



Security Regulations May Affect You: What to Do if You are Considered a Chemical Facility by DHS

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The events of September 11th drew national attention to the deficiency in American infrastructure security. Congress responded in various ways, including by authorizing Federal regulation of high-risk chemical facilities for security reasons. In 2007, the Department of Homeland Security (“DHS”) published the Chemical Facility Anti-Terrorism Standards (“CFATS”) regulations. Don’t let the name fool you: the regulations cover more than typical chemical facilities. The term “chemical facility” refers to any facility that possesses a chemical DHS considers potentially dangerous if targeted in a terrorist attack. Under the regulations, any facility that possesses one or more chemicals of interest (“COIs”) must submit relevant information to DHS, through a “Top-Screen” submission, by January 22, 2008 or within sixty days of coming into possession of a COI. Based on this information, DHS determines which facilities present a high security risk. These high-risk facilities must comply with CFATS, meaning that they must come into compliance with risk-based performance standards. Those facilities that are not designated as high-risk do not need to take any further action. The first step, however, is for any facility that possesses chemicals to determine if it is required to comply with the CFATS regulations.

Any facility, regardless of the nature of its business, that possesses a COI must comply with the first part of the CFATS regulations: registering to access the Chemical Security Assessment Tool (“CSAT”) and submitting the Top-Screen, which includes information regarding the facility, its chemical inventory, and its current security measures. This is the primary way that DHS identifies high-risk facilities. Less frequently, DHS will notify a chemical facility that it must complete the Top-Screen submission. If a facility is not contacted by DHS, it must consult Appendix A to the CFATS regulations to determine if it is required to submit a Top-Screen.

Appendix A lists the COIs, as well as the minimum concentration and amount of each that will trigger the registration and Top-Screen requirements. If a facility possesses even one COI in the minimum concentration and amount, it must satisfy these requirements. It may seem as if DHS is being overly cautious in setting the bar for registration and submission so low, but keep in mind that many facilities will not have to take any additional precautionary steps. Furthermore, registration and submission of the Top-Screen are not very difficult or time-consuming.

Registering to access the CSAT system requires a facility to provide information on the person or persons who will be involved in submitting the Top-Screen, including his/her name, country of citizenship, and domicile. There are three roles involved in submitting the Top-Screen: (1) the Preparer, who enters the Top-Screen data; (2) the Submitter, who submits Top-Screen data to DHS; and (3) the Authorizer, who assures DHS that the Submitter and Preparer are authorized to complete or submit the Top-Screen information. All three roles can be filled by the same person or by different people. There is also a fourth and optional role: the Reviewer, who reviews the information but cannot enter, edit, or submit it. The registration must also indicate how these roles will be organized within each facility. Companies reporting more than one facility should consult the CSAT User Registration Guide, which is available online at http://www.dhs.gov/xlibrary/assets/chemsec_csatuserregismanual.pdf, to evaluate their best organizational option. The registration form is available online at <https://csat-registration.dhs.gov>. It must be completed and signed then mailed or faxed to DHS.

All regulated facilities must also submit a Top-Screen. With 111 pages in the PDF, filling out the questionnaire may seem like a daunting task. But don't be intimidated by the length. The Top-Screen is relatively simple and not especially time-consuming, since most of the length is generated by the list of COIs. It requires the Preparer to enter data regarding COIs and the facility. For some COIs, the amount must be indicated in pounds while for others it is only necessary to indicate whether a threshold quantity is possessed. Information about the facility includes its location, type, and whether a security vulnerability assessment has been performed. The Top-Screen submission must also be faxed or mailed to DHS. For those organizations concerned about providing sensitive commercial information to the government, rest assured that provisions have been made for maintaining the privacy and confidentiality of the records. The Freedom of Information Act does not apply to the CFATS regulations. Moreover, records regarding a facility are only released on a need-to-know basis. Those facilities that have not submitted the Top-Screen by the January 22 deadline should do so immediately. DHS is empowered to fine facilities that have not submitted the Top-Screen on time. This does not mean that they will fine a facility for missing the deadline, but it is nevertheless important to come into compliance quickly.

Once DHS has evaluated the Top-Screen submissions, it identifies the chemical facilities that present a high security risk, meaning that a successful terrorist attack on them could cause significant damage to human life or health, national security, or the economy. DHS considers three factors in making that determination: consequence, vulnerability, and threat. Consequence refers to the likely results of a successful terrorist attack. Vulnerability refers to the likelihood that an attack would be successful. Finally, threat refers to whether a group would be capable of and interested in attacking the facility. Having to submit a Top-Screen is no indication of whether a facility will be designated high-risk. Many facilities will not be required to take any action beyond registering and submitting the Top-Screen. Only high-risk facilities are subject to further regulation.

If a facility is designated as high-risk, it must perform a Security Vulnerability Assessment ("SVA"), which is an analysis of the following five factors: (1) asset

characterization, (2) threat assessment, (3) security vulnerability analysis, (4) risk assessment, and (5) countermeasures analysis. Performing the SVA will require considerably more time and information than the Top-Screen submission. The high-risk facility must identify and describe its critical assets and the potential consequences of an attack on them, the facility, and its surroundings. It must also explain the possible threats to the facility from internal and external sources. In addition, it must identify and describe areas of security vulnerability, existing countermeasures, and the effectiveness of those countermeasures in increasing security and meeting the risk-based performance standards. The risk assessment involves an analysis of how a terrorist attack would affect each critical asset and the likelihood that an attack would be successful. Finally, each high-risk facility must analyze alternative methods of reducing the likelihood of a successful attack. Based on the SVA, DHS will class the high-risk facilities into four tiers based on their hazard level and the urgency of implementing a Site Security Plan that conforms to the risk-based performance standards.

The fact that the government has enacted risk-based performance standards is good news for high-risk chemical facilities. The alternative is so-called command and control standards, which would require facilities to implement government designed security measures. With the performance-based standards, high-risk facilities will be allowed to design a security plan that meets its individual needs in a cost effective manner. Of course, the plan is subject to government approval. There are nineteen different security standards, some of which are discussed below.

The performance standards require high-risk facilities to secure the building and land by restricting the perimeter, securing and monitoring critical assets, and controlling access to the facility. They must also secure and monitor the shipping, receipt, and storage of hazardous materials. In case these deterrence and prevention methods fail, the facility must have an emergency security response plan. All facility personnel must be properly trained to detect, monitor, and respond to security issues. Moreover, if DHS identifies a specific vulnerability at a facility, it must be addressed in the Site Security Plan. A facility's Site Security Plan must meet all the performance standards. Moreover, the Site Security Plan must describe the measures that will be taken and how they will deter and respond to different types of terrorist attacks. Every year, facilities must conduct an audit to determine if they are in compliance with their Site Security Plan. While the CFATS require detailed analysis, planning, and security implementation, they will make high-risk facilities safer, which is good news for the surrounding community, the nation, and the facility's owner. In fact, some chemical facilities performed security assessments and introduced new security measures even before the enactment of the CFATS regulations. DHS will take such steps into consideration when evaluating whether a high-risk facility has satisfied CFATS.

To determine if your facility is affected by DHS's new CFATS regulations, first check to see if the chemical inventory includes any COIs. If it does, determine their amount and concentration. Possession of a COI below the minimum concentration and amount does not trigger the CFATS regulations. However, if the concentration and quantity of the COI is at or above regulated levels, the facility must then register to access the CSAT

system and submit the Top-Screen. If, after reviewing the Top-Screen, DHS determines that your facility presents a high security risk because of factors such as the amount of COIs possessed, the facility's location, and its critical economic assets, you will be required to perform an SVA identifying the facility's security weaknesses. DHS will use this information to classify the facility into one of four tiers. A facility's tier determines when it will be required to implement a Site Security Plan. First tier facilities present the highest security risk and must implement a Site Security Plan before facilities in the other tiers. The Site Security Plan must meet or exceed nineteen risk-based performance standards, which range from protection of the grounds, to monitoring of the chemical inventory, to training facility personnel. While some of the provisions and standards of the CFATS regulations are complex, they are manageable. For some of the more complicated requirements, facilities may wish to seek guidance from professional organizations with expertise in hazardous materials regulatory compliance.