



Chemical Security Update: MTSA meets CFATS and a Legislative Status Report

Special Note: This advisory is a joint Chemical and Maritime news update.

New Development

The Department of Homeland Security ("DHS") Infrastructure Security Compliance Division ("ISCD") and the United States Coast Guard announced that the two agencies had reached an agreement, in principle, that some facilities subject to the Maritime Transportation Security Act of 2002 ("MTSA") will be required to submit Top-Screens under the Chemical Facility Anti-Terrorism Standards ("CFATS"). Under current law, MTSA facilities are exempt from the CFATS requirements. The announcement came during the recently held 2010 Chemical Sector Security Summit (the "2010 Summit") in Baltimore, Maryland. The agreement to have MTSA facilities submit Top-Screens results from efforts of the Coast Guard and ISCD through the MTSA/CFATS Harmonization Working Group that was set up in June 2007. While it is not certain, it is likely that any MTSA Top-Screen requirement will be published in the Federal Register.

Background on CFATS and MTSA

MTSA was signed into law on November 25, 2002, a little more than a year after the September 11th terrorist attacks. MTSA requires vessels and certain shoreside facilities to conduct a security vulnerability assessment, develop a facility security plan ("FSP"), have the FSP approved by the Coast Guard, and implement the FSP. The MTSA security requirements have been fully implemented and most facilities have undergone the five-year revalidation/renewal process for their FSPs.

The CFATS program, authorized under Section 550 of the Homeland Security Appropriations Act of 2007, was signed into law in October 2006. Section 550, scheduled originally to sunset on October 4, 2009 but extended by one year, provided the authority for DHS to regulate "high risk" chemical facilities in the United States. Section 550 exempted MTSA facilities and certain other facilities from CFATS regulation. In June 2007, DHS issued the CFATS Interim Final Rule codified at 6 CFR Part 27 confirming that the CFATS regulations do not apply to MTSA facilities. The CFATS program is currently being implemented and ISCD is just now issuing authorization letters approving some of the 3100 site security plans that have been submitted.

DHS determines whether a facility presents a high level of security risk through a multi-step process. First, all facilities with a Chemical of Interest ("COI"), listed in Appendix A of Part 27, in quantities above the Screening Threshold Quantity ("STQ"), must submit a Top-Screen. The Top-Screen is an initial screening process through which chemical facilities provide information to DHS about the types and quantities of chemicals on site and security measures in place. Based upon its review of the Top-Screen, DHS notifies the facility if it must complete and submit a Security Vulnerability Assessment ("SVA"). Based upon its review of the SVA, DHS will determine the risk level associated with the chemical facility and assign the facility to one of four risk-based tiers, ranging from highest risk at Tier 1 to lowest risk at Tier 4. Depending on the tier, the facility must submit a Site Security Plan within the time period set by DHS based on the tier level.

Discussion

At the present time, MTSA facilities are exempt from regulation under CFATS. At the 2010 Summit, however, Sue Armstrong, Acting Deputy Assistant Secretary of Homeland Security for Infrastructure Protection, announced that ISCD and the Coast Guard had agreed in principle that certain MTSA facilities should be required to submit Top-Screens. The agreement, which is part of the effort of the two agencies to harmonize chemical security regulations, is to “ensure that the U.S. government understands what chemicals are held where.” Armstrong indicated that the requirement for certain MTSA facilities to submit Top-Screens will likely be published in the Federal Register. Whether the requirement will be published in the Federal Register or whether those targeted facilities will be notified in some other way, as well as how the Top-Screens will be used, remain under discussion between the two agencies. It is likely the same Top-Screen triggers would apply to MTSA facilities, i.e., possessing a COI in quantities above the STQ. Armstrong also said that there was the potential for “adjustments” to both the CFATS and MTSA regulatory regimes based upon a review of the Top-Screens submitted by MTSA facilities.

James Bull, Deputy Chief of the Coast Guard’s Cargo and Facilities Division, commented that the Coast Guard “supports a coordinated DHS effort to ensure proper security for facilities and institutions handling hazardous materials.” He also noted that the Coast Guard was constrained to some extent from adjustments to MTSA because some MTSA security requirements implement the International Ship and Port Facility Security (“ISPS”) Code, which is part of the International Convention for the Safety of Life at Sea (“SOLAS”), and compliance is mandatory for the Contracting Parties, including the United States.

While the desire to harmonize the MTSA and CFATS regimes is understandable, it is unclear what legal authority the ISCD and the Coast Guard would use to require certain MTSA facilities to submit Top-Screens in light of Section 550’s language that “the Secretary shall not apply regulations issued pursuant to this sec-

tion to facilities regulated pursuant to the Maritime Transportation Security Act of 2002.” The agreement in principle seems counter to Congressional intent, absent new legislation, unless the program is implemented on a voluntary basis or otherwise through a rulemaking.

Update on Chemical Security Legislation

Section 550, which has already been extended once, is scheduled to expire in October 2010. Congressional staffers from both Democratic and Republican sides of the House of Representatives and the Senate gave an update on chemical security legislation at the 2010 Summit. In November 2009, the House passed the Chemical and Water Security Act (H.R. 2868). In addition to reauthorizing the CFATS program, H.R. 2868 would expand the reach of the program to MTSA facilities. Moreover the House bill would require the use of so-called Inherently Safer Technology (“IST”). In the Senate, Senator Susan Collins (R-Maine) introduced the Continuing Chemical Facilities Antiterrorism Security Act of 2010 (S. 2996), which will extend the current CFATS program for another five years. The Collins bill will not extend the program to MTSA facilities or require IST. The Senate Homeland Security and Government Affairs Committee plans a markup in late July. At the time of the 2010 Summit, it was not clear whether the Collins bill or something similar to the House bill would be the vehicle for the mark up.

Conclusion and Recommendations

Owners and operators of MTSA facilities should closely monitor the issues associated with requiring certain MTSA facilities to complete Top-Screens. In addition, owners and operators of both CFATS and MTSA chemical facilities should continue to track Congressional legislation and determine whether it would be in their best interest to try to influence that legislation. Blank Rome, which has extensive experience with both the MTSA and CFATS programs, can assist with both regulatory and government relations matters concerning chemical security. ■

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