

# CRS Report for Congress

## Chemical Facility Security: Regulation and Issues for Congress

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Dana A. Shea  
Specialist in Science and Technology Policy  
Resources, Science, and Industry Division

Todd B. Tatelman  
Legislative Attorney  
American Law Division



Prepared for Members and  
Committees of Congress

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## Summary

On April 9, 2007, the Department of Homeland Security (DHS) issued an interim final rule (72 *Federal Register* 17688-17745) on chemical facility security, implementing the statutory authority granted in the Homeland Security Appropriations Act, 2007 (P.L. 109-295, Section 550). The regulations require chemical facilities possessing amounts and types of substances considered by the Secretary to be hazardous to notify DHS and undergo a consequence-based screening process. The Secretary then determines which chemical facilities are high-risk and thus need to comply with additional security requirements. High-risk facilities are to be categorized into tiers based on risk, and those with higher risk must comply with more stringent performance-based security requirements.

Under the interim final rule, high-risk chemical facilities are required to create and submit to DHS a vulnerability assessment; create and submit to DHS a site security plan, addressing the vulnerability assessment and complying with the performance-based standards; and implement the site security plan at the chemical facility. The Secretary is to approve or disapprove each step in the process, and may require the chemical facility to improve the submission or implementation.

The interim final rule establishes a new category of protected information, Chemical-terrorism Vulnerability Information (CVI), granting it a status between sensitive but unclassified and classified information. The Secretary has discretion over access to this information, how it may be used, and what will comprise CVI. While the interim final rule states it may preempt future state and local chemical facility security regulations, the 110<sup>th</sup> Congress has narrowed such preemption to when federal regulations have an “actual conflict” with state and local regulations.

These regulations highlight key issues debated in previous Congresses. These issues include what facilities should be considered as chemical facilities; which chemical facilities should be considered as “high-risk” and thus regulated; the scope of the risk-based performance standards for different tiers of high-risk chemical facilities; the appropriateness and scope of federal preemption of existing state chemical facility security regulation; and the availability of information for public comment, potential litigation, and congressional oversight. One key issue not directly addressed by the regulation is the role of inherently safer technology.

Congress may take further action. Since the statutory authority to regulate chemical facilities expires in 2009, policymakers may choose to observe the impact of the current regulations and, if necessary, address any perceived weaknesses at a later date. Congress might attempt to influence its implementation through oversight and report language or through additional legislation. Congress addressed concerns over state preemption through the Consolidated Appropriations Act, 2008 (P.L. 110-161). Three authorizing bills (H.R. 1530, H.R. 1574, and H.R. 1633) on chemical facility security have been introduced in the House, and chemical facility security language has been attached to appropriations bills (H.R. 2638 and S. 1644) and the 2007 farm bill (S. 2302 and H.R. 2419, as amended by the Senate).

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# Chemical Facility Security: Regulation and Issues for Congress

## Introduction

Chemical facility security has been an issue of congressional interest for many years. First considered an environmental issue, the potential for release of toxic chemicals and the associated potential health impacts on surrounding areas became linked to concerns over terrorism following the September 11, 2001 attacks. The passage of Section 550 of the Homeland Security Appropriation Act, 2007 (P.L. 109-295) established statutory authority for the Department of Homeland Security (DHS) to regulate security at select chemical facilities.<sup>1</sup> How DHS implements this authority will likely be an area of intense congressional interest, given that chemical facility security legislation was introduced in each of the previous four Congresses and that this new statutory authority expires three years after enactment.<sup>2</sup>

Chemical facility security authority had been called for by both the Executive and Legislative branches for many years, but disagreements about how chemical facilities should be regulated impeded consensus. The potential for injuries and fatalities following an attack on a chemical facility, as well as the value of the chemical sector to the national economy, led many security experts to suggest that chemical facilities are high-value targets for terrorists. Securing chemical facilities is considered a key component of protecting the nation's critical infrastructure.<sup>3</sup> Enactment of P.L. 109-295 and promulgation of the interim final rule were seen by stakeholders as important steps in protecting chemical facilities against terrorist attack; however, any increase in homeland security will depend on their effective implementation.

This report describes the statutory authority granted to DHS and the interim final rule promulgated by DHS and identifies select issues of contention related to the interim final rule. Finally, this report discusses several possible policy options for Congress.

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<sup>1</sup> Department of Homeland Security Appropriations Act, 2007, P.L. 109-295 § 550, 120 Stat. 1355 (2006) [hereinafter DHS Appropriations Act]. See also 71 *Federal Register* 78276-78332 (December 28, 2006) and 72 *Federal Register* 17688-17745 (April 9, 2007).

<sup>2</sup> See CRS Report RL31530, *Chemical Facility Security*, by Linda-Jo Schierow (providing background on the need for additional security measures, security enhancement options, and legislation in the 109<sup>th</sup> Congress).

<sup>3</sup> Executive Office of the President, The White House, "Critical Infrastructure Identification, Prioritization, and Protection," *Homeland Security Presidential Directive/HSPD-7*, December 17, 2003.

## Authority to Regulate Chemical Facilities

The Homeland Security Appropriations Act, 2007 (P.L. 109-295), Section 550 provides statutory authority to DHS to regulate chemical facilities for security purposes. This law directed the Secretary of Homeland Security to issue interim final regulations establishing risk-based performance standards for chemical facility security and requiring the development of vulnerability assessments and the development and implementation of site security plans.<sup>4</sup> The law specified that these regulations are to apply only to those chemical facilities that the Secretary determines present high levels of security risk.<sup>5</sup> Furthermore, the regulations are to allow regulated entities to employ combinations of security measures to meet the risk-based performance standards.<sup>6</sup>

Under the law, the Secretary must review and approve the required assessment, plan, and implementation for each facility. The statute prohibits the Secretary from disapproving a site security plan on the basis of the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan that does not meet the risk-based performance standards. The Secretary may approve vulnerability assessments and site security plans created through security programs not developed by DHS, so long as the results of these programs meet the risk-based performance standards established in regulation.

Information developed for these regulations is to be protected from public disclosure but may be shared, at the Secretary's discretion, with state and local government officials, including law enforcement officials and first responders possessing the necessary security clearances. Such shared information may not be publicly disclosed, regardless of state or local laws, and is exempt from the Freedom of Information Act (FOIA). Additionally, the information provided to the Secretary,

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<sup>4</sup> These interim final regulations must be issued within six months of the date of enactment of P.L. 109-295. The statutory deadline for the interim final regulations was April 4, 2007. Regulations were issued April 9, 2007.

<sup>5</sup> By statute, some facilities are exempt from these regulations. They are facilities defined as a water system or wastewater treatment works; facilities owned or operated by the Department of Defense or Department of Energy; facilities regulated by the Nuclear Regulatory Commission; and those facilities regulated under the Maritime Transportation Security Act of 2002 (P.L. 107-295).

<sup>6</sup> According to the White House Office of Management and Budget, a performance standard is a standard "that states requirements in terms of required results with criteria for verifying compliance but without stating the methods for achieving required results. A performance standard may define the functional requirements for the item, operational requirements, and/or interface and interchangeability characteristics. A performance standard may be viewed in juxtaposition to a prescriptive standard which may specify design requirements, such as materials to be used, how a requirement is to be achieved, or how an item is to be fabricated or constructed." Office of Management and Budget, The White House, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," *Circular A-119*, February 10, 1998. For example, a performance standard might require that a facility perimeter be secured, while a prescriptive standard might dictate the height and type of fence to be used to secure the perimeter.

along with related vulnerability information, is to be treated as classified information in all judicial and administrative proceedings. Violation of the information protection provision is punishable by fine.

The Secretary must audit and inspect chemical facilities and determine regulatory compliance. If the Secretary finds a facility not in compliance, the Secretary shall write to the facility explaining the deficiencies found, provide an opportunity for the facility to consult with the Secretary, and issue an order to comply by a date determined by the Secretary. If the facility continues to be out of compliance, the Secretary may fine and, eventually, order the facility to close.

Only the Secretary of DHS may bring a lawsuit against a facility owner to enforce provisions of the law. The law does not affect any other federal law regulating chemicals in commerce. The statute contains a “sunset provision” and expires on October 4, 2009, three years from the date of enactment.

Section 550 was amended by the Consolidated Appropriations Act, 2008 (P.L. 110-161) and established a state’s right to promulgate chemical facility security regulation that is at least as stringent as the federal chemical facility security regulation. Only in the case of an “actual conflict” between the federal and state regulation would the state regulation be preempted. The scope of an “actual conflict” was not further defined.

## **Regulations Issued by the Department of Homeland Security**

On April 9, 2007, the Department of Homeland Security issued an interim final rule regarding chemical facility security.<sup>7</sup> This interim final rule, implementing P.L. 109-295, entered into force on June 8, 2007. The interim final rule implements both statutory authority explicit in P.L. 109-295 and authorities DHS found to be implicitly granted.

Under the interim final rule, the Secretary of DHS will determine which chemical facilities must meet the security requirements of these regulations. The decision is to be based on the degree of risk posed by each facility.<sup>8</sup> Chemical facilities with greater than specified quantities of potentially dangerous chemicals are

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<sup>7</sup> 72 *Federal Register* 17688-17745 (April 9, 2007). This interim final rule followed the release of an advanced notice of rulemaking. See 71 *Federal Register* 78276-78332 (December 28, 2006).

<sup>8</sup> This initial screening of chemical facilities will be done on the basis of potential consequence, rather than risk. It is unclear whether compliance with the regulation would reduce the risk status of the chemical facility, since regulatory compliance would presumably decrease the vulnerability of the facility and vulnerability is a factor used to determine risk status. 72 *Federal Register* 17688-17745 (April 9, 2007) at 17700.

be required to submit information to DHS, so that DHS can determine the facility's risk status.<sup>9</sup> High-risk facilities are then categorized into risk-based tiers.

The DHS is to establish a different performance-based requirements for facilities assigned to each risk-based tier. Those facilities identified by DHS as high risk will have additional responsibilities. All high-risk facilities must assess their vulnerabilities, develop an effective security plan, submit these documents to DHS, and implement their security plan. Vulnerability assessments and site security plans developed through alternative security programs will be accepted so long as they meet the tiered, performance-based requirements of the interim final rule. In turn, DHS will approve or disapprove the vulnerability assessments, the site security plans, and their implementation through audit and inspection. The DHS will provide certification of the facility's compliance status.<sup>10</sup>

The vulnerability assessment will serve two purposes under the interim final rule. One is to determine or confirm the placement of the facility in a risk-based tier. The other is to provide a baseline against which to compare the site security plan activities. The DHS requires the vulnerability assessment to include the following components: asset characterization, threat assessment, security vulnerability analysis, risk assessment, and countermeasures analysis.<sup>11</sup>

The site security plans must address the vulnerability assessment by describing how activities in the plan correspond to facility vulnerabilities. Additionally, the site security plan must address preparations for and deterrents against specific modes of potential terrorist attack, as applicable. These modes of attack may include vehicle-borne improvised explosive device; water-borne explosive device; ground assault; or other modes of potential attack identified by DHS.<sup>12</sup> The site security plans must also describe how the activities taken by the facility meet the risk-based performance standards provided by DHS.

All vulnerability assessments and site security plans are to be submitted to DHS for approval. The Secretary may disapprove those assessments or plans that fail to meet DHS standards but not on the basis of the presence or absence of a specific measure. In the case of disapproval, DHS must identify in writing those areas of the assessment and plan that need improvement. Chemical facilities may appeal disapprovals to DHS.

The information generated under this interim final rule, as well as any information developed for chemical facility security purposes that the Secretary determines needs to be protected, will be labeled "Chemical-terrorism Vulnerability

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<sup>9</sup> The list contains approximately 300 chemicals and is specified as Appendix A to the regulation. *72 Federal Register* 65396-65435 (November 20, 2007).

<sup>10</sup> Audit inspections may be conducted by third-party auditors. The DHS plans to issue a future rulemaking regarding the use of third-party auditing. *72 Federal Register* 17688-17745 (April 9, 2007) at 17712.

<sup>11</sup> *72 Federal Register* 17688-17745 (April 9, 2007) at 17732.

<sup>12</sup> *Id.* at 17732.

Information” (CVI), a new category of security-related information. According to the interim final rule, DHS will have sole discretion regarding who will be eligible to receive CVI.<sup>13</sup>

The interim final rule states it will preempt state and local regulation that “conflicts with, hinders, poses an obstacle to or frustrates the purposes of” the federal regulation.<sup>14</sup> States, localities, or affected companies may request a decision from DHS regarding potential conflict between the regulations. Since promulgation of the interim final rule, Congress has amended the DHS’s statutory authority for chemical facility security to state that such preemption will occur only in the case of an “actual conflict.” The DHS has not yet issued revised regulations addressing this change in statute.

The interim final rule establishes penalties for lack of compliance and the disclosure of CVI information. If a facility remains out of compliance with this interim final rule, DHS may order its closure after other penalties, such as fines, have been levied. The interim final rule establishes the process by which chemical facilities can appeal DHS decisions and rulings.

## Key Issues

Chemical facility security was the focus of several congressional hearings and policy debates surrounding proposed legislation in the 109<sup>th</sup> Congress, legislation reported by the House Homeland Security Committee and the Senate Committee on Homeland Security and Governmental Affairs. Some, but not all, of the topics that were considered contentious were addressed by P.L. 109-295. Even so, many of these topics have remained issues of interest to the 110<sup>th</sup> Congress. This section describes several of these topics in light of the enacted provisions: the scope of the regulated facilities, inherently safer technology, federal preemption, and the protection of information.

### Scope of Regulated Facilities

P.L. 109-295 did not specify which facilities should be regulated, and this remains an issue of policy debate. Under the interim final rule, chemical facilities

shall mean any establishment that possesses or plans to possess, at any relevant point in time, a quantity of a chemical substance determined by the Secretary to be potentially dangerous or that meets other risk-related criteria identified by the Department.<sup>15</sup>

Regulated, or covered, facilities represent only a portion of all chemical facilities, being those that present “a high risk of significant adverse consequences for human

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<sup>13</sup> *Id.* at 17738.

<sup>14</sup> *Id.* at 17739.

<sup>15</sup> *Id.* at 17730.



life or health, national security and/or critical economic assets if subjected to terrorist attack, compromise, infiltration, or exploitation.”<sup>16</sup>

The chemical substances determined by the Secretary to be potentially dangerous were reported with the interim final rule. A final rule reporting the list of chemical substances of interest, promulgated as Appendix A to the interim final rule, has been released by DHS.<sup>17</sup> The DHS sought public comment on the chemical list, and the final rulemaking incorporated DHS’s responses to these comments. The list includes chemicals from the Environmental Protection Agency’s Risk Management Program list, the Chemical Weapons Convention schedules, and the Department of Transportation’s list of hazardous materials. The list specifies the amount of each chemical that triggers the reporting requirement. The DHS established three thresholds, for chemical release, for chemical theft or diversion, and for sabotage or contamination. Facilities must assess the chemicals on hand for each type of threshold.

The rule’s definition of chemical facility may describe many facilities.<sup>18</sup> While many, if not most, of these facilities would not be high-risk, DHS will require all of these chemical facilities to complete a consequence-based screening questionnaire to determine their risk category.<sup>19</sup> The DHS will treat facilities not completing such a questionnaire as presumptively high-risk.<sup>20</sup> Such an approach may tax DHS resources, as well as negatively impact small businesses, especially during the initial screening process. Retail propane dealers, for example, have asserted that they would be adversely affected by the proposed threshold.<sup>21</sup> Since the reporting requirement depends on the total amount of chemical of interest held at a chemical facility, not the amount of chemical of interest in a particular storage vessel, facilities that have large numbers of small containers of a chemical of interest may be required to report. Some universities and colleges, not typically considered as a chemical

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<sup>16</sup> *Id.*

<sup>17</sup> 72 *Federal Register* 65396-65435 (November 20, 2007).

<sup>18</sup> The Environmental Protection Agency’s Risk Management Program, a program whose list of chemicals is almost wholly subsumed within the DHS list of chemicals of interest, is estimated to regulate approximately 15,000 facilities. Some of these facilities would fall within the statutory exemptions to chemical security regulation, such as water or wastewater treatment facilities.

<sup>19</sup> In 2005, DHS testified that approximately 3,400 chemical facilities were considered high-risk, having the ability to impact 1,000 or more people. Testimony of Robert B. Stephan, Assistant Secretary for Infrastructure Protection, Department of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on June 15, 2005. The use of a consequence threshold as an approximation of risk, as is used in the initial screening procedure, would likely capture all high-risk facilities if the consequence threshold was set at a low level. That tactic might also capture many non-high-risk facilities.

<sup>20</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17731.

<sup>21</sup> Linda Roeder, “Security Homeland Security Rule Provisions Spur Criticism Over Chemical Thresholds,” *Daily Environment Report*, June 4, 2007.

facility, have asserted that, because of the low threshold for some chemicals of interest, they are likely to have to report to DHS as a chemical facility.<sup>22</sup>

In responding to public comment on the rule, DHS appears to have attempted to address these specific concerns, among others. For example, the threshold amount for propane was increased so that DHS could focus their “security screening effort on industrial and major consumers, regional suppliers, bulk retail, and storage sites and away from non-industrial propane customers.”<sup>23</sup> Other thresholds have also been increased from the initial proposed threshold. Universities and colleges, which may have a significant burden in inventorying their chemical holdings, have been granted the option of requesting additional time to perform necessary work before coming into compliance with the chemical facility regulations.<sup>24</sup>

The Department expects that roughly 40,000 facilities will be required to comply with the reporting requirements of the regulations. The Department estimates that between 1,500 and 6,500 facilities eventually will be covered by risk-based performance measure requirements. Such facilities would have completed the initial screening process and been categorized as falling within one of the four regulated risk tiers.<sup>25</sup> As of December 2007, more than 16,000 facilities had registered with DHS, with more than 1,000 having completed submitting the required screening information.<sup>26</sup>

## **Inherently Safer Technology**

Considerable congressional debate on chemical facility security revolved around the issue of inherently safer technology. During this debate, the application of inherently safer technology as a risk-reducing security measure was generally supported by environmental groups and opposed by industry groups. Environmental groups proposed that reducing the inherent consequences from a release at a chemical facility would increase its security, as the incentive to attack such a lower-consequence facility would be reduced. Industry groups argued that chemical substance and technology changes were business and process safety concerns, not related to security issues, and best left to the discretion of the chemical facility, rather than the federal government.

Both the statute and the interim final rule are silent on the issue of inherently safer technology. Neither recommend nor prohibit the use of inherently safer technology as a security method, assuming that it contributes to meeting the risk-

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<sup>22</sup> Kelly Field, “Chemical-Security Rules Could Pose Huge Burden for Colleges, Critics Say,” *Chronicle of Higher Education Daily News*, June 5, 2007.

<sup>23</sup> 72 *Federal Register* 65396-65435 (November 20, 2007) at 65406.

<sup>24</sup> 72 *Federal Register* 65396-65435 (November 20, 2007) at 65412.

<sup>25</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17723.

<sup>26</sup> Robert B. Stephan, Assistant Secretary for Infrastructure Protection, National Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure Protection, December 12, 2007.

based performance standards put forth by DHS. The risk-based performance standards appear more focused on hardening facilities than on consequence mitigation techniques. Alternatively, use of inherently safer technology may reduce the quantity or type of chemical stored on site, possibly removing the chemical facility from regulation. Both the statute and the interim final rule, in establishing risk-based performance standards, expressly prohibit requiring any specific security measure from chemical facilities.

## Federal Preemption

Another area of congressional debate was whether federal chemical facility security legislation should preempt such activities on the state level.<sup>27</sup> Several states have begun to enact security regulations for chemical facilities.<sup>28</sup> Supporters of explicit federal preemption assert that a patchwork of state regulation provides a competitive disadvantage to companies on a state-by-state basis and may lead to uneven security efforts. Opponents of explicit federal preemption claim that federal security regulation should set a floor, rather than a ceiling, for security efforts; individual states should, in their opinion, be allowed to require additional security measures, so long as the federal standard is surpassed.

The statute was originally silent with respect to preemption; however, the interim final rule contains language indicating that DHS reserves the authority to preempt conflicting state requirements. According to DHS, the balance struck by P.L. 109-295 between DHS security requirements and a facility's flexibility to choose specific security measures must be preserved.<sup>29</sup> The interim final rule's explanatory statement distinguishes, consistent with federal case law, between "field preemption" and "conflict preemption," asserting that the Department intends only the latter to apply to chemical security regulations.<sup>30</sup> As an example, DHS notes that Congress's delegation of authority extends only to those facilities that pose "high levels of

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<sup>27</sup> See *Cong. Rec.* H7968-69 (daily ed. September 29, 2006) (statement of Rep. Barton) (stating that "[d]uring negotiations it was discussed and consciously decided among the authorizing committee negotiators to not include a provision exempting this section from Federal preemption because we do not want a patchwork of chemical facilities that are trying to secure themselves against threats of terrorism caught in a bind of wondering whether their site security complies with all law."). See also *Cong. Rec.* H7967 (daily ed. September 29, 2006) (statement of Rep. King) (noting that the intent of the committee was not to preempt state authority in adopting requirements more stringent than federal standards and concluding that "...it is our understanding, and we had the opinion of committee counsel on this, that [the bill language] does not preempt States.").

<sup>28</sup> New Jersey, arguably the state with the most stringent chemical security regulations, requires the consideration of inherently safer technology as a component of a facility's security plan.

<sup>29</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17727.

<sup>30</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17727 (stating that "[DHS] does not view its regulatory scheme as one which so fully occupies the field as to preempt any state law touching the same subject.").

security risk;” thus, according to DHS, the states remain free to regulate any facility that DHS has determined not to be encompassed by this classification.<sup>31</sup>

According to the statute, “the Secretary may not disapprove a Site Security Plan submitted under this section based on the presence or absence of a particular security measure.”<sup>32</sup> The federal chemical facility security regulation thus does not require the application or use of any particular security measure. The interim final rule then seems to imply that any state regulation that does require a specific security measure would have been preempted, because it “conflicts with, hinders, poses an obstacle to or frustrates the purposes of these regulations or of any approval, disapproval or order issued thereunder.”<sup>33</sup>

Although DHS has indicated that it has not reviewed all existing state regulations for preemption purposes, they assert that these existing state regulations are unlikely to be preempted by the interim final rule. Future state regulations, however, may be found to be preempted. It seems likely that prescriptive state regulations would be interpreted by DHS as preempted by the performance-based federal regulation.<sup>34</sup>

Subsequent to promulgation of the chemical facility security regulations, Congress passed the Consolidated Appropriations Act, 2008 (P.L. 110-161). This law contained a provision that established a state’s right to establish chemical facility security regulation that is at least as stringent as the federal chemical facility security regulation. Only in the case of an “actual conflict” between the federal and state regulation would the state regulation be preempted. The DHS has not yet altered its chemical facility regulation to incorporate this change in statute. Consequently, it is not yet known exactly how DHS will implement this provision in regulation or how DHS will determine whether “actual conflict” arises between state and federal regulation.

## Information Availability

Another issue that generated considerable congressional interest and debate was how, and to what extent, the information created by chemical facilities and submitted to DHS is to be protected from disclosure to the public, industry competitors, and potential bad actors. The Freedom of Information Act (FOIA), which generally applies to records held by agencies of the executive branch of the federal

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<sup>31</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17727.

<sup>32</sup> DHS Appropriations Act, *supra* note 1 at § 550(a).

<sup>33</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17739.

<sup>34</sup> For a legal analysis of preemption and a discussion of DHS’s authority to preempt state law by administrative action, see CRS Congressional Distribution Memorandum, *Legal Analysis of the Preemption Provisions in the Recent Department of Homeland Security’s Chemical Facility Security Advance Notice of Rulemaking*, by Todd B. Tatelman (January 23, 2007) (available from author upon request).

government, regulates the disclosure of government information.<sup>35</sup> The FOIA requires agencies to publish in the *Federal Register* certain records, and to make other records available for public inspection and copying.<sup>36</sup>

While the FOIA contains three specific law enforcement related exclusions and nine exemptions that permit the withholding of certain government-held information, it has been the prevailing view since September 11, 2001, that separate federal statutes prohibiting the disclosure of certain types of information, and authorizing its withholding under the FOIA, are necessary. As a result, several security-related information protection statutes have been enacted by Congress and implemented by the government. Of specific relevance to chemical facilities is the protection regime known as “Sensitive Security Information” (SSI), currently used by the Transportation Security Administration in enforcing the Maritime Transportation Security Act of 2002 (MTSA).<sup>37</sup>

Section 550(c) of P.L. 109-295 contains two specific mandates regarding information protection. The first mandate requires that

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 [MTSA].<sup>38</sup>

The reference to MTSA is considered to be a reference to SSI, which is the information protection regime developed and administered by the Transportation Security Administration and applicable to maritime facilities regulated under MTSA.

The DHS’s interim final chemical facility security regulations expressly recognize the reference to SSI; however, instead of amending the existing SSI regulations to include application to chemical facilities, DHS has implemented a new security-information protection regime, “Chemical-terrorism Vulnerability Information” (CVI).<sup>39</sup>

The interim final rule provides that the following types of information will constitute CVI: (1) vulnerability assessments; (2) site security plans; (3) any

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<sup>35</sup> 5 U.S.C. § 552 *et seq.* (2000). For an overview of FOIA, see CRS Report RL32780, *Freedom of Information Act (FOIA) Amendments: 110th Congress*, by Harold C. Relyea.

<sup>36</sup> See *id.* at § 552(a)(1)-(2).

<sup>37</sup> While initially created for the Department of Transportation in 1974, SSI has been significantly expanded by the Aviation Transportation Security Act of 2001 (ATSA), the Homeland Security Act of 2002, and the Maritime Transportation Security Act of 2002. See CRS Report RL33670, *Protection of Security-Related Information*, by Gina Marie Stevens and Todd B. Tatelman (providing an in-depth discussion of the history, requirements, and litigation that has developed under SSI).

<sup>38</sup> DHS Appropriations Act, *supra* note 1 at § 550(c).

<sup>39</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17727-17739.

documents developed relating to the Department's review and approval of vulnerability assessments and security plans; (4) alternate security plans; (5) documents relating to inspection or audits; (6) any records required to be created or retained under these regulations; (7) sensitive portions of orders, notices or letters (8) information developed to determine the risk posed by chemical facilities, or to determine which facilities are "high risk;" and (9) any other information that the Secretary, in his discretion, determines warrants the protections set forth in this part.<sup>40</sup>

The interim final rule states that "covered persons" must "[d]isclose, or otherwise provide access to, CVI only to covered persons who have a need to know."<sup>41</sup> The interim final rule defines the term "covered persons" as: persons who have a need to know CVI and as persons who otherwise receive access to "what they know or reasonably should know constitutes CVI."<sup>42</sup> According to the interim final rule, persons with the "need to know," which expressly includes state and local officials, are categorized in five ways: (1) persons who require access to carry out activities approved or sanctioned by DHS; (2) persons who require access to train for DHS approved or sanctioned activities; (3) persons required to supervise, manage, or otherwise oversee DHS approved or sanctioned activities; (4) persons who require the information for the purposes of providing technical or legal advice; and (5) persons who are representing a covered person in either an administrative or judicial proceeding.<sup>43</sup>

The interim final rule indicates that DHS may "make an individual's access to the CVI contingent upon satisfactory completion of a security background check or other procedures or requirements for safeguarding CVI that are satisfactory to DHS."<sup>44</sup> Finally, the interim final rule provides DHS with discretionary authority to further limit access to CVI, even if persons otherwise meet the required qualifications. The regulations state that "[f]or some specific CVI, DHS may make a finding that only specific persons or classes of persons have a need to know."<sup>45</sup> It is unclear from this language in what circumstances, or by what standards, DHS will issue such findings.

The second mandate contained in P.L. 109-295 states 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.<sup>46</sup>

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<sup>40</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17737.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 17738.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> DHS Appropriations Act, *supra* note 1 at § 550(c).

The terms “classified material” or “classified information” have been defined in several different contexts. Congress has statutorily defined “classified material” as “[a]ny information or material that has been determined by the United States government pursuant to an Executive Order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security....”<sup>47</sup> Executive Orders have defined “classified information” as “information that ... require[s] protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.”<sup>48</sup> In addition, according to Executive Order, “classified information” may include anything that the original classifying authority determines that “reasonably could be expected to result in damage to national security, which include[s] defense against transnational terrorism, and the original classification authority is able to identify and describe the damage.”<sup>49</sup>

As a result of this congressional mandate and the nature of the information at issue, DHS has indicated that in administrative proceedings and litigation before courts, CVI will only be disclosed under the narrowest of parameters consistent with Executive Orders and other congressional enactments. In administrative proceedings, DHS indicates that CVI will only be disclosed at the Secretary’s sole discretion and only when it “is necessary for the person to prepare a response to allegations contained in a legal enforcement action document issued by the Department.”<sup>50</sup> Even in such a circumstance, DHS reserves the right to require the requesting person or entity to undergo and satisfy a security background check before receiving the information.<sup>51</sup>

Similarly, in litigation arising out of enforcement actions, whether civil or criminal, DHS has implemented a system of applicable procedures akin to those contained in both the Classified Information Protection Act,<sup>52</sup> and at 18 U.S.C. § 2339B. For example, DHS will permit reviewing courts, after an opportunity to independently view the documents, to authorize one of the following as a substitute for CVI sought in discovery: (1) A redacted version of the CVI documents; (2) a summary of the information contained in the CVI documents; or (3) a statement admitting relevant facts that the CVI documents would tend to prove.<sup>53</sup> The interim final rule also provides protections against the disclosure of CVI through live witness testimony.<sup>54</sup> Moreover, in the event that the Government objects to a witness’s testimony, the regulations authorize the court to consider an *ex parte* proffer by the Government on what the witness is likely to say, as well as a proffer from the

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<sup>47</sup> Classified Information Procedures Act, P.L. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. App. 3 §§ 1-16 (2000)) [hereinafter CIPA].

<sup>48</sup> Exec. Order No. 12958 § 6.1(h), 60 *Federal Register* 19825 (April 20, 1995).

<sup>49</sup> Exec. Order No. 13292 §1.1(a)(4), 68 *Federal Register* 15315 (March 28, 2003).

<sup>50</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17738.

<sup>51</sup> *Id.*

<sup>52</sup> See CIPA, *supra* note 45.

<sup>53</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17738-17739.

<sup>54</sup> *Id.*

defendant of the nature of the information sought.<sup>55</sup> Further, the interim final rule permits the Department to immediately appeal if a court denies any request related to the disclosure of CVI.<sup>56</sup> Finally, the interim final rule expressly states that no CVI will be provided in any civil litigation unrelated to the enforcement of Section 550.<sup>57</sup>

## Expiration of Regulations and Authority

The meaning of the expiration provision of P.L. 109-295 appears to be the subject of some uncertainty. The statute states:

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 supercede this section. Provided, [t]hat the authority provided by this section shall terminate three years after the date of enactment of this Act.<sup>58</sup>

In the preamble to DHS's proposed regulations the Department suggests that notwithstanding the plain text of the statute, should future funds be appropriated by Congress, even in the absence of an authorizing statute, the regulations and the authority to enforce them would continue as though sufficiently authorized.<sup>59</sup>

As a general rule, there is no specific statutory or other legal requirements that appropriations be preceded by specific authorizations. As a result, Congress may, subject to possible procedural points of order,<sup>60</sup> appropriate funds for programs that exceed the scope and/or duration of a prior authorization. In instances where Congress has opted for this type of action, the enacted appropriation has been interpreted by the Comptroller General to, in effect, carry with it its own authorization and, therefore, is to be available to the agency for obligation and expenditure.<sup>61</sup> In addition, the Comptroller General has also held that, as a general proposition, the appropriation of funds for a program whose funding authorization has expired, or is about to expire during the period of availability of the appropriation (e.g., authorization expires during a fiscal year for which money has already been appropriated), provides sufficient legal basis to continue a program during that period

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> DHS Appropriations Act, *supra* note 1 at § 550(b).

<sup>59</sup> See 71 *Federal Register* 78276-78332 (December 28, 2006) at 78276 and 78281 (stating that “[i]f a future appropriations bill continued funding for the Section 550 program beyond that period, the Department could consider that future funding for the program as an extension of the ‘authority provided by this section.’”).

<sup>60</sup> Rule XXI(2) of the Rules of the House of Representatives prohibits appropriations for objects not previously authorized by law. A similar, but more limited, prohibition exists in Rule XVI of the Standing Rules of the Senate. Each of these provisions must be raised via a “point of order,” which may be overcome by a super-majority vote in each chamber.

<sup>61</sup> See 67 Comp. Gen. 401 (1988).



of availability, even when expressed congressional intent appears to be contrary.<sup>62</sup> Given these general rules, it would appear that should Congress appropriate funds to DHS for the purpose of continuing to secure chemical facilities, even after the expiration of the Section 550 authorization, sufficient legal authority would exist for the regulations to remain in effect.

## Policy Options

Reaction to the proposed regulation and the interim final rule has been mixed. Some policymakers and advocates have criticized the approach taken by DHS. Others have been supportive. As written, the law anticipates further legislative activity in this area. Policymakers may decide to wait and observe how the final interim rule is implemented, attempt to influence DHS's implementation of the interim final rule, or legislate to alter or supersede the enacted legislation.

### Maintain Status Quo

The authority to federally regulate chemical facility security is new. As such, regulation in this area may need time to mature. Congress, when passing P.L. 109-295, contemplated the eventual supersession of these regulations:

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, [t]hat the authority provided by this section shall terminate three years after the date of enactment of this Act.<sup>63</sup>

Policymakers may view this regulatory authority, and thus these regulations, as a stop-gap measure, providing a temporary solution to the perceived chemical security problem, with the intent of allowing the security policy debate to further mature. In this case, policymakers may decide to wait, allowing DHS to implement its interim final rule before considering changes in chemical facility security policy. This might more fully reveal the impacts of the current regulation.

### Attempt to Influence Implementation

The statutory language of P.L. 109-295, Section 550 grants significant discretion to the Secretary. The interpretation and application of this discretion by the Secretary, particularly in the areas of information protection and state preemption, were the source of some of the criticisms levied against the proposed regulations.<sup>64</sup>

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<sup>62</sup> See, e.g., 65 Comp. Gen. 524 (1986); 65 Comp. Gen. 318, 320-21 (1986); 55 Comp. Gen. 289 (1975).

<sup>63</sup> DHS Appropriations Act, *supra* note 1 at § 550.

<sup>64</sup> John Heilprin, "Chemical Plants to Submit Security Plans," *Associated Press*, December 22, 2006; Greg Gordon, "New Rules Aim to Protect Chemical Plants from Terrorists," *San* (continued...)

While discretionary authority may be important to the effective and efficient implementation of a regulatory structure, policymakers may believe that execution of this discretionary authority has been counter to congressional intent. Policymakers may decide to influence the manner in which the Secretary exercises this discretion.

The DHS requested public comment from interested parties on questions, issues, and the proposed regulatory language.<sup>65</sup> As such, the comments of policymakers, advocates and interested parties influenced the form and language of the interim final rule. Through comments to the docket, policymakers expressed support for and criticism of the proposed regulations.<sup>66</sup> The docket for the proposed regulation closed on February 7, 2007. The interim final rule, promulgated on April 9, 2007, took account of these comments, addressing them as the Department deemed appropriate.

Policymakers may conclude that they are dissatisfied with the form of the interim final rule. If this is the case, policymakers could act to more explicitly describe and limit the discretionary scope granted to the Secretary. They may influence the interim final rule's implementation through the congressional oversight process by clarifying congressional intent, through hearings on the interim final rule's implementation, or through language added to DHS appropriations reports.

## Legislative Alternatives

Policymakers may decide that additional legislation is necessary in the chemical facility security area. Such legislation could be targeted in nature, attempting to remedy perceived flaws by slightly altering the existing authorities granted to DHS, or more comprehensive. A more comprehensive approach may make substantive changes in the existing authorities and thus extensive revision of any chemical facility security regulation.

Policymakers may ultimately decide that the regulatory structure established by DHS does not satisfy homeland security needs or will prove too onerous to industry and opt to enact new chemical facility legislation. Such legislation might expand the reach of the regulatory structure, for example, by mandating the inclusion of particular chemical substances as potentially dangerous; restrict the scope of regulation, for example, by lowering regulatory burdens or requirements on small businesses; or direct the agency to include or exclude particular components from its regulations.

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<sup>64</sup> (...continued)

*Jose Mercury News*, December 22, 2006.

<sup>65</sup> 71 *Federal Register* 78276-78332 (December 28, 2006) at 78277. An electronic docket for this proposed regulation was established at [<http://www.regulations.gov>] under docket identification number DHS-2006-0073.

<sup>66</sup> Comments submitted to the docket may be viewed online at [<http://www.regulations.gov>] under docket identification number DHS-2006-0073.

Developing new legislation, or changing existing legislation, to alter the DHS interim final rule may bring additional costs, especially to facilities that have already come into compliance. If new regulations, established under new or amended authority, present new requirements for chemical facilities, security efforts enacted under the original interim final rule may not be entirely applicable. Chemical facilities may be required to invest in additional security measures to meet these new requirements, potentially incurring further cost. When considering whether to enact new legislation or amend existing law, policymakers may opt to consider methods to mitigate additional costs to chemical facilities that have already complied with the interim final rule. As the initial statute had a three-year sunset provision, Congress may have intended that future legislation build upon P.L. 109-295, Section 550, so that future regulations would be harmonized with the interim final rule initially promulgated.

**Legislation in the 110<sup>th</sup> Congress.** Legislative efforts are under way in the 110<sup>th</sup> Congress to alter DHS's statutory authority to regulate chemical facilities. The Consolidated Appropriations Act, 2008 (P.L. 110-161) contained provisions affecting the chemical security regulations. Three freestanding bills have been introduced in the House of Representatives and chemical facility security provisions are found in the Senate farm bill (S. 2302) and the House and Senate DHS 2008 appropriations bills. Finally, chemical facility security provisions were included in the vetoed FY2007 supplemental appropriation bill (H.R. 1591).

The Consolidated Appropriations Act, 2008 (P.L. 110-161) amended Section 550 of the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295) to establish a state's right to promulgate chemical facility security regulation that is at least as stringent as the federal chemical facility security regulation. Only in the case of an "actual conflict" between the federal and state regulation would the state regulation be preempted. The DHS has not yet altered its chemical facility regulation to incorporate this change in statute.

The Safe Facilities Act (H.R. 1574) would attempt to preserve state chemical facility security authority by preventing federal preemption of state chemical facility security laws and regulations that are more stringent than the federal standard. Similarly, H.R. 1633 would attempt to preserve state chemical facility security authority by prohibiting the Secretary from promulgating chemical facility security regulations that preempt more stringent state chemical facility security regulations.

The Chemical Facility Security Improvement Act of 2007 (H.R. 1530) also would attempt to preserve state chemical facility security laws and regulations, but it contains additional provisions. It would limit the chemical facility security information protected from disclosure to vulnerability assessments and site security plans. Chemical facility security information would be treated in judicial proceedings as Sensitive Security Information (SSI), rather than as classified material.<sup>67</sup> It would allow the Secretary to disapprove a site security plan based on

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<sup>67</sup> See CRS Report RL33670, *Protection of Security-Related Information*, by Gina Marie Stevens and Todd B. Tatelman (providing an in-depth discussion of the history, (continued...))

the presence or absence of a particular security measure. Finally, it would grant others besides the Secretary a right of legal action to enforce security provisions.

The 2007 farm bill (H.R. 2419, as amended by the Senate) addresses the impact of chemical facility security regulations on possessors of propane. It would require the DHS Secretary to provide a report to Congress that enumerated details regarding propane-possessing facilities that were required to comply with chemical facility security regulations. It would also require educational outreach by DHS to rural, propane-possessing facilities, possibly facilitated by the Food and Agricultural Sector Coordinating Council. H.R. 2419, as amended by the Senate, passed the Senate on December 14, 2007, and the House of Representatives, in its unamended form, on July 27, 2007. It has not yet reported from conference.

An earlier version of the Senate 2007 farm bill (S. 2302, Food and Energy Security Act of 2007) contains a provision related to chemical facility security. Section 11070 would prohibit the DHS Secretary from applying the chemical facility security regulations to sale, use, or storage of propane at rural chemical facilities. It would not prohibit the DHS Secretary from applying such regulations to nonrural facilities. S. 2302 was reported out of the Senate Committee on Agriculture, Nutrition, and Forestry on November 2, 2007.

The Department of Homeland Security Appropriations Act, 2008 (S. 1644) would attempt to preserve state chemical facility security laws and regulations by preventing federal preemption of state chemical facility security regulations that are more stringent than the federal standard. Only in the case of “actual conflict” would state law be preempted. S. 1644 was reported out of the Senate Committee on Appropriations on June 18, 2007. The Department of Homeland Security Appropriations Act, 2008 (H.R. 2638) would attempt to preserve state chemical facility security laws and regulations by preventing federal preemption of state chemical facility security regulations that are more stringent than the federal standard. It would also limit the chemical security information protected and treat protected information as SSI. H.R. 2638 passed the House of Representatives on June 15, 2007. The Senate amended H.R. 2638 with the language of S. 1644. H.R. 2638 passed the Senate on July 26, 2007. No further action was taken since the Consolidated Appropriations Act, 2008 (P.L. 110-161), discussed above, provided appropriations for DHS.

Chemical facility security provisions were included in the vetoed FY2007 supplemental appropriations bill. The chemical facility security provisions of the U.S. Troop Readiness, Veterans’ Health, and Iraq Accountability Act, 2007 (H.R. 1591) would have attempted to preserve state chemical facility security laws and regulations; limited the scope of information protected as chemical security information; and treated protected information as SSI.

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<sup>67</sup> (...continued)

requirements, and litigation that has developed under SSI).