



Chemical Security Group LLC

**STATEMENT OF STEVE ROBERTS  
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**BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON ENVIRONMENT**

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**THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS  
(CFATS) PROGRAM – A PROGRESS REPORT**

**JUNE 14, 2018**

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Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Subcommittee, thank you for convening today's hearing on the Chemical Facility Anti-Terrorism Standards (CFATS). I appreciate participating as a witness on this important topic.

As a security consultant and lawyer, I have been fortunate to assist and visit many CFATS-regulated facilities since the very beginning of the program in 2007. Together with my colleagues, I have seen the development and practical application of CFATS at dozens of chemical plants, oil refineries, chemical and petroleum terminals, paint and coatings facilities, food and agriculture operations, aerospace and defense locations, and chemical distributors in the last eleven years. Most of these facilities are owned and operated by larger corporations, but my experience has also included smaller businesses. Against this backdrop, I am pleased to offer the following comments, observations, and suggestions:

**I. REAUTHORIZE CFATS FOR MULTIPLE YEARS**

The *Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014* (P.L. 113-254) was the first standalone CFATS legislation, but will end by its own terms in the coming months. It is imperative that Congress reauthorize the program for multiple years and not allow CFATS to lapse. Industry requires the certainty of multi-year CFATS reauthorization to ensure the continuity of CFATS-driven security measures and to make investments in new ones. Multi-year reauthorization will also give the Department of Homeland Security (DHS), and, specifically, the Infrastructure Security Compliance Division (ISCD), the sustainability it needs for programmatic development.

Continuity is particularly important now – since ISCD initiated the Chemical Security Assessment Tool (CSAT) 2.0 process in September 2016, the number of CFATS-affected facilities has increased from approximately 2,962 as of September 2016 to approximately 3,389 as of May 2018. Of these 427 facilities, many have recently implemented (or are in the process of

implementing) CFATS site security plans that require additional measures to protect one or more Chemicals of Interest (COIs). From direct and recent experience, the ability of facilities to commit capital (which often must be allocated and budgeted over one or more fiscal years) for CFATS security measures, such as fencing, cages, cameras, access control systems, or alarms, would be impeded if the underlying CFATS program lapsed, expired, or otherwise had an uncertain future.

Because the CSAT 2.0 risk tiering process has resulted in an increase in the number of facilities regulated for a Release COI (and, specifically, for Toxic Inhalation Hazard chemicals such as Chlorine, Ammonia, and Hydrogen Fluoride), the nature of the security enhancements necessary to meet the applicable Risk-Based Performance Standards (RBPSs) may be larger or more complex. For example, a facility regulated only for a Theft and Diversion COI (such as cylinders of Chlorine) could meet certain physical security RBPSs metrics simply by locking the cylinders in a metal cage and implementing robust access control. The same facility, now also regulated for Chlorine stored in large aboveground tanks as a Release COI, may require enhanced security measures at the facility's perimeter. These security projects are more complex, costly, and often can take one year or more to complete.

The increase in the number of CFATS-regulated facilities, and the changes in tier rankings and COI Security Issues experienced by many facilities, result directly from ISCD's execution of what Congress directed. The CSAT 2.0 process implements the requirement for ISCD to "...develop a security risk assessment approach and corresponding tiering methodology for covered chemical facilities that incorporates the relevant elements of risk, including threat, vulnerability, and consequence" that was imposed by the *Protecting and Securing Chemical Facilities from Terrorist Attack Act of 2014*. It would be unreasonable to require these facilities, many of which have recently developed new or updated CFATS-compliant security plans and have

committed to security enhancements just in the last 18 months, to operate under a cloud of legislative uncertainty.

## **II. FURTHER ENHANCE TRANSPARENCY IN RISK TIER DETERMINATIONS**

The launch of CFATS in 2007 and the ensuing several years were replete with programmatic challenges, a poor software interface, and often long periods of silence between the time a facility submitted CFATS materials to ISCD and when it received a response. In contrast, CSAT 2.0 represents significant progress. It is easier to use, facilitates program management for companies with multiple CFATS-regulated facilities, and is more efficient (e.g., user role changes are completely electronic; previously, facilities had to print, sign, and fax certain information to ISCD).

Through CSAT 2.0, ISCD has also improved the transparency of its risk determination process to help the regulated community better understand why a facility may be tiered. In addition to a *CFATS Tiering Results Update* webinar and a *Tiering Methodology Fact Sheet*, ISCD is willing to provide a “technical consultation” to discuss, at a high-level, the factors used to make tiering decisions. While this does not change the outcome (i.e., the facility still must develop a CFATS security plan unless there was a mistake in the data submission or analysis), the mere fact that ISCD is willing to engage in dialogue is constructive and helpful. Dialogue and engagement were not readily possible or welcomed by ISCD in the initial years of the program.

This is not to suggest that I, or the facilities for which I work, always agree with ISCD’s perception of risk, especially in the context of Release COIs that are Toxic Inhalation Hazards. I have had many discussions with facilities now deemed high-risk for a Release-Toxic COI (e.g., Ammonia) as a result of ISCD’s new CSAT 2.0 process. Under CSAT 1.0, ISCD did not consider these facilities high-risk or, if they were high-risk, ISCD assigned them to a more favorable risk-

tier. When facility management asks whether it can challenge a facility's risk tier assignment, I must advise that the CFATS regulation does not permit a facility to appeal a tiering decision.

Additional transparency regarding how CSAT 2.0 calculates risk "scores" in a particular instance, however, might result in fewer regulated facilities and a more focused application of resources – and lower overall risk. By way of example, if a facility knew that the presence of secondary containment would revert a facility to its prior (non-CFATS) status, then management could make an informed business decision: does the cost of constructing secondary containment to mitigate the consequence of a Toxic Inhalation Hazard release to the facility and the surrounding area justify the benefit of less regulation?

Toward this end, a tiering review process that is more formal than a technical consultation, but less than an outright appeal (which could possibly swallow ISCD's ability to implement the program), would be beneficial for facilities with good cause and would complement the other CSAT 2.0 improvements. Currently, the statute says that "[t]he Secretary shall share with the owner or operator of a covered chemical facility any information that the owner or operator needs to comply with this section." Congress might expand this language to create a clear obligation for ISCD to share with a facility a more precise reason for its tier assignment.

### **III. A CFATS RULEMAKING IS REQUIRED TO UPDATE THE REGULATION**

The CFATS regulation has not changed since it was first published in April 2007. Despite this, the practical and operational application of CFATS has changed in the ensuing eleven years. While ISCD issued a CFATS *Advance Notice of Proposed Rulemaking* in August 2014, a *Notice of Proposed Rulemaking* has still not been issued. According to the Spring 2018 *Unified Agenda of Regulatory and Deregulatory Actions*, this rulemaking has been relegated to DHS's list of Long-Term Actions. Congress can and should accelerate this process by directing DHS to publish

proposed and final CFATS rules – or a determination that no changes are necessary – by dates certain. Otherwise, the prospect of regulatory updates before 2020 (at the earliest) is unlikely.

Because a rulemaking has not occurred, ISCD and industry are both disadvantaged. ISCD must rely on instructions, guidance, a handful of advisory opinions, and awareness materials to implement its evolving policy priorities, while certain regulatory questions important to industry remain unresolved. For example, RBPS 9 of the CFATS regulation requires a facility to “[d]evelop and exercise an emergency plan to respond to security incidents internally and with assistance of local law enforcement and first responders.” Because CFATS is a performance-based regulatory scheme, DHS cannot be prescriptive in interpreting the meaning of the phrase, “with the assistance of local law enforcement and first responders.”

For the last several years, however, ISCD has made law enforcement outreach and engagement between a regulated facility and the law enforcement agency with primary response jurisdiction a policy priority. As recently as May 2018, ISCD released a new Fact Sheet on *Resources for Law Enforcement and First Responders*. Whether and to what extent a CFATS-regulated facility has engaged its local police department or sheriff’s office is a recurring inspection question. This is done for good reason and with near universal support of CFATS-regulated facilities – but ISCD cannot direct that a facility do so in a specific manner or at a specific frequency. It is certainly reasonable to assume that many within the regulated community would support ISCD including, in a future rulemaking, a more direct (and prescriptive) requirement for a CFATS-regulated facility to engage local law enforcement on a recurring basis.

As another example, the CFATS regulation states that, “[i]f a covered facility makes material modifications to its operations or site, the covered facility must complete and submit a revised Top-Screen to the Department within 60 days of the material modification.” Since the inception of the CFATS program, industry has sought clarification of what constitutes a “material

modification.” It is clear that the reduction of a COI below its Appendix A reporting trigger (or the complete removal of a COI) is a “material modification.” When to file a Top-Screen – and when not to file a Top-Screen – at other times remains opaque.

For example, CFATS requires a facility to file a Top-Screen if it has 400 pounds or more of Hydrogen Peroxide at or above 35% concentration in a transportation package (e.g., a drum). Consider a facility that needs 500 pounds of 50% Hydrogen Peroxide for a short-term pilot project, thereby triggering a Top-Screen filing. Assume that the facility acquires the chemical on June 1. By June 8, all of the Hydrogen Peroxide has been consumed. By regulation, a facility must file a Top-Screen to report a new COI within 60 days, or by August 1 in this example, even though the Hydrogen Peroxide has not been onsite for weeks. The facility must then file a superseding Top-Screen indicating that the COI is gone. This example has been perplexing for years and is one, among many, that highlights the need to update the regulation to clarify key operational aspects of the rule.

Similarly, the list of COIs, contained in Appendix A to the rules, has not changed since its publication in November 2007. A new rulemaking would enable ISCD to make adjustments to the COIs, including amounts and concentrations, based on updated risk profiles and objective standards. Certain oxidizers, such as Hydrogen Peroxide, may be adjusted downward if ISCD has a reason to justify that they may be used as an effective Improvised Explosive Device precursor at an amount or in a concentration less than what was identified in 2007.

Alternatively, industry would expect some COIs to drop from the Appendix A list entirely or experience other changes in their reportable amounts. ISCD set the reporting trigger for all but one Release-Flammable COI at 10,000 pounds. Yet, under CSAT 2.0, I have yet to see ISCD tier a facility for a Release-Flammable COI unless the facility possesses *many times* that amount.

Whether adding, modifying, or removing COIs, it is critical that Appendix A changes occur through the rulemaking process. Such changes also must be transparent in application, evenly applied, and objectively considered. Though not directly tied to CFATS, the recently published study on *Reducing the Threat of Improvised Explosive Device Attacks by Restricting Access to Explosive Precursor Chemicals* by the National Academies of Sciences, Engineering, and Medicine applied strict ranking principles to determine what chemicals posed the greatest risk – but also showed a degree of arbitrariness. Despite acknowledging that Urea Ammonium Nitrate (UAN) “has not been used historically to produce explosives,” the National Academies departed from “a strict application of the committee’s [chemical] ranking principles” and included UAN in its highest risk category without objective justification. ISCD must be careful not to act in such an arbitrary fashion.

**IV. ISCD SHOULD CONTINUE TO ENHANCE THE CONSISTENCY OF AUTHORIZATION INSPECTIONS AND COMPLIANCE INSPECTIONS AMONG ITS INSPECTION PERSONNEL**

Together with my colleagues, I have directly participated in or have knowledge of hundreds of Authorization Inspections (AIs) and Compliance Inspections (CIs). These activities span all 10 ISCD inspector regions, across all CFATS risk tiers (i.e., Tier 1 – Tier 4), and at all types of regulated facilities, from the very large to the very small, over many years.

While a diverse Chemical Security Inspector (CSI) cadre is an asset, the manner and detail of how CSIs conduct their work varies from region-to-region, and even within the same region. This inconsistency continues to stymie the program and is a source of ongoing frustration for many facilities and businesses (especially those that operate CFATS facilities across multiple regions and receive uneven information and divergent direction from region-to-region). With very rare and limited exception, all CSIs are very friendly and courteous. Many have prior law enforcement or military experience and arrive at ISCD from other branches of the federal government.



Some CSIs are very knowledgeable regarding the CFATS program and the application of a performance-based regulation, but others are not. Some CSIs spend considerable time reviewing the accuracy and completeness of a facility's CFATS program during their time at a facility, but others do not. Some CSIs understand and apply ISCD's "corporate approach program" (whereby security measures that apply to all of a company's CFATS-regulated facilities are reviewed and approved once at a corporate level but applied broadly at the facility level), but other CSIs have little knowledge or awareness of those (already institutionalized) measures when arriving onsite.

ISCD leadership has acknowledged this and has taken steps to drive standardization and increase technical knowledge. Specifically, ISCD now has a Chief of Regulatory Compliance (CRC) in each of the 10 CFATS regions. The CRCs help manage and oversee CFATS compliance activities in their respective regions. All new CSIs must attend training at ISCD headquarters and participate in a specific number of AIs and/or CIs with an experienced CSI before leading either. Next year, ISCD is developing a new internal audit process that will enhance AI and CI uniformity.

These are steps in the right direction, but more is needed. Considering that CFATS is a performance-based regulatory program, ISCD should ensure that all personnel possess baseline CFATS knowledge, understand the interplay between regulation and guidance, and conduct AIs and CIs to the same level of completeness, precision, and rigor. There should be a mechanism by which horizontal consistency is ensured between and within regions and vertical consistency is ensured between headquarters and the regions.

ISCD's use of contractors to review CFATS security plan submissions has resulted in unnecessary administrative burdens and confusion. For example, on several occasions, contract analysts have interpreted guidance documents as regulatory requirements, insisted that all questions addressed in the Site Security Plan questionnaire be applied to facilities using an Alternative Security Program, and inserted novel criteria into plan reviews (e.g., asking a facility

to list protective measures that the facility expressly decided to remove when submitting its updated security plan). If ISCD must continue to use contractors, then it should provide additional training to these personnel and institute more (or stronger) internal controls.

**V. CONCLUSION**

CFATS has made great strides and has improved significantly from its rocky start more than a decade ago. Many facilities are in a regular cycle of compliance and have institutionalized CFATS as part of their operating tempo. CSAT 2.0 has brought new facilities into the program, which will benefit from lessons learned. Like any complex regulatory program, the opportunities for improvement and further refinement always exist. Congress should proceed with a multi-year reauthorization and use this time to consider what further legislative changes are needed to ensure continued success and sustainability.

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