



Chemical Facility Security Regulation

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A broad range of industry faces a new and rapidly evolving set of chemical security regulations from the Department of Homeland Security (DHS): the Chemical Facility Anti-Terrorism Standards (CFATS). Hunton & Williams' Chemical Security practice helps industry clients efficiently integrate CFATS regulations into their existing compliance practices. Our multidisciplinary team guides clients through each step of this new regulatory landscape, including compliance, risk management, and crisis management.

The Department of Homeland Security's new CFATS program is the Department's first security-specific regulation for critical infrastructure and key resources. Notably, this regulation will cover facilities beyond traditional chemical facilities, including pulp and paper mills, petroleum facilities, food and agriculture facilities, pipelines, metal production and manufacturing facilities and industrial cleaning facilities.

Those facilities that possess or plan to possess any of the 322 listed "Chemicals of Interest" (COI) above the corresponding "Screening Threshold

Quantities" (STQ) must register for the program, utilizing the online Chemical Security Analysis Tool (CSAT). Facilities must then submit basic facility-specific information via the "Top-Screen" online survey, which will inform DHS's initial risk determinations. In addition to the self-reporting, DHS has the independent authority to identify facilities that may be covered by this regulation.

Regulated facilities are required to conduct comprehensive security vulnerability assessments, leveraging extensive facility and corporate information. The follow-on site security plan will require companies to satisfy complex risk-based performance standards intended to address identified vulnerabilities and reduce a facility's risk profile. Those plans require DHS approval through field inspections and document reviews.

The CFATS program will generate a significant amount of sensitive information about chemical facilities, known as "Chemical-terrorism Vulnerability Information" (CVI), imposing specific handling requirements for regulated entities.

Failure to comply with the CFATS regulations could lead to civil penalties of up to \$25,000 per day, and closure of noncompliant facilities.

The CFATS regulation represents a shift from the traditional voluntary partnership between the federal government and the private sector on security issues and may mark a trend toward federal regulation of security for a wide range of critical infrastructure and resource sectors of the economy.

Coping with CFATS

This new, substantive regulation presents a host of challenges that many affected companies have not previously encountered. CFATS will require the regular review and assessment of chemical inventories, impose new roles upon both safety and security personnel that will require them to work in close concert, mandate unprecedented cybersecurity protections, and require annual auditing.

First steps. Entities engaged in or using chemicals in any capacity potentially subject to the regulations should have already reviewed the list

of “Chemicals of Interest” known as “Appendix A.” If a facility possesses any of the listed chemicals in a quantity at or above the threshold, and is not subject to any of the statutory exemptions, the company must have (a) registered with the DHS CSAT, and (b) completed the “Top-Screen” questionnaire for DHS review by January 22, 2008, or within 60 days of coming into possession of the chemicals.

An analysis and review of the Top-Screen information will inform the DHS’s preliminary risk determination. DHS will notify those facilities that present a high level of security risk, requiring them to comply with the CFATS substantive security requirements.

Hunton & Williams works with clients to determine whether a facility is subject to the CFATS regulatory requirements, or whether any of the exemptions apply. We then assist in the registration and Top-Screen completion processes. For facilities that have not timely complied with the regulatory program, Hunton & Williams can work with DHS to negotiate an agreed-upon process to bring the client into compliance.

Vulnerability assessments and security plans. When DHS determines that a facility is a security risk, the company must develop and submit a vulnerability assessment, and will be required to create a site security plan. Assessments must take into account the critical assets at the facility and vulnerabilities based on DHS-created scenarios. Creating a site-specific security plan entails reviewing the vulnerabilities and examining risk-based performance standards. CFATS also lays out a cyclical “boots on the ground” inspection process for regulated facilities, where the Department will deploy federal inspectors to conduct on-site assessments of both the quality of the vulnerability

assessments and the adequacy of the site security plan as implemented.

Hunton & Williams has experience assisting clients in assessing vulnerabilities and creating security plans that comport with DHS standards, and can provide companies with strategic advice on how best to address the sometimes-overlapping and conflicting requirements of other security regulations.

Chemical-terrorism Vulnerability Information. Sensitive information about chemical facilities needs protection, and DHS has created a new information protection regime for the use of federal, state, and local enforcement officials. CVI includes sensitive but unclassified information that is excluded from public release under the federal Freedom of Information Act and state “sunshine” laws. CVI can include such items as correspondence from DHS, completed Top-Screens, facility-specific vulnerability assessments, site security plans, and training records.

To protect this information, companies must follow specific steps, such as registering personnel with access to CVI and the development of standard operating procedures to track, store, and handle CVI. Mishandling CVI can result in significant penalties.

Hunton & Williams helps to identify the information and records considered CVI and to develop policies, protocols, and training to appropriately generate, control and maintain CVI.

Continuing Compliance Requirements

The Hunton & Williams Chemical Facility Security Regulation practice helps with these and other aspects of compliance obligations:

- Develop effective internal audit programs;

- Prepare companies for field inspections and technical assistance visits;
- Advise managers in their regular interactions with DHS regulators;
- Represent companies in the review and adjudication of DHS’s determination of a facility’s security risk;
- Respond quickly to enforcement actions or agency inquiries; and
- Represent companies in the agency appeals process.

About Our Practice

The Hunton & Williams Chemical Facility Security Regulation attorneys worked extensively with chemical-sector clients and Congress during the years leading up to passage of the enabling legislation and promulgation of DHS’s CFATS regulatory requirements. We continue to advise corporate clients on CFATS compliance, including the legal issues, risk profiles and practical problems arising from these new federal regulatory requirements. Moreover, the existing program will “sunset” in 2009, and our team remains actively engaged in the ongoing legislative reauthorization process.

Our clients seek the most efficient way to implement and evaluate compliance with CFATS, including integration with existing compliance programs. Review of vulnerability assessments and site security plans by counsel addresses the concerns that the company has met the regulatory requirements, and identified potential legal issues. We also assist in the process of appealing DHS decisions within the agency.

If you have questions regarding any aspect of the Chemical Facility Anti-Terrorism Standards or their potential impact on your business, please contact us.

Contacts



Evan D. Wolff
Counsel & Director,
Homeland Security Practice
1900 K Street NW
Washington, DC 20006-1109
(202) 955-1908
ewolff@hunton.com



John W. Woods, Jr.
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8629
jwoods@hunton.com



Maida O. Lerner
Counsel
1900 K Street NW
Washington, DC 20006-1109
(202) 955-1590
mlerner@hunton.com



Catherine D. Little
Bank of America Plaza, Suite 4100
600 Peachtree Street, NE
Atlanta, Georgia 30308-2216
(404) 888-4047
clittle@hunton.com



Joseph C. Stanko
Government Relations Practice Head
1900 K Street NW
Washington, DC 20006-1109
(202) 955-1529
jstanko@hunton.com



Chris M. Amantea
550 South Hope Street, Suite 2000
Los Angeles, California 90071
(321) 532-2102
camantea@hunton.com

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