

CHEMICAL FACILITY ANTI-TERRORISM ACT OF 2009

OCTOBER 23, 2009.—Ordered to be printed

Mr. WAXMAN, from the Committee on Energy and Commerce,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2868]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 2868) to amend the Homeland Security Act of 2002 to extend, modify, and recodify the authority of the Secretary of Homeland Security to enhance security and protect against acts of terrorism against chemical facilities, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress makes the following findings:

(1) The Nation’s chemical sector represents a target that terrorists could exploit to cause consequences, including death, injury, or serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy.

(2) Chemical facilities that pose such potential consequences and that are vulnerable to terrorist attacks must be protected.

(3) The Secretary of Homeland Security has statutory authority pursuant to section 550 of the Department of Homeland Security Appropriations Act, 2007 (Public Law 109–295) to regulate the security practices at chemical facilities that are at significant risk of being terrorist targets.

(4) The Secretary of Homeland Security issued interim final regulations called the Chemical Facility Anti-Terrorism Standards, which became effective on June 8, 2007.

(b) PURPOSE.—The purpose of this Act is to modify and make permanent the authority of the Secretary of Homeland Security to regulate security practices at chemical facilities.

SEC. 3. EXTENSION, MODIFICATION, AND RECODIFICATION OF AUTHORITY OF SECRETARY OF HOMELAND SECURITY TO REGULATE SECURITY PRACTICES AT CHEMICAL FACILITIES.

(a) IN GENERAL.—The Homeland Security Act of 2002 (6 U.S.C. 101 et seq.) is amended by adding at the end the following new title:

“TITLE XXI—REGULATION OF SECURITY PRACTICES AT CHEMICAL FACILITIES

“SEC. 2101. DEFINITIONS.

“In this title, the following definitions apply:

“(1) The term ‘chemical facility’ means any facility—

“(A) at which the owner or operator of the facility possesses or plans to possess at any relevant point in time a substance of concern; or

“(B) that meets other risk-related criteria identified by the Secretary.

“(2) The term ‘chemical facility security performance standards’ means risk-based standards established by the Secretary to ensure or enhance the security of a chemical facility against a chemical facility terrorist incident that are designed to address the following:

“(A) Restricting the area perimeter.

“(B) Securing site assets.

“(C) Screening and controlling access to the facility and to restricted areas within the facility by screening or inspecting individuals and vehicles as they enter, including—

“(i) measures to deter the unauthorized introduction of dangerous substances and devices that may facilitate a chemical facility terrorist incident or actions having serious negative consequences for the population surrounding the chemical facility; and

“(ii) measures implementing a regularly updated identification system that checks the identification of chemical facility personnel and other persons seeking access to the chemical facility and that discourages abuse through established disciplinary measures.

“(D) Methods to deter, detect, and delay a chemical facility terrorist incident, creating sufficient time between detection of a chemical facility terrorist incident and the point at which the chemical facility terrorist incident becomes successful, including measures to—

“(i) deter vehicles from penetrating the chemical facility perimeter, gaining unauthorized access to restricted areas, or otherwise presenting a hazard to potentially critical targets;

“(ii) deter chemical facility terrorist incidents through visible, professional, well-maintained security measures and systems, including security personnel, detection systems, barriers and barricades, and hardened or reduced value targets;

“(iii) detect chemical facility terrorist incidents at early stages through counter surveillance, frustration of opportunity to observe potential targets, surveillance and sensing systems, and barriers and barricades; and

“(iv) delay a chemical facility terrorist incident for a sufficient period of time so as to allow appropriate response through on-site security response, barriers and barricades, hardened targets, and well-coordinated response planning.

“(E) Securing and monitoring the shipping, receipt, and storage of a substance of concern for the chemical facility.

“(F) Deterring theft or diversion of a substance of concern.

“(G) Deterring insider sabotage.

“(H) Deterring cyber sabotage, including by preventing unauthorized on-site or remote access to critical process controls, including supervisory control and data acquisition systems, distributed control systems, process control systems, industrial control systems, critical business systems, and other sensitive computerized systems.

“(I) Developing and exercising an internal emergency plan for owners, operators, and covered individuals of a covered chemical facility for responding to chemical facility terrorist incidents at the facility. Any such plan shall include the provision of appropriate information to any local emergency planning committee, local law enforcement officials, and emergency response providers to ensure an effective, collective response to terrorist incidents.

“(J) Maintaining effective monitoring, communications, and warning systems, including—

“(i) measures designed to ensure that security systems and equipment are in good working order and inspected, tested, calibrated, and otherwise maintained;

“(ii) measures designed to regularly test security systems, note deficiencies, correct for detected deficiencies, and record results so that they are available for inspection by the Department; and

“(iii) measures to allow the chemical facility to promptly identify and respond to security system and equipment failures or malfunctions.

“(K) Ensuring mandatory annual security training, exercises, and drills of chemical facility personnel appropriate to their roles, responsibilities, and access to chemicals, including participation by local law enforcement, local emergency response providers, appropriate supervisory and non-supervisory facility employees and their employee representatives, if any.

“(L) Performing personnel surety for individuals with access to restricted areas or critical assets by conducting appropriate background checks and ensuring appropriate credentials for unescorted visitors and chemical facility personnel, including permanent and part-time personnel, temporary personnel, and contract personnel, including—

“(i) measures designed to verify and validate identity;

“(ii) measures designed to check criminal history;

“(iii) measures designed to verify and validate legal authorization to work; and

“(iv) measures designed to identify people with terrorist ties.

“(M) Escalating the level of protective measures for periods of elevated threat.

“(N) Specific threats, vulnerabilities, or risks identified by the Secretary for that chemical facility.

“(O) Reporting of significant security incidents to the Department and to appropriate local law enforcement officials.

“(P) Identifying, investigating, reporting, and maintaining records of significant security incidents and suspicious activities in or near the site.

“(Q) Establishing one or more officials and an organization responsible for—

“(i) security;

“(ii) compliance with the standards under this paragraph;

“(iii) serving as the point of contact for incident management purposes with Federal, State, local, and tribal agencies, law enforcement, and emergency response providers; and

“(iv) coordination with Federal, State, local, and tribal agencies, law enforcement, and emergency response providers regarding plans and security measures for the collective response to a chemical facility terrorist incident.

“(R) Maintaining appropriate records relating to the security of the facility, including a copy of the most recent security vulnerability assessment and site security plan at the chemical facility.

“(S) Assessing and, as appropriate, utilizing methods to reduce the consequences of a terrorist attack.

“(T) Methods to recover or mitigate the release of a substance of concern in the event of a chemical facility terrorist incident.

“(U) Any additional security performance standards the Secretary may specify.

“(3) The term ‘chemical facility terrorist incident’ means any act or attempted act of terrorism or terrorist activity committed at, near, or against a chemical facility, including—

“(A) the release of a substance of concern from a chemical facility;

“(B) the theft, misappropriation, or misuse of a substance of concern from a chemical facility; or

“(C) the sabotage of a chemical facility or a substance of concern at a chemical facility.

“(4) The term ‘employee representative’ means the representative of the certified or recognized bargaining agent engaged in a collective bargaining relationship with a private or public owner or operator of a chemical facility.

“(5) The term ‘covered individual’ means a permanent, temporary, full-time, or part-time employee of a covered chemical facility or an employee of an entity with which the covered chemical facility has entered into a contract who is performing responsibilities at the facility pursuant to the contract.

“(6) The term ‘covered chemical facility’ means a chemical facility that meets the criteria of section 2102(b)(1).

“(7) The term ‘environment’ means—

“(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); and

“(B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

“(8) The term ‘owner or operator’ with respect to a facility means any of the following:

“(A) The person who owns the facility.

“(B) The person who has responsibility for daily operation of the facility.

“(C) The person who leases the facility.

“(9) The term ‘person’ means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

“(10) The term ‘release’ means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).

“(11) The term ‘substance of concern’ means a chemical substance in quantity and form that is so designated by the Secretary under section 2102(a).

“(12) The term ‘method to reduce the consequences of a terrorist attack’ means a measure used at a chemical facility that reduces or eliminates the potential consequences of a chemical facility terrorist incident, including—

“(A) the elimination or reduction in the amount of a substance of concern possessed or planned to be possessed by an owner or operator of a covered chemical facility through the use of alternate substances, formulations, or processes;

“(B) the modification of pressures, temperatures, or concentrations of a substance of concern; and

“(C) the reduction or elimination of onsite handling of a substance of concern through improvement of inventory control or chemical use efficiency.

“SEC. 2102. RISK-BASED DESIGNATION AND RANKING OF CHEMICAL FACILITIES.**“(a) SUBSTANCES OF CONCERN.—**

“(1) DESIGNATION BY THE SECRETARY.—The Secretary may designate any chemical substance as a substance of concern and establish the threshold quantity for each such substance of concern.

“(2) MATTERS FOR CONSIDERATION.—In designating a chemical substance or establishing or adjusting the threshold quantity for a chemical substance under paragraph (1), the Secretary shall consider the potential extent of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy that could result from a chemical facility terrorist incident.

“(b) LIST OF COVERED CHEMICAL FACILITIES.—

“(1) CRITERIA FOR LIST OF FACILITIES.—The Secretary shall maintain a list of covered chemical facilities that the Secretary determines are of sufficient security risk for inclusion on the list based on the following criteria:

“(A) The potential threat or likelihood that the chemical facility will be the target of a chemical facility terrorist incident.

“(B) The potential extent and likelihood of death, injury, or serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy that could result from a chemical facility terrorist incident.

“(C) The proximity of the chemical facility to large population centers.

“(2) SUBMISSION OF INFORMATION.—The Secretary may require the submission of information with respect to the quantities of substances of concern that an owner or operator of a chemical facility possesses or plans to possess in order to determine whether to designate a chemical facility as a covered chemical facility for purposes of this title.

“(c) ASSIGNMENT OF CHEMICAL FACILITIES TO RISK-BASED TIERS.—

“(1) ASSIGNMENT.—The Secretary shall assign each covered chemical facility to one of four risk-based tiers established by the Secretary, with tier one representing the highest degree of risk and tier four the lowest degree of risk.

“(2) PROVISION OF INFORMATION.—The Secretary may request, and the owner or operator of a covered chemical facility shall provide, any additional information beyond any information required to be submitted under subsection (b)(2) that may be necessary for the Secretary to assign the chemical facility to the appropriate tier under paragraph (1).

“(3) NOTIFICATION.—Not later than 60 days after the date on which the Secretary determines that a chemical facility is a covered chemical facility or is no longer a covered chemical facility or changes the tier assignment under paragraph (1) of a covered chemical facility, the Secretary shall notify the owner or operator of that chemical facility of that determination or change together with the reason for the determination or change and, upon the request of the owner or operator of a covered chemical facility, provide to the owner or operator of the covered chemical facility the following information:

“(A) The number of individuals at risk of death, injury, or severe adverse effects to human health as a result of a worst case chemical facility terrorist incident at the covered chemical facility.

“(B) Information related to the criticality of the covered chemical facility.

“(C) The proximity or interrelationship of the covered chemical facility to other critical infrastructure.

“(d) REQUIREMENT FOR REVIEW.—The Secretary—

“(1) shall periodically review—

“(A) the designation of a substance of concern and the threshold quantity under subsection (a)(1); and

“(B) the criteria under subsection (b)(1); and

“(2) may at any time determine whether a chemical facility is a covered chemical facility or change the tier to which such a facility is assigned under subsection (c)(1).

“(e) PROVISION OF THREAT-RELATED INFORMATION.—In order to effectively assess the vulnerabilities to a covered chemical facility, the Secretary shall provide to the owner, operator, or security officer of a covered chemical facility threat information regarding probable threats to the facility and methods that could be used in a chemical facility terrorist incident.

“SEC. 2103. SECURITY VULNERABILITY ASSESSMENTS AND SITE SECURITY PLANS.**“(a) IN GENERAL.—**

“(1) REQUIREMENT.—The Secretary shall—

“(A) establish standards, protocols, and procedures for security vulnerability assessments and site security plans to be required for covered chemical facilities;

“(B) require the owner or operator of each covered chemical facility to—

“(i) conduct an assessment of the vulnerability of the covered chemical facility to a range of chemical facility terrorist incidents, including an incident that results in a worst-case release of a substance of concern;

“(ii) prepare, submit, and implement a site security plan for that covered chemical facility that addresses the security vulnerability assessment and meets the risk-based chemical security performance standards under subsection (c); and

“(iii) include at least one supervisory and at least one non-supervisory employee of the covered chemical facility, and at least one employee representative, from each bargaining agent at the covered chemical facility, if any, in developing the security vulnerability assessment and site security plan required under this section;

“(C) set deadlines, by tier, for the completion of security vulnerability assessments and site security plans;

“(D) upon request, as necessary, and to the extent that resources permit, provide technical assistance to a covered chemical facility conducting a vulnerability assessment or site security plan required under this section;

“(E) establish specific deadlines and requirements for the submission by a covered chemical facility of information describing—

“(i) any change in the use by the covered chemical facility of more than a threshold amount of any substance of concern that may affect the requirements of the chemical facility under this title; or

“(ii) any material modification to a covered chemical facility’s operations or site that may affect the security vulnerability assessment or site security plan submitted by the covered chemical facility;

“(F) require the owner or operator of a covered chemical facility to review and resubmit a security vulnerability assessment or site security plan not less frequently than once every 5 years; and

“(G) not later than 180 days after the date on which the Secretary receives a security vulnerability assessment or site security plan under this title, review and approve or disapprove such assessment or plan.

“(2) INHERENTLY GOVERNMENTAL FUNCTION.—The approval or disapproval of a security vulnerability assessment or site security plan under this section is an inherently governmental function.

“(b) PARTICIPATION IN PREPARATION OF SECURITY VULNERABILITY ASSESSMENTS OR SITE SECURITY PLANS.—Any person selected by the owner or operator of a covered chemical facility or by a certified or recognized bargaining agent of a covered chemical facility to participate in the development of the security vulnerability assessment or site security plan required under this section for such covered chemical facility shall be permitted to participate if the person possesses knowledge, experience, training, or education relevant to the portion of the security vulnerability assessment or site security plan on which the person is participating.

“(c) RISK-BASED CHEMICAL SECURITY PERFORMANCE STANDARDS.—The Secretary shall establish risk-based chemical security performance standards for the site security plans required to be prepared by covered chemical facilities. In establishing such standards, the Secretary shall—

“(1) require separate and, as appropriate, increasingly stringent risk-based chemical security performance standards for site security plans as the level of risk associated with the tier increases; and

“(2) permit each covered chemical facility submitting a site security plan to select a combination of security measures that satisfy the risk-based chemical security performance standards established by the Secretary under this subsection.

“(d) CO-LOCATED CHEMICAL FACILITIES.—The Secretary may allow an owner or operator of a covered chemical facility that is located geographically close to another covered chemical facility to develop and implement coordinated security vulnerability assessments and site security plans.

“(e) ALTERNATE SECURITY PROGRAMS SATISFYING REQUIREMENTS FOR SECURITY VULNERABILITY ASSESSMENT AND SITE SECURITY PLAN.—

“(1) ACCEPTANCE OF PROGRAM.—In response to a request by an owner or operator of a covered chemical facility, the Secretary may accept an alternate security program submitted by the owner or operator of the facility as a component of the security vulnerability assessment or site security plan required under this section, if the Secretary determines that such alternate security program,

in combination with other components of the security vulnerability assessment and site security plan submitted by the owner or operator of the facility—

“(A) meets the requirements of this title and the regulations promulgated pursuant to this title;

“(B) provides an equivalent level of security to the level of security established pursuant to the regulations promulgated under this title; and

“(C) includes employee participation as required under subsection (a)(1)(B)(iii).

“(2) SECRETARIAL REVIEW REQUIRED.—Nothing in this subsection shall relieve the Secretary of the obligation—

“(A) to review a security vulnerability assessment and site security plan submitted by a covered chemical facility under this section; and

“(B) to approve or disapprove each such assessment or plan on an individual basis according to the deadlines established under subsection (a).

“(3) COVERED FACILITY’S OBLIGATIONS UNAFFECTED.—Nothing in this subsection shall relieve any covered chemical facility of the obligation and responsibility to comply with all of the requirements of this title.

“(4) PERSONNEL SURETY ALTERNATE SECURITY PROGRAM.—In response to an application from a non-profit, personnel surety accrediting organization acting on behalf of, and with written authorization from, the owner or operator of a covered chemical facility, the Secretary may accept a personnel surety alternate security program that meets the requirements of section 2115 and provides for a background check process that is—

“(A) expedited, affordable, reliable, and accurate;

“(B) fully protective of the rights of covered individuals through procedures that are consistent with the privacy protections available under the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.); and

“(C) is a single background check consistent with a risk-based tiered program.

“(f) OTHER AUTHORITIES.—

“(1) REGULATION OF MARITIME FACILITIES.—

“(A) RISK-BASED TIERING.—Notwithstanding any other provision of law, the owner or operator of a chemical facility required to submit a facility security plan under section 70103(c) of title 46, United States Code, shall be required to submit information to the Secretary necessary to determine whether to designate such a facility as a covered chemical facility and to assign the facility to a risk-based tier under section 2102 of this title.

“(B) ADDITIONAL MEASURES.—In the case of a facility designated as a covered chemical facility under this title that is also regulated under section 70103(c) of title 46, United States Code, the Commandant of the Coast Guard, after consultation with the Secretary, shall require the owner or operator of such facility to update the vulnerability assessments and facility security plans required under that section, if necessary, to ensure an equivalent level of security for substances of concern, including the requirements under section 2111, in the same manner as other covered chemical facilities in this title.

“(C) PERSONNEL SURETY.—

“(i) EXCEPTION.—A facility designated as a covered chemical facility under this title that has had its facility security plan approved under section 70103(c) of title 46, United States Code, shall not be required to update or amend such plan in order to meet the requirements of section 2115 of this title.

“(ii) EQUIVALENT ACCESS.—An individual described in section 2115(a)(1)(B) who has been granted access to restricted areas or critical assets by the owner or operator of a facility for which a security plan is required to be submitted under section 70103(c) of title 46, United States Code, may be considered by that owner or operator to have satisfied the requirement for passing a security background check otherwise required under section 2115 for purposes of granting the individual access to restricted areas or critical assets of a covered chemical facility that is owned or operated by the same owner or operator.

“(D) INFORMATION SHARING AND PROTECTION.—Notwithstanding section 70103(d) of title 46, United States Code, the Commandant of the Coast Guard, after consultation with the Secretary, shall apply the information sharing and protection requirements in section 2110 of this title to a facility described in subparagraph (B).

“(E) ENFORCEMENT.—The Secretary shall establish, by rulemaking, procedures to ensure that an owner or operator of a covered chemical facility required to update the vulnerability assessment and facility security plan for

the facility under subparagraph (B) is in compliance with the requirements of this title.

“(F) FORMAL AGREEMENT.—The Secretary shall require the Office of Infrastructure Protection and the Coast Guard to enter into a formal agreement detailing their respective roles and responsibilities in carrying out the requirements of this title. Such agreement shall ensure that the enforcement and compliance requirements under this title and section 70103 of title 46, United States Code, are not conflicting or duplicative.

“(2) COORDINATION OF STORAGE LICENSING OR PERMITTING REQUIREMENT.—In the case of any storage required to be licensed or permitted under chapter 40 of title 18, United States Code, the Secretary shall prescribe the rules and regulations for the implementation of this section with the concurrence of the Attorney General and avoid unnecessary duplication of regulatory requirements.

“(g) ROLE OF EMPLOYEES.—

“(1) DESCRIPTION OF ROLE REQUIRED.—Site security plans required under this section shall describe the roles or responsibilities that covered individuals are expected to perform to deter or respond to a chemical facility terrorist incident.

“(2) ANNUAL TRAINING FOR EMPLOYEES.—The owner or operator of a covered chemical facility required to submit a site security plan under this section shall annually provide each covered individual with a role or responsibility referred to in paragraph (1) at the facility with a minimum of 8 hours of training. Such training shall, as relevant to the role or responsibility of such covered individual—

“(A) include an identification and discussion of substances of concern;

“(B) include a discussion of possible consequences of a chemical facility terrorist incident;

“(C) review and exercise the covered chemical facility’s site security plan, including any requirements for differing threat levels;

“(D) include a review of information protection requirements;

“(E) include a discussion of physical and cyber security equipment, systems, and methods used to achieve chemical security performance standards;

“(F) allow training with other relevant participants, including Federal, State, local, and tribal authorities, and first responders, where appropriate;

“(G) use existing national voluntary consensus standards, chosen jointly with employee representatives, if any;

“(H) allow instruction through government training programs, chemical facilities, academic institutions, nonprofit organizations, industry and private organizations, employee organizations, and other relevant entities that provide such training;

“(I) use multiple training media and methods; and

“(J) include a discussion of appropriate emergency response procedures, including procedures to mitigate the effects of a chemical facility terrorist incident.

“(3) EQUIVALENT TRAINING.—During any year, with respect to any covered individual with roles or responsibilities under paragraph (1), an owner or operator of a covered chemical facility may satisfy any of the training requirements for such covered individual under subparagraphs (A), (B), (C), (D), (E), or (J) of paragraph (2) through training that such owner or operator certifies, in a manner prescribed by the Secretary, as equivalent.

“(4) WORKER TRAINING GRANT PROGRAM.—

“(A) AUTHORITY.—The Secretary shall establish a grant program to award grants to or enter into cooperative agreements with eligible entities to provide for the training and education of covered individuals with roles or responsibilities described in paragraph (1) and first responders and emergency response providers that would respond to a chemical facility terrorist incident.

“(B) ADMINISTRATION.—The Secretary shall seek to enter into an agreement with the National Institute for Environmental Health Sciences to make and administer grants or cooperative agreements under this paragraph.

“(C) USE OF FUNDS.—The recipient of funds under this paragraph shall use such funds to provide for the training and education of covered individuals with roles or responsibilities described in paragraph (1), first responders, and emergency response providers, including—

“(i) the annual mandatory training specified in paragraph (2); and

“(ii) other appropriate training to protect nearby persons, property, critical infrastructure, or the environment from the effects of a chemical facility terrorist incident.

“(D) ELIGIBLE ENTITIES.—For purposes of this paragraph, an eligible entity is a nonprofit organization with demonstrated experience in implementing and operating successful worker or first responder health and safety or security training programs.

“(h) STATE, REGIONAL, OR LOCAL GOVERNMENTAL ENTITIES.—No covered chemical facility shall be required under State, local, or tribal law to provide a vulnerability assessment or site security plan described under this title to any State, regional, local, or tribal government entity solely by reason of the requirement under subsection (a) that the covered chemical facility submit such an assessment and plan to the Secretary.

“SEC. 2104. SITE INSPECTIONS.

“(a) RIGHT OF ENTRY.—For purposes of carrying out this title, the Secretary shall have, at a reasonable time and on presentation of credentials, a right of entry to, on, or through any property of a covered chemical facility or any property on which any record required to be maintained under this section is located.

“(b) INSPECTIONS AND VERIFICATIONS.—

“(1) IN GENERAL.—The Secretary shall, at such time and place as the Secretary determines to be reasonable and appropriate, conduct chemical facility security inspections and verifications.

“(2) REQUIREMENTS.—To ensure and evaluate compliance with this title, including any regulations or requirements adopted by the Secretary in furtherance of the purposes of this title, in conducting an inspection or verification under paragraph (1), the Secretary shall have access to the owners, operators, employees, and employee representatives, if any, of a covered chemical facility.

“(c) UNANNOUNCED INSPECTIONS.—In addition to any inspection conducted pursuant to subsection (b), the Secretary shall require covered chemical facilities assigned to tier 1 and tier 2 under section 2102(c)(1) to undergo unannounced facility inspections. The inspections required under this subsection shall be—

“(1) conducted without prior notice to the facility;

“(2) designed to evaluate at the chemical facility undergoing inspection—

“(A) the ability of the chemical facility to prevent a chemical facility terrorist incident that the site security plan of the facility is intended to prevent;

“(B) the ability of the chemical facility to protect against security threats that are required to be addressed by the site security plan of the facility; and

“(C) any weaknesses in the site security plan of the chemical facility;

“(3) conducted so as not to affect the actual security, physical integrity, safety, or regular operations of the chemical facility or its employees while the inspection is conducted; and

“(4) conducted—

“(A) every two years in the case of a covered chemical facility assigned to tier 1; and

“(B) every four years in the case of a covered chemical facility assigned to tier 2.

“(d) CHEMICAL FACILITY INSPECTORS AUTHORIZED.—During the period of fiscal years 2011 and 2012, subject to the availability of appropriations for such purpose, the Secretary shall increase by not fewer than 100 the total number of chemical facility inspectors within the Department to ensure compliance with this title.

“(e) CONFIDENTIAL COMMUNICATIONS.—The Secretary shall offer non-supervisory employees the opportunity to confidentially communicate information relevant to the employer’s compliance or non-compliance with this title, including compliance or non-compliance with any regulation or requirement adopted by the Secretary in furtherance of the purposes of this title. An employee representative of each certified or recognized bargaining agent at the covered chemical facility, if any, or, if none, a non-supervisory employee, shall be given the opportunity to accompany the Secretary during a physical inspection of such covered chemical facility for the purpose of aiding in such inspection, if representatives of the owner or operator of the covered chemical facility will also be accompanying the Secretary on such inspection.

“SEC. 2105. RECORDS.

“(a) REQUEST FOR RECORDS.—In carrying out this title, the Secretary may require submission of, or on presentation of credentials may at reasonable times obtain access to and copy, any records, including any records maintained in electronic format, necessary for—

“(1) reviewing or analyzing a security vulnerability assessment or site security plan submitted under section 2103; or

“(2) assessing the implementation of such a site security plan.

“(b) PROPER HANDLING OF RECORDS.—In accessing or copying any records under subsection (a), the Secretary shall ensure that such records are handled and secured appropriately in accordance with section 2110.

“SEC. 2106. TIMELY SHARING OF THREAT INFORMATION.

“(a) RESPONSIBILITIES OF SECRETARY.—Upon the receipt of information concerning a threat that is relevant to a certain covered chemical facility, the Secretary shall provide such information in a timely manner, to the maximum extent practicable under applicable authority and in the interests of national security, to the owner, operator, or security officer of that covered chemical facility and to a representative of each recognized or certified bargaining agent at the facility, if any.

“(b) RESPONSIBILITIES OF OWNER OR OPERATOR.—The Secretary shall require the owner or operator of a covered chemical facility to provide information concerning a threat in a timely manner about any significant security incident or threat to the covered chemical facility or any intentional or unauthorized penetration of the physical security or cyber security of the covered chemical facility whether successful or unsuccessful.

“SEC. 2107. ENFORCEMENT.

“(a) REVIEW OF SITE SECURITY PLAN.—

“(1) DISAPPROVAL.—The Secretary shall disapprove a security vulnerability assessment or site security plan submitted under this title if the Secretary determines, in his or her discretion, that—

“(A) the security vulnerability assessment or site security plan does not comply with the standards, protocols, or procedures under section 2103(a)(1)(A); or

“(B) in the case of a site security plan—

“(i) the plan or the implementation of the plan is insufficient to address vulnerabilities identified in a security vulnerability assessment, site inspection, or unannounced inspection of the covered chemical facility; or

“(ii) the plan fails to meet all applicable chemical facility security performance standards.

“(2) PROVISION OF NOTIFICATION OF DISAPPROVAL.—If the Secretary disapproves the security vulnerability assessment or site security plan submitted by a covered chemical facility under this title or the implementation of a site security plan by such a chemical facility, the Secretary shall provide the owner or operator of the covered chemical facility a written notification of the disapproval within 14 days of the date on which the Secretary disapproves such assessment or plan, that—

“(A) includes a clear explanation of deficiencies in the assessment, plan, or implementation of the plan; and

“(B) requires the owner or operator of the covered chemical facility to revise the assessment or plan to address any deficiencies and, by such date as the Secretary determines is appropriate, to submit to the Secretary the revised assessment or plan.

“(3) ORDER FOR COMPLIANCE.—Whenever the Secretary determines that the owner or operator of a covered chemical facility has violated or is in violation of any requirement of this title or has failed or is failing to address any deficiencies in the assessment, plan, or implementation of the plan by such date as the Secretary determines to be appropriate, the Secretary may—

“(A) after providing notice to the owner or operator of the covered chemical facility and an opportunity for such owner or operator to appeal the Secretary’s determination, issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both; or

“(B) commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including temporary or permanent injunction.

“(4) ORDER TO CEASE OPERATIONS.—If the Secretary determines that the owner or operator of a covered chemical facility continues to be in noncompliance after an order for compliance is issued under paragraph (3), the Secretary may issue an order to the owner or operator of a covered chemical facility to cease operations at the facility until the owner or operator complies with such order issued under paragraph (3). Notwithstanding the preceding sentence, the Secretary may not issue an order to cease operations under this paragraph to the owner or operator of a wastewater facility.

“(b) PENALTIES.—

“(1) CIVIL PENALTIES.—A court may award a civil penalty, pursuant to an order issued by the Secretary under this title, of not more than \$50,000 for each day on which a violation occurs or a failure to comply continues.

“(2) ADMINISTRATIVE PENALTIES.—The Secretary may award an administrative penalty, pursuant to an order issued under this title, of not more than \$25,000 for each day on which a violation occurs or a failure to comply continues.

“SEC. 2108. WHISTLEBLOWER PROTECTIONS.

“(a) ESTABLISHMENT.—The Secretary shall establish and provide information to the public regarding a process by which any person may submit a report to the Secretary regarding problems, deficiencies, or vulnerabilities at a covered chemical facility associated with the risk of a chemical facility terrorist incident.

“(b) CONFIDENTIALITY.—The Secretary shall keep confidential the identity of a person that submits a report under subsection (a) and any such report shall be treated as protected information under section 2110 to the extent that it does not consist of publicly available information.

“(c) ACKNOWLEDGMENT OF RECEIPT.—If a report submitted under subsection (a) identifies the person submitting the report, the Secretary shall respond promptly to such person to acknowledge receipt of the report.

“(d) STEPS TO ADDRESS PROBLEMS.—The Secretary shall review and consider the information provided in any report submitted under subsection (a) and shall, as necessary, take appropriate steps under this title to address any problem, deficiency, or vulnerability identified in the report.

“(e) RETALIATION PROHIBITED.—

“(1) PROHIBITION.—No owner or operator of a covered chemical facility, profit or not-for-profit corporation, association, or any contractor, subcontractor or agent thereof, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or other privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

“(A) notified the Secretary, the owner or operator of a covered chemical facility, or the employee’s employer of an alleged violation of this title, including communications related to carrying out the employee’s job duties;

“(B) refused to engage in any practice made unlawful by this title, if the employee has identified the alleged illegality to the employer;

“(C) testified before or otherwise provided information relevant for Congress or for any Federal or State proceeding regarding any provision (or proposed provision) of this title;

“(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this title;

“(E) testified or is about to testify in any such proceeding; or

“(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this title.

“(2) ENFORCEMENT ACTION.—Any employee covered by this section who alleges discrimination by an employer in violation of paragraph (1) may bring an action governed by the rules and procedures, legal burdens of proof, and remedies applicable under subsections (d) through (h) of section 20109 of title 49, United States Code. A party may seek district court review as set forth in subsection (d)(4) of such section not later than 90 days after receiving a written final determination by the Secretary of Labor.

“(3) PROHIBITED PERSONNEL PRACTICES AFFECTING THE DEPARTMENT.—

“(A) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Department shall be covered by—

“(i) paragraphs (1), (8), and (9) of section 2302(b) of title 5, United States Code;

“(ii) any provision of law implementing any of such paragraphs by providing any right or remedy available to an employee or applicant for employment in the civil service; and

“(iii) any rule or regulation prescribed under any such paragraph.

“(B) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed to affect any rights, apart from those referred to in subparagraph (A), to which an individual described in that subparagraph might otherwise be entitled to under law.

“SEC. 2109. FEDERAL PREEMPTION.

“This title does not preclude or deny any right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance

with respect to a covered chemical facility that is more stringent than a regulation, requirement, or standard of performance issued under this title, or otherwise impair any right or jurisdiction of any State or political subdivision thereof with respect to covered chemical facilities within that State or political subdivision thereof.

“SEC. 2110. PROTECTION OF INFORMATION.

“(a) PROHIBITION OF PUBLIC DISCLOSURE OF PROTECTED INFORMATION.—Protected information, as described in subsection (g)—

“(1) shall be exempt from disclosure under section 552 of title 5, United States Code; and

“(2) shall not be made available pursuant to any State, local, or tribal law requiring disclosure of information or records.

“(b) INFORMATION SHARING.—

“(1) **IN GENERAL.—**The Secretary shall prescribe such regulations, and may issue such orders, as necessary to prohibit the unauthorized disclosure of protected information, as described in subsection (g).

“(2) **SHARING OF PROTECTED INFORMATION.—**The regulations under paragraph (1) shall provide standards for and facilitate the appropriate sharing of protected information with and between Federal, State, local, and tribal authorities, emergency response providers, law enforcement officials, designated supervisory and nonsupervisory covered chemical facility personnel with security, operational, or fiduciary responsibility for the facility, and designated facility employee representatives, if any. Such standards shall include procedures for the sharing of all portions of a covered chemical facility’s vulnerability assessment and site security plan relating to the roles and responsibilities of covered individuals under section 2103(g)(1) with a representative of each certified or recognized bargaining agent representing such covered individuals, if any, or, if none, with at least one supervisory and at least one non-supervisory employee with roles or responsibilities under section 2103(g)(1).

“(3) **PENALTIES.—**Protected information, as described in subsection (g), shall not be shared except in accordance with the regulations under paragraph (1). Any person who purposefully publishes, divulges, discloses, or makes known protected information in any manner or to any extent not authorized by the standards provided by the regulations under paragraph (1), shall, upon conviction, be imprisoned for not more than one year or fined in accordance with the provisions of chapter 227 of title 18, United States Code, applicable to class A misdemeanors, or both, and, in the case of Federal employees or officeholders, shall be removed from Federal office or employment.

“(c) TREATMENT OF INFORMATION IN ADJUDICATIVE PROCEEDINGS.—In any judicial or administrative proceeding, protected information described in subsection (g) shall be treated in a manner consistent with the treatment of sensitive security information under section 525 of the Department of Homeland Security Appropriations Act, 2007 (Public Law 109–295; 120 Stat. 1381).

“(d) OTHER OBLIGATIONS UNAFFECTED.—Except as provided in section 2103(h), nothing in this section affects any obligation of the owner or operator of a chemical facility under any other law to submit or make available information required by such other law to facility employees, employee organizations, or a Federal, State, tribal, or local government.

“(e) SUBMISSION OF INFORMATION TO CONGRESS.—Nothing in this title shall permit or authorize the withholding of information from Congress or any committee or subcommittee thereof.

“(f) DISCLOSURE OF INDEPENDENTLY FURNISHED INFORMATION.—Nothing in this title shall affect any authority or obligation of a Federal, State, local, or tribal government agency to protect or disclose any record or information that the Federal, State, local, or tribal government agency obtains from a chemical facility under any other law.

“(g) PROTECTED INFORMATION.—

“(1) **IN GENERAL.—**For purposes of this title, protected information is the following:

“(A) Security vulnerability assessments and site security plans, including any assessment required under section 2111.

“(B) Portions of the following documents, records, orders, notices, or letters that the Secretary determines would be detrimental to chemical facility security if disclosed and that are developed by the Secretary or the owner or operator of a covered chemical facility for the purposes of this title:

“(i) Documents directly related to the Secretary’s review and approval or disapproval of vulnerability assessments and site security plans under this title.

“(ii) Documents directly related to inspections and audits under this title.

“(iii) Orders, notices, or letters regarding the compliance of a covered chemical facility with the requirements of this title.

“(iv) Information required to be provided to, or documents and records created by, the Secretary under section subsection (b) or (c) of section 2102.

“(v) Documents directly related to security drills and training exercises, security threats and breaches of security, and maintenance, calibration, and testing of security equipment.

“(C) Other information, documents, or records developed exclusively for the purposes of this title that the Secretary determines, if disclosed, would be detrimental to chemical facility security.

“(2) EXCLUSIONS.—For purposes of this section, protected information does not include—

“(A) information that is otherwise publicly available, including information that is required to be made publicly available under any law;

“(B) information that a chemical facility has lawfully disclosed other than in accordance with this title; or

“(C) information that, if disclosed, would not be detrimental to the security of a chemical facility, including aggregate regulatory data that the Secretary determines is appropriate to describe facility compliance with the requirements of this title and the Secretary’s implementation of such requirements.

“SEC. 2111. METHODS TO REDUCE THE CONSEQUENCES OF A TERRORIST ATTACK.

“(a) ASSESSMENT REQUIRED.—

“(1) ASSESSMENT.—The owner or operator of a covered chemical facility shall include in the site security plan conducted pursuant to section 2103, an assessment of methods to reduce the consequences of a terrorist attack on that chemical facility, including—

“(A) a description of the methods to reduce the consequences of a terrorist attack implemented and considered for implementation by the covered chemical facility;

“(B) the degree to which each method to reduce the consequences of a terrorist attack, if already implemented, has reduced, or, if implemented, could reduce, the potential extent of death, injury, or serious adverse effects to human health resulting from a release of a substance of concern;

“(C) the technical feasibility, costs, avoided costs (including liabilities), personnel implications, savings, and applicability of implementing each method to reduce the consequences of a terrorist attack; and

“(D) any other information that the owner or operator of the covered chemical facility considered in conducting the assessment.

“(2) FEASIBLE.—For the purposes of this section, the term ‘feasible’ means feasible with the use of best technology, techniques, and other means that the Secretary finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available for use at the covered chemical facility.

“(b) IMPLEMENTATION.—

“(1) IMPLEMENTATION.—

“(A) IN GENERAL.—The owner or operator of a covered chemical facility that is assigned to tier 1 or tier 2 because of the potential extent and likelihood of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy from a release of a substance of concern at the covered chemical facility, shall implement methods to reduce the consequences of a terrorist attack on the chemical facility if the Director of the Office of Chemical Facility Security determines, in his or her discretion, using the assessment conducted pursuant to subsection (a), that the implementation of such methods at the facility—

“(i) would significantly reduce the risk of death, injury, or serious adverse effects to human health resulting from a chemical facility terrorist incident but—

“(I) would not increase the interim storage of a substance of concern outside the facility;

“(II) would not directly result in the creation of a new covered chemical facility assigned to tier 1 or tier 2 because of the potential extent and likelihood of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public

health, homeland security, national security, and the national economy from a release of a substance of concern at the covered chemical facility; and

“(III) would not result in the reassignment of an existing covered chemical facility from tier 3 or tier 4 to tier 1 or tier 2 because of the potential extent and likelihood of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy from a release of a substance of concern at the covered chemical facility;

“(ii) can feasibly be incorporated into the operation of the covered chemical facility; and

“(iii) would not significantly and demonstrably impair the ability of the owner or operator of the covered chemical facility to continue the business of the facility at its location.

“(B) WRITTEN DETERMINATION.—A determination by the Director of the Office of Chemical Facility Security pursuant to subparagraph (A) shall be made in writing and include the basis and reasons for such determination.

“(C) MARITIME FACILITIES.—With respect to a covered chemical facility for which a security plan is required under section 70103(c) of title 46, United States Code, a written determination pursuant to subparagraph (A) shall be made only after consultation with the Captain of the Port for the area in which the covered chemical facility is located.

“(2) REVIEW OF INABILITY TO COMPLY.—

“(A) IN GENERAL.—An owner or operator of a covered chemical facility who is unable to comply with the Director’s determination under paragraph (1) shall, within 120 days of receipt of the Director’s determination, provide to the Secretary a written explanation that includes the reasons therefor. Such written explanation shall specify whether the owner or operator’s inability to comply arises under clause (ii) or (iii) of paragraph (1)(A), or both.

“(B) REVIEW.—Not later than 120 days of receipt of an explanation submitted under subparagraph (A), the Secretary, after consulting with the owner or operator of the covered chemical facility who submitted such explanation, as well as experts in the subjects of environmental health and safety, security, chemistry, design and engineering, process controls and implementation, maintenance, production and operations, chemical process safety, and occupational health, as appropriate, shall provide to the owner or operator a written determination, in his or her discretion, of whether implementation shall be required pursuant to paragraph (1). If the Secretary determines that implementation is required, the Secretary shall issue an order that establishes the basis for such determination, including the findings of the relevant experts, the specific methods selected for implementation, and a schedule for implementation of the methods at the facility.

“(c) SECTORAL IMPACTS.—

“(1) GUIDANCE FOR FARM SUPPLIES MERCHANT WHOLESALERS.—The Secretary shall provide guidance and, as appropriate, tools, methodologies or computer software, to assist farm supplies merchant wholesalers in complying with the requirements of this section. The Secretary may award grants to farm supplies merchant wholesalers to assist with compliance with subsection (a), and in awarding such grants, shall give priority to farm supplies merchant wholesalers that have the greatest need for such grants.

“(2) ASSESSMENT OF IMPACTS.—Not later than 6 months after the date of enactment of this title, the Secretary shall transmit an assessment of the potential impacts of compliance with provisions of this section regarding the assessment and, as appropriate, implementation, of methods to reduce the consequences of a terrorist attack by manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer to the Committee on Energy and Commerce of the House of Representatives, the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate. Such assessment shall be conducted by the Secretary in consultation with other appropriate Federal agencies and shall include the following:

“(A) Data on the scope of facilities covered by this title, including the number and type of manufacturers, retailers, aerial commercial applicators and distributors of pesticide and fertilizer required to assess methods to reduce the consequences of a terrorist attack under subsection (a) and the number and type of manufacturers, retailers, aerial commercial applicators and distributors of pesticide and fertilizer assigned to tier 1 or tier 2 by the Secretary because of the potential extent and likelihood of death, in-

jury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy from the release of a substance of concern at the facility.

“(B) A survey of known methods, processes or practices, other than elimination of or cessation of manufacture of the pesticide or fertilizer, that manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer could use to reduce the consequences of a terrorist attack, including an assessment of the costs and technical feasibility of each such method, process, or practice.

“(C) An analysis of how the assessment of methods to reduce the consequences of a terrorist attack under subsection (a) by manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer, and, as appropriate, the implementation of methods to reduce the consequences of a terrorist attack by such manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer subject to subsection (b), are likely to impact other sectors engaged in commerce.

“(D) Recommendations for how to mitigate any adverse impacts identified pursuant to subparagraph (C).

“(3) FARM SUPPLIES MERCHANT WHOLESALER.—In this subsection, the term ‘farm supplies merchant wholesaler’ means a covered chemical facility that is primarily engaged in the merchant wholesale distribution of farm supplies, such as animal feeds, fertilizers, agricultural chemicals, pesticides, plant seeds, and plant bulbs.

“(d) PROVISION OF INFORMATION ON ALTERNATIVE APPROACHES.—

“(1) IN GENERAL.—The Secretary shall make available information on the use and availability of methods to reduce the consequences of a chemical facility terrorist incident.

“(2) INFORMATION TO BE INCLUDED.—The information under paragraph (1) may include information about—

- “(A) general and specific types of such methods;
- “(B) combinations of chemical sources, substances of concern, and hazardous processes or conditions for which such methods could be appropriate;
- “(C) the availability of specific methods to reduce the consequences of a terrorist attack;
- “(D) the costs and cost savings resulting from the use of such methods;
- “(E) emerging technologies that could be transferred from research models or prototypes to practical applications;
- “(F) the availability of technical assistance and best practices; and
- “(G) such other matters that the Secretary determines are appropriate.

“(3) PUBLIC AVAILABILITY.—Information made available under this subsection shall not identify any specific chemical facility, violate the protection of information provisions under section 2110, or disclose any proprietary information.

“(e) FUNDING FOR METHODS TO REDUCE THE CONSEQUENCES OF A TERRORIST ATTACK.—The Secretary may make funds available to help defray the cost of implementing methods to reduce the consequences of a terrorist attack to covered chemical facilities that are required by the Secretary to implement such methods.

“SEC. 2112. APPLICABILITY.

“This title shall not apply to—

“(1) any chemical facility that is owned and operated by the Secretary of Defense;

“(2) the transportation in commerce, including incidental storage, of any substance of concern regulated as a hazardous material under chapter 51 of title 49, United States Code;

“(3) all or a specified portion of any chemical facility that—

“(A) is subject to regulation by the Nuclear Regulatory Commission (hereinafter in this paragraph referred to as the ‘Commission’) or a State that has entered into an agreement with the Commission under section 274 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2021 b.);

“(B) has had security controls imposed by the Commission or State, whichever has the regulatory authority, on the entire facility or the specified portion of the facility; and

“(C) has been designated by the Commission, after consultation with the State, if any, that regulates the facility, and the Secretary, as excluded from the application of this title; or

“(4) any public water system subject to the Safe Drinking Water Act (42 U.S.C. 300f et seq.).

“SEC. 2113. SAVINGS CLAUSE.

“(a) **IN GENERAL.**—Nothing in this title shall affect or modify in any way any obligation or liability of any person under any other Federal law, including 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.).

“(b) **OTHER REQUIREMENTS.**—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.

“(c) **ACCESS.**—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.

“SEC. 2114. OFFICE OF CHEMICAL FACILITY SECURITY.

“(a) **IN GENERAL.**—There is established in the Department an Office of Chemical Facility Security, headed by a Director, who shall be a member of the Senior Executive Service in accordance with subchapter VI of chapter 53 of title 5, United States Code, under section 5382 of that title, and who shall be responsible for carrying out the responsibilities of the Secretary under this title.

“(b) **PROFESSIONAL QUALIFICATIONS.**—The individual selected by the Secretary as the Director of the Office of Chemical Facility Security shall have professional qualifications and experience necessary for effectively directing the Office of Chemical Facility Security and carrying out the requirements of this title, including a demonstrated knowledge of physical infrastructure protection, cybersecurity, chemical facility security, hazard analysis, chemical process engineering, chemical process safety reviews, or other such qualifications that the Secretary determines to be necessary.

“(c) **SELECTION PROCESS.**—The Secretary shall make a reasonable effort to select an individual to serve as the Director from among a group of candidates that is diverse with respect to race, ethnicity, age, gender, and disability characteristics and submit to the Committee on Homeland Security and the Committee on Energy and Commerce of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate information on the selection process, including details on efforts to assure diversity among the candidates considered for this position.

“SEC. 2115. SECURITY BACKGROUND CHECKS OF COVERED INDIVIDUALS AT CERTAIN CHEMICAL FACILITIES.

“(a) **REGULATIONS ISSUED BY THE SECRETARY.**—

“(1) **IN GENERAL.**—

“(A) **REQUIREMENT.**—The Secretary shall issue regulations to require covered chemical facilities to establish personnel surety for individuals described in subparagraph (B) by conducting appropriate security background checks and ensuring appropriate credentials for unescorted visitors and chemical facility personnel, including permanent and part-time personnel, temporary personnel, and contract personnel, including—

“(i) measures designed to verify and validate identity;

“(ii) measures designed to check criminal history;

“(iii) measures designed to verify and validate legal authorization to work; and

“(iv) measures designed to identify people with terrorist ties.

“(B) **INDIVIDUALS DESCRIBED.**—For purposes of subparagraph (A), an individual described in this subparagraph is—

“(i) a covered individual who has unescorted access to restricted areas or critical assets or who is provided with a copy of a security vulnerability assessment or site security plan;

“(ii) a person associated with a covered chemical facility, including any designated employee representative, who is provided with a copy of a security vulnerability assessment or site security plan; or

“(iii) a person who is determined by the Secretary to require a security background check based on chemical facility security performance standards.

“(2) REGULATIONS.—The regulations required by paragraph (1) shall set forth—

“(A) the scope of the security background checks, including the types of disqualifying offenses and the time period covered for each person subject to a security background check under paragraph (1);

“(B) the processes to conduct the security background checks;

“(C) the necessary biographical information and other data required in order to conduct the security background checks;

“(D) a redress process for an adversely-affected person consistent with subsections (b) and (c); and

“(E) a prohibition on an owner or operator of a covered chemical facility misrepresenting to an employee or other relevant person, including an arbitrator involved in a labor arbitration, the scope, application, or meaning of any rules, regulations, directives, or guidance issued by the Secretary related to security background check requirements for covered individuals when conducting a security background check.

“(b) MISREPRESENTATION OF ADVERSE EMPLOYMENT DECISIONS.—The regulations required by subsection (a)(1) shall set forth that it shall be a misrepresentation under subsection (a)(2)(E) to attribute an adverse employment decision, including removal or suspension of the employee, to such regulations unless the owner or operator finds, after opportunity for appropriate redress under the processes provided under subsection (c)(1) and (c)(2), that the person subject to such adverse employment decision—

“(1) has been convicted of, has been found not guilty of by reason of insanity, or is under warrant, indictment for a permanent disqualifying criminal offense listed in part 1572 of title 49, Code of Federal Regulations;

“(2) was convicted of or found not guilty by reason of insanity of an interim disqualifying criminal offense listed in part 1572 of title 49, Code of Federal Regulations, within 7 years of the date on which the covered chemical facility performs the security background check;

“(3) was incarcerated for an interim disqualifying criminal offense listed in part 1572 of title 49, Code of Federal Regulations, and released from incarceration within 5 years of the date that the chemical facility performs the security background check;

“(4) is determined by the Secretary to be on the consolidated terrorist watchlist; or

“(5) is determined, as a result of the security background check, not to be legally authorized to work in the United States.

“(c) REDRESS PROCESS.—Upon the issuance of regulations under subsection (a), the Secretary shall—

“(1) require the owner or operator to provide an adequate and prompt redress process for a person subject to a security background check under subsection (a)(1) who is subjected to an adverse employment decision, including removal or suspension of the employee, due to such regulations that is consistent with the appeals process established for employees subject to consumer reports under the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), as in force on the date of enactment of this title;

“(2) provide an adequate and prompt redress process for a person subject to a security background check under subsection (a)(1) who is subjected to an adverse employment decision, including removal or suspension of the employee, due to a determination by the Secretary under subsection (b)(4), that is consistent with the appeals process established under section 70105(c) of title 46, United States Code, including all rights to hearings before an administrative law judge, scope of review, and a review of an unclassified summary of classified evidence equivalent to the summary provided in part 1515 of title 49, Code of Federal Regulations;

“(3) provide an adequate and prompt redress process for a person subject to a security background check under subsection (a)(1) who is subjected to an adverse employment decision, including removal or suspension of the employee, due to a violation of subsection (a)(2)(E), which shall not preclude the exercise of any other rights available under collective bargaining agreements or applicable laws;

“(4) establish a reconsideration process described in subsection (d) for a person subject to an adverse employment decision that was attributed by an owner or operator to the regulations required by subsection (a)(1);

“(5) have the authority to order an appropriate remedy, including reinstatement of the person subject to a security background check under subsection (a)(1), if the Secretary determines that the adverse employment decision was

made in violation of the regulations required under subsection (a)(1) or as a result of an erroneous determination by the Secretary under subsection (b)(4);

“(6) ensure that the redress processes required under paragraphs (1), (2), or (3) afford to the person a full disclosure of any public-record event covered by subsection (b) that provides the basis for an adverse employment decision; and

“(7) ensure that the person subject to a security background check under subsection (a)(1) receives the person’s full wages and benefits until all redress processes under this subsection are exhausted.

“(d) RECONSIDERATION PROCESS.—

“(1) IN GENERAL.—The reconsideration process required under subsection (c)(4) shall—

“(A) require the Secretary to determine, within 30 days after receiving a petition submitted by a person subject to an adverse employment decision that was attributed by an owner or operator to the regulations required by subsection (a)(1), whether such person poses a security risk to the covered chemical facility; and

“(B) include procedures consistent with section 70105(c) of title 46, United States Code, including all rights to hearings before an administrative law judge, scope of review, and a review of an unclassified summary of classified evidence equivalent to the summary provided in part 1515 of title 49, Code of Federal Regulations.

“(2) DETERMINATION BY THE SECRETARY.—In making a determination described under paragraph (1)(A), the Secretary shall—

“(A) give consideration to the circumstance of any disqualifying act or offense, restitution made by the person, Federal and State mitigation remedies, and other factors from which it may be concluded that the person does not pose a security risk to the covered chemical facility; and

“(B) provide his or her determination as to whether such person poses a security risk to the covered chemical facility to the petitioner and to the owner or operator of the covered chemical facility.

“(3) OWNER OR OPERATOR RECONSIDERATION.—If the Secretary determines pursuant to paragraph (1)(A) that the person does not pose a security risk to the covered chemical facility, it shall thereafter constitute a prohibited misrepresentation for the owner or operator of the covered chemical facility to continue to attribute the adverse employment decision to the regulations under subsection (a)(1).

“(e) RESTRICTIONS ON USE AND MAINTENANCE OF INFORMATION.—Information obtained under this section by the Secretary or the owner or operator of a covered chemical facility shall be handled as follows:

“(1) Such information may not be made available to the public.

“(2) Such information may not be accessed by employees of the facility except for such employees who are directly involved with collecting the information or conducting or evaluating security background checks.

“(3) Such information shall be maintained confidentially by the facility and the Secretary and may be used only for making determinations under this section.

“(4) The Secretary may share such information with other Federal, State, local, and tribal law enforcement agencies.

“(f) SAVINGS CLAUSE.—

“(1) RIGHTS AND RESPONSIBILITIES.—Nothing in this section shall be construed to abridge any right or responsibility of a person subject to a security background check under subsection (a)(1) or an owner or operator of a covered chemical facility under any other Federal, State, local, or tribal law or collective bargaining agreement.

“(2) EXISTING RIGHTS.—Nothing in this section shall be construed as creating any new right or modifying any existing right of an individual to appeal a determination by the Secretary as a result of a check against a terrorist watch list.

“(g) PREEMPTION.—Nothing in this section shall be construed to preempt, alter, or affect a Federal, State, local, or tribal law that requires criminal history background checks, checks on the authorization of an individual to work in the United States, or other background checks of persons subject to security background checks under subsection (a)(1).

“(h) DEFINITION OF SECURITY BACKGROUND CHECK.—The term ‘security background check’ means a review at no cost to any person subject to a security background check under subsection (a)(1) of the following for the purpose of identifying individuals who may pose a threat to chemical facility security, to national security, or of terrorism:

“(1) Relevant databases to verify and validate identity.

“(2) Relevant criminal history databases.

“(3) In the case of an alien (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3))), the relevant databases to determine the status of the alien under the immigration laws of the United States.

“(4) The consolidated terrorist watchlist.

“(5) Other relevant information or databases, as determined by the Secretary.

“(i) DEPARTMENT-CONDUCTED SECURITY BACKGROUND CHECK.—The regulations under subsection (a)(1) shall set forth a process by which the Secretary, on an ongoing basis, shall determine whether alternate security background checks conducted by the Department are sufficient to meet the requirements of this section such that no additional security background check under this section is required for an individual for whom such a qualifying alternate security background check was conducted. The Secretary may require a facility to which the individual will have unescorted access to sensitive or restricted areas to submit identifying information about the individual and the alternate security background check conducted for that individual to the Secretary in order to enable the Secretary to verify the validity of the alternate security background check. Such regulations shall provide that no security background check under this section is required for an individual holding a transportation security card issued under section 70105 of title 46, United States Code.

“SEC. 2116. CITIZEN ENFORCEMENT.

“(a) IN GENERAL.—Except as provided in subsection (c), any person may commence a civil action on such person’s own behalf—

“(1) against any governmental entity (including the United States, any other governmental instrumentality or agency, and any federally owned-contractor operated facility, to the extent permitted by the eleventh amendment to the Constitution) alleged to be in violation of any order that has become effective pursuant to this title; or

“(2) against the Secretary, for an alleged failure to perform any act or duty under this title that is not discretionary for the Secretary.

“(b) COURT OF JURISDICTION.—

“(1) IN GENERAL.—Any action under subsection (a)(1) shall be brought in the district court for the district in which the alleged violation occurred. Any action brought under subsection (a)(2) may be brought in the district court for the district in which the alleged violation occurred or in the United States District Court of the District of Columbia.

“(2) RELIEF.—The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties to enforce the order referred to in subsection (a)(1), to order such governmental entity to take such action as may be necessary, or both, or, in an action commenced under subsection (a)(2), to order the Secretary to perform the non-discretionary act or duty, and to order any civil penalties, as appropriate, under section 2107.

“(c) ACTIONS PROHIBITED.—No action may be commenced under subsection (a) prior to 60 days after the date on which the person commencing the action has given notice of the alleged violation to—

“(1) the Secretary; and

“(2) in the case of an action under subsection (a)(1), any governmental entity alleged to be in violation of an order.

“(d) NOTICE.—Notice under this section shall be given in such manner as the Secretary shall prescribe by regulation.

“(e) INTERVENTION.—In any action under this section, the Secretary, if not a party, may intervene as a matter of right.

“(f) COSTS.—The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

“(g) OTHER RIGHTS PRESERVED.—Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law.

“SEC. 2117. CITIZEN PETITIONS.

“(a) IN GENERAL.—The Secretary shall issue regulations to establish a petition process for petitions described in subsection (b), including—

“(1) the format for petitions;

“(2) the procedures for investigation of claims;

“(3) the procedures for response to petitions, including timelines; and

“(4) the procedures for de novo review of responses to petitions by the Office of the Inspector General for the Department of Homeland Security.

“(b) PETITIONS.—The regulations issued pursuant to subsection (a) shall allow any person to file a petition with the Secretary—

“(1) identifying any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) alleged to be in violation of any standard, regulation, condition, requirement, prohibition, plan, or order that has become effective under this title; and

“(2) describing the alleged violation of any standard, regulation, condition, requirement, prohibition, plan, or order that has become effective under this title by that person.

“(c) REQUIREMENTS.—Upon issuance of regulations under subsection (a), the Secretary shall—

“(1) accept all petitions described under subsection (b) that meet the requirements of the regulations promulgated under subsection (a);

“(2) investigate all allegations contained in accepted petitions;

“(3) determine whether enforcement action will be taken concerning the alleged violation or violations;

“(4) respond to all accepted petitions promptly and in writing;

“(5) include in all responses to petitions a brief and concise statement, to the extent permitted under section 2110, of the allegations, the steps taken to investigate, the determination made, and the reasons for such determination;

“(6) maintain an internal record including all protected information related to the determination; and

“(7) provide an opportunity for review by the Department of Homeland Security Inspector General on the full record, including protected information, for all determinations made under such regulations.

“(d) FINAL AGENCY ACTION.—

“(1) ONGOING ENFORCEMENT PROCEEDINGS.—Any determination by the Secretary to pursue enforcement action in response to a petition under this section shall not constitute final agency action because of ongoing enforcement proceedings.

“(2) DETERMINATION NOT TO PURSUE ENFORCEMENT.—Any determination by the Secretary not to pursue enforcement action in response to a petition under this section shall constitute final agency action.

“SEC. 2118. ANNUAL REPORT TO CONGRESS.

“(a) ANNUAL REPORT.—Not later than one year after the date of the enactment of this title, annually thereafter for the next four years, and biennially thereafter, the Secretary shall submit to the Committee on Homeland Security and the Committee on Energy and Commerce of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Environment and Public Works of the Senate a report on progress in achieving compliance with this title. Each such report shall include the following:

“(1) A qualitative discussion of how covered chemical facilities, differentiated by tier, have reduced the risks of chemical facility terrorist incidents at such facilities, including—

“(A) a generalized summary of measures implemented by covered chemical facilities in order to meet each risk-based chemical facility performance standard established by this title, and those that the facilities already had in place—

“(i) in the case of the first report under this section, before the issuance of the final rule implementing the regulations known as the ‘Chemical Facility Anti-Terrorism Standards’, issued on April 9, 2007; and

“(ii) in the case of each subsequent report, since the submittal of the most recent report submitted under this section; and

“(B) any other generalized summary the Secretary deems appropriate to describe the measures covered chemical facilities are implementing to comply with the requirements of this title.

“(2) A quantitative summary of how the covered chemical facilities, differentiated by tier, are complying with the requirements of this title during the period covered by the report and how the Secretary is implementing and enforcing such requirements during such period, including—

“(A) the number of chemical facilities that provided the Secretary with information about possessing substances of concern, as described in section 2102(b)(2);

“(B) the number of covered chemical facilities assigned to each tier;

“(C) the number of security vulnerability assessments and site security plans submitted by covered chemical facilities;

“(D) the number of security vulnerability assessments and site security plans approved and disapproved by the Secretary;

“(E) the number of covered chemical facilities without approved security vulnerability assessments or site security plans;

“(F) the number of chemical facilities that have been assigned to a different tier or are no longer regulated by the Secretary due to implementation of a method to reduce the consequences of a terrorist attack and a description of such implemented methods;

“(G) the number of orders for compliance issued by the Secretary;

“(H) the administrative penalties assessed by the Secretary for non-compliance with the requirements of this title;

“(I) the civil penalties assessed by the court for non-compliance with the requirements of this title;

“(J) the number of terrorist watchlist checks conducted by the Secretary in order to comply with the requirements of this title, the number of appeals conducted by the Secretary pursuant to the processes described under paragraphs (2), (3) and (4) of section 2115(c), aggregate information regarding the time taken for such appeals, aggregate information regarding the manner in which such appeals were resolved, and, based on information provided to the Secretary annually by each owner or operator of a covered chemical facility, the number of persons subjected to adverse employment decisions that were attributed by the owner or operator to the regulations required by section 2115; and

“(K) any other regulatory data the Secretary deems appropriate to describe facility compliance with the requirements of this title and the Secretary’s implementation of such requirements.

“(b) PUBLIC AVAILABILITY.—A report submitted under this section shall be made publicly available.

“SEC. 2119. AUTHORIZATION OF APPROPRIATIONS.

“There is authorized to be appropriated to the Secretary of Homeland Security to carry out this title—

“(1) \$325,000,000 for fiscal year 2011, of which \$100,000,000 shall be made available to provide funding for methods to reduce the consequences of a terrorist attack, of which up to \$3,000,000 shall be made available for grants authorized under section 2111(c)(1);

“(2) \$300,000,000 for fiscal year 2012, of which \$75,000,000 shall be made available to provide funding for methods to reduce the consequences of a terrorist attack, of which up to \$3,000,000 shall be made available for grants authorized under section 2111(c)(1); and

“(3) \$275,000,000 for fiscal year 2013, of which \$50,000,000 shall be made available to provide funding for methods to reduce the consequences of a terrorist attack, of which up to \$3,000,000 shall be made available for grants authorized under section 2111(c)(1).”.

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of such Act is amended by adding at the end the following:

“TITLE XXI—REGULATION OF SECURITY PRACTICES AT CHEMICAL FACILITIES

“Sec. 2101. Definitions.

“Sec. 2102. Risk-based designation and ranking of chemical facilities.

“Sec. 2103. Security vulnerability assessments and site security plans.

“Sec. 2104. Site inspections.

“Sec. 2105. Records.

“Sec. 2106. Timely sharing of threat information.

“Sec. 2107. Enforcement.

“Sec. 2108. Whistleblower protections.

“Sec. 2109. Federal preemption.

“Sec. 2110. Protection of information.

“Sec. 2111. Methods to reduce the consequences of a terrorist attack.

“Sec. 2112. Applicability.

“Sec. 2113. Savings clause.

“Sec. 2114. Office of Chemical Facility Security.

“Sec. 2115. Security background checks of covered individuals at certain chemical facilities.

“Sec. 2116. Citizen enforcement.

“Sec. 2117. Citizen petitions.

“Sec. 2118. Annual report to Congress.

“Sec. 2119. Authorization of appropriations.”.

(c) CONFORMING REPEAL.—

(1) REPEAL.—The Department of Homeland Security Appropriations Act, 2007 (Public Law 109–295) is amended by striking section 550.

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall take effect on the date of the enactment of this Act.

(d) TREATMENT OF CFATS REGULATIONS.—

(1) SENSE OF CONGRESS.—It is the sense of Congress that the Secretary of Homeland Security was granted statutory authority under section 550 of the Department of Homeland Security Appropriations Act (Public Law 109–295) to regulate security practices at chemical facilities until October 1, 2009. Pursuant to that section the Secretary prescribed regulations known as the Chemical Facility Anti-Terrorism Standards, or “CFATS”.

(2) USE OF CURRENT REGULATIONS.—In carrying out the requirements of title XXI of the Homeland Security Act of 2002, as added by subsection (a), the Secretary may, to the extent that the Secretary determines is appropriate, use any of the regulations known as CFATS regulations, as in effect immediately before the date of the enactment of this Act, that the Secretary determines carry out such requirements.

(3) AMENDMENT OF CFATS.—The Secretary shall amend the regulations known as the Chemical Facility Anti-Terrorism Standards to ensure that such regulations fulfill the requirements of this Act and the amendments made by this Act, to the extent that the requirements of this Act and the amendments made by this Act differ from the requirements of such regulations, as in effect on the date of the enactment of this Act.

(4) USE OF TOOLS DEVELOPED FOR CFATS.—In carrying out this Act and the amendments made by this Act, to the extent determined appropriate by the Secretary, the Secretary may use such rules or tools developed for purposes of the regulations known as the Chemical Facility Anti-Terrorism Standards, including the list of substances of concern, usually referred to as “Appendix A” and the chemical security assessment tool (which includes facility registration, a top-screen questionnaire, a security vulnerability assessment tool, a site security plan template, and a chemical vulnerability information repository).

(e) FACILITIES COVERED BY CFATS.—The owner or operator of a covered chemical facility, who, before the effective date of the final regulations issued under title XXI of the Homeland Security Act of 2002, as added by subsection (a), submits a security vulnerability assessment or site security plan under the regulations known as CFATS regulations, as in effect immediately before the enactment of this Act, shall be required to update or amend the facility’s security vulnerability assessment and site security plan to reflect any additional requirements of this Act or the amendments made by this Act, according to a timeline established by the Secretary.

(f) CONSULTATION WITH OTHER PERSONS.—In developing and carrying out the regulations under title XXI of the Homeland Security Act of 2002, as added by subsection (a), the Secretary shall consult with the Administrator of the Environmental Protection Agency, and other persons, as appropriate, regarding—

- (1) the designation of substances of concern;
- (2) methods to reduce the consequences of a terrorist attack;
- (3) security at co-owned and co-operated drinking water and wastewater facilities;
- (4) the treatment of protected information; and
- (5) such other matters as the Secretary determines necessary.

(g) DEADLINE FOR REGULATIONS.—

(1) PROPOSED RULE.—The Secretary of Homeland Security shall promulgate a proposed rule to fulfill the requirements of title XXI of the Homeland Security Act of 2002, as added by subsection (a), not later than 6 months after the date of the enactment of this Act.

(2) FINAL RULE.—The Secretary shall, after proper notice and opportunity for public comment, promulgate a final rule to fulfill the requirements of such title not later than 18 months after the date of the enactment of this Act.

PURPOSE AND SUMMARY

In the fall of 2006, Congress authorized the Department of Homeland Security (Department) to establish risk-based security performance standards for chemical facilities that use or store chemicals that make attractive terrorist targets. The Department promulgated interim final regulations on April 9, 2007, resulting in the Chemical Facility Anti-Terrorism Standards (CFATS). The legislative authority for CFATS was scheduled to sunset on October 4, 2009. The Chemical Facility Anti-Terrorism Act of 2009 (H.R. 2868) makes permanent the authority of the Secretary of Homeland Security to regulate security at chemical plants.

The bill maintains the current structure of the existing CFATS program, requiring covered chemical facilities to identify security vulnerabilities and develop site security plans that apply layered security measures to address those vulnerabilities. The bill also makes changes to the CFATS program that reduce the likelihood and consequences of a terrorist attack by requiring covered chemical facilities to assess the feasibility of, and in some circumstances adopt, inherently safer chemicals and processes. The bill also adds citizen enforcement, requires port facilities to meet the same security standards as chemical facilities, protects whistleblowers, and ensures worker participation in chemical security programs.

BACKGROUND AND NEED FOR LEGISLATION

In 1984, a chemical facility in Bhopal, India accidentally released 40 tons of methyl isocyanate, killing approximately 3,000 people and injuring thousands more. The tragic event in Bhopal was an accident; had it been a deliberate terrorist attack the consequences could have been much worse.

Chemical facilities are an integral part of the United States economy, generating \$550 billion in annual revenues. These facilities, often located in densely populated areas, hold many chemicals that can cause serious harm to humans and the environment if used maliciously or without sufficient care. These factors make U.S. chemical facilities attractive terrorist targets. As a result, the chemical sector is among the 17 critical infrastructure and key resources (CI/KR) sectors under the National Infrastructure Protection Plan, pursuant to Homeland Security Presidential Directive-7 (HSPD-7).

In 2007, pursuant to section 550 of the Homeland Security Appropriations Act of 2007 (P.L. 109–295), the Department of Homeland Security was provided with interim authority to regulate the nation's chemical facilities. Pursuant to that authority, the Department issued the Chemical Facility Anti-Terrorism Standards (CFATS) in June 2007. These standards require each chemical facility to report the amounts and types of chemicals on site so that the Department can determine whether that facility will be further regulated by CFATS rules. The Department issued the final CFATS regulations on April 9, 2007. Based on these regulations, the Department has begun placing regulated facilities into one of four tiers. The facilities placed in the highest-risk tier will be subject to the most stringent security requirements.

Enactment of H.R. 2868 is necessary to continue the implementation of CFATS regulations of the nation's chemical facilities, which is essential for the protection of U.S. citizens against terrorist attacks. Specifically, H.R. 2868 establishes many of the current CFATS regulations in law and requires each CFATS-regulated chemical facility to conduct a security vulnerability assessment and subsequently implement a site security plan. It also provides the Department with the authority and resources to inspect these facilities and ensure compliance. In addition to making the CFATS authority permanent, H.R. 2868 includes some new security modifications such as the regulation of port facilities and wastewater facilities under CFATS; required assessment of, and in some circumstances a requirement to implement, methods to reduce consequences of a terrorist attack; whistleblower protections; and new

avenues for citizen enforcement. The current CFATS regulations will be improved, not disrupted, by this legislation.

LEGISLATIVE HISTORY

H.R. 2868 was introduced on June 15, 2009, by Committee on Homeland Security Chairman Thompson, Committee on Energy and Commerce Chairman Waxman, Subcommittee on Energy and Environment Chairman Markey, and Reps. Jackson-Lee (D-TX) and Clarke (D-NY). The bill was referred to the Committee on Homeland Security, and in addition to the Committee on Energy and Commerce. The Committee on Energy and Commerce referred the bill to its Subcommittee on Energy and Environment on June 16, 2009.

The Subcommittee on Energy and Environment held a legislative hearing on October 1, 2009, on two bills: H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009, and H.R. 3258, the Drinking Water System Security Act of 2009. The Subcommittee received testimony from two panels of witnesses. The witnesses on the first panel were the Hon. Peter Silva, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency, and the Hon. Rand Beers, Under Secretary, National Protection and Programs Directorate, U.S. Department of Homeland Security. Panel 2 was comprised of four witnesses: Mr. Brian Ramaley, Director, Newport News Waterworks (Virginia) and President of the Board of Directors of the Association of Metropolitan Water Agencies; Mr. Marty Durbin, Vice President, Federal Affairs, American Chemical Council; Dr. Darius Sivin, Legislative Representative of the CWA-UAW Legislative Alliance; and Mr. Stephen Poorman, International EHS Manager, Fujifilm Imaging Colorants Chair, Safety and Security Committee, Society of Chemical Manufacturers and Affiliates.

COMMITTEE CONSIDERATION

The Subcommittee on Energy and Environment met in open markup session on Wednesday, October 14, 2009, to consider H.R. 2868. The Subcommittee agreed to favorably forward H.R. 2868, amended, to the full Committee by a roll call vote of 18 yeas to 10 nays.

The Committee on Energy and Commerce met in open markup session on Wednesday, October 21, 2009, to consider H.R. 2868 as approved by the Subcommittee on Energy and Environment. Subsequently, the full Committee ordered H.R. 2868 favorably reported to the House, amended, by a roll call vote of 29 yeas to 18 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. The Committee agreed to a motion by Mr. Markey to order H.R. 2868 favorably reported to the House, amended, by a recorded vote of 29 yeas and 18 nays. The following are the recorded votes taken during Committee consideration of H.R. 2868, including the names of those Members voting for and against:

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 124**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: An amendment to the Markey amendment in the nature of a substitute offered by Mr. Gingrey, # 1C, to add at the end of section 2111 of the Homeland Security Act of 2002, as proposed to be added by section 3, a condition that the Secretary increase the number of chemical process engineers within the Department.

DISPOSITION: NOT AGREED TO by a roll call vote of 13 yeas to 29 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman				Mr. Barton			
Mr. Dingell		X		Mr. Hall			
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher				Mr. Stearns	X		
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon		X		Mr. Whitfield	X		
Mr. Rush				Mr. Shimkus	X		
Ms. Eshoo		X		Mr. Shadegg			
Mr. Stupak		X		Mr. Blunt			
Mr. Engel		X		Mr. Buyer			
Mr. Green		X		Mr. Radanovich	X		
Ms. DeGette		X		Mr. Pitts	X		
Mrs. Capps				Ms. Bono Mack			
Mr. Doyle		X		Mr. Walden			
Ms. Harman		X		Mr. Terry	X		
Ms. Schakowsky		X		Mr. Rogers			
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee		X		Mr. Sullivan	X		
Ms. Baldwin		X		Mr. Murphy of PA	X		
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner		X		Ms. Blackburn			
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield				Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow		X					
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space		X					
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 125**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: A substitute amendment to the Markey amendment in the nature of a substitute offered by Mr. Stearns, # 1E, to extend the authority of the Secretary of Homeland Security to regulate the security of chemical facilities until October 1, 2012.

DISPOSITION: NOT AGREED TO by a roll call vote of 16 yeas to 28 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman		X		Mr. Barton			
Mr. Dingell		X		Mr. Hall			
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher				Mr. Stearns	X		
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon				Mr. Whitfield	X		
Mr. Rush				Mr. Shimkus	X		
Ms. Eshoo		X		Mr. Shadegg			
Mr. Stupak		X		Mr. Blunt			
Mr. Engel		X		Mr. Buyer	X		
Mr. Green		X		Mr. Radanovich	X		
Ms. DeGette		X		Mr. Pitts			
Mrs. Capps		X		Ms. Bono Mack			
Mr. Doyle		X		Mr. Walden			
Ms. Harman				Mr. Terry	X		
Ms. Schakowsky		X		Mr. Rogers	X		
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee		X		Mr. Sullivan	X		
Ms. Baldwin		X		Mr. Murphy of PA	X		
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner		X		Ms. Blackburn			
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield		X		Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow	X						
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space	X						
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 126**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: An amendment to the Markey amendment in the nature of a substitute offered by Mr. Sullivan, # 1F, to add a requirement that the Secretary of Homeland Security conduct an analysis and report to Congress the costs and employment effects of proposed security measures before mandating implementation.

DISPOSITION: NOT AGREED TO by a roll call vote of 17 yeas to 30 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman		X		Mr. Barton			
Mr. Dingell		X		Mr. Hall	X		
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher				Mr. Stearns	X		
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon				Mr. Whitfield	X		
Mr. Rush		X		Mr. Shimkus	X		
Ms. Eshoo		X		Mr. Shadegg			
Mr. Stupak		X		Mr. Blunt			
Mr. Engel		X		Mr. Buyer	X		
Mr. Green		X		Mr. Radanovich	X		
Ms. DeGette		X		Mr. Pitts			
Mrs. Capps		X		Ms. Bono Mack	X		
Mr. Doyle		X		Mr. Walden			
Ms. Harman				Mr. Terry	X		
Ms. Schakowsky				Mr. Rogers	X		
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee		X		Mr. Sullivan	X		
Ms. Baldwin		X		Mr. Murphy of PA	X		
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner		X		Ms. Blackburn	X		
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield		X		Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow		X					
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space		X					
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 127**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: An amendment to the Markey amendment in the nature of a substitute offered by Mr. Burgess, # 1G, to make section 2111 of the Homeland Security Act of 2002, as proposed to be added by section 3, inapplicable to a covered chemical facility that manufactures products necessary to protect public health.

DISPOSITION: NOT AGREED TO by a roll call vote of 19 yeas to 30 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman		X		Mr. Barton	X		
Mr. Dingell		X		Mr. Hall	X		
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher		X		Mr. Stearns	X		
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon		X		Mr. Whitfield	X		
Mr. Rush		X		Mr. Shimkus	X		
Ms. Eshoo		X		Mr. Shadegg			
Mr. Stupak		X		Mr. Blunt			
Mr. Engel		X		Mr. Buyer	X		
Mr. Green				Mr. Radanovich	X		
Ms. DeGette		X		Mr. Pitts	X		
Mrs. Capps		X		Ms. Bono Mack	X		
Mr. Doyle		X		Mr. Walden			
Ms. Harman				Mr. Terry	X		
Ms. Schakowsky				Mr. Rogers	X		
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee		X		Mr. Sullivan	X		
Ms. Baldwin		X		Mr. Murphy of PA	X		
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner				Ms. Blackburn	X		
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield		X		Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow		X					
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space		X					
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 128**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: An amendment to the Markey amendment in the nature of a substitute offered by Mr. Shimkus, # 1H, , striking section 2111 of the Homeland Security Act of 2002, as proposed by section 3, relating to "Methods to Reduce the Consequences of a Terrorist Attack", as well as corresponding language in the bill, and making other technical and conforming changes.

DISPOSITION: NOT AGREED TO by a roll call vote of 14 yeas to 28 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman				Mr. Barton	X		
Mr. Dingell		X		Mr. Hall	X		
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher		X		Mr. Stearns			
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon		X		Mr. Whitfield	X		
Mr. Rush		X		Mr. Shimkus	X		
Ms. Eshoo				Mr. Shadegg			
Mr. Stupak		X		Mr. Blunt			
Mr. Engel		X		Mr. Buyer			
Mr. Green		X		Mr. Radanovich			
Ms. DeGette		X		Mr. Pitts	X		
Mrs. Capps		X		Ms. Bono Mack	X		
Mr. Doyle		X		Mr. Walden			
Ms. Harman				Mr. Terry	X		
Ms. Schakowsky		X		Mr. Rogers			
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee				Mr. Sullivan			
Ms. Baldwin		X		Mr. Murphy of PA			
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner				Ms. Blackburn	X		
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield		X		Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow		X					
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space	X						
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 129**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: An amendment to the Markey amendment in the nature of a substitute offered by Mr. Upton, # 11, to make section 2111 of the Homeland Security Act of 2002, as proposed to be added by section 3, not apply to a covered chemical facility if projections based on the Act's implementation indicate that the number of employees at that facility will be at least 15 percent less than the number of individuals so employed on the date of enactment of this bill.

DISPOSITION: NOT AGREED TO by a roll call vote of 11 yeas to 28 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman		X		Mr. Barton	X		
Mr. Dingell				Mr. Hall	X		
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher		X		Mr. Stearns			
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon				Mr. Whitfield			
Mr. Rush		X		Mr. Shimkus	X		
Ms. Eshoo				Mr. Shadegg			
Mr. Stupak		X		Mr. Blunt			
Mr. Engel				Mr. Buyer			
Mr. Green		X		Mr. Radanovich			
Ms. DeGette		X		Mr. Pitts			
Mrs. Capps		X		Ms. Bono Mack	X		
Mr. Doyle		X		Mr. Walden			
Ms. Harman				Mr. Terry	X		
Ms. Schakowsky		X		Mr. Rogers			
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee				Mr. Sullivan			
Ms. Baldwin		X		Mr. Murphy of PA			
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner		X		Ms. Blackburn	X		
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield		X		Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow		X					
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space		X					
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 130**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: An amendment to the Markey amendment in the nature of a substitute offered by Mr. Upton, # 1J, to strike section 2116 of the Homeland Security Act of 2002, as proposed to be added by section 3, and make such technical and conforming changes as may be necessary.

DISPOSITION: NOT AGREED TO by a roll call vote of 15 yeas to 28 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman		X		Mr. Barton	X		
Mr. Dingell		X		Mr. Hall	X		
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher				Mr. Stearns	X		
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon				Mr. Whitfield	X		
Mr. Rush				Mr. Shimkus	X		
Ms. Eshoo		X		Mr. Shadegg			
Mr. Stupak		X		Mr. Blunt			
Mr. Engel				Mr. Buyer			
Mr. Green		X		Mr. Radanovich			
Ms. DeGette		X		Mr. Pitts			
Mrs. Capps		X		Ms. Bono Mack	X		
Mr. Doyle		X		Mr. Walden			
Ms. Harman				Mr. Terry	X		
Ms. Schakowsky		X		Mr. Rogers			
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee				Mr. Sullivan	X		
Ms. Baldwin		X		Mr. Murphy of PA	X		
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner		X		Ms. Blackburn	X		
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield		X		Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow		X					
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space		X					
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

10/21/2009

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 131**

BILL: **H.R. 2868**, the "Chemical Facility Anti-Terrorism Act of 2009".

AMENDMENT: An amendment to the Markey amendment in the nature of a substitute offered by Mr. Barton, # 1K, to strike "purposefully" and insert "knowingly or recklessly" in section 2110(b)(3) of the Homeland Security Act of 2002, as proposed to be added by section 3.

DISPOSITION: **NOT AGREED TO** by a roll call vote of 19 yeas to 28 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman		X		Mr. Barton	X		
Mr. Dingell		X		Mr. Hall	X		
Mr. Markey		X		Mr. Upton	X		
Mr. Boucher		X		Mr. Stearns	X		
Mr. Pallone		X		Mr. Deal	X		
Mr. Gordon				Mr. Whitfield	X		
Mr. Rush		X		Mr. Shimkus	X		
Ms. Eshoo		X		Mr. Shadegg			
Mr. Stupak	X			Mr. Blunt	X		
Mr. Engel		X		Mr. Buyer			
Mr. Green		X		Mr. Radanovich			
Ms. DeGette		X		Mr. Pitts	X		
Mrs. Capps		X		Ms. Bono Mack	X		
Mr. Doyle		X		Mr. Walden			
Ms. Harman				Mr. Terry	X		
Ms. Schakowsky		X		Mr. Rogers			
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee				Mr. Sullivan	X		
Ms. Baldwin		X		Mr. Murphy of PA	X		
Mr. Ross		X		Mr. Burgess	X		
Mr. Weiner		X		Ms. Blackburn	X		
Mr. Matheson		X		Mr. Gingrey	X		
Mr. Butterfield				Mr. Scalise	X		
Mr. Melancon		X					
Mr. Barrow	X						
Mr. Hill		X					
Ms. Matsui		X					
Mrs. Christensen							
Ms. Castor		X					
Mr. Sarbanes		X					
Mr. Murphy of CT		X					
Mr. Space		X					
Mr. McNerney		X					
Ms. Sutton		X					
Mr. Braley		X					
Mr. Welch		X					

10/21/2009

**COMMITTEE ON ENERGY AND COMMERCE – 111TH CONGRESS
ROLL CALL VOTE # 132**

BILL: H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009".

MOTION: A motion by Mr. Markey to order H.R. 2868 favorably reported to the House, amended.
(Final Passage)

DISPOSITION: **AGREED TO** by a roll call vote of 29 yeas to 18 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Waxman	X			Mr. Barton		X	
Mr. Dingell	X			Mr. Hall		X	
Mr. Markey	X			Mr. Upton		X	
Mr. Boucher	X			Mr. Stearns		X	
Mr. Pallone	X			Mr. Deal		X	
Mr. Gordon				Mr. Whitfield		X	
Mr. Rush	X			Mr. Shimkus		X	
Ms. Eshoo	X			Mr. Shadegg			
Mr. Stupak				Mr. Blunt		X	
Mr. Engel	X			Mr. Buyer			
Mr. Green	X			Mr. Radanovich			
Ms. DeGette	X			Mr. Pitts		X	
Mrs. Capps	X			Ms. Bono Mack		X	
Mr. Doyle	X			Mr. Walden			
Ms. Harman				Mr. Terry		X	
Ms. Schakowsky	X			Mr. Rogers			
Mr. Gonzalez				Mrs. Myrick			
Mr. Inslee	X			Mr. Sullivan		X	
Ms. Baldwin	X			Mr. Murphy of PA		X	
Mr. Ross	X			Mr. Burgess		X	
Mr. Weiner	X			Ms. Blackburn		X	
Mr. Matheson	X			Mr. Gingrey		X	
Mr. Butterfield				Mr. Scalise		X	
Mr. Melancon	X						
Mr. Barrow	X						
Mr. Hill	X						
Ms. Matsui	X						
Mrs. Christensen							
Ms. Castor	X						
Mr. Sarbanes	X						
Mr. Murphy of CT	X						
Mr. Space		X					
Mr. McNerney	X						
Ms. Sutton	X						
Mr. Braley	X						
Mr. Welch	X						

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee are reflected in the descriptive portions of this report.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

Regarding compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of budget authority and revenues regarding H.R. 2868 prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974. The Committee finds that H.R. 2868 would result in no new or increased entitlement authority or tax expenditures.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2868 contains the following general performance goals, and objectives, including outcome related goals and objectives authorized.

The purpose of this legislation is to amend the Homeland Security Act of 2002 to modify and make permanent the authority of the Secretary of Homeland Security (Secretary) to enhance security and protect chemical facilities against acts of terrorism, and for other purposes, including:

- Designating certain chemical substances as substances of concern, establishing a threshold quantity for each substance of concern, and requiring reporting and other requirements;
- Assigning each covered chemical facility to one of four or more risk-based tiers established by the Secretary;
- Providing for periodic review by the Secretary of the criteria under which covered chemical facilities are assigned to risk-based tiers or by which chemical facilities are designated as covered chemical facilities;
- Establishing requirements for covered chemical facilities including security vulnerability assessments and site security plans;
- Conducting chemical facility site inspections to verify compliance;
- Ensuring timely sharing of threat-related information to covered chemical facilities and appropriate state, local, and tribal officials and appropriate covered chemical facility officials;
- Enforcing the regulations through orders or administrative or civil penalties;
- Providing whistleblower protections for covered individuals and Departmental personnel;
- Allowing state, local, or tribal governments to establish more stringent chemical facility security requirements;
- Ensuring that specific security-related information is protected from public disclosure, while ensuring that such information can be shared with appropriate persons;
- Requiring all covered chemical facilities to conduct an assessment of the feasibility of methods to reduce the con-

sequences of a terrorist attack, and allowing the Secretary to require implementation of such methods for certain chemical facilities in the two highest risk-based tiers;

- Making funds available to help defray the cost of implementing methods to reduce the consequences of a terrorist attack to covered chemical facilities that voluntarily choose to implement such methods or are required by the Secretary to do so;

- Exempting chemical facilities owned and operated by the Department of Defense, transportation modes currently regulated by Department of Transportation Hazardous Materials regulations, and those portions of nuclear facilities that are regulated by the Nuclear Regulatory Commission for security;

- Ensuring that nothing in this title would affect or modify any obligation of a person or facility under any other federal law;

- Establishing an Office of Chemical Facility Security, to be headed by a qualified Director, to administer the regulations required by this title;

- Requiring security background checks for covered individuals with unescorted access to critical assets, providing adequate redress processes for covered individuals subject to adverse employment decisions as a result of the background check, and prohibiting a covered chemical facility from unreasonably misrepresenting to an employee or labor arbiter the scope, application, or meaning of any rules, regulations, directives, or guidance issued by the Secretary related to security background check requirements;

- Providing citizens with the right to commence civil actions against the Secretary or federal facilities for failure to comply with the requirements of this title and providing citizens with a petition process by which they can inform the Secretary of alleged violations at specific facilities;

- Submitting an annual report to Congress on progress in achieving compliance with title XXI of the Homeland Security Act of 2002, as added by section 3 of this legislation, not later than one year after the date of enactment thereof; and

- Authorizing certain funding to carry out the requirements of this title: \$325 million for fiscal year 2011, of which \$100 million is available for funding of methods to reduce consequences of a terrorist attack; \$300 million for fiscal year 2012, of which \$75 million is available for funding of methods to reduce consequences of a terrorist attack; and \$275 million for fiscal year 2013, of which \$100 million is available for funding of methods to reduce consequences of a terrorist attack.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the constitutional authority for H.R. 2868 is provided in Article I, section 8, clauses 1, 3, and 18.

EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 2868 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

ADVISORY COMMITTEE STATEMENT

No advisory committees were created by H.R. 2868 within the meaning of section 5 U.S.C. App., 5(b) of the Federal Advisory Committee Act.

APPLICABILITY OF LAW TO THE LEGISLATIVE BRANCH

The Committee finds that H.R. 2868 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act of 1985.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimates of federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

COMMITTEE COST ESTIMATE

Pursuant to clause 3(d) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the cost estimate on H.R. 2868 prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate on H.R. 2868 provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

OCTOBER 23, 2009.

Hon. HENRY A. WAXMAN,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2868, the Chemical Facility Anti-Terrorism Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2868—Chemical Facility Anti-Terrorism Act of 2009

Summary: H.R. 2868 would authorize the appropriation of \$900 million over the 2011–2013 period for the Department of Homeland Security (DHS) to regulate the security of facilities across the United States where certain types of chemicals are present. The bill would authorize a chemical security office within DHS to carry

out the provisions of this legislation, including conducting audits and inspections of the nation’s chemical facilities. In addition, because the bill’s requirements would be permanent, CBO estimates that DHS would need funding of \$283 million for fiscal year 2014 to continue to carry out those activities.

Assuming appropriation of the necessary amounts, CBO estimates that implementing H.R. 2868 would cost about \$1.1 billion over the 2011–2014 period. In addition, enacting the bill could affect direct spending and revenues, but we estimate that any such effects would not be significant.

H.R. 2868 would extend intergovernmental and private-sector mandates, as defined in the Unfunded Mandates Reform Act (UMRA), and impose new mandates on employers and on owners and operators of public and private facilities where certain chemicals are present. The bill also would preempt state and local laws. Because the cost of some of the mandates would depend on future regulatory actions, CBO cannot determine whether the aggregate costs of complying with the mandates would exceed the annual thresholds established in UMRA for intergovernmental or private-sector mandates (\$69 million and \$139 million, respectively, in 2009, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 2868 is shown in the following table. The costs of this legislation fall within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—					
	2010	2011	2012	2013	2014	2010–2014
CHANGES IN SPENDING SUBJECT TO APPROPRIATION ¹						
Estimated Authorization Level ²	0	325	300	275	283	1,183
Estimated Outlays	0	260	305	280	282	1,127

¹Enacting H.R. 2868 could affect direct spending and revenues, but CBO estimates that any such effect would not be significant in any year.

²The authorization levels for 2011 through 2013 are specified by H.R. 2868; CBO estimated the 2014 level.

Basis of estimate: CBO estimates that implementing H.R. 2868 would cost about \$1.1 billion over the 2011–2014 period, assuming appropriation of the necessary funds. Enacting the bill could affect direct spending and revenues, but we estimate that any effects would be insignificant.

Spending subject to appropriation

For this estimate, CBO assumes that the necessary amounts will be appropriated for each fiscal year and that spending will follow the historical spending patterns for those or similar activities.

H.R. 2868 would authorize the appropriation of \$325 million for 2011, \$300 million for 2012, and \$275 million for 2013 for DHS to regulate the security of chemical facilities in the United States. In addition, because the bill’s provisions would be permanent, CBO estimates that implementing the bill would require funding of \$283 million in 2014 for DHS to continue to carry out the bill’s activities. We estimated the 2014 level by adjusting the 2013 level for anticipated inflation.

Direct spending and revenues

Enacting H.R. 2868 could affect direct spending and revenues because the legislation would establish criminal penalties against individuals who disclose certain restricted information and civil and administrative penalties against owners and operators of chemical facilities that fail to comply with the bill's requirements. Criminal fines are deposited into the Crime Victims Fund and later spent. Civil and administrative fines are recorded as revenues and deposited in the Treasury. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

Intergovernmental and private-sector impact: H.R. 2868 would extend intergovernmental and private-sector mandates, as defined in UMRA, and impose new mandates on employers and on owners and operators of public and private facilities where certain chemicals are present. The bill also would preempt state and local laws. Because the cost of some of the mandates would depend on future regulatory actions, CBO cannot determine whether the aggregate costs of complying with the mandates would exceed the annual thresholds established in UMRA for intergovernmental or private-sector mandates (\$69 million and \$139 million, respectively, in 2009, adjusted annually for inflation).

Extension of mandates on chemical facilities

The bill would extend and make permanent mandates contained in section 550 of Public Law 109-295, the Chemical Facility Anti-Terrorism Standards (CFATS), that are set to expire under current law. Those mandates require owners and operators of public and private facilities where certain chemicals are present to assess the vulnerability of their facilities to a terrorist incident and to prepare and implement security plans. The bill also would extend mandates that require owners and operators of such facilities to maintain records, periodically submit reviews of the adequacy of the vulnerability assessments or security plans, and allow DHS access to their property for security inspections and verifications. In addition, owners and operators would have to continue to conduct background checks on employees with access to restricted areas and provide training to employees. Information from DHS and industry sources indicates that those facilities are currently in compliance with CFATS regulations, and CBO estimates that the cost of continuing to comply with those regulations would be small relative to the annual thresholds established in UMRA.

Expansion of mandates to wastewater facilities

The bill would require wastewater facilities, entities that are currently exempt from the CFATS regulations, to comply with those requirements. According to government and industry representatives, many of the facilities potentially affected by the bill's provisions are currently engaged in activities similar to those that would be required under H.R. 2868. Such facilities are acting either in response to the terrorist attacks of September 11, 2001, as part of meeting voluntary industry standards, or other federal regulations.

The bill also would require public and private wastewater facilities to complete an initial assessment of their chemical holdings. CBO has no basis for estimating how many public water facilities

currently use the chemicals affected by those requirements or the number of those facilities that would be required to complete vulnerability assessments and security plans. Therefore, CBO cannot determine whether the costs to public entities of complying with the mandates would exceed the intergovernmental threshold established in UMRA. Because there are few private water facilities and they tend to be small, CBO expects that the compliance cost for those entities would be small relative to UMRA's annual threshold for private-sector mandates.

New Mandates on Chemical Facilities

Mandates on High-Risk Facilities. The bill would require owners and operators of public and private high-risk facilities, as determined by the Secretary of DHS, to conduct a specific assessment of plans and procedures to reduce the consequences of a terrorist attack. If the Secretary determines that specific methods are necessary for a facility to reduce the consequences of a terrorist attack, owners or operators would be required to implement such methods. The bill also would require DHS to make funds available to help defray some of the cost of implementing those methods. Because the facilities that would be affected and the types of methods to be required depend on future regulatory actions, CBO cannot estimate the cost of this mandate.

The bill also would impose a new mandate on the owners and operators of those facilities by requiring them to allow the Secretary to conduct unannounced inspections. Based on information from industry sources, CBO expects that the cost to comply with this mandate would be minimal.

Whistleblower Protections. H.R. 2868 would prohibit an owner or operator of a chemical facility or other employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee reported an alleged violation of security practices.

The prohibition also would apply if the employee engages in other activities, including testifying or providing relevant information in a governmental proceeding. Based on information from industry sources, CBO estimates that public and private entities would incur minimal costs, if any, to comply with such protections for their employees.

Other Impacts. The bill would authorize \$100 million for fiscal year 2011, \$75 million for fiscal year 2012, and \$50 million for fiscal year 2013 that could be used to help chemical facilities comply with the mandate to reduce the consequences of a terrorist attack.

Other intergovernmental mandates

The bill would exempt some security plans and documents from state and local laws that provide public access to information and preempt any state or local regulation that would conflict with the security activities authorized by the bill. CBO estimates that the costs, if any, of those preemptions would be small.

Previous CBO Estimate: On July 9, 2009, CBO transmitted a cost estimate for H.R. 2868 as ordered reported by the House Committee on Homeland Security on June 23, 2009. The two versions of the bill are similar, and the cost estimates are nearly identical.

Estimate prepared by: Federal costs: Mark Grabowicz; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Paige Piper/Bach

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

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

Section 2. Findings and purpose

Congress finds that the nation’s chemical facilities represent a terrorist target and must be protected. The Secretary of Homeland Security (Secretary) currently has interim 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 3. Extension, modification, and recodification of the authority of the Secretary of Homeland Security to regulate security practices at chemical facilities

Section 3 paragraph (a) adds “Title XXI—Regulation of Security Practices at Chemical Facilities” to the Homeland Security Act of 2002. Title XXI includes the following provisions:

Section 2101. Definitions

This section defines numerous terms that appear in the text of the legislation, including the following terms:

The Committee intends for the term “substance of concern” to be equivalent to the term “chemical of interest” as defined and used under the CFATS regulations issued on April 9, 2007, pursuant to section 550 of Public Law 109–295.

The Committee does not intend the term “method to reduce the consequences of a terrorist attack” to include efforts to mitigate, control, contain, or recover a substance of concern in the event of a chemical facility terrorist incident.

Section 2102. Risk-based designation and ranking of chemical facilities

This section grants authority to the Secretary to designate a chemical substance as a substance of concern and establish the regulated threshold quantities for each such chemical that is 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, public health, homeland security, national security, or the national economy from a chemical facility terrorist incident. The Secretary may use the Appendix A list that was published in the *Federal Register* on November 20, 2007 (Federal Register Vol. 72, No. 223; 6 CFR Part 27) 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 sufficient 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 review process used in the 2008 assessment of chemical facilities, commonly referred to as the “top screen” process under CFATS, to fulfill this requirement.

The Secretary is required to assign each covered chemical facility to one of at least four risk-based tiers, with tier 1 being the highest risk tier. The Secretary must notify facilities within 60 days of their designation or any change in their designation. The Secretary must periodically review the list of substances of concern and the threshold quantities. Additionally the Secretary at any time may add, remove, or change the tier assignment for each facility.

The Secretary must provide covered chemical facilities with relevant information about 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. The Committee intends that the Secretary may set staggered deadlines, based on tier, for submission of SVAs and SSPs. The Committee intends that the Secretary also may include staggered deadlines for submission of assessments required under section 2111.

Facilities must involve their employees and employee representatives, if any, 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. The Committee intends that the Department of Homeland Security itself—rather than a third party—approve or disapprove SVAs and SSPs.

Facilities must review and resubmit SVAs and SSPs 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 to each other may develop and implement coordinated SVAs and SSPs.

The Committee believes that the methods of complying with risk-based performance standards may differ by facility, even when those facilities are classified within the same risk-based tier. For example, owners or operators of depleted underground geological natural gas storage facilities may require separate guidance for how to comply with the risk-based performance standard for restricting the area perimeter. In these facilities, natural gas, which contains methane, a chemical of interest on Appendix A, is stored in gaseous form within geologic rock formations several thousand feet below the ground surface. In addition to the geological depth of the storage facility, the corresponding surface area can range from hundreds of acres to nearly 100,000 acres. Owners of the corresponding surface land may have the right to use their property in a variety of way including agriculture, forest, dwellings, public roads, waterways, and land. Both the size of the perimeter of these facilities and their nature may make the restriction of their entire perimeters impractical.

The Secretary may accept as fulfilling, in whole or in part, the regulatory requirements to complete an SVA or SSP, the submission of an alternate security program (ASP) that was prepared by the facility for some other reason, such as complying with another law or program. Any such ASP must provide an equivalent level of security to the level of security required under the regulations and must include employee participation. The Secretary must review and approve or disapprove each ASP. Under this section, the Secretary also may accept a personnel surety alternate security program to meet the requirements of section 2115.

The Committee intends for covered chemical facilities to be able to submit, as ASPs, the vulnerability assessments, security plans or other documents developed to comply with other federal, state, local and tribal laws, or as part of an industry-wide security program, such as the American Chemistry Council's Responsible Care Code. The Committee intends for the Secretary to review and approve or disapprove all ASPs on a facility-by-facility basis. The Committee does not intend for any provision of section 2103 to relieve any covered chemical facility of the responsibility to comply with each requirement of this title or any other law.

Section 2103 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 for substances of concern as required under CFATS. The Coast Guard and the Department of Homeland Security Office of Infrastructure Protection are required to enter into a formal agreement detailing the roles and responsibilities of each entity in carrying out their chemical security mandates.

The Committee intends for the Coast Guard to be responsible for ensuring that MTSA facilities are in compliance with the requirements of the CFATS program. The Committee also believes that the formal agreement between the Office of Infrastructure Protection and the Coast Guard should ensure that chemical facilities at ports see "one face" of the Department for chemical security compliance issues.

This section ensures that if a covered chemical facility already has a facility 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 of 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 in accordance with requirements of MTSA.

The Committee is aware that some U.S. port facilities that handle chemicals in commerce may be subject to CFATS under the requirements of this Act. The Committee urges the Department and the Coast Guard to consider carefully any unique operational considerations, including those related to international trade, at these facilities when implementing this Act.

The Secretary is required to coordinate with the Attorney General (through 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 U.S.C. § 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 who have such roles or responsibilities with an annual minimum of eight hours of relevant training 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 seek to 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 have a role in responding 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.

The Committee notes that the Department has indefinitely extended the deadline to comply with the requirements of CFATS for agricultural end users that possess a chemical of concern for the treatment of crops, feed, land, or livestock. This indefinite extension applies to facilities such as farms (e.g., crop, fruit, nut, and vegetable); ranches and rangeland; poultry, dairy, and equine facilities; turfgrass growers; golf courses; nurseries; floricultural operations; and public and private parks. The Committee does not intend for this legislation to require the Department to deviate from its current plan to address the security of agricultural end users on a separate timeline.

Section 2104. Site inspections

The Secretary or his 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, the Department must increase the number of chemical facility inspectors by at least 100 in fiscal years 2011 and 2012.

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. If the facility does not have an employee representative, a non-supervisory employee also must have the opportunity to accompany the Secretary during inspections if the owner or operator is accompanying the Secretary. The Committee believes that the Secretary should be free to conduct parts of his or her inspections unaccompanied, if desired.

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 or the facility's SSP or implementation of the SSP is insufficient to address identified vulnerabilities or meet relevant security performance standards. While the Committee considers non-discretionary under section 2107 the requirement that the Secretary determine whether a covered chemical facility's SVA or SSP complies with the requirements of the Act, the substance of these determinations is at the discretion of the Secretary.

The Secretary must give notice of disapproval of such a determination that clearly explains the deficiencies and requires the owner or operator to revise the SVA or SSP within 14 days. The Secretary may issue an order assessing a civil penalty, after providing the owner or operator the opportunity for appeal, or the Secretary may commence a civil action to enforce compliance by 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 an order to cease operations to a wastewater treatment facility. The Court may also issue civil penalties of up to \$50,000 per day, or the Secretary may order 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. Any employee who alleges retaliation may seek review in district court.

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.

The Committee observes that in December 2007 Congress amended section 550 of P.L. 109–295 in the Consolidated Appropriations Act for FY2008. As amended, section 550 allows a state or political subdivision thereof to adopt a regulation, requirement, or standard of performance issued that is more stringent than federal law, unless there is an actual conflict between the state and federal law. The Committee dropped “unless there is an actual conflict” as part of the language of section 2109. By dropping this language, the Committee does not intend to imply that state laws can conflict with federal laws. Instead, the Committee believes that the Supremacy Clause of the U.S. Constitution is sufficient to direct courts when considering whether a state law conflicts with this legislation.

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, local and tribal information disclosure laws.

This section gives the Secretary the authority to promulgate regulations and issue orders so as to prohibit the unauthorized disclosure of protected information. The Secretary must provide standards for the appropriate sharing of protected information with federal, state, local, and tribal 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. The Committee intends for this to include the assessment conducted under section 2111.

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 docu-

ments, 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 other 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.

The Committee believes that the Department may continue to use the chemical-terrorism vulnerability information (CVI) regime for safeguarding protected information as long as the Department updates the regulations to comply with the requirements of this title.

The Committee observes that on May 27, 2009, the President issued the Memorandum for the Heads of Executive Departments and Agencies on Classified Information and Controlled Unclassified Information (CUI), which creates an interagency task force on CUI. This task force is in the process of developing a framework for the sharing of CUI, taking into consideration the value of standardizing the procedures for designating, marking, and handling all sensitive but unclassified information; a presumption in favor of openness; and the need to prevent the public disclosure of information where disclosure would compromise privacy, security or other legitimate interests. The Committee does not intend for this section to obstruct the President's efforts to develop a CUI information sharing environment or to preclude the President from incorporating CVI into this CUI framework at a future date.

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. Any authority or obligation of a federal agency to protect or disclose a record or information under any other law is not affected. This section does not prohibit the sharing of information with Congress. The Committee intends for the Department to provide Members of Congress with protected information, upon request.

Section 2111. Methods to reduce the consequences of a terrorist attack.

This section lays out specific requirements of the risk-based performance standard for assessing and, as appropriate, utilizing methods to reduce the consequences of a terrorist attack (hereafter "methods"). The owner or operator of the covered chemical facility must include an assessment of such methods in its site security plan.

The assessment must include several elements, including a description of the methods already implemented at the covered chemical facility as well as those considered for implementation. The Committee believes that the regulations promulgated by the Secretary should require the covered chemical facility to assess a wide range of potential methods, including both commercially available technology and innovative process changes unique to the covered chemical facility.

For a covered chemical facility that stores, distributes, or sells a substance of concern but does not manufacture substances of concern or use them to manufacture other products, the Committee believes that the facility's assessment of methods should focus on po-

tential practical changes to the manner in which the substance of concern is stored, distributed, or sold. The assessment does not need to focus on the question of whether the facility should continue to store, distribute, or sell the substance of concern. The Committee encourages the Department to provide guidance to such covered chemical facilities to assist them in complying with this section.

The assessment also must include a description of the degree to which each method could reduce or already has reduced the consequences of the potential extent of death, injury, or serious adverse effects to human health resulting from a release of a substance of concern. It also must discuss the technical feasibility, costs, avoided costs (including actual and potential avoided liabilities), personnel implications, savings and applicability of implementing each method.

The Committee intends for the Department to require each covered chemical facility to conduct a cost analysis associated with each method considered, including an assessment of the operational costs (and savings, if applicable), construction costs, cost savings realized by reducing physical security or mitigation needs, any reduction in terrorism-related insurance costs, personnel implications (both an assessment of the number of individuals who might need to be hired to implement the method as well as any other personnel implications), other avoided costs (i.e. reducing the cost of regulatory compliance), and any other cost-or-savings-related information the covered chemical facility or the Secretary deems relevant.

The Committee intends for the Department to require each covered chemical facility to conduct an analysis of a wide range of potential methods. The definition of “feasible”, drawn from the Safe Drinking Water Act definition, is intended to serve as a minimum baseline of methods that the Department must consider and is not intended to limit the scope of the facilities’ analysis of available methods.

This section also sets forth the conditions under which the Department can require implementation of methods to reduce the consequences of a terrorist attack at a covered chemical facility.

The Committee understands that the Department places covered chemical facilities in risk-based tiers because of the extent of the risk of various hazards, including release, theft or diversion, and contamination or sabotage. The covered chemical facilities placed in tiers 1 or 2 for a release risk both possess large quantities of substances of concern and, because they are located in or near population centers, are the most likely to cause death, injury, and other serious consequences in the event of a release of a substance of concern. Consequently, the Committee chose to give the Department the authority to require implementation of methods to reduce the consequences of a terrorist attack at this subset of high-risk facilities, under certain conditions, as described below.

The Director of the Office of Chemical Facility Security can require a covered chemical facility to implement methods if the Director affirmatively determines, in his or her discretion and using the assessment provided by the covered chemical facility, that three conditions are met.

First, the Director must determine that the implementation of methods would reduce the risk of death, injury, or serious adverse

effects to human health from a chemical facility terrorist incident without increasing the terrorism security risk elsewhere. The Committee intends for the Director to focus on a potential shift or increase in security-related risks rather than consider a shift or increase in safety-related risks associated with human error. For example, some may argue that a reduction in the amount of substance of concern stored at a covered chemical facility could add shipments of the substance of concern to the covered chemical facility, increasing the likelihood of a transportation-related accident. The Committee intends for the Director to focus on the potential shift or increase in risk or consequences from intentional acts rather than accidents or human error.

Second, the Director must determine that the covered chemical facility can feasibly incorporate methods into the operation of the covered chemical facility. Finally, the Director must determine that the implementation of methods to reduce the consequences of a terrorist attack would not significantly and demonstrably impair the ability of the owner or operator of the covered chemical facility to continue the business of the facility at its location.

The Committee believes that the Department should carefully consider the assessment of methods provided by each covered chemical facility as it decides whether to require implementation of such methods. In particular, the Department should work with each covered chemical facility to understand the technical feasibility and economic impacts of such methods, as these factors will be unique to each covered chemical facility.

The Committee is also aware that some industry sectors, notably the pharmaceutical sector, are concerned that a “feasible” method, as defined, could result in a product that is less effective or less available to those who need it. The Committee believes that the requirement that the Department determine that implementation of methods would not significantly and demonstrably impair the ability of a covered chemical facility to continue its business means that the Department must consider such unintended consequences. If a product made using an alternative method was less effective, for example, that could significantly and demonstrably impair the ability of the company to continue its business. If the implemented method forced the company to seek new regulatory approvals (such as from the Food and Drug Administration) that would take years to obtain, that also could mean that the covered chemical facility could not continue its business. The Committee expects the Department to consider carefully the challenges faced by different industry sectors when reviewing the assessments required under this section.

The Director must use the facility’s assessment, which it has included in its SSP, when making a determination but may request additional information from the facility or outside parties. For example, if the Director learns of a feasible method to reduce the consequences of a terrorist attack that a covered chemical facility did not include in its assessment, the Director may use that knowledge when making its determination on whether to require implementation of such method. Similarly, if the Director ascertains that a facility’s proposed plan to adopt a method would increase security risks elsewhere, the Director may use this information in his or her determination. Finally, if the Director is aware that a covered

chemical facility's estimate of the costs required to implement the method are inaccurate, the Director also may use this information in his or her determination. The Committee encourages the Director to request as much information as needed to make a determination that takes into account the unique characteristics, capabilities and constraints of the covered chemical facility.

This section also requires the Director to make a written determination when it requires the implementation of a method to reduce the consequences of a terrorist attack, and, in the case of a covered chemical facility that is also regulated under the Maritime Transportation Security Act, to consult with the captain of the port at which the covered chemical facility is located in order to obtain port-specific input that may inform his or her determination.

This section also sets forth the process by which a covered chemical facility can appeal if the Director determines the facility must implement methods to reduce the consequences of a terrorist attack. The owner or operator must, within 120 days, provide a written explanation to the Secretary of why it cannot comply with the determination. The Secretary then has an additional 120 days in which to consult with the owner or operator as well as with a wide range of technical experts. If the Secretary affirms the Director's determination, the Secretary must issue a final order that includes the views of the technical experts with whom he or she consulted.

The Committee has not specified a process by which the Secretary should identify the wide range of technical experts with whom he or she must consult. The Committee expects that the Secretary will want to consult with a variety of experts depending on the chemical facility, industry sector, and methods under consideration. The Committee encourages the Secretary to create a process that addresses potential conflicts of interest, including affiliations with the owner of the covered chemical facility, its competitors, or adversaries in litigation; utilizes expertise found among members of the private sector, non-governmental organizations, government agencies, and academia; and ensures public transparency to the extent permitted under section 2110 of this Act.

The Committee intends that the Department should make each determination under this section on a facility-by-facility basis and should not seek to impose wholesale, sector-wide process or chemical changes.

For example, the Committee is aware of considerable debate about whether this section could require refineries to replace entire alkylation units that use hydrofluoric acid with units that use sulfuric acid or other alternatives. The Committee intends for the Department to consider and validate separately for each refinery the potential impediments to replacing alkylation units, such as the refinery's operating budget and profits, rather than make an industry-wide determination that refineries must use certain a technology or process. The Committee is aware of solid acid catalyst alkylation methods that are not yet commercially available in any full-scale refinery operation but are in the pilot stage in Europe. The Committee encourages the Department to similarly review and validate information on the potential technical feasibility and economic practicability of such methods.

This section also contains several provisions that address the unique characteristics of the agricultural sector, particularly farm

supplies merchant wholesalers that distribute and sell fertilizer or pesticides.

For a covered chemical facility that stores, distributes or sells fertilizer or pesticides (but does not manufacture them), the Committee believes that the facility should focus on potential practical changes to the manner in which the fertilizer or pesticide is distributed or sold (such as the amount being stored or locations at which storage is occurring). It need not focus on the question of whether the pesticide or fertilizer should be distributed or sold in the first place. This section directs the Department to provide guidance, and, as appropriate, tools, methodologies or computer software to farm supplies merchant wholesalers to assist them in carrying out the requirements of the section.

The section authorizes the Secretary to award grants to assist farm supplies merchant wholesalers in assessing methods to reduce the consequences of a terrorist attack, giving priority to those covered chemical facilities that have the greatest financial need. In addition, this section directs the Department to study how applying the requirements of this section to manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer could affect the agricultural sector overall.

This section requires the Secretary to provide information on methods to reduce the consequences of a terrorist attack. The Committee intends that the Secretary provide this information to the regulated industry, academics, and others who may have interest. 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.

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 Chemical Facility Security, requirements for the selection process, and the responsibilities of the Director.

Section 2115. Security background checks of covered individuals at certain chemical facilities

This section requires the Secretary to 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 blame such decision on the requirements of this Act unless the individual in question has been convicted of, found not guilty of by reason of insanity, or is under want, warrant, or indictment for, or incarcerated for a specific crime as detailed under part 1572 of title 49, CFR. Nothing in this section requires an employer to terminate, or make any other adverse employment decision regarding, an employee.

This section requires the regulations issued under this section to include a prohibition on misrepresentations, in response to two incidents in which terminations were dishonestly attributed to homeland security requirements. In 2006, Burlington Northern Santa Fe Railway and H&M International Transportation, Inc., which is a primary contractor for Union Pacific Railroad Company, Norfolk Southern Corporation, and CSX Corporation, both began conducting background checks of contractors. Those background checks were voluntary, and responded to guidance from the Department of Homeland Security.

Large numbers of employees were fired as a result of those checks and were told that their firings were required by the Secretary of Homeland Security. Redress processes were unclear and inconsistent. The House Committee on Homeland Security investigated those incidents and determined that misrepresentations regarding the personnel surety requirements imposed by the Department of Homeland Security had violated workers' rights. The prohibition on misrepresentation required by this section is intended to address the problem identified in those incidents and protect workers' rights.

The Committee does not intend to override corporate human resources policies. If a company wishes to terminate an employee for an offense not listed under part 1572 of title 49 of the Code of Fed-

eral Regulations, the company may do so if permitted by existing collective bargaining agreements and other applicable laws, as long as the company does not attribute the adverse employment decision to the regulations issued under this section.

The owner or operator of a covered chemical facility must provide an adequate and prompt redress process to a person subject to 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.

Additionally, the section requires the Secretary to provide a reconsideration process by which an affected individual can apply for a determination by the Secretary that the particular individual does not pose a security risk to the covered chemical facility at which he or she is employed. In making such a determination, the Secretary shall consider the criteria included in the waiver provision of section 70105(c) of title 46, United States Code, as well as risks particular to a facility and possible connections between listed offenses and those risks. For example, an employee convicted of certain drug offenses may pose a security risk to a facility that produces or uses chemicals suitable for the production of illicit drugs. Similarly, an employee convicted of arson may pose a security risk to a facility that uses or stores flammable chemicals.

Where the Secretary determines that an individual does not pose a security risk to the facility at which he or she is employed, the employer may not blame the adverse employment decision on the regulations issued under this section. If the employer wants to pursue the adverse employment decision, the employer therefore must use its internal human resources policy, collective bargaining agreements, or other such policies, as relevant and appropriate, to justify the adverse employment decision.

The Secretary must determine, by regulation, which alternate security background checks conducted by the Department are sufficient to meet the requirements of this section. Where that finding is made, no additional background check will be required under this section, although an employer may choose to conduct an additional check. The Committee intends for Transportation Worker Identification Credentials (TWICs) to satisfy the requirements of this section.

Nothing in this section affects the rights and responsibilities 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, such as promulgation of regulations. Suits are available to enforce orders against all government-owned facilities, regardless of whether they

are contractor-operated. This section does not provide for civil actions against privately-owned chemical facilities.

The Committee decided to exclude private rights of action against chemical facilities in this section for two reasons. First, the Department raised concerns about the risk of disclosure of sensitive security information in a judicial proceeding. Second, the standards created under this bill are risk-based and performance-based and therefore are more subjective and less susceptible to judicial review than standards in other statutes with citizen suit provisions. Since compliance data is protected from public disclosure and compliance is subjective, it would be difficult for a citizen to identify and allege a violation in this context. The Committee does not intend for this to serve as precedent for citizen suit provisions in any existing or future laws.

Under this section, 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.

With regard to non-discretionary duties of the Department, while the Committee considers non-discretionary the requirement under section 2111 that the Department make a determination whether a covered chemical facility should implement methods, the substance of this determination is at the Department's discretion.

The Committee expects that information discussed and considered during proceedings under this section should be protected in accordance with section 2110 of this title, as well as any other applicable existing protections.

Section 2117. Citizen petitions

This section requires the Secretary to establish a petition process to receive, investigate, and respond to allegations of violations at covered facilities. The Committee intends for this process to provide citizens with the opportunity to report alleged violations without filing suit. Petitions may allege a violation of any standard, regulation, condition, requirement, prohibition, plan, or order that has become effective under this title. The Committee believes that the Secretary, as part of the rulemaking under this section, may consider whether compliance with all requirements of an approved site security plan is sufficient to determine that the facility is not in violation of a standard under this title.

The Secretary must establish by regulation the parameters of the petition process, including the format for petitions, the procedures

for investigation of claims, the procedures for response, and the procedures for the Inspector General's de novo review of the Secretary's response to a petition.

The Secretary must accept all petitions, investigate all allegations, determine whether an enforcement action is required, and respond to all accepted petitions in writing. The Secretary's response must include a brief summary of the investigation of the allegation, the determination made (including enforcement action taken), and the reasons for such determination. This written response must comply with the information protection provisions in section 2110.

The petitioner may request that the Homeland Security Inspector General provide de novo review of any petition and the Department's response.

A determination by the Secretary not to pursue enforcement action in response to a petition under this section shall constitute final agency action.

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 the Department, 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, background checks conducted and appealed, 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 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 FY2012, with \$225 million for departmental expenditures and \$75 million for consequence reduction, and \$275 million for FY2013, with \$225 million for departmental expenditures and \$50 million for consequence reduction. This section carves out specific funding to assist farm supplies merchant wholesalers.

The following sections are part of the legislation but do not amend the Homeland Security Act of 2002:

(b) CLERICAL AMENDMENT.—This 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 the date of enactment of this Act.

(d) TREATMENT OF CFATS REGULATIONS.—It is the sense of Congress that the Secretary was granted the authority to regulate se-

curity at chemical facilities pursuant to section 550 of P.L. 109–295. 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 the April 9, 2007, CFATS regulation 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 that are currently 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, 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. The Committee intends for all Federal Agencies to take into account all necessary regulatory processes and timelines to guarantee full implementation by this date.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

HOMELAND SECURITY ACT OF 2002

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) * * *

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

* * * * *

TITLE XXI—REGULATION OF SECURITY PRACTICES AT CHEMICAL FACILITIES

<i>Sec. 2101.</i>	<i>Definitions.</i>
<i>Sec. 2102.</i>	<i>Risk-based designation and ranking of chemical facilities.</i>
<i>Sec. 2103.</i>	<i>Security vulnerability assessments and site security plans.</i>
<i>Sec. 2104.</i>	<i>Site inspections.</i>
<i>Sec. 2105.</i>	<i>Records.</i>
<i>Sec. 2106.</i>	<i>Timely sharing of threat information.</i>
<i>Sec. 2107.</i>	<i>Enforcement.</i>
<i>Sec. 2108.</i>	<i>Whistleblower protections.</i>
<i>Sec. 2109.</i>	<i>Federal preemption.</i>
<i>Sec. 2110.</i>	<i>Protection of information.</i>
<i>Sec. 2111.</i>	<i>Methods to reduce the consequences of a terrorist attack.</i>
<i>Sec. 2112.</i>	<i>Applicability.</i>
<i>Sec. 2113.</i>	<i>Savings clause.</i>

- Sec. 2114. *Office of Chemical Facility Security.*
 Sec. 2115. *Security background checks of covered individuals at certain chemical facilities.*
 Sec. 2116. *Citizen enforcement.*
 Sec. 2117. *Citizen petitions.*
 Sec. 2118. *Annual report to Congress.*
 Sec. 2119. *Authorization of appropriations.*

* * * * *

TITLE XXI—REGULATION OF SECURITY PRACTICES AT CHEMICAL FACILITIES

SEC. 2101. DEFINITIONS.

In this title, the following definitions apply:

- (1) *The term “chemical facility” means any facility—*
 - (A) *at which the owner or operator of the facility possesses or plans to possess at any relevant point in time a substance of concern; or*
 - (B) *that meets other risk-related criteria identified by the Secretary.*
- (2) *The term “chemical facility security performance standards” means risk-based standards established by the Secretary to ensure or enhance the security of a chemical facility against a chemical facility terrorist incident that are designed to address the following:*
 - (A) *Restricting the area perimeter.*
 - (B) *Securing site assets.*
 - (C) *Screening and controlling access to the facility and to restricted areas within the facility by screening or inspecting individuals and vehicles as they enter, including—*
 - (i) *measures to deter the unauthorized introduction of dangerous substances and devices that may facilitate a chemical facility terrorist incident or actions having serious negative consequences for the population surrounding the chemical facility; and*
 - (ii) *measures implementing a regularly updated identification system that checks the identification of chemical facility personnel and other persons seeking access to the chemical facility and that discourages abuse through established disciplinary measures.*
 - (D) *Methods to deter, detect, and delay a chemical facility terrorist incident, creating sufficient time between detection of a chemical facility terrorist incident and the point at which the chemical facility terrorist incident becomes successful, including measures to—*
 - (i) *deter vehicles from penetrating the chemical facility perimeter, gaining unauthorized access to restricted areas, or otherwise presenting a hazard to potentially critical targets;*
 - (ii) *deter chemical facility terrorist incidents through visible, professional, well-maintained security measures and systems, including security personnel, detection systems, barriers and barricades, and hardened or reduced value targets;*

(iii) detect chemical facility terrorist incidents at early stages through counter surveillance, frustration of opportunity to observe potential targets, surveillance and sensing systems, and barriers and barricades; and

(iv) delay a chemical facility terrorist incident for a sufficient period of time so as to allow appropriate response through on-site security response, barriers and barricades, hardened targets, and well-coordinated response planning.

(E) Securing and monitoring the shipping, receipt, and storage of a substance of concern for the chemical facility.

(F) Deterring theft or diversion of a substance of concern.

(G) Deterring insider sabotage.

(H) Deterring cyber sabotage, including by preventing unauthorized onsite or remote access to critical process controls, including supervisory control and data acquisition systems, distributed control systems, process control systems, industrial control systems, critical business systems, and other sensitive computerized systems.

(I) Developing and exercising an internal emergency plan for owners, operators, and covered individuals of a covered chemical facility for responding to chemical facility terrorist incidents at the facility. Any such plan shall include the provision of appropriate information to any local emergency planning committee, local law enforcement officials, and emergency response providers to ensure an effective, collective response to terrorist incidents.

(J) Maintaining effective monitoring, communications, and warning systems, including—

(i) measures designed to ensure that security systems and equipment are in good working order and inspected, tested, calibrated, and otherwise maintained;

(ii) measures designed to regularly test security systems, note deficiencies, correct for detected deficiencies, and record results so that they are available for inspection by the Department; and

(iii) measures to allow the chemical facility to promptly identify and respond to security system and equipment failures or malfunctions.

(K) Ensuring mandatory annual security training, exercises, and drills of chemical facility personnel appropriate to their roles, responsibilities, and access to chemicals, including participation by local law enforcement, local emergency response providers, appropriate supervisory and non-supervisory facility employees and their employee representatives, if any.

(L) Performing personnel surety for individuals with access to restricted areas or critical assets by conducting appropriate background checks and ensuring appropriate credentials for unescorted visitors and chemical facility personnel, including permanent and part-time personnel, temporary personnel, and contract personnel, including—

(i) measures designed to verify and validate identity;

(ii) measures designed to check criminal history;

(iii) measures designed to verify and validate legal authorization to work; and

(iv) measures designed to identify people with terrorist ties.

(M) Escalating the level of protective measures for periods of elevated threat.

(N) Specific threats, vulnerabilities, or risks identified by the Secretary for that chemical facility.

(O) Reporting of significant security incidents to the Department and to appropriate local law enforcement officials.

(P) Identifying, investigating, reporting, and maintaining records of significant security incidents and suspicious activities in or near the site.

(Q) Establishing one or more officials and an organization responsible for—

(i) security;

(ii) compliance with the standards under this paragraph;

(iii) serving as the point of contact for incident management purposes with Federal, State, local, and tribal agencies, law enforcement, and emergency response providers; and

(iv) coordination with Federal, State, local, and tribal agencies, law enforcement, and emergency response providers regarding plans and security measures for the collective response to a chemical facility terrorist incident.

(R) Maintaining appropriate records relating to the security of the facility, including a copy of the most recent security vulnerability assessment and site security plan at the chemical facility.

(S) Assessing and, as appropriate, utilizing methods to reduce the consequences of a terrorist attack.

(T) Methods to recover or mitigate the release of a substance of concern in the event of a chemical facility terrorist incident.

(U) Any additional security performance standards the Secretary may specify.

(3) The term “chemical facility terrorist incident” means any act or attempted act of terrorism or terrorist activity committed at, near, or against a chemical facility, including—

(A) the release of a substance of concern from a chemical facility;

(B) the theft, misappropriation, or misuse of a substance of concern from a chemical facility; or

(C) the sabotage of a chemical facility or a substance of concern at a chemical facility.

(4) The term “employee representative” means the representative of the certified or recognized bargaining agent engaged in a collective bargaining relationship with a private or public owner or operator of a chemical facility.

(5) The term “covered individual” means a permanent, temporary, full-time, or part-time employee of a covered chemical facility or an employee of an entity with which the covered

chemical facility has entered into a contract who is performing responsibilities at the facility pursuant to the contract.

(6) The term “covered chemical facility” means a chemical facility that meets the criteria of section 2102(b)(1).

(7) The term “environment” means—

(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.); and

(B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(8) The term “owner or operator” with respect to a facility means any of the following:

(A) The person who owns the facility.

(B) The person who has responsibility for daily operation of the facility.

(C) The person who leases the facility.

(9) The term “person” means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

(10) The term “release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).

(11) The term “substance of concern” means a chemical substance in quantity and form that is so designated by the Secretary under section 2102(a).

(12) The term “method to reduce the consequences of a terrorist attack” means a measure used at a chemical facility that reduces or eliminates the potential consequences of a chemical facility terrorist incident, including—

(A) the elimination or reduction in the amount of a substance of concern possessed or planned to be possessed by an owner or operator of a covered chemical facility through the use of alternate substances, formulations, or processes;

(B) the modification of pressures, temperatures, or concentrations of a substance of concern; and

(C) the reduction or elimination of onsite handling of a substance of concern through improvement of inventory control or chemical use efficiency.

SEC. 2102. RISK-BASED DESIGNATION AND RANKING OF CHEMICAL FACILITIES.

(a) SUBSTANCES OF CONCERN.—

(1) DESIGNATION BY THE SECRETARY.—*The Secretary may designate any chemical substance as a substance of concern and*

establish the threshold quantity for each such substance of concern.

(2) **MATTERS FOR CONSIDERATION.**—*In designating a chemical substance or establishing or adjusting the threshold quantity for a chemical substance under paragraph (1), the Secretary shall consider the potential extent of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy that could result from a chemical facility terrorist incident.*

(b) **LIST OF COVERED CHEMICAL FACILITIES.**—

(1) **CRITERIA FOR LIST OF FACILITIES.**—*The Secretary shall maintain a list of covered chemical facilities that the Secretary determines are of sufficient security risk for inclusion on the list based on the following criteria:*

(A) *The potential threat or likelihood that the chemical facility will be the target of a chemical facility terrorist incident.*

(B) *The potential extent and likelihood of death, injury, or serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy that could result from a chemical facility terrorist incident.*

(C) *The proximity of the chemical facility to large population centers.*

(2) **SUBMISSION OF INFORMATION.**—*The Secretary may require the submission of information with respect to the quantities of substances of concern that an owner or operator of a chemical facility possesses or plans to possess in order to determine whether to designate a chemical facility as a covered chemical facility for purposes of this title.*

(c) **ASSIGNMENT OF CHEMICAL FACILITIES TO RISK-BASED TIERS.**—

(1) **ASSIGNMENT.**—*The Secretary shall assign each covered chemical facility to one of four risk-based tiers established by the Secretary, with tier one representing the highest degree of risk and tier four the lowest degree of risk.*

(2) **PROVISION OF INFORMATION.**—*The Secretary may request, and the owner or operator of a covered chemical facility shall provide, any additional information beyond any information required to be submitted under subsection (b)(2) that may be necessary for the Secretary to assign the chemical facility to the appropriate tier under paragraph (1).*

(3) **NOTIFICATION.**—*Not later than 60 days after the date on which the Secretary determines that a chemical facility is a covered chemical facility or is no longer a covered chemical facility or changes the tier assignment under paragraph (1) of a covered chemical facility, the Secretary shall notify the owner or operator of that chemical facility of that determination or change together with the reason for the determination or change and, upon the request of the owner or operator of a covered chemical facility, provide to the owner or operator of the covered chemical facility the following information:*

(A) *The number of individuals at risk of death, injury, or severe adverse effects to human health as a result of a*

worst case chemical facility terrorist incident at the covered chemical facility.

(B) Information related to the criticality of the covered chemical facility.

(C) The proximity or interrelationship of the covered chemical facility to other critical infrastructure.

(d) **REQUIREMENT FOR REVIEW.**—The Secretary—

(1) shall periodically review—

(A) the designation of a substance of concern and the threshold quantity under subsection (a)(1); and

(B) the criteria under subsection (b)(1); and

(2) may at any time determine whether a chemical facility is a covered chemical facility or change the tier to which such a facility is assigned under subsection (c)(1).

(e) **PROVISION OF THREAT-RELATED INFORMATION.**—In order to effectively assess the vulnerabilities to a covered chemical facility, the Secretary shall provide to the owner, operator, or security officer of a covered chemical facility threat information regarding probable threats to the facility and methods that could be used in a chemical facility terrorist incident.

SEC. 2103. SECURITY VULNERABILITY ASSESSMENTS AND SITE SECURITY PLANS.

(a) **IN GENERAL.**—

(1) **REQUIREMENT.**—The Secretary shall—

(A) establish standards, protocols, and procedures for security vulnerability assessments and site security plans to be required for covered chemical facilities;

(B) require the owner or operator of each covered chemical facility to—

(i) conduct an assessment of the vulnerability of the covered chemical facility to a range of chemical facility terrorist incidents, including an incident that results in a worst-case release of a substance of concern;

(ii) prepare, submit, and implement a site security plan for that covered chemical facility that addresses the security vulnerability assessment and meets the risk-based chemical security performance standards under subsection (c); and

(iii) include at least one supervisory and at least one non-supervisory employee of the covered chemical facility, and at least one employee representative, from each bargaining agent at the covered chemical facility, if any, in developing the security vulnerability assessment and site security plan required under this section;

(C) set deadlines, by tier, for the completion of security vulnerability assessments and site security plans;

(D) upon request, as necessary, and to the extent that resources permit, provide technical assistance to a covered chemical facility conducting a vulnerability assessment or site security plan required under this section;

(E) establish specific deadlines and requirements for the submission by a covered chemical facility of information describing—

(i) any change in the use by the covered chemical facility of more than a threshold amount of any sub-

stance of concern that may affect the requirements of the chemical facility under this title; or

(ii) any material modification to a covered chemical facility's operations or site that may affect the security vulnerability assessment or site security plan submitted by the covered chemical facility;

(F) require the owner or operator of a covered chemical facility to review and resubmit a security vulnerability assessment or site security plan not less frequently than once every 5 years; and

(G) not later than 180 days after the date on which the Secretary receives a security vulnerability assessment or site security plan under this title, review and approve or disapprove such assessment or plan.

(2) **INHERENTLY GOVERNMENTAL FUNCTION.**—The approval or disapproval of a security vulnerability assessment or site security plan under this section is an inherently governmental function.

(b) **PARTICIPATION IN PREPARATION OF SECURITY VULNERABILITY ASSESSMENTS OR SITE SECURITY PLANS.**—Any person selected by the owner or operator of a covered chemical facility or by a certified or recognized bargaining agent of a covered chemical facility to participate in the development of the security vulnerability assessment or site security plan required under this section for such covered chemical facility shall be permitted to participate if the person possesses knowledge, experience, training, or education relevant to the portion of the security vulnerability assessment or site security plan on which the person is participating.

(c) **RISK-BASED CHEMICAL SECURITY PERFORMANCE STANDARDS.**—The Secretary shall establish risk-based chemical security performance standards for the site security plans required to be prepared by covered chemical facilities. In establishing such standards, the Secretary shall—

(1) require separate and, as appropriate, increasingly stringent risk-based chemical security performance standards for site security plans as the level of risk associated with the tier increases; and

(2) permit each covered chemical facility submitting a site security plan to select a combination of security measures that satisfy the risk-based chemical security performance standards established by the Secretary under this subsection.

(d) **CO-LOCATED CHEMICAL FACILITIES.**—The Secretary may allow an owner or operator of a covered chemical facility that is located geographically close to another covered chemical facility to develop and implement coordinated security vulnerability assessments and site security plans.

(e) **ALTERNATE SECURITY PROGRAMS SATISFYING REQUIREMENTS FOR SECURITY VULNERABILITY ASSESSMENT AND SITE SECURITY PLAN.**—

(1) **ACCEPTANCE OF PROGRAM.**—In response to a request by an owner or operator of a covered chemical facility, the Secretary may accept an alternate security program submitted by the owner or operator of the facility as a component of the security vulnerability assessment or site security plan required under this section, if the Secretary determines that such alternate se-

curity program, in combination with other components of the security vulnerability assessment and site security plan submitted by the owner or operator of the facility—

(A) meets the requirements of this title and the regulations promulgated pursuant to this title;

(B) provides an equivalent level of security to the level of security established pursuant to the regulations promulgated under this title; and

(C) includes employee participation as required under subsection (a)(1)(B)(iii).

(2) **SECRETARIAL REVIEW REQUIRED.**—Nothing in this subsection shall relieve the Secretary of the obligation—

(A) to review a security vulnerability assessment and site security plan submitted by a covered chemical facility under this section; and

(B) to approve or disapprove each such assessment or plan on an individual basis according to the deadlines established under subsection (a).

(3) **COVERED FACILITY'S OBLIGATIONS UNAFFECTED.**—Nothing in this subsection shall relieve any covered chemical facility of the obligation and responsibility to comply with all of the requirements of this title.

(4) **PERSONNEL SURETY ALTERNATE SECURITY PROGRAM.**—In response to an application from a non-profit, personnel surety accrediting organization acting on behalf of, and with written authorization from, the owner or operator of a covered chemical facility, the Secretary may accept a personnel surety alternate security program that meets the requirements of section 2115 and provides for a background check process that is—

(A) expedited, affordable, reliable, and accurate;

(B) fully protective of the rights of covered individuals through procedures that are consistent with the privacy protections available under the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.); and

(C) is a single background check consistent with a risk-based tiered program.

(f) **OTHER AUTHORITIES.**—

(1) **REGULATION OF MARITIME FACILITIES.**—

(A) **RISK-BASED TIERING.**—Notwithstanding any other provision of law, the owner or operator of a chemical facility required to submit a facility security plan under section 70103(c) of title 46, United States Code, shall be required to submit information to the Secretary necessary to determine whether to designate such a facility as a covered chemical facility and to assign the facility to a risk-based tier under section 2102 of this title.

(B) **ADDITIONAL MEASURES.**—In the case of a facility designated as a covered chemical facility under this title that is also regulated under section 70103(c) of title 46, United States Code, the Commandant of the Coast Guard, after consultation with the Secretary, shall require the owner or operator of such facility to update the vulnerability assessments and facility security plans required under that section, if necessary, to ensure an equivalent level of security for substances of concern, including the requirements under

section 2111, in the same manner as other covered chemical facilities in this title.

(C) PERSONNEL SURETY.—

(i) EXCEPTION.—A facility designated as a covered chemical facility under this title that has had its facility security plan approved under section 70103(c) of title 46, United States Code, shall not be required to update or amend such plan in order to meet the requirements of section 2115 of this title.

(ii) EQUIVALENT ACCESS.—An individual described in section 2115(a)(1)(B) who has been granted access to restricted areas or critical assets by the owner or operator of a facility for which a security plan is required to be submitted under section 70103(c) of title 46, United States Code, may be considered by that owner or operator to have satisfied the requirement for passing a security background check otherwise required under section 2115 for purposes of granting the individual access to restricted areas or critical assets of a covered chemical facility that is owned or operated by the same owner or operator.

(D) INFORMATION SHARING AND PROTECTION.—Notwithstanding section 70103(d) of title 46, United States Code, the Commandant of the Coast Guard, after consultation with the Secretary, shall apply the information sharing and protection requirements in section 2110 of this title to a facility described in subparagraph (B).

(E) ENFORCEMENT.—The Secretary shall establish, by rulemaking, procedures to ensure that an owner or operator of a covered chemical facility required to update the vulnerability assessment and facility security plan for the facility under subparagraph (B) is in compliance with the requirements of this title.

(F) FORMAL AGREEMENT.—The Secretary shall require the Office of Infrastructure Protection and the Coast Guard to enter into a formal agreement detailing their respective roles and responsibilities in carrying out the requirements of this title. Such agreement shall ensure that the enforcement and compliance requirements under this title and section 70103 of title 46, United States Code, are not conflicting or duplicative.

(2) COORDINATION OF STORAGE LICENSING OR PERMITTING REQUIREMENT.—In the case of any storage required to be licensed or permitted under chapter 40 of title 18, United States Code, the Secretary shall prescribe the rules and regulations for the implementation of this section with the concurrence of the Attorney General and avoid unnecessary duplication of regulatory requirements.

(g) ROLE OF EMPLOYEES.—

(1) DESCRIPTION OF ROLE REQUIRED.—Site security plans required under this section shall describe the roles or responsibilities that covered individuals are expected to perform to deter or respond to a chemical facility terrorist incident.

(2) ANNUAL TRAINING FOR EMPLOYEES.—The owner or operator of a covered chemical facility required to submit a site se-

curity plan under this section shall annually provide each covered individual with a role or responsibility referred to in paragraph (1) at the facility with a minimum of 8 hours of training. Such training shall, as relevant to the role or responsibility of such covered individual—

(A) include an identification and discussion of substances of concern;

(B) include a discussion of possible consequences of a chemical facility terrorist incident;

(C) review and exercise the covered chemical facility's site security plan, including any requirements for differing threat levels;

(D) include a review of information protection requirements;

(E) include a discussion of physical and cyber security equipment, systems, and methods used to achieve chemical security performance standards;

(F) allow training with other relevant participants, including Federal, State, local, and tribal authorities, and first responders, where appropriate;

(G) use existing national voluntary consensus standards, chosen jointly with employee representatives, if any;

(H) allow instruction through government training programs, chemical facilities, academic institutions, nonprofit organizations, industry and private organizations, employee organizations, and other relevant entities that provide such training;

(I) use multiple training media and methods; and

(J) include a discussion of appropriate emergency response procedures, including procedures to mitigate the effects of a chemical facility terrorist incident.

(3) EQUIVALENT TRAINING.—During any year, with respect to any covered individual with roles or responsibilities under paragraph (1), an owner or operator of a covered chemical facility may satisfy any of the training requirements for such covered individual under subparagraphs (A), (B), (C), (D), (E), or (J) of paragraph (2) through training that such owner or operator certifies, in a manner prescribed by the Secretary, as equivalent.

(4) WORKER TRAINING GRANT PROGRAM.—

(A) AUTHORITY.—The Secretary shall establish a grant program to award grants to or enter into cooperative agreements with eligible entities to provide for the training and education of covered individuals with roles or responsibilities described in paragraph (1) and first responders and emergency response providers that would respond to a chemical facility terrorist incident.

(B) ADMINISTRATION.—The Secretary shall seek to enter into an agreement with the National Institute for Environmental Health Sciences to make and administer grants or cooperative agreements under this paragraph.

(C) USE OF FUNDS.—The recipient of funds under this paragraph shall use such funds to provide for the training and education of covered individuals with roles or respon-

sibilities described in paragraph (1), first responders, and emergency response providers, including—

(i) the annual mandatory training specified in paragraph (2); and

(ii) other appropriate training to protect nearby persons, property, critical infrastructure, or the environment from the effects of a chemical facility terrorist incident.

(D) **ELIGIBLE ENTITIES.**—For purposes of this paragraph, an eligible entity is a nonprofit organization with demonstrated experience in implementing and operating successful worker or first responder health and safety or security training programs.

(h) **STATE, REGIONAL, OR LOCAL GOVERNMENTAL ENTITIES.**—No covered chemical facility shall be required under State, local, or tribal law to provide a vulnerability assessment or site security plan described under this title to any State, regional, local, or tribal government entity solely by reason of the requirement under subsection (a) that the covered chemical facility submit such an assessment and plan to the Secretary.

SEC. 2104. SITE INSPECTIONS.

(a) **RIGHT OF ENTRY.**—For purposes of carrying out this title, the Secretary shall have, at a reasonable time and on presentation of credentials, a right of entry to, on, or through any property of a covered chemical facility or any property on which any record required to be maintained under this section is located.

(b) **INSPECTIONS AND VERIFICATIONS.**—

(1) **IN GENERAL.**—The Secretary shall, at such time and place as the Secretary determines to be reasonable and appropriate, conduct chemical facility security inspections and verifications.

(2) **REQUIREMENTS.**—To ensure and evaluate compliance with this title, including any regulations or requirements adopted by the Secretary in furtherance of the purposes of this title, in conducting an inspection or verification under paragraph (1), the Secretary shall have access to the owners, operators, employees, and employee representatives, if any, of a covered chemical facility.

(c) **UNANNOUNCED INSPECTIONS.**—In addition to any inspection conducted pursuant to subsection (b), the Secretary shall require covered chemical facilities assigned to tier 1 and tier 2 under section 2102(c)(1) to undergo unannounced facility inspections. The inspections required under this subsection shall be—

(1) conducted without prior notice to the facility;

(2) designed to evaluate at the chemical facility undergoing inspection—

(A) the ability of the chemical facility to prevent a chemical facility terrorist incident that the site security plan of the facility is intended to prevent;

(B) the ability of the chemical facility to protect against security threats that are required to be addressed by the site security plan of the facility; and

(C) any weaknesses in the site security plan of the chemical facility;

(3) conducted so as not to affect the actual security, physical integrity, safety, or regular operations of the chemical facility or its employees while the inspection is conducted; and

(4) conducted—

(A) every two years in the case of a covered chemical facility assigned to tier 1; and

(B) every four years in the case of a covered chemical facility assigned to tier 2.

(d) **CHEMICAL FACILITY INSPECTORS AUTHORIZED.**—During the period of fiscal years 2011 and 2012, subject to the availability of appropriations for such purpose, the Secretary shall increase by not fewer than 100 the total number of chemical facility inspectors within the Department to ensure compliance with this title.

(e) **CONFIDENTIAL COMMUNICATIONS.**—The Secretary shall offer non-supervisory employees the opportunity to confidentially communicate information relevant to the employer's compliance or non-compliance with this title, including compliance or non-compliance with any regulation or requirement adopted by the Secretary in furtherance of the purposes of this title. An employee representative of each certified or recognized bargaining agent at the covered chemical facility, if any, or, if none, a non-supervisory employee, shall be given the opportunity to accompany the Secretary during a physical inspection of such covered chemical facility for the purpose of aiding in such inspection, if representatives of the owner or operator of the covered chemical facility will also be accompanying the Secretary on such inspection.

SEC. 2105. RECORDS.

(a) **REQUEST FOR RECORDS.**—In carrying out this title, the Secretary may require submission of, or on presentation of credentials may at reasonable times obtain access to and copy, any records, including any records maintained in electronic format, necessary for—

(1) reviewing or analyzing a security vulnerability assessment or site security plan submitted under section 2103; or

(2) assessing the implementation of such a site security plan.

(b) **PROPER HANDLING OF RECORDS.**—In accessing or copying any records under subsection (a), the Secretary shall ensure that such records are handled and secured appropriately in accordance with section 2110.

SEC. 2106. TIMELY SHARING OF THREAT INFORMATION.

(a) **RESPONSIBILITIES OF SECRETARY.**—Upon the receipt of information concerning a threat that is relevant to a certain covered chemical facility, the Secretary shall provide such information in a timely manner, to the maximum extent practicable under applicable authority and in the interests of national security, to the owner, operator, or security officer of that covered chemical facility and to a representative of each recognized or certified bargaining agent at the facility, if any.

(b) **RESPONSIBILITIES OF OWNER OR OPERATOR.**—The Secretary shall require the owner or operator of a covered chemical facility to provide information concerning a threat in a timely manner about any significant security incident or threat to the covered chemical facility or any intentional or unauthorized penetration of the physical security or cyber security of the covered chemical facility whether successful or unsuccessful.

SEC. 2107. ENFORCEMENT.**(a) REVIEW OF SITE SECURITY PLAN.—**

(1) **DISAPPROVAL.**—*The Secretary shall disapprove a security vulnerability assessment or site security plan submitted under this title if the Secretary determines, in his or her discretion, that—*

(A) *the security vulnerability assessment or site security plan does not comply with the standards, protocols, or procedures under section 2103(a)(1)(A); or*

(B) *in the case of a site security plan—*

(i) *the plan or the implementation of the plan is insufficient to address vulnerabilities identified in a security vulnerability assessment, site inspection, or unannounced inspection of the covered chemical facility; or*

(ii) *the plan fails to meet all applicable chemical facility security performance standards.*

(2) **PROVISION OF NOTIFICATION OF DISAPPROVAL.**—*If the Secretary disapproves the security vulnerability assessment or site security plan submitted by a covered chemical facility under this title or the implementation of a site security plan by such a chemical facility, the Secretary shall provide the owner or operator of the covered chemical facility a written notification of the disapproval within 14 days of the date on which the Secretary disapproves such assessment or plan, that—*

(A) *includes a clear explanation of deficiencies in the assessment, plan, or implementation of the plan; and*

(B) *requires the owner or operator of the covered chemical facility to revise the assessment or plan to address any deficiencies and, by such date as the Secretary determines is appropriate, to submit to the Secretary the revised assessment or plan.*

(3) **ORDER FOR COMPLIANCE.**—*Whenever the Secretary determines that the owner or operator of a covered chemical facility has violated or is in violation of any requirement of this title or has failed or is failing to address any deficiencies in the assessment, plan, or implementation of the plan by such date as the Secretary determines to be appropriate, the Secretary may—*

(A) *after providing notice to the owner or operator of the covered chemical facility and an opportunity for such owner or operator to appeal the Secretary's determination, issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both; or*

(B) *commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including temporary or permanent injunction.*

(4) **ORDER TO CEASE OPERATIONS.**—*If the Secretary determines that the owner or operator of a covered chemical facility continues to be in noncompliance after an order for compliance is issued under paragraph (3), the Secretary may issue an order to the owner or operator of a covered chemical facility to cease operations at the facility until the owner or operator complies with such order issued under paragraph (3). Notwithstanding*

the preceding sentence, the Secretary may not issue an order to cease operations under this paragraph to the owner or operator of a wastewater facility.

(b) PENALTIES.—

(1) CIVIL PENALTIES.—A court may award a civil penalty, pursuant to an order issued by the Secretary under this title, of not more than \$50,000 for each day on which a violation occurs or a failure to comply continues.

(2) ADMINISTRATIVE PENALTIES.—The Secretary may award an administrative penalty, pursuant to an order issued under this title, of not more than \$25,000 for each day on which a violation occurs or a failure to comply continues.

SEC. 2108. WHISTLEBLOWER PROTECTIONS.

(a) ESTABLISHMENT.—The Secretary shall establish and provide information to the public regarding a process by which any person may submit a report to the Secretary regarding problems, deficiencies, or vulnerabilities at a covered chemical facility associated with the risk of a chemical facility terrorist incident.

(b) CONFIDENTIALITY.—The Secretary shall keep confidential the identity of a person that submits a report under subsection (a) and any such report shall be treated as protected information under section 2110 to the extent that it does not consist of publicly available information.

(c) ACKNOWLEDGMENT OF RECEIPT.—If a report submitted under subsection (a) identifies the person submitting the report, the Secretary shall respond promptly to such person to acknowledge receipt of the report.

(d) STEPS TO ADDRESS PROBLEMS.—The Secretary shall review and consider the information provided in any report submitted under subsection (a) and shall, as necessary, take appropriate steps under this title to address any problem, deficiency, or vulnerability identified in the report.

(e) RETALIATION PROHIBITED.—

(1) PROHIBITION.—No owner or operator of a covered chemical facility, profit or not-for-profit corporation, association, or any contractor, subcontractor or agent thereof, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or other privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(A) notified the Secretary, the owner or operator of a covered chemical facility, or the employee's employer of an alleged violation of this title, including communications related to carrying out the employee's job duties;

(B) refused to engage in any practice made unlawful by this title, if the employee has identified the alleged illegality to the employer;

(C) testified before or otherwise provided information relevant for Congress or for any Federal or State proceeding regarding any provision (or proposed provision) of this title;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this title;

(E) testified or is about to testify in any such proceeding;

or

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this title.

(2) **ENFORCEMENT ACTION.**—Any employee covered by this section who alleges discrimination by an employer in violation of paragraph (1) may bring an action governed by the rules and procedures, legal burdens of proof, and remedies applicable under subsections (d) through (h) of section 20109 of title 49, United States Code. A party may seek district court review as set forth in subsection (d)(4) of such section not later than 90 days after receiving a written final determination by the Secretary of Labor.

(3) **PROHIBITED PERSONNEL PRACTICES AFFECTING THE DEPARTMENT.**—

(A) **IN GENERAL.**—Notwithstanding any other provision of law, any individual holding or applying for a position within the Department shall be covered by—

(i) paragraphs (1), (8), and (9) of section 2302(b) of title 5, United States Code;

(ii) any provision of law implementing any of such paragraphs by providing any right or remedy available to an employee or applicant for employment in the civil service; and

(iii) any rule or regulation prescribed under any such paragraph.

(B) **RULE OF CONSTRUCTION.**—Nothing in this paragraph shall be construed to affect any rights, apart from those referred to in subparagraph (A), to which an individual described in that subparagraph might otherwise be entitled to under law.

SEC. 2109. FEDERAL PREEMPTION.

This title does not preclude or deny any right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance with respect to a covered chemical facility that is more stringent than a regulation, requirement, or standard of performance issued under this title, or otherwise impair any right or jurisdiction of any State or political subdivision thereof with respect to covered chemical facilities within that State or political subdivision thereof.

SEC. 2110. PROTECTION OF INFORMATION.

(a) **PROHIBITION OF PUBLIC DISCLOSURE OF PROTECTED INFORMATION.**—Protected information, as described in subsection (g)—

(1) shall be exempt from disclosure under section 552 of title 5, United States Code; and

(2) shall not be made available pursuant to any State, local, or tribal law requiring disclosure of information or records.

(b) **INFORMATION SHARING.**—

(1) **IN GENERAL.**—The Secretary shall prescribe such regulations, and may issue such orders, as necessary to prohibit the unauthorized disclosure of protected information, as described in subsection (g).

(2) **SHARING OF PROTECTED INFORMATION.**—The regulations under paragraph (1) shall provide standards for and facilitate

the appropriate sharing of protected information with and between Federal, State, local, and tribal authorities, emergency response providers, law enforcement officials, designated supervisory and nonsupervisory covered chemical facility personnel with security, operational, or fiduciary responsibility for the facility, and designated facility employee representatives, if any. Such standards shall include procedures for the sharing of all portions of a covered chemical facility's vulnerability assessment and site security plan relating to the roles and responsibilities of covered individuals under section 2103(g)(1) with a representative of each certified or recognized bargaining agent representing such covered individuals, if any, or, if none, with at least one supervisory and at least one non-supervisory employee with roles or responsibilities under section 2103(g)(1).

(3) *PENALTIES.—Protected information, as described in subsection (g), shall not be shared except in accordance with the regulations under paragraph (1). Any person who purposefully publishes, divulges, discloses, or makes known protected information in any manner or to any extent not authorized by the standards provided by the regulations under paragraph (1), shall, upon conviction, be imprisoned for not more than one year or fined in accordance with the provisions of chapter 227 of title 18, United States Code, applicable to class A misdemeanors, or both, and, in the case of Federal employees or officers, shall be removed from Federal office or employment.*

(c) *TREATMENT OF INFORMATION IN ADJUDICATIVE PROCEEDINGS.—In any judicial or administrative proceeding, protected information described in subsection (g) shall be treated in a manner consistent with the treatment of sensitive security information under section 525 of the Department of Homeland Security Appropriations Act, 2007 (Public Law 109–295; 120 Stat. 1381).*

(d) *OTHER OBLIGATIONS UNAFFECTED.—Except as provided in section 2103(h), nothing in this section affects any obligation of the owner or operator of a chemical facility under any other law to submit or make available information required by such other law to facility employees, employee organizations, or a Federal, State, tribal, or local government.*

(e) *SUBMISSION OF INFORMATION TO CONGRESS.—Nothing in this title shall permit or authorize the withholding of information from Congress or any committee or subcommittee thereof.*

(f) *DISCLOSURE OF INDEPENDENTLY FURNISHED INFORMATION.—Nothing in this title shall affect any authority or obligation of a Federal, State, local, or tribal government agency to protect or disclose any record or information that the Federal, State, local, or tribal government agency obtains from a chemical facility under any other law.*

(g) *PROTECTED INFORMATION.—*

(1) *IN GENERAL.—For purposes of this title, protected information is the following:*

(A) *Security vulnerability assessments and site security plans, including any assessment required under section 2111.*

(B) *Portions of the following documents, records, orders, notices, or letters that the Secretary determines would be*

detrimental to chemical facility security if disclosed and that are developed by the Secretary or the owner or operator of a covered chemical facility for the purposes of this title:

(i) Documents directly related to the Secretary's review and approval or disapproval of vulnerability assessments and site security plans under this title.

(ii) Documents directly related to inspections and audits under this title.

(iii) Orders, notices, or letters regarding the compliance of a covered chemical facility with the requirements of this title.

(iv) Information required to be provided to, or documents and records created by, the Secretary under section subsection (b) or (c) of section 2102.

(v) Documents directly related to security drills and training exercises, security threats and breaches of security, and maintenance, calibration, and testing of security equipment.

(C) Other information, documents, or records developed exclusively for the purposes of this title that the Secretary determines, if disclosed, would be detrimental to chemical facility security.

(2) EXCLUSIONS.—*For purposes of this section, protected information does not include—*

(A) information that is otherwise publicly available, including information that is required to be made publicly available under any law;

(B) information that a chemical facility has lawfully disclosed other than in accordance with this title; or

(C) information that, if disclosed, would not be detrimental to the security of a chemical facility, including aggregate regulatory data that the Secretary determines is appropriate to describe facility compliance with the requirements of this title and the Secretary's implementation of such requirements.

SEC. 2111. METHODS TO REDUCE THE CONSEQUENCES OF A TERRORIST ATTACK.

(a) ASSESSMENT REQUIRED.—

(1) ASSESSMENT.—*The owner or operator of a covered chemical facility shall include in the site security plan conducted pursuant to section 2103, an assessment of methods to reduce the consequences of a terrorist attack on that chemical facility, including—*

(A) a description of the methods to reduce the consequences of a terrorist attack implemented and considered for implementation by the covered chemical facility;

(B) the degree to which each method to reduce the consequences of a terrorist attack, if already implemented, has reduced, or, if implemented, could reduce, the potential extent of death, injury, or serious adverse effects to human health resulting from a release of a substance of concern;

(C) the technical feasibility, costs, avoided costs (including liabilities), personnel implications, savings, and appli-

cability of implementing each method to reduce the consequences of a terrorist attack; and

(D) any other information that the owner or operator of the covered chemical facility considered in conducting the assessment.

(2) *FEASIBLE*.—For the purposes of this section, the term “feasible” means feasible with the use of best technology, techniques, and other means that the Secretary finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available for use at the covered chemical facility.

(b) *IMPLEMENTATION*.—

(1) *IMPLEMENTATION*.—

(A) *IN GENERAL*.—The owner or operator of a covered chemical facility that is assigned to tier 1 or tier 2 because of the potential extent and likelihood of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy from a release of a substance of concern at the covered chemical facility, shall implement methods to reduce the consequences of a terrorist attack on the chemical facility if the Director of the Office of Chemical Facility Security determines, in his or her discretion, using the assessment conducted pursuant to subsection (a), that the implementation of such methods at the facility—

(i) would significantly reduce the risk of death, injury, or serious adverse effects to human health resulting from a chemical facility terrorist incident but—

(I) would not increase the interim storage of a substance of concern outside the facility;

(II) would not directly result in the creation of a new covered chemical facility assigned to tier 1 or tier 2 because of the potential extent and likelihood of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy from a release of a substance of concern at the covered chemical facility; and

(III) would not result in the reassignment of an existing covered chemical facility from tier 3 or tier 4 to tier 1 or tier 2 because of the potential extent and likelihood of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy from a release of a substance of concern at the covered chemical facility;

(ii) can feasibly be incorporated into the operation of the covered chemical facility; and

(iii) would not significantly and demonstrably impair the ability of the owner or operator of the covered chemical facility to continue the business of the facility at its location.

(B) *WRITTEN DETERMINATION.*—A determination by the Director of the Office of Chemical Facility Security pursuant to subparagraph (A) shall be made in writing and include the basis and reasons for such determination.

(C) *MARITIME FACILITIES.*—With respect to a covered chemical facility for which a security plan is required under section 70103(c) of title 46, United States Code, a written determination pursuant to subparagraph (A) shall be made only after consultation with the Captain of the Port for the area in which the covered chemical facility is located.

(2) *REVIEW OF INABILITY TO COMPLY.*—

(A) *IN GENERAL.*—An owner or operator of a covered chemical facility who is unable to comply with the Director's determination under paragraph (1) shall, within 120 days of receipt of the Director's determination, provide to the Secretary a written explanation that includes the reasons therefor. Such written explanation shall specify whether the owner or operator's inability to comply arises under clause (ii) or (iii) of paragraph (1)(A), or both.

(B) *REVIEW.*—Not later than 120 days of receipt of an explanation submitted under subparagraph (A), the Secretary, after consulting with the owner or operator of the covered chemical facility who submitted such explanation, as well as experts in the subjects of environmental health and safety, security, chemistry, design and engineering, process controls and implementation, maintenance, production and operations, chemical process safety, and occupational health, as appropriate, shall provide to the owner or operator a written determination, in his or her discretion, of whether implementation shall be required pursuant to paragraph (1). If the Secretary determines that implementation is required, the Secretary shall issue an order that establishes the basis for such determination, including the findings of the relevant experts, the specific methods selected for implementation, and a schedule for implementation of the methods at the facility.

(c) *SECTORAL IMPACTS.*—

(1) *GUIDANCE FOR FARM SUPPLIES MERCHANT WHOLESALEERS.*—The Secretary shall provide guidance and, as appropriate, tools, methodologies or computer software, to assist farm supplies merchant wholesalers in complying with the requirements of this section. The Secretary may award grants to farm supplies merchant wholesalers to assist with compliance with subsection (a), and in awarding such grants, shall give priority to farm supplies merchant wholesalers that have the greatest need for such grants.

(2) *ASSESSMENT OF IMPACTS.*—Not later than 6 months after the date of enactment of this title, the Secretary shall transmit an assessment of the potential impacts of compliance with provisions of this section regarding the assessment and, as appropriate, implementation, of methods to reduce the consequences of a terrorist attack by manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer to the Committee on Energy and Commerce of the House of Rep-

representatives, the Committee on Homeland Security of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate. Such assessment shall be conducted by the Secretary in consultation with other appropriate Federal agencies and shall include the following:

(A) Data on the scope of facilities covered by this title, including the number and type of manufacturers, retailers, aerial commercial applicators and distributors of pesticide and fertilizer required to assess methods to reduce the consequences of a terrorist attack under subsection (a) and the number and type of manufacturers, retailers, aerial commercial applicators and distributors of pesticide and fertilizer assigned to tier 1 or tier 2 by the Secretary because of the potential extent and likelihood of death, injury, and serious adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy from the release of a substance of concern at the facility.

(B) A survey of known methods, processes or practices, other than elimination of or cessation of manufacture of the pesticide or fertilizer, that manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer could use to reduce the consequences of a terrorist attack, including an assessment of the costs and technical feasibility of each such method, process, or practice.

(C) An analysis of how the assessment of methods to reduce the consequences of a terrorist attack under subsection (a) by manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer, and, as appropriate, the implementation of methods to reduce the consequences of a terrorist attack by such manufacturers, retailers, aerial commercial applicators, and distributors of pesticide and fertilizer subject to subsection (b), are likely to impact other sectors engaged in commerce.

(D) Recommendations for how to mitigate any adverse impacts identified pursuant to subparagraph (C).

(3) *FARM SUPPLIES MERCHANT WHOLESALER.*—In this subsection, the term “farm supplies merchant wholesaler” means a covered chemical facility that is primarily engaged in the merchant wholesale distribution of farm supplies, such as animal feeds, fertilizers, agricultural chemicals, pesticides, plant seeds, and plant bulbs.

(d) *PROVISION OF INFORMATION ON ALTERNATIVE APPROACHES.*—

(1) *IN GENERAL.*—The Secretary shall make available information on the use and availability of methods to reduce the consequences of a chemical facility terrorist incident.

(2) *INFORMATION TO BE INCLUDED.*—The information under paragraph (1) may include information about—

(A) general and specific types of such methods;

(B) combinations of chemical sources, substances of concern, and hazardous processes or conditions for which such methods could be appropriate;

(C) the availability of specific methods to reduce the consequences of a terrorist attack;

(D) the costs and cost savings resulting from the use of such methods;

(E) emerging technologies that could be transferred from research models or prototypes to practical applications;

(F) the availability of technical assistance and best practices; and

(G) such other matters that the Secretary determines are appropriate.

(3) **PUBLIC AVAILABILITY.**—Information made available under this subsection shall not identify any specific chemical facility, violate the protection of information provisions under section 2110, or disclose any proprietary information.

(e) **FUNDING FOR METHODS TO REDUCE THE CONSEQUENCES OF A TERRORIST ATTACK.**—The Secretary may make funds available to help defray the cost of implementing methods to reduce the consequences of a terrorist attack to covered chemical facilities that are required by the Secretary to implement such methods.

SEC. 2112. APPLICABILITY.

This title shall not apply to—

(1) any chemical facility that is owned and operated by the Secretary of Defense;

(2) the transportation in commerce, including incidental storage, of any substance of concern regulated as a hazardous material under chapter 51 of title 49, United States Code;

(3) all or a specified portion of any chemical facility that—

(A) is subject to regulation by the Nuclear Regulatory Commission (hereinafter in this paragraph referred to as the “Commission”) or a State that has entered into an agreement with the Commission under section 274 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2021 b.);

(B) has had security controls imposed by the Commission or State, whichever has the regulatory authority, on the entire facility or the specified portion of the facility; and

(C) has been designated by the Commission, after consultation with the State, if any, that regulates the facility, and the Secretary, as excluded from the application of this title; or

(4) any public water system subject to the Safe Drinking Water Act (42 U.S.C. 300f et seq.).

SEC. 2113. SAVINGS CLAUSE.

(a) **IN GENERAL.**—Nothing in this title shall affect or modify in any way any obligation or liability of any person under any other Federal law, including 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.*).

(b) *OTHER REQUIREMENTS.*—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.

(c) *ACCESS.*—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.

SEC. 2114. OFFICE OF CHEMICAL FACILITY SECURITY.

(a) *IN GENERAL.*—There is established in the Department an Office of Chemical Facility Security, headed by a Director, who shall be a member of the Senior Executive Service in accordance with subchapter VI of chapter 53 of title 5, United States Code, under section 5382 of that title, and who shall be responsible for carrying out the responsibilities of the Secretary under this title.

(b) *PROFESSIONAL QUALIFICATIONS.*—The individual selected by the Secretary as the Director of the Office of Chemical Facility Security shall have professional qualifications and experience necessary for effectively directing the Office of Chemical Facility Security and carrying out the requirements of this title, including a demonstrated knowledge of physical infrastructure protection, cybersecurity, chemical facility security, hazard analysis, chemical process engineering, chemical process safety reviews, or other such qualifications that the Secretary determines to be necessary.

(c) *SELECTION PROCESS.*—The Secretary shall make a reasonable effort to select an individual to serve as the Director from among a group of candidates that is diverse with respect to race, ethnicity, age, gender, and disability characteristics and submit to the Committee on Homeland Security and the Committee on Energy and Commerce of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate information on the selection process, including details on efforts to assure diversity among the candidates considered for this position.

SEC. 2115. SECURITY BACKGROUND CHECKS OF COVERED INDIVIDUALS AT CERTAIN CHEMICAL FACILITIES.

(a) *REGULATIONS ISSUED BY THE SECRETARY.*—

(1) *IN GENERAL.*—

(A) *REQUIREMENT.*—The Secretary shall issue regulations to require covered chemical facilities to establish personnel surety for individuals described in subparagraph (B) by conducting appropriate security background checks and ensuring appropriate credentials for unescorted visitors and chemical facility personnel, including permanent and part-time personnel, temporary personnel, and contract personnel, including—

- (i) measures designed to verify and validate identity;
- (ii) measures designed to check criminal history;
- (iii) measures designed to verify and validate legal authorization to work; and
- (iv) measures designed to identify people with terrorist ties.

(B) *INDIVIDUALS DESCRIBED.*—For purposes of subparagraph (A), an individual described in this subparagraph is—

(i) a covered individual who has unescorted access to restricted areas or critical assets or who is provided with a copy of a security vulnerability assessment or site security plan;

(ii) a person associated with a covered chemical facility, including any designated employee representative, who is provided with a copy of a security vulnerability assessment or site security plan; or

(iii) a person who is determined by the Secretary to require a security background check based on chemical facility security performance standards.

(2) *REGULATIONS.*—The regulations required by paragraph (1) shall set forth—

(A) the scope of the security background checks, including the types of disqualifying offenses and the time period covered for each person subject to a security background check under paragraph (1);

(B) the processes to conduct the security background checks;

(C) the necessary biographical information and other data required in order to conduct the security background checks;

(D) a redress process for an adversely-affected person consistent with subsections (b) and (c); and

(E) a prohibition on an owner or operator of a covered chemical facility misrepresenting to an employee or other relevant person, including an arbiter involved in a labor arbitration, the scope, application, or meaning of any rules, regulations, directives, or guidance issued by the Secretary related to security background check requirements for covered individuals when conducting a security background check.

(b) *MISREPRESENTATION OF ADVERSE EMPLOYMENT DECISIONS.*—The regulations required by subsection (a)(1) shall set forth that it shall be a misrepresentation under subsection (a)(2)(E) to attribute an adverse employment decision, including removal or suspension of the employee, to such regulations unless the owner or operator finds, after opportunity for appropriate redress under the processes provided under subsection (c)(1) and (c)(2), that the person subject to such adverse employment decision—

(1) has been convicted of, has been found not guilty of by reason of insanity, or is under want, warrant, or indictment for a permanent disqualifying criminal offense listed in part 1572 of title 49, Code of Federal Regulations;

(2) was convicted of or found not guilty by reason of insanity of an interim disqualifying criminal offense listed in part 1572 of title 49, Code of Federal Regulations, within 7 years of the date on which the covered chemical facility performs the security background check;

(3) was incarcerated for an interim disqualifying criminal offense listed in part 1572 of title 49, Code of Federal Regulations, and released from incarceration within 5 years of the

date that the chemical facility performs the security background check;

(4) is determined by the Secretary to be on the consolidated terrorist watchlist; or

(5) is determined, as a result of the security background check, not to be legally authorized to work in the United States.

(c) **REDRESS PROCESS.**—Upon the issuance of regulations under subsection (a), the Secretary shall—

(1) require the owner or operator to provide an adequate and prompt redress process for a person subject to a security background check under subsection (a)(1) who is subjected to an adverse employment decision, including removal or suspension of the employee, due to such regulations that is consistent with the appeals process established for employees subject to consumer reports under the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), as in force on the date of enactment of this title;

(2) provide an adequate and prompt redress process for a person subject to a security background check under subsection (a)(1) who is subjected to an adverse employment decision, including removal or suspension of the employee, due to a determination by the Secretary under subsection (b)(4), that is consistent with the appeals process established under section 70105(c) of title 46, United States Code, including all rights to hearings before an administrative law judge, scope of review, and a review of an unclassified summary of classified evidence equivalent to the summary provided in part 1515 of title 49, Code of Federal Regulations;

(3) provide an adequate and prompt redress process for a person subject to a security background check under subsection (a)(1) who is subjected to an adverse employment decision, including removal or suspension of the employee, due to a violation of subsection (a)(2)(E), which shall not preclude the exercise of any other rights available under collective bargaining agreements or applicable laws;

(4) establish a reconsideration process described in subsection (d) for a person subject to an adverse employment decision that was attributed by an owner or operator to the regulations required by subsection (a)(1);

(5) have the authority to order an appropriate remedy, including reinstatement of the person subject to a security background check under subsection (a)(1), if the Secretary determines that the adverse employment decision was made in violation of the regulations required under subsection (a)(1) or as a result of an erroneous determination by the Secretary under subsection (b)(4);

(6) ensure that the redress processes required under paragraphs (1), (2), or (3) afford to the person a full disclosure of any public-record event covered by subsection (b) that provides the basis for an adverse employment decision; and

(7) ensure that the person subject to a security background check under subsection (a)(1) receives the person's full wages and benefits until all redress processes under this subsection are exhausted.

(d) **RECONSIDERATION PROCESS.**—

(1) *IN GENERAL.*—*The reconsideration process required under subsection (c)(4) shall—*

(A) *require the Secretary to determine, within 30 days after receiving a petition submitted by a person subject to an adverse employment decision that was attributed by an owner or operator to the regulations required by subsection (a)(1), whether such person poses a security risk to the covered chemical facility; and*

(B) *include procedures consistent with section 70105(c) of title 46, United States Code, including all rights to hearings before an administrative law judge, scope of review, and a review of an unclassified summary of classified evidence equivalent to the summary provided in part 1515 of title 49, Code of Federal Regulations.*

(2) *DETERMINATION BY THE SECRETARY.*—*In making a determination described under paragraph (1)(A), the Secretary shall—*

(A) *give consideration to the circumstance of any disqualifying act or offense, restitution made by the person, Federal and State mitigation remedies, and other factors from which it may be concluded that the person does not pose a security risk to the covered chemical facility; and*

(B) *provide his or her determination as to whether such person poses a security risk to the covered chemical facility to the petitioner and to the owner or operator of the covered chemical facility.*

(3) *OWNER OR OPERATOR RECONSIDERATION.*—*If the Secretary determines pursuant to paragraph (1)(A) that the person does not pose a security risk to the covered chemical facility, it shall thereafter constitute a prohibited misrepresentation for the owner or operator of the covered chemical facility to continue to attribute the adverse employment decision to the regulations under subsection (a)(1).*

(e) *RESTRICTIONS ON USE AND MAINTENANCE OF INFORMATION.*—*Information obtained under this section by the Secretary or the owner or operator of a covered chemical facility shall be handled as follows:*

(1) *Such information may not be made available to the public.*

(2) *Such information may not be accessed by employees of the facility except for such employees who are directly involved with collecting the information or conducting or evaluating security background checks.*

(3) *Such information shall be maintained confidentially by the facility and the Secretary and may be used only for making determinations under this section.*

(4) *The Secretary may share such information with other Federal, State, local, and tribal law enforcement agencies.*

(f) *SAVINGS CLAUSE.*—

(1) *RIGHTS AND RESPONSIBILITIES.*—*Nothing in this section shall be construed to abridge any right or responsibility of a person subject to a security background check under subsection (a)(1) or an owner or operator of a covered chemical facility under any other Federal, State, local, or tribal law or collective bargaining agreement.*

(2) *EXISTING RIGHTS.*—Nothing in this section shall be construed as creating any new right or modifying any existing right of an individual to appeal a determination by the Secretary as a result of a check against a terrorist watch list.

(g) *PREEMPTION.*—Nothing in this section shall be construed to preempt, alter, or affect a Federal, State, local, or tribal law that requires criminal history background checks, checks on the authorization of an individual to work in the United States, or other background checks of persons subject to security background checks under subsection (a)(1).

(h) *DEFINITION OF SECURITY BACKGROUND CHECK.*—The term “security background check” means a review at no cost to any person subject to a security background check under subsection (a)(1) of the following for the purpose of identifying individuals who may pose a threat to chemical facility security, to national security, or of terrorism:

(1) Relevant databases to verify and validate identity.

(2) Relevant criminal history databases.

(3) In the case of an alien (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3))), the relevant databases to determine the status of the alien under the immigration laws of the United States.

(4) The consolidated terrorist watchlist.

(5) Other relevant information or databases, as determined by the Secretary.

(i) *DEPARTMENT-CONDUCTED SECURITY BACKGROUND CHECK.*—The regulations under subsection (a)(1) shall set forth a process by which the Secretary, on an ongoing basis, shall determine whether alternate security background checks conducted by the Department are sufficient to meet the requirements of this section such that no additional security background check under this section is required for an individual for whom such a qualifying alternate security background check was conducted. The Secretary may require a facility to which the individual will have unescorted access to sensitive or restricted areas to submit identifying information about the individual and the alternate security background check conducted for that individual to the Secretary in order to enable the Secretary to verify the validity of the alternate security background check. Such regulations shall provide that no security background check under this section is required for an individual holding a transportation security card issued under section 70105 of title 46, United States Code.

SEC. 2116. CITIZEN ENFORCEMENT.

(a) *IN GENERAL.*—Except as provided in subsection (c), any person may commence a civil action on such person’s own behalf—

(1) against any governmental entity (including the United States, any other governmental instrumentality or agency, and any federally owned-contractor operated facility, to the extent permitted by the eleventh amendment to the Constitution) alleged to be in violation of any order that has become effective pursuant to this title; or

(2) against the Secretary, for an alleged failure to perform any act or duty under this title that is not discretionary for the Secretary.

(b) *COURT OF JURISDICTION.*—

(1) *IN GENERAL.*—Any action under subsection (a)(1) shall be brought in the district court for the district in which the alleged violation occurred. Any action brought under subsection (a)(2) may be brought in the district court for the district in which the alleged violation occurred or in the United States District Court of the District of Columbia.

(2) *RELIEF.*—The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties to enforce the order referred to in subsection (a)(1), to order such governmental entity to take such action as may be necessary, or both, or, in an action commenced under subsection (a)(2), to order the Secretary to perform the non-discretionary act or duty, and to order any civil penalties, as appropriate, under section 2107.

(c) *ACTIONS PROHIBITED.*—No action may be commenced under subsection (a) prior to 60 days after the date on which the person commencing the action has given notice of the alleged violation to—

(1) the Secretary; and

(2) in the case of an action under subsection (a)(1), any governmental entity alleged to be in violation of an order.

(d) *NOTICE.*—Notice under this section shall be given in such manner as the Secretary shall prescribe by regulation.

(e) *INTERVENTION.*—In any action under this section, the Secretary, if not a party, may intervene as a matter of right.

(f) *COSTS.*—The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(g) *OTHER RIGHTS PRESERVED.*—Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law.

SEC. 2117. CITIZEN PETITIONS.

(a) *IN GENERAL.*—The Secretary shall issue regulations to establish a petition process for petitions described in subsection (b), including—

(1) the format for petitions;

(2) the procedures for investigation of claims;

(3) the procedures for response to petitions, including timelines; and

(4) the procedures for de novo review of responses to petitions by the Office of the Inspector General for the Department of Homeland Security.

(b) *PETITIONS.*—The regulations issued pursuant to subsection (a) shall allow any person to file a petition with the Secretary—

(1) identifying any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) alleged to be in violation of any standard, regulation, condition, requirement, prohibition, plan, or order that has become effective under this title; and

(2) describing the alleged violation of any standard, regulation, condition, requirement, prohibition, plan, or order that has become effective under this title by that person.

(c) **REQUIREMENTS.**—Upon issuance of regulations under subsection (a), the Secretary shall—

(1) accept all petitions described under subsection (b) that meet the requirements of the regulations promulgated under subsection (a);

(2) investigate all allegations contained in accepted petitions;

(3) determine whether enforcement action will be taken concerning the alleged violation or violations;

(4) respond to all accepted petitions promptly and in writing;

(5) include in all responses to petitions a brief and concise statement, to the extent permitted under section 2110, of the allegations, the steps taken to investigate, the determination made, and the reasons for such determination;

(6) maintain an internal record including all protected information related to the determination; and

(7) provide an opportunity for review by the Department of Homeland Security Inspector General on the full record, including protected information, for all determinations made under such regulations.

(d) **FINAL AGENCY ACTION.**—

(1) **ONGOING ENFORCEMENT PROCEEDINGS.**—Any determination by the Secretary to pursue enforcement action in response to a petition under this section shall not constitute final agency action because of ongoing enforcement proceedings.

(2) **DETERMINATION NOT TO PURSUE ENFORCEMENT.**—Any determination by the Secretary not to pursue enforcement action in response to a petition under this section shall constitute final agency action.

SEC. 2118. ANNUAL REPORT TO CONGRESS.

(a) **ANNUAL REPORT.**—Not later than one year after the date of the enactment of this title, annually thereafter for the next four years, and biennially thereafter, the Secretary shall submit to the Committee on Homeland Security and the Committee on Energy and Commerce of the House of Representatives and the Committee on Homeland Security and Governmental Affairs and the Committee on Environment and Public Works of the Senate a report on progress in achieving compliance with this title. Each such report shall include the following:

(1) A qualitative discussion of how covered chemical facilities, differentiated by tier, have reduced the risks of chemical facility terrorist incidents at such facilities, including—

(A) a generalized summary of measures implemented by covered chemical facilities in order to meet each risk-based chemical facility performance standard established by this title, and those that the facilities already had in place—

(i) in the case of the first report under this section, before the issuance of the final rule implementing the regulations known as the “Chemical Facility Anti-Terrorism Standards”, issued on April 9, 2007; and

(ii) in the case of each subsequent report, since the submittal of the most recent report submitted under this section; and

(B) any other generalized summary the Secretary deems appropriate to describe the measures covered chemical facilities are implementing to comply with the requirements of this title.

(2) A quantitative summary of how the covered chemical facilities, differentiated by tier, are complying with the requirements of this title during the period covered by the report and how the Secretary is implementing and enforcing such requirements during such period, including—

(A) the number of chemical facilities that provided the Secretary with information about possessing substances of concern, as described in section 2102(b)(2);

(B) the number of covered chemical facilities assigned to each tier;

(C) the number of security vulnerability assessments and site security plans submitted by covered chemical facilities;

(D) the number of security vulnerability assessments and site security plans approved and disapproved by the Secretary;

(E) the number of covered chemical facilities without approved security vulnerability assessments or site security plans;

(F) the number of chemical facilities that have been assigned to a different tier or are no longer regulated by the Secretary due to implementation of a method to reduce the consequences of a terrorist attack and a description of such implemented methods;

(G) the number of orders for compliance issued by the Secretary;

(H) the administrative penalties assessed by the Secretary for non-compliance with the requirements of this title;

(I) the civil penalties assessed by the court for non-compliance with the requirements of this title;

(J) the number of terrorist watchlist checks conducted by the Secretary in order to comply with the requirements of this title, the number of appeals conducted by the Secretary pursuant to the processes described under paragraphs (2), (3) and (4) of section 2115(c), aggregate information regarding the time taken for such appeals, aggregate information regarding the manner in which such appeals were resolved, and, based on information provided to the Secretary annually by each owner or operator of a covered chemical facility, the number of persons subjected to adverse employment decisions that were attributed by the owner or operator to the regulations required by section 2115; and

(K) any other regulatory data the Secretary deems appropriate to describe facility compliance with the requirements of this title and the Secretary's implementation of such requirements.

(b) **PUBLIC AVAILABILITY.**—A report submitted under this section shall be made publicly available.

SEC. 2119. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to the Secretary of Homeland Security to carry out this title—

(1) \$325,000,000 for fiscal year 2011, of which \$100,000,000 shall be made available to provide funding for methods to reduce the consequences of a terrorist attack, of which up to \$3,000,000 shall be made available for grants authorized under section 2111(c)(1);

(2) \$300,000,000 for fiscal year 2012, of which \$75,000,000 shall be made available to provide funding for methods to reduce the consequences of a terrorist attack, of which up to \$3,000,000 shall be made available for grants authorized under section 2111(c)(1); and

(3) \$275,000,000 for fiscal year 2013, of which \$50,000,000 shall be made available to provide funding for methods to reduce the consequences of a terrorist attack, of which up to \$3,000,000 shall be made available for grants authorized under section 2111(c)(1).

**DEPARTMENT OF HOMELAND SECURITY
APPROPRIATIONS ACT, 2007**

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TITLE V—GENERAL PROVISIONS

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【SEC. 550. (a) No later than six months after the date of enactment of this Act, the Secretary of Homeland Security shall issue interim final regulations establishing risk-based performance standards for security of chemical facilities and requiring vulnerability assessments and the development and implementation of site security plans for chemical facilities: *Provided*, That such regulations shall apply to chemical facilities that, in the discretion of the Secretary, present high levels of security risk: *Provided further*, That such regulations shall permit each such facility, in developing and implementing site security plans, to select layered security measures that, in combination, appropriately address the vulnerability assessment and the risk-based performance standards for security for the facility: *Provided further*, That the Secretary may not disapprove a site security plan submitted under this section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section: *Provided further*, That the Secretary may approve alternative security programs established by private sector entities, Federal, State, or local authorities, or other applicable laws if the Secretary determines that the requirements of such programs meet the requirements of this section and the interim regulations: *Provided further*, That the Secretary shall review and approve each vulnerability assessment and site security plan required under this section: *Provided further*, That the Secretary shall not apply regulations issued pursuant to this section to facilities regulated pursuant to the Maritime Transportation Security Act of 2002, Public Law 107-295, as amended; Public Water Systems, as defined by section 1401 of the Safe Drinking Water Act, Public Law 93-523, as amended; Treatment Works as defined in section 212 of the Federal Water Pollution Control Act, Public Law 92-500, as amended;

any facility owned or operated by the Department of Defense or the Department of Energy, or any facility subject to regulation by the Nuclear Regulatory Commission.

[(b) Interim regulations issued under this section shall apply until the effective date of interim or final regulations promulgated under other laws that establish requirements and standards referred to in subsection (a) and expressly supersede this section: *Provided*, That the authority provided by this section shall terminate three years after the date of enactment of this Act.

[(c) Notwithstanding any other provision of law and subsection (b), information developed under this section, including vulnerability assessments, site security plans, and other security related information, records, and documents shall be given protections from public disclosure consistent with similar information developed by chemical facilities subject to regulation under section 70103 of title 46, United States Code: *Provided*, That this subsection does not prohibit the sharing of such information, as the Secretary deems appropriate, with State and local government officials possessing the necessary security clearances, including law enforcement officials and first responders, for the purpose of carrying out this section, provided that such information may not be disclosed pursuant to any State or local law: *Provided further*, That in any proceeding to enforce this section, vulnerability assessments, site security plans, and other information submitted to or obtained by the Secretary under this section, and related vulnerability or security information, shall be treated as if the information were classified material.

[(d) Any person who violates an order issued under this section shall be liable for a civil penalty under section 70119(a) of title 46, United States Code: *Provided*, That nothing in this section confers upon any person except the Secretary a right of action against an owner or operator of a chemical facility to enforce any provision of this section.

[(e) The Secretary of Homeland Security shall audit and inspect chemical facilities for the purposes of determining compliance with the regulations issued pursuant to this section.

[(f) Nothing in this section shall be construed to supersede, amend, alter, or affect any Federal law that regulates the manufacture, distribution in commerce, use, sale, other treatment, or disposal of chemical substances or mixtures.

[(g) If the Secretary determines that a chemical facility is not in compliance with this section, the Secretary shall provide the owner or operator with written notification (including a clear explanation of deficiencies in the vulnerability assessment and site security plan) and opportunity for consultation, and issue an order to comply by such date as the Secretary determines to be appropriate under the circumstances: *Provided*, That if the owner or operator continues to be in noncompliance, the Secretary may issue an order for the facility to cease operation, until the owner or operator complies with the order.

[(h) This section shall not preclude or deny any right of any State or political subdivision thereof to adopt or enforce any regulation, requirement, or standard of performance with respect to chemical facility security that is more stringent than a regulation, requirement, or standard of performance issued under this sec-

tion, or otherwise impair any right or jurisdiction of any State with respect to chemical facilities within that State, unless there is an actual conflict between this section and the law of that State.】

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DISSENTING VIEWS

We, the undersigned Members of the Committee on Energy and Commerce, oppose the passage of H.R. 2868 and submit the following comments to express our significant concerns regarding this legislation.

While we applaud the efforts of the Majority on the Committee on Energy and Commerce to pass legislation that will address the October 2009 sunset of the existing Chemical Facility Anti-Terrorism Standards (CFATS) program at the Department of Homeland Security (DHS), we believe this bill will not ultimately enhance security and will make America a less safe place to live and work. Further, we question both the haste with which this sweeping bill is being moved, as well as the multiple changes to the existing CFATS program that this bill requires, in light of the infancy of that program and the dearth of any hard data to show where improvements, if any, are needed.

In the fall of 2006, Congress passed Section 550 of the Department of Homeland Security Appropriations Act for Fiscal Year 2007 (Public Law 109-295). This law authorizes the DHS to regulate security at designated chemical facilities. This law's passage and the promulgation of regulations by DHS in the spring of 2007 were seen as important and effective steps for ensuring protection of chemical facilities against terrorist attack.

Section 550 constituted DHS's first ever grant of regulatory authority, allowing DHS to regulate chemical facilities for *security* purposes. Under Section 550, the Secretary of Homeland Security was required to issue interim final regulations establishing risk-based performance standards for chemical facility security and requiring the development of vulnerability assessments, as well as the creation and implementation of risk- and performance-based site security plans at high-risk chemical facilities.

In addition, under Section 550, DHS was required to review and approve assessment plans and oversee implementation for each facility. Moreover, DHS was prohibited from disapproving a site security plan for any reason other than lack of compliance. We believe this was a key feature of CFATS because it guaranteed that security concerns would not result in inappropriate, federal micro-management of a plant's operations, nor interference with investment and planning decisions made by the plant's owners.

Finally, Section 550 protected information developed for compliance with these DHS regulations from public disclosure, gave DHS the sole authority to audit and inspect chemical facilities, and authorized DHS to notify non-compliant facilities and close those refusing to take corrective actions.

In the intervening time since enactment of the law and promulgation of final regulations, DHS has endeavored to implement the requirements of the CFATS program provided for under the 2006 legislation. Notwithstanding its best efforts, DHS has not yet fully implemented the entire CFATS program before the program's original sunset date—which we believe was premature—of October 4, 2009—a mere 17 days before the markup of this legislation by the full committee. To the contrary, we understand that DHS's letters notifying covered facilities that they were going to be placed in a high-risk tier under CFATS were mailed just one week before the markup of this bill in the full committee. Further, DHS has not yet conducted a single enforcement inspection, as testified to by the Department itself at an October 1, 2009, hearing before the Subcommittee on Energy and Environment.

H.R. 2868 is not a bill about chemical facilities; this is a bill about facilities with chemicals. Against the backdrop of 10 percent national unemployment and projections from the U.S. Bureau of Labor Statistics pointing to a 16 percent decrease in chemical manufacturing jobs and wages—as well as a frozen credit market and DHS estimates that the existing CFATS program alone will cost \$18.5 billion by 2015—we believe that drastically changing the rules of our nation's chemical facility security program is neither wise nor warranted. Moreover, and quite importantly, after listening to the testimony of DHS on H.R. 2868 and assessing the current status of DHS's progress in implementing the CFATS program, we are convinced that neither DHS nor Congress is in a position to know if the current program is working; what changes to it, if any, are essential; and whether such changes would be justified by the potential costs. It seems more than reasonable to us that we should extend this program for a few years and actually implement it before we make changes. This program impacts the health of our economy and the security of our citizens. We are disappointed that the Majority of this Committee has rushed to promulgate new legislation and rejected this prudent view of policy.

Aside from the requirements for the performance of vulnerability assessments, site security plans, and emergency response plans, we believe H.R. 2868 is well-intentioned but misguided. While characterized as a national security bill, it is in effect proposed environmental legislation, seeking to address environmental concerns while using the patina of security to justify its efforts. We do not believe that security should be a branch of environmental law and reject the idea that pollution control is the most effective anti-terrorism strategy for our nation.

In particular, we are extremely concerned about Section 2110 of H.R. 2868, requiring an evaluation by facilities of Methods to Reduce the Consequence of a Terrorist Attack and forcing the highest risk facilities to justify to DHS why they should not be forced to make process, input, or storage changes to their respective manufacturing processes and facilities. Exacerbating our concern with these provisions are two things: (1) the remarks at the full committee markup by the Energy and Environment Subcommittee chairman, Mr. Markey, that this bill was not about bolstering security, and (2) the statement by DHS Deputy Under Secretary Philip Reiting, when testifying before the House Homeland Security

Committee on June 16, 2009: “we do not have any positions [at DHS] that are formally IST specialists.”

Moreover, we give serious weight to the October 1, 2009, testimony of Stephen Poorman, on behalf of the Society of Chemical Manufacturers and Affiliates, to our Energy and Environment Subcommittee who stated that inherently safer technology (IST)—the forerunner notion enshrined in Section 2110—is hard to define and that experts have repeatedly testified before Congress that the government should not be in the business of mandating IST because of “significant technical challenges that requires more research.” Considering the implications of the requirements, the enforcement authority attendant to the requirements, and the universe of unique facilities that would be swept into this requirement, we have significant concerns about the mandates being foisted on American businesses and their far-reaching, potentially adverse effects across the industrial, manufacturing, and agricultural sectors.

While the Minority offered an amendment to strike Section 2110, we also made several efforts to bring sanity to the program contained in Section 2110. For instance, one amendment required more chemical engineers be hired by DHS before the provisions of the Act became enforceable. Another amendment prohibited active ingredients in lifesaving drugs from being taken off the market or rendered ineffective by this program. A third provided that mass layoffs for compliance cost reasons could not be the unintended result of these provisions. The Majority rejected each of these insurance policies, arguing, like the Wizard of Oz, to “pay no attention to the man behind the curtain.”

For the record, we note that the most dangerous time at a chemical plant is at either the start up or the shut down of its active operations. We believe we should make efforts to eliminate the proliferation of these events if at all possible. We note that DHS has testified that many facilities, without the benefit of a federal mandate, have voluntarily reduced their risks. These facilities did so because it made sense for many reasons, and these facilities could do it on their own timeline, minimizing risks to their workers, their plants, and the surrounding community.

Finally, on this point, we agree with Neal Langerman, with the American Chemical Society, who explained that the plants covered under Section 2110 are also required to comply with the U.S. Environmental Protection Agency’s Risk Management program and the U.S. Occupational Safety and Health Administration’s Process Safety Management standard. These two federal programs, in addition to the requirements of the Emergency Planning and Community Right to Know Act, provide strong incentives to examine and implement safer processes and prepare for coordinated responses. We need to let these programs work in conjunction with Homeland Security’s mandate to enhance infrastructure security, not try to muscle up on duplicate requirements that frustrate these efforts and the mandates of those separate agencies.

In addition to the above, H.R. 2868 raises genuine national and homeland security concerns by rejecting security-enhancing provisions in favor of environmental law standards in other areas, most notably information protection. H.R. 2868 rejects the congressional tradition since the terrorist attacks of 9–11 that affords broader

protections to sensitive security information, including the vulnerability assessment; site security plan; and the books, records, and notes used to inform them or required to be otherwise kept by DHS. Instead, H.R. 2868 adopts a public “right-to-know” view that only documents and information specifically identified in the law should be included as protected, effectively leaving unprotected materials that may have security implications. We do not underestimate the potential for such materials to be sought in discovery and compelled in litigation by people who wish us harm. For that reason, we are troubled by the legislation’s conscious exclusion of certain materials in Section 2110(g)(1)(C) from protection, allowing them to serve as terror “blue-prints” for the able.

Most strikingly, H.R. 2868 places an extremely high bar on the prosecution of improper disclosures of sensitive, protected information, and requires a showing that such information was divulged “purposefully” before any penalties would apply. This “purposefully” standard must be proven when trying to penalize persons for disclosure of protected, sensitive information. While we applaud the use of civil and criminal penalties in H.R. 2868, we seriously doubt there are many scenarios, if any, in which these sanctions can be enforced. The “purposefully” standard would not allow the United States to prosecute anyone who has been careless, negligent, or reckless with sensitive, protected information. At both subcommittee and full committee we offered the well-established standard of “knowingly or recklessly,” each time being rebuffed by arguments that did not reflect an understanding of the provisions of the bill or an appreciation for what was at stake. We believe a deterrent of a strong penalty is only efficacious if it can actually be enforced. We are disappointed that the Majority did not share this paramount concern as well.

Two other matters that give us pause about this bill are the civil suit provisions in Section 2116 and the pre-emption provisions in Section 2109.

While we believe Section 2116 has improved since introduction of H.R. 2868 by the removal of language permitting citizen suits against a regulated facility, we remain concerned that civil suits generally have no place in national security legislation. The Majority’s main justification for including the language permitting suits against the federal government is based upon experiences with forcing federal entities into compliance with environmental law. Yet, the language is not limited to State action against the federal government; it additionally permits suits against the federal government by “any person”. We are concerned that under the legal construct of Section 2116, suits brought by any outside party against DHS for its failure to take mandatory action at a certain plant allows a plaintiff, through the court system, to gain access to information that this provision is otherwise trying to protect. It is no secret that terrorists hire lawyers, and DHS has testified before Congress that citizen suits may lead to the disclosure of sensitive information in these proceedings. Because we are not aware that either the Obama Administration requested this provision, we question why it is needed at all. We are disappointed the Majority defeated amendments to delete this provision, expressing no sympathy for the unintended consequences it might engender.

Finally, on the matter of preemption, Section 2109 allows States and local governments to enact laws that are more “stringent” than the federal law. This is a new standard to the chemical security program and one derived from federal environmental law. We believe the DHS program should be a uniform, national standard which States and local governments should not disrupt. This is not a novel approach. It is already the case in nuclear, hazmat transportation, aviation, and port security programs where the federal government is the dominant regulator. Embracing a patchwork approach to national security, however, the Majority voted against an amendment offered by the Minority that would have restricted States and local entities from enacting State or local laws that pose obstacles to, hinder, or frustrate the purpose of the chemical facilities terrorism law. While it may be appropriate in localized pollution cases to have State and local laws that are more stringent than the relevant federal environmental statutes, we cannot treat homeland security like a local problem relegated to one area or State.

There are other provisions in this bill that give us pause, but they are secondary to the larger issues we have mentioned. Ultimately, we had hoped that because this bill relates to homeland security protection, long a bipartisan issue, that it would have been possible to reach a legislative compromise. We believe, however, that partisanship and misdirected ideology have left our Committee reporting a bill that naively sacrifices sound homeland security policy in the name of environmental goals.

We will continue to fight the provisions we have identified above because they do not make us safer in defense of the country and people we have taken an oath to protect. Absent significant changes that balance real security with economic freedom; openness with firm, meaningful protections; and local flexibility with a strong, overarching framework; we must oppose this bill, as reported, and urge the Congress to do the same.

JOE BARTON,
Ranking Member.
 GREG WALDEN.
 JOHN SHIMKUS.
 RALPH HALL.
 NATHAN DEAL.
 FRED UPTON.
 CLIFF STEARNS.
 GEORGE RADANOVICH.
 ED WHITFIELD.
 ROY BLUNT.
 STEVE BUYER.
 JOSEPH R. PITTS.
 JOHN SHADEGG.
 TIM MURPHY.
 PHIL GINGREY.
 SUE MYRICK.
 MARY BONO MACK.
 LEE TERRY.
 STEVE SCALISE.

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JOHN SULLIVAN.
MARSHA BLACKBURN.
MICHAEL BURGESS.
MIKE ROGERS.

