providing no explanation other than a belief that its bigger list will provide a "more complete picture of the universe of facilities that may qualify as high-risk." 72 Fed. Reg. 17696 (2007). Bigger, however, is not necessarily better.

Colleges and universities maintain inventories of chemicals regulated under these existing programs; accordingly, adoption of these existing criteria would allow them to determine quickly and accurately whether they fall within the purview of the DHS regulations. If Appendix A is implemented in its current form, colleges and universities will be required to conduct entirely new inspections and reviews of every location where even the smallest amount of some of these substances may be present, just to determine whether they should complete a Top-Screen. Such an exercise will only serve to impede DHS efforts to identify quickly those organizations in most need of oversight.

3. *Proposed Appendix A amplifies the ambiguities faced by colleges and universities who attempt to comply with the new rules.*

The comments submitted by CSHEMA illustrate many of the ambiguities faced by entities in determining whether completing a Top-Screen analysis is required. For example, an entity falls under the purview of the rule if it "plans to possess, at any relevant point in time" any of the substances in Appendix A at quantities at or above the threshold listed. 72 Fed. Reg. 17730 (2007). The regulation does not explain what "relevant point in time" means.

Many colleges and universities are research institutions. As a result, they and their faculties are continually engaged in cutting-edge scientific research. Because of this, most of these institutions might “plan to possess” many, if not all, of the Chemicals of Interest in Appendix A at some point and time, as this could be necessary for research purposes. Without further guidance regarding what “plans to possess” means, there will be no identifiable boundaries placed on the universe of institutions that will need to complete a Top-Screen.

4. *The consultation offered by DHS to assist in answering these difficult questions is unlikely to resolve these serious concerns.*

The proposed regulation provides an opportunity to consult DHS regarding the vague and unclear terms that might trigger the obligation to submit the Top-Screen. 72 Fed. Reg. 17690 (2007). However, it appears that this consultation opportunity, which is critical to addressing the serious questions raised regarding fundamental aspects of the Top-Screen process, may not be as meaningful as intended. In the preamble to the Interim Final Rule, DHS states:

The language in revised § 27.120(b) indicates that the Coordinating Official and his staff shall provide guidance to facilities, and while the Coordinating Official and his staff will be available for consultation and to provide technical assistance, they will be available only to the extent that resources permit. ... In the second sentence of § 27.120(c), the Department provides that requests for consultation or technical guidance do not serve to toll any of the applicable timelines set forth in this part. *Accordingly, regardless of whether or when a facility submits a request for consultation or technical guidance, the Department will require the facility to comply with the regulatory requirements, such as completing the Top-Screen... Id.* (emphasis added).

It is our understanding that the Chemical Security Regulatory Task Force is responsible for finalizing and implementing this program. Its five employees are the only individuals who will have the knowledge and background to address the serious concerns about initial implementation that have been raised during this comment period. It is difficult to conceive how a staff this size will be able to provide any significant guidance to the thousands of colleges and universities faced with making the initial Top-Screen determination, let alone the hundreds of thousands of other entities in other sectors that must complete the Top-Screen within 60 days of when Appendix A becomes final.¹

5. *Appendix A may expose college and university officials to serious criminal sanctions if they fail to complete the Top-Screen to the satisfaction of DHS.*

¹ According to the Regulatory Assessment prepared by DHS, at least 50,000 entities must complete the Top-Screen analysis. <http://web.pdx.edu/~cooperc/hmis/DHS-2006-0073-0116%5b1%5d.pdf>

The Top-Screen is far more than a “procedural tool” as described in the Interim Final Regulations. 72 Fed. Reg. 17696 (2007). DHS requires that entities identify the individual responsible for submitting, and attesting to, the information included in the entity’s Top-Screen. 6 C.F.R. § 27.200(b)(3). That person may be subject to criminal penalties under Title 18 of the United States Code² if the information submitted is determined by DHS to be “false.” Specifically, the submitter faces up to eight years in prison, an alarming consequence considering that the key terms upon which the submitter must rely to file the Top-Screen are ambiguous, undefined or vague. The threat of such a prosecution is not illusory; prosecutions for making false statements on government required documents may be the most common type of case brought by the Department of Justice. <http://www.ussc.gov/JUDPACK/JP2006.htm>.

6. *DHS should exempt colleges and universities from the Top-Screen requirement.*

It would benefit not only colleges and universities but the entire enforcement scheme if DHS would exempt colleges and universities from the Top-Screen process, at least at the present time. As explained above, the debate over the need for security at chemical facilities did not even consider colleges and universities where small amounts of chemicals are used in laboratories.

Moreover, colleges and universities are regulated in a comprehensive manner by OSHA, the EPA, the U.S. Centers for Disease Control and Prevention and numerous federal and state laws and regulations. In addition, colleges and universities are already subject to special legislation that addresses concerns about substances used in research and other facilities on campus and that may present unusual, terrorist-related threats. *See* PHSBPRA, Pub. L. 107-188 (June 12, 2002). This program includes requirements for clearing persons who can handle these materials and for implementing plans for safe handling of the materials.

In the ANRM, DHS never mentions colleges and universities. Furthermore, in the accompanying “Capital Cost Information for Public Comment,” DHS did not consider these facilities when it evaluated potential costs. Rather, it considered facilities where security guards,

² 18 U.S.C. § 1001 provides in pertinent part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

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fences, and jersey barriers are used; these are materials associated with chemical plants, not colleges and universities.

Finally, DHS vastly underestimates the costs to colleges and universities of completing a Top-Screen. For example, we can point to one mid-sized university that has 1,500 small laboratories. These labs would have to be individually inspected to determine if each contains any of the Chemicals of Interest, particular those that need only be present in “any amount.” Engaging in such an exercise—merely to complete a Top-Screen that will confirm such an institution is not a targeted “high-risk” facility—is unnecessary and was certainly not the intent of Congress when it enacted the underlying legislation.

Conclusion

We ask that DHS consider the foregoing carefully and revise Appendix A to mitigate the unintended effects its broad scope will have on colleges and universities. Please contact us if with any questions regarding these comments.

Sincerely,



David Ward
President

DW/mmm

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Jesuit Colleges and Universities
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of State Universities and Land-Grant Colleges