Statement For the Record

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Testimony for the

U.S. House of Representatives Committee on Homeland Security
Subcommittee on Transportation Security and Infrastructure Protection
Partnering with the Private Sector to Secure Critical Infrastructure:
Has the Department of Homeland Security Abandoned the Resilience-Based Approach?

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Chairwoman Jackson-Lee, Ranking Member Lungren, and distinguished members of the Subcommittee, thank you for inviting me to testify on the vital issue of private sector resiliency and the Voluntary Private Sector Preparedness Certification Program called for by Title IX, Section 524 of PL 110-523, The Implementing Recommendations of the 9-11 Commission Act of 2007.

As with many undertakings in the private sector, this new program offers both substantial opportunity and significant risk, most especially if the private sector is not effectively engaged. It will be the balancing of these two elements that will determine the ultimate success or failure of this program. It is an effort though that I believe to be well worth undertaking for sake of both the individual businesses and our wider society.

The 9-11 Commission's Private Sector Recommendations Focused on the "What" and "Why" of Preparedness

As you may be aware, our Center, the International Center for Enterprise Preparedness (or InterCEP) at New York University is the first academic research center dedicated to private sector resilience. Our activities regularly involve outreach to hundreds of businesses, much of it through interactive forums focused on key issues.

The Center takes its primary focus from the private sector recommendations of the 9-11 Commission, which I was honored to advise on private sector preparedness.

The Commission's recommendations and thus InterCEP's research focus on promoting private sector preparedness through the linking the "what" and the "why" of preparedness/resilience. The 9-11 Commission clearly understood that absent a compelling bottom-line rationale for preparedness, businesses would not invest the funds and other resources necessary to develop a preparedness program. The Commission sought to leverage basic market-based economics, bottom-line orientation, to promote effective private sector preparedness activities by business. They did so with an initial focus on two key elements:

1. identifying a consensus-based industry standard for business preparedness (<u>the what to do</u>); businesses were looking for a high level set of criteria that represented best practices in preparedness yet allowed the business flexibility as to how to achieve particular outcomes.

2. identifying potential incentives for businesses to voluntarily conform with that standard (<u>the why to do it</u>) including mitigating legal liability after an event, potential insurance recognition, and encouraging rating agency

acknowledgement (all in addition of course to the basic rationale of continuity of the business in the aftermath of a crisis).

There is a Need for a Measurement Approach / Tool to Assess Business Preparedness

Since establishing our Center in October of 2004 and the extensive research and interface with business that followed, it has become clear that the linkage of the "what" and "why" of preparedness often requires measurement or assessment to determine if the "what" to do of preparedness has been or is being accomplished so that the "why" to do it can be confirmed or rewarded. Thus, there is a third key element that our research with the business sector has identified as critical to successfully promoting private sector preparedness:

3. a method to measure or assess achievement of preparedness objectives, i.e., identifying "<u>if preparedness is being achieved</u>."

Measurement is important for several reasons. Internally, there are multiple benefits:

- First and foremost, a business needs a yardstick to assess if it is achieving its preparedness goals for which it may have invested effort and resources to assure its business continuity.
- Measurement may also have reputational benefits for corporations that wish to demonstrate to their customers and other stakeholders that they are prepared.
- Measurement may additionally help advance corporate governance goals, especially in validating risk management efforts.

External to the firm, potential "incentives stakeholders" such as supply chain partners, insurance underwriters, rating agencies and the legal community need a credible confirmation that preparedness efforts have been undertaken. These communities generally grant that there is value in preparedness efforts by businesses, and these stakeholders may be disposed towards acknowledging or rewarding preparedness in their activities.

These potential incentives stakeholders do not however wish to undertake the actual assessment or measurement of preparedness on their own on a business by business basis. They do not want to nor do they have the resources to send out assessors to a business to ascertain if a particular business's program conforms to a particular industry standard. Yet, if there was a credible program which indicated compliance with such a standard, these stakeholders may consider rewarding it, at least over time. Thus, external benefits to measurement include:

- Measurement could promote resilience of supply chains by supplying a common approach and tool for assessing supplier preparedness.

- A common measurement program may make it easier for various business incentive communities to acknowledge the value of effective preparedness (e.g., insurance, legal, rating agency, etc.) overtime.
- Measurement to a commonly-recognized standard may help facilitate exchange of best practices, enabling business to more easily compare practices across industries and sectors which may have distinct terminology and approaches but lack a "rosetta stone" or common set of criteria to compare their efforts.
- A common measurement program may also enable more consistent benchmarking to other firms both within and industry and potentially across sectors – including potentially the critical infrastructure sectors.

The Developing Voluntary Private Sector Preparedness Certification Program

It is in light of these three elements, (1) what to do, (2) why to do it and (3) a measurement of achievement that I would like to discuss the developing Voluntary Business Preparedness Certification Program.

This new program is proving to be a distinct catalyst, with significant initial and potential impact on private sector preparedness. It is also a program that nonetheless must be guided by key considerations and private sector input to assure its success.

This new program could potentially integrate

- the "what to do" in the form of one or more preparedness standards to be designated under the legislation,
- an evolving "why to do it" by proactively identifying the business case for preparedness and integrating its elements into the program where possible including potential incentives stakeholders in the process of program development and implementation
- a credible measurement / assessment methodology based upon historic experience with other voluntary certification programs such as those in quality management (ISO 9000) and environmental management (ISO 14000) which have been implemented in and by the private sector for decades.

The announcement of this program has already to date provided a catalyst for business sector activity. Despite the legislation's annunciation that the program is to be voluntary, the perceived threat of potential government regulation along with other concerns has motivated significant private sector activity. Much of it based on the presumption that the private sector must take the lead in this process to assure that the outcome has positive value and not onerous impact.

For example, one remarkable effort involved four key professional organizations coming together to define the core elements of private sector preparedness based on existing standards and professional practices across multiple disciplines. This effort was sponsored by the Alfred P. Sloan Foundation which is a key funder of InterCEP's activities and involved representatives from ASIS International (a key security

association), the Disaster Recovery Institute International (a key business continuity association), the National Fire Protection Association (which maintains the Standard on Disaster/Emergency Management & Business Continuity referenced in the legislation and endorsed by both the 9-11 Commission and DHS) and the Risk & Insurance Management Society (a leading risk management society for businesses). These organizations collectively defined a framework for voluntary preparedness that supports a flexible approach to assessing preparedness potentially including multiple standards reflecting a common core set of preparedness elements. The final report is available at www.sloan.org

Additionally, other organizations have begun forums to discuss the program including the U.S. Chamber of Commerce among others. As an example, InterCEP currently has dozens of businesses actively engaged in five different Working Groups which initially address key potential incentive areas for program acknowledgement:

- supply chain management
- legal liability mitigation
- insurance
- rating agency acknowledgement
- business reporting acknowledgement/crediting

Key Considerations and Concerns of the Private Sector

Key considerations and concerns identified by the private sector through a diversity of forums hosted by the Center are outlined in the Appendix. The key themes include:

1. **Assure that the program is private sector led and addresses private sector needs** through ongoing engagement of key stakeholders.

2. **Build on the existing** including existing standards, proven accreditation/certification processes and established industry practices – key building blocks already exist.

3. **Allow for flexibility** potentially utilizing a high level umbrella or framework standard which can be used independently or to relate multiple more focused standards and practices which business may already be using.

4. **Enable potential market-based incentives** through involvement of their stakeholders and concerns.

Action Items for Government Going Forward

It will be vital to the ultimate success of the program that government take the initiative as a catalyst and investor in this process:

- Both DHS and the ultimate accrediting body to be designated by it must actively and consistently engage the private sector in the development and implementation of the program. Specific considerations and issues are identified in the Appendix.

- DHS must continue to maintain its integrated approach to supporting this program which includes FEMA as program lead but also includes active involvement by Infrastructure Protection, Science & Technology and the DHS Private Sector Office (and others as appropriate).

- Congress should provide the resources to enable an ongoing commitment by DHS to this program. It is an investment that will yield substantial benefits in terms of societal resilience given the role that the private sector plays in backbone critical infrastructure for our nation.

- DHS should continue to evaluate the voluntary application of the program to critical infrastructure as this community may find significant value in the capability of the program. Furthermore, the program may provide a very valuable tool in cross-sector cooperation and assessment.

- Education and tools must be developed by key stakeholders (optimally with government support) to enable business (large and small) to pursue program assessment and implementation with minimal cost and disruption.

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Appendix

Summary of InterCEP Research to Date

On the Voluntary Private Sector Preparedness Certification Program

Per Title IX, Section 524 of PL 110-523,

The Implementing Recommendations of the 9-11 Commission Act of 2007

May 14, 2008

Key Points & Considerations

Four basic themes are reflected in the following considerations, they are:

1. **Assure that the program is private sector led and addresses private sector needs** through ongoing engagement of key stakeholders.

2. **Build on the existing** including existing standards, proven accreditation/certification processes and established industry practices – key building blocks exist.

5. **Allow for flexibility** potentially utilizing a high level umbrella or framework standard which can be used independently or to relate multiple more focused standards and practices which business may already be using.

6. **Enable potential market-based incentives** through involvement of their stakeholders and concerns.

Specific Considerations

- **Early and continuing stakeholder involvement must be maintained to assure that the program is private sector led.** While government can play a catalytic role in the early development of the program, ultimately the program should be market driven as has been the case with the continuing voluntary certification programs in quality and environmental management. Key to assuring that the voluntary certification program has real operational value to business is to involve the full-spectrum of the business sector in the development and ongoing implementation of the voluntary certification program.

- **There is concern within the private sector that the program could develop into a mandatory requirement by government.** Similar concerns exist about whether the program will be truly voluntary once market pressures force firms to pursue certification in order to remain competitive.

- **There are concerns about the potential costs and liabilities associated with the program.** It will be important to contain the implementation costs and minimize the bureaucracy associated with the certification process.

- **The program should build on existing voluntary accreditation and certification processes. There are lessons to be learned from historical experience with existing voluntary certification programs in quality and environmental management**. Current voluntary certification programs in quality management and/or environmental management utilize established processes for accreditation and certification. These could potentially be utilized in the development of the preparedness certification program thereby avoiding significant time and effort as well as benefiting from substantial historical application. Furthermore, opportunities and efficiencies might potentially be achieved by businesses that currently have existing quality and environmental programs by building upon them (i.e., existing management processes). For example, the program should be informed by lessons learned from C-TPAT and pandemic planning regarding the best way to minimize impacts on business and maximize benefits to business.

- **Existing efforts of key vertical industries, such as the financial services sector, should be acknowledged and incorporated into the voluntary certification program.** Some business sectors have a long history in preparedness activities and robust programs in place. The financial services sector is one. The new law specifically calls for existing industry efforts, standards, practices and reporting in the area of preparedness not be duplicated or displaced but rather recognized and integrated where appropriate. Opportunities should be evaluated with each sector to see not only how their existing efforts can be credited in the process but also how the new certification program can address unique issues important to their sector. Sector coordinating councils and key industry associations should be involved.

- **A "maturity model" or multi-level approach should be considered**. A "maturity model" approach should be considered which could acknowledge various levels of preparedness and depth of program; for example: Level 1, Level 2, Level 3, etc. This could be helpful in several ways. Depth of program capacity could vary based on how critical a particular organization is in a supply chain. Levels could also be used as targets for progression over the course of time to allow for a step progression from a lower level of preparedness to a higher level. Furthermore, levels may be appropriate in considering expectations for small, medium and large organizations with their varying levels of size, complexity and resources.

- **The voluntary certification should credit / integrate other business reporting requirements when valuable.** Based on the functions of a business, its vertical industry and public or private ownership, there are a variety of reporting requirements that businesses have to shareholders, customers, partners, the government and others. As reflected in the enabling legislation, efforts should be made to acknowledge and existing reporting activity where appropriate so as to avoid duplication and excess effort. Certification activity may be able to "piggy-back" on some existing auditing efforts.

- **The program should support self-assessment by businesses as well as external second party and third party assessments.** Businesses should be able to apply elements of the program to self-assess their operations and self-declare (first party assessment) as well as utilize it in assessing related parties such as suppliers (second party assessment). Third party certification by unrelated certifiers should also be an option. First, second party and third party assessments could be valuable in assuring business preparedness in supply chains.

- **The corporate governance & corporate social responsibility (CSR) areas should be evaluated for past lessons learned and possible synergies with the voluntary certification program.** In an increasingly risky business environment, risk management is a growing concern among boards of directors and executive management. The voluntary certification program might potentially be structured to address these concerns at least in part by assessing the state of business preparedness.

- **In designating one or more preparedness standards for use in the program, a constellation of standards or framework approach should be evaluated. An umbrella standard should be considered in this regard to assure core consistency among various standards.** There are multiple preparedness guidance documents with significant value to one or more business sectors. Some are general or program level; others may be more functionally oriented, for example, risk assessment focused. Consideration should be given to structuring a certification process which accommodates the assessment of the business against one or more standards but in a unified framework. Such a framework could acknowledge a common core of program elements potentially utilizing an "umbrella standard."

- **The program and chosen standards should be applicable on an international basis to have the most value to multinational corporations.** The program may involve a number of standards, but whichever standards are chosen, they should be capable of being applied on an international basis in order to accommodate the needs of multinational firms.

- **Special considerations should be made for small businesses that wish to pursue voluntary certification. The involvement of industry associations and large-to-small business mentoring should be considered.** Clearly not all small businesses will see value in pursuing the voluntary certification. This is to be expected. For those that do, the new certification program must be economically and operationally achievable. Separate classifications and methods of certification for small businesses should be established as appropriate and in consultation with small business representatives and organizations. Supply chain mentoring should be explored to consider how larger companies might assist their critical suppliers that are small businesses.

- **Potential "incentives stakeholders" should be welcomed into the process from the beginning** to assure that the voluntary certification program has value to them in potentially acknowledging and rewarding business preparedness efforts. A major rationale cited in the testimony for the program was the need to enable a closer link between preparedness and benefits for business. Key stakeholders in such areas as supply chain management, legal liability, insurance and rating agencies have generally concurred that business preparedness is valuable and should be acknowledged more widely but to date there has been no generally accepted methodology to confirm that preparedness exists in a business so that it could be acknowledged. This program could supply such a method, and so the process should involve these potential incentives stakeholders as well as others early in the development of the program. Following are considerations in this regard.

    - **As rating agencies potentially widen their review of enterprise risk management in their analysis of businesses, the rating agency perspective should be invited into the development and ongoing operation of the certification program. This could potentially facilitate greater recognition of effective corporate preparedness.** Rating agencies are increasingly focusing on enterprise risk management in their analysis including business continuity and emergency management programs by the corporation. Including rating agency input into the voluntary certification program might allow for these agencies to acknowledge this voluntary certification more readily in their own analysis and thereby effectively reward preparedness by corporations.

    - **Supply chain resilience is a growing concern among corporations. The voluntary certification program offers value in assessing supplier resilience. The supply chain management perspective should be included in the development and ongoing operations of the certification program.** There is an increasing focus on supply chain resilience and the preparedness of critical suppliers. Firms frequently require supply partners to adhere to certain preparedness requirements. Some firms promote preparedness-related best practices through mentorship, training, education and joint exercises with supply partners.

Corporations are looking for tools to assess the resilience / reliability of the suppliers of critical goods and services. From the supplier perspective, some firms are noting significant time spent on interfacing with multiple customers assuring each of the business' preparedness status. A voluntary certification program could potentially provide a commonly accepted verification of preparedness and thereby avoid multiple customer queries. Similarly, customers could use the certification to minimize their supply assessment efforts.

- **Insurance company and related input should be incorporated into the voluntary certification program to support increased recognition of business preparedness in the future.** It can be argued that the insurance industry on the whole understands the general value of business preparedness to minimize losses to both the individual businesses and the insurance company. However, how and if insurance companies measure preparedness varies significantly. Current efforts to correlate preparedness actions to loss reductions are largely focused on property risk. The insurance market is stratified, with larger companies receiving relatively more attention and greater flexibility from underwriters than smaller companies. A commonly accepted third party assessment of business preparedness could be a valuable indicator of risk which might be used by insurance companies in their underwriting potentially. This could possibly result in a greater recognition of preparedness in the future. The audit processes involved with the certification program may provide underwriters with data they cannot access otherwise due to lack of time or expertise, helping them to systematize their understanding of business continuity. In addition, a voluntary certification program could also begin to build a historical record that over time could inform a closer understanding of what preparedness measures best minimize future insurance claims. Challenges that need to be addressed include how preparedness standards would fit into underwriting guidelines. State insurance regulators may also consider how to promote the incorporation of elements of the certification program in the underwriting process. Another possibility for driving the development of insurance incentives for preparedness is to approach it from a consumer demand standpoint. Insured companies may take individual and/or collective action to demand acknowledgement of preparedness efforts by insurers.

- **Representatives from the corporate counsel and wider legal community should be incorporated in the development and implementation process of the program to support a potential role of certification in minimizing legal liability for the impacts of emergencies.** Negligence tort and other legal liability can be a major exposure for companies of all sizes in the aftermath of an emergency. When another party is impacted by the event, it is often argued that the company did not do enough to prepare for emergencies. Yet, it can be

difficult to ascertain how much preparedness is enough given the diversity of risks that face a company. Advance and documented compliance with an established recognized standard for preparedness can serve to support an affirmative defense to liability claims after an emergency. The certification program will be centered on voluntary compliance with one or more industry standards. Thus, the certification program should optimally be structured to minimize legal liability of the business which pursues preparedness in compliance with it. The development of statutory guidelines would provide additional legal motivation to pursue certification. On the other hand, there is a potential disincentive pertaining to undertaking preparedness certification and the related documentation of preparedness actions undertaken by a company, especially with respect to the identification of risks to the company and its current vulnerabilities. Legislation providing safe harbor from litigation to any certified firm would provide a major incentive for certification, as would the development of what is called ‘self-evaluative privilege’ to insure that the findings of the certification process would not be used in court against a proactive corporation.