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Deadline Approaching For Top-Screen Reports Under Department Of Homeland Security Chemical Facilities Anti-Terrorism Standard

In June 2007, the Department of Homeland Security (“DHS”) published the interim final Chemical Facilities Anti-Terrorism Standard (the “Rule”). A key component of the Rule is the requirement for covered chemical facilities to file a screening assessment called a “Top Screen” with the DHS. Chemical facilities are defined in the Rule as “any establishment that possesses or plans to possess, at any relevant point in time, a quantity of a chemical substance determined by the Secretary of the DHS to be potentially dangerous or that meets other risk-related criteria.” In late 2007, the DHS published the final Appendix to the Rule establishing the quantities of particular chemicals of interest (“COI”) that trigger the requirement to comply with the Rule (available at www.dhs.gov/xlibrary/assets/chem-sec_appendixafinalrule.pdf). **All facilities that handle hazardous chemicals in any quantity should review the COI list to determine if they are covered by the Rule.** Chemical facilities that possess or plan to possess COI in quantities equal or greater to those listed must file a Top Screen with the DHS by **January 22, 2008**. The submission is to be made using the DHS’ on-line Chemical Security Assessment Tool.

Identification of Security Issues

The DHS identifies three types of security issues for the various chemicals of interest (“COI”): (1) a release into the environment, (2) theft or diversion of the COI, and (3) sabotage or contamination. Each COI listed presents at least one of these security issues. Each chemical facility must calculate the COI quantities separately for each security issue it presents.

(1) Release:

The chemicals under this category include toxic, flammable, or explosive chemicals that if released could potentially have significant adverse consequences for human life or health. For release-toxics criteria, the DHS uses essentially the same listing criteria as the EPA acute toxicity criteria and vapor cut-off criteria. However, the DHS Screening Threshold Quantities (“STQ”) calculation is more conservative than the EPA Risk Management Program Threshold Quantities because under the Rule a facility must aggregate the total COI possessed at the facility as a whole. For release-explosives, Appendix A lists most of the release-explosives included in the Department of Transportation (“DOT”) Class 1, Division 1.1 explosives materials list.

(2) Theft or Diversion:

The theft/diversion category includes chemicals or materials that if stolen or diverted could be mis-

used as weapons, easily converted into weapons, or that could be stolen and used as explosives. To identify chemical weapons, the DHS looked to the lists of chemicals in the Chemical Weapons Convention’s (“CWC”) three schedules. Appendix A includes the chemicals and precursors listed in Schedules 2 and 3 that can be easily converted into chemical weapons. For a chemical that may be stolen or diverted for use as a weapon of mass effect, the DHS looked to the DOT hazardous materials regulations regarding gases that are poisonous by inhalation for guidance. Appendix A includes those gases that rise to a level of consequentiality that warrants inclusion. In determining which chemicals should be considered COI due to their ability to be used as an improvised explosive device (“IED”), the DHS included the DOT Class 1 explosives and the IED precursors that the National Research Council recommends.

(3) Sabotage or Contamination:

This category refers to COI that if mixed with readily available materials could potentially create significant adverse consequences for human life or health. If a facility ships the sabotage/contamination COI and is required to placard the shipment pursuant to the DOT Hazardous Materials placarding requirements, the facility meets the STQ. This is referred to in the Appendix A list of COI as “APA,” or “a placard amount.”

Purpose of a Top Screen

A Top-Screen assists the DHS in determining whether the facility presents a high level of risk. The fact that a facility possesses chemicals at the STQ does not necessarily mean that facility is a high risk facility, however. The DHS will determine whether a facility presents a high security risk based on the information contained in the Top-Screen. Depending upon the security risk presented by the facility, the DHS will place it in one of four risk tiers, ranging from Tier 1 (highest risk level) to Tier 4 (lowest risk level). Certain high risk facilities eventually will be required to submit a Security Vulnerability Assessment and a Site Security Plan. Those deadlines are 90 and 120 calendar days, respectively, from receipt of notice of the requirement from the DHS.

This is only a brief overview of a portion of the Chemical Facilities Anti-Terrorism Standard. For further information regarding the Rule and the Top-Screen submission requirement, please contact M. Benjamin Cowan at 713.226.1339 or bcowan@lockelord.com.