

Ranking Member Yvette D. Clarke (D-NY) Opening Statement

Subcommittee on Cybersecurity, Infrastructure Protection, and Security Technologies

“The Chemical Facility Anti-Terrorism Standards Authorization and Accountability Act of 2014: Legislative Hearing”

February 27, 2014

Thank you for holding this legislative hearing to examine your bill, H.R. 4007. The legislation before us today would repeal and replace the existing statute that authorizes the Department of Homeland Security (DHS) to regulate chemical facilities for security purposes.

This Subcommittee has a great stake, and long history, in attempting to help the CFATS program succeed, and I have watched with interest the development of this legislative language. However, I do have some concerns about the approach the bill takes.

First, the bill stands alone, and would not amend the Homeland Security Act of 2002. This would not affect the implementation of the bill, if it is passed and enacted into law, but some might argue that such a bill does not provide a firm statutory footing for the CFATS program or resolve issues of congressional jurisdiction.

The bill does contain much of the language in the existing statutory authority and includes some new requirements for the Secretary to follow. Like in the existing statutory authority, the bill authorizes the use of the current regulatory rule that requires such facilities to submit security vulnerability assessments and to develop and implement site security plans, and facilities that have approved site security plans as of the date of enactment will not have to resubmit those plans for approval just because the bill was enacted.

And the bill expressly authorizes DHS to accept the submission alternative security programs, or ASP's, with respect to site security plans. The practice of using ASP's is already in use at the Department, and I'm in favor of the ASP's, I think it is an innovative approach for companies to address their security needs.

Let me turn to the issue of standards versus regulations. The existing statutory authority expressly directs the Secretary to issue interim final regulations. H.R 4007 does not, but instead directs the creation of a program establishing certain standards.

The bill mandates the Secretary to establish risk-based performance standards designed to protect chemical facilities that the Secretary determines represent a high level of security risk. This is an important feature, because unlike the existing statutory authority, this bill would require the performance standards to provide protection from “acts of terrorism”; while the existing statutory authority requires the risk-based performance standards be for “security.” This may help with some of our jurisdictional issues, but in my mind, the establishment of ‘standards’ as opposed to the current regulatory scheme, poses questions as to how the Department would interpret such language, if it becomes law.

For example, I think it is possible that some stakeholders, including some of our witnesses today, may assume that since such standards would be binding on the public, that this language provides an implied authority to issue regulations under provisions of the Administrative Procedure Act to implement these standards.

On the other hand, in a close reading of the bill, one might also assert that the removal of the requirement to issue regulations reflects the majority's Congressional intent to move the CFATS program away from a regulatory framework to a public/private partnership, or some other unspecified structure.

I am hoping to get some clarification, or opinion from the Department, on how they view these issues, especially in light of their surprisingly full-throated support of this language.

Another issue I'd like to bring up is the use of contractors in CFATS. One of the features of H.R. 4007 is that it specifically authorizes the Secretary to designate inspectors that are not DHS employees. The language says that the audit and inspection processes "may be carried out by a non-Department or nongovernmental entity, as approved by the Secretary".

I understand that the bill is attempting to aid the Department in accelerating the site security authorization, approval, and compliance process, but I have serious reservations about the use of contractors in the inspector cadre, where this work is generally recognized as an inherently governmental responsibility, especially when it involves terroristic threats and risks to the nation.

Finally, Mr. Chairman, I am anxious to work with you on the pressing issue of Personnel Surety, and I know your bill includes some helping language. But enactment into law for H.R. 4007 may be a while off.

More recently, DHS has issued a 30-day information collection request offering its latest personnel surety proposal. The proposal, as I understand, would accept credentials that are vetted recurrently against the terrorist-screening database and has their validity verified on a continuing basis by electronic or other means. However, DHS has previously communicated with stakeholders that it would not grant reciprocity to personnel surety programs that vet individuals against the terrorism-screening database on a schedule not equivalent to recurrent vetting. This poses substantial problems in a very complex arena.

Many have expressed concerns about duplication of efforts and the burden for multiple background checks, and others have rightfully asked about what protections might be offered for workers who would be required to secure multiple credentials to continue working, and what financial and operation problems would be put on facilities who are already complying with credentialing regulations?

We must find a way to meet the needs of addressing the risks posed by access to chemical facilities through a common-sense approach that will likely involve multiple program efforts to harmonize government credentialing among the agencies and programs.

We all know that the CFATS program has been striving to improve its performance, and we commend the hard work and leadership shown at ISCD, and we will hear today from two agencies that have looked closely at the program to help us determine what we might codify to help the program achieve its potential.

Thank you Mr. Chairman, I look forward to working with you to make the CFATS program one we can be proud of.