

Client Alert

August 2013

Executive Order Issued on Chemical Facility Safety and Security

Prompted by recent events at facilities in Texas and Florida that store and handle hazardous chemicals, on August 1, 2013, President Obama signed an executive order (Order), "Improving Chemical Facility Safety and Security." The Order has the potential to impact a broad group of industrial facilities that use, manufacture, store or handle high quantities of hazardous chemicals. Hazardous chemicals is a broad term that can include such commonly used industrial chemicals as anhydrous ammonia, ammonium nitrate, propane, chlorine, as well as many other chemicals now covered by existing Environmental Protection Agency (EPA), Department of Homeland Security (DHS) and Department of Labor (Labor) regulatory programs.

The Order — recognizing that many levels of government and public agencies currently share responsibility for chemical safety and security — focuses on several main areas and includes action items intended to help address the safety and security risks associated with hazardous chemicals. These include enhancing information sharing between government critical infrastructure owners; addressing policy, regulation and standards modernization; and identifying best practices. Notably, the White House released the Order while the House Homeland Security Committee was holding a hearing about the explosion at an ammonium nitrate storing facility in Texas unknown to the CFATS program before the incident.

Following are some of the activities directed by the Order.

Chemical Facility Safety and Security Working Group: The Order establishes a Chemical Facility Safety and Security Working Group (Working Group or Group), which will be co-chaired by the secretaries of DHS, EPA and Labor and will include as members the heads of the Departments of Justice, Agriculture and Transportation. The Group is directed to consult with the Council on Environmental Quality, the National Security Staff, the Domestic Policy Council, the Office of Science and Technology Policy, OMB, the White House Office of Cabinet Affairs and any other agencies and offices that the president may designate. It is also encouraged to invite other affected agencies, such as the Nuclear Regulatory Commission, to attend its meetings.

The Order directs the Working Group to create a "unified federal approach" for identifying and responding to risks at facilities, including improving coordination with state, local and industry groups to improve chemical facility safety and security, to find ways to modernize the collection and sharing of chemical facility information and to reduce duplicative efforts. The Working Group is directed to provide a status report to the president within 270 days of the date of the Order.

This "unified federal approach" provides industry with an opportunity to watch and potentially to have input into the government's handling of the often-overlapping matrix of existing chemical safety and security programs, including CFATS and the Maritime Transportation Security Act (MTSA).

Information Collection and Sharing and Operational Coordination: The Order tasks the Working Group with, within 90 days of the date of the Order, developing an analysis on the potential for improving information collection and sharing among agencies "to help identify chemical facilities which may not have

provided all required information or may be non-compliant with Federal requirements to ensure chemical facility safety.” Also, within 180 days, the Working Group is directed to identify and recommend changes to streamline and improve data collection.

Within 135 days of the date of the Order, the Working Group is directed to develop a plan to help state and local governments, first responders and facility owners to identify ways to improve their coordination, have “ready access to key information” and examine opportunities for public access to information about chemical facility risks.

Given the recent changes in the Obama administration, including a new EPA administrator, the imminent departure of the current DHS secretary, and the varying and overlapping authorities of the government agencies that will constitute the Working Group, we anticipate that the Group is likely to face some organizational and substantive challenges. Also, similar issues related to the Clean Air Act and the Emergency Planning and Community Right-to-Know Act (EPCRA) demonstrate that in carrying out the Order’s directives, the Group will likely have to address and balance the value of sharing information and the ability and responsibility of government and the private sector to protect information that can be used by an adversary to identify and select high-consequence targets.

Policy, Regulation and Standards Modernization: The Order directs the secretaries of DHS, Labor and the Department of Agriculture to, within 90 days of the Order, develop a list of potential regulatory and legislative proposals to improve the safe and secure storage, handling and sale of ammonium nitrate and identify ways in which ammonium nitrate safety and security can be enhanced under existing authorities.

Also the Order directs DHS, within the same time period, to “identify a list of chemicals ... that should be considered for addition to the CFATS Chemicals of Interest list.” Other federal agencies are similarly tasked with determining if additional chemicals should be covered by existing programs, including EPA’s Risk Management Program and Labor’s Process Safety Management Standards. The Order — which cannot expand any government entity’s current authority — does not address, however, whether expansions of these lists, including CFATS Appendix A, would be preceded by notice and comment rulemaking. Although DHS has historically taken the position that it may promulgate CFATS regulations without the traditional Administrative Procedure Act notice and comment opportunity, DHS provided these opportunities when it promulgated the CFATS rule.

Identification of Best Practices: The Order also requires that the federal agencies deploy a regional pilot program that will validate best practices and test innovative new methods for federal interagency collaboration on chemical facility safety and security.

The Working Group is also directed to convene stakeholders, including chemical critical infrastructure owners and operators and consensus standards organizations, to identify and share “best practices to reduce safety risks and security risks in the production and storage” of hazardous chemicals “including through the use of safer alternatives, adoption of best practices, and potential public-private partnerships.” The government has tried to address these types of issues as it developed the CFATS program and was unable to reach consensus.

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We anticipate that the tight timelines included in the Order may pose a challenge to the government, especially as DHS, NIST and other federal entities also try to implement and address the directives included in the cybersecurity executive order the president released earlier this year.

A fact sheet issued by the White House in conjunction with the Order acknowledges the “number of regulatory programs related to the safe and secure transportation of chemicals across all modes of transportation, including highway, rail, aviation, maritime, and pipeline” and states that “[t]his fact sheet is focused on chemical safety and security at fixed facilities and does not address the programs focused on the transportation of hazardous materials.” The Executive Order, however, does not address the scope of its provisions, so this is an issue that will also need to be watched.

We also will watch its potential impact on the proposed DHS National Protection and Programs Directorate (NPDD) Ammonium Nitrate (AN) Security Program rule. Pursuant to that rulemaking, DHS is considering the impact of voluntary AN standards adopted previously by industry as well as the impact of duplicative federal rules under other security programs, including MTSA and CFATS.

What We Can Do to Help

Hunton & Williams' homeland security practice can assist companies in developing and understanding the impact of the administration's proposals on cybersecurity and related policies. A review of a company's current cybersecurity regulatory footprint may aid in understanding the potential impact. In addition, we can assist affected companies in working with appropriate members of Congress and agency officials to ensure that their concerns and risks are understood prior to enactment of the legislation. If you would like more information on how Hunton & Williams can assist with responding to this and other issues, please visit our practice pages for Homeland Security; Mining, Petroleum and Related Chemicals; and Government Relations and Regulated Markets and Energy Infrastructure.

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