



## **Guidance Document**

**The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.**

Document Summary: The following document outlines the penalties and the procedures that CISA follows to assess civil penalties for chemical facilities found to be in violation of the Chemical Facility Anti-Terrorism Standards (CFATS).

Document Title: Policy for Assessing a Civil Penalty under the Chemical Facility Anti-Terrorism Standards (CFATS)

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# **U.S. DEPARTMENT OF HOMELAND SECURITY**



**Infrastructure Security Compliance Division**

**Policy for Assessing a Civil Penalty under the  
Chemical Facility Anti-Terrorism Standards**

**Policy # 02.08.03.010-1.0**

**2017**



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National Protection and Programs Directorate  
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## **I. Background<sup>1</sup>**

The Chemical Facility Anti-Terrorism Standards (CFATS) program identifies and regulates high-risk chemical facilities to ensure they have the security measures in place to reduce the risks of terrorist attack or exploitation associated with more than 300 chemicals of interest (COI) listed in what is called “Appendix A.” If held in specified quantities and/or concentrations, these chemicals trigger reporting requirements and facilities must submit a survey, known as a Top-Screen, through the Chemical Security Assessment Tool (CSAT) 2.0 in order to determine if a facility is high risk. A facility must submit a Top-Screen within 60 days of coming into possession of a COI.

Using the information from the Top-Screen, facilities are then ranked into four tiers, with Tier 1 representing the highest risk. Based on their tier, facilities must develop and implement performance-based security standards appropriate to the risk they pose. These security measures are detailed in a Site Security Plan (SSP) or an Alternative Security Program (ASP) the facility submits to CFATS for approval. Once approved, a facility is subject to compliance inspections to ensure it continues to meet the required security standards.

Failure to comply with the regulation may subject a facility to a civil penalty. The CFATS Penalty Policy outlines the policies and procedures that the Department of Homeland Security’s Infrastructure Security Compliance Division (ISCD) follows to issue an Administrative Order (A Order) and an Order Assessing Civil Penalty (otherwise known as a B Order) to a chemical facility found to be in violation of the CFATS (6 CFR Part 27) and The *Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014* (CFATS Act of 2014), Pub. L. No. 113-254, (6 USC § 621, et seq.). Both A Orders and B Orders may be appealed pursuant to the procedures set forth in 6 CFR Part 27 Subpart C.

This document is applicable to CFATS-covered chemical facilities and chemical facilities of interest believed to be in violation of CFATS.

This policy is intended to provide guidance to ISCD personnel in how to assess civil penalties. This policy does not establish any right or remedy, implied or otherwise, in addition to the rights and remedies afforded to parties alleged to be in violation of CFATS under 6 CFR Part 27, Subpart C. ISCD reserves the right, at its sole discretion, to depart from this policy in appropriate circumstances and to change this policy at any time without prior notice.

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## **II. Authorities**

1. Chemical Facility Anti-Terrorism Standards (CFATS) (6 CFR Part 27).
2. *Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014* (CFATS Act of 2014), Pub. L. No. 113-254, (6 USC § 621, et seq.).
3. Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74 section 701).

## **III. Civil Penalty Issuance and Calculation**

Under CFATS, DHS has the authority to issue an enforcement action to a chemical facility found to be in violation of CFATS. The civil penalty calculations and timelines are broken up into two distinct categories of violations: (1) Failure to File Violations, (2) SSP/ASP Deficiencies (generally found during the authorization and approval process) and/or SSP/ASP Infractions (generally found during Compliance Inspections), and (3) Chemical-terrorism Vulnerability Information (CVI) Violations. Failure to File Violations are calculated on a set schedule at a set amount. For SSP/ASP Deficiencies and SSP/ASP Infractions, ISCD considers each case individually using an established set of criteria to ensure consistency in the application of civil penalties. Recommended civil penalty amounts vary for each facility based on the risk posed by the facility, the severity of violation, as well as aggravating factors. Mitigating factors are generally not considered in calculating civil penalty amounts, but they may be considered during settlement discussions.

### **1. Failure to File Violations**

Failure to File Violations occur when a chemical facility of interest or a covered chemical facility fails to submit or resubmit a Top-Screen or fails to submit an initial Security Vulnerability Assessment (SVA)/SSP or ASP within the timelines identified in the regulation or as directed by DHS. ISCD breaks Failure to File Violations into two categories: (1.1) Top-Screen Failure to File Violations and (1.2) SVA/SSP or ASP Failure to File Violations. ISCD may stay these timelines on a case-by-case basis when it deems necessary (e.g., if further information is required prior to the issuance of a penalty).

#### **1.1 Top-Screen Failure to File Violations Timelines and Calculations**

Pursuant to 6 USC § 2104(b)(2), DHS can directly fine a facility that fails to file a Top-Screen without first issuing an Administrative Order or “A Order” to the chemical facility of interest. Despite that ability, this policy outlines a series of steps that will occur prior to DHS fining a facility for a failure to file a Top-Screen. The civil penalty amounts for this type of violation are assessed on a periodic basis as one-time amounts until the facility has been out of compliance for a length of time explained in Table 1 below, after which the penalties will accrue each day. Outlined in Table 1 is a timeline for correspondence notifying the facility of the assessment of potential civil penalty amounts for Top-Screen Failure to File Violations.



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Day	Action
Date of Expiration of Time to File (Day "T")	Reminder letter sent to facility
T + 14 = X	Letter of Warning sent to facility with potential penalty amount of \$2,000
X + 30	One-time penalty amount of \$2,000 levied against the facility (B order)
X + 60	One-time penalty amount of \$10,000 levied against the facility (B Order)
X + 90	Begin to levy \$2,000/day against the facility until the facility complies with CFATS filing requirements

**Table 1. Applicable fines for failing to file Top-Screen**

The civil penalty amounts listed in Table 1 above are cumulative. For example, if a facility remains out of compliance after the second civil penalty amount of \$10,000 is issued (i.e., 60 days after the Letter of Warning was sent to the facility), the facility will owe a total of \$12,000. If a facility is still not in compliance for a significant amount of time after per-day civil penalties have commenced, ISCD will consider an increased per-day civil penalty amount or an Order to Cease Operations.

**1.2 Initial SVA/SSP or ASP Failure to File Violations Timelines and Calculations**

Initial SVA/SSP and ASP Failure to File Violations are essentially the same as Top-Screen Failure to File Violations, except that ISCD will issue an A Order in lieu of the Letter of Warning 14 days after the expiration of the time to file, and a B Order for a violation of the A Order if the SVA/SSP or ASP is not submitted within 30 days of the A Order. Subsequent B Orders will be issued in accordance with Table 2 below.

Day	Action
Date of Expiration of Time to File (Day "T")	Reminder letter sent to facility
T + 14 = X	A Order sent to facility with potential penalty amount of \$2,000 and 30 days to file to avoid B Orders
X + 30	One-time penalty amount of \$2,000 levied against the facility (B Order)
X + 60	One-time penalty amount of \$10,000 levied against the facility (B Order)
X + 90	Begin to levy \$2,000/day against the facility until the facility complies with CFATS filing requirements (B Order)

**Table 2. Applicable fines for failing to file initial SVA/SSP or ASP**

If a facility is still not in compliance for a significant amount of time after per-day civil penalties have commenced, ISCD will consider an increased per-day civil penalty amount or an Order to Cease Operations.

**1.3 Submission of False Information**

ISCD has the authority to fine for submission of false information. Penalty amounts will be determined on a case by case basis in accordance with the principles of this policy.



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## **2. SSP/ASP Deficiencies and SSP/ASP Infractions (Violations of A Orders)**

For SSP/ASP Deficiencies and SSP/ASP Infractions, ISCD must use the A Order followed by a B Order structure and will implement monetary civil penalties accruing on a per-day basis. If a covered chemical facility fails to correct the violations within the timeframes identified in the A Order, ISCD may issue a B Order (Order Assessing Civil Penalty), which imposes a monetary civil penalty on the facility for a violation of the A Order. Multiple B Orders may be issued if necessary until compliance is achieved.

### **2.1 Timeline**

Generally, the first B Order is issued on the third calendar day after the timeframe for compliance specified in the A Order has expired. If the facility comes into compliance following the issuance of the B Order, ISCD may issue another B Order to assess penalties accruing between the B Order and the date of compliance.<sup>2</sup> If the facility is still not in compliance by the tenth calendar day after the facility's A Order timeframe has expired, or at the assessment of a \$200,000 civil penalty amount, whichever is earlier, a second B Order will be issued to assess accrued civil penalties for those additional days. B Orders will continue to be issued in ten-day intervals or at ISCD's discretion until the facility comes into compliance. When multiple B Orders are issued, each B Order has its own separate deadline for the covered chemical facility to seek review pursuant to 6 CFR § 27.310(b). If the facility resolves some of the deficiencies or compliance issues, but not all, ISCD can adjust the civil penalty amount in any subsequent B Orders. DHS also has the authority to issue an Order to Cease Operations as another enforcement tool at any time.

### **2.2 Calculating the Civil Penalty Amount**

SSP/ASP Deficiencies identified during the SVA/SSP/ASP review and approval process or SSP/ASP Infractions discovered during a Compliance Inspection or similar action are categorized as either a minor, moderate, or major SSP/ASP Deficiency or SSP/ASP Infraction, respectively. The categorization is dependent upon several factors, including the degree of implementation of a security measure and/or the impact of the lack of the security measure on the facility's overall security posture. The presence or absence of any one security measure does not, in itself, determine the categorization as minor, moderate, or major; rather, the measures are considered holistically in relation to the risk-based performance standards (RBPS) and identified security issues.

Generally, ISCD categorizes a security measure or issue as either minor, moderate, or major based on its severity so **that a measure with a greater impact on the facility's security or a more severe deficiency will result in the assessment of higher civil penalty amounts**, as follows:

- **Minor** – An SSP/ASP Deficiency (or series of deficiencies) or SSP/ASP Infraction(s) in which any RBPS is not fully addressed and the lack thereof is reasonably expected **not to**

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<sup>2</sup> ISCD may use its discretion and mitigating factors once a facility has come into compliance regarding whether to issue and/or the amount assessed in a B Order for days during which the penalty accrued, but for which a B Order has not yet been issued.



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**pose an immediate or significant impact** on the security of the COI or a failure to comply with regulatory reporting requirements that degrades the government’s ability to verify consistent application of appropriate countermeasures. This includes a situation where an RBPS is wholly unaddressed but does not pose an immediate threat to the security of the COI.

- **Moderate** – An SSP/ASP Deficiency (or series of deficiencies) or SSP/ASP Infraction(s) in which any RBPS is only partially addressed or failure to comply with regulatory reporting requirements eliminates the government’s ability to verify consistent application of appropriate countermeasures, **and poses an immediate and significant impact** on the security of the COI.
- **Major** – An SSP/ASP Deficiency (or series of deficiencies) or SSP/ASP Infraction(s) in which any RBPS is significantly or wholly unaddressed, **and poses an immediate and critical impact** on the security of the COI.

The civil penalty amount under each of the three categories may be assessed at a higher rate based on the consideration of aggravating factors, up to double the amount per deficiency in or infraction of the SSP/ASP (Table 3).<sup>3</sup> The maximum cumulative civil penalty assessed per-day may not exceed \$33,333.<sup>4</sup>

Severity of Deficient Measure	Amount Per Deficient Measure	Aggravating Factor Maximum Amount
Minor	\$1,000	\$2,000
Moderate	\$3,000	\$6,000
Major	\$5,000	\$10,000

**Table 3. Applicable fines for severity of a deficiency or infraction**

## 2.3 Continued Noncompliance

- 2.3.1. If a facility demonstrates repeated violations of CFATS, ISCD may, in its discretion, directly enter a B Order (Order Assessing Civil Penalty, or an Order to Cease Operations, or both) without first issuing an A Order in accordance with 6 USC § 624(a)(2). Penalty amounts will be discretionary, but will conform generally to the guidelines outlined herein and will not exceed \$33,333 per day.

<sup>3</sup> Please note: These penalty amounts are assessed per deficiency—either in the SSP or measures not in compliance with the SSP—to amount to a total recommended penalty amount for the B Order. For these types of violations, ISCD considers the violation triggering the B Order to occur on noncompliance with the A Order, which is why ISCD refers to these as “deficiencies” or “infractions.”

<sup>4</sup> This maximum cumulative civil penalty is subject to change periodically. *See Civil Monetary Penalty Adjustments for Inflation*, 81 FR 42987 (July 1, 2016).





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- 2.3.2. If an owner or operator remains noncompliant after an A Order has been issued or demonstrates repeated violations of CFATS and the CFATS Act, the Secretary may issue a B Order to the facility to cease operations (6 USC § 624(a)(2)). ISCD will exercise this authority if it reasonably believes that such continued noncompliance of a facility creates a risk to the Nation's security.

**3. Chemical-terrorism Vulnerability Information (CVI) Violations**

- 3.1 If ISCD determines that a chemical facility of interest has committed a CVI violation under 6 CFR § 27.400(j), an A Order will be issued.
- 3.1.1. If a CVI violation is continuous in nature (e.g., a facility has posted CVI on its website), an A Order will be issued giving the facility two days to remedy the violation. A B Order will follow in the same process as in Section 1.2. if the violation is not corrected.
- 3.1.2. If a facility has already been issued two A Orders for CVI violations or other violations within the last year, DHS may, in its discretion, determine that the facility has repeatedly violated CFATS to an extent that warrants a B Order for continued noncompliance for a one-time \$1,000 minimum/\$2,000 maximum civil penalty. (See 6 USC § 624(a)(2)).
- 3.1.3. If after one B Order has been issued for a CVI violation, the facility continues to violate CFATS requirements regarding the handling of CVI, DHS may issue additional B Orders in civil penalty amounts to be determined based on the circumstances of the case.
- 3.2 ISCD will assess larger civil penalties, as appropriate, in cases in which an entity or person knowingly or intentionally violates the CVI rules, or provides CVI information to terrorists or other individuals who intend to use CVI information for criminal purposes. DHS will utilize any and all legal authorities to enforce against the provision of CVI for criminal purposes. Additionally, if DHS believes that any CVI has been provided to a terrorist or terrorist organization or will be used for other criminal purposes, the matter will be immediately referred to the Department of Justice for investigation and prosecution.

**IV. Small Business Entities**

Under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), a facility that falls within that statute's definition of a small business may have its civil penalty reduced as long as it is not disqualified from a reduction. A reduction in the civil penalty may not be appropriate if the facility shows a pattern of noncompliance, the violation poses a serious threat to safety, violation involves willful or criminal conduct, or the facility has not made a good faith effort to comply with the law.





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For violations involving SSP/ASP Deficiencies or Infractions, the facility will be provided an opportunity to demonstrate to ISCD's satisfaction that the facility qualifies as a small business based on the Small Business Administration's criteria. Once ISCD is satisfied that the facility is a small business under SBREFA, ISCD may reduce the maximum aggregate civil penalty amount determined by 20 percent.

For violations involving a chemical facility of interest's failure to submit an initial or revised Top-Screen and a covered chemical facility's failure to submit an initial SVA/SSP or ASP, ISCD has determined, as a matter of policy, that the facility is not eligible for a 20 percent civil penalty reduction under SBREFA because such circumstances invariably involve lack of good faith on the part of the facility to comply with the law due to the amount of warning and contact provided in this policy. (See SBREFA § 223.) However, if it is determined that the facility did not have reportable quantities of COI, even though ISCD had a reasonable belief that the facility was required to report, the reduction may still be applied.

If a facility has identified itself as a Small Business in CSAT, and ISCD believes that it otherwise qualifies for reduction under SBREFA, ISCD will take an automatic reduction in the civil penalty amount of any B Orders issued. For facilities that did not identify themselves in CSAT as a small business, the A Order will include language providing them the opportunity to request a reduction in civil penalty amount if they can demonstrate their qualification. Any subsequent B Orders after such a request is approved will incorporate such a reduction. If a facility has not notified ISCD of its status as a small business either in CSAT or after receiving the A Order, the reductions will not be included in the B Orders. In these cases, SBREFA reductions will only be conducted retroactively to an issued B Order pursuant to settlement negotiations (i.e., except pursuant to settlement, ISCD will not reissue B Orders with revised civil penalty amounts for SBREFA).

## **V. Settlement and Negotiations of Civil Penalties**

Settlement discussions can take place at any time after ISCD issues a B Order (i.e., Order Assessing Civil Penalty). Conditions of settlement will include the waiver of the right to appeal and/or to continue an appeal of a civil penalty. In arriving at a settlement amount, ISCD may deviate significantly from the amount that could be assessed based on a strict application of Sections III through V of this policy. In appropriate circumstances, ISCD may initiate a downward departure of the civil penalty amount listed in the Order Assessing Civil Penalty (and after applying any small business reduction under Section IV, where applicable) absent a specific request from the facility. Specific mitigating factors ISCD may consider in arriving at a reduced settlement amount include, but are not limited to:

1. **Level of Cooperation:** ISCD may reduce the amount being assessed if the facility exhibits a cooperative attitude after ISCD issued the Order Assessing Civil Penalty. (Note: This factor should be not applied if ISCD earlier applied the facility's noncooperative attitude as an aggravating factor in determining an appropriate per-day civil penalty amount pursuant to Section III of this policy.)



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2. **Extenuating Circumstances:** Examples include the death or illness of key personnel, lack of notice, etc., and other factors not within the facility's control that impeded its ability to comply in a timely manner.
3. **Good Faith Attempts at Coming into Compliance:** When a facility makes good faith attempts to come into immediate compliance, but full compliance is not achieved until sometime after the facility's initial attempts, ISCD may stay the daily accrual of civil penalties beginning on the day on which the facility demonstrates good faith efforts toward achieving full compliance.
4. **Ability to Pay:** ISCD may, in its discretion, consider other information relating to a facility's ability to pay a civil penalty amount and/or the facility's ability to continue in business. As a matter of policy in determining ability to pay in settlement negotiations, ISCD will not seek to assess a civil penalty amount that exceeds the greater of two percent of the facility's annual total (net) income based on an evaluation of the facility's Federal income tax returns for the past three years or \$2,000, unless ISCD has evidence that a facility is attempting to hide assets to obtain a lower fee. The facility is responsible for providing reliable evidence of its inability to pay a civil penalty or of the impact that a penalty would have on the facility's ability to continue in business.<sup>5</sup> Ability to pay should be of limited consideration, if any, when the violation involves willful or criminal conduct or is a part of a pattern of repeated noncompliance.
5. **Settlement Process:**
  - 5.1 Once a settlement has been agreed upon by both parties, ISCD will issue a final B Order with the total settlement amount for which the facility has waived appeal rights and which will become the proof of debt for collection.
  - 5.2 When ISCD and the noncompliant facility agree to a settlement in a matter where one (or more) Order Assessing Civil Penalty has already been issued, ISCD will issue an Order Assessing Civil Penalty that finalizes and supersedes any previously issued Order Assessing Civil Penalty that is the subject of the settlement. As a condition of settlement, the facility must agree to waive its right to challenge the final Order Assessing Civil Penalty pursuant to 6 CFR § 27.310 and its right to contest the final Order Assessing Civil Penalty in a suit filed in Federal court.

## **VI. Definitions**

1. **Aggravating Factors:** Considerations applied when determining a civil penalty amount that may increase the assessment up to double the amount per deficiency or infraction. Aggravating Factors generally are considered under four categories: (1) intention (i.e., the facility knowingly committed the violation); (2) high level of experience (i.e., a facility's high-level management employee caused the violation); (3) lack of cooperation (i.e., a facility attempted to conceal discovery of a violation); and (4) past noncompliance or

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<sup>5</sup> Any Federal income tax return information will be safeguarded in accordance with 6 USC § 6103.



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violation history (i.e., a facility has previously received an order for violations, such as missed deadlines).

- 2. Chemical Facility of Interest:** A facility that holds, or that the Secretary has a reasonable basis to believe holds, a chemical of interest (COI) as designated under Appendix A to 6 CFR Part 27, or any successor thereto, at a screening threshold quantity (STQ) set pursuant to relevant risk-related security principles; and is not an excluded facility.
- 3. Covered Chemical Facility:** A facility the Secretary (i) identifies as a chemical facility of interest; and (ii) based upon review of the facility's Top-Screen, determines meets the risk criteria developed under 6 USC § 622(e)(2)(B); and is not an excluded facility.
- 4. Determination of Disapproval:** A letter that is issued pursuant to 6 CFR § 27.245(b) under which ISCD disapproves a covered chemical facility's Security Vulnerability Assessment/Site Security Plan (SVA/SSP) or Alternative Security Program (ASP) because the facility has not submitted an SVA/SSP or ASP that fully satisfies the requirements of 6 CFR § 27.225 in response to ISCD's previous issuance of a Notice of Deficiency. This Determination of Disapproval is issued with the B Order.
- 5. Excluded Facility:** A facility that is statutorily excluded from regulation under CFATS because the facility is: (1) regulated under the Maritime Transportation Security Act (MTSA) of 2002; (2) a public water system, as that term is defined in Section 300f of Title 42 USC; (3) a Treatment Works, as that term is defined in Section 1292 of Title 33, USC; (4) owned or operated by the Department of Defense or the Department of Energy; or (5) subject to regulation by the Nuclear Regulatory Commission (NRC), or by a State that has entered into an agreement with the NRC under Section 2021(b) of Title 42 USC to protect against unauthorized access of any material, activity, or structure licensed by the NRC.
- 6. Letter of Warning (LOW):** A letter that provides written notice to a facility of a potential violation of CFATS along with a specified amount of time for the facility to come into compliance before DHS takes a formal enforcement action.
- 7. Mitigating Factors:** Considerations that reduce the impact of a facility's noncompliance with CFATS. Examples of possible mitigating factors are the facility's level of cooperation with CFATS before, during, and/or after the enforcement action; the facility's past history of compliance; and extenuating circumstances affecting an owner or operator's ability to comply.
- 8. Notice of Deficiency:** A letter of noncompliance sent to a covered chemical facility that includes a clear explanation of deficiencies in the SVA/SSP or ASP and the time required for the facility to resubmit the SVA/SSP or ASP pursuant to 6 USC § 624 and 6 CFR § 27.245(b) prior to DHS disapproving the SVA/SSP or ASP. This Notice of Deficiency is issued with the A Order.



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9. **Order:** A formal enforcement mechanism that triggers the right to an administrative adjudication under CFATS pursuant to 6 CFR § 27.310, codified in 6 USC § 624. Under CFATS, DHS has the authority to issue two types of orders:
- 9.1. **Administrative Order (referred to as an A order or Order for Corrective Action):** An order that notifies the facility of a potential violation of CFATS pursuant to 6 CFR § 27.300(a) and provides a time period by which the facility must come into compliance or advise DHS why it is not required to do so.
  - 9.2. **Penalty Order (referred to as a B Order, Order Assessing Civil Penalty, or Order to Cease Operations):** Under 6 CFR § 27.300, a B Order cannot be issued to a covered chemical facility unless the chemical facility is found first to be in noncompliance with a previously issued A Order. Except that, an A Order is not required prior to the issuance of a B Order for a chemical facility of interest that fails to submit a Top-Screen or knowingly submits false information. (See 6 USC § 624(b)(2).)
10. **Risk-Based Performance Standards (RBPS):** The 18 performance standards specified in 6 CFR § 27.230 upon which a facility's security posture, based on risk, is evaluated, such as perimeter security, access control, personnel surety, and cybersecurity. Specific measures to achieve the standards are at the discretion of the covered chemical facility, unless this facility has elected to participate in submitting an Expedited Approval Program SSP.
11. **Site Security Plan/Alternative Security Program (SSP/ASP) Deficiency:** A shortcoming or inadequacy in the security measures within a covered chemical facility's SSP or ASP submission that results in a finding, based on an individual and holistic analysis of those measures and of other applicable facility circumstances, that a risk-based performance standard has not been satisfied.
12. **Site Security Plan/Alternative Security Program (SSP/ASP) Infractions:** Violations of an approved or accepted SSP/ASP, usually discovered during a Compliance Inspection. Penalties for these types of violations are assessed in the same manner as SSP Deficiencies.