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July 21, 2009

George Slover
Legislative Counsel/Parliamentarian
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Bldg.
Washington, DC 20515

Re: Concerns with H.R. 2868 Potentially Implicating the Jurisdiction of the Judiciary Committee

Dear Mr. Slover:

As we discussed last week, I am providing you with concerns that my client the Society of Chemical Manufacturers & Affiliates (SOCMA) has regarding H.R. 2868, the "Chemical Facility Anti-Terrorism Act of 2009," as that bill was reported by the House Committee on Homeland Security on July 13 (H. Rep. No. 111-205, pt. 1; hereafter, the "Report"). This list of concerns is not exhaustive, but is oriented toward issues that might conceivably implicate the jurisdiction of the Judiciary Committee. For example, we do not discuss our strong opposition to any mandate to implement "methods to reduce the consequences of a terrorist attack."

Section 2116 – Citizen Suits

Of the provisions potentially relevant to the Judiciary Committee's jurisdiction, SOCMA is most concerned, by far, about proposed new 6 U.S.C. § 2116.[1] We believe a citizen suit provision is completely inappropriate in the context of homeland security regulation and should be deleted.

Section 2116 would authorize literally "any person" to file suit against either

- anyone who the plaintiff believed was violating some requirement of the new law; or

[1] Section 3(a) of the bill would add a new Chapter 21 to Title 6 of the U.S. Code.

- DHS, if the plaintiff believed that DHS had failed to take some nondiscretionary action the law required it to take.

Both of these prospects would be bad security policy, as explained below.

Facilities should not be subject to suit under H.R. 2868

Section 2116 is very closely modeled on the citizen suit provisions of environmental laws like RCRA. SOCMA acknowledges that citizen suit provisions are common in environmental and natural resource statutes of the sort listed in page 49 of the Report. One of the main reasons that such laws have citizen suit provisions is because the obligations – and the compliance status – of regulated entities under these laws is a matter of public record. It is relatively easy to get access to facilities' permits, and their compliance data is normally also made public as a matter of law – in many cases, on the Internet. Also, citizen enforcement is generally thought to promote the purposes of these laws. By adding citizen oversight to EPA and state enforcement, Congress believes it can help eliminate or reduce emissions, discharges, etc. of pollution.

By contrast, the only public fact about a facility's regulation under the Chemical Facility Anti-Terrorism Standards ("CFATS") –- either in their current form or as H.R. 2868 would revise them -- is that fact that it *is* regulated. Everything other item of information that the facility or DHS has developed under the law – the facility's tier level, vulnerability assessment, security plan, list of security measures, etc. – is protected from public release. And for good reason: if this information were publicly available, terrorists could use that information to target the facility and its surrounding community. Because this information is protected (currently as "Chemical-terrorism Vulnerability Information" or "CVI"), there is no way that "any person" could evaluate the compliance status of a facility. Indeed, it is questionable whether such a person, relying on publicly-available information, could even form the reasonable belief regarding noncompliance that would be required to file a lawsuit in federal court under Rule 11(b) of the Federal Rules of Civil Procedure.

Because of the way H.R. 2868 also limits public availability of compliance-related information, the Homeland Security Committee evidently expects that would-be plaintiffs under Section 2116 would obtain information regarding noncompliance through discovery.[2] SOCMA believes it is a terrible idea to create an expectation among the general public that this could in fact occur routinely. Even under the more relaxed standard that the bill would create for access to "protected

[2] Report at 49 (referring to the Committee's expectations regarding "information provided during such proceedings").

information" in litigation – equivalent to that now applicable to "sensitive security information" or "SSI" -- the bill would still make it fairly difficult to obtain such information. The plaintiff would have to show a need equivalent to that required currently to obtain fact work product, the plaintiff's counsel would have to complete a background check, and the court would have to issue a protective order after concluding that access to the information did not present a risk of harm.[3] SOCMA understands that courts have rarely, if ever, approved the release of SSI under this regime. It is bizarre for the Homeland Security Committee to establish a presumptive right of action that could not, in many cases, ever be exercised.[4]

On the other hand, if the Homeland Security Committee expects that its legislation *will* lead to wide access to protected information in citizen suits, or if that is what will in fact occur, SOCMA is even more concerned. We simply do not trust that the information protection regime established under the bill will operate successfully if it is routinely allowing security-sensitive information to be released under protective orders. These cases are likely to be so politicized, and so high-profile, that sensitive information is bound to leak out. Congress should not create weak spots in the web of applicable legal protections that could allow CVI to be disclosed in random citizen suits. Unlike the environmental laws, CFATS is one area where citizen enforcement could actually work against, not support, the protective purpose of the law.

It is for this reason that DHS Deputy Under Secretary Reitinger – a former senior DOJ official -- expressed "concern" about the citizen suit provision in the Homeland Security Committee's hearing on June 16. He stated that, "no matter what the protections are," protected information "inevitably" would be disclosed over time. SOCMA understands that the Administration will formally announce its opposition to the citizen suit provision at the Energy & Commerce Committee hearing scheduled for this Thursday (but apparently being rescheduled).

Supporters of applying the citizen suit model to CFATS may argue that regulated facilities have large amounts of dangerous chemicals onsite – the same hazard that might make them regulated under environmental laws – and thus H.R. 2868 should have the same citizen suit feature as those laws. As H.R. 2868

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[3] *See* Pub. L. No. 109-295, § 525(d), referenced in new Section 2110(c).

[4] SOCMA also notes that the Report seems to promise greater protection of information than the bill itself provides, as the Report says "[t]he Committee expects that information provided during [citizen suit] proceedings should be maintained in accordance with existing protections for *classified and* sensitive materials *including but not limited to* the protections set forth in Section 2110 of this title." Report at 49 (emphasis added).

confirms,[5] however, it would not displace any environmental laws, and any information that a facility has to make public under those laws would remain publicly available under the bill -- as it is under the current CFATS program. Citizens who want access to that information can get it, and those who think that environmental laws are not being followed at a facility can attempt to enforce those laws. But the bill should not create a litigation tool to go beyond those authorities to obtain security-related information.

Relatedly, SOCMA takes issue with the view, regularly asserted by proponents of a citizen suit provision, that such provisions are normal features of any federal regulatory statute. Such provisions are in fact not common: they are not contained in statutes regulating food and drugs, aviation safety, consumer product safety, bank safety & soundness, transportation safety, or any of the myriad substantive areas that the federal government regulates. Nor has the Supreme Court inferred a private right of action in ages.[6] Most important, citizen suit provisions are absent from federal statutes regulating the security of ports, port facilities, vessels, aircraft, railroads, or motor vehicles. As the listing on page 49 of the Report makes clear, citizen suit provisions are uniformly an environmental/natural resources phenomenon. And chemical facility security is a security matter, not an environmental matter.

DHS should not be subject to suit either

DHS has been working night and day to implement CFATS, and has developed a credible program under very tight deadlines. There is no reason to believe that DHS would have done a better job if it were acting under judicial supervision – indeed, having to defend itself in court would only distract from its ability to get the CFATS program up and running. Deputy Under Secretary Reitinger alluded to this potential for "diversion from existing labors" in his remarks on June 16. Again, as noted above, there is no way that average citizens should be able to determine whether DHS has acted correctly or incorrectly in approving a facility's site security plan or otherwise complying with a CFATS obligation – that information is CVI. And again, environmental laws are a bad model for a law that deals with protected, rather than public, information.

SOCMA must point out that the Report misleads in stating (at 49) that "the Nuclear Regulatory Commission, which, like the Department [of Homeland Security] is a security agency, is subject to suits brought by citizens." The NRC is

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[5] *See* new Section 2110(d).
[6] Thus SOCMA is troubled by the Report's disingenuous description of the citizen suit provision as "remov[ing] the current restrictions on citizen suits" from a statute that is silent on the topic. Report at 21.

subject to citizen suits under environmental laws in the same way as any other federal agency that operates facilities that are regulated under such laws. But the Atomic Energy Act does not authorize citizen suits against the NRC for violating or failing to take required action under the AEA. If DHS operated hazardous waste treatment plants, it would be subject to citizen suits under RCRA. But that is not a basis for saying it should be subject to suit under its own organic statute.

For these reasons, Congress should drop Section 2116 and references to it such as in new Section 2108(e)(1)(D)-(F).

Section 2110 – Protection of Information

SOCMA has several concerns with H.R. 2868's provisions for protecting security-sensitive information:

Inadequate protection of information in citizen suits

Due to the extreme sensitivity of CVI, the statute currently authorizing the CFATS program requires such information to be treated in enforcement cases as if it were classified.[7] H.R. 2868 would diminish the level of protection afforded, in litigation under the statute, to what it now calls "protected information." The bill would require such information to be treated in enforcement cases and citizen suits as if it were "sensitive security information" or "SSI."[8] The SSI regime imposes a number of restrictions on plaintiffs' ability to obtain SSI through discovery, discussed at the top of page 3 above. Those provisions might be adequate if the only parties to the lawsuit were DHS and the facility. If other plaintiffs can participate in adjudications under the statute, however, SOCMA believes the SSI model is too likely to lead to releases of protected information. If citizen suits are retained in the bill, the existing level of CVI protection should be retained as well.

Absence of any *protection in private litigation*

New Section 2110(c) limits the protections that it applies in "[a]djudicative proceedings" to "proceeding[s] under this title." This is a gaping loophole, as it means that the bill would provide *no* protections whatsoever for protected information when such information is sought in discovery or to be introduced into evidence in litigation not arising under the statute; e.g., private tort litigation. Clearly, Congress does not want to make protected information fair game for any private litigant that might want to go fishing for it. Based on

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[7] *See* Pub. L. No. 109-295, § 550(c).
[8] *See* new Section 2110(c).

conversations with Homeland Security Committee staff, this was not the Committee's intent, but it is the unavoidable reading of the bill. Thus, the introductory phrase "In a proceeding under this title" must be deleted from new Section 2110(c).

Protected information need not be created "exclusively" for purposes of the bill

In two instances (new Sections 2110(g)(1)(B) and (g)(1)(C)), the bill limits the definition of "protected information" to information developed "exclusively" for purposes of the bill. This is unnecessarily limiting, as facilities will not uncommonly generate documents for multiple purposes. For example:

- The bill requires a facility to develop an emergency plan (new Section 2101(2)(I)). Many regulated facilities are currently required to have emergency plans under EPA's RMP rule, OSHA's PSM rule, RCRA, and other statutes.
- A facility's analysis of vulnerabilities may be developed both for process safety and security purposes.
- Training and maintenance records will frequently be developed for both security and other purposes.

Facility should not be required to prepare a separate, duplicative document in these cases simply to ensure that it is protected. The word "exclusively" should be deleted in both instances, or at a minimum should be replaced with the phrase "at least in part".

The bill fails to protect all the sensitive records that it requires facilities to generate

Section 2101(2)(R) requires DHS's risk-based performance standards to include a requirement that facilities "[m]aintain[] appropriate records relating to the security of the facility . . . ." Under the current CFATS rules, facilities are required to generate, but not submit to DHS, a range of records regarding matters such as employee training and maintenance of security equipment.[9] But these records are not included in the specific enumeration of "protected information" contained in new Section 2110(g)(1). That paragraph should be revised to include a new subparagraph (B)(v), "Information required to be maintained under paragraph (2)(R) of section 2101."[10]

[9] *See* 6 C.F.R. § 27.255(a).
[10] By the way, new Section 2110(g)(1)(B)(iv) has a typo: "section subsection."

Other Issues

"Reasonable misrepresentations" allowed?

The personnel surety provisions of Section 2115(a)(2)(E) include a requirement that DHS prohibit facility owners and operators from "unreasonably misrepresenting" the scope, application or meaning of any DHS rules or guidance regarding background checks. A misrepresentation can be intentional or not, but it can never be reasonable or unreasonable. SOCMA believes the word "unreasonable" should be replaced with "knowing."

Making facility owner/operators the "employers" of their contractors' employees

Multiple provisions of the bill require facility owners and operators to take on personnel surety and training obligations regarding their contractors' employees.[11] Oddly, these obligations do not extend to subcontractors' employees.[12] The bill never clarifies that the owner or operator can ensure that these events occur (rather than "performing" them itself) in the case of subcontractor employees. The result raises concerns about whether the owner or operator could be deemed, under the Fair Labor Standards Act or similar law, to be such employees' "employer." The bill should rectify this problem.

Misplaced definition of "release"

The bill defines "release," unnecessarily in SOCMA's view, but more problematically, does so by taking verbatim the definition contained in the Superfund statute.[13] Thus, if a terrorist attack results only in "exposure solely to persons within a workplace" or "the normal application of fertilizer," it is not covered by the bill. The definition also imports a number of terms (e.g., "hazardous substance") that are not used anywhere else in the bill and thus create questions of jurisdiction creep. The definition either should be dropped or should be revised so that line 4 (on page 4 of the Report) reads "tainers, and other closed receptacles containing any substance of concern)."

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[11] *E.g.,* new Sections 2101(2)(L), 2101(5), and 2115(a)(1)(A) (personnel surety) and 2103(f)(2)(training).
[12] *See* new Section 2101(5).
[13] *Compare* new Section 2102(10) with 42 U.S.C. § 9601(22).

No exclusion of drinking water facilities

It is widely acknowledged that the bill is intended to exclude drinking water facilities, which will be regulated instead by a title being developed by the Energy & Commerce Committee. However, neither new Section 2112 nor any other provision of the bill actually excludes such facilities.

Other report glitches

The Report (at 43) contains the curious statement that "[a] court may award . . . administrative penalties of up to $25,000 per day for non-compliance." Fortunately this is not what new Section 2107(b)(2) provides. More worrisome, the Report creates the implication that the five bases enumerated in new Section 2115(b) for taking adverse action against an employee are the *only* legally permissible bases for taking such action for security-related reasons,[14] when the bill itself provides that the five enumerated bases are the only permissible reasons for taking such action "*due to* [DHS's] *regulations*" regarding background checks.[15]

SOCMA hopes that the foregoing is helpful to you. Please do not hesitate to contact me regarding any questions you have or if I can provide you with any other information or views.

Sincerely,

James W. Conrad, Jr.

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[14] *See* Report at 48 ("A facility shall not make an adverse employment decision unless . . .").

[15] *See* also new Section 2115(f) ("Nothing in this section shall be construed to abridge any right . . . of . . . an owner or operator . . . under any other . . . law or collective bargaining agreement.").