



**Statement of
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before the

**United States House of Representatives
Energy and Commerce Subcommittee on Energy and
the Environment**

**Legislative Hearing on
H.R. 2868**

“The Chemical Facility Antiterrorism Act of 2009”

October 1, 2009

Mr. Chairman, Ranking Member Upton, and Members of the Committee, my name is Marty Durbin, and I am vice president of Federal Affairs for the American Chemistry Council (ACC). Thank you for this opportunity to speak with you again on the important topic of security in the business of chemistry, a critical sector of America's infrastructure.

First and foremost, I would like to acknowledge the willingness of this committee to seek our input, and both to consider and understand our viewpoint. We have had constructive discussions that I hope will continue as we work together and the legislation progresses.

My testimony today will highlight three primary points:

1. Security is and will remain a top priority for our members. Since 2001, our members have invested nearly \$8 billion in security enhancements under ACC's mandatory Responsible Care Security Code[®]. When it comes to security, our members demonstrate each day an unflagging commitment to protect their facilities, employees and communities.
2. Since passage of federal chemical security legislation in 2006 – an effort ACC strongly supported – the Department of Homeland Security (DHS) has moved swiftly to implement the most robust, comprehensive and demanding chemical security program to date, the Chemical Facility Anti-Terrorism Standards (CFATS). Along with thousands of our industry partners, ACC members continue implementation of CFATS.
3. ACC welcomes the efforts of both Congress and DHS to make CFATS permanent, review how the program is working, and ensure DHS has the resources necessary to do its job. The legislation being considered by this committee represents an important step toward that goal.

1. Security and Safety - ACC's Top Priorities

ACC represents 140 leading companies who account for approximately 85 percent of basic industrial chemical production in the U.S. The business of chemistry is an important part of our nation's economy, directly employing nearly 850,000 Americans and producing 19 percent of the world's chemicals. ACC member companies manufacture essential products critical to everyday items that keep the economy moving and are essential to developing the greener, cleaner, more competitive economy the nation seeks. More than 96 percent of all manufactured goods in the U.S. are directly touched by the business of chemistry. Our members provide the chemistry that is used to produce life-saving medications and medical devices, body armor used by our military and law enforcement officers, lightweight components for vehicles, energy-saving insulation and windows, silicon for solar panels, wind turbine blades, and so much more.

Because of our critical role in the economy and our responsibility to our communities, security is a priority for ACC members. In 2001, our members adopted an aggressive security program that became the Responsible Care[®] Security Code (RCSC). It is part of the overall Responsible Care initiative, which is ACC's signature program of ethical principles and management systems designed to continuously improve our members' safety, health, product stewardship, environmental, and security performance.

Implementation of Responsible Care is mandatory for all members of the American Chemistry Council, as well as for Responsible Care Partner companies, who represent chemical transporters, distributors, warehouses, logistics planners and others along the supply chains. In developing the Security Code, we consulted closely with first responders and government agencies at all levels. With its risk-based provisions, the RCSC provided a model for state-level chemical security regulatory programs in New Jersey, New York and Maryland and was deemed equivalent to the U.S. Coast Guard's *Maritime Transportation Security Act* program.

To date, ACC members have invested nearly \$8 billion in security enhancements under the RCSC, which requires an assessment of security risks; implementation of protective measures at facilities; and evaluation and protection of products throughout a company's value chain. Certification of the management system is conducted by independent, credentialed third-party auditors.

The Code has won praise from Congress, senior DHS officials, and the media. While we are understandably proud of our members' performance under the Code, it is important to acknowledge that non-ACC members have also taken aggressive action to enhance security at their facilities.

Our Security Code also covers the crucial area of cyber security, to protect our highly automated operations from being attacked electronically. Here again, the leadership efforts of ACC members provide a model to other industries employing similar automated systems.

We are gratified that the Obama Administration has made cyber security a top priority. Along with physical security, ACC members didn't hesitate following 9/11 as they actively addressed cyber security issues and by June 2002, they developed and began implementation of the Chemical Sector Cyber Security Strategy. Additionally, the ACC's Chemical Sector Cyber Security Program created a Cyber Security Guidance Document, which was referenced by the Bush Administration's National Strategy to Secure Cyberspace of 2003, and is still in use today. A 2009 Program Update can be found on the White House website - "Making Strides to Improve Cyber Security in the Chemical Sector."

ACC participated in the White House 60-Day Cyber Policy Review and our cyber experts work closely with the DHS National Cyber Security Division (NCSD) in many areas including: national Cyber Storm exercises, information sharing pilot programs, and development of the Roadmap to Control Systems Security for the Chemical Sector.

Security in all its dimensions is a top priority for ACC, and our record of accomplishment and cooperation with Congress, DHS and other agencies is well established.

2. DHS Is Moving Aggressively to Enforce Regulations, and Chemical Facilities Are Moving Aggressively to Comply.

In recent months, DHS issued its site security plan requirements and *Risk-Based Performance Standards Guidance* to assist high-risk chemical facilities in selecting and implementing the specific measures they will adopt to meet the DHS performance standards. DHS has notified all Tier 1 and 2 facilities, which comprise the highest-risk facilities, of their obligation to develop site security plans and submit these plans for DHS inspectors to review and approve. In addition, DHS has begun to notify Tier 3 facilities of their requirements.

This guidance makes it perfectly clear that the current DHS chemical security rules are tough, yet appropriately flexible. “Among other things, CFATS established 18 Risk-Based Performance Standards (RBPSs) that identify the areas for which a facility’s security posture will be examined, such as perimeter security, access control, personnel surety and cyber security,” DHS explains.

The Department adds, “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.” DHS inspectors will review each of these submitted plans and only approve them when they meet the established performance level.

For ACC members, this is exactly what a strong, smart regulatory approach must do: ***set a high bar through performance-based standards and then hold facilities accountable.*** Or, as explained in the report, *The Forgotten Homeland*, co-authored by DHS Undersecretary Rand Beers, “Smart regulation focuses on results or end-states rather than dictating how those results should be achieved.”

The approach taken by CFATS allows facilities to utilize a full range of potential security enhancements – including “methods to reduce consequences” or “inherently safer” approaches – to address potential security vulnerabilities identified by the department’s assessment tool.

CFATS is by far the most robust, comprehensive and demanding chemical security regulatory program to date. It will require significant additional investment from ACC member company facilities deemed “high risk.” In fact, DHS anticipates that by 2015, implementation costs for CFATS will exceed \$8.5 billion.

Yet, despite the cost and other requirements for compliance, ACC not only called for these regulations, but at each step of the process our member companies volunteered to pilot core program elements and assist DHS in rapidly and successfully developing the tools needed to implement the program and swiftly meet their regulatory deadlines.

ACC members are committed to security and to working with DHS and Congress to protect the nation’s chemical infrastructure, and we are grateful DHS has developed an effective program. While most regulatory programs can take years to develop, DHS, with the support of the industry, has proposed and finalized a comprehensive regulation, evaluated the risk of over 35,000 facilities, required detailed risk assessments from over 7,000 of these facilities deemed high risk and now has those high risk sites implementing security measures – all within the three years – a significant accomplishment.

3. Congress Must Provide DHS with All Resources Required to Protect Chemical Facilities and Make CFATS Permanent.

CFATS lays out clear, comprehensive requirements for covered chemical facilities on an aggressive timeline, and DHS and these sites are implementing the rule as rapidly as possible. DHS personnel have already conducted reviews of site-specific vulnerability information and are now assisting facilities as they develop site security plans. DHS is in the process of visiting the regulated sites to review and approve each of these security

plans. This will include assessing how each facility has addressed the applicable risk-based performance standards for facilities in its risk tier – a complex, site-specific evaluation.

While DHS has enjoyed a solid start, there is a crucial need for Congress to support DHS' budget requests and make CFATS permanent. DHS staff has demonstrated outstanding commitment and effort to date, so we urge Congress to provide the agency with the necessary resources to handle the workload and to ensure that chemical facility security is properly implemented in a timely manner. As an important step, we were pleased to see Congress approve the recent DHS budget request and include an extension for CFATS to ensure that the program can continue to move forward for an additional year even as a permanent program is being fashioned.

4. ACC Comments on “The Chemical Facility Antiterrorism Act of 2009”

H.R. 2868 represents an important first step toward establishing permanent chemical facility security regulations. ACC clearly supports that goal. We're pleased to see the legislation reflect many of the security measures that will be implemented under CFATS, and we appreciate the efforts made to minimize duplication of effort by facilities that have already acted or will take further action under the program.

However, I'd like to highlight a few provisions we've discussed with the committee where we continue to have questions and concerns. For example, we believe the provision that would give DHS authority to mandate process changes is unnecessary. Through its use of risk-based performance standards, CFATS has already demonstrated that it drives each facility to consider all possible risk-reduction options - including “methods to reduce consequences” or “inherently safer” approaches when developing a site security plan. The reason this occurs is that the highest risk facilities subject to CFATS face significant cost to implement the stringent requirements and thus have a strong incentive to implement enhancements that could move the facility to a lower-risk tier, or potentially even move it out of the program. This is a substantial incentive to

reduce regulatory requirements. While you can't mandate innovation, CFATS allows DHS to unleash the ingenuity, expertise and resources of the chemical sector. Congress should not abandon a strategy to enhance security that employs performance-based security standards to hold facilities accountable but avoids the potential for shifting risk.

In addition, we feel the provision that provides for "Private Right of Action" is counterproductive to the ultimate success of CFATS. Unlike environmental statutes, CFATS is not a series of prescriptive statutory measures with which compliance is mandatory, like emission standards or discharge limitations, and therefore it is much more difficult for an outsider – whether it be a citizen or judge - to ascertain if a standard is being met or to decide what needs to be done to address an alleged deficiency. We also share concerns raised by DHS regarding the potential for disclosure of sensitive or classified information in judicial proceedings.

Citizens' suit provisions are absent from federal statutes regulating maritime security, airline security, railroad and motorcarrier security. The regulation of security at chemical facilities should not be treated differently and singled out to bear the counterproductive burden of being subject to citizens' suits.

In its earliest stages, one of the goals of the program was to have more secure sites through a collaborative effort between DHS and the regulated community. Creating a litigious environment will most certainly undermine such an effort. Congress should not delegate its oversight authority to courts. If Congress truly believes that DHS will have a problem enforcing the program, it should ensure that it has staff and resources to do the job and allow DHS to have a tight grip on compliance.

In Conclusion

We agree with Congress that our shared priority is to enhance security at sites nationwide. CFATS is already driving over 7,000 high-risk facilities toward that goal as

we speak. We ask that Congress provide DHS the support necessary to implement the current program.

The crucial partnership between our industry and the federal government requires each of us to do our part. ACC and its member companies are committed to safeguarding America's chemical facilities, and will continue to work with Congress and DHS in that spirit.

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