

Section by Section Analysis of the Chemical Facility Anti-Terrorism Act of 2008

Section 1. Short Title

This Act may be cited as the “Chemical Facility Anti-Terrorism Act of 2008”

Section 2. Findings and Purpose

Congress finds that the Nation’s chemical facilities represent a terrorist target that 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). CFATS will sunset in October 2009, and the purpose of this Act is to give permanent status to CFATS as well as provide further Congressional guidance for the future implementation of CFATS.

Section 3. 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 Chemical Facilities.”

Section 2101. Definitions

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

This section requires the Secretary to designate or exempt 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, national security, the economy, or public welfare from a terrorist-related release.

The Secretary is required to maintain a list of “significant chemical facilities” which have more than threshold quantities of “substance of concern” or that meet specific criteria: potential or likely targets of terrorism; potential extent of death, serious injury, or adverse effects to health or safety; nature and quantity of the substance of concern and the potential threat of obtaining it for an act of terrorism; and potential harm to critical infrastructure, national security, the economy, or public welfare from a terrorist incident.

Each significant chemical facility will be assigned 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. If the designation changes the Secretary must notify the facility within 30 days. Periodic reviews are required every three years and the Secretary may add, remove, or change the tier assignment.

Section 2103. Vulnerability Assessments and Facility Security Plans

This section requires the Secretary to prescribe risk-based, performance-based regulations to establish standards, protocols, and procedures for vulnerability assessments and facility security plans for the listed facilities. The regulations are to consider cost and technical feasibility;

substance of concern quantities stored, used, or handled; and the potential for death, injury, or serious adverse effects to human health, the environment, critical infrastructure, national security, the economy, or public welfare from a terrorist-related release. Assistance and guidance will be provided for vulnerability assessments and facility security plans.

High-risk tier facilities are required to conduct a vulnerability assessment and prepare and implement a facility security plan that addresses the results of the vulnerability assessment within six months from the date of issuing the regulations. Vulnerability assessments require, among other things, the identification of any hazard that could result from a terrorist incident; the number of individuals at risk; criticality to the economy or national security; proximity or interrelationship to other critical infrastructure; any vulnerabilities to physical security; computers, communication networks or systems, or automated systems; alarms, cameras, or protection systems; utilities or other infrastructure; structural integrity of storage, handling, or other equipment; and threat information.

This section requires high-risk tier facility security plans to include: measures to address vulnerabilities to a terrorist incident; drills and exercises which include first responders and local law enforcement; equipment, plans, and procedures in a terrorist incident including site evacuation, release mitigation, and containment plans; coordination with State, local law enforcement, first responders, and Federal officials; specifying the security officer as the point of contact for the facility; description of enhanced security measures to be used at times of increased threat; an analysis of methods to reduce the consequences of a terrorist attack; and other actions required by the Secretary.

The Secretary is required to provide threat-related information to the maximum extent practicable to high-risk tiers and to conduct Red-Team exercises on a periodic basis. This section also requires the Secretary to review and approve or disapprove each vulnerability assessment and facility security plan submitted.

The Secretary is required to conduct Red Team exercises at high risk chemical facilities to identify weaknesses in security within six years of enactment.

This section requires the Secretary to establish security performance requirements through regulations with separate and increasingly stringent requirements as the level of risk increases. The Secretary is required to permit facilities to select a combination of security measures to meet the requirements. Two or more co-located facilities may develop and coordinate vulnerability assessments and facility security plans at the discretion of the owner or operator of the facilities.

The Secretary may approve the use of existing procedures, protocols, and standards requirements for vulnerability assessments and facility security plans upon a person's petition.

This section requires facilities already subject to the Safe Drinking Water Act and the Maritime Transportation Safety Act to submit the same documents necessary to comply with those existing authorities the Secretary for review. The Secretary determines if the actions under those existing authorities fulfill the requirements of this Act, and will require further action by the facility if needed, in consultation with appropriate authorities, to ensure the requirements of this Act and

existing authorities are non-duplicative and non-contradictory. The Secretary is required to coordinate with the Attorney General on facilities that import, manufacture, distribute, or store explosive materials and are required to be licensed under §18 USC 40.

Facilities are required to review their plans not later than three years after they are submitted and at least once every five years submit a review of the adequacy of the vulnerability assessment or facility security plan.

Section 2104. Record Keeping; Site Inspections

This section requires that a current copy of the vulnerability assessment and facility security plan be maintained at each facility. The Secretary or his designee shall have the right of entry at reasonable times and shall conduct security verifications and inspections. The Secretary may authorize third-party entities that are trained and certified by the Secretary to ensure and evaluate compliance with regulations, security standards, and requirements under this title. Failures to maintain, produce, or allow access to records or to the property shall result in an order requiring compliance.

Section 2105. Enforcement

This section requires the regulations promulgated to set specific deadlines for a facility to submit vulnerability assessments and facility security plans, which may differ according to the risk-based tier. Facilities will be required under the regulations to notify the Secretary if there is any change in the threshold amount of a substance of concern or any significant change in a vulnerability assessment or facility security plan previously submitted. If a facility fails to comply with submitting a vulnerability assessment or facility security plan, then the Secretary shall issue an order requiring the submission. If the Secretary finds the facility still non-compliant, he may issue an order to cease operations.

This section also requires the Secretary to review and approve/disapprove a vulnerability assessment or a facility security plan no later than 180 days from the date of receipt. The Secretary may designate a third party verifier to conduct such review. A vulnerability assessment or facility security plan shall be disapproved if it does not comply with the regulations required under §2103 or if the facility security plan does not sufficiently address any assessed vulnerabilities or associated oversight actions under §2103 or the threat of a terrorist incident. However, this section specifies that a facility security plan shall not be disapproved based solely on the security measures that a facility selects in order to meet the security performance requirements established under the regulations required in §2103.

In the event of the Secretary's disapproval, the disapproval must be communicated in writing with a clear explanation of the deficiencies in the assessment, plan or implementation; provide guidance in addressing the deficiency; and, if in a high-risk tier, consult with the facility to identify appropriate steps to address the deficiency by a specific date. If that date is not met, then the Secretary shall issue an order requiring the deficiencies to be met. A revision will be required to be resubmitted.

This section requires the Secretary to establish a reporting process for any person to notify the Department regarding problems, deficiencies, or vulnerabilities at a chemical facility. No employer may discharge any employee or otherwise discriminate against any employee because the employee reports such problems to his employer, refuses to engage in unsecure practices, or testifies before Congress or Federal or State proceeding, on such problems. Any employee who alleges discrimination may bring an action governed under U.S.C. Title 49 section 20109.

Section 2106. Penalties

This section authorizes the Secretary to issue administrative penalties of not more than \$250,000 for a failure to comply with an order. It requires written notice of the penalty and the opportunity for the person to request a hearing on the proposed penalty. The Secretary may prescribe regulations for the procedures for administrative hearings including review and deadlines.

The Secretary may bring an action in a U.S. district court against a facility that violates or fails to comply with any order, directive, or facility security plan. A court may issue an order for injunctive relief and a civil penalty of not more than \$50,000 for each day a violation or failure to comply continues.

Criminal penalties may be brought against an owner or operator who knowingly and intentionally violates a compliance order issued by the Secretary. They may be fined not more than \$100,000 and imprisoned for not more than one year or both.

Information submitted to or obtained by the Secretary under this title or related vulnerability or security information shall be treated as classified material in any adjudicative proceeding. Any employee of a Federal, State, or local government who discloses such information can be jailed for not more than a year, fined, or removed from office.

Section 2107. 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 so long as that regulation, requirement, or standard of performance does not conflict with the Federal regulations established under this Act. If such a conflict exists, then the Federal statute preempts the State or local statute.

Nothing in this act shall preclude a State or local authority from to adopt or enforce environmental, health, or safety laws or regulations.

A person, State, or local government directly affected by a requirement may apply to the Secretary for a decision on preemption. The Secretary has 180 days to decide. In that time, no court case can be filed. Once the Secretary makes a decision or the 180 day time frame passes, which ever comes first, the person, State, or local government may file for judicial review of the Secretary's decision.

Section 2108. Protection of Information

This section provides that protected information shall not be disclosed except as provided in this title. The Secretary shall ensure that protected information is not disclosed by any Federal agency under the Freedom of Information Act or under any State or local sunshine law. The Secretary will prescribe, within one year of enactment, regulations or orders to prohibit unauthorized disclosure of protected information.

This section requires that the regulations: permit information sharing with Federal, State, and local law enforcement as well as with first responders and chemical facility personnel, as necessary; allow confidential use in administrative or judicial proceedings under the title; and limit access to protected information to persons designated by the Secretary.

This section does not relieve 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 disclose a record or information under any other law is not affected.

For the purposes of this title, protected information includes: criteria and data used by the Secretary to assign chemical facilities to risk-based tiers; the submitted vulnerability assessments and facility security plans; information concerning the security performance requirements; any other information generated or collected by a Federal, State, or local government agency or by a chemical facility that describes any vulnerability to an act of terrorism; that describes a security measure; or that the disclosure of which the Secretary determines would be detrimental to the security of a chemical facility.

Section 2109. Certification of Third Party Entities

This section requires the Secretary to certify third-party entities if they are to be used to carry out certain sections of this title. The Secretary must ensure that the third party entities have knowledge of physical infrastructure protection, cybersecurity, hazard analysis, engineering, and other related expertise. The Secretary will certify conformance with operating procedures and requirements and the demonstrated ability to perform validations. Qualified third party entities will receive some protection under the SAFETY Act.

Section 2110. Methods to Reduce the Consequences of a Terrorist Attack

This section requires that the facility security plan include an assessment of methods to reduce the consequences of a terrorist attack on a facility. These include substitution of chemicals, changes in processes, storage or use of less of a chemical of concern on site, changes to safer practices, reducing consequences of equipment failure or human error, improvements in inventory control, and reduction or elimination of storage, transportation, handling, disposal, or discharge of substances of concern.

The Secretary shall require the implementation of such method(s) to reduce the consequences of a terrorist attack on a high-risk facility if the Secretary determines that such method(s): would significantly reduce the impact to health or the environment from a terrorist release; can be

feasibly incorporated into the facility's operations; and would not significantly and demonstrably impair the ability of the facility to sustain operations. Upon such a determination by the Secretary, a facility that feels it cannot comply may submit a written explanation to the Panel on Methods to Reduce the Consequences of a Terrorist attack within 60 days. The Panel has 60 days to review the written explanation and accept or deny the explanation. If the explanation is denied, the facility has 180 to implement the required method(s) to reduce the consequences of a terrorist attack. The Panel will be established and chaired by the Secretary and composed of appropriate members of Federal and State agencies as well as independent security experts.

This Section requires the Secretary, in consultation with the Panel, to provide information on method(s) to reduce the consequences of a terrorist attack to facilities regulated under this Act. Information will be gathered by the Secretary and the Panel from information provided by facilities, academe, industry, other safety and security experts, and any other method the Secretary deems appropriate. 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 2108.

Section 2111. Annual Report to Congress

This section requires an annual report to Congress beginning not later than one year from the date of enactment on the progress of implementation of this title; assessments of the effectiveness of the facility security plans developed; lessons learned; and recommendations of the Secretary.

Section 2112. Applicability

This section clarifies that this title shall not apply to any facility owned and operated by the Departments of Defense, Justice, Energy, or any facility that is owned or operated by a licensee or certificate holder of the Nuclear Regulatory Commission. This title shall not apply to the transportation in commerce (including incidental storage) of a substance of concern which 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 Clean Water Act, the Resource Conservation and Recovery Act, the National Environmental Policy Act of 1969, the Occupational Safety and Health Act, the National Labor Relations Act, the Emergency Planning and Community Right to Know Act, Safe Drinking Water Act, the Maritime Transportation Security Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.

Section 2114. Office of Chemical Facility Security

This section establishes within the Department an Office of Chemical Facility Security. The head of the Office is responsible for carrying out the responsibilities of the Secretary under this Act.

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

This section requires the Secretary to give guidance to facilities on appropriate scope and applications of security background checks. A facility shall not make an adverse employment decision 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 within the past 5 years for a permanent or interim disqualifying crime under part 1572 of title 49, CFR.

The Secretary must provide an adequate redress process for an individual subjected to an adverse employment decision because of a background check, and have the authority to order an appropriate remedy. A chemical facility may not misrepresent to an employee or labor arbiter the background check rules and regulations issued by the Secretary.

Nothing in this section affects the right and responsibility of an employer to make an adverse employment decision under another Federal, State, local, or tribal law, or effect the rights and responsibilities of facilities or employees covered such a law. This section does not preempt any other Federal, State, tribal, or local law that requires background checks.

Section 4. Inspector General Report

Not later than one year after the date of enactment of the regulations under this Act, the Inspector General shall submit a report to Congress on the effectiveness of the implementation of this Act, the effectiveness of the facility security plans required under the Act, and recommendations. A classified annex may be added if deemed necessary.

Section 5. Deadline for Regulations

This section requires that the Secretary conduct the rulemaking process so that a final rule to carry out the provisions of this act is effective by October 1, 2009.

Section 6. Chemical Facility Training Program

The Secretary, will establish a Chemical Facility Security Training Program. The program will provide training for Federal, State, and local authorities, chemical plant owners, operators, and employees, and governmental and nongovernmental emergency response providers. The training shall be consistent with the National Incident Management System, the National Response Framework, the National Infrastructure Protection Plan, the National Preparedness Guidance, and the National Preparedness Goals. The Secretary shall support the promulgation of national voluntary consensus standards for such training programs.