NACD KEY ISSUE: CHEMICAL FACILITY SECURITY

NACD ISSUE

Allowing the new Chemical Facility Anti-Terrorism Standards to be fully implemented and assessed before rewriting the rules.

BACKGROUND

More than five years after the 9/11 terrorist attacks on New York and Washington, legislation was signed into law in October 2006 to give the Department of Homeland Security (DHS) authority to regulate security at chemical facilities. Enacted as part of the fiscal year 2007 Homeland Security Appropriations bill, the law authorizes DHS to require chemical facilities to conduct security vulnerability assessments (SVAs) and to implement site security plans (SSPs), based on risk. It includes penalties for non-compliance, including authority for DHS to shut down facilities that fail to comply with the requirements. The major problem with the law is that it was written to sunset in October of this year.

The Chemical Facility Anti-Terrorism Standards (CFATS), to implement the requirements of the 2006 legislation, took effect in June of 2007. Under the CFATS rule, all facilities possessing specified quantities of an extensive list of chemicals were required to submit a completed "Top Screen" consequence assessment to DHS. To date, over 36,000 facilities have submitted Top Screens. DHS has notified these facilities about their Top Screen results, specifically, whether or not they pose enough risk to be required to go on to the next step, and, if so, their initial risk tier assignments. The more than 6400 facilities assigned to risk tiers were then required to complete SVAs. DHS is in the process of evaluating these SVAs and notifying facilities of their final risk tier assignments. Facilities are then required to implement SSPs with increasingly stringent performance standards based on risk. DHS will then inspect covered facilities to ensure that they have implemented their SSPs, and will have authority to impose penalties, including shutting down facilities that fail to comply.

Although CFATS is an extensive new regulation that is still in the process of implementation, Congress is already considering legislation that would make significant changes to the program.

LEGISLATIVE UPDATE

On June 23, the House Homeland Security Committee approved H.R. 2868, the Chemical Facility Anti-Terrorism Act, sponsored by Committee Chairman Bennie Thompson (D-MS). The House Energy and Commerce Committee approved the bill on October 21. The full House of Representatives will take up H.R. 2868 soon. The Senate will likely consider the legislation after the House approves it.

There are several major differences between H.R. 2868 and the current law. Overall, H.R. 2868 is **much more prescriptive** than the current law. Under the current CFATS program, facilities must address risk-based performance standards (RBPS), but DHS cannot mandate specific security measures for facilities. In meeting the RBPSs, facilities are able to adopt measures that are appropriate for their own security issues. In contrast, H.R. 2868 contains several specific "one-size-fits-all" requirements. One of the most problematic mandates would require all facilities to conduct an assessment of the use of inherently safer technologies (ISTs) and would further give DHS the authority to mandate certain facilities in risk tiers 1 and 2 to implement these ISTs. The draft bill also includes a requirement for facilities to conduct annual drills and

exercises with the participation of local officials and emergency responders, sets out specific criteria for employee training and procedures for background checks, and mandates that union representatives be involved in the development of SVAs and SSPs.

Another major difference is that the draft gives explicit authority for states and localities to adopt more stringent standards than those in the federal program. Perhaps most troubling is that **the House Homeland Security Committee version of the bill creates a private right of action for any person to sue a chemical facility for alleged non-compliance**.

On May 19, Representative Charlie Dent (R-PA) introduced H.R. 2477, the Chemical Facility Security Authorization Act, to extend the authority of DHS to regulate chemical facilities until October 1, 2012.

The fiscal year 2010 Homeland Security Appropriations legislation extends DHS's current authority to implement and enforce the CFATS for one year as requested by the Obama Administration.

NACD POSITION

NACD was the first chemical trade association to approve new security measures, as part of its management program, the Responsible Distribution Process℠ (RDP), and has developed a security vulnerability assessment that specifically addresses security issues relevant to chemical distribution facilities. NACD members have invested millions of dollars and substantial resources to safeguard their facilities and the transportation of their products.

NACD was pleased that Congress enacted legislation in 2006 to give DHS the authority to regulate chemical facilities in the area of security. **NACD supports legislation to simply make the CFATS regulations permanent and believes that it is premature to make programmatic changes at this point.** CFATS is still in the implementation process; facilities are still receiving final risk tier assignments and beginning to write and implement their SSPs. DHS will then begin inspecting these facilities. Therefore, it will take a while longer to find out if there are any gaps in the system. CFATS is a major new regulatory program, and DHS has done a commendable job with limited resources in writing the regulations and setting up the internal infrastructure to be able to implement and enforce the new standards. Because of these efforts, real security measures are being implemented at facilities around the nation. Requiring DHS to go back and rework the regulations at this time would be counterproductive. NACD strongly urges Congress to give CFATS more time to be fully implemented and tested before making changes to this important program. While H.R. 2477 is not permanent, it does allow adequate time for CFATS to be fully implemented and evaluated.

In addition to the general concern about premature enactment of new chemical security rules, NACD has significant concerns with the prescriptive nature of the draft chemical security bill.

First, NACD is concerned with the requirement that all covered facilities conduct assessments of "methods to reduce the consequences of a terrorist attack," otherwise known as **"inherently safer technologies" (ISTs),** and that certain facilities in tiers 1 and 2 adopt these measures. The appropriate role of security laws and regulations is not to dictate industrial processes. Significant regulations and incentives already exist for facilities to use the safest materials and methods possible in their operations.

The mandate for each covered facility to conduct an IST assessment is vague; and most chemical distributors would need to hire consultants familiar with IST methods, their likelihood of reducing risk, and their costs in order to complete these assessments. In addition, chemical distributors maintain specific inventories of products in order to respond to the needs of their customers. A requirement to reduce inventories of certain products would prevent these distributors from effectively addressing their customers' needs. This type of requirement could also lead to increased transportation activities, which would increase the likelihood of loading, unloading, or in-transit incidents, including potential security incidents.

During the chemical security debate, there has been substantial discussion about the IST requirement under the state of New Jersey's chemical security regulations and how it has been relatively painless for chemical facilities to comply. **NACD would like to emphasize that the IST provisions in H.R. 2868 are much more extensive than those in the New Jersey regulations**. The IST assessment requirement in New Jersey applies *only* to facilities that handle extremely hazardous, flammable, or reactive chemicals in certain quantities and are covered under the Toxic Catastrophe Prevention Act (TCPA). The requirement in H.R. 2868, on the other hand, applies to **all tiered facilities under the CFATS** program. This would include many small distributors who are covered under CFATS because they handle small quantities of theft and diversion chemicals. In addition, unlike the New Jersey regulation, which only requires an assessment, H.R. 2868 would require certain facilities in risk tiers I and II to actually implement the ISTs.

NACD is also concerned about the specific mandates in the draft bill including those that would require facilities to conduct annual drills and exercises with the participation of local officials and emergency responders, set out specific criteria for employee training and procedures for background checks, and require that union representatives be involved in the development of SVAs and SSPs. These specific measures may not be appropriate for every covered facility. For example, the requirement to conduct yearly drills and exercises that include local law enforcement and emergency responders could place facilities in the position of being out-of-compliance with the regulations because the emergency responders in many locales do not always have the time and resources to spend on these exercises and cannot be forced to participate. NACD strongly supports the concept of such drills and exercises, but urges Congress to allow for flexibility in this area in order to recognize the resource limitations of the local organizations.

In addition, NACD strongly opposes the creation of a private right of action that would allow any individual to sue a chemical facility for alleged non-compliance, which is included in the House Homeland Security Committee version of the bill. H.R. 2868 gives DHS authority to impose substantial civil and administrative penalties as well as the authority to shut down facilities for non-compliance. An additional private right of action is not only unnecessary, but could also divert resources from security enhancements to litigation costs.

Finally, NACD is concerned about the provision of the bill that allows states and localities to adopt and enforce standards more stringent than the federal law. Because the protection of chemical facilities is a national security issue, NACD believes that federal preemption is an important element of an effective chemical security program. There is precedent for federal preemption in the areas of aviation, nuclear, port, and hazardous materials transportation

security. Lack of a strong national standard will result in a patchwork of different chemical security rules throughout the nation, which would make compliance confusing for any company that does business across state lines, which is the industry norm, and would not be in the best interest of national security, the very objective that chemical security legislation is meant to promote.

In closing, NACD again urges Congress to enact straightforward legislation to give DHS permanent authority to regulate chemical facilities, which would allow for the continued implementation and evaluation of the CFATS regulation.