



Testimony of
Tim O'Brien
President
Detotec North America

on

Sensibly Reforming the Chemical Facility Anti-Terrorism Standards Program

before the

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

June 4, 2019

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Chairman Johnson, Ranking Member Peters, and members of the Committee, as President of Detotec North America and past Board Chairman of the Institute of Makers of Explosives (IME) – the safety and security association for the commercial explosives industry, I thank you for the opportunity to discuss the Department of Homeland Security's (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) program and how duplicative regulations negatively impact my business and the greater commercial explosives industry without any marked improvement in explosives security.

Before I detail my company's story as it pertains to CFATS, I'd like to provide a brief background on the larger issue of duplicative CFATS regulation on my industry, commercial explosives. For other industries in the chemical sector, CFATS is the first and only program designed to bolster chemical facility security at the federal level, something that is necessary and should be maintained to the benefit of national security. Conversely, the commercial explosives industry has been regulated for security since the onset of the 1971 Organized Crime Control Act, under the jurisdiction of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). In the wake of the tragic events of September 11th, 2001 Congress passed the Homeland Security Act of 2002, which included the Safe Explosives Act and realigned ATF under the aegis of the U.S. Department of Justice, further strengthening ATF's mission to **protect the public from the diversion of explosives for illicit use, including acts of terrorism**. These shared goals between ATF and DHS could fit together well if DHS did not overreach their precursor chemical mandate into ATF's explosives jurisdiction.

On this point, ATF officials have clearly stated that the agency effectively regulates the security of commercial explosives emphasizing that the *only* value DHS adds related to explosives is in the regulation of precursor chemicals where ATF does not have jurisdiction. Although in testimony earlier this year before the House Homeland Security Committee, DHS claimed that CFATS is “in all cases bringing something additional to the table”, we respectfully disagree when it comes to the security of commercial explosives. If ATF were to share with this committee the comments they submitted to DHS in August of 2007 regarding the CFATS rulemaking process, we believe that this committee would be reassured that, “ATF has considerable experience and expertise regulating explosives to prevent their criminal misuse, including acts of terrorism...” and that regulations in this area are proven to be effective and sufficient. In a 2012 letter to the regulated explosives community that serves as the foreword to ATF’s explosives regulations, the ATF Director stated, “[S]ecurity of explosive materials helps protect Americans from violent crime and is an essential tool in the war against terrorism” and then proceeded to list how ATF regulatory requirements and industry best practices combat the criminal diversion or misuse of explosive materials.

Detotec North America, Inc.

Detotec North America, Inc. was founded in 1988 by myself and my family and currently employs 20 workers. We manufacture explosives and explosive-based products in two locations in Connecticut which are regulated by a series of bodies including the Department of Transportation (DOT), the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), the Department of Defense (DOD), the Defense Contract Management Agency (DCMA), ATF, and DHS. As you can imagine, compliance with the

regulations administered by all these regulatory bodies can be a heavy lift for a small business like Detotec. That said, we know that robust and sensible regulation is paramount to maintaining safety and security, a duty of all responsible businesses and a charge we do not take lightly as evidenced by our track record outside of CFATS. As such, I do not appear before you to ask for deregulation of commercial explosives but to make the case for reducing duplication of regulatory mandates that will cut costs for taxpayers, ensure government is serving the American people more productively, and alleviate a superfluous compliance burden on one of the nation's most pivotal industries.

Impact of CFATS on Detotec

Detotec's two facilities in Connecticut are separately located. Due to DoD separation requirements we are prohibited from siting all the production buildings and storage facilities at one location. The separated facilities are each located on 100 acres of remote land. Since Detotec opened its doors 30-years ago, we have been subject to and compliant with ATF's comprehensive security regulations. In all that time we have never experienced a theft or a diversion of our products. With the advent of CFATS, we are now doubly regulated for security, specifically, for "theft and diversion" – the very security concerns that ATF regulations have prevented for more than 30 years. We have multiple outdoor storage facilities, referred to as magazines, all manufactured to ATF construction standards and approved according to the American Table of Distances (ATD). The ATD serves to mitigate impact to the surrounding community and prevent propagation between magazines should a rare incident occur. Some of the magazines are used to store explosive materials not under CFATS' purview, but most have the potential to hold materials DHS has included on the CFATS Chemicals of Interest (COI) list.

Therefore, both facilities submitted CFATS Top-Screens in January 2008 and received final tiering in October 2009. Site Security Plans (SSP) for both facilities were submitted in May 2010 and received conditional authorization in July 2013. A new SSP that amended the magazine inspection rates was submitted in December of 2013 to address the conditional authorization. The facilities showed as “pending” in the Chemical Security Assessment Tool program following the new SSP from December of 2013 until October of 2016 when we received a letter stating that there was a new tiering methodology and that a new Top-Screen was required. There had been no communication from or inspections by DHS during the three years between the 2013 amended SSP submission and the 2016 requirement to submit a new Top-Screen.

During those three years, ATF inspected my facilities on three separate occasions. ATF determined our sites to be compliant with explosives regulations, finding no violations or action items as a result of those inspections. Additionally, during that time, DCMA (the safety branch of the DoD) inspected us every 6 months as required under the contract we had to make detonating cord for the Army. They similarly found no issues with our facilities including issues relating to security and maintenance of the sites.

In November of 2016, Detotec submitted our new Chemical Security Assessment Top-Screen survey and in April of 2017 we learned that our facilities would not change tiers under the new tiering methodology. Despite no change in our tier levels, we received a notice of deficiency for our SSP in June of 2017. These deficiencies, according to DHS, had existed since our original SSP in 2013. Absent communication from DHS from 2013 to 2016, it was certainly news to us that they had found deficiencies in our security protocols. This was especially surprising given the

absence of any security incidents at our facilities and in light of the multiple inspections from ATF, DoD, and DCMA finding no security concerns during that three-year period.

Despite our full compliance with the requirements imposed by other regulatory bodies, including ATF's explosives security mandates, under DHS's non-prescriptive program, the Agency informed us that it expected magazine monitoring at a maximum interval of every 12 hours and indicated this was a requirement for certain tier levels. It also informed us that our plan for implementation was due within 10 days of the notice of deficiency. In an email sent to DHS, I asked for more time to allow us to find a way to monitor the magazines. DHS verbally responded that the deficiency had been outstanding since 2013 and, thus, would not grant an extension. Again, this was the first time we were made aware that this deficiency was a carryover from the 2013 SSP. As we explored options it became increasingly evident that the remoteness of our facilities, as is the case with most explosives facilities, precluded us from implementing many monitoring options available to other industries that do not have to comply with ATF mandated setbacks and DoD regulations for safety regarding explosives.

DHS made suggestions for compliance such as contracting security personnel to conduct roving surveillance which was quoted from \$400,000 to \$600,000 per year or instituting video monitoring in lieu of hiring roving personnel which was estimated to cost in the range of \$750,000 to well over \$1,000,000 due to DoD requirements that all power near explosives be underground for the last 75 feet minimum. DHS, in denying my request for further compliance time, highlighted the options they had suggested as reasonable accommodation and would not allow for more time to find feasible options. Again, our explosives industry is no stranger to robust

regulation and I appreciate sensible regulation as a part of our duty to our community, but as a small business, these potential costs would have shut us down.

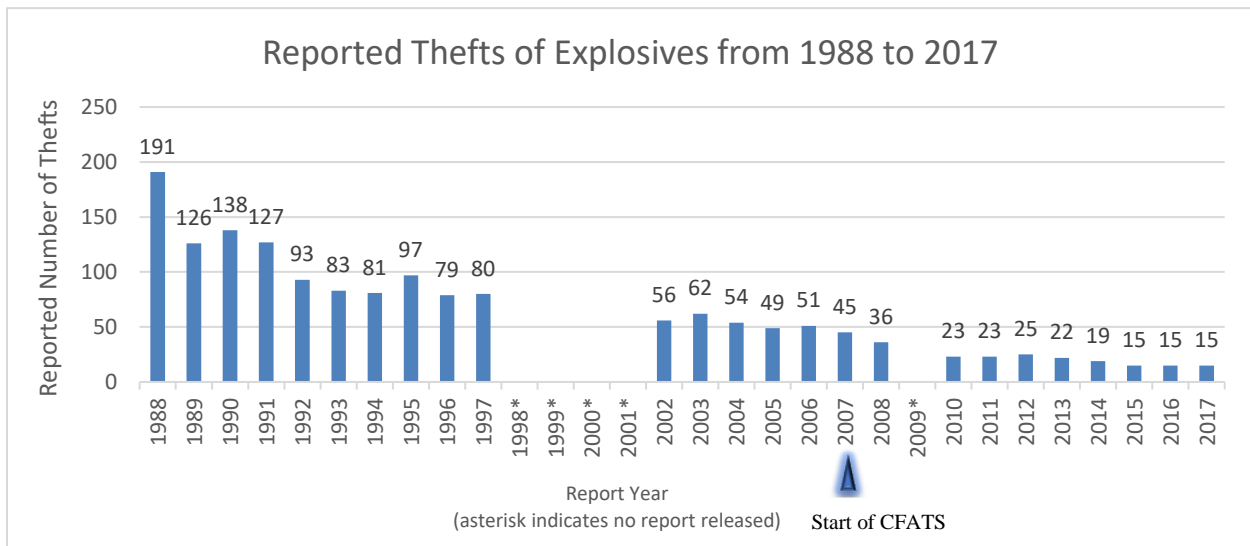
To find reasonable and cost-effective compliance measures, Detotec needed to identify alternative options and contractors capable of implementing them. DHS's allocation of 10 days to submit our plan for implementation was insufficient due to the multitude of obstacles we faced, therefore our submission came 10 days late resulting in a fine of \$100,000. Detotec was able to reduce the amount paid through a small business consideration process, however, the final amount of the fine was still greater than the annual salary of 75% of our employees and as a result, an employee had to be let go. Eventually, after exhaustive efforts to comply, we reached an agreement with a large corporation located many miles away from our facilities to piggyback on their roving security contract. Now their security guard travels to our facility every 12 hours at what is considered to be a discounted cost of \$100,000 per year.

My small company has endured all this, ostensibly to "secure" facilities already regulated by ATF and DoD for safety and security. Not only has CFATS imposed costs that threaten the viability of our business, but it has now mandated access to our facility by outside personnel which only serves to increase security concerns. Explosive facilities are highly secured sites for good reason, and unnecessary access to them by individuals outside of the organization that is responsible for their security is the inverse of a "value add." Barring DHS' ability to articulate how the program has increased security commensurate to cost and duplicative regulatory burden, and in consideration of the U.S. government data that shows since its creation 11 years ago CFATS has had no impact on explosives security, I would request the removal of explosives from the CFATS program. This reduction in duplicative regulatory burden would allow the

explosives industry to apply our resources toward complying with the ATF regulations and industry best practices that have long been sufficient to protect our nation from criminal and terrorist misuse of our products.

The excessive costs and lacking security benefits of CFATS

As past Chairman of the Institute of Makers of Explosives (IME), I have studied the historical security record of the commercial explosives industry and as a result have found the following to be true: CFATS, despite increasing facility security expenditures, has done little, if anything, to improve commercial explosive security. After reviewing the available Explosives Incident Reports (EIRs) issued by ATF from 1988 to 2017, we 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 since the onset 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 terrorist or other illicit use.



While there is no empirical data that shows a need for CFATS regulation of commercial explosives under ATF jurisdiction, we were able to gather data on how much CFATS compliance costs the industry on the whole. In 2017, IME prepared four case studies to identify these costs and found that, for the four sites reviewed, the total projected compliance cost reached over \$2.6 million; a sum that saw no proportionate increase in facility security. Considering all four sites were already regulated for explosives security by ATF, CFATS requirements provided minimal additional security benefits despite the massive associated costs.

In addition to monetary expenditures, the workforce burden of CFATS is excessive. While the commercial explosives industry only has approximately 31 sites regulated by CFATS, all ATF regulated facilities must submit to Top-Screens. There are, roughly, 10,000 ATF regulated explosives licensee and permittees. The Office of Management and Budget has estimated 6 hours for the completion of a Top-Screen survey, i.e., the number of man-hours required, for the most part, to determine that a facility does not qualify for CFATS oversight. One IME member alone spent an estimated 357 hours in 2017 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.

Removal of ATF regulated materials from CFATS

Detotec, alongside IME and other member companies, has repeatedly requested that DHS relieve the explosives industry from this duplicative and burdensome regulation. I was part of an IME delegation that met with Mr. Robert Kolasky, Director of the Cybersecurity and Infrastructure Security Agency's National Risk Management Center, in his position as Regulatory Reform Officer (RRO) for the department on October 30, 2017 to discuss DHS' efforts to conform

with Executive Orders 13771 and 13777. Our group 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. Despite our efforts, the Department did advise us that they will not pursue rulemaking to remove explosive materials subject to ATF regulation from the Chemicals of Interest list, however, outside of the October meeting, DHS officials indicated that they would not object to a legislative fix if industry chooses to pursue that route.

DHS has referenced a “55% increase in facility security” as a result of the CFATS program in multiple forums without any reference as to how that statistic is borne out. While that statistic may be true for some of the CFATS regulated community, based on all available government data, it certainly does not apply to the commercial explosives industry which has been regulated for explosives security for 50 years. Removing ATF regulated materials from CFATS is an opportunity for this committee to reform the program in the direction of good stewardship of federal dollars and the reduction of harmful duplicative and unnecessary regulation on industry while maintaining a robust national security program.

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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 way that enhances national security while reducing blatantly duplicative regulations; clearing the path for government to focus resources on priority 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 towards combating terrorism. Thank you for the opportunity to testify today.