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## got chemicals?

### Homeland Security tightens up regs

**A**midst continued national security concerns, the Department of Homeland Security (DHS) has toughened guidelines for U.S. chemical facilities. Appendix A, further detailing the CFATS enacted last April, was added in November 2007.

Under the new standards, few facilities—save certain plants that fall under the jurisdiction of the Nuclear Regulatory Commission or other departments—are exempt. Included in the targeted facilities are those that manufacture, store or distribute chemicals; petroleum refineries; liquefied natural gas facilities; and others. In fact, the CFATS broadly define a chemical facility 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 to be potentially dangerous, or that meets other risk-related criteria identified by the Department.”*

Does your business fall under the guidelines? How should you proceed?

If you haven't already done so, the first step is to inventory immediate past, current, and intended future possession of any of 300 chemicals listed on Appendix A. Chemicals affected differ in type and quantity based on one of three security risks: (1) toxic, flammable, or explosive release; (2) theft or diversion; and (3) sabotage or contamination.

Chemical facilities were required to register and submit online to Homeland Security a Chemical Assessment Tool (called the “Top Screen”) by January 22, 2008,—however the DHS will consider granting an extension on a case-by-case basis.

Chemical facilities that do not possess threshold amounts as of January 22, 2008, have continuing obligations. In sum, the rules apply to a facility that possesses or “plans to possess, at any relevant point in time” any chemical of interest above the trigger quantity. A facility must submit a Top Screen within 60 calendar days of coming into possession of such chemical. One compliance strategy to consider would be whether the facility may meet its business and manufacturing objectives while possessing less than the trigger amount at any point in time.

The U.S. Department of Homeland Security has issued new legal regulations governing chemical facilities. Chemical Facility Anti-Terrorism Standards (CFATS) spell out what substances are considered dangerous, impose deadlines for compliance, levy penalties, and give the government authority to shut down recalcitrant facilities. Even minimal amounts of chemicals can trigger CFATS, and the clock is ticking now. Are you ready?

# BANKRUPTCIES CREATE OPPORTUNITY FOR BUYERS

For those with capital and business acumen, the current market has created some good buys. More and more distressed companies are seeking financial relief through bankruptcy—and that means assets are going for bargain prices.

Purchasing assets from a distressed debtor in bankruptcy can be a safe and sound business decision. That's because the bankruptcy process affords a potential buyer rights and protections that can significantly minimize legal risks.

## 1. Protection from creditor claims

A primary concern of any purchaser of troubled assets is the ability to acquire those assets free of claims from the seller's creditors. Bankruptcy's "free and clear order" solves that problem. Unlike a non-bankruptcy acquisition, in which a creditor must specifically release and discharge its liens and claims, a bankruptcy court has the power to approve a sale free of encumbrances of creditors and others—even, in some cases, those that are unknown. Claims of creditors are transferred from the *assets* of the sale to the *proceeds* of the sale. Thus, the purchaser is protected.



## 2. Protection from fraud

Another common risk in purchasing distressed assets? A fraudulent transfer, made while a debtor is insolvent, for less than the asset's true value. In such cases, creditors may attack the transaction on the basis that a buyer did not pay enough. Since this argument usually arises *after* the purchase price has been paid, it has the potential to void the sale. On the other hand, if the asset sale takes place in bankruptcy, an order approving the sale is entered *before* the deal is consummated, along with a finding that the buyer is, in fact, paying a "reasonably equivalent value" for the assets. Only bankruptcy provides this judicial determination of the buyer's rights prior to making the purchase.

Taken together, these protections—the ability to confidently purchase assets free of claims by both known and unknown creditors, and the prior judicial blessing of the sale in an order that expressly details terms of the purchase—make bankruptcy the preferred way to acquire assets from a distressed debtor.

In fact, the last few years have seen bankruptcy filings for the sole purpose of effecting pre-negotiated asset acquisitions to ensure these comforts and protections. There's no reason to believe opportunities will abate any time soon.

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# Big digs in Kalamazoo

## The new Miller Canfield Building is open

Miller, Canfield, Paddock and Stone, P.L.C.

277 South Rose Street

Kalamazoo MI 49007

269/ 381-7030

It's official... we've moved into our spacious, new quarters on the corner of Rose and South streets in downtown Kalamazoo. The facility not only marks growth for our law firm—it's an important new development for the central city, too.

Local dignitaries and business leaders heralded the project—the first Class A office building to go up in the downtown area in more than 20 years—at a groundbreaking, held 18 months ago. Now that the facility is ready, it's hoped to become a catalyst for other development.

Our firm occupies a 32,000 square-foot suite on the top two floors of the 135,000 square-foot, state-of-the-art office facility.

"We're pleased to be part of Kalamazoo's renaissance," says John Cook, who heads the office. "This new building represents our commitment to the community, while the state-of-the-art facility will allow us to expand and provide services to clients around the block, and around the world."

Learn more with a  
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# TOP 10 WAYS TO AVOID EMPLOYMENT LITIGATION



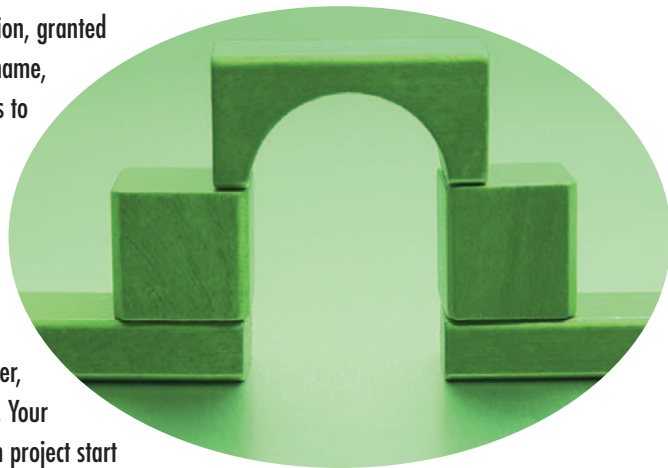
Employment-related lawsuits are tough and time consuming. They can get personal too—resulting in hurt feelings and loss of morale in the workplace. Follow these tips to reduce the chance of litigation and strengthen your defense in the event an employee or former employee files a lawsuit.

1. **Train employees** (supervisory and non-supervisory alike) in workplace policies and complaint procedures. That will help achieve consistency in understanding ground rules, discipline, and response to complaints.
2. **Document all employee incidents.** It's difficult to defend a case if a personnel file is void of any documented problems or disciplinary actions.
3. **Conduct regular evaluations.** Lack of a record detailing poor work habits or disciplinary action will make defending a suit difficult. Conduct annual (or more frequent) employee evaluations. Be honest and give clear feedback. An employee may legitimately claim to be unaware of problem conduct if you fail to monitor, discuss, and document.
4. **Regulate computer use.** Make sure you have appropriate policies for use of the Internet and email in the workplace. Sexually explicit emailed jokes and visits to pornographic Web sites on company computers can quickly develop into claims of harassment. Your policies should make it clear that employees have no expectation of privacy when it comes to using company computers. Their email messages and Internet history are considered documents that could come back to haunt you during litigation.
5. **Know the Fair Labor Standards Act.** In recent years, there've been several large verdicts regarding employee eligibility for overtime pay under the FLSA. You should carefully review the FLSA status of all your employees so that overtime is paid when required.
6. **R-e-s-p-e-c-t.** Although it won't solve all of your problems, many employees want to be in the loop and actively involved in solving workplace problems. To the extent practical, listen to and communicate with your employees about the decisions that impact them. The more goodwill you develop, the less likely you are to be involved in employment-related litigation.
7. **Be fair and objective.** Employees need to feel they are treated fairly. Don't show favoritism and make sure you can objectively justify decisions that benefit certain employees over others.
8. **Investigate claims and complaints thoroughly.** Aside from respecting your employee, an investigation will allow you to determine if there's merit to the complaint and, if so, respond accordingly. It may also help identify other underlying problems and solve them too.
9. **Be honest if you terminate an employee.** Employers may try to be nice and sugarcoat the true reason for a termination—sometimes so the employee can receive unemployment or other benefits. That's a mistake that could become a bigger problem in the event of a lawsuit. For example: if you tell an employee her position is being eliminated instead of discussing performance issues, and you fill the position a week later, your actions could result in a lawsuit. A confrontation may be uncomfortable, but it's in your best interest to be honest.
10. **Be proactive.** Don't wait for a lawsuit. If you see problems, confront them and try to find a solution immediately. When you're uncertain about something, consult your human resources staff or company attorney. And make sure you stay abreast of changes in employment law as they relate to your duties and obligations to your employees.

# Green Building Takes the LEED®!

Escalating oil prices. The search for renewable energy sources and sustainable solutions. And now, the emergence of new green-building initiatives to spur conservation. A green revolution is underway in the real estate industry.

LEED® (Leadership in Energy and Environmental Design) certification, granted by the U.S. Green Building Council, is rapidly becoming the brand-name, defacto green design-and-construction standard. But when it comes to meeting LEED's rigorous criteria—and acquiring the coveted designation—there's more to going green than meets the eye. Ambiguity abounds when it comes to interpreting and applying terms, documenting requirements, and translating LEED's green goals into actual projects.



Whether you're an architect, developer, lender, contractor, or builder, it's essential that all parties in a transaction are on the same page. Your documentation will need to ensure LEED objectives are met—from project start to finish. When preparing letters of intent or contracts, here's what you need to consider.

## 1. Which LEED Rating Systems apply?

Many projects have the capacity to incorporate several LEED Rating Systems—and utilizing multiple ratings can enhance the value of a building from the perspective of lender, buyer, landlord, and tenant. Be prepared to involve all the players—from architect and builder, to owner and lender—and allocate plenty of time to study applicable cost-benefit scenarios to determine which LEED ratings you can utilize.

## 2. Which version of the Rating Systems should you use?

LEED Rating Systems are continuously evolving. And, since your project may span years from design to completion, all parties must agree on a point in time at which the prevailing version of the selected rating systems will apply, as well as who will assume responsibility for assuring compliance. Alternatively, the parties could agree to the rating systems in effect at the time of drawing up contracts, leaving open the possibility of renegotiating at a future date when systems presumably would be modified.

## 3. What goal will you target?

There are four levels of achievement within each LEED Rating System: Certified, Silver, Gold, and Platinum. Levels are determined by a complex system of points, which are awarded for compliance in six different categories and a number of sub-categories. The cost and time required for design and construction, as well as for future operation and maintenance, can be significantly affected by point-calculation methods. Because there are a variety of ways in which final points can be tallied, it's important for parties to agree on a precise point goal for each category—and a specific plan for how a final point total will be determined.

## 4. What about future compliance?

Finally, after all parties have agreed upon the precise terms that will govern LEED certification, it's a good idea to decide to what extent the building will maintain compliance with current and new versions of the standards.

While new construction has been the impetus for rapid adoption of the LEED Rating Systems, the industry is now looking to utilize LEED-EB, the rating system designed for existing buildings. That system is expected to have a far more significant impact on achieving energy savings throughout the real estate industry.

*As green-building criteria continue to expand, it's more important than ever to make certain your goals are carefully spelled out in contracts. If you'd like some help, please call our office.*





# SEC Amends Rule 144 of Securities Act

*[And that's good news for all companies]*

**A** reason to cheer! Companies issuing restricted securities in lieu of going through the costly registration process required by the Securities and Exchange Commission saw some positive changes take effect February 15, 2008.

In December 2007, the SEC adopted amendments to Rule 144 of the Securities Act of 1933. The most significant change is a reduction of the required holding period—from one year to six months—for the resale of restricted securities of reporting companies by affiliates and non-affiliates.

Other revisions also simplify the Preliminary Note to Rule 144, amend requirements for manner of sale and eliminate them for debt securities, change volume limitations with respect to debt securities, increase Form 144 filing thresholds, and codify several staff interpretations.

The intention is to increase liquidity and decrease the cost of capital—without sacrificing investor protection. And, while amendments are aimed at small companies, all companies will likely benefit.

How? Shorter holding periods enable issuers to negotiate smaller discount-to-market prices when selling unregistered securities in exempt offerings. Registration rights may no longer be needed for issuers negotiating a private placement. What's more, the increased liquidity of restricted securities may make them more favorable as a form of consideration in business combination transactions.

Here's a summary of Rule 144 amendments. For a more complete description, see SEC Release No. 33-8869 "Revisions to Rules 144 and 145" at [www.sec.gov/rules/final/2007/33-8869.pdf](http://www.sec.gov/rules/final/2007/33-8869.pdf).

	<b>Affiliate or Person Selling on Behalf of an Affiliate</b>	<b>Non-Affiliate (and Has Not Been an Affiliate During the Prior 90 Days)</b>
<b>Restricted Securities of Reporting Issuers</b>	<p><b>During six-month holding period:</b> May not resell under Rule 144</p> <p><b>After six-month holding period:</b> May resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"><li>• Current public information</li><li>• Volume limitations</li><li>• Manner of sale requirements for equity securities</li><li>• Filing of Form 144</li></ul>	<p><b>During six-month holding period:</b> May not resell under Rule 144</p> <p><b>After six-month holding period but before one year:</b> Unlimited public re-sales permitted under Rule 144, except that the current public information requirement still applies</p> <p><b>After one-year holding period:</b> Unlimited public re-sales permitted under Rule 144 and need not comply with any other Rule 144 requirements</p>
<b>Restricted Securities of Non-Reporting Issuers</b>	<p><b>During one-year holding period:</b> May not resell under Rule 144</p> <p><b>After one-year holding period:</b> May resell in accordance with all Rule 144 requirements, including:</p> <ul style="list-style-type: none"><li>• Current public information</li><li>• Volume limitations</li><li>• Manner of sale requirements for equity securities</li><li>• Filing of Form 144</li></ul>	<p><b>During one-year holding period:</b> May not resell under Rule 144</p> <p><b>After one-year holding period:</b> Unlimited public re-sales permitted under Rule 144 and need not comply with any other Rule 144 requirements</p>

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Once submitted, the Top Screen is reviewed by the DHS, which makes a preliminary determination as to whether the facility presents a high-level security risk. Potential high-risk facilities are given a short timeframe in which to meet site-specific, risk-based performance standards. For example, within 90 days, they must present a Security Vulnerability Assessment; and within 120 days, a Site Security Plan must be submitted. Facilities may be required to address identified site security concerns. Strict record keeping is required.

More than 15,000 chemical facilities may fall under these new regulations, costing the industry \$8.5 billion over the next decade. Facilities that fail to act do so at their peril. The DHS is authorized to pursue costly and potentially embarrassing remedies.

*If you believe your business is affected by CFATS and would like to discuss your response, please call our office for assistance.*



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**RETURN SERVICE REQUESTED**

**Meet Greg Parry, our  
Homeland Security expert**

Our firm recently welcomed an experienced counselor, who joins the Environmental and Regulatory group. Gregory J. Parry has



Gregory J. Parry

served as lead environmental counsel to major national clients—including retailers, lenders, corporations, and real estate companies. He has extensive experience leading both industrial and corporate environmental due diligence projects, environmental audits,

and regulatory environmental compliance matters. This summer Parry expects to receive his Master's Degree in Homeland Security Leadership from the University of Connecticut, in partnership with the U.S. Naval Post-Graduate School. We're pleased to have him on board, helping our clients navigate the complexities of security regulations.



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