

Statement for the Record

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Thank you, Chairman Thompson, Ranking Member King, and distinguished Members of the Committee. It is a pleasure to appear before you today to address the Department's authority over high-risk chemical facilities through the Chemical Facility Anti-Terrorism Standards (CFATS) program. We have made significant progress since CFATS' implementation. We have reviewed over 36,500 facilities' Top-Screen consequence assessment questionnaires. In June 2008, we notified 7,010 preliminarily tiered facilities of the Department's initial high-risk determination and of the facilities' requirement to submit Security Vulnerability Assessments (SVAs). We received and are reviewing over 6,100 SVAs; we have recently begun to notify facilities of their final high-risk determinations, tiering assignments, and the requirement to complete and submit Site Security Plans (SSPs) or Alternative Security Programs (ASPs). CFATS currently covers approximately 6,400 high-risk facilities nationwide, which reflects changes related to chemicals of interest that facilities have made since receiving preliminary tiering notifications in June 2008.

Chemical Security Regulations

Section 550 of the FY2007 Department of Homeland Security Appropriations Act directed the Department to develop and implement a regulatory framework to address the high level of security risk posed by certain chemical facilities. Consequently, the Department published an Interim Final Rule, known as the Chemical Facility Anti-Terrorism Standards (CFATS), on April 9, 2007. Specifically, Section 550(a) of the Act authorized the Department to adopt rules requiring high-risk chemical facilities to complete SVAs, develop SSPs, and implement protective measures necessary to meet risk-based performance standards established by the Department. Section 550, however, expressly exempts from those rules certain facilities that are regulated under other Federal statutes. For example, Section 550 exempts facilities regulated by the United States Coast Guard pursuant to the Maritime Transportation Security Act (MTSA); drinking water and wastewater treatment facilities regulated under Section 1401 of the Safe Water Drinking Act and Section 212 of the Federal Water Pollution Control Act, respectively, are similarly exempted. In addition, Section 550 exempted facilities owned or operated by the Department of Defense and the Department of Energy, and certain facilities subject to regulation by the Nuclear Regulatory Commission.

The following core principles guided the development of the CFATS regulatory structure:

- 1) Securing high-risk chemical facilities is an immense undertaking that involves a national effort, including all levels of government and the private sector. Integrated and effective participation by all stakeholders—Federal, State, local, and the private sector—is essential to securing our national critical infrastructures, including high-risk chemical facilities. Implementing this program means tackling a sophisticated and complex set of issues related to identifying and mitigating vulnerabilities and setting security goals. This requires a broad spectrum of input. By working closely with experts, members of industry, academics, and Federal government partners, we leveraged vital knowledge and insight to develop the regulation.
- 2) Risk-based tiering will ensure that resources are appropriately deployed. Not all facilities present the same level of risk. The greatest level of scrutiny should be focused on those facilities that, if attacked, present the most risks and could endanger the greatest number of lives.
- 3) Reasonable, clear, and equitable performance standards will lead to enhanced security. The CFATS rule includes enforceable risk-based performance standards. High-risk facilities have the flexibility to select among appropriate site-specific security measures that will effectively address risk. The Department will analyze each tiered facility's SSP, to see if it meets CFATS performance standards; if necessary, DHS will work with the facility to revise and resubmit an acceptable plan.
- 4) Recognition of the progress many companies have already made in improving facility security leverages those advancements. Many responsible companies have made significant capital investments in security since 9/11. Building on that progress in implementing the CFATS program will raise the overall security baseline of high-risk chemical facilities.

Appendix A to CFATS lists 322 chemicals of interest, including common industrial chemicals such as chlorine, propane, and anhydrous ammonia, as well as specialty chemicals, such as arsine and phosphorus trichloride. The Department included chemicals based on the consequence associated with one or more of the following three security issues:

- 1) Release – toxic, flammable, or explosive chemicals that have the potential to create significant adverse consequences for human life or health if intentionally released or detonated;
- 2) Theft/Diversion – chemicals that have the potential, if stolen or diverted, to be used or converted into weapons that could cause significant adverse consequences for human life or health; and
- 3) Sabotage/Contamination – chemicals that, if mixed with other readily available materials, have the potential to create significant adverse consequences for human life or health.

The Department established a Screening Threshold Quantity for each chemical based on its potential to create significant adverse consequences for human life or health in light of the security issues listed above.

Implementation Status

Implementation and execution of the CFATS regulation requires the Department to identify which facilities it considers high-risk. The Department developed the Chemical Security Assessment Tool (CSAT) to identify potentially high-risk facilities and to provide methodologies facilities can use to conduct SVAs and to develop SSPs. CSAT is a suite of online applications designed to facilitate compliance with the program; it includes user registration, the initial consequence-based screening tool (Top-Screen), an SVA tool, and an SSP template. Through the Top-Screen process, the Department can initially identify and sort facilities based on their associated risks.

If a facility is not designated as low-risk during the Top-Screen process, the Department assigns the facility to one of four preliminary risk-based tiers, with Tier 1 indicating the highest level of risk. Those facilities must then complete SVAs and submit them to the Department. Results from the SVA inform the Department's final determinations as to whether a facility is high-risk and, if it is high-risk, of the facility's final tier assignment. To date, the Department has received over 6,100 SVAs. Each one is carefully reviewed for its physical, cyber, and chemical security content.

Only facilities that receive a final high-risk determination letter under CFATS will be required to complete and submit an SSP or an Alternative Security Program. DHS's final determinations as to which facilities are high-risk are largely based on each facility's individual consequentiality and vulnerability as determined by the Top-Screen and SVA.

After approval of their SVAs, the final high-risk facilities are required to develop SSPs (or ASPs) that address their identified vulnerabilities and security issues. The higher the risk-based tier, the more robust the security measures and the more frequent and rigorous the inspections will be. The purpose of inspections is to validate the adequacy of a facility's SSP and to verify that measures identified in the SSP are being implemented.

In May, the Department issued about 140 final tiering determination letters to the highest risk (Tier 1) facilities, which confirm their high-risk status, and begin their time frame (120 days) for submitting an SSP. Following preliminary authorization of the SSPs, the Department expects to begin performing inspections in the first quarter of FY 2010, starting with the designated Tier 1 facilities.

Along with issuing the initial set of final tiering determination notifications, the Department launched the SSP tool, which was developed by DHS with input from an industry working group. A critical element of the Department's efforts to identify and secure the Nation's high-risk chemical facilities, the SSP enables final high-risk facilities to document their individual security strategies for meeting the Risk-Based Performance Standards (RBPS) established under CFATS.

Each final high-risk facility's security strategy will be unique, depending on its risk level, security issues, characteristics, and other factors. Therefore, the SSP tool collects information and data on each of the 18 RBPS for each facility. The RBPS cover the fundamentals of security, such as restricting the area perimeter, securing site assets, screening and controlling

access, cyber, training, and response. The SSP tool also recognizes that facilities typically administer most security measures on a facility-wide basis but that facilities also customize security for certain assets. That being the case, facilities can describe facility-wide and/or asset-specific security measures. Moreover, the Department understands that the private sector in general and, the CFATS-affected industries in particular are dynamic. The SSP tool allows facilities to involve its subject-matter experts from across the facility, company, and corporation, if appropriate, in completing the SSP and to submit a combination of existing and planned security measures to satisfy the RBPS. The Department expects that most approved SSPs will consist of a combination of existing and planned security measures. It will be through a review of the SSP, in conjunction with an on-site inspection, that DHS will determine whether a facility has met the requisite level of performance given its risk profile and thus whether its SSP should be approved.

With the launch of the SSP tool, DHS also issued the *Risk-Based Performance Standards Guidance* document. The Department developed this guidance to assist high-risk chemical facilities subject to CFATS in considering appropriate protective measures and practices to meet the RBPS. It seeks to help facilities comply with CFATS by describing in greater detail the 18 RBPS and by providing examples of various security measures and practices that could be considered by facilities to achieve the appropriate level of performance for the RBPS at each tier level. This guidance also reflects public and private sector dialogue on the RBPS and industrial security, including public comments on the draft guidance document. High-risk facilities are free to make use of whatever security programs or processes that they would like, provided that they achieve the requisite level of performance under the CFATS RBPS. The guidance will help high-risk facilities gain a sense of what types and combination of security measures may satisfy the RBPS.

To provide a concrete example: in the case of a Tier 1 facility with a release hazard security issue, the “restrict area perimeter” performance standard at the Tier 1 level may involve the facility establishing a clearly defined perimeter that cannot be breached by a wheeled vehicle. To meet the performance standard, the facility is able to consider a vast number of security measures. Among other options, a facility could, install cable anchored in concrete block along with movable bollards at all active gates, or it could “landscape” its perimeter with large boulders, steep berms, streams, or other obstacles that would thwart a wheeled vehicle. As long as the specific measures in the SSP are sufficient to address the performance standards, the Department would approve the plan.

Outreach Efforts and Program Implementation

Since the release of CFATS in April 2007, the Department has taken significant steps to publicize the rule and make sure that our security partners are aware of CFATS and its requirements. As part of a dedicated outreach program, the Department has regularly updated the Sector Coordinating and Government Coordinating councils of sectors impacted by CFATS, including the Chemical, Oil and Natural Gas, and Food and Agriculture Sectors. We have also made it a point to solicit feedback from our public and private sector partners as we interact with them and, where appropriate, to reflect that feedback in our implementing activities. We have presented at numerous security and chemical industry conferences, participated in a variety of

other meetings of relevant security partners, established a Help Desk for CFATS questions, and developed and regularly updated a highly-regarded Chemical Security website. These efforts are having a positive impact: approximately 36,500 facilities have submitted Top-Screens to the Department via CSAT.

Additionally, the Department continues to focus efforts on fostering solid working relationships with State and local officials and first responders in jurisdictions with high-risk facilities. To meet the risk-based performance standards under CFATS, facilities likely will need to develop effective working relationships—including a clear understanding of roles and responsibilities—with local officials who would aid in delaying and responding to potential attacks. To facilitate these relationships, our inspectors have been actively working with facilities and officials in their assigned areas, and have participated in almost 100 Local Emergency Planning Committee meetings to give a better understanding of CFATS' requirements.

We are also pursuing efforts on several levels to identify facilities that may meet the threshold for potential CFATS compliance but have not yet registered with CSAT or filed a Top-Screen. We have recently completed pilot efforts at the State level with New York and New Jersey to identify such facilities in those jurisdictions; we will use those pilots to design an approach that all States can use to assist in this effort. Further, we are in the process of commencing targeted outreach efforts to certain segments of industry where we believe compliance may not be at the level it should be.

We continue to build the Infrastructure Security Compliance Division that is implementing CFATS. We have hired or are in the process of onboarding over 125 people, and we will continue to hire throughout this fiscal year to meet our goals. Likewise, we continue our relationship with the Federal Protective Service to detail personnel with extensive physical security experience. The budget request for FY 2010 contains an increase to support the hiring, training, equipping, and housing of additional inspectors to support the CFATS program as well as to continue to deploy and maintain compliance tools for covered facilities.

New Legislation

We have enjoyed a constructive dialogue with Congress as it works on new draft authorizing legislation for CFATS. CFATS is enhancing security by helping to ensure high-risk chemical facilities throughout the country have security postures commensurate with their level of risk; thus, we support a permanent authorization of the program. Since the Department's authority under Section 550 is due to sunset on October 4, 2009, the Administration's FY 2010 budget includes a request for a one-year extension of the statutory authority for CFATS. We look forward to working closely with Congress to extend the program permanently. We urge that, in authorizing continued implementation of this important program, Congress provide adequate time and resources to implement any new requirements under the legislation and ensure that new requirements would not require the Department to extensively revisit aspects of the program that are either currently in place or will be implemented in the near future. Throughout our discussions with Congressional committees, including the Committee on Homeland Security, the Department has communicated a series of issues for consideration to be discussed as part of any legislative proposal involving CFATS.

As DHS has stated before, we believe that there is an important gap in the framework for regulating the security of chemicals in the United States, namely drinking water and wastewater treatment facilities. We need to work with the Congress to close this gap in order to secure substances of concern at these facilities and protect the communities they serve. Drinking water and wastewater treatment facilities that would be considered high-risk due to the presence of substances of concern should be regulated; however, we do recognize the unique public health and environmental requirements and responsibilities of such facilities. For example, we understand that a cease operations order that might be appropriate for a chemical facility under CFATS could have significant public health and environmental consequences when applied to a water facility.

In addition, the Department's current authority under Section 550 does not extend to certain exempt facilities, including those regulated by the U.S. Coast Guard under MTSA and by the Nuclear Regulatory Commission. Because CFATS and MTSA both address chemical facility security, there certainly should be harmonization, where applicable, between these programs. We are working with the Coast Guard to review the processes and procedures of both programs in an ongoing dialogue. We also support further clarification in the statute concerning the type of nuclear facilities exempt from CFATS.

CFATS currently provides facilities with flexibility to assess and determine what measures to include in their SSPs to meet the RBPS. This includes adoption of safer technologies, where appropriate. Under CFATS, facilities are also required to submit a revised Top-Screen when they make a material modification to their operations. Based on revised Top-Screens many facilities have already made voluntary changes to, among other things, their chemical holdings and distribution practices (for example, completely eliminating use of certain chemicals of interest). We support such voluntary measures when they reduce risk.

In the area of enforcement, we support eliminating the requirement that an Order Assessing Civil Penalty may only be issued following the issuance of an Administrative Order for compliance. This would greatly streamline the civil enforcement process, thereby enhancing the Department's ability to obtain compliance from facilities. We also support language that would authorize the Department to enforce compliance by initiating a civil penalty action in district court or commencing a civil action to obtain appropriate relief, including temporary or permanent injunction.

The Department has significant concerns with the citizen suit provision being contemplated under some legislative proposals.

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

Conclusion

The Department is collaborating extensively with the public, including members of the chemical sector and other interested groups, to work toward achieving our collective goals under the CFATS regulatory framework. In many cases, industry has voluntarily done a tremendous amount to ensure the security and resiliency of its facilities and systems. As we implement the chemical facility security regulations, we will continue to work with industry, States, and localities to get the job done.

We must focus our efforts on implementing a risk- and performance-based approach to regulation and, in parallel fashion, continue to pursue the voluntary programs that have already experienced considerable success. We look forward to collaborating with the Committee to ensure that the chemical security regulatory effort achieves success in reducing risk in the chemical sector. In addition to our Federal Government partners, success is dependent upon continued cooperation with our industry and State and local government partners as we move toward a more secure future.

Thank you for holding this important hearing. I would be happy to respond to any questions you may have.