

Section-by-Section Analysis of H.R. 2868
The Chemical Facility Anti-Terrorism Act of 2009
As Amended by the Subcommittee on Energy and Environment

Section 1. Short Title

This Act may be cited as the “Chemical Facility Anti-Terrorism Act of 2009”.

Section 101. Findings and Purpose

Congress finds that the nation’s chemical facilities represent a terrorist target and must be protected. The Secretary currently has authority to regulate chemical facilities under the Chemical Facility Anti-Terrorism Standards (CFATS) issued pursuant to section 550 of the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295). The purpose of this Act is to modify and give permanent status to CFATS.

Section 102. Extension, Modification, and Re-codification of the Authority of the Secretary to Regulate Security Practices at Chemical Facilities

This section amends the Homeland Security Act of 2002 to include: Title XXI “Regulation of Security Practices at Chemical Facilities.”

Section 2101. Definitions

Section 2102. Risk-Based Designation and Ranking of Chemical Facilities

This section grants the Secretary the authority to designate a chemical substance as a “substance of concern” and determine the regulated “threshold” quantities of these identified chemicals that are used, stored, manufactured, processed or distributed by a chemical facility. Factors for consideration are the potential for death, injury, or serious adverse effects to human health, the environment, critical infrastructure, homeland security, national security, or the national economy from a terrorist-related release. The Secretary may use the current Appendix A list under CFATS to fulfill this requirement.

The Secretary is required to maintain a list of chemical facilities that have more than a threshold quantity of a “substance of concern” and pose a security risk based on certain criteria, including the potential threat or likelihood of a terrorist attack at the facility; the potential harm to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy, from a terrorist incident; and the proximity of the facility to large population centers. The Secretary may require a facility to submit information regarding the facility’s possession of substances of concern to determine whether it is “covered” under this title. The Secretary may use the current top screen process under CFATS to fulfill this requirement.

The Secretary will assign each such covered chemical facility to one of at least four risk-based tiers with at least one tier being a high-risk tier. Facilities will be notified within 60 days of their

designation or any change in their designation. The Secretary must review the tiering periodically, and the Secretary may add, remove, or change the tier assignment for each facility.

The Secretary shall provide covered chemical facilities with information regarding probable threats to these facilities.

Section 2103. Security Vulnerability Assessments and Site Security Plans

This section requires the Secretary to develop regulations to establish risk-based, performance-based standards, protocols, and procedures for mandatory security vulnerability assessments (SVAs) and site security plans (SSPs) and set deadlines by tier for completing the SVAs and SSPs. Facilities must involve their employees and their representatives when developing SVAs and SSPs. Upon request, the Secretary shall provide assistance and guidance to facilities conducting SVAs and SSPs to the extent that resources permit. The Secretary must approve or disapprove SVAs and SSPs within 180 days of receipt.

Facilities must review and resubmit SVAs and SSP at least every five years. In addition, facilities are required to notify the Secretary if they change their use or storage of a substance of concern or modify operations in a way that could affect the security vulnerability assessment or site security plan previously submitted.

The Secretary is required to establish risk-based security performance standards for SSPs. The security performance standards are to be increasingly stringent according to the tier and allow a facility to choose a combination of security measures that together meet the security performance requirements. In addition, facilities closely located may develop and implement coordinated SVAs and SSPs.

The Secretary may accept, in whole or in part, the submission of an alternate security program (ASP) that was prepared by the facility for some other reason for purposes of fulfilling the regulatory requirements to complete an SVA or SSP as long as it meets the requirements of this title and provides a level of security equivalent to that established under the regulations. The Secretary also may accept an ASP from an accredited non-profit personnel surety accrediting organization. The Secretary must review and approve or disapprove each ASP.

This section requires facilities subject to the Maritime Transportation Security Act (MTSA) to submit to the Secretary information necessary to determine whether such a facility would be designated as a covered chemical facility under CFATS. For those so designated, the Coast Guard may require a MTSA facility to update the SVA or SSP it completed under MTSA to obtain an equivalent level of security as provided under CFATS. The Coast Guard and the Office of Infrastructure Protection are required to enter into a formal agreement detailing the roles and responsibilities of each in carrying out their chemical security responsibilities. The Coast Guard will be responsible for ensuring that MTSA facilities are in compliance with the requirements of the CFATS program.

This section ensures that if a covered chemical facility already has a site security plan approved under MTSA, it will not have to update or amend that plan in order to comply with section 2115.

This section also ensures that the owner or operator a covered chemical facility can grant an individual access to restricted areas or critical assets if the same owner or operator already granted the same individual access to restricted areas or critical assets of a facility regulated under MTSA.

The Secretary is required to coordinate with the Attorney General (the Bureau of Alcohol, Tobacco, and Firearms) on facilities that import, manufacture, distribute, or store explosive materials and are required to be licensed under §18 USC 40.

All SSPs must set forth the roles and responsibilities of employees to deter and respond to a terrorist attack. Covered facilities must provide employees with roles or responsibilities with a minimum of eight hours of relevant training annually in chemical facility security. A covered chemical facility may satisfy any of the training requirements through other training that the owner or operator certifies as equivalent.

The Secretary must enter into an agreement with the National Institute for Environmental Health Sciences to make and administer grants or cooperative agreements for the training and education of employees, first responders and emergency response providers who would respond to a chemical facility terrorist incident.

State and local authorities may not require facilities to provide them with SVAs and SSPs merely because the facilities have provided that information to the federal government.

Section 2104. Site Inspections

The Secretary or her designee shall have the right of entry at reasonable times and shall conduct security verifications and inspections. The Secretary shall have access to the facility owners/operators, employees, and employee representatives during the inspections. For tier 1 and 2 facilities, the Secretary also will conduct unannounced inspections to ensure and evaluate compliance with requirements under this title in a manner so as not to affect the actual security, physical integrity, safety or regular operations of the facility.

Subject to appropriations, DHS must increase the number of chemical facility inspectors by at least 100 in fiscal years 2010 and 2011.

During inspections, the Secretary must offer non-supervisory employees the opportunity to share, confidentially, information about the facility's compliance or non-compliance. An employee representative, if any, also must have the opportunity to accompany the Secretary during inspections if the owner or operator is accompanying the Secretary.

Section 2105. Records

The Secretary may require the submission of, or access to, a facility's records in order to review such facility's SVA or SSP or their implementation. Such records must be handled in accordance with the information protection provisions of this title.

Section 2106. Timely Sharing of Threat Information

The Secretary is required to provide information concerning a threat that is relevant to a specific covered chemical facility, in as timely a manner, to the maximum extent practicable. The covered chemical facility is required to report to the Secretary any threat, significant security incident, or penetration of the facility's cyber or physical security, whether successful or not.

Section 2107. Enforcement

This section requires the Secretary to disapprove a facility's SVA or SSP if it does not comply with the CFATS standards or if the facility's implementation of the SSP is insufficient to address identified vulnerabilities or meet relevant security performance standards.

The Secretary must give a notice of disapproval within 14 days of such a determination that clearly explains the deficiencies and requires the owner or operator to revise the SVA or SSP. The Secretary may issue an order assessing a civil penalty, after providing the owner or operator the opportunity for appeal, or commence a civil action to force compliance from a covered chemical facility.

If a facility continues to be in non-compliance, the Secretary may issue an order to cease operations. The Secretary may not, however, issue a cease operations order to a wastewater treatment facility. The Secretary may also issue civil penalties of up to \$50,000 per day or administrative penalties of up to \$25,000 per day for non-compliance.

Section 2108. Whistleblower Protections

The Secretary shall establish a process for any person to report to the Secretary any deficiencies or vulnerabilities at a covered chemical facility. The identity of such a person shall be kept confidential. The Secretary shall acknowledge receipt of the information and address, where appropriate, any reported deficiencies or vulnerabilities. Retaliation against whistleblowers is prohibited.

Section 2109. Federal Preemption

Any state or local government may issue a regulation, requirement, or standard of performance for chemical facility security that is more stringent than the federal statute.

Section 2110. Protection of Information

This section identifies the types of information that must be protected and the procedures for safeguarding it.

Protected information is exempt from disclosure under the Freedom of Information Act and state and local information disclosure laws.

This section gives the Secretary the authority to promulgate regulations and issue orders in order

to prohibit the unauthorized disclosure of protected information. The Secretary must provide standards for the appropriate sharing of protected information with federal, state, and local governments, law enforcement and first responders, and designated chemical facility personnel. These standards also must include procedures for sharing with employees and their representatives, if any, those portions of a covered chemical facility's vulnerability assessment and site security plan that relate to the roles and responsibilities of those employees.

Any person who purposefully discloses protected information is subject to criminal penalties (including fines and up to one year of jail time), and, in the case of federal employees or officeholders, removal from federal office or employment.

This section also requires that protected information be treated as Sensitive Security Information (SSI) in administrative or judicial proceedings.

“Protected information” includes vulnerability assessments and site security plans and portions of other security-related documents, records, orders, notices, and letters that would be detrimental to the security of covered chemical facilities if disclosed. Protected information does not include information that is required to be made publicly available under any law; information that a covered chemical facility has lawfully disclosed elsewhere; and other information that, if disclosed, would not be detrimental to the security of one or more covered chemical facilities.

This section does not relieve an owner or operator of any obligation to comply with other federal, state, or local laws requiring submission of information. This section does not prohibit the sharing of information with Congress. Any authority or obligation of a federal agency to protect or disclose a record or information under any other law is not affected.

Section 2111. Methods to Reduce the Consequences of a Terrorist Attack

This section requires that the site security plan include an assessment of methods to reduce the consequences of a terrorist attack on that facility. The assessment must include a description of methods assessed, the degree to which each method would reduce consequences, the technical feasibility of the method, costs, avoided costs (including liabilities), personnel implications, savings, and applicability of implementing each method to reduce consequences.

Methods to reduce consequences include substitution of chemicals (or forms of chemicals), changes in processes, storage or use of less of a substance of concern on site, and improvements in inventory control and handling of substances of concern.

DHS has the authority to require implementation of these methods for covered chemical facilities assigned to tier 1 or tier 2 because they pose a risk of release of a substance of concern. The Director of the Office of Chemical Facility Security can require a facility to implement such method(s) to reduce the consequences of a terrorist attack if he or she determines that such method(s): would significantly reduce the risk of death, injury, or serious adverse effects to human health from an attack on that facility and would not result in another facility being placed into a high-risk tier; is technically and economically feasible to be incorporated into the facility's operations; and would not significantly and demonstrably impair the ability of the facility to

sustain operations at its current location. In the case of a covered chemical facility regulated under the Maritime Transportation Security Act, the Director must consult with the Captain of the port at which the covered chemical facility is located before requiring implementation.

When the Director of the Office of Chemical Facility Security makes a determination that implementation is required at a tier 1 or tier 2 facility and that facility determines that it cannot comply, the facility must submit a written explanation to the Secretary within 120 days. The Secretary shall then have 120 days after receipt to review the written explanation. Before making a final determination, the Secretary must consult with a range of technical experts. If the Secretary still determines that implementation is necessary, she must issue an order that contains the views of the technical experts with whom she consulted as well as a timeline for implementation.

The Secretary must provide guidance, tools and technical assistance to farm supplies merchant wholesalers to streamline and simplify compliance with this section.

This section requires the Secretary to provide information on method(s) to reduce the consequences of a terrorist attack. Information that is made available to the public shall not identify any specific facility and must comply with the protection of information requirements of section 2110.

This section allows the Secretary to make funds available to facilities that are required by the Secretary to implement methods to reduce the consequences of a terrorist attack to help defray the cost of implementation.

Section 2112. Applicability

This section clarifies that this title shall not apply to public water systems regulated under the Safe Drinking Water Act, any facility owned and operated by the Department of Defense, or all or part of chemical facility that is subject to regulation of security by the Nuclear Regulatory Commission (NRC) or an NRC agreement state, and has been designated by the NRC, the Secretary, and the agreement state (if applicable) as exempt. This title does not apply to the transportation in commerce (including incidental storage) of a substance of concern that is regulated as a hazardous material under Chapter 51 of title 49 of the U.S. Code.

Section 2113. Savings Clause

This section specifies that nothing in this title affects section 112 of the Clean Air Act (42 U.S.C. 7412), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.), the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), the Occupational Safety and Health Act (29 U.S.C. 651 et seq.), the National Labor Relations Act (29 U.S.C. 151 et seq.), the Emergency Planning and Community Right to Know Act of 1996 (42 U.S.C. 11001 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Maritime Transportation Security Act of 2002 (Public Law 107-295), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.), the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), and the Fair

Credit Reporting Act (15 U.S.C. 1681 et seq.).

In addition, nothing in this title shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance relating to environmental protection, health, or safety. Nothing in this title shall abridge or deny access to a chemical facility site to any person where required or permitted under any other law or regulation.

Section 2114. Office of Chemical Facility Security

This section establishes an Office of Chemical Facility Security, administered by a Director, within the Department of Homeland Security. It sets forth qualifications for the Director of the Office of Facility, requirements for the selection process, and the responsibilities of Director.

Section 2115. Security Background Checks of Covered Individuals at Certain Chemical Facilities

The Secretary must issue regulations requiring covered chemical facilities to establish personnel surety for individuals with access to restricted areas or the facility's critical assets and describe the appropriate scope and applications of security background checks. An employer may not misrepresent to an employee or labor arbiter the background check rules and regulations issued by the Secretary and may not make an adverse employment decision and attribute such decision to the requirements of this Act unless the individual in question has been convicted of, found not guilty by reason of insanity, or is under want, warrant, or indictment, or incarcerated for a specific crime as detailed under part 1572 of title 49, CFR.

The owner or operator of a covered chemical facility must provide an adequate and prompt redress process to a person subject an adverse employment decision wishing to challenge the accuracy of the background check. The Secretary also must provide an adequate and prompt redress process for an individual subject to an adverse employment decision if that employment decision is based on the terrorist watchlist check or if the individual believes the employer violated this Act in making the adverse employment decision. The Secretary has the authority to order an appropriate remedy, if warranted.

The Secretary must determine, by regulation, which alternate security background checks can be used to satisfy the requirements of this section. Transportation Worker Identification Credentials (TWICs) satisfy the requirements.

Nothing in this section affects the right and responsibility of a person subject to a background check or an employer under another federal, state, local, or tribal law or collective bargaining agreement. This section does not preempt any other federal, state, tribal, or local law that requires background checks.

Section 2116. Citizen Enforcement

Any person may commence a civil action against any governmental entity alleged to be in

violation of an order or against the Secretary for failure to perform non-discretionary duties. The federal court with jurisdiction over the matter shall be the U.S. District Court of the district wherein the violation is alleged to have occurred or the U.S. District Court of the District of Columbia. That court shall have authority to enforce the requirements of this Act. Relief to a person who prevails in a citizen suit is limited to the issuance of a court order requiring performance by a Secretary or facility and civil penalties set forth in Section 2107.

No person may commence a civil action without a 60 day notice to the Secretary and/or the governmental entity alleged to be in violation of an order. The Secretary has the right to intervene in any civil action under this section to which she is not a party. The court may award court costs to the prevailing side, when appropriate, and may require the filing of a bond (or its equivalent) in accordance with the Federal Rules of Civil Procedure. Nothing in this section shall restrict any right that any person (or class of persons) may have under any statute or common law.

Section 2117. Citizen Petitions

This section requires the Secretary to establish, by regulation, a citizen petition process. Any person may submit a petition to the Secretary alleging a violation with chemical facility security requirements. The Secretary must accept and investigate all petitions, determine whether enforcement action is necessary, and respond to the petitioner in writing. This response must comply with the information protection requirements outlined in section 2110.

The Department of Homeland Security Inspector General may review the full agency record of each petition.

Section 2118. Annual Report to Congress

This section requires a report to Congress on the progress of implementation of this title not later than one year from the date of enactment and annually for the next four years and biennially thereafter. This report must include a qualitative discussion of how covered chemical facilities have reduced their risk of chemical facility terrorist incidents and a quantitative summary of the number of facilities that submitted information to DHS, the number of facilities in each tier, the number of SVAs and SSPs submitted and approved or disapproved, changes in tier due to implementation of methods to reduce consequences, number of compliance orders or penalties issued by the Secretary, and any other information deemed necessary by the Secretary. The report will be made publicly available.

Section 2119. Authorization of Appropriations

This section authorizes \$325 million for fiscal year (FY) 2011 to carry out the requirements of this Act, which includes \$225 million for Departmental expenditures in carrying out this Act and \$100 million for facilities to fund capital costs incurred from implementing methods to reduce the consequences of a terrorist attack. The section authorizes \$300 million for FY 2012, with \$225 million for Departmental expenditures and \$75 million for consequence reduction, and \$275 million for FY 2013, with \$225 million for Departmental expenditures and \$50 million for

consequence reduction.

Outside of the Quotes:

The following sections do not amend the Homeland Security Act of 2002. They appear for clerical reasons:

(b) Clerical Amendment

This section updates the table of contents for of the Homeland Security Act of 2002 to reflect the amendments made by this bill.

(c) Conforming Repeal

Section 550 of the Department of Homeland Security Appropriations Act, 2007 (Public Law 109–295) is struck on October 1, 2009.

(d) Treatment of CFATS Regulations

It is the sense of Congress that the DHS Secretary was granted the authority to regulate security at chemical facilities pursuant to section 550 of P.L. 109-295, and that such authority will sunset on October 1, 2009. Under that authority, the Secretary promulgated the CFATS regulations. In carrying out the requirements of this Act, the Secretary may use whatever parts of CFATS and tools developed under CFATS that are relevant in carrying out this Act and shall amend CFATS in order to carry out new requirements that the current CFATS regulations do not cover.

(e) Facilities Covered by CFATS

Owners or operators of facilities currently that are covered by CFATS (in place pursuant to section 550 of P.L. 109-295) shall update their previously-approved SVAs and SSPs in order to comply with the requirements of this Act on a timeline determined by the Secretary.

(f) Consultation with Other Persons

The Secretary shall consult with the Administrator of the Environmental Protection Agency, and other appropriate persons regarding the designation of substances of concern, methods to reduce the consequences of a terrorist attack, security at co-owned or co-operated drinking water and wastewater facilities, treatment of protected information, and other such matters that the Secretary deems appropriate.

(g) Deadline for Regulations

The Secretary shall promulgate a proposed rule within 6 months of passage of this Act, and, after a notice and comment period, shall promulgate a final rule within 18 months of passage of this Act.