

**CHARTING A PATH FORWARD FOR THE  
CHEMICAL FACILITIES ANTI-TERRORISM  
STANDARDS PROGRAM**

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**HEARING**

BEFORE THE

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

SECOND SESSION

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**WEDNESDAY, MAY 14, 2014**

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

The Committee met, pursuant to notice, 10:01 at a.m., in room SD-342, Dirksen Senate Office Building, Hon. Thomas R. Carper, Chairman of the Committee, presiding.

Present: Senators Carper, Levin, Landrieu, Coburn, and Johnson.

**OPENING STATEMENT OF CHAIRMAN CARPER**

Chairman CARPER. The hearing will come to order. I want to welcome everybody for coming today. I am going to make a very short statement, and then turn it over to Dr. Coburn.

This program that was needed is a program that did not start well, had all kinds of problems, as you know. And I think the Department of Homeland Security (DHS) deserves some credit, a good deal of credit, for taking a program not well run and making it a whole lot better. There are a lot of folks that have been part of that, not just at DHS, but we commend you there.

We also know everything we do we can do better, and we still need to do better here. I have some concerns, and we will talk about those. I know Dr. Coburn has some concerns. But I think we have the prospect here today for a very constructive hearing that, if done well and with good followup, would enable us to hopefully move forward with a reauthorization bill. And we need that because we have not had authorization for quite a while, and there are problems.

When the government shuts down, we have a real problem with this program without the lack of an authorization bill, so thank you all for coming. I am looking forward to a really constructive hearing.

We are going to have, unfortunately, a series of votes that start about 11:15, but Dr. Coburn and I have been practicing on how one of us stays, the other goes, and we swap back and forth and keep things moving. So my goal is to hopefully be finished with the first panel by maybe about 11:30 or so, and then we will bring on our second panel. Dr. Coburn.

**OPENING STATEMENT OF SENATOR COBURN**

Senator COBURN. Well, good morning and welcome to you, David. I did not get to say greetings. I did to Suzanne and Stephen.

I want to tell you how enthused I am with the leadership at DHS and the changes that are occurring, and congratulate you both in terms of your Secretary but also in terms of the improvements that are being made. And I mean that very sincerely.

But one of the programs that deserves a robust review is the Chemical Facility Anti-Terrorism Standards (CFATS). Since 2007 we have spent \$600 million on the program, and less than 2 percent of the facilities have been inspected for compliance. And in my review, I have learned some things:

One is that CFATS is not significantly reducing the risk that terrorists will use chemicals to conduct attacks against the United States.

The second thing I have learned is that the approach to assessing risk in chemical facilities which guides the CFATS program is broken. We will go into that in the questions.

Third, DHS is far behind in meeting its deadlines in this program, reviewing security plans, and inspecting facilities. That is not to say that David has not made a lot of progress. He has, and I congratulate him on it.

My fourth criticism is there is not enough work with the private sector or security efforts to fix the problems in the programs, and my feeling is that we need to fix it before we make it permanent, and that is what I intend to do.

I wanted to give you a little visual. Here are the requirements for a company that has to meet the Coast Guard's Maritime Transportation Security Act (MTSA) program. Here are the requirements if you have to meet the Transportation Security Administration (TSA) Pipeline Security Branch guidance. Here is what is required if you have to meet the U.S. Environmental Protection Agency (EPA's) Risk Management Program. And here is what you have to fill out if you are one of the 41,000 facilities regulated by CFATS. And then if you are one of the 4,100, besides filling that out, you have to fill this out. It cannot be that complicated. As a matter of fact, talking to industry, which I have, it is not that complicated.

So one of the reasons it is hard to fix is because we have put all this gobbledygook that has no attendant impact on what we are doing. So if you take all three of these programs—EPA's, TSA's, and the Coast Guard's—it does not even come close to what the requirements are for a chemical facility. And then if you are one at high risk that is covered by CFATS you have to spend 2½ times more than that.

We have to look at this program. We have to fix it. It is an important thing that we need to do. We need to solve the problems. I look forward to your testimony, and I thank you for being here.

Chairman CARPER. All right. That is a good note to start on, isn't it? We have our work cut out for us.

One thing, I am not going to introduce our witnesses. You have been with us before. We are happy that you are with us again, and we appreciate your preparation.

Some of our colleagues will wander in and out during the course of this morning, and we will just identify people and recognize them as time allows.

Please proceed. We had Department of Defense (DOD) here with us yesterday. Dr. Coburn and I worked them over for a couple of hours with our colleagues to try to figure out how they could do what you have done at DHS, and that is, to be not just auditable but also to get a clean financial audit in record time. And if DHS can do that with aplomb, then DOD should as well. In the entire testimony that they gave us, only one of them used an acronym, and I would just say that is a high standard to set for DOD to be able to do that sort of thing, so the Federal Bureau of Investigations (FBI), the Central Intelligence Agency (CIA), EPA, those are fine, but the other stuff? Stay away from it. Just stay away from it. Your job is to try to explain stuff. My job, our job, is to try to understand it. So just do not use acronyms. Thank you.

Ms. Spaulding, you are recognized. Thank you for joining us.

**TESTIMONY OF THE HON. SUZANNE E. SPAULDING,<sup>1</sup> UNDER SECRETARY, NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, U.S. DEPARTMENT OF HOMELAND SECURITY**

Ms. SPAULDING. Thank you very much, Mr. Chairman, and we will certainly try to meet that high bar.

I very much appreciate, Chairman Carper and Ranking Member Coburn, the opportunity to be here this morning to discuss the Chemical Facility Anti-Terrorism Standards program, fostering security at America's highest-risk chemical facilities.

Our testimony today focuses on the progress the program has made, our efforts to continue strengthening the program, and the need for permanent authorization to fully stabilize this program.

Two years ago, DHS had not approved a single security plan. Today that number is 764. Two years ago, DHS had not completed a single compliance inspection. The first compliance inspections began last September, and today that number is 31, and our inspectors have conducted over 1,000 authorization inspections.

Ninety-eight percent of Tier 1 facilities have an approved security plan; 66 percent of Tier 2 facilities and 39 percent of Tier 3 facilities have an approved plan. We are sustaining an average rate of more than 80 approvals each month, which would cut in half the Government Accountability Office (GAO's) estimate of how long it would take to clear the backlog of plan approvals.

Approximately 75 percent of these facilities' plans included measures recommended by DHS or the facility as necessary upgrades in order to satisfy the applicable Risk-Based Performance Standards. This is significant progress. It is a testament to the dedicated team at the Infrastructure Security and Compliance Division (ISCD), the program reforms they have put in place, and their efforts to work every day with our partners in the private sector and in government to put this program on a stable path.

That work continues. We continue to engage with stakeholders and focus on three core areas to strengthen the program: first, reducing the backlog; two, improving the risk assessment process;

<sup>1</sup>The prepared statement of Ms. Spaulding appears in the Appendix on page 47.

and, three, ensuring that all potentially high-risk facilities are identified. Along with long-term authorization, our continued focus on these areas will ensure our stakeholders have the stability they need to successfully comply with their regulatory obligations. We welcome the opportunity to work with you and our stakeholders on these important issues.

First, the backlog. Successful efforts to streamline the approval process include encouraging increased use of Alternative Security Programs (ASP) and supporting industry stakeholders' development of new templates, focusing inspections on key Risk-Based Performance Standards at our lower-tier facilities, and working at the corporate level to identify efficiencies.

At the same time we will maintain the quality and thoroughness of the security plan approval process and the level of security required at chemical facilities.

Improving the risk assessment process. DHS has conducted a thorough review of the CFATS risk assessment process. We have documented the risk assessment methodology, conducted an internal review of the risk assessment process, and initiated an external peer review.

All three of these phases are now complete. We have analyzed the peer review recommendations and developed an implementation plan to enable us to address their recommendations in a timely and thoughtful manner. We also recognize that it is essential to continue to engage with stakeholders as we assess changes to the risk assessment process. We intend to adopt appropriate changes to the tiering methodology in an integrated fashion, addressing as many issues concurrently as we possibly can, to balance improvements to the methodology with our stakeholders' need for stability.

Following the tragic explosion in West, Texas, just over a year ago, DHS has taken a number of steps to ensure that facilities are aware of their reporting obligations under CFATS. As you know, that incident led the President to issue an Executive Order (EO) on chemical safety and security with DHS as a co-chair of the implementation group. That group will provide recommendations to the President to improve information collection, more effectively share information between agencies, improve operational and Federal coordination efforts, and improve the effectiveness of existing policies governing chemicals and chemical facilities.

In addition to enhanced coordination with Federal, State, and local partners, these efforts will help ensure that the Federal Government most effectively uses its collective resources for managing chemical facility risk.

Finally, the Department strongly believes that long-term authorization would be beneficial to your oversight activities by ensuring the full maturation of the program and the review and approval of backlogged Site Security Plans (SSPs). Efforts to codify and enhance this authority to seek out noncompliant facilities will also greatly support our ongoing actions to bring those facilities into compliance. And perhaps most importantly, long-term authorization will provide industry stakeholders with the stability they need to plan for and invest in CFATS security-related measures. An authorization period of 5 years or longer would also enable Congress

to send an important message to facilities that may willfully be seeking to avoid compliance.

In conclusion, Mr. Chairman, I am proud of the progress we have made and the efforts we are taking to secure America's highest-risk facilities. We are committed to working with you to pass legislation to authorize the program. CFATS is making the Nation more secure by reducing the risks associated with our Nation's chemical infrastructure, and we along with our stakeholders and partners are committed to its continued success.

Thank you for the opportunity to testify today, and I look forward to answering your questions.

Chairman CARPER. We appreciate that opening statement, and we look forward to hearing now from Mr. Wulf. Please proceed.

**TESTIMONY OF DAVID M. WULF,<sup>1</sup> DIRECTOR, INFRASTRUCTURE SECURITY COMPLIANCE DIVISION, OFFICE OF INFRASTRUCTURE PROTECTION, NATIONAL PROTECTION AND PROGRAMS DIRECTORATE, U.S. DEPARTMENT OF HOMELAND SECURITY**

Mr. WULF. Thank you, Chairman Carper, Senator Coburn and Members of the Committee. I appreciate the opportunity to testify before you today to provide an update on the progress of the Chemical Facility Anti-Terrorism Standards program, the progress the CFATS program has made, and to discuss the prospect of long-term authorization for this important anti-terrorism program that fosters security at America's highest-risk chemical facilities.

Earlier this week, our program reached a new milestone as I had the privilege of granting final approval of the 750th Site Security Plan that has been approved under CFATS, a security plan belonging to a small chemical distributor in the Midwest. While there certainly remains more to do, the Department, including our Infrastructure Security Compliance Division, is continuing the forward momentum the CFATS program has experienced over the past 2 years.

The pace of authorizations and approvals is increasing consistently. Through much hard work on the part of our staff and industry stakeholders, we have since September, just 8 months ago, more than tripled the number of Site Security Plans that have attained final approval. As I noted, that number now stands at more than 750 with more than 1,500 facilities having attained authorization of their Site Security Plans.

The CFATS program has matured tremendously over the past 2 years as we have addressed the challenges described in the internal memorandum and associated action plan that was developed in the fall of 2011. We have developed improved policies, procedures, and training to ensure that inspections are conducted in a consistent and thorough fashion. We have implemented an effective, streamlined Site Security Plan review process, a process that has greatly enhanced our ability to authorize and, as appropriate, grant final approval for Site Security Plans.

We have also done much to stabilize our leadership cadre by hiring permanent seasoned managers, and we continue to foster

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<sup>1</sup>The prepared statement of Mr. Wulf appears in the Appendix on page 47.

transparency and open communication throughout the organization. I would like to recognize our workforce, which truly has a passion for the mission of chemical facility security, and is on the job every day working hard in concert with our industry stakeholders to foster security for America's highest-risk chemical infrastructure.

Our pace of inspections, reviews, and approvals will increase further as we continue to achieve efficiencies and to implement game-changing initiatives to streamline our processes and to work with stakeholders. I expect to continue to conduct inspections at a rate of more than 100 per month and to continue authorizing and approving security plans while moving further into a regular cycle of compliance inspection activity.

Among other game-changing measures, we are assigning corporate case managers, inspectors who are working directly with companies that operate multiple CFATS facilities and which frequently have corporate policies and practices that are consistent company-wide in an effort to further streamline the inspection and approval process for those facilities.

I have testified before this and other Congressional Committees 10 times in the past 2 years, and I have not been hesitant to highlight the challenges that have faced our program. I am pleased to tell you today, however, that this program is in a far different and much better place than it was 2 years ago. It is a program that truly has moved to the next level and that could benefit tremendously from the stability that would come with a long-term or permanent authorization.

In view of the significant forward progress CFATS has made, it is appropriate that Congress is considering authorizing the program on a long-term basis. Long-term authorization will provide industry with the certainty it needs to plan for and invest in CFATS-related security measures, and it will provide the Department with the ability to continue to recruit and retain top talent and continue planning and executing improvements to move the program forward.

It will also reduce the possibility of another lapse in authority such as occurred during October's government shutdown. In addition to the confusion this situation created among industry stakeholders, had the need arisen for the Department to take enforcement action to address a national security threat at a CFATS facility during the period of this lapse, the underlying statutory authority for such enforcement action would have been in doubt. This is not a situation anyone wants to see repeated.

Our chemical security inspectors are today providing compliance assistance to facilities and conducting inspections at an unprecedented rate, and I am pleased to report that I have received much favorable feedback from our industry stakeholders about their experience with these inspections. As you know—and this is something for which I am profoundly grateful—our stakeholders are not shy when it comes to expressing their candid thoughts and concerns about the program. So I am confident that when I am hearing positive things from industry about their facilities' inspections-related experiences, we are on the right track.

You will hear from one such individual today, Tim Scott, representing Dow Chemical Company and the American Chemistry Council. A number of industry organizations have been instrumental in promoting the continued forward progress of CFATS. The American Chemistry Council has been a leader in the development of an Alternative Security Program template and, along with organizations such as the Society of Chemical Manufacturers and Affiliates, the National Association of Chemical Distributors, the American Fuel and Petrochemical Manufacturers, and many others, has for years played a critical role in educating chemical companies about CFATS and other regulatory and voluntary programs that foster chemical facility security.

So thank you again for the opportunity to provide an update on the forward progress the CFATS program continues to make. It is an honor and a privilege to serve with the dedicated professionals of the Infrastructure Security Compliance Division and the National Protection and Programs Directorate (NPPD). We are committed 100 percent to the critical mission of securing our Nation's highest-risk chemical infrastructure. Along with the rest of our team, I am excited and optimistic about the future of the CFATS program.

Thank you again for the opportunity to be here today. I look forward to any questions you may have.

Chairman CARPER. Good. Thanks. And let me just say you two have done a great job on those acronyms, too.

Mr. WULF. Well, thank you.

Chairman CARPER. All right. Mr. Caldwell, please.

**TESTIMONY OF STEPHEN L. CALDWELL,<sup>1</sup> DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE**

Mr. CALDWELL. Chairman Carper and Ranking Member Coburn as well as Senator Landrieu and Senator Johnson, thank you very much for inviting GAO to discuss chemical security at the hearing today, especially about the path forward and potential reauthorization for the CFATS program. My written statement summarizes the work we did in 2012 and 2013 with some updates with the Department that we did in 2014, and I will summarize four key areas: identifying the chemical facilities, assessing the risks and prioritizing those facilities, reviewing Site Security Plans, and inspecting facilities for compliance.

Based on the updates that we have had in our work, as well as through the hearing today, there are indications of progress in all of the four areas that I mentioned.

Regarding the identification of facilities, the April 2013 explosion of the fertilizer factory in West, Texas, raised concerns about outliers, which are facilities that never reported to DHS but should have. On August 1, as has been mentioned, the President issued Executive Order, 13650, to address this issue, which calls for a working group to improve Federal, State, and local coordination for security and safety of chemical facilities and to, among other

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<sup>1</sup>The prepared statement of Mr. Caldwell appears in the Appendix on page 55.

things, identify additional facilities that, once identified, if appropriate, would be subject to regulation such as through CFATS.

DHS reports on that and the working group is supposed to report back to the White House at the end of May. And in Ms. Spaulding's budget testimony 2 weeks ago, she noted the request for additional resources that will be used for data matching between databases at CFATS, EPA, and the Occupational Safety and Health Administration (OSHA), and perhaps State and local databases as well. From our own data-matching efforts, we know that this is an intensive process from both the technology and from a labor standpoints.

Regarding the assessment of risk and the prioritization of facilities, DHS is working to implement our prior recommendations on this risk management methodology. As was mentioned, they tasked the Homeland Security Studies and Analysis Institute to conduct an internal review of their methodology. They completed that review in October 2013, and the results were pretty similar to what we found in April 2013. So we feel that our finding has been validated, and the Department now has an implementation plan. We have not reviewed that plan yet, but we look forward to reviewing that plan.

Regarding the review and the approval of Site Security Plans, our earlier report noted a cumbersome review process and a long backlog. As has just been reported, DHS reports streamlining the processes for CFATS, and the statistics this month indicate they have approved more than 700 security plans. That is about 18 to 20 percent of the 4,000 facilities covered by CFATS. Given that percentage, our upcoming review will certainly look at those approvals, and we will revisit our earlier estimate, which said it would be 7 to 9 years to resolve the backlog.

But the outstanding issue for all of the facilities and one we have made almost no progress since GAO started reviewing the program is the personnel surety issue. All of these plans that have been approved at the site level have been conditionally approved because there is still no resolution to Performance Standard 12, which is on personnel surety. So until this is resolved, none of the Site Security Plans actually have achieved final approval. Our understanding is that this rule is under consideration at the Office of Management and Budget (OMB) and has been for some time. That is the one area where we would like to see progress, and I think the Department would like to see progress on that as well.

Regarding the inspection of facilities for compliance, DHS now reports they have started that, which is the final part of this process. This month they gave us an estimate that they had completed 29 of these to date. At the time of our last in-depth audit, we had not looked at any of those because they had not started. As part of our upcoming review, this will be one of the new areas that we will look at to see how that is going.

In closing, I would like to note that GAO still needs to verify a lot of this progress through in-depth audit, and we plan to do so. We have a mandate from the Appropriations Committees as well as at least one request from the House side from the authorizers to continue our audits.

So with that, I will be happy to respond to any questions.  
Chairman CARPER. Great. Thanks so much, Mr. Caldwell.

As I mentioned to Dr. Coburn, I am prepared to yield my time to the Senator from Louisiana. Great to see you. And then I will just turn it over to Dr. Coburn, Senator Johnson, Senator Levin, and then I will ask some questions of my own. Nice to see you, Senator Landrieu.

#### OPENING STATEMENT OF SENATOR LANDRIEU

Senator LANDRIEU. Thank you, Mr. Chairman. I really appreciate the courtesy because I have to slip out, and I thank the Chairman. And I know we have votes at 11:15, so let me get right to it.

As the Chair of the Appropriations Committee for Homeland Security, I have been funding or our Committee has been funding this program without authorization now for several years because we know how important it is.

Let me begin by saying that I am proud of the chemical industry in our State. It employs 26,000 people directly and tens of thousands of people indirectly. It is a very vital industry, Mr. Chairman, not just to Louisiana but to your State, of course, and to other places in this country.

In addition, not only is it vital to creating high-paying middle-class jobs that are very skilled and highly technical, but we are in a boom cycle because of the finding of natural gas. Natural gas is used as a feedstock, so getting these regulations efficient and correctly, both for safety and also for efficient permitting of these facilities so they can continue to grow is absolutely essential.

If I am correct, a few years ago we had a 9-year backlog or an 8-year backlog. Is that correct, Ms. Spaulding?

Ms. SPAULDING. Senator, GAO's estimate was a 7-to 9-year backlog. We believe we are now sustaining a rate that would cut that time in half to get through the backlogs.

Senator LANDRIEU. But it is still too long. I mean, Mr. Chairman, this is still too long. And I know, Senator Coburn, you agree with this.

So I am going to be focused on this line item in our appropriations bill and ask my Ranking Member to really focus on what we can do to help here. But I think the authorizers could give us some good direction on this, and so I am looking forward to hearing from the authorizers about how they would like to move forward. But we have an opportunity to create literally thousands of jobs. This permitting has to go quickly, of course. The facilities have to be safe.

So I will just leave it at that and just submit a question to the record, Mr. Chairman, since you have been so gracious, that the Personnel Surety Program must be implemented in a way that does not hurt thousands of contractors that are working every day on these facilities. I was encouraged to see the suggestion, a new implementation procedure that took some of the initial comments. What is the timeline for completion and implementation of that rule? And what is the nature of the feedback that you are getting?

Now, to respect the Committee, why don't you just submit that to me in writing? And then they can proceed with their questions.

Senator LANDRIEU. Mr. Chairman, thank you very much, and I look forward to working with you and Senator Coburn as we move forward.

Chairman CARPER. You bet. A great opportunity for the authorizers and the appropriators to work together in yet other venues, so that is great. Thank you. Dr. Coburn.

Senator COBURN. So let me summarize what I have heard, and you all correct me if I am wrong. You have 750 Site Security Plans approved?

Mr. WULF. That is right. It is a little more than 760.

Senator COBURN. So that means there are still 3,200 that have not been approved.

Mr. WULF. Yes, there are approximately 3,200 that have received final tiers, about 4,000 in the entire universe.

Senator COBURN. But they still have not been approved.

Mr. WULF. That is correct.

Senator COBURN. All right. And you are going to do 100 inspections a month.

Mr. WULF. That is correct.

Senator COBURN. Right. So we are still 3 years from getting everybody inspected. And I made my point on the paperwork requirement. Somebody ought to review that.

Secretary Spaulding, one of the questions I have for you—you do not have to respond to it, but I would like an analysis from your office of here is what the peer review said and here is what we have done in response to the peer review because it was valuable.

Mr. Wulf, the first problems with the risk assessment in DHS was found in 2011, before you got there.

Mr. WULF. Yes.

Senator COBURN. The GAO identified problems with it again in 2013, and then the peer review found the same problem again. Why haven't we fixed the assessment process?

Mr. WULF. Well, we are in the process of implementing improvements to the risk-tiering methodology. Much of what the peer review panel found and observed we also had noted through our own internal documentation of the methodology and our own internal Department review of the methodology. So we are, moving forward aggressively to look at how we can more fully incorporate considerations of vulnerability and threat into the risk-tiering methodology.

The peer review panel did validate that consequence is an appropriate driver of tiering. Our model right now is very heavily focused on consequence. The model can certainly be improved. We are committed to improving it. And as the Under Secretary noted, we are going to move forward to do that in a way that balances the need for improvement with the need for industry to have some measure of stability in our risk tiering.

Senator COBURN. One of the things you have in risk tiering is the location, the State. Each State has a different one. Let us take Kansas City, for example. If you are in Kansas City, Kansas, you have a different rating than if you are in Kansas City, Missouri. Correct?

Mr. WULF. That—

Senator COBURN. And you may be 2 miles away from each other.

Mr. WULF. Yes.

Senator COBURN. That does not make sense. Would you agree?

Mr. WULF. I would agree, and we will be looking to enhance the granularity with which we assess threat in the tiering methodology, absolutely.

Senator COBURN. One of the things that I have noted, having been a manufacturer at one time—and I am not going to list these specifically, but we have a number of explosive precursors that are not on your list. I have 12 sitting in front of me. And my question is, and I will give this to you: Why not?

And so what I cannot understand is why they were not included in the first place. Can you give me any history on that?

Mr. WULF. Well, the CFATS regulation was directed to be put into place within, I think, a 6-month period by Congress when the initial authority was—

Senator COBURN. Seven years ago.

Mr. WULF. Seven years ago, that is correct. So, I think it was some good work. I will not say that there is not room for improvement in that list, and we are anticipating in the very near future issuing an Advanced Notice of Proposed Rulemaking to open up the entirety of the CFATS regulation to comment and suggestions from our stakeholders and other interested parties for improvement. That will include the Appendix A list of chemicals of interest. So if there are additional chemicals that should be added, adjustments that should occur in the screening threshold quantities, et cetera, this is the opportunity to get that done.

Senator COBURN. And some that should be removed.

Mr. WULF. Conceivably.

Senator COBURN. Yes.

Mr. WULF. Conceivably. But our assessment now is, given our current authority, that is something that has to occur through the rulemaking process.

Senator COBURN. One question for you. Are there any chemical plants right now that are considered higher risk than what they are just because they are on the wrong side of a State border? Is somebody falling into this tougher tier because they happen to be in a State with a high threat score, but, they are not really at a higher risk?

Mr. WULF. The model is largely consequence driven, so not driven very heavily by the threat variable, so that is another of the things we are looking at. So I would say that is very unlikely.

Senator COBURN. I have some significant chemical distributors in Oklahoma, and when I talk with them about the paperwork load—and they are small businesses—and one of the things that bothers me is the regulatory cost for a smaller chemical distributor versus a large one. And what we are doing—with the amount of paperwork and the compliance costs for a small firm—we are going to drive the small firms out of business.

Now, the larger firms here do not care about that. As a matter of fact, the large firms routinely use the Federal Government to enhance their capability toward oligopolies. Where is your concern with that? What do we do about that? How do we make it easier, even though they might have, appropriate chemicals that need to be safeguarded against their use for terrorism?

Ms. SPAULDING. Senator, we share your concern about ensuring that the regulatory burden does not fall too heavily on small and

medium-sized businesses. We feel a particular obligation to assist those businesses, and Director Wulf will be able to speak in some detail to all of the things that we have in place, including visits by our inspectors, compliance assistance visits to sit down with those facilities and give them assistance as well as all kinds of online activities.

But perhaps most significantly, this is one of the reasons we have worked so hard to make Alternative Security Programs a viable alternative for facilities and to work with the trade associations to develop templates, but, again, to sit down with facilities one on one to help them work their way through what is a more streamlined process. Director.

Mr. WULF. Yes, I think that is all right. Compliance assistance is a high priority. We will send our inspectors out to smaller facilities upon request to consult on security measures, on options. Our goal is to provide a maximum degree of flexibility and options for facilities to comply.

With respect to the Site Security Plan questionnaire, we agree. We have assessed it. It is too cumbersome. We have already taken actions to streamline it. We have removed approximately 100 questions that we deemed to be not necessary or redundant in different places. We are going to continue to do that, continue to streamline that. And as the Under Secretary noted, the use of Alternative Security Program templates is another way in which facilities can tailor plans in a way that may work better for them, for a particular industry segment, and for that matter for companies that have multiple facilities doing similar things.

Senator COBURN. Great. Have you all thought about the unintended consequences of what is happening right now in terms of storage of chemicals now, not in a facility but in a railroad car, just outside the facility or the fact that—because I do not want to have to be vulnerable to this regulation—my shipments are now in smaller quantities but 10 times as frequent? Have we thought about that?

Ms. SPAULDING. We have, Senator. We are aware that there are other regulatory regimes that are complementary to ours that we believe limit the prospect that risk has merely been shifted with regard to storage and transportation of hazardous materials, for example. But we are looking at and continue to work at developing effective and granular metrics to make sure that we are, in fact, enhancing security in America with regard to the risk from high-risk chemical facilities.

And so we have, for example, determined, with regard to Tier 1 and Tier 2 facilities, that their Site Security Plans have been approved, at least in part, based on, about 75 percent of them, upgrades in their security. So we know that they are making investments that are, in fact, enhancing their security.

But we are going back and verifying with—looking at bills of lading, shipping records, et cetera, what has happened with regard to these facilities that have reduced, modified, or eliminated their chemical holdings that make them no longer highest risk.

Senator COBURN. All right. I am out of time. Thank you.

Chairman CARPER. You bet.

Senator Johnson, thanks for being here.

Senator JOHNSON. Thanks for having me.

Chairman CARPER. Always asking good questions.

Senator JOHNSON. I appreciate your welcoming me back.

Chairman CARPER. Thank you.

#### OPENING STATEMENT OF SENATOR JOHNSON

Senator JOHNSON. Ms. Spaulding, you made a statement about companies willfully avoiding compliance. I just want to kind of drill down on that. Why would they willfully avoid compliance?

Ms. SPAULDING. Senator, I do not know that we can say with any certainty that there are companies out there that are willfully avoiding compliance. But what I did say is that if there are companies that think they could perhaps wait us out because the program may not be reauthorized, that a long-term reauthorization would send a helpful message to them that this program is here to stay and they—

Senator JOHNSON. I understand, but, again, I am just trying to— why would anybody willfully not comply? It is a pretty basic question. Why is it? Do you ask yourself that question?

Ms. SPAULDING. Senator, as I indicated, I think that the program that Congress has created here, the Chemical Facilities Anti-Terrorism Standards program, is promoting enhanced investments in security. Companies are making greater investments and more importantly, more effective investments in security than they would without this program. And so there may well be companies that choose not to make those investments and do not want to, therefore, come under this regulatory regime.

Senator JOHNSON. Coming from business, having been International Organization for Standardization (ISO) certified, having to pay insurance, having to worry about the liability of something going wrong, from my standpoint I would think an awful lot of business people would want to comply, want to do it voluntarily if the government is facilitating their compliance versus, dictating a regulatory regime that might be considered onerous. So that is what I am trying to get in terms of what your feedback is from people that are having to comply with this, why would people try and avoid it?

Ms. SPAULDING. Senator, I completely agree with you that the overwhelming majority of chemical facilities, are willingly complying with this and understand the value of this across the board with regard to the industry and—

Senator JOHNSON. Have you calculated, getting to Senator Coburn's point about the thick stack of papers that have to be apparently filled out and the questions have to be answered, have you just done a calculation of what it costs to comply for a particular company?

Ms. SPAULDING. Senator—

Senator JOHNSON. And different tiers, I mean, do you have any idea of the cost to companies?

Ms. SPAULDING. I would defer to the Director as to whether we have tried to calculate the cost. We are certainly aware that this can be a burdensome process, which is why we have tried to establish as many mechanisms as we can to reduce that burden and con-

tinue to look for ways to streamline not only our processes but the ability for industry to streamline their compliance.

Senator JOHNSON. Let us go to Director Wulf then. Do you have any idea what it costs to comply?

Mr. WULF. I think we will be in a better position to assess that as part of the rulemaking process as we move forward with our Advanced Notice of Proposed Rulemaking, a Notice of Proposed Rulemaking, and doing that cost-benefit analysis. I do not think that data existed as much when the program was getting started the last time rulemaking occurred. I—

Senator JOHNSON. In other words, that is something you really have not considered yet, you have not really—

Mr. WULF. Well, I think we are cognizant—

Senator JOHNSON [continuing]. Put a pencil to that or get feedback from companies? Have you ever had a company say, "This has already cost me \$100,000" or—

Mr. WULF. Yes. We hear those things from companies, and our inspectors work with those companies to discuss options, in many cases much lower cost options than ones they had been considering, but options that will work to meet our non-prescriptive Risk-Based Performance Standards. So that is one of the great things about the CFATS program and why I think it is really uniquely well tailored to this industry, which is not a cookie-cutter industry. It is not even one industry. It is just a probably, I am going to say, almost in the hundreds of different types of facilities that are part of the CFATS universe. What works for one company to meet a Risk-Based Performance Standard may not be appropriate for another company. So CFATS is about providing options and flexibility. It is non-prescriptive. We absolutely will work with companies to discuss a variety of options.

Senator JOHNSON. I am new to this issue. Are there penalties for noncompliance?

Mr. WULF. Yes, there can be. There can be fines.

Senator JOHNSON. And are those already being implemented?

Mr. WULF. We have not fined a company for—

Senator JOHNSON. But you have the power to do that?

Mr. WULF. We do.

Senator JOHNSON. Have you tried to look at any private sector compliance or other, for example, the insurance market or ISO certification, have you looked at any other types of private sector certification programs that you can tie into to make this far more cost-effective? I mean, ISO certification, when I am listening to the delays in getting people compliant, ISO certification is a very big deal for a manufacturer, but it does not take 3 or 4 years to get certification. It takes, if really done well, you can do it in a year. Have you looked at tying into those systems that are already in place?

Mr. WULF. We have had discussions with industry associations, which manage some, I think, very effective stewardship programs, things like the Responsible Care program, the ChemStewards program, the relatively new Responsible Ag program, which promote security at different types of chemical facilities. So we will continue to discuss the ways in which we can leverage those programs.

Senator JOHNSON. How familiar are you with ISO certification?

Mr. WULF. I am not very familiar with it.

Senator JOHNSON. That would be something I would highly recommend you get up to speed on, and I would talk to the certification companies that do ISO certification, because this is exactly what manufacturers go through. They do a risk assessment. They have to comply to make sure that, if something catastrophic were to happen, they know how to handle that, how to prevent those catastrophes from occurring. I mean, I would think that would be a natural coordination between ISO certification and then also the insurance market. If you want to drive compliance in business, probably the best way to do it is, well, if you comply, your insurance rate is going to be lower. It is a natural way to facilitate compliance as opposed to having—holding penalties over somebody's head. Does that make sense?

Mr. WULF. Yes.

Senator JOHNSON. OK. From my standpoint, I would love to see, again, the government contact ISO certification companies. I think you would be able to move this process forward at a much more rapid pace.

Mr. WULF. We can certainly do that.

Senator JOHNSON. And I doubt there are any of the large chemical manufacturers that are not ISO certified. You can just plug right into that process.

Ms. SPAULDING. Senator, thank you. As Director Wulf said, we certainly have been in discussions with industry and are looking at all of the ways in which we might be able to hasten the elimination of this backlog consistent with our national security imperative, and that is certainly one of the ones that we are looking at.

I did want to note that, with regard to your earlier question about the burden of compliance, we do have—each of our processes, the Top-Screen, the Security Vulnerability Assessment, and the Site Security Plan, are considered information collection requests, and pursuant to OMB process, we did have to provide them with estimates on the burden of this regulatory compliance, and I believe that is information we can provide you.

Senator JOHNSON. OK. I would appreciate that. Thanks.

Chairman CARPER. Thanks, Senator Johnson. Those were good points. Thank you. Senator Levin.

#### **OPENING STATEMENT OF SENATOR LEVIN**

Senator LEVIN. Thank you very much, Mr. Chairman. It is a very important hearing. We thank you and Dr. Coburn for having this hearing. It is a big industry in my State, the third largest, as a matter of fact, manufacturing industry in my State. I think there are 28,000 employees. And so to make sure that this program is fairly and effectively working is really important to us.

I have a couple quick questions. One has to do with the fines that Senator Johnson asked about. As I understand, there are no fines for not filing. Is that correct? If you do not file, if an industry does not file, there is no fine.

Mr. WULF. I think there is a school of thought to suggest that until a facility becomes regulated, goes through the process of filing its Top-Screen, being determined to be high-risk and having a Site Security Plan approved, the enforcement mechanisms may not

apply. I think our view is that we can issue a notice requesting or essentially ordering a facility to comply, to file, and then move forward in the enforcement process.

Senator LEVIN. Is that the way you are operating.

Mr. WULF. Yes.

Senator LEVIN. Are you fining people who do not file when you find out about their existence?

Mr. WULF. We have issued I think 66 administrative orders—

Senator LEVIN. No, that is not my question. Do you fine people for not filing? I know you have issued orders. After you find out about them—

Mr. WULF. We believe we could fine them, yes.

Senator LEVIN. But you have not fined any—

Ms. SPAULDING. We have not.

Mr. WULF. Everyone has come—

Senator LEVIN. But you think you have the power.

Mr. WULF. We do.

Senator LEVIN. Do you have any idea as to what number of people have not filed who should file?

Mr. WULF. Well, I think that is a difficult—

Senator LEVIN. You have no idea.

Mr. WULF [continuing]. Number to know. I think we know that we have engaged in extensive outreach, 11,000 or more separate outreach engagements, and that has generated upwards of 48,000 Top-Screen filings. We believe we have a good handle on the known universe of high-risk chemical facilities, and we are working with our partner agencies to cross-walk data sets and to ensure that we are doing all that we can to identify potentially noncompliant facilities and bring them into the program. We are also working with State agencies, with State homeland security advisers to reach down—

Senator LEVIN. OK. I was asking about penalties for non-filing. At any rate, I want to ask also about your budget. Your budget has been cut, I see. Is there any effect on this program by the cuts in funding for the program? Has that had an effect? And does that help create the backlog?

Ms. SPAULDING. Senator, we do not believe so. We have had to make some difficult choices with regard to our budget—

Senator LEVIN. But that is not one of the causes—

Ms. SPAULDING [continuing]. But the approval process has picked up speed over time.

Senator LEVIN. All right. So there is no relationship between budget and the backlog or the speed of administration of the program?

Ms. SPAULDING. Senator, at this point we believe we have the resources we need to sustain this pace and reduce this backlog.

Senator LEVIN. All right. If you had more resources, could you speed up the pace?

Ms. SPAULDING. Again, at this point we believe that we—we have streamlined the process—

Senator LEVIN. I understand. My question is: Could you pick up the pace if you had more resources? It is pretty straightforward.

Ms. SPAULDING. Yes, frankly, Senator—

Senator LEVIN. I am not asking if you are asking for them—

Ms. SPAULDING [continuing]. If there were more——

Senator LEVIN. I am just asking you a straightforward question. If you had more resources, could you pick up the pace? It is a very direct question.

Ms. SPAULDING. If there were more people reviewing the Site Security Plans and if there were potentially more inspectors, although I am not sure the approval—that there is any backlog in inspections, but certainly with regard to reviewal of Site Security Plans and working with industry on the Alternative Security Plans, it is entirely possible, Senator.

Senator LEVIN. There is a question of background checks for employees and unescorted visitors that I want to ask you about that provide identifying information to the DHS for use in screening employees against the terrorist screening database. The DHS is still in the process of finalizing how exactly facilities ensure that individuals with known terrorist affiliations do not gain access to high-risk facilities. A major chemical company, Dow Chemical in my State, told me that they are concerned that DHS does not tell them if someone in their facility is on the terrorist screening database. And labor groups are concerned that there is no transparency in the process, and for workers who might be inaccurately classified, that there is no appeal process.

Well, let me put it, Director Wulf, to you: When will the process for which personnel surety or screening is going to be finalized by the DHS?

Mr. WULF. We hope it will be finalized soon. We——

Senator LEVIN. Can you give me just an approximation?

Mr. WULF. I think you would have to ask OMB, because the documentation is up there for final approval right now.

Senator LEVIN. Well, what are you recommending?

Mr. WULF. We are recommending a—well, we have proposed a program which would provide a number of different options for facilities to ensure vetting of persons who are seeking unescorted access to high-risk chemical facilities and the chemical holdings thereon. So the ability to directly vet those individuals by directly submitting information to the Department for vetting, the opportunity to leverage other vetting that has taken place, such as through the Transportation Workers Identification (TWIC) program, or the Hazardous Materials Endorsement program, as well as the opportunity to conduct vetting electronically and the opportunity to propose an additional option or options that we may not have considered.

So we have tried to design a program that affords maximum flexibility. That is what we propose, and that is what is sitting at——

Senator LEVIN. And that is what you proposed to OMB?

Mr. WULF. That is right.

Senator LEVIN. And if they approve that program, how long after they approve it would it be in place?

Mr. WULF. I think it would be within months. But we would proceed in a measured fashion. We would work first with a handful of facilities to ensure that we were getting everything right, that facilities were able to work well with the online system that we have developed to facilitate this vetting. But we do believe that this

is an important hole in the program that needs to be filled soon, ensuring that folks who are seeking unescorted access to our higher-risk chemical infrastructure are, in fact, vetted against the terrorist screening database.

Senator LEVIN. Has OMB told you when they are going to give you an answer?

Mr. WULF. They have not.

Senator LEVIN. Thank you.

Thank you, Mr. Chairman.

Senator COBURN. Could I? You tell me if I am wrong on this. All of the DHS proposals for personnel surety require submitting information to CFATS, even if they have already been vetted by other DHS agencies?

Ms. SPAULDING. Not exactly, Senator. There is an option there for facilities to use—to better leverage existing credentials from DHS that—

Senator COBURN. When did that go out to industry? Because that is not what I am hearing from industry.

Ms. SPAULDING. We have spent months talking with industry to make sure that we understand their concerns and to talk with them about the ways in which we are thinking about this program and have shared—again, it is difficult to get out to all of the 4,000-plus facilities that are regulated, but we have in our notice or request that is with OMB included a proposal that would allow an electronically verified TWIC card to be used for meeting the personnel surety standard. And that does not require that they submit any information to the Department beyond what is already done in the TWIC program.

Senator COBURN. What about a Hazardous Materials Endorsement (HME)?

Mr. WULF. I do not believe there is currently a way to electronically verify a hazardous material—

Senator COBURN. But if somebody has that card, why do they have to get verified again by DHS? That is the question I am asking. It is make-work. If they have already cleared one agency in DHS, why do they have to clear another one? If they are good enough for part of it, why can't they be good enough for this?

Ms. SPAULDING. Senator, our concern is to make sure that the credentials that are being used to access the most sensitive parts of chemical facilities, where the chemicals of interest, highest-risk chemicals are located, that those credentials are still valid and are still held by the person who should be—

Senator COBURN. I understand that, but if they have been cleared by one agency in the Department of Homeland Security and termed a “chemical handler,” why isn't that good enough? Why can't they just submit this employee has this card, you have already approved them for handling the highest-risk chemicals, now you are going to make them go and get another certification from the same department of government to say, oh, yes, by the way, you are OK? Why can't a business just say these people right here already have a TWIC card, already have a Hazardous Materials Endorsement, why aren't they cleared automatically?

Mr. WULF. We would just be asking those facilities that are looking to leverage that existing vetting to provide us information like that in a number—

Senator COBURN. Well, why should they have to—why can't they just keep it on file there and avow that we have these people covered? Why would we make them do it again? I mean, their TWIC card is not forever.

Ms. SPAULDING. Senator, under the Maritime Transportation Safety Act, which the Coast Guard administers at maritime chemical facilities, that regime always envisioned the use of an electronic reader as an essential and important—

Senator COBURN. You are missing my point. I am not talking about electronic. I am talking about if a company says these people are certified and we can prove it in our files, when you come in to inspect that, rather than make them go through the process of sending a whole lot more information to you, which you really do not need, and their assumption is there is a penalty if I am lying about somebody's access, there is nothing to be gained by having them have another surety requirement when they have already passed two surety requirements from the same department. That is my point.

Ms. SPAULDING. Senator, those regimes are—those credentials are for different purposes, and what the Personnel Surety Program is about is access to the most highest-risk chemicals within a facility, unescorted access to those chemicals. And the HME card is for a different regulatory purpose.

Senator COBURN. But you would agree, if somebody has an HME card, they have access to them anyway. So what is the difference? I mean, you have already done a security check on them.

I am finished. Sorry.

Ms. SPAULDING. Senator, I take your point, and I understand the point you are making. Again, our interest is in making sure that, with regard to people who have unescorted access to these chemicals, that this card, the credential that they have, is still valid and they are the appropriate card holder. We will continue to work with industry and with the Committee to find ways to accomplish that security objective that is least burdensome to industry that we can possibly—

Senator COBURN. But what I hear you saying, they are still going to have to submit to the CFATS that we have an HME card or we have a TWIC card, and then they are going to have to apply.

Ms. SPAULDING. Senator, there is a fourth option under our request with OMB, and that is for chemical facilities to present us with their alternative to meet the security standard, and that reflects our ongoing commitment. We do not necessarily have all the answers. There may be alternatives there that we have not yet thought of that industry will come forward with, and we are open to that possibility.

Senator COBURN. If a truck driver with a TWIC card is carrying a load of isopropyl percarbonate, which is a catalyst which can explode if you lose the refrigeration on it, they have access to a bomb. And if we are going to recheck that truck driver when they are unloading into a special area in a special plant, again, against a code

that is redundant and not efficient and cost prohibitive. That is the kind of point I am trying to make.

I will make one other point. I think it was during the Clinton Administration under OSHA that they decided that they were going to take a period of time where they were going to not be a penalizing organization; they were going to be a fixing organization. And the response of the industry was miraculous. OSHA came in, said, "You have these problems. We want you to fix these problems. We are not going to penalize you. Fix them. We will come back in 6 months and look at it." And that approach did more for employee safety than all of the other OSHA regulations we have ever done. And I hear from Mr. Wulf that that is the kind of approach you are trying to take. And what I would say is that is the approach that is going to work best with industry: a cooperative, compliant partnership that solves these problems.

Chairman CARPER. This past Sunday was Mother's Day, and I am sitting here not channeling my mother but my father, and my father was always saying to my sister and me, when we would do some bone-headed stunt, he would say, "Just use some common sense." This may be one of those situations where a little common sense would go a long way. And I think Dr. Coburn raises some important points. I think you know that. Let us just figure out how we can address that, those concerns.

The other thing I would say is you all are interested in if not a permanent reauthorization, at least a multiyear reauthorization. I think I heard 5 years from you, Ms. Spaulding, and the House, our counterparts in the House, reported out a reauthorization of, I think, 3 years. I think we started off, maybe when this program was created, with a 3-year authorization, I believe. And since then we have been pretty much without authorization, as I understand. And somewhere between no authorization and permanent, there is a number there that probably works. And to the extent that you can continue to take seriously the concerns Dr. Coburn is raising and others are raising, to the extent that you can take seriously those concerns and address them in a way using some common sense, we are going to get closer—we are not going to go to permanent, but we will get closer on that end of the scale than to zero. So that would be my knowledge that I would share with you on this.

Mr. Caldwell, I do not think you have been talking nearly enough today, and we are going to give you an opportunity to rectify that. And put yourself in our shoes. I am reminded a little bit, Tom and Ron, I am reminded a little bit of what DHS did in moving from the high-risk list, unable to even be auditable much less get audited, to move not with lightning speed but to move pretty fast from a point of being auditable to getting—passing a clean audit. It was pretty impressive. We urged our DOD friends yesterday to take a chapter out of that book.

I think that this program in terms of going where it needs to go, you are sort of at the same point where—it is not the right analogy, but I will say you are auditable, close to auditable. But what we need to do is just not to say, OK, well, things are going fine and we will rest on our laurels. I mean, this is time to put our foot on the pedal to the metal and just push it on through. And to the

extent that we can do that—and we would play a role in that obviously—we will all be better off.

All right, Mr. Caldwell. We are not going to talk about it right now, about all the good things that are being done. There are a number of those, and we applaud that. But I want you to help us focus on that which still needs to be done by the Department, by Mr. Wulf and the folks who work in this program under the direction of Ms. Spaulding. Focus on the stuff that still needs to be addressed and that you guys have pointed out, and just let us talk about that. You have heard from Dr. Coburn and others some of our concerns on what needs to be done. Just speak to those, please.

What I want to get here, I want to get some consensus, sort of a to-do list coming out of here, what we think you need to be doing and what you all think we need to be doing, and let us just move forward.

Go ahead, please.

Mr. CALDWELL. Well, in terms of your analogy to the high-risk list, there are a couple of areas where we pointed out serious problems with the programs. We had help from the Department doing that, when their internal memo was leaked a couple years ago, that these were indeed serious problems.

We have found—and we think that our involvement helped this—that the Department has put together some very specific action plans. For example, they had a 94-item action plan to address the serious management problems they had. Now they have an annual operations plan to actually operationalize that plan so that they are tracking some of these things that they are doing. At least for some of those management problems, we are beyond the most serious problems to focus on actually running the program, so I think that is positive.

In terms of running the program, the biggest issue that we have at this point as an open issue is the vulnerability assessments. We have open recommendations on that. And going back to the questions you had asked about the risk management that Senator Coburn had talked about. In terms of the consequence, even their own rules said that certain types of consequences are going to be included, and they did not include those. For example, economic consequences, according to their own rule, were going to be looked at, but they did not look at them.

And in terms of vulnerability, they said they were going to look at vulnerability, but late in the process when they actually inspect the facility plans. To us, vulnerability is one of the things you consider up front. I do think it makes perfect sense to look at consequences first. But the reason that we got for them not including vulnerability is it was self-reported information, at the beginning of the process.

Well, everything about the program is self-reported. So that just did not make sense to us. That is the biggest issue. DHS did have an internal review by the Institute for Homeland Security Analysis.

The issue that we have not even looked at is the personnel surty one, which I have already talked about.

Chairman CARPER. On the point he just made, very briefly, 15 seconds, just respond please, Ms. Spaulding.

Ms. SPAULDING. So we did get recommendations from the external peer review on ways in which we might be able to better incorporate vulnerability in our risk-tiering methodology, and we are working through those recommendations now.

Chairman CARPER. Good. Thank you.

Mr. Caldwell, please proceed.

Mr. CALDWELL. We are talking about them tweaking their methodology to have something consistent with the National Infrastructure Protection Plan (NIPP) and some of the standard risk management methodologies the Department uses. We think those are good criteria.

We do not want them throwing new facilities on the list or off the list. At this point it would be reasonable as they go forward to amend as they go. Or else you are never going to get to a stable list of facilities that have requirements to be met.

From our standpoint, obviously, the service we at GAO provide is going in and actually verifying the information. So we are about to start on our next phase of that audit work. We have, as I said, mandates from the appropriators as well as from the House side on the authorizers. We can work with this Committee if you want to be part of that audit. So that is it there.

In terms of the bigger issue before you, which is authorization, I think that there are certain advantages of that. It provides some stability in terms of the CFATS workforce. Industry wants it as well. They want the stability, too. They want to know that CFATS is going to drop off. As Senator Johnson said will there actually be incentives for industry, not joining to joining or not reporting or reporting.

The House bill also codifies some of the current practices based on regulation. But there is less authority if the regulations are not in the law. The House bill which we have been working with them on does emphasize certain corrective actions that need to be taken. So, I think we are on a path forward. There is impatience, and that is understandable. But, DHS appears to have a commitment to change, we are seeing that.

Chairman CARPER. I feel like Dr. Coburn wants to jump in here.

Senator COBURN. Well, I would just make two points.

One, if we were starting over, what I think this Committee would recommend is much what the TSA did with the Pipeline Security Branch. It was a total collaborative process from the beginning where you had industry input working with committed government individuals to create a pipeline program against terrorism. It created a small amount of paperwork with massive compliance on part of the industry because they were part of it.

The second example I would give is the President's Executive Order on cybersecurity. It was a total collaborative process where the Administration listened to the players and we are getting a good result. And we did not do that in this.

The final point I would make is if you have an explosives permit from the Bureau of Alcohol, Tobacco and Firearms (ATF), under your proposed guidelines, you still have to get another clearance from Homeland Security. That makes no sense whatsoever. And so you have to fix that.

So I do not know what you have at OMB, but I know what is rumored to be there, and what is rumored to be there is not going to be acceptable. So you have to figure out a way to utilize the resources of the rest of the government when we give clearances to somebody, especially an explosive permit. To say they have to go to another agency to get another permit again is absolutely—well, I will not use the word that I am thinking.

Chairman CARPER. Now we are just going to wonder what word he was thinking. Let me reclaim my time—

Mr. CALDWELL. I think it was an acronym, sir.

Chairman CARPER. It was an acronym? OK, probably.

I want to turn to a concern relating to the ease of compliance for a large company, think DuPont, think Dow, as opposed to a small company that deals with some of these dangerous chemicals and has maybe a half dozen employees, and they are just trying to figure out how to keep afloat and meet payroll and sell their products and so forth.

There are some concerns I have heard that some of our larger chemical companies may actually be advantaged by this program because it is easier for them to comply, and their small competitors, very small competitors, find it very difficult to comply. And I just want you to respond to that concern, Ms. Spaulding, if you would, please, and sort of the point here is similar to what Dr. Coburn raised earlier, ease of compliance, particularly for smaller companies, keeping an eye on risk.

Ms. SPAULDING. Senator, it is a legitimate concern, and it is one that we share, and which is why we have worked hard to have in place as many mechanisms as we can to assist small and medium-sized businesses to comply with this important regulatory program. And that includes, onsite compliance assistance visits by our inspectors who are all across the country, who will come in and sit down with that facility, and provide whatever assistance they need in meeting their requirements.

We have, the ability to call someone, a help desk. We have online resources. And, again, one of the things that we recognized some time ago was perhaps most helpful was this option for an alternative security program, which can be a much more streamlined way of meeting the regulatory requirements with regard to submitting a security plan for your facility. And we have worked very hard with—industry has come to the table in full collaboration on this to help their industry partners by developing templates that will significantly ease the burden for companies to comply.

Director Wulf, if you want to add anything to that?

Mr. WULF. I think that is all covered very well. With respect to compliance assistance, as we work with these smaller companies to discuss options for meeting the Risk-Based Performance Standards and getting those Site Security Plans or Alternative Security Programs into shape, such that we are at a point where we can authorize the plan and go ahead and inspect it, I think it is important to recognize that although we have only gotten to—we have inspected, done formal inspections of a little more than 1,000 facilities, our inspectors have been out at other facilities that have not yet gotten to the point of inspections. So we are working particularly with smaller companies on a regular basis, and security is

being enhanced at those facilities, even prior to the formal inspection and approval.

Chairman CARPER. All right. Thank you. We are going to start a vote, a series of several votes, in just a couple of minutes, and I think Dr. Coburn, when we start that, will go over and vote early and come back so I can vote on the first and second votes, and then we will switch places again, and when I come back, I will ask questions.

I want us to drill down on the backlog. It used to be 7 to 9 years. It is now maybe half that. That is progress, but can we do better? You bet we can. And I want to just talk about specifically what you all need to do better, what we need to do to enable you to do better, and maybe what industry needs to do.

Tom, would you like to ask anything else before you head out?

Senator COBURN. No. I just would remind Under Secretary Spaulding we really want that analysis of what the peer review said versus what your response was.

Ms. SPAULDING. Absolutely, Senator. We will get that to you. We very much valued the peer review's recommendations, and as we have indicated, we have an implementation plan, and we would be happy to get that information over to you. Thank you, Senator.

Chairman CARPER. All right. Thank you. Senator Johnson.

Senator JOHNSON. I will just reinforce the point that you have literally thousands of private sector inspectors out there that can help you out. Whether it is people rating for insurance, whether it is ISO certification, those surveillance auditors, use them. No sense creating an extra burden for businesses. You have one inspection here, you have another inspection here. Rather than actually producing products, rather than concentrating in innovation, we are just worrying about audits and inspections. It gets pretty burdensome.

So utilize what is already out there. Try and kill two or three or four birds with one stone. I would really encourage that. I think you would be far further ahead if you tied into ISO certification problems, if you tied into the insurance rating systems. It would work.

Ms. SPAULDING. Thank you, Senator.

Chairman CARPER. When our witnesses were before us yesterday from the Department of Defense, the Comptroller and others, we were acknowledging that they are making some progress toward moving toward being auditable. At least within the Marine Corps they are making some progress, the Navy, Department of Navy, the others beginning to but not nearly enough. And I said to our witnesses—Bob Hale, the Comptroller who is leaving, a good man. But I said to him and to them, “We acknowledge that it is not all on you. Part of this is on us.” And he said, “Well, we tried to make progress toward becoming auditable and to get a clean audit. But,” he said, “it has been challenging in the fiscal environment we have operated in recent years—shutdowns, fiscal cliffs, continuing resolutions, lack of certainty, lack of predictability.” And he is absolutely right.

Part of this—what is it?—“We have looked at the enemy, and it is us.” There is some of that going on here with respect to their

becoming auditable at DOD and our doing an even better job on this particular program.

Before we break and bring on the second panel, let me just ask this: What can we do—and I think part of it would be a reauthorization, but just what can we do with some specificity, feel free to mention that, but then drill down a little bit beyond the 3, 5, or whatever period of time would be most helpful. And, Mr. Caldwell, I am going to ask you to go last on this, but, Suzanne, if you would just start off, and then David and then Steve, but, please, our responsibilities.

Ms. SPAULDING. Mr. Chairman, thank you very much. Thank you for the question, and thank you for your interest and hard work and efforts to make sure that this program is on track and is where it needs to be. I indicated earlier how much we valued the peer review, outside input and recommendations. We very much value GAO's second set of eyes, third, fourth set of eyes on our program, and we very much value the oversight of this Committee in helping us make sure that we are meeting the national security imperative in a way that makes sense for industry and keeps America safe. And so that continued oversight—

Chairman CARPER. I am going to interrupt you.

Ms. SPAULDING [continuing]. Will be helpful.

Chairman CARPER. Give me some specifics. I want some specifics. This is your chance to ask us, this is your—to say, “Here is your to-do list.” Give us your order. Or we will take the order, so, please, take advantage of it right now.

Ms. SPAULDING. Thank you. I would, say again that the long-term authorization, permanent authorization for this program is probably the single most important thing that Congress could do to help advance this program.

Chairman CARPER. All right.

Ms. SPAULDING. For all of the reasons that we have talked about, and you mentioned in yesterday's hearing the references to—

Chairman CARPER. I have that. Let us go—OK.

Ms. SPAULDING [continuing]. The economic challenges.

Chairman CARPER. You can move on from that. I have that. Thank you.

Ms. SPAULDING. Right. And with regard to further legislative proposals, we are looking at that, at ways in which the current statutory regime, might be strengthened to give us authority. We are looking at, for example, is the compliance regime and our ability to bring enforcement actions, does that need to be strengthened? Does that need to be streamlined? And that is something we are looking at, and we will come back to the Committee, when we have finished looking at that.

Again, I think Congress, in creating this Risk-Based Performance Standard Program, which does not require facilities to build a 15-foot fence but gives them the leeway to develop the measures based on an outcome, is the right approach. And so I would encourage that authorization to continue that approach, which is, again, an outcome-based approach.

We are looking at, in the context of rulemaking, whether we want to open this up and make some changes to our rule. But,

again, I think authorizing the program more or less as it currently stands is really, what we are looking for from Congress.

Chairman CARPER. All right.

Ms. SPAULDING. Director Wulf may have some—

Chairman CARPER. Before you say anything, David, when Jane Holl Lute was the Deputy, she used to come before us and testify, Deputy Secretary at DHS, we would ask her, “How did DHS get off the high-risk list at GAO for any number of sins?” And she said one of the things that she did, she would go meet with Gene Dodaro, the Comptroller General, literally in his office, and say, “We want to get off your high-risk list. What do we need to do to do that?” And they were just like chapter and verse: This is what you need to do, this is what you need to do. And I think her leadership and Rafael Borrás, his leadership in the Department, were enormously helpful in that, I am sure the Secretary’s admonitions as well.

Mr. Wulf, far be it from me to tell you what to do, but if the Deputy Secretary of the Department can go call on the Comptroller General and his staff again and again and again to, clear out the underbrush and get off the high-risk list in a variety of ways, you may want to consider some visits over here to the Hill. And my wing man here, Dr. Coburn, he has some real reservations—you have heard them today—real reservations on what—not to take away from the work that has been done, but actual things that need to be done. And to the extent that you can almost one on one with some of your team work with him and his team, that would be enormously helpful to you and I think to us, so I would urge you to do that.

Mr. WULF. Yes, we absolutely will do that.

Chairman CARPER. All right. Thank you.

Mr. Caldwell, any closing statements here to help us along.

Mr. CALDWELL. Yes, a couple of things. Some are asking the really big question about CFATS, like: Is this the right approach, or should we start over again? If we start over again, it is going to be years before we have anything in place. At GAO, the most important criteria is the laws that Congress passed, and CFATS was passed, and there has been appropriations for it, so we see that as a sign of congressional support. There are advantages of authorizing the program in terms of the stability, both to the people running the program as well as to industry.

In terms of authorizing legislation, the House has already taken that up, and there are ways to nudge the Department to do things where there is congressional interest in particular improvements. One thing that comes to mind is discussion about the small business community and how to help them. The House bill does have a section to help small business. So that is an example where Congress can make sure things happen by putting them in legislation.

On the personnel surety side, I am not really sure what is going to happen. I do not know how to get that rule out of OMB. I am not sure the Department knows or Congress knows at this point how to move OMB.

Chairman CARPER. All right. At least we can have a conversation with OMB, and we are going to have that this week, and this hearing has spurred us to do that. Sometimes that can be helpful.

Mr. CALDWELL. So that would be good.

Chairman CARPER. All right. I have these guiding principles that I try to follow. They are kind of like my moral compass. And we have actually touched on a number of them here today.

One, if it is not perfect, make it better.

Another one is just use some common sense. I think we see some opportunities to do more of that here.

I have a friend who, if you say to him, "How are you doing?" he says, "Compared to what?" And if you compare this program to where it was a half dozen years ago, you have come a long way. But we are not in the end zone; we are not in the red zone. And we need to get there.

I used the analogy yesterday, I will use it again today: In naval aviation, when—I was an old Navy P-3 aircraft mission commander for a number of years. In our airplane, the P-3 aircraft—the plane that has been used over the Indian Ocean to do a lot of these searches. But in aircraft, you are coming down the runway to begin your takeoff roll, and you reach a spot in your takeoff roll called "the refusal speed." And refusal speed is the point where the pilot in command either pulls back on the throttle and you stay on the ground, or you push ahead and fly. I think we are really sort of—I thought we were—yesterday I said, "I think we are at refusal speed at DOD in the work they are moving toward, getting a clean audit." I think this program is at refusal speed, too. And just like DHS decided to push ahead and to fly to the goal of getting a clean audit, I think that is pretty much where we are. And just like DOD needs to go to school on DHS and how they got a clean audit, there are, I think, some opportunities here for us to learn as well. And a big part of it was Jane Holl Lute and probably Rafael Borrás coming over personally and meeting with GAO folks and saying, "OK, what do we need to do? What are we doing? And what more can we do? And what help do we need?" So keep that in mind.

With that, we are going to call our second panel of witnesses forward, and, Ms. Spaulding, I think we get to meet with you on a different subject later today.

Ms. SPAULDING. I am looking forward to it, Senator. Thank you.

Chairman CARPER. We look forward to it as well. Thank you so much.

Ms. SPAULDING. Thank you very much.

Chairman CARPER. Thanks, Mr. Wulf.

Mr. WULF. Thank you.

Chairman CARPER. Thank you, Mr. Caldwell. And, Mr. Caldwell, everybody at GAO who worked day and night very hard and who provide great service and assistance to us in our jobs, we want to again thank you. And we need your help. Just like you have been helpful to our friends over in the House as they fashioned their bill, we would like to have some of the same.

Mr. CALDWELL. And such meetings have already started, so thank you.

Chairman CARPER. Thanks so much.

[Pause.]

All right. Good morning. I am not going to introduce or provide a formal introduction for our witnesses. We are happy you are here. It is nice to see you all, and we welcome your testimony.

We are going to go ahead and start, and Dr. Coburn may well come back and spell me so I can run and vote the first and second votes, but the idea is to keep moving and to give you full opportunity to hear—it will give us a full opportunity to hear your testimonies and then for us to be able to have a good conversation. So welcome. Dr. Shea, why don't you go first?

**TESTIMONY OF DANA A. SHEA,<sup>1</sup> PH.D., SPECIALIST IN SCIENCE AND TECHNOLOGY POLICY, RESOURCES, SCIENCE, AND INDUSTRY DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS**

Mr. SHEA. Thank you for the opportunity to testify before the Committee today about Federal efforts to secure chemical facilities within the United States from terrorist attack. In addition to my remarks today, the Congressional Research Service (CRS) has several reports on this topic, and in accordance with our enabling statutes, CRS takes no position on any related legislation.

My testimony has three parts. First, I will reference the CFATS program's progress and challenges; second, I will identify several policy issues regarding authorization—

Chairman CARPER. Let me just say, were you here when I made my earlier admonition to our first panel about acronyms?

Mr. SHEA. I was.

Chairman CARPER. I thought didn't they do a great job? I would just ask that you follow their example.

Mr. SHEA. Third, I will briefly analyze H.R. 4007, the Chemical Facility Anti-Terrorism Standards Program Authorization and Accountability Act of 2014.

The 109th Congress authorized DHS to regulate chemical facilities for security purposes. Subsequent Congresses have extended this authority, which now expires on October 4, 2014. Advocacy groups, stakeholders, and policymakers have called for its reauthorization, though they disagree about the preferred approach.

Since 2007, the CFATS program has received more than 46,000 Top-Screen submissions from over 36,000 chemical facilities. DHS currently regulates approximately 4,100 facilities as high risk.

DHS has had challenges in implementing the CFATS regulations. These include a persistent backlog of high-risk facilities not assigned a final risk tier, an ongoing effort to develop and implement a personnel surety Risk-Based Performance Standard, and a failure to meet DHS expectations for inspecting regulated facilities and approving Site Security Plans.

That said, the pace of DHS authorization, inspection, and approval of Site Security Plans at regulated facilities has increased compared to the early days of the CFATS program.

Policymakers have considered chemical facility security in the 113th Congress. Some of the issues debated include: how to assess facility risk, whether to employ third parties as inspectors, and whether DHS should be allowed to mandate facilities use certain approaches or chemical process practices, also known as "inherently safer technologies."

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

A key underpinning of the CFATS program is its assessment of facility security risk. The DHS is currently determining how to best address recommendations for improving its risk assessment process.

Congressional policymakers may be interested in how changes in how DHS determines risk affect the regulated community and what plans DHS has to minimize financial impacts. The regulated community's investment in security measures will increase as program implementation continues.

Regarding third-party inspectors, DHS has implied that its existing statutory authority allows their use. Policy issues include whether third parties should perform CFATS inspections and, if so, who might be appropriate, and how to harmonize training and inspection standards.

If CFATS program performance challenges arise from insufficient inspection capacity, third-party inspectors might help. If the challenges arise from other factors, third-party inspectors might have little effect on performance.

The Obama Administration has stated its support for inherently safer technologies to enhance security at high-risk chemical facilities. Currently, DHS cannot require a regulated facility to adopt specific security approaches or chemical process changes, including inherently safer technologies. A fundamental challenge is how to compare a technology with its potential replacement.

Congressional policymakers might mandate the implementation or consideration of certain inherently safer technologies, or they might direct DHS to identify specific approaches. Alternatively, policymakers might establish an incentive-based structure to encourage regulated entities to adopt inherently safer technologies.

To some extent, the CFATS regulation provides such an incentive since DHS might assign such facilities to lower-risk tiers.

I will now summarize how H.R. 4007 compares with the existing statute. The bill incorporates much of the existing statute, but it also has key differences. Some examples are: The current statutory authority will terminate on October 4, 2014; the authority granted under H.R. 4007 would be permanent.

The current statute does not specify how DHS should consider security risk. The bill directs DHS to use specific criteria when assessing chemical facility risk.

The bill would expressly allow the Secretary to use third-party inspectors in the inspection process, and the bill would provide certain limitations on the Secretary with respect to issuing a personnel surety standard. These limitations would conflict with the current DHS personnel surety approach.

Thank you for the opportunity to appear before the Committee, and I would be happy to answer any questions you might have.

Senator COBURN. [Presiding.] Mr. Shea, thank you. Sorry for the back and forth. The votes will continue while we will do this. Ms. Fendley.

**TESTIMONY OF ANNA FENDLEY,<sup>1</sup> MPH, LEGISLATIVE  
REPRESENTATIVE, UNITED STEELWORKERS**

Ms. FENDLEY. Good morning. Thank you for the opportunity to testify today. I am here on behalf of the United Steelworkers (USW) International Union. Our 850,000 members include the majority of unionized workers in the chemical industry and hundreds of thousands of men and women whose workplaces use and store large quantities of industrial chemicals.

Our members are well aware of the hazards and the potential for widespread damage to critical infrastructure and the communities where they work and live. Small accidental releases occur more often than the public realizes, and it is only a matter of time before the next large explosion or release.

Events in West, Texas, and at the Chevron refinery in Richmond, California, have brought acute national attention to the danger of chemical facilities and the need to prevent catastrophic events caused either by accident or by the intentional actions of terrorists.

The CFATS program was an interim measure when the 109th Congress gave DHS statutory authority to regulate chemical facilities for security purposes. Since that time subsequent Congresses have continued to extend the authority to DHS for the program without addressing recognized problems with its implementation and scope.

A legislative path forward needs to address the inherent weaknesses of CFATS, five of which I will cite in detail today.

First, CFATS coverage does not extend to chemicals shipped or stored outside of a facility's fence line in nearby rail yards or elsewhere that may have little or no security measures. Currently CFATS does not prevent and DHS does not systematically document whether chemicals and the risks associated with them are merely shifted from one location to another.

Second, DHS is prohibited from requiring a CFATS-covered facility to use any particular security measure, including a fence in a particular area, a specific control on a unit, or any other measure that is well documented through past practice in the industry.

Third, CFATS should develop and promote the most effective means of preventing a chemical incident, which is reducing the potential consequences by using safer chemical processes. DHS, the Environmental Protection Agency, and the U.S. Chemical Safety Board (CSB) have cited the effectiveness of assessing and, where feasible, implementing safer processes at high-risk facilities.

According to a report from DHS, since the inception of the CFATS program nearly 1,900 facilities have removed or reduced their chemicals of interest. But many companies will never even look into innovating with safer processes without a legal requirement to do so.

Fourth, many have expressed concerns today about duplication of efforts and the burden for multiple background checks under the Personnel Surety Program. The Transportation Worker Identification Credential is an option to use under CFATS. Many of our members have successfully obtained a TWIC card, but it is not without some concerns.

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<sup>1</sup>The prepared statement of Ms. Fendley appears in the Appendix on page 87.

Another concern about personnel surety is that CFATS does not prevent the collection of unnecessary personal employee data by employers or third parties. There is not an adequate appeals process for workers who are wrongly discriminated against during the personnel surety process. In a February 3 Federal Register notice, DHS stated that employment decisions based on background checks are outside of the scope of CFATS and that DHS expects employers to comply with applicable Federal, State, and local law regarding employment and privacy.

Workers are seeing DHS apathy about their jobs play out in facilities across the country. In fact, one of our local unions recently received a letter from their employer that said, "Although [our company] and its representatives are not required to notify its employees or union leadership of this requirement prior to conducting background investigations, we believe it is a prudent and a good business practice to do so."

Not all employers will do the right thing by telling their employers about new security measures without a requirement. On the whole this is inadequate. Workers need to be informed about security measures, including background checks being performed on them, and workers need an appeals process should they be unjustly disqualified from their job due to an employer-conducted background check.

This brings me to my fifth point. CFATS lacks the requirement for a meaningful role for workers in chemical security. It is our observation that DHS stakeholder engagement with industry is frequent and productive. However, DHS does not adequately engage workers and their representatives either at the Federal level or within a facility. Workers at facilities would be hurt first and worst in an attack. CFATS should require meaningful involvement of plant employees in developing security plans and provide whistleblower protections for those who engage in the process. At a very minimum this could help DHS identify facilities that are covered by CFATS but are not complying with its requirements.

In closing, any legislation authorizing the program must be responsive to the identified shortcomings and challenges of CFATS.

Thank you again for the opportunity to testify today.

Senator COBURN. Mr. Scott.

**TESTIMONY OF TIMOTHY J. SCOTT,<sup>1</sup> CHIEF SECURITY OFFICER, THE DOW CHEMICAL COMPANY, ON BEHALF OF DOW AND THE AMERICAN CHEMISTRY COUNCIL**

Mr. SCOTT. Chairman Carper, Ranking Member Coburn, and Members of the Committee, I am Tim Scott, chief security officer and corporation director for emergency services and security at Dow Chemical. I am here today representing Dow and the American Chemistry Council.

The security of our Nation's chemical industry has been in the media, legislative, and regulatory spotlight since 9/11. But industry's efforts to be a safe and secure partner in the communities where we operate and transport our products started well before then.

<sup>1</sup>The prepared statement of Mr. Scott appears in the Appendix on page 92.

When DHS was given the authority to regulate the chemical industry relative to security, the industry was an active and enthusiastic partner in the development of the Risk-Based Performance Standards. The Responsible Care Security Code matched these standards in many areas and is a mandatory requirement for the American Chemical Council (ACC) membership.

The launch of DHS, CFATS, and the Responsible Care Security Code is a successful example of what defines a partnership: everyone working toward a common goal, perhaps in a different manner, but with one focus.

During that time and still today, ACC is very proactive in supporting CFATS legislation in order to bring everyone to the table. The launch of DHS and CFATS was tenuous at first, but it is successful based on a partnership approach with open communication. Through the last few years, the implementation became difficult for many reasons. The communication and the partnership was strained. I am here today to say that we have turned the corner and we are once again on the right path. The partnership is working. Progress is being made, and the security of the chemical industry is stronger today than ever before.

There have been many positive developments over the last several months with the most significant being the progress toward multiyear authorization for CFATS. A multiyear authorization puts DHS and CFATS closer in line to the industry's capital planning process and allows for some certainty for industry to take action.

A multiyear authorization also brings stability to DHS in planning and implementing CFATS and also in staffing to be sure that the necessary expertise is in place and will remain in place to accomplish the mission.

Maintaining the original premise of Risk-Based Performance Standards and allowing individual sites the flexibility to determine the local solution that will meet the standards also spurs progress.

No two sites are the same, but all must meet the same goal. This flexibility allows each unique site to identify the solution that meets the performance standard in the best manner for that site, and improving security to meet the performance standard is the goal.

We are not done. Industry, DHS, and this Committee are not done. We are making progress, but we need to complete the mission. We need to fine-tune the personnel surety process so that it adds value to all concerned. We need to share critical information. We need to ensure that risk is being determined in a fair and consistent manner. And we need to leverage the plethora of industry security programs that are already in place today such as the ACC Responsible Care Program.

We have improved communications between DHS and the sites, but we need to do more. We need to give the regulators the resources needed to ensure compliance, to understand the regulations, understand how the industry works, understand the sites and their area of responsibility, and visit those sites on a regular basis. And industry needs to challenge our peers. We need to self-regulate and bring everyone included in what is considered the

chemical sector into the process. And we need to include the communities around our sites and along our transportation routes.

CFATS is making the chemical industry more secure. DHS is maturing and finding its balance and reaching its goals. Industry is doing its share, but we are not done. A multiyear reauthorization and a commitment to continue the partnership in a risk-based approach are essential.

Just as important, we need to bring all the players to the table to work toward our common goal. We are not there yet on either the public or the private sector sides. We are encouraged by the progress being made, but we need your help in maintaining this forward momentum.

Thank you.

Senator COBURN. Thank you.

Senator JOHNSON, I am going to let you go first since I am going to go late to the vote.

Senator JOHNSON. Thanks, Senator Coburn.

Mr. Scott, I really want to explore private sector cooperation in terms of achieving that goal, that shared focus that you were talking about. I would imagine Dow Chemical is ISO certified?

Mr. SCOTT. Yes, sir.

Senator JOHNSON. Do you believe within that framework you could utilize the surveillance audits of certification of ISO to work in coordination with what we are trying to do here with CFATS?

Mr. SCOTT. Yes, sir, it would be a very good fit, very close fit, and it would be a good foundation for the whole process, yes.

Senator JOHNSON. Can you just talk about, as a private sector company, the duplication of audits of certification, of, whether it is insurance, whether it is ISO, whether it is the multiple regulatory agencies you comply with and the cost of that duplication?

Mr. SCOTT. There is a significant amount of overlap, and on security, on CFATS alone, we, Dow Chemical, have spent about \$300 million on a global basis. Now, probably about half of that or two-thirds of that has been spent in the United States, but we implement everything on a global basis. So to our company at least, it has been significant.

Senator JOHNSON. How much would you have spent without CFATS? Just because you recognize within the private sector your insurance ratings, insurance expenses, how much do you think you would have spent without CFATS?

Mr. SCOTT. Well, it would probably be a little bit less, but we implement the Responsible Care Code, and it does very similar things. We tier our sites, and, again, we implement the Responsible Care Code on a global basis. So our higher-tier sites under Responsible Care already have a higher level of security in place.

CFATS brings some more specifics focused on things like the vehicle barricades at gates that need to be in place, so there would be some difference. But CFATS does add some cost, but Responsible Care implementation also adds some cost, and we have been moving to bear that.

Senator JOHNSON. Let me move on. You talked about the American Chemical Council. There are certain standards that you have to meet just to be a certified member of that, correct? Can you just speak to those a little bit?

Mr. SCOTT. The Responsible Care standards are very strict. You have to implement Responsible Care across the board at your sites in order to be a member of ACC. It is audited. You do a self-assessment audit on an annual basis. You have external auditors on a 3-year cycle. So we look at the whole picture of the Responsible Care Codes, which includes things in my area, obviously, are security, the Responsible Care Security Code, but we also have codes that are specific to transportation security, transportation emergency response, site emergency response, which includes—those include the Community Awareness and Emergency Response program, plus the Transportation Community Awareness and Emergency Response (TRANSCAER) program for transportation emergency. So it is an all-inclusive code.

Senator JOHNSON. What has happened to those standards since September 11, 2001?

Mr. SCOTT. We have added the Security Code, it was added after 9/11. The rest of those codes were in place well before 9/11. I think we have bulked up a lot of them. We have gone back and looked at the details and added some specifics around particularly transportation. There is a process safety piece to the Responsible Care Codes that we have now linked that with the Security Code, so we can do vulnerability assessments from both a security perspective and a process safety perspective. So I think we have built on what we already had in place to make it stronger.

Senator JOHNSON. Dow Chemical is obviously one of the big guys. Are you concerned about your distribution system, your smaller customers, your smaller suppliers and their ability to—obviously, you have the financial wherewithal to spend money on this. Can you speak to the difficulty maybe smaller companies, smaller suppliers are having trying to comply with this? And do you have any solutions?

Mr. SCOTT. Solutions.

Senator JOHNSON. Just start background the problem.

Mr. SCOTT. I will start with the problem first. Yes, smaller companies find it very difficult to meet some of the standards in place just because of the size and the cost of the standards that are in place. But I think as we heard with DHS, they are doing a very good job of going out and working with people that—especially the smaller companies, to find a reasonable approach to upgrade the level of security. So I think there has been a lot of progress made working with that.

Many of the associations—ACC and the other industry associations—have been out working with their member companies to work through the whole process. I think that has been helpful.

There is a cost involved, and there are a lot of companies, small companies out there, that do not belong to a member company. Dow works through its supply chain network and its customer network. So we work on both ends, not just at our sites but on the transportation routes and our customers and our suppliers and those who carry our products. So we work very closely with all those companies to make sure they are meeting the standards.

Senator JOHNSON. Dr. Shea, Ms. Fendley talked a little bit about background checks. I would like you to address the problem that employers have when they are kind of caught between a rock and

a hard place trying to comply with a regulation, from one agency and then privacy concerns and employment law on the other. Can you speak to—how does business deal with those?

Mr. SHEA. I think there have been several concerns that have been raised in the context of personnel surety here. One is regarding information and its sharing from the Federal Government down to companies. The other one is related to the employees themselves knowing the results of any sort of background check that is performed. And then the third one, which was brought up earlier in this hearing, is about whether or not, if you have already undergone a background check under one program, should you also then undergo some sort of vetting to either validate the credential that you have or to be certified under another program.

The Department of Homeland Security has said that the information sharing that it would be doing would not be necessarily to a facility but potentially to local law enforcement. Similarly, the information that it would have about positive hits in its database may not be provided back to a person that is being vetted. The proper recourse from their perspective is either an intelligence-based one or a law enforcement-based one.

Of course, as probably Mr. Scott can refer to, the stakeholders believe that this information is information that is important to them, either for business decisions or potentially for liability. And so the personnel surety proposal that DHS has put forward, stakeholders have had a series of concerns and wish DHS to modify it in a variety of ways.

This proposal, as was pointed out by DHS, has gone through two comment periods, actually, and is now up in front of OMB for final determination.

Senator JOHNSON. But specifically I want you to address employers trying to comply with CFATS. Are they vulnerable? Are they going to be subject to lawsuits in terms of employment discrimination? What kind of vulnerability exists there? And how can you address that? How can we prevent that?

Mr. SHEA. I think that is a very challenging problem, and it probably falls into the area of legal counsel and determinations by general counsel. That would be out of the scope of what I would really be able to discuss.

Senator JOHNSON. Ms. Fendley, you raised the issue which raised the question in my mind. Can you speak to that a little bit?

Ms. FENDLEY. Sure. I think that the most important thing that we are looking for is some transparency. As the letter I referenced that one of our local unions received from its company said, they feel like they have no obligation to even tell their employees that they are going to be undergoing background checks due to their CFATS Site Security Plan. And any employment decision that would result in a worker getting fired, if that worker had a local union, certainly that would be challenged and questioned. But many workplaces do not have unions, and workers could potentially be fired and not understand why.

Senator JOHNSON. Well, even non-unionized workers have recourse through the courts, and that is the problem I am having with the regulations requiring that. Again, employers end up being just in an impossible situation. But I am over time. Thank you.

Senator COBURN. I will submit the majority of my questions to the record since we have about 4 minutes left on this vote, Ron, if you want to take off.

Transparency is key, I agree with you. But the fact is if somebody has to pass a CFATS personnel surety check and they cannot pass it, what is the legal basis—if there is transparency—for a suit against somebody for not allowing that person to have that employment, if they cannot meet the requirements that the government says?

Ms. FENDLEY. I agree with you, and I think that you make a very accurate point. I think what we are concerned about is decisions that are made due to inaccurate information, whether we hear all the time reports about people's credit checks or criminal histories being inaccurate. And what is the recourse for someone who gets an adverse employment decision based upon inaccurate information? I recognize, we all recognize the hard place that employers are in in this case, and we really want to work with DHS and with industry to get to a solution that works for everyone.

Senator COBURN. All right. Thank you. I will submit the rest of my questions for the record.

Chairman CARPER. [Presiding.] All right. Thanks, Dr. Coburn. Sorry to be gone for so long. The first vote, they stretched it out 27 minutes. It is supposed to be 15 or 20.

Anyway, I am back so I missed the questioning that took place. I think what I would like to ask is—one of the things I like to do at these hearings is we have a diverse panel here, and we need help in developing consensus. I said earlier that I very much would like to see us authorize the CFATS program, not permanently, probably not for 5 years, but certainly for more than zero, which is where we are right now.

Would you just talk with us about why it is important from your perspectives for the Congress to do something, not just anything but something constructive, and what might be most important in that something constructive for us on our to-do list as we approach authorization, reauthorization of this program? Do you want to go first, Dr. Shea?

Mr. SHEA. Certainly. So with regards to concerns about the program, as has been pointed out previously, the duration of, or actually if there would be, any reauthorization of the program has been brought up both by stakeholders and by the agency itself in terms of providing consistency and a sense that the program would be an enduring program.

The current proposal in the House would be a permanent authorization with a 3-year authorization of appropriations. The President has requested in his budget a 1-year extension of this authority. So, there is a range of potential durations for any potential extension that Congress might want to put into place.

The longer that that duration is, then the more constancy the program might have. On the other hand, the shorter that reauthorization period is, the greater the potential for Congress to come back and review how the program is going because of these deadlines.

The program has been extended essentially in 1-year increments through the appropriations process. That has, since the original

statute was put in place, caused Congress to come back and look at this basically in each Congress. I think one might be able to make a strong case that a medium-term or a short-term authorization would increase congressional oversight on the progress.

I think the other issue that has come to the fore is about the rate of implementation. Part of this is, I believe, a question of what is the intent of Congress regarding how quickly this program should be fully in place. During the time that the original statutory authority was provided, there was a sense that this needed to be in place rather quickly with the 6-month requirement for the interim final rule. As we heard earlier today, DHS is projecting at least multiple years before they will reach completion on the first round of these facilities. So direction from Congress about how long this process should take might assist them in their priorities.

Chairman CARPER. All right. Thank you.

Ms. Fendley, I notice you have a Ph.D., we have Mr. Scott, and he has nothing after his name; and for you we have a Master of Public Health "(MPH)." And I turned to my staff, and I said, "Is that 'miles per hour'?" They said, "No. It might be 'Master's in Public Health.'" I do not know. What is it?

Ms. FENDLEY. Yes, sir, that is what it is.

Chairman CARPER. All right. Fair enough.

Well, speaking of miles per hour, we are trying to move into the fast lane as we move toward some kind of authorization here. At least we get off the curb and move us down the road to help us with that.

Ms. FENDLEY. Wonderful. So I think from our perspective, the most important thing that Congress could do when looking at, authorizing the program is find a way to protect the workers at these sites. Ultimately this does affect conditions of work, and workers who report a security vulnerability do not have whistleblower protections. As I mentioned in my testimony, there are concerns within the Personnel Surety Program, and workers are not involved by DHS or their employers in the development of these plans, which we think harms security. We think workers really understand better than anyone else the vulnerabilities at a site and what can be done to prevent a catastrophic incident. So those would be our top-line items for your to-do list.

Chairman CARPER. All right. Thank you. Mr. Scott, are you here representing Dow?

Mr. SCOTT. Dow Chemical and the American Chemistry Council.

Chairman CARPER. And how long have you been with Dow?

Mr. SCOTT. Thirty-five years.

Chairman CARPER. Did you start right out of school?

Mr. SCOTT. No. I started right out of the Navy.

Chairman CARPER. Oh, really? What did you do in the Navy?

Mr. SCOTT. I was on the first crew of the USS Nimitz, which is now the old nuclear aircraft carrier.

Chairman CARPER. How about that. Good for you. I once took a bunch of Boy Scouts down to Norfolk Naval Station. My sons were both Scouts, and had about, 20 or 25 Scouts and some adults with them, and we visited the Theodore Roosevelt. This was about 6, 7, 8 years ago. And it was a Sunday morning, and the captain of the ship was there to greet us, took us up to the conning tower, and

we were talking with him. He was talking with us about our boys and about what the Roosevelt could do, and he said, "Boys, when our ship goes to sea, it is a thousand feet long." The boys went, "Oooh." He said, "When the Roosevelt goes to sea, we have 5,000 sailors on board." And the boys went, "Oooh." And he said, "And when the Roosevelt goes to sea, we have 75 aircraft on board." And the boys went, "Oooh."

Then he said, "And the USS Roosevelt"—which is a nuclear ship. "The USS Roosevelt stops to refuel every 25 years." And the adults went, "Oooh. Very impressive."

So talk to us, if you will, please?

Mr. SCOTT. The Roosevelt is a Nimitz class carrier, that is right. And I apologize. A lot of people put things after my name, but I do not put them out there to—

Chairman CARPER. Some put things before my name. [Laughter.]

Mr. SCOTT. There you go.

Chairman CARPER. It is probably better to have them after your name.

Mr. SCOTT. We talked a little bit about the extension and the length of the extension, and that is a critical point for industry and for DHS, just to provide some certainty. And I think it is certainty for industry so they know that the program is going to be in place. But it is also certainty for DHS. And 3 years is the minimum to really match up with the capital planning process for industry. If you tell me today I have to go do something, I will get the money next year and probably finish the project the year after that. So, 3 years is the minimum as far as working with industry and making it a little bit easier to do the planning process. So three is good, four is better.

But it is also certainty for DHS. They have had a lot of people moving in and out of DHS and change jobs, and I think part of the issue is that there is no certainty in DHS that DHS is going to be in existence, that CFATS is still going to go on. And that hurts the whole process when we have a lot of changeover in personnel.

So I think that is a key benefit for them—nothing to do with CFATS, the process itself, but just with maintaining personnel and qualified personnel and keep them in place long enough to get the job done.

The other thing that I would like to clarify just on the Personnel Surety Program, there are two pieces of this: The background checks is one piece, and that is the typical background check on the criminal history, anything that might keep you from being a good employee at the site. And there are processes in place for people to talk about that because things that happen when you are 18 years old and you are now 40 are different things. So I think that part of the process has been in place in most companies, as a matter of fact—for many years, and that process is working through.

The issue on this one, in my opinion, is the terrorist database screening, so you separate those two, and industry can and has always typically done background checks, some specific to industry, some specific to a site. But, in general, they cover the same things. But the new edition is a terrorist database screening, and only the government can do that.

So you have to submit the information to DHS or you use a process like the TWIC card that is already there. Everybody going out, especially small sites, going out and buying the equipment to implement the TWIC process is expensive and burdensome for some. We could do that at some of our smaller sites. We already do it at our MTSA sites. And that lets you see if this TWIC card still works. Then you know they have passed the terrorist database screening, and that is what we need to know for this sort of thing.

There are also other credentials out there that if you validate that they are still current, they have also gone through a terrorist database screening, and those ought to be approved. But then there are some people that do not have any of that, and the site would have to submit that information to get the clearance and the terrorist database screening, which is essential to good security.

The issue that I have is we never get a yes or a no from DHS. We do not give any—they do not issue a card. You just submit the information. Then you let the person go to work. And what I have asked for is, if somebody—just like the airlines, if there is somebody that is on the no-fly list, they cannot get on the airplane until they get the letter that says, “No, this is the wrong John Doe. This one is good to go.”

There needs to be that process in place so that we can be sure that everybody that is coming into our site does pass the terrorist database, and if there is somebody on the terrorist database list, there is a stop, a hold in place, until we get it cleared up. So that is the issue as far as the background, the personnel surety. It is the terrorist database screening and getting that information communicating between industry and DHS to get a hold versus just send in the information, let the person go to work, and we do not know if he is on it or not on it.

Chairman CARPER. All right. Of the audience—I do not normally ask questions of the audience, but I am going to ask a question. Anybody still here from DHS? Oh, good. I hope you took good notes on those comments, and that could be very helpful in terms of moving us along in a smart way. Thank you.

The other thing I wanted to ask of all of you is just sometimes I will say, when we are looking to build consensus on an issue, you had an earlier panel that spoke, and I thought that was constructive, the interaction there with them. But think back on some of the conversation and reflect anything you want to reflect on, on what was said or maybe not said, maybe in their statements or in answering our questions, just some things that we should be mindful of that you agreed with, maybe did not agree with. Please. Some things you would like to underline, put an exclamation point at the end? Please.

Ms. FENDLEY. Sure. So there are two things that came to mind when I was listening to the first panel. The first speaks to a point I have made multiple times, and that is when DHS talked about their stakeholder engagement, it was always stakeholder engagement with industry. And we would like to underline the point that workers, labor, is also a key stakeholder here, and we have not been engaged as much as we would like, we have not been able to do that with DHS, either at the Federal policy level or at the facility-by-facility level.

The second thing that I would underline is, due to the backlog, due to the slow approval of Site Security Plans, our members are just now seeing and reporting in a few cases where the sites are beginning to implement plans. So we are hopeful that the flexibility within the program can continue because we want to make sure that these plans actually work. I do not think we are—as someone said, we are not—I believe it was you, Chairman—at the end zone yet, we are not even in the red zone. These plans are just beginning to be implemented, and we are just seeing the effects on workers at these sites.

Chairman CARPER. All right. Thank you. I am probably not the first to have said that. I am the first one that said it here today, so I will take credit.

Others, just reflecting back on the first panel, what was said, maybe on what was unsaid.

Mr. SCOTT. I would say there are more positives now than negatives, which is a great sign. I think the fact that they are recognizing—DHS is recognizing Alternative Security Plans makes it easier on everybody, especially the smaller companies.

Chairman CARPER. I thought that was a good takeaway.

Mr. SCOTT. They are doing a great job there, and the various associations are helping the smaller companies by developing Alternative Security Plans that they can get out. So there is a good team effort there.

I think the inspectors that are coming onsite now, it is more of a partnership approach, coming up with the right solution for each particular plant instead of coming in with a cookie-cutter approach, and that is significant progress. And I think the number of inspectors that they have out in the field now is increasing. So I think that is—the good news is I think the positives are outweighing the negatives as far as the implementation. I mean, everybody is still not happy that we are not farther along, but we are making a lot faster progress than we were in the past.

Chairman CARPER. Good. My staff was good enough to give me some questions I might want to consider asking. You just answered one without my asking it, so very good.

Mr. Shea, anything you want to reflect back on the first panel?

Mr. SHEA. Certainly. The Department has talked about how it is currently undergoing a process to assess the recommendations for the way that it calculates risk. One of the things that has happened in the past when anomalies were discovered in the way that they calculated risk for facilities was that facilities changed risk tiers underneath the CFATS program. So, when DHS does implement whatever changes it makes to the way that it considers facility risk, regulated facilities might find themselves in a different risk tier. If you are moving from a lower to a higher tier, that might lead to your facility incurring more security costs; and, of course, if you are going from a higher-risk tier to a lower-risk tier, potentially lower security costs.

This, of course, would have an impact on the facility itself. How DHS rolls that process out and how it considers the costs of implementation may be something to look at.

Chairman CARPER. All right. Thank you.

One last question, if I can. I am going to ask this to Mr. Scott and to Dr. Shea. As I think we discussed earlier, DHS reports that roughly 3,000 chemical facilities around the country have tiered out of the program by removing or modifying or reducing the amount of chemicals of interest in their processes at their facilities. Do either of you have any more specific information about these facilities and how they did that or maybe you have some examples from Dow or some other place? But do you believe that we ought to be gathering some best practices from these facilities, maybe even ask GAO for a review and looking at those 3,000 a bit more closely to see what we can learn from them? Mr. Scott.

Mr. SCOTT. Well, a lot of the changes were in inventory, the amount of the chemical of interest that you have onsite or that you use in the process. So I think that is one of the bigger reasons that made people move down in the tiering process.

There are some that just by changing the percentage, the chemical makeup of a product, has taken it out of the process. So there are some things like that.

I think there are some sites that we have just moved out of. The site for whatever reason—I mean, typically there is a business reason. Then you add security to it, and we have moved away from that site totally now. I know that has happened. And then there are other places where we have moved the process from one area, for example, in the Houston Ship Channel, which is a high population area, and a plant is an old type of manufacturing process, open-air type of manufacturing process, and we have moved it to our Texas operations area, which is south of Texas, and put the process into our new design process, which we use on a global basis, which is a fully contained—the part of the process that is critical, that has a chemical of interest, is fully contained in a pressurized container. So the safety is much higher for that particular site. So it is a combination of all of the above that really makes it work.

Chairman CARPER. Good. That is helpful.

Mr. Shea, just briefly, and then we will wrap it up.

Mr. SHEA. I think to the extent that DHS has been following why these 3,000 facilities or how these 3,000 facilities have modified their holdings, I think that might be very enlightening. Whether or not they, for example, have not changed any of their processes and just, as has been pointed out, gone to a lower amount stored. This brings in this question of risk shifting that was addressed by the Committee earlier. The amount of risk that is contained in transporting chemicals more frequently, is that offsetting the risk that is reduced by having less at the facility?

But the other issue that I would raise here is that the chemical industry has regularly said that these sorts of chemical process assessments are done as part of their business model. Then when they look at their process, they try to determine whether or not there is a different way that would be safer for them and cost-competitive with what they are doing. To the extent that that information is core to their business model, the sharing of that information may provide competitive advantage to their competitors who have not undergone as effective or efficient a process.

Chairman CARPER. OK. Well, our third and last vote for the morning is underway—actually, the morning is over—and so I am going to slip off and do my constitutional duty to vote.

I had come here today hoping that we would hear from the first panel and the second panel and from my colleagues just a good exchange of ideas and information that would enable us to actually make some progress on cobbling together an authorization bill, a multiyear authorization bill that we could get strong support for here that Dr. Coburn and I might be able to support together. And this has been helpful. I thank you as well.

We are fortunate in our State that we have—Dow is one of our corporate citizens. They acquired Rohm and Haas several years ago. Rohm and Haas had acquired a company called Rodel, a great company. And so we are blessed with Dow in our State and grateful not only for the employment opportunities they provide but really for the good that they do in our State. And I know that is true in other places around the country, so a special thanks to your compadres at Dow.

I am going to ask our staffs, both Senator Coburn's staff, a key staff person on this issue, and several people on ours, just to stay together for a few minutes back in the anteroom and just reflect on what we have heard and talk about how we might build on this conversation going forward.

The hearing record will remain open for 15 days—that is, until May 29, 5 p.m.—for the submission of statements and for questions for the record. And if you would hand me that gavel over there—would you just do a favor for me, just like bang it? With that, our hearing is adjourned. Thanks so much.

[Whereupon, at 12:14 p.m., the Committee was adjourned.]

## A P P E N D I X

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**Opening Statement of Chairman Thomas R. Carper  
Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program  
May 14, 2014**

*As prepared for delivery:*

This morning we will be discussing the Chemical Facility Anti-Terrorism Standards program, also known as C-FATS. This program was established to secure our nation's high risk chemical facilities from attack, sabotage, and theft.

These facilities, and the chemicals they hold, could pose significant risks to our communities if they were exploited by those who seek to do us harm.

Because of the vital importance of chemicals to our economy, they can be found in nearly every community in the United States.

Congress has decided – correctly in my view – that we cannot leave the security of these facilities to chance or the good intentions of only the most responsible companies.

Since 2007, DHS has worked to identify which chemical facilities pose the greatest risk, and push those who manufacture, store, and use them to put adequate security measures in place.

This was not a simple assignment. Perhaps not surprisingly, the implementation has been challenging.

There have been significant missteps to date – including analytical mistakes and some management failings.

In fact, an internal DHS memo leaked to the news media in December 2011 detailed a number of bad practices, such as the purchase of equipment and vehicles the program didn't need.

The program was also slow to start approving facility site security plans. The approval of these plans is a crucial first step before DHS can begin inspecting facilities to ensure they comply with security regulations. This is where the rubber meets the road for this program so any unnecessary delay is troubling.

But the good news is that that's not the end of the story.

That leaked internal memo was the result of leadership within DHS recognizing problems, and being determined to get this vitally important program on track. And since that review, increased scrutiny from Congress, coupled with high level attention from DHS leadership, has helped to turn things around.

Over the past year, DHS has authorized and approved hundreds of security plans.

To date, more than 3,000 facilities have eliminated, reduced, or modified their holdings of dangerous chemicals, making them more secure from attack, and making the communities that surround them safer too.

DHS has made these strides, I'm told, through a productive partnership with the chemical industry.

Key industry partners support reauthorizing the program and have worked with DHS to devise solutions to some of the implementation problems that have emerged.

While there's good news here, there's still a lot of work to be done.

Despite the Department's accelerated pace for reviewing security plans and facilities, there remains a backlog of facilities awaiting inspection.

GAO and other experts have also expressed concern that the Department's method for assessing risk for a chemical facility is incomplete. Specifically, more and better information must be used in conducting these assessments.

And the explosion at the West Texas Fertilizer Company plant a year ago showed that, in some cases, the Department likely isn't aware of some facilities that should be submitting information to the program but are not.

As some of you may have heard me say before, "If it's not perfect, make it better." So I believe our goal today is to figure out what we, Congress, can do to make the Department of Homeland Security's chemical security efforts better.

I think we should also recognize that Congress' failure to provide a long-term authorization has not provided the Department with the stability it needs to make the program as good as it could be.

In fact, because the program's authorization only occurred as part of an annual appropriations bill, it ceased to exist for a short time during the government shutdown last fall.

That created confusion and uncertainty not only for the Department, but also for an industry that has invested millions of dollars in security and compliance.

A few weeks ago the House Homeland Security Committee took action to mark up a bill to authorize the C-FATS program for the next three years.

I understand that legislation was supported not only by the Department and by industry, but was approved by a bipartisan voice vote after a great deal of work from both Republicans and Democrats.

I think a bill that can bring those various stakeholders together is one that this committee should examine closely, take seriously, and perhaps use as a model for our work on this issue between now and the end of the year.

I look forward to hearing from our witnesses today about their thoughts on the House bill and what we here in the Senate should be thinking about as we work to make this program more effective, and our communities safer.

**Opening Statement of Sen. Tom Coburn  
“Charting a Path Forward for the Chemical Facilities  
Anti-Terrorism Standards Program”  
Wednesday, May 14, 2014**

Good morning and welcome. I want to start by telling you how enthused I am with the leadership at DHS and the changes that are occurring, particularly with the Secretary. I also congratulate Under Secretary Suzanne Spaulding and Director David Wulf in terms of the improvements that are being made with the Chemical Facility Anti-Terrorism Standards (CFATS) program, and I mean that very sincerely.

But the CFATS program is one of the programs that deserve a robust review from DHS and this Committee. Since 2007 we have spent nearly \$600 million on the program, and less than 2 percent of the facilities have had a compliance inspection. And in my review of the program, I have learned some problems with the program.

One is that CFATS is not significantly reducing the risk that terrorists will use chemicals to conduct attacks against the United States.

The second thing is that the approach to assessing risk in chemical facilities which guides the CFATS program is broken.

Third, DHS is far behind in meeting its deadlines in this program, reviewing security plans and inspecting facilities, which is not to say Mr. Wulf has not made a lot of progress; he has, and I commend him for the progress he has made with CFATS.

My fourth criticism is there is not enough work with the private sector or security experts to fix the problems in the program.

My fifth criticism is that too much time and effort is spent on administrative aspects of the program that do not improve chemical security. The requirements for other chemical regulations like the Coast Guard’s Maritime Transportation Security Act Program, the Environmental Protection Agency’s Risk Management Program, and the Transportation Security Administration’s Pipeline Security Branch, do not come close to the requirements for CFATS.

It cannot be that complicated. As a matter of fact, in talking to industry I know it is not that complicated. We need to fix CFATS before we make it permanent, and that is what I intend to do. We have got to look at this program and fix it.

I look forward to your testimony, and I thank you for being here.

Testimony

The Honorable Suzanne E. Spaulding  
Under Secretary  
National Protection and Programs Directorate  
Department of Homeland Security

Director David Wulf  
National Protection and Programs Directorate  
Department of Homeland Security

Before the

Committee on Homeland Security and Governmental Affairs  
United States Senate

May 14, 2014

Thank you, Chairman Carper, Ranking Member Coburn, and distinguished Members of the Committee. I appreciate the opportunity to appear before you today to discuss the Department of Homeland Security's (DHS) regulation of high-risk chemical facilities under the Chemical Facility Anti-Terrorism Standards (CFATS) and the importance of authorizing the program. Over the past two years, the CFATS program has made significant progress, advancing programmatically while simultaneously addressing internal management concerns. We are pleased to appear before you today to discuss authorizing the program and ensuring that DHS has the authority to carry out the program in a manner that will foster the security of America's highest-risk chemical infrastructure.

As you are aware, the Department's current authority under Section 550 of the Fiscal Year 2007 Department of Homeland Security Appropriations Act, as amended, is set to expire in October 2014. DHS is eager to work with the Committee and our stakeholders both in government and the private sector to achieve passage of legislation that provides long-term authorization and appropriately matures the CFATS program. In support of this collaboration, our testimony focuses on the progress made over the last two years, our efforts to continue strengthening the program, and the need for permanent authorization in order to fully stabilize the program.

**CFATS Has Made the Nation More Secure**

The CFATS program is an important part of our Nation's counterterrorism efforts as we work with our industry stakeholders to keep dangerous chemicals out of the hands of those who wish to do us harm. Since the CFATS program was created, we have engaged with industry to identify and regulate high-risk chemical facilities to ensure they have security measures in place to reduce the risks associated with the possession of chemicals of interest. Interagency partners have benefited from this information as it has enhanced law enforcement cooperation with high-

risk chemical facilities. CFATS has also played a significant role in reducing the number of high-risk chemical facilities that are susceptible to attack or exploitation. To date, more than 3,000 facilities have eliminated, reduced or modified their holdings of chemicals of interest. The significant reduction in the number of chemical facilities that represent the highest risk is an important success of the CFATS program and is attributable both to the design of the program as enacted by Congress and to the work of CFATS personnel and industry at thousands of chemical facilities.

The progress made in the CFATS program over the last two years has helped to put the program on a path to success; however, there is still work to be done. The Department continues to engage with stakeholders and focus on three core areas: reducing the backlog of site security plan approvals, improving the risk assessment process, and ensuring that all potentially high-risk facilities are identified and are meeting their existing regulatory obligations as required by the CFATS regulations.<sup>1</sup> Along with long-term authorization, our continued focus on these areas will ensure our stakeholders have the stability they need to comply with their regulatory obligations. We welcome the opportunity to work with you and our stakeholders on these important issues to further improve this vital national security program.

### **CFATS Implementation Progress**

The cornerstone of the CFATS program is the development, submission, and implementation of Site Security Plans (SSPs), or Alternative Security Programs (ASPs) in lieu of SSPs, which document the security measures that high-risk chemical facilities utilize to satisfy the applicable Risk-Based Performance Standards (RBPS) under CFATS. It is important to note that these plans are not “one-size-fits-all,” but are in-depth, highly customized, and account for each facility’s unique circumstances.

In order to determine whether a facility is regulated under CFATS, the facility submits a Top-Screen to the Department’s National Protection and Programs Directorate (NPPD) Infrastructure Security Compliance Division (ISCD) within the Office of Infrastructure Protection. Since we began collecting this information in 2007, ISCD has data from more than 46,000 Top-Screens submitted by chemical facilities, providing important information about their chemical holdings. Based on the information received in the Top-Screens, ISCD makes an initial determination that certain facilities are considered high-risk and assigns each of these to a preliminary tier<sup>2</sup>. These facilities then compile and submit Security Vulnerability Assessments (SVAs), which are used by ISCD to identify which facilities present a terrorism risk that is sufficiently high to warrant the assignment of a final high-risk tier under CFATS. As of April 21, 2014, CFATS covers over 4,100 high-risk facilities nationwide; of these, over 3,250 have received final high-risk

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<sup>1</sup> A copy of the CFATS regulations can be found at <http://www.regulations.gov/#!documentDetail;D=DHS-2006-0073-0115>.

<sup>2</sup> The Department has developed a risk-based tiering structure and assigns facilities to one of four risk-based tiers ranging from high (Tier 1) to low (Tier 4) risk. Assignment of preliminary and final tiers is based primarily on an assessment of the potential consequences of a successful attack on assets associated with chemicals of interest.

determinations and are required to develop SSPs (or ASPs) for ISCD review. The remaining facilities are awaiting final tier determinations based on their SVA submissions. The tiered population is dynamic and subject to change, depending on the chemical holdings and other conditions at facilities.

<b>Tier*</b>	<b>Total # of Facilities</b>	<b>Received Final Tier</b>	<b>Authorized SSPs and ASPs</b>	<b>Authorization Inspection Conducted</b>	<b>Approved SSPs and ASPs</b>	<b>Compliance Inspections Conducted</b>
1	121	111	107	106	100	20
2	382	334	262	234	213	3
3	1088	933	590	464	317	0
4	2542	1914	365	130	26	0
<b>Total</b>	<b>4133</b>	<b>3292</b>	<b>1324</b>	<b>934</b>	<b>657</b>	<b>23</b>

\*As of April 21, 2014

\*\* Totals do not include facilities that are no longer regulated, but have received letters of authorization, authorization inspections, and/or approved SSPs/ASPs

Over the past year, the CFATS program has authorized, inspected, and approved hundreds of security plans. The program has also improved the pace of inspections and SSP approvals, developing new processes and distributing guidance materials. The majority of Tier 1 and Tier 2 facilities (the highest of the high risk), as well as a number of Tier 3 and Tier 4 facilities, now have an approved security plan. In September 2013, ISCD marked yet another milestone when we began conducting compliance inspections for facilities with approved SSPs. During compliance inspections, the Department verifies that the facility is implementing the measures contained in its approved SSP. The Department has developed a process whereby the timing for compliance inspections is based on a variety of factors, such as the facility's risk tier, the facility and/or parent company's past CFATS compliance history, date since last inspection, and the number of planned measures contained in the approved SSP.

The improvements that have been made have accelerated the pace of approvals and we are continuing to identify and explore options to enhance the program. We recognize the projected timeframe for all approvals must be reduced and we are exploring a variety of ways to increase the pace at which approvals are granted while maintaining the quality and thoroughness of the security plan approval process and the level of security required at chemical facilities. These include encouraging increased use of ASPs and supporting stakeholders' development of new ASP templates, focusing inspections on key RBPS at lower tier facilities, working with corporations to develop authorization inspection schedules that allow for multiple inspections by one inspection team per week, and inspecting measures at a corporate level for corporations that have similar measures implemented at multiple facilities. The Department continues to engage with CFATS stakeholders on efforts to expedite security plan reviews and is committed to identifying and implementing appropriate enhancements to streamline the CFATS process. ASPs are an important option for facilities that desire flexibility in their site security plan, and we appreciate the Subcommittee's effort to ensure this option remains available for the CFATS program moving forward.

### **CFATS Risk Assessment**

As a part of our commitment to continue moving the CFATS program forward, NPPD has conducted a thorough review of our risk assessment process. In support of this review, NPPD implemented a phased approach, which included documenting all processes and procedures relating to the risk assessment methodology; conducting an internal NPPD review of the risk assessment process; and initiating an external peer review of the risk assessment methodology.

All three of these phases are now complete, with the Department receiving the CFATS Tiering Methodology Peer Review Final Report from the expert peer review panel in October 2013. Although many of the peer review panel's recommendations pertain to areas the Department had previously identified for improvement, we felt it was essential to engage external stakeholders through an external peer review to ensure the fullest expertise was engaged in risk assessment improvements. As a result of continued stakeholder engagement, the Report provides valuable perspectives that will inform our efforts to enhance the CFATS risk-tiering methodology. We have analyzed the peer review recommendations and developed an implementation plan to enable us to address the recommendations in a timely and thoughtful manner. We also recognize that it is essential to continue to engage our stakeholders in implementing changes to the risk assessment process.

As recommended by the Peer Review Final Report, the Department intends to adopt appropriate changes to the tiering methodology in an integrated fashion, addressing as many issues concurrently as feasible. The implementation plan also addresses modifications to the tiering methodology stemming from efforts beyond the peer review, such as the economic and mission criticality studies being conducted on behalf of the Department by Sandia National Laboratories. Additionally, consistent with both recommendations within the Peer Review Final Report and our response to the Government Accountability Office's report on the CFATS tiering methodology, ISCD intends to have a third-party verify and validate the revised tiering methodology. As we move forward with implementing recommendations, we are committed to ensuring these improvements are balanced with our stakeholders need for continued stability in tiering.

### **Chemical Facility Safety and Security Improvement: A Shared Responsibility**

Since the inception of the CFATS program, the Department has worked to ensure that potentially regulated facilities are aware of their reporting obligation under the CFATS regulations and that they comply with these existing regulations. Following the explosion in West, Texas, in April 2013, DHS has taken a number of steps to reinvigorate this effort, including supporting the implementation of Executive Order (EO) 13650, Improving Chemical Facility Safety and Security. Under EO 13650, Federal agencies established a working group co-chaired by DHS, the Department of Labor, and the Environmental Protection Agency, with participation from the Department of Justice, Department of Transportation, and U.S. Department of Agriculture, to explore options for improving chemical facility safety and security to reduce the likelihood of incidents occurring in the future. The members of the Working Group have worked closely together over the past year to analyze and develop recommendations on improving information collection, more effectively sharing information between agencies, improving operational and federal coordination efforts, and improving the effectiveness of existing regulations and policies

governing chemicals and chemical facilities. These coordinated efforts will help ensure that the Federal government most effectively uses the collective resources available for managing chemical risk.

#### *Promoting Compliance*

The activities taking place in support of EO 13650 complement many of the individual efforts being undertaken within the Department, and other Federal departments and agencies, following the tragic events in West, Texas. Since the April 2013 explosion, DHS has engaged with numerous members of industry and all have agreed that we must work together to prevent future incidents. Industry has offered to share information about the CFATS regulatory requirements with other members of industry that may not currently be aware of CFATS and do their part to promote safety and security at chemical facilities. The Department appreciates this support and looks forward to working with industry and our government partners to carry out these activities. In pursuit of this shared responsibility, the Department has undertaken significant outreach efforts throughout the years, to inform potentially high-risk chemical facilities of their obligations under CFATS. These outreach efforts have been a major contributor to the submission of over 46,000 Top-Screens from potentially high-risk chemical facilities to date.

As the tragic incident in West, Texas, demonstrated, not all facilities with threshold quantities of CFATS chemicals of interest have met their obligation to submit Top-Screens. DHS is committed to pursuing all reasonable measures to identify potential high-risk chemical facilities that are not among those that have already complied with initial Top-Screen submission requirements, and we will continue to work to get those facilities into compliance. When appropriate, the Department can utilize available enforcement mechanisms to bring non-compliant facilities into compliance. Both increased outreach and, where appropriate, the use of compliance enforcement mechanisms are part of the Department's overall strategy to reduce the likelihood of potentially high-risk chemical facilities intentionally or unintentionally evading identification under the CFATS program.

#### *State and Local Partnerships*

The Department's strategy for identifying potentially non-compliant facilities also includes enhanced coordination with Federal, State, and local partners. One such activity has focused on reinvigorating efforts with the EPA and other Federal partners with regulatory authority over the chemical industry to compare lists of regulated facilities to identify facilities which may have complied with another regulatory program and are potentially regulated under CFATS but have yet to comply with CFATS. Initial results from these efforts have been promising, with the Department seeing a substantial increase in the monthly rate of new Top-Screen submissions since August 2013.

The Department is also undertaking similar efforts with States and localities. Since April 2013, ISCD has reached out to officials in all 50 States, including State Homeland Security Advisors (HSAs) and the Governors Homeland Security Advisory Council, about CFATS requirements. These efforts are in addition to continuing to provide State HSAs and their designees with access to information on CFATS-regulated facilities in their jurisdictions via CFATS Share, a Web-

based information-sharing portal that provides access to key information on CFATS facility information to certain Federal, State, and local agencies on an as needed basis.

#### *Outreach to Non-Compliant Facilities*

The Department is expanding outreach efforts to identify potentially non-compliant facilities and has developed an Outreach and Engagement Strategy and Implementation Plan to raise awareness of CFATS. DHS will continue to operate its CFATS Tip Line and will follow up on any information of potentially non-compliant facilities.

All of the aforementioned efforts are being undertaken in addition to the larger-scale efforts being coordinated under EO 13650. Of particular relevance is the effort being led by DHS under Section 5 of the EO, which addresses Enhanced Information Collection and Sharing. This section requires the development of recommendations on possible changes to improve and streamline information collection from regulated industries and recommendations to enhance data sharing between agencies, states, localities, and tribal entities to better identify facilities which may not have provided all required information or may be non-compliant with requirements.

We feel strongly that our private sector stakeholders are key to our efforts to enhance data sharing, increase cross-training, and identify areas for possible regulatory changes as well as identifying possible gaps in existing statutory authorities. Enhancing security and building resilience across the chemical sector is not something a single company, industry or even government can do by itself. This has to be a collaborative effort. It also has to be a comprehensive effort, because of the sheer complexity of affected facilities, the linkages to other sectors, and the potential cascading effects and consequences of a significant attack or disruption.

#### **Industry Engagement**

Industry engagement has always been an important aspect of CFATS, but will be more important than ever as we move forward with program improvements. Chemical Security Inspectors play an important role, serving as our boots on the ground and the face of CFATS in the field. Inspectors and interagency partners from the Federal Bureau of Investigation provide assistance and outreach directly to facilities and play an important role in helping facilities identify appropriate security measures. For example, one facility had numerous positive aspects to their security program, but failed to address any security measures for small containers, which could easily be concealed within a handbag or backpack. Through the inspection, the facility understood the potential vulnerability and developed planned measures to prohibit bags within the restricted area and to inspect hand-carried items when exiting the restricted area to ensure nothing sensitive is being removed. Another example is a different regulated facility that had effective security for the chemicals of interest located within the building, but failed to address the chemicals of interest located in the open storage yard. As a result of the inspection, the facility identified a new restricted area to store the chemicals of interest within the main building and added procedures to ensure that upon receipt, the appropriate facility personnel immediately moved the chemicals of interest into the new restricted area. In addition to conducting

inspections and providing compliance assistance to facilities, NPPD's chemical inspectors actively work with local stakeholders and governmental agencies across the country.

### **The Need for Program Authorization**

DHS recognizes the significant work that the Committee and others have undertaken to reauthorize the CFATS program. The progress we have made over the last two years demonstrates the Department's commitment to ensuring this program is a success.

However, the federal funding hiatus last October illustrates the complications in the current authorization structure. The funding hiatus directly impacted the CFATS program because the program is authorized through annual appropriations bills. The hiatus resulted in all ISCD staff being furloughed, which resulted in cancellation of numerous inspections and immobilized security plan approvals. In addition to the shutdown of programmatic activities, the authorization of the CFATS program expired on October 5, 2013. The gap in program authorization caused concern among regulated facilities, with many facilities questioning whether the regulations were still in effect. This confusion and uncertainty demonstrated the need for long-term authorization outside of the appropriations process. Moreover, it is unclear if the Department would have had the authority to act had there been an exigent need during the shutdown to take enforcement action under CFATS in furtherance of national security interests. Long-term authorization would address this as well.

The Department strongly believes that an authorization would be beneficial to your oversight activities by ensuring the full maturation of the program and the review and approval of all backlogged Site Security Plans. Perhaps most importantly, long term authorization will provide industry stakeholders with the stability needed to plan for and invest in CFATS-related security measures to harden their critical sites against terrorist attack or exploitation. Companies have regularly communicated to us that their capital-planning/budgeting processes for security improvements frequently run on a three-to-five-year cycle and they deserve to know that the program will not be allowed to lapse as they invest in major CFATS-related security improvements.

Uncertainty about the future of CFATS also has provided an incentive for potentially regulated facilities storing large quantities of dangerous chemicals to ignore their obligations under CFATS in hopes that the program will be allowed to sunset. An authorization period of five years or longer would enable Congress to send an important message to such facilities that may willfully be seeking to avoid compliance.

In addition, the committee's efforts to codify and enhance the Department's authority to seek out non-compliant facilities will greatly support our ongoing actions to bring such facilities into compliance. In the year following the explosion at the West Fertilizer plant in Texas, the Department has been committed to ensuring that facilities across the Nation are both aware of the requirements to report under CFATS and meet their obligations. The Department has worked closely with our interagency partners to implement EO 13650; equally important is providing specific statutory authority for engaging these non-compliant facilities. Finally, the Department believes Congress should take action to address the gap in the framework for regulating the security of chemicals at water and wastewater treatment facilities in the

United States, and believes the options provided in the recent Information Collection Request for facility compliance with RBPS-12, personnel surety, are the most appropriate for identifying personnel with terrorist ties that may have access to the high-risk chemicals at a facility.

### **Conclusion**

The Department has made significant improvements to the CFATS program and is moving forward strategically to address the challenges that remain. The Department has taken important steps to build a strong CFATS program and has a seasoned leadership team committed to the success of the program. With your support, we can ensure our Nation is more secure by continuing implementation of the CFATS program, and we are committed to working with you to pass legislation to authorize the program. With support from industry and action by Congress to authorize the program, the CFATS program's mission to protect Americans will be strengthened.

As we implement CFATS, we will continue to work with stakeholders to keep our Nation secure by preventing terrorists from exploiting chemicals or chemical facilities. We firmly believe that CFATS is making the Nation more secure by reducing the risks associated with our Nation's chemical infrastructure and we are—along with our stakeholders and partners—committed to its continued success.

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United States Government Accountability Office



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

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## CRITICAL INFRASTRUCTURE PROTECTION

### Observations on DHS Efforts to Implement and Manage its Chemical Security Program

Statement of Stephen L. Caldwell,  
Director, Homeland Security and Justice

## GAO Highlights

Highlights of GAO-14-608T, a testimony before the Committee on Homeland Security and Governmental Affairs, U.S. Senate

### Why GAO Did This Study

Facilities that produce, store, or use hazardous chemicals could be of interest to terrorists intent on using toxic chemicals to inflict mass casualties in the United States. As required by statute, DHS issued regulations establishing standards for the security of these facilities. DHS established the CFATS program to assess risk at facilities covered by the regulations and inspect them to ensure compliance.

This statement provides observations on DHS efforts related to the CFATS program. It is based on the results of previous GAO reports issued in July 2012 and April 2013 and a testimony issued in February 2014. In conducting the earlier work, GAO reviewed DHS reports and plans on the program and interviewed DHS officials.

### What GAO Recommends

In a July 2012 report, GAO recommended that DHS measure its performance implementing actions to improve its management of CFATS. In an April 2013 report, GAO recommended that DHS enhance its risk assessment approach to incorporate all elements of risk, conduct a peer review, and gather feedback on its outreach to facilities. DHS concurred and has taken actions or has actions underway to address them.

View GAO-14-608T. For more information, contact Stephen Caldwell at (202) 512-9610 or [caldwells@gao.gov](mailto:caldwells@gao.gov)

May 14 2014

## CRITICAL INFRASTRUCTURE PROTECTION

### Observations on DHS Efforts to Implement and Manage its Chemical Security Program

#### What GAO Found

In managing its Chemical Facility Anti-Terrorism Standards (CFATS) program, the Department of Homeland Security (DHS) has a number of efforts underway to identify facilities that are covered by the program, assess risk and prioritize facilities, review and approve facility security plans, and inspect facilities to ensure compliance with security regulations.

- Identifying facilities.** DHS has begun to work with other agencies to identify facilities that should have reported their chemical holdings to CFATS, but may not have done so. DHS initially identified about 40,000 facilities by publishing a CFATS rule requiring that facilities with certain types and quantities of chemicals report certain information to DHS. However, a chemical explosion in West, Texas last year demonstrated the risk posed by chemicals covered by CFATS. Subsequent to this incident, the President issued Executive Order 13650 which was intended to improve chemical facility safety and security in coordination with owners and operators. Under the executive order, a federal working group is sharing information to identify additional facilities that are to be regulated under CFATS, among other things.
- Assessing risk and prioritizing facilities.** DHS has begun to enhance its ability to assess risks and prioritize facilities. DHS assessed the risks of facilities that reported their chemical holdings in order to determine which ones would be required to participate in the program and subsequently develop site security plans. GAO's April 2013 report found weaknesses in multiple aspects of the risk assessment and prioritization approach and made recommendations to review and improve this process. In February 2014, DHS officials told us they had begun to take action to revise the process for assessing risk and prioritizing facilities.
- Reviewing security plans.** DHS has also begun to take action to speed up its reviews of facility security plans. Per the CFATS regulation, DHS is to review security plans and visit the facilities to make sure their security measures meet the risk-based performance standards. GAO's April 2013 report found a 7- to 9-year backlog for these reviews and visits, and DHS has begun to take action to expedite these activities. As a separate matter, one of the performance standards—personnel surety, under which facilities are to perform background checks and ensure appropriate credentials for personnel and visitors as appropriate—is being developed. Of the facility plans DHS had reviewed as of February 2014, it conditionally approved these plans pending final development of the personal surety performance standard. According to DHS officials, it is unclear when the standard will be finalized.
- Inspecting to verify compliance.** In February 2014, DHS reported it had begun to perform inspections at facilities to ensure compliance with their site security plans. According to DHS, these inspections are to occur about 1 year after facility site security plan approval. Given the backlog in plan approvals, this process has started recently and GAO has not yet reviewed this aspect of the program.

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Chairman Carper, Ranking Member Coburn, and Members of the Committee:

I am pleased to be here today to discuss our work on the Department of Homeland Security's (DHS) efforts in implementing and managing the Chemical Facility Anti-Terrorism Standards (CFATS) program. Facilities that produce, store, or use hazardous chemicals could be of interest to terrorists intent on using toxic chemicals to cause harm to surrounding populations during terrorist attacks, and these chemicals could be stolen and used as chemical weapons, such as improvised explosive devices, or as the ingredients for making chemical weapons. The danger posed by these chemicals became evident last year when ammonium nitrate—one of the chemicals covered by the CFATS program—detonated during a fire at a fertilizer storage and distribution facility in West, Texas. An investigation by the U.S. Chemical Safety Board (CSB) showed that the explosion killed at least 14 people and injured more than 200 others and severely damaged or destroyed nearly 200 homes, 3 nearby schools, a nursing home, and an apartment complex.<sup>1</sup> According to CSB, the fire at the facility detonated about 30 tons of ammonium nitrate. This event serves as a tragic reminder of the extent to which chemicals covered by the CFATS program can pose a risk to surrounding populations.

The DHS appropriations act for fiscal year 2007<sup>2</sup> required DHS to issue regulations to establish risk-based performance standards for securing high-risk chemical facilities.<sup>3</sup> In 2007, DHS established the CFATS program to assess the risk posed by chemical facilities, place facilities considered to be high-risk in one of four risk-based tiers, require high-risk

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<sup>1</sup>Rafael Moure-Eraso, Chairperson, U.S. Chemical Safety Board, testimony before the Senate Committee on Environment and Public Works, 113th Congress 1st Sess., June 27, 2013. The CSB is an independent federal agency charged with investigating industrial chemical accidents. The CSB board members are appointed by the President and confirmed by the Senate. According to the CSB website, CSB does not issue fines or citations, but makes recommendations to plants, regulatory agencies, industry organizations, and labor groups.

<sup>2</sup>Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388 (2006).

<sup>3</sup>The CFATS regulation establishes 18 risk-based performance standards that identify the areas for which a facility's security are to be examined, such as perimeter security, access control, and cyber security. 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 applicable standard.

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facilities to develop security plans, review these plans, and inspect the facilities to ensure compliance with regulatory requirements. DHS's National Protection and Programs Directorate (NPPD) is responsible for the CFATS program. Within NPPD, the Infrastructure Security Compliance Division (ISCD), a division of the Office of Infrastructure Protection (IP), manages the program.

On February 6, 2014 congressman Meehan and other members of the House of Representatives' Committee on Homeland Security, along with one member of the House of Representatives' Committee on Energy and Commerce, introduced H.R. 4007, the Chemical Facility Anti-Terrorism Standards Authorization and Accountability Act of 2014.<sup>4</sup> Among other things, H.R. 4007 contained provisions regarding multiple aspects of the CFATS program, including risk assessment, security plan reviews, and facility inspections. On April 30, 2014, the bill, as amended, was reported out by the House Committee on Homeland Security. Related to H.R. 4007, on February 27, 2014, we testified on DHS efforts to implement and manage the CFATS program at a legislative hearing before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, House Committee on Homeland Security.<sup>5</sup>

The purpose of this statement is to provide our observations on the status of DHS's efforts related to the implementation and management of the CFATS program. Specifically my testimony today summarizes our past work on the CFATS program and provides our observations on the status of DHS's efforts in four key areas—identifying facilities to be covered by CFATS, assessing risk and prioritizing covered facilities, reviewing facility security plans, and inspecting facilities to verify compliance with CFATS regulations. My statement is based on reports and a testimony we issued from July 2012 through February 2014 on various aspects of the CFATS

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<sup>4</sup>H.R. 4007, 113th Cong. (2014).

<sup>5</sup>GAO, *Critical Infrastructure Protection: Observations on DHS Efforts to Identify, Prioritize, Assess, and Inspect Chemical Facilities*, GAO-14-365T (Washington, D.C.: February 27, 2014).

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program.<sup>6</sup> To conduct our prior work, we reviewed applicable laws and regulations, as well as NPPD, IP, and ISCD policies and procedures for administering the CFATS program and conducting its mission. We interviewed senior ISCD officials along with NPPD and IP officials to obtain their views on the program and how ISCD assesses risk. We also reviewed ISCD documents and data on tiered facilities and the approach used to determine a facility's risk and assessed ISCD's process for reviewing security plans. Further details on the scope and methodology for the previously issued reports and testimony statement are available within each of the published products.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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### Observations on DHS Efforts to Identify Facilities, Assess Risk, Review Security Plans, and Verify Compliance

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#### Identifying Facilities Covered by CFATS

DHS has begun to take action to work with other agencies to identify facilities that are required to report their chemical holdings to DHS but may not have done so.

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<sup>6</sup>GAO-14-365T, *Critical Infrastructure Protection: DHS Needs to Improve Its Risk Assessments and Outreach for Chemical Facilities*, GAO-13-801T (Washington, D.C.: Aug. 1, 2013); *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); *Critical Infrastructure Protection: DHS Is Taking Action to Better Manage Its Chemical Security Program, but It Is Too Early to Assess Results*, GAO-12-515T (Washington, D.C.: July 26, 2012).

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The first step of the CFATS process is focused on identifying facilities that might be required to participate in the program. The CFATS rule was published in April 2007,<sup>7</sup> and appendix A to the rule, published in November 2007, listed 322 chemicals of interest and the screening threshold quantities for each.<sup>8</sup> As a result of the CFATS rule, about 40,000 chemical facilities reported their chemical holdings and their quantities to DHS's ISCD.

In August 2013, we testified about the ammonium nitrate explosion at the chemical facility in West, Texas, in the context of our past CFATS work. Among other things, the hearing focused on whether the West, Texas, facility should have reported its holdings to ISCD given the amount of ammonium nitrate at the facility. During this hearing, the Director of the CFATS program remarked that throughout the existence of CFATS, DHS had undertaken and continued to support outreach and industry engagement to ensure that facilities comply with their reporting requirements. However, the Director stated that the CFATS regulated community is large and always changing and DHS relies on facilities to meet their reporting obligations under CFATS. At the same hearing, a representative of the American Chemistry Council testified that the West, Texas, facility could be considered an "outlier" chemical facility, that is, a facility that stores or distributes chemical-related products, but is not part of the established chemical industry. Preliminary findings of the CSB investigation of the West, Texas, incident showed that although certain federal agencies that regulate chemical facilities may have interacted with the facility, the ammonium nitrate at the West, Texas, facility was not covered by these programs. For example, according to the findings, the Environmental Protection Agency's (EPA) Risk Management Program, which deals with the accidental release of hazardous substances, covers the accidental release of ammonia, but not ammonium nitrate.<sup>9</sup> As a result, the facility's consequence analysis considered only the possibility of an ammonia leak and not an explosion of ammonium nitrate.

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<sup>7</sup>72 Fed. Reg. 17,688 (Apr. 9, 2007) (codified at 6 C.F.R. pt. 27).

<sup>8</sup>72 Fed. Reg. 65,396 (Nov. 20, 2007). According to DHS, CFATS covers facilities that manufacture chemicals as well as facilities that store or use certain chemicals as part of their daily operations. This can include food-manufacturing facilities that use chemicals of interest in the manufacturing process, universities that use chemicals to do experiments, or warehouses that store ammonium nitrate, among others.

<sup>9</sup>See 40 C.F.R. § 68.130.

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On August 1, 2013, the same day as the hearing, the President issued Executive Order 13650—*Improving Chemical Facility Safety and Security*, which was intended to improve chemical facility safety and security in coordination with owners and operators.<sup>10</sup> The executive order 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. In February 2014, DHS officials told us that the working group has taken actions in the areas described in the executive order. For example, according to DHS officials, the working group has held listening sessions and webinars to increase stakeholder input, explored ways to share CFATS data with state and local partners to increase coordination, and launched a pilot program in New York and New Jersey aimed at increasing federal coordination and information sharing. DHS officials also said that the working group is exploring ways to better share information so that federal and state agencies can identify non-compliant chemical facilities and identify options to improve chemical facility risk management. This would include considering options to improve the safe and secure storage, handling, and sale of ammonium nitrate.

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#### Assessing Risk and Prioritizing Facilities

DHS has also begun to take actions to enhance its ability to assess risk and prioritize facilities covered by the program.

For the second step of the CFATS process, facilities that possess any of the 322 chemicals of interest at levels at or above the screening threshold quantity must first submit data to ISCD via an online tool called a Top-Screen.<sup>11</sup> ISCD uses the data submitted in facilities' Top Screens to make an assessment as to whether facilities are covered under the program. If DHS determines that they are covered by CFATS, facilities are to then submit data via another online tool, called a security vulnerability assessment, so that ISCD can further assess their risk and prioritize the

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<sup>10</sup>Exec. Order No. 13,650, 78 Fed. Reg. 48,029 (Aug. 1, 2013).

<sup>11</sup>6 C.F.R. § 27.200(b)(2).

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covered facilities.<sup>12</sup> ISCD uses a risk assessment approach to develop risk scores to assign chemical facilities to one of four final tiers. Facilities placed in one of these tiers (tier 1, 2, 3, or 4) are considered to be high risk, with tier 1 facilities considered to be the highest risk.<sup>13</sup> The risk score is intended to be derived from estimates of consequence (the adverse effects of a successful attack), threat (the likelihood of an attack), and vulnerability (the likelihood of a successful attack, given an attempt). ISCD's risk assessment approach is composed of three models, each based on a particular security issue: (1) release, (2) theft or diversion, and (3) sabotage, depending on the type of risk associated with the 322 chemicals. Once ISCD estimates a risk score based on these models, it assigns the facility to a final tier.

Our prior work showed that the CFATS program was using an incomplete risk assessment approach to assign chemical facilities to a final tier. Specifically, in April 2013, we reported that the approach ISCD used to assess risk and make decisions to place facilities in final tiers did not consider all of the elements of consequence, threat, and vulnerability associated with a terrorist attack involving certain chemicals. For example, the risk assessment approach was based primarily on consequences arising from human casualties, but did not consider economic criticality consequences, as called for by the 2009 National Infrastructure Protection Plan (NIPP)<sup>14</sup> and the CFATS regulation.<sup>15</sup> In April 2013, we reported that ISCD officials told us that, at the inception of the CFATS program, they did not have the capability to collect or process

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<sup>12</sup>6 C.F.R. §§ 27.215, .220.

<sup>13</sup>6 C.F.R. § 27.220

<sup>14</sup>DHS, *National Infrastructure Protection Plan* (Washington, D.C.: June 2006). The NIPP sets forth the risk management framework for the protection and resilience of the nation's critical infrastructure. DHS updated the NIPP in January 2009 to include resiliency. See DHS, *National Infrastructure Protection Plan, Partnering to Enhance Protection and Resiliency* (Washington, D.C.: January 2009). Broadly defined, risk management is a process that helps policymakers assess risk, strategically allocate finite resources, and take actions under conditions of uncertainty. DHS further updated the NIPP, which is now called the National Plan, in December 2013. See DHS, *NIPP 2013, Partnering for Critical Infrastructure Security and Resilience* (Washington, D.C.: December 2013).

<sup>15</sup>The CFATS regulation states that chemical facilities covered by the rule are those that present a high risk of significant adverse consequences for human life or health or critical economic assets, among other things, if subjected to terrorist attack, compromise, infiltration, or exploitation. 6 C.F.R. §§ 27.105, .205.

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all of the economic data needed to calculate the associated risks and they were not positioned to gather all of the data needed. They said that they collected basic economic data as part of the initial screening process; however, they would need to modify the current tool to collect more sufficient data. We also found that the risk assessment approach did not consider threat for approximately 90 percent of tiered facilities. Moreover, for the facilities that were tiered using threat considerations, ISCD was using 5-year-old data. We also found that ISCD's risk assessment approach was not consistent with the NIPP because it did not consider vulnerability when developing risk scores. When assessing facility risk, ISCD's risk assessment approach treated every facility as equally vulnerable to a terrorist attack regardless of location and on-site security. As a result, in April 2013 we recommended that ISCD enhance its risk assessment approach to incorporate all elements of risk and conduct a peer review after doing so.

ISCD agreed with our recommendations, and in February 2014, ISCD officials told us that they were taking steps to address them and recommendations of a recently released Homeland Security Studies and Analysis Institute (HSSAI) report that examined the CFATS risk assessment model.<sup>16</sup> As with the findings in our report, HSSAI found, among other things, that the CFATS risk assessment model inconsistently considers risks across different scenarios and that the model does not adequately treat facility vulnerability. Overall, HSSAI recommended that ISCD revise the current risk-tiering model and create a standing advisory committee—with membership drawn from government, expert communities, and stakeholder groups—to advise DHS on significant changes to the methodology.

In February 2014, senior ISCD officials told us that they have developed an implementation plan that outlines how they plan to modify the risk assessment approach to better include all elements of risk while incorporating our findings and recommendations and those of HSSAI. Moreover, these officials stated that they have completed significant work with Sandia National Laboratory with the goal of including economic

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<sup>16</sup>Homeland Security Studies and Analysis Institute, *CFATS Tiering Methodology Peer Review (For Official Use Only)* (Falls Church, Virginia: October 2013). The Homeland Security Studies and Analysis Institute, operated by Analytic Services Inc. on behalf of DHS, is a federally funded research and development center providing independent analyses of homeland security issues.

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consequences into their risk tiering approach. They said that the final results of this effort to include economic consequences will be available in the summer of 2014. With regard to threat and vulnerability, ISCD officials said that they have been working with multiple DHS components and agencies, including the Transportation Security Administration and the Coast Guard, to see how they consider threat and vulnerability in their risk assessment models. ISCD officials said that they anticipate that the changes to the risk tiering approach should be completed within the next 12 to 18 months. We plan to verify this information as part of our recommendation follow-up process.

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#### Reviewing of Facilities' Security Plans

DHS has begun to take action to lessen the time it takes to review site security plans which could help DHS reduce the backlog of plans awaiting review.

For the third step of the CFATS process, ISCD is to review facility security plans and their procedures for securing these facilities. 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.<sup>17</sup> The security plan is to describe security measures to be taken and how such measures are to address applicable risk-based performance standards.<sup>18</sup> After ISCD receives the site security plan, the plan is reviewed using teams of ISCD employees (i.e., physical, cyber, chemical, and policy specialists), contractors, and ISCD inspectors. If ISCD finds that the requirements are satisfied, ISCD issues a letter of authorization to the facility. After ISCD issues a letter of authorization to the facility, ISCD is to then inspect the facility to determine if the security measures implemented at the site comply with the facility's authorized plan. If ISCD determines that the site security plan is in compliance with the CFATS regulation, ISCD approves the site security plan, and issues a letter of approval to the facility, and the facility is to implement the approved site security plan.

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<sup>17</sup>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. 6 C.F.R. § 27.105.

<sup>18</sup>6 C.F.R. § 27.225.

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In April 2013, we reported that it could take another 7 to 9 years before ISCD would be able to complete reviews of the approximately 3,120 plans in its queue at that time. As a result, we estimated that the CFATS regulatory regime, including compliance inspections (discussed in the next section), would likely not be implemented for 8 to 10 years. We also noted in April 2013 that ISCD had revised its process for reviewing facilities' site security plans. ISCD officials stated that they viewed ISCD's revised process to be an improvement because, among other things, teams of experts reviewed parts of the plans simultaneously rather than sequentially, as had occurred in the past. In April 2013, ISCD officials said that they were exploring ways to expedite the process, such as streamlining inspection requirements.

In February 2014, ISCD officials told us that they are taking a number of actions intended to lessen the time it takes to complete reviews of remaining plans including the following:

- providing updated internal guidance to inspectors and ISCD reviewers;
- updating the internal case management system;
- providing updated external guidance to facilities to help them better prepare their site security plans;
- conducting inspections using one or two inspectors at a time over the course of 1 day, rather than multiple inspectors over the course of several days;
- conducting pre-inspection calls to the facility to help resolve technical issues beforehand;
- creating and leveraging the use of corporate inspection documents (i.e., documents for companies that have over seven regulated facilities in the CFATS program);<sup>19</sup>
- supporting the use of alternative security programs to help clear the backlog of security plans because, according to DHS officials, alternative security plans are easier for some facilities to prepare and use; and

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<sup>19</sup>According to ISCD officials, these documents would be designed to provide examples of standard operating procedures regarding employee vetting, chemical handling, or security practices that are standard across corporations and that could be placed in a facility's file and expedite the inspection process.

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- taking steps to streamline and revise some of the on-line data collection tools such as the site security plan to make the process faster.

It is too soon to tell whether DHS's actions will significantly reduce the amount of time needed to resolve the backlog of site security plans because these actions have not yet been fully implemented.

In April 2013, we also reported that DHS had not finalized the personnel surety aspect of the CFATS program. The CFATS rule includes a risk-based performance standard for personnel surety, which is intended to provide assurance that facility employees and other individuals with access to the facility are properly vetted and cleared for access to the facility.<sup>20</sup> In implementing this provision, we reported that DHS intended to (1) require facilities to perform background checks on and ensure appropriate credentials for facility personnel and, as appropriate, visitors with unescorted access to restricted areas or critical assets, and (2) check for terrorist ties by comparing certain employee information with the federal government's consolidated terrorist watch list. However, as of February 2014, DHS had not finalized its information collection request that defines how the personnel surety aspect of the performance standards will be implemented. Thus, DHS is currently approving facility security plans conditionally whereby plans are not to be finally approved until the personnel surety aspect of the program is finalized. According to ISCD officials, once the personnel surety performance standard is finalized, they plan to reexamine each conditionally approved plan. They would then make final approval as long as ISCD had assurance that the facility was in compliance with the personnel surety performance standard. As an interim step, in February 2014, DHS published a notice about its Information Collection Request (ICR) for personnel surety to gather information and comments prior to submitting the ICR to the Office of Management and Budget (OMB) for review and clearance.<sup>21</sup> According to ISCD officials, it is unclear when the personnel surety aspect of the CFATS program will be finalized.

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<sup>20</sup>6 C.F.R. § 27.230(a)(12).

<sup>21</sup>79 Fed. Reg. 6418 (Feb. 3, 2014). DHS previously published a notice about the personnel surety ICR on March 22, 2013. 78 Fed. Reg. 17,660 (March 22, 2013).

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During a March 2013 hearing on the CFATS program, industry officials discussed using DHS's Transportation Worker Identification Credential (TWIC) as one approach for implementing the personnel surety program. The TWIC, which is also discussed in DHS's ICR, is a biometric credential<sup>22</sup> issued by DHS for maritime workers who require unescorted access to secure areas of facilities and vessels regulated under the Maritime Transportation Security Act of 2002 (MTSA).<sup>23</sup> In discussing TWIC in the context of CFATS during the August 2013 hearing, officials representing some segments of the chemical industry stated that they believe that using TWIC would lessen the reporting burden and prevent facilities from having to submit additional personnel information to DHS while maintaining the integrity of the program. In May 2011, and May 2013, we reported that the TWIC program has some shortfalls—including challenges in development, testing, and implementation—that may limit its usefulness with regard to the CFATS program.<sup>24</sup> We recommended that DHS take steps to resolve these issues, including completing a security assessment that includes addressing internal controls weaknesses, among other things. The explanatory statement accompanying the Consolidated Appropriations Act, 2014, directed DHS to complete the recommended security assessment.<sup>25</sup> However, as of February 2014, DHS had not yet done the assessment, and although

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<sup>22</sup>A biometric access control system consists of technology that determines an individual's identity by detecting and matching unique physical or behavioral characteristics, such as fingerprint or voice patterns, as a means of verifying personal identity.

<sup>23</sup>See Pub. L. No. 107-295, 116 Stat. 2064. The TWIC program is intended to provide a tamper-resistant biometric credential to maritime workers who require unescorted access to secure areas of facilities and vessels regulated under the MTSA. TWIC is to enhance the ability of MTSA-regulated facility and vessel owners and operators to control access to their facilities and verify workers' identities. Under current statute and regulation, maritime workers requiring unescorted access to secure areas of MTSA-regulated facilities or vessels are required to obtain a TWIC, and facility and vessel operators are required by regulation to visually inspect each worker's TWIC before granting unescorted access. 46 U.S.C. § 70105(a); 33 C.F.R. §§ 101.514, 104.265(c), 105.255(c). Prior to being granted a TWIC, maritime workers are required to undergo a background check, known as a security threat assessment. See 49 C.F.R. § 1572.21.

<sup>24</sup>GAO, *Transportation Worker Identification Credential: Card Reader Pilot Results Are Unreliable, Security Benefits Need to Be Reassessed*, GAO-13-198 (Washington, D.C.: May 8, 2013); *Transportation Worker Identification Credential: Internal Control Weaknesses Need to Be Corrected to Help Achieve Security Objectives*, GAO-11-657 (Washington, D.C.: May 10, 2011).

<sup>25</sup>Explanatory statement accompanying the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014).

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DHS had taken some steps to conduct an internal control review, it had not corrected all the control deficiencies identified in our report.

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**Inspecting to Verify  
Compliance with  
Facility Plans**

DHS reports that it has begun to perform compliance inspections at regulated facilities. The fourth step in the CFATS process is compliance inspections by which ISCD determines if facilities are employing the measures described in their site security plans. During the August 1, 2013, hearing on the West, Texas, explosion, the Director of the CFATS program stated that ISCD planned to begin conducting compliance inspections in September 2013 for facilities with approved site security plans. The Director further noted that the inspections would generally be conducted approximately 1 year after plan approval. According to ISCD, as of February 24, 2014, ISCD had conducted 12 compliance inspections. ISCD officials stated that they have considered using third-party non-governmental inspectors to conduct inspections but thus far do not have any plans to do so.

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In closing, we anticipate providing oversight over the issues outlined above and look forward to helping this and other committees of Congress continue to oversee the CFATS program and DHS's progress in implementing this program. Currently, the explanatory statement accompanying the Consolidated and Further Continuing Appropriations Act, 2013, directs GAO to continue its ongoing effort to examine the extent to which DHS has made progress and encountered challenges in developing CFATS. Additionally, once the CFATS program begins performing and completing a sufficient number of compliance inspections, we are mandated review those inspections along with various aspects of them.<sup>26</sup>

Chairman Carper, Ranking Member Coburn, and members of the Committee, this completes my prepared statement. I would be happy to respond to any questions you may have at this time.

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<sup>26</sup>Explanatory statement accompanying the Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198 (2013).

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**GAO Contact and  
Staff  
Acknowledgments**

For information about this statement please contact Stephen L. Caldwell, at (202) 512-9610 or [caldwellS@gao.gov](mailto:caldwellS@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Other individuals making key contributions to this and our prior work included John F. Mortin, Assistant Director; Jose Cardenas, Analyst-in-Charge; Chuck Bausell; Michele Fejfar; Jeff Jensen; Tracey King; Marvin McGill; Jessica Orr; Hugh Paquette, and Ellen Wolfe.



**Congressional  
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**Testimony of Dana A. Shea, Ph.D.  
Specialist in Science and Technology Policy  
Resources, Science, and Industry Division  
Congressional Research Service**

**Before the Senate Committee on Homeland Security and Governmental Affairs  
May 14, 2014**

**“Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program”**

Thank you for the opportunity to testify before the committee today. My name is Dana Shea, and I am a Specialist in Science and Technology Policy at the Congressional Research Service. At the Committee’s request, I am here to discuss federal efforts to secure chemical facilities within the United States from terrorist attack. In addition to my remarks today, CRS has several reports on this topic,<sup>1</sup> and in accordance with our enabling statutes, CRS takes no position on any related legislation

My testimony today has three parts. First, I will provide a brief overview of the efforts by the Department of Homeland Security (DHS) to increase security at chemical facilities through the Chemical Facility Anti-Terrorism Standards (CFATS) regulatory program. In this context, I will discuss some of the program’s progress and challenges and how it has responded to audits and oversight reports issued by the Department’s Inspector General and the Government Accountability Office (GAO). Second, I will identify several policy issues that may be of interest to the Committee and Congress regarding authorization of the CFATS program. These issues will include efforts to improve risk assessment within the CFATS program; efforts to use third parties to inspect regulated facilities, and efforts to better leverage chemical process expertise and best practices to mitigate risk. Third, I will provide a brief analysis of H.R. 4007, the Chemical Facility Anti-Terrorism Standards Program Authorization and Accountability Act of 2014, as amended and ordered reported by the House Committee on Homeland Security.

### **Program Overview**

State and federal governments have long recognized the potential harm that a large, sudden release of hazardous chemicals poses to nearby people. In response, they have regulated safety practices at chemical facilities. Chemical facilities historically engaged in security activities—as distinct from safety—on a voluntary basis. After the 2001 terrorist attacks and the decision by several states to begin regulating

<sup>1</sup> See CRS Report R42918, *Chemical Facility Security: Issues and Options for the 113th Congress*, by Dana A. Shea; CRS Report R43346, *Implementation of Chemical Facility Anti-Terrorism Standards (CFATS): Issues for Congress*, by Dana A. Shea; and CRS Report R43070, *Regulation of Fertilizers: Ammonium Nitrate and Anhydrous Ammonia*, by Dana A. Shea, David M. Bearden, and Scott D. Szymendera.

security at chemical facilities, Congress addressed whether to establish federal security requirements to mitigate these risks.

### Statute and Regulation

In 2006, the 109<sup>th</sup> Congress passed legislation providing the Department of Homeland Security (DHS) with statutory authority to regulate chemical facilities for security purposes. This authority came through a provision in an appropriations bill.<sup>2</sup> The statute contains a “sunset provision” with an expiration date for the statutory authority. Subsequent Congresses have extended this authority, which currently expires on October 4, 2014.<sup>3</sup> Advocacy groups, stakeholders, and policy makers have called for Congress to reauthorize this authority, though they disagree about the preferred approach.

The 2006 statute required DHS to issue regulations within 6 months of enactment. On April 9, 2007, DHS issued an interim final rule regarding the chemical facility anti-terrorism standards (CFATS).<sup>4</sup> In promulgating the interim final rule, DHS interpreted the language of the statute to determine what DHS asserts was the intent of Congress. Consequently, much of the rule arises from the Secretary’s discretion and interpretation of legislative intent rather than from explicit statutory language.

Under the interim final rule, the Secretary of Homeland Security determines which chemical facilities must meet regulatory security requirements, based on the degree of risk posed by each facility. The DHS lists 322 “chemicals of interest” for the purpose of compliance with CFATS. The DHS considers each chemical in the context of three threats: release; theft or diversion; and sabotage and contamination. Chemical facilities with greater than specified quantities, called screening threshold quantities, of chemicals of interest must submit information to DHS to determine the facility’s risk status. As a consequence of this approach, the CFATS regulation applies to numerous facilities not traditionally considered to be part of the chemical manufacture or distribution sector. The statute exempts several types of facilities: facilities defined as a water system or wastewater treatment works; facilities owned or operated by the Department of Defense or Department of Energy; facilities regulated by the Nuclear Regulatory Commission (NRC); and facilities regulated under the Maritime Transportation Security Act of 2002 (P.L. 107-295).

Also under the interim final rule, DHS developed a tiered regulatory framework. Facilities that DHS deems high-risk are assigned to one of four tiers based on the magnitude of the facility’s risk. The DHS created graduated performance-based standards for facilities assigned to each risk-based tier. Facilities in higher risk tiers must meet more stringent standards.<sup>5</sup>

<sup>2</sup> Section 550, P.L. 109-295, Department of Homeland Security Appropriations Act, 2007.

<sup>3</sup> The original statutory authority expired on October 4, 2009, three years after enactment. Congress has incrementally extended this authority through many appropriation acts and continuing resolutions. The Consolidated Appropriations Act, 2014 (P.L. 113-76) extends the statutory authority through October 4, 2014.

<sup>4</sup> 72 *Federal Register* 17688-17745 (April 9, 2007). An interim final rule is a rule that meets the requirements for a final rule and that has the same force and effect as a final rule, but contains an invitation for further public comment on its provisions. After reviewing comments to the interim final rule, an agency may modify the interim final rule and issue a “final” final rule. The DHS first issued the proposed rule in December 2006 and solicited public comments. 71 *Federal Register* 78276-78332 (December 28, 2006). The DHS has not further modified the interim final rule.

<sup>5</sup> According to the White House Office of Management and Budget, a performance standard is a standard that states requirements in terms of required results with criteria for verifying compliance but without stating the methods for achieving required results. A performance standard may define the functional requirements for the item, operational requirements, and/or interface and interchangeability characteristics. A performance standard may be viewed in juxtaposition to a prescriptive standard which may specify design requirements, (continued...)

Regardless of their tier assignments, all high-risk facilities must perform a security vulnerability assessment, develop an effective site security plan, submit these documents to DHS, and implement their security plan. The site security plan must address the security vulnerability assessment by describing how activities in the plan correspond to securing facility vulnerabilities. The DHS must review and approve the submitted documents, audit and inspect the facilities, and determine regulatory compliance. The DHS may disapprove submitted security vulnerability assessments or site security plans that fail to meet DHS performance-based standards, but not because of the presence or absence of a specific security measure.

If, after inspecting a chemical facility, DHS finds that the facility has not complied with the regulatory requirements, the Secretary may issue an order to the facility to comply by a specified date. If the facility continues to be out of compliance, DHS may fine the facility and, eventually, order it to cease operation. The interim final rule establishes the process by which chemical facilities can appeal certain DHS decisions and rulings, but the statute prohibits third-party suits for enforcement purposes.

The statute requires certain protections for information developed by a facility in compliance with the statutory requirements. The DHS named this category of information "Chemical-terrorism Vulnerability Information" (CVI). The statute directs that judicial and administrative proceedings are to treat CVI the same as classified information.

### Implementation

Administratively, the Infrastructure Security Compliance Division (ISCD), part of the Office of Infrastructure Protection in the DHS National Protection and Programs Directorate (NPPD), implements CFATS. The ISCD has both a headquarters staff and an inspector cadre associated with regional offices. Since FY2007, Congress has appropriated a total of \$595 million for ISCD.<sup>6</sup> Annual appropriations for this program peaked in FY2010 at \$103 million. The President's FY2015 request is \$87 million.

The DHS has had challenges in implementing the CFATS regulations, although its performance has improved following a 2011 internal review of CFATS program process. As of May 2014, DHS has authorized 1,474 site security plans; conducted 1,008 authorization inspections; and approved 719 site security plans.<sup>7</sup> Over the last six months, DHS has been authorizing 104 and approving 53 site security plans monthly. That said, DHS is still in the process of addressing the initial round of submissions from regulated facilities.

Since 2007, DHS has received more than 46,000 submissions of information, known as Top-Screens, from over 36,000 chemical facilities. Of these facilities, DHS required more than 7,800 facilities to submit a security vulnerability assessment to determine whether they were high-risk. From the submitted

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such as materials to be used, how a requirement is to be achieved, or how an item is to be fabricated or constructed.

For example, a performance standard might require that a facility perimeter be secured. In contrast, a prescriptive standard might dictate the height and type of fence to be used to secure the perimeter. See Office of Management and Budget, The White House, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," *Circular A-119*, February 10, 1998.

<sup>6</sup> The ISCD also is responsible for regulating ammonium nitrate sale and transfer. Some of its appropriated funding is for this purpose.

<sup>7</sup> Department of Homeland Security, *Chemical Facility Anti-Terrorism Standards*, May 2014, [http://www.dhs.gov/sites/default/files/publications/CFATS%20Update%20FS\\_May2014\\_508\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/CFATS%20Update%20FS_May2014_508_0.pdf).

security vulnerability assessments, DHS currently identifies approximately 4,100 facilities as high-risk. DHS assigns a preliminary risk tier to the facility based on the submitted Top-Screen data. The DHS assigns a final risk tier only after reviewing the facility's security vulnerability assessment. Since mid-2010, between 14% and 22% of high-risk facilities at any given time lack a final tier assignment.

The DHS has issued 18 risk-based performance standards. One of these performance standards, regarding personnel surety, is not yet in force. The ISCD has not fully established the process by which CFATS-regulated facilities can meet this performance standard. The DHS issued a series of information collection requests from 2009 to 2011 that described implementation of the personnel surety performance standard,<sup>8</sup> but, in July 2012, DHS withdrew this proposal from Office of Management and Budget review. The ISCD has recently restarted its efforts to establish a process for meeting the personnel surety performance standard. In March 2013 and February 2014, DHS released notices of a new information collection request for compliance with the CFATS personnel surety program.<sup>9</sup> While DHS plans to eventually require implementation of the personnel surety program at facilities in each risk tier, it would limit the initial program to only Tier 1 and Tier 2 facilities.<sup>10</sup> This proposal is under review in the Office of Management and Budget.

The DHS has also experienced challenges in the inspection of facilities. For example, DHS did not meet its own expectations regarding when it would begin inspection of regulated facilities. In July 2007, soon after the issuance of the CFATS regulation, DHS testified that formal site inspections of a selected group of facilities would begin by the end of the calendar year.<sup>11</sup> In December 2007, DHS testified that facility inspection would begin in Fall 2008.<sup>12</sup> In 2009, DHS testified that inspections would begin in the first quarter of FY2010.<sup>13</sup> The first authorization inspection took place in July 2010.<sup>14</sup>

Similarly, DHS has not met its own expectations with regard to inspection and site security plan approval milestones. In 2010, DHS testified that it expected to inspect all Tier 1 facilities by the end of calendar year 2010.<sup>15</sup> In 2011, DHS testified that it expected to inspect all Tier 1 facilities by the end of calendar year 2011.<sup>16</sup> In 2013, DHS testified that it planned to have all Tier 1 facilities approved by October 2013.<sup>17</sup> In 2013, DHS also reported that it planned to have all Tier 1 and Tier 2 facilities approved by May

<sup>8</sup> See 74 *Federal Register* 27555-27557 (June 10, 2009); 75 *Federal Register* 18850-18857 (April 13, 2010); and 76 *Federal Register* 34720-24732 (June 14, 2011).

<sup>9</sup> 78 *Federal Register* 17680-17701 (March 22, 2013) and 79 *Federal Register* 6418-6452 (February 3, 2014).

<sup>10</sup> As of February 20, 2014, 512 of the 4,202 regulated facilities were in Tier 1 and Tier 2.

<sup>11</sup> Testimony of Robert B. Stephan, Assistant Secretary for Infrastructure Protection, National Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure, July 24, 2007.

<sup>12</sup> Testimony of Robert B. Stephan, Assistant Secretary for Infrastructure Protection, National Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Homeland Security, Subcommittee on Transportation Security and Infrastructure, December 13, 2007.

<sup>13</sup> Testimony of Philip Reiting, Deputy Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Homeland Security, June 16, 2009.

<sup>14</sup> House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, Evaluating Internal Operation and Implementation of the Chemical Facility Anti-Terrorism Standards [CFATS] Program by the Department of Homeland Security, Serial 112-111, February 3, 2012, p. 65

<sup>15</sup> Oral testimony of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs, March 3, 2010.

<sup>16</sup> Oral testimony of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Homeland Security, Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, February 11, 2011.

<sup>17</sup> Testimony of Rand Beers, Under Secretary, and David Wulf, Director, Infrastructure Security Compliance Division, National (continued...)

2014.<sup>18</sup> The DHS did not meet these milestones. It now estimates that, by the end of FY2014, it will have approved over 90% of all Tier 1 and Tier 2 facilities that have authorized site security plans (SSPs).<sup>19</sup>

At the current level of performance, it appears likely that DHS will require several years to authorize the remaining SSPs, and several years beyond that to inspect the facilities and approve the SSPs. That said, the pace of DHS authorization, inspection, and approval of site security plans at regulated facilities has dramatically increased compared to early phases of the CFATS program. While the CFATS program has been in place since 2007, significant reforms that began in 2012 have changed how DHS implements the program. Increased efficiencies on the part of the DHS or more effective compliance by regulated facilities could further improve program performance.

### Program Reviews

The CFATS program has undergone external reviews of its processes and progress. Both the DHS Office of the Inspector General (OIG) and the GAO released reports in 2013 addressing the CFATS program. Based on recommendations arising from these reviews, DHS has reviewed its internal procedures and attempted to address challenges identified.

#### *Office of the Inspector General Review*

In March 2013, the DHS OIG released a report on its review of the CFATS program through the end of FY2012.<sup>20</sup> The DHS OIG review addressed whether:

- management controls were in place and operational to ensure that CFATS is not mismanaged;
- NPPD and ISCD leadership misrepresented program progress; and
- nonconforming opinions of program personnel were suppressed or met with retaliation.

The DHS OIG report was critical of the prior performance of the CFATS program, stating:

Program progress has been slowed by inadequate tools, poorly executed processes, and insufficient feedback on facility submissions. In addition, program oversight had been limited, and confusing terminology and absence of appropriate metrics led to misunderstandings of program progress. The Infrastructure Security Compliance Division still struggles with a reliance on contractors and the inability to provide employees with appropriate training. Overall efforts to implement the program have resulted in systematic noncompliance with sound Federal Government internal controls and fiscal stewardship, and employees perceive that their opinions have been suppressed or met with retaliation. Although we were unable to substantiate any claims of retaliation or suppression of

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Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, March 14, 2013.

<sup>18</sup> Office of the Inspector General, Department of Homeland Security, *Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program*, OIG-13-55, March 2013, p. 22.

<sup>19</sup> Communication between Office of Legislative Affairs, Department of Homeland Security, and CRS, October 25, 2013.

<sup>20</sup> Office of the Inspector General, Department of Homeland Security, *Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program*, OIG-13-55, March 2013.

nonconforming opinions, the Infrastructure Security Compliance Division work environment and culture cultivates this perception. Despite the Infrastructure Security Compliance Division's challenges, the regulated community views the Chemical Facility Anti-Terrorism Standards Program as necessary in establishing a level playing field across a diverse industry.<sup>21</sup>

The DHS OIG issued 24 recommendations to assist ISCD to correct identified program deficiencies and attain intended program results and outcomes. The ISCD concurred fully or partially with 20 recommendations and did not concur with 4 recommendations. The DHS OIG recommendations included improving internal processes to achieve a more timely response to information submissions and requests from regulated entities; defining, developing, and implementing improved processes and procedures for inspections; refining and improving the existing CFATS tiering methodology and tiering process; and reducing reliance on contractors and improving managerial oversight within ISCD.

In response to these recommendations, ISCD provided the DHS OIG with a corrective action plan. As of February 2014, ISCD has addressed 12 of the DHS OIG recommendations. Nine recommendations were administrative and include selecting permanent ISCD leadership; reducing reliance on contract personnel; developing policy for appointing acting management; ensuring that all employees serving in an acting supervisory capacity have a supervisory position description; ensuring that all employees receive performance reviews; disseminating ISCD organizational and reporting structure to staff; reiterating to all employees the process for reporting misconduct allegations; implementing a plan to ensure the long-term authorization of the CFATS Program; and establishing internal controls for the accountability of appropriated funds. Three recommendations were programmatic and pertained to: revising the long-term review process to reduce the site security plan backlog; implementing a process to improve the timeliness of facility submission determinations; and program metrics that measure CFATS program value accurately and demonstrate the extent to which risk has been reduced at regulated facilities.<sup>22</sup>

The ISCD is still addressing 12 DHS OIG recommendations. Ten recommendations are programmatic and include improving CFATS Program tools and processes; engaging regulated industry and government partners; and finalizing program requirements. The two administrative recommendations include providing training and guidance; and eliminating inappropriate Administratively Uncontrollable Overtime pay.<sup>23</sup>

### *Government Accountability Office Review*

In April 2013, GAO issued a report on the CFATS program.<sup>24</sup> The GAO assessed how DHS assigned chemical facilities to tiers and the extent to which it did so, how DHS revised its process to review facility security plans, and whether DHS communicated and worked with owners and operators to improve security. The GAO found that the approach DHS used to assess risk and make decisions to place facilities

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<sup>21</sup> Office of the Inspector General, Department of Homeland Security, *Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program*, OIG-13-55, March 2013, p. 1.

<sup>22</sup> Testimony of Marcia Moxey Hodges, Chief Inspector, Office of Inspections, Office of the Inspector General, Department of Homeland Security, before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, House Committee on Homeland Security, February 27, 2014.

<sup>23</sup> Testimony of Marcia Moxey Hodges, Chief Inspector, Office of Inspections, Office of the Inspector General, Department of Homeland Security, before the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, House Committee on Homeland Security, February 27, 2014.

<sup>24</sup> Government Accountability Office, *Critical Infrastructure Protection: DHS Efforts to Assess Chemical Security Risk and Gather Feedback on Facility Outreach Can Be Strengthened*, GAO-13-353, April 2013.

in final tiers does not consider all of the elements of consequence, threat, and vulnerability. For example, the risk assessment approach is based primarily on consequences arising from human casualties, but does not consider economic consequences. In addition, GAO found that DHS had not been tracking data on reviews of site security plans and thus could not quantify improvements to that process. The GAO estimated that it could take another seven to nine years before DHS completed reviews on submitted site security plans. Input GAO solicited from 11 trade associations also indicated that DHS does not obtain systematic feedback on outreach activities. The GAO recommended that DHS:

- develop a plan, with timeframes and milestones, that incorporates the results of the various efforts to fully address each of the components of risk and take associated actions where appropriate to enhance ISCD's risk assessment approach and
- conduct an independent peer review, after ISCD completes enhancements to its risk assessment approach that fully validates and verifies ISCD's risk assessment approach consistent with the recommendations of the National Research Council of the National Academies.

The ISCD has taken steps to address the GAO recommendations. For example, ISCD engaged the Homeland Security Studies and Analysis Institute to coordinate an examination of the CFATS risk assessment model. According to GAO, HSSAI recommended that ISCD revise the current risk-tiering model and create a standing advisory committee—with membership drawn from government, expert communities, and stakeholder groups—to advise DHS on significant changes to the methodology. In addition, ISCD plans to modify the risk assessment approach to better include all elements of risk and has developed an accompanying implementation plan. Finally, DHS is engaged with Sandia National Laboratory to assess how to include economic consequences into their risk tiering approach.<sup>25</sup>

## Policy Considerations

Congressional policy makers have considered chemical facility security legislation in each Congress since the 109<sup>th</sup> and have introduced legislation in the 113<sup>th</sup> Congress. Some of the policy issues raised during congressional consideration of such legislation include: how to assess facility risk; whether to employ third-party employees as inspectors to improve program performance; whether DHS should be allowed to mandate the use of certain approaches or chemical process best practices, sometimes known as inherently safer technologies or methods to reduce the consequences of terrorist attack; which facilities should be regulated as chemical facilities; and how to identify non-responsive facilities.

## Risk Assessment

The risk-based tier assignment process has presented challenges to DHS. The DHS has identified anomalies in its risk assessment tools that led to approximately 500 facilities receiving erroneous tier assignments. Additionally, GAO has identified other factors DHS should include in calculating security risk for CFATS facilities. The DHS is in the process of receiving additional recommendations and analysis to determine how to best address these recommendations in the risk-based tier assignment process.

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<sup>25</sup> Government Accountability Office, *Critical Infrastructure Protection: Observations on DHS Efforts to Identify, Prioritize, Assess and Inspect Chemical Facilities*, GAO-14-365T, February 27, 2014; and Personal Communication with DHS, May 8, 2014.

In May 2010, DHS identified an anomaly in one of the risk-assessment tools it was using to determine a facility's risk tier. At that time, DHS believed that it had resolved the anomaly. In June 2011, a new acting ISCD Director "rediscovered" this issue, identified its potential effect on facility tiering, brought the issue to the attention of NPPD leadership,<sup>26</sup> and notified numerous facilities of a change in their risk tier.<sup>27</sup> Subsequent review of the risk-assessment tool resulted in DHS reviewing the tier determination of approximately 500 facilities. In some cases, DHS determined that facilities no longer qualified as high-risk and thus were no longer subject to the CFATS regulations.

In April 2013, GAO issued a report on the CFATS program.<sup>28</sup> The GAO found that the approach DHS was using to assess risk and place facilities in final tiers did not consider all elements of consequence, threat, and vulnerability. The GAO review of the risk assessment approach revealed that ISCD was inconsistent in how it assessed threat. According to GAO, ISCD considered threat for the 10 percent of facilities tiered because of the risk of release or sabotage, but not for the approximately 90 percent of facilities that are tiered because of the risk of theft or diversion. Also, GAO identified that when it did use threat data, the data were not current. The DHS subsequently engaged in an additional review of these issues and is considering improvements to its process.

When developing its interim final rule, DHS estimated the number of facilities it expected to be regulated primarily because of the threat from a potential release and the number regulated due to the potential for theft or diversion of chemicals.<sup>29</sup> In 2012, DHS analyzed facilities with final tier assignments and identified their primary risk category. The actual distribution of facilities did not align with how DHS had estimated in 2007. In 2007, DHS estimated that 62% of regulated chemical facilities would be release facilities.<sup>30</sup> In 2012, only 13% of the regulated facilities were release facilities.<sup>31</sup> This could be a significant issue for policy makers. It potentially reflects a shift in regulatory focus away from the threat of release to the surrounding community toward the threat of theft for later use as a weapon. Alternatively, this might reflect an unequal treatment of risk by DHS when considering release and theft from facilities.

Congressional policy makers may be interested in the extent to which changes in the way DHS determines risk affects the regulated community and the plans that DHS has to minimize its financial impact. The mechanisms by which DHS determines the risk of the regulated facilities is a key consideration for the CFATS regulatory program. Changes to these mechanisms may have significant impacts on the regulated community. Depending on what changes are made, facilities might be given a higher or lower tier assignment or be found no longer high-risk. Other facilities currently not considered high-risk might become regulated. As the CFATS program continues into its implementation, investment by the regulated community in required security measures will continue to increase as DHS approves an increasing number of site security plans.

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<sup>26</sup> Oral testimony of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Energy and Commerce, Subcommittee on Environment and the Economy, February 3, 2012.

<sup>27</sup> Department of Homeland Security, "DHS Notifies Chemical Facilities of Revised Tiering Assignments," July 5, 2011, <http://www.dhs.gov/files/programs/cfats-revised-tiering-assignments.shtm>.

<sup>28</sup> Government Accountability Office, *Critical Infrastructure Protection: DHS Efforts to Assess Chemical Security Risk and Gather Feedback on Facility Outreach Can Be Strengthened*, GAO-13-353, April 2013.

<sup>29</sup> Note that a facility might be primarily regulated for one category but also qualify under the other.

<sup>30</sup> Department of Homeland Security, *Chemical Facility Anti-Terrorism Standards Interim Final Rule Regulatory Assessment*, DHS-2006-0073, April 1, 2007.

<sup>31</sup> 79 *Federal Register* 6418-6452 (February 3, 2014) at 6438.

### Third-Party Inspection

DHS inspects regulated chemical facilities using a federal inspector cadre, known as Chemical Security Inspectors. These DHS employees manage, coordinate, and conduct inspections, compliance assistance visits, and outreach activities.<sup>32</sup>

DHS had previously considered using DHS-certified third-party inspectors as part of its regulatory program and had implied that its existing statutory authority allows such use.<sup>33</sup> Several policy issues were raised at that time. They included whether such inspections should be performed solely by federal employees; what third-party entities might be appropriate to perform CFATS inspections; and how to harmonize training and inspection standards between federal and third-party inspectors. These issues are discussed below.

### Inherently Governmental Functions

Policy makers have weighed the appropriate role of federal versus nonfederal employees in CFATS inspections. Some government functions are considered as inherently governmental, meaning they must be performed by government employees and cannot be contracted out.<sup>34</sup> The most recent policy guidance for federal agencies on inherently governmental and related functions was released in September 2011.<sup>35</sup> This policy guidance describes three categories of functions:

- inherently governmental functions,
- functions closely associated with the performance of inherently governmental functions, and
- critical functions.<sup>36</sup>

While inherently governmental functions must be performed by government employees, functions closely associated with the performance of inherently governmental functions and critical functions may be performed by either federal employees or contractors.<sup>37</sup>

The DHS itself has raised questions about “whether it is appropriate for DHS to use third-party auditors and if so, for which tiers of facilities; what the standards and requirements would be for those third-party auditors; and who would pay for third-party auditors.”<sup>38</sup> That said, the most recent policy guidance

<sup>32</sup> As of October 2012, DHS had 101 Chemical Security Inspectors located in 10 regional areas organized in three districts across the United States. DHS had an additional 13 regional and district commanders to oversee the Chemical Security Inspectors. Office of Inspector General, Department of Homeland Security, *Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program*, OIG-13-55, March 2013.

<sup>33</sup> 71 *Federal Register* 78276-78331 (December 28, 2006).

<sup>34</sup> For an analysis of the various definitions of “inherently government functions,” See CRS Report R42325, *Definitions of “Inherently Governmental Functions” in Federal Procurement Law and Guidance*, by Kate M. Manuel.

<sup>35</sup> 76 *Federal Register* 56227-56242 (September 12, 2011).

<sup>36</sup> For a more thorough analysis of the policy letter, see CRS Report R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration's Final Policy Letter*, by Kate M. Manuel, L. Elaine Halchin, and Erika K. Lunder. See also CRS Report R42325, *Definitions of “Inherently Governmental Functions” in Federal Procurement Law and Guidance*, by Kate M. Manuel.

<sup>37</sup> 76 *Federal Register* 56227-56242 (September 12, 2011) at 56241.

<sup>38</sup> 72 *Federal Register* 17688-17745 (April 9, 2007) at 17712.

contains examples of both inherently governmental functions and functions closely associated with the performance of inherently governmental functions.<sup>39</sup> The approval of federal licensing actions and inspections is listed as an inherently governmental function. Provision of inspection services is listed as a function closely associated with the performance of inherently governmental functions.

### *Identity of Third-Party Inspectors*

The DHS has a range of entities that might be employed as third-party inspectors, including private sector companies, state agencies, or other federal agencies. Some other federal agencies already employ contractors to conduct inspections to assess compliance with federal regulatory requirements. For example, the Environmental Protection Agency (EPA) uses both federal and contract staff to inspect federal facilities for compliance with some federal environmental regulations. According to EPA, properly trained and authorized contract inspectors are appropriate for federal facility compliance inspections and evaluations under the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), the Toxic Substances Control Act (TSCA), the Oil Pollution Act (OPA), and the Safe Drinking Water Act (SDWA).<sup>40</sup> The EPA has also identified EPA contract inspectors as eligible to assess compliance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>41</sup>

Additionally, both the EPA and the Nuclear Regulatory Commission (NRC) may delegate certain responsibilities to state officials. The EPA delegates an assortment of environmental authorities to states.<sup>42</sup> The authority for these delegations is generally in statute. Under the Atomic Energy Act of 1954 (P.L. 83-703, as amended), the NRC may relinquish to states portions of its regulatory authority to license and regulate radioactive materials. Under the EPA and NRC authorities, states generally must promulgate regulations that are at least as stringent as the federal requirements.<sup>43</sup> When approved, these states then regulate in lieu of the federal requirements. These agreements are documented through approval by senior agency officials.

### *Certification of Third-Party Inspectors*

Since the current inspector cadre is composed of federal employees, stakeholders might reasonably expect that their qualifications and performance meet DHS standards. If DHS was to use other federal agency, state, or contract employees as inspectors, the regulated community might wish greater transparency in how DHS is assessing these inspectors' skills and training in order to have equal confidence in equivalency between DHS and non-DHS inspectors. The DHS might develop such stakeholder confidence by setting contractor minimum capabilities through contract requirements; rigorously verifying contract inspector knowledge and skills; and providing inspection guidance available to the regulated community.

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<sup>39</sup> 76 *Federal Register* 56227-56242 (September 12, 2011) at 56241.

<sup>40</sup> David J. Kling, Director, Federal Facilities Enforcement Office, Office of Enforcement and Compliance Assurance, Environmental Protection Agency, "Clarification on the Use of Contract Inspectors for EPA's Federal Facility Compliance Inspections/Evaluations," *Memorandum to Regional Federal Facilities Senior Managers and Program Managers*, September 19, 2006.

<sup>41</sup> <http://www.epa.gov/compliance/resources/publications/federalfacilities/compliance/accessbrochure.pdf>.

<sup>42</sup> For an overview of federal environmental laws, including delegation to states, see CRS Report RL30798, *Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency*, coordinated by David M. Bearden, and CRS Report RL34384, *Federal Pollution Control Laws: How Are They Enforced?*, by Robert Esworthy.

<sup>43</sup> In some cases, such as regulation of underground storage tanks, states may directly enforce EPA regulations.

### *Capacity and Timing*

Fundamental to the issue of third-party inspection is whether the existing DHS inspector cadre has sufficient capacity to perform the necessary inspections in a time period meeting congressional expectations. If some of the challenges to CFATS program performance arise from insufficient inspection capacity, third-party inspectors might augment the capacity of the inspection cadre. This increased inspection capacity might lead to a commensurate increase in the rate of authorization inspection, site security plan approval, and compliance inspection of CFATS-regulated facilities. In contrast, if some of the challenges to CFATS program performance arise from factors outside of the inspector cadre, such as review of submitted documentation, use of third-party inspectors might have a minimal effect on performance.

A key question is whether the use of third-party inspectors is intended to accelerate the rate of inspection in the short or long term. An increase in the number of inspectors may not yield results as quickly as some policy makers might expect. The DHS likely would have to develop policy and procedure for the acquisition of non-DHS and nongovernmental inspectors. Once these inspectors were hired, either as federal employees or under contract, they would likely need to undergo CFATS-specific training and certification activities. Thus, there would likely be a delay between DHS receiving the authority and DHS deploying third-party inspectors to perform inspections.

### **Inherently Safer Technologies**

Congressional policy makers may choose to address the issue of inherently safer technologies, sometimes called methods to reduce the consequences of terrorist attack. The current statute bars DHS from mandating the presence or absence of a particular security measure. Therefore, DHS cannot require a regulated facility to adopt or consider inherently safer technologies. Congress could choose to continue the current policy or provide DHS with statutory authority regarding inherently safer technologies at regulated chemical facilities or require efforts regarding inherently safer technologies.

The Obama Administration has stated its support of inherently safer technologies to enhance security at high-risk chemical facilities in some circumstances. The DHS has testified that the Administration believes that all facilities regulated under CFATS should be required to assess inherently safer technology methods at their facilities. In addition, regulators should be able to require implementation of inherently safer technology methods at Tier 1 and Tier 2 facilities, if such methods demonstrably enhance overall security and are determined to be feasible.<sup>44</sup>

A fundamental challenge for inherently safer technologies is how to compare one technology with its potential replacement. It is difficult to unequivocally state that one technology is inherently safer than another without adequate metrics. Risk factors may exist outside of the comparison framework, and analyses may become narrowly focused and their outcomes inappropriately weighted.<sup>45</sup> Some experts

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<sup>44</sup> Testimony of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs, March 3, 2010; and Personal Communication between CRS and Office of Legislative Affairs, Department of Homeland Security, January 16, 2014.

<sup>45</sup> For example, the replacement of hydrogen fluoride with sulfuric acid for refinery processing would replace a more toxic chemical with a less toxic one. In this case, experts estimate that equivalent processing capacity would require 25 times more sulfuric acid. Thus, more chemical storage facilities and transportation would be required, potentially posing different dangers than atmospheric release to the surrounding community. Determining which chemical process had less overall risk might require considering factors both internal and external to the chemical facility and the surrounding community. See testimony of M. Sam Mannan, Director, Mary Kay O'Connor Process Safety Center, Texas A&M University, before the House Committee on (continued...)

have asserted that the metrics for comparing industrial processes are not yet fully established and need additional research and study.<sup>46</sup>

Supporters of adopting inherently safer technology as a way to improve chemical facility security argue that reducing or removing chemicals of interest from a facility will reduce the incentive to attack the facility. They suggest that reducing the consequences of a release also lowers the threat from terrorist attack and mitigates the risk to the surrounding populace. Some facilities have voluntarily changed amounts of chemicals on hand or chemical processes in use. Supporters of adopting inherently safer technology cite these as examples that facilities can implement such an approach in a cost-effective, practical fashion.<sup>47</sup>

Opponents of mandating inherently safer technologies question this approach. Industrial entities assert that these are safety, not security, methods; that process safety engineers within the regulated industry already employ such approaches in a safety context; and that process safety experts and business executives should determine the applicability and financial practicality of changing existing processes at specific chemical facilities.<sup>48</sup> Additionally, some stakeholders question whether the federal government contains the required technical expertise to adjudicate the practicality and benefit of alternative technological approaches.<sup>49</sup> Opponents of an inherently safer technology mandate also state concern that few existing alternative approaches are well understood with regard to their unanticipated side effects.<sup>50</sup>

One policy approach might be to mandate the implementation of inherently safer technologies for a set of processes. Another policy approach might be to mandate the consideration of implementation of inherently safer technologies with certain criteria controlling whether implementation is required. A third policy approach might be to mandate the development of a federal repository of inherently safer technology approaches and consideration of chemical processes against those options listed in the repository. Alternatively, policy makers might establish an incentive-based structure to encourage the adoption of inherently safer technologies by regulated entities. To some extent the CFATS regulation provides such an incentive, since DHS may assign facilities that reduce or eliminate the amount of

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Homeland Security, December 12, 2007; and Committee on Inherently Safer Chemical Processes, National Research Council, *The Use of Methyl Isocyanate (MIC) at Bayer CropScience*, 2012.

<sup>46</sup> Committee on Assessing Vulnerabilities Related to the Nation's Chemical Infrastructure, National Research Council, *Terrorism and the Chemical Infrastructure: Protecting People and Reducing Vulnerabilities*, 2006; and Testimony of M. Sam Mannan, Director, Mary Kay O'Connor Process Safety Center, Texas A&M University, before the House Committee on Homeland Security, December 12, 2007.

<sup>47</sup> See, for example, Paul Orum and Reece Rushing, Center for American Progress, *Preventing Toxic Terrorism: How Some Chemical Facilities Are Removing Danger to American Communities*, April 2006; and Paul Orum and Reece Rushing, Center for American Progress, *Chemical Security 101: What You Don't Have Can't Leak, or Be Blown Up by Terrorists*, November 2008.

<sup>48</sup> See, for example, testimony of Timothy J. Scott, Dow Chemical Company, before the House Committee on Homeland Security, Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, February 11, 2011; and testimony of Marty Durbin, Managing Director, Federal Affairs, American Chemistry Council, before the House Committee on Energy and Commerce, Subcommittee on Environment and Hazardous Materials, June 12, 2008.

<sup>49</sup> See, for example, testimony of M. Sam Mannan, Director, Mary Kay O'Connor Process Safety Center, Texas A&M University, before the House Committee on Homeland Security, Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, February 11, 2011; testimony of Dennis C. Hendershot, Staff Consultant, Center for Chemical Process Safety, American Institute of Chemical Engineers, before the Senate Committee on Environment and Public Works, June 21, 2006, S.Hrg. 109-1044; and testimony of Matthew Barmasse, Synthetic Organic Chemical Manufacturers Association, before the Senate Committee on Homeland Security and Governmental Affairs, July 13, 2005.

<sup>50</sup> For example, EPA experts have pointed to the change by drinking water treatment facilities between two approved disinfectants—chlorine and chloramine—as correlated with an unexpected increase in levels of lead in drinking water due to increased corrosion. Government Accountability Office, *Lead in D.C. Drinking Water*, GAO-05-344, March 2005.

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chemicals of interest they store to lower risk tiers. More than 3,000 facilities have removed or reduced the amount of chemicals of interest stored onsite and no longer qualify as a high-risk facility.

### Definition of Chemical Facility

The DHS regulates an assortment of facilities that possess and manufacture chemicals of interest. The term chemical facility encompasses many types of facilities. These include chemical manufacturers and distributors, agricultural facilities, universities, and others. Because DHS defines chemical facilities according to possession of a chemical of interest, it regulates facilities that are not part of the chemical manufacturing and distributing chain.

As mentioned above, the statutory authority underlying CFATS exempts several types of facilities, including water and wastewater treatment facilities. Thus, the federal government does not regulate water and wastewater treatment facilities for chemical security purposes. Instead, current chemical security efforts at water and wastewater treatment facilities are voluntary.<sup>51</sup> Some advocacy groups have called for inclusion of currently exempt facilities, such as water and wastewater treatment facilities.<sup>52</sup> Some water and wastewater treatment facilities possess amounts of chemicals of interest that would lead to regulation if located at a non-exempt facility.<sup>53</sup> Advocates for their inclusion in security regulations cite the presence of hazardous chemicals and their relative proximity to population centers as reasons to mandate security measures for such facilities. In contrast, representatives of the water sector point to the critical role that water and wastewater treatment facilities have in daily life. They caution against including these facilities in the existing regulatory framework because of the potential for undue public impacts. They cite, for example, loss of basic fire protection and sanitation services if the federal government were to order a water or wastewater utility to cease operations for security reasons or failure to comply with regulation.<sup>54</sup>

If Congress was to remove the water and wastewater treatment facility exemption, the number of regulated facilities might substantially increase, placing additional burdens on the CFATS program. The United States contains approximately 52,000 community water systems and 16,500 wastewater treatment facilities.<sup>55</sup> These facilities vary substantially in size and service area. The number of regulated facilities would depend on the criteria used to determine inclusion, such as chemical possession or number of individuals served. It is likely that only a subset of these facilities would meet a regulatory threshold.<sup>56</sup> In

<sup>51</sup> Congress required certain water facilities to perform vulnerability assessments and develop emergency response plans through Section 401 of P.L. 107-188, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. For more information on water security activities, see CRS Report RL31294, *Safeguarding the Nation's Drinking Water: EPA and Congressional Actions*, by Mary Tiemann.

<sup>52</sup> See, for example, Paul Orum and Reece Rushing, Center for American Progress, *Chemical Security 101: What You Don't Have Can't Leak, or Be Blown Up by Terrorists*, November 2008; and testimony of Philip J. Crowley, Senior Fellow and Director of Homeland Security, Center for American Progress, before the House Committee on Energy and Commerce, Subcommittee on Environment and Hazardous Materials, June 12, 2008.

<sup>53</sup> See U.S. Environmental Protection Agency, *Factoids: Drinking Water and Ground Water Statistics for 2008*, EPA 816-K-08-004, November 2008; and U.S. Environmental Protection Agency, *Clean Watersheds Needs Survey 2004: Report to Congress*, January 2008.

<sup>54</sup> American Water Works Association, "Chemical Facility Security," *Fact Sheet*, 2009. For more information on security issues in the water infrastructure sector, see CRS Report RL32189, *Terrorism and Security Issues Facing the Water Infrastructure Sector*, by Claudia Copeland.

<sup>55</sup> See U.S. Environmental Protection Agency, *Factoids: Drinking Water and Ground Water Statistics for 2008*, EPA 816-K-08-004, November 2008; and U.S. Environmental Protection Agency, *Clean Watersheds Needs Survey 2004: Report to Congress*, January 2008. For comparison, more than 36,000 chemical facilities filed a Top-Screen under CFATS.

<sup>56</sup> For example, the number of individuals served by the water facility might be used as a regulatory criterion. Section 401 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (P.L. 107-188) mandated drinking water (continued...)

2011, a DHS official testified that approximately 6,000 such facilities would likely meet the CFATS reporting threshold.<sup>57</sup>

Another option might be to grant statutory authority to regulate water and wastewater treatment facilities for security purposes to EPA. Some water-sector stakeholders suggest that this approach would be more efficient. Providing EPA the authority to oversee security as well as public health and safety might reduce the potential for redundancy and other inefficiencies.<sup>58</sup>

If policy makers were to assign responsibility for chemical facility security at different facilities to different agencies, each agency would promulgate separate rules. These rules might be similar or different depending on the agencies' statutory authority and interpretation of that authority, the ability of the regulated entities to comply, and any interagency coordination that might occur. Some industry representatives have expressed concern regarding the effects of multiple agencies regulating security at water and wastewater treatment facilities.<sup>59</sup> They assert that municipalities that operate both types of facilities might face conflicting regulations and guidance if different agencies regulate water and wastewater treatment facilities. Congress may wish to assess the areas where such facilities are similar and different in order to provide authorities that meet any unique characteristics.

Any new regulation of water and wastewater treatment facilities is likely to cause the regulated entities, and potentially the federal government, to incur some costs. Representatives of the water and wastewater sectors argue that local ratepayers will eventually bear the capital and ongoing costs incurred due to increased security measures.<sup>60</sup> Congressional policy makers may wish to consider whether the regulated entities and the customers they serve should bear these costs, as is done for other regulated chemical facilities, or whether they should be borne by the taxpayers in general through federal financial assistance to the regulated entities. Additionally, if inclusion of other facility types significantly increases the number of regulated entities, the regulating agency may require additional funds to process regulatory submissions and perform required inspections.

### Identification of Non-Responsive Facilities

Although facilities with greater than screening threshold quantities of chemicals of interest must submit information to DHS under the Top-Screen process, an unknown number of facilities do not provide such information. A well-known example is the West Fertilizer Company, which reported more than a threshold amount of a chemical of interest to the EPA under the Risk Management Plan (RMP) program

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facilities serving more than 3,300 individuals develop an emergency response plan and perform a vulnerability assessment. Approximately 8,400 community water systems met this requirement in 2002. For more information on drinking water security activities, see CRS Report RL31294, *Safeguarding the Nation's Drinking Water: EPA and Congressional Actions*, by Mary Tiemann.

<sup>57</sup> Oral testimony of Rand Beers, Under Secretary, National Protection and Programs Directorate, Department of Homeland Security, before the House Committee on Homeland Security, Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, February 11, 2011.

<sup>58</sup> Some agencies oversee both safety and security issues. For example, the U.S. Coast Guard has both safety and security responsibilities for ports.

<sup>59</sup> See, for example, American Water Works Association, "AWWA Members Urged to Contact Congress on Chemical Security Bill," and Association of Metropolitan Water Agencies, "Drinking Water Security and Treatment Mandates," *Policy Resolution*, October 2008.

<sup>60</sup> Testimony of Brad Coffey, Association of Metropolitan Water Agencies, before the House Committee on Energy and Commerce, Subcommittee on Environment and Hazardous Materials, June 12, 2008.

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but did not file with DHS under CFATS. One limited survey of community hospitals reported that 50% of respondents were unaware of CFATS reporting requirements.<sup>61</sup> The DHS refers to non-compliant facilities as “outliers.” Congressional policy makers have raised the concern that many facilities may still not have properly reported to DHS.<sup>62</sup>

The total number of facilities not complying with CFATS reporting requirements is not known. If DHS lacks information about a facility’s chemical holdings, it is unlikely to be able to identify it as an outlier. Comparing federally held information on regulated facilities with data held by other sources may be effective in identifying outliers. In order to identify such facilities, DHS has engaged with EPA regarding RMP data. In 2013, DHS identified 3,362 facilities as potential outliers through this effort; approximately 900 have subsequently filed a Top-Screen while 522 facilities have not responded to DHS. According to DHS, ISCD plans to continue to compare EPA RMP data, as well as the Superfund Amendments and Reauthorization Act Title III data from all 50 individual state data sets, on an annual basis to identify facilities that are potentially non-compliant with the CFATS regulation.<sup>63</sup> Each discrepancy between the data sets will then be investigated and resolved to ensure reporting facilities adhere to all regulatory obligations.

In August 2013, President Obama issued Executive Order 13650, *Improving Chemical Facility Safety and Security*.<sup>64</sup> The White House is coordinating a review under this executive order of chemical safety and security regulations across departments and agencies to identify gaps in coverage and explore ways to mitigate those gaps through existing authorities. This effort is still in progress.

### Analysis of H.R. 4007

H.R. 4007, the Chemical Facility Anti-Terrorism Standards Program Authorization and Accountability Act of 2014, was referred to the House Committee on Energy and Commerce and the House Committee on Homeland Security. On April 3, 2014, the Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies, of the House Committee on Homeland Security, amended the bill as introduced and ordered it forwarded to the full Committee with a favorable recommendation, as amended. On April 30, 2014, the House Committee on Homeland Security amended the bill as reported by the Subcommittee and ordered it to be reported to the House of Representatives with a favorable recommendation, as amended.

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<sup>61</sup> Hospitals may store chemicals of interest above screening threshold quantities and thus become regulated under CFATS. Morgan M. Bliss, Kiril D. Hristovski, and Jon W. Ulrich. “Compliance of Community Hospitals with the Chemical Facility Anti-Terrorism Standards (CFATS) in the Western United States” *Journal of Homeland Security and Emergency Management*, 10(2), 2013, pp. 433-445.

<sup>62</sup> Representative Michael T. McCaul, Chairman, Committee on Homeland Security; Representative Fred Upton, Chairman, Committee on Energy and Commerce; and Representative John Carter, Chairman, Homeland Security Appropriations Subcommittee, *Letter to Janet Napolitano, Secretary, U.S. Department of Homeland Security*, July 22, 2013; Senator Tom Carper, Chairman, Committee on Homeland Security and Governmental Affairs, *Letter to Janet Napolitano, Secretary, and Suzanne Spaulding, Acting Under Secretary, National Protection and Programs Directorate, U.S. Department of Homeland Security*, June 28, 2013; and Representative Henry A. Waxman, Ranking Member, Committee on Energy and Commerce, and Representative Bennie G. Thompson, Ranking Member, Committee on Homeland Security, *Letter to President Barack Obama*, May 2, 2013.

<sup>63</sup> Department of Homeland Security, National Protection and Programs Directorate, *Infrastructure Protection and Information Security Fiscal Year 2015 Congressional Justification*, p. 90.

<sup>64</sup> Executive Order 13650, *Improving Chemical Facility Safety and Security*, August 1, 2013. See 78 *Federal Register* 48029-48032 (August 7, 2013).

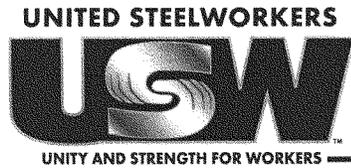
H.R. 4007 has similarities with the existing statute. The bill incorporates much of the language in the existing statutory authority. It would require the Secretary of Homeland Security to establish risk-based performance standards and mandate that covered facilities submit security vulnerability assessments and develop and implement site security plans. The act as amended would require the Secretary to review and approve or disapprove such security vulnerability assessments and site security plans. H.R. 4007 prohibits the Secretary from making such approval or disapproval on the basis of the presence or absence of a particular security measure, which maintains the inability of DHS to require implementation of inherently safer technologies. H.R. 4007 would maintain existing statutory exemptions, information protection requirements, and preempt state law or regulation only in the case of an “actual conflict.”

H.R. 4007, as amended, and the existing statute have key differences. These are briefly described below.

- H.R. 4007, as amended, lacks a termination date for the statutory authority. The current statutory authority will terminate on October 4, 2014. The authority granted under H.R. 4007 would be permanent.
  - H.R. 4007, as amended, would specify that the CFATS risk assessment approach and tiering methodology would be based on all relevant elements of risk, including threat, vulnerability, and consequence. It further specifies the criteria to include relevant threat information, the potential economic consequences of a terrorism incident at the facility and the potential loss of human life, as well as the vulnerability of the facility to certain terrorist events. This differs from the existing statute, which does not specify how to consider security risk.
  - H.R. 4007, as amended, would expressly allow the Secretary to use third-party inspectors rather than federal employees in the inspection process. While DHS had implied that it had such authority, H.R. 4007, as amended, would codify this authority.
  - H.R. 4007, as amended, would provide certain limitations on the Secretary with respect to issuing a personnel surety standard. As mentioned above, DHS has issued a personnel surety proposal, but provisions in H.R. 4007, as amended, would conflict with this proposal. Specifically, H.R. 4007, as amended, would require DHS to accept certain credentials beyond those identified in its personnel surety proposal, prohibit DHS from requiring information on as many types of individuals as DHS planned, and require greater information sharing than DHS had proposed.
  - H.R. 4007, as amended, would codify certain activities undertaken through the Secretary’s discretion. One is mandating the acceptance of reviewed and approved alternative security programs in lieu of a site security plan. The other is creating an exemption for rail facilities handling hazardous materials. In both cases, DHS has implemented these actions through its rulemaking.
  - H.R. 4007, as amended, would amend the Homeland Security Act of 2002 by creating a new title, Title XXI, called Chemical Facility Anti-Terrorism Standards. The existing statute is free standing, not part of the Homeland Security Act.
  - H.R. 4007, as amended, would require DHS to plan and perform certain outreach activities, support small chemical facilities, and issue reports to Congress on various aspects of the CFATS program, certifying its progress and development of a risk assessment approach. It would also require a semiannual GAO report to Congress assessing the act’s implementation.
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Thank you for the opportunity to appear before the committee. I would be happy to address any questions you may have.

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Testimony of  
 Anna Fendley, MPH  
 United Steelworkers  
 before the  
 US Senate Committee on Homeland Security and Governmental Affairs  
 on  
 Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program  
 May 14, 2014  
 Washington, DC

Chairman Carper, Ranking Member Coburn and members of the Committee, thank you for the opportunity to testify today. My name is Anna Fendley. I am here on behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union – USW for short. We represent 850,000 workers in the sectors I just mentioned and many others, including the majority of unionized workers in the chemical industry and hundreds of thousands of men and women whose workplaces use and store large quantities of industrial chemicals.

Our members are well aware of the hazards and the potential for widespread damage to critical infrastructure and the communities where they work and live. Small accidental releases occur more often than the public realizes, and it is only a matter of time before the next large explosion or release. I spoke recently with one of our members at a chemical plant on the west coast. He described a normal procedure that turned atypical several months ago and caused a release of sulfuric acid that sent workers at the warehouse next door to the hospital. Luckily this release was stopped relatively quickly. However, that may not be the case in every situation.

Americans have witnessed and read the news about catastrophic events at chemical facilities like the massive explosion last year at the West Fertilizer Company in West, TX that killed fifteen people and injured hundreds more by destroying a nursing home, an apartment complex, schools, and private homes. Or like the fire at the Chevron refinery in Richmond, CA that made thousands of people ill. Events like these have brought acute national attention to the danger of chemical facilities and the need to prevent catastrophic events caused either by accident or by the intentional actions of terrorists.

The Chemical Facility Anti-Terrorism Program (CFATS) was intended to be an interim measure when the 109th Congress passed legislation providing the Department of Homeland Security (DHS) with statutory authority to regulate chemical facilities for security purposes. Since that time subsequent Congresses have continued to extend the authority to DHS for the CFATS program through appropriations. These

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United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union  
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appropriations have not addressed recognized problems within the implementation and scope of the CFATS program and have instead allowed an inadequate status quo. Moving forward with a legislative path must address these recognized problems within CFATS in order to protect the millions of workers and community members who are now at risk.

There are ongoing activities within the federal government related to the implementation of CFATS and, more broadly, to the prevention of releases, fires and explosions at chemical facilities. USW encourages you to include the recommendations and outcomes of the following activities and prior legislative efforts as you consider a legislative path forward for the CFATS:

- In a March 2013 report, the Office of Inspector General (OIG) found that the program continued to face implementation challenges in the areas of submission tools and processes, representation and oversight, human capital, and fiscal stewardship.<sup>1</sup> OIG made 24 recommendations to improve implementation of the CFATS program.
- President Obama's Executive Order (EO) 13650 on Improving Chemical Facility Safety and Security requires DHS participation in a working group to improve operational 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.<sup>2</sup> A status report is due to the president in May that will include the working group's recommendations for implementing and updating CFATS, among other things, to better prevent catastrophic incidents.
- During the 111<sup>th</sup> Congress, the House passed HR 2868, the "Continuing Chemical Facilities Antiterrorism Security Act of 2010." USW and other unions supported that legislation which would have solved many of the recognized problems in CFATS by:
  - requiring all covered facilities to make plans for the use of technologies that reduce the potential consequences of an attack;
  - authorizing the government to require implementation of such plans, where technically and economically feasible, at those facilities that present the greatest release risk;
  - mandating employee training and participation in plant security, including in compliance inspections;
  - allowing states to set more protective standards;
  - allowing workers and communities to enforce protections through citizen suits against government agencies and by petitioning agencies for enforcement against individual facilities; and
  - requiring the government to report on enforcement and compliance so the public can know the law is being implemented, while avoiding publication of the vulnerabilities of individual facilities.

<sup>1</sup> [http://www.oig.dhs.gov/assets/Mgmt/2013/OIG\\_13-55\\_Mar13.pdf](http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-55_Mar13.pdf)

<sup>2</sup> <http://www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security>

A legislative path forward needs to address the inherent weaknesses of CFATS, five of which of which I will cite in detail today:

First, CFATS coverage does not extend to chemicals shipped or stored outside of a facility's fence line in nearby rail yards or elsewhere that may have little or no security measures. Currently CFATS does not prevent or document this type of risk shifting from one location to another. I have seen pictures and gotten accounts from our members of rail cars full of hazardous chemicals parked for days outside the fence line within yards of a busy road near homes and other businesses. Employers may engage in this practice to be taken off the list of high-risk facilities, or risk shifting could be an established practice occurring for years because workers and management do not recognize the hazard and the potential for a criminal act. Under CFATS there is no way of knowing if and how these risks are being shifted, which leaves communities in danger. DHS claims that "more than 3000 facilities removed, reduced, or modified holdings of chemicals of interest" but maintains no information as to how these reductions in holdings were achieved.<sup>3</sup> The program does not know or track whether the risk was shifted.

Second, DHS is prohibited from requiring a CFATS-covered facility to use any "particular security measure" including a fence in a particular area, a specific control on a unit, or any other measure that is well documented through past practice in the industry to prevent catastrophic incidents. This capacity building measure would require covered facilities to conduct a structured review of options that avoid catastrophic chemical hazards in well-documented assessments and plans that are reported to DHS. My colleagues and I work with employers every day. Many take safety measures that go above and beyond, but there are always some that will only do the minimum required by law and, as we all know, some who refuse to even do the minimum required.

Third, CFATS should develop and promote the most effective means of reducing a catastrophic chemical incident, which is reducing the potential consequences by using safer chemical processes. DHS,<sup>4</sup> EPA<sup>5</sup> and the US Chemical Safety Board<sup>6</sup> have all highlighted the effectiveness of assessing and, where feasible, implementing safer alternatives at high risk facilities. Some companies have shifted to safer processes or reduced their inventory of hazardous chemicals so they are no longer listed as high risk. In fact, according to a report from DHS to the Coalition to Prevent Chemical Disasters, since the inception of the CFATS program nearly 1300 facilities have completely removed their Chemicals of Interest and approximately 600 no longer possess a Chemical of Interest at the threshold that requires submission of a Top-Screen to DHS. But many companies will never even look into innovating with safer chemical processes without a legal requirement to do so. Legislation that passed the House in the 111<sup>th</sup> Congress included the requirement that CFATS-covered facilities "assess alternatives, in particular "the technical feasibility, costs, avoided costs (including liabilities),

<sup>3</sup> [http://www.dhs.gov/sites/default/files/publications/CFATS%20Update\\_February2014.pdf](http://www.dhs.gov/sites/default/files/publications/CFATS%20Update_February2014.pdf)

<sup>4</sup> <http://www.dhs.gov/news/2011/03/30/written-testimony-nppd-house-committee-energy-and-commerce-hearing-titled-hr-908>

<sup>5</sup> [http://www.epa.gov/ocir/hearings/testimony/111\\_2009\\_2010/2010\\_0728\\_ccd.pdf](http://www.epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0728_ccd.pdf)

<sup>6</sup> <http://www.nytimes.com/2014/01/29/opinion/the-next-accident-awaits.html?smid=pl-share&r=0>

personnel implications, savings, and applicability of implementing each method to reduce the consequences of a terrorist attack.<sup>7</sup> Safer chemical processes can include a range of controls including:

- Reducing the quantity of hazardous material or energy;
- Substituting a hazardous material or process with an alternative that reduces the hazard; or
- Simplifying a process by using automation, sensors, alarms, automatic shutdowns, improved operating procedures, and changed equipment design.<sup>8</sup>

Fourth, the Personnel Surety Program (PSP) under CFATS has the potential for unintended consequences. Many have expressed concerns about duplication of efforts and the burden for multiple background checks. The Transportation Worker Identification Credential (TWIC) is an option to use under CFATS. Many of our members have successfully obtained a TWIC card, but it is not without concerns about the burden on workers to obtain them and the burden on industry to install readers when the Coast Guard has not issued a final rule for TWIC readers.

Another concern about the PSP is that, within the current context of the CFATS program, individual chemical facilities are responsible for clearing workers under their PSP. CFATS does not prevent the collection of unnecessary personal employee data by employers or third parties that may be full of inaccuracies due to errors in reporting. There is not an adequate appeals process for workers who are wrongly discriminated against during the PSP process. In a February 3, 2014 Federal Register notice, DHS stated that employment decisions based on background checks are outside of the scope of CFATS and that DHS expects employers to comply with applicable federal, state and local law regarding employment and privacy.<sup>9</sup> Workers are seeing DHS apathy about their jobs play out in facilities across the country. In fact, one of our local unions recently received a letter from their employer that said, "Although [COMPANY NAME] and its representatives are not required to notify its employees or union leadership of this requirement prior to conducting background investigations, we believe it is a prudent and a good business practice to do so." Not all employers will do the right thing by telling their employers about new security measures without a requirement by DHS to do so. On the whole this is inadequate. Workers need to be informed about new security measures, including background checks being performed on them, and workers need an appeals process should they be unjustly disqualified from their job due to an employer-conducted background check.

This brings me to my fifth point. CFATS lacks the requirement for a meaningful role for workers in chemical security. It is our observation that DHS stakeholder engagement with industry is very productive. However, DHS does not adequately engage workers and their representatives at either the federal level or within a facility. Workers who operate and maintain chemical facilities know the most about what needs to be done to reduce vulnerability and protect against a terrorist attack. They would be hurt first and worst in an attack on a facility, and therefore have the largest stake in ensuring safety. CFATS should require meaningful

<sup>7</sup> HR 2868 – 111<sup>th</sup> Congress. <http://beta.congress.gov/bill/111th-congress/house-bill/2868>

<sup>8</sup> Atay and Komosinsky. (2012) *Inherently safer technology implementation – Risk reduction and risk shifting*. New Jersey Department of Environmental Protection. Prepared for presentation at 8<sup>th</sup> Global Congress on Process Safety.

<sup>9</sup> <http://www.gpo.gov/fdsys/pkg/FR-2014-02-03/pdf/2014-02082.pdf> (page 6436)

involvement of plant employees in developing security plans and provide whistleblower protections for those who engage in the process in any way including by reporting a security vulnerability either to their employer or to DHS. At a very minimum this could help DHS identify facilities that are covered by CFATS but are not complying with its requirements. DHS should also be required to include an employee representative when the agency visits a facility. The Occupational Safety and Health Administration<sup>10</sup> and the Environmental Protection Agency<sup>11</sup> both have policies that could be used as a model for DHS to include workers in inspections.

Any legislation authorizing the program must be responsive to the identified shortcomings and challenges of CFATS, the oversight recommendations, and other activities at the federal level regarding the CFATS program. Congress should not merely require more metrics from an inadequate program when there is consensus about problems in the program. Legislative action based the recommendations from OIG, the EO Working Group, and other stakeholders is necessary to address the gaps in CFATS that leave millions of American workers and communities at risk.

Thank you again for the opportunity to testify today.

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<sup>10</sup> [https://www.osha.gov/Firm\\_osh\\_data/100006.html](https://www.osha.gov/Firm_osh_data/100006.html)

<sup>11</sup> <http://www.epa.gov/compliance/resources/policies/monitoring/caa/caa112r-rmpguide.pdf>

**Written Statement of**

**The Dow Chemical Company  
and the American Chemistry Council**

**To**

**The United States Senate  
Committee on Homeland Security and  
Governmental Affairs**

**On**

**“Charting a Path Forward for the Chemical  
Facilities Anti-Terrorism Standards Program”**

**May 14, 2014**

**Introduction:**

Chairman Carper, Ranking Member Coburn and members of the Committee, my name is Tim Scott and I'm the Chief Security Officer of The Dow Chemical Company. I'm speaking today on behalf of Dow and the American Chemistry Council, the nation's chemical industry trade group.

The chemical industry is an extremely diverse sector of the global economy which provides a broad range of products and services that improve the quality of life around the world. Some of essential products include chemicals that provide clean drinking water, medicines and medical products, fertilizers for the farming industry, key components and chemicals for use in the high tech manufacturing industry, light weight composite materials for use in the airline and transportation industries and critical items designed for top secret military applications. The chemical industry is a multi-billion dollar enterprise that provides high paying jobs and is growing. Chemical manufacturing is returning to the United States due to a boom in domestic natural gas production, increasing the number of well-paying paying jobs for American families and making the U.S. a global competitor once again.

An essential element for success of the business of chemistry is ensuring the security of our products and information and our people and the communities where we operate. For members of the ACC, the Responsible Care Program provides the framework and foundation for managing security risk across an organization by providing an integrated approach that encompasses all aspects of the chemical supply chain: (1) Physical Plant Security, (2) Cyber and IT Security, and (3) Transportation / Value Chain Security. When treated as a system, an organization can implement a comprehensive approach to managing security risk by looking at vulnerabilities across the organization in a holistic way, and developing sound solutions that minimize the risks while maximizing the value of the business operation and protecting the critical assets of the company.

Within months of the terrorist attacks of 9/11, ACC created a stringent, mandatory security program called the Responsible Care® Security Code. To date, ACC member companies have invested nearly \$13 billion to further enhance site, transportation, and cyber security at their facilities under the Security Code, which has become a gold standard for the industry and serves as a model for regulatory programs. Core elements of the Security Code include:

*Cybersecurity:*

Recognize that protecting information and information systems is a critical component of a sound security management system. Assess cybersecurity vulnerabilities and implement enhancements. Incorporate cybersecurity into training, drills and guidance, and all aspects of a Plan-Do-Check-Act security system. Take steps to protect against intrusion into facility systems and the diversion of products.

*Facility Security:*

Conduct comprehensive site security vulnerability assessments using recognized methods, such as the Sandia National Laboratories, Chemical Security Vulnerability Assessment Methodology. Implement and continuously improve site security measures within a well-defined timeline. Document security management programs, processes, and procedures.

*Transportation/Supply Chain Security:*

Conduct vulnerability assessments throughout the supply chain and implement security measures, including screening of transportation providers. Working with commercial partners to assess transport routing and monitor shipments. Secure access to transportation/distribution facilities.

**Federal Security Programs and CFATS:**

In addition to enhancing security through strong industry initiatives such as Responsible Care, ACC and its members support an array of federal programs currently in place that give multiple agencies the authority to take a smart approach to regulating chemical security, while minimizing the burden on its operations. Some of the key Agencies and programs include:

- The DHS Chemical Facilities Anti-Terrorism Standards.
- The Coast Guard Maritime Transportation Security Regulations.
- The TSA Rail Transportation Security Rule.
- The DOT Hazardous Transportation Security Plan.
- The CBP Customs and Transportation Partners against Terrorism.

Under these programs, the regulated community must submit security plans for review and approval and be subject to rigorous site inspections. Several agencies have the authority to fine or shut down a facility if it fails to be in compliance. ACC is committed to working with regulators to make these programs more effective and efficient through improved implementation and better use of private and public sector resources.

In 2006, ACC helped lead the charge in Congress to pass legislation to give the Department of Homeland Security (DHS) the authority to create CFATS, the Chemical Facilities Anti-Terrorism Standards. This stringent DHS program regulates security for a wide variety of chemical facilities that make, store, or use chemicals, including chemical manufacturers, farmers, hospitals and universities. CFATS allows facilities to tailor their security plans to meet their unique needs while providing DHS with clear authority to fine or shutdown facilities that do not meet the program's comprehensive security standards.

When DHS was given the authority to regulate chemical industry security, ACC and our members was an active and enthusiastic partner in the development of the risk-based performance standards model that is in place today. The ACC Responsible Care Security Code

is aligned in many areas and is a mandatory requirement for ACC membership. The launch of DHS, CFATS and the Responsible Care Security Code is a successful example of what defines a partnership – everyone working together on a common goal, to defeat a common foe. Despite some challenges along the way, we believe that CFATS has turned the corner and is moving in the right direction. The quality of inspections has vastly improved. The pace of implementation has picked up significantly and the partnership is working once again. The end result is that progress is being made and the security of the chemical industry is stronger today, more than ever before.

I would like to point out what Dow Chemical alone has done in terms of capital investments and security upgrades in an effort to lead the industry in compliance with the CFATS program. Dow has spent approximately \$250 million on security systems to ensure our facilities are as safe and secure as they can reasonably be and we have completed vulnerability assessments, audits and as needed security upgrades at our facilities worldwide – not just those regulated under CFATS in the US. We did this in part because we have a duty to our shareholders, employees, and communities but also because we find the CFATS program a good model – in harmony with the Responsible Care Security Code -- to secure our facilities. It's my understanding that Dow is the only chemical company to achieve SAFETY Act designation from DHS for both our site security and our distribution system security processes.

There have been many positive developments over the last few months for CFATS – with the most significant being the progress toward multi-year authorization. A multi-year authorization puts DHS and CFATS closer in line to the industry's capital planning process, and allows for some certainty for industry to take action. A multi-year authorization also brings stability to DHS – in planning and implementing CFATS and also staffing to be sure the necessary expertise is in place – and will remain in place – to accomplish the mission.

Maintaining the original premise of a risk-based performance standards model approach, which permits individual sites the flexibility to determine the local solution that will meet the standards, also spurs progress. No two sites are the same, but all must meet the same goal. This flexibility allows each unique site the flexibility to take individual ownership and identify the solution that meets the performance standard in the best manner possible for that site.

We are not done – industry is not done - DHS is not done - and Congress is not done. We are making progress, but more needs to be done. We need to fine tune the personnel surety process so that it adds value to all concerned. We need to ensure that risk is being determined in a fair and consistent manner. We need to ensure transparency about the people at the site who have access to sensitive areas and the transparency about the risk they are working so hard to mitigate. And we need to leverage the plethora of industry security programs that are in place today, such as the ACC Responsible Care Program. Put together, all these goals will establish a sound

regulatory framework that will ensure the security of our nation's chemical infrastructure for decades to come.

Communication has between DHS and the sites, but we need to do more – there are still some barriers there. DHS field Inspectors need to be viewed as an equal partner working together to defeat terrorism. We need to give the inspectors the training and resources they need so they can ensure compliance and they understand the regulations, understand how the industry works, and understand the sites in their area of responsibility, and visit those sites on a regular basis. And industry needs to challenge our peers – we need to self-regulate both upstream and downstream along the supply chain and especially those in our own back yard.

CFATS is making the chemical industry more secure, today. DHS is maturing and finding its way in reaching its goals. Industry is doing its share by partnering with the government at the federal and local levels. A multi-year reauthorization and a commitment to continue the partnership in a risk-based approach is essential. Just as important, we need to bring all the players to the table – we're not there yet on either the public or private sector sides. We're encouraged by the progress that is being made, but we need your help in maintaining the forward momentum.



United States Senate Committee on  
Homeland Security and Government Affairs

*Hearing On*

“Charting a Path Forward for the Chemical Facilities Anti-  
Terrorism Standards Program”

*Testimony for the Record*

*On behalf of the*

Society of Chemical Manufacturers and Affiliates

May 14, 2014

Thank you for the opportunity to submit written testimony for the Chemical Facility Anti-Terrorism Standards (CFATS) Program hearing on May 14, 2014 entitled, "Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program" held before this committee. For more than 90 years, SOCMA has been and continues to be the leading trade association representing the specialty chemical industry. SOCMA's more than 220 member companies employ more than 100,000 workers across the country and produce some 50,000 products – valued at \$60 billion annually – that help make our standard of living possible. Over 80% of SOCMA's members are small businesses and many are covered by the CFATS program.

As we have testified multiple times before this committee and committees in the House, SOCMA strongly supports the CFATS program, and we are wholly supportive of current legislative efforts to shore up the program with a multi-year funding extension. The program requires chemical facilities nationwide to develop security enhancements, and its performance-based approach protects facilities against attack without impairing the industry's ability to remain innovative. SOCMA member companies covered by CFATS take the security of facilities and products very seriously, as well as the safety of employees and communities. SOCMA member companies that implement responsible stewardship programs such as ChemStewards want a stable and predictable CFATS program.

SOCMA recognizes that years ago the CFATS program went through a difficult period of administrative challenges, not unlike many new regulatory programs; however, as a result of the chemical sector's strong cooperation with DHS, there has been significant improvement in the program. There has been 100% compliance by industry with the requirements to submit Top-

Screens, Security Vulnerability Assessments, and Site Security Plans or Alternate Security Plans. For its part, DHS is making good progress in implementing the reforms identified by Director David Wulf, with oversight from Congress. SOCMA member companies report positive experiences with authorization inspections and especially are appreciative that DHS responded to a SOCMA request to develop a resource called "What to Expect from the Inspectors" explaining what companies should anticipate for final authorizations. This is a good example of chemical companies wanting to do the right thing, and DHS working well with us for compliance to meet mutual goals.

The CFATS program is working. It is important to underscore the fact that CFATS is driving facilities to reduce inherent hazards relying not on federal regulatory mandates, such as one to impose inherently safer technology. Since the program was launched in 2007, CFATS has driven nearly 3,000 facilities nationwide to reduce inherent hazards, where in their expert judgment doing so makes economic sense, is in fact safer, and does not transfer risk to some other point in the supply chain. Thus, CFATS is reducing risks in a market-based way.

Furthermore, DHS is nearing the completion of 1,000 site security plan approvals, which include plans from facilities among the highest of the high-risk tiers. The collaborative quality of the work being conducted between the agency and specialty manufacturers in authorization inspections is remarkable for meeting shared, mutual goals of enhancing security at our chemical facilities. The agency appears to be making every effort to assist small businesses who are eager to find favorable solutions to meet regulatory requirements that fit the needs of the specific company. These authorization inspections are a good model for how government should work

with businesses to meet common goals. These are not hasty approvals; they are simply working well together to get the job done and, in fact, DHS is on target to complete many of the goals of the program in a shorter time frame than originally expected.

Without ignoring the opportunity to improve DHS's implementation of CFATS, it is important to note the successes of the program. To a great extent, the CFATS rules faithfully implement the statutory mandate issued by Congress in 2006. CFATS is a comprehensive, appropriately risk-based regulation that avoids being overly prescriptive, yet also has teeth -- the Secretary has the authority to shut down a facility for non-compliance. Furthermore, covered facilities have invested billions of dollars to upgrade security and meet CFATS's requirements.

Now it is time for Congress to act. After numerous oversight hearings in the House and Senate during the past several years that have publicly documented DHS' progress without uncovering flaws in the standards themselves, Congress needs to ensure CFATS's continued stability by properly establishing it as a program through Homeland Security, and through a longer-term authorization and funding cycle. Additionally, SOCMA would like the program to permit facilities to satisfy their obligation to help screen employees and visitors for terrorist ties if the facilities rely on federal credentials that are vetted against the terrorist screening database -- without having to supply any other information to DHS. These legislative changes to the program would provide significant stability for the program. These changes already have bipartisan support, as evidenced by the support of H.R. 4007, "The CFATS Authorization and Accountability Act of 2014" that was recently passed by the House Committee on Homeland Security and may soon be voted on by the full House.

Congress continues to miss an opportunity to provide regulatory certainty for the private sector and DHS alike by not authorizing CFATS on a multi-year basis. We cannot and should not continue down the current path of temporary extensions and one-year appropriations riders, nor can we afford to throw the baby out with the bathwater by defunding or abolishing this critical program. If Congress halts the program, it would immediately throw the security efforts of thousands of facilities into limbo, waste millions of dollars, and create a major setback to the public's justifiable expectation that industry and government work together to secure chemicals produced or stored by CFATS facilities.

As Kate Donahue, President of Hampford Research, a SOCMA member company, testified to a House subcommittee in February that programmatic disruptions and regulatory uncertainty are things Congress should do its best to avoid. "Even under ideal circumstances, it costs companies, especially small businesses, time and money to plan for, pay for, prepare for, and clear days off calendars of multiple employees to comply with a program like CFATS," Donahue testified. "We want a stable and predictable program."

SOCMA urges Senator Carper and Senator Coburn to consider and propose a legislative measure similar to H.R. 4007, "The CFATS Authorization and Accountability Act of 2014," and to work together with your colleagues in the House to find a way forward to providing the stability and regulatory certainty for which SOCMA members are asking and need.

**Post-Hearing Questions for the Record  
Submitted to Hon. Suzanne Spaulding and David Wulf  
From Senator Carl Levin**

**“Charting a Path Forward for the  
Chemical Facilities Anti-Terrorism Standards Program”  
May 21, 2014**

<b>Question#:</b>	1
<b>Topic:</b>	CFATS 1
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** The August 2013 Executive Order on Improving Chemical Facility Safety and Security directs the agency to assess how chemical security could be improved, including:

Coordinating more effectively with State, Local and Tribal partners, including first responders;

Coordinating more effectively with other federal agencies to identify non-responders to the CFATS (Chemical Facilities Anti-Terrorism Standards) program; and

Sharing information about best practices concerning the use of safer chemicals and processes.

When will DHS finalize those assessments, and will they be made available to the regulated community and/or the public?

**Response:** On June 6, 2014, the Department of Homeland Security, the Department of Labor, and the Environmental Protection Agency released a report entitled Actions to Improve Chemical Facility Safety and Security – A Shared Commitment. The report, which was developed by the working group established under Executive Order (EO) 13650, summarizes both the actions taken by the Federal government since the issuance of EO 13650 (many of which involved collaboration with other chemical facility safety and security stakeholders) and future activities planned to enhance chemical facility safety and security. The report contains sections on “Enhancing Federal Operation Coordination”, “Improving Data Management”, and “Modernizing Policies and Regulations”, among others, which include discussions on the Federal interagency working group’s findings related to more effective coordination with State, local,

<b>Question#:</b>	1
<b>Topic:</b>	CFATS 1
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

territorial, and tribal partners; enhancing Federal coordination to identify potential non-responders; and sharing best practices.

<b>Question#:</b>	2
<b>Topic:</b>	CFATS 2
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** Although facilities with greater than threshold quantities of chemicals of interest are required to submit information to DHS, some facilities do not provide such information. This situation was brought to light in April 2013 when an explosion occurred at a fertilizer plant in West, Texas, killing 15 people (12 first responders and 3 residents) and injuring 200 people. Although this facility had 40 to 60 tons of ammonium nitrate at the facility (more than the DHS threshold amount), it had never reported this information to DHS and was not complying with any of the Chemical Facilities Anti-Terrorism Standards Program (CFATS) requirements.

Under current law, DHS can issue orders requiring a facility to come into compliance. If the facility is unresponsive, then DHS can issue penalties, which include closing the facility. At the May 14 hearing, Director Wulf stated that DHS thinks it has the power to issue fines to nonresponsive facilities.

Could such a fine be issued only after DHS orders a facility to register under CFATS, and the facility then did not register?

**Response:** Under Section 550 of the Homeland Security Appropriations Act of 2007, the Department must provide the owner or operator with written notification and issue an order to comply by such date as the Secretary determines to be appropriate under the circumstances. The Secretary may assess civil penalties only if the facility violates an order.

**Question:** Could such a fine also be issued to a nonresponsive facility that DHS identified and which subsequently registered after DHS ordered it to do so?

**Response:** If DHS issued an order requiring a facility to file a top screen<sup>1</sup> with DHS and the facility filed the top screen within the time frame contained in the order, then the Department would not have the authority to assess civil penalties for the initial noncompliance; however, if the facility violated that order by not filing a top screen until after the expiration of the timeframe contained within the order, then the Department would have the discretion to assess civil penalties despite the facility's subsequent compliance.

<sup>1</sup> A top screen is an initial screening process designed by the Assistant Secretary through which chemical facilities provide information to the Department for use pursuant to § 27.200 of these regulations. See reference: [6 CFR 27.105](#)

<b>Question#:</b>	2
<b>Topic:</b>	CFATS 2
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** If DHS cannot issue fines to nonresponsive facilities that subsequently register after DHS identifies the facility and then orders it to register, would DHS support legislation that would penalize facilities that are required to register with DHS but fail to do so?

**Response:** DHS would support legislation that would give the Department the discretionary authority to penalize facilities that are required by regulation to file top screens with DHS and have not complied. As noted in Actions to Improve Chemical Facility Safety and Security – A Shared Commitment, the Report developed by the Federal working group under EO 13650, the Department is committed to working with Congress to pursue action to streamline the CFATS enforcement process to allow DHS, in extreme circumstances, to immediately issue orders to assess civil penalties or to close down a facility for violations, without having to first issue an order calling for correction of the violation.

**Question:** Has DHS taken a position on the late Senator Lautenberg’s legislation (S. 814) that would provide for stronger penalties for violations of CFATS?

**Response:** No.

<b>Question#:</b>	3
<b>Topic:</b>	CFATS 3
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** Under CFATS, chemical facilities are required to conduct background checks on employees and unescorted visitors and provide identifying information to DHS for use in screening employees against the Terrorist Screening Database (TSDB). DHS is still in the process of finalizing how facilities ensure that individuals with known terrorist affiliations do not gain access to high-risk facilities.

If DHS finds that the name of a person submitted by a chemical facility to DHS matches a person on the Terrorist Screening Database, will DHS inform the chemical facility? If DHS does not inform the chemical facility of a TSDB match, why does DHS withhold such information?

**Response:** To prevent a significant threat to a facility or loss of life, a high-risk chemical facility will be contacted where appropriate and in accordance with federal law and policy, as well as law enforcement and intelligence requirements.

**Question:** Is there a way for a person to learn whether he or she has not been hired or has been fired because of a TSDB issue? Is there any way for this individual to appeal the TSDB finding by DHS?

**Response:** CFATS does not regulate the hiring or firing process, and DHS will neither require nor recommend that facilities hire, fire, or refuse to hire any individuals because of TSDB vetting results. Furthermore, DHS will not maintain any records about facilities' hiring or firing practices.

Once DHS begins collecting information on individuals for vetting against the TSDB under the CFATS program, if an affected individual raises questions about the accuracy of the vetting information submitted to DHS by a high-risk chemical facility, the Department will recommend that the individual contact the facility in question to request that the submission be updated with correct information. If a high-risk chemical facility is unable to, or refuses, to correct inaccurate or erroneous information, the affected individual may also contact DHS to have inaccurate or erroneous information corrected.

Pursuant to 6 CFR 27.310(a)(1), an affected individual will also be able to institute formal proceedings to contest a finding by DHS that he/she is a potential security threat. The procedures for such formal proceedings are described in Subpart C of the CFATS

<b>Question#:</b>	3
<b>Topic:</b>	CFATS 3
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

regulations, 6 CFR 27.300 – 27.345. Administrative Law Judges will preside over any such proceedings.

<b>Question#:</b>	4
<b>Topic:</b>	third-party inspectors
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** To increase the number of site security plans reviewed and approved and the rate of chemical facility inspections, DHS is considering the use of third-party inspectors.

How would the use of third-party inspectors by DHS impact the security of our nation?

Are inspections of our nation's highest risk chemical facilities an inherently governmental function?

**Response:** At this time, DHS is not actively pursuing the use of third-party inspectors. DHS intends to issue an Advance Notice of Proposed Rulemaking regarding the CFATS regulations to solicit public input on possible program changes to CFATS, through which the public could comment on the notion of using third-party inspectors for CFATS inspections. As part of any analysis of the potential utility of and various structures for third-party audit programs, however, the Department would assess both the impact of the use of third-party inspectors on the security of our nation and the question of whether CFATS inspections are an inherently governmental function.

<b>Question#:</b>	5
<b>Topic:</b>	GAO
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Question:** GAO found that DHS's assessment of chemical facility risks was flawed. Some of the flaws GAO found included the fact that DHS did not consider economic consequences, was using old data, and did not consider vulnerability differences across facilities. In February 2014, DHS reported that it was revising its risk assessment process to address the issues GAO identified, and should complete these revisions within the next 12 to 18 months.

Is DHS still on track to finalize its revised risk assessment to address the problems identified by GAO by August 2015?

**Response:** Yes.

**Question:** Will the revised risk assessment be used by DHS to evaluate all chemical facilities that have submitted a Top-Screen, or only those facilities that will in the future submit a Top-Screen or have not yet been assigned to a risk tier?

**Response:** The Department has not yet made a decision regarding the applicability of the revised risk assessment to previously assessed facilities and is in the process of assessing various options related to that issue.

**Question:** If DHS only uses the revised risk assessment on facilities that have not yet been assigned to a risk tier, would this mean that some facilities are incorrectly assigned to risk tiers? In other words, would some facilities that DHS previously identified as being lower risk (meaning that they were not assigned to one of the 4 high risk tiers) actually be high risk if the revised risk assessment method were used? Will DHS re-evaluate these so-called lower risk facilities using the revised risk assessment method?

**Response:** The Department has not yet made a decision regarding the applicability of the revised risk assessment to previously assessed facilities and is in the process of assessing various options related to that issue.

**Question:** What plans does DHS have to re-evaluate all chemical facilities that have registered through their Top-Screen submission to ensure the facilities are assigned to the correct risk tier?

<b>Question#:</b>	5
<b>Topic:</b>	GAO
<b>Hearing:</b>	Charting a Path Forward for the Chemical Facilities Anti-Terrorism Standards Program
<b>Primary:</b>	The Honorable Carl Levin
<b>Committee:</b>	HOMELAND SECURITY (SENATE)

**Response:** The Department has not yet made a decision regarding the applicability of the revised risk assessment to previously assessed facilities and is in the process of assessing various options related to that issue.