

September 28, 2009

The Honorable Henry Waxman
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Waxman and Ranking Member Barton:

As the leading chemical and petrochemical manufacturers, purchasers, distributors, and related organizations in the United States, we write to express our concerns about H.R. 2868, the “Chemical Facility Anti-Terrorism Act of 2009.”

Our industries recognize and take seriously the need to protect our nation’s chemical plants, storage facilities, and infrastructure against security threats and potential terrorist attacks. Since 2006, businesses have spent approximately \$4 billion to enhance the security of our own chemical facilities and systems.* Given the importance of these safety issues, we generally have supported the federal government’s efforts to develop and implement reasonable risk-based and performance-oriented security standards that focus on facilities posing the greatest risk to our workers, communities, and national security interests. To that end, we have worked constructively with the U.S. Department of Homeland Security (DHS) in providing valuable input for the Chemical Facility Anti-Terrorism Standards (CFATS) program and are actively working to implement these new standards.

Notwithstanding our support for DHS’s effort to implement the CFATS, however, we have significant concerns with three provisions in the “Chemical Facility Anti-Terrorism Act of 2009,” currently pending before the House Energy and Commerce Committee.

First, we believe the legislation’s anti-preemption provision (Section 2109), which would permit state and local governments to adopt or enforce standards more stringent than those required by federal law, would greatly burden industry with no concomitant benefits for public safety. As reflected in the title and findings of H.R. 2868, the protection of chemical facilities against terrorist activities is a matter of national security.

Thus, as with other national security issues – such as nuclear, hazmat transportation, aviation, and port security – chemical facility security should be regulated solely by the federal government.

* See Regulatory Assessment for the Chemical Facility Anti-Terrorism Standards (CFATS), DHS-2006-0073, April 1, 2007, U.S. Department of Homeland Security. The Assessment estimates that the cost of complying with the CFATS interim final rule could be approximately \$9 billion over the period 2006-2015.

Federal preemption is critical to the legislation's overarching goals. Absent uniform national standards, businesses will be subject to a patchwork of differing and possibly conflicting regulations. Such an approach would force facilities to sort through a dizzying maze of potentially contradictory regulations and could divert scarce resources to complying with disparate requirements that do not necessarily advance national security interests. This patchwork of state and federal regulation would breed confusion for the myriad companies operating in multiple states.

Second, we also have strong concerns about the bill's "citizen suit" provision (Section 2116), which would allow any person – even those who have not suffered any harm – to bring suit against regulated facilities or the DHS to enforce compliance with the act. Although such private rights of action are common in environmental statutes, the performance-oriented requirements of the CFATS are not well suited to enforcement by citizen suits. This is so because CFATS's performance-based standards provide facilities the flexibility to decide which security measures or technologies to adopt. Allowing layperson litigants rather than DHS security specialists to challenge a facility's selection of security measures will not enhance security in any meaningful way.

Furthermore, we share the DHS's concerns that broad discovery rights in federal lawsuits could lead to public disclosure of classified or highly sensitive information that could assist terrorists. Such information likely would include the types and amounts of chemicals stored at a facility, the specific locations of the chemicals, and the security measures in place to protect the chemicals. As DHS Deputy Under Secretary Philip Reitingger testified in June before the House Homeland Security Committee:

The Department is concerned about the potential for disclosure of sensitive or classified information in such proceedings. Similarly, the Department urges that it retain discretion in determining the manner and extent to which information about the reasons for placing a facility in a given tier is divulged, as those reasons may involve classified information.

In short, the citizen suit provision will not enhance enforcement of the chemical facility regulations or promote the objectives of the "Chemical Facility Anti-Terrorism Act of 2009." To the contrary, the provision will only encourage costly lawsuits, divert resources from implementation of the CFATS and compliance with the act, and enrich lawyers at the expense of national security interests.

Finally, we strongly oppose the bill's provision (Section 2111) requiring all covered chemical facilities to assess so-called "inherently safer technologies" (ISTs) and mandating that chemical facilities assigned to "tier 1" or "tier 2" actually implement ISTs, if so ordered by DHS. This provision essentially provides DHS the authority to implement manufacturing process changes, an action that is unnecessary and potentially very disruptive to many chemical facilities. The performance-based CFATS already provide chemical facilities with powerful incentives to implement enhanced safety measures, improve processes, and substitute safer chemicals. Notably, the CFATS program allows facilities to move to a lower-risk tier (or out of the program all together) if risk profiles are reduced and vulnerabilities are minimized. Mandating adoption of government-selected ISTs would gut the core of the CFATS without reducing real risks.

The cost of assessing ISTs also would be unduly burdensome for smaller chemical facilities and could hinder overall efforts at improving security. Smaller facilities that use or store relatively modest amounts of chemicals (rather than manufacturing them) would be required to retain expensive consultants and chemical safety engineers simply to assess the existence and feasibility of ISTs. These operations, already suffering from the ongoing economic crisis, will have even fewer resources to dedicate to actual security enhancements if forced to conduct costly IST assessments.

In addition, an IST mandate, if enacted, could lead to disruption in our nation's food supply. In the agriculture industry, such a directive could jeopardize the availability of lower-cost sources of plant nutrient products or certain agricultural pesticides used by farmers.

For all of these reasons, we strongly urge the committee to remove the anti-preemption, citizen suit, and IST provisions from H.R. 2868.

Sincerely,

Agricultural Retailers Association
American Farm Bureau Federation
American Forest & Paper Association
American Petroleum Institute
American Trucking Associations
Association of Oil Pipe Lines
Chemical Producers and Distributors Association
Consumer Specialty Products Association
Environmental Technology Council
Institute of Makers of Explosives
International Association of Refrigerated Warehouses
International Liquid Terminals Association
International Warehouse Logistics Association
National Agriculture Aviation Association
National Association of Chemical Distributors
National Association of Manufacturers
National Mining Association
National Oilseed Processors Association
National Paint and Coatings Association
National Pest Management Association
National Petrochemical & Refiners Association
National Propane Gas Association
North American Millers' Association
Petroleum Equipment Suppliers Association
Petroleum Marketers Association of America
The Fertilizer Institute
U.S. Chamber of Commerce