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The safety and security institute of the commercial explosives industry since 1913

Testimony of

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on

Examining the Chemical Facility Anti-Terrorism Standards Program

before the

U.S. Senate Committee on Homeland Security and Governmental Affairs

June 12, 2018

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Chairman Johnson, Ranking Member McCaskill, and members of the Committee, on behalf of the Institute of Makers of Explosives (IME) and the commercial explosives industry, thank you for the opportunity to discuss the Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) program and the critical role Congress plays in ensuring the effectiveness of CFATS while safeguarding our nation's security.

We commend the Committee for its leadership on CFATS reauthorization and willingness to address the concerns of those affected by the program, namely the duplicative nature of the program for the explosives industry.

Founded in 1913, IME is the safety and security institute for the commercial explosives industry, a charge we do not take lightly, as evidenced by the industry's excellent track record. Our work, in conjunction with the regulations set forth by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and our industry's dedication to continual improvement has resulted in an ever-increasing culture of security that has seen the use of regulated commercial explosives as a component of improvised explosives devices in bombing incidents remain below 2% for the last 25 years, according to available ATF Explosives Incident Reports (EIRs). IME takes an active role in promoting responsible practices through the full life cycle of commercial explosives and regularly publishes, updates, and distributes free of charge, our series of Safety Library Publications (SLPs), including SLP 27 which covers *Security in Manufacturing, Transportation, Storage and Use of Commercial Explosives*, to the benefit of our workers and the general public.

Duplicative regulation of explosives should be eliminated

While IME readily acknowledges the improvements the CFATS program has made in the last four years, we remain concerned that DHS' regulations on explosive materials continue to duplicate security regulations under the jurisdiction of ATF. This duplication of regulation imposes significant costs that impact jobs and industry investment without a commensurate increase in security.

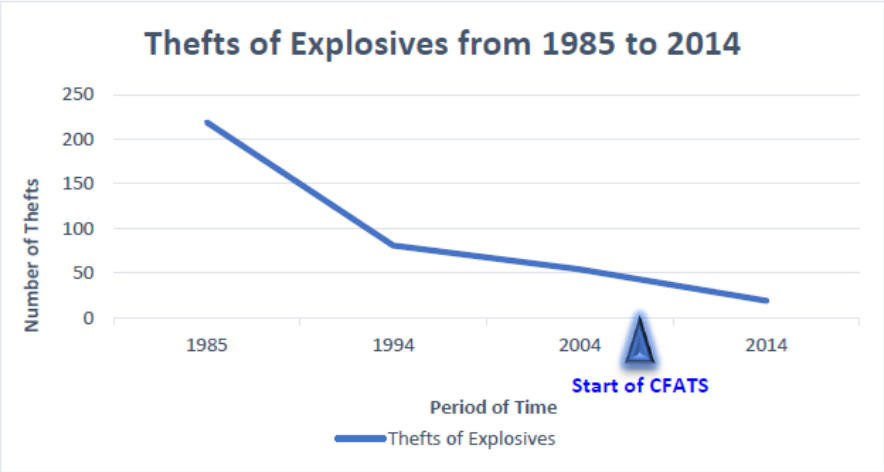
When the department promulgated the CFATS Chemicals of Interest (COI), Appendix A, in 2007, they included explosive materials that were already regulated by ATF for safety and security purposes for nearly a half century in accordance with the Organized Crime Control Act of 1970, and later by the Safe Explosives Act of 2002. Explosives are the only materials on the COI for which security regulations exist under the jurisdiction of another agency. Given that ATF regulatory requirements, along with industry best practices, have resulted in a sustained and exemplary security record for the commercial explosives industry, the costs incurred under the duplicative CFATS requirements far exceed any benefits.

The inclusion of already regulated explosive materials on the COI may likely be the result of ATF's exclusion from the CFATS development process, a concern ATF mirrored in an August 2007 correspondence to DHS, obtained by IME through a Freedom of Information Act (FOIA) request, stating "For reasons unclear to ATF, until this time ATF was not consulted or asked to comment on various drafts or prior versions of this rule. As you know, ATF has considerable experience and expertise regulating explosives to prevent their criminal misuse, including acts of terrorism." ATF has long held the role of regulating commercial explosives and the duplication

of those regulations by DHS has only served to increase compliance costs and confusion, rather than security.

The excessive costs and lacking security benefits of CFATS

CFATS, despite augmenting facility security expenditures, has done little towards an actual increase in commercial explosive security. After reviewing the available Explosives Incident Reports (EIRs) issued by ATF from 1985 to 2014, IME found that while there has been a consistent and remarkable reduction in thefts of explosives over the last 30 plus years, there is no marked increase in that rate of decline following the beginning of the CFATS program. Clearly, the record shows that ATF regulations and industry best practices effectively ensure security of commercial explosives and prevent diversion for criminal or other illicit use.



While there is no empirical data that shows a need for CFATS regulation of commercial explosives under ATF jurisdiction, IME was able to gather data on how much CFATS compliance costs the industry. In 2017, IME prepared four case studies to identify these costs and found that, for the four sites reviewed, the total expected compliance cost reached over $2.6 Million; a sum that saw no proportionate increase in facility security. One facility, also regulated by the Department of Defense (DoD) and ATF, was asked to run electricity to a mandated no-spark

environment. The result was the imposition of massive cost, upwards of $500,000 to run underground electricity in accordance with DoD regulations or the alternative option for round-the-clock in person surveillance over multiple storage sites, which carried with it an estimated cost of $3M. Considering all four sites were already regulated for security by the ATF, CFATS requirements provided minimal additional security benefits despite the massive associated costs. During these case studies, it became evident that many IME member companies find the compliance measures germane to CFATS to be superfluous yet costly, an experience that is further detailed by the Austin Powder Company in their related testimony.

In addition to monetary expenditures, the workforce burden of CFATS is exhaustive. While the commercial explosives industry only has approximately 24 sites regulated by CFATS, all ATF regulated facilities must submit to Top-Screens. With an estimated 10,500 ATF licenses and permits in circulation, and the DHS estimated 30.8 hours it takes to complete a Top-Screen survey, the number of man-hours required to, in large part, find out you do not qualify for CFATS oversight can be immense and unnecessary. One IME company alone spent an estimated 1,632 hours filling out Top-Screens for facilities already effectively regulated by ATF for security, hours that could have been spent bolstering their existing security, safety, health and environmental safeguards.

CFATS contradicts other federal regulations

While IME's first concern remains the duplicative nature of the CFATS program on our already regulated industry, we would be remiss if we neglected to address how this duplication lends itself to regulatory conflict. On occasion, CFATS regulations will challenge the mandates of other federal regulators, leaving our member companies to decide which body carries the

bigger stick. One such example resulted in an explosives company being asked to move an explosives storage magazine to comply with CFATS, a magazine that had been approved by ATF according to the American Table of Distances (ATD). The ATD was developed by IME and adopted by ATF to ensure safety in storing explosive materials to prevent both sympathetic detonations of surrounding storage sites and impact to surrounding communities. On other occasions, DHS personnel advised IME member companies and downstream customers that *mobile* bulk trucks that operate with blasting agents not subject to CFATS purview would be tiered into the program and would have continued down that regulatory path had IME not intervened with technical information and guidance. In addition to failure to respect ATF's jurisdictional lines, confusion has also been caused by DHS' oversight into operations that fall under the authority of the Department of Transportation. In the past, the explosives industry experienced reasonable certainty in regards to what types of operations fell under which agency's jurisdiction, but DHS has stated in no uncertain terms that they do not follow any jurisdictional boundaries typically respected by other agencies.

Lack of transparency in the CFATS tiering process and challenges with non-prescriptive standards

All regulations should be transparent: clear, concise and easy to follow in order to promote consistency, reliability and compliance. The CFATS program, by design, is none of these. At each step, from submission of top screens to security plans and through compliance inspections, the regulated party must wait for a decision from Washington, based on non-published algorithms before advancing to the next step. While CFATS personnel in Washington are willing to discuss a particular site's security issues over the phone to explain their thinking,

there are no articulated guidelines, charts or tables available to the regulated industries to provide direct information on how they will be tiered. This presents an obstacle to business planning for existing and future operations, and limits the ability of a facility to make proactive choices to control operational aspects that could change a tiering status.

As evidenced by Austin Powder's experience with the tiering process, a company does not know what tier level it may be assigned because the decision matrix is concealed from them. Companies do know if they possess chemicals of interest and the quantity but because the CFATS tiering program (the Chemical Security Assessment Tool (CSAT) includes other factors unknown to the company, determining a facility's tiering level prior to a Top-Screen is impossible for most companies. Tiering is simply the first challenging step.

A facility's tier then determines what sort of Risk Based Performance Standards (RBPS) it must implement to meet CFATS compliance. DHS has produced a 199-page guidance document to "help" companies figure out how to comply with the 18 different standards.

It is important for the committee to know that the guidance document says this:

> "To meet the RBPSs, covered facilities are free to choose whatever security programs or processes they deem appropriate, so long as they achieve the requisite level of performance in each applicable area. The programs and processes that a high-risk facility ultimately chooses to implement to meet these standards must be described in the Site Security Plan (SSP) that every high-risk chemical facility must develop pursuant to the regulations. It is through a review of the SSP, combined with an on-site inspection, that DHS will determine whether or not a high-risk facility has met the

requisite levels of performance established by the RBPSs given the facility's risk profile.[1]"

Ultimately, a company must jump through a series of hoops and at each step and wait for approval. While these steps were created with the best of intentions, four facts make them problematic.

1. DHS can change the tiering program (CSAT) without notice, which could increase or decrease a facility's tier. CSAT 2.0, for example, was released in September 2016.
2. CFATS personnel have discussed the possibility of conducting a re-tiering process on a multi-year schedule.
3. The 199-page guidance document is a non-binding guidance that can also be changed or updated without notice.
4. In 2014, DHS started working on an update of CFATS regulations in accordance with the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, Pub. L. 113-254. When initiated, DHS noted, "The NPRM will propose substantive modifications to CFATS based on public comments received on the ANPRM and based on program implementation experience the Department has gained since 2007.[2]" While the effort was recently moved to long term actions on the Unified Regulatory Agenda, one can expect that if reauthorized in 2018, the effort will be renewed.

[1] DHS Risk-Based Performance Standards Guidance, Chemical Facility Anti-Terrorism Standards, May 2009 Pg 8.

[2] Department of Homeland Security (DHS) *Fall 2015 Statement of Regulatory Priorities*, Chemical Facility Anti-Terrorism. Pg 14.

As you can see, these four factors make pre-emptive compliance inherently difficult at best in the short-term. Predictably is impossible in the long-term.

The Austin Powder Company, in their associated testimony, will explain in detail how the guarded tiering process has worked to increase their expenditures while leaving facility security unaffected. Had Austin Powder known the additional burdens CFATS compliance would entail, they may have changed their decision to lease the property. That negative experience will influence their future business decisions.

Conversely, an IME member planning to build a new facility according to ATF regulations knows the construction, security, and compliance costs, therefore allowing for sound business decisions to be made.

An exemption for ATF regulated facilities for industry

IME has repeatedly requested that DHS relieve the industry from this duplicative burdensome regulation. IME met with Mr. Robert Kolasky, Deputy Under Secretary (acting), National Protection and Programs Directorate, in his position as Regulatory Reform Officer (RRO) for the department. The meeting was held on October 30, 2017 to discuss regulatory reform per Executive Order (EO) 13771 on Reducing Regulation and Controlling Regulatory Costs and EO 13777 on Enforcing the Regulatory Reform Agenda. IME briefed him on the redundancy of CFATS on our industry and explained how removal of this duplicative regulation would allow DHS to focus valuable resources on other critical risks to our Nation. The Department did advise IME that they will not pursue rulemaking to remove explosive materials subject to ATF regulation, however, outside of the October meeting DHS officials indicated that they would not object to a legislative fix if IME choses to pursue that route.

During the initial development of the CFATS legislative text, Congress wisely understood that a one-size-fits-all approach to chemical security was not necessary and exempted: 1) Facilities regulated pursuant to the Maritime Security Act of 2002; 2) Public Water Systems as defined by the Safe Drinking Water Act (Sec 1401); 3) Treatment Works as defined by the Federal Water Pollution Control Act (Sec. 212); 4) Dept. of Defense and Dept. of Energy facilities; and, 5) Facilities regulated by the Nuclear Regulatory Commission. Surprisingly, ATF regulated facilities are not provided similar deference. For this reason, and those previously stated, we request the Committee reduce the duplicative burden of CFATS on the explosives industry by providing an additional and equal exemption based on the comprehensive and effective ATF regulations outlined above.

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The commercial explosives industry is eager to work with this Committee in a bipartisan manner to reauthorize the CFATS program in a manner that enhances national security while reducing blatantly duplicative regulations; clearing the path for government to focus resources on actual threats to our national security and allowing industry to fully invest their time and resources in a regulatory system that has long proven to be effective. Thank you for the opportunity to testify today.