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The Honorable John Shimkus
Chairman
U.S. House Subcommittee on Environment and Economy
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Shimkus:

AFPM appreciated the opportunity to provide its perspective during the March 14th, 2013 hearing entitled “the “Chemical Facility Anti-Terrorism Standards (CFATS) Program – A Progress Update.” AFPM also appreciated the opportunity to address several questions submitted for the record.

Please feel free to contact me or my staff, Suzanne Gillen at (202) 457-0480 or sgillen@afpm.org with any questions. Again, thank you for the opportunity to share AFPM's views.

Regards,

Charles T. Drevna

The Honorable John Shimkus

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

No. AFPM members still have several concerns that need to be addressed on personnel surety. Congress intended that the Risk-Based Performance Standard 12 on Personnel Surety allow facilities the flexibility to determine the most efficient manner to meet the standard. Instead, DHS again proposed a personnel surety program stating how the regulated facilities are expected to meet the standard. AFPM recommends that DHS follow Congressional intent and personnel surety should be written as a risk-based performance standard.

There are still several issues that need to be addressed on personnel surety:

- **Submitting additional PII for federally vetted individuals is burdensome:** Facilities should have the option to use already established federally secure vetting programs, such as the Transportation Worker Identification Credential (TWIC), to satisfy CFATS without also submitting additional personally identifiable information (PII) to DHS. Submitting additional PII, such as a name, contact information, and date of birth, would be burdensome and unnecessary given that this type of information would already be submitted for previously vetted individuals and not further enhance security. AFPM appreciates that DHS has made an improvement to recognize the TWIC if it is verified with a reader. However, this is still a burdensome requirement for owners and operators of a facility to submit PII on individuals if a TWIC reader isn't used to verify the TWIC even if the individual is already federally vetted. If the goal is to lessen the burden and improve the process for those individuals who are already federally vetted, then DHS should allow for the TWIC to satisfy meeting the standard even without a reader. Submitting additional PII on individuals who have already been federally vetted and who also have a TWIC is burdensome to both DHS and industry and would be a wasteful and an ineffective use of agency and industry resources.
 - **Providing 48 hours advance notification and submitting PII to DHS for personnel access:** While DHS has limited the 48 hour advance notice requirement to tier 1 and 2 sites, there is still a burden for those tier 1 and 2 sites to have to notify and submit PII to DHS with 48 hours advance notice of personnel accessing a facility. In addition to the burden, it is difficult to provide DHS with 48 hours advance notice for some instances involving contractors or emergencies. For example, if there is an emergency with equipment failures that need a quick turnaround to fix the problem or a change in subcontractors, then it may be necessary to provide access to those personnel without being able to provide DHS with 48 hours advance notice. However, those personnel may already be federally vetted with a TWIC so there really is no need to provide their PII since DHS already has that on record.
- 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?**

Yes, AFPM acknowledges that there has been far greater outreach and much more detailed discussions by DHS with the regulated community this past year than previous years. However, it is still too early to tell the outcomes of that outreach since we haven't seen any final results yet. Specifically, AFPM is encouraged that DHS has conducted outreach meetings on how to improve the Topscreens, Site Vulnerability Assessments and Site Security Plans and created a peer review panel to review the site tiering methodology and modeling. These are two areas that AFPM had suggested that DHS re-engage industry two years ago.

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

DHS has had much better communication with stakeholders this past year than previous years. The method and the quality of the communication between DHS and the regulated community vary since it is sometimes informal and other times systematic. For example, the communication is systematic when DHS provides regular updates at trade meetings and at both the Oil & Gas and Chemical sector council meetings. However, there are other times when there will be an informal response from DHS, such as responding to emails, calls or telling information that would affect all industry to just one trade association.

However, the messages from DHS are still not coherent and reliable because there are still areas where the communication from DHS is inconsistent and should be improved. For example, the communications regarding the start-up of the clearance program has been disjointed at best. Considering the recent assessment by DHS of the cyber security threat, the clearance program start-up and process needs to be clearly communicated. To date that communication to industry stakeholders has largely been disjointed and inconsistent leaving the industry cyber security experts in clearance limbo. It is critical for cyber security of our nation's critical infrastructure that the process for this program gets communicated properly and clearly.

Another example is the use of certain terminology by DHS. For example, many in the regulated community, and we suspect Congress, are confused by how DHS interchangeably uses terms including "approved inspections" versus "authorized inspections" and "authorized plans" versus "conditional plans." Taken as a whole they are being used to show progress when that may not really be the case. AFPM recommends that DHS be clear and precise to Congress when using these terms.

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

Given the backlog that DHS is experiencing with implementing the core CFATS program, AFPM does not think DHS will have the time or resources to review surveys. Instead of surveys, DHS should have the inspectors and protective security advisors continue their enhanced engagement with the sites. AFPM encourages DHS to continue with the pace of their recent outreach efforts which has significantly increased and improved over the past year. DHS should also be more systematic in their outreach to all stakeholders.

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?

AFPM is encouraged by the recent increased communication with the regulated community on many aspects of the CFATS program. However, greater transparency and informed discussions with the regulated community continue to be necessary to better understand how DHS arrives at decisions. This would lead to less confusion and quicken implementation for all parties. For example, AFPM recommends that DHS better communicate the reasons behind the decisions for site tiering.

AFPM is strongly concerned that the DHS risk modeling used for setting risk tier levels for facilities in CFATS is seriously flawed. AFPM continues to ask DHS to be more transparent regarding DHS risk modeling and risk tier level determinations. The risk modeling of the CFATS sites is the foundation of the CFATS program and AFPM is encouraged that DHS established a peer review panel to resolve the modeling issues. However, we again question why this was not done sooner as flaws in the risk modeling have been brought to DHS attention numerous times.

In the National Academies of Science's (NAS) 2010 "Review of the Department of Homeland Security's Approach to Risk Analysis," the NAS comments multiple times on the significance of stakeholder involvement and transparency in effective risk modeling. While NAS is commenting on risk assessment practices within DHS, the comment is directly applicable to CFATS implementation. The NAS recommendations for transparency and stakeholder input would benefit not only the risk assessment practices within the ISCD, but also provide substantial improvement on rule implementation.

The Honorable Henry A. Waxman

When the Committee drafted H.R. 2868 in the 111th Congress, several provisions were included to guide the tiering process for the CFATS facilities.

Section 2102 of the bill directed the Department of Homeland Security to first make a list of high risk facilities, based on a consideration of threat and consequence including adverse effects to human health, the environment, critical infrastructure, public health, homeland security, national security, and the national economy, as well as the geographic proximity to large population centers. Facilities on the list would then be sorted into tiers by the Department based on risk. Under this two step process, vulnerability would be considered in assessing risk and placing a facility into a tier, but not in determining whether a facility fell within the universe of CFATS regulated facilities. By removing vulnerability from the threshold determination of what facilities are covered by CFATS, this process might address the concern that a facility could cycle in and out of the regulated universe by adding or removing security measures.

- 1. Do AFPM 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?**

Yes, vulnerability is an extremely important component in determining the risk tier assignment for a facility. The risk equation consists of three elements and all of them must be included when calculating risk, including consequence, vulnerability and threat. A facility that has implemented enhanced security measures is less vulnerable and therefore should be in a lower risk tier than a similarly situated facility that has not deployed enhanced security measures. Clearly, vulnerability is a factor in the risk equation and must be evaluated if DHS wants to accurately determine and sort tiers based on risk. If DHS ignores vulnerability and instead designates every site as having the same constant vulnerability, then DHS is ignoring the security systems and improvements that individual sites have implemented.

2. Do AFPM 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. For the reasons stated in question # 1, we cannot support a process that ignores facility vulnerability. Threat, consequence and vulnerability need to be considered when calculating the risk and determining whether a facility is subject to the CFATS regulations.

Section 2102 of the bill also outlined requirements for the Secretary of Homeland Security to provide owners and operators of covered facilities with the reason for the facilities tier assignment, and upon request, information related to the criticality of the facility, the proximity to other critical infrastructure, and the potential human consequences of a successful attack.

3. Do AFPM members support requirements to provide that information to the owners and operators of covered facilities?

Yes, AFPM members would support requirements for DHS to provide that type of information to the owners and operators of covered facilities because that would mean DHS would be transparent and provide details on the process. Some information provided upon request would be helpful to a facility's security risk mitigation efforts, such as the critical infrastructure near a site which may or may not be germane to the security of that site.

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

Yes, AFPM members would want to receive additional information that explains the methodology and framework for determining the risk tiering level. Currently, the process is not transparent and the methodology for the risk tiering process is not explained.

During the third panel of the hearing, you and other witnesses testified that under the existing CFATS framework, the regulatory process must be started over from the beginning any time a change is made in the facility. Section 2103 of H.R. 2868 called on the Secretary of Homeland Security to establish specific deadlines and requirements for the

submission of information describing material modifications to a covered facility's operation that may affect the security of a facility.

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

As the process is currently, if a site moves up or down a tier they would have to go through the whole CFATS process again and resubmit information to DHS. AFPM suggests that there is no tangible reason to do this unless there is a major change at a site that would affect their tiering level because it wastes resources of both industry and DHS. AFPM encourages DHS to re-engage industry on this issue as we believe a workable solution can be developed that would lessen the burden on both DHS and industry. AFPM submitted a proposal on how they might fix this issue to DHS in 2010 but has never received a response from DHS. In addition, if mandated, timeframes or deadlines need to be reasonable and not open to any outside litigation.

During the hearing, Timothy Scott of Dow Chemical testified that all Dow facilities regulated under the MTSA program are currently meeting security standards for tier 1 CFATS facilities, on a voluntary basis. H.R. 2868 would have ensured that all MTSA facilities were held to the appropriate risk-based standards to ensure an equivalent level of security for substances of concern at all facilities, while maintaining the Commandant of the Coast Guard as the primary regulatory authority for MTSA facilities.

6. Are all AFPM members companies implementing security measures at MTSA facilities sufficient to meet the CFATS tier 1 standards?

AFPM does not have member site information to support whether some facilities are or are not implementing security measures at MTSA facilities sufficient to meet the CFATS tier 1 standards. MTSA security measures are appropriate for those facilities that are regulated under the U.S. Coast Guard. AFPM does not support harmonization of the MTSA and CFATS programs and believes they should remain separate to avoid jurisdictional conflicts and duplication of efforts. However, AFPM recognizes that MTSA is an effective program and there are good lessons to be learned for implementing a truly risk-based program.

7. Do AFPM 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?

Currently the CFATS risk modeling tiering methodology is being peer reviewed so it is premature to even remotely consider having MTSA regulated facilities meet security standards equivalent to the standards applicable to the tier such facilities would be assigned to if covered by the CFATS program. MTSA security measures are appropriate for those facilities that are regulated under the U.S. Coast Guard. However, while MTSA is an effective program, it would be counterproductive to have MTSA facilities reassessed using CFATS methodology, particularly before some of the issues with the CFATS program have been addressed.

One frequently cited measure of success for the CFATS program is the number of facilities reducing their chemical holdings to no longer be deemed high risk.

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

AFPM does not track our members tiering because specific site tiering is Chemical–terrorism Vulnerability Information (CVI). In general, we are aware that some of our member sites have tiered down or tiered out by using a variety of methods. AFPM doesn’t keep individual member data because it is CVI. AFPM supports the ability to tier-down or tier-out a facility based upon changes made on-site; however, each facility is unique and the ability to reduce chemical holdings or deploy specific security risk mitigation measures varies from site-to-site.

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

See above response to question #8. AFPM members have used a variety of ways to reduce their holdings of substances of concern including but not limited to just in time delivery, volume reduction, shifting storage, and managing inventory. AFPM strongly notes however that each facility is unique and the ability to reduce chemical holdings or deploy specific security risk mitigation measures varies from site-to-site with many factors that must be considered.