



Testimony of

Matthew J. Leary
Corporate EHS&S Manager
Pilot Chemical Company

On Behalf of the
Society of Chemical Manufacturers and Affiliates

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Subcommittee on Environment and the Economy

on

The Chemical Facility Anti-Terrorism Standards
Program – A Progress Report

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Good morning Chairman Shimkus, Ranking Member Green, and members of the Subcommittee. My name is Matt Leary and I am both Corporate Security Officer as well as the Environment, Health, and Safety Manager for Pilot Chemical Company in Cincinnati, Ohio. I am pleased to provide this testimony on behalf of the Society of Chemical Manufacturers and Affiliates (SOCMA) regarding how the Department of Homeland Security (DHS) has been implementing the Chemical Facility Anti-Terrorism Standards (CFATS) and what that has meant for Pilot Chemical's two covered facilities.

Pilot Chemical is a small privately-held company, celebrating its 60th anniversary on the 19th of this month. We specialize in alkylation, sulfonation and sulfation, which are used to manufacture detergents. We have only 200 employees. We have 4 facilities, two of which are subject to CFATS.

Pilot Chemical is in many ways typical of the members of the Society of Chemical Manufacturers and Affiliates, to which we are proud to belong. For 91 years, SOCMA has been and continues to be the leading trade association representing the batch, custom, and specialty chemical industry. SOCMA's nearly 230 member companies employ more than 100,000 workers across the country and produce some 50,000 products – valued at \$60 billion annually – that make our standard of living possible. From pharmaceuticals to cosmetics, soaps to plastics and all manner of industrial and construction products, SOCMA members make materials that save lives, make our food supply safe and abundant, and enable the manufacture of literally thousands of other products. Over 80% of SOCMA's active members are small businesses like Pilot Chemical.

Maintaining the security of our facilities has always been a priority for SOCMA members, and was so before September 11. After the tragic events of 9/11, which occurred 11 years ago today, SOCMA members did not wait for new government regulations before researching, investing in and implementing additional and far-reaching facility security measures to address these new threats. Under SOCMA's ChemStewards® initiative, SOCMA members were required to conduct security vulnerability assessments (SVAs) and to implement security measures. However, there were no uniform federal standards for measuring and implementing these security improvements across industry. CFATS standardized that security process.

Many SOCMA member company facilities, just like Pilot Chemical's, are encompassed within the CFATS program. They have submitted their Site Security Plans (SSPs) and – we assume – will eventually be inspected by DHS to verify the adequacy of those plans and their conformance to them. SOCMA members have spent billions of dollars and have devoted countless man-hours to secure their facilities and operations. These investments will naturally continue for the foreseeable future. SOCMA has tried to actively engage with DHS to accelerate and continuously improve the implementation of the CFATS program, exploring new approaches to personnel surety and Alternative Security Programs.

Definitively, DHS's Chemical Facility Anti-Terrorism Standards **work**. DHS listened to the private sector in developing a regulatory framework that is performance-based and preserves the ability for security professionals to make investments in measures that suit their specific

facilities, but that also provides robust performance standards and imposes strict penalties for non-compliance.

But that does not mean that the CFATS experience has been easy for regulated companies, especially small ones like Pilot Chemical. In several respects, the way that DHS has implemented the CFATS regulations has imposed substantial uncertainties and costs on companies. I recognize that DHS has been building out the program at the very same time it has been implementing it. Nonetheless, I believe that DHS could have substantially reduced these uncertainties and costs if they had implemented the program more quickly and confidently. They still could.

At the same time, Pilot Chemical along with SOCMA wants to recognize the marked improvement in CFATS implementation under the leadership of National Programs and Protection Directorate (NPPD) Deputy Undersecretary Suzanne Spaulding and Infrastructure Security Compliance Division (ISCD) Director David Wulf, both of whom joined the Department last year. We are confident that this program will continue to move forward with the both of them at the helm.

Below I will (i) explain what is good about CFATS; (ii) describe the problems with its implementation and the impacts on smaller companies like Pilot Chemical; and (iii) describe some needed improvements.

I. Despite Departmental Mismanagement, CFATS is Reducing Risk

To be clear, SOCMA's membership regards the program thus far as a success, even if its implementation has moved much more slowly and cautiously than we all would prefer. The CFATS statute was wisely drafted to be comprehensive and flexibly structured to impose security performance standards that are relatively more demanding of higher-risk facilities and less demanding of lower-risk plants. To a great extent, DHS's rules implement the statutory mandate issued by Congress in 2006.

Both the law and the rules are fundamentally sound and do not require replacement. Since the program was launched in 2007, more than 2,000 facilities have changed processes or inventories in ways that have enabled them to screen out of the program. Thus, as predicted, CFATS is driving facilities to reduce inherent hazards, where in their expert judgment doing so is in fact safer, does not transfer risk to some other point in the supply chain, and makes economic sense. Hundreds of other regulated facilities that had not already done so have already made significant proactive investments in security measures in anticipation of compliance with the full implementation of CFATS. As a result of CFATS, our nation is more secure from terrorist chemical attacks and other threats than it was before the program's inception. And this risk reduction has taken place through a market-based approach that has certainly cost society less than if all the initially covered facilities were still subject to regulation.

Furthermore, due to the outstanding cooperation of the chemical sector, there has been 100% compliance with the requirements to submit Top-Screens, SVAs and SSPs – DHS has not yet had to institute a single administrative penalty action to enforce compliance.

SOCMA also supports the CFATS program because our members have invested significant amounts of financial and human capital in it over the past several years. Overall, covered facilities have invested billions of dollars in security upgrades to meet CFATS's requirements – Pilot Chemical itself has invested hundreds of thousands of dollars. SOCMA's members alone, a majority of which are small manufacturers with under \$40 million in annual sales, have invested an estimated \$515 million in security measures to date. CFATS has provided significant additional security to a critical segment of our nation's infrastructure, as well as the general public.

No one should dispute that, despite the challenges to its implementation, the two main alternatives to CFATS would both be far worse. Having no chemical security regulation at all would create a risky and tilted playing field in which most companies secured their facilities voluntarily, at significant cost, while a minority created risks for us all, and gained an unfair economic advantage, by not doing so. Our nation would also not be well-served by a prescriptive program that mandated incorporation of inherently safer technology (IST). Such an approach would threaten to drive chemical operations overseas where security standards are weaker.

II. Small Businesses Suffer Disproportionately from DHS's Problems Implementing CFATS

A. The Impact of Delay on Budgeting, Investment and Staff Credibility

As Corporate Security Officer for Pilot Chemical, I can tell you that the most frustrating aspect of CFATS implementation has been not knowing, for years now, how much to budget for compliance. In this tough economy, every penny counts. Finance directors want to know when and how much our company will be spending on security measures to meet the requirements of CFATS compliance. Unfortunately, there is no way for me to answer either question.

While security budgeting is an issue for any company whose site falls under CFATS, the challenges are especially great for small businesses like Pilot Chemical. We have limited capital to invest. Obviously, we would like to invest that money in plants and equipment so that we can take advantage of profitable business opportunities as they present themselves. We also have limited cash flow from operations, which we would like to be able spend buying raw materials and creating jobs. We recognize that we have to comply with CFATS, and we are prepared to do so, but we need to know how much it will cost and when those costs will be incurred. Instead, we have been forced to guess, and to hold the amount of projected early outlays in suspense, unavailable for productive purposes, in case DHS suddenly approves our SSP and we need to start incurring expenses to comply. You can, I hope, imagine our frustration as this situation persists, year after year, and we still have no idea when DHS will ever get to authorization inspections for our facilities' tiers. That frustration is compounded as we relive the annual drama of whether Congress will extend the perennially expiring regulations for yet another year.

We believe that our facilities are appropriately secure. But we have no real idea what DHS will conclude is required based on our submitted SSP, and companies the size of Pilot Chemical

cannot afford to guess. The biggest catastrophe for a small business is to hear something like: “The \$250,000 you just shelled out for [fill in the blank] did not really help your profile and was in fact not needed.” As a result, we cannot spend dollars on security in advance unless we are clear that what is spent will directly lead to compliance with the standard.

Besides tying up assets and preventing productive investments, the extended delays in implementation of CFATS also lead companies to question whether their government is really serious about the security of chemical facilities. While DHS expects regulated facilities to submit their SVAs and SSPs on time, commitments made about approving SSPs and completing pre-authorizing inspections by date X are repeatedly broken. Rarely are such exceptions made for industry. Such failures cause security professionals to lose credibility with their superiors who authorize compliance costs, as these managers conclude that their security staff are simply “crying wolf” about their regulatory obligations. DHS mismanagement has, in some cases, stopped the momentum that security managers had with their own senior management in convincing them of the need for certain cost decisions, placing forward progress in a holding pattern.

B. The Inability to Get Meaningful Guidance from DHS

An ongoing challenge for Pilot Chemical, and for many other companies that have yet to see their SSP reviewed by DHS or that have had their submission rejected, has been the unwillingness of DHS to give us useful guidance on how to comply with the Risk-Based Performance Standards (RBPS) that are the heart of CFATS. When facilities ask headquarters or regional DHS staff whether particular security measures would satisfy a given standard for a given tier level, the staff routinely decline to give us a clear answer. We are only able to get non-specific comments that security professionals cannot translate into particular actions.

DHS staff say they cannot give us clear guidance because the CFATS statute prohibits DHS from requiring facilities to implement specific security measures. That is ridiculous, however. The statute’s prohibition on requiring particular security measures doesn’t prevent DHS staff from saying “Security measure X is one way to meet RBPS Y at tier level Z. It is not the only way, and we are certainly open to discussing other ways.” The implementation of CFATS would be vastly improved if DHS staff were willing to offer non-exclusive safe harbors in this fashion. Then smaller companies like Pilot Chemical that are looking for clear compliance guidance would be able to obtain it, and larger companies would be free to design and propose their own solutions.

I agree it would be a problem if DHS regularly disapproved SSPs that included anything besides the example or safe harbor guidance. But the possibility that this might occur somewhere, sometime, is not a good reason to prohibit DHS staff across the board from offering safe harbors.

The other reason we believe DHS has been unwilling to give clear guidance is described on page 10 of the Anderson/Wulf memo, which says “there exists within the cadre of SSP reviewers a reluctance to recommend ‘good enough’ SSPs for authorization or conditional authorization out of fear that the leadership has a zero tolerance philosophy towards mistakes and out of a lack of clarity regarding expectations.” As DHS has testified today, only one SSP has been

conditionally approved to-date. DHS has obviously been letting the perfect be the enemy of the good. While SOCMA does not support a rushed process that accepts inadequate or incomplete SSPs, DHS needs to make clear to staff that they are expected to use their judgment and to make decisions – and that their management will not punish them for doing so.

That said, despite the bad picture the Anderson/Wulf memorandum has painted of inspectors, they have always been available to SOCMA and its members, either providing compliance assistance on-site upon request or attending SOCMA events, and have been very engaging with our membership.

C. Small Business Concerns with DHS’s Personnel Surety Program

RBPS #12 requires facilities to implement security measures designed to: (i) verify and validate identity; (ii) check criminal history; (iii) verify and validate legal authorization to work; and (iv) identify people with terrorist ties. The facility is responsible for the first three tasks and for determining what criminal background findings would be disqualifying. Evaluating terrorist ties requires federal government involvement, however, in the form of evaluating names against the national Terrorist Screening Database (TSDB) maintained by the FBI.

Last year, DHS announced its intent to establish a web-based application that would require facility owners and operators to submit personally-identifying information about current and prospective employees, as well as contractor and visitor personnel seeking access to a plant. Contrary to the flexible spirit of the CFATS program, this proposal would not grant companies the ability to decide how to vet personnel, such as accepting any of the half-dozen or so other federally-issued credentials that involve a TSDB check unless facilities gather additional information from persons presenting them.

Our industry has expressed serious reservations about the logistical nightmares that this proposal could lead to, given the heavy presence of contractors at chemical sites, especially during plant-wide maintenance “turnarounds.” We have strongly urged DHS to accept other federally-issued credentials that involve a TSDB check without further collection of information. Unions have also expressed concern about DHS’s proposal.

DHS has been open to discussing alternative approaches, and the industry has proposed both interim and long-term alternatives that could involve reliance on existing federal vetting programs, mechanisms by which contractor and visitor employers could submit information regarding their own employees, and ultimately a universal federal security credential that would supersede all others.

Many smaller companies like Pilot Chemical would benefit from leveraging existing processes for vetting individuals that we feel meet the intent of the standards. DHS’s prior proposal would unnecessarily limit the number of options open to regulated facilities for complying with RBPS #12.

We have had productive discussions with the Office of Infrastructure Protection on our proposals, and DHS has accepted some of them (and backed off from some of its other

problematic proposals). DHS has also shown a good faith effort to engage industry since it withdrew its initial proposal in July from the Office of Management and Budget, which was reviewing it under the Paperwork Reduction Act. However, further progress has had to struggle against the desires of some within DHS to make CFATS a system for tracking which persons have ever had access to which chemical facility.

Moving forward, I would emphasize that smaller companies have a seat at the table on personnel surety.

Resolving this challenge expeditiously would free up ISCD resources to focus on the more pressing tasks of approving SSPs and initiating compliance inspections.

D. Stalled Progress in Developing a Viable ASP

The Alternative Security Program (ASP) originated under the Coast Guard's Maritime Transportation Security Act (MTSA) program. The concept was to be a standardized plan designed for particular classes of facilities that would be more tailored to their circumstances and more flexible and open-ended option.

DHS's first mistake in this regard was in its Interim Final Rule, when DHS abandoned its original proposal and limited ASPs to individual facilities – so that DHS could not approve a single ASP for more than one facility.¹ This is one of the few areas where DHS could and should revise its CFATS regulations to make them better.

As a result of DHS's change, the option for facilities to submit an ASP has all but disappeared. Again, DHS has said that it wants to engage regulated facilities in developing more useful ASPs, but these discussions have not yet borne fruit. Many companies, including SOCMA members, have said that in order to produce an ASP template that satisfies DHS, they essentially need to replicate the SSP. For this reason, Pilot Chemical has chosen not to even attempt crafting an ASP. Until it revises its rules, DHS needs to be more open to models that are more like the security plans that companies actually use, and to approve generic or model ASPs that individual facilities could adopt for their own submissions.

E. Delays in CSAT Tool Improvement

The SSP tool was developed without sufficient input from industry. As a result, it is really a data collection tool, not a plan. A site security plan is an actionable document that tells managers what to do in a given circumstance. The CSAT SSP does not do this – you cannot manage with it.

DHS has been working, on and off, for over a year on a "Gen II" SSP. DHS should accelerate that work. They should actively engage the industry in that process and work closely together to produce a product that makes sense and meets the needs of both DHS and facilities.

¹ Compare current 6 C.F.R. § 27.235 with the proposal (located at 71 Fed. Reg. 78298, Dec. 28, 2006).

III. DHS Must Improve Communication with the Regulated Community and Embrace Industry to Achieve Real Progress in Implementation

As I have testified today, and as SOCMA has repeatedly testified before, the CFATS framework is sound, but DHS's implementation has been flawed. This is largely because DHS has drifted away from the spirit of the public-private partnership on chemical security that it has so often hailed as a keystone of the CFATS program. Congress should encourage ISCD to work collaboratively with the regulated community to solve the technical, training and tool-related issues currently presenting challenges to the implementation of CFATS. Additionally, DHS must provide better guidance to the regulated community – particularly smaller companies without the benefit of a team of in-house experts or a budget that can accommodate outside consultants – on how to produce a SSP or ASP that meets the requirements of the RBPS.

Industry can provide much assistance moving forward, including ways for DHS to minimize the future cost and complexity of the CFATS program. SOCMA believes that CFATS can successfully be implemented without the need for additional legislation. Success will require DHS to (i) give CFATS facilities regulatory certainty; (ii) make demonstrable progress reviewing and approving SSPs and inspecting facilities; and (iii) suitably engage industry in improving the CFATS program, especially as regards SSPs, ASPs and personnel surety. Congress can increase the chances of success by (i) conducting regular oversight, (ii) reauthorizing the statute for an extended period of time; and (iii) adequately funding the CFATS program.

I appreciate this opportunity to testify before you today and look forward to your questions.