Statement for the Record

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Thank you, Chairman Lieberman, Ranking Member Collins, and distinguished Members of the Committee. It is a pleasure to appear before you today to discuss the Department of Homeland Security's (DHS) regulatory authority for security at high-risk chemical facilities. As you are aware, the Department's current authority expires in October 2010 under Section 550 of the Fiscal Year 2007 Department of Homeland Security Appropriations Act, as amended. DHS is eager to work with this Committee, the larger stakeholder community across Congress, and all levels of government and the private sector to achieve passage of legislation that permanently authorizes and appropriately matures our chemical security program. In the interest of facilitating that collaboration, my testimony focuses on the current program and the key principles that DHS would like to see in future law.

Chemical Security Regulations

Section 550 of the FY2007 Department of Homeland Security Appropriations Act directed the Department to develop and implement a regulatory framework to address the high level of security risk posed by certain chemical facilities. Specifically, Section 550(a) of the Act authorized the Department to adopt rules requiring high-risk chemical facilities to complete Security Vulnerability Assessments, develop Site Security Plans, and implement protective measures necessary to meet risk-based performance standards established by the Department. Consequently, the Department published an Interim Final Rule, known as the Chemical Facility Anti-Terrorism Standards (CFATS), on April 9, 2007. Section 550, however, expressly exempts from those rules certain facilities that are regulated under other Federal statutes, including those

regulated by the United States Coast Guard pursuant to the Maritime Transportation Security Act (MTSA); drinking water and wastewater treatment facilities as defined by Section 1401 of the Safe Water Drinking Act and Section 212 of the Federal Water Pollution Control Act, respectively; and facilities owned or operated by the Departments of Defense and Energy, as well as certain facilities subject to regulation by the Nuclear Regulatory Commission (NRC).

The following core principles guided the development of the CFATS regulatory structure:

1) Securing high-risk chemical facilities is a comprehensive undertaking that involves a national effort, including all levels of government and the private sector. Integrated and effective participation by all stakeholders—federal, state, local, and the private sector—is essential to securing our national critical infrastructure, including high-risk chemical facilities. Implementing this program means tackling a sophisticated and complex set of issues related to identifying and mitigating vulnerabilities and setting security goals. This requires a broad spectrum of input, as the regulated facilities bridge multiple industries and critical infrastructure sectors. By working closely with experts, members of industry, academia, and federal government partners, we leveraged vital knowledge and insight to develop the regulation.

2) Risk-based tiering to guide resource allocations. Not all facilities present the same level of risk. The greatest level of scrutiny should be focused on those facilities that, if attacked, present the most risk and could endanger the greatest number of lives.

3) Reasonable, clear, and calibrated performance standards will lead to enhanced security. The current CFATS rule includes enforceable risk-based performance standards. High-risk facilities have the flexibility to select among appropriate site-specific security measures that will effectively address risk. The Department will analyze each final tiered facility's Site Security Plan to see if it meets CFATS performance standards. If necessary, DHS will work with the facility to revise and resubmit an acceptable plan.

4) Recognition of the progress many companies have already made in improving facility security leverages those advancements. Many responsible companies have made significant capital investments in security since 9/11. Building on that progress in implementing the CFATS program will raise the overall security baseline at high-risk chemical facilities.

On Nov. 20, 2007, the Department published Appendix A to CFATS, which lists 322 chemicals of interest, including common industrial chemicals—such as chlorine, propane, and anhydrous ammonia—as well as specialty chemicals, such as arsine and phosphorus trichloride. The Department included chemicals based on the consequences associated with one or more of the following three security issues:

1) Release – Toxic, flammable, or explosive chemicals that have the potential to create significant adverse consequences for human life or health if intentionally released or detonated;
2) Theft/Diversion – Chemicals that have the potential, if stolen or diverted, to be used or converted into weapons that could cause significant adverse consequences for human life or health; and
3) Sabotage/Contamination – Chemicals that, if mixed with other readily available materials, have the potential to create significant adverse consequences for human life or health.

The Department established a Screening Threshold Quantity for each chemical based on its potential to create significant adverse consequences for human life or health in one or more of these ways.

Implementation and execution of the CFATS regulation requires the Department to identify which facilities it considers high-risk. The Department developed the Chemical Security Assessment Tool (CSAT) to identify potentially high-risk facilities and to provide methodologies that facilities can use to conduct Security Vulnerability Assessments (SVAs) and to develop Site Security Plans (SSP). CSAT is a suite of online applications designed to facilitate compliance with the program; it includes user registration, the initial consequence-based screening tool (Top-

Screen), a Security Vulnerability Assessment tool, and a Site Security Plan template. Through the Top-Screen process, the Department initially identifies and sorts facilities based on their associated risks.

If a facility is initially identified during the Top-Screen process as potentially having a level of risk subject to regulation under CFATS, the Department assigns the facility to one of four preliminary risk-based tiers, with Tier 1 indicating the highest level of potential risk. Those facilities must then complete SVAs and submit them to the Department. Results from the SVA inform the Department's final determinations as to whether a facility is in fact high-risk and, if so, of the facility's final tier assignment. Each one is carefully reviewed for its description of how chemicals of interest are actually held at the site, how those chemicals are managed, and for physical, cyber, and chemical security content.

Only facilities that receive a final high-risk determination letter under CFATS will be required to complete and submit either an SSP or Alternative Security Plan (ASP). DHS' final determinations as to which facilities are high-risk are based on each facility's individual consequentiality and vulnerability as determined by its Top-Screen, SVA, and any other available information.

After approval of their SVAs, the final high-risk facilities are required to develop SSPs or ASPs that address their identified vulnerabilities and security issues. The higher the risk-based tier, the more robust the security measures and the more frequent and rigorous the inspections will be. The purpose of inspections is to validate the adequacy of a facility's Site Security Plan and to verify that measures identified in the plan are being implemented.

To date, we have reviewed nearly 38,000 Top-Screen consequence assessment questionnaires submitted by potentially high-risk chemical facilities. Since June 2008, we have notified over 7,000 preliminarily tiered facilities that they have been initially designated as high-risk and are thus required to submit SVAs; we have nearly completed our review of the almost 6,200 SVAs that have been submitted. In May 2009, we began notifying facilities of their final high-risk determinations, risk-based tiering assignments, and the requirement to complete and submit an SSP or ASP.

CFATS currently covers 6,023 high-risk facilities nationwide across all 50 states, of which over 3,500 facilities have received final high-risk determinations and due dates for submission of an SSP or ASP. More than 1,600 facilities have submitted SSPs (or ASPs) to date, and the Department is in the process of reviewing these submissions.

Implementation Status

In May 2009, the Department issued 141 final tier determination letters to the highest risk (Tier 1) facilities, confirming their high-risk status and initiating their 120-day time frame for submitting an SSP. Since this initial set of final tier determinations, the Department has notified approximately 3,400 additional facilities of their final tier assignments. The Department continues to issue final tier notifications to approximately 500 facilities across all four risk tiers each month. The Department expects to notify all of the 6,023 covered CFATS facilities of their final tier assignments by end of summer 2010. In February 2010, the Department began conducting inspections of final-tiered facilities, starting with the Tier 1-designated facilities.

It should be noted that the CFATS compliance inspection is comprehensive and detailed. The Department intends to use these inspections to help gain a fuller understanding of the processes, risks, vulnerabilities, response capabilities, security measures and practices, and any other factors that may be in place at a regulated facility that affect security risk in order to determine if the facility meets the CFATS requirements.

A critical element of the Department's efforts to secure the nation's high-risk chemical facilities, the SSP enables final high-risk facilities to document their individual security strategies for meeting the Risk-Based Performance Standards (RBPS) established under CFATS. Each high-risk facility's security strategy will be unique, as it depends on the facility's risk level, security issues, characteristics, and other factors. Therefore, the Site Security Plan tool collects information on each of the 18 RBPS for each facility. The RBPS cover the fundamentals of security, such as restricting the area perimeter, securing site assets, screening and controlling access, cybersecurity, training, and response. The Site Security Plan tool is designed to take into

account the complicated nature of chemical facility security and allows facilities to describe both facility-wide and asset-specific security measures. The Department understands that the private sector generally and CFATS-affected industries in particular are dynamic. The Site Security Plan tool allows facilities to involve their subject-matter experts from across the facility, company and corporation, as appropriate, in completing the Site Security Plan and submitting a combination of existing and planned security measures to satisfy the RBPS. The Department expects that most approved SSPs will consist of a combination of existing and planned security measures. Through a review of the SSP, in conjunction with an on-site inspection, DHS will determine whether a facility has met the requisite level of performance given its risk profile and thus whether its SSP should be approved.

Along with the initial group of final Tier 1 notifications and the activation of the Site Security Plan tool in May 2009, DHS issued the *Risk-Based Performance Standards Guidance* document. The Department developed this guidance to assist high-risk chemical facilities subject to CFATS in determining appropriate protective measures and practices to satisfy the RBPS. It is designed to help facilities comply with CFATS by providing detailed descriptions of the 18 RBPS as well as examples of various security measures and practices that would enable facilities to achieve the appropriate level of performance for the RBPS at each tier level. The *Guidance* also reflects public and private sector dialogue on the RBPS and industrial security, including public comments on the draft guidance document. High-risk facilities are free to make use of whichever security programs or processes they choose, provided that they achieve the requisite level of performance under the CFATS RBPS. The *Guidance* will help high-risk facilities gain a sense of what types and combination of security measures may satisfy the RBPS.

To provide a concrete example: In the case of a Tier 1 facility with a release hazard security issue, the facility is required to restrict the area perimeter appropriately, which may include preventing breach by a wheeled vehicle. To meet this standard, the facility is able to consider numerous security measures, such as cable anchored in concrete block along with movable bollards at all active gates or perimeter landscaping (e.g., large boulders, steep berms, streams, or other obstacles) that would thwart vehicle entry. The Department will approve the security measure as long as it is determined by the Department to be sufficient to address the applicable

performance standard. Under Section 550, the Department cannot mandate a specific security measure to approve the Site Security Plan.

Outreach Efforts

Since the release of CFATS in April 2007, the Department has taken significant steps to publicize the rule and ensure that our security partners are aware of its requirements. As part of this dedicated outreach program, the Department has regularly updated impacted sectors and Government Coordinating Councils of industries most impacted by CFATS, including the Chemical, Oil and Natural Gas, and Food and Agriculture Sectors. We have also made it a point to solicit feedback from our public and private sector partners and, where appropriate, to reflect that feedback in our implementation activities. We have presented at numerous security and chemical industry conferences; participated in a variety of other meetings of relevant security partners; established a Help Desk for CFATS questions; put in place a CFATS tip-line for anonymous chemical security reporting; and developed and regularly updated a highly regarded Chemical Security Web site (www.DHS.gov/chemicalsecurity). These efforts are having a positive impact: over 38,000 Top-Screens have been submitted to the Department via CSAT.

Additionally, the Department continues to focus on fostering solid working relationships with state and local officials as well as first responders in jurisdictions with high-risk facilities. To meet the risk-based performance standards under CFATS, facilities need to cultivate and maintain effective working relationships—including a clear understanding of roles and responsibilities—with local officials who would aid in preventing, mitigating and responding to potential attacks. To facilitate these relationships, our inspectors have been actively working with facilities and officials in their areas of operation, and they have participated in over 100 Local Emergency Planning Committee meetings to provide a better understanding of CFATS requirements.

We are also working with the private sector as well as all levels of government to identify facilities that may meet the threshold for CFATS regulation but that have not yet registered with CSAT or filed a Top-Screen. We have completed pilot efforts at the state level with New York

and New Jersey to identify such facilities in those jurisdictions. We are using these pilots to help the Department identify other facilities for our follow up. Further, we have commenced targeted outreach efforts to certain segments of industry where we believe compliance may need improvement.

Internally, we are continuing to build the Infrastructure Security Compliance Division that is responsible for implementing CFATS. We have hired, or are in the process of on-boarding, more than 140 people, and we will continue to hire throughout this fiscal year to meet our staffing goals of 268 positions. The FY 2011 budget request allows the Department to continue to meet program goals for hiring, training, equipping, and housing inspectors as well as to continue the development and deployment of compliance tools for covered facilities.

Legislation to Permanently Authorize CFATS

We have enjoyed a constructive dialogue with Congress, including this Committee, as it contemplates new authorizing legislation. The Department recognizes the significant work that this Committee and others, including the House Committee on Homeland Security and the House Committee on Energy and Commerce, have devoted to drafting legislation to reauthorize the CFATS program and to address chemical security at the nation's water systems. We appreciate this effort and look forward to continuing the constructive engagement with Congress on these important matters.

The Department supports a permanent authorization for the CFATS program. The Department is committed to working with Congress and other security partners to pass stand-alone chemical security legislation that includes permanent authority beginning in FY 2011.

While we remain committed to providing the Congress with a draft of a comprehensive authorization bill this fiscal year, we recognize the time constraints and challenges of passing such comprehensive authorization laws; thus the President's FY 2011 budget includes a request for a one-year extension of the statutory authority for CFATS, to ensure the time, if needed, to complete enactment of a permanent program while avoiding the sunset of the Department's

regulatory authority on Oct. 4, 2010. Given the complexity of chemical facility regulation, the logistics of implementing, as well as the resource implications of any requirements considered in prospective legislation, should be taken into account to avoid having the Department to extensively revisit aspects of the program that are either currently in place or will be implemented in the near future.

It is important to highlight that the Administration has developed a set of guiding principles for the reauthorization of CFATS. The following principles are the foundation for the Department's legislative position on permanent CFATS reauthorization in line with the Administration's guiding principles:

- The Administration supports permanent authorization to regulate security of high-risk chemical facilities through risk-based performance standards.

- The Department should be given reasonable deadlines by Congress to promulgate new rules to implement any new legislative requirements. CFATS, as currently being implemented, should remain in effect until they supplemented by new regulations.

- The Administration supports, where possible, using safer technology, such as less toxic chemicals, to enhance the security of the nation's high-risk chemical facilities. We recognize, however, that risk management requires balancing threat, vulnerabilities, and consequences with the costs and benefits to mitigate risk. Similarly, the potential public health and environmental consequences of alternative chemicals must be considered with respect to the use of safer technology. In this context, the Administration has established the following policy principles in regards to inherently safer technologies (IST) at high-risk chemical facilities:

    - The Administration supports consistency of IST approaches for facilities regardless of sector.
    - The Administration believes that all high-risk chemical facilities, Tiers 1-4, should assess IST methods and report the assessment in the facilities' SSPs. Further, the appropriate regulatory entity should have the authority to require

facilities posing the highest degree of risk (Tiers 1 and 2) to implement IST method(s) if such methods demonstrably enhance overall security, are determined to be feasible, and, in the case of water sector facilities, consider public health and environmental requirements.

  - For Tier 3 and 4 facilities, the appropriate regulatory entity should review the IST assessment contained in the SSP. The entity should be authorized to provide recommendations on implementing IST, but it would not have the authority to require facilities to implement the IST methods.
  - The Administration believes that flexibility and staggered implementation would be required in implementing this new IST policy.

- The Administration supports maintaining the Department's current Chemical-terrorism Vulnerability Information regime for protecting sensitive information relating to chemical facility security. This regime is similar to, but distinct from, other Sensitive But Unclassified information protection regimes.

- The Department supports amending the current exemption for drinking water and wastewater facilities to specify that EPA would have the lead on regulating for security, with the Department supporting EPA to ensure consistency across all sectors; this consistency could be achieved, for example, by the use of CFATS compliance tools and risk analysis with modifications as necessary to reflect the uniqueness of the water sector and statutory requirements. As DHS and EPA have stated before, we believe that there is a critical gap in the U.S. chemical security regulatory framework—namely, the exemption of drinking water and wastewater treatment facilities from CFATS. We need to work with Congress to close this gap to secure substances of concern at these facilities and to protect the communities that they serve; drinking water and wastewater treatment facilities that meet CFATS thresholds for chemicals of interest should be regulated. We do, however, recognize the unique public health and environmental requirements and responsibilities of such facilities. For example, we understand that a cease-operations order that might be appropriate for another facility under CFATS would have significant public health and environmental consequences when applied to a water facility.

- The Department supports modifying the exemption for facilities regulated under the MTSA to provide that each chemical facility currently subject to MTSA shall submit information to the Secretary of Homeland Security to determine whether it would be designated as a high-risk chemical facility under CFATS. This will also ensure consistency across all sectors and provides important information for the Department to continue to evaluate regulatory regimes as part of its ongoing CFATS/MTSA harmonization efforts. The Secretary would be authorized to require the facility to update its existing vulnerability assessments or Facility Security Plans under MTSA to provide an adequate level of security.

- With respect to the other current statutory exemptions, the Department supports:
    - Maintaining the exemptions for Departments of Defense and Energy facilities; and
    - Amending the exemption for facilities regulated under the Nuclear Regulatory Commission (NRC) to clarify the scope of the NRC exemption and to specify that the Department of Homeland Security shall make the final determination as to whether a nuclear facility is exempt.

Conclusion

The Department is collaborating extensively with the public, including members of the chemical sector and other interested groups, to work toward achieving our collective goals under the CFATS regulatory framework. In many cases, industry has voluntarily made tremendous progress to ensure the security and resiliency of its facilities and systems. As we implement the chemical facility security regulations, we will continue to work with industry, our other federal partners, states, and localities to get the job done.

The Administration recognizes that CFATS reauthorization requires further technical work. The Department is ready to engage in technical discussions with Committee staff, affected stakeholders, and others to work out the remaining technical details. We must focus our efforts

on implementing a risk- and performance-based approach to regulation and, in parallel fashion, continue to pursue the voluntary programs that have already resulted in considerable success. We look forward to collaborating with the Committee, industry, and government partners to ensure that the chemical security regulatory effort achieves success in reducing risk in the chemical sector.

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