

Eliminate Duplicative Regulations: Exempt ATF-regulated Facilities from CFATS

Issue: Should explosive materials regulated by the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) be subjected to duplicative regulation by the Department of Homeland Security (DHS) considering the effectiveness of ATF regulations and industry best practices?

Background: In accordance with the Organized Crime Control Act of 1970 and the Safe Explosives Act of 2002, ATF regulations establish safety and security mandates for the commercial explosives industry. Regulatory requirements include licensing, conduct of business, recordkeeping, inventory accountability, secure storage, and background checks for any person engaged in explosives operations as well as any recipient of explosive materials, among other mandates. Additionally, the commercial explosives industry adheres to longstanding security best practices that are continually improved, such as the Institute of Makers of Explosives' (IME) Safety Library Publications.

ATF regulations and industry best practices have resulted in an exemplary security record for the commercial explosives industry, as evidenced by the lack of reference in the U.S. Bomb Data Center's 2016 *Explosives Incident Report (EIR)* (U). The EIR provides analytical data regarding explosives related incidents, bombings, recoveries, and theft/losses reported through the Bomb Arson Tracking System (BATS). In 2016, of the 39 main charges related to 439 explosion incidents, under 1% involved explosive materials regulated by ATF and used in the commercial explosives industry. Of 3,367 explosion incidents reported during the five-year period of 2012 through 2016, less than 2% involved main charges of ATF-regulated explosive materials used in the commercial explosives industry. According to available ATF EIRs, the use of regulated commercial explosives in bombing incidents has hovered near 2% for the past 25 years. The EIR data further underscores the excellent security record of the commercial explosives industry by reporting only 11 thefts of commercial explosives in 2016, and 96 from 2012-2016. Although the industry strives for zero thefts, the number is infinitesimal considering that 29 *billion* pounds of commercial explosives were consumed in the United States during the 2012-2016 period. 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.

Despite this remarkable security record, in addition to ATF regulations, the commercial explosives industry has been subjected to a duplicative DHS regulatory scheme. Certain facilities deemed high-risk by DHS are required to meet the additional security requirements of the Chemical Facility Anti-Terrorism Standards (CFATS) program. CFATS originated from an amendment to the DHS Appropriations Act of 2007, Section 550, and after a rocky beginning, the program received its first full authorization when Congress passed the Protecting and Securing Chemical Facilities from Terrorists Act of 2014 (P.L. 113-254). When CFATS was first established, Congress understood a one-size-fits-all policy was not necessary and exempted: 1) Facilities regulated pursuant to the Maritime Security Act of 2002; 2) Public Water Systems as defined by the Safe Drinking Water Act (Sec 1401); 3) Treatment Works as defined by the Federal Water Pollution Control Act (Sec. 212); 4) Dept. of Defense and Dept. of Energy facilities; and, 5) Facilities regulated by the Nuclear Regulatory Commission. Surprisingly, ATF regulated facilities are not provided similar deference.

Discussion: Congress should recognize that ATF regulatory requirements and industry best practices effectively ensure security of commercial explosives and prevent diversion of explosive materials for illicit purposes. Congress should further recognize that the duplicative burden imposed by the DHS CFATS program on an industry that is already effectively regulated does not further advance the security of commercial explosives.

Recommendation: Congress should amend 6 U.S.C. Chapter 1, Subchapter XVI, Chemical Facility Anti-Terrorism Standards, Section 621 (4) to include as an excluded facility "(F) a business premises where explosive materials are manufactured, imported, stored or distributed subject to the regulation of the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, under 18 U.S.C. Chapter 40 and 27 CFR Part 555."