

**SENSIBLY REFORMING THE CHEMICAL FACILITY  
ANTI-TERRORISM STANDARDS PROGRAM**

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**ROUNDTABLE**

BEFORE THE

COMMITTEE ON  
HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE  
ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

JUNE 4, 2019

Available via the World Wide Web: <http://www.govinfo.gov>

Printed for the use of the  
Committee on Homeland Security and Governmental Affairs



U.S. GOVERNMENT PUBLISHING OFFICE

36–699 PDF

WASHINGTON : 2019

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## **SENSIBLY REFORMING THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS PROGRAM**

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**TUESDAY, JUNE 4, 2019**

U.S. SENATE,  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:30 p.m., in room SD-106, Dirksen Senate Office Building, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Scott, Hawley, Peters, Carper, and Hassan.

### **OPENING STATEMENT OF CHAIRMAN JOHNSON**

Chairman JOHNSON. Good afternoon. This roundtable is called to order.

I want to thank all of our witnesses for your thoughtful testimony and your time here today appearing before us answering our questions.

I would ask consent that my written statement<sup>1</sup> be entered into the record. Without objection.

Just real quick, I do want to remind everybody what Chemical Facility Anti-Terrorism Standards stands for (CFATS). It is not the Environmental Protection Agency (EPA). It is not Occupational Safety and Health Administration (OSHA). It is not Department of Defense (DOD). It is not Department of Transportation (DOT). This was a piece of legislation enacted to prevent the diversion basically for terrorist purposes of chemicals, and from my standpoint it should be focused on that.

Last Congress, we had actually a larger roundtable, more participants. I learned a lot from that and found there was duplication with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). We tried to address that in our bill that passed by voice vote. We tried to reward good behavior. If you are up to snuff and you have enacted a great plan here, we give you some rewards in terms of less of a regulatory burden. You have it covered. You do not need the nanny State coming in here and telling you exactly how to run your operation.

I would hope that that will be—the goal of our ongoing efforts here is to reauthorize this, and I do realize those in industry would like a long-term authorization. It is all part of the Stockholm Syn-

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<sup>1</sup> The prepared statement of Senator Johnson appear in the Appendix on page 35.

drome. They are kidnapped and they are just asking for a glass of water. They want some certainty, and I am happy to give them that level of certainty.

I do not think they want greater regulation. I do not think they want CFATS to become an adjunct or an addition to OSHA and EPA and DOT and DOD. I am sure there is more of an alphabet soup here of different agencies that control your lives. Again, I want to keep this thing focused. I appreciate everybody's involvement in here, but, hopefully that statement from the Chairman of this Committee will provide some guidance in what we are trying to do to reauthorize this program. We should reauthorize it for a longer period of time to provide that certainty. But I think we should reform it without mission creep.

With that, I will turn it over to Senator Peters.

#### **OPENING STATEMENT OF SENATOR PETERS**

Senator PETERS. Thank you, Mr. Chairman. I will give a few opening remarks, too, but I would ask unanimous consent that my prepared statement—<sup>1</sup>

Chairman JOHNSON. I am not so sure about that. [Laughter.]

Without objection.

Senator PETERS. Thank you, Mr. Chairman.

I would agree with the Chairman. At the most basic level, CFATS is about ensuring that certain chemicals never fall into the hands of terrorists. That is its fundamental task. But by most accounts that I have heard, at least, the program is well regarded. I have heard that from stakeholders, including industry owners and operators, labor unions, and the Department of Homeland Security (DHS). And it has been my experience that everybody is seeking the certainty that a long-term extension of the program would bring, and I agree with that aspect, and I am happy to hear the Chairman also agrees that that is something that we need to seek out.

We need to keep the aspects of the program that are working well and improve aspects of the program that are not to ensure that CFATS is a mature and reliable security program on par with other established and enduring compliance frameworks. Improving CFATS' focus on cybersecurity, employee engagement, whistleblower protections, and outreach and coordination with first responders on-site, I think, are areas that there is some real room for progress.

Senator Johnson put forward a number of priorities in the last Congress, and I look forward to working with the Chair and our House colleagues to find some common ground and to strike a bipartisan agreement that enhances security, reduces the risk of terrorist attacks, and protects workers and our communities. And I am confident, Mr. Chairman, that we can get that job done, and I look forward to working with you in a very frank and productive discussion with the experts we have here today.

Chairman JOHNSON. I appreciate that, Senator Peters.

We will just go down the list. Everybody has been given a generous 2 minutes. [Laughter.]

<sup>1</sup>The prepared statement of Senator Peters appears in the Appendix on page 36.

We read your testimony, and it was very thoughtful, and that will obviously be entered in the record. But if you can just summarize your main points in 2 minutes, and then we will open it up for general discussion. And we do this a little bit different than a hearing where we each get 7 minutes. It is really more of an open discussion so that we stay on the same point with different Senators going down that same vein or the same line of questioning as opposed to hopping all over the place with more formalized rounds.

We will start with Brian Harrell. Mr. Harrell currently serves as the Assistant Secretary for Infrastructure Security of the Cybersecurity and Infrastructure Security Agency (CISA), U.S. Department of Homeland Security. Mr. Harrell.

**TESTIMONY OF BRIAN HARRELL,<sup>1</sup> ASSISTANT DIRECTOR FOR INFRASTRUCTURE SECURITY, CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY, U.S. DEPARTMENT OF HOMELAND SECURITY**

Mr. HARRELL. Alright. Thank you, Chairman Johnson, Ranking Member Peters, and Members of the Committee, for having me here today to discuss this important chemical security program.

Chemicals are vital to our daily lives and economy. We use them to develop medicines, refine fuels for our vehicles, and build microchips for smartphones. Despite these benefits, chemicals do not come without risk.

We live in a dynamic threat environment. Terrorists have shown the desire to seek out and use chemicals in devastating attacks, and our adversaries around the globe continue to target facilities that store or produce chemicals.

The threat environment is changing. While an attacker would have to physically drive a vehicle bomb up to a building 20 years ago, today the attacker might target a chemical facility's operating system or employ unmanned aircraft or a drone to carry out an attack from the comfort of their remote location.

Ensuring that does not happen is one of my chief reasons that I sit before you today. CFATS, as a non-prescriptive, flexible anti-terrorism program is well suited to reduce the risks of a chemical terrorist attack. Since its creation, CFATS has identified chemical facilities that present the highest risk in case of attack or exploitation, and we have worked to ensure these facilities have security measures in place to reduce the risks of these hazardous chemicals. As a result, the level of security across the industry has significantly increased, not only making a successful chemical attack more difficult but also serving as a significant deterrent to our adversaries.

Chemical security is a shared commitment, and the gains made by CFATS are the result of a strong working relationship with our industry stakeholders, our government partners, and first responders.

However, the Department recognizes that as the threat environment is constantly evolving, so, too, must CFATS. We are engaging our workforce and industry stakeholders on ways in which the reg-

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<sup>1</sup>The prepared statement of Mr. Harrell appears in the Appendix on page 38.

ulation can continue to meet today's complex risk landscape. We cannot be satisfied with our past progress, but we must look for opportunities for improvement and adjust within the changing physical and cybersecurity landscape. This is a sign of a mature program.

Last, recognizing that CFATS focuses its efforts on only a fraction of chemical facilities, the Department is considering other opportunities to assist the chemical facility population at large through voluntary initiatives. Chemical security must remain a high priority for the Nation. We cannot allow terrorists to access dangerous chemicals. If we can imagine a scenario, a motivated terrorist can imagine a more devastating one.

DHS looks forward to working with Congress toward a long-term solution that includes both regulatory and voluntary efforts so that we can continue to defend today and secure tomorrow.

Thank you, and I look forward to the conversation.

Chairman JOHNSON. Our next witness is Nathan Anderson. Mr. Anderson currently serves as the Acting Director of the Homeland Security and Justice Team at the U.S. Government Accountability Office (GAO). Mr. Anderson.

**TESTIMONY OF NATHAN ANDERSON,<sup>1</sup> ACTING DIRECTOR,  
HOMELAND SECURITY AND JUSTICE TEAM, U.S. GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. ANDERSON. Chairman Johnson, Ranking Member Peters, Members of this Committee, good afternoon. We at GAO have issued a number of reports on CFATS over the last 7 years, and DHS has made substantial progress in a number of areas where we found deficiencies such as identifying high-risk facilities, prioritizing them, and reviewing security plans. But there is room for improvement, particularly in measuring the CFATS program's performance.

Sometimes when people use terms like "performance measures," it is difficult to understand the implications of shortcomings in this area, so let me be clear. When we identify deficiencies in the program's performance measures, we are stating that improvements are needed so that decisionmakers have the information necessary to gauge whether or in what form the program should exist.

In our report from late last year, we found that DHS performance measures for the CFATS program speak to program accomplishments, such as the number of facilities inspected, and these are important outputs. However, they do not measure program outcomes. One way to do this is to measure reductions in vulnerability at facilities that have resulted from implementing required security measures.

Think of this in terms of cost-benefit. We know the cost of the CFATS program in terms of annual appropriations, and we have information on the cost that industry has incurred through compliance. But we do not have clear information on the benefits, specifically the amount that risk is reduced through compliance with the CFATS program. Such information is needed to assess the pro-

<sup>1</sup> The prepared statement of Mr. Anderson appears in the Appendix on page 44.

gram's return on investment, and such measures exist in some other DHS component programs.

Mr. Chairman, Ranking Member Peters, and Members of the Committee, this concludes my statement, and I look forward to the discussion.

Chairman JOHNSON. Thank you, Mr. Anderson and Mr. Harrell.

Our next witness is Matthew Fridley. Mr. Fridley is the Safety, Regulatory, and Security Manager at Brenntag North America. He is also the current chair of the Chemical Sector Coordinating Council (CSCC). Mr. Fridley.

**TESTIMONY OF MATTHEW FRIDLEY,<sup>1</sup> CORPORATE MANAGER, SAFETY, HEALTH, AND SECURITY, BRENNTAG NORTH AMERICA, ON BEHALF OF THE NATIONAL ASSOCIATION OF CHEMICAL DISTRIBUTORS**

Mr. FRIDLEY. Good afternoon, Chairman Johnson, Ranking Member Peters, and distinguished Members of the Committee. Again, my name is Matthew Fridley, and I am the safety, health, and security manager for Brenntag North America, a chemical distribution company headquartered in Reading, Pennsylvania.

In addition to my role at Brenntag, I am the chair of the Chemical Sector Coordinating Council. I am also the vice chair of the Regulatory Affairs and Security Committee for the National Association of Chemical Distributors (NACD) on whose behalf I am testifying today.

I thank you for allowing me to participate in this important roundtable. Brenntag is currently the largest chemical distributor globally and the second largest chemical distributor in the United States.

I believe the CFATS program has made the chemical industry and our Nation much more secure with industry investing significant capital and training resources toward enhanced security measures.

DHS has generally taken a non-adversarial and balanced approach in implementing the CFATS program. DHS has excelled in outreach to industry in a number of ways. They include understanding the diversity of the chemical industry and working with companies on security measures that meet the CFATS risk-based performance standards (RBPS); interacting with chemical owners and operators; and always making inspectors and headquarters personnel available to walk through and talk through issues or questions.

One priority I can recommend to the Committee is to require that any changes to Appendix A: Chemicals of Interest (COI) list remain subject to rulemaking and notice and comment. Changes to the COI list will have a major impact on my business operation and security investments.

I also support the creation of the program under which DHS would recognize companies that meet certain criteria such as participation in an initiative such as Responsible Distribution. By acknowledging the value of these industry initiatives, DHS will be

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<sup>1</sup>The prepared statement of Mr. Fridley appears in the Appendix on page 52.

able to prioritize resources in noncompliant outliers that pose a greater risk to security.

In 2014, the reauthorization further enhanced the security efforts by providing regulatory certainty to both industry and DHS, thereby increasing efficiencies in the program. It is my hope Congress can pass a long-term reauthorization of the CFATS program.

On behalf of both NACD and Brenntag, I appreciate the opportunity to present our views on this important issue.

Chairman JOHNSON. Thank you, Mr. Fridley.

Our next witness is Timothy O'Brien. Mr. O'Brien is President of Detotec North America, an explosive manufacturing company headquartered in Sterling, Connecticut. Mr. O'Brien.

**TESTIMONY OF TIM O'BRIEN,<sup>1</sup> PRESIDENT, DETOTEC NORTH AMERICA**

Mr. O'BRIEN. Chairman Johnson, Ranking Member Peters, and Members of the Committee, as president of Detotec North America and past chairman of the Institute of Makers of Explosives, I thank you for the opportunity to discuss the CFATS program.

The commercial explosives industry has been regulated for security since 1971 by ATF. Following the tragic events of September 11, 2001 (9/11), Congress passed the Homeland Security Act of 2002, which strengthened ATF's mission to protect the public from the diversion of explosives for illicit use, including acts of terrorism.

Reports from the U.S. Bomb Data Center show a consistent decline in thefts of explosives over the past 30 years. CFATS has had no perceptible impact on security for commercial explosives. This may have been the reason why DHS stated before this Committee last year that they would "lose no sleep over explosives leaving the program."

Since Detotec opened 30 years ago, we have been compliant with ATF's comprehensive security regulations. In all that time, we have never experienced a theft or diversion of our products. In 2008, Detotec submitted our first CFATS Top-Screens and received conditional authorization in 2013.

In 2016, we submitted new Top-Screens based on a new tiering methodology. Between the authorizations and the new Top-Screens, we were inspected 10 times by ATF, DOD, and the Defense Contract Management Agency (DCMA). No security concerns were raised, and we were found to be in full compliance.

Despite our record, DHS required additional security measures from us. DHS made suggestions for compliance, and our cost estimates for those ranged from \$400,000 to over \$1 million. That would have shut us down.

By the time we found a viable plan, we were 10 days late, resulting in a fine of \$100,000. Detotec was able to reduce the amount paid through a small business process; however, an employee had to be let go.

Let me reiterate: I had to lay off an employee to pay a fine for failing to submit to DHS my plan for what we would implement in 6 months, not for failure to implement those measures.

<sup>1</sup> The prepared statement of Mr. O'Brien appears in the Appendix on page 60.

I do not appear before you to ask for deregulation of commercial explosives, but to make the case for removing ATF-regulated materials from CFATS, which will cut costs for taxpayers and reduce duplicative regulation without having a negative effect on national security.

Thank you. I look forward to any questions that you may have.

Chairman JOHNSON. Thank you, Mr. O'Brien.

Our next witness is William Erny. Mr. Erny is a Senior Director at the American Chemistry Council (ACC), which represents over 170 businesses involved in the chemistry industry. Mr. Erny.

**TESTIMONY OF WILLIAM ERNY,<sup>1</sup> SENIOR DIRECTOR,  
AMERICAN CHEMISTRY COUNCIL**

Mr. ERNY. Yes, good afternoon. As you all know, the business of chemistry is a major economic driver here in the United States. We are a \$526 billion enterprise, and we are growing.

It is because of this critical role in the economy that chemical security continues to be a major priority for ACC and its members, and to demonstrate this commitment, this year marks the 31st anniversary of ACC's Responsible Care program. Responsible Care is the leading chemical industry stewardship program. Under Responsible Care, our members have invested more than \$17 billion to enhance security at all of our sites.

The CFATS program also plays a very critical role in protecting chemicals. CFATS provides a baseline to set for the industry that covers all facilities that they must adhere to. As such, ACC supports long-term authorization.

It is true that DHS has made a lot of progress over the last 4½ years. However, we would like to make some additional recommendations we believe would further enhance the program.

One, DHS should maintain its focus on chemical security. CFATS should retain its core mission of chemical security, not wander into other areas such as safety and environmental requirements that we believe would serve to sort of water down their current focus and resources on their core mission.

Two, personal surety, terrorist screening for Tiers 3 and 4, lower-risk tiers, should be optional. DHS has recently announced they plan on expanding terrorist screening to more than 3,000 additional lower-risk facilities, including tens of thousands of additional workers and contractors. In a nutshell, we believe this is just too far, it is too much, and it is not necessary.

And then item number three, establish a CFATS recognition program. DHS should leverage chemical industry stewardship programs such as Responsible Care by providing regulatory recognition for responsible operators. Such a program would enhance the current stewardship programs that are available and incentivize the creation of new programs.

It is a fact that companies who participate in industry stewardship programs outperform their peers and the industry as a whole. Creating a CFATS recognition program would enhance chemical security across the sector and beyond the universe of the regulated community.

<sup>1</sup> The prepared statement of Mr. Erny appears in the Appendix on page 70.

In closing, I would just like to say that CFATS has helped make our industry and our communities more secure. We encourage this Committee to consider these proposed changes and to provide long-term authorization for CFATS.

Thank you, and I look forward to our discussion.

Chairman JOHNSON. Thank you, Mr. Erny.

Our next witness is Andrew Wright. Mr. Wright is the Vice President of Legislative Affairs of the International Liquid Terminals Association (ILTA), representing both terminal and supply members that transport liquid products. Mr. Wright.

**TESTIMONY OF ANDREW WRIGHT,<sup>1</sup> VICE PRESIDENT, LEGISLATIVE AFFAIRS, INTERNATIONAL LIQUID TERMINALS ASSOCIATION**

Mr. WRIGHT. Chairman Johnson, Ranking Member Peters, and Members of the Committee, thank you for the opportunity to participate in today's roundtable.

The International Liquid Terminals Association represents the tank and terminals industry in all 50 States. ILTA members provide storage and transportation logistics and value-added services for a wide range of liquid commodities, including crude oil, gasoline, diesel, jet fuel, and chemicals.

ILTA appreciates the critical role that DHS and the CFATS program play in maintaining our Nation's security and supports the CFATS coalition priorities.

However, I want to focus on an ILTA recommendation to correct the treatment of gasoline, diesel, and other fuel mixtures. All flammable materials identified as chemicals of interest have a National Fire Protection Association (NFPA) rating of Class 4, which is extremely flammable, with the notable and problematic exception of gasoline Class 3 along with diesel, kerosene, and jet fuel, all of which are Class 2.

Faced with the best science and the most authoritative standard in use today for the characterization of flammable materials, DHS no longer requires those facilities to perform top-screen evaluations based solely on the presence of these mixtures. In fact, for nearly a decade, gasoline, diesel, kerosene, and jet fuel have effectively not been regulated under CFATS because of a DHS regulatory hold. Therefore, in practice, DHS recognizes the lower risk associated with gasoline and other fuel blends. We believe that it is time to bring the regulation in line with current DHS practice and remove the unjustified exception that would incorrectly treat these products as if they were chemicals of interest.

ILTA and its member companies have worked unsuccessfully through regulatory channels for more than 10 years to correct the mistaken treatment of gasoline and fuel blends that are still written into the regulations. Only Congress can focus CFATS on plausible security risk and ensure that gasoline and fuel mixtures are removed from CFATS during this and future Administrations.

I look forward to your questions.

Chairman JOHNSON. Thank you, Mr. Wright.

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<sup>1</sup> The prepared statement of Mr. Wright appears in the Appendix on page 73.

Our final witness, last but not least, is John Morawetz. Mr. Morawetz is a Health and Safety Representative for the International Chemical Workers Union Council and the United Food and Commercial Workers (UFCW) International Union. Mr. Morawetz.

**TESTIMONY OF JOHN S. MORAWETZ,<sup>1</sup> HEALTH AND SAFETY REPRESENTATIVE, INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION**

Mr. MORAWETZ. Thank you, Chairman Johnson, Ranking Member Peters, and Committee Members for the honor of appearing before you on chemical facilities security and safety. I represent, as you said, the Chemical Workers and UFCW. We represent 20,000 members in 32 States and strongly support a multiyear reauthorization with four improvements.

One, our members work with many CFATS Appendix A extremely hazardous substance and have a vested interest in a facility operation for everyone's well-being. Thankfully, there has not been a terrorist attack on a chemical plant, but we can learn from unintentional releases at our facilities, including a massive release in Houston that killed four people and a complete rupture of a full chlorine tanker car in West Virginia.

Most tragically, in 1971, a Georgia facility that manufactured magnesium trip flares had some fires and blew up. Horribly, the evacuation distance was not sufficient, and 27 workers were killed.

Our recommendations:

First, workers and labor representatives need to be involved in protecting our chemical infrastructure. Workers' daily expertise must be utilized and documented in the drafting, implementation, and evaluation of plant security plans. I would love to talk about CFATS inspections, but our locals and members are often not included while other Federal agencies have established joint management-labor inspection models.

Second, everyone, including CFATS inspectors, must be trained on specific hazards, responses, their roles and drills.

Third, whistleblowers must not face retaliation. DHS must have procedures on whistleblower retaliation, including at least 90 days to file a complaint, a private right of action, and for representatives to file complaints.

Last, DHS knows how facilities use best practices to reduce their risk, including safer substances, reductions in storage, and just-in-time use, and that information should be released annually.

Thank you, and I would be glad for the continuing discussion.

Chairman JOHNSON. Thank you, Mr. Morawetz.

Let me just start. I come from a manufacturing background, and it was my experience that the whole safety issue started with local police and fire public safety organizations. We would get frequent visits by the fire department. Do you have any hazardous chemicals? Where are they located? What the quantities were, what is your evacuation plan, those types of things. So, kind of like the

<sup>1</sup>The prepared statement of Mr. Morawetz appears in the Appendix on page 76.

Federal Emergency Management Agency (FEMA), a layered approach, local, State, and then Federal.

What we have here with CFATS after 9/11 is a whole new program specifically designed to keep dangerous chemicals that could be used in a terrorist attack out of the hands of terrorists. I do not believe the intent of Congress—and had I been here, I would have fought that intent—was to have an all-encompassing regulatory agency governing worker safety, fire hazards, chemical discharge, potential pollution issues.

I want to start questioning with industry: What agencies regulate your businesses already in addition to DHS? We will start with Mr. Fridley because you look like you are ready to go here.

Mr. FRIDLEY. Yes, pretty much the alphabet soup, as you stated earlier, Chairman.

Chairman JOHNSON. So give us the most significant ones, if you can.

Mr. FRIDLEY. Obviously, EPA, OSHA, DOT, DEA, we have ATF, we have the Food and Drug Administration (FDA), the U.S. Coast Guard (USCG) as well because we have the Maritime Transportation Security Act of 2002 (MTSA) facilities, are the primary, along with DHS.

Chairman JOHNSON. And you are heavily regulated by most of those.

Mr. FRIDLEY. Yes, sir.

Chairman JOHNSON. It is not like you do not get visited. It is not like they are ignoring those issues that they are concerned about.

Mr. FRIDLEY. That is correct.

Chairman JOHNSON. Mr. O'Brien.

Mr. O'BRIEN. ATF would be our primary agency that oversees us, and they in the past have clearly stated that they effectively regulate the security of commercial explosives, emphasizing that the only value DHS adds relative to explosives is the regulation of the precursor chemicals. We are visited routinely by them. We have very prescriptive regulations by them, that they tell us exactly what we have to do.

Chairman JOHNSON. Describe "routinely." How often do you get site visits from ATF?

Mr. O'BRIEN. So at a minimum, you are inspected every 3 years because a license lasts 3 years. My particular company has three separate licenses, so they happen to fall one a year. So we were getting visits one every year by ATF. And when they come in, they will come in and examine exactly how much explosives we have, down to the gram. They will count all of the detonators we have. They will count everything. There is no threshold at which, OK, this program only applies if you are over a certain level. If we have a gram or higher, we are regulated by ATF.

They also have a vetting program because after the Safe Explosives Act of 2002, all of our downstream customers had to get a license. So they have all gone through the ATF vetting process as well. They will verify that we are only receiving and giving out explosives to companies that—

Chairman JOHNSON. I do not want to get too far in the weeds.

Mr. ERNY. By the way, this is my first and only kind of structured question. Then we are going to throw it open. If you want

to say something on an issue, put your name tag up so we can call on you, OK. Mr. Erny, quickly.

Mr. ERNY. Sure. To add on to the ones that I think I caught mentioned so far, some of the additional ones, in addition to OSHA and EPA and the regular ones, would be DOT, for instance. They have security regulations in place that handle en route security of chemicals, which include the sale point and the end point as well. So there is a lot of crossover and duplication in that.

The Transportation Security Administration (TSA) and its rail security regulation, very involved in sort of the transportation via rail of chemical products.

Customs and Border Protection (CBP) and Customs-Trade Partnership Against Terrorism (CTPAT) program, not a regulation, voluntary, but the nature of it and the importance of it to import chemicals across the border makes it essentially a must-do.

And then FDA with food-grade chemicals and things of that nature.

Chairman JOHNSON. Mr. Wright.

Mr. WRIGHT. Yes, Senator—

Chairman JOHNSON. Can you add anything to that?

Mr. WRIGHT. Well, the Coast Guard. A lot of our facilities are maritime, so we have the Coast Guard, EPA, OSHA, DHS, DOT. I would add we have a lot of State and local regulation on our facilities. We probably have as much from the States as we do—obviously, it varies State to State, but we probably have as much from the States as we do from the Feds.

Chairman JOHNSON. Again, we got more site visits by the local fire department. So a show of hands, does anybody feel you are underregulated?

[No hands raised.]

OK. Senator Peters, do you have something?

Senator PETERS. I will do a couple.

Mr. Morawetz, in your opening remarks, you discussed the need to improve employee engagement in the development and implementation of these assessments. I think as you mentioned in your opening comments, chemical workers are routinely not consulted. Is that correct?

Mr. MORAWETZ. That is correct.

Senator PETERS. Can you discuss the security benefits of engaging more broadly with these chemical workers on the site plans? Why do we need to try to facilitate that in your mind?

Mr. MORAWETZ. I would say it is no different than any other party at this table or any stakeholder involved in this process, that if you leave anybody out, you lose some vital information. In particular, the people who actually operate the machinery, the reactor vessels, the storage vessels, the piping, everything, if they are not involved, then I think we lose potentially some information, and basically from a terrorist attack—and that is what we are concentrated on; I agree with that—we are at greater risk if we do not include people.

Senator PETERS. So you are saying they are not included for all the benefits to potentially be there, but they are not included now in this current program? Could you discuss your experience with

inspectors in other compliance programs that may be a good model for us to look at?

Mr. MORAWETZ. I have experience, direct experience with three: the National Institute for Occupational Safety and Health (NIOSH)—I worked at NIOSH for 2 years; OSHA—OSHA inspected some of these facilities; and the Chemical Safety Board. The facility that I mentioned where four people got killed, it was a massive release of methyl mercaptan. It was the subject of OSHA regulations. It was the subject of a Chemical Safety Board investigation. It is actually still pending. It was basically a seamless, easy process. The inspectors come in. There is a union there or the union knows. They sit down. They meet together. The vast majority of the time you sit down and you meet and you discuss the problem and try to resolve it.

A rare situation where one side or the other says, "No, I want to meet separately." Then there are separate meetings with both parties. I think there is a lot to be gained for inspectors in doing that and, in particular, it puts me at a disadvantage of answering a lot of questions about CFATS, how it applies with the other gentlemen know more, because we only have found one facility where our members know and have been involved with the CFATS program.

Senator PETERS. The current CFATS program also does not have real whistleblower retaliation protections in place. Would you talk a little bit about why that may be problematic?

Mr. MORAWETZ. I do not have direct experience with the chemical workers. However, in the news, our whistleblowers may be biased, but I tend to think where a union is in place, a whistleblower situation is less inclined to get to an extreme position and things resolve easier. We work with a couple of Department of Energy (DOE) facilities, and in those facilities, for the last, I think, about 5 or 6 years, there has been a whole move toward a culture of safety based upon a DOE worker who complained. It was a whistleblower complaint. His job was taken away from him. He had his pay, but he was put into a different office basically doing nothing. That is one. There are other articles today about American Federation of Government Employees (AFGE) in Kansas City, I believe, that there is a whistleblower complaint. So it can happen.

Senator PETERS. Yes. I have other questions, but I will defer so Senator Hawley can ask his questions, if that is alright, Mr. Chairman.

Chairman JOHNSON. Senator Hawley.

#### **OPENING STATEMENT OF SENATOR HAWLEY**

Senator HAWLEY. Thank you very much. I just want to note that Missouri companies often tell us what while they support the intent of regulations like CFATS, these regulations are often redundant, contradictory, poorly defined, as many of you have testified today, and it makes it harder and costlier for them to meet the requirements, and that is especially true in the case of small businesses.

I want to just ask about the commercial security initiatives. Mr. Fridley, I think it was in your written testimony, you wrote that verified industry standard programs and insurance carriers often

require companies to maintain contingency plans that are “as comprehensive as the contingency plans required by government agencies and often have much more applicability and effectiveness in real-world situations.” That is from your testimony. Do you want to say something more about that?

Mr. FRIDLEY. Yes, Senator Hawley. Thank you for the question. There are obviously municipalities, there are insurance requirements. I have five facilities, over 100 people employed in the State of Missouri, so we see this—

Senator HAWLEY. We are so glad you do.

Mr. FRIDLEY. But, yes, everybody has different aspects that they want as part of that contingency plan. How we are doing some of these things is we are leveraging the different agencies and different ones on how we can do one plan that satisfies multiple agency requirements, insurance requirements and such.

We are doing that same thing with our security models. We are looking at the various requirements by the different agencies, and we are putting in one security system, that will be able to be managed and be applied by all. So we are not necessarily seeing the duplicative portion of it, at least not in my experience.

Senator HAWLEY. Let me just ask Mr. Harrell on that point, can you speak to how CFATS is leveraging or considering leverages commercial security initiatives to advance the goal of protecting chemical facilities and then, wherever possible, to reduce any duplicative or unnecessary regulatory burdens on business?

Mr. HARRELL. Absolutely. I just got to the Department back in December, so I have often said in this forum that I have been a regulator, I have been regulated, and now I am seeing things through kind of that Federal lens. I am very sensitive to that duplicative nature of compliance and regulatory standards. I think it is very important to reduce where we can. I think that is where the Department of Homeland Security has done a good job of engaging with the other Federal regulators out there. We have routine meetings with them to ensure that while we may show up on a Monday, that somebody else is not showing up on a Tuesday, which would be completely disruptive to private industry. Coming from private industry, I am very sensitive to that.

I think we have done a good job of ensuring that there is coordinating and the ability to share information back and forth, which I think prevents some of the issues that you are describing.

Senator HAWLEY. Very good. Thank you, Mr. Chairman.

Chairman JOHNSON. Mr. Morawetz, let me ask you, you said in OSHA you have the ability, labor has the ability to input into OSHA’s process, into their inspections?

Mr. MORAWETZ. Yes.

Chairman JOHNSON. What other Federal agencies does labor have the input right?

Mr. MORAWETZ. In an OSHA inspection?

Chairman JOHNSON. Well, what about EPA? What about the Department of Transportation?

Mr. MORAWETZ. I do not have direct experience with EPA. So my experience is NIOSH, OSHA, and Chemical Safety Board, and basically there are joint meetings. There are separate conversations. We have access to information, letters, etc., and we discuss the

questions and see what—in particular, not so much me, but I would say the rank-and-file members who know more information about processes and dangers, they get involved in it.

Chairman JOHNSON. Most union contracts lay out a process for workers to come forward and lodge certain safety concerns or other types of problems, correct? Most formal labor agreements? That would be a true statement?

Mr. MORAWETZ. I do not have really direct experience exactly what particular contracts say about bringing health and safety concerns. I know contracts often have a health and safety committee, so there is a process set up.

Chairman JOHNSON. I know what I have experienced coming from the private sector to the public sector. Whistleblower retaliation is far more prevalent—I do not know how many orders of magnitude more prevalent—within government than it ever was in the private sector, because in the private sector you can get sued out of existence if you use and abuse your employees that way. Do you have a different experience?

Mr. MORAWETZ. I could not compare private and public. Most of our main job is not involved with retaliation, so, really, it is hard for me to—

Chairman JOHNSON. My understanding is that workers have a great deal of protection when it comes to whistleblowing on their employers, whether it is a labor issue, whether it is a safety issue. Just go right down the line. Just get an attorney, and you will find out how many rights you have in the private sector as a whistleblower against an employer.

Again, I am not seeing a great need to offer additional whistleblower protection within something like CFATS, which should be a narrowly focused piece of legislation about keeping dangerous chemicals out of the hands of terrorists.

Mr. MORAWETZ. Generally from my experience, talking to representatives, the vice president of the union, they really feel that because it is not so much public sector but because they have a union contract in that structure, that it is more likely that there will not be that kind of situation. In non-union facilities, we feel that that intimidation is much real and can happen more readily. And my personal experience and different ways that I have heard from people, I think the fear on the job is a very real factor.

Chairman JOHNSON. Mr. Wright, real quick, because I am not following the Class 2, 3, and 4, really describe what you are talking about here. Are all the liquids exempted from CFATS except for gasoline and diesel fuel? Or are they all under it except for—describe what you are talking about.

Mr. WRIGHT. Yes, Senator. I am sorry. That is sort of complicated. Only 4's are included as COIs. However—and that was the specific rule that DHS put into the regulation. But then away from Appendix A, they put a couple of little paragraphs in that brought gasoline in, diesel fuel, kerosene, even though it was not a 4, but a 3 or a 2.

Chairman JOHNSON. This is as clear as mud right now. I am sorry. What liquids were included to be covered under CFATS in the original law?

Mr. WRIGHT. Well, things like—I mean, we are talking about flammables. I mean, it would be——

Chairman JOHNSON. OK, flammable liquids.

Mr. WRIGHT. Yes.

Chairman JOHNSON. That is what you are dealing—again, talking about your industry. So which ones were included under the law?

Mr. WRIGHT. It would be chemicals like propane, for example, that need to be kept under pressure, that are genuinely highly flammable, that might explode. Basically the thing that we are trying to prevent here is for terrorists to be able to use something as a weapon that, in the case of flammables, that might explode and cause damage outside the fence. With gasoline, it will burn but it will not explode. I call it the “A Team effect.” You watch these television shows, and they bump up against a car and the car explodes.

Chairman JOHNSON. So liquids that were not only flammable but explodable were included in the law?

Mr. WRIGHT. That is correct.

Chairman JOHNSON. And then by regulation——

Mr. WRIGHT. Well, it was included in the regulation.

Chairman JOHNSON. So included in the regulation.

Mr. WRIGHT. Under Title A—or under Appendix A. But then they just added gasoline in and kerosene and the other flammables.

Chairman JOHNSON. So they added liquids that are flammable but not explosive.

Mr. WRIGHT. Correct.

Chairman JOHNSON. Are they regulating them now?

Mr. WRIGHT. They are not regulating them now under a regulatory hold.

Chairman JOHNSON. And you are asking to put something in this piece of legislation to prevent them from adding that at a later date, to make the distinction between a liquid that is flammable and non-explosive versus a liquid that is flammable and explosive?

Mr. WRIGHT. That is basically the case.

Chairman JOHNSON. Is that the——

Mr. WRIGHT. But right now, Senator, they are not regulating, but the regulation still exists. It is just on a regulatory hold.

Chairman JOHNSON. I am trying to get clarity.

Mr. Harrell, tell me, is that an accurate description of what we are talking about here with flammable liquids? You are including under CFATS and regulating under CFATS flammable and explosive liquids but not strictly flammable, although you are reserving the option to do so?

Mr. HARRELL. Yes, absolutely. So what he is describing is, in fact, accurate. There are a number of chemicals that are originally part of Appendix A that we have since essentially minimized. And so now as we move forward, we are willing and open to have this conversation of removing these chemicals from Appendix A. But that will require rulemaking.

Chairman JOHNSON. Or law.

Mr. HARRELL. Correct.

Chairman JOHNSON. We could do that as part of this reauthorization, make it very explicit so it is not necessarily up to one regulator after the next going, “OK. No, we changed our mind.”

Mr. HARRELL. And I think that is—

Chairman JOHNSON. Wouldn't it be better to kind of lay out exactly what CFATS is all about? Why are we doing this? What is the purpose of CFATS? Anti-terrorism. And what chemicals are we trying to protect from what?

Mr. HARRELL. I think we agree with that.

Chairman JOHNSON. Is there a generalized statement you can make in terms of what CFATS is supposed to be dealing with in terms of chemicals, an overall mission statement?

Mr. HARRELL. So, the overall mission statement would be the Department's role in risk reduction, right? So removing or mitigating the risk of high-risk chemicals for chemical facilities across the country.

Chairman JOHNSON. Now define high-risk chemicals. Wouldn't that be the next step? So now define a high-risk chemical.

Mr. HARRELL. Right. So that potentially could do significant harm, cause a number of deaths, and have giant explosions throughout the country, that we would otherwise feel uncomfortable with as a country, as a Nation; that and the stealing of those chemicals that could be used potentially against soft targets or otherwise.

Chairman JOHNSON. Do you have that definition anywhere with regulation, whatever a high-risk chemical is?

Mr. HARRELL. We do, and I have not committed it to memory, but I am sure we have it.

Chairman JOHNSON. OK, great. I would like to see what that definition is.

Any of you folks aware of what that definition is of a high-risk chemical?

[Witnesses shaking heads.]

You have obviously looked at this. Do you understand what the mission is of the CFATS regulation? Are they following that mission?

Mr. ANDERSON. Yes, sir, absolutely. When we speak of high-risk chemicals, we are talking about chemicals in X quantity past a certain threshold could inflict mass danger based on a geographic distance of concern. And what we have looked at recently is how the methodology has changed, how CFATS has become more mature and has a better understanding for where there might be higher consequences or lower consequences. And there was a peer-reviewed study by Sandia National Labs where they got into that and made some changes to how they define risk.

Chairman JOHNSON. Again, Appendix A was developed under the regulatory regime, and the industry had the opportunity to comment on that? Did DHS do a pretty good job of responding to comments and lay out that list where it made sense? Go ahead, Mr. O'Brien. By the way, I am not here to litigate your particular case.

Mr. O'BRIEN. No, nor am I saying—but from our experience, we know that ATF was only engaged very late in the process. So I was just going to offer that perspective.

Chairman JOHNSON. Duplicative regulation is different than what I am talking about right now. Right now I am trying to talk about how CFATS defined its mission, how it came up with Appendix A, what the definition of those risky chemicals are, and wheth-

er that Appendix A makes sense, and does it need further refinement? Or does the definition need further refinement?

Mr. Wright, you had—

Mr. WRIGHT. Yes, thank you, Senator. I just wanted to point out that when we were included, we went back to DHS in 2009 with white papers, evidence, and said, look, this is not a chemical of mass effect. We can have a fire but we are not going to have an explosion. And they basically as a result of that quit regulating us, but they would never change the underlying regulation. And that is why we are asking the Senate to exercise some oversight and say, OK, 10 years is long enough, let us make the regulation meet the reality—I mean the policy meet the reality.

Chairman JOHNSON. Mr. Harrell, real quick, do you kind of agree—you are just in the position now. Do you agree with that distinction between something that is flammable, but then you have a ton of it could cause real damage, versus something that is flammable and explosive in terms of a risky chemical.

Mr. HARRELL. Indeed, yes, so there is a difference between the two. I think DHS is absolutely committed to having the conversation back and forth with this Committee to do what makes sense and to remove or add things if we had to, to Appendix A through rulemaking.

Chairman JOHNSON. And to me, again, the whole purpose of reauthorization is to provide certainty, and if we can kind of do that—gasoline has been around a while. It is not like this is a new issue. I think we should bring certainty to this. If you are going to regulate it, regulate it. If not, you are not. I would tend to agree, kind of the explosive definition.

Mr. Fridley, you had a comment?

Mr. FRIDLEY. Yes, the only thing I would want to make sure is we are very careful with what we are going to change as far as Appendix A, whether we are going to take away from or add to, percentages, poundage, it could be anything, because any minor change could have significant consequences to my industry.

Chairman JOHNSON. OK. By the way, I agree. This is all about bringing certainty.

Mr. FRIDLEY. Yes, absolutely.

Chairman JOHNSON. If we have an Appendix A that can be changeable depending on Administration or the administrator or regulator, I would say it does not bring a great deal of certainty.

Now, if we develop new chemicals, we learn something new about something, but we know what gasoline does. If it is not going to be regulated, it should not be on the list. We probably ought to take that out, I would think, legislatively.

Again, you guys hop in here. Otherwise, I will just keep going.

Senator PETERS. Let me—

Chairman JOHNSON. Just hop in. I want this free-flowing.

Senator PETERS. I should have hopped in on some of the whistleblower information. I want to get back to you, Mr. Morawetz. The Chairman was asking you about union protections for folks who are whistleblowers. It is true if you are in a union, you usually have a lot of additional protections, but I understand a lot of the companies in this industry are not unionized. Is that correct?

Mr. MORAWETZ. That is correct.

Senator PETERS. So they would not have those kinds of protections——

Mr. MORAWETZ. That is correct.

Senator PETERS [continuing]. That you have in a union, so that is why we are looking at this broadly as protections to make sure we are creating a work environment where when people see things that are not right, they know they will not——

Chairman JOHNSON. But there are plenty of protections within law.

Senator PETERS. Well, yes, but you must have a process that makes it a lot easier than saying, well, you are going to get fired, you must hire a lawyer, you are going to be out of work for a few years. You are going to have to litigate the case. I mean, that is not really reasonable for folks. That is still going to create an environment that is not conducive to folks who are seeing things, particularly workers who are on the front lines and are actually engaged in this activity.

Chairman JOHNSON. Not to interrupt, but I am going to interrupt. You have the exact same thing with the law in CFATS. Again, what I am saying is there is already whistleblower protection in law. Do we need another layer of whistleblower protection in law within a specific program? I am happy to look at that.

Senator PETERS. We will talk about it. We have an actual process where the person continues to stay in the job, continues to work, does not have to——

Chairman JOHNSON. And that exists in law. We will figure out where that is and work that out.

Senator PETERS. Yes, we had a GAO report titled, “Improvements Needed for DHS Chemical Facility Whistleblower Report Process.” There is a long title. And included in the DHS response, which was dated back in 2016, the DHS, Mr. Harrell, was going to move forward with some of that. Were such whistleblower retaliation rules ever issued as a result of that GAO report, to your knowledge?

Mr. HARRELL. So DHS has developed a documented process and procedure to address and investigate whistleblower retaliation reports, and we can share this process with this Committee. However, DHS will need to complete rulemaking to fully implement the whistleblower retaliation provision.

We value whistleblower provisions and any program that investigates any retaliation claims. However—and this is really to Senator Johnson’s point. CFATS is focused on anti-terrorism, facility security, and risk reduction, so this is outside of our subject matter expertise.

So we would like to work with Congress to develop a program that meets the needs of industry, facility employees, and, of course, the Department.

Senator PETERS. Mr. Harrell, the President’s Fiscal Year (FY) 2020 budget includes about \$18 million in cuts to CFATS. If the cut were implemented, how would that impact your program?

Mr. HARRELL. So any budget cut, whether you are in the private sector or you are in the Federal Government, will certainly impact operations. So my job is really to minimize those impacts and assure that we do not diminish national security or allow foreseeable

risks to materialize. So CISA will continue to approve facility security plans and conduct inspections, although probably at a somewhat reduced rate.

The good news is, though, we have streamlined many of our processes and inspections over the years, and we have matured. We have improved training and implemented measures to ensure the consistency across the country.

So, ultimately, at the end of the day, though, we would need to curtail some of our inspector training, some of our travel, and some of our outreach as some of the low-hanging fruit there of how we would curtail.

Senator PETERS. So \$18 million is low-hanging fruit?

Mr. HARRELL. No. We will continue the mission. We will continue to execute. It will just be somewhat of a slower process and a bit reduced other than normal operations.

Senator PETERS. Has the Department's focus on the Southern Border impacted any of the CFATS program in any way?

Mr. HARRELL. It has had zero impact.

Senator PETERS. Zero impact. A few weeks ago, a notice went out to all CISA employees soliciting volunteers to go to the Southern Border. Did any of your personnel volunteer to be deployed down to the Southern Border?

Mr. HARRELL. They did, yes. So the Cybersecurity and Infrastructure Security Agency had a number of employees volunteer, some of which came from the Infrastructure Security Division, my division, and so there are some down there now.

Senator PETERS. How many in total?

Mr. HARRELL. I do not have the total number offhand, but we have a few down there. But in terms of impact, in terms of that operational impact, not doing inspections or slowing the process down of approving site security plans, there has been none of that.

Senator PETERS. OK. During the February 27 House hearing on CFATS, Director David Wulf mentioned that thousands of facilities have lowered their tier or have tiered out and are no longer considered high risk. I think we should all consider that probably a good thing that that happened. It seems to me that there are fewer facilities that are high risk.

So my question for you, Mr. Harrell, is: Has DHS done anything to inform facilities still covered by CFATS of lessons that were learned from those facilities that now have a lower tier or tiered out of the program?

Mr. HARRELL. So we pride ourselves on doing a lot of outreach. We are very transparent with some of the things that we have done well over the years. And so in terms of going around the country and engaging with facilities and engaging with trade associations, we are talking about these industry best practices and some of these physical security mitigation measures that industry has implement over the years.

So do I have a document to point to? No, not necessarily. But there are conversations that are happening on almost a daily basis about what good security looks like, and I think we have been able to convey that to the industry at large.

Senator PETERS. So you are having informal conversations, but it does not sound like there is any systemic way of actually com-

piling data to look at facilities that are at reduced risk and then provide some of that data to other facilities?

Mr. HARRELL. In terms of data, I think this is probably an opportunity for improvement for us.

Senator PETERS. Is that something you will consider going forward? Is that something we need to be engaged in here?

Mr. HARRELL. No, indeed. As a matter of fact, it is ongoing as we speak now. As we move forward, I think it is incumbent upon us as a mature program to push out these industry best practices to what reduces risk for not only the regulated community but also the non-regulated community as well. The 30,000 facilities that are out there that we do not necessarily touch now, they may not be high risk, but they are not no risk. And so there is an opportunity to engage them as to what good security looks like and provide that road map.

Senator PETERS. A good security format is that we want to reduce the security risk, so it is good to get folks into lower tiers. So that should be a focus of your efforts. You would agree with that?

Mr. HARRELL. Indeed.

Senator PETERS. That is a good thing.

Mr. HARRELL. Yes.

Senator PETERS. We need to step up those efforts.

Mr. HARRELL. Yes.

Senator PETERS. Great. Thank you.

Mr. HARRELL. Thank you.

Chairman JOHNSON. Senator Carper.

#### **OPENING STATEMENT OF SENATOR CARPER**

Senator CARPER. Thanks. Sorry to arrive late, and I know some other of our colleagues will arrive eventually.

Senator Tom Coburn and I, I think we were Chair and Ranking Member of this Committee when we worked on CFATS reauthorization. Actually, it might have been authorization. I think it was earlier. It was not actually authorized, but I think it was maybe included in an appropriations bill. But we worked on it, and we did a pretty good model of bipartisan cooperation, which we always like to do, but my recollection is that we made a number of changes and improvements to the law in order to address, on the one hand, the backlog of inspections of the facilities across the country, and also ensure that DHS and also the industry being regulated had the kind of certainty that they needed in order to make investments in securing chemical facilities.

I would just ask, Mr. Anderson, you are representing GAO. Is that correct?

Mr. ANDERSON. Yes, sir.

Senator CARPER. And, Mr. Harrell, I understand you are here representing DHS. Is that correct?

Mr. HARRELL. Yes, sir.

Senator CARPER. I am going to ask both of you sort of the same question. Nobody back 5 years ago thought the law was perfect, and the idea is to find out what works, do more of that. And if it is not perfect, make it better. So we knew it was not perfect, so the idea is to make it better, and my hope is that this conversation today will help us to do that.

In the spirit of if it is not perfect make it better, I understand that GAO has issued a number of recommendations to DHS regarding improvements to the program. Mr. Anderson, if you could just talk a little bit about maybe some of those recommendations, and then I am going to ask you, Mr. Harrell, if either you or maybe both of you could talk about how DHS has responded to those recommendations. And, finally, is there more work to be done? And my guess is the answer is probably yes.

Mr. Anderson, do you want to lead us off?

Mr. ANDERSON. Happy to lead off. We have issued 12 recommendations over the last 7 years. Ten have been implemented, and they speak to identifying high-risk facilities, better prioritizing them, and then reviewing and approving facility site security plans.

The two areas that we believe are outstanding and do demand attention, first is performance measurement. And as I said in my opening remarks, this sounds bureaucratic, but it really speaks to how the program should exist, how in that risk equation of threat, vulnerability, and consequence do we know that these security measures that the CFATS program puts in place are actually reducing vulnerability? A lot of the big facilities, they have a security posture in place where they might be high consequence and, therefore, get a real high risk rating. But they have already got those security measures in place, so it is not the CFATS program that is reducing that threat of a terrorist attack. It is some of the smaller ones in many cases that maybe, would not have a perimeter fence or would not have video surveillance but for the requirements of the program.

In that situation, then perhaps if it is the CFATS program coming in and recommending or requiring that security posture, there has been a reduction in vulnerability. We feel at GAO that that is where the program needs to improve. It is called an "outcome measure." What is the outcome of that investment in the CFATS program?

The second area is with information sharing for first responders, and that was from our most recent report as well, that in many cases the Local Emergency Planning Committees (LEPCs), did not have the information or did not have access to the information to know what kind of chemicals were present in an area when they were responding to an event.

Senator CARPER. Mr. Harrell.

Mr. HARRELL. Thank you, Senator, for the question.

Senator CARPER. Do you agree with anything he said?

Mr. HARRELL. We are very focused on metrics and accountability, and we have spent a lot of—

Senator CARPER. I am sorry. Very focused on metrics, did you say?

Mr. HARRELL. Metrics, yes. This program has over the last number of years really driven, I think, a lot of the physical security protective measures within industry. And these measures are contributing to risk reduction. Well, now the question, the logical question, is: Prove it. Do not tell me about it, but show me. Right?

And so in going forward in coordination with the GAO report, we are trying to move our metrics and our responsibility toward proving the fact that we have done risk reduction. And so we think that

comes through engaging with the facility and talking about from the moment in which you started CFATS and you had just kind of a regular security program, to now implementing the measures within CFATS, how has risk been reduced? What measures have you put in place that have quantitatively reduced risk?

And so we are trying to take that data, compile it, and measure with it, and I think that is one of the new things that really should be back to this Committee, is, again, expressing the fact that we have done risk reduction.

Right now we have measured that over the last number of years we have had a number of facilities increase their security measures by 55 percent, and we are certainly willing to kind of walk through that number with this Committee as to how we have gotten to that. But we think it is important, moving forward, that we measure this, and I think it is a sign of a mature program. That is what I am committed to doing.

Senator CARPER. Anybody else want to comment on this exchange and what was said or not said? Speak now or forever hold your peace.

Mr. ERNY. Maybe I will just say just a few things. Information availability, this is an issue that sort of spans across multiple statutory authorities and regulatory agencies, and with involuntary programs, etc. In fact, DHS, Brian, I do not think you mentioned anything about your Internet Protocol (IP) Gateway. A great tool that is available today where, folks, members of the LEPCs and others can gain access to critical information about sites, CFATS sites, and chemicals in their community.

But the thing that I want to stress with this is you have to balance the need for information and transparency and security, and I think it is always kind of that tough line that we are trying to reach as to what is the right balance here. So I would just caution everybody when we talk about making more information available to more people, the whole issue around need to know is really important?

Senator CARPER. OK. Yes, Mister—is it Fridley?

Mr. FRIDLEY. Yes, sir.

Senator CARPER. Hi, Mr. Fridley.

Mr. FRIDLEY. Just a little piggyback on Bill's comment. The outreach, I think we do as good a job as we can, and obviously it has been getting better with the CFATS DHS inspectors' help. They do a lot of the coordination for us. They know who are the players. We do really big live exercises with different agencies. The Federal Bureau of Investigation (FBI), we involve the Joint Terrorism Task Forces (JTTF). We involve, you know, ATF. We involved Transportation Security Administration officers. We do not publicize this nor do they, but we offer up our facilities on a regular basis for them to come in to do their drills as well as our drills.

So there is a lot of coordination, I think, that goes out that does not necessarily get communicated out. So we are dealing with the right people. It is just not publicized.

Senator CARPER. OK. Good. Anyone else?

Mr. WRIGHT. Yes, thank you, Senator. I want to reiterate what Bill is saying. I think it is a balance, and there are lots of other statutes and agencies that deal with sharing of this type of infor-

mation. As Senator Johnson said in his opening, we need to keep CFATS focused on the terrorism issue. There are lots of other statutes, lots of other agencies that can do this. I know that my industry, we work very hard—and other industries—

Senator CARPER. What is your industry?

Mr. WRIGHT. I work with the terminals, sir, the storage facilities that you see at ports particularly. But we work very hard and it is in our interest to see that the local first responders know what we have and know how to deal with it. So we do that.

But in the CFATS context, the whole purpose of CFATS is to keep information close to the people who are trained to deal with it, the people who are committed to keeping it secret, because we go through this exercise, and that information about dangerous chemicals or vulnerabilities to facilities, we have sort of turned the thing on its head. And so, it is very critical that we keep—and I think we have done a good job of this, and I think certainly DHS has done a good job with this, is to keep the information to the number and kinds of people with the right training who can deal with it.

And so if there is a problem, maybe it is another statute, maybe it is another agency that ought to be dealing with it. But I feel that industry is doing a very good job because it is in the industry's interest.

Chairman JOHNSON. In other words, you want to keep your security plans out of the hands of terrorists.

Mr. WRIGHT. That is correct.

Chairman JOHNSON. Mr. Harrell, you wanted to comment on something?

Mr. HARRELL. Yes. Thank you again for the question. So information sharing I think is absolutely critical to not only the facility but also first responders, and I say this as a former law enforcement officer. We need to strike that nice balance between getting the information to first responders and then also not providing that blueprint for attack. I think that is kind of what we all necessarily can agree on up here. But CFATS requires facilities currently to make contact with first responders during the facility's security planning. This is found under Risk-based Performance Standard No. 9.

So we have made concerted efforts over the last year as a response to the GAO audit to engage our Local Emergency Planning Committees. As a matter of fact, in 2018 we engaged 570, which is a pretty significant number. Over the last 5 years, we have actually engaged every single LEPC that is active in the United States. So I think we are doing a very good job of engaging those local first responders and providing them the things that they need to know so that when things go bump in the night or something happens, they have and are armed with the information to properly respond.

Chairman JOHNSON. I think it was Mr. Anderson's testimony that said there was—you did take a look at use of the IP Gateway.

Mr. ANDERSON. Yes.

Chairman JOHNSON. And the local responders had access to that? I am highly concerned about having that information available, but it is in a secured channel with a properly secured gateway. Local responders should be looking at that. What is the disconnect here?

Mr. ANDERSON. Two data points that may be relevant to the discussion here. Thirteen of 15 LEPCs that we spoke with did not have access to IP Gateway, so they did not know how to navigate it. Put that on one side. Seven of 11 other LEPCs we spoke with did not realize they had CFATS-covered facilities in their jurisdiction. So part of this is communication, and part of this is education. But we did see some pretty big gaps in terms of information sharing with first responders as of August 2018.

Chairman JOHNSON. I would think that would be pretty easy to take care of. You have how many total CFATS-regulated companies? How many thousand?

Mr. ANDERSON. High risk, 3,500. Total, 30,000.

Chairman JOHNSON. Those 3,500 that DHS just says you have to contact your local fire department and make them aware that you are there and that here is your secure password into this IP Gateway. I would think that would be pretty simple. Again, a little lowly plastics manufacturer, our fire department knew everything about our operation. So what is happening with local law enforcement?

Mr. O'BRIEN. Senator Johnson, just to add our perspective from the explosives industry, by ATF law we have to engage the local fire and first responders. So every facility covered by CFATS that is an ATF-regulated facility already has to engage local law enforcement and first responders.

Chairman JOHNSON. I will kick it over to you, Mr. Harrell. Do you have an answer to why law enforcement did not even know about the CFATS facilities or why not a one that were surveyed had access to the IP Gateway.

Mr. HARRELL. I think we are still very intent on engaging local law enforcement, LEPCs. This is an iterative process. This is us going and pinging them, constantly talking about our tools. Some of them are overtaxed. Some of them are running from call to call and do not necessarily have the resources and do not necessarily have the full situational awareness that we offer these things. I think it is incumbent upon us to engage early and often to remind them that we have these tools, and, oh, by the way, they are free. And so we are committed to that.

Chairman JOHNSON. OK. Again, my experience with, fire departments, they are waiting in between fire calls, and this is what they do in between that, is they visit different sites so they are prepared.

Mr. Harrell, you talked about operating systems. I am a little concerned about hearing you talk about operating systems. Can you tell me what you are talking about, CFATS program looking at operating systems?

Mr. HARRELL. Sure. The Risk-based Performance Standard No. 8, which is cybersecurity, if you read the language today it is a little bit antiquated. I think there is an opportunity for improvement here to revisit that language, refresh it, and really focus on today's cybersecurity threats when it comes to not only corporate systems but also industrial control systems. And so I think we really need to understand the threat, and we have seen this threat in terms of industrial control systems and, nation-state adversaries trying to exploit this overseas, and we do not want that to happen here.

Chairman JOHNSON. Cybersecurity is an incredibly complex and an unbelievably large issue here. The President's budget calls for a reduction and basically calls for it because your right-sizing the industry for today's threat. First of all, do you agree with that statement of the President's budget?

Mr. HARRELL. Well, so CFATS resides in the Cybersecurity and Infrastructure Security Agency—

Chairman JOHNSON. I understand, so should cybersecurity and looking at operational controls of chemical facilities, do you really think that should be within the purview or within the jurisdiction of the CFATS program?

Mr. HARRELL. As it currently is written, and I would continue this today, that is, there are certain industry best practices, things that we should be doing to safeguard our systems, having a phishing plan, understanding insider threats, doing the basic cyber hygiene that every company should be doing. And so, yes, the answer is yes. I think from a risk-based performance standard we should continue to at a high level look at cybersecurity.

Chairman JOHNSON. OK. Anybody in industry want to comment on that?

Mr. FRIDLEY. We actually utilize a lot of the resources that DHS provides us for our information technology (IT). I am not an IT person, but I have put them in contact with our IT.

Chairman JOHNSON. That is DHS, that is CISA's responsibility, not necessarily CFATS.

Mr. FRIDLEY. But I am using the CFATS portal to be able to make the right contacts. I just do not have the infinite knowledge of who is all who, so they definitely play a role in that. But we actually work with a lot of things as far as looking at pulling certain things off our business network that are not core to our business and putting them on separate networks, to kind of keep that delineation between the different attacks that could happen.

Chairman JOHNSON. Using CFATS as your portal to get to the experts at CISA in terms of plugging into National Institute of Standards and Technology (NIST) standards or whatever, that does not bother me. Where I get a little concerned is if all of a sudden CFATS is going to set up its own little cybersecurity directorate to audit and consult with chemical facilities in terms of your operating systems and how to prevent cyber attacks. I am questioning that right now.

Mr. FRIDLEY. We actually get inspected from our cyber standpoint from, RBPS 8 that Brian was talking about, and we actually had the inspectors come and get with our IT folks to kind of go through and do that cleanse.

Chairman JOHNSON. Which inspectors?

Mr. FRIDLEY. The CFATS inspectors.

Chairman JOHNSON. On cyber?

Mr. FRIDLEY. Yes, sir.

Chairman JOHNSON. This is different from the roundtable we had last year on cyber.

Mr. FRIDLEY. We have a corporate approach for our cyber, so they send their cyber experts to our facility, our headquarters, and they did the whole inspection process with our director of cybersecurity.

Chairman JOHNSON. OK.

Senator PETERS. I will interject. I mean, it is clear, I think, Mr. Harrell, you mentioned the attack on a plant now is not going to be a truck driving through the gate. It is likely to be a cyber attack in some way and that is why cybersecurity is an important part of what you do. Is that correct?

Mr. HARRELL. It is, yes, 100 percent.

Senator PETERS. And would all of you agree that we are thinking about with CFATS?

[Witnesses nodding heads.]

Great. Thank you.

Mr. HARRELL. If you do not mind, sir, one of the things I would just add to that is, I would really refrain from looking at this through the silos of physical security, cybersecurity, and industrial controls. Today we are seeing blended attacks. We are seeing that hybrid threat. And so it is incredibly important that we look at this from a convergence perspective to understand that what happens on the physical side can certainly have a cyber implication. And what happens on the cyber side can have a physical implication.

IP-based cameras, access control systems, they are all Internet-facing today, and we do not want that to be the enemy avenue of approach on the physical security side to get into some of the key cyber systems. So I think we need to have a full understanding across the entire threat landscape.

Senator PETERS. Everyone agree with that? Any other opinions on that?

Mr. ERNY. Maybe I will just add a couple of thoughts. I do not disagree with that; for sure there needs to be a focus, a cyber-related focus when it comes to the CFATS program. However, it needs to be a focused approach to this, and I think for the most part, my understanding listening to members, that DHS has done that. But there is a continuing concern of this thing expanding out. We are looking at things like ransomware and some of these other cyber-related issues that we see today. Some of this gets blended in with more of sort of what you would consider to be sort of a traditional attack on a chemical facility through a cyber means.

I think the one way to look at it and the way we try to define it in our membership is: Can a cyber means be used to institute a physical release or a physical theft of chemicals of interest? And so I would just ask DHS that as long as you maintain a focus on cyber as it applies to CFATS, I think that is appropriate.

The one last thing I will say about this issue is we have other agencies dipping their toes into cyber. We have the Coast Guard getting ready to release some cyber guidance through their Navigation and Vessel Inspection Circulars (NVIC) process. Customs and Border Protection just added a lot of cyber-related, and they are not all the same.

And so one of the issues here with the companies is just getting overwhelmed by all these different agencies—

Chairman JOHNSON. That is my concern.

Mr. ERNY [continuing]. Different approaches around cybersecurity. That is a real concern.

Chairman JOHNSON. It is the concern I am expressing right now. Listen, there is no doubt about it that cyber attacks, that

cybersecurity is a threat to every business particularly in this sphere. What you do not want is you do not want every one of your alphabet soup agencies with a whole new cyber standard and their cyber inspection team and that type of thing. I can certainly see every agency being a portal to a unified approach how we go about doing this. Now, the unified approach may be to an Industry Sector Advisory Committee (ISAC) within a particular industry where you try and get like-minded, similar types of industries working at the problems because they have some similarities there, like the Financial Systemic Analysis and Resilience Center (FSARC) or whatever. I have a real concern when one program within a larger agency is taking the whole cybersecurity issue on its own back and trying to develop the processes and the expertise and that type of thing, do full audits and, here is the program, this is what you have to comply with; if you do not comply with it, here is your fine. That is where I start having some real concern. Mr. Harrell, if that makes sense to you.

Mr. HARRELL. Actually, it does, and our commitment to you is that, we will reduce those redundancies amongst regulation. We do not want that same scenario that you just described. And so as we go down that road, potentially, the onus is on us to ensure that does not happen.

Chairman JOHNSON. And you may take that attitude. The fellow or gal that follows you may not. Again, I think Congress has done a pretty poor job of actually writing law that directs these agencies. We write these little frameworks to have the agencies go about and become their own little fiefdoms. So as we reauthorize this thing, I am going to try and do as best as possible to keep CFATS within its little box doing its thing and hopefully doing it really well and doing it really efficiently and, rewarding the good actors here.

Senator PETERS. I will just say, Mr. Chairman, when you say keep it in a box and silos, we have way too many silos right now when it comes to this. And when you have cyber, we have to be able to break down silos and make sure the communication is there to really have a whole-of-society impact so that folks from DHS or Coast Guard or wherever are also assisting private industry to safeguard assets, too. We have to come together. I do not think this is just strictly a regulatory regime. It is also a way to incorporate how we use some of the assets that we have at the Federal Government to assist you in protecting your assets as well against the bad guys that are looking for the weakest link to get in. And if we do not do this in a comprehensive way, we are not going to be successful. So that will put my 2 cents in.

Chairman JOHNSON. I am not looking at silos in terms of information when we see a threat and, oh, we are just going to keep that to ourselves. I am just talking about mission creep and having 16 ways on Sunday in terms of this is—no, you have to comply with cyber this way, no, you have to—again, you mentioned all the alphabet soups, and they are all giving you the business, right? Because we all recognize this is a threat, we cannot let this, I do not think, cyber to proliferate in terms of regulatory regimes. We have to try as best as possible unify this.

OK. One thing, and I think this came across, and it is actually pretty pleasing to hear it in the last roundtable, there does appear

to be a pretty cooperative—and I think Mr. O'Brien may disagree with this, but, in general, there seems to be a fair level of good cooperation between industry and DHS. This seems to be one agency that, by and large, because Mr. O'Brien said opportunity to assist voluntarily. Is that pretty accurate?

Mr. FRIDLEY. Yes, sir.

Chairman JOHNSON. I know you have your regulator sitting right next to you, but—

Mr. FRIDLEY. He is one down. [Laughter.]

Chairman JOHNSON. One down. We kept it arm's length.

Mr. WRIGHT. Senator, we think so. We think particularly after the 2014 changes that we have had a very cooperative relationship with DHS. We have been very pleased. But as this reauthorization process starts, we have the same concern that you have.

Chairman JOHNSON. I know. You want clarity on that issue, and we will—

Mr. WRIGHT. Exactly. On our narrow issue I do, but on the broader issue, we just do not want to see mission creep here. We want this program to remain focused on terrorism.

Chairman JOHNSON. OK. Anybody else want to comment? Confirm? Deny?

Mr. FRIDLEY. Yes, I think that, obviously, at Brenntag we have probably the most regulated facilities for the CFATS program in the country. So, we have a lot of conversations. Any questions we have get answered. Any concerns we have, we may not like the answer, but we get the answers back. They listen. It is a team effort. It is one of the few, obviously, from the regulatory agencies that we have that relationship and actually think we are being heard and valued.

Chairman JOHNSON. OK. Mr. O'Brien?

Mr. O'BRIEN. Thank you, Senator.

Chairman JOHNSON. Spill your guts. [Laughter.]

Mr. O'BRIEN. Actually, this may surprise you, but they have been amazingly receptive. The deficiency has been no recognition of ATF in their mission and what they do. So that is the deficiency. But as an agency, I mean, I have to be fair and I have to be honest. They have been approachable. They have given answers. But there has been no justification for those answers, and that is where we are really falling. Understand—why are we regulated for safety and security against terrorism twice? And we cannot get those answers. But the people who come out have been nice, congenial.

Chairman JOHNSON. By the way, there is not a good answer for it.

Mr. O'BRIEN. Might not be.

Chairman JOHNSON. Mr. Harrell, do you want to comment?

Mr. HARRELL. Yes, we would love to. The intent really is to work with all entities that are subject to compliance. This is not a "gotcha" regulation. We pride ourselves on the outreach and the transparency and the willingness to help facilities really across the board.

The program is designed to give facilities many chances to come into compliance. Out of the 3,327 facilities that are regulated by CFATS, DHS has only taken five enforcement actions on four facili-

ties. One facility was actually fined twice. But this represents less than 1 percent of the regulated population.

So, we are committed to—a rising tide lifts all boats. We want to have the interaction back and forth. We are very flexible, and we want to have the conversation to where, at the end of the day, the facility becomes more secure. We are committed to that.

Chairman JOHNSON. So one of the things I am a big believer in—I was not always when running a small business, then I got bought by a bigger business, and I had to create one, when I really found out the real value of developing a mission statement. I asked staff, do we have a mission statement? Is it anywhere in law? And there really is not one for this. So I would recommend as we reauthorize this stuff to develop a mission statement. If we need to clearly define some of these things, we should do it. Let us take the opportunity right now, let us lay out that mission statement. Let us try and get—because we have this cooperation and coordination. Let us get agreement within the industry this is what—everybody wants this reauthorized. Fine. Under what mission statement? And if we do a good job writing it—I am not talking about multiple paragraphs, multiple sentences. I am talking about something pretty simple. The simpler, the better. Then if we need to look at some of these definitions of what a risky chemical is, a liquid that is flammable but explodable, and just try and get some definition to bring everybody a little bit better clarity of what CFATS is all about, the regulators combined with the regulated, then I think we will have done a pretty good job as we reauthorize this thing.

So let us bring clarity to this thing, let us bring certainty to the business, while at the same time accomplishing what I consider is the primary goal here. Let us make sure we keep chemicals out of the hands of terrorists and do not let them fall into the wrong hands to be used for terrorist-type events.

Again, I think it ought to be pretty simple to do these things, so let us work together on that.

I will give everybody an opportunity. We will start with Mr. Morawetz, and if you have any comments that you cannot wait to get out?

Mr. MORAWETZ. Besides my written statement, I would just reiterate that we are a stakeholder like everybody else at this table and this room. We think that we should be included in it. Without that, I think you are losing a lot from it. In particular, I agree about where the focus is, which is Appendix A, Chemicals, and that they are extremely hazardous substances. And we are only dealing with it in the realm of anti-terrorism, but there is a lot that could be done on it.

Chairman JOHNSON. By the way, Mr. Morawetz. It is interesting. When I was running a manufacturing plant, if I wanted to get answers, I did not go to management. I went to people on the plant floor. So you are absolutely right. They are the ones that are actually implementing. Any smart management, any smart regulator is going to get input from the people that are actually doing the work on the shop floor. So we are in complete agreement from that standpoint.

Mr. MORAWETZ. And my guess is most of the people at this table involve their workforce.

Chairman JOHNSON. Mr. Wright.

Mr. WRIGHT. Senator, just thank you for this opportunity. As I say, we have a very specific issue, and we want Congress to exercise some oversight and to help give us some relief for what we consider to be a rather narrow problem. But beyond that, we are very supportive of CFATS and very supportive of the program, and we look forward to working with you as we get into the reauthorization language. And thank you very much for your comments today.

Chairman JOHNSON. Mr. Erny.

Mr. ERNY. I would just say a few things. I like the focus and the attention that you are bringing to this issue. We stand ready to help and support the Committee as needed. I think one of the more important things here is to make sure that we keep CFATS focused on anti-terrorism and chemical security, and I would be very concerned with any wandering away into some other areas.

Anyway, I look forward to working with your Committee.

Chairman JOHNSON. As a homework assignment, I would not be opposed to each of you writing up a no-more-than-two-sentence mission statement. I would be really interested in seeing something like that. If you have to go longer, I am just going to ignore it. No, I am just kidding. I think these things are best when they are really focused. I have seen mission statements that run on three pages. That is really not being succinct enough. Mr. O'Brien.

Mr. O'BRIEN. Thank you, Senator Johnson, for the opportunity to be here. A side note. My kids were thrilled that I actually was participating with a Senator. They had no idea things like this happened in—

Chairman JOHNSON. Not that big a deal. [Laughter.]

Mr. O'BRIEN. I said, boy, when my kids think it is a big deal, it must be a big deal. Daddy did something good.

I appreciate the opportunity. It still confuses us why a group that is already regulated for safety and security against terrorism is falling under the CFATS program. It is the most obvious duplicative regulation we can see out there. When you look around, we cannot find another one that is as obvious as this. We still would love answers as to why we are continuing to be in this, because we have done our metrics. We do not see the benefit for security that DHS is claiming. We do not know where they are getting those metrics from.

So the continued ask is please look at us as a regulated community and look for that justification. If you are opening up the thing as to what ought to change? We are easy, double-regulation group.

Chairman JOHNSON. Well, as you are aware, I fixed that last time, so you understand where I stand on that.

Mr. O'BRIEN. We appreciate your efforts, Senator.

Chairman JOHNSON. Mr. Fridley.

Mr. FRIDLEY. Yes. With over 100 CFATS-regulated facilities, we are looking to invest quite a bit of capital, and we are just looking for certainty on reauthorization. So we look forward to working with you, Ranking Member Peters, and both your staffs on this regulation and get the reauthorization.

Chairman JOHNSON. I actually have a question for Mr. Anderson, because I think what you are asking for, a metric reduction vulner-

ability, I just think it is unanswerable and immeasurable. So how do you do that? Or let us put it this way: very difficult to.

Mr. ANDERSON. There are other analogs in Federal space, and I will point to the Coast Guard and to their MTSA and how they regulate and measure the effects of—I should say measure the effects of their efforts, for example, at port chemical facilities. It is called the “Maritime Security Risk Analysis Model (MSRAM),” and to unpack that a little bit, what they will do is they will go in and, based on that initial security vulnerability assessment, there will be a baseline of the security posture. And then after additional measures are put in place, even if it is somewhat back of the hand, say they have gone from a five in terms of vulnerability to a terrorist attack to a two, based on some perhaps subjective measure, but there is usually alignment between some of those numerics and a given security posture. Then you are getting a better understanding for how much has vulnerability reduced as a function of these requirements. Otherwise, you and other decisionmakers who are in a position to evaluate this program do not have the information necessary to determine whether the benefit is worth the cost.

Chairman JOHNSON. OK. You have answered my question. I understand what you are talking about. I think part of the problem for DHS on that is if they have already brought people up to a standard—the good metrics have already been achieved, hopefully. Now what else are you going to measure? So, you are here. Without further mission creep, without saying, “well, because we have to improve our metrics now, OK, you met this standard.” It is like in my business, it is OK, you have the one part per billion. Hey, how about two parts per trillion? Because now we can measure it. Which, by the way, is exactly what is happening in industry as we get an ability to measure with more precision. It has gone from parts per million to parts per billion. Now I am reading things like parts per billion in terms of purity. Again, I am a little concerned about a metric like that at this level at this point in time after people have already been certified. How would they actually have an improved metric if you have already got people at a certification level?

Mr. Harrell, are you providing any scores on that? Is there any score right now in terms of facilities other than tier level?

Mr. HARRELL. There is. As a matter of fact, we are focused on from when you enter the program and your current State of security program to where you finally come into compliance and you have added some of these physical security protective measures in place. What is that score? What is that risk reduction? And we have been able to measure that, and we are happy to supply—

Chairman JOHNSON. Isn't it just for GAO's purposes, just a matter of accumulating all that data on 3,500 companies?

Mr. HARRELL. I believe it is.

Mr. ANDERSON. I would say there is a little bit of the devil is in the details. The information that we have gotten from DHS is on risk, writ large. We are talking about the vulnerability variable between threat plus vulnerability plus consequence. So you could reduce risk by, reducing consequence. Or you could better measure risk or have a risk score based on a high-consequence event. But it is really vulnerability that we are after here. We are trying to

reduce the vulnerability of facilities to a terrorist attack. That needs to be measured. There are analogs in Federal space. While it is difficult, other mature programs have gotten there, and I would be happy to unpack the MSRAM model for DHS.

Chairman JOHNSON. I would like to keep talking—let me throw one out. How would you measure this one? After 9/11, I think the most significant security measure we took is we hardened the cockpits. How do you put a score on that? I think it dramatically increased security in our airspace. But how would you ever measure that? Other than we did it. This was obvious. Just kind of like meeting the standards of what CFATS certification is, you have done it. So we will have this—we do need to have this conversation because I am just not quite getting measurement. I do want these agencies to concentrate on actually certifying and responding and cooperating with the agencies to make things safe as opposed to spending a lot of time measuring the unanswerable. So you have to do a little more convincing, at least to me.

Mr. ANDERSON. I am happy to, and I do have more to say, but I am thinking the conversation is pivoting away from this at the moment.

Chairman JOHNSON. Well, we should probably do this in my conference room or whatever with staff. Because, I am intrigued. That is why I am asking the question. I am an accountant. I love data. I like to measure things. But sometimes, again—

Mr. ANDERSON. But it also underscores your point. It does underscore that perhaps the program needs to change. If you have gotten to this high baseline already for a given security posture, then maybe you argue at that point that the hard work has been done. Now the program needs to shift from one of checking internal controls.

Chairman JOHNSON. Mr. Harrell, do you have anything just burning—

Mr. HARRELL. Just our commitment to evolving the program, not only with you but this Committee. We recognize that the program should be focused on risk reduction and active intelligence. The threat has evolved, and so should we. And we are committed to this body, the industry, and, we want to be a partner in a long-term policy solution.

Chairman JOHNSON. OK. Well, let me underscore how important it is that you maintain the attitude you have right now with the people you are regulating that you have been cooperative. I think that is pretty rare in the Federal Government, so I am glad to be conducting the oversight over a program and agency that has that type of seal of approval from your regulator, those that you regulate. It is a real feather in the cap to all your personnel, so thank them personally from me.

Mr. HARRELL. Yes, sir, I will.

Chairman JOHNSON. Make sure you maintain it. That should be a prime goal of the organization, is to maintain that level of cooperation that is in reality that you really are cooperating.

One suggestion for doing that is listening. Where you have duplication like ATF, support a reform that in a way does not jeopardize national security, and helps reduce the regulatory burden. Those businesses that have International Organization for Standardiza-

tion (ISO) certification or, other regulatory agencies that are keeping you up to snuff, they have already met your certification and potentially surpassed it, reward them with less of a regulatory burden. I think that not only would demonstrate that you have an attitude toward cooperation, but in the end you will actually modify things based on the reality and you will continue to cooperate with the industries that you regulate.

Again, hats off to you and everybody within the CFATS program for, first of all, creating that atmosphere where you really do have people that appreciate the fact you have that cooperation and just lay that in as just an ongoing culture within your agency.

Mr. HARRELL. Thank you.

Chairman JOHNSON. Anybody have any last thoughts based on that?

[No response.]

Speak now, or you have to do it in the conference room later.

[Laughter.]

This hearing record will remain open for 15 days until June 19 at 5 p.m. for the submission of statements and questions for the record. This hearing is adjourned.

[Whereupon, at 4 p.m., the Committee was adjourned.]



## A P P E N D I X

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**“Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program”  
Opening Statement of Chairman Ron Johnson  
June 4, 2019**

*As prepared for delivery:*

The Department of Homeland Security’s first regulatory program, the Chemical Facility Anti-Terrorism Standards program known as CFATS, was initiated in 2006 to reduce the chance of terrorists using certain high-risk chemicals during an attack. Since its initial authorization, however, a number of questions have been raised concerning the effectiveness of the CFATS program. Both Congress and non-partisan government watchdogs have highlighted significant challenges facing the program, including a flawed threat-tiering methodology, ineffective metrics, significant backlogs, and program mismanagement. This oversight has helped uncover and correct some of the program’s deficiencies. As a result, each time Congress has authorized the program, it has provided a sunset to ensure ongoing oversight and reform.

In 2014, Congress made changes to the CFATS program and reauthorized it for another four years. Since then, my Committee has conducted additional oversight of the CFATS program to evaluate its effectiveness and propose reforms addressing its shortcomings. Last year, we passed a five year reauthorization and reform of the CFATS program by voice vote out of the Committee. Unfortunately, we were unable to come to an agreement with the House on the legislation before the program was set to expire, and instead agreed to passing a short-term extension of the program that will expire in April 2020.

Ahead of April 2020, we know there is much work to do. A recent report by the U.S. Government Accountability Office found that after its creation thirteen years ago, CFATS still does not effectively measure or demonstrate risk reduction. The chemical industry has also provided valuable feedback, including the need to avoid duplication with other regulatory regimes, keep the program focused on national security, protect sensitive site security information, and adapt the program to the current threat environment. As a former plastics manufacturer, I understand how this industry greatly contributes to our economy and the need to protect it from bad actors. However, I also understand the burden of duplicative or excessive regulations on businesses.

Today, we have assembled a roundtable of key stakeholders to discuss proposals for improving and reforming the CFATS program. Our goal should be to lessen the burden on regulated facilities while still enhancing the national security of the United States. We welcome representatives from DHS, GAO, private sector companies regulated by CFATS, and a member of the chemical sector workforce. I thank everyone for joining this roundtable. I look forward not only to your comments, but also to engaging with Ranking Member Peters, Representative Thompson, Representative Rogers, and others to identify reforms to improve the efficiency and effectiveness of the CFATS program.

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
“Sensibly Reforming the Chemical Facility Anti-Terrorism Standards  
Program”**

**OPENING STATEMENT OF RANKING MEMBER GARY C. PETERS**

**June 4, 2019**

**AS PREPARED FOR DELIVERY**

Thank you, Mr. Chairman.

At its most basic level, the Chemical Facility Anti-Terrorism Standards program, commonly referred to as CFATS, was designed to ensure that certain chemicals would never fall into the hands of terrorists. Created in 2006, this program struggled with inconsistency and inefficiency in its early years.

CFATS has seen multiple short-term extensions over the past decade, undermining the stability needed to manage a vital national security program.

The uncertainty surrounding the future of CFATS made it difficult for the Department of Homeland Security to advance and mature the program's core functions. Likewise, chemical facilities around the country lacked the regulatory certainty to make long-term investments in their security.

Fortunately, in 2014, Congress came together on a bipartisan basis and provided a four year reauthorization, creating the consistency and stability necessary to make CFATS successful. I am committed to building on that momentum and once again providing a bipartisan, multi-year reauthorization.

As the program continues to mature, we must address the remaining gaps and work to bring CFATS up to par with other established and enduring safety and security programs.

There are a number of areas where we can refine and improve this program. In today's world, cyber threats permeate every aspect of our lives, and chemical facilities face distinct threats.

Terrorists can exploit the cybersecurity vulnerabilities of chemical facilities to cause real-world physical impacts in our communities. We must ensure that these facilities are fully addressing the cyber-threats they face.

Enhancing outreach and coordination with first responders is another area that deserves attention. DHS has recently made progress on this front, but there is room to do more.

A number of facilities have testified before Congress about their extensive coordination with first responders. We should make these success stories the norm for CFATS facilities across the country.

As CFATS continues to mature, developing the employee engagement components of the program must remain a priority. Similar to other established inspection regimes, like those run by OSHA and EPA, CFATS should have procedures in place for inspectors to coordinate with both management and workers.

Chemical workers know the ins and outs of their facilities. It only makes sense that their expertise would be consulted when drafting, implementing, and evaluating site security plans.

We should also examine how to improve the current, incomplete whistleblower program.

Current law does not include critical whistleblower retaliation protections, which could create a chilling effect that dissuades individuals from stepping forward and making difficult, but necessary, reports on the security of facilities.

These retaliation protections support transparency and security. They are a standard and crucial piece of any whistleblower program and should be part of a long-term CFATS reauthorization.

As we've seen in the past, reauthorizing CFATS is no small task. But we must come together to ensure that terrorists cannot gain access to these chemicals.

I appreciate that Chairman Johnson worked with me to extend this program until April of next year, and I'm confident that we can work together to find the common ground necessary to get the job done.

Thank you, Mr. Chairman. I look forward to a frank and productive discussion.



**Testimony**

**Brian Harrell**

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Cybersecurity and Infrastructure Security Agency  
U.S. Department of Homeland Security**

**FOR A ROUNDTABLE ON**

***"The Chemical Facility Anti-Terrorism Standards Program"***

**BEFORE THE**

**UNITED STATES SENATE**

**COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS**

**June 4, 2019**

**Introduction**

Chairman Johnson, Ranking Member Peters, and members of the Committee,

I appreciate the opportunity to appear before you today to discuss the development and maturation of the U.S. Department of Homeland Security's (DHS) regulation of high-risk chemical facilities under the Chemical Facility Anti-Terrorism Standards (CFATS) Program.

I also want to thank you for your efforts in extending the program's authorization for an additional 15 months so that we may continue to work together toward the long-term reauthorization of this critical national security program.

Chemicals are vital to our daily lives and our economy. We use them to develop medicines that maintain our health, to fertilize our crops, to provide refrigeration for our food supply, to refine fuel for our vehicles, and to build the microchips that run our smartphones. Despite these benefits, chemicals do not come without risk. Terrorists continue to seek out, acquire, and use chemicals in devastating attacks and our adversaries around the world continue to target facilities that store or produce chemicals.

We have worked hard to strengthen our homeland security in the aftermath of Oklahoma City in 1995 and the September 11, 2001 attacks. However, the reality is that we continue to live in a dynamic, changing threat environment. While an attacker would have to physically drive a truck bomb up to a building 20 years ago, today, that attacker might target a chemical facility's operating systems making toxic chemicals vulnerable or employ an unmanned aircraft system to carry out an attack from the comfort and security of a remote location. The consequences of an airborne chemical attack on a crowded location would be devastating and ensuring that doesn't

happen is one of the reasons that I sit before you today. We must remain diligent in our mission to help protect the American people from chemical attacks.

#### **Benefits of the CFATS Program**

Simply, CFATS has made our Nation more secure. Since its creation, and greatly aided by long-term authorization, we have engaged with public- and private-sector stakeholders to identify chemical facilities that present the highest risk in case of terrorist attack or exploitation and to ensure that these facilities have security measures in place to reduce the risks of these hazardous chemicals. CFATS, as a non-prescriptive, flexible, program is well-suited to reduce the risk of a chemical terrorist attack. DHS works with facilities to identify security measures tailored to the individual site's unique circumstances. Our Chemical Security Inspector cadre works with facilities to discuss options for complying with the program's 18 risk-based performance standards and also to ensure they take credit for existing measures and business practices, thus minimizing any unnecessary expenses. As a result, the level of security across the chemical industry has significantly increased, not only making a successful attack on a chemical facility more difficult, but also serving as a significant deterrent to adversaries who might seek to exploit chemicals for nefarious purposes.

In 2006, Congress recognized the threat of attacks using chemicals to injure and cause mass casualties. Recognizing that security gaps at chemical facilities had left our Nation vulnerable and, with the aim to reduce the risk of a chemical attack against Americans, Congress took decisive action to establish the CFATS regulatory compliance program.

In December 2014, Congress passed the *Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014* (CFATS Act of 2014). This statute, which enjoyed strong

bipartisan and stakeholder support, brought stability for both the Department and the regulated community and provided stakeholders with confidence in the program's future. Enacting a multi-year CFATS authorization as Congress did in 2014, has facilitated important improvements in the CFATS program, as well as incentivized facilities to engage with the Department on facility security. Facilities unsure of the return on capital investment were assured that security standards established by CFATS would not change and made critical investments to improve security. DHS/CISA would like to look to a long-term policy solution for protecting and security chemical facilities, we look forward to working with Congress and other parts of the Administration to achieve this long-term vision.

#### **The Path Forward for Chemical Security**

Since the passage of the CFATS Act of 2014, much has been accomplished and our program continues to make significant forward progress. Through the collective efforts of our dedicated workforce, industry and other stakeholders, and through the support and leadership of Congress, the CFATS program has significantly matured.

Since the passage of the CFATS Act of 2014, the program has realized true results including:

- A dramatic improvement in the pace of inspections, reviews, and approvals;
- Development and deployment of an enhanced risk-tiering methodology that affords a more accurate reflection of a facility's risk;
- Streamlining of the Site Security Plan development process and the stakeholder "user experience," reducing the burden without sacrificing security through the launch of the CSAT 2.0; and

- Enhancing efforts to address insider threat at our nation's high-risk chemical facilities through the implementation of the CFATS Personnel Surety Program (PSP).

Though much progress has been made, both within the CFATS program—and across our extended community of industry stakeholders, we are not finished. The Department recognizes that as the threat environment is constantly evolving, so too must the CFATS Program. We continue to focus on ways to enhance and evolve the CFATS program. At the Secretary's direction, and as part of our commitment to this Committee, we are undertaking a deep dive of the CFATS Program to identify opportunities to improve efficiencies and enhance the security value. While facets of this deep-dive are still ongoing, many of the program areas were covered by the recent, extensive Government Accountability Office (GAO) audit. Having concurred with GAO's recommendations, DHS is working to actively incorporate vulnerability reduction into the program's metrics and enhance outreach to local emergency planners.

In addition, CISA continues to engage our workforce and industry stakeholders on ways in which the regulation can continue evolving to meet today's complex risk landscape. Building on the success of the regulatory efforts to enhance chemical security, DHS believes we can work across the chemical security community to foster an even broader culture of chemical security through voluntary efforts. Recognizing the targeted approach of the CFATS program covers only the highest-risk sites – a fraction of the broader universe of chemical facilities – the Department is considering other opportunities to further assist the chemical facility population at-large to enhance their security through voluntary initiatives.

## **Conclusion**

In view of the continuing threat, chemical security must remain a continuing high-priority for the nation. We cannot allow terrorists to access dangerous chemicals. If we can imagine a scenario, a motivated terrorist can imagine a worse one. From the Middle East to Europe and beyond, we have seen overseas the devastating consequences of chemical terrorism: this cannot be allowed to happen on American soil.

As we work to defend today and secure tomorrow, it is imperative that we continue to directly address the threat of chemical terrorism, and the CFATS Program is an integral part of that effort. I look forward to working with this Committee to chart a path towards long-term reauthorization of this critical national security program, and I thank you for your continuing leadership on this issue. I am happy to take questions.

**Chemical Facility Anti-Terrorism Roundtable Discussion  
June 4, 2019**

**Key GAO Findings and Recommendations (2012-2019)**

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Since 2012, GAO has issued five reports reviewing the Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism (CFATS) program. GAO's findings and recommendations relate to five areas of CFATS operations:

- 1) Identifying high-risk chemical facilities
- 2) Assessing risk and prioritizing facilities for review
- 3) Reviewing and approving facility site security plans
- 4) Inspecting facilities and ensuring compliance
- 5) Conducting stakeholder and first responder outreach<sup>1</sup>

As of May 2019, GAO has made 10 recommendations to the CFATS program in these five areas and DHS has implemented eight of them while taking action to begin implementation of the remaining two recommendations.

DHS established the CFATS program in 2007 to, among other things, identify high-risk chemical facilities and assess the risk posed by them; place facilities considered to be high-risk into one of four risk-based tiers (with tier 1 being the highest risk tier and 4 being the lowest); assess facility security; approve security plans prepared by facilities; and inspect facilities to ensure compliance with regulatory requirements.<sup>2</sup> DHS's CFATS rule established 18 performance standards that identify the areas for which a facility's security posture is to be examined, such as perimeter security, access control, and cyber security.<sup>3</sup> To meet these standards, facilities are free to choose whatever security programs or processes they deem appropriate so long as DHS determines that the facilities achieve the requisite level of performance in each of the applicable areas.

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<sup>1</sup>GAO, *Critical Infrastructure Protection: DHS Efforts to Assess Chemical Security Risk and Gather Feedback on Facility Outreach Can Be Strengthened*, GAO-13-353 (Washington, D.C.: Apr. 5, 2013); *Chemical Safety: Actions Needed to Improve Federal Oversight of Facilities with Ammonium Nitrate*, GAO-14-274 (Washington, D.C.: May 19, 2014); *Critical Infrastructure Protection: DHS Action Needed to Verify Some Chemical Facility Information and Manage Compliance Process*, GAO-15-614 (Washington, D.C., July 22, 2015); *Critical Infrastructure Protection: DHS Has Implemented Its Chemical Security Expedited Approval Program and Participation Has Been Limited*, GAO-17-502 (Washington, D.C.: June 29, 2017); and *Critical Infrastructure Protection: DHS Should Take Actions to Measure Reduction in Chemical Facility Vulnerability and Share Information with First Responders*, GAO-18-538 (Washington, D.C.: Aug. 8, 2018).

<sup>2</sup>See 72 Fed. Reg. 17,688 (Apr. 9, 2007) (codified as amended at 6 C.F.R. pt. 27).

<sup>3</sup>DHS has enumerated 18 risk-based performance standards that chemical facilities must meet to comply with CFATS. See 6 C.F.R. § 27.230.

### 1. Identifying high-risk chemical facilities

In May 2014, GAO found that more than 1,300 facilities had reported having ammonium nitrate to DHS. However, based on GAO's review of state data and records, there were more facilities with ammonium nitrate holdings than those that had reported to DHS under the CFATS program.<sup>4</sup> GAO concluded that some facilities were not required to report to DHS and some that were required may have failed to do so.<sup>5</sup> GAO made one recommendation to DHS.

- **Recommendation:** DHS should work with other agencies, including the Environmental Protection Agency (EPA), to develop and implement methods of improving data sharing among agencies and with states as members of a Chemical Facility Safety and Security Working Group.<sup>6</sup>

**Status: Implemented.** DHS compared its data with data from other federal agencies, such as EPA, as well as member states from the Chemical Facility Safety and Security Working Group to identify potentially noncompliant facilities. As a result of this effort, in July 2015, DHS officials reported that they had identified about 1,000 additional facilities that should have reported information to comply with CFATS and subsequently contacted these facilities to ensure compliance. DHS officials told us that they continue to engage with states to identify potentially non-compliant facilities. For example, in June 2018, DHS officials identified 43 lists of potentially noncompliant facilities from 34 state governments, which were in various stages of review by DHS. DHS officials also told us that they had hired an individual to serve as the lead staff member responsible for overseeing this effort.

In July 2015, GAO found that DHS used self-reported and unverified data to determine the risk categorization for facilities that held toxic chemicals that could threaten surrounding communities if released.<sup>7</sup> At the time, DHS required that facilities self-report the Distance of Concern—an area in which exposure to a toxic chemical cloud could cause serious injury or

<sup>4</sup>GAO-14-274. GAO reviewed Emergency Planning and Community Right-to-Know Act of 1986 data from Texas and Alabama, which have different reporting criteria than CFATS. Under section 312 of the act and Environmental Protection Agency's regulations, facilities with 10,000 pounds or more of ammonium nitrate generally must submit an annual chemical inventory report to their designated state and local authorities. 42 U.S.C. § 11022, 40 C.F.R. § 370.10(a)(2)(i).

<sup>5</sup>Consistent with law and regulation, certain facilities—including, in general, facilities regulated under the Maritime Transportation Security Act of 2002 (Public Law 107-295, 116 Stat. 2064), public water systems or wastewater treatment facilities, facilities owned and operated by the Department of Defense or the Department of Energy, and facilities subject to regulation by the Nuclear Regulatory Commission or in accordance with the Atomic Energy Act of 1954—are not subject to regulation under CFATS and are referred to as excluded facilities. See 6 U.S.C. § 621(4); 6 C.F.R. § 27.110(b). In addition, pursuant to its authority under 6 C.F.R. § 27.210(c), DHS has extended the deadline for submitting CFATS reports until further notice for certain agricultural production facilities, such as farms, ranches, turfgrass growers, golf courses, nurseries, and public and private parks. See Notice to Agricultural Facilities About Requirement To Complete DHS' Chemical Security Assessment Tool, 73 Fed. Reg. 1640 (Jan. 9, 2008).

<sup>6</sup>Executive Order 13650, *Improving Chemical Facility Safety and Security*, established a Chemical Facility Safety and Security Working Group, composed of representatives from DHS; EPA; and the Departments of Justice, Agriculture, Labor, and Transportation, and directed the working group to identify ways to improve coordination with state and local partners; enhance federal agency coordination and information sharing; modernize policies, regulations and standards; and work with stakeholders to identify best practices. See Exec. Order No. 13,650 (Aug. 1, 2013), 78 Fed. Reg. 48,029 (Aug. 7, 2013).

<sup>7</sup>GAO-15-614.

fatalities from short-term exposure—as part of their Top-Screen.<sup>8</sup> GAO estimated that more than 2,700 facilities with a toxic release threat had misreported the Distance of Concern.<sup>9</sup> GAO made two recommendations to DHS and DHS has fully implemented them.

- **Recommendation:** DHS should provide milestone dates and a timeline for implementation of a new Top-Screen and ensure that changes to this Top-Screen mitigate errors in the Distance of Concern submitted by facilities.  
**Status: Implemented.** DHS implemented an updated Top-Screen survey in October 2016 and now collects data from facilities and conducts more accurate modeling to determine the actual area of impact (formerly called the Distance of Concern), rather than relying on the facilities' calculation.
- **Recommendation:** DHS should (1) develop a plan to implement a new Top-Screen to address errors in the Distance of Concern submitted by facilities, and (2) identify potentially miscategorized facilities that could cause the greatest harm and verify that the Distance of Concern these facilities report is accurate.  
**Status: Implemented.** DHS officials reported in November 2016 that they reassessed all facility Top-Screens that reported threshold quantities of chemicals posing a toxic release threat, and identified 158 facilities with the potential to cause the greatest harm. In April 2018, DHS officials reported that all of these facilities have since been reassessed using updated Top-Screen information and, where appropriate, assigned a risk tier.

## 2. Assessing risk and prioritizing facilities

In April 2013, GAO reported that DHS's risk assessment approach did not consider all of the elements of threat, vulnerability, and consequence associated with a terrorist attack involving certain chemicals. GAO's work showed that DHS's CFATS risk assessment methodology was based primarily on consequences from human casualties, but did not consider economic consequences, as called for by the National Infrastructure Protection Plan (NIPP) and the CFATS regulation. GAO also found that DHS's approach was not consistent with the NIPP because it treated every facility as equally vulnerable to a terrorist attack regardless of location or on-site security. Finally, GAO found that DHS was not using threat data for 90 percent of the high risk, tiered facilities—those tiered for the risk of theft or diversion—and using 5-year-old threat data for the remaining 10 percent of those facilities that were tiered for the risks of toxic chemical release or sabotage. GAO made 2 recommendations to DHS and DHS has fully implemented them.

- **Recommendation:** DHS should enhance its risk assessment approach to incorporate all elements of risk.

<sup>8</sup>Any chemical facility that possesses any of the 322 chemicals in the quantities that meet or exceed the threshold quantity or concentration outlined in Appendix A to the DHS CFATS rule is required to complete the Chemical Security Assessment Tool (CSAT) Top Screen—which is the initial screening tool or document whereby the facility is to provide DHS various data, including the name and location of the facility and the chemicals and their quantities at the site. See 6 C.F.R. § 27.200(b); see also 72 Fed. Reg. 65,396 (Nov. 20, 2007) (codified at 6 C.F.R. pt. 27, App. A).

<sup>9</sup>GAO recalculated the Distance of Concern for a generalizable sample of facilities—a simple random sample of 475 facilities from the population of 36,811 facilities that submitted Top-Screens since the inception of the CFATS program in 2007 through January 2, 2015—and compared these results to what facilities reported in their Top-Screen submission. Based upon this sample, GAO estimated that 4,173 facilities with a toxic release chemical misreported the Distance of Concern, with an associated 95 percent confidence interval of 2,798 to 5,822 facilities.

**Status: Implemented.** DHS enhanced its risk assessment approach to incorporate all elements of risk and worked with Sandia National Laboratories to develop a model to estimate the economic consequences of a chemical attack. In addition, DHS worked with Oak Ridge National Laboratory to devise a new tiering methodology, called the Second Generation Risk Engine. In so doing, DHS revised the CFATS threat, vulnerability, and consequence scoring methods to better cover the range of CFATS security issues.

- **Recommendation:** DHS should conduct an independent peer review after DHS completes enhancements to its risk assessment approach.

**Status: Implemented.** DHS conducted peer reviews and technical reviews with government organizations and facility owners and operators, and worked with Sandia National Laboratories to verify and validate the CFATS program's revised risk assessment methodology.

### 3. Reviewing and Approving Facility Site Security Plans

In April 2013, GAO reported that DHS revised its procedures for reviewing facilities' security plans to address DHS managers' concerns that the original process was slow, overly complicated, and caused a backlog in approving plans.<sup>10</sup> GAO estimated that it could take DHS another 7 to 9 years to review the approximately 3,120 plans in its queue at that time. GAO also estimated that, given the additional time needed to do compliance inspections, the CFATS program would likely be implemented in 8 to 10 years. GAO did not make any recommendations for DHS to improve its procedures for reviewing facilities' security plans because DHS officials reported that they were exploring ways to expedite the process, such as reprioritizing resources and streamlining inspection requirements.

In July 2015, GAO reported that DHS had made substantial progress in addressing the plan backlog—estimating that it could take between 9 and 12 months for DHS to review and approve security plans for the approximately 900 remaining facilities.<sup>11</sup> DHS officials attributed the increased approval rate to efficiencies in DHS's review process, updated guidance, and a new case management system. Subsequently, DHS reported in its December 2016 semi-annual report to Congress that it had eliminated its approval backlog.<sup>12</sup>

In June 2017 GAO reported that DHS took action to implement an Expedited Approval Program (EAP).<sup>13</sup> The CFATS Act of 2014 required that DHS create the EAP as another option that tier 3 and tier 4 chemical facilities may use to develop and submit security plans to DHS.<sup>14</sup> Under the program, these tier 3 and 4 facilities may develop a security plan based on specific standards published by DHS (as opposed to the more flexible performance standards using the standard,

<sup>10</sup>GAO-13-353.

<sup>11</sup>GAO-15-614.

<sup>12</sup>Department of Homeland Security, National Protection and Programs Directorate, *Implementation Status of the Chemical Facility Anti-Terrorism Standards: Second Semiannual, Fiscal Year 2016 Report to Congress* (Washington, D.C.: December 9, 2016).

<sup>13</sup>GAO-17-502.

<sup>14</sup>See 6 U.S.C. § 622(c)(4). Under the CFATS rule, once a facility is assigned a final tier, it is to submit a site security plan or participate in an alternative security program in lieu of a site security plan. An alternative security program is a third-party or industry organization program, a local authority, state, or federal government program, or any element or aspect thereof that DHS determines meets the requirements of the regulation and provides an equivalent level of security to that established by the regulation. See 6 C.F.R. § 27.105.

non-expedited process). DHS issued guidance intended to help facilities prepare and submit their EAP security plans to DHS, which includes an example that identifies prescriptive security measures that facilities are to have in place. According to committee report language, the EAP was expected to reduce the regulatory burden on smaller chemical companies, which may lack the compliance infrastructure and the resources of large chemical facilities, and help DHS to process security plans more quickly.<sup>15</sup> If a tier 3 or 4 facility chooses to use the expedited option, DHS is to review the plan to determine if it is facially deficient, pursuant to the requirements of the CFATS Act of 2014.<sup>16</sup> If DHS approves the EAP site security plan, it is to subsequently conduct a compliance inspection.

In June 2017, GAO also reported that DHS had implemented the EAP and had reported to Congress on the program, as required by the CFATS Act of 2014.<sup>17</sup> In addition, as of June 2018, according to DHS officials, only 18 of the 3,152 facilities eligible to use the EAP had opted to use it. DHS officials attributed the low participation to several possible factors including:

- DHS had implemented the expedited program after most eligible facilities already submitted standard (non-expedited) security plans to DHS;
- facilities may consider the expedited program's security measures to be too strict and prescriptive, not providing facilities the flexibility of the standard process; and
- the lack of an authorization inspection may discourage some facilities from using the expedited program because this inspection provides useful information about a facility's security.<sup>18</sup>

GAO also found in June 2017 that recent changes DHS had made to the CFATS program could affect the future use of the expedited program.<sup>19</sup> As discussed below, DHS has revised its methodology for determining the level of each facility's security risk, which could affect a facility's eligibility to participate in the EAP.

#### **4. Inspecting Facilities and Ensuring Compliance**

In July 2015, GAO reported that DHS began conducting compliance inspections in September 2013, and by April 2015, had conducted inspections of 83 of the 1,727 facilities that had approved security plans.<sup>20</sup> GAO's analysis showed that nearly half of the 83 facilities were not

<sup>15</sup>S. Rep. No. 113-263, at 9-10 (Sept. 18, 2014).

<sup>16</sup>A facially deficient site security plan is defined as a security plan that does not support a certification that the security measures in the plan address the security vulnerability assessment and risk-based performance standards, based on a review of the facility's site security plan, the facility's Top-Screen, the facility's security vulnerability assessment, or any other information that the facility submits to the Infrastructure Security Compliance Division (ISCD) or ISCD obtains from a public source or other source. 6 U.S.C. § 621(7). Specifically, ISCD determines that an EAP site security plan is deficient if it: does not include existing or planned measures which satisfy the applicable Risk Based Performance Standard; materially deviates from at least one EAP security measure without adequately explaining that the facility has a comparable security measure; or contains a misrepresentation, omission, or inaccurate description of at least one EAP security measure. A facility is to implement any planned security measures within 12 months of the EAP site security plan's approval because ISCD has determined that it is unlikely that all required security measures will be in place when a facility submits its plan to ISCD.

<sup>17</sup>GAO-17-502. See 6 U.S.C. § 622(c)(4)(I)(ii).

<sup>18</sup>An authorization inspection consists of an initial, physical review of the facility by DHS to determine if the Top-Screen, security vulnerability assessment, and site security plan accurately represent and address the risks for the facility.

<sup>19</sup>GAO-17-502.

<sup>20</sup>GAO-15-614.

fully compliant with their approved site security plans and that DHS had not used its authority to issue penalties because DHS officials found it more productive to work with facilities to bring them into compliance. GAO found that DHS did not have documented processes and procedures for managing the compliance of facilities that had not implemented planned measures by the deadlines outlined in their plans. GAO also reported in July 2015 that DHS's performance measure for the CFATS program, which was intended to reflect the overall impact of the CFATS regulation on facility security, did not solely capture security measures that were implemented by facilities and verified by ISCD. Instead, the performance measure reflected both existing security measures and planned security measures that facilities intended to implement within the fiscal year. GAO made 2 recommendations to DHS.

- **Recommendation:** DHS should document processes and procedures for managing compliance to provide more reasonable assurance that facilities implement planned measures and address security gaps.  
**Status: Implemented.** DHS officials updated the CFATS Enforcement Standard Operating Procedure to outline the roles, responsibilities and processes for identifying and resolving all enforcement procedures. In addition, in October 2018, officials updated the CFATS Inspections Standard Operating Procedure to document the verification procedures for planned measure completion, including details on when extensions should be granted and when enforcement should be recommended.
- **Recommendation:** DHS should improve the measurement and reporting of the CFATS program performance by developing a performance measure that includes only planned measures that have been implemented and verified.  
**Status: Implemented.** DHS finalized its fiscal year 2016 annual operating plan that included verification requirements for the performance measure. Specifically, the new requirement requires that ISCD officials verify that planned measures have been implemented in accordance with the approved site security plan by compliance inspection or other means before inclusion in the performance measure calculation.

In August 2018, GAO reported that our analysis of DHS data since our July 2015 report showed that DHS had made substantial progress in conducting and completing compliance inspections.<sup>21</sup> Specifically, our analysis showed that DHS increased the number of compliance inspections completed per year since DHS began conducting compliance inspections in 2013 and that, for the 2,466 high-risk facilities with an approved site security plan as of May 2018, DHS had conducted 3,553 compliance inspections.<sup>22</sup> Of these, DHS issued corrective actions to two facilities that were not in compliance with their approved site security plan.<sup>23</sup>

In our August 2018 report, GAO also found that DHS developed a new methodology and performance measure for the CFATS program in order to evaluate security changes made by high-risk chemical facilities, but that the methodology did not measure the program's impact on

<sup>21</sup>GAO-18-538.

<sup>22</sup>In accordance with the CFATS regulations, as a general matter, DHS intends to require facilities in Tiers 1 and 2 to update their Top-Screen every 2 years, and for Tiers 3 and 4 every 3 years. DHS conducts compliance inspections on a regular and recurring basis. DHS officials stated that compliance inspections are prioritized based on several factors including tier and the number of planned security enhancements required at facilities.

<sup>23</sup>In addition to these two corrective actions, GAO reported in August 2018 that, since fiscal year 2015, DHS had issued five additional orders to four high-risk facilities with final penalties totaling \$38,691.88. Of these five orders, three included the failure of a facility to submit an approvable security plan and two included the failure of a facility to submit a Top-Screen.

reducing a facility's vulnerability to an attack. GAO found that DHS could take steps to evaluate vulnerability reduction resulting from the CFATS compliance inspection process. GAO made one recommendation.

- Recommendation:** GAO recommended that DHS incorporate vulnerability into the new methodology to help measure the reduction in the vulnerability of high-risk facilities to a terrorist attack, and use that data in assessing the CFATS program's performance in lowering risk and enhancing national security. DHS agreed and is taking steps to implement this recommendation.

**Status: Not fully implemented.** Specifically, in May 2019, DHS provided documentation regarding implementation of two new performance metrics. DHS officials stated that these metrics should, among other things, evaluate the progress of individual facilities in enhancing their security while part of the CFATS program and be used to demonstrate an increase in the security posture across the population of CFATS facilities. GAO will continue to monitor DHS's actions to fully implement this recommendation.

#### 5. Conducting Stakeholder and First Responder Outreach

In April 2013, GAO reported that DHS took various actions to work with facility owners and operators, including increasing the number of visits to facilities to discuss enhancing security plans, but that some trade associations had mixed views on the effectiveness of DHS's outreach.<sup>24</sup> GAO found that DHS solicited informal feedback from facility owners and operators in its efforts to communicate and work with them, but did not have an approach for obtaining systematic feedback on its outreach activities. GAO made one recommendation and DHS has fully implemented it.

- Recommendation:** DHS should take action to solicit and document feedback on facility outreach consistent with DHS efforts to develop a strategic communication plan.

**Status: Implemented.** DHS developed a questionnaire to solicit feedback on outreach with industry stakeholders and began using the questionnaire in October 2016.

In August 2018, GAO reported that DHS shares some CFATS information with first responders and emergency planners, but these stakeholders may not have all of the information they need to minimize the risk of injury or death when responding to incidents at high-risk facilities.<sup>25</sup> While certain facilities are required under the Emergency Planning and Community Right-to-Know Act of 1986 to report some chemical inventory information, which local officials told us they rely on to prepare for and respond to incidents at chemical facilities, GAO found over 200 chemicals covered by CFATS that may not be covered by these reporting requirements.<sup>26</sup> GAO also reported that DHS developed a secure interface called the Infrastructure Protection (IP) Gateway that provides access to CFATS facility-specific information that may be missing from required reporting. However, GAO found that the IP Gateway is not widely used at the local

<sup>24</sup>GAO-13-353.

<sup>25</sup>GAO-18-538.

<sup>26</sup>Under Section 312 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), facilities are required to submit an emergency and hazardous chemical inventory form—referred to as a Tier II form. See 42 U.S.C. § 11022. The purpose of this form is to provide state and local officials and the public with specific information on potential hazards. This includes the locations and amount of hazardous chemicals present at a facility during the previous calendar year.

level and officials from 13 of 15 selected Local Emergency Planning Committees GAO contacted—consisting of first responders and covering 373 CFATS high-risk facilities—said they did not have access to CFATS data in the IP Gateway. GAO made one recommendation to DHS.

- **Recommendation:** DHS should take actions to encourage access to and wider use of the IP Gateway and explore other opportunities to improve information-sharing with first responders and emergency planners.  
**Status: Not fully implemented.** DHS reported in September 2018 that the department is taking actions to implement it. Specifically, DHS has revised three fact sheets and an outreach presentation to include information on the IP Gateway and how to request access to it. In addition, DHS plans to ensure contact is made with first responders representing the top 25 percent of CFATS high-risk chemical facilities so that they are properly prepared to respond to incidents at these facilities. GAO will continue to monitor DHS's actions to fully implement this recommendation, including DHS's outreach to first responders with high-risk chemical facilities within their jurisdiction.

Statement

*of*

Matthew Fridley, CHS  
Corporate Manager of Safety, Health, and Security  
Brenntag North America, Inc.

*on behalf of*

National Association of Chemical Distributors

*before the*

U.S. Senate  
Committee on Homeland Security and Governmental Affairs

*on*

Sensibly Reforming the Chemical Facility Anti-Terrorism  
Standards

Tuesday, June 4, 2019

Good afternoon, Chairman Johnson, Ranking Member Peters, and distinguished members of the committee. My name is Matthew Fridley. I am the Safety, Health, and Security Manager for Brenntag North America, Inc., a chemical distribution company headquartered in Reading, Pennsylvania.

In addition to my role at Brenntag North America, Inc., I am currently the chair of the Chemical Sector Coordinating Council (CSCC). The CSCC has a strong history of working in partnership with both private and public sectors to develop industry practices that build a culture of safety and security. I am also the vice chair of the Regulatory Affairs and Security Committee for the National Association of Chemical Distributors (NACD), on whose behalf I am testifying today.

I want to thank you for allowing me to participate in this important roundtable and am pleased to provide input on the Chemical Facility Anti-Terrorism Standards (CFATS) program.

**About Brenntag North America, Inc. and NACD**

Brenntag North America, Inc. is part of the Brenntag Group, which entered the chemical distribution business in 1912. Brenntag is currently the largest chemical distributor in the world and the second largest chemical distributor in the United States. Brenntag North America, Inc. operates over 180 facilities in the U.S. with customers in all 50 states. Brenntag North America, Inc. employs more than 5,100 people who manage over 20,000 different products sold to over 30,000 customers.

NACD's nearly 430 member and Affiliate companies represent more than 85% of the chemical distribution capacity in the nation and 90% of the industry's gross revenue. NACD member companies are vital to the chemical supply chain providing products to over 750,000 diverse companies such as aerospace, agriculture, cosmetics, detergents, electronics, automotive, plastics, paints and coatings, pharmaceuticals, food ingredients, water treatment, and more.

Brenntag has been an active member of NACD for over 35 years. NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. NACD added a specific Security Code, which encompasses many CFATS regulations, to NACD Responsible Distribution that consolidated many prior requirements and enhanced others. These requirements apply to all NACD members, including those that do not have facilities subject to CFATS. Since NACD adopted security requirements as part of NACD Responsible Distribution, our members have spent nearly \$50,000,000 to enhance site security programs further.

**Support for Long-Term Reauthorization of CFATS**

The chemical industry is responsible for more than a quarter of the U.S. GDP (\$768 billion), supports the production of almost all commercial and household goods, and is essential to economic growth. The chemical industry provides more than 800,000 skilled, good-paying American jobs. The business of chemistry is America's largest exporting sector, supplying an eighth of the world's chemical needs. The total value of U.S. chemical exports exceeds \$174 billion.

Brenntag North America, Inc. and NACD support a long-term reauthorization of CFATS. I believe the CFATS program has made the chemical industry and our nation much more secure. From the time of the program's establishment in 2007, the industry has invested significant capital and training resources towards enhanced or augmented security measures at our facilities.

In fact, Brenntag North America, Inc. — as one of the most regulated Department of Homeland Security (DHS) CFATS companies in the United States — would know the importance of the CFATS program better than most. While these resources did not necessarily assist in growing business, they were nonetheless important to ensure the security of the company, our employees, and the community.

**The Need for CFATS in Light of Threat Environment**

Evaluating and enhancing our security procedures based on the input of experienced DHS personnel has undoubtedly been beneficial to my company and the chemical distribution industry. However, I believe it is possible the program could be administered with less of an administrative and financial burden on industry.

While it is true that in the program's first few years there were some growing pains, the DHS Infrastructure Security Compliance Division team was able to make substantial improvements to run the CFATS program more efficiently, enhance security, and reduce burden by listening to those in chemical distribution. Many of the objectives of the Risk-Based Performance Standards (RBPS) are already integral to the operations of the chemical industry, including complying with the regulations of other agencies (such as the Drug Enforcement Agency), industry association standards (such as NACD Responsible Distribution), insurance recommendations, and good chemical practices. However, there are still areas in which DHS could improve, such as clarifying the process for what security measures facilities should take based on potential threat increases. The ongoing supply of chemicals and associated services is critical in times of emergency; therefore, simply ceasing operations is not a viable option for businesses during times of higher risk.

**Overall Experience with CFATS Process Through DHS**

DHS has generally taken a non-adversarial, consultative, and reasonable approach in implementing the CFATS regulations. DHS has made significant improvements to the program following the program's 2014 reauthorization. Changes in the leadership of the CFATS program helped establish a commitment to work with the regulated chemical industry, along with the Chemical Sector Coordinating Council to have a positive impact on chemical security across the United States.

Examples DHS's improvements include achieving the intent of the RBPS and the preparation of Site Security Plans (SSPs) and Alternate Security Plans (ASPs). That same approach has remained throughout the entirety of the program. While the initial process was burdened with cumbersome, confusing, and inefficient paperwork, this aspect of the program has improved over time. DHS has also greatly improved the Chemical Security Assessment tool, the online portal for submitting Top Screens, Security Vulnerability Assessments, and SSPs and ASPs. However, it should be noted that the process for SSP and ASP revisions and updates remains challenging for distributors. This is something we are willing to continue to work with DHS to resolve.

It has been our experience that DHS staff, in both the field and at headquarters, have generally been knowledgeable, professional, courteous, and willing to provide consultation for facilities that request it. Additionally, DHS staff typically arrange their site visits in advance, unlike many other government agencies.

**First Responder Coordination/Information Sharing**

As good stewards of the DHS CFATS program, along with the NACD Responsible Distribution program, Brenntag goes above and beyond the regulatory requirements for certain information sharing and outreach with first responders and other local entities.

An example of this coordination is a recent occurrence at one of our highly regulated DHS facilities in the Southeast. After months of preparation with DHS CFATS inspectors, Transportation Security Administration officers, FBI Weapons of Mass Destruction agents, Joint Terrorism Task Force members, and local police and fire department bomb/arson units, we completed a live exercise drill of an unknown package at our facility. The live exercise drill was developed to allow our company to practice emergency response procedures to ensure we knew what we were supposed to do in that situation. Once we simulated the call to the first responders, our employees became spectators, and we allowed the emergency response community to exercise as they needed.

These types of drills are important for both our industry and emergency responders. Without our partnerships that are developed through the CFATS program, drills such as these would not be an easy task to achieve.

#### **Protecting Confidential Information**

As important as it is to coordinate and share information with emergency responders, it is equally important to only provide the facilities' sensitive security information on a need-to-know basis.

The current Chemical-terrorism Vulnerability Information process has the correct balance to ensure facilities communicate and share need-to-know information with those agencies to enable them to respond effectively (RBPS 9). During the inspections process, all DHS inspectors verify that the facility has performed its yearly requirement for outreach with local responders and will not approve the facility's SSP if this outreach has not occurred.

NACD members, such as Brenntag, take engagement with local communities seriously and recognize the value in forming strong relationships with those communities. To that end, the chemical distribution industry complies with an array of federal and state laws and regulations requiring communication of certain information about regulated facilities with first responders and other local entities. In addition to information sharing requirements in DHS's CFATS, the chemical distribution industry complies with the following:

1. EPA Emergency Preparedness and Community Right to Know Act (EPCRA) Section 304: Emergency Notification
2. EPA Emergency Preparedness and Community Right to Know Act (EPCRA) Section 311: Safety Data Sheets (SDSs)
3. EPA Emergency Preparedness and Community Right to Know Act (EPCRA) Section 312: Tier I, II
4. EPA Emergency Preparedness and Community Right to Know Act (EPCRA) Section 313: Toxic Release Inventory (TRI)
5. EPA Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 103: Release Reporting
6. EPA Clean Air Act: Risk Management Program
7. EPA Toxic Substances Control Act (TSCA): Chemical Data Reporting
8. DOT Hazardous Materials Regulations: Emergency Response and Release Reporting
9. OSHA Hazard Communication Standard
10. OSHA Hazardous Waste Operations and Emergency Response (HAZWOPER) Standard
11. OSHA Process Safety Management (PSM) Standard

The CFATS-regulated community shares information with a variety of entities under the regulatory and legal regimes listed above. NACD, along with Brenntag, believes these requirements appropriately address public safety and facilitate the proper level of dialogue between regulated-entities and the public. Therefore, we oppose additional information-sharing requirements in CFATS reauthorization legislation.

#### **Recognition for Participation in Industry Program**

I support the consideration of incorporating, in whole or in part, verified industry-standard programs, such as NACD Responsible Distribution, into the evaluation of whether a facility has met the intent of the applicable RBPS. NACD members and others who participate in robust industry stewardship programs have made a strong commitment to operate their facilities safely and securely. Recognizing these responsible companies through simple measures like less frequent inspections would allow DHS to prioritize resources to concentrate on the "outliers" or bad actors that don't participate in these programs and that may pose a greater security risk to themselves or the population at large.

#### **Appendix A Changes**

Currently, if DHS proposes changes to Appendix A: Chemicals of Interest, then those changes must be subject to notice and comment. NACD, along with Brenntag, supports the status quo, as well as codifying that DHS be subject to notice-and-comment rulemaking for any proposed changes to Appendix A: Chemicals of Interest in the next reauthorization. A transparent process that encourages stakeholder engagement is key, as changes made to Appendix A that may be perceived as minor could impact a facility's CFATS risk tiering. Should DHS attempt to alter Appendix A, any rulemaking must be based on the level of risk, scientific data, and a cost-benefit analysis.

#### **Simplification of the Change Process**

While calls and emails placed to DHS's CFATS helpline regarding changes to SSPs and ASPs are generally acknowledged quickly, responses to these questions can sometimes take considerably longer and may be too ambiguous to be useful. A quicker response rate and clear guidance by DHS personnel in answering inquiries would ensure timely and accurate solutions for regulated companies. Rapid and frequent changes in product offerings, procurement, and inventory are core to the business of many chemical distribution companies. Prompt accommodation regarding DHS documents is needed for new Chemicals of Interest (COI) or newly increased Screening Threshold Quantities for existing COI. In most cases, the existing facility infrastructure and procedures will suffice for meeting the intent of the RBPS.

**Maintain Security Focus to Avoid Further Duplicative Regulations with Other Regulatory Agencies**

The CFATS program is the only federal program focused on security at facilities with certain chemicals, and this must remain the program's sole purpose. The chemical distribution industry is required to comply with various regulatory programs administered by other agencies (e.g., EPA, OSHA, DOT, etc.) to ensure the safety of the communities in which the chemical distribution facilities serve and are located. Potential expansion of the CFATS program into areas regulated by other agencies, including EPA, OSHA, and DOT, would result in duplicative, confusing, and contradictory regulatory requirements – thereby eroding the purpose of this program: to secure our nation's high-risk chemical facilities from terrorist exploitation. The DHS CFATS program allows for facilities to leverage other agencies requirements to meet CFATS compliance.

While each agency should maintain its particular focus and certain subject-specific nuance, multiple agencies and programs require contingency plans/procedures, which entail multiple, often duplicative elements. These include DHS (CFATS/RBPS); DOT; EPA (RCRA - hazardous waste); EPA (Risk Management Plan); OSHA (Process Safety Management Plan); DEA (especially for List 1 chemicals); and FDA (especially the Food Safety Modernization Act International Adulteration rule).

Government agencies performing compliance inspections have required separate, comprehensive contingency plans for their particular agency program, even while acknowledging that such separate plans may be redundant with other agency plans. A single master contingency plan, with appropriate sections and nuance, would be much more efficient and, more importantly, effective in meeting the intent of a contingency plan.

Furthermore, NACD Responsible Distribution requirements also include contingency plans and procedures, with third-party verifications (audits). Insurance carriers generally require a company to have a special type of contingency plan, a Business Continuity Plan. These plans are often as comprehensive as the contingency plans required by government agencies and often have much more applicability and effectiveness in real-world situations.

**Conclusion**

That said, as the threat environment is long-term, so too should be the authorization of the CFATS program. NACD and Brenntag North America support CFATS and look forward to working with the committee on legislation to reauthorize this important security regulation in the coming weeks and months. A multi-year reauthorization of CFATS would provide needed certainty and enhance the security of chemical facilities and our nation. Both industry and DHS need reasonable predictability.

The DHS CFATS program has been looked upon at the international level as a model program for developing security programs within the G7 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction and Global Congress. The Global Congress assembles a community of over 30 countries committed to countering chemical and explosives terrorism by bad actors and their access to chemical agents. CFATS is recognized globally as a model chemical-security framework worldwide, and DHS frequently responds to requests to work with other governments as they seek to build cultures of chemical security on a par with the security-culture CFATS has cultivated in the United States.

On behalf of both the National Association of Chemical Distributors and Brenntag North America, Inc., I appreciate this opportunity to present our views on this important issue. I look forward to your questions.



Testimony of  
Tim O'Brien  
President  
Detotec North America

on

Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program

before the

U.S. Senate Committee on Homeland Security and Governmental Affairs

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Testimony of Tim O'Brien  
President, Detotec North America  
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Chairman Johnson, Ranking Member Peters, and members of the Committee, as President of Detotec North America and past Board Chairman of the Institute of Makers of Explosives (IME) – the safety and security association for the commercial explosives industry, I thank you for the opportunity to discuss the Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) program and how duplicative regulations negatively impact my business and the greater commercial explosives industry without any marked improvement in explosives security.

Before I detail my company's story as it pertains to CFATS, I'd like to provide a brief background on the larger issue of duplicative CFATS regulation on my industry, commercial explosives. For other industries in the chemical sector, CFATS is the first and only program designed to bolster chemical facility security at the federal level, something that is necessary and should be maintained to the benefit of national security. Conversely, the commercial explosives industry has been regulated for security since the onset of the 1971 Organized Crime Control Act, under the jurisdiction of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). In the wake of the tragic events of September 11<sup>th</sup>, 2001 Congress passed the Homeland Security Act of 2002, which included the Safe Explosives Act and realigned ATF under the aegis of the U.S. Department of Justice, further strengthening ATF's mission to **protect the public from the diversion of explosives for illicit use, including acts of terrorism**. These shared goals between ATF and DHS could fit together well if DHS did not overreach their precursor chemical mandate into ATF's explosives jurisdiction.

On this point, ATF officials have clearly stated that the agency effectively regulates the security of commercial explosives emphasizing that the *only* value DHS adds related to explosives is in the regulation of precursor chemicals where ATF does not have jurisdiction. Although in testimony earlier this year before the House Homeland Security Committee, DHS claimed that CFATS is “in all cases bringing something additional to the table”, we respectfully disagree when it comes to the security of commercial explosives. If ATF were to share with this committee the comments they submitted to DHS in August of 2007 regarding the CFATS rulemaking process, we believe that this committee would be reassured that, “ATF has considerable experience and expertise regulating explosives to prevent their criminal misuse, including acts of terrorism...” and that regulations in this area are proven to be effective and sufficient. In a 2012 letter to the regulated explosives community that serves as the foreword to ATF’s explosives regulations, the ATF Director stated, “[S]ecurity of explosive materials helps protect Americans from violent crime and is an essential tool in the war against terrorism” and then proceeded to list how ATF regulatory requirements and industry best practices combat the criminal diversion or misuse of explosive materials.

**Detotec North America, Inc.**

Detotec North America, Inc. was founded in 1988 by myself and my family and currently employs 20 workers. We manufacture explosives and explosive-based products in two locations in Connecticut which are regulated by a series of bodies including the Department of Transportation (DOT), the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), the Department of Defense (DOD), the Defense Contract Management Agency (DCMA), ATF, and DHS. As you can imagine, compliance with the

regulations administered by all these regulatory bodies can be a heavy lift for a small business like Detotec. That said, we know that robust and sensible regulation is paramount to maintaining safety and security, a duty of all responsible businesses and a charge we do not take lightly as evidenced by our track record outside of CFATS. As such, I do not appear before you to ask for deregulation of commercial explosives but to make the case for reducing duplication of regulatory mandates that will cut costs for taxpayers, ensure government is serving the American people more productively, and alleviate a superfluous compliance burden on one of the nation's most pivotal industries.

**Impact of CFATS on Detotec**

Detotec's two facilities in Connecticut are separately located. Due to DoD separation requirements we are prohibited from siting all the production buildings and storage facilities at one location. The separated facilities are each located on 100 acres of remote land. Since Detotec opened its doors 30-years ago, we have been subject to and compliant with ATF's comprehensive security regulations. In all that time we have never experienced a theft or a diversion of our products. With the advent of CFATS, we are now doubly regulated for security, specifically, for "theft and diversion" – the very security concerns that ATF regulations have prevented for more than 30 years. We have multiple outdoor storage facilities, referred to as magazines, all manufactured to ATF construction standards and approved according to the American Table of Distances (ATD). The ATD serves to mitigate impact to the surrounding community and prevent propagation between magazines should a rare incident occur. Some of the magazines are used to store explosive materials not under CFATS' purview, but most have the potential to hold materials DHS has included on the CFATS Chemicals of Interest (COI) list.

Therefore, both facilities submitted CFATS Top-Screens in January 2008 and received final tiering in October 2009. Site Security Plans (SSP) for both facilities were submitted in May 2010 and received conditional authorization in July 2013. A new SSP that amended the magazine inspection rates was submitted in December of 2013 to address the conditional authorization. The facilities showed as "pending" in the Chemical Security Assessment Tool program following the new SSP from December of 2013 until October of 2016 when we received a letter stating that there was a new tiering methodology and that a new Top-Screen was required. There had been no communication from or inspections by DHS during the three years between the 2013 amended SSP submission and the 2016 requirement to submit a new Top-Screen.

During those three years, ATF inspected my facilities on three separate occasions. ATF determined our sites to be compliant with explosives regulations, finding no violations or action items as a result of those inspections. Additionally, during that time, DCMA (the safety branch of the DoD) inspected us every 6 months as required under the contract we had to make detonating cord for the Army. They similarly found no issues with our facilities including issues relating to security and maintenance of the sites.

In November of 2016, Detotec submitted our new Chemical Security Assessment Top-Screen survey and in April of 2017 we learned that our facilities would not change tiers under the new tiering methodology. Despite no change in our tier levels, we received a notice of deficiency for our SSP in June of 2017. These deficiencies, according to DHS, had existed since our original SSP in 2013. Absent communication from DHS from 2013 to 2016, it was certainly news to us that they had found deficiencies in our security protocols. This was especially surprising given the

absence of any security incidents at our facilities and in light of the multiple inspections from ATF, DoD, and DCMA finding no security concerns during that three-year period.

Despite our full compliance with the requirements imposed by other regulatory bodies, including ATF's explosives security mandates, under DHS's non-prescriptive program, the Agency informed us that it expected magazine monitoring at a maximum interval of every 12 hours and indicated this was a requirement for certain tier levels. It also informed us that our plan for implementation was due within 10 days of the notice of deficiency. In an email sent to DHS, I asked for more time to allow us to find a way to monitor the magazines. DHS verbally responded that the deficiency had been outstanding since 2013 and, thus, would not grant an extension. Again, this was the first time we were made aware that this deficiency was a carryover from the 2013 SSP. As we explored options it became increasingly evident that the remoteness of our facilities, as is the case with most explosives facilities, precluded us from implementing many monitoring options available to other industries that do not have to comply with ATF mandated setbacks and DoD regulations for safety regarding explosives.

DHS made suggestions for compliance such as contracting security personnel to conduct roving surveillance which was quoted from \$400,000 to \$600,000 per year or instituting video monitoring in lieu of hiring roving personnel which was estimated to cost in the range of \$750,000 to well over \$1,000,000 due to DoD requirements that all power near explosives be underground for the last 75 feet minimum. DHS, in denying my request for further compliance time, highlighted the options they had suggested as reasonable accommodation and would not allow for more time to find feasible options. Again, our explosives industry is no stranger to robust

regulation and I appreciate sensible regulation as a part of our duty to our community, but as a small business, these potential costs would have shut us down.

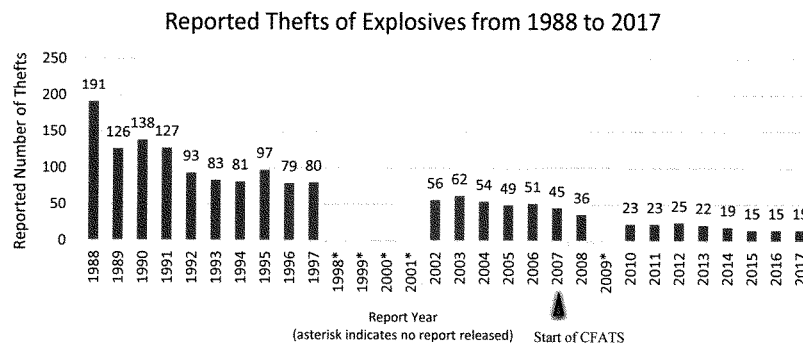
To find reasonable and cost-effective compliance measures, Detotec needed to identify alternative options and contractors capable of implementing them. DHS's allocation of 10 days to submit our plan for implementation was insufficient due to the multitude of obstacles we faced, therefore our submission came 10 days late resulting in a fine of \$100,000. Detotec was able to reduce the amount paid through a small-business consideration process, however, the final amount of the fine was still greater than the annual salary of 75% of our employees and as a result, an employee had to be let go. Eventually, after exhaustive efforts to comply, we reached an agreement with a large corporation located many miles away from our facilities to piggyback on their roving security contract. Now their security guard travels to our facility every 12 hours at what is considered to be a discounted cost of \$100,000 per year.

My small company has endured all this, ostensibly to "secure" facilities already regulated by ATF and DoD for safety and security. Not only has CFATS imposed costs that threaten the viability of our business, but it has now mandated access to our facility by outside personnel which only serves to increase security concerns. Explosive facilities are highly secured sites for good reason, and unnecessary access to them by individuals outside of the organization that is responsible for their security is the inverse of a "value add." Barring DHS' ability to articulate how the program has increased security commensurate to cost and duplicative regulatory burden, and in consideration of the U.S. government data that shows since its creation 11 years ago CFATS has had no impact on explosives security, I would request the removal of explosives from the CFATS program. This reduction in duplicative regulatory burden would allow the

explosives industry to apply our resources toward complying with the ATF regulations and industry best practices that have long been sufficient to protect our nation from criminal and terrorist misuse of our products.

#### **The excessive costs and lacking security benefits of CFATS**

As past Chairman of the Institute of Makers of Explosives (IME), I have studied the historical security record of the commercial explosives industry and as a result have found the following to be true: CFATS, despite increasing facility security expenditures, has done little, if anything, to improve commercial explosive security. After reviewing the available Explosives Incident Reports (EIRs) issued by ATF from 1988 to 2017, we found that while there has been a consistent and remarkable reduction in thefts of explosives over the last 30 plus years, there is no marked increase in that rate of decline since the onset of the CFATS program. Clearly, the record shows that ATF regulations and industry best practices effectively ensure security of commercial explosives and prevent diversion for terrorist or other illicit use.



While there is no empirical data that shows a need for CFATS regulation of commercial explosives under ATF jurisdiction, we were able to gather data on how much CFATS compliance costs the industry on the whole. In 2017, IME prepared four case studies to identify these costs and found that, for the four sites reviewed, the total projected compliance cost reached over \$2.6 million; a sum that saw no proportionate increase in facility security. Considering all four sites were already regulated for explosives security by ATF, CFATS requirements provided minimal additional security benefits despite the massive associated costs.

In addition to monetary expenditures, the workforce burden of CFATS is excessive. While the commercial explosives industry only has approximately 31 sites regulated by CFATS, all ATF regulated facilities must submit to Top-Screens. There are, roughly, 10,000 ATF regulated explosives licensee and permittees. The Office of Management and Budget has estimated 6 hours for the completion of a Top-Screen survey, i.e., the number of man-hours required, for the most part, to determine that a facility does not qualify for CFATS oversight. One IME member alone spent an estimated 357 hours in 2017 filling out Top-Screens for facilities already effectively regulated by ATF for security, hours that could have been spent bolstering their existing security, safety, health and environmental safeguards.

#### **Removal of ATF regulated materials from CFATS**

Detotec, alongside IME and other member companies, has repeatedly requested that DHS relieve the explosives industry from this duplicative and burdensome regulation. I was part of an IME delegation that met with Mr. Robert Kolasky, Director of the Cybersecurity and Infrastructure Security Agency's National Risk Management Center, in his position as Regulatory Reform Officer (RRO) for the department on October 30, 2017 to discuss DHS' efforts to conform

with Executive Orders 13771 and 13777. Our group briefed him on the redundancy of CFATS on our industry and explained how removal of this duplicative regulation would allow DHS to focus valuable resources on other critical risks to our Nation. Despite our efforts, the Department did advise us that they will not pursue rulemaking to remove explosive materials subject to ATF regulation from the Chemicals of Interest list, however, outside of the October meeting, DHS officials indicated that they would not object to a legislative fix if industry chooses to pursue that route.

DHS has referenced a "55% increase in facility security" as a result of the CFATS program in multiple forums without any reference as to how that statistic is borne out. While that statistic may be true for some of the CFATS regulated community, based on all available government data, it certainly does not apply to the commercial explosives industry which has been regulated for explosives security for 50 years. Removing ATF regulated materials from CFATS is an opportunity for this committee to reform the program in the direction of good stewardship of federal dollars and the reduction of harmful duplicative and unnecessary regulation on industry while maintaining a robust national security program.

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The commercial explosives industry is eager to work with this Committee in a bipartisan manner to reauthorize the CFATS program in a way that enhances national security while reducing blatantly duplicative regulations; clearing the path for government to focus resources on priority threats to our national security and allowing industry to fully invest their time and resources in a regulatory system that has long proven to be effective towards combating terrorism. Thank you for the opportunity to testify today.



**US Senate, Committee on Homeland Security and Government Affairs**

**Roundtable: Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program**

**Prepared Statement by the American Chemistry Council**

**2:30 pm, June 4, 2019, SD-106 Dirksen Senate Office Building**

The American Chemistry Council (ACC) represents the major chemical producers across the United States, including a diverse set of large, medium and small companies engaged in the business of chemistry. ACC members make products that are critical to the everyday health and welfare of our nation. Our products support the military mission, provide lifesaving medications, maintain a plentiful and safe drinking water supply and support fuel economy goals with light weight composites used in the auto industry. From the smart phone in your pocket to the clothes on your back, the business of chemistry touches everyone in their daily lives. Ensuring that clear and workable programs such as CFATS remain in place is critical to maintaining a stable regulatory environment that's needed to help foster the growth in innovation and support the additional investments needed in expanding U.S. operations.

Today, the chemical industry is experiencing a renaissance in the United States thanks in large part to the growth in domestic shale gas production. The business of chemistry is a \$526 billion enterprise and growing. Today, the industry employs more than ½ million highly skilled, well paid American workers and demand for STEM expertise is growing. It is because of our critical role in the U.S. economy, and our responsibility to employees and our communities, that chemical security remains a top priority for ACC and our members.

This year marks the 31<sup>st</sup> anniversary of ACC's Responsible Care® Program. Responsible Care is the leading chemical industry Environmental, Safety and Security Stewardship Program and has become the gold standard for the industry. Responsible Care is international in scope and serves as a model for numerous regulatory programs. Months after the tragic events of September 11, 2001, the ACC Board of Directors approved the addition of the Security Code, a comprehensive security management system that is mandatory for all members of the ACC. Since then, ACC members have invested more than \$17 billion under Responsible Care to enhance their chemical security.

The CFATS Program plays a critical role as an industry baseline for securing certain chemicals of interest. CFATS levels the playing field to ensure that all establishments play by the rules and provide a minimum level of security for certain chemical holdings. As such, ACC supports long-term authorization of the CFATS Program.

DHS has made important strides in improving the CFATS Program and has demonstrated a sincere commitment to listen and work with the regulated community to help move the program forward. Nevertheless, ACC would like to offer the following important recommendations that will further enhance the CFATS program:

1. DHS should maintain its Focus on Chemical Security.

CFATS should retain its focus on its core mission of chemical security and NOT wander into other areas such as safety and environmental requirements that would serve to divert DHS attention and resources away from their core mission. Non-security related requirements should be retained under their appropriate Agency, where a core competency currently resides. Duplication of authorities across the various Federal programs creates confusion and should be minimized.

2. Eliminate the mandate for TSDB screening at lower risk facilities.

Over the past several years, DHS has been implementing the terrorist screening portion of the CFATS Personnel Surety Program (PSP) outlined under Risk-Based Performance Standard 12(iv) at all tier 1 and tier 2 (HIGH RISK) facilities (about 200 sites). This process requires the facility to collect, manage and protect sensitive personal information on its employees and contractors and securely transmit that data to DHS for FBI vetting against the Terrorist Screening Database (TSDB).

DHS is now planning to extend this program to an additional 3,000 lower risk sites assigned tiers 3 and 4. This is an enormous expansion, involving tens of thousands of employees and contractors and their personal information. ACC is concerned that such a drastic expansion of PSP is unnecessary and will needlessly put personal information at risk. Further, employees and contractors are already required to go through multiple background checks and identity verification by the facility and other entities. ACC believes the benefit associated with TSDB vetting is simply not worth the cost or the associated risk. While we support mandated TSDB vetting at tier 1 and 2 facilities, ACC recommends elimination of this mandate for lower risk tiers 3 and 4 facilities and alternatively be provided an option for those who choose to participate.

3. Establish a CFATS Recognition Program - A Public-Private Partnership:

DHS should leverage chemical industry stewardship programs, such as ACC's Responsible Care Program, with the goal of further enhancing the security of chemicals across the Nation. Under CFATS, DHS can provide regulatory recognition for responsible operators who demonstrate superior performance. Such a recognition program would enhance existing stewardship programs and incentivize the creation of new ones. It would also provide DHS a mechanism to prioritize and streamline the CFATS program. It is a fact that companies who participate in stewardship programs out perform their peers and the industry as a whole. A CFATS Recognition Program would enhance chemical security across the sector and beyond the universe of CFATS regulated facilities.

4. Improve transparency in DHS risk determinations.

DHS should be more transparent with regulated facilities regarding risk tiering determinations and what actions the facility may take to further mitigate risk. Often security managers are not aware of the determining factor(s) behind their assigned risk tier level. These are the very individuals with the overall responsibility and authority for making critical security risk management decisions for a specific site. DHS should provide a detailed explanation to the site security as to the threat driving a certain risk tier and under classified conditions if necessary.

CFATS has helped make our industry and our communities more secure. We hope that in considering long-term reauthorization of the program, this Committee will consider ACC's recommendations and supply the needed regulatory certainty and stability for companies to continue to make prudent risk management decisions and investments. ACC and its members encourage you to support this important program and take CFATS to the next level, while continuing to provide effective Congressional oversight and guidance.

WRITTEN STATEMENT OF THE INTERNATIONAL LIQUID TERMINALS ASSOCIATION  
(ILTA)

Senate Homeland Security and Governmental Affairs Committee (HSGAC) Roundtable “Sensibly  
Reforming the Chemical Facility Anti-Terrorism Standards Program.”

Andrew S. Wright  
Vice President of Legislative Affairs  
June 4, 2019

Chairman Johnson, Ranking Member Peters and Members of the Committee, thank you for the opportunity to participate in today’s roundtable discussion of sensible reforms to the Chemical Facility Anti-Terrorism Standards (CFATS) Program.

The International Liquid Terminals Association (ILTA) is the only trade association focused exclusively on the tank and terminals industry, representing nearly 90 companies with over 600 terminals across all 50 states. ILTA members provide storage and transportation logistics and value-added services for a wide range of liquid commodities, including crude oil, gasoline, diesel, jet fuel, chemicals, renewable fuels, fertilizer, vegetable oil and other food-grade materials. Liquid terminals are critical to the transportation infrastructure that connects producers, manufacturers, retailers and ultimately consumers across the U.S. and into overseas markets in the trade of bulk liquid commodities.

ILTA member companies provide storage and logistics for many bulk liquid products that are inputs for many industries. A subset of these bulk liquids stored by ILTA members are materials covered by CFATS.

ILTA recognizes the crucial role that CFATS plays in maintaining our nation’s security and appreciates the diligence with which the Department of Homeland Security (DHS) - Cybersecurity and Infrastructure Security Agency (CISA) administers this important program. ILTA member companies appreciate the cooperative relationship—spanning multiple Administrations—they have maintained with CISA and its predecessor organization, the National Protection and Programs Directorate. For example, since the reauthorization of CFATS in 2014, DHS has made significant improvements, including streamlining the process for approving security plans and the vetting process for facility access.

As Congress works toward CFATS reauthorization, ILTA would like to offer two important recommendations for improving the program’s effectiveness. In my closing, I will also describe three additional principles that we ask the Committee to consider as it works towards a longer-term reauthorization of the program.

First, as a member of the CFATS industry coalition, ILTA endorses the coalition’s call for longer-term reauthorization. ILTA recommends that Congress establish a multi-year reauthorization cycle for the program, to provide all affected industries with the regulatory certainty needed to plan for prudent investments in their security infrastructure.

The major part of my testimony will be devoted to explaining the importance of an additional ILTA recommendation that pertains to the treatment of gasoline, diesel, and other fuel mixtures under the CFATS program. ILTA strongly urges Congress to include language in CFATS authorization to ensure that gasoline, diesel, and other Class 1, 2 and 3 flammable mixtures are categorized appropriately based on their physical properties.

DHS maintains a list of over 300 Chemicals of Interest (COIs) which are regulated under CFATS. For flammable materials, inclusion in this list is based on a standard rating system for identification of hazardous materials developed by the National Fire Protection Association (NFPA). NFPA is widely acknowledged as the leading authority on fire and related hazards, and the codes and standards it develops are referred to by numerous Authorities Having Jurisdiction (AHJs) at the federal, state, and local levels of government. Through research and consultation with its extensive network of fire protection professionals, NFPA has developed and promulgated over 275 consensus-based codes and standards. NFPA standards are supported by research on the physical properties of subject materials, as well as the practical experiences of thousands of fire-fighting professionals.

DHS has developed its COI list because of the security concerns these materials might pose. All flammable materials identified as COIs have NFPA ratings of Class 4 (extremely flammable). However, the CFATS rules include a notable and problematic exception in their treatment of gasoline (Class 3) and diesel, kerosene and jet fuel (Class 2). In other words, the treatment of gasoline, diesel, and other fuel blends is inconsistent with the most authoritative standard in use today for the characterization of flammable materials.

Faced with overwhelming scientific evidence DHS has recognized that gasoline and other fuels do not pose the same risks as other more flammable liquids. In fact, for nearly a decade, DHS has not required facilities that possess only gasoline, diesel, kerosene and jet fuel to file a "top-screen" report. Other security programs – such as the US Coast Guard's Maritime Security Transportation Act (MTSA) regulations – do not consider gasoline, diesel, kerosene and jet fuel to be included among "Certain Dangerous Cargos" requiring additional security considerations. In addition, gasoline and other fuel mixtures are not included in the Environmental Protection Agency's Risk Management Plan or the Occupational Safety and Health Administration's Process Safety Management regulations for environmental protection and worker safety.

ILTA appreciates that, in practice, DHS recognizes the lower risk associated with gasoline and other fuel blends relative to other materials listed as COIs. At the same time, ILTA and its member companies have sought to correct the mistaken regulatory treatment of gasoline and other fuel blends through regulatory channels for more than ten years. The stated regulatory treatment of gasoline and fuel blends is out of step with the underlying regulatory policy, creating uncertainty for our industry.

Only action by Congress can ensure that gasoline and fuel mixtures receive appropriate treatment in CFATS enforcement under all future Administrations. This can be done by specifying in the statute that DHS may not designate a material as a COI or require a facility to file a "top-screen" or similar report, based on flammability unless the material has an NFPA rating of Class 4. Alternatively, if the Committee would prefer to avoid reference to a third-party designation such as the NFPA rating system itself, it could include in the statute a reference to the actual physical properties of an NFPA Class 4 substance, without referencing the classification itself. Either approach would ensure that DHS is able

to maximize the security of chemical facilities by remaining focused on materials whose attributes make them a plausible security risk.

In closing, I would like to describe three additional principles we believe should guide the next round of CFATS reauthorization.

***The CFATS Program Must Retain a Singular Mission of Reducing the Risk of Terrorism.***

While it may seem obvious for a program that was statutorily created with the words “Anti-Terrorism” and “Security” in its name, ILTA asks Congress to ensure that CFATS remains focused on its mission—protecting chemical facilities from the potential risks of terrorist activity. The mission creep that would result by folding extraneous provisions—even those directed toward laudable goals such as worker safety or environmental protections—would serve only to dilute a program whose mission is too critical to be co-opted for other purposes. These other important considerations are best left to other agencies and other statutes with more topical expertise and relevance.

***The CFATS Program Should Protect the Confidentiality of Site Security Information.***

It is vitally important that DHS structures the CFATS program to prevent disclosure of site-specific security information to the public, or to anyone lacking a need-to-know and the required security clearances. A core principle of CFATS is to protect sensitive information from individuals who might pose a threat to the facility’s employees, surrounding community and property. Sensitive information—such as security plans—must remain protected to ensure national security objectives are being met.

***DHS Should Follow Appropriate Notice and Comment Rulemaking Procedures Within CFATS.***

If DHS wants to modify Appendix A, currently, it must undertake notice-and-comment rulemaking. ILTA encourages Congress to maintain this requirement. Changes to the COI list are critical decisions with serious implications for facilities that are subject to CFATS and how they are tiered within the program. Removing the requirement of notice-and-comment rulemaking would reduce transparency in the designation process and deprive DHS of important information as it makes decisions. Changes to the COI must be based on risk and the best scientific data and take into consideration current industry mitigation practices.

Thank you again for the opportunity to provide these views on behalf of the tanks and terminals industry. I look forward to your questions.

**Written Testimony of John S. Morawetz  
International Chemical Workers Union Council,  
United Food and Commercial Workers International Union**

**Before the  
Committee on Homeland Security and Governmental Affairs  
U.S. Senate**

**Roundtable on  
Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program**

**June 4, 2019**

Thank you, Chairman Johnson, Ranking Member Peters and members of the committee for holding this important roundtable and for the opportunity to participate. I am here today representing the International Chemical Workers Union Council (ICWUC) of the United Food and Commercial Workers International Union (UFCW). The ICWUC was founded in 1944 and represents approximately 20,000 chemical workers in 32 states. In 1996, we merged with the 1.3 million-member UFCW and this mutually beneficial partnership continues to serve our members well today. It is my honor to appear before you to address the security and safety of our members who work in chemical plants and the security of these facilities.

ICWUC strongly supports a multi-year authorization of the Chemical Facilities Anti-Terrorism Standards (CFATS) program with certain essential changes.

**About the International Chemical Workers Union Council**

The ICWUC has been active for decades in promoting strong and effective health and safety standards in the hazardous chemical facilities where our members work. Workers and their union representatives have a vested interest in safe worksites. The ICWUC supports chemical security and safety standards and laws to protect our members, the facilities they work at and the public.

UFCW chemical workers work in many different manufacturing industries including petroleum and coal products, fertilizers, pharmaceuticals, pesticides and other agricultural chemical smelters and refineries, as well as, natural gas distribution, nuclear weapon production and power plants. Our members work with extremely hazardous substances and have a vested interest in the safe operation of their facilities for their own health, for their coworkers' health and for their communities' well-being.

Our members handle many of the hazardous materials in CFATS Appendix A. Specifically, we unload tanker and railcars that contain hazardous materials, monitor large storage tanks filled with these substances, move the storage tanks within our facilities, manage the control rooms that monitor and operate reactor vessels, and load the containers for shipment off site. The vast majority of the time, the handling of chemicals is done safely, but when there is a release, we respond in a range of roles including onsite

response teams.

Past incidents remind us of the danger that these chemicals pose. Examples of the tragic impact of the release of Appendix A hazardous materials include an incident in 2014, where four people were overcome by the massive release of methyl mercaptan in Houston, Texas or the rupture of a full chlorine tanker car in West Virginia that luckily did not kill anyone.<sup>1</sup> The site of one of ICWUC's most tragic loss of lives was at the Thiokol facility near Woodbine, Georgia, which manufactured magnesium trip flares for the U.S. Army during the Vietnam War. On February 3, 1971, the Thiokol facility was evacuated after several small fires broke out inside the plant which caused the flares to ignite. Horribly, the evacuation distance was not sufficient, and 27 workers were killed when the plant blew up. The Thiokol explosion led to a better understanding of the full danger of the materials in that plant and what a safe evacuation distance should be. Thankfully there has not been a terrorist attack on a chemical facility to date, but there is much that can be learned from unintentional incidents. Chemical safety is a very serious issue that we are familiar with and the workers at chemical facilities want to do everything possible to prevent these types of events whether from terrorism or other causes.

Unions have a proud history of fighting for the right to a safe workplace and for the basic right for workers to return home after a day on the job as healthy as when they left. Unions have made sure their members are educated and trained on the safety and health hazards they face on the job. Union negotiators bargain over health and safety contract language, actively participate in the investigation and identification of health and safety hazards and testify in support of legislation which strengthens workplace security. Unions are actively involved in making our workplaces safer. It is therefore an honor for me to appear before you to address the security and safety of our members who work in chemical plants and the security of these facilities.

As to my background, I have over three decades of experience investigating occupational health hazards for the National Institute for Occupational Safety and Health (NIOSH), as the Director of Health and Safety for the Molders Union and the Chemical Workers Union and currently as the Director of the ICWUC Training Center in Cincinnati, Ohio. I am participating today in my capacity as a representative of the ICWUC Health and Safety Department.

In my remarks, I will address the following elements that are crucial to the security of chemical plants:

- 1) worker involvement in security plans,
- 2) effective training requirements,
- 3) strong whistleblower protections, and
- 4) successful practices.

#### **About CFATS**

In 2007, the Department of Homeland Security (DHS) established the CFATS program to

<sup>1</sup><https://www.ntsb.gov/investigations/AccidentReports/Reports/HZM1901.pdf>

identify and assess the security risk posed by facilities that contain hazardous chemicals that could be used by terrorists to inflict mass casualties or harm surrounding populations. DHS approves facility security plans and inspects high-risk facilities to ensure that the facilities are compliant with required security measures and procedures.

#### **Workers Must Be Involved in Chemical Plant Security**

CFATS inspectors, workers, labor representatives and company representatives all need to be involved in protecting our chemical infrastructure. Chemical workers have direct, current knowledge and experience of plant operations that is invaluable in solving site specific problems. Chemical workers know first-hand how a plant works, what chemicals are used, how those chemicals react to one another, their facilities' weaknesses and the most recent operational changes. We also know if backup systems will work when the power goes out. We know the exact location of the CFATS hazardous materials and we know if training is effective. All these responsibilities make chemical workers the first and best line of defense.

We believe employee involvement in the drafting, implementation and evaluation of plants' chemical security plans is crucial. It is important that workers' expertise – the same expertise that operates these plants everyday – be utilized. Including chemical workers in this process will enhance facility security and protection. We believe the facility's operator should document recommendations received from employees in their site security plans, certify that there has been worker input into the site security plan, and share employee recommendations with inspectors.

Workers should be involved in chemical facility security because our onsite responders are the first people to respond to catastrophic events. At many sites, there is a joint labor management response team that is usually the first on the scene to an incident. The experiences and knowledge of workers is important when considering how to prevent or plan for future incidents. These workers should be talking with CFATS inspectors and sharing their knowledge along with management.

Workers should also be protected from any type of retaliation on the part of employers for full involvement in workplace safety and health, and chemical plant security efforts. Any barriers to involvement, such as discipline for reporting incidents or talking with CFATS inspectors should be identified and removed.

I'd love to tell you about what takes place during a CFATS inspection, but we don't know since we are not informed of these visits. Right now, the law allows discretion on the part of inspectors as to whether workers and the union are advised of an inspection. We know of very few locals or members that have been involved in inspections, and this means an important stakeholder and their valuable information may be excluded from the process.

Concerns about interfering in the labor management relationship should not be a barrier to greater chemical plant security. Federal agencies including the Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA),

NIOSH, the U.S. Chemical Safety Board and the Environmental Protection Agency (EPA) all have procedures to work with both management and labor during their inspections. In my experience as NIOSH staff and working with OSHA and the CSB, these federal procedures work efficiently and balance the needs of workers, employers and site security. By not involving labor in these inspections, DHS is relying on management's information and has de-facto taken a side.

Workers need to know their basic CFATS rights. One way to inform and include workers is to require a CFATS breakroom poster in all chemical facilities that submitted a Top Screen survey. The poster could include basic facts about CFATS and contact information like OSHA break room posters.

#### **Effective training for all workers at covered areas in CFATS tiered facilities**

Key to effective worksite security is good training for everyone about their roles and responsibilities and drills for proper response and evacuation. For over 30 years my union has run training programs and collected data on how much training our members received. OSHA's Hazard Communication Standard is the primary OSHA standard requiring training on hazardous chemicals, and the requirement is minimal. Workers are trained when they initially assigned to a job, and then again if new chemicals are introduced. Other than this initial training, workers often do not receive further training on hazardous chemicals. According to data collected by our union, we found that from 2017 to 2018 over 80% of workers who attended ICWUC training had no training in the last year in nine of the ten key worker safety areas. The nine areas not trained on were: Engineering Controls, Air Monitoring, Decontamination, Toxic Effects, Emergency Response Procedures, OSHA Regulations, Plugging and Patching, Selection of Protective Clothing or Respirators. The government and companies must increase the amount and type of training for all workers inside of CFATS covered plants.

Effective training requires training materials that are easily understood, and that are targeted to the audience using the materials. An example of good training materials is those developed by the state of New Jersey which has taken a strong interest in the security of their chemical plants. The state has devoted a considerable amount of time and effort over the last 30 years to developing clear resources on these key issues. The New Jersey training materials cover many of the CFATS substances.

Implementing good training is not easy. One facility that I reviewed was trying to implement the right procedures but after careful review, I realized that all the drills were taking place on the first shift because that is when the salaried employees worked. The facility has three shifts and operates continuously, so only a fraction of the workers were being drilled for these types of events.

Training is also important for the CFATS inspectors. They should be trained on toxic effects, chemical operations, CFATS procedures, Top Screen operation and definition of tiers, effective controls, incompatible substances, relevant guidelines and standards, and methods that reduce the potential consequences of a terrorist attack. Their training should also include knowledge of methods to reduce or remove hazards that could be

attractive targets. It would be extremely valuable to inspectors to know how similar facilities have reduced or removed such hazards. We need to be sure that information received by CFATS inspectors is consistent with the best industry practices and inspection observations.

#### **Whistleblower protections for workers to report problems to CFATS**

In addition to routine interactions with inspectors, employees at facilities with hazardous chemicals can play an important role in helping to ensure CFATS compliance by submitting a whistleblower report when they suspect noncompliance. Whistleblowers who disclose wrongdoing at chemical facilities can save lives and help improve public safety and plant security and should not face retaliation.

Regretfully fear is a fact of life at all too many workplaces and jeopardizing one's job by blowing the whistle is a risky thing to do. Workers, who bravely come forward to protect themselves, their co-workers, and communities around the plant, should not fear losing their jobs when they speak out. Whistleblower protection is vital in assuring the free exchange of ideas, improving security and ensuring that effective measures are actually implemented. Workers must have the ability to come forth and communicate program deficiencies without fear of retribution.

DHS is responsible for managing the CFATS whistleblower process and procedures, but DHS lacks processes and procedures to address whistleblower retaliation reports. DHS should develop whistleblower anti-retaliation regulations that allow for at least 90 days to file a complaint, a private right of action and for both employees and worker representatives to file whistleblower anti-retaliation claims. The 90 days should start when the worker learns that they have been discriminated against for bringing up a CFATS related question, rather than when the discrimination initially happened.

#### **CFATS Should Identify and Disseminate Successful Practices**

There are many steps and measures that could and should be taken to improve chemical plant safety and security. The U.S. Department of Homeland Security has stated that many "CFATS facilities have either reduced their holdings of high risk chemicals of interest or eliminated them completely, substituting less risky chemicals or have changed their processes and have actually come out of the program and determined to no longer to be high risk."<sup>2</sup> These facilities have substituted less dangerous formulations better designed containers, or various engineering steps, which all can minimize the consequences of an accident or attack at a chemical plant. Unfortunately, there is no report that can be shared with other facilities that spells out the methods to reduce the consequences of a catastrophic release of chemicals from intentional attacks or unintentional disasters.

Although reducing potential consequences may not be feasible in all circumstances, because of technological or economic constraints, steps such as substituting safer solvents or formulations for more dangerous ones can be implemented if companies know about it. The quantities or concentrations can be reduced to below threshold amounts, some

<sup>2</sup>Secretary Wulf's testimony before House Homeland Security Committee on February 27, 2019.

substances can be used in a less dangerous form, alternative processes can be used, chemicals can be used “just in time” (without storage), vulnerable sections can be reinforced, inventory control can be improved, bulk storage can be minimized and maintenance schedules can be reviewed regularly. Many companies have implemented these changes and there is much to be learned from which changes have been the most effective. This information sharing can be done without identifying individual companies or locations.

Incorporating these considerations into site security planning will ensure that covered chemical facilities are aware of the security implications of their production processes and enable the selection of more effective security methods.

Facilities that have successfully reduced their risk have valuable best practices information that should be aggregated and annually released. Facilities have much to learn from each other and aggregated data could be one step.

#### **Conclusion**

Although this Committee’s mandate is the protection of facilities from terrorist attack, I applaud the recognition that the measures that you are discussing will protect us not only from a terrorist attack, but also minimize the impact of a hazardous material release resulting from a natural disaster or accident. The changes outlined in my testimony will mitigate the consequences and risks of a release regardless of the cause of that release and fulfil CFATS’ mandate.

The International Chemical Workers Union Council supports the work of this Committee to ensure the security and safety of our chemical workers, the communities around the facilities and all Americans. We strongly support a multi-year reauthorization of the Chemical Facilities Anti-Terrorism Standards program, hope this authorization will reduce risk, protect workers and communities, prevent a terrorist attack and tragedies like the Thiokol explosion.

On behalf of the ICWUC, I urge you to act now to protect America – to protect all workers and their families – by strengthening and reauthorizing CFATS before it expires next year.

Again, I thank you for your time and would be pleased to answer any questions that you may have.



**Senate Committee on Homeland Security and Governmental Affairs**  
**"Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program"**  
**Statement for the Record, American Fuel & Petrochemical Manufacturers**

**June 4, 2019**

The American Fuel & Petrochemical Manufacturers (AFPM) is a trade association representing high-tech American manufacturers of virtually the entire U.S. supply of fuels and home heating oil, as well as the petrochemicals used as building blocks for thousands of vital products in daily life.

AFPM members make modern life possible and keep America moving and growing as they meet the needs of our nation and local communities, strengthen economic and national security, and support over three million American jobs.

America's refining and petrochemical companies play an important role in ensuring and maintaining the security of America's energy and petrochemical infrastructure. The security of our member company employees, contractors, and surrounding communities are of the highest importance, and as a result our companies invest in some of the most advanced technologies and security practices in the world. The protection of critical infrastructure against potential threats is a shared responsibility between government and stakeholders that our members take seriously.

Despite well-documented early challenges with the CFATS program, the Department of Homeland Security (DHS) has made significant improvements to the program in the time since Congress initially reauthorized CFATS in 2014.

In particular, the 2014 statute addressed major impediments to completing site security plans and streamlined the vetting process for facility access, updates that AFPM members supported. Most importantly, the four-year reauthorization provided industry with the certainty needed to make long-term facility security investments and enabled DHS to efficiently run the CFATS program and appropriately re-tier sites.

The strength of the CFATS program lies in its flexibility. No two facilities are alike, and so each of the approximately 3,000 facilities covered by the CFATS program will have different threat profiles and security needs. Additionally, the threat environment is always changing. As terrorists and other bad actors evolve their tactics, so must facilities adapt their security procedures. A command-and-control regulatory structure would not only add additional cost to complying with regulations but will also likely lead to less security and increased risk.

With performance-based standards comes an increased need for cooperation. To that end, AFPM appreciates the long-standing cooperative relationship—spanning multiple administrations—with DHS and commends the professionalism of the DHS program offices. AFPM and its members have participated in multiple advisory groups within DHS, such as the Chemical Sector Security Council, the Oil and Natural Gas Sector Security Council, and were members of the Risk Tiering Methodology Working Group. These forums provide opportunities for shared learning and have proven extremely beneficial given the data driven nature of security risk assessment. For example, these forums helped DHS to develop robust, risk-based performance standards (RBPS) that avoid being too prescriptive for an industry as diverse in size and function as the chemical sector, but that also include strict enforcement penalties for noncompliance.



While overall DHS inspector knowledge of CFATS sites and issues have improved, we are still seeing the need for greater regional consistency on interpreting compliance issues by inspectors. AFPM urges DHS to update and keep current the "What to Expect During a Compliance Inspection" literature.

The current CFATS authorization will expire in April of 2020, providing both an impetus for action in 2019 and an opportunity to make modest improvements to the program. AFPM urges Congress to enact a multi-year reauthorization that retains the core elements of the 2014 legislation.

**The 2014 CFATS Reauthorization Improved the Program so Additional Major Changes are Unnecessary.**

The statutory changes to CFATS passed by Congress in 2014 have helped DHS improve the program dramatically. These include updates to risk assessments and tiering methodology, the establishment of an Expedited Approval Program (EAP) for Tier 3 and 4 facilities, the reinforcement of coordination with state and local officials, and streamlining the vetting process through the Personnel Surety Program (PSP) for Tiers 1 and 2.

The structure of the CFATS framework itself is sound. AFPM supports the performance-based approach that has been applied to CFATS implementation and regulation and believes this approach has worked well for facilities from a compliance and efficiency standpoint. As a result, major changes to the program are not necessary, and could result in an undue burden on industry and on DHS that may not equate to increased security at CFATS facilities.

**Policy Recommendations for the 2020 CFATS Reauthorization.**

The 2014 CFATS reauthorization bill addressed several issues, including major impediments to completing site security plans and a streamlining of the vetting process for facility access. Most importantly, the four-year reauthorization provided industry with the certainty needed to make long-term facility security investments and enabled DHS to efficiently run the CFATS program.

As policy development for a CFATS reauthorization bill gets underway, AFPM looks forward to continuing to work with lawmakers, stakeholders, and DHS. As Congress considers potential changes to the CFATS program, AFPM offers the following recommendations:

**(1) Enact a multi-year, but not permanent, reauthorization.**

In January of 2019 Congressional leaders passed a 15-month extension of the CFATS program which is set to expire on April 18, 2020.

Congress must not allow this program to lapse. Congress should pass a multi-year reauthorization bill, as this would provide industry with the continued certainty it needs to make long-term facility security investments. A multi-year reauthorization would also enable DHS to efficiently run the CFATS program. Nevertheless, AFPM recommends setting a sunset date to allow Congress, DHS, and industry to address any needed changes.

**(2) Ensure program focus on site security.**



CFATS facilities are also subject to numerous regulations from other government agencies that protect the safety and security of its employees and surrounding communities. The sole purpose of the CFATS program is to ensure the site security of facilities with certain chemicals of interest (COI). This is not a safety or environmental regulatory program.

AFPM opposes expansion of the CFATS program into areas otherwise regulated by other agencies, including the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Department of Labor (DOL), and the Department of Transportation (DOT), among others. Such an expansion could result in duplicative regulations, contradictory requirements, compliance confusion and, most significantly, an erosion of security at high-risk facilities.

**(3) Protect the confidentiality of site security information.**

Reauthorization legislation should not permit the disclosure of site security information to the general public, or anyone who does not have a need to know or the required security clearances to obtain such information. Facilities must protect sensitive information from individuals that might pose a threat to the facility's employees or property. Sensitive information – such as site security plans, site vulnerability analysis, security system designs, control system schematics, COI records, and tactical response information for emergency personnel – could threaten national security if it falls into the wrong hands.

**(4) Promote transparency in any changes to Appendix A and Chemicals of Interest (COI).**

Currently, if DHS wants to modify Appendix A, it must undergo notice and comment rulemaking. AFPM encourages Congress to maintain this requirement.

Allowing changes to be made to Appendix A without going through notice and comment would greatly undermine transparency in the designation process and deprive DHS of potentially important information in its decision making. Congress should ensure that proposed changes to Appendix A continue to be subject to the formal notice and comment rulemaking process and that a timeline for this process is established to ensure certainty.

**(5) Ensure that the designation of covered products and mixtures is based on sound science.**

Not all chemicals are created equal, nor do all chemical mixtures pose the same security risks. Therefore, AFPM warns against treating all products and mixtures containing chemicals of interest as significant threats.

AFPM would support a provision that allows exclusion of CFATS designation for a covered product or mixture if there is evidence based on sound science that the product or mixture does not present the same high security risks as the original chemical of interest or is a flammable liquid mixture with a National Fire Protection Association (NFPA) rating of three or less.

**(6) Avoid major changes that will further hamper implementation of the CFATS program and divert resources to duplicative or otherwise wasteful policies.**

DHS has made significant progress in implementing the CFATS program, but the work is still ongoing. AFPM cautions against adding new and extraneous provisions that will slow or diminish the progress to date, including expansion of stakeholders involved in SSP development, resubmission of top-screen



information untethered from a material change to a facility's profile, requirements for further credentials, or other related changes.



Dear Chairman Johnson and Ranking Member Peters:

Dow combines one of the broadest technology sets in the industry with asset integration, focused innovation and global scale to achieve profitable growth and become the most innovative, customer centric, inclusive and sustainable materials science company. Dow's portfolio of performance materials, industrial intermediates and plastics businesses delivers a broad range of differentiated science-based products and solutions for our customers in high-growth segments, such as packaging, infrastructure and consumer care. Dow operates 113 manufacturing sites in 31 countries and employs approximately 37,000 people. Dow delivered sales of approximately \$50 billion in 2018.

Thank you for your leadership and oversight of the Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) program. CFATS uses an effective regulatory framework in which industry and government collaborate to prevent terrorists from gaining access to certain chemicals using risk-based performance standards. Dow views the CFATS program as critically important for reducing security risks from terrorism at chemical facilities, and to date we have invested tens of millions of dollars to ensure compliance with program requirements.

We appreciate your efforts to further drive the discussion and in seeking input through holding a CFATS Round Table, scheduled for June 4, 2019. I respectfully offer the following policy priorities as you consider CFATS reauthorization and request that these remarks be included as part of the round table record.

**Long-Term Reauthorization is Essential.** Dow fully supports the CFATS program and wants it to continue. CFATS reauthorization in 2014 gave DHS and industry the time required to understand, implement and adjust as necessary. Dow views another multi-year reauthorization as key to the continued success of CFATS while allowing for predictable, out-year planning.

**Personnel Surety Program for Tiers 3 and 4 Should Be Optional.** Personnel surety, the vetting of facility personnel and unescorted visitors who have or are seeking access to chemical facilities, can be an important part of chemical facility security. Done right, personnel surety programs involve advanced technology, the ability to fully secure personally-identifiable information, long-term capital investment and corporate-wide coordination. Screening and badging personnel surety programs that don't work can shut down chemical facility operations in a matter of hours. Dow understands that DHS has implemented its CFATS personnel surety program for a few hundred facilities, and now may launch the program across tier 3 and tier 4 facilities. We are concerned that DHS may not have the resources or the necessary expertise to manage an exponential expansion its personnel surety program to over 3,000 facilities, especially if that process includes perpetual vetting using the FBI's Terrorist Screening Database. We are further concerned with the CFATS program lack of process and experience in managing positive hits or its ability to resolve technical issues that may arise. We are not aware of lessons-learned from personnel surety program implementation to date, DHS has not shared best practices, nor do we have a sense of an implementation plan moving forward. Screening currently takes place at the highest-risk Tier 1 and Tier 2 facilities, and it should remain that way until DHS can demonstrate its ability to effectively manage the personnel surety program.



**Confidentiality of Site Security Information is Imperative.** Reauthorization legislation should not permit the disclosure of site security information to the public, or anyone who does not have a need to know to obtain such information. Facilities must protect sensitive information from individuals that might pose a threat to employees, property or surrounding communities. Sensitive information—such as security system designs, control system schematics, worst case scenario discharge data, Chemical of Interest (COI) records, Chemical-terrorism Vulnerability Information, and tactical response information for emergency personnel—could threaten security if it falls into the wrong hands.

**Compliance with industry stewardship programs should be given regulatory credit.** Several of the trade associations in the CFATS-regulated community have stewardship programs that deliver additional security benefit and seek to ensure safe operations. These programs are implemented across association membership, are independently verified, and continuously audited for performance. Dow participates in the American Chemistry Council's Responsible Care program and actively supports its ongoing implementation. The reach of Responsible Care and other programs like it often stretches beyond the CFATS-regulated universe. As these operators are brought to a higher standard, they should be given some form of regulatory credit for doing so.

Dow greatly appreciates the Committee's commitment to CFATS and its continued success. We look forward to working with you to craft a reauthorization that capitalizes on the success CFATS has enjoyed while ensuring its success well into the future. Thank you for the opportunity to provide you with our input and I look forward to Dow's further participation and partnership on the important topic.

Most sincerely,

A handwritten signature in black ink, appearing to read "Louis A. Vega".

**Louis A. Vega**

Vice President, Government Affairs & Advocacy (NA)

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## Environmental Technology Council

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June 12, 2019

The Honorable Ron Johnson  
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Washington, DC 20510

The Honorable Gary Peters  
Ranking Member  
Senate Committee on Homeland  
Security & Government Affairs  
442 Hart Senate Office Bldg.  
Washington, DC 20510

**Prepared Statement for the CFATS Roundtable:  
“Examining the Chemical Facility Anti-Terrorism Standards Program”  
Senate Committee on Homeland Security and Government Affairs**

Chairman Johnson, Ranking Member Peters and Members of the Committee, the Environmental Technology Council (ETC) would like to express its appreciation for the opportunity to submit this statement regarding our proposed change to the Chemical Facilities Anti-Terrorism Standards (CFATS) as part of the Department of Homeland Security Reauthorization bill.

The ETC is the national trade association for the commercial hazardous waste management industry. Our member companies provide technologies and services to customers for the safe and effective recycling, treatment, and secure disposal of hazardous wastes through high-temperature incineration and other advanced technologies. Due to the broad definition of “chemical facility” in CFATS, many ETC member companies are subject to the CFATS program. These facilities hold permits under the Resource Conservation and Recovery Act (RCRA) that impose stringent security and safety procedures that duplicate CFATS requirements. In addition, the companies must comply with security requirements of other Federal agencies, such as the Department of Transportation, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives. These redundancies place administrative and financial burdens on our industry that are not necessary to secure hazardous waste management facilities against terrorist threats. Therefore, we are asking that commercial hazardous waste management facilities permitted under RCRA be added to the list of excluded facilities under 6 CFR § 27.110(b) of the CFATS regulations.

It is important to point out that RCRA-permitted commercial hazardous waste management facilities are not chemical facilities. They do not manufacture chemicals of interest (COI), but rather treat and dispose of hazardous waste that may contain small amounts of COIs in the waste. Such facilities should be exempt from CFATS because

RCRA already has safeguards in place to prevent incidents and protect the safety and wellbeing of human life and the environment

In terms of security measures, RCRA sets forth strict standards for hazardous waste facilities. 40 C.F.R. 264.14 states that the facility must minimize the possibility for any unauthorized entry of persons onto the active portion of the facility. More specifically, RCRA regulations require that hazardous waste facilities have:

- A 24-hour surveillance system (e.g., television monitoring or surveillance by guards or facility personnel) which continuously monitors and controls entry onto the active portion of the facility; or
- An artificial or natural barrier which completely surrounds the active portion of the facility; and
- A means to control entry, at all times, through the gates or other entrances to the active portion of the facility (e.g., an attendant, television monitors, locked entrance, or controlled roadway access to the facility).

RCRA-permitted hazardous waste facilities are also required to have preparedness and prevention plans. 40 C.F.R. 264.31 states that hazardous waste facilities must be designed, constructed, maintained, and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment. Contingency plans and emergency procedures must also be in place. For example, contingency plans must:

- Describe the actions facility personnel must take in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste;
- Describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services;
- Include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required; and
- Include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary.

One of the most significant RCRA safeguards is the use of the hazardous waste manifest. To the extent CFATS focuses on diversion of COIs, the manifest tracks every shipment of hazardous wastes that may contain COIs from the generator to the disposal facility. The manifest itself contains information on the type and quantity of the waste being transported, instructions for handling the waste, and chain-of-custody signature

lines for all parties involved in the disposal process. Each party that handles the waste signs the manifest and retains a copy for themselves. This ensures critical accountability in the transportation and disposal processes. Once the waste reaches its destination, the receiving facility returns a signed copy of the manifest to the generator and the U.S. EPA, confirming that the waste has been received by the designated facility.

In addition, RCRA requires that facility personnel undergo adequate training in terms of handling, treating and disposing of hazardous waste. 40 C.F.R. 264.1 provides that personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with RCRA. The training program must be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems. It is clear that many of the safety precautions set forth in CFATS are already being undertaken by RCRA permitted hazardous waste facilities. Regular facility inspections, security site plans, preparedness and prevention plans, and contingency plans and emergency procedures are all mandatory regulations under RCRA.

Despite the fact that ETC member companies are hazardous waste facilities and not chemical facilities, they have been subject to the high cost of complying with CFATS regulations. One of the ETC member companies estimated that they spend \$80,000 annually to comply with CFATS. The company noted that the following factors were considered when calculating the annual compliance cost:

- Administrative salary hours and costs for maintenance and updating of security plans;
- Salary hours and costs for training of new employees and refresher training of existing personnel; and
- Administrative costs for recordkeeping.

These costs do not result in any increased safety or protection against terrorist activity, since the hazardous waste facility already has in place all the RCRA requirements for security, inventory tracking, and employee training. These costs could be saved by excluding RCRA-permitted hazardous waste facilities from the CFATS program.

In closing, many sections of RCRA are duplicative of CFATS as demonstrated in greater detail by the RCRA/CFATS side-by-side that was provided to each Committee Member's staff. Therefore, we are asking that commercial hazardous waste management facilities permitted under RCRA be added to the list of excluded facilities under 6 CFR § 27.110(b) of the current CFATS regulations. Thank you for the opportunity to submit this statement to the Committee.

**Post-Roundtable Questions for the Record**  
**Submitted to Brian Harrell**  
**From Ranking Member Gary C. Peters**  
**“Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program”**  
**June 4, 2019**

<b>Question#:</b>	1
<b>Topic:</b>	OSHA Whistleblower Protection
<b>Hearing:</b>	Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Gary C. Peters
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** The Occupational Safety and Health Administration (OSHA) enforces 23 whistleblower retaliation protection statutes, most related to the private sector. Common components of these statutes include an investigation, remedies for the whistleblower that can be ordered by the government (such as back pay, reinstatement, and compensatory and punitive damages), and the ability for the whistleblower to pursue the case in court. In many cases, the whistleblower is able to pursue the case in court if the OSHA process lasts longer than a certain period of time.

Of these provisions, which, if any, are included in the CFATS statute?

**Response:** Under the *Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014* (CFATS Act of 2014), chemical facilities of interest are prohibited from retaliating against CFATS whistleblowers. Under the Statute, the U.S. Department of Homeland Security (DHS) has the authority to review and consider information received from CFATS whistleblowers and to take action to address any substantiated CFATS violations via a civil penalty. Civil penalties do not include remedies for the whistleblower.

Of the provisions common to other programs listed above, the only whistleblower retaliation authority granted to DHS by the CFATS Act of 2014 is to conduct an investigation into a whistleblower retaliation complaint. DHS’s authority does not include provisions for back pay, reinstatement or compensatory and punitive damages.

<b>Question#:</b>	2
<b>Topic:</b>	Private Right of Action
<b>Hearing:</b>	Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Gary C. Peters
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** Under the current CFATS statute, does a whistleblower have a private right of action based on whistleblower retaliation?

**Response:** Under the CFATS Act of 2014, whistleblowers do not have a private right of action.

<b>Question#:</b>	3
<b>Topic:</b>	DHS Authority Whistleblower Protection
<b>Hearing:</b>	Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Gary C. Peters
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** What authority does DHS have to provide a remedy to a whistleblower who is retaliated against by officials at a chemical facility of interest?

Please explain if this authority is sufficient for making a whistleblower whole for substantiated retaliation.

**Response:** The current statute does not provide for any such remedies.

<b>Question#:</b>	4
<b>Topic:</b>	Investigation Whistleblower Retaliation
<b>Hearing:</b>	Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Gary C. Peters
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** Under current law, who is responsible for investigating whistleblower retaliation complaints?

Please include any delegation of this authority, and to whom this authority has been delegated.

**Response:** Under current law, the Secretary of Homeland Security is responsible for implementing the whistleblower provisions of the CFATS program. These authorities, including the authority to respond to a report regarding a violation of these provisions, have been delegated from the Secretary to the Under Secretary of the National Protection and Programs Directorate (now the Director of the Cybersecurity and Infrastructure Security Agency<sup>1</sup>). From the Under Secretary, authorities are delegated to the Assistant Secretary for Infrastructure Protection (now the Assistant Director for Infrastructure Security). From the Assistant Secretary, authority has been delegated to the Director of the Infrastructure Security Compliance Division (now the Associate Director for Chemical Security).

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<sup>1</sup> Titles changed when the National Protection and Programs Directorate became the Cybersecurity and Infrastructure Security Agency in November 2018. Revised delegations reflecting titles and authorities in the newly-formed Cybersecurity and Infrastructure Security Agency are currently in the review process.

<b>Question#:</b>	5
<b>Topic:</b>	Investigator Experience
<b>Hearing:</b>	Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Gary C. Peters
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** What experience do CFATS investigators have in investigating whistleblower retaliation complaints, and how does that compare to the experience that the DHS Office of Inspector General has investigating whistleblower retaliation complaints?

**Response:** As DHS has not received any whistleblower retaliation claims, the program has no experience in investigating such claims. In regard to the DHS Office of Inspector General (OIG), it is important to note that the DHS OIG's investigatory authorities are limited to federal employees, contractors, sub-contractors, and DHS grantees, and are not comparable to inspections within the private sector as relates to a regulatory program.



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.  
Washington, DC 20548

August 2, 2019

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
United States Senate

"Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program": *Responses to Post-hearing Questions for the Record*

Dear Mr. Chairman:

On June 4, 2019, I testified before the Committee on Homeland Security and Governmental Affairs on our past oversight work and key findings regarding the Chemical Facilities Anti-Terrorism Standards (CFATS) program. On June 25, 2019, I received your questions for the record. The enclosure provides my responses, which are based on our issued report from July 12, 2016.<sup>1</sup> If you have any questions about the response, please contact me at (202) 512-3841 or [AndersonN@gao.gov](mailto:AndersonN@gao.gov).

Sincerely,

A handwritten signature in cursive script that reads "Nathan Anderson".

Nathan Anderson  
Acting Director, Homeland Security and Justice

Enclosure

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<sup>1</sup> GAO, *Critical Infrastructure Protection: Improvements Needed for DHS's Chemical Facility Whistleblower Report Process*, GAO-16-572 (Washington, D.C.: July 12, 2016).

1. **The Occupational Safety and Health Administration (OSHA) enforces 22 whistleblower retaliation protection statutes, most related to the private sector. Common components of these statutes include an investigation, remedies for the whistleblower that can be ordered by the government (such as back pay, reinstatement, and compensatory and punitive damages), and the ability for the whistleblower to pursue the case in court. In many cases, the whistleblower is able to pursue the case in court if the OSHA process lasts longer than a certain period of time. Of these provisions, which, if any, are included in the CFATS statute?**

The CFATS statute prohibits retaliation against a whistleblower, providing that an owner or operator of a chemical facility of interest may not discharge an employee or otherwise discriminate against an employee with respect to the compensation provided to, or terms, conditions, or privileges of the employment of, the employee because the employee (or an individual acting pursuant to a request of the employee) submitted a whistleblower report.<sup>2</sup> The statute does not include specific language about retaliation investigations, remedies, or rights of action in court. In 2016, we reported that DHS did not have documented processes and procedures to address and investigate whistleblower retaliation reports and we recommended that DHS develop such procedures.<sup>3</sup> According to DHS, the department had not received a report of whistleblower retaliation that it substantiated from June 16, 2015 (the date DHS implemented its whistleblower program), to July 25, 2019, and any retaliation reports would be addressed on a case-by-case basis. According to DHS's Infrastructure Security Compliance Division (ISCD) officials, in September 2016 they initiated development of a standard operating procedure (SOP) for addressing and investigating whistleblower retaliation complaints. In February 2018, DHS issued the SOP for whistleblower retaliations. The SOP includes documented processes for investigating and addressing allegations of whistleblower retaliations submitted to DHS related to its CFATS program, including processes for voluntary mediation and administrative enforcement. Further, as part of our 2016 review, DHS officials told us that DHS has authority under the CFATS Act of 2014 to issue an administrative order against a chemical facility of interest that violates the act, including for retaliating against a whistleblower.<sup>4</sup> If chemical facility officials do not comply with the order, DHS has authority to issue a civil penalty of up to \$25,000 for each day the facility is not in compliance.

2. **Under the current CFATS statute, does a whistleblower have a private right of action based on whistleblower retaliation?**

The CFATS statute does not provide for a private right of action based on whistleblower retaliation.

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<sup>2</sup> 6 U.S.C. § 625(a)(6).

<sup>3</sup> GAO-16-572.

<sup>4</sup> See 6 U.S.C. § 624.

- 3. What authority does DHS have to provide a remedy to a whistleblower who is retaliated against by officials at a chemical facility of interest? Please explain if this authority is sufficient for making a whistleblower “whole” for substantiated retaliation.**

As part of our 2016 review, DHS officials told us that DHS has authority under the CFATS Act of 2014 to issue an administrative order against a chemical facility of interest that violates the act, including for retaliating against a whistleblower.<sup>5</sup> If chemical facility officials do not comply with the order, DHS has authority to issue a civil penalty of up to \$25,000 for each day the facility is not in compliance. DHS officials noted that the CFATS Act of 2014 does not give DHS the authority to provide a remedy to a whistleblower who was retaliated against by officials at a chemical facility of interest.

- 4. Under current law, who is responsible for investigating whistleblower retaliation complaints? Please include any delegation of this authority, and to whom this authority has been delegated.**

The CFATS statute does not assign responsibility for investigating whistleblower retaliation allegations. ISCD’s SOP outlines roles and responsibilities, providing that the Field Operations Branch Chief or Deputy Branch Chief is responsible for conducting administrative inquiries related to allegations of whistleblower retaliations. The SOP further provides that the individuals who will conduct such inquiries are to satisfactorily complete OSHA course 1420 on Whistleblower Investigation Fundamentals or an equivalent course.

- 5. What experience do CFATS investigators have in investigating whistleblower retaliation complaints, and how does that compare to the experience that the DHS Office of Inspector General has investigating whistleblower retaliation complaints?**

In 2016, we reported that DHS did not have documented processes and procedures to address and investigate whistleblower retaliation reports and we recommended that DHS develop such procedures.<sup>6</sup> According to DHS, the department had not received a report of whistleblower retaliation that it substantiated from June 16, 2015 (the date DHS implemented its whistleblower program), to July 25, 2019, and any retaliation reports would be addressed on a case-by-case basis. According to ISCD officials, in September 2016 they initiated development of a standard operating procedure (SOP) for addressing and investigating whistleblower retaliation complaints. In February 2018, DHS issued the SOP for whistleblower retaliations. The SOP includes documented processes for investigating and addressing allegations of whistleblower retaliations submitted to DHS related to its CFATS program. We have not conducted work on DHS’s process for investigating reports of whistleblower retaliation since our 2016 report and have not examined the DHS IG’s process for investigating whistleblower complaints.

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<sup>5</sup> See 6 U.S.C. § 624.

<sup>6</sup> GAO-16-572.