

ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

October 10, 2013

To: Democratic Members of the Energy and Commerce Committee

Fr: Rep. Henry A. Waxman

Re: Expiration of Chemical Security Requirements

The media has reported countless stories about the many hardships caused by the Republicans' decision to close the federal government. The purpose of this memorandum is to describe one unfortunate and dangerous consequence that has received little attention. On Friday, October 4, 2013, the authorization for the Department of Homeland Security's (DHS) Chemical Facility Antiterrorism Standards (CFATS) program expired. As a result of this expiration, there are currently no legally binding regulations in place to protect the nation's chemical facilities from criminal and terrorist attacks.

Background

Numerous federal agencies and other experts agree that the nation's chemical facilities are attractive terrorist targets.¹ Chemical facilities use and store chemical substances that can form toxic clouds that endanger people at the facility and in surrounding communities. Terrorists also could steal chemicals from these facilities to create improvised weapons of mass destruction.

¹ Department of Homeland Security, *Statement by the Department of Homeland Security on Continued Al-Qaeda Threats* (Nov. 21, 2003); Government Accountability Office, *Voluntary Initiatives Are Under Way at Chemical Facilities, but the Extent of Security Preparedness is Unknown* (GAO-03-439) (Mar. 2003); Government Accountability Office, *DHS is Taking Steps to Enhance Security at Chemical Facilities, but Additional Authority is Needed* (GAO-06-150) (Jan. 2006); Agency for Toxic Substances and Disease Registry, *Industrial Chemicals and Terrorism: Human Health Threat Analysis, Mitigation and Prevention* (June 1999); National Institute of Justice, U.S. Department of Justice, *A Method to Assess the Vulnerability of U.S. Chemical Facilities* (Nov. 2002).

In 2006, congressional appropriators included a provision in the Department of Homeland Security Appropriations Act that directed the Department to promulgate regulations to help ensure that chemical facilities are protected from terrorist attack.² The appropriations rider, known as section 550, was intended to provide a measure of security while Congress worked out a comprehensive statutory scheme for ensuring the security of the nation's chemical facilities. For that reason, section 550 was originally set to terminate three years after enactment. This provision made the program unique among DHS programs and among regulatory programs in general.

DHS issued regulations in 2007 to implement this temporary program. The regulations, known as the "Chemical Facility Anti-Terrorism Standards," were expected to sunset in October 2009, at the termination of the section 550 authority.³ Since that time, the date for the sunset of the program has been extended numerous times by appropriations bills in an effort to prevent a lapse and to provide time for a comprehensive program to be put in place.

However, the failure to pass a continuing resolution has led to the first-ever expiration of the authority to implement the CFATS program.

Impact of Program Expiration

As of September, the CFATS program covered approximately 4,300 high-risk facilities nationwide.⁴ Under the regulations, those facilities were required to submit information about their chemical holdings to DHS, assess their vulnerabilities, and prepare a plan to address those vulnerabilities and secure those chemicals. Almost 3,400 facilities have submitted site security plans or alternative security plans, and more than 700 have received letters authorizing them to implement their plans. In mid-September, the CFATS program carried out its first compliance inspection, the final stage of the process that determines whether a facility is complying with the requirements laid out in their approved security plan.

My staff contacted DHS earlier this week to inquire about the current status of the CFATS program. We were told that because the Department's authority under section 550 has lapsed, the CFATS program no longer has legal effect. This means that the chemical safety regulations adopted in 2007 are no longer in force, and the Department of Homeland Security has no authority to require security measures at high-risk facilities.

This expiration of authority is serious because without the regulatory authority underlying this program, no private entity is required to do anything. Citizen enforcement and

² Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295 (Oct. 4, 2006).

³ Department of Homeland Security, Chemical Facility Anti-Terrorism Standards, 72 Fed. Reg. 17688 (Apr. 9, 2007) (interim final rule).

⁴ Department of Homeland Security, *Chemical Facility Anti-Terrorism Standards Statistic Update: September 2013*, (Sept. 1, 2013).

enforcement by the federal government are not available, because there are no requirements to enforce.

Practically, the effect of this expiration is that the facilities that have not yet submitted security plans are not now required to submit those plans, while those that have are no longer required to implement them. DHS inspectors are not on the job, visiting chemical facilities.

Instead, the security of these facilities will depend on voluntary efforts by industry, efforts that may entail significant costs. At the most recent hearing on the CFATS program, one witness representing industry testified:

Having no chemical security regulation at all would create a risky and tilted playing field in which most companies secured their facilities voluntarily, at significant cost, while a minority created risks for us all, and gained an unfair economic advantage, by not doing so.⁵

Reform of the CFATS Program

The CFATS program has had a troubled history of implementation. In fact, earlier this year I joined with Rep. Bennie Thompson, the Ranking Member of the Committee on Homeland Security, to call for a stronger and more effective program.⁶ To his credit, the President responded in August, issuing an executive order aimed at enhancing the safety and security of chemical facilities by modernizing policies, regulations, and standards.⁷

But whatever the flaws in the CFATS program, the answer is not to let the program sunset without any replacement, which is exactly what congressional Republicans have done. This state of affairs leaves dangerous chemical facilities unregulated and vulnerable to attack.

⁵ Testimony of William Allmond, Society of Chemical Manufacturers and Affiliates, Subcommittee on Environment and the Economy, *Hearing on the Chemical Facility Anti-Terrorism Standards Program – A Progress Report*, 113th Cong. (Mar. 14, 2013).

⁶ Letter from Henry A. Waxman and Bennie G. Thompson to President Barack Obama (May 2, 2013).

⁷ Executive Order on Improving Chemical Facility Safety and Security, issued on August 1, 2013 (online at www.whitehouse.gov/the-press-office/2013/08/01/executive-order-improving-chemical-facility-safety-and-security).