



Homeland Security | CFATS Knowledge Center

Article Number: 1661

Date Published: November 19, 2010

Last Updated: November 19, 2010

Subject: What is the definition of A Commercial Grade (ACG) for the purposes of CFATS? Specifically, under Appendix A of the Chemical facility Anti-Terrorism Standards (CFATS), 6 CFR Part 27, if a chemical facility manufactures or otherwise possesses a Theft/Diversion or Sabotage chemical of interest (COI) but does not directly offer the

Abstract: Under 6 CFR §§ 27.204(b)(3) and 27.204(c), a facility must count all “commercial grades” of any Theft/Diversion COI (in transportation packaging) that could be used to produce explosives or to produce improvised explosive devices (IED) or precursors (Theft/Diversion-EXP/IEDP) as well as any Sabotage COI which the facility ships and placards. The facility must count the entire quantity of all such COI in its possession unless the COI has a specific minimum concentration level listed in Appendix A, in which case only the quantity of the COI exceeding that minimum concentration needs to be counted.

Article:

For questions and assistance, please call the CFATS Helpdesk at 1-866-323-2957

Monday - Friday 7:00a.m. - 7:00p.m., Eastern Time

Not open on federal holidays

2016-12-01 04:33

Under 6 CFR §§ 27.204(b)(3) and 27.204(c), a facility must count all “commercial grades” of any Theft/Diversion COI (in transportation packaging) that could be used to produce explosives or to produce improvised explosive devices (IED) or precursors (Theft/Diversion-EXP/IEDP) as well as any Sabotage COI which the facility ships and placards. The facility must count the entire quantity of all such COI in its possession unless the COI has a specific minimum concentration level listed in Appendix A, in which case only the quantity of the COI exceeding that minimum concentration needs to be counted.

Section 27.105 of CFATS defines “a commercial grade” as “any quality or concentration of a chemical of interest offered for commercial sale that a facility uses, stores, manufactures or ships.” Some facilities have suggested that this definition means that if a facility does not directly offer a Theft/Diversion-EXP/IEDP or Sabotage COI for sale in commerce, the facility is not required to count that COI under Appendix A, even if that chemical is later offered for commercial sale by another entity. That is not correct.

First, the definition of “a commercial grade” in § 27.105 refers to a COI that a facility “uses, stores, manufactures or ships.” Significantly, the definition does not specify that the facility itself “sells” the chemical. In fact, since the definition includes a facility that “uses” the chemical, it follows that such a facility must count the COI—assuming it meets the other criteria in the definition – even if it completely uses all of the chemical and thus has no COI left over to sell to any other entity. If DHS had intended the definition to apply only to facilities that sell the chemical, it would have been unnecessary to include the words “uses, manufactures, stores or ships” at all. Instead, the definition would simply have stated that the term applies to a chemical that a facility offers for commercial sale.

Moreover, to read the definition as applying only to a facility that actually sells the chemical in question would be illogical and hinder the purposes for which the regulations were written. Under such a narrow reading, for example, a warehouse that contracts with another entity to store large quantities of a Theft/Diversion-EXP/IEDP COI (in transportation packaging that is readily susceptible to theft and use by a terrorist), but that does not actually sell the chemical in commerce, would not be required to count the COI or file a Top-Screen as long as the warehouse—even if the warehouse otherwise would be considered a high-risk facility under CFATS. DHS clearly did not intend such a facility to be excluded from Appendix A and the Top-Screen requirement.

In addition, the phrase “that is offered for commercial sale” in the definition refers to and modifies the words “chemical of interest;” it does not refer to the “facility.” That is, the language in the definition only requires that the chemical in question be offered for sale, not that a particular facility that possesses the chemical must offer it for sale.

Thus, any facility that uses, manufactures, stores or ships a Theft/Diversion-EXP/IEDP or Sabotage chemical of interest that is intended to be and is offered for commercial sale must count that chemical toward the applicable STQ, even if that facility does not directly sell the chemical itself. This is true whether the sale occurs before or after the point at which the facility in question possesses the chemical. For example, a facility that manufactures such a chemical for later sale by another entity under an arrangement whereby the manufacturer does not actually “sell” the chemical to anyone else must count the chemical toward the applicable STQ. Similarly, a research facility that buys such a chemical in a commercial sale—or acquires the chemical in some other manner from an entity that did buy it—and then uses the entire quantity of the chemical itself, without reselling any of it, must count the chemical toward the applicable STQ.

The definition of “a commercial grade” first refers to a “quality or concentration” of a COI that is offered for commercial sale. That is, the quality of the chemical is what makes it potentially suitable and attractive for use by a terrorist to create an explosion or produce an IED or an IED precursor. A COI that exists in a quality and/or concentration level suitable for commercial sale is more likely to be attractive and readily usable by a terrorist, through Theft or Sabotage, than a chemical lacking such qualities. Whether or not the specific COI is actually offered for commercial sale by the facility in question is not crucial to a terrorist who plans to steal, divert or sabotage the chemical.