

July 15, 2013

Nick Abraham  
Legislative Clerk  
Committee on Energy and Commerce  
2125 Rayburn House Office Building  
U.S. House of Representatives  
Washington, DC 20515

Re: Responses to Questions for the Record for “The Chemical Facility Anti-Terrorism Standards Program – A Progress Update” (March 14, 2013)

Dear Mr. Abraham:

SOCMA appreciates the invitation to testify at the above-referenced hearing before the Subcommittee on Environment & the Economy. We are pleased to provide the following responses to the Members’ questions for the record. We apologize for the delay in our response.

The Honorable John Shimkus

**1. Do you think that ISCD is making progress with personnel surety? Is it headed in the right direction?**

A week after the hearing, DHS published a new information collection request (ICR) in connection with the CFATS personnel surety program (PSP).<sup>1</sup> In the almost two years since the previous ICR, ISCD engaged in significant outreach to the CFATS regulated community, which SOCMA appreciates. To some extent, that outreach has resulted in improvements to the program:

- *Limitation to Tiers 1 and 2.* Most important, ISCD has announced that it will limit the PSP for now to Tiers 1 and 2, and would publish another ICR before applying PSP to facilities in Tiers 3 and 4. This is a substantial improvement, as most affected SOCMA member facilities are in Tiers 3 and 4. This approach would allow ISCD to evaluate the implementation of the PSP at riskier facilities, and see what lessons can be learned from the experience, before the burdens of the PSP are imposed on lower-risk facilities.
- *Innovative monitoring alternatives.* The new ICR also announced that facilities may propose innovative alternatives such as video monitoring. Smaller facilities are especially unlikely to have free employees available to escort uncleared

---

<sup>1</sup> 78 Fed. Reg. 17680 (March 22, 2013).

visitors. The ability to use existing, centralized or stationary security personnel to provide “virtual escorting” would make the PSP far less disruptive for many facilities.

While these changes reflect progress, SOCMA remains concerned about two aspects of the PSP:

- *Requiring 48 hours prior notice.* The current ICR never discusses the issue, but it makes clear that DHS expects facilities to submit information for covered individuals 48 hours before giving them unescorted access to restricted areas or critical assets. Chemical facilities frequently have important contractors and visitors arriving upon short or no notice. Such people may have to come on site unexpectedly – for example, if a production unit goes down or otherwise requires emergency maintenance. A requirement that the facility know the identity of the particular individuals who will or may be arriving at the plant in advance would impose a substantial burden. Facilities would also likely suffer collateral or indirect effects from not being able to clear someone as quickly as he or she is needed. Conceivably, a production unit might have to be shut down because it could not be repaired before the requisite minimum prior notice period expired
- *Requiring PSP for individuals possessing TWICs or similar credentials.* The performance standard driving the PSP – Risk Based Performance Standard (RBPS) #12 – is that regulated facilities “[p]erform appropriate background checks on and ensure appropriate credentials for facility personnel, and as appropriate, for unescorted visitors with access to restricted areas or critical assets, including . . . [m]easures designed to identify people with terrorist ties.”<sup>2</sup> DHS currently issues roughly a half-dozen credentials that require, as a condition of issuance, that DHS check the applicant against the Terrorist Screening Database (TSDB) – most notably including the Transportation Worker Identification Credential (TWIC) and the Hazardous Materials Endorsement (HME) to a commercial drivers license. Moreover, DHS recurrently vets these credentials against the TSDB so that it will discover if a credential holder subsequently has been added to the TSDB. In our considered view, a facility has satisfied its obligation under RBPS #12 if it determines that an individual possesses one of these credentials. We believe DHS does not have authority to require such individuals to be subjected to the PSP, which will only increase delays at facilities and raise implementation costs.

**2. How does the recent experience of the regulated community with the CFATS program compare with its experience at the time of the Subcommittee’s last hearing on September 11, 2012? Are there improvements and, if so, what are they?**

Under David Wulf’s leadership, the CFATS program has continued to improve since last fall:

---

<sup>2</sup> 6 C.F.R. § 27.230(a)(12).

- Most important, ISCD continues to inspect and authorize an increasing number of facilities, and has begun inspecting Tier 2 and 3 facilities.
- ISCD also announced approval of an Alternative Security Program, developed jointly by ISCD and the American Chemistry Council (ACC) but available to any CFATS-regulated facility. ISCD's endorsement of the ASP has enormously simplified the process of developing a Site Security Plan (SSP) and has greatly shortened the time it takes ISCD to conduct an authorization inspection.
- SOCMA members' interactions with ISCD inspectors have also continued to improve. Inspectors are providing sufficient details with facilities prior to their arrival onsite, including an itinerary for their visit, which greatly assists facility personnel in planning ahead for the inspector to ensure resources and personnel are available if needed. The amount of time spent by inspectors onsite conducting the facility is also reasonable, with some inspections only taking two to three days. Last, but highly important, inspectors appear no longer to be adhering rigidly to the RBPS Guidance and, instead, are permitting company personnel to explain, from the facility perspective, how they are appropriately implementing their site security plan. On the other hand, and as noted in our testimony, inspectors should give facilities more than the customary 30 days DHS requires now to resubmit revised SSPs following an authorizing inspection (AI). DHS should put in writing explicit consideration of extended time, preferably up to 90 days, for facilities, when requested and on a case-by-case basis, to resubmit revised SSPs. We have heard from at least one SOCMA member that requested from their inspectors more time at the end of an AI and were told by the inspectors that they can request extra time but that they should not expect to be granted it. If ISCD develops a process to consider extra time for facilities, ISCD needs to ensure that its inspectors are fully aware of the process and to ensure requests are considered fairly and transparently.

**3. What is the quality of communication between DHS and the regulated community? Is feedback systematic or based more on occasional, informal contacts?**

DHS and the regulated community interact predominantly through bi-monthly meetings of the Chemical Sector Coordinating Council (CSCC) with ISCD leadership and other DHS officials. We occasionally will meet or have conference calls more frequently as needed. We are generally pleased with this arrangement.

**4. Should feedback from the regulated facilities be more systematic through direct, detailed surveys? Would this significantly improve CFATS?**

SOCMA questions whether regulated facilities would appreciate being regularly surveyed regarding CFATS – such surveys could be distracting and burdensome. (The survey would have to be approved under the Paperwork Reduction Act, a process that would create its own demands on DHS and the regulated community.) We are also not

confident how good the response rate to such surveys would be, for the same reason. In general, we believe that the current system works optimally – member companies of the trade associations that make up the CSCC are able to surface concerns within their associations, and those associations can raise those concerns with DHS individually or via the CSCC.

**5. Overall, both DHS and GAO agree that there is progress on communication with the regulated community – do you think DHS has enabled you to fully understand the CFATS program and how DHS arrives at decisions?**

As a general matter, that depends:

- We feel that we do understand how the DHS evaluates SSPs and conducts inspections.
- Sometimes we understand how DHS makes policy decisions regarding the CFATS program – some explanations are more opaque than others.
- We have very little idea how facilities are tiered, since DHS has classified the methodology and does not explain to facilities why they were tiered as they were. We have generally had the impression that CFATS has gone overemphasized or overweighted the theft and diversion scenario, in effect tiering chemicals, not facilities. Now we see why: DHS has not been taking threat into account for the theft and diversion scenario, and it has not been considering vulnerability for *any* scenario. We look forward to the outcome of the ongoing peer review of the tiering methodology, and hope that it will include some amount of validation or verification of the methodology, rather than just looking at the model documentation.

We believe that DHS should explain to facilities why they were assigned to particular tiers, and where facilities have personnel with security clearances, DHS should explain precisely how the facility was evaluated by the tiering methodology. We note that Section 9(c) of the recent Executive Order on critical infrastructure cybersecurity (EO 13636<sup>3</sup>) says that, when DHS determines that a particular entity is “greatest risk,” it will “ensure identified owners and operators are provided the basis for the determination.” This is a serious due process issue, and DHS should address it.

The Honorable Henry A. Waxman

**1. Do SOCMA members support the consideration of vulnerability in determining the risk tier assignment for a facility, as set out in the National Infrastructure Protection Plan and the Interim Final Rule that created the CFATS program?**

---

<sup>3</sup> Available at <http://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity>.

Yes. By statute, CFATS must be a risk-based program,<sup>4</sup> and the security risk posed by facility is a function of threat, vulnerability and consequences. All three factors must therefore be considered by DHS in tiering facilities.

**2. Do SOCMA members support the two-step process set out in H.R. 2868, so that only threat and consequence would be considered in making the determination of whether a facility is subject to the CFATS regulations?**

No. SOCMA believes that Congress got it right in 2006 and that chemical facility security should continue to be based on risk.

**3. Do SOCMA members support requirements to provide [the reason for a facility's tier assignment and, upon request, information related to the criticality of the facility] to the owners of operators of covered facilities?**

Yes. As noted in our response above to Chairman Shimkus' question # 5, we believe that this presents a serious due process issue. DHS should explain to facilities why they were assigned to particular tiers, and where facilities have personnel with security clearances, DHS should explain precisely how the facility was evaluated by the tiering methodology. Such an explanation should actually help facilities to reduce risk more effectively than at present, because it would allow them to see exactly which changes would most significantly reduce the risk estimated by the tiering methodology. We note that Section 9(c) of the recent Executive Order on critical infrastructure cybersecurity (EO 13636<sup>5</sup>) says that, when DHS determines that a particular entity is "greatest risk," it will "ensure identified owners and operators are provided the basis for the determination." DHS should do likewise under CFATS.

**4. Is there additional information that SOCMA members would want to receive with their tier assignment to increase transparency and accountability in the tiering process?**

Facilities should receive the specific items of information that were considered by the tiering methodology (or DHS staff) in determining the proposed tiering, and the methodology (or at least access to the tiering model interface) so that the facility can determine what tier level would be associated with particular changes at the facility.

---

<sup>4</sup> See Pub. L. 109–295, title V, § 550(a), 6 U.S.C. § 121 note (“[T]he Secretary of Homeland Security shall issue interim final regulations establishing *risk*-based performance standards for security of chemical facilities . . . . [S]uch regulations shall apply to chemical facilities that, in the discretion of the Secretary, present high levels of security *risk*. . . .”) (emphasis added).

<sup>5</sup> See note 3 *supra*.

**5. Do SOCMA members support increasing transparency and predictability in the CFATS regulatory process through the establishment of specific deadlines for the submission of information describing material modifications to facility operations?**

The current CFATS regulations already require facilities to submit a revised Top-Screen within 60 days of making a material modification. *See* 6 C.F.R. § 27.210(d).

The problem associated with material modifications during the early years of the CFATS program was that facilities that experience frequent changes in the presence or quantity of a chemical of interest or in site configurations were being required to submit multiple revised Top-Screens, often well before DHS had responded to prior submissions.

**6. Are all MSTA facilities owned and operated by SOCMA members implementing security measures sufficient to meet the CFATS tier 1 standards?**

SOCMA does not know the answer to this question. SOCMA member companies are required to implement ChemStewards, an environment, health, safety and security performance improvement program that includes external third-party verification. ChemStewards includes a requirement that facilities not in the CFATS program implement a security vulnerability assessment and implement security countermeasures commensurate with assessed risks. Thus SOCMA member facilities regulated under MTSA may well have adopted security measures that go beyond what MTSA requires.

**7. Do SOCMA members support requiring MTSA regulated facilities to meet security standards equivalent to the standards applicable to the tier such facilities would be assigned to if covered by the CFATS program?**

SOCMA would have a number of concerns with this approach. First, the Coast Guard has done a good job of standing up the MTSA program and administering it. We question the extent to which the Coast Guard currently has the resources and personnel to in effect superimpose CFATS onto the MTSA program. We suspect that the Coast Guard does not support that change. Second, we would be concerned about transposing to the MTSA program the identified flaws in the CFATS tiering process. Third, we would oppose any program under which ISCD was authorized to overrule or redirect the Coast Guard with respect to MTSA facilities. Each component should remain independent of the other.

**8. How many facilities owned or operated by SOCMA members have reduced their chemical holdings to “tier-out” of the CFATS program?**

We have never attempted to gather this information systematically from our membership. Anecdotally, a sizable percentage of the SOCMA member company facilities that completed a Top-Screen have since exited the CFATS program.

**9. What chemicals, processes, or technologies, have those facilities used to reduce their holdings of substances of concern?**

Again, we have never attempted to gather this information from our members. In many cases, our members would regard that information as having competitive value and would not want to share it.

Thank you once again for the opportunity to respond to these questions. If you have any questions about them or need any further information, please do not hesitate to contact me at 202-721-4122 or [allmondb@socma.com](mailto:allmondb@socma.com).

Sincerely,

A handwritten signature in black ink that reads "WE Allmond" with a stylized flourish at the end.

William E. Allmond, IV  
Vice President, Government and Public Relations