

Homeland Security Bulletin

JULY 2003

Senate Considers Competing Bills to Address Security at Chemical Manufacturing and Processing Facilities

The U.S. Senate is considering two competing bills aimed at strengthening security measures for the nation's chemical facilities. The Bush Administration is supporting a measure sponsored by Sen. James M. Inhofe (R-OK) entitled the Chemical Facilities Security Act of 2003. Inhofe's bill is considered by some to be a more workable alternative to a measure that was introduced by Sen. Jon Corzine (D-NJ).

The core purpose of both bills is the same: to require owners or operators of chemical "sources" to assess their facilities' vulnerability to terrorist attacks and to implement security or prevention and response plans that address the results of the assessment in order to reduce the vulnerability of the facility to terrorist attacks. The bills, however, differ in their approaches.

Both bills initially define "chemical sources" using section 112(r)(2) of the Clean Air Act, which refers to a list of regulated substances that could cause death, injury or serious adverse effects to human health or the environment upon release. Facilities with more than the the Environmental Protection Agency ("EPA") designated threshold quantity of those substances (500 to 20,000 pounds depending on the substance) pursuant to 40 CFR Part 68 would fall within both bills' requirements. The Corzine measure is potentially more inclusive because it authorizes the EPA to include sources it deems "high priority." Chemical Security Act of 2003, S. 157, 108th Cong. § 3(2)&(3) (2003). The criteria that the EPA would use in making these determinations are both broad and vague, ranging from whether the substance could cause "harm" upon release, to the potentially limitless

"other factors as appropriate." S. 157 § 4(2). EPA would have the discretion to determine which chemical sources fall into "high priority" categories governed by the Act. S. 157 §4(1).

The Inhofe measure is not quite so expansive. It also identifies "sources" within the meaning of section 112(r)(2) but requires that the source be one that already completed a risk management plan under section 112(r)(7)(B)(ii) of the Clean Air Act. Chemical Facilities Security Act of 2003, S. 994 § 3(1)(A). If that criterion is met, the Secretary of Homeland Security can include other facilities handling substances of concern, which might include "other chemical substances as the Secretary may designate," using criteria substantially similar to those in the Corzine bill. S. 994 § 3 (8)(B) (2003).

The bills' most notable differences are the types of measures companies would need to take to reduce perceived threats and the spectrum of review by the oversight agencies.

Under the Corzine bill, oversight would rest with the Environmental Protection Agency ("EPA") and would require chemical sources that EPA designates as "high priority" risks to implement certain measures in its prevention and response plans, including "safer design and maintenance of the chemical source, to eliminate or significantly lessen the potential consequences of an unauthorized release of a covered substance of concern." S. 157 § 4(3)(B).

Those measures could include, among other things, preventing or reducing the vulnerability of the chemical

source to a release of a covered substance of concern through use of inherently safer technologies. Other measures, such as buffer zones, can be found in the summary table attached to this article. S. 157 § 3(7).

The Corzine bill defines “inherently safer technology” as a use of a technology, product, raw material or practice that, as compared with those currently in use, “(i) reduces or eliminates the possibility of a release of a substance of concern from the chemical source prior to secondary containment, control or mitigation; and (ii) reduces or eliminates the threats to public health and the environment associated with a release or potential release of a substance of concern from the chemical source.” S. 157 § 3(11)(A).

Arguably, businesses deemed “high priority” could be subject to expensive retrofits under the Corzine measure because, under the bill, the “use of inherently safer technology” includes “input substitution, catalyst or carrier substitution, process redesign (including reuse or recycling of a substance of concern), product reformulation, procedure simplification, and technology modification so as to:

- (i) use less hazardous substances or benign substances;
- (ii) use a smaller quantity of covered substances of concern;
- (iii) reduce hazardous pressures or temperatures;
- (iv) reduce the possibility and potential consequences of equipment failure and human error;
- (v) improve inventory control and chemical use efficiency; and
- (vi) reduce or eliminate storage, transportation, handling, disposal, and discharge of substances of concern.” S. 157 § 3(11)(B).

The implications of such expansive authority could be far-reaching, including possible Fifth Amendment “Takings” implications in the patent context, if the EPA

determined, for example, that valuable patented technologies must be replaced by “inherently safer technologies.” The inclusion of “inherently safer technologies” in the Corzine bill is reported to be one of the key sticking points in the behind-the-scenes negotiations in the Senate.

The Inhofe bill, on the other hand, avoids injecting federal agencies into production decisions (inputs, catalysts, processes, etc.). Instead, it focuses more directly on security and contains very specific examples of how businesses must address their security needs (e.g., employee background checks, intrusion detection devices, access control). S. 994 § 3(7)(B). A complete list of the security measures proposed in the Inhofe bill is in the attached table.

Sen. Inhofe’s measure would give oversight authority to the Department of Homeland Security (“DHS”), which would be charged with promulgating regulations that establish procedures, protocols and standards for the vulnerability assessments and the site security plans. S. 994 § 4(a)(1). According to a Senate insider, Democrats may be willing to compromise on giving DHS oversight authority, but they are still pressing for a continued role for EPA. Republicans, however, believe that DHS has the more appropriate expertise to oversee homeland security measures.

Another key battleground is the requirement of submissions to regulators and the breadth of oversight. Sen. Inhofe’s bill does not require assessments and security plans to be submitted to DHS, except upon request. S. 994 § 4(b)(2). The bill’s Republican backers foresee an “audit” system where DHS would have the flexibility to focus on selected sites it deems most at risk. The Corzine bill, on the other hand, would require all of the approximately 15,000 high priority sites to submit their assessments and plans for approval. S. 157 § 4(b). It would also give EPA the power to determine if the facilities are in compliance by

analyzing whether the plans sufficiently address certain risk factors. S. 157 § 5(a)(1).

The Corzine bill also includes a unique enforcement provision. If, after approval of a plan by the EPA, the Secretary determines that a threat of a terrorist attack exists beyond what is addressed in the plan, it can notify the facility. S. 157 § 5(d)(1). If the facility does not respond sufficiently, the Secretary can issue an order to obtain “such relief as is necessary to abate a threat,” which presumably includes shutting down the facility. S. 157 § 5(d)(3). Such a scenario could lead to due-process concerns, especially if, as might be expected, the Secretary refuses to reveal the basis for the order on national security grounds. This provision is reportedly the subject of ongoing negotiations.

The bills also differ in how the agencies would credit chemical facilities for security measures already voluntarily implemented. Under the Inhofe plan, chemical sources that have already prepared vulnerability assessments and security plans in line with the bill would be exempt from having to re-do the

assessments or plans. S. 994 § 4(d). Under Corzine’s measure, there is no automatic grandfathering for early compliers, but facilities could apply for an affirmative determination by EPA that their assessments or plans comply with proposed regulations prior to the final publication of proposed regulations. S. 157 § 5(a)(2)(C).

Both bills are currently being considered by the Senate Committee on Environment and Public Works. No hearings have been scheduled, though several Senators, including Sen. Jeffords and Sen. Inhofe, are working to craft a compromise. Once passed, any Senate bill will have an uncertain future in the House. A companion bill to the Corzine proposal was introduced in the House by Rep. Frank Pallone Jr. (D-NJ).

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CHEMICAL SECURITY BILLS – A SIDE-BY-SIDE COMPARISON OF KEY PROVISIONS

<i>Category</i>	<i>Sen. Inhofe Bill (Bush Administration)</i>	<i>Sen. Corzine Bill</i>
Title	Chemical Facilities Security Act of 2003	Chemical Security Act of 2003
Bill Number	S. 994	S. 157
Oversight Agency	Department of Homeland Security (DHS)	Environmental Protection Agency (EPA)
Applies to:	<p>Chemical sources: stationary source (as defined in § 112(r)(2) of the Clean Air Act (42 U.S.C. § 7412(r)(2)) for which:</p> <ul style="list-style-type: none"> (A) the owner or operator is required to complete a risk management plan in accordance with section 112(r)(7)(B)(ii) of the Clean Air Act; and (B) Secretary is required to promulgate implementing regulations under . . . the Act. <ul style="list-style-type: none"> ■ Secretary of DHS may designate certain chemical substances in particular quantities “substances of concern” or may exempt certain substances from that designation. 	<p>Chemical sources: stationary source (as defined in § 112(r)(2) of the Clean Air Act (42 U.S.C. § 7412(r)(2)) that contains a “substance of concern” deemed “a high priority” by the Administrator.</p> <p>“High priority categories” to be determined by EPA based on:</p> <ul style="list-style-type: none"> (A) the severity of the harm that could be caused by an unauthorized release; (B) the proximity to population centers; (C) the threats to national security; (D) the threats to critical infrastructure; (E) threshold quantities of substances of concern that pose a serious threat; and (F) such other safety or security factors as the Administrator, in consultation with the head of the Office, determines to be appropriate.
Vulnerability Assessments	<p>Within one year of enactment of law, Secretary of DHS will promulgate regulations requiring owner or operator to conduct assessment of vulnerability of the chemical source to a terrorist release, including identifying hazards that may result from terrorist release. DHS will determine time frame allowed for conducting assessment.</p> <ul style="list-style-type: none"> ■ Secretary of DHS may promulgate regulations establishing procedures, protocols, and standards for vulnerability assessments. 	<p>EPA has one year from enactment of law to promulgate regulations (in consultation with the United States Chemical Safety and Hazard Investigation Board and state and local agencies).</p> <ul style="list-style-type: none"> ■ Source has one year from promulgation of regulations to conduct an assessment of the vulnerability of the chemical source to a terrorist attack or other unauthorized release and identify hazards that may result from an unauthorized release of a covered substance of concern.

Category	<i>Sen. Inhofe Bill (Bush Administration)</i>	<i>Sen. Corzine Bill</i>
Security/Response Plans	<p>Within one year of enactment of law, DHS will promulgate regulations requiring facilities to prepare and implement site security plans that address the results of the vulnerability assessment. DHS will determine time frame allowed for conducting assessment.</p> <ul style="list-style-type: none"> ■ Secretary of DHS may promulgate regulations establishing procedures, protocols, and standards for site security plans. 	<p>Within 18 months of EPA’s promulgation of regulations, source must prepare a prevention, preparedness and response plan that incorporates the results of the vulnerability and hazard assessments.</p>
Contents of Security/Response Plans	<ul style="list-style-type: none"> ■ Shall include security measures to reduce vulnerability of the chemical source covered by the plan to terrorist release (defined as a release caused by an act of terrorism or a theft by a person for off-site release in furtherance of an act of terrorism). ■ May include other actions and procedures appropriate to reduce the vulnerability of the chemical source to a terrorist release. ■ Shall describe, at a minimum, particular equipment, plans, and procedures that could be implemented or used by or at the chemical source in the event of a terrorist release. 	<ul style="list-style-type: none"> ■ Shall include actions and procedures, including safer design and maintenance of the chemical source, to eliminate or significantly lessen the potential consequences of an unauthorized release of a covered substance of concern. ■ “Safer design and maintenance” includes, to the extent practicable, (A) use of “inherently safer technology”; (B) use of well-maintained secondary containment, control or mitigation equipment; (C) implementing security measures; and (D) use of buffer zones between the chemical source and surrounding populations (e.g., residences, schools, hospitals, senior centers, shopping centers, malls, sports and entertainment arenas, public roads and transportation routes, and other population centers).
Enumerated Security Measures	<ul style="list-style-type: none"> ■ An employee training and background check; ■ The limitation and prevention of access to controls of the chemical source; ■ The protection of the perimeter of the chemical source; ■ The installation and operation of intrusion detection sensors; 	<ul style="list-style-type: none"> ■ Defines “inherently safer technology” as a use of a technology, product, raw material or practice that, as compared with those currently in use: (i) reduces or eliminates the possibility of a release of a substance of concern from the chemical source prior to secondary

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<p>Enumerated Security Measures (cont.)</p>	<ul style="list-style-type: none"> ■ The implementation of measures to increase computer or computer network security; ■ The implementation of other security-related measures to protect against or reduce the threat of – <ul style="list-style-type: none"> (i) an attack on the chemical source; or (ii) the theft of a substance of concern for the purpose of off-site release or act of terrorism; and ■ Conduct of any similar activity, as determined by the Secretary. 	<p>containment, control or mitigation; and (ii) reduces or eliminates the threats to public health and the environment associated with a release or potential release of a substance of concern from the chemical source.</p> <ul style="list-style-type: none"> ■ “Use of inherently safer technology” includes input substitution, catalyst or carrier substitution, process redesign (including reuse or recycling of a substance of concern), product reformulation, procedure simplification, and technology modification so as to: <ul style="list-style-type: none"> (i) use less hazardous substances or benign substances; (ii) use a smaller quantity of covered substances of concern; (iii) reduce hazardous pressures or temperatures; (iv) reduce the possibility and potential consequences of equipment failure and human error; (v) improve inventory control and chemical use efficiency; and (vi) reduce or eliminate storage, transportation, handling, disposal, and discharge of substances of concern.

<i>Category</i>	<i>Sen. Inhofe Bill (Bush Administration)</i>	<i>Sen. Corzine Bill</i>
Agency Review of Assessments and Response Plans	<p>Must certify in writing to DHS that owner or operator has completed a vulnerability assessment and has developed and implemented (or is implementing) a site security plan in accordance with the Act.</p> <p>On request of DHS, must provide copies of vulnerability assessments and site security plans for review.</p>	<p>Within one year of promulgation of regulations, must submit copy of assessment to EPA along with certification that assessment complies with regulations.</p> <p>Within 18 months of promulgation of regulations, must submit copy of prevention, preparedness, and response plan to EPA along with certification that plan incorporates the results of the assessment and complies with regulations.</p>
Subsequent Review	<p>Within five years of the date of certification of a vulnerability assessment and site security plan, and at least every five years thereafter, must review the adequacy of the vulnerability assessment and site security plan and certify to DHS that source has completed review and implemented the site security plan.</p> <p>Upon request of DHS, must submit a description of changes to the vulnerability assessment or site security plan.</p>	<p>Within five years of the date of submission of the assessment and response plan and at least every three years thereafter, must review adequacy of plan and certify to EPA that source has completed review and, as appropriate, make changes to assessments or plans.</p>
Protection of Information	<p>All information, except certifications made to DHS, exempt from disclosure under § 552 of Title 5, U.S. Code.</p>	<p>All information, except certifications made to EPA and EPA's review to determine compliance with the regulations, exempt from disclosure under § 552 of Title 5, U.S. Code.</p>
Early Approval	<p>Source or person may petition DHS to endorse or recognize procedures or protocols established by industry, Federal, State or local authorities in effect as of the date of enactment of the Act.</p> <p>Chemical sources that have already conducted vulnerability assessment and site security plans in accordance with the standards, procedures or protocols of the Act as of the date of the Act's enactment are exempt from having to re-do assessments and plans.</p>	<p>Can seek determination from EPA that efforts taken prior to the Act's passage comply with the Act's requirements before the promulgation of final regulations.</p> <p>EPA can certify compliance of an assessment or plan without requiring any revisions.</p>

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Penalties for Failure to Comply	<p>DHS may issue order requiring a certification and submission of a vulnerability assessment or site security plan.</p> <p>DHS may disapprove a vulnerability assessment or site security plan if it does not comply with regulations it promulgates or is insufficient. Must provide written notification with clear explanation of deficiencies and consult with owner or operator to identify appropriate steps to achieve compliance.</p> <p>Civil penalties up to \$50,000 for each day of violation.</p> <p>Administrative penalties up to \$250,000 for failure to comply with order of Secretary.</p>	<p>Subject to civil penalty up to \$25,000 for each day in which a violation occurs or a failure to comply continues.</p> <p>Knowing violations subject to criminal penalties – fine of between \$2,500-\$25,000 per day of violation for first offense and/or up to one year imprisonment. Subsequent violations punishable by up to \$50,000 per day and/or imprisonment up to two years.</p> <p>Administrative penalties possible if civil penalty is less than \$125,000.</p>



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