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115TH CONGRESS, 2d Session | SENATE | REPORT 115–384

PROTECTING AND SECURING CHEMICAL FACILITIES FROM TERRORIST ATTACKS ACT

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 3405

TO REAUTHORIZE THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS PROGRAM OF THE DEPARTMENT OF HOMELAND SECURITY

NOVEMBER 26, 2018.—Ordered to be printed

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Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 3405]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 3405), to reauthorize the Chemical Facility Anti-Terrorism Standards Program of the Department of Homeland Security, having considered the same, reports favorably thereon with an amendment (in the nature of a subsitute) and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of S. 3405, the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2018, is to reauthorize and improve the Chemical Facility Anti-Terrorism Standards (CFATS) program at the Department of Homeland Security ("DHS" or the "Department") for a period of five years.

The legislation makes several important reforms to improve the CFATS program's effectiveness and efficiency. Importantly, it improves transparency regarding changes to tiers and the list of cov-

ered chemicals; requires improved reporting to Congress and assessments on how the program improves security; provides regulatory relief for certain covered facilities regulated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and companies that participate in a CFATS recognition program; and extends authorization for the CFATS program for an additional five years.

II. Background and the Need for Legislation

Background on the CFATS program

In 2006, Congress authorized the Secretary of Homeland Security to regulate security at high-risk chemical facilities through the Department of Homeland Security Appropriations Act of 2007, thus creating the CFATS program.[1] The program is managed by the Infrastructure Security Compliance Division (ISCD), within DHS's National Protection and Programs Directorate. DHS regulates 3,369 high-risk chemical facilities, and covers over 40,000 facilities.[2] The CFATS program regulates facilities within multiple industries including "chemical manufacturing, storage and distribution, energy and utilities, agriculture and food, explosives, mining, electronics, plastics, universities and laboratories, paint and coatings, healthcare and pharmaceuticals."[3]

The CFATS program regulates chemical facilities throughout the United States determined to be high risk by DHS.[4] Some facilities are exempt from the program, including those regulated by the U.S. Coast Guard under the Maritime Transportation Security Act[5]; public water systems and treatment works regulated by the Environmental Protection Agency[6]; facilities that are owned or operated by the Department of Defense and Department of Energy; facilities regulated by the Nuclear Regulatory Commission; and some agricultural production facilities.[7]

Under the CFATS program, non-exempt facilities are required to compare their chemical inventories to the 322 chemicals of interest and threshold quantities in Appendix A, created by the Department under the CFATS program.[8] The chemicals listed on Appendix A are determined to be a chemical of interest based on their screening threshold quantities and the security issues related to each chemical.[9] If the facilities' amounts of chemicals on Appendix A are below the threshold, they are not regulated by CFATS. If the company's amounts of chemicals on Appendix A are above the stated amount, the company is required to submit additional information to DHS via an online "Top-Screen" to determine if they are to be

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[1] Department of Homeland Security Appropriations Act, Pub. L. No. 109–295, § 550, 120 Stat. 1355, 1388–1389 (2006); *see also* Frank Gottron, Cong. Research Serv., IF10853, Chemical Facility Anti-Terrorism Standards (2018), *available at* http://www.crs.gov/Reports/IF10853.

[2] Dep't of Homeland Sec., Chemical Facility Anti-Terrorism Standards (CFATS) (2018), *available at* https://www.dhs.gov/chemical-facility-anti-terrorism-standards (last visited Nov. 9, 2018); *see also* Dep't of Homeland Sec., CFATS Monthly Statistics (2018), *available at* https://www.dhs.gov/cfats-monthly-statistics.

[3] Dep't of Homeland Sec., CFATS Covered Facilities and Inspections (2018), *available at* https://www.dhs.gov/cfats-covered-chemical-facilities (last visited Nov. 9, 2018).

[4] Chemical Facility Anti-Terrorism Standards, *supra* note 2.

[5] Maritime Transportation Security Act of 2002, Pub. L. No. 107–295, § 116 Stat. 2064 (2002).

[6] 42 U.S.C. § 300; 33 U.S.C. § 1292.

[7] CFATS Covered Facilities and Inspections, *supra* note 3.

[8] Frank Gottron, Cong. Research Serv., IF10853, Chemical Facility Anti-Terrorism Standards (2018), *available at* http://www.crs.gov/Reports/IF10853.

[9] Dep't of Homeland Sec., Appendix A: Chemicals of Interest (COI) (2018), *available at* https://www.dhs.gov/appendix-a-chemicals-interest-list.

regulated.[10] Since the program's inception, the Department has received over 90,000 Top-Screens from more than 40,000 chemical facilities nationwide.[11]

Facilities subject to CFATS regulations are divided into four tiers based on the Department's determination of the relative security risks of the covered facilities, with Tier 1 including the highest risk and Tier 4 covering the lowest risk.[12] Most of the facilities regulated under CFATS fall under Tier 3 and Tier 4.[13] According to an October 2018 report by the Congressional Research Service (CRS), five percent of facilities fall under Tier 1; two percent of the facilities are under Tier 2; 40 percent of facilities are in Tier 3; and 53 percent of facilities fall under Tier 4.[14]

A covered chemical facility's security plans and implementation must comply with DHS's Risk-Based Performance Standards (RBPS).[15] There are currently 18 RBPS which include: "Restrict Area Perimeter"; "Secure Site Assets"; "Screen and Control Access"; "Deter, Detect, and Delay"; "Shipping, Receipt, and Storage"; "Theft or Diversion"; "Sabotage"; "Cyber"; "Response"; "Monitoring"; "Training"; "Personnel Surety"; "Elevated Threats"; "Specific Threats, Vulnerabilities, or Risks"; "Reporting of Significant Security Incidents"; "Significant Security Incidents and Suspicious Activities"; "Officials and Organization"; and "Records."[16] The highest risk facilities (Tier 1 and Tier 2) are required to comply with the most rigorous standards.[17] According to CRS, "[t]he statute does not permit DHS to require any particular security measure. Facilities may implement any security program or process that adequately meets the requisite performance level for its risk level."[18]

Between 2007 and 2014, Congress extended the CFATS program annually via appropriations.[19] However, the program was plagued with significant problems. According to the Government Accountability Office (GAO), the program had a seven to nine year backlog to review approximately 3,120 site security plans.[20] GAO also reported to Congress that DHS's tiering methodology did not consider key risk elements, including economic consequences and facility vulnerability.[21] GAO also referenced program management issues with executing the CFATS program.

According to a leaked 2011 DHS memorandum, management issues within the program included "an array of challenges that ISCD had experienced implementing the CFATS program, including an inability to hire staff with the needed skills, an overly com-

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[10] Dep't of Homeland Sec., Chemical Security Assessment Tool (CSAT) Top-Screen (2018), *available at* https://www.dhs.gov/csat-top-screen (a Top-Screen is an online survey that helps DHS determine if a facility meets the level of risk to be regulated under CFATS).

[11] Dep't of Homeland Sec., CFATS Monthly Statistics (2018), *available at* https://www.dhs.gov/cfats-monthly-statistics (last visited Nov. 9, 2018).

[12] Frank Gottron, *supra* note 8.

[13] *Id.*

[14] *Id.*

[15] Dep't of Homeland Sec., Risk-Based Performance Standards (RBPS) (2018) *available at* https://www.dhs.gov/cfats-rbps.

[16] Dep't of Homeland Sec., Risk-Based Performance Standards Guidance (2009), *available at* https://www.dhs.gov/sites/default/files/publications/CFATS-Risk-Based-Performance-Standards-508.pdf.

[17] Frank Gottron, *supra* note 8.

[18] *Id.*

[19] Dana A. Shea, Cong. Research Serv., R41642, Chemical Facility Security: Issues and Options for the 112th Congress (2012), *available at* https://fas.org/sgp/crs/homesec/R41642.pdf.

[20] U.S. Gov't Accountability Office, GAO–13–353, Critical Infrastructure Protection (2013), *available at* https://www.gao.gov/products/gao-13-353.

[21] *Id.*

plicated security plan review process, and a compliance inspection process that had yet to be developed."[22] The DHS Office of Inspector General (DHS OIG) also issued a report in 2013 questioning whether the CFATS program could achieve its mission, documenting 13 major deficiencies and providing 24 recommendations.[23] According to the report, "[p]rogram progress has been slowed by inadequate tools, poorly executed processes, and insufficient feedback on facility submissions."[24] The DHS OIG also found that "[o]verall efforts to implement the program have resulted in systematic noncompliance with sound Federal Government internal controls and fiscal stewardship. . . ."[25]

Congress also questioned whether the program was successfully reducing risk and enhancing security. In 2014, Senator Tom Coburn, then the Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs, released a minority staff report evaluating CFATS. According to the report, the Department's own internal review found "fundamental problems, errors, inconsistencies, and unsupported assumptions in the methodology underlying the whole CFATS program as well as a general lack of transparency with the private sector and outside experts."[26] It also found "fundamental problems in the design, implementation, and management of the CFATS program," including multiple challenges with DHS risk formulas.[27]

Based on his oversight and the available information from watchdogs in 2014, Senator Coburn wrote:

> In its current form, CFATS isn't working. The program regulates the wrong chemical plants—increasing costs for companies at lower risk while missing those at higher risk—and would not make us significantly more secure even if it worked as designed. Faced with new evidence of on-going challenges in CFATS, and the likelihood that the program will not be adequately fixed for many more years—if ever—Congress must act decisively. Whether Congress decides to substantially overhaul CFATS and put it on track, or terminate the program altogether, one thing is clear: small fixes here are no fix at all.[28]

Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014

In 2014, Congress attempted to fix these problems by authorizing and reforming the program in the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (2014 Authorization).[29] The legislation made several changes to the program. First,

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[22] U.S. Gov't Accountability Office, GAO–13–801T, Critical Infrastructure Protection (2013), *available at* https://www.gao.gov/assets/660/656482.pdf.

[23] Dep't of Homeland Sec., Office of Inspector Gen., OIG–13–55, Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program (2013), *available at* https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/2013/OIG_13-55_Mar13.pdf.

[24] *Id.*

[25] *Id.*

[26] Sen. Tom Coburn of Sen. Comm. on Homeland Sec. & Governmental Affairs, 113th Cong., Chemical Insecurity, (Comm. Print 2014), *available at* https://www.hsgac.senate.gov/imo/media/doc/Chemical_Insecurity.pdf.

[27] *Id.*

[28] *Id.*

[29] Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, Pub. L. No. 113–254, § 128 Stat. 2898 (2014); *see also* Frank Gottron, *supra* note 8.

the legislation established the Expedited Approval Program, providing greater flexibility for Tier 3 and Tier 4 owners and operators to develop their facility's site security plans.[30] Second, the 2014 Authorization improved whistleblower protections.[31] Third, the 2014 Authorization required DHS to biannually report its performance metrics to Congress and conduct outreach to chemical facilities.[32] The 2014 Authorization included a four-year sunset of the CFATS program, setting the program to expire on January 17, 2019.[33]

The Committee's oversight in the 115th Congress

Throughout the 115th Congress, the Committee has conducted oversight of the CFATS program. On March 13, 2017, Chairman Ron Johnson, Ranking Member Claire McCaskill, and Ranking Member Bennie Thompson of the House Committee on Homeland Security requested GAO conduct a review of the CFATS program.[34] On April 4, 2018, Chairman Johnson wrote a letter to ISCD requesting additional information on the CFATS program, including the status of overdue reports to Congress, and the number of facilities certified under expedited approval.[35] On June 12, 2018, the Committee held a roundtable titled, Examining the Chemical Facility Anti-Terrorism Standards, that included DHS, GAO, a CFATS chemical inspector, and a variety of chemical facilities and industry groups.[36] On October 23, 2018, Chairman Johnson and Senator Capito wrote a letter to the House Committee on Homeland Security and the House Committee on Energy and Commerce regarding the CFATS reauthorization, urging both Committees to work with the Senate and incorporate the reforms in S. 3405 into the CFATS reauthorization.[37] Committee staff has also met with chemical facilities owners, industry trade associations, and received multiple briefings from DHS, ATF, CRS, GAO, the Federal Bureau of Investigation (FBI), and Sandia National Laboratories.[38]

Through congressional oversight and DHS OIG and GAO reports, the management and performance of the CFATS program has improved. For example, DHS has completely reduced the number of facilities awaiting final tiering into the CFATS program.[39] GAO previously estimated it could take seven to nine years for DHS to

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Request letter from S. Comm. on Homeland Sec. & Governmental Affairs and H. Comm. on Homeland Sec. to U.S. Government Accountability Office (March 13, 2017) (on file with Comm. majority staff). Chairman Michael McCaul later joined the request.
[35] Request letter from Chairman Ron Johnson to U.S. Dep't of Homeland Sec., National Protection and Programs Directorate, Infrastructure Security Compliance Division (April 4, 2018) (on file with Comm. majority staff).
[36] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. (2018), *available at* https://www.hsgac.senate.gov/hearings/roundtable_-examining-the-chemical-facility-anti-terrorism-standards-program.
[37] Letter from Chairman Ron Johnson and Senator Shelley Moore Capito to the House Committee on Homeland Security and the House Committee on Energy and Commerce (October 23, 2018) (on file with Comm. majority staff).
[38] *See e.g.*, Comm. staff briefing with FBI (Feb. 8, 2018); Comm. staff briefing with FBI (Apr. 9, 2018); Comm. staff briefing with Envtl. Tech. Council (Apr. 12, 1018); Comm. staff briefing with Dep't of Homeland Sec. (May 14, 2018); Comm. staff briefing with Dep't of Homeland Sec. (June 1, 2018); Comm. staff briefing with GAO (June 7, 2018).
[39] Majority staff analysis of U.S. Dep't of Homeland Sec., Chemical Facility Anti-Terrorism Standards Semiannual Performance Reports (Sept. 26, 2015 to Sept. 12, 2018) (on file with Comm. majority staff) [hereinafter Majority staff analysis of Chemical Facility Anti-Terrorism Standards Semiannual Performance Reports].

verify site security plans and clear the backlog.[40] Additional improvements include an increase in the number of compliance inspections, and a reduced timeframe for facilities to submit an initial Site Security Plan or Alternative Security Plan.[41]

As discussed below, additional reforms are still needed before the program is reauthorized. As discussed below, S. 3405 incorporates the information learned from the Committee's oversight to make improvements in the CFATS program.

S. 3405 Requires DHS to ensure broader awareness of the Expedited Approval Program

The Expedited Approval Program allows flexibility for Tier 3 and Tier 4 facilities to develop expedited security plans versus the standard security plans, effectively encouraging companies that own covered chemical facilities to proactively implement security measures in compliance with CFATS without requiring a DHS authorization inspection.[42] The Expedited Approval Program was also intended to reduce the time and costs required to comply with the CFATS program.[43]

However, few companies have participated in expedited approval since the 2014 Authorization. In 2015, DHS reported that only one facility was utilizing the program.[44] According to GAO, in April 2017, only 2 facilities were using the program out of 2,496 eligible facilities.[45] Representatives from facilities that have used the Expedited Approval Program said "its prescriptive nature helped them quickly determine what they needed to do to implement required security measures and reduced the time and cost to prepare and submit their security plans to DHS."[46]

Low participation in the Expedited Approval Program has been attributed to how it was implemented by DHS, its stringent security measures, and the desire for in-person authorization inspections.[47] Further, the online assessment tool used to collect data for facilities not participating in expedited approval (CSAT 2.0) has become more user friendly and less burdensome, resulting in facilities to choose the normal CFATS process.[48] In addition, majority Committee staff found that some facility representatives and industry groups are unaware of the Expedited Approval Program's existence, raising questions about DHS's efforts to proactively inform companies of their options to effectively self-certify their security measures through the Expedited Approval Program.[49] Today, participation in the expedited approval option within the CFATS program remains limited, with only 17 facilities out of 3,130 partici-

[40] Critical Infrastructure Protection, *supra* note 20.
[41] Majority staff analysis of Chemical Facility Anti-Terrorism Standards Semiannual Performance Reports.
[42] U.S. Gov't Accountability Office, GAO–17–502, Critical Infrastructure Protection (2017), *available at* https://www.gao.gov/assets/690/685520.pdf.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (For example, on July 20, 2018, Committee staff attended a CFATS facility tour organized by DHS and asked the facility if they have heard of the Expedited Approval Program. The facility said they had not heard of the program.).

pating.[50] To increase participation, S. 3405 requires DHS to notify all new and currently covered CFATS facilities of the Expedited Approval Program. The bill also gives facility owners and operators additional time to certify expedited approval security plans to potentially allow more businesses to use the Expedited Approval Program.

S. 3405 Requires DHS to provide greater regulatory relief for companies that participate in the CFATS Recognition Program

During the Committee's June 12, 2018, roundtable, six representatives from the chemical industry expressed their support for greater regulatory relief for covered chemical facilities that participate in industry-led best practices or recognition programs and exceed compliance of CFATS security standards. Currently, the chemical industry has a variety of stewardship programs, which assist facilities in complying with various standards and regulations, including health, environmental, safety, and security.[51] At the roundtable, industry and participating facilities described the potential benefits of creating a CFATS Recognition Program to provide covered facilities participating in current and future industry stewardship programs additional regulatory relief. Randall Eppli of Columbus Chemical Industries, a chemical facility headquartered in Columbus, Wisconsin, explained that companies that participate in verified industry security standard programs "have made a strong commitment to operate their facilities safely and securely," and argued that, "[r]ecognizing these responsible companies through simple measures like less frequent inspections would allow DHS to prioritize resources to concentrate on the outliers' or bad actors who don't participate in these programs that may pose a greater security risk to themselves or the population at large."[52]

Justin Louchheim, Director of Government Affairs at The Fertilizer Institute (TFI), which represents both large and small fertilizer companies nationwide, highlighted ResponsibleAg, the agricultural retailers' industry compliance program that assists in ensuring its members comply with various Federal regulations, including CFATS, as an example of an Industry-led program that should be eligible for a CFATS Recognition Program.[53] According to Mr. Louchheim, "[t]o date, over 2,500 facilities are registered with the ResponsibleAg program, over 1,000 of these facilities have been certified, 185 auditors have been trained, and almost 2,000 audits have been completed."[54]

William Erny, Senior Director of the American Chemistry Council, which represents major chemical producers and businesses within the chemistry field, also expressed support for the concept

[50] Email from Dep't of Homeland Sec. to Comm. majority staff (Oct. 24, 2018) (on file with Committee majority staff).

[51] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (statement of William Erny, Senior Director, American Chemistry Council), *available at* https://www.hsgac.senate.gov/hearings/roundtable_-examining-the-chemical-facility-anti-terrorism-standards-program; *see also* Responsible Care, American Chemistry Council, https://responsiblecare.americanchemistry.&fnl;com/.

[52] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (written testimony of Randall Eppli, President and CEO, Columbus Chemical Industries, Inc.).

[53] *Id.* (written testimony of Justin Louchheim, Director of Government Affairs, The Fertilizer Institute).

[54] *Id.*

of a recognition program: "DHS can provide regulatory recognition for responsible operators that demonstrate superior performance and who exceed regulatory compliance. Such a program would incentivize the implementation of existing industry stewardship programs-and the creation of new ones where necessary—thus enhancing chemical security across the sector and beyond the universe of CFATS regulated facilities." [55]

DHS told the Committee that encouraging industry security best practices through a recognition program would enhance security. Specifically, David Wulf, then Acting Deputy Assistant Secretary for Infrastructure Protection, stated that industry stewardship programs "do great work, and they raise the bar for security . . . not only at the 10 percent or so of facilities that find themselves covered under CFATS but at those other 90 percent." [56] Mr. Wulf also said they are "very interested in working with the Committee on prospects for ways in which we can recognize those programs within CFATS, whether that is the ability to place facilities that are in good standing with those programs on a . . . less frequent inspection cycle, or other ways of recognizing." [57]

S. 3405 requires the establishment of a CFATS Recognition Program within 270 days of enactment that will leverage industry stewardship programs to better secure covered chemical facilities. Specifically, the bill requires the Secretary of Homeland Security to establish criteria for the CFATS Recognition Program, minimum eligibility criteria for industry stewardship programs that would like to participate, and performance requirements for participating facilities within nine months of the bill's passage. S. 3405 also requires the Secretary of Homeland Security to establish program incentives for participation in the CFATS Recognition Program. This includes a reduction in the frequency of compliance inspections; streamlined processes for vulnerability assessments and site security plans; and any additional regulatory relief determined appropriate. The Committee expects that DHS will work with industry to develop the CFATS Recognition Program and ensure facilities are aware of how they can use it.

S. 3405 Requires DHS to reduce the frequency of audits and inspections

The purpose of a compliance inspection is to ensure covered facilities are completely implementing their security measures.[58] According to the Department, 3,995 Compliance Inspections have been conducted since the program's inception.[59] On average, the frequency of audits and inspections take place every 18 months to two years.[60]

This legislation changes the frequency of CFATS audits and inspections to be more in line with other Federal regulatory inspection regimes. Under the Safe Explosives Act, for example, ATF is

[55] *Id.* (written testimony of William Erny, Senior Director, American Chemistry Council).

[56] *Id.* (statement of David Wulf, Acting Deputy Assistant Sec'y for Infrastructure Protect., Nat'l Prot. and Programs Directorate U.S. Dep't of Homeland Sec.).

[57] *Id.*

[58] U.S. Dep't of Homeland Sec., Chemical Facility Anti-Terrorism Standards: Compliance Inspection (CI) (2017), *available at* https://www.dhs.gov/sites/default/files/publications/fs-cfats-compliance-inspection-508_0.pdf.

[59] Dep't of Homeland Sec., CFATS Monthly Statistics (2018), *available at* https://www.dhs.gov/cfats-monthly-statistics.

[60] Comm. majority and minority staff meeting with Dep't of Homeland Sec. (Sept. 18, 2018).

required to inspect storage magazines of every licensee at least once every three years.[61] Under the Clean Air Act, the Environmental Protection Agency (EPA) is required to conduct a full "compliance evaluation at title V major facilities once every two federal fiscal years; at mega-sites, which are the largest title V major facilities, once every three federal fiscal years; and at SM–80s once every five federal fiscal years."[62] Under the Clean Water Act, the EPA inspects major facilities at least once every two years and non-major facilities at least once every five years.[63] Under the Resource Conservation and Recovery Act, large quantity generators are inspected by the EPA every five years.[64] Under the Department of Labor's Occupational Safety and Health Administration process safety management standards, compliance audits of highly hazardous chemicals are conducted at least every three years.[65]

Under S. 3405, covered chemical facilities cannot be inspected more frequently than once every two years. This codifies the two-year duration of DHS's current practice[66] and will also help increase efficiency. In addition, under S. 3405, those companies participating in a CFATS recognition program that meet compliance, audit, and inspection requirements cannot be inspected more frequently than once every three years. However, the Secretary may conduct more frequent audits and inspections for specific reasons, including when: the facility has identified planned enhancements that have not been verified; the facility commits a deficiency or infraction that could result in an enforcement action; the Department has identified a specific or elevated threat; suspicious activity or a security incident has occurred at the facility; or the Secretary determines, due to exigent circumstances, that an inspection or audit is needed.

S. 3405 Improves the Personnel Surety Program

Under RBPS–12, covered facilities are required "to account for four types of background checks on facility personnel and unescorted visitors who have or are seeking access to restricted areas, critical assets, and chemicals of interest at high-risk facilities."[67] The purpose of these background checks are to confirm a person's identity; check for any criminal history; certify legal authorization to work at the facility; and identify individuals with terrorist connections.[68]

Currently, only Tier 1 and Tier 2 facilities are required to screen for individuals with terrorists connections through the Personnel Surety Program (PSP).[69] Under RBPS–12, frequent vetting of individuals' information against the Terrorist Screening Database is re-

[61] Safe Explosives Act, Pub. L. No. 107–296, § 116 Stat. 2280 (2002).
[62] U.S. Envtl. Prot. Agency, State Compliance Monitoring Expectations (2018), *available at* https://echo.epa.gov/trends/comparative-maps-dashboards/state-compliance-monitoring-expectations.
[63] *Id.*
[64] *Id.*
[65] U.S. Dep't of Labor, Occupational Safety and Health Administration, OSHA 3132, Process Safety Management (2000), *available at* https://www.osha.gov/Publications/osha3132.pdf.
[66] Comm. majority and minority staff meeting with Dep't of Homeland Sec. (Sept. 18, 2018).
[67] U.S. Dep't of Homeland Sec., CFATS Personnel Surety Program (last updated Aug. 22, 2018), *available at* https://www.dhs.gov/cfats-personnel-surety-program.
[68] *Id.*
[69] *Id.*

quired.[70] The Terrorist Screening Database is administered by the FBI and supports Federal agencies in detecting known or suspected terrorists.[71] Facilities can submit an individual's information to DHS in different ways to screen an individual against the Terrorist Screening Database. This includes via DHS's online portal; directly verifying an individual's enrollment in an existing DHS program; utilizing an electronic reader to verify credentials; or using another Federal screening program that operates the Terrorist Screening Database.[72]

On December 27, 2017, DHS posted a notice in the Federal Register seeking comment on its proposal to extend the PSP terror screening requirements to Tier 3 and Tier 4 facilities.[73] Industry has voiced concerns with this proposed expansion.[74] According to written testimony from Mr. Erny of the American Chemistry Council (ACC),

> such an expansion of the PSP program is unnecessary and will needlessly put personal employee information at risk. ACC believes the benefit associated with [Terrorist Screening Database] vetting is simply not worth the cost or the risk. While we support [Terrorist Screening Database] vetting at high risk Tier 1 and 2 facilities, ACC recommends elimination of this requirement for lower risk Tiers 3 and 4 facilities, or could be an option for those who choose to participate.[75]

Additionally, Mr. Louchheim from the The Fertilizer Institute stated that this is an "exponential expansion of the program from the less than 200 facilities presently covered to more than 3,500. Many of the 1,500 or so agricultural retail facilities are not equipped to implement this program at this time."[76]

All covered CFATS facilities are required to run background checks to confirm a person's identity; check for any criminal history; and certify legal authorization to work at the facility.[77] Committee majority staff oversight and review of DHS's data on the use of the terror screening strategy suggests that it is not effective in achieving DHS's purported personnel security objectives.[78] Industry standard background checks plus the additional background checks required under RBPS–12 for all covered facilities eliminates the need to require terror screening at lower-risk Tier 3 and Tier 4 facilities.

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[70] Comm. majority and minority staff briefing with Dep't of Homeland Sec. (June 1, 2018) (briefing notes on file with Comm. majority staff).

[71] Fed. Bureau of Investigations, Leadership and Structure, Terrorist Screening Center, *available at* https://www.fbi.gov/about/leadership-and-structure/national-security-branch/tsc.

[72] CFATS Personnel Surety Program *supra* note 67.

[73] Chemical Facility Anti-Terrorism Standards Personnel Surety Program, 82 Fed. Reg. 61312 (proposed Dec. 27, 2017) (to be codified in C.F.R. pt. 6), *available at* https://www.federalregister.gov/documents/2017/12/27/2017-27519/chemical-facility-anti-terrorism-standards-personnel-surety-program.

[74] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36.

[75] *Id.* (written testimony of William Erny, Senior Director American, Chemistry Council).

[76] *Id.* (written testimony of Justin Louchheim, Director, Government Affairs The Fertilizer Institute).

[77] U.S. Dep't of Homeland Sec., CFATS Personnel Surety Program (last updated Aug. 22, 2018), *available at* https://www.dhs.gov/cfats-personnel-surety-program.

[78] Comm. majority staff briefing with Dep't of Homeland Sec. (July 24, 2018) (briefing notes on file with Comm. majority staff).

S. 3405 makes clear that terror screening must be conducted by all Tier 1 and Tier 2 covered facilities, consistent with the policy that was implemented during the Obama Administration in 2015,[79] but is only optional for all Tier 3 and Tier 4 covered facilities.

S. 3405 Requires DHS to be more transparent regarding changes in facility tiering

In 2013, outside industry and government experts conducted a review of the CFATS risk-tiering methodology and provided findings and recommendations to DHS.[80] The review determined that DHS needed to develop an enhanced tiering methodology to more adequately assign risk to chemical facilities.[81] In 2016, DHS introduced a new tiering methodology and notified all chemical facilities potentially subject to CFATS regulations to submit information through a new online tool, the Chemical Security Assessment Tool (CSAT) 2.0.[82] In April 2017, DHS, using its new, enhanced methodology, began notifying facilities of their CFATS program tier.[83] The Department continues to notify facilities of their tiering status on a rolling basis as new facilities submit Top-Screens or currently regulated facilities update their chemical holdings.[84]

According to DHS, "some facilities have seen a change in their tier. Some facilities that were previously not covered under CFATS found themselves covered, and some previously-covered facilities are no longer considered high-risk." [85]

During the Committee's roundtable in June 2018, representatives of the chemical industry discussed these changes in tiering and the need for DHS to be more transparent regarding methodology changes.[86] For example, Linda Menendez, Director of Operations for Austin Powder, an explosives company headquartered in Cleveland, Ohio, explained the company had a facility "that was previously tiered a 2, requiring us to implement all of these security measures. When CFATS 2.0 came about we had to re-tier. We dropped to a Tier 3, with no explanation. We had no change in the facility, no change in the chemicals, no change in the quantity of the chemicals, and we dropped down to a Tier 3." [87]

Mr. Erny from the American Chemistry Council called for greater transparency and information sharing when DHS changes a facility's tiering level: "Often times the facility security director—the very person with the overall responsibility and authority for making critical security risk management decisions for the site—is not aware of the determining factor(s) behind the assigned risk tier level." [88] Mr. Louchheim from The Fertilizer Institute also explained that "some TFI facilities were reclassified into a higher risk classification. What was not clear to TFI members, was the under-

[79] Dep't of Homeland Sec., Chemical Facility Anti-Terrorism Standards: RBPS 12(iv)—Screening for Terrorist Ties (2017), *available at* https://www.dhs.gov/sites/default/files/publications/fs-rbps-12iv-psp-508.pdf.

[80] Dep't of Homeland Sec., CFATS Tiering Methodology (2018), *available at* https://www.dhs.gov/cfats-tiering-methodology.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36.

[87] *Id.* (statement of Linda Menendez, Dir. of Operations, Austin Powder Co.).

[88] *Id.* (written testimony of William Erny, Senior Dir., Ame. Chemistry Council).

lying basis for the new categorizations. We believe this should be a more transparent effort between DHS and individual facilities, allowing for a more thorough discussion of the security risks posed by individual facilities. This could ultimately bolster the quality of site security plans."[89] If facilities receive information as to why their tier changed, they will have an actual understanding of the current and changing risks their facilities pose to their employees and surrounding communities. This can result in facilities taking additional security measures or reducing their chemical inventories.

S. 3405 includes changes to the CFATS program to increase transparency between DHS and the regulated chemical facilities. Specifically, the bill requires the Secretary of Homeland Security to submit a controlled unclassified[90] statement to facilities within 30 days on why their tier changed or they are no longer regulated under CFATS.

S. 3405 Requires DHS to improve the metrics it uses to evaluate program success

Prior to the 2014 reauthorization, the Committee's then-Ranking Member, Senator Coburn, issued a report about the CFATS program, and included a finding that "without better metrics DHS has no way of knowing [if] CFATS is improving security and reducing the risk of terrorist attack[s]."[91] Senator Coburn's report concluded that DHS must implement metrics "to show to the private sector and Congress CFATS is improving chemical security at high risk chemical facilities, the facilities being regulated are truly high risk, CFATS reflects plausible attack scenarios, and the program is not merely shifting risk elsewhere."[92]

To help Congress more effectively evaluate whether the CFATS program was improving, the 2014 legislation required DHS to biannually report to Congress on the program's performance and include metrics to assist in its oversight of the program.[93] However, because the program had implementation issues, the metrics required under the 2014 legislation did not address risk reduction and instead looked at basic program implementation metrics. For example, DHS was required to provide metrics on how many compliance or authorization inspections were completed during the reporting period and how many inspectors attended each inspection on average.[94]

Through its oversight, the Committee has found that these basic data points were not sufficient to address the degree to which CFATS was materially reducing terrorism risks. At the June 12, 2018 Committee roundtable, GAO representative Christopher Currie stated that "measuring risk reduction or the security benefit [of the CFATS program] is really difficult. It is hard to do that with just outputs. So I think we need to continue to push DHS to try

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[89] *Id.* (written testimony of Justin Louchheim, Dir. of Gov't Affairs, Fertilizer Institute).

[90] This is defined as sensitive, but not classified, information.

[91] Sen. Tom Coburn of Sen. Comm. on Homeland Sec. & Governmental Affairs, 113th Cong., Chemical Insecurity, (Comm. Print 2014), *available at* https://www.hsgac.senate.gov/imo/media/doc/Chemical_Insecurity.pdf.

[92] *Id.*

[93] Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, Pub. L. No. 113–254, § 128 Stat. 2898 (2014).

[94] *Id.*

to measure across the country how we are reducing risk."[95] An August 2018 GAO report confirmed this statement, finding that DHS does not evaluate or measure vulnerability reduction.[96] GAO emphasized that "[d]oing so would provide DHS an opportunity to begin assessing how vulnerability is reduced—and by extension, risk lowered—not only for individual high-risk facilities but for the CFATS program as a whole."[97]

S. 3405 includes language to update the CFATS program metrics requirements. New metrics include how effective CFATS is at managing security risks and measuring risk reduction. The updated requirements push DHS to evolve its very basic program metrics to more advanced risk-focused metrics to measure program effectiveness and risk reduction. The Committee is directing DHS to measure and demonstrate actual risk reduction, if any, provided by CFATS, and benefits, if any, for the money spent by U.S. taxpayers on the CFATS program. The metrics reporting period is also increased from six months to one year to allow the Department more time to focus on the report.

S. 3405 Modifies the petition process for the exemption of covered products or mixtures

DHS has voiced concerns to the Committee regarding the petition process for the exemption of covered chemical products or mixtures. DHS officials explained that there have been instances when mixtures of multiple chemicals include one chemical of interest, but in that mixture do not present the same hazard as the original form of the chemical of interest listed under Appendix A.[98] As a result, the mixture is no longer a chemical of interest and therefore will not be subject to CFATS regulation.

Based on the Department's feedback, S. 3405 includes language for an interested party to petition DHS to exempt certain chemical mixtures that no longer pose the same hazard as a pure CFATS chemical of interest listed under Appendix A. If, during processing, the pure CFATS chemical of interest is converted to a new chemical compound that is no longer a security risk, the company may petition DHS for an exemption on the final chemical product.[99] DHS can then review the petition and the technical basis for the exemption request. Following DHS's review, DHS will make a final decision on whether or not to exempt the final chemical product, and notify the petitioner of the decision.

S. 3405 Reduces duplicative regulations by exempting regulated explosive materials from CFATS

A number of facilities are excluded from the CFATS program to prevent facilities from being subject to duplicative or contradictory regulatory regimes. The Department of Homeland Security Appro-

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[95] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (statement of Christopher Currie, Dir., Homeland Sec. & Justice Team, U.S. Gov't Accountability Office).

[96] U.S. Gov't Accountability Office, GAO–18–538, Critical Infrastructure Protection (2018), *available at* https://www.gao.gov/assets/700/693817.pdf.

[97] *Id.*

[98] Comm. majority and minority staff briefing with Dep't of Homeland Sec. (Sept. 18, 2018) (briefing notes on file with Comm. majority staff).

[99] Comm. majority staff phone briefing with Dep't of Homeland Sec. (Oct. 29, 2018) (notes on file with Comm. majority staff).

priations Act of 2007 (and later the 2014 Authorization) exempted facilities from the CFATS regulations when those facilities are:

> regulated pursuant to the Maritime Transportation Security Act of 2002, Public Law 107–295, as amended; Public Water Systems, as defined by section 1401 of the Safe Drinking Water Act, Public Law 93–523, as amended; Treatment Works as defined in section 212 of the Federal Water Pollution Control Act, Public Law 92–500, as amended; any facility owned or operated by the Department of Defense or the Department of Energy, or any facility subject to regulation by the Nuclear Regulatory Commission.[100]

S. 3405 maintains these exemptions. The CFATS program also overlaps with the ATF's regulation of facilities used to store certain explosive materials. Explosive materials are regulated by ATF under the Organized Crime Control Act of 1970 and the Safe Explosive Act of 2002.[101] When CFATS regulations were established in 2007, explosive materials became regulated by both the ATF and DHS.[102]

Under the Organized Crime Control Act of 1970, ATF annually publishes a list of explosive materials that it is responsible for regulating.[103] As of December 28, 2017, there are 238 explosive materials on ATF's annual Notice of List of Explosive Materials.[104] CFATS currently regulates 322 chemicals of interest.[105] Thirty-four explosive materials are regulated by both ATF and CFATS.[106] In practice, this means that companies with facilities that are covered by both the CFATS and ATF regulatory regimes must comply with specific aspects of the program that are duplicative, such as background checks, inspections, and reviews of physical security measures. Companies must spend additional time (30.5 hours) to complete DHS's Top Screens in addition to ATF's permitting applications and submit duplicative reporting of potential security incidents to both agencies.[107]

The duplicative regulations come at a significant and unnecessary cost to the explosives industry. According to four case studies conducted by the Institute of Makers of Explosives (IME), "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."[108] In addition to increasing costs, the duplicative regula-

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[100] Department of Homeland Security Appropriations Act, 2007 Pub. L. N. 109–29, § 120 Stat. 138 (2007); Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, Pub. L. No. 113–254, §128 Stat. 2898 (2014).

[101] *See generally* Organized Crime Control Act of 1970 18 U.S.C.A. § 842; Safe Explosives Act, Pub. L. No. 107–296, § 116 Stat. 2280 (2002).

[102] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs*, *supra* note 36 (written statement of Debra Satkowiak, President, Institute of Makers of Explosives).

[103] *See* Commerce in Explosives; 2017 Annual List of Explosive Materials, 56 Fed. Reg. 248 (Proposed Dec. 28, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-12-28/pdf/2017-28010.pdf.

[104] *Id.*

[105] Frank Gottron, *supra* note 8.

[106] Comm. majority staff analysis of ATF's annual Notice of List of Explosive Materials and CFATS Appendix A chemicals of interest.

[107] Comm. majority staff analysis of DOJ and ATF's explosive regulations and DHS's CFATS regulations.

[108] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs*, *supra* note 36 (written statement of Debra Satkowiak, President, Institute of Makers of Explosives).

tions have also resulted in potential safety issues. For example, "[o]ne facility, also regulated by the Department of Defense (DoD) and ATF, was asked to run electricity to a mandated no-spark environment."[109] This is a safety hazard as electricity cannot be within a certain range of explosives. "The result was the imposition of massive cost, upwards of $500,000, to run underground electricity in accordance with DoD regulations or put in place round-the-clock in-person surveillance over multiple storage sites, which carried with it an estimated cost of $3 [million]."[110]

At the Committee's June 12, 2018 roundtable, Ms. Menendez testified about Austin Powder's experience complying with both regulatory regimes and the costs imposed to specific explosive facilities because they are also regulated by CFATS.[111] For example, one Austin Powder facility went from not being a CFATS-covered facility in 2008 to being a Tier 2 after submitting a Top Screen in 2013.[112] To comply with Tier 2 RBPS, Austin Powder spent $325,000 on labor and implementation costs and has an annual expense of $70,000 for contracted monitoring services.[113] Another Austin Powder facility not a CFATS-covered facility in 2008, but after Top Screen submissions in 2015 and 2017 it became a Tier 3 facility. Costs to comply with Tier 3 RBPS totaled $837,400 with an additional annual recurring expense.[114]

Data and information provided to the Committee by the explosives industry shows that the CFATS program does not appear to have resulted in any change in the number of thefts of explosives, which raises questions about whether the duplicative regulatory regime under CFATS is enhancing security.[115] During the Committee's June 12, 2018 roundtable, Debra Satkowiak, President of IME explained:

> 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.[116]

When discussing exempting explosive materials at the Committee's June 12, 2018 roundtable, Mr. Wulf, Acting Deputy Assistant Secretary for Infrastructure Protection, stated that DHS is "sympathetic to the duplicative regulation situation. . . ."[117]

S. 3405 exempts explosive materials regulated by DOJ under chapter 40 of title 18, United States Code, or by the ATF under part 555 of title 27, Code of Federal Regulations, as CFATS chemicals of interest. The bill also requires the Secretary of Homeland

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[109] *Id.*
[110] *Id.*
[111] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36.
[112] *Id.* (written testimony of Linda Menendez, Dir. of Operations, Austin Powder Co.).
[113] *Id.*
[114] *Id.*
[115] *Id.* (written and oral statement of Debra Satkowiak, President, Institute of Makers of Explosives) (additional data and information on file with Comm. majority staff).
[116] *Id.* (written statement of Debra Satkowiak, President, Institute of Makers of Explosives).
[117] *Id.* (statement of David Wulf, Acting Deputy Assistant Sec'y for Infrastructure Prot., Nat'l Prot. & Programs Directorate U.S. Dep't of Homeland Sec.).

Security to remove any additional explosive material designated as a CFATS chemical of interest if it becomes regulated by DOJ or ATF in the future. For example, DHS will continue to regulate improvised explosive device precursor chemicals because ATF does not regulate the precursor chemicals.

S. 3405 Requires notice of proposed rulemaking before changes to Appendix A

As stated previously, Appendix A is a list of 322 chemicals of interest that are regulated under the CFATS program.[118] The list has not been modified since its inclusion in the final rule on November 30, 2007.[119] During the Committee's June 12, 2018 roundtable, industry recommended clarifying the process required to make changes to Appendix A. For example, Jennifer Gibson, Vice President of Regulatory Affairs from the National Association of Chemical Distributors, suggested that:

> any changes to the Appendix A list of chemicals remain subject to notice and comment rulemaking. Changes to this [chemicals of interest] list have major impacts on many companies' businesses and security investments. While changes may periodically be needed, it is important to give the regulated community the opportunity to provide information and explain the impacts of any proposed changes.[120]

Mr. Louchheim from The Fertilizer Institute also discussed the need for increased transparency in regards to Appendix A and how "uncertainties could be remedied through a comprehensive notice and comment rulemaking."[121]

This legislation requires the Secretary of Homeland Security to publish a notice of proposed rulemaking before making any changes to Appendix A, which will give industry the opportunity to comment. Changes include a chemical being added as a CFATS chemical of interest; a chemical being removed as a CFATS chemical of interest; or a modification of a CFATS chemical of interest's amount, concentration, or threshold quantity under Appendix A.

S. 3405 Requires DHS to more effectively assess the program's success

The Committee's oversight in the 115th Congress has focused on whether the CFATS program effectively reduces risk and enhances national security.[122] GAO recommended in August 2018 that DHS take further action to measure risk reduction and national security benefits resulting from the CFATS implementation.[123] GAO also found that "DHS shares some CFATS information, but first responders and emergency planners may not have all of the informa-

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[118] Frank Gottron, *supra* note 8.

[119] *See generally* Appendix to Chemical Facility Anti-Terrorism Standards, 6 Fed. Reg. pt. 2 (Nov. 20, 2007) *available at* https://www.gpo.gov/fdsys/pkg/FR-2007-11-20/pdf/07-5585.pdf.

[120] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (written statement of Jennifer Gibson, Vice President, Regulatory Affairs Nat'l Ass'n of Chem. Distrib.).

[121] *Id.* (written testimony of Justin Louchheim, Dir. of Gov't Affairs, Fertilizer Institute).

[122] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36.

[123] U.S. Gov't Accountability Office, GAO–18–538, Critical Infrastructure Protection (2018), *available at* https://www.gao.gov/assets/700/693817.pdf.

tion they need to minimize the risk of injury or death when responding to incidents at high-risk facilities."[124] The GAO review also reported that DHS does not evaluate or measure vulnerability reduction.[125]

This legislation requires a third-party assessment to help address the issues raised by GAO. The assessment will address the CFATS program's effectiveness in managing security requirements and the Department's preparedness and response planning with first responders and emergency planners. It will also examine the development of metrics and capabilities to measure risk reduction.

One area where additional improvement is needed, based on the Committee's oversight during the 115th Congress, is inspector training. During the Committee's June 2018 roundtable, a CFATS chemical inspector, Jesse LeGros, Jr., provided insight on current issues with inspector training.[126] For example, inspector training has been significantly shortened compared to the first formal inspector academy class, to the point where most training is now acquired on the job.[127] According to Mr. LeGros, the Department has also "hired a number of individuals with little to no physical security training or experience."[128] In addition, Mr. LeGros discussed a particular lack of cybersecurity training, which is covered under RBPS–8.[129] The two limited classes provided to inspectors "was about hackers and how they could access cyber systems"[130] and "did not get into the various technical aspects of the Cyber world or Cyber Security."[131] As a result, some inspectors have obtained additional cybersecurity training outside the inspector program.[132] Although cybersecurity experts from DHS are available to assist inspectors when appropriate, the Department's Compliance Branch Chief[133] recommends who should ultimately complete RBPS–8.[134] This has resulted in additional confusion for the chemical inspectors and has the potential to result in inconsistent compliance inspection results.[135]

S. 3405 requires GAO to submit a report to Congress on CFATS inspector training and how it can be improved. This includes information about how DHS selects inspectors; what training is completed before inspectors are selected as CFATS facility inspectors; a review of the qualification standards, on-the-job training, final qualification, approval standards, and continuous qualification and training; and issues with inspector cybersecurity training and how it can be further improved.

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[124] *Id.*

[125] *Id.*

[126] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (statement of Jesse LeGros, Jr. Vice President, Infrastructure Prot., AFGE National Local #918).

[127] *Id.* (written statement of Jesse LeGros, Jr. Vice President, Infrastructure Prote., AFGE National Local #918).

[128] *Id.*

[129] *Id.*; *see also* Dep't of Homeland Sec., Risk-Based Performance Standards (RBPS) (2018) *available at* https://www.dhs.gov/cfats-rbps.

[130] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (statement of Jesse LeGros, Jr. Vice President, Infrastructure Prot., AFGE National Local #918).

[131] *Id.*

[132] *Id.*

[133] Individuals responsible for overseeing, reviewing, and approving compliance inspections.

[134] *Roundtable: Examining the Chemical Facility Anti-Terrorism Standards Program Before the Sen. Comm. on Homeland Sec. & Governmental Affairs, supra* note 36 (statement of Jesse LeGros, Jr. Vice President, Infrastructure Prot., AFGE National Local #918).

[135] *Id.*

Since the CFATS program was authorized in 2006, America's threat environment has changed. According to a recent report by the National Academies, "[b]etween the 1970s and 2000, a series of larger vehicle bombs emerged in terrorist attacks with main charges in the thousands of pounds range, but in the following decade, bombs with smaller charges like those seen in the 1970s started to appear again. By the 2010s, the use of [homemade explosives] in smaller charges was growing."[136] In recent attacks in the U.S. and Europe, such as the Boston, Paris, and Brussels, terrorists have utilized smaller improvised explosive devices, such as backpack bombs.[137] However, "[p]ast research and regulatory efforts have tended to focus on the threat posed by [vehicle-borne improvised explosive devices (IEDs)], but attacks that employ [person-borne IEDs] can have and have had serious consequences both domestically and internationally."[138]

This legislation requires DHS to provide an annual briefing to Congress on current threats to chemical facilities; how bad actors are utilizing CFATS chemicals of interest; how CFATS is addressing the threat landscape and making the United States safer; and data, rationale, and metrics on how the CFATS program is effectively reducing risk and enhancing security.

In 2007, DHS completed an initial estimate that predicted the CFATS program would regulate 5,000 chemical facilities and have an economic cost of $8.5 billion over the period of 2006–2015.[139] To date, the Department has not completed an updated estimate. This legislation requires DHS to complete an updated retrospective estimate on costs to carry out the CFATS program.

S. 3405 Ends the program after five years

The Committee continues to believe that putting a sunset on the program's authorization ensures that Congress can periodically review its effectiveness and make any necessary improvements. Accordingly, S. 3405 terminates the CFATS program five years after the date of enactment.

III. Legislative History

On September 4, 2018, Chairman Johnson (R–WI) introduced S. 3405, Protecting and Securing Chemical Facilities from Terrorists Attacks Act of 2018, which was referred to the Committee on Homeland Security and Governmental Affairs. Senators Shelley Moore Capito (R–WV) and Steve Daines (R–MT) are cosponsors.

The Committee considered S. 3405 at a business meeting on September 26, 2018. During the business meeting, a modified substitute amendment was offered by Chairman Johnson and accepted by unanimous consent.

Ranking Member McCaskill (D–MO) offered two amendments at the business meeting. McCaskill Amendment 1 as modified requires that the Secretary of Homeland Security determine which

[136] Nat'l Academies of Sciences, Engineering, and Medicine, Reducing the Threat of Improvised Explosive Device Attacks by Restricting Access to Explosive Precursor Chemicals 23 (2017), *available at* https://www.nap.edu/catalog/24862/reducing-the-threat-of-improvised-explosive-device-attacks-by-restricting-access-to-explosive-precursor-chemicals.

[137] *Id.* at vii.

[138] *Id.* at 2.

[139] Chemical Facility Anti-Terrorism Standards, 6 C.F.R. § 27 (2006), *available at* https://www.dhs.gov/xlibrary/assets/IP_ChemicalFacilitySecurity.pdf.

industry stewardship programs can participate in the CFATS Recognition Program. McCaskill Amendment 2 as modified clarified that only explosive materials regulated by ATF are exempt from CFATS. It also requires the removal of any additional explosive material that is designated as a CFATS chemical of interest if it becomes regulated by DOJ or ATF in the future. The Committee adopted McCaskill Amendment 1 as modified and McCaskill Amendment 2 as modified both by voice vote. Senators present for the votes on the amendments were: Johnson, Paul, Lankford, Enzi, Daines, McCaskill, Heitkamp, Peters, Hassan, Harris, and Jones.

The Committee favorably reported the bill, as amended, by voice vote. Senators present were: Johnson, Portman, Paul, Lankford, Enzi, Daines, McCaskill, Heitkamp, Peters, Hassan, Harris, and Jones.

Consistent with Committee Rule 11, the Committee reports the bill with a technical amendment by mutual agreement of the Chairman and Ranking Member.

IV. Section-by-Section Analysis of the Bill, as Reported

Section 1. Short title; table of contents

This section provides the bill's short title, the "Protecting and Securing Chemical Facilities from Terrorists Attacks Act of 2018", and a table of contents.

Section 2. Definitions

This section clarifies the definition of the term "guidance for expedited approval facilities".

Section. 3. Expedited approval program

This section requires the Secretary of Homeland Security to maintain guidance for the expedited approval program. This section also adds language that an owner or operator of a facility should consider, but is not required, to utilize the guidance for expedited approval facilities to determine appropriate security measures for site security plans.

This section also shortens the length of the required notice period from 30 days to 7 days before a facility owner or operator may submit their expedited approval site security plan and certification to the Department.

This section also requires that DHS notify all new and currently-covered CFATS facilities of the expedited approval program.

Section. 4. CFATS Recognition Program

This section requires the Secretary of Homeland Security to establish a CFATS recognition program within 270 days of enactment that leverages industry stewardship programs to further secure covered chemical facilities. It also requires the Secretary to establish criteria for the CFATS recognition program, including industry stewardship program eligibility, performance requirements, incentives to encourage participation, and issue guidance.

This section also requires the Secretary of Homeland Security to establish minimum eligibility criteria for industry stewardship programs that would like to participate in the program. The section mandates certain requirements, including industry stewardship

programs be governed by an industry association or technical organization; documentation showing the industry stewardship program's top management is committed to chemical facility security; criteria for program auditing, security vulnerability assessment requirements, Risk-Based Performance Standards incorporated into security measures, and required reporting.

This section also requires the Secretary of Homeland Security to establish facility performance requirements. This includes the facility submitting an acknowledgment by its sponsor industry stewardship organization that the facility is a member in good standing and in full compliance with the industry stewardship program's security requirements. It also requires a participating facility to notify the Secretary of Homeland Security if they cease to be in good standing or in full compliance with the requirements of the participating industry stewardship program.

This section requires the Secretary of Homeland Security to establish program incentives for participation in the CFATS Recognition Program, including lowering the occurrence of compliance inspections; streamlining processes for vulnerability assessments and site security plans; and providing additional regulatory relief as appropriate.

Section. 5. Frequency of audits and inspections

This section limits the frequency of CFATS facility audits and inspections to once every two years for a covered chemical facility and once every three years for a covered chemical facility participating in a CFATS recognition program that meets compliance, audit, and inspection requirements.

This section stipulates that the Secretary may only conduct more frequent audits and inspections for the following reasons: a covered facility has identified planned enhancements that have not been verified; DHS identifies a deficiency or infraction that could result in an enforcement action against the facility; the Department has identified a specific or elevated threat to a chemical facility; a specific incident or suspicious activity occurred at the facility; or the Secretary determines there are exigent circumstances requiring an inspection or audit.

Section. 6. Personnel Surety Program

This section makes terrorist screening provisions under the Personnel Surety Program mandatory for Tier 1 and Tier 2 covered facilities and optional for Tier 3 and Tier 4 covered facilities.

Section. 7. Security risk assessment approach and corresponding tiering methodology

This section requires the Secretary of Homeland Security to maintain additional information on why DHS changed a covered facility's tier or DHS determines the covered facility should no longer be regulated under CFATS.

Whenever DHS modifies a covered facilities tier or determines they should no longer be regulated by the CFATS program, this section also requires the Secretary to submit a controlled unclassified explanation for the change to facilities within 30 days.

Section. 8. Annual performance reporting

This section requires the Secretary of Homeland Security to report annually to Congress on performance metrics, instead of every six months. It also requires DHS to report on how effectively the program manages security risks, develops and utilizes metrics, and its ability to measure risk reduction over time.

Section. 9. Specific products and mixtures containing chemicals of interest

This section gives the Secretary of Homeland Security sole and unreviewable discretion to review petitions from interested parties to remove a covered product or mixture from CFATS regulation if the Secretary determines that specific product or mixture does not present the same hazards for which the chemical of interest was originally designated under CFATS. Within one year of enactment, the Secretary must publish regulations on the petition process for which an interested party can request for an exclusion of a covered product or mixture.

Section. 10. CFATS regulations

This section amends and provides technical edits to Section 2107(b) of the Homeland Security Act of 2002 (6 U.S.C. 627(b)).

Section. 11. Explosive materials

This section exempts explosive materials from the CFATS program if they are regulated by the Department of Justice under chapter 40 of title 18, United States Code, or by the ATF under part 555 of title 27, Code of Federal Regulations.

This section also requires the Secretary of Homeland Security to remove any additional explosive material that is designated as a CFATS chemical of interest if it becomes regulated by DOJ or ATF in the future.

Section. 12. Changes to Appendix A to part 27 of title 6, Code of Federal Regulations

This section requires the Secretary of Homeland Security to publish a notice of proposed rulemaking before making changes to Appendix A if the Secretary determines that a chemical should now be designated as a CFATS chemical of interest; a chemical of interest under Appendix A should no longer be designated as a CFATS chemical of interest; or a CFATS chemical of interest's amount, concentration, or threshold quantity under Appendix A should be changed.

Section. 13. Assessment, report, briefing, and updated retrospective estimate on costs

This section requires a third-party assessment, within one year of enactment, to determine how effective the CFATS program is at managing security risks, developing and using appropriate metrics and analysis capabilities to measure risk reduction, and engaging with first responders and emergency planners. Within 90 days of the assessment's completion, the Secretary of Homeland Security must provide a briefing on the assessment to the Senate Committee on Homeland Security and Governmental Affairs, House

Committee on Homeland Security, and House Committee on Energy and Commerce.

This section requires a GAO report on CFATS inspector training and how it can be improved. The report should review how DHS selects inspectors; the amount of training completed before inspectors are selected as CFATS facility inspectors; review of qualification standards, on-the-job training, final qualification, approval standards, and continuous qualification and training; and improving inspector cybersecurity training.

This section requires an annual briefing to Congress on current threats to chemical facilities; how bad actors are utilizing CFATS chemicals of interest; how CFATS is addressing the threat landscape and making the United States safer; and data, rationale, and metrics on how the CFATS program is effectively reducing risk and enhancing security.

This section requires the Secretary of Homeland Security to complete an updated retrospective estimate on costs to carry out the CFATS program within one year of enactment. This includes costs to the Government, regulated entities, and the public.

Section. 14. Effective date

This section states that the legislation, any amendments made by it, will take effect 30 days after the date of enactment.

Section. 15. Termination

This section terminates the CFATS program five years after the date of enactment.

Section. 16. Technical and conforming amendment

This section provides a technical and conforming amendment.

V. Evaluation of Regulatory Impact

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. Congressional Budget Office Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, November 13, 2018.

Hon. Ron Johnson,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3405, the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2018.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is William Ma.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 3405—Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2018

Summary: S. 3405 would extend for five years the Chemical Facility Anti-Terrorism Standards (CFATS) program. CBO estimates that implementing the bill would cost $348 million over the 2019–2023 period, assuming appropriation of the estimated amounts.

CBO also estimates that enacting S. 3405 would increase direct spending by $2 million and would increase revenues by an insignificant amount over the 2019–2028 period; therefore, pay-as-you-go procedures apply.

CBO estimates that enacting S. 3405 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 3405 would impose intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) on operators of chemical facilities by reauthorizing existing security standards and duties under the CFATS program. CBO estimates the cost of the mandates would fall below the annual intergovernmental and private-sector thresholds established in UMRA ($80 million and $160 million in 2018, respectively, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary effects of S. 3405 are shown in the following table. The costs of the legislation fall within budget functions 050 (national defense) and 800 (general government).

By fiscal year, in millions of dollars—						
	2019	2020	2021	2022	2023	2019–2023
INCREASES IN SPENDING SUBJECT TO APPROPRIATION [a]						
Estimated Authorization Level	60	74	76	79	81	370
Estimated Outlays	46	69	75	78	80	348
INCREASES IN DIRECT SPENDING [b]						
Estimated Budget Authority	0	0	0	0	0	0
Estimated Outlays	1	1	0	0	0	2

Enacting S. 3405 also would increase revenues by an insignificant amount over the 2019–2028 period.

a. Implementing S. 3405 would require an additional appropriation of $25 million in 2024, CBO estimates. Another $45 million in estimated outlays would occur over the 2024–2028 period, assuming appropriation of the estimated amounts.

b. Enacting S. 3405 would increase direct spending by $2 million over the 2019–2028 period.

Basis of estimate: For this estimate, CBO assumes that S. 3405 will be enacted near the beginning of calendar year 2019. Outlays are based on historical spending patterns for similar programs.

Spending subject to appropriation

S. 3405 would extend the CFATS program for five years after the date of enactment; the authority to carry out the current program will expire in January 2019. Under CFATS, the Department of Homeland Security (DHS) regulates security at facilities that manufacture, store, or distribute any of more than 300 chemicals that

could be used by terrorists to cause mass injury or death. The regulations set minimum standards for perimeter security, access control, personnel security, and cybersecurity to reduce the risk that those chemicals could be stolen, released, or sabotaged. DHS provides technical assistance and inspects regulated facilities to ensure that they meet those standards.

For 2018, the Congress appropriated $72 million for the CFATS program. CBO estimates that the reauthorization in the bill would cover the last three quarters of fiscal year 2019 through the end of the first quarter of fiscal year 2024; thus, the estimated amounts for CFATS in fiscal years 2019 and 2024 cover only nine months and three months, respectively. On the basis of information from DHS, CBO estimates that implementing the program extension would cost $346 million over the 2019–2023 period, assuming appropriation of the estimated amounts. Another $45 million would be spent after 2023.

S. 3045 would require the Government Accountability Office and DHS to report to the Congress on the CFATS program. CBO estimates that in addition to the costs mentioned above, preparing those reports would cost $2 million over the 2019–2023 period, CBO estimates.

Actual costs could differ if the Congress appropriates more or less than the amounts estimated here; such decisions could be based on information from federal agencies or other sources that differs from the information CBO used for this estimate.

Direct spending

Section 13 would require DHS to use appropriations that are available to the department under current law to obtain a third-party assessment of the effectiveness of the CFATS program. CBO expects that DHS would spend previously appropriated funds that would otherwise not be spent. Changes in outlays from enacted appropriations are classified as direct spending. On the basis of information from DHS, CBO estimates that the study would increase direct spending by $2 million over the 2019–2028 period.

Revenues

Reauthorizing the CFATS program also would extend DHS's authority to levy civil penalties against owners or operators of facilities that fail to comply with orders to correct deficiencies in their security plans. Funds collected under that authority are deposited in the Treasury and recorded as revenues. CBO estimates that DHS would collect less than $500,000 over the 2019–2028 period.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays and revenues that are subject to those pay-as-you-go procedures are shown in the following table.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR S. 3405, THE PROTECTING AND SECURING CHEMICAL FACILITIES FROM TERRORIST ATTACKS ACT OF 2018, AS ORDERED REPORTED BY THE SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS ON SEPTEMBER 26, 2018

	By fiscal year, in millions of dollars—											
	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2019–2023	2019–2028
NET INCREASE IN THE DEFICIT												
Statutory Pay-As-You-Go Effect	1	1	0	0	0	0	0	0	0	0	2	2

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 3405 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

Mandates: S. 3405 would impose intergovernmental and private-sector mandates as defined in UMRA on operators of chemical facilities. The bill would reauthorize existing security requirements, including vulnerability assessments and site security plans, under the CFATS program. Because chemical facilities are already subject to these mandates, the cost to comply with the reauthorization would be small. The bill also would introduce alternative processes for meeting some requirements and would ease the stringency of requirements on lower-risk facilities. These changes would further reduce the costliness of the mandates. In total, CBO estimates that the cost of the mandates would fall below the annual intergovernmental and private-sector thresholds established in UMRA ($80 million and $160 million in 2018, respectively, adjusted annually for inflation).

Estimate prepared by: Federal Costs: William Ma; Mandates: Andrew Laughlin.

Estimate reviewed by: David Newman, Chief, Defense, International Affairs, and Veterans' Affairs Cost Estimates Unit; Susan Willie, Chief, Public and Private Mandates Unit; Leo Lex, Deputy Assistant Director for Budget Analysis.

VII. Changes in Existing Law Made by the Bill, as Reported

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

HOMELAND SECURITY ACT OF 2002

* * * * * * *

SEC. 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the "Homeland Security Act of 2002."

(b) Table of Contents.—The table of contents for this Act is as follows:

Sec. 1. * * *

* * * * * * *

TITLE XXI—CHEMICAL FACILITY ANTI-TERRORISM STANDARDS

* * * * * * *

Sec. 2103. Protection and sharing of information.[—]

* * * * * * *

[Sec. 2109. Outreach to chemical facilities of interest.]
Sec. 2109. Explosive materials.
Sec. 2110. Changes to Appendix A to part 27 of title 6, Code of Federal Regulations.

* * * * * * *

TITLE XXI—CHEMICAL FACILITY ANTI-TERRORISM STANDARDS

SEC. 2101. DEFINITIONS.

In this title—

(1) * * *

* * * * * * *

(8) the term "guidance for expedited approval facilities" means the guidance issued under [section 2102(c)(4)(B)(i)] *section 2102(c)(4) by the Secretary that identifies specific security measures that are sufficient to meet the risk-based performance standards for facilities in tiers 3 and 4 that elect to utilize the expedited approval program*;

* * * * * * *

SEC. 2102. CHEMICAL FACILITY ANTI-TERRORISM STANDARDS PROGRAM.

(a) * * *

(b) * * *

(c) APPROVAL OR DISAPPROVAL OF SITE SECURITY PLANS.—

(1) * * *

* * * * * * *

(4) EXPEDITED APPROVAL PROGRAM.—

(A) IN GENERAL.—A covered chemical facility assigned to tier 3 or 4 may meet the requirement to develop and submit a site security plan under subsection (a)(2)(D) by developing and submitting to the Secretary—

(i) a site security plan and the certification described in [subparagraph (C)] *subparagraph (C)(i)*; or

(ii) * * *

(B) GUIDANCE FOR EXPEDITED APPROVAL FACILITIES.—

(i) IN GENERAL.—[Not later than 180 days after the date of enactment of the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, the Secretary shall issue] *The secretary shall maintain* guidance for expedited approval facilities that identifies specific security measures that are sufficient to meet the risk-based performance standards.

(ii) * * *

[(iii) APPLICABILITY OF OTHER LAWS TO DEVELOPMENT AND ISSUANCE OF INITIAL GUIDANCE.—During the period before the Secretary has met the deadline under clause (i), in developing and issuing, or amending, the guidance for expedited approval facilities

under this subparagraph and in collecting information from expedited approval facilities, the Secretary shall not be subject to—

[(I) section 553 of title 5, United States Code;

[(II) subchapter I of chapter 35 of title 44, United States Code; or

[(III) section 2107(b) of this title.]

(C) CERTIFICATION.—[The owner]

(i) IN GENERAL.—The owner or operator of an expedited approval facility shall submit to the Secretary a certification, signed under penalty of perjury, that—

[(i)] *(I)* the owner or operator is familiar with the requirements of this title and part 27 of title 6, Code of Federal Regulations, or any successor thereto, and the site security plan being submitted;

[(ii)] *(II)* the site security plan includes the security measures required by subsection (b);

[(iii)] *(III)*

[(I)] *(aa)* the security measures in the site security plan do not materially deviate from the guidance for expedited approval facilities except where indicated in the site security plan;

[(II)] *(bb)* any deviations from the guidance for expedited approval facilities in the site security plan meet the risk-based performance standards for the tier to which the facility is assigned; and

[(III)] *(cc)* the owner or operator has provided an explanation of how the site security plan meets the risk-based performance standards for any material deviation;

[(iv)] *(IV)* the owner or operator has visited, examined, documented, and verified that the expedited approval facility meets the criteria set forth in the site security plan;

[(v)] *(V)* the expedited approval facility has implemented all of the required performance measures outlined in the site security plan or set out planned measures that will be implemented within a reasonable time period stated in the site security plan;

[(vi)] *(VI)* each individual responsible for implementing the site security plan has been made aware of the requirements relevant to the individual's responsibility contained in the site security plan and has demonstrated competency to carry out those requirements;

[(vii)] *(VII)* the owner or operator has committed, or, in the case of planned measures will commit, the necessary resources to fully implement the site security plan; and

[(viii)] *(VIII)* the planned measures include an adequate procedure for addressing events beyond the control of the owner or operator in implementing any planned measures.

(ii) RISK-BASED PERFORMANCE STANDARDS.—In submitting a site security plan and certification under subparagraph (A)(i), an owner or operator of an expedited approval facility should consider using the guidance for expedited approval facilities to determine appropriate measures for the site security plan of the expedited approval facility.

(D) DEADLINE.—

(i) IN GENERAL.—Not later than 120 days after the date described in clause (ii), the owner or operator of an expedited approval facility shall submit to the Secretary the site security plan and the certification described in [subparagraph (C)] *subparagraph (C)(i).*

(ii) * * *

(iii) NOTICE.—An owner or operator of an expedited approval facility shall notify the Secretary of the intent of the owner or operator to certify the site security plan for the expedited approval facility not later than [30] *7* days before the date on which the owner or operator submits the site security plan and certification described in [subparagraph (C)] *subparagraph (C)(i).*

(E) * * *

(F) AMENDMENTS TO SITE SECURITY PLAN.—

(i) REQUIREMENT.—

(I) IN GENERAL.—If the owner or operator of an expedited approval facility amends a site security plan submitted under subparagraph (A), the owner or operator shall submit the amended site security plan and a certification relating to the amended site security plan that contains the information described in [subparagraph (C)] *subparagraph (C)(i).*

(II) * * *

(G) * * *

(H) * * *

[(I) EVALUATION.—

[(i) IN GENERAL.—Not later than 18 months after the date of enactment of the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, the Secretary shall take any appropriate action necessary for a full evaluation of the expedited approval program authorized under this paragraph, including conducting an appropriate number of inspections, as authorized under subsection (d), of expedited approval facilities.

[(ii) REPORT.—Not later than 18 months after the date of enactment of the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, the Secretary shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security and the Committee on Energy and Commerce of the House of Representatives a report that contains—

[(I)(aa) the number of eligible facilities using the expedited approval program authorized under this paragraph; and

[(bb) the number of facilities that are eligible for the expedited approval program but are using the standard process for developing and submitting a site security plan under subsection (a)(2)(D);

[(II) any costs and efficiencies associated with the expedited approval program;

[(III) the impact of the expedited approval program on the backlog for site security plan approval and authorization inspections;

[(IV) an assessment of the ability of expedited approval facilities to submit facially sufficient site security plans;

[(V) an assessment of any impact of the expedited approval program on the security of chemical facilities; and

[(VI) a recommendation by the Secretary on the frequency of compliance inspections that may be required for expedited approval facilities.]

(I) NOTICE BY THE SECRETARY.—The Secretary shall provide notice to each covered chemical facility of the expedited approval program under this paragraph.

(5) CFATS RECOGNITION PROGRAM.—

(A) DEFINITIONS.—In this paragraph—

(i) the term "CFATS Recognition Program" means the program established under subparagraph (B);

(ii) the term "participating facility" means a covered chemical facility that is a member of a participating industry stewardship program;

(iii) the term "participating industry stewardship program" means an industry stewardship program that—

(I) meets the eligibility requirements under subparagraph (C)(i); and

(II) is accepted by the Secretary to participate in the CFATS Recognition Program; and

(iv) the term "sponsor organization" means the governing body of a participating industry stewardship program.

(B) ESTABLISHMENT.—

(i) IN GENERAL.—Not later than 270 days after the date of enactment of this paragraph, the Secretary shall establish a program that shall be known as the CFATS Recognition Program—

(I) with the goal of leveraging CFATS regulations and industry stewardship programs to further enhance security relating to hazardous chemicals; and

(II) under which the Secretary shall—

(aa) establish—

(AA) eligibility criteria under subparagraph (C)(i) for industry stewardship pro-

grams seeking to Participate in the CFATS Recognition Program; and

(BB) performance requirements under subparagraph(C)(ii) for participating facilities;

(bb) provide incentives under subparagraph(C)(iii) to Encourage participation in the CFATS Recognition Program; and

(cc) issue such guidance as the Secretary deems necessary or appropriate for the implementation of the CFATS Recognition Program.

(ii) APPLICABILITY OF OTHER LAWS.—During the period before the Secretary has met the deadline under clause (i), in developing and issuing, or amending, the guidance relating to carrying out the CFATS Recognition Program and collecting information from industry stewardship programs, sponsor organizations, and participating facilities, the Secretary shall not be subject to—

(I) section 553 of title 5, United States Code;

(II) subchapter I of chapter 35 of title 44, United States Code; or

(III) section 2107(b) of this Act.

(C) ELIGIBILITY CRITERIA; FACILITY PERFORMANCE REQUIREMENTS; INCENTIVES.—

(i) ELIGIBILITY CRITERIA FOR INDUSTRY STEWARDSHIP PROGRAMS.—Not later than 270 days after the date of enactment of this paragraph, the Secretary shall establish minimum eligibility criteria for industry stewardship programs desiring to be considered by the Secretary for participation in the CFATS Recognition Program that shall include—

(I) a requirement that any industry stewardship program desiring to participate in the CFATS Recognition Program be governed by an industry association or technical organization that is an entity described in paragraph (3) or (6) of section 501(c) of the Internal Revenue Code of 1986;

(II) a documented top management commitment to chemical facility security;

(III) criteria relating to—

(aa) program auditing requirements and frequency;

(bb) security vulnerability assessment requirements and frequency; and

(cc) security measures that align with the risk-based performance standards established under subsection (a)(2)(C), including—

(AA) detection measures;

(BB) delay measures;

(CC) cybersecurity measures;

(DD) response measures; and

(EE) security management; and

(dd) reporting required to be done by any industry stewardship program desiring to participate in the CFATS Recognition Program.

(ii) PERFORMANCE REQUIREMENTS FOR PARTICIPATING FACILITIES.—The Secretary shall require that each participating facility—

(I) submit an acknowledgment by the sponsor organization of the participating industry steward program, of which the participating facility is a member, that the participating facility is—

(aa) a member in good standing of the participating industry stewardship program; and

(bb) in full compliance with the requirements of the participating industry stewardship program; and

(II) promptly notify the Secretary if the participating facility ceases to be—

(aa) a member in good standing of the participating industry stewardship program; or

(bb) in full compliance with the requirements of the participating industry stewardship program.

(iii) PROGRAM INCENTIVES.—Not later than 270 days after the date of enactment of this paragraph, the Secretary shall—

(I) establish incentives for participation in the CFATS Recognition Program, which shall include—

(aa) a reduction in the frequency of compliance inspections, except—

(AA) in the case of any inspection relating to any planned measure in the site security plan of a participating facility that has not been fully implemented; or

(BB) in a case in which a participating facility is not in full compliance with the requirements under the Chemical Facility Anti-Terrorism Standards Program;

(bb) streamlined vulnerability assessment and site security plan processes; and

(cc) any other regulatory relief as determined appropriate by the Secretary; and

(II) provide written guidance on any incentive established under subclause (I).

(D) EVALUATION.—Not later than 1 year after the date on which the CFATS Recognition Program is established under subparagraph (B)(i), the Secretary shall provide a briefing to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committees on Homeland Security and Energy and Commerce of the House of Representatives on the progress in carrying out the CFATS Recognition Program.

(d) COMPLIANCE.—

(1) AUDITS AND INSPECTIONS.—

(A) * * *

(B) AUTHORITY TO CONDUCT AUDITS AND INSPECTIONS.—[The Secretary] *Subject to subparagraph (G), the Secretary* shall conduct audits or inspections under this subchapter using—

(i) * * *

(ii) * * *

(iii) * * *

* * * * * * *

(G) FREQUENCY OF AUDITS AND INSPECTIONS.—

(i) IN GENERAL.—Except as provided in clauses (ii) and (iii), the Secretary may not conduct any audit or inspection under this paragraph of a covered chemical facility more frequently than once every 2 years.

(ii) CFATS RECOGNITION PROGRAM.—Except as provided in clause (iii), in the case of a covered chemical facility that participates in the CFATS Recognition Program under subsection (c)(5) and meets compliance, audit, and inspection requirements under that program, the Secretary may not conduct any audit or inspection under this paragraph of that covered chemical facility more frequently than once every 3 years.

(iii) INCREASED FREQUENCY OF AUDITS AND INSPECTIONS.—The Secretary may conduct audits and inspections more frequently than provided in clauses (i) and (ii) when—

(I) the covered chemical facility has identified planned enhancements that have not yet been validated by an audit or inspection;

(II) a deficiency or infraction at the covered chemical facility has been identified that may result in an enforcement action against the covered chemical facility;

(III) an elevated or specific threat has been identified;

(IV) a security incident or suspicious activity has occurred at the covered chemical facility; or

(V) the Secretary determines that an inspection or audit is warranted by exigent circumstances.

(2) PERSONNEL SURETY.—

(A) PERSONNEL SURETY PROGRAM.—For purposes of this title, the Secretary shall establish and carry out a Personnel Surety Program that *is mandatory for each owner or operator of a covered chemical facility assigned to tier 1 or 2 and optional for each owner or operator of a covered chemical facility assigned to tier 3 or 4 that—*

(i) * * *

(ii) provides a participating owner or operator of a covered chemical facility with relevant information about an individual *who will have access to any chemical of interest designated under Appendix A to part 27 of title 6, Code of Federal Regulations, or any successor thereto*, based on vetting the individual against the terrorist screening database, to the extent that such feedback is necessary for the facility to be in compli-

ance with regulations promulgated under this title; and

* * * * * * *

(e) RESPONSIBILITIES OF THE SECRETARY.—

(1) * * *

(2) RISK ASSESSMENT.—

(A) IN GENERAL.—For purposes of this title, the Secretary shall [develop] *maintain* a security risk assessment approach and corresponding tiering methodology for covered chemical facilities that incorporates the relevant elements of risk, including threat, vulnerability, and consequence.

(B) * * *

(3) CHANGES IN TIERING.—

(A) * * *

(B) REQUIRED INFORMATION.—The records maintained under subparagraph (A) shall include information on whether and how the Secretary confirmed the information that was the basis for the change or determination described in subparagraph (A)[.], *including—*

(i) each input and assumption under the tiering methodology;

(ii) the rationale for each input; and

(iii) the output of the tiering methodology.

(C) REPORTS.—Not later than 30 days after the Secretary makes a determination that tiering for a covered chemical facility is changed, or that a covered chemical facility is no longer subject to the requirements under this title, the Secretary shall submit to the owner or operator of the covered chemical facility a written report that contains—

(i) the information described in subparagraphs (A) and (B); and

(ii) a controlled unclassified statement—

(I) of the criteria under paragraph (2)(B) and how the security risk of terrorism associated with the covered chemical facility was evaluated under those criteria; and

(II) that includes any chemical terrorism vulnerability information (as defined in section 27.105 of title 6, Code of Federal Regulations, or any successor thereto) relating to the determination.

(D) PUBLIC DISCLOSURE.—Reports submitted to the owner or operator of the covered chemical facility to which the report pertains under subparagraph (C) shall be protected from public disclosure under section 2103.

(4) [SEMIANNUAL] *ANNUAL* PERFORMANCE REPORTING—Not later than [6 months after the date] *1 year after the date* of enactment of the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of [2014] *2018*, and not less frequently than [once every 6 months] *once each year* thereafter, the Secretary shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security and the Committee on Energy and Commerce of the House of Representatives a report that includes, for the period covered by the report—

(A) * * *

(B) * * *

[(C) the average number of days spent reviewing site security or an alternative security program for a covered chemical facility prior to approval;]

[(D)] *(C)* the number of covered chemical facilities inspected;

(D) the effectiveness of the Chemical Facility Anti-Terrorism Standards Program at—

(i) managing security risks; and

(ii) developing and using appropriate metrics and analysis capabilities to measure risk reduction, including—

(I) vulnerability and consequence mitigation indicators; and

(II) outcome metrics that measure cumulative risk reduction over time; and

[(E) the average number of covered chemical facilities inspected per inspector; and]

[(F)] *(E)* any other information that the Secretary determines will be helpful to Congress in evaluating the performance of the Chemical Facility Anti-Terrorism Standards Program.

(5) SPECIFIC PRODUCTS AND MIXTURES CONTAINING CHEMICALS OF INTEREST.—

(A) DEFINITIONS.—In this paragraph—

(i) the term "chemical of interest" means a chemical designated as a chemical of interest under Appendix A to part 27 of title 6, Code of Federal Regulations, or any successor thereto; and

(ii) the term "covered product or mixture" means a specific product or mixture that contains a chemical of interest at or above the minimum concentration listed under Appendix A to part 27 of title 6, Code of Federal Regulations, or any successor thereto.

(B) IN GENERAL.—The Secretary may exclude a covered product or mixture from the designation as a chemical of interest for the purposes of the definition of the term "chemical facility of interest" if, in the sole and unreviewable discretion of the Secretary, the Secretary determines that the covered product or mixture does not present the same hazards for which the chemical of interest contained in the covered product or mixture was designated as a chemical of interest.

(C) REGULATIONS.—

(i) PROMULGATION.—Not later than 1 year after the date of enactment of this paragraph, the Secretary shall promulgate regulations to prescribe a process under which an interested party may petition the Secretary for exclusion of a covered product or mixture under subparagraph (B).

(ii) FEDERAL INFORMATION POLICY.—In collecting information from petitioners pursuant to this subpara-

graph, the Secretary shall not be subject to subchapter I of chapter 35 of title 44, United States Code.

* * * * * * *

SEC. 2107. CFATS REGULATIONS.

(a) * * *

(b) EXISTING CFATS REGULATIONS.—

(1) IN GENERAL.—Notwithstanding section 4(b) of the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 *(Public Law 113–254; 128 Stat. 2919)*, each existing CFATS regulation shall remain in effect unless the Secretary amends, consolidates, or repeals the regulation.

(2) REPEAL.—Not later than 30 days after the date of enactment of the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of [2014] *2018*, the Secretary shall repeal any existing CFATS regulation that the Secretary determines is duplicative of, or conflicts with, this title.

(c) * * *

* * * * * * *

[SEC. 2109. OUTREACH TO CHEMICAL FACILITIES OF INTEREST.

[Not later than 90 days after the date of enactment of the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, the Secretary shall establish an outreach implementation plan, in coordination with the heads of other appropriate Federal and State agencies, relevant business associations, and public and private labor organizations, to—

[(1) identify chemical facilities of interest; and

[(2) make available compliance assistance materials and information on education and training.]

SEC. 2109. EXPLOSIVE MATERIALS.

(a) IN GENERAL.—The Secretary may not designate any explosive material regulated by the Department of Justice under chapter 40 of title 18, United States Code, or by the Bureau of Alcohol, Tobacco, Firearms, and Explosives under part 555 of title 27, Code of Federal Regulations, as a chemical of interest under Appendix A to part 27 of title 6, Code of Federal Regulations, or any successor thereto.

(b) EXPLOSIVE MATERIAL REGULATED AFTER DESIGNATION.—If any explosive material that is designated as a chemical of interest under Appendix A to part 27 of title 6, Code of Federal Regulations, or any successor thereto, becomes regulated by the Department of Justice under chapter 40 of title 18, United States Code, or by the Bureau of Alcohol, Tobacco, Firearms, and Explosives under part 555 of title 27, Code of Federal Regulations, or any successor thereto, the Secretary shall remove the designation of such explosive material as a chemical of interest.

SEC. 2110. CHANGES TO APPENDIX A TO PART 27 OF TITLE 6, CODE OF FEDERAL REGULATIONS.

(a) DEFINITION.—In this section, the term "Appendix A" means Appendix A to part 27 of title 6, Code of Federal Regulations, or any successor thereto.

(b) NOTICE OF PROPOSED RULEMAKING.—The Secretary shall publish a notice of proposed rulemaking in the Federal Register relating

to any proposed change to Appendix A if the Secretary determines that—

(1) a chemical should be designated as a chemical of interest under Appendix A;

(2) a chemical designated as a chemical of interest under Appendix A should not be so designated; or

(3) a chemical amount, concentration, or threshold quantity described in Appendix A should be modified.

○