

February 7, 2007

BY ELECTRONIC MAIL

Mr. Dennis Deziel, Chief Program Analyst  
Chemical Security Regulatory Task Force  
IP/CNPPD, Mail Stop 8610  
Department of Homeland Security  
Washington, DC 20528-8610  
Electronic Address: <http://www.regulations.gov> (RIN 1601-AA41; Docket No. DHS-2006-0073)

***Re: Proposed Chemical Facility Anti-Terrorism Standards Rule***

Dear Mr. Deziel:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Department of Homeland Security's (DHS) *Proposed Chemical Facility Anti-Terrorism Standards Rule*.<sup>1</sup> The draft interim final rule would implement Section 550 of the Homeland Security Appropriations Act of 2007, which requires DHS to promulgate interim final regulations for the security of certain chemical facilities in the United States within six months of its passage.<sup>2</sup> DHS has worked closely with private sector entities in the chemical industry as well as state and local government entities and other interested stakeholders and has published a draft rule that utilizes risk assessment, performance standards, and flexibility in allowing chemical facilities to tailor their security plans to their individual circumstances.<sup>3</sup> It should be noted that many chemical facilities have already developed and implemented voluntary security programs.<sup>4</sup>

**Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>5</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>6</sup> gives small entities a

<sup>1</sup> 71 Fed. Reg. 78276 (December 28, 2006).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> 5 U.S.C. § 601 et seq.

<sup>6</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.<sup>7</sup> Moreover, on August 13, 2002, President Bush signed Executive Order 13272,<sup>8</sup> which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

## **Background**

Under DHS' draft interim final rule, chemical facilities meeting a certain risk profile would be required to complete an initial risk assessment screening through a secure DHS website.<sup>9</sup> DHS would use this information to determine whether the facility presents a high security risk. If it does, the facility would be required to prepare and submit a Vulnerability Assessment and Site Security Plan to DHS. DHS would evaluate these submissions for compliance with certain risk-based performance standards and conduct an inspection and audit of the facility. DHS would work with the facility to ensure the security plans are approved, and would then use these documents as the criteria against which compliance would be measured. In other words, facilities would be given flexibility to develop plans that are tailored to their individual circumstances, and then would be held accountable by DHS to meet those standards.<sup>10</sup>

## **Discussion**

Federal regulations must generally undergo certain regulatory analyses and review before they are finalized.<sup>11</sup> As indicated above, one of these analyses is an Initial Regulatory Flexibility Analysis (IRFA) under the Regulatory Flexibility Act (RFA). An IRFA is required whenever a federal rule is expected to "have a significant economic impact on a substantial number of small entities."<sup>12</sup> In this instance, DHS did not assess the impact of this proposed rule on small entities or prepare an IRFA because Congress directed it to issue "interim final regulations" within six months. While Congress did not specifically instruct the agency to bypass the proposed rule stage, the short timeframe and "interim final" language arguably gave the agency good cause to bypass the traditional notice and

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<sup>7</sup> 5 U.S.C. § 603.

<sup>8</sup> See, Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

<sup>9</sup> 71 Fed. Reg. 78276.

<sup>10</sup> *Id.*

<sup>11</sup> See, Executive Order 12866, *Regulatory Planning and Review*, available at [http://www.whitehouse.gov/omb/infoereg/eo12866/eo12866\\_amended\\_01-2007.pdf](http://www.whitehouse.gov/omb/infoereg/eo12866/eo12866_amended_01-2007.pdf).

<sup>12</sup> 5 U.S.C § 603(a).

comment rulemaking process and the RFA.<sup>13</sup> However, there is no doubt that numerous small businesses will be required to comply with this interim final rule and that the costs to them will be significant. For instance, if a small business is required to implement security controls (e.g., erect security fences, install video cameras, hire security personnel, etc.) or to change its current procedures (e.g., revise inventory practices, substitute materials, etc.), it could face substantial compliance costs. To its credit, DHS has requested public comment on the economic impact of the draft rule on small entities.<sup>14</sup>

However, following established agency practices, DHS should prepare an IRFA upon issuance of its interim final rule and publish it for public comment along with a request for post-promulgation comment on the final interim rule.<sup>15</sup> While time constraints may have justified the agency not preparing an IRFA prior to publication of the draft rule, there is no reason not to prepare and publish one immediately after issuance of the interim final rule. Further, DHS states that once its interim final rule is adopted, it may decide to revise it at a later date.<sup>16</sup> If it does, DHS should likewise comply with the Administrative Procedure Act<sup>17</sup> and RFA at that time.<sup>18</sup>

The RFA process is an extremely valuable tool for federal agencies to use when assessing the impact of its regulations on small businesses and other small entities. The analysis includes a description of why the action is being considered, who will be affected, what will be required, and what feasible alternatives the agency considered that may be less costly and burdensome.<sup>19</sup> The process is intended to increase the likelihood that regulations will be sound, workable, and cost-effective.

Small businesses bear a disproportionate share of the regulatory burden. A 2005 Advocacy-funded study by W. Mark Crain entitled, *The Impact of Regulatory Costs on*

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<sup>13</sup> DHS states that “when an agency publishes a rulemaking without prior notice and opportunity for comment, the Regulatory Flexibility Act requirements do not apply.” (71 Fed. Reg. 78292). However, this language seems to mischaracterize the RFA, which provides: “Whenever an agency is required by Section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rulemaking ... the agency shall publish and make available for public comment an initial regulatory flexibility analysis.” (5 U.S.C 603 (a)). Hence, the RFA is triggered by the legal requirements for notice and comment under the Administrative Procedure Act, not by whether or not a given rule is actually offered for notice and public comment.

<sup>14</sup> 71 Fed. Reg. 78292.

<sup>15</sup> See, Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* (4<sup>th</sup> Ed. 2006), p. 114 - 115. (“... in many cases, agencies issuing rules without notice and comment following a good cause finding have referred to the rules as “interim rules” and then modified the rules, as appropriate, following post-promulgation comment. This practice comports with a recommendation of the Administrative Conference adopted in 1995. Congress has also expressly authorized this procedure in specific programs from time to time.”) (Footnotes omitted).

<sup>16</sup> 71 Fed. Reg. 78281.

<sup>17</sup> 5 U.S.C. § 553 et seq.

<sup>18</sup> The final interim rule is scheduled under the authorizing legislation to sunset in three years, presumably unless and until further authorizing legislation is enacted. (71 Fed. Reg. 78281).

<sup>19</sup> 5 U.S.C. § 603.

*Small Firms*,<sup>20</sup> found that of the nearly \$1.1 trillion annual regulatory burden, small businesses with less than 20 employees faced an annual regulatory cost of \$7,647 per employee, nearly forty-five percent higher than regulatory costs facing large firms (with 500 or more employees).<sup>21</sup> Given the potential cost and impact of this chemical facility security rule on small businesses, the RFA should help the agency develop a more flexible and cost-effective regulation. In fact, carefully considering the impact of federal regulations on small business, obtaining their input, and exploring feasible alternatives are likely to result in better regulations, higher compliance rates, and enhanced security.

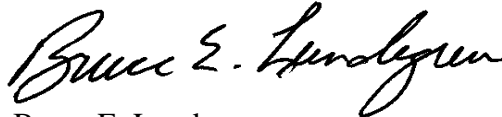
### **Conclusion**

Advocacy commends DHS for issuing its draft rule on such a tight schedule and for providing flexibility to the regulated community. The recognition that “one-size-fits-all” regulations in this area would be difficult to implement, and the reliance on risk assessment, performance standards, and flexibility, appears to be a sound approach. To ease implementation of the new rule, DHS should consider issuing small business compliance guides, conducting small business outreach, and developing flexible enforcement strategies to assist small businesses. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 (or [bruce.lundegren@sba.gov](mailto:bruce.lundegren@sba.gov)) if you have any questions or require additional information.

Sincerely,



Thomas M. Sullivan  
Chief Counsel for Advocacy



Bruce E. Lundegren  
Assistant Chief Counsel for Advocacy

cc: Steven D. Aitken, Acting Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

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<sup>20</sup> *The Impact of Regulatory Costs on Small Firms* (September 2005) is available at <http://www.sba.gov/advo/research/rs264tot.pdf>.

<sup>21</sup> *Id.* at page v.