



April 29, 2013

Mr. Nick Abraham
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building,
Washington, DC 20515

Re: The Chemical Facility Anti-Terrorism Standards Program – A Progress Report

The American Chemistry Council (ACC) appreciates this opportunity to respond to members of the Committee regarding the recent oversight hearing on March 14, 2013 before the Subcommittee on Energy and Power. Attached is our formal response to questions for the record. This response was prepared by ACC in conjunction with Mr. Tim Scott, Chief Security Officer with the Dow Chemical Company who testified on behalf of Dow and the ACC.

ACC commends the Committee for taking a strong leadership role and providing oversight on this important Chemical Security Program. While ACC believes that DHS has made progress, more work needs to be done. ACC stands ready to assist members of the Committee and DHS to improve the CFATS program and advance the state of chemical security across the Nation.

Regards,

A handwritten signature in blue ink that reads "Walter Moore". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Walter Moore
Vice-President, Federal Affairs



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The Honorable John Shimkus:

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

Since DHS withdrew its personnel surety program (PSP) proposal from the Office of Management and Budget (OMB) this past summer, DHS has done a commendable job in reaching out to stakeholders and incorporating many of the ideas that will help streamline the program and reduce burden on the regulated community. By leveraging existing programs, such as the Transportation Worker Identification Credential (TWIC), and by allowing for corporate and third-party submissions for vetting against the Terrorist Screening Database (TSDB), a significant reporting burden will be minimized, while the integrity of the program is maintained.

The goal of PSP is to ensure that personnel who have access to sensitive areas of high-risk chemical facilities do not pose a security threat to the facility, its workers or to the surrounding community. However, the current proposal may not provide the level of assurance necessary to ensure such threats are minimized. This is due to the fact that DHS has not provided any detail regarding their vetting procedures, including how and under what circumstances DHS will notify a facility that their personnel have been successfully vetted and how matches against the TSDB are resolved. It is crucial, that such personnel are vetted and cleared *prior* to being granted access to such sensitive areas. ACC believes that DHS must provide proper and timely notification to the covered facility that such persons have been vetted and are cleared for access *prior* to entry.

ACC is optimistic, given the changes made in this recent proposal, that a workable PSP is achievable. Until such time, however, no site security plans can be completely authorized or approved. We urge members of the Committee to address this important issue so that all high-risk chemical facilities are safe, secure and fully compliant with all 18 CFATS Risk Based Performance Standards.

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?

Since the last CFATS oversight hearing on September 11, 2012, ACC published its ASP Guidance Document for CFATS Covered Chemical Facilities. This document was the culmination of a year-long initiative including ACC, members of the regulated community and

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DHS. Since then, we understand that several covered facilities have opted to submit an ASP in lieu of a SSP. Anecdotal reports from ACC members on the process indicate an improved clarity in compliance requirements and in conversations with DHS as a direct result of using the ASP.

Similar anecdotal reports from ACC members indicate that recent authorization inspections have been conducted in a far more efficient and effective manner, compared to prior inspections. The inspection staff is more knowledgeable, better trained and focused on specific compliance issues, requiring less time and manpower to cover the same material.

Communications between DHS and the regulated community have improved. This has been evidenced by the recent stakeholder engagement during the Personnel Surety Program (PSP) review leading up to their latest proposal. Additional, DHS has recently launched a series of focus group sessions around the country to gather feedback from the regulated community on ways to improve their suite of online CSAT tools. These sessions should provide DHS with the information and ideas that will greatly improve the effectiveness of the CFATS program.

Lastly, DHS has commissioned a third-party Panel Review of its Risk Tiering Methodology. This panel includes risk assessment experts as well as security and regulatory experts. In addition, members of the regulated community were given a chance to present their experiences with the risk tier process to the panel.

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

Depending on the nature of the issue, the feedback provided to DHS has been through both systematic and informal information sharing. For example, DHS has used a number of systematic approaches to collect input on various aspects of the CFATS program including focus group sessions, working groups, peer review and Federal Notices. Additional, DHS has increased its outreach to specific members of the regulated community, trade associations and with the Chemical Sector Coordinating Council.

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

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DHS could improve its ability to communicate with the CFATS regulated community as a whole, and feedback in all forms can be helpful to improve the CFATS program. Depending on the nature of the issue, a detailed survey might be the right approach. However, other forms of information collection may provide better data. For example, DHS does not seem to have the ability to send or collect information targeting the CFATS regulated community as a whole. The result is an uneven understanding about the current status of the program and compliance expectations.

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?

While DHS has made improvements in enabling the regulated community to more fully understand the CFATS program, more progress can be made. In particular, the process for assigning a risk tier to a covered facility is unclear and may produce incorrect results.

All factors used by DHS regarding the assignment of a risk tier for a CFATS covered facility are not shared with the facility. This lack of transparency between the CFATS process and the regulated facility continues to be a concern and is contrary to an effective security partnership. In the CFATS tiering process, the regulated facility is not made aware of the following factors:

- How information provided to DHS relates to their security posture or potential vulnerabilities at the facility level;
- How DHS analyzes site specific information provided by the facility;
- How tiering decisions are made;
- How changes made to the facility or to security practices will affect their risk level (tier)

The responsibility of the facility security manager is to understand the risks and vulnerabilities at his location and make prudent, well informed risk mitigation and security investment decisions. ACC recommends that, if requested by a covered facility, DHS should share all factors associated with their risk tier assignment. The covered facility should have the opportunity to engage DHS and provide information to ensure that the facility is being tiered properly and that facility security management is well informed and prepared to make important security decisions.

6. GAO testified that it will take 7 to 9 years more to fully implement CFATS.

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a. Could using Alternate Security Programs (ASPs) speed things up?

The ASP Guidance Document developed by ACC in conjunction with the regulated community and DHS provide the ability to increase the pace of CFATS implementation. The ASP initiative is an excellent example of how an effective public/private security partnership can create smart regulatory solutions that will benefit DHS, the regulated community and the surrounding community.

The DHS Site Security Plan (SSP) has been often identified as a roadblock in moving the CFATS program forward, which is a cumbersome process, marked with duplicative reporting and unclear questions regarding measures to minimize security risk at a covered facility. To overcome this, the ASP option provides a more efficient alternative.

ACC launched the ASP initiative in November of 2011 with the goal of providing an effective option for CFATS facilities to develop and submit security plans in an efficient manner by minimizing duplication and reducing the effort required to properly assess and audit plans for approval. ACC worked with DHS and members of the regulated community for more than a year and in December of 2012 published the ASP Guidance Document and Template. Available for free to the public, the ASP Guidance Document and Template provides guidance on how to create an effective security plan for submission to DHS, which clearly demonstrates a facility’s compliance with the 18 Risk Based Performance Standards (RBPS), while providing an operational plan that can be used by site personnel as well as DHS during an inspection.

While DHS has made progress in moving CFATS implementation forward, more needs to be done. Existing industry security programs, such as the ACC Responsible Care Security Code, should be recognized by DHS under their ASP authority as meeting initial hurdles for CFATS authorization, thus streamlining and prioritizing reviews. DHS would still be required to verify compliance by conducting a final site inspection. ACC believes this process could free up DHS resources so they can focus on those facilities and plans needing the most attention.

Another opportunity for efficiency is the “corporate review.” Companies who have multiple CFATS facilities typically operate under a single corporate procedure for many of the Risk Based Performance Standards. Cybersecurity and site security escalation processes are two

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common examples. Currently, CFATS inspections cover the same information, site-by-site, instead addressing the issue once at a corporate level. Corporate reviews can be utilized by DHS to cover issues once, reducing the redundancy and improving the pace of inspections.

b. Is there any security trade-off between a CFATS Site Security Plan and an ASP?

No, there is no security trade-off between an SSP and an industry ASP. The ASP does not change a covered facility’s compliance obligations under the CFATS regime. If anything, an ASP provides a security benefit by providing a clearer more complete and understandable description of a site’s security program and how it complies with the 18 Risk Based Performance Standards. In addition, the final product results in an “auditable operational document” that both the site security personnel, as well as DHS inspectors can use to inspect the facility for compliance. This is not the case with the conventional SSP.

The Honorable Henry A. Waxman:

1. Do ACC 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?

As discussed in question 5 above, DHS does not share all information related to the assignment of a risk tier with the covered facility, including vulnerability information. This lack of transparency between the CFATS process and the regulated facility continues to be a concern and is contrary to an effective security partnership.

Vulnerability assessment is a core element of an effective security risk management program. All members of the ACC are required to conduct security vulnerability assessments (SVAs) as part of their obligation under the ACC Responsible Care Security Code, which is requirement of membership. Results from the SVA provide the relevant information to address in their site’s security plan. It also helps prioritize capital and security investments to those areas needing the most attention.

2. Do ACC 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?

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Under CFATS today, facilities first need to submit information to DHS regarding security risk. This information may reflect potential consequences or vulnerabilities to a terrorist attack or incident. This includes, for example: information concerning the nature of the business and activities conducted at the facility; the names, uses storage conditions and other information concerning the chemicals at the facility; the facility’s security, safety and emergency response practices, operations and procedures; and information concerning incidents, funding and other matters that bear on the effectiveness of the security, safety and emergency repose practices. After DHS receives this information, it is evaluated by DHS to determine if the information provided indicates the potential that a terrorist attack involving the facility could result in significant adverse consequences for human life or health, national security or critical economic assets. If the facility presents a high level of security risk, the facility is then placed in a risk-based tier.

After being placed in a tier, the facility must submit a security vulnerability assessment, which includes: the identification and characterization of critical assets; identification of hazards and consequences of concerns for the facility; a description of possible internal and external threats; identification of potential security vulnerabilities and effectiveness of existing countermeasures; an assessment of the degree of risk to the facility in terms of the expected effect on each critical assets and the likelihood of success of a terrorist attack; and an analysis of strategies that reduce the probability of an attack or the degree of success, and feasibility and effectiveness of such strategies. After review of this information, DHS makes a final decision as to which tier of risk the facility belongs.

ACC members believe that DHS should ensure that they effectively execute their mandate under CFATS. DHS must first conduct the detailed and methodical process to establish whether a facility is indeed a high risk facility and then determine what degree of risk is present, in accordance with the requirements set forth in CFATS.

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

ACC believes that DHS could provide better information to regulated facilities on their risk tier and compliance. ACC member companies are eager to implement CFATS in a timely fashion, including more rapid authorization inspections and plan approvals. While DHS has shown improvement in this area, particularly with the level of engagement by the DHS field inspectors, more needs to be done.

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For example, DHS should leverage existing industry security programs such as the Responsible Care Security Code. Industry programs that require members to have a security management system in place and are audited by a certified third-party auditor could be used by DHS to help expedite some of the early CFATS authorization steps. This would help DHS focus their resources where they are needed most.

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

ACC believes that DHS should be more forthcoming with the covered facility regarding all factors related to their risk-based tiering. The security manager at the site has the ultimate responsibility for the safety and security of its operations and he or she also has the authority to make informed risk mitigation and security investment decisions. Therefore, the information that the security manager needs to know in order to devise, implement and maintain an effective security program that addresses the risks at hand must be made available to the covered facility security manager. This issue is at the core of an effective security partnership.

5. Do ACC 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?

In order for industry to succeed, regulatory requirements must be clear and consistently applied by the agency. Standards need to be clear and compliance requirements need to be uniformly enforced. If a covered facility is engaged in a constant guessing game as to whether it is in compliance with the law, then money, time and effort may be needlessly wasted when it could be put to better use providing jobs, producing goods, or enhancing security and safety in new ways. If an agency is rushed to make a determination, the decision may not be based on a full evaluation of relevant information, and it may be flawed. An appropriate amount of time needs to be spent assessing all of the facts at hand, so the right regulatory determination can be made by the agency. ACC believes that DHS has to demonstrate that it has achieved this balance throughout the CFATS program, although there are aspects where it has performed better than others. ACC hopes that with time and with experience, DHS will be able to make timelier, well-reasoned, decisions in a fashion that provides industry with the predictability and certainty it needs to succeed.

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

Mr. Scott’s testimony during the hearing was in response to an allegation made by a panelist that MTSA-regulated facilities in general and one specific Dow site were not adequately secured. Mr. Scott’s response was specific to the Dow site that was mentioned and was speaking as the Chief Security Officer of The Dow Chemical Company.

Dow adopted and implemented the Responsible Care Security Code as it was first established by the American Chemistry Council, and implemented the Code on a global basis at all sites in order to achieve a consistent, global and corporate approach to our security programs and processes. Dow also conducted internal SVAs on a global basis. The Security Code includes a risk-based tiering process for sites. When CFATS and MTSA – along with other regulatory guidelines or requirements around the world – Dow complies with all regulations and uses the Security Code as a guideline for consistency when there are gaps in the risk assessment or tiering process or between the regulations. The risk-based performance standards developed by DHS were a good guideline to follow and implement in our corporate security guidelines and give us a consistent corporate approach while meeting the various government regulations. This is Dow’s approach to globally integrated security program.

7. Do ACC 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?

The focus of the Chemical Facility Anti-Terrorism Standards and the Maritime Transportation Security Act are very different. CFATS is focused on physical attack on a manufacturing or storage facility, theft or diversion of chemicals for use as weapons, or insider threats that could cause a significant operational event at a site. MTSA is focused on the security of marine operations facilities and the movement of products to/from/through those marine operations. Both standards meet their intended purpose. While ACC does not support merging MTSA and CFATS programs, ACC has consistently supported the merging of appropriate aspects of these two programs as long as the merger improves efficiency and security without diluting the primary purpose of either program.

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

ACC conducted a CFATS performance survey in the summer of 2011. When asked if their company had reduced the onsite quantity of any CFATS-regulated Chemical of Interest (COI), a majority of respondents said they had. For some respondents, their stated reason was purely for business purposes. For others it was to reduce their CFATS risk profile and/or reduce the number of facilities subject to CFATS regulation.

Chemical facilities routinely perform safety and security risk assessments for a variety of reasons including: compliance with federal, state and local laws; to remain competitive in the marketplace; to minimize insurance premiums; to protect workers and the community; to improve manufacturing efficiency and to reduce liability exposure. For whatever reason, the overall goal of a facility's risk management program is to produce products for the consumer market that improves the quality of life, provide safe employment for the community while minimizing their impact on the environment.

For members of the ACC, the Responsible Care Program requires regular assessments of security, safety and environmental risks and to minimize those risks through the implementation of measures, including the reduction of onsite chemical holdings.

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

The results of the ACC survey found that a majority of respondents regularly assess chemical alternatives or processes to reduce their risks. For those who were able to reduce their holdings, some consolidated their chemical holdings at one location. Others changed the way they conducted business, allowing them to maintain smaller inventories on-site (just in time production). In many cases, the technical feasibility or cost associated with process changes made it impractical. Potential risk-shifting was also noted as reason that limited their reduction of onsite chemicals, in the case of increased shipments. Lastly, product quality/customer specifications were another limiting factor.