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DHS Proposes New Standards for Private-Sector Disaster and Emergency Preparedness

The Department of Homeland Security (DHS) is accepting comments on standards for the private sector intended to improve preparedness for disasters and emergencies. These standards are likely to impact many elements of the private sector, including agriculture and food, commercial facilities, energy, information technology, transportation systems, chemical, healthcare and public health, and water.

“Voluntary” Standards May Have Broad Impact Upon Noncertified Companies

Although DHS has made clear that the standards for the Voluntary Private Sector Accreditation and Certification Preparedness Program (PS-Prep) are indeed voluntary, it is likely that the final standards will ultimately be recognized industry-wide as the best practice in business continuity and emergency management and may be relied upon by agencies and courts in establishing the standard of care owed by a company to its employees or third parties, thereby exposing noncertified companies to risk and liabilities for noncompliance with the standards. In addition, the standards may impact a noncertified company's ability to obtain liability insurance. In short, the voluntary standards may end up becoming mandatory.

Comments Due on November 15, 2009

Comments on the proposed standards, which were published by DHS in an October 16, 2009 *Federal Register* notice, are due to DHS on or before November 15, 2009. The notice states that DHS will also take and consider comments on the PS-Prep program at any time. A comment form and instructions for submission are online at www.regulations.gov, in Docket ID: FEMA-2008-0017.

What are the Proposed Standards?

PS-Prep is a partnership between DHS and the private sector enabling private entities — including businesses, nonprofit organizations and universities — to receive emergency preparedness certification from DHS. The program is intended to facilitate planning and preparedness for disasters and emergencies by private-sector entities. Through the PS-Prep program, DHS seeks to encourage the wide adoption of private-sector preparedness efforts, especially for the nation's critical infrastructure and key resources (CIKR) sectors.

The October 16 notice proposes PS-Prep standards to enhance operational resilience, business continuity management, and disaster and emergency management among participating

private-sector partners. PS-Prep is intended to enable an accredited third party to certify that a private-sector entity is in compliance with the preparedness standards ultimately selected by DHS. DHS has selected the three following standards from a group of 25 standards proposed for consideration in a December 24, 2008, *Federal Register* notice, based upon their scalability, balance of relevance and interest to PS-Prep:

- NFPA1600 – Standard on Disaster/Emergency Management and Business Continuity Programs (2007)
- British Standard 25999-2: 2007 – Business Continuity Management

- ASIS SPC.1-2009 – Organizational Resilience: Security, Preparedness and Continuity Management Systems – Requirements with Guidance for Use

Potential Benefits of Certification

Compliance with the voluntary standards may offer benefits to certified companies. In addition to offering liability protections, certification will help support an application under the SAFETY Act (Support Anti-terrorism by Fostering Effective Technologies Act of 2002) program. The SAFETY Act provides significant liability protections and

other benefits to the developers and users of antiterrorism technologies.

Affected companies that anticipate that they may seek DHS certification of preparedness or be adversely impacted if they do not seek certification may want to consider filing comments on the PS-Prep program and the proposed standards. Attorneys in the Hunton & Williams Homeland Security practice have extensive knowledge and experience with DHS-regulated industries. We are following these issues closely and are available to answer your questions and concerns, and to assist you in assessing your regulatory issues.

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