

## **Anti-Terrorism Mandates Face Major Revision: Prospective legislation may put more emphasis on inherent safety.**

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**By Lynn L. Bergeson**

Congress is currently focusing on a key piece of legislation to reauthorize the Chemical Facility Anti-Terrorism Standards (CFATS), set to expire on October 4. This may lead to measures that are more far reaching and have a more significant impact upon the chemical industry.

### **CFATS Beginnings**

Section 550 of the Department of Homeland Security (DHS) Appropriations Act of 2007 required DHS to issue interim final regulations to assure the safety of domestic “high- risk” chemical facilities. Under Section 550, a high-risk facility is one that’s determined to present “high levels of security risk.” Facilities using or planning to use a “chemical of concern” above certain screening threshold quantities fall under CFATS requirements. DHS uses a “top-screen” risk analysis process to determine whether a facility presents a “high-risk” level. These determinations are based on available information and seek to assess the potential that a terrorist attack involving the facility could result in significant harm. Covered facilities must conduct a Security Vulnerability Assessment (SVA), followed by development and implementation of Site Security Plans (SSP) designed to satisfy certain risk-based performance standards (RBPS). (For more on CFATS, see “Defuse CFATS Challenges,” and “Get Ready to Comply with New Security Mandates.”)

### **Expiration of Section 550**

Section 550, passed in 2006, wasn’t without controversy. Detractors believed Section 550 didn’t go far enough in compelling consideration and use of “inherently safer technology” (IST). IST generally refers to reducing or eliminating the hazards posed by chemical releases, as opposed merely to controlling them.(See “Rethink Your Approach to Process Safety.”)The National Research Council in 2006 urged DHS to “support research and development to foster cost-effective, inherently safer chemistries and chemical procedures” in addressing risk from terrorists for chemical facilities. A coalition of labor unions and environmental organizations in 2006, for example, criticized the bill and urged passage of measures that required much tighter plant security and use of safer chemicals and technologies.

Another hotly debated topic was the preemptive effect of Section 550 on state and local regulatory initiatives intended to address chemical plant security. Detractors claimed Section 550 went too far to preempt state and local regulations.

### **Headed for a Showdown**

Several bills were submitted in the last Congress. H.R. 5577, the Chemical Facility Anti-Terrorism Act of 2008, would have reauthorized Section 550, but would have required facilities

at the highest risk levels to switch to safer, alternative chemicals where feasible and cost effective. Federal preemption was addressed by precluding the preemptive effect of the CFATS program, thus, according to some, protecting states' rights to impose more-onerous provisions. The bill contains many other provisions too numerous to outline here.

As of this writing, DHS was preparing to introduce a new bill to Congress.. Hearings are likely to convene this summer. Given the change in political landscape, several points can be made.

First, the IST provisions in any reauthorizing legislation may be significantly tougher than in earlier bills. Industry should carefully monitor reauthorization legislation as it could contain measures that could impact chemical plant operations beyond those typically expected under DHS reauthorization legislation.

Second, the state and local preemptive effect of Section 550 can be expected to be revisited by the Obama Administration. President Barack Obama sent a memorandum on May 29 advising department and agency heads that federal preemption will be the exception that makes the rule, and that preemption should "be undertaken only with full consideration of the legitimate prerogatives of the states and with a sufficient legal basis for preemption." This telegraphs a potentially strong message that the Obama Administration may not support reauthorization of Section 550 in a way that would encourage federal preemption.

In short, readers are urged to monitor CFATS reauthorization legislation. Depending upon the scope of any new measures reauthorizing the CFATS program, their reach could be well beyond what might be considered strictly DHS territory.

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*Lynn Bergeson is Chemical Processing's Regulatory Editor. Lynn is managing director of Bergeson & Campbell, P.C., a Washington, D.C.-based law firm that concentrates on chemical industry issues. The views expressed herein are solely those of the author. This column is not intended to provide, nor should be construed as, legal advice.*