

Overview of Submitters for CFATS Personnel Surety 30 Day Notice:

There were 20 comments submitted. 8 private sector companies, 9 associations, 1 training council, 1 union, and 1 government sponsored council compose of private sector chemical facilities.

Comment #	Submitter	Type
DHS-2009-0026-0021	Institute of Makers of Explosives	Association
DHS-2009-0026-0022	Harcros Chemicals Inc.	Private Company
DHS-2009-0026-0023	Shell Oil Company	Private Company
DHS-2009-0026-0024	Compressed Gas Association	Association
DHS-2009-0026-0025	American Trucking Associations	Association
DHS-2009-0026-0026	LexisNexis® Screening Solutions	Private Company
DHS-2009-0026-0027	American Chemistry Council	Association
DHS-2009-0026-0028	U.S. Chamber of Commerce	Association
DHS-2009-0026-0029	National Petrochemical & Refiners Association	Association
DHS-2009-0026-0030	Industrial Safety Training Council Safety Council Security Consortium	Training Council
DHS-2009-0026-0031	Chemical Sector Coordinating Council	Government Sponsored Council
DHS-2009-0026-0032	GROWMARK Inc.	Private Company
DHS-2009-0026-0033	Edison Electric Institute	Association
DHS-2009-0026-0034	International Liquid Terminals Association	Association
DHS-2009-0026-0035	International Chemical Workers Union Council	Union
DHS-2009-0026-0036	Southern Company Generation	Private Company
DHS-2009-0026-0037	Magellan Midstream Partners	Private Company
DHS-2009-0026-0038	American Air Liquide Holdings Inc.	Private Company
DHS-2009-0026-0039	The Fertilizer Institute (TFI), the Agricultural Retailers Association (ARA) and CropLife America	Association
DHS-2009-0026-0040	Allied Universal Corporation	Private Company

SUPPLEMENTARY INFORMATION section for electronic access to the SECG.

FOR FURTHER INFORMATION CONTACT:

Nancy S. Bufano, Center for Food Safety and Applied Nutrition (HFS-315), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-1493.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of July 9, 2009 (74 FR 33030), FDA issued a final rule requiring shell egg producers to implement measures to prevent *Salmonella* Enteritidis (SE) from contaminating eggs on the farm and from further growth during storage and transportation, and requiring these producers to maintain records concerning their compliance with the rule and to register with FDA. The final rule became effective September 8, 2009.

FDA examined the economic implications of the final rule as required by the Regulatory Flexibility Act (5 U.S.C. 601-612) and determined that the final rule will have a significant economic impact on a substantial number of small entities. In compliance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Public Law 104-121), FDA is making available this SECG stating in plain language the requirements of the regulation.

FDA is issuing this SECG as level 2 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115(c)(2)). The SECG represents FDA's current thinking on the prevention of SE in shell eggs. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This SECG refers to collections of information described in FDA's final rule that published in the **Federal Register** of July 9, 2009 (74 FR 33030 at 33089), and that became effective on September 8, 2009. As stated in the final rule, these collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501-3520). In compliance with the PRA (44 U.S.C. 3507(d)), the agency has submitted the information collection provisions of the final rule to OMB for review. FDA will publish a notice in the **Federal Register** announcing OMB's decision to approve,

modify, or disapprove the information collection provisions in this final rule. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments regarding this SECG. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The SECG and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the document at <http://www.fda.gov/FoodGuidances> or <http://www.regulations.gov>.

Dated: April 7, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010-8359 Filed 4-12-10; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS-2009-0026]

National Protection and Programs Directorate; Chemical Facility Anti-Terrorism Standards Personnel Surety Program

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: 30-day notice and request for comments: New information collection request 1670-NEW.

SUMMARY: The Department of Homeland Security (DHS), National Protection and Programs Directorate (NPPD), Office of Infrastructure Protection (IP), Infrastructure Security Compliance Division (ISCD) will be submitting the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is a new information collection. A 60-day public notice for comments was previously published in the **Federal Register** on June 10, 2009, at 74 FR 27555. Comments were received and responses

are in this notice. The purpose of this notice is to solicit additional comments during a 30-day public comment period prior to the submission of this collection to OMB. The submission describes the nature of the information collection, the categories of respondents, the estimated burden, and cost.

DATES: Comments are encouraged and will be accepted until May 13, 2010. This process is conducted in accordance with 5 CFR 1320.8.

ADDRESSES: Interested persons are invited to submit comments on the proposed information collection through the Federal Rulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments must be identified by docket number DHS-2009-0026.

Comments that include trade secrets, confidential commercial or financial information, Chemical-terrorism Vulnerability Information (CVI), Sensitive Security Information (SSI), or Protected Critical Infrastructure Information (PCII) should not be submitted to the public regulatory docket. Please submit such comments separately from other comments in response to this notice. Comments containing trade secrets, confidential commercial or financial information, CVI, SSI, or PCII should be appropriately marked and submitted by mail to the DHS/NPPD/IP/ISCD CFATS Program Manager at the Department of Homeland Security, 245 Murray Lane, SW., Mail Stop 0610, Arlington, VA 20528-0610. Comments must be identified by docket number DHS-2009-0026.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained through the Federal Rulemaking Portal at <http://www.regulations.gov>.

SUPPLEMENTARY INFORMATION:

Program Description

The Chemical Facility Anti-Terrorism Standards (CFATS), 6 CFR part 27, require high-risk chemical facilities to submit information about facility personnel and, as appropriate, unescorted visitors with access to restricted areas or critical assets at those facilities. This information will be vetted by the Federal Government against the Terrorist Screening Database (TSDB), the consolidated and integrated terrorist watchlist maintained by the Federal Government, to identify known or suspected terrorists (i.e., individuals with terrorist ties).

High-risk chemical facilities must also perform other relevant background checks in compliance with CFATS Personnel Surety Risk-Based Performance Standard 12 (RBPS-12). See 6 CFR 27.230(a)(12)(i-iii): High-risk chemical facilities must “perform appropriate background checks * * * including (i) Measures designed to verify and validate identity; (ii) Measures designed to check criminal history; [and] (iii) Measures designed to verify and validate legal authorization to work.” The CFATS Personnel Surety Program is not intended to halt, hinder, or replace high-risk chemical facilities’ performance of background checks which are currently required for employment or access to secure areas of those facilities.

Background

On October 4, 2006, the President signed the Department of Homeland Security Appropriations Act of 2007 (the Act), Public Law 109-295. Section 550 of the Act provides DHS with the authority to regulate the security of high-risk chemical facilities.

Section 550 requires that DHS regulations establish CFATS RBPS. RBPS-12 (6 CFR 27.230(a)(12)(iv)) requires that regulated chemical facilities implement “measures designed to identify people with terrorist ties.” The ability to identify individuals with terrorist ties requires the use of information held in Government-maintained databases, which are unavailable to high-risk chemical facilities. Therefore, DHS is implementing the CFATS Personnel Surety Program, which will allow chemical facilities to comply with RBPS-12 by implementing “measures designed to identify people with terrorist ties.”

Overview of CFATS Personnel Surety Process

The CFATS Personnel Surety Program will work with the DHS Transportation Security Administration (TSA) to identify individuals who have terrorist ties by comparing information submitted by each high-risk chemical facility to the information of known or suspected terrorists who are listed in the TSDB.

Information will be submitted to DHS through the Chemical Security Assessment Tool (CSAT), the online data collection portal for CFATS. The representative(s) of each high-risk chemical facility will submit the information of affected individuals to DHS through CSAT. The representative(s) of each high-risk chemical facility will also certify that

the information is (1) true, correct, and complete, and (2) collected and submitted in compliance with the facility’s Site Security Plan (SSP). The representative(s) of each high-risk chemical facility will also affirm that notice required by the Privacy Act of 1974, 5 U.S.C. 552a, has been given to affected individuals before their information is submitted to DHS.

DHS will send a verification of submission to the representative(s) of each high-risk chemical facility when a high-risk chemical facility (1) Submits information about an affected individual for the first time, (2) submits updated or corrected information about an affected individual, and/or (3) notifies DHS that an affected individual no longer has access to that facility’s restricted areas or critical assets.

Upon receipt of each affected individual’s information in CSAT, DHS will send a copy of the information to TSA. Within TSA, the Office of Transportation Threat Assessment and Credentialing (TTAC) conducts screening and vetting of information against the TSDB for many DHS programs. On behalf of DHS, TTAC will compare the information of affected individuals collected by DHS to the information of known or suspected terrorists on the TSDB. TTAC will forward the results from potential matches to the Federal Bureau of Investigation’s Terrorist Screening Center (TSC), which will make a final determination of whether an individual is a match to a known or suspected terrorist listed in the TSDB.

In the event that there is a positive match to an identity in the TSDB, the TSC will notify the appropriate Federal law enforcement agency for coordination, investigative action, and/or response, as appropriate. DHS will neither routinely provide vetting results to high-risk chemical facilities, nor will it provide results to an affected individual whose information was submitted by a high-risk chemical facility. As warranted, high-risk chemical facilities may be contacted by the Department or Federal law enforcement as a part of appropriate law enforcement investigation activity. (See the amendment to the FBI’s Terrorist Screening Records System, published in the **Federal Register** on August 22, 2007, at 72 FR 47073.)

Information Collected

DHS may collect the following information from individuals:

- Full name
- Date of birth
- Place of birth
- Gender

- Citizenship
- Passport information
- Visa information
- Alien registration number
- DHS Redress Number (if available)
- Work phone number(s)
- Work e-mail address(es)

DHS will collect information that identifies the high-risk chemical facility or facilities, to which the affected individual has access to restricted areas or critical assets. As applicable, DHS will also collect information to verify that an affected individual is currently enrolled in a DHS program which relies on DHS-performed TSDB checks, in addition to other program-specific requirements.

DHS may request additional information on an affected individual to confirm that the individual is or is not a match to a known or suspected terrorist in the TSDB. DHS may randomly select a small percentage of affected individuals for further verification as part of data accuracy review and auditing processes. In order to assist with this confirmation and verification, DHS may request additional information on affected individuals from the high-risk chemical facilities which have submitted their information to the Department. DHS may also collect information about points of contact at each high-risk chemical facility, and which points of contact the Department or Federal law enforcement personnel may contact with follow-up questions. However, a request for additional information from DHS does not imply, and should not be construed to indicate, that an individual is known or suspected to be associated with terrorism.

DHS may collect information on affected individuals as necessary to enable it to provide redress for individuals who believe that they have been improperly impacted by the Personnel Surety Program. The information collected may include information necessary to conduct adjudications under subpart C of CFATS, 6 CFR 27.300-27.345.

DHS will also collect administrative or programmatic information (e.g., affirmations or certifications of compliance, extension requests, brief surveys for process improvement, etc.) necessary to manage the CFATS Personnel Surety Program.

Affected Population

6 CFR 27.230(a)(12) requires facility personnel and, as appropriate, unescorted visitors who have access to restricted areas or critical assets to undergo background checks. This affected population will include (1)

facility personnel (e.g., employees and contractors) who have access, either unescorted or otherwise, to restricted areas or critical assets, and (2) unescorted visitors who have access to restricted areas or critical assets.

These background checks do not affect facility personnel who do not have access to facilities' restricted areas or critical assets, nor do they affect escorted visitors.

Linking Affected Individuals to Specific CFATS Covered Facilities

To comply with CFATS, high-risk chemical facilities are required to identify who is an affected individual, and at which high-risk chemical facility or facilities each affected individual has access to restricted areas or critical assets. DHS intends to collect this information through CSAT.

Personnel Surety Submission Schedule To Check for Terrorist Ties

DHS will establish a CFATS Personnel Surety Submission schedule for high-risk chemical facilities when submitting information to DHS to check for terrorist ties under 6 CFR 27.230(a)(12)(iv). The schedule will be published in the **Federal Register**. The schedule, when published, will require: (1) An initial submission of information either within a certain number of days after DHS issues a letter of authorization or within certain number of days after publication of the schedule, whichever is later; (2) additional submissions for individuals that become newly affected (e.g., new hires or other individuals given access to a restricted area or critical asset); (3) updates or corrections to information for affected individuals whose information has previously been submitted; and (4) notification when an affected individual no longer has access to a restricted area or critical asset. The schedule will likely vary by final tier. A proposed schedule is provided in subpart (B) of the "Response To Comments Received During The 60-Day Comment Period" section of this 30-Day notice. High-risk chemical facilities may request extensions or variances from this schedule based on unique or unusual circumstances.

Request for Exception to the Requirement Under 5 CFR 1320.8(b)(3)

DHS is requesting from OMB an exception for the CFATS Personnel Surety Program to the Paperwork Reduction Act (PRA) requirement, as contained in 5 CFR 1320.8(b)(3), which requires Federal agencies to confirm that their information collections provide certain reasonable notices, under the Paperwork Reduction Act, to

affected individuals. If this exception is granted, DHS will be relieved of the potential obligation to require high-risk chemical facilities to collect signatures or other positive affirmations of these notices from affected individuals. Whether or not this exception is granted, DHS will still require high-risk facilities to affirm that required Privacy Act notice has been provided to affected individuals before personal information is collected. See 5 U.S.C. 552a(e)(3).

DHS's request for an exception to the requirement under 5 CFR 1320.8(b)(3) would not exempt high-risk chemical facilities from having to adhere to applicable Federal, State, local, or tribal laws, or to regulations or policies pertaining to the privacy of facility personnel and the privacy of unescorted visitors.

Responses to Comments Received During the 60-Day Comment Period

DHS received 17 comments in response to the 60-day notice for comment. Comments were received from three private citizens, four private sector companies, seven associations, one training council, and one professional society. One additional comment was a jointly submitted comment. Many of the comments were in response to the questions posed by DHS in the 60-day notice for comments. In this section of this notice, DHS first addresses specific questions that the Department solicited, then other comments related to the Personnel Surety Program, and finally unsolicited comments received in response to the 60-day notice.

(A) On behalf of OMB, DHS solicited comments that evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

Comment: Commenters challenged the practical utility of requiring high-risk chemical facilities to update previously submitted information.

Response: The information collected by DHS is generally static. However, DHS will require each high-risk chemical facility to update and correct information previously submitted about affected individuals. Updates and corrections do not necessarily need to be made immediately when submitted information changes; rather, DHS will require high-risk facilities to make updates and corrections in accordance with a DHS-approved schedule.

For example, when a high-risk chemical facility becomes aware that an affected individual's information has changed (e.g., when a high-risk

chemical facility becomes aware that an affected individual has changed his/her name), the high-risk chemical facility must update the submitted information. DHS will also require a high-risk chemical facility to correct previously submitted information when the high-risk chemical facility becomes aware that an affected individual's information is incorrect (e.g., an affected individual's place or date of birth). Requiring high-risk chemical facilities to update and correct information about affected individuals will increase the accuracy of the data collected, and decrease the probability of incorrect matches to the information of known or suspected terrorists listed on the TSDB.

One piece of information that may change is the list of high-risk chemical facilities within one company or organization to which an affected individual has access. When such a change occurs, updates are not required immediately but rather in accordance with a schedule to be published by DHS.

Comment: Commenters challenged the practical utility of requiring high-risk chemical facilities to notify the Department when an affected individual no longer has access to a high-risk chemical facility's restricted area(s) or critical asset(s). Commenters suggested that this notification by a high-risk chemical facility to DHS would provide no value in the context of terrorism screening.

Response: DHS will not rely on a single, one-time check to determine that an affected individual has ties to terrorism. Instead, DHS will continue to vet an affected individual's information against new and/or updated TSDB records as they become available, for as long as the affected individual has access to a high-risk chemical facility's restricted area(s) or critical asset(s). This process is referred to as "recurrent vetting" and is a standard DHS vetting practice. DHS will require high-risk chemical facilities to notify the Department when an affected individual no longer has access to a high-risk chemical facility's restricted areas or critical assets so that the Department can cease recurrent vetting of the affected individual.

Comment: Many commenters suggested that the proposed collection of information is needless and duplicative. Specifically, commenters suggested that the proposed information collection will place an undue burden on industry—in regard to time, money and other resources—by creating a program which duplicates an existing DHS screening or vetting program, such as the Transportation Worker

Identification Credential (TWIC) program.

Response: TWIC's authorizing statute, the Maritime Transportation Security Act of 2002 (MTSA), as amended, 46 U.S.C. 70101 *et seq.*, explicitly applies "transportation security card" requirements only to: "individual[s] allowed unescorted access to secure area[s] designated in * * * [maritime] vessel or [maritime] facility security plan[s]" (§ 70105(b)(2)(A)); certain MTSA license and permit holders (§ 70105(b)(2)(B)); maritime vessel pilots (§ 70105(b)(2)(C)); maritime towing vessel personnel (§ 70105(b)(2)(D)); individuals with access to certain protected maritime security information (§ 70105(b)(2)(E)); and "other individuals engaged in port security activities" (§ 70105(b)(2)(F)). Furthermore, individuals are only eligible to receive TWICs if they have not committed certain "disqualifying criminal offense[s]," or if they do not meet certain "immigration status requirements" 49 CFR 1572.5(a)(1)–(2). However, the CFATS authorizing statute applies to "chemical facilities that * * * present high levels of security risk" Department of Homeland Security Appropriations Act of 2007, Public Law 109–295, section 550 (Oct. 4, 2006), as amended. CFATS Personnel Surety Program requirements apply only to high-risk chemical facilities' "personnel,

and as appropriate * * * unescorted visitors with access to restricted areas or critical assets" 6 CFR 27.230(a)(12). Moreover, facilities regulated under MTSA are exempt from CFATS. Accordingly, the CFATS Personnel Surety Program is not duplicative of the TWIC program.

DHS recognizes that some affected individuals under CFATS possess TWICs or other credentials that rely on DHS-conducted TSDB vetting (*e.g.*, an individual vetted under the TWIC program). DHS intends to reduce the burden of this collection by recognizing previous TSDB vetting results conducted by DHS. Therefore, an affected individual who possesses a current and valid TWIC will likely require less information to be submitted than an affected individual who does not have a TWIC. Some additional personal information will be required in order to verify that the affected individual has a previous TSDB vetting result upon which the TWIC was issued.

Comment: One comment suggested that the vetting of affected individuals against the TSDB has little practical utility in identifying terrorists due to the large number of individuals whose names appear on the TSDB, even though they are not actually threats to national security.

Response: As indicated in the CFATS interim final rule, the Department has

determined that a TSDB check is necessary for the purpose of protecting restricted areas and critical assets of high-risk chemical facilities from persons who may have ties to terrorism. *See* 72 FR 17708. The TSDB is the Federal Government's integrated and consolidated terrorist watchlist and is the appropriate database to identify individuals with terrorist ties.

(B) On behalf of OMB, DHS solicited comments which evaluate the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

Comment: Commenters suggested that DHS did not provide sufficient detail about the proposed information collection to adequately evaluate the estimated burden.

Response: In order to provide the public with more information to evaluate the estimated burden, the Department has established the information submission schedule outlined below. The Department will review comments received in response to this 30-day notice when finalizing the DHS schedule for submitting information. High-risk chemical facilities will be notified of the final DHS schedule prior to its implementation. The final DHS schedule will also be published in the **Federal Register**.

	Final tier 1	Final tier 2	Final tier 3	Final tier 4
Initial Submission of Affected Individual's Information.	60 days after DHS issues a letter of authorization.	60 days after DHS issues a letter of authorization.	90 days after DHS issues a letter of authorization.	90 days after DHS issues a letter of authorization.
Submission of a New Affected Individual's Information.	Within 30 days of being granted access.	Within 30 days of being granted access.	Within 60 days of being granted access.	Within 60 days of being granted access.
Submission of Updates and Corrections to an Affected Individual's Information.	Within 90 days of becoming aware of the need for an update or correction.	Within 90 days of becoming aware of the need for an update or correction.	Within 90 days of becoming aware of the need for an update or correction.	Within 90 days of becoming aware of the need for an update or correction.
Submission of notification that an affected individual no longer has access.	Within 90 days of access being removed.	Within 90 days of access being removed.	Within 90 days of access being removed.	Within 90 days of access being removed.

Comment: Commenters generally believed the mechanics of the information submission and update process could place a heavy burden on high-risk facilities. One commenter indicated that DHS could expect submissions to be in the tens of thousands per month. Commenters suggested that the proposed 35-minute burden for the information collection was based on an incomplete estimate, and did not account for the duplicative submission of affected individuals' information by multiple high-risk

chemical facilities in the cases of individuals who have access to restricted areas or critical assets at multiple facilities.

Response: The estimated burden relied on the regulatory evaluation published for CFATS on April 1, 2007. In the regulatory evaluation, the Department estimated that 1,063,200 affected individuals would be vetted against the TSDB (*i.e.*, 29,533 per month) over a three-year period. This estimate allows for the possibility that a specific individual could have access at

multiple high-risk chemical facilities. The Department's population estimate also aligns with the commenters' expectations that DHS should expect tens of thousands of submissions during each month.

The estimated time for a responsible entity to submit the information of each affected individual through the CSAT portal is 0.59 hours per individual. This estimate is based upon the CFATS regulatory evaluation. The estimated time per affected individual was derived by assuming that (1) 30 minutes is

required to type in the required information for every affected individual once; (2) 5 percent of affected individuals will have some element of their information change annually, requiring 10 additional minutes of effort; and (3) 20 percent of affected individuals will lose access to restricted areas or critical assets annually, which will require 10 additional minutes of effort to remove each affected individual's information from CSAT.

DHS believes that the information contained in this notice, in the Personnel Surety Program's 60-day PRA notice preceding this notice (74 FR 27555 (June 10, 2009)), and in the CFATS regulatory evaluation provides sufficient detail about the proposed Personnel Surety Program's information collection process.

Comment: One commenter suggested that the Department's estimate of the burden may not have accounted for the burden an affected individual incurs from investigations and adverse employment decisions that may result from the individual's possibly unjustified presence on the TSDB.

Response: The burden outlined in this 30-day notice is limited in scope to those activities listed in 5 CFR 1320.3(b)(1). Specifically, 5 CFR 1320.3(b)(1) requires the Department to estimate the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.

The Department is also seeking to collect five core data elements about each individual to be vetted under the Personnel Surety Program: Full name, date of birth, place of birth, gender, and citizenship. When taken together, these identifiers will minimize false positive matches to the TSDB. Furthermore, each potential match will be manually reviewed by Department adjudicators who have expertise in evaluating matches prior to confirmation that an individual's information matches the information of a known or suspected terrorist.

(C) On behalf of OMB, DHS solicited comments to enhance the quality, utility, and clarity of the information to be collected.

Comment: Most of the commenters requested additional clarity about what information DHS will routinely collect and update. Several commenters suggested that the information collected should be limited to information which is necessary to conduct an inquiry against the TSDB. One commenter also suggested that the information should be limited to personal information that is unlikely to change.

Response: As outlined earlier in this 30-day notice, DHS will routinely collect an affected individual's full name, date of birth, place of birth, gender, and citizenship. DHS will also collect information that identifies the high-risk chemical facility or facilities to which the affected individual has access. DHS has limited the information routinely collected to include only that which is (1) Necessary to conduct a TSDB check and adjudicate potential matches, (2) unlikely to change, and (3) is essential for quickly understanding the risk a known or suspected terrorist poses to high-risk chemical facilities.

DHS will not require immediate reporting of updates to previously submitted information. As previously discussed in this notice, DHS will permit high-risk chemical facilities to update information on a periodic basis in compliance with a DHS-approved schedule.

Comment: Most commenters commended DHS for intending to recognize the previous TSDB vetting results completed by other DHS programs, such as the TWIC program. Several commenters, however, suggested that DHS should not collect information from high-risk chemical facilities for the purpose of verifying the validity of credentials issued as part of other DHS programs (which conduct TSDB vetting) because the burden of data collection necessary to verify such credentials could be burdensome.

Response: In lieu of conducting new TSDB vetting on all affected individuals, DHS intends to recognize the results of previous TSDB vetting conducted on individuals enrolled in certain other DHS programs. Specifically, DHS is considering recognizing the previous TSDB vetting results completed by other DHS programs, such as TWIC, and the Trusted Traveler Programs (Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Free and Secure Trade (FAST), and NEXUS). Further, DHS is also considering recognizing the results of TSDB vetting (conducted by DHS) upon which each State relies when issuing a Commercial Driver's License with a Hazardous Materials Endorsement (HME).

This will likely require fewer pieces of information than are required to vet an individual who is not enrolled in another vetting program. DHS believes the burden of collecting those fewer pieces of information is accounted for in the estimated burden.

This approach will also limit the number of instances in which different DHS programs may vet the same affected individual against the TSDB. If

other programs' vetting results cannot be verified without substantial effort, DHS may initiate new vetting of an affected individual's information against the TSDB.

Comment: Several commenters recommended that the Department recognize and offer reciprocity to the background checks, which include vetting against the TSDB, as conducted by the Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Commenters suggested that without this accommodation, the regulatory overlap between the two agencies will impose unreasonable burdens.

Response: ATF does not conduct recurrent vetting against the TSDB, and thus is not appropriate as a reciprocal program to meet the requirements of CFATS.

(D) On behalf of OMB, DHS solicited comments regarding the minimization of the burden of information collection on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

Comment: Commenters encouraged DHS to consider the procedural and logistical challenges of large-scale data collection and transmission when developing the Personnel Surety portal component of CSAT. Specifically, commenters suggested that DHS permit each high-risk chemical facility to transmit data collectively (e.g., via a spreadsheet or other readily available electronic means). In other words, a high-risk chemical facility would collect the required information in a single file (or series of files) and upload it to DHS. Anything to the contrary—such as manual entry of discrete information into data fields—would result in an undue burden to the regulated community, increase human error, and raise information security concerns.

Response: DHS will enable high-risk chemical facilities to upload information electronically about multiple affected individuals collectively. DHS would welcome suggestions about what technical standards, formats, or export/import capabilities are in use by high-risk chemical facilities to facilitate such data submission.

Comment: Many commenters suggested that third parties be authorized to support data submission to the Department. Specifically, many commenters suggested that DHS should permit third party vendors to enter information into CSAT on a facility's

behalf. One commenter suggested that (1) Background check providers understand the information security and privacy protections that apply to information; (2) a web of Federal, State, and local laws protect information (many corporations outsource personnel surety needs for this reason); and (3) experienced background check providers will help high-risk chemical facilities ensure that compliance with CFATS does not cause noncompliance with other laws which govern the collection, use, storage, or destruction of information.

Response: To support the submission of information by high-risk chemical facilities, DHS has historically allowed—and will continue to allow—authorized third-party access to CSAT as a Preparer. Information about the CSAT Preparer user role can be found at <http://www.dhs.gov/chemicalsecurity>.

Comment: A few commenters suggested that high-risk chemical facilities receive an electronic acknowledgement that the submitted information has been received. Such an acknowledgement would aid in demonstrating a high-risk chemical facility's compliance with 6 CFR 27.230(a)(12)(iv).

Response: DHS will send an electronic verification of submission to high-risk chemical facilities when a high-risk chemical facility (1) Submits information about an affected individual for the first time, (2) submits updated or corrected information about an affected individual, and/or (3) notifies DHS that an affected individual no longer has access to restricted areas or critical assets.

(E) DHS solicited comments that respond to the Department's interpretation of the population affected by RBPS-12's background check requirement.

Comment: Many commenters provided extensive responses to the Department's interpretation of the population which is affected by RBPS-12. The comments suggested that the Department's interpretation expanded the definition beyond the scope of CFATS. The comments referenced the preamble to the CFATS Interim Final Rule, in which DHS stated that each facility "shall identify critical assets and restricted areas and establish which employees and contractors may need unescorted access to those areas or assets, and thus must undergo a background check" 72 FR 17708 (Apr. 7, 2007). Commenters also suggested that vetting escorted facility personnel is inconsistent with other regulatory schemes (e.g., TWIC).

Response: The regulatory text makes no distinction between facility personnel who are escorted and facility personnel who are unescorted. The actual text of CFATS, at 6 CFR 27.230(a)(12), uses the term "unescorted" to modify only the noun "visitors." As such, if facility personnel have access, either unescorted or otherwise (e.g., escorted), to restricted areas or critical assets, then they are affected individuals who must be screened for the purposes of the Personnel Surety Program.

However, the preamble to the CFATS Interim Final Rule could be read to imply that a different population would undergo vetting rather than the population suggested in the regulatory text of CFATS. To the extent that there is a potential conflict, the regulatory text of CFATS takes precedence. As such, the populations of individuals who must be vetted under 6 CFR 27.230(a)(12) are the same as those described in the 60-day notice preceding this 30-day notice: (1) Facility personnel (e.g., employees and contractors) with access (unescorted or otherwise) to restricted areas or critical assets, and (2) unescorted visitors with access to restricted areas or critical assets.

DHS would like to underscore that a high-risk chemical facility has wide latitude in its unique and tailored SSP regarding the terms under which facility personnel will be granted access, either unescorted or otherwise, to restricted areas and critical assets. Each high-risk chemical facility will need to consider its unique security concerns when determining which individuals will be afforded access to restricted areas or critical assets.

Additionally, DHS will expect that each facility be able to explain why an individual is an affected individual. Specifically, an affected individual must meet one and only one of the following three criteria: (1) The individual is facility personnel with unescorted access to restricted areas or critical assets; (2) the individual is facility personnel with access, but not unescorted access, to restricted areas or critical assets; or (3) the individual is an unescorted visitor with access to restricted areas or critical assets.

(F) DHS solicited comments which respond to the statement that a Federal law enforcement agency may, if appropriate, contact the high-risk chemical facility as a part of a law enforcement investigation into terrorist ties of facility personnel.

Comment: One commenter expressed concern that contact from a Federal law enforcement agency about an individual

who is properly on the watchlist but is innocent nevertheless may result in adverse employment decisions.

Response: Contact by a Federal law enforcement organization does not necessarily indicate that any affected person is a known or suspected terrorist. Further, employment decisions made by a high-risk chemical facility in response to contact by a Federal law enforcement agency are not regulated by CFATS. A corporation or facility should ensure that it is complying with all applicable laws, including applicable state regulations, when considering employment decisions.

It should also be noted that DHS will randomly audit its vetting processes in an effort to maximize vetting accuracy and Personnel Surety Program efficiency. As part of this auditing, DHS may request information on a small percentage of affected individuals after those individuals have been initially vetted against the TSDB. A request for additional information does not imply, and should not be construed to indicate, that an individual is known or suspected to be associated with terrorism.

(G) DHS solicited comments which respond to the Department's intention to seek an exception to the notice requirement under 5 CFR 1320.8(b)(3).

Comment: DHS received several comments in response to the Department's intention to seek an exception to the PRA's notice requirement. Every comment expressed concern about the impact to an affected individual's right to be granted notice under the Privacy Act. See 5 U.S.C. 552a(e)(3).

Response: The request for an exception to 5 CFR 1320.8(b)(3) is related to the PRA and unrelated to the Privacy Act; 5 CFR 1320.8(b)(3) requires that each collection of information shall inform and provide reasonable notice to the potential persons to whom the collection of information is addressed. The request by DHS for an exception to 5 CFR 1320.8(b)(3) from OMB will ensure that DHS will be relieved of the potential obligation to require high-risk chemical facilities to collect signatures or other positive affirmations of these notices from affected individuals (although high-risk chemical facilities would not be precluded from collecting signatures or other positive affirmations of notice if this exception is granted). This exception will then afford high-risk chemical facilities wide latitude in choosing how to collect, recollect, or leverage already collected data based upon their unique business operations and processes.

Because the information being collected under this information collection request is information that will be used to identify individuals with known or suspected terrorist ties, the Department believes that it is important for affected individuals to be informed of the Government's intended use of their information. However, under CFATS the Department regulates high-risk chemical facilities and not affected individuals. Although the affected individual is ultimately the source of the collected information, the burden of submitting the collected data to DHS lies on the high-risk chemical facility. (For example, high-risk chemical facilities may collect affected individuals' information by having affected individuals fill out forms, or high-risk chemical facilities may submit batch files extracted from databases which contain the necessary information previously collected from affected individuals.) An exception to 5 CFR 1320.8(b)(3) will ensure that the Department does not need to inspect, audit, or receive confirmation (*e.g.*, signatures of acknowledgement from affected individuals) from high-risk chemical facilities where every affected individual has received notice under the PRA of this information collection.

The Department's request for an exception to 5 CFR 1320.8(b)(3) of the PRA is not a request for an exception to provide notice to affected individuals under the Privacy Act. If this exception is granted, high-risk chemical facilities will be relieved of the potential obligation to collect signatures or other positive affirmations from affected individuals, but will still be obligated to affirm that required privacy notice has been provided to affected individuals before personal information is collected.

Comment: Several commenters suggested that affected individuals should be notified in writing that they must undergo background checks consistent with the requirements of 6 CFR 27.230 as a condition of employment at any high-risk chemical facility. Commenters also suggested that affected individuals should be advised of their rights to contest the findings of background checks, and of how to contest those findings.

Response: No affirmative written statements of this sort are required by CFATS. However, DHS has discussed Personnel Surety Program background check requirements in CFATS in the Advanced Notice of Rulemaking preceding CFATS (71 FR 78276 (Dec. 28, 2006)), the CFATS Risk-Based Performance Standards Guidance Document (May 2009), and the

Personnel Surety Program's 60-day PRA notice (74 FR 27555 (June 10, 2009)).

(H) DHS also received unsolicited comments in response to the 60-day notice related to the CFATS Personnel Surety Program.

Comment: One commenter expressed disappointment in the proposed information collection, because the commenter believed that the collection approach did not guarantee the availability of all due process protections under notice and comment rulemaking pursuant to the Administrative Procedure Act (APA).

Response: Through this notice and through DHS's June 10, 2009, 60-day PRA notice, 74 FR 27555 (June 10, 2009), DHS is fulfilling its obligations to solicit and respond to public comment under the PRA. DHS's PRA publications detail (1) which data points the Department will collect in order to conduct vetting against the TSDB; (2) how the Department will collect those data points; and (3) how the Department will perform vetting against the TSDB. This type of program description is the type of detail which is appropriate in a PRA notice, because it allows DHS to solicit comments on how to improve the proposed information collection and to consider ways to reduce the burden the CFATS Personnel Surety Program will place on affected individuals and high-risk chemical facilities.

Comment: Many commenters expressed concern that DHS would not notify high-risk chemical facilities when affected individuals are determined to be known or suspected terrorists. Commenters stated that as a result of such lack of notification, high-risk chemical facilities may unknowingly grant access to individuals who are known or suspected to have terrorist ties, thereby subjecting facility personnel and surrounding communities to unnecessary risk. Some of the commenters acknowledged that there may be circumstances when it is either appropriate or inappropriate to contact a facility in the context of a law enforcement investigation, but stated that DHS should not withhold TSDB vetting results as a general matter. Other commenters suggested that DHS should always notify facilities about known or suspected terrorists to enable appropriate facility action, such as potentially limiting or denying known or suspected terrorists' access to restricted areas or critical assets.

Response: DHS will not routinely notify high-risk chemical facilities of Personnel Surety Program vetting results. DHS will coordinate with Federal law enforcement entities to monitor and/or prevent situations in

which known or suspected terrorists have access to high-risk chemical facilities. The precise manner in which DHS or Federal law enforcement entities could contact high-risk chemical facilities following vetting are beyond the scope of this PRA notice.

Comment: Commenters also suggested that failure to notify an individual that he/she is a known or suspected terrorist would abrogate that individual's right to request an administrative adjudication of a finding under RBPS-12 that he/she is a potential security threat.

Response: Administrative adjudications which contest findings that affected individuals are potential security threats are provided by 6 CFR 27.310(a)(1). The Department does not intend to limit affected individuals' abilities to request administrative adjudications merely because it will not routinely notify them of TSDB vetting results. Individuals who believe they have been adversely affected by vetting may file Notices of Application for Review with the Department.

Comment: One commenter recommended that DHS should not collect an acknowledgement of State and local privacy law compliance from high-risk chemical facilities. The commenter suggested that requiring a compliance certification would add unnecessary procedural burden to the Personnel Surety Program because DHS is not responsible for State or local privacy law compliance.

Response: DHS agrees with the commenter and will not collect this acknowledgement as part of Personnel Surety Program information submissions.

Solicitation of Comments

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology

(e.g., permitting electronic submissions of responses).

The Department is particularly interested in comments which:

1. Respond to the Department's interpretation of the population affected by RBPS-12 background checks, as outlined in 6 CFR 27.230(a)(12);

2. Respond to fact that the Department or a Federal law enforcement agency may, if appropriate, contact the high-risk chemical facility as a part of a law enforcement investigation into terrorist ties of facility personnel;

3. Respond to the Department's intention to collect information that identifies the high-risk chemical facilities, restricted areas and critical assets to which each affected individual has access; and

4. Respond to the Department on its intention to seek an exception to the notice requirement under 5 CFR 1320.8(b)(3).

Analysis

Agency: Department of Homeland Security, National Protection and Programs Directorate, Office of Infrastructure Protection, Infrastructure Security Compliance Division.

Title: CFATS Personnel Surety Program.

Form: Not Applicable.

OMB Number: 1670-NEW.

Frequency: As required by the DHS-approved schedule.

Affected Public: High-risk chemical facilities as defined in 6 CFR part 27, high-risk chemical facility personnel, and as appropriate, unescorted visitors with access to restricted areas or critical assets.

Number of Respondents: 354,400 individuals.

Estimated Time per Respondent: 0.59 hours (35.4 minutes).

Total Burden Hours: 210,351.7 annual burden hours.

Total Burden Cost (capital/startup): \$0.00.

Total Burden Cost (operating/maintaining): \$17,669,543.

Dated: March 6, 2010.

Thomas Chase Garwood, III,

Chief Information Officer, National Protection and Programs Directorate, Department of Homeland Security.

[FR Doc. 2010-8312 Filed 4-12-10; 8:45 am]

BILLING CODE 9110-9P-P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS-2009-0146]

Privacy Act of 1974; Department of Homeland Security Citizenship and Immigration Services Ombudsman-001 Virtual Ombudsman System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security is giving notice that it proposes to establish a new Department of Homeland Security system of records notice titled, "Department of Homeland Security Citizenship and Immigration Services Ombudsman-001 Virtual Ombudsman System of Records." This system of records will ensure the efficient and secure processing of information to aid the Citizenship and Immigration Services Ombudsman in providing assistance to individuals, employers, and their representatives in resolving problems with U.S. Citizenship and Immigration Services; identify areas in which individuals, employers, and their representatives have problems working with U.S. Citizenship and Immigration Services; and to the extent possible, propose changes to mitigate problems pursuant to 6 U.S.C. 272. This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before May 13, 2010. This new system will be effective May 13, 2010.

ADDRESSES: You may submit comments, identified by docket number DHS-2009-0146 by one of the following methods:

- *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 703-483-2999.

- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

- *Docket:* For access to the docket to read background documents or comments received go to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Raymond Mills (202-357-8100), Privacy Point of Contact, Office of the Citizenship and Immigration Services Ombudsman, Department of Homeland Security, Washington, DC 20528. For privacy issues please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Privacy Act of 1974, (5 U.S.C. 552a), the Department of Homeland Security (DHS) Citizenship and Immigration Services Ombudsman (CISOMB) is giving notice that it proposes to establish a new DHS system of records notice titled, "DHS/CISOMB-001 Virtual Ombudsman System of Records." This system of records will ensure the efficient and secure processing of information to aid the CISOMB in providing assistance to individuals, employers, and their representatives in resolving problems with U.S. Citizenship and Immigration Services (USCIS); identify areas in which individuals, employers, and their representatives have problems working with USCIS; and to the extent possible, propose changes to mitigate problems pursuant 6 U.S.C. 272.

CISOMB has developed the DHS/CISOMB-001 Virtual Ombudsman System of Records to ensure the efficient and secure processing of information and to aid the Ombudsman in assisting individuals and employers in making systemic recommendations to USCIS. The core of the DHS/CISOMB-001 Virtual Ombudsman System of Records is CISOMB's Web form 7001 which is a user interface Web-based form which will automatically convert information submitted by an individual or employer into a case within CISOMB's account within Internet Quorum/Enterprise Correspondence Tracking (IQ/ECT) system. IQ/ECT is the Department's enterprise-wide correspondence and case management tracking system. This system allows the Department's headquarters and components to manage cases and resolve issues in a coordinated and timely manner. For more information on IQ/ECT, please view the Enterprise Correspondence Tracking System PIA at <http://www.dhs.gov/privacy>. The system also enables CISOMB to segregate data into several categories to generate internal reports, provide customized feedback to individuals and employers, and supply real-time aggregated

PUBLIC SUBMISSION

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Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-0021

Comment Submitted by Cynthia Hilton, Institute of Makers of Explosives- 2nd Comment

Submitter Information

Name: Cynthia Hilton

Address:

1120 Nineteenth St., NW

Suite 310

Washington, DC, 20036

Email: chilton@ime.org

Phone: 202-266-4319

Organization: Institute of Makers of Explosives

General Comment

See attached file.

Attachments

DHS-2009-0026-0021.1: Comment Submitted by Cynthia Hilton, Institute of Makers of Explosives (Attachment)- 2nd Comment

IME
institute of makers of explosives

The safety and security institute of the commercial explosives industry since 1913

May 11, 2010

Infrastructure Security Compliance Division
Office of Infrastructure Protection
National Protection and Programs Directorate
US Department of Homeland Security
Washington, DC 20528

RE: DHS-2009-0026¹

Information Collection Activity: Chemical Facility Anti-Terrorism Standards Personnel Surety Program
OMB Control Number: 1670-NEW

Dear Sir or Madam:

On behalf of the Institute of Makers of Explosives (IME), I am submitting comments on the US Department of Homeland Security (DHS) Infrastructure Security Compliance Division's (ISCD) new information collection request (ICR) that deals with personnel surety requirements under the Chemical Facility Anti-Terrorism Standards (CFATS), which the agency will be submitting to the Office of Management and Budget (OMB).

Interest of the IME

The IME is a non-profit association founded to provide accurate information and comprehensive recommendations concerning the safety and security of commercial explosive materials. The IME represents U.S. manufacturers and distributors of commercial explosive materials and oxidizers as well as companies providing related services. These products are used in every state of the Union, and they are literally the workhorse of our industrial society for which there is currently no alternative. Explosives are essential to energy production, metals and minerals mining, construction activities and supplies, and consumer products. IME members that are participating in the CFATS program will be impacted by the ISCD personnel surety requirements.

Background

Since 1970, the safety and security of explosives has been closely regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) under Federal Explosives Law (FEL). In recognition of this close regulation by ATF, the CFATS program applies to only a few named explosives. Nevertheless, explosives manufacturing involves chemical precursors that are covered by the CFATS program. As a result, some explosives manufacturing sites are subject to both programs.

FEL requires persons who import, manufacture, store, or distribute explosives to obtain a license, and those who receive or use explosives and do not have a license, to obtain a permit. Among the many requirements that these business entities must meet in order to obtain a license or a permit is to submit the names of all employees who are authorized to possess² explosives or those empowered to make management decisions or policies to ATF for a background check. The FEL standards for the background checks conducted by ATF

¹ 75 FR 18850 (April 13, 2010).

² "Possession" is interpreted as both actual and constructive.

are the forerunner of the background check standards that were subsequently adopted by DHS for the plethora of programs it administers for transportation workers.³ Each of these DHS programs has adopted the core disqualifications used by the ATF. The ATF threat assessment also includes a check against the terrorist screening database (TSDB).

Comments

IME provided comments to ISCD's initial June 10, 2009 notice of its intention to collect information about persons with access to CFAT-regulated restricted areas or critical assets for the purpose of vetting the information against the TSDB.⁴ We appreciate ISCD's clarifications and accommodation of some of our comments as explained in this second agency notice. However, issues remain. With this perspective, IME offers the following comments:

- **Process:** In our June 2009 comments, we expressed disappointment that ISCD has chosen to implement this regulatory requirement through an ICR to OMB because it does not guarantee all of the process protections available under notice and comment rulemaking pursuant to the Administrative Procedures Act (APA). ISCD defends the ICR approach by pointing out that public comment was solicited. That is one aspect of the protections that the APA affords the public. However, the ICR approach is deficient because the agency cannot, based on the public comment received, amend its rules. ISCD provides the clearest example of the merit of the rulemaking approach in its summary of comments objecting to the scope of the population of individuals to be covered by the personnel surety background check requirement.⁵ The agency states that it cannot alter the plain words of the current rule which covers facility personnel, including those that are escorted, and visitors who are unescorted, irrespective of the fact that this scope is inconsistent with other DHS vetting schemes. The ICR approach is inadequate to the task of establishing requirements for personnel surety, and sets a disturbing precedent.

Without the benefit of rules which would be published in the Code of Federal Regulations, how are future covered facilities to know what identifying information is to be provided on individuals, within what timeframes, and other regulatory aspects of this ICR? An ICR is simply an inadequate substitute for rules. This ICR will render standards for personnel surety invisible. The penalties and stakes are too high to base compliance with these requirements on an information collection.

- **Avoiding Regulatory Overlaps:** A purpose of the Paperwork Reduction Act is to "minimize the burden of the collection of information on those who are to respond." In CFATS risk-based performance standards (RBPS) 12, ISCD states that the standard "is not intended to alter, limit, or conflict with other Federal ... laws and rules" concerning background checks. In retrospect, ISCD should have included in its statement of intentions not to duplicate existing laws and rules as well.

In our June 2009 comments, we asked ISCD to take the critically important step toward minimizing the compliance burden of the CFATS personnel surety requirements by allowing reciprocity with other DHS background check programs. In support of our position, we quoted from ISCD guidance on RBPS 12 that "workers ... who [have] successfully undergone a security threat assessment conducted by DHS and [are] in possession of a valid DHS credential ... will not need to undergo additional vetting by DHS."⁶ Since, ISCD qualified that the "document is a 'guidance document' and does not establish any legally

³ Hazardous materials endorsement threat assessment, Transportation worker identification credential (TWIC), Free and secure trade credential, NEXUS, etc.

⁴ Comments to DHS-2009-0026 from IME dated August 6, 2009.

⁵ See discussion 75 FR 18855 (April 13, 2010).

⁶ Risk-based Performance Standards Guidance, May 2009, page 97, FN 22.

enforceable requirements,” we asked ISCD to ensure that this policy be implemented.⁷ Regrettably, ISCD has inexplicably refused to grant reciprocity to DHS’ own, well-established vetting and credentialing programs, such as the Transportation Worker Identification Credential (TWIC) or commercial driver’s licenses with hazardous materials endorsements (CDL-HME).⁸ Holders of these credentials have already been vetted by the federal government to each of the required background check screens – identity, criminal history, citizenship, and terrorist ties. Although ISCD is prepared to add nothing to the rigor of the government’s background check standards, ISCD puts itself forward as an arbiter of whether other DHS vetting and credentialing schemes are sufficient. This is not a role envisioned by Congress for ISCD or the CFATS program. ISCD’s role is to offer facilities a service to check against the TSDB for those employees and unescorted visitors who have not been vetted against the TSDB by another equivalent federal background check program.

Likewise, in our June 2009 comments, we explained, as noted above, that ATF performs a security background check on all employees.⁹ Yet, ISCD flat out refuses to accept ATF clearances because it alleges that ATF “does not conduct recurrent vetting against the TSDB.”¹⁰ We are dumbfounded. We have been assured by ATF that it does run checks of employees of ATF licensees and permittees against the same TSDB. Moreover, ATF states that it is actively working with DHS to share information and results from TSDB “hits.”¹¹ It should be unacceptable to OMB that ISCD will not accept the vetting results that the ATF is willing to provide about individuals employed at those facilities now regulated by both agencies given that ATF has historically regulated these facilities since the 1970s and has successfully vetted employees to equivalent DHS standards since 2003. Without this accommodation, the regulatory overlaps between the two agencies will impose unreasonable burdens on this segment of the regulated community without any corollary enhancement to security. ISCD’s support for this accommodation should be prerequisite to OMB’s approval of this ICR.

OMB should insist that ISCD grant reciprocity for purposes of RBPS 12 to all equivalent federal security vetting programs. Leveraging other equivalent federal background checks will reduce the cost burden of RBPS 12 for both the government and industry without compromising security.

- Compliance & Implementation: ISCD states as a justification for its need to require duplicative information from individuals already vetted by equivalent government programs that “additional personal information will be required in order to verify that the affected individual has a previous TSDB [terrorist screening database] vetting result upon which the TWIC was issued.”¹² (Emphasis added.) This is absurd. The same TSDB is used in the vetting of TWIC, CDL-HME, FAST, SIDA and other DHS-security credentialed applicants. Drivers with CDL-HMEs will be particularly hard hit by this policy. A majority of them already were forced to obtain a TWIC, although the department has declared that the

⁷ Risk-based Performance Standards Guidance, May 2009, page 97, footer.

⁸ DHS is considering recognizing the previous TSDB vetting results completed by other DHS programs, such as TWIC, and the Trusted Traveler Programs (Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Free and Secure Trade (FAST), and NEXUS). Further, DHS is also considering recognizing the results of TSDB vetting (conducted by DHS) upon which each State relied when issuing a [CDL-HME].” (Emphasis added.) 75 FR 18854 (April 13, 2010).

⁹ As required by the FEL, the ATF conducts the same background check - identity, criminal history, and citizenship – that ISCD tasks to employers, as well as the TSDB screen for terrorist ties. The FEL standard also screens for and precludes mental defectives and individuals with dishonorable discharges from the armed forces.

¹⁰ 75 FR 18854 (April 13, 2010).

¹¹ Currently, a TSDB “hit” is not, in and of itself, a disqualifying offense that would preclude an individual from working for an ATF licensee or permittee. However, “hits” are not ignored. The FBI manages the TSDB and immediately follows up on all “hits”.

¹² 75 FR 18853 (April 13, 2010). We assume that ISCD’s specific use of the term “TWIC” is intended to be a generic reference to all equivalent DHS-issued security credentials.

CDL-HME and the TWIC vetting schemes are equivalent.¹³ Yet, ISCD insists that these credentialed individuals allow ISCD to verify that they have a previous TSDB vetting. The “proof” of this vetting is the possession of a TWIC or CDL-HME credential. These credentials should stand on their own.

While it is reasonable the ISCD should expect facilities to make a visual inspection of equivalent security credentials to order to verify that the credential is valid, facilities should not have to report the individuals who possess these credentials to the agency. If ISCD believes that these credentials are insufficient for personnel surety validation, the agency should take its proof of a vulnerability gap to those other agencies within DHS that administer these credentialing programs for their action. Likewise, ISCD should accept that the possession by an employer of a valid ATF license or permit means that ATF has vetted and cleared all of the employees covered by the license or permit. No security purpose would be served to resubmit personal identifying information on these persons to ISCD. Also, there should be no expectation that non-MTSA facilities should be equipped with “readers” for TWIC credentials. Recently, the House Homeland Security Committee stated that for non-MTSA facilities, “the Committee does not intend to require that card readers be installed at all shipping facilities, rather, the Committee recognizes that a visual inspection of the card will provide the same level of security as provided under the current HME licensing process.”¹⁴ Again, we ask OMB, given the objectives of the ICR review, to require ISCD to deem persons with valid DHS security credentials to have met the CFATS personnel surety standard.

Not all facility personnel or unaccompanied visitors will have a federal government issued security credential or will be vetted through an equivalent federal program like ATF’s as described above. For these individuals, we appreciate ISCD’s position that employers do not have to wait for a notification of clearance before covered individuals may be permitted unescorted access to restricted areas and critical assets, and we support the proposed notification schedule. However, we oppose ISCD’s plan to “collect information that identifies the high-risk chemical facility or facilities to which the affected individual has access.”¹⁵ ISCD has failed to justify this level of intrusive oversight. ISCD also runs the risk of amassing so much information that it will be meaningless. OMB should not sanction the collection of this overreaching level of detail. Rather, as noted below, ISCD should reach out to the facility contact that submitted an individual’s information to determine specifics about the individual’s site assess when circumstances warrant.

Finally, IME seeks guidance on compliance with RBPS 12 as it applies to emergency responders. Any number of non-terrorist related situations or circumstances may involve site access by emergency personnel – a medical emergency, fire, workplace violence, and the like. Facilities should not impede the access of such personnel coming or going from the site of an emergency by insisting on the collection of personal identifying information.

- Employer notification: We support the agency’s plan to provide employers with an electronic acknowledgement that information submitted for such individuals has been received. However, we continue to oppose ISCD’s policy that it “will not routinely notify high-risk chemical facilities of Personnel Surety Program vetting results.” (Emphasis added.) This policy is inconsistent that other federal security vetting programs used by the private sector, and it is inconsistent with RBPS 12.

¹³ Based on congressional and public complaint about program overlaps and redundancy, TSA has initiated a rulemaking to revise and standardize the procedures, adjudication criteria, and fees for all its credentialed security threat assessments programs that have been deemed equivalent. RIN 1652-AA61.

¹⁴ H.Rept. 111-123, page 56.

¹⁵ 75 FR 18854 (April 13, 2010).

The ATF background check program provides notice to the employer and the employee whether employee has or has not cleared the agency's background check. This notice does not reveal to the employer facts that led the agency to disqualify the employee, but it does allow the employer the opportunity to immediately, if appropriate, remove the employee from work functions that would allow the individual to process explosives. The notice to the employee explains the grounds for the determination and provides information on how the disability may be relieved or appealed. Likewise, Congress mandated that the Transportation Security Administration develop and implement a process for notifying hazmat employers designated by an applicant for a CDL-HME of the results of the applicant's background check. Both of these approaches contrast with that of the proposed CFATS personnel surety program in that neither employers nor employees will receive notification of a TSDB match.

RBSP 12 provides that "[a]ccess to restricted areas or critical assets is allowed after appropriate background checks have been successfully completed." (Emphasis added.) It is unclear how this standard will be met when ISCD will not share the results of the TSDB review. We do not believe that it is in the best interest of other workers, the employer, or the public who remain in proximity to a suspect worker. At minimum, ISCD should give notice to the employer that reveals the name of any employee who has failed the TSDB assessment.

Conclusion

We appreciate the importance of assuring that employees and unescorted visitors with access to restricted areas and critical assets at CFATS' regulated sites undergo background checks. At the same, all federal agencies that require security-based background checks should actively look for opportunities to harmonize the requirements for these checks and should reciprocally-recognize equivalent programs. The ISCD should carefully tailor the implementation of its personnel surety program, including recordkeeping and reporting, so that it is capturing only those individuals not already covered and vetted under other equivalent programs. Finally, the requirements of this program should be established through APA rulemaking and codified in the Code of Federal Regulations.

Thank you for the opportunity to comment.

Respectfully,



Cynthia Hilton
Executive Vice President

PUBLIC SUBMISSION

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-0022

Comment Submitted by Clifford M. Wiksten Jr., Harcros Chemicals Inc.

Submitter Information

Name: Clifford M Wiksten Jr.

Address:

5200 Speaker Rd.
P.O. Box 2930 (66110)
Kansas City, KS, 66106

Email: cwiksten@harcros.com

Phone: 913-621-7844

Fax: 913-621-7817

Organization: Harcros Chemicals Inc.

General Comment

I believe that DHS should utilize processes and programs that are already in place to accomplish the RBPS – 13 Personnel Surety. (“Visitors” would include any person that is going to be on the company property unescorted.) For unescorted visitors the background checks that are conducted to obtain a Commercial Drivers License with a HazMat Endorsement or obtain a TWIC card are sufficient. A company should be able to allow unescorted visitors on the property if they hold a valid CDL/HM or a TWIC card. Those persons that are requesting access, and the company will allow, that do not have either of these documents could be checked through the DHS-PSP or would have to be escorted while on the property. Performing the check when the visitor shows up will not accomplish DHS’s intended purpose because the visitor could be on and off the property before the company receives a response from DHS.

For employee, requiring each employee to obtain a TWIC card will again meet the requirements of the DHS-PSP. Random rechecks of employees could be performed on some type of schedule.

I recommend that DHS reconsider it thinking that a background check should be performed each time a visitor requests access to company facilities.

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-0023

Comment Submitted by Terry F. Whitley, Shell Oil Company

Submitter Information

Name: Terry F Whitley

Address:

910 Louisiana
Suite 4430A
Houston, TX, 77025

Email: terry.whitley@shell.com

Phone: 713-241-4061

Fax: 713-241-1099

Organization: Shell Oil Company

General Comment

See Attached Comment.

Attachments

DHS-2009-0026-0023.1: Comment Submitted by Terry F. Whitley, Shell Oil Company
(Attachment)



Terry F. Whitley CPP CFE
Senior Security Manager North America
Shell Oil Company
P.O. BOX 2463
Houston, Texas 77252-2463
Tel: +1 713 241-4061
Email: terry.whitley@shell.com
Internet <http://www.shell.com>

May 11, 2010

U.S. Department of Homeland Security
National Protection and Programs Directorate
Office of Infrastructure Protection
Infrastructure Security Compliance Division
Mail Stop 8100
Washington, DC 20528

Re: Docket No. DHS-2009-0026—Submission for Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection 1670-NEW

Dear Sir or Madam:

Shell Oil Company US (Shell) appreciates the opportunity to provide comments on the above. As you know, Shell has worked with DHS since its creation and has been heavily engaged with DHS since the inception of the CFATS program. We are active members of the Oil and Natural Gas Sector Coordinating Council as well as the CIPAC and have offered assistance to DHS in every way possible during the development of CFATS. We have volunteered for many DHS initiatives and have hosted a number of site visits to help educate DHS staff and inspectors.

Shell has long recognized the importance a Personnel Surety Program (PSP) plays in the protection of our employees, contractors, vendors, visitors, assets and facilities. We also understand the importance of an effective PSP in protecting our critical infrastructure. We have been, and remain, highly concerned about the suitability of persons to whom we grant access at our sites; it is, after all, in our own best interest to provide for the safety and security of our sites and all who work therein.

Long before DHS was created Shell implemented a policy in the US requiring both employee and contractor background checks. Given that our program has been in place for many years, we have accumulated significant amount of experience in screening personnel and over time have learned what is practical and prudent, and what is not.

We fully support DHS' effort to implement an effective PSP. We are concerned, however, that some of the proposed requirements detailed in the Notice are neither practical nor prudent, and if implemented will ultimately be found by DHS to be ineffective and/or unmanageable. The following general comments summarize our major concerns:

- Publishing these requirements through an ICR to OMB is, in our opinion, improper in that it does not guarantee all the process protections available under the Administrative Procedures Act (APA). Further, this approach is deficient as DHS cannot amend its rules based on public comments received. We believe that implementation of a PSP program is of such an impact and significance that using the ICR approach is not adequate for the task at hand, and we see it as a most disturbing precedence.

There is no doubt DHS, and the Infrastructure Compliance Division in particular, is under tremendous pressure to implement the CFATS (and the PSP Program) as quickly as possible. However, shortcutting legitimate processes may put the PSP, and the entire CFATS program, at risk of judicial review thereby further delaying implementation.

- As proposed, the PSP program is overly burdensome and cumbersome for business, industry and DHS. DHS intends to impose data gathering and submission requirements that are needlessly redundant, greatly complicate the program and substantially increase manpower and funding requirements on both industry and DHS while doing little to enhance security of the regulated sites themselves.
- DHS has, in our opinion, grossly underestimated the number of employee, contractor, vendor and other third party personnel the proposed PSP will impact. For example, DHS does not distinguish between a contractor, who is on site for a defined period of time to provide a service (could be days, week or months), and a vendor who is on-site for very brief periods (as little as 10-15 minutes or less in some cases) to deliver things such as mail and packages, food, bottled water, supplies or materials. In the case of vendors, such as mail and package services, any given driver may potentially access a dozen or more CFATS sites in one day with his or her name being entered into the system upon each separate entry. Requirements of this type will dramatically increase the workload on DHS and industry, and could easily overwhelm both parties who are short on resources.

Many of the numerous problems encountered by TSA and the US Coast Guard (USCG) with TWIC implementation are now being attributed to TSA's prodigious error in underestimating the number of TWICs that would be required to ensure industry compliance with MTSA. It seems only logical that DHS would be judicious in this regard and make every effort to avoid much of the embarrassment seen in the TWIC rollout as a result of underestimating the affected population.

- DHS has not accurately estimated the costs that both they (DHS) or the industry will incur to implement and maintain the PSP program as proposed, primarily as a result of underestimating the population that will be affected.
- We believe DHS has exceeded its mandate by attempting to structure the PSP such that it can be used by DHS as a tool to track individuals from site-to-site and, incredibly, even within the confines of a site (see the propose procedure to require by-name tracking of persons accessing restricted areas and critical assets within a regulated site).

This purpose is in great contrast to DHS' stated goal of establishing a program to simply conduct a terrorist screening check against the Terrorist Screening Data Base for persons accessing regulated facilities. We are highly concerned DHS has does not fully understand or appreciate the impact of adding hundreds of thousands (if not millions), of unnecessary data submissions to the system annually, and the tremendous burden such will place on both DHS and industry.

In an effort to avoid repetition, and in lieu of providing further statistics, detail or recommendations regarding the above points, DHS should note that **Shell has carefully reviewed the comments prepared for submission by the National Petrochemical and Refiner's Association (NPRA), and that we share the same concerns expressed by them. We fully support NPRA in their comments, observations, conclusions and recommendations.** Given that NPRA represents a significant portion of our industry, we encourage DHS to carefully consider the many valid points set forth in their correspondence.

DHS vs. TSA - Use of the TWIC

A final ancillary issue related to use of the TWIC at CFATS regulated sites warrants discussion. Shell supports DHS' proposal to accept the TWIC card (as well as other federal-issued credentials such as the HME, FAST, and NEXUS cards) as evidence of a satisfactory background check. However, there remains a stumbling block to using the TWIC card which we request DHS correct.

There is no language in the Marine Transportation Security Act (MTSA) that expressly prohibits the use of the TWIC at non-maritime facilities. As a result, and in response to repeated inquiries from industry as the TWIC program was initially rolled out, the Transportation Security Administration (TSA) issued an Informational Bulletin on August 28, 2008, titled "Transportation Worker Identification Credential (TWIC) Program. In this bulletin, which takes the form of Frequently Asked Questions (FAQs), TSA asks and answers the following questions:

"Can employers require their employees to enroll for a TWIC even if their job does not require them to have unescorted access to facilities and vessels regulated by the Maritime Security Act (MTSA)."

"No. All applicants must certify that they need a TWIC to perform their job. Applicants must be, or are applying to be, a port worker who requires unescorted access to secure areas of maritime facilities and vessels regulated by MTSA; or they are a commercial HME driver licensed in Canada or Mexico. Applicants also certify that the information they provide during the enrollment process is true, complete, and correct. If required, civil or criminal action may be taken if an individual provides false information or makes false certifications (per 49 CFR 1570.5 and 18 U.S.C. 1001)."

"Where in the TWIC regulation is this topic covered?"

"49CFR 1572.17 Applicant information required for TWIC security threat assessment (e) the applicant must certify the following statement in writing: As part of my employment duties I am required to have unescorted access to secure areas of maritime facilities or vessels in which a Transportation Worker Identification Credential is required; I am now, or I am applying to be, a credentialed merchant mariner; or I am a commercial driver licensed in Canada or Mexico transporting hazardous materials in accordance with 49 CFR 1572.201"

The above guidance from TSA, as well as language found in the TWIC application itself, has created a problem for CFATS sites that would prefer to use the TWIC for their employee or contractor personnel. Simply stated, to its credit DHS is has declared the TWIC will acceptable as evidence of a background check at CFTAS sites (which have no maritime nexus) while TSA has stated it can only be used for those sites with a maritime nexus.

We recognize that not all companies will agree that the use of the TWIC as a means to satisfy PSP requirements is a desired or preferred solution; many may prefer other options they see as more effective or less intrusive and costly. We also fully understand and appreciate that DHS cannot prescribe the use of any security measure at a regulated site and we are not asking DHS do so with regard to use of the TWIC. **However, we do believe that DHS can, and should, assist in removing administrative roadblocks that either complicate the PSP program or prohibit measures that actually simplify and enhance the PSP program.** The TSA bulletin in question is a prime example of an administrative roadblock easily eliminated with inter-agency cooperation.

An expressed goal of DHS, as stated recently by the DHS Assistant Secretary for Infrastructure Protection and other senior members of his staff, is to harmonize DHS regulations with other federal agency regulations in order to reduce redundancies and conflicts, thereby reducing the burden on industry. Amending or rescinding the TSA bulletin (as well as the TWIC application form) is consistent with this goal and would ensure those companies that elect to use the TWIC at CFATS facilities can do so

without fear of repercussion. In consideration of this recommendation DHS should note that the use of the TWIC at CFATS sites offers a number of advantages to those companies who chose to do so. For example:

- Background checks for MTSA and CFATS sites would be consistent in their scope and conduct thereby harmonizing efforts with both TSA and the USCG. Note this is an issue that will take on added significance as DHS moves to upgrade MTSA site security programs to CFATS standards.
- Companies would have more flexibility in the administration and management of their PSP programs; they could either use the TWIC or implement other measures that best meet their individual facility or company needs.
- Use of the TWIC will simplify the background check and processes over those processes that will be required in the absence of the TWIC Program. In some cases the need for a given individual, such as a vendor or contractor employee, to undergo repeated backgrounds by multiple companies they service would be eliminated.
- Budgeting for background checks would be simplified and over time the cost on industry to perform background checks should diminish as more and more workers acquire the TWIC.
- For companies with multiple sites, use of the TWIC at CFATS sites would facilitate the transfer or temporary assignment of employees from a CFATS regulated site (which does not require a TWIC) to an MTSA regulated site (which does require a TWIC).
- Use of the TWIC at CFATS sites would provide companies flexibility in the use of emergency responders from CFATS sites who, in a crisis such as a hurricane, may respond to an MTSA site (often from outside the local area). This aspect has the added advantage of improving resiliency in the event of a crisis or disaster, a stated goal of the Department of Energy (DOE).

For the above reasons we believe it is in the best interest of both industry and DHS to resolve this issue. We encourage DHS to engage TSA in a joint-effort to amend or rescind the August 2008 TSA Bulletin, as well as TWIC application, thereby providing industry an option for the use of the TWIC at CFATS regulated sites that is unencumbered.

In closing Shell strongly recommends that DHS respond to all comments received as a result of this notice, as well as to those comments submitted in June, 2009, that to date have been ignored and remain open issues in the minds of the affected parties.

Thank you for the opportunity to comment and please accept our standing offer to participate with DHS in efforts to improve both the CFATS and the proposed PSP Program. In the end, we all have the same goal... the safety and protection of our personnel and facilities. We can best accomplish this goal by working together for optimal solutions.

Respectfully submitted,

Terry F. Whitley

Terry F. Whitley, CPP CFE
Senior Security Manager North America

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Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-0024

Comment Submitted by Marc Meteyer, Compressed Gas Association- 2nd Comment

Submitter Information

Name: Marc Meteyer

Address:

4221 Walney Road

5th Floor

Chantilly, VA, 20151

Email: ngerike@cganet.com

Phone: 703-788-2745

Fax: 703-961-1831

Submitter's Representative: Marc Meteyer

Organization: Compressed Gas Association

General Comment

See attached letter for Compressed Gas Association comments.

Attachments

DHS-2009-0026-0024.1: Comment Submitted by Marc Meteyer, Compressed Gas Association (Attachment)- 2nd Comment



COMPRESSED GAS ASSOCIATION

4221 Walney Road, 5th Floor, Chantilly, VA 20151-2923
(703) 788-2700 ■ Fax: (703) 961-1831 ■ E-mail: cga@cganet.com ■ Web Site: www.cganet.com

May 12, 2010

U.S. Department of Homeland Security
National Protection and Programs Directorate
Office of Infrastructure Protection
Infrastructure Security Compliance Division CFATS
Program Manager at the Department of Homeland Security
245 Murray Lane, SW, Mail Stop 0610
Arlington, VA 20528-0610

Docket No. DHS-2009-0026, Information Collection 1670 - NEW

To Whom It May Concern:

On behalf of the Compressed Gas Association (CGA), I am submitting comments regarding the Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection 1670 - NEW (Docket No. DHS-2009-0026) published on Tuesday, April 13, 2010, in the *Federal Register*.

CGA, founded in 1913, is dedicated to the development and promotion of safety standards and safe practices in the industrial and medical gas industry. CGA represents over 125 member companies in all facets of the industry: manufacturers, distributors, suppliers, and transporters of gases, cryogenic liquids, and related products and services. Through a committee system, CGA develops technical specifications, safety standards, and training and educational materials, and works with government agencies to formulate responsible regulations and standards and to promote compliance with these regulations and standards.

CGA reviewed the comments and information collection request and provides the following comments regarding personnel surety practices based on the information presented in the *Federal Register* on April 13, 2010:

- The CFATS Personnel Surety Program does not provide owner operators of regulated facilities with a value added tool to screen potential personnel, contractors, and visitors or to identify potential security risks. The proposed program is a one-way process that provides information to DHS on personnel with access to restricted areas, without any feedback provided to the owner operators of regulated facilities on their personnel.
- The proposed program places undue burdens and costs on businesses that operate multiple regulated facilities where it would require redundant entries for a given individual who visits multiple sites.
- CGA strongly recommends that DHS use a preexisting approved federal security review program (e.g. TWIC, NEXUS, FAST, HME) rather than creating a new procedure that does not provide an added value to the partnership between DHS and regulated facilities.

CGA commends the Department of Homeland Security for the continued development of the Chemical Facility Anti-Terrorism Standards programs and providing stakeholders the opportunity to provide comments on personnel surety practices.

Sincerely,


Marc J. Meteyer
President and CEO

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Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-0025

Comment Submitted by Boyd Stephenson, American Trucking Associations- 2nd Comment

Submitter Information

Name: Boyd Stephenson

Address:

950 N Glebe Rd. Ste 210
Arlington, VA, 22203

Email: bstephenson@trucking.org

Phone: 703-838-7982

Submitter's Representative: Self

Organization: American Trucking Associations

General Comment

Please find the attached comments of the American Trucking Associations on DHS' Chemical Facility Anti-Terrorism Standards' Personnel Surety Standards.

Attachments

DHS-2009-0026-0025.1: Comment Submitted by Boyd Stephenson, American Trucking Associations (Attachment)- 2nd Comment

May 12, 2010

Via Regulations.gov

Thomas Chase Garwood, III
DHS/NPPD/IP/ISCD CFATS
Department of Homeland Security

Re: Docket No. DHS-2009-0026: National Protection and Programs Directorate; Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection 1670-NEW

The American Trucking Associations (ATA)¹ is pleased to offer its comments on the Department of Homeland Security's (DHS) National Protection and Programs Directorate's Office of Infrastructure Protection's Submission for Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program Information Collection 1670-NEW.² As the primary representative of the trucking industry, ATA has an interest in the impact that the Chemical Facility Anti-Terrorism Standards will have upon its members that transport Appendix A chemicals as well as other non-regulated loads to and from CFATS-regulated facilities.³

Although DHS found truck terminals' security requirements promulgated by the Department of Transportation (DOT) to be sufficient to exempt them from direct regulation under CFATS program, motor carriers are still significantly impacted by the program when picking up from or delivering to a regulated facility. ATA appreciates the opportunity to inform DHS about these impacts and offers the following suggestions to improve the CFATS Personnel Security Standards:

- DHS must definitively state which credentials will be accepted as having an acceptable background investigation to meet the regulatory burden imposed in 6 CFR 27.230 (a)(12)(i-iv) and
- DHS must exempt drivers possessing a DHS-recognized credential from additional screening under the Chemical Security Assessment Tool (CSAT).

Credentials & Background Checks

As part of the CFATS program, regulated facilities must meet 18 different Risk-Based Performance Standards outlined in 6 CFR 27.230. The Personnel Surety Standards are among them and mandate that management of CFATS-regulated facilities must verify (1) the identity, (2) criminal history, (3) legal authorization to work, and (4) potential terrorist ties of facility personnel and visitors

¹ ATA is a federation of motor carriers, state trucking associations, and national trucking conferences that promotes and protects the interests of the trucking industry. Directly, and through its affiliated organizations, ATA represents more than 37,000 motor carriers of every size, type, and class in the U.S., Canada and Mexico.

² See 75 *Federal Register* 18850-18857 (April 13, 2010).

³ See 72 *Federal Register* 65395-65435 (November 20, 2007).

who will have unescorted access to chemicals with the potential to be weaponized.⁴ Potential privacy implications surround the checking of the first three of these. The last one is beyond the scope of any private organization to check and is clearly the responsibility of the federal government. ATA is pleased that the Department has developed the CSAT portal that allows facilities to submit employee and visitors' information for vetting.

In its April 13, 2010 proposal, DHS states that it is, "considering recognizing the previous TSDB [Terrorist Screening Database] vetting results completed by other DHS programs" and then lists those credentials under the Department's examination.⁵ These include the Transportation Worker Identification Credential (TWIC), various Customs and Border Protection credentials including the Free And Secure Trade (FAST) card, and a Hazardous Materials Endorsement (HME) on a commercial drivers license (CDL) among others. ATA supports the inclusion of these credentials as meeting the requirements of the Personnel Surety Standard but is troubled by the proposal's statement that the Department is merely "considering" their inclusion. DHS should definitively list those credentials which will be considered as meeting the CFATS standard and accept comment on them before submitting the proposed information collection to the Office of Management and the Budget (OMB). We further recommend and urge that DHS prohibit CFATS facilities from requiring truck drivers that possess a DHS-approved credential from having to obtain an additional security credential.

Registering Drivers in CSAT

ATA further urges DHS to allow facilities to accept drivers bearing these credentials to enter without registering in the CSAT. The Department has indicated that those possessing these forms of identification "will likely require fewer pieces of information to vet an individual who is not enrolled in another vetting program,"⁶ but has stopped short of stating that such individuals will not have to register with the CSAT. All three credentials require a DHS-performed Security Threat Assessment (STA), which verifies an applicant's identity, criminal history, and legal work status in addition to checking him/her against the TSDB.⁷

DHS' primary reason for requiring this information is to perform "recurrent vetting" on individuals—essentially running their names through the TSDB database each time it updates. Yet, the credentials previously mentioned already are subject to the same recurrent vetting processes. DHS plans to accomplish recurrent vetting under this program by forwarding individuals' information received through the CSAT to TSA's Transportation Threat Assessment and Credentialing (TTAC) office. TTAC, of course, is the division of TSA that issues both the TWIC and an HME on a CDL. Furthermore, TSA recognizes the FAST card as meeting the background check requirements of both the TWIC and HME STA processes. All three of these cards are subject to recurrent vetting, meaning that submission of these credentialed individuals through the CSAT tool is nothing more than a redundant screening process.

The perpetual vetting process associated with TWIC, FAST, and the HME clearly exceeds the threshold established by 6 CFR 27.230 (a)(12)(i-iv). There are 1.5 million HM endorsed CDL-holders in the U.S. right now, and they are the only ones who can legally haul the chemicals listed on CFATS

⁴ See 6 CFR 27.230 (a)(12)(i-iv).

⁵ 75 *Federal Register* at 18854.

⁶ 75 *Federal Register* at 18854.

⁷ See TSA's TWIC Frequently Asked Questions Page at:

http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm#eligibility_requirements, listing specific databases and disqualifying criteria for TWIC, HME, and the FAST Programs,,71 *Federal Register* 44873-44881 (August 7, 2006).

Appendix A to these facilities.⁸ Because TSA has already vetted these drivers against categories that are more stringent than those proposed by the Personnel Surety Standard, there should be no need to collect information on them.

While CFATS-regulated facilities receive deliveries of Appendix A hazardous materials, they also receive deliveries of general freight, and there are no comparable background check requirements for the issuance of a CDL alone. However, thousands of these drivers possess FAST cards and almost 300,000 possess TWICs, which meet or exceed the Personnel Surety Standards.⁹

Finally, DHS proposes to grant facilities thirty days to notify it via CSAT after they have admitted a visitor for unescorted access. ATA questions the efficacy of such a requirement—especially for drivers. Although some facilities can expect to see a regular driver on a regular delivery schedule, there will always be vacations, sick days, schedule changes, employment changes, etc. affecting who will be dispatched to a particular client. Rather than trust in a system where the facility submits a driver's information via CSAT within 30 days, ATA believes that CFATS-regulated facilities would prefer to trust in the explicit vetting guarantees from government background checks on the HME, the TWIC, and the FAST card.

Conclusion

Thank you for considering ATA's concerns on the CSAT Information Collection. Again, ATA believes that DHS should implement the following policies:

- Establish that the STAs of the TWIC, FAST, and HME on a CDL meet the requirements outlined in 6 CFR 27.230 (a)(12)(i-iv) and, thus, that no further STA is required of the holders of such credentials; and,
- Exempt facilities from submitting information about drivers holding those credentials into the CSAT system.

By implementing these recommendations, DHS has an opportunity to simultaneously maintain rigorous security standards, reduce significantly the burden on industry, while facilitating the flow of commerce. The trucking industry looks forward to continued partnership with DHS to secure our nation and our economic wellbeing. Should you have any questions related to these issues, please contact the undersigned at 703-838-7982 or bstephenson@trucking.org.

Respectfully submitted,



Boyd Stephenson
Manager
Security and Cross Border Operations
American Trucking Associations

⁸ See Testimony of the Honorable David Heyman, Assistant Secretary for Policy at DHS, to the Senate Committee on Commerce, Science, and Transportation, April 21, 2010.

⁹ See Lockheed Martin and Transportation Security Administration. TWIC Dashboard. April 15, 2010.

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

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Comment Submitted by Steven Emmert, Reed Elsevier Inc.

Submitter Information

Name: Steven Emmert

Address:

1150 18th St. NW

Suite 600

Washington, DC, 20036

Email: steven.emmert@reedelsevier.com

Phone: 202-857-8254

Organization: Reed Elsevier Inc.

General Comment

See attached file(s)

Attachments

DHS-2009-0026-0026.1: Comment Submitted by Steven Emmert, Reed Elsevier Inc.
(Attachment)

May 13, 2010

U.S. Department of Homeland Security
National Protection and Programs Directorate
Office of Infrastructure Protection
Infrastructure Security Compliance Division

Re: Docket No. DHS-2009-0026
National Protection and Programs Directorate
Chemical Facility Anti-Terrorism Standards Personnel Surety Program
30-day notice and request for comments
New information collection request 1670-NEW
Comments by LexisNexis Screening Solutions

LexisNexis® Screening Solutions, a part of LexisNexis Risk Solutions, helps clients gain confidence in their staffing decisions by identifying risks associated with the individuals they screen. LexisNexis Screening Solutions leads the industry with the most advanced technology and comprehensive data solutions, so our clients can make the right decisions quickly about the individuals given access to their sites—both contractors and employees. LexisNexis Screening Solutions supports its user-friendly screening solutions with service excellence, compliance updates and best practices that allow clients to drive efficiencies into their workflows and maximize value. LexisNexis Screening Solutions has successfully set the standards for mitigating employment and contractor risk with nearly a third of the largest companies worldwide. Our experience of over 30 years supplying innovative screening answers provides clients with proven insight, speed, and accuracy so they can confidently make the right decisions every day.

LexisNexis is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting, and academic markets. LexisNexis Risk Solutions builds on the LexisNexis tradition as a trusted provider and custodian of quality information, and leverages new cutting-edge technology, unique data and advanced scoring analytics to create total solutions to address client needs. A member of Reed Elsevier, LexisNexis serves customers in more than 100 countries with 18,000 employees worldwide.

LexisNexis Screening Solutions is aware of the importance of authenticating the identity of persons accessing high-risk chemical facilities and of screening persons to identify those with connections to known or suspected terrorists. Identity authentication should be performed for all employees, contractors, and unescorted visitors to high-risk chemical facilities, including

screening such persons in accordance with the Chemical Facility Anti-Terrorism Standards (CFATS) which require high-risk chemical facilities to submit information about facility personnel and, as appropriate, unescorted visitors with access to restricted areas or critical assets at those facilities. This information is vetted by the federal government against the Terrorist Screening Database (TSDB), the consolidated and integrated terrorist watch list maintained by the federal government to identify known or suspected terrorists.

LexisNexis Screening Solutions currently provides personnel surety solutions for the chemical industry through partnerships with industrial safety training councils and directly with many national and international chemical companies and petroleum refiners. LexisNexis is also a vetted vendor partner in a nationally recognized chemical industry contractor screening consortium known as the Safety Council Security Consortium (SCSC).

Section 550 of Public Law 109-295, the Department of Homeland Security Appropriations Act of 2007 (the Act) requires that the U.S. Department of Homeland Security (DHS) regulations establish CFATS Risk-Based Performance Standards (RBPS) for regulated chemical facilities designed to identify people with terrorist ties, set forth in RBPS-12. The ability to identify people with terrorist ties requires the use of information held in government-maintained databases, which are unavailable to high-risk chemical facilities. The CFATS Personnel Surety Program will allow chemical facilities to comply with RBPS-12 by implementing “measures designed to identify people with terrorist ties.”

1. DHS Should Allow Qualified Chemical Industry Safety Training Councils, Contractor Personnel Surety Consortia, and Qualified Personnel Screening Service Providers to Submit Information on Individuals to be Screened to TSDB on Behalf of High-Risk Chemical Facilities.

High-risk chemical facilities employ significant numbers of individuals, including contractors and service personnel who require unescorted facility access. Chemical facilities face a significant burden in screening personnel, requiring specialized, dedicated staff and outside resources. The burden of these requirements is often costly and time consuming. This burden can be eased greatly through the use of advanced systems and tools offered by certified service providers like LexisNexis Screening Solutions, including electronic submission of information to the TSDB if permitted under the regulations.

Many high-risk chemical facilities are currently working with qualified service providers and consortium based programs to facilitate the screening of potential employees, contractors, and unescorted visitors. The service providers in these programs authenticate the identities of the individuals based upon applicant information transmitted to them by the chemical facilities and their contractors by matching provided information against databases of public and proprietary identifying information. The service providers provide the chemical facility with information relating to the identity of the individual as well as information regarding past criminal offenses. The facility then decides whether to hire the individual or to allow the individual access to the facility. If the decision is made to hire or allow access, then the facility must also submit information to DHS for processing against TSDB in accordance with CFATS. This submission to the TSDB can be facilitated by allowing the service providers to submit information on the

individual to DHS for processing against the TSDB on behalf of the chemical facility at their request. The service providers already have complete information on the individual in electronic form, based in part on the initial submission by the chemical facility and contractors and in part on the previously completed screening process and can use this information complete the submission to TSDB electronically.

Qualified third party service providers who engage in commercial background screening, employ significant privacy and security safeguards and are capable of complying with the requirements of CFATS in handling data submissions. These service providers are also required by law to adhere to applicable federal and state laws regarding employment screening, most notably the Fair Credit Reporting Act (FCRA) and state versions of the FCRA. As such, these service providers are well equipped to assist high-risk chemical facilities with compliance of the requirements of CFATS while maintaining compliance with other applicable federal and state laws. Additionally, these service providers are typically well equipped to maintain high standards of data security, consumer privacy and management of any applicable adverse action processes.

Electronic data submissions have definite advantages over manual processes. In addition to speed and efficiency, errors are significantly reduced when compared to manual submissions as the information is “touched” fewer times, limiting the risk of introduced errors, and is repeatedly validated throughout the entire screening process, thereby reducing the risk that errors will pass undetected. Also, electronic data processing is faster and creates incremental cost savings due to lower administrative processing and decreased staff intervention.

2. DHS Should Provide Chemical Facility Owners and/or their Qualified Service Providers, an Electronic Confirmation Message Acknowledging Receipt of Electronically Submitted Information to be Matched Against the TSDB.

Electronic systems permit a high volume of submissions to be completed with minimal staff intervention. The discretion to process the data submitted, and the decision whether to share the results of any TSDB search must necessarily remain with DHS. However, as it is a requirement of CFATS that data on employees, contractors, and unescorted visitors be submitted, and as high-risk chemical facilities face potential sanctions for failure to comply with CFATS, the electronic submission process should be developed to include an electronic confirmation of receipt for each individual submitted.

Confirmation receipts can be generated electronically using minimal information: date of receipt, time of receipt, and an identification or item number that corresponds to the record of the individual submitted, and if necessary an identification number for the facility making the submission. Records of this submission receipt can be maintained by DHS, the high-risk chemical facility and the authorized service provider, if any, involved in the submission, creating an audit trail that can be used to document compliance by the chemical facility and the service provider with the requirements of CFATS.

3. DHS Should Establish a Uniform Standard for Electronic Submissions for the TSDB.

In an effort to maintain consistency, data security and scalability for any future electronic data submission and validation processes, DHS should consider establishing uniform information technology standards utilizing the latest industry standards. Further dialogue with qualified industry leading service providers should be considered regarding these technology standards.

4. DHS Should Consider the Deployment of a “Pilot Program” for Proof Testing of an Electronic Submission Process to the TSDB

In an effort to assure an efficient, timely and quality delivery of any future electronic data submission process, a pilot program testing process should be considered. A pilot program process should be considered that leverages existing and best-practice technology solutions.

LexisNexis Screening Solutions hopes that DHS finds the above suggestions to be helpful and is prepared to discuss these suggestions in detail with DHS. Should DHS require additional information, please feel free to contact me at 859-351-3865 or via email at trey.benson@lexisnexis.com.

Sincerely,

Trey Benson

AVP Strategic Sales – Chemical & Petrochemical Markets

PUBLIC SUBMISSION

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-0027

Comment Submitted by William Erny, American Chemistry Council

Submitter Information

Name: William Erny

Address:

1300 Wilson Blvd
Arlington, VA, 22209

Email: bill_erny@americanchemistry.com

Phone: 703-741-5246

Organization: American Chemistry Council

General Comment

See attached file(s)

Attachments

DHS-2009-0026-0027.1: Comment Submitted by William Erny, American Chemistry Council (Attachment)



May 13, 2009

Mr. Todd M. Keil
Assistant Secretary for Infrastructure Protection
U. S. Department of Homeland Security
Washington, D.C. 20528

Re: Docket No. DHS-2010-0019—Submission for Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection Request

Assistant Secretary Keil:

The American Chemistry Council (ACC) provides the following comments on the DHS Submission for Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program Information Collection. Many ACC members are subject to these standards and have a significant interest in how this program is developed and implemented.

Ensuring that well qualified and trustworthy personnel are employed by and work for chemical facilities continues to be a priority for ACC members. Under the Responsible Care Security Code, ACC member companies are required to conduct background checks of employees and contractors who have access to restricted areas and critical assets. Periodic reassessments are also required as well. We believe that the core elements of the CFATS program for personnel surety as outlined in RBPS 12 are consistent with the background checks already utilized by ACC members and generally within the chemical industry. We support a robust, comprehensive and effective approach to screening employees and contractors that have unescorted access to restricted areas and critical assets at high risk facilities. However, some of the approaches proposed by the DHS to gather information of affected individuals will have severe unintended consequence and will create significant burden without additional benefit or practical utility. Following is a detailed discussion of these issues.

1. DHS has Exceeded the Legislative Intent of the Personnel Surety Program

ACC believes that DHS is extending the personnel surety program (PSP) beyond the legislative intent of its personnel surety obligation at great cost and burden to the regulated community. The intent of the PSP is to ensure that employees and visitors who have unescorted access to restricted areas at covered facilities are properly screened against the TSDB. Further, in the Final Rule on CFATS published on April 9, 2007, page 17709 it states:

“To minimize redundant background checks of workers, DHS agrees that a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential such as a TWIC, HME, NEXUS, or FAST, will not need to undergo additional vetting by DHS.”

However, as was explained by DHS during the personnel surety briefing at ACC on Wednesday, April 28, the reason why DHS wants all facilities to submit redundant information on affected individuals is to know all the locations at every facility and the specific COIs that every affected individual has access to. This information would then be used for analysis and investigative purposes. ACC contends that this purpose extends far beyond the intended purpose of ensuring personnel surety by checking against the Terrorist Screening Database.

ACC believes that persons who hold a valid TWIC or other federally issued credential such as HME, NEXUS, or FAST satisfy the intent of the personnel surety requirements as outlined in RBPS 12, and such persons need not be submitted into the DHS CSAT Database.

2. Will the PSP be Counter-Productive to Reducing Security Risk?

ACC questions the wisdom of requiring redundant reporting by covered facilities who will be required to submit the same information on affected individuals. From a data quality perspective, having all covered facilities collect, verify, submit and maintain this information creates a situation that is ripe for data entry errors and presents a significant challenge to keep all the information up to date. Further, having so many sources of this information creates an unnecessary and significant vulnerability of the information getting into the wrong hands, which is counter-productive to the mission of enhancing our National security. It also creates a significant increased legal liability for covered facilities that have to accurately and timely collect, verify, report, maintain and protect this sensitive information.

3. DHS has Grossly Underestimated the Burden of the Personnel Surety Program

DHS estimates that the personal surety program will include 1,063,200 affected individuals. ACC is concerned that DHS has grossly underestimated this impact. Simply looking at another similar DHS program, there are currently 1.5 million active TWICs in existence today. The Coast Guard's original estimate of 400,000 turned out to be off by nearly a factor of four. In comparison, the number of CFATS facilities is nearly double that of MTSA (roughly 6000 versus 3200), and when you consider the additional CFATS requirement for reporting escorted facility employees and the multiple and redundant entries that are required by each covered facility and for reporting when affected individuals no longer have access to restricted areas, ACC estimates that the number of affected individuals will be upwards of 10 million. The administrative burden this will create for both the public and private sectors is simply enormous.

DHS estimates that the amount of time for a responsible entity to submit the information on each affected individual into the CSAT portal is 0.59 hours per individual. DHS also clarified that this time burden is limited in scope to those activities listed in 5 CFR 1320.3(b)(1). ACC believes this time does not accurately reflect the actual time burden imposed on industry associated with the proposed personnel surety program. Specifically, it does not account for investigations, legal review, privacy accommodations and adverse employment decisions. With that said, simply using the 0.59 hours per affected individual estimate and multiplying by a realistic estimate for the number of affected individuals (as described above), ACC believes that a more realistic estimate of the total time burden associated with collecting, verifying, reporting, maintaining and protecting information for each affected individual would be upwards of 6,000,000 man hours. From a cost burden perspective, based on an average hourly wage of \$20 per hour for an appropriate individual with the proper security level and training, the total cost burden imposed on the regulated community would be \$120 million.

Executive Order 12866 directs agencies [to] assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector and to provide a qualitative and quantitative assessment of the anticipated costs and benefits of a Federal mandate resulting in annual expenditures of \$100 million or more, including the costs and benefits to State, local, and tribal governments or the private sector. ACC believes DHS should carefully review as to whether this action qualifies as a significant rulemaking and therefore be subject to the appropriate administrative procedures.

4. DHS expands the Definition of Affected Population

The definition of “Affected Population” expands the Scope of the requirements beyond those established in the regulation at 6 CFR § 27.230(a)(12), which states that a covered facility must “[p]erform appropriate background checks on and ensure appropriate credentials for facility personnel, and as appropriate, for unescorted visitors with access to restricted areas or critical assets” Furthermore, the guidance in RBPS 12 for existing employees does not require escorted employees to be included in the personnel surety requirements for compliance. Following is an excerpt from RBPS 12, Table 17:

Metric 12.1 – New/Prospective Employees & Unescorted Visitors	All new/prospective employees and contractors, as well as any unescorted visitors, who have access to restricted areas or critical assets have appropriate background checks. Access to restricted areas or critical assets is allowed after appropriate background checks have been successfully completed.
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Thus, individuals with escorted access to restricted areas or critical assets fall outside of the scope of the affected population and should not be subject to a background check for CFATS compliance purposes. Only those persons that are escorted by a qualified employee or contractor who has been submitted to DHS and has been cleared through the TSDB will be permitted access to these areas. Further, employees who have not been cleared by DHS will not be permitted unescorted access. This is consistent with other similar security programs such as MTSA and TWIC.

DHS expands the definition of affected individual in the Information Collection Request (ICR) by stating that “(1) facility personnel (e.g., employees and contractors) with access (unescorted or otherwise) to restricted areas or critical assets, and (2) unescorted visitors with access to restricted areas or critical assets” would need the background checks. DHS acknowledged that their intent is to include escorted facility personnel under the personnel surety requirements since it is their belief that these persons pose a greater risk of terrorism and therefore need to be watched. ACC disagrees with DHS that personnel employed by the facility who may have escorted access to restricted areas pose a greater risk of terrorism. Facility employees are required to go through an extensive hiring and application process that ensures identify verification. In addition, if such employees would require access to restricted areas they would have to be escorted by someone who has met the PSP requirement. This new CFATS requirement for escorted facility personnel to meet the PSP requirements would significantly increase the reporting burden and should be eliminated from this program.

5. Some Possible Solutions

DHS should consider reissuing the Personnel Surety Program to OMB as a significant rulemaking thus requiring compliance with the full administrative procedures, including risk/benefit analysis. The Paperwork Reduction Act was not intended for conducting rulemaking as comprehensive as the Personnel Surety Program. Additionally, DHS should consider as a part of the rulemaking that it conduct a public

meeting so that members of the regulated community and the public would have the opportunity to air its concerns and engage the Agency. This would help to ensure that a reasonable approach is considered that adequately affords the proper level of security at high risk chemical facilities while minimizing regulatory burden.

DHS should accept TWIC and HME and other Federal security credential programs as meeting the CFATS personal surety requirement. DHS should NOT require covered facilities to submit into the DHS CSAT portal redundant information on affected individuals who have already been screened and cleared against the TSDB and who hold an active, valid TWIC or other Federal security credential. This one step alone would help to considerably alleviate the reporting burden on the regulated community, without compromising security. Additionally, this would allow DHS to focus its resources and attention on those affected individuals who have not yet been screened.

As a practical matter, many companies should be permitted to develop groups of employee submittals that could be provided to DHS. These submittals would not be facility based. The DHS requirement for facility-based reporting would essentially undercut existing practices by having the owner/operator submit names based upon each site. This leaves little flexibility if employees work at multiple sites. Further the requirement for notifying DHS when someone leaves their employment adds burden for facilities with no discernible benefit.

Lastly, the new CFATS requirement for escorted facility personnel to have a background check is inconsistent with the congressional intent, the regulatory language and the RBPS guidance and should be eliminated entirely from this program.

Again, thank you for this opportunity to provide comments on this important issue. Please feel free to reach out to me if you have any questions or require further information.

Sincerely,

A handwritten signature in black ink, appearing to read "William J. Erny". The signature is fluid and cursive, with a large, stylized initial "W".

William J. Erny
Senior Director, Security
American Chemistry Council

PUBLIC SUBMISSION

As of: May 14, 2010 Received: May 13, 2010 Status: Draft Tracking No. 80aec453 Comments Due: May 13, 2010 Submission Type: Web

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0028

Comment Submitted by

Submitter Information

Name: Ann M. Beauchesne

Address:

1615 H Street, NW
Washington, DC, 20062

Email: meggers@uschamber.com

Phone: 202-463-3100

Fax: 202-463-3177

Submitter's Representative: Matthew J. Eggers

Organization: U.S. Chamber of Commerce

General Comment

See attached file(s)

Attachments

DHS-2009-0026-DRAFT-0028.1: Comment Submitted by

U.S. Chamber of Commerce

www.uschamber.com



May 13, 2010

Ann Beauchesne

Vice President

National Security & Emergency Preparedness Department

The Honorable Rand Beers
Under Secretary for National Protection and Programs
U.S. Department of Homeland Security
Washington, DC 20528

Re: Docket No. DHS-2009-0026

Dear Under Secretary Beers:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, writes to thank the Department of Homeland Security (DHS) for collecting public comments on the Chemical Facilities Anti-Terrorism Standards (CFATS) Personnel Surety program.¹ The Chamber's concerns and views relating to the CFATS Personnel Surety program include:

(Conflicting) Laws Applying to Background Checks; Screening Facility Personnel, Visitors

The Chamber is concerned that the Chemical Security Assessment Tool (CSAT) Site Security Plan (SSP) Questions document asks for information related to Personnel Surety that is either protected under existing U.S. privacy laws or unavailable due to the lack of a direct employment relationship between the facility site owner and the individual (e.g., an employee of a contractor, a first responder). For example: CSAT SSP question 18.3-16663,² related to Terrorist Screening Database (TSDB) Records, asks whether a facility will implement a process to submit personally identifiable information about facility personnel, and as appropriate, unescorted visitors, who have access to restricted areas or critical assets so DHS can perform TSDB background checks. This question raises several issues.

¹ See 75 Federal Register (FR), pages 18850-18857, available at <http://edocket.access.gpo.gov/2010/pdf/2010-8312.pdf> (April 13, 2010).

² CSAT questions available at www.dhs.gov/xlibrary/assets/chemsec_csat_ssp_questions.pdf.

- DHS has not explained how it will request this information from facilities. In June 2009, DHS published an information collection request entitled “Submission for Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection 1670-NEW”³ but DHS has not published a final tool to guide compliance by owners/operators.
- Screening might yield a high number of false positives or information not germane to whether a person has ties to terrorism that could delay access for essential workers/visitors.
- Various federal and state laws, such as the Fair Credit Reporting Act (FCRA),⁴ require protection of personally identifiable information. Obligations that a facility has under the FCRA might preclude a facility from providing such information in an SSP. Potential conflicts exist between CFATS, the FCRA, and other laws that need to be clarified. Also, because of privacy laws, site facilities might not be able to obtain personally identifiable information for workers that are not employees of the site owner (e.g., contractors and subcontractors).
- The Chamber supports eliminating the requirement that facilities must re-notify when an affected person(s) no longer has access to a facility’s restricted areas or critical assets. Likewise, it makes practical sense to eliminate the requirement to vet through the TSDB, or conduct several types of background checks on, a person who is escorted on-site.
- The Chamber is uncertain about how DHS will define contractors, which some companies or facilities may use extensively. The department is expected to consider individual contractors as “visitors.” It is unclear if facilities will have to screen contractors, many of whom may work several facilities, against the CSAT. The Chamber understands that facility owners/operators must notify DHS when contractors are no longer at a facility. In effect, a facility needs to notify DHS prior to when a contractor accesses the sensitive areas of a facility; then a facility must notify DHS when they leave. The burden here would be considerable, to put things lightly.
- DHS should propose guidance to explain the difference between contractors and visitors, whether escorted or unescorted. Concern exists about how DHS will treat corporate employees who may go from one company site to another several times a year for audits, etc. DHS has suggested that they be “escorted” so nothing related to background checks will need to be submitted.

Another example: CSAT SSP question 18.39-18800, which attempts to ask how a facility will identify facility personnel and unescorted visitors with access to restricted areas or critical assets if they have ties to terrorism, is difficult to answer as posed by DHS officials.

³ See 74 Federal Register, pages 27555-2757, available at <http://edocket.access.gpo.gov/2009/pdf/E9-13618.pdf> (June 10, 2009).

⁴ See www.ftc.gov/os/statutes/031224fcra.pdf.

- Depending on the facility and its circumstances, delivery and emergency personnel (including, but not limited to, firefighters) may find themselves in a restricted area. This question implies that such individuals should not be permitted access absent screening, which could create a host of practical problems.
- As currently defined by DHS, the scope of the population affected by 6 CFR § 27.230(a)(12) raises significant concerns for the regulated community. DHS states, “[I]f facility personnel have access, either unescorted or otherwise (*e.g.*, escorted), to restricted areas or critical assets, then they are affected individuals who must be screened for the purposes of the Personnel Surety Program.”⁵ This may disallow escorting, thereby enlarging the population of affected individuals without any corresponding security benefit, and implicitly mandate that a covered facility subject all “facility personnel” to the Personnel Surety program. Permitting escorting for individuals who have not been subject to a government-mandated background check, but who otherwise need legitimate access to security-sensitive areas, is a hallmark of other regulatory programs designed to enhance the security of the nation’s critical infrastructure. Escorting should be allowed for CFATS-regulated facilities. In particular, the U.S. Coast Guard permits individuals without a Transportation Worker Identification Credential (TWIC) to access the secure areas of a Maritime Transportation Security Act-regulated facility so long as the individual is escorted.⁶ Why DHS has seemingly departed from this policy in the context of CFATS is not clear. Commenters raised this issue in response to DHS’s June 10, 2009, information collection request, but DHS has not provided a meaningful response.
- DHS has recognized the potential inability of facilities to provide personally identifiable information for emergency and delivery personnel. The CSAT Tool Frequently Asked Questions website (1368)⁷ indicates that fire department personnel are not required to undergo background checks. Also, DHS’s response to public comments on the draft RBPS, or Risk Based Performance Standards Guidance document, indicates that a facility is not required to prescreen every third-party visitor or delivery personnel prior to entry.⁸

Accepting Other Credentials to Reduce the Financial Burden; Limiting Liability

The Chamber recognizes that an appropriate personnel security threat assessment is required under CFATS and can improve a facility’s ability to deter and protect against insider threats or covert attacks. The CFATS Personnel Surety program is similar to the TWIC card, Hazardous Material Endorsement license, and other licensing and credentialing programs.

⁵ 75 FR, page 18855.

⁶ See enclosure number 3 in “Navigation and Vessel Inspection Circular No. 03-07,” U.S. Coast Guard (July 2, 2007) www.tsa.gov/assets/pdf/twic_nvlic_07-02-07.pdf.

⁷ See <http://csat-help.dhs.gov/pls/apex/f?p=100:1:2610238360839734>.

⁸ See www.dhs.gov/xlibrary/assets/chemsec_cfats_riskbased_performance_standards_comments_received.pdf.

- Performing a battery of background checks on both facility personnel (e.g., employees and contractors) who have access to restricted areas or critical assets and on unescorted visitors who have access to these sensitive areas will be costly. Industry has argued that there are many federal identification programs, like TWIC, that have already vetted people through terrorist watch lists. DHS suggests⁹ that it wants to minimize redundant background checks of people who have successfully undergone a security threat assessment conducted by DHS and holds a valid DHS credential. However, the dominant impression of many owners and operators is that facilities in practice will have to provide background and identifying information about individuals in such detail that will negate the benefits of reciprocity between and among a number of DHS credentials. DHS should make explicit that it will accept TWIC and other credentials rather than make facilities run people through the TSDB again. Such a move would go far to reduce the resource burden on covered facilities and DHS. DHS should be cognizant of minimizing adverse financial and operational impacts on businesses, especially on small businesses.
- According to the April 13, 2010, Federal Register notice, “DHS recognizes that some affected individuals under CFATS possess TWICs or other credentials that rely on DHS-conducted TSDB vetting (e.g., an individual vetted under the TWIC program). DHS *intends to reduce the burden* of this collection by recognizing previous TSDB vetting results conducted by DHS” [italics added]. DHS goes on to say, “In lieu of conducting new TSDB vetting on all affected individuals, DHS intends to recognize the results of previous TSDB vetting conducted on individuals enrolled in certain other DHS programs. Specifically, DHS is considering recognizing the previous TSDB vetting results completed by other DHS programs, such as TWIC,” and other related programs.¹⁰ The Chamber support any and all efforts by DHS to reduce the heavy reporting burden on facilities.
- Regarding legal liability concerns, DHS requires facilities to screen individuals (e.g., employees, contractors, unescorted visitors) against the TSDB. However, key questions remain: When individuals’ names get screened against the TSDB, what happens if there is an affirmative match? Does DHS send that information back to the facility? Is it shared with another federal agency, such as the FBI? Implementing anything other than a strict, standardized process could expose a company to potential discrimination claims. The legal liability implications, as well as the likelihood of coordination missteps and confusion, are substantial.

⁹ A footnote to the CFATS RBPS states, in a somewhat confusing way: “Note that to minimize redundant background checks of workers, a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential (such as a TWIC, hazardous materials endorsement (HME) license, NEXUS, or Free and Secure Trade (FAST) credential) will not need to undergo additional vetting by DHS. The facility, however, *still must provide DHS with sufficient identifying information* about the individual and his credential to allow DHS to verify that the credential still is valid” [italics added]; see page 97 of www.dhs.gov/xlibrary/assets/chemsec_cfats_riskbased_performance_standards.pdf.

¹⁰ 75 FR, pages 18853-18854.

Screening Database and Watch Lists Should be Accessible to Allow for Efficient, Consistent Background Checks; No Notice of Positive Matches to TSDB a Concern

- As you know, DHS does not share the background screening requirements, or provide public access to the watch lists that officials use to conduct its screening. However, numerous other U.S. and partner nation agencies do share this information in the public domain, which allows for regulated entities to engage a third-party vendor to facilitate the background screening (e.g., Office of Foreign Assets Control watch lists). Additionally, there is no central database that covered entities could query to validate that an already existing background screening may be on file with DHS.
- The Chamber suggests that the screening database and watch lists be accessible by the public, or that DHS establish a process to authorize regulated entities to use the database and watch list, in order to facilitate efficient and consistent vetting of facility personnel and unescorted visitors.
- The April 13, 2010, Federal Register notice states that DHS “will not routinely notify” facilities of the Personnel Surety program vetting results. Instead, DHS will coordinate with federal law enforcement entities “to monitor and/or prevent situations in which known or suspected terrorists have access to high-risk chemical facilities.” DHS goes on to say that the manner in which the department or federal law enforcement officials contact facilities following vetting are beyond the scope of this notice.¹¹ However, some in industry reasonably believe that facility owners/operators should be notified when there is a positive match to an identity in the TSDB.

Conclusion: The Chamber Supports the CFATS Program and Welcomes a Dialogue on Shaping Its Continued Success

The Chamber appreciates the opportunity to present its view on the CFATS Personnel Surety program. We thank you and DHS for reaching out to the private sector to solicit our concerns and views. While the Chamber has serious concerns with a number of the Personnel Surety program components, the Chamber applauds your efforts to address the nation’s chemical security, and we look forward to working with you and your DHS colleagues on this important issue. Please let me know if you have any questions. Thank you.

Sincerely,



Ann M. Beauchesne

¹¹ 75 FR, page 18856.

PUBLIC SUBMISSION

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Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0029

Comment Submitted by

Submitter Information

Name: David Friedman

Address:

1667 K Street NW

Washington, DC, 20006

Email: dfriedman@npra.org

Phone: 202-552-8461

Fax: 202-457-0486

Submitter's Representative: David Friedman

Organization: National Petrochemical and Refiners Association

General Comment

Please see the attached comments from the National Petrochemical and Refiners Association.

Attachments

DHS-2009-0026-DRAFT-0029.1: Comment Submitted by



National Petrochemical & Refiners Association

1667 K Street, NW
Suite 700
Washington, DC
20006

202.457.0480 voice
202.457.0486 fax

May 13, 2010

National Protection and Programs Directorate
Office of Infrastructure Protection
Infrastructure Security Compliance Division
U.S. Department of Homeland Security

RE: NPRA Comments on Docket No. DHS-2009-0026 – Submission for Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection 1670-NEW

NPRA, the National Petrochemical & Refiners Association, represents more than 450 businesses, including virtually all U.S. refiners and petrochemical manufacturers, their suppliers, and vendors. NPRA members supply consumers with a wide variety of products used daily in their homes and businesses, including fuels, lubricants, and chemicals that serve as building blocks for everything from plastics to clothing, medicine, and computers.

NPRA appreciates the opportunity to provide comments on the “Submission for Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection” notice (75 FR 18850, April 13, 2010). Many NPRA members are subject to the Chemical Facility Anti-Terrorism Standards (CFATS) and have a considerable interest in personnel surety and in the development and implementation of the Personnel Surety Program (PSP).

CFATS require high-risk chemical facilities to submit to the U.S. Department of Homeland Security (DHS) personally identifiable information (PII) for facility personnel and, when appropriate, unescorted visitors with access to restricted areas or critical assets. The purpose of the PII submissions is to provide sufficient information for DHS to screen individuals against the Terrorist Screening Data Base (TSDB). High-risk chemical facilities are also required to conduct background checks to comply with the CFATS risk-based performance standard (RBPS) for personnel surety, otherwise known as RBPS 12.

I. Executive Summary of Comments

NPRA members fully support the need to screen affected parties against the TSDB to ensure the protection of high-risk chemical facilities from insider threats. In fact, many sites regulated by the Maritime Transportation Security Act (MTSA) already conduct background checks as part of the Transportation Worker Identification Card (TWIC) program. The process described in this Information Collection Request (ICR) appears to be an attempt to shift responsibility for ensuring that workers are not terrorists from the government to the



private sector. Specifically, NPRA has the following concerns related to this notice: (1) the regulatory vehicle used to present the procedures and processes outlined in this ICR; (2) the potentially redundant reporting requirements; (3) the overly prescriptive measures to comply with the CFATS performance standards; (4) whether DHS is going beyond the scope of screening for potential terrorists; (5) the legal implications placed on industry as an unintended consequence of CFATS implementation; and, (6) the burden estimate outlined in the ICR.

The remainder of these comments will expand on NPRA's concerns on each of these topics.

II. A Formal Rulemaking with Notice and Comment is More Appropriate than an Information Collection Request

The imposition of new reporting requirements by a federal agency that establish binding, prescriptive future actions on the regulated community typically go through a rulemaking process with notice and comment. The processes and procedures outlined in this ICR do not reflect a simple information collection under an existing rule; rather, the prescriptions in this ICR establish new requirements and burdens on industry. Additionally, for future compliance purposes, the requirements outlined in this ICR should be published in the Code of Federal Regulations, which would be the result of a rulemaking. Whether intended or not, agency action can be considered a rule if it imposes new requirements that have never been outlined in a previous rule or subject to notice and comment. The following examples are from court cases that demonstrate when rulemaking is appropriate.

- In *DIA Navigation Co., Ltd v. Pomeroy*, 34 F.3d 1255 (3rd Cir. 1994), the court concluded that agency policies having a binding effect on the regulated community are rules and require notice and comment.
- In *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994) the court determined that unpublished internal agency documents that prescribe actions to be applied in a mandatory fashion are rules that require notice and comment.
- In *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629-630 (5th Cir. 2001), the court found that new interpretations of existing regulations are considered new rules and subject to notice and comment.

NPRA recommends that DHS first establish this reporting under a formal rulemaking, followed by a series of future ICRs, which will establish and fully explain the authority for the action and provide the regulated community with explicit instructions for future compliance.

III. DHS Can Reduce the Potential Regulatory Burden Posed by this ICR by Excluding Escorted Employees and Persons Who Have Already Been Screened Against the TSDB



One of the overarching principles involved in federal government actions to collect information from the regulated community is to avoid redundant or duplicative reporting. To achieve this objective, persons who have already been screened against the TSDB for other programs, such as the Transportation Worker Identity Card (TWIC) program, Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Free and Secure Trade (FAST) and NEXUS should be excluded from this program. In addition, DHS should also recognize state initiatives that use this type of screening when issuing Hazardous Materials Endorsements (HMEs).

Persons who need access to multiple facilities also face duplicative reporting requirements under the language of this ICR. The purpose of this ICR is to collect information that will allow for screening against the TSDB, not for tracking the movements of employees, contractors and visitors. NPRA agrees that screening is not a static process; however, trying to capture information on the coming and going of employees, contractors and visitors will result in redundant reporting that lends nothing to the objective of screening against the TSDB.

Lastly, employees who are not allowed access to restricted areas or critical assets unless they are escorted do not pose a threat like those who are unescorted. The guidance for RBPS 12 for existing personnel only speaks to unescorted employees and does not require escorted personnel to meet the personnel surety requirements set out in the standard. Excluding escorted employees from this ICR would be consistent with other surety programs under the federal government, e.g., M TSA. There is little practical utility to information collected on escorted employees, just like there being little utility to information collected on any escorted contractor or visitor.

IV. The Measures Found in this ICR May be Too Prescriptive for Meeting a Risk-based Performance Standard under CFATS

DHS cannot deny a Site Security Plan for failure to implement a particular security measure. In essence, this ICR is prescribing what each facility is required to do to meet RBPS 12. However, CFATS also has provisions that require DHS to screen persons for potential ties to terrorism. The only way to resolve the limitations of prescription and requirements for screening that have been placed on DHS is to make individual employees, contractors and certain types of unescorted visitors responsible for providing information directly to DHS, much in the same way terrorist screening is approached under other programs. Through this process DHS would not be prescribing requirements to meet RBPS 12, but would be able to obtain the necessary information for screening against the TSDB.

V. The Requirements Outlined in this ICR Clearly Transcend the Intended Purpose of Collecting Information to Allow for Screening against the TSDB



The purpose of this ICR is to allow DHS to collect sufficient information for terrorist screening, not to track the movements of employees, contractors and other types of unescorted visitors. Information related to temporary changes in access status or other such administrative details have little practical utility for screening against the TSDB.

VI. Companies May be Put in a Legally Vulnerable Position as a Result of the ICR

Facilities are rarely in a legal position to guarantee the truth, correctness or completeness of information related to contractors, vendors, truck drivers or any other non-employees. Requiring signed documents by company officials will not ensure that information from parties outside of their legal control is true, correct and complete. Additionally, signed documents have no practical utility in terrorist screening. DHS should provide the means for non-employees to provide the information directly to DHS and not through a third party, such as a chemical facility.

NPRA is also concerned that the activities under this ICR are not explicitly limited to providing specific information that will allow for screening against the TSDB. The ICR reads as though facilities will somehow assist the federal government in the performance of anti-terrorism duties. Telephone companies have been sued for assisting the government in the setup of wire taps for suspected terrorists; therefore, companies could be vulnerable to legal actions related to privacy.

VII. DHS has Underestimated the Potential Burden Resulting from Compliance with this ICR

DHS estimates that the personal surety program will include 1,063,200 affected individuals. DHS has underestimated the number of personnel who will be affected by this ICR. A brief review of the current TWIC Program reveals the consequences of underestimating the population potentially affected by a regulatory action. The US Coast Guard originally estimated that 400,000 persons would require a TWIC card to comply with MTSA. The TWIC program requires similar screening against the TSDB as is outlined by this ICR. So far, approximately 1,566,000 TWICs have been issued, which is around four times the original estimate. As a result TSA underestimated the number of enrollment centers and staffing needed to implement the program, making TWIC implementation more difficult and time-consuming than anyone imagined.

In comparison, the initial number of CFATS facilities is nearly double the number of facilities that must comply with MTSA (roughly 6000 versus 3200). Considering the additional CFATS requirement for reporting escorted facility employees and duplicative reporting of employees who need access to multiple locations, it is reasonable to conclude that the DHS burden estimate is far lower than it should be.

NPRA recently conducted a sampling of 12 members to determine how many persons would potentially be subject to screening and the number of reports DHS could expect from this ICR. Below is a summary of the answers supplied to NPRA:



- Number of initial submissions required to begin program: **13,479**
- Number of new affected individual initial submissions (Number of new persons granted access during a 30 day period): **21, 020**
- Number of changes to previously submitted data within sample 30 day period: **8,535**
- Number of persons who no longer have access to site within sample 30 day period: **9,857**
- Number of estimated outliers (such as non-scheduled deliveries): **1,936**

It is clear from this small sampling that DHS may have underestimated not only the burden on industry, but also the burden on itself.

VIII. Option to Resolve Issues Reflected in the NPRA Comments

NPRA strongly urges DHS to shift the responsibility for ensuring that employees and non-employees are not terrorists from the private sector back to government, which is where it has traditionally been and should remain. DHS should consider requiring individuals who wish to be granted unescorted access to restricted areas and critical assets to provide information necessary for screening against the TSDB directly to DHS and not through a third party, such as a chemical facility. DHS should set up a program similar to the TWIC program under MTSA and require individuals to provide information and significant updates directly to DHS, where DHS would then provide the individual with credentials in the form of a card that verifies the person has been screened against the TSDB. Additionally, chemical facilities should not be responsible for updating or making any changes to the access status of employees and non-employees. These suggestions are not intended to relieve chemical facilities from their responsibilities to meet RBPS 12 under CFATS; rather, they are proposed here to assist DHS in collecting appropriate and useful information for terrorist screening in a manner that does not place undue burdens or legal vulnerabilities on the regulated community.

IX. Conclusion

NPRA appreciates the opportunity to provide comments on the DHS Personnel Surety Program and views personnel surety as an integral component of chemical site security. The requirements outlined in this ICR are more suited to rule-making because these are newly imposed requirements with a binding effect on future actions by the regulated community. Many of the issues raised in these comments could be addressed by adopting the option presented in Section VIII. There is nothing in Section 550 of the Department of Homeland Security Appropriations Act of 2007 that would prevent DHS from adopting the



recommendations of NPRA. NPRA looks forward to its continued work with DHS and others to ensure the security of petrochemical plants and refineries.

Respectfully submitted,

A handwritten signature in black ink, which appears to read "David Friedman". The signature is written in a cursive style and is positioned above a faint, light-colored rectangular box.

David Friedman
Senior Director, Regulatory Affairs
NPRA



324 Highway 69
Nederland, TX 77627
Phone (409) 724-2565
Fax (409) 724-2671
www.istc.net

8200 North Main
Baytown, TX 77521
Phone (281) 421-0459
Fax (281) 421-8130

600 Marina Street
Beaumont, TX 77703
Phone (409) 833-2378
Fax (409) 833-2376
www.bestcomplex.com



DEPARTMENT OF HOMELAND SECURITY
National Protection and Programs Directorate
Chemical Facility Anti-Terrorism Standards for Personnel Surety

Request for Comments (75 FR 18850) on
New Information Collection Request 1670-NEW
[Docket No. DHS-2009-0026]

COMMENTS OF:
Industrial Safety Training Council
Safety Council Security Consortium

I. INTRODUCTION

The Industrial Safety Training Council (“ISTC”) and the Safety Council Security Consortium (“SCSC”) appreciate the opportunity to comment on the Department of Homeland Security (“DHS”) information collection request (“ICR”) on the vetting of personnel and unescorted visitors with access to restricted areas or critical assets (“covered persons”) at high-risk chemical facility against the Terrorist Screening Database (“TSDB”) as required under the Chemical Facility Anti-Terrorism Standards’ (“CFATS”) personnel surety Risk-Based Performance Standard (“RBPS”).

The ISTC is a 501(c)3 non-profit training and educational organization located in Southeast Texas. The ISTC and thirteen other safety councils comprise the SCSC. Together, the ISTC and the SCSC operate an established, highly successful and comprehensive identification verification and background screening program for contractors, and their employees, working at over 100 chemical and refining facilities throughout Texas, the Gulf Coast, and also in New Jersey, West Virginia and several other states. The ISTC’s subscriber base includes well over 1,100 contractor companies, and the ISTC implements training for over 4,000 contractor companies. The ISTC provides site-specific, in-house-designed security programs for refineries, petrochemical plants, and manufacturing facilities.

Under Section 550 of the Homeland Security Appropriations Act of 2007,¹ Congress gave DHS regulatory authority over security at high-risk chemical facilities. On April 9, 2007, DHS published the CFATS interim final regulations.² DHS has also established 18 RBPSs under CFATS for chemical facility security, including the personnel surety RBPS. Under the

¹ Pub. L. 109-295, Sec. 550.

² 6 CFR Part 27; 72 FR 17688.

personnel surety RBPS-12, high-risk chemical facilities are required to implement “measures designed to identify people with terrorist ties.”³ Information to achieve this requirement is to be submitted to DHS through the Chemical Security Assessment Tool ("CSAT"), an online data collection portal. The ISTC/SCSC is looking forward to working with DHS to implement a CSAT pilot, and the ISTC/SCSC respectfully submits the following comments.

II. DISCUSSION

A. The ISTC/SCSC is concerned that the DHS information collection will be overly burdensome on ISTC/SCSC member facilities and participating contractors.

The ISTC/SCSC is not aware of any facility that currently maintains, in an easily accessible or transferrable format, the information proposed in the ICR. Because of the broad scope of the ICR, facilities would be required to maintain a comprehensive database of personal information about covered persons, and those facilities would further be required to perform regular updates to keep the information current. The ISTC/SCSC member facilities have designated the ISTC/SCSC to perform many of the functions related to covered persons that involve collecting the types of information proposed in the ICR.

The ISTC/SCSC has already considered and dealt with the legal issues associated with collecting information of this kind. Through nationally recognized consumer reporting agency vendors (which are fully regulated under the federal Fair Credit Reporting Act), the ISTC/SCSC operates an established, highly successful, comprehensive and privacy-sensitive identification verification and background screening program. The ISTC/SCSC process verifies and validates the identity of employees, contractor employees and unescorted guests and their current status of authorization by a specific facility to enter that facility. The ISTC/SCSC process also already identifies certain individuals with terrorist ties by checking names against the OFAC list. The ISTC/SCSC welcomes the expansion and strengthening of this check for its member facilities through CSAT.

B. Should DHS choose to move forward, then the ISTC/SCSC would be a competent and reliable partner with DHS to ensure that all required information about covered persons is submitted for proper vetting against the TSDB.

Although the ISTC/SCSC does not currently collect personal information for covered persons in each category listed in the ICR, the addition of these categories can be easily accommodated in the routine technical processes of the ISTC/SCSC information collection. The ISTC/SCSC looks forward to working with DHS as the dialogue continues on the appropriateness of including particular data points in the ICR. Regardless, the ISTC/SCSC can effectively maintain and update this information as needed under the proposed DHS schedule. The ISTC/SCSC would also be able to leverage the existing infrastructure and network capabilities to ensure secured electronic delivery of the information to DHS.

The ISTC/SCSC has also implemented an additional layer of security not included in the ICR by capturing digital images (photographs) of each contractor employee or other employees

³ 6 CFR 27.230(a)(12)(iv).

who pass through the ISTC/SCSC system. Although an image as an identifying characteristic of a particular individual can quickly become outdated, the ISTC/SCSC digital images of the covered persons that pass through the ISTC/SCSC system are sometimes updated daily, but in no event are older than six months. The ISTC/SCSC has determined that incorporating current digital images of covered persons is beneficial throughout the identification verification process and reduces false positives.

C. The ISTC recommends that DHS permit high-risk chemical facilities to designate third parties to collect and submit the required data to DHS.

In order to preserve the highly effective personnel surety processes currently in place at chemical and refining facilities nationwide, the ISTC/SCSC recommends that the personnel surety RBPS include explicit provisions that allow private sector third-parties operating on behalf of covered facilities to prepare and to submit information on covered persons to DHS for vetting against the TSDB. DHS already provides a process for TWIC vendors to submit names to the TSA to be checked against the TSDB. DHS should assure that private sector third-parties under CFATS have the ability to perform the same comprehensive TSDB functions for covered persons at high-risk chemical facilities.

CFATS provides high-risk chemical facilities with the discretion to choose and implement security measures that satisfy the RBPSs. Further, the CSAT User Guide⁴ states that the system, "was designed to allow each company to determine the best way to provide information." However, the ability of third parties to provide facilities with assistance is limited to the role of a "preparer" to enter the data into the CSAT system. At present, only a designated company employee may submit the information collected in the CSAT system to DHS.

The ISTC/SCSC is well-positioned to serve as a preparer of information. The ISTC/SCSC has deep knowledge of each of its members' facilities through its safety and security training of personnel and contractors. The ISTC/SCSC is also ready to step into the role as a regional supplier of information to DHS in order to ease the administrative burden on the ISTC/SCSC member facilities. As a conduit for these facilities, the ISTC/SCSC can provide a universal format to submit information to DHS. Therefore, we urge DHS to remain flexible on the source of the information collected. The ISTC/SCSC believes that the facilities should have the discretion to designate a third party to perform both the preparation and the submission of information in order to further minimize the burden of the ICR on high-risk chemical facilities.

DHS has recognized that many chemical facilities are not prepared to handle, "the potential sensitivity of the information uncovered" during a background check, which "are subject to a unique set of laws and regulations to protect employees and consumers in the event of misuse of data or fraud."⁵ Similarly, the information to be collected to perform a check for terrorist ties against the TSDB under the ICR may also involve sensitive personal information that facilities may not be prepared to handle. A private sector third-party, such as the ISTC/SCSC that specializes in compliance with the Fair Credit Reporting Act and other

⁴ http://www.dhs.gov/xlibrary/assets/chemsec_csatuserregismanual.pdf

⁵ http://www.dhs.gov/xlibrary/assets/chemsec_cfats_riskbased_performance_standards.pdf

applicable federal and state information, privacy, and security laws would allow participating chemical facilities to preserve valuable administrative resources. Because a significant number of facilities currently use private sector third-parties to comply with other requirements of the personnel surety RBPS, these facilities should be able to designate these same service providers to prepare and to submit information through CSAT to DHS.

III. CONCLUSION

We appreciate your consideration of these comments by the ISTC and the SCSC.

Respectfully submitted,

Russell Melancon Jr., CAE
President & CEO
Industrial Safety Training Council
324 Hwy 69
Nederland, TX 77627

PUBLIC SUBMISSION

As of: May 14, 2010 Received: May 13, 2010 Status: Draft Tracking No. 80aed106 Comments Due: May 13, 2010 Submission Type: Web

Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0031

Comment Submitted by

Submitter Information

Name: Dan Walters

Address:

600 Fourth St

Sioux City, IA, 51102-6000

Email: danielb.walters@gmail.com

Phone: 7122336565

Organization: Chemical Sector Coordinating Council

General Comment

See attached file(s)

Attachments

DHS-2009-0026-DRAFT-0031.1: Comment Submitted by

Chemical Sector Coordinating Council

May 13, 2010

Todd M. Keil
Assistant Secretary
Office of Infrastructure Protection
National Protection and Programs Directorate
Department of Homeland Security
Washington, DC 20528

American Coatings Association

American Chemistry Council

American Petroleum Institute

Agricultural Retailers Association

Chemical Producers & Distributors
Association

The Chlorine Institute

CropLife America

Compressed Gas Association

The Fertilizer Institute

International Institute of Ammonia
Refrigeration

International Liquid Terminals
Association

Institute of Makers of Explosives

National Association of Chemical
Distributors

National Petrochemical &
Refiners Association

Society of Chemical Manufacturers and
Affiliates

Re: Docket No. DHS-2009-0026—Chemical Facility Anti-Terrorism
Standards Personnel Surety Program Information Collection
Request

Dear Mr. Keil:

On behalf of the Chemical Sector Coordinating Council (CSCC)¹, I am writing to provide comments on the Department of Homeland Security (DHS)'s proposed Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program (PSP) Information Collection Request (ICR) (75 Fed. Reg. 18850, April 13, 2010).

CSCC members have a vital interest in having successful personnel surety programs at our facilities and are committed to implementing solutions that both comply with DHS requirements and are workable for private sector owner/operators. CSCC members already follow a series of voluntary practices, guidelines and standards to ensure that only qualified and trustworthy personnel are hired to work at chemical facilities. We support a robust and comprehensive approach to screening potential and current employees and contractors that work at our facilities – regardless of whether those facilities are deemed “high risk” under the CFATS program. However, we have serious concerns about the approach proposed by the DHS to gather information on affected individuals. As discussed below, we believe the proposed PSP:

- Is inconsistent with the CFATS statute because it is not a performance standard;

¹ The mission of the CSCC is to advance the physical and cyber security and emergency preparedness of the nation's chemical sector infrastructure. Membership in the CSCC is open to any industry association predominantly representing chemical sector businesses. The CSCC manages its activities consistent with Homeland Security Presidential Directive 7 and related authorities.

- Is an expansion of the Interim Final Rule that requires rulemaking;
- Is unnecessary to that extent, duplicative of existing credentialing systems, and will create significant burdens on facilities; and
- Requires analysis under E.O. 12866 and statutes that protect small businesses.

Below we present a detailed discussion of these issues. We urge DHS to implement the PSP in a way that remains within the scope of Interim Final Rule. We look forward to working with you to help facilitate that process.

1. PSP Conflicts with the Congressional Mandate that DHS Implement Performance Standards

Since each chemical facility faces different security challenges, Congress explicitly directed DHS to issue regulations "establishing risk-based performance standards for security chemical facilities."² Performance standards are particularly appropriate in a security context because they provide the extraordinary diversity of CFATS facilities with flexibility to address their equally diverse and unique security challenges. Using performance standards rather than prescriptive standards also helps to increase the overall security of the sector by varying the security practices used by different chemical facilities. Security measures that differ from facility to facility mean that each presents a new and unique problem for an adversary to solve.

The Office of Management and Budget (OMB)'s Circular A-119 (Feb. 10, 1998) explains that performance standards "state requirements in terms of required result with criteria for verifying compliance but without stating the methods for achieving required results." DHS cited this OMB Circular in the proposed CFATS rules³ and in its *Risk-Based Performance Standards Guidance* for CFATS issued in May 2009.⁴

Consistent with Congressional intent and the OMB Guidance, the CFATS interim final rule established RBPS # 12, which requires facilities to "perform appropriate background checks on and ensure appropriate credentials for facility personnel and as appropriate, for unescorted visitors with access to restricted areas or critical assets, including . . . [m]easures designed to identify people with terrorist ties."

Unfortunately, the proposed PSP conflicts with Congress's intent in enacting the CFATS statute, and the OMB Circular, because it takes away a high-risk facility's flexibility to achieve compliance with RBPS-12. The CFATS statute, and RBPS #12, allow a facility to meet its obligations by any method that is "designed to identify people with terrorist ties." The preamble to the interim Final Rule (IFR) clarified that "[t]his . . . standard can be achieved by

² Pub. L. No. 109-295, § 550(a), 6 U.S.C. § 121 note.

³ See 71 FR 78282-83 (Dec. 28, 2006).

⁴ *Risk-Based Performance Standards Guidance, Chemical Facility Anti-Terrorism Standards*, v. 2.4 (Oct. 2008), at 9.

checking against the consolidated Terrorist Screening Database (TSDB).”⁵ As a result, therefore, a facility should be deemed to satisfy RBPS #12 by any personnel surety program that entails a TSDB check – for example, a system that requires presentation of a TWIC, HME, NEXUS or FAST credential. Also, while it is essential for DHS to establish a mechanism to enable facilities to run personnel against the TSDB (especially personnel who do not have one of the foregoing credentials), DHS should not impose any obligations on facilities seeking to use that mechanism beyond whatever minimal requirements are needed to ensure that users are legitimate and do not impair its functionality.

The preamble to the IFR stated that, “[t]o minimize redundant background checks of workers, DHS agrees that a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential such as a TWIC, HME, NEXUS, or FAST, will not need to undergo additional vetting by DHS.”⁶ DHS has no legal authority to now impose more terrorist background checking requirements than were announced in the IFR. Neither the CFATS statute nor RBPS #12 authorize DHS, in the context of the CFATS program, to demand more, or to now question the sufficiency of other federal vetting and credentialing programs for CFATS purposes.

2. The PSP Changes the IFR and thus Must Go Through Notice & Comment Rulemaking

The CSCC is concerned about aspects of the ICR, and statements by DHS staff, indicating that DHS may be retreating from statements in the IFR or adding new requirements upon facilities not contained there. These include:

- DHS’s new plan to conduct “recurrent vetting” of cleared personnel, thus requiring facilities to notify DHS when a person no longer has access to restricted areas or critical assets.
- DHS’s intention to require facilities to submit updates on a DHS-approved schedule whenever an approved person’s “information has changed.”
- The statements in the ICR that DHS is now only “considering recognizing the previous TSDB vetting results completed by other DHS programs.”
- Statements by DHS staff that DHS intends to use the PSP as a way of linking each person screened through it to a particular facility.

The sum effect of these changes is that the PSP is prescribing specific protocols for administering background checks that take a categorically different approach than all other TSDB background check programs currently administered in the United States. They suggest

⁵ 72 Fed. Reg. 17709 (April 9, 2007).

⁶ Id.

that DHS does *not* intend to utilize the PSP merely as a mechanism to ensure that individuals who are known to be threats are prohibited from accessing our nation’s critical infrastructure, but rather to leverage private sector resources to track all individuals with access to these facilities, regardless of whether they have been identified as terrorist threats to the homeland.

The IFR is a final regulation, and can only be retracted or expanded by notice and comment rulemaking. Because this transformation of RBPS #12 into a public/private potential terrorist tracking system is inconsistent with the IFR, DHS would have to go through rulemaking to implement it. As DHS staff have publicly recognized, the ICR notices are not proposed rules, and hence do not satisfy that requirement. Therefore, DHS should initiate the public notice and comment process established by the Administrative Procedure Act (APA) if the agency decides to go ahead with these additional provisions. That process would properly alert the public to DHS’s intentions and would obligate DHS to properly respond to all substantive comments.

If DHS does not institute a new rulemaking process, the PSP program will be an illegal or “de facto” rule to the extent that it varies from what was described in the IFR. The APA provides a broad definition of a “rule” as an “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future”⁷ Agency actions such as the PSP can be considered a rule even if not issued as such. Determining whether an agency action is a rule has been the subject of much litigation, and case law provides extensive examples of spurious rules that were invalidated:

- In *DIA Navigation Co., Ltd v. Pomeroy*, 34 F.3d 1255 (3rd Cir. 1994), the court concluded that an INS policy, applied in a binding form to carriers and based on an internal legal opinion that required carriers to pay for the detention of stowaways was, in fact, a rule that required notice-and-comment rulemaking due to its binding effect on carriers.
- In *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994), an unpublished internal paper that the Interior Department applied in a mandatory fashion was held to be a rule that required notice-and-comment rulemaking.

Even if the PSP were viewed as a “new interpretation” of the IFR, that would require notice-and-comment rulemaking:

- In *Shell Offshore Inc. v. Babbitt* , 238 F.3d 622, 629-630 (5th Cir. 2001) the court determined that an offshore leasing rate was a “new interpretation” of a regulation governing acceptance of a tariff, which was a “new substantive rule” also subject to notice and comment.

⁷ See 5 U.S.C. § 551(4).

If DHS is determined to proceed with these changes to the IFR, it should explain their necessity and legal authority in a proposed rule. In doing so, DHS will have to comply with E.O. 12866, the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act since, as explained in Section 4 below, the PSP as currently envisioned will itself:

- Cost over \$100 million in a single year and thus be a “major” rule; and
- Have a significant impact on a substantial number of small entities.

Or, as we recommend, DHS should simply drop these changed features and proceed with a simplified PSP designed simply to enable facilities to meet their obligations under RBPS # 12.

3. The Proposed PSP Will Impose Reporting Obligations that Are Unnecessary, Redundant and Far More Burdensome than Necessary

The ICR requests comments on whether the PSP will comply with the Paperwork Reduction Act (PRA), and in particular whether it is necessary, whether it minimizes the burdens associated with it, and whether those burdens have been estimated accurately.⁸ As explained below, the PSP does not satisfy the PRA because (i) aspects of it are unnecessary, (ii) it will impose redundant requirements, and (iii) DHS’s estimate of reporting burden is dramatically low.

a. Aspects of the PSP Are Unnecessary

Section 1 of these comments explains how the PSP exceeds DHS’s statutory authority, because it limits the flexibility that facilities are entitled to under a statute that authorizes only “performance standards,” not prescriptive requirements. To the extent that the PSP goes beyond DHS’s legal authority, it is by definition not “necessary for the proper performance of the functions of the agency.”

b. The PSP Would Lead to Redundant Collection of Information

Among the individuals that will have access to restricted areas or critical assets at high-risk chemical facilities are those that have already been vetted against the TSDB; received other relevant background checks – identity, criminal history, and citizenship; and, in most cases, received a credential from a federal agency.⁹ The proliferation of federal security screening programs has already led to thousands of individuals being subject to more than one screening program. This redundancy is unnecessary and wasteful for the regulated population and the government, and is exactly the sort of thing that the Paperwork Reduction Act was intended to flag and curtail. To its credit, earlier this year the White House issued recommendations to federal agencies to promote comparability and reciprocity of assessments across credentialing

⁸ 75 Fed. Reg. 18856.

⁹ Security background checks administered by the Transportation Security Administration, the US Coast Guard, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Department of Defense, and the like.

and screening programs and to implement the principle of ‘enroll once, use many’ to reuse the information of individuals applying for multiple access privileges.¹⁰ The proposed PSP establishes yet another federal background check program for many of these same individuals, and is at odds with the Administration’s overall effort to harmonize existing federal background check programs.

As noted above, the IFR stated bluntly that, “[t]o minimize redundant background checks of workers, DHS agrees that a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential such as TWIC, HME, NEXUS, or FAST, will not need to undergo additional vetting by DHS.”¹¹ We support this position. However, the PSP dramatically rolls back this clear position, instead saying that:

DHS is *considering recognizing* the previous TSDB vetting results completed by other DHS programs, such as TWIC, and the Trusted Traveler Programs (Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Free and Secure Trade (FAST), and NEXUS). Further, DHS is also *considering recognizing* the results of TSDB vetting (conducted by DHS) upon which each State relies when issuing a Commercial Driver's License with a Hazardous Materials Endorsement (HME).¹²

It is particularly remarkable that, while the Administration is struggling to get different federal agencies to grant reciprocity to each other, DHS is not willing to accept equivalent federal background checks, including those *conducted by itself*, as sufficient for the CFATS standard. Instead, the agency’s proposal requires facilities to “submit the name and credential information for these persons along with the application data for other employees [and directs] facilities ... not [to] allow unescorted access to a critical asset or restricted area to a person in possession of a DHS credential unless information on that person has been submitted [because] *DHS [needs to] determine whether the applicant poses a security threat.*”¹³ (Emphasis added.)

According to written testimony provided by David Heyman, DHS Assistant Secretary for Policy, on April 21, 2010 before the Senate Commerce, Science and Transportation Committee, TSA’s security threat assessment for the HME vetting program “covers approximately 3 million drivers authorized to transport hazardous materials.” Heyman also testified that “TSA has conducted a full security threat assessment of, and issued a Transportation Worker Identification Credential (TWIC) to, 1.6 million workers requiring unescorted access to secure areas of port facilities.” HME drivers are already one of the largest groups of TWIC holders. Individuals with these types of credentials must go through a “rigorous vetting program,” as Assistant Secretary Heyman correctly pointed out to Congress. Many of these credentialed workers are either directly employed by a high-risk facility or provide service to these facilities as a contractor or transport carrier delivering or picking up a chemical of interest (COI).

¹⁰ *Surface Transportation Security Priority Assessment*, White House, March 2010.

¹¹ Transportation Worker Identification Credential (TWIC), Hazardous Materials Endorsement (HME), Fast and Secure Trade (FAST).

¹² 75 Fed. Reg. 18854 (emphasis added).

¹³ 67 FR 17709 (April 9, 2007).

In the case of any high-risk facility that is also licensed or permitted by the ATF to manufacture, import, distribute, or use explosives, the redundancy of the CFATS program will be 100 percent, because all individuals that are authorized to possess explosives, and those empowered to make management decisions or policies, are subject to a background check that is equivalent to TWIC, HME, FAST, or any other DHS vetting programs.¹⁴

For this ICR to be approved, DHS needs to explain why the “rigorous vetting program” for HMEs, TWICs, and other equivalent vetting programs needs to be duplicated by the CFATS program. We simply see no additional security return. The CSCC cannot imagine any reason, other than DHS’s apparent plan, noted above, to use the PSP to create a new potential terrorist tracking system – something which we also have explained is beyond DHS’s CFATS authority.

c. DHS Has Grossly Underestimates the PSP’s Real Burdens

We believe DHS is significantly underestimating the number of times affected individuals that will be impacted by this proposal, given the large universe of existing credentialed employees and contractors working at high-risk facilities:

- In cases such as an agricultural retail or distribution facility, all employees at some point in a day will likely be in a restricted area or near critical assets. In many cases, such facilities cannot feasibly isolate restricted areas or critical assets to a limited number of employees or visitors.
- DHS’s estimate fails to take into account the additional facilities that may fall under the CFATS program once the “indefinite time extension” issued by DHS on January 9, 2008 is removed for farms, ranches, nurseries and other agricultural operations.
- Many high-risk facilities in the retail segment of the economy during peak times of the year could see a large number of visitors (i.e. customers) coming onto the facility. Depending on how DHS defines “unescorted visitor,” and given the existing population of 5,333 finally or preliminarily tiered facilities, the number of affected individuals could be an order of magnitude greater than the 354,400 figure estimated by the agency

The CSCC also believes that DHS does not fully recognize the background checking consequences that will flow from the certain fact that many individuals, such as truck drivers or project contractors, will require ongoing access to facilities.

¹⁴ Contrary to the statement in the agency’s April 13th notice, the ATF vetting program does include a check against the TSDB. The FBI operates the National Instant Criminal Background Check System (NICS) that ATF uses to vet employees. One of the databases that NICS searches is the National Crime Information Center database, which includes the TSDB.

The PSP also fails to take into account the potential for certain Maritime Transportation Security Act (MTSA)-regulated facilities to be subject to CFATS in the future, as the Administration calls for. Currently, there are approximately 3,200 MTSA-regulated facilities. If the current MTSA exemption is eliminated, the number of CFATS-regulated facilities could increase by more than 50% above the existing population. The number of affected individuals might increase even further, based on the relative size of certain marine facilities to their inland counterparts.

The administrative burden that PSP would create for both the public and private sectors is simply enormous. As a standard of comparison – and warning – the Coast Guard’s original estimate of 400,000 people requiring TWICs has already proven to be understated by factor of four. Based on likely populations and multiple facility access requirements, the CSCC estimates that the number of submittals required by PSP would affect upwards of 10 million. DHS estimates that the amount of time for a responsible entity to submit the information on each affected individual into the CSAT portal is 0.59 hours per individual. DHS also clarified that this time burden is limited in scope to those activities listed in 5 CFR § 1320.3(b)(1). CSCC believes this time does not account for investigations, increased liability, privacy accommodations and adverse employment decisions. But even accepting the 0.59 hour estimate and multiplying by a more likely estimate for the number of affected individuals (as described above), the total time burden associated with collecting, verifying, reporting, maintaining and protecting information for each affected individual could exceed 6,000,000 person hours. Based on an average hourly wage of \$20 per hour for an appropriate individual with the proper security level and training, the total cost burden imposed on the regulated community would be \$120 million.

4. DHS Should Comply with E.O. 128866, the RFA and SBREFA

For the reasons just discussed, the economic impacts of a PSP program could be staggering. This has several consequences.

First, Executive Order 12866 directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, and to provide a qualitative and quantitative assessment of the anticipated costs and benefits of a Federal mandate resulting in annual expenditures of \$100 million or more. The CSCC believes DHS should treat this attempted expansion of the Interim Final Rule as a significant rulemaking and comply with the Executive Order.

Second, the impacts of the proposed PSP will be especially profound on small businesses. In fact, the CSCC believes the PSP will have a significant economic impact on a substantial number of small entities, which requires DHS to conduct a Regulatory Flexibility Analysis in accordance with the Regulatory Flexibility Act, and to convene a Small Business Regulatory Enforcement Fairness Act panel.

The Regulatory Flexibility Act has two complementary objectives. The first is to ensure that federal agencies follow specific procedures to assess the economic impacts of their regulatory

actions on small entities, and then consider regulatory alternatives that would reduce those impacts. The second, broader objective is to change the culture within federal agencies so that they appreciate the importance of small entities and reflect this appreciation in their regulatory actions. For many years, the RFA, as a tool for regulatory reform, seemed to be doing poorly at both objectives. Agencies either essentially ignored the RFA or conducted perfunctory regulatory flexibility analyses.¹⁵

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)¹⁶ reinforced the RFA by making agency noncompliance with the RFA judicially reviewable.¹⁷ SBREFA also requires an agency to convene a special review panel consisting of OMB and representatives of affected small entities whenever it has to prepare a regulatory flexibility analysis.¹⁸

CSCC members appreciate that DHS has voluntarily provided an initial analysis of the PSP's potential impacts on small entities, but this was conducted prior to final tiering. The new cost, time and technical burdens make it clear that the PSP will have a significant impact on a substantial number of small entities. Therefore, DHS should reassess its compliance with a small business analysis should be re-evaluated by DHS.

Conclusion

CSCC members remain committed to complying with CFATS through the implementation of suitable security measures at our facilities. Furthermore, we openly welcome frank discussions with DHS as to how we achieve this mutual objective. The CSCC strongly urges DHS to consult with it about future program development before such regulatory initiatives are prescribed to help ensure that errors such as those introduced in PSP do not continue in future rulemakings.

CSCC is also concerned that the current ICR notice does not respond to every significant comment filed on the initial ICR. We hope that DHS will fully respond to the significant comments contained here, as well as to others submitted to the docket under current, past and future ICR notices.

Thank you for your consideration of our views and concerns.

Respectfully,



Dan Walters
Chairman

¹⁵ Keith W. Holman, *The regulatory flexibility act at 25: Is the law achieving its goal?*, 33 Fordham Urb. L.J. 1119,1132 (2006).

¹⁶ Pub. L. No. 104-121.

¹⁷ 5 U.S.C. § 611

¹⁸ 5 U.S.C. §609(b).

PUBLIC SUBMISSION

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Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0032

Comment Submitted by

Submitter Information

Name: Lindsay Otten

Address:

1701 Towanda Ave

Bloomington, IL, 61702-2500

Email: lotten@growmark.com

Phone: 309-557-6818

Organization: GROWMARK, Inc.

General Comment

See attached file(s)

Attachments

DHS-2009-0026-DRAFT-0032.1: Comment Submitted by

May 13, 2010

DHS/NPPD/IP/ISCD CFATS Program Manager
Department of Homeland Security
245 Murray Lane SW
Mail Stop 0610
Arlington, VA 20528-0610

Re: Docket No. DHS-2009-0026-National Protection and Programs Directorate;
Chemical Facility Anti-Terrorism Standards Personnel Surety Program

To Whom It May Concern:

GROWMARK, Inc. is a regional federated agriculture supply and grain marketing cooperative serving thousands of farmers from Iowa to the East Coast with \$6.1 billion in annual sales. We provide wholesale purchasing of farm inputs, grain marketing support, and a wide range of business services to FS member cooperatives. Our headquarters is located at 1701 Towanda Avenue, Bloomington, Illinois.

The GROWMARK System of farmer owned cooperatives believes that the current regulations under the Department of Transportation Hazardous Materials Regulations and Transportation Worker Identification Cards (TWIC) does satisfy the requirement to conduct background checks. These regulations require us to perform background checks on certain company personnel. The Department of Homeland Security(DHS) stated in the final Chemical Facility Anti-Terrorism Standards (CFATS) rule that personnel who have successfully completed these background checks would not be required to undergo additional screenings by DHS. However, the DHS has contradicted that statement by insisting, these employees be screened under Personnel Surety, as well. These background checks should suffice. While we understand this only ensures the security of our drivers, those individuals should not have to be rescreened.

In the agricultural industry, there are various seasons of high demand. During that time, agricultural retail facilities hire many part-time employees to help meet the demand of our farmer customers. Therefore, those employees would have to be added to the submission and then deleted once they have left. Depending on the season, a part-time employee could come and go in less than three weeks. DHS is requiring us to submit the information on these employees within 90 days. Most of the employees will have come and gone by the required submission time. Depending on the company, the number of part-time employees could range anywhere from 5-100. During the busy season, it would be unreasonable to expect those names be submitted during the time frame they are employed with the company. The administrative burden of this task would be significant on someone working for an agricultural retailer. Please note, in most instances those

employees are required to have the Hazardous Materials Endorsement (HME). Therefore, by accepting the HME background check, DHS would reduce the administrative burden.

The agricultural industry has a unique relationship with our customers. We know many of our customers from the communities in which we live and the long term basis we may do business with families. In the busy seasons, it is not uncommon for a known farmer to pick up some of their products. While the farmer may not be escorted the entire time, he/she would be seen by various people throughout the facility. Also, before the customer would leave the facility someone would have to write them a receipt and review their purchase. Therefore, a company professional would know what products he/she picked up in their purchase. This poses the question, if the farmer would have the potential to be unescorted throughout the facility, would the DHS require us to submit their names to the Terrorist Screening Database (TSDB)? The agricultural industry prides itself on the fact that we do know our customers. We feel it would be detrimental to our relationship with our customer if we were required to submit this kind of information about them. The GROWMARK System of farmer owned cooperatives also feels it would be an unnecessary administrative burden to submit the names of the local farmers. There would be a great deal of time spent for one person making sure that each regulated facility submits their farmer customers names.

This develops into the issue of the submission of the names. DHS has indicated the names will be submitted through the Chemical Security Assessment Tool (CSAT) system. DHS has indicated that each employee per company will have to be entered for each facility. This will create an immense amount of duplication. This implies that every corporate employee that has the potential to be unescorted throughout any of the facilities their company owns would be submitted under each facility. This also includes any part-time employees who may work for multiple facilities. That means a company would be forced to re-enter names numerous times. We feel this creates a lot of unnecessary duplication. Once a person is cleared for one facility, they should be cleared for all facilities.

Regardless of size, various agricultural facilities are regulated under CFATS. Therefore, various facilities would be regulated under this ruling. All facilities, will be subjected to an unnecessary administrative burden. To address privacy acts and obtain certain information about an individual, facilities will be required to maintain forms on those people they have to submit to DHS. That increases the potential for one person to have a file at every facility. The administrative burden to keep up with contractors and visitors would be detrimental to some facilities. Administrative personnel would be continually submitting and deleting names to the CSAT application. This person would be the one that is the submitter for all facilities. Often times, in agricultural retail companies one person submits all the information for each facility. This is due to the nature and content of the information submitted. This person would be burdened with the task of continually keeping this up-to-date.

Another issue with this proposed rule is the lack of response from the DHS. The facility will be burdened with the task of submitting information and receiving no return. The only response the facility will receive is a successful submission notification. We feel this simple notification does not justify the administrative burden. We believe the facility and/or company should be notified of the screened result of each individual submitted.

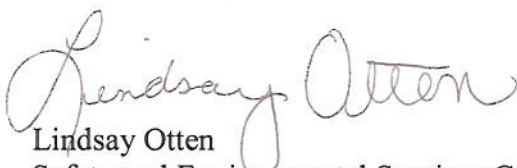
DHS is already overwhelmed with the amount of paperwork facilities have been required to submit under CFATS. DHS has indicated that they will forward these names on to the Transportation Security Administration (TSA) to be screened against the TSDB. It appears, that DHS has underestimated the paperwork burden that will be involved with the Personnel Surety submissions. Currently, there are still a significant amount of facilities that have not received their final tier letters. Some facilities have waited over a year to find out their final tier letter. DHS underestimated the amount of regulated facilities with the implementation of CFATS. Also, the DHS has currently given an "indefinite time extension" for farms, ranches, nurseries, and other agricultural operations. If this time extension is lifted, the amount of facilities regulated under CFATS will increase. Therefore, DHS will not be able to keep up with the amount of work involved with all of the regulated facilities. The GROWMARK System of farmer owned cooperatives feels the DHS may not be prepared for the paperwork burden that is involved with the personnel surety submissions and growing regulated facilities under CFATS.

The GROWMARK System of farmer owned cooperatives requests this proposal not be adopted.

We appreciate the opportunity to comment on the proposed rule making.

Sincerely,

GROWMARK, Inc.

A handwritten signature in cursive script that reads "Lindsay Otten". The signature is written in black ink and is positioned above the printed name and title.

Lindsay Otten
Safety and Environmental Services Coordinator

PUBLIC SUBMISSION

As of: May 14, 2010 Received: May 13, 2010 Status: Draft Tracking No. 80aed289 Comments Due: May 13, 2010 Submission Type: Web

Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0033

Comment Submitted by

Submitter Information

Name: Gail Royster

Address:

701 Pennsylvania Avenue NW
Edison Electric Institute
Washington, DC, 20004

Email: groyster@eei.org

Phone: 202-508-5587

Fax: 202-508-5673

Submitter's Representative: Gail Royster

Organization: Edison Electric Institute

General Comment

Comments of the Edison Electric Institute: Chemical Facility Anti-Terrorism Standards Personnel Surety

Attachments

DHS-2009-0026-DRAFT-0033.1: Comment Submitted by



**EDISON ELECTRIC
INSTITUTE**

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
202-508-5000
www.eei.org

May 13, 2010

U.S. Department of Homeland Security
National Protection and Programs Directorate
Infrastructure Security Compliance Division
Office of Infrastructure Protection
Mail Stop #8100
Washington, D.C. 20528

Subject: Chemical Facility Anti-Terrorism Standards Personnel Surety

To whom it may concern:

The Edison Electric Institute (“EEI”),¹ on behalf of its member companies, hereby respectfully submits these comments in response to the April 13, 2010 Department of Homeland Security (“DHS”) notice 75 Fed. Reg. 18,850, and request for comments in Docket No. DHS-2009-0026, regarding a proposed information collection request (“ICR”) pertaining to the Chemical Facility Anti-Terrorism Standards (“CFATS”). EEI wishes to commend DHS for its efforts and also to express the electric industry’s appreciation for providing an opportunity for interested stakeholders to submit comments on CFATS.

Some of our members have facilities that are subject to CFATS by virtue of processes that are necessary for purposes of environmental quality and compliance. They place the very highest priority on the safety and security of its employees, facilities, and neighbors. Any utility facility subject to CFATS has been subject to robust security measures since before the creation of DHS’s chemical security program. Those measures have been designed specifically with electric utility issues in mind. We urge DHS to exercise restraint and judgment prior to imposing security measures designed with chemical companies in mind on other industries. Notwithstanding the applicability of CFATS, the presence of a chemical of interest may or may not reflect the most important security issues at an electric utility facility. Any use of DHS’s narrow chemical authority to divert a disproportionate amount of scarce security resources from more significant needs at an electric utility facility has the potential to be counterproductive.

¹ EEI is the trade association for shareholder-owned electric companies and serves international affiliates and industry associates worldwide. Our U.S. member companies serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry and nearly 70 percent of all electric utility customers in the nation. EEI members own approximately 60 percent of the nation’s circuit miles of transmission. EEI membership includes vertically integrated and stand-alone utility business models.

EEI is concerned that the proposed ICR may reflect intent to require particular security measures at regulated facilities. According to the statute, DHS “may not disapprove a site security plan submitted under this section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section.” Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388 (2006). However, the proposed ICR indicates DHS will require all regulated facilities at all risk tiers to produce background checks for all “facility personnel and, as appropriate, unescorted visitors” who are deemed to have access to “restricted areas or critical assets.” *See* 75 Fed. Reg. at 18,851, 18,853.

An electric utility’s facility is subject to CFATS if it possesses one or more chemicals of interest above the screening threshold quantity. Such facilities are likely to be “restricted areas” in the sense that there is perimeter fencing and individual screening by trained security personnel at the access point. The particular chemicals giving rise to DHS jurisdiction may or may not be subject to additional fencing or access restrictions. Depending on site-specific situations, there may be safety-related reasons not to further restrict access to the chemical storage area within the larger, facility-wide restricted area. That means anybody on the premises could conceivably be deemed to have access to restricted areas.

In addition, from time to time, electric utility facilities may be subject to substantial projects for the installation of new pollution control devices or for other purposes. Those projects may call for hundreds of contractors to be within the fence on some portion of the facility’s grounds for several months or years at a time. Contractor employees are not necessarily escorted by facility personnel as they go about their functions. Obviously, that fact raises certain security issues that a covered facility must take into account. However, it would not be appropriate or lawful for DHS to impose a mandatory requirement, subject to penalties of \$25,000 per day per violation, *see* 6 C.F.R. § 27.300, for a covered electric utility to perform background checks on every contractor employee who may be on some portion of the facility at some time. Whether across-the-board background checks are appropriate at a particular covered facility should be determined as the statute requires: on a facility-specific basis, taking into account the particular security risks and conditions at the site.

If DHS were to interpret its own regulations as requiring this particular security measure to be mandatory for all covered facilities at all risk tiers, then the regulations also would be contrary to the statute. However, it would be arbitrary and capricious to read DHS’s regulations that way. The personnel surety risk-based performance standard (“RBPS”) requires “appropriate background checks on and ensure appropriate credentials for facility personnel and as appropriate, for unescorted visitors with access to restricted areas or critical assets” 6 C.F.R. § 27.230(a) (12) (emphases added). The proposed ICR indicates DHS is interpreting the regulations in a manner that ignores the word “appropriate.” That is the heart of the concern.

Accordingly, EEI urges DHS to clarify that it will apply this RBPS and other standards in a risk-based manner, taking into account facility-specific conditions. We further urge DHS to clarify that it will not impose a background check requirement for all persons

who may have access to covered facilities, except as determined to be necessary for risk-based reasons on a facility-specific basis.

Thank you again for this opportunity to provide comments. If you have any questions about these comments please feel free to contact Gail Royster, Program Manager, at 202-508-5587 or groyster@eei.org, or Aryeh Fishman, Director, Regulatory Legal Affairs, at 202-508-5023 or afishman@eei.org. EEI looks forward to working closely with DHS in the future.

Respectfully submitted

/s/ James P. Fama

James P. Fama

Executive Director, Energy Delivery
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004-2696
(202) 508-5000

PUBLIC SUBMISSION

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0034

Comment Submitted by

Submitter Information

Name: R. Peter Weaver

Address:

1444 I Street NW

Suite 400

Washington, DC, 20005

Email: rpweaver@ilta.org

Phone: (202) 842-9200

Fax: (202) 326-8660

Submitter's Representative: R. Peter Weaver

Organization: ILTA

General Comment

ILTA is pleased to submit the attached additional comments on DHS's proposed Personnel Surety Program, Docket No. DHS-2009-0026. These are provided in response to the Department's April 13, 2010 notice and request for comments, 75 Fed. Reg. 18850.

Attachments

DHS-2009-0026-DRAFT-0034.1: Comment Submitted by



May 13, 2010

Todd M. Keil
Assistant Secretary
Office of Infrastructure Protection
National Protection and Programs Directorate
Department of Homeland Security

Re: Second Request for Comments by DHS on its Chemical Facility Anti-Terrorism Standards Personnel Surety Program, Docket No. DHS-2009-0026

Dear Assistant Secretary Keil:

The International Liquid Terminals Association (ILTA) is pleased to submit additional comments on the above-referenced Department of Homeland Security (DHS) information collection request for submittal to the Office of Management and Budget. The following comments augment an earlier submission by ILTA on August 10, 2009, which responded to DHS's initial information collection request, *74 Fed. Reg. 27555*.

ILTA is an international trade association that represents eighty commercial operators of bulk liquid terminals, aboveground storage tank facilities and pipelines located in the United States and 42 other countries. In addition, ILTA includes in its membership more than three hundred companies that supply products and services to the bulk liquid storage industry.

ILTA member facilities include deepwater, barge, and pipeline terminals whose bulk liquid commodities are essential to our economy. These terminals interconnect with and provide services to the various modes of bulk liquid transportation, including oceangoing tankers, barges, tank trucks, rail cars, and pipelines. The commodities handled include chemicals, crude oil, petroleum products, renewable fuels, asphalt, animal fats and oils, vegetable oils, molasses, and fertilizers. Customers who store products at these terminals include oil producers, chemical manufacturers, product manufacturers, food growers and producers, utilities, transportation companies, commodity brokers, government agencies, and the military.

CFATS Personnel Surety Program, Docket No. DHS-2009-0026
Additional Comments of the International Liquid Terminals Association
May 13, 2010

ILTA and its terminal member companies recognize the importance of providing effective personnel surety at our nation's high-risk chemical facilities in order to ensure that individuals with unescorted access to restricted areas or critical assets have suitable backgrounds for their level of access. Effective personnel surety includes a comparison of appropriate personally identifiable information (PII) against that of known and suspected terrorists as maintained in the government's Terrorist Screening Database (TSDB). ILTA strongly agrees with DHS's May 2009 Risk-Based Performance Standards (RBPS) guidance for personnel surety in that regard.

In the Department's April 13, 2010 notice and request for comments, 75 *Fed. Reg.* 18850, DHS requested "additional comments" on its personnel surety program (PSP) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (PRA). Through this submittal, ILTA is responding to new OMB and DHS questions with additional comments, including the following main points:

1. PSP violates the statutory Congressional requirement for performance standards in DHS's regulation of the Chemical Facility Anti-Terrorism Standards (CFATS).
2. PSP is fundamentally at odds with DHS's guidance for its performance standard on personnel surety, RBPS-12, by failing to provide a mechanism for facilities to ensure that individuals have suitable backgrounds for their level of access. This raises the question as to whether DHS plans to utilize the PSP, *not* to ensure that individuals who are known to be threats are prohibited from accessing our nation's critical infrastructure, but rather to leverage private sector resources for the purpose of tracking all individuals with access to these facilities, regardless of whether they have been identified as security threats.
3. Submissions of PII by facilities to DHS for personnel or unescorted visitors who can demonstrate through an existing credential that they have been successfully screened against the TSDB is duplicative, wasteful, and serves no legitimate purpose.
4. DHS has underestimated the likely affected population and, correspondingly, the cost and burden of administering the proposed PSP. The accuracy of its estimates may be further undermined by the potential for future additions of currently exempted maritime or agricultural facilities.
5. DHS's request for an exemption from the PRA is unwarranted and raises privacy concerns.

The proposed PSP raises concerns important issues about DHS's objectives in implementing CFATS. To address these issues, ILTA poses the following questions:

CFATS Personnel Surety Program, Docket No. DHS-2009-0026
Additional Comments of the International Liquid Terminals Association
May 13, 2010

- If DHS's Infrastructure Security Compliance Division (ISCD) believes that an individual listed on the TSDB should be prohibited from accessing a "high risk chemical facility," then why wouldn't the PSP include measures to enable a facility to recognize whether its employees, contractors, truck drivers, or unescorted visitors were identified on that list?
- Why does ISCD believe that is relevant to national security to identify the high-risk chemical facilities to which an *approved* individual might require access?
- How does ISCD intend to manage redundant submissions of PII that it would obtain from multiple facilities submitting information on personnel, including truck drivers and contractors? How will ISCD effectively update its database when an individual is removed from one facility yet not from others where he has also been granted access? ILTA maintains that such a duplicative process would likely increase the probability of data entry error or breaches in data security.
- How is a facility to determine whether truck drivers or certain contractors will be visiting the facility on a future occasion? When such information is unknown, would it be appropriate to submit the individual's data to ISCD within the time allowed and at a later date, report that the individual no longer has access? Would this process repeat upon a future return of the individual to perform work the facility?
- Can ISCD explain why it would need to verify that a background check was completed for an individual who already holds a government-issued security credential, which requires a successful check against the TSDB prior to its issuance?
- Why is it that ISCD has chosen to decouple the four required background check elements required by 27.230(a)(12), rather than address them in a single process as has been accomplished, for instance, by both the Coast Guard and Department of Transportation?
- Finally, would ISCD articulate its specific objectives for PSP and explain how it will efficiently or effectively meet these objectives?

General ILTA Comments

1. PSP Conflicts with the Congressional Mandate to Implement Performance Standards

The proposed PSP prescribes specific protocols for administering background checks with a categorically distinct approach from other TSDB background check programs currently administered in the United States. This proposal goes against the foundational "performance standards" basis of the CFATS interim final rule.

CFATS Personnel Surety Program, Docket No. DHS-2009-0026
Additional Comments of the International Liquid Terminals Association
May 13, 2010

In the initial authorization language for CFATS, Congress explicitly directed DHS to issue regulations "establishing risk-based performance standards for security chemical facilities." At that time, performance standards were deemed particularly appropriate in the security context because they provided individual facilities with the flexibility to address their unique security challenges. Using performance standards rather than prescriptive standards would further help increase overall chemical sector security by varying the security practices used by different facilities as differing facility-specific security measures present new and unique problems for an adversary to overcome.

Office of Management and Budget (OMB) Circular A-119 (Feb. 10, 1998) explains that performance standards "state requirements in terms of required result with criteria for verifying compliance but without stating the methods for achieving required results." This OMB Circular is referenced in DHS's May 2009 RBPS guidance. But PSP is in direct conflict with both the OMB Circular and the intention of Congress with regard to performance rather than prescriptive standards. If mandated, PSP would remove a high-risk facility's flexibility to achieve compliance in accord with the guidance for RBPS-12 which allows for the facility to determine the sufficiency of federal vetting and credentialing programs, rather than ISCD.

For these reasons, it would be appropriate for ISCD to offer PSP as an option for facilities to consider for checking personnel against the TSDB as required under RBPS-12. But such a prescriptive measure cannot be required under CFATS. Facilities should be allowed to utilize any of the numerous equivalent federal programs to check such individuals against the TSDB, including the Coast Guard's Transportation Worker Identification Credential (TWIC), the Department of Transportation's Hazardous Materials Endorsement (HME), or the United States and Canada's joint Free and Secure Trade (FAST) program.

2. DHS's Personnel Surety Program Conflicts with RBPS 12.

ILTA maintains that the proposed PSP is significantly flawed. This is due to the program's inability to achieve the inherent goal of TSDB screening, as stated in RBPS 12, to "ensure that individuals allowed on-site have suitable backgrounds for their level of access." DHS's first request for comments on the PSP was published in the *Federal Register* on June 10, 2009, just one month after its RBPS guidance was issued.

According to the PSP, a high-risk facility may grant access to any individual, including those who may be listed on the TSDB, long before PII is submitted to DHS. Additional weeks could pass before any actions were initiated that might inhibit the individual's access. At no point would such a facility be able to verify that the individual has a "suitable background," based on exclusion from the TSDB.

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May 13, 2010

A disclaimer in the guidance states that it “reflects DHS’s current views on certain aspects of the Risk-Based Performance Standards” and “does not establish legally enforceable requirements.” The disclaimer continues, stating that “(h)igh risk facility owners/operators have the ability to choose and implement other measures to meet the RBPSs...” and that specific security measures and practices in the document are “neither mandatory or necessarily the ‘preferred solution.’” Nevertheless, given the highly subjective nature of CFATS obligations, it is reasonable to expect that a facility that complies with the guidance would be in compliance with the regulation.

In addition, each of DHS’s relevant metrics supporting personnel surety compliance (guidance metrics 12.1 through 12.5) is in conflict with the PSP:

Metric 12.1

RBPS 12:

“All new/prospective employees and contractors, as well as any unescorted visitors, who have access to restricted areas or critical assets have appropriate background checks. Access to restricted areas or critical assets is allowed after appropriate background checks have been successfully completed.”

PSP:

The PSP would do nothing to prevent an employee, contractor or unescorted visitor from being given access to restricted areas or critical assets at any time. “Initial Submission of Affected Individual’s information” would not be required for submission to ISCD until 90 days *after* the individual is first allowed on site at a tier 3 or tier 4 regulated facility (60 days for tier 1 and tier 2 facilities). Only then would the information be available to DHS for submission to the Transportation Security Administration (TSA) for an obligatory review against the TSDB. Regardless of the time required for the government to complete this process, the facility would never receive any information as to whether the individual poses a known threat. Thus, according to PSP, the facility would not be prompted to further restrict access to facility personnel, nor would it know whether an individual has had his data submitted for background investigations, know whether appropriate background checks have been completed, or receive the results of the investigation. Therefore, a facility would be unable to demonstrate compliance with Metric 12.1 if it adheres strictly to the PSP.

Additionally, the PSP only references affected populations as “facility personnel” and “unescorted visitors.” This reference to facility personnel does not align with RBPS-12 categorizations of “employees” and “contractors.” Under PSP, it remains ambiguous whether a DHS inspector would characterize an escorted contractor as part of the

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“affected population.” For instance, would a truck driver be an “employee” or could he be an “escorted visitor”? This confusion persists through Metric 12.2 and 12.4 as well.

Metric 12.2

RBPS 12:

“All existing employees and contractors who have access to restricted areas or critical assets undergo background investigations in an expedited but reasonable period from the date of preliminary approval of the [Site Security Plan]. [For tiers 1, 2, and 3,] investigations are repeated for all individuals at regular intervals thereafter.”

PSP:

The PSP requires that the affected population have their data submitted to ISCD within 60 or 90 days, depending on tier. It also requires that all facilities submit notification within 90 days of when “an affected individual no longer has access,” regardless of tier. ISCD has stated that this requirement is intended to assist DHS in the elimination of unnecessary repeat investigations. However PSP fails to recognize that RBPS guidance excludes any requirement for persons with access to restricted areas or critical assets at tier 4 facilities to undergo repeat background checks.

Metric 12.3

RBPS 12:

“The background checks are conducted in accordance with documented requirements established by the corporation, facility, or FSO.”

PSP:

The PSP is highly prescriptive, requiring that the facility submit data on each “affected individual,” regardless of whether that employee, unescorted visitor, contractor or truck driver can demonstrate a current and successful completion of all required government background checks. Such a requirement conflicts directly with Metric 12.3 which allows the background check process to be determined by the corporation, facility or FSO.

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Metric 12.4

RBPS 12:

“Processes are in place to provide DHS with the necessary information to allow DHS to screen individuals (e.g., employees, contractors, unescorted visitors) who have access to restricted areas or critical assets against the TSDB.”

PSP:

PSP language apparently presupposes that “DHS” does not include TSA, the agency responsible for coordinating access to the TSDB. While the FBI, not TSA, manages this list, TSA coordinates access to the TSDB for *all* the current government vetting programs. PSP would obligate facilities to present background information on individuals to ISCD, through use of its Chemical Security Assessment Tool (CSAT). ISCD would then be expected to forward the received information to TSA. It is unclear why this would be required for individuals who have already submitted their data to TSA directly in obtaining effectively the same background check, as administered under programs such as TWIC, HME or FAST. ILTA respectfully requests ISCD to explain what it intends to achieve by requiring direct submissions to the CSAT even when individuals have previously submitted to DHS background checks against the TSDB.

Metric 12.5

RBPS 12:

“The background check program is audited annually.”

PSP:

Company or facility audits of background check programs are not addressed in the PSP.

3. Requiring the Submission of PII to Verify Individuals Successfully Screened Against the TSDB is Duplicative, Wasteful, and Serves No Legitimate Purpose.

According to the April 21, 2010 written testimony of David Heyman, DHS Assistance Secretary for Policy before the Senate Commerce, Science and Transportation Committee, TSA’s security threat assessment for the HME vetting program “covers approximately three million drivers authorized to transport hazardous materials.” Heyman noted that “TSA has conducted a full security threat assessment of, and issued a Transportation Worker Identification Credential (TWIC), to 1.6 million workers requiring unescorted access to secure areas of port facilities.”

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HME drivers are already one of the largest groups of TWIC holders, and individuals with these credentials go through a “rigorous vetting program.” These workers may also be directly employed by a high-risk facility or provide service to these facilities as contractors or truck drivers delivering and /or picking up a chemical of interest (COI). Many of these workers will require access to one or more CFATS-regulated facilities. The proliferation of federal security screening programs has already led to many thousands of individuals being subject to one or more screening programs.

The Interim Final Rule for CFATS published in the *Federal Register* on April 9, 2007 states: “To minimize redundant background checks of workers, DHS agrees that a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential such as TWIC, HME, or FAST, will not need to undergo additional vetting by DHS.” ILTA strongly supports this position.

However, the proposed PSP indicates that ISCD is unwilling to accept these equivalent federal background checks as sufficient for the CFATS standard. The proposal requires facilities to “submit the name and credential information for these persons along with the application data for other employees [and directs] facilities ... not [to] allow unescorted access to a critical asset or restricted area to a person in possession of a DHS credential unless information on that person has been submitted [because] **DHS [needs to] determine whether the applicant poses a security threat.**” Such a position is simply without merit for individuals who have already undergone and maintain current, comparable background checks.

DHS should not require duplicative submissions for persons who are known *not* to be on the TSDB. There is no legitimate security purpose for tracking these individuals. Equally important, the quality and reliability of information collected on personnel *not* previously screened against the TSDB through an alternate and comparable program would be enhanced by not loading the system with records of cleared individuals.

The submission of data for individuals at each high-risk facility where access is granted, as required under the proposed PSP, would be redundant for all individuals already holding a valid credential demonstrating successful vetting against the TSDB. Such a requirement would also exceed the guidance provided for personnel surety under RBPS-12. Such redundancy is unnecessary and wasteful and can adversely impact both the regulated population and the government.

During a *Surface Transportation Security Priority Assessment* in March 2010, the White House issued recommendations to federal agencies to (1) promote comparability and reciprocity of assessments across credentialing and screening programs and (2) implement “the principle of ‘enroll once, use many’ to reuse the information of individuals applying for multiple access

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privileges. The PSP proposal is at odds with the Administration's overall effort to harmonize existing federal background check programs. Establishing another federal background check program for the same individuals will not further enhance security at these high-risk facilities. ILTA cannot envision how the ISCD approach will enhance security when limited resources are diverted to tracking individuals who have already been cleared against the TSDB.

The practice of tracking approved citizens with access to high-risk facilities introduces potentially significant privacy concerns. PSP is overly prescriptive, unnecessarily burdensome and highly duplicative. It demands the reporting of significant quantities of data yet it fails to achieve the objectives of RBPS-12. ILTA contends that the administrative burden on ISCD if this duplicative requirement persists will be onerous and conducive to error while providing no security return. Therefore, the information collection, as stated, is *not* necessary for many, if not most, potentially impacted individuals.

4. DHS has Understated the Likely Size of an Affected Population

ILTA believes that ISCD is significantly underestimating the number of affected individuals that will be impacted by this proposal given the large universe of existing credentialed employees and contractors working at high-risk facilities. ISCD may also be significantly underestimating the number of facilities that certain affected individuals will be required to access. Furthermore, it overestimates the ability of facilities, especially storage terminals, to isolate restricted areas or critical assets from selected employees or visitors. It also appears as though ISCD has not considered a persistent uncertainty that exists regarding whether certain individuals, such as truck drivers or project contractors, require ongoing access. In addition, the estimation of a likely affected population has a unique complexity under CFATS in that the definition of an "asset," particularly with networked computer systems, can extend beyond the physical perimeter of the facility. As such, ILTA believes that the DHS estimate of 354,400 respondents is likely off by an order of magnitude when considering the current population of 5,333 tiered facilities.

Currently, an exemption exists for facilities regulated by the Maritime Transportation Security Act (MTSA). If the exemption is eliminated at some point in the future, as is currently being considered by Congress, approximately 3,200 MTSA-regulated facilities could become subject to regulation under CFATS, increasing the number of affected facilities by 50%. The number of affected individuals and facility submissions would likely increase disproportionately, based on the larger size of certain marine facilities relative to their inland counterparts.

The DHS estimate also excludes consideration of the farms, ranches, nurseries and other agricultural operations that may fall under the CFATS program at some later date once the

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“indefinite time extension,” issued by DHS in January 2008, is removed. Depending on how DHS defines “unescorted visitor,” the number of affected individuals at these facilities alone could far outweigh DHS’s current estimated number of respondents.

Based on likely populations and multiple facility access requirements, the Chemical Sector Coordinating Council (CSCC) has estimated that the current scope of DHS’s proposed PSP would require upwards of 10 million individual submissions of PII. For comparison, the Coast Guard’s original estimate of 400,000 TWIC holders has already proven to be understated by a factor of four. The administrative burden that ISCD’s proposal would create for both the public and private sectors is simply enormous. DHS estimates that the amount of time for a responsible entity to submit the information on each affected individual into the CSAT portal is 0.59 hours per individual for activities listed in 5 CFR 1320.3(b)(1). Using this value as well as the CSCC estimate for the required number of submissions, the total time burden associated with collecting, verifying, reporting, maintaining and protecting information for each affected individual would approach six million man hours. Assuming an average hourly wage of \$20 per hour for an appropriate individual with the proper security level and training, the total cost burden imposed on the regulated community would be nearly \$120 million.

Executive Order 12866 directs agencies to assess the effects of Federal regulatory actions on state, local, and tribal governments, as well as the private sector. It also requires a qualitative and quantitative assessment of the anticipated costs and benefits of a Federal mandate resulting in annual expenditures of \$100 million or more among all referenced parties. ILTA believes that the PSP qualifies as a significant rulemaking, and should it become a requirement rather than an option, it must be held to the appropriate administrative procedures.

5. DHS’s Request for an Exemption to the PRA is Unwarranted

ISCD claims that its request for an exemption to the Paperwork Reduction Act (PRA) is for the purpose of efficiency so that facilities would not be obligated to collect signatures from individuals from whom PII is collected. ILTA maintains that the signature collection burden would be minimal in comparison to the burden of obtaining the PII itself. The PRA exemption request is simply unwarranted.

ILTA has articulated its concerns regarding the PRA exemption request in its August 10, 2009 submission to this docket. Those comments addressed ILTA’s belief that such an exemption would inappropriately allow the use of information about an individual without his or her knowledge or consent, regardless of DHS’s intent.

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ILTA Recommendation

ILTA recommends that DHS offer PSP as an option for facilities to consider in meeting the objectives of RBPS 12. To require individual facilities to constantly update and correct information about affected individuals will neither “increase the accuracy of data collected,” nor “decrease the probability of incorrect matches” with the TSDB. It will, however, significantly increase the administrative burden on companies required to provide the information. In so doing, it increases the likelihood that the data, at times, will be incomplete and/or inaccurate.

While certain entities regulated under the CFATS program may elect to adopt some or all of the practices proposed in the PSP, ILTA objects to utilizing it as a means of enforcing certain practices at high-risk chemical facilities where the facility is otherwise able to demonstrate adherence to official DHS guidance on RBPS-12 through other mechanisms.

Mandating PSP to achieve personnel surety for all personnel at every CFATS-regulated facility is not an effective means of improving our nation’s overall security posture.

Thank you for your consideration of these comments.

Sincerely,



R. Peter Weaver
Director of Regulatory Compliance and Safety

PUBLIC SUBMISSION

As of: May 14, 2010 Received: May 13, 2010 Status: Draft Tracking No. 80aecec0 Comments Due: May 13, 2010 Submission Type: Web

Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0035

Comment Submitted by

Submitter Information

Name: John S Morawetz

Address:

329 Race Street
Cincinnati, OH, 45202

Email: JMorawetz@ICWUC.org

Phone: 513-621-8882

Fax: 513-621-8247

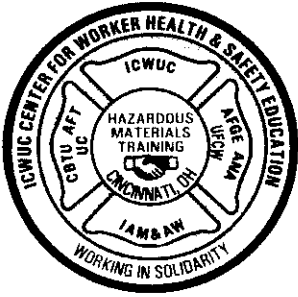
Organization: ICWUC/UFCW

General Comment

See attached file(s)

Attachments

DHS-2009-0026-DRAFT-0035.1: Comment Submitted by



ICWUC CENTER FOR WORKER HEALTH AND SAFETY EDUCATION

*Training programs for Emergency Response,
Hazardous Waste and Nuclear Workers*

329 Race Street, Cincinnati, Ohio 45202-3534
(513) 621-8882 / FAX (513) 621-8247

Frank Cyphers, Executive Director, fcyphers@icwuc.org
John S. Morawetz, Center Director, jmorawetz@icwuc.org

Visit us at WWW.HSED.ICWUC.ORG

May 13, 2010

Todd M. Keil
Assistant Secretary
Office of Infrastructure Protection
National Protection and Programs Directorate
Department of Homeland Security
Washington, DC 20528

Matthew Bettridge
National Protection and Programs Directorate
Office of Infrastructure Protection
Infrastructure Security Compliance Division
Department of Homeland Security

Re: Docket No. DHS-2009-0026 Chemical Facility Anti-Terrorism Standards Personnel Surety Program
Information Collection Request

Dear Sirs:

On behalf of the International Chemical Workers Union Council/UFCW, I am writing these comments on the DHS "Submission for Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program (PSP) Information Collection" Request. We have a significant interest in how these rules will impact facilities where we represent the workforce as well as the non union facilities. We appreciate the Departments efforts to secure our nation's infrastructure and want to be sure that these efforts are directed at that goal. Other measures may or may not be necessary but if they are not a part of an effort to provide personal surety from a terrorist threat, they fall outside the scope of these regulations and should not be a part of it. We have been discussing these regulations with a number of other unions (United Automobile Workers, United Steelworkers, International Brotherhood of Teamsters and others) and we all share the same concerns elaborated below.

We are pleased that the Department is recognizing the utility of the Transportation Worker Identification Credential (TWIC). Although some updating of this information may be necessary, this should be limited in the burden it might place on facilities. We believe this is an important step even though the utility of convictions of interim disqualifying offenses to identify terrorist is questionable. We are troubled, however, in the Department recognizing TWIC on one hand but then issuing the list of Appendix C's guidelines. In 2009, Gale Rossides, acting administrator, Transportation Security Administration said "American ports from coast to coast are more secure today because of the significant progress this program has made". We agree that progress has been made and recognizing this program for CFATS facilities is a common sense approach and hope DHS will clarify their position on TWIC. We have had some initial discussion with DHS on these questions and look forward to DHS's response to all of our positions.

Members of the Consortium

International Chemical Workers
Union Council/UFCW
International Association of
Machinists and Aerospace Workers

United Food and Commercial Workers Union
American Federation of Teachers
American Federation of Government
Employees

Coalition of Black Trade Unionists
American Nurses Association
University of Cincinnati
Department of Environmental Health



In the context of CFATS requirements for personal surety and protecting the nation's chemical infrastructure, the consolidated and integrated terrorist watchlist, even with the limitations listed below, is likely the best check for potential terrorists by DHS compared to other methods and information. Although the questions in this Federal Register notice concentrates on the Terrorist Screening Database (TSDB), this notice is on "CFATS Personal Surety Program" and its background section describes DHS' CFATS RBPS-12. As such we trust the Department will evaluate all comments on personal surety.

We believe the focus is on "measures designed to identify people with terrorist ties", a phrase repeated within the same paragraph on page 18851. As such, we believe that the watch list questions cannot be separated from all personal surety requirements. Specifically the much expanded list in Appendix C of the Department's RBPS document issued in May 2009 goes significantly beyond the preamble comments of the Department in finalizing CFATS regulations on April 9, 2007 and is of grave concern to us. Although there is a disclaimer on each of the RBPS page that this "does not establish legally enforceable requirements", the example on page 183 clearly states these topics are "an example of a typical background check under RBPS-12. We believe DHS at its word that these are not requirements but part of a performance standard where each item may not be required but they are the list of areas that DHS will examine to see if a facility's plan is in compliance and a significant expansion from the April 7, 2007 rationale and rules.

It is especially worrisome that DHS' underlying philosophy is that "the Department regulates high risk chemical facilities and not affected individuals" (page 18856). DHS is treading into employment areas that they have little demonstrated experience with an apparent disregard for the rights of these people. We are concerned that this philosophy permeates many aspects of the practical applications of CFATS with little regard to the potential human cost.

We believe that there are four fundamental areas of concern:

1. Are these areas appropriate for employers to determine if workers are a terrorist threat?

We believe that the best method, even with its weaknesses, is the TSDB with other sources of personal information being very difficult for private industry to identify as a "terrorist threat". The listing on RBPS pages 181-183 may not even be appropriate for law enforcement but certainly not all workers covered by CFATS. The RBPS guidelines will likely be of little added benefit for employers in determining individuals who are a likely terrorist threat but pose a serious personal threat to workers.

Law enforcement agencies may examine these areas for people who have been identified on the watchlist but DHS has moved the discussion from law enforcement to private industry and from individuals of concern to a large population where the only reason for this examination is their place of employment. Since the RBPS document appears to be the guidelines for DHS to evaluate whether individual facilities are meeting their personal surety requirements (page 183 "confirm dates of high school attendance"!), we believe this should be open to public comment and feedback.

Further, DHS is straying will beyond their original intent as stated when promulgating these regulations on April 9, 2007. At that time they stated "It should also be noted that nothing in this regulation prohibits a person that has been convicted of a misdemeanor offense from being employed at a high risk facility" (page 17708). Now the RPBS includes misdemeanors, civil court records, real estate disputes, pleas of no contest, unresolved indictments or charges. They are asking the facility to make judgments of an individual's "maturity at the time of the conduct" and the "motivation for the conduct", areas that we do not believe companies have the expertise to make these judgments, should not be at the discretion of an employer and open to significant error.

If the “voluntariness of participation” is one factor to take into account, would this statement be taken as a negative factor by a facility if I had a background check to receive CVI or a site security plan? If a local member objects to this process, is that going to be held against them in this personal surety process?

In summary, RBPS-12 and Appendix should be rescinded, reevaluated and significantly rewritten.

2. What is the appeal or waiver provision if the employer takes an adverse employment decision based on DHS guidelines?

There is no appeal or waiver process for management decisions in the current rules by any outside independent agency. Rather on RBPS pages 184 and 185, DHS is recommending (but not requiring) an adjudication process run by the company that makes the employment decisions. This is inadequate and unacceptable. Further, it is unclear if sections 6 CFR 27.300-27.345 would give workers redress rights against their management’s decisions. These sections appear to discuss solely the rights of individuals to appeal a decision by DHS based on the TSDB, not to an employment decision on the other personal surety elements (i), (ii) or (iii).

It appears that DHS is leaving this area solely to the discretion of each employer with no recourse under CFATS. The Department’s response to this question in this Federal Notice is inadequate. To state that “employment decisions made by a high risk chemical facility in response to contact by a Federal law enforcement agency are not regulated by CFATS” (page 18855) is irresponsible and potentially leaves workers at the mercy of their employers, especially non union facilities. Is DHS proposing they have no responsibility if a covered facility fires an individual with no terrorist ties due to law enforcement contact initiated by CFATS? We do not believe most companies would take such action for most people but we have numerous examples of union members being fired for their activities. The Department cannot set these wheels in motion and then callously walk away.

This logic is further troubling if it is extended to someone being fired due to information found through implementing RBPS guidelines such as their reported dates of high school, litigation on real estate disputes or that their employment history is “embellished” (all in Appendix C). Does DHS believe they have a responsibility to have an appeals or waiver procedure or is this area “not regulated by CFATS”?

3. What are the controls to prevent an individual or the facility from using this personal information for other purposes?

Although DHS states that this information is “subject to a set of laws and regulations”, restrictions must be issued by the Department that this information may not be made available to the public and cannot be accessed by employees of the facility except for employees who are directly involved with collecting the information or conducting or evaluating security background checks. It must also be maintained confidentially by the facility and the Secretary and can only be used for making CFATS determinations. The RBPS requirements will result in thousands of personal surety data bases housed at each facility with no controls over how this very personal information will be maintained a risky undertaking that may have numerous unintended consequences. DHS must address this weakness.

4. What is the justification for putting this significant financial burden on companies?

The type of examination that the Department is asking covered facilities to undertake will require a significant amount of staff and resources, an economic burden that is legitimately a role for law enforcement agencies, especially the broad sweeping areas of investigation recommended by DHS.

Fulfilling these CFATS performance standards will inappropriately place the burden on private industry to track over a million workers with the overwhelming majority having no terrorist ties. Unless the Department can show that they are unable to this basic government function, it should not be an additional economic burden for these facilities. This is all the more significant given the ability of DHS to successfully implement the TWIC program, a process that could be easily modified to fit CFATS facilities. We have reports from some of our facilities covered by MTSA where the workforce all is required to secure TWIC cards, a process that works smoothly for these facilities with a stable workforce.

Below are our responses on this Notice's main questions. In the interest of having a complete document, on many points we are incorporating our previous 2009 comments with some elaboration.

The Office of Management and Budget Is Particularly Interested in Comments Which

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

DHS would for the first time to our knowledge, make being on the watchlist information that could adversely affect one's employment after federal law enforcement contacts a high risk chemical facility. This is a matter of concern both for those who may ultimately be innocent even though they are properly on the watchlist and for the many who are not properly on the watchlist. References with quantitative data for the points below were submitted in our previous 2009 comments. These include:

- a. Names of individuals that are not associated with a case containing any of the following current designations: international terrorism, domestic terrorism or bombing, and for whom there exists no other justification.
- b. Names of individuals that should have been removed from the watchlist after their cases were closed but weren't removed or whose removal was tardy.
- c. Nominations submitted directly to the National Counterterrorism Center (NCTC) by FBI field offices bypassing FBI headquarters and FBI quality review.
- d. Nominations extracted by NCTC from agency reports and attributed to specific agencies without the knowledge of those agencies. Such agencies include the FBI, Drug Enforcement Administration (DEA) and U.S. National Central Bureau (USNCB).

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

We believe that the agency's estimate of the burden of the information collection leaves out the burden on the affected employees whose personally identifiable information (PII) matches that of a record on the watchlist. Our 2009 information provided in response to question 1 suggests that one in five matches may be matches to records that should not be on the watchlist therefore unnecessary investigative action. Although DHS will not provide screening results to high risk chemical facilities, federal law enforcement may contact such facilities as part of an investigation and possible adverse employment decisions. Hence the potential burden includes unnecessary intrusive investigations and unjustified adverse employment decisions, that could, for the first time, result from one's, possibly unjustified, presence on the watchlist.

3. Enhance the quality, utility, and clarity of the information to be collected;

Enhancing the quality, utility and clarity of the information to be collected requires correcting the flaws in the watchlist identified above. Such corrections would protect people from the unnecessary intrusive investigations and the unjustified adverse employment decisions that might otherwise result, for the first time, from the Department's proposed use of the watchlist. Again, these intrusive investigations beyond the watchlist must be shown to have a reasonable likelihood that employers can identify terrorists. We believe these areas do not meet this test and opens up a significant area of misidentification of alleged terrorists.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

The most important burden does not have to do with the time, effort or expense it takes to submit the information. It is the potential for unnecessary intrusive investigations, unjustified adverse employment decisions and misuse of personal information. It cannot be minimized through the use of technological collection techniques. It can be minimized by correcting the flaws in the watchlist identified above and DHS issuing clear guidelines limiting the use of this personal information.

The Department Is Particularly Interested in Comments Which

1. Respond to the Department's interpretation of the population affected by RBPS 12 background checks outlined in 6 CFR 27.230(a)(12);

Providing an informed response to the Department's interpretation of the population affected by RBPS 12 background checks outlined in 6 CFR 27.230(a)(12) would require the Department to provide information about the number of individuals the department estimates are covered per facility and its method for arriving at the number of individuals per facility.

2. Respond to fact that a Federal law enforcement agency may contact the high-risk chemical facility as a part of a law enforcement investigation into terrorist ties of facility personnel;

We are concerned about the possibility that such contact will result in adverse employment decisions. This is a matter of concern for individuals who may eventually turn out to be innocent even though they are properly on the watchlist. An even greater concern is individuals who are improperly on the watchlist. If the facility is notified, then the individual must be notified also so they can make use of any appeal procedures. It is unclear to us that the Department's reference that "DHS may collect information on affected individuals as necessary to enable it to provide redress" (page 18851) does not set up a uniform thorough system that gives workers a full appeals or waiver procedures.

This should not limit law enforcement agencies performing their work if they do not notify the company. Although one might build the case that the company can provide valuable information in an investigation, given the significant possibility of people being identified in error, both the company and the individual should be notified at the same time. Alternatively, law enforcement can proceed with their investigation without notifying the company or they can notify the company as part of a criminal investigation that is not a CFATS investigation.

The random auditing of the vetting procedure is admirable but DHS should collect information on all employees who have a CFATS related adverse employment decision. To evaluate personal surety further, the Department needs to gather this information and make it publically available (without personal identifiers).

- 3. Respond to the Department's intention to collect information that identifies the high risk chemical facilities, restricted areas and critical assets to which each affected individual has access;**

We support the Department gathering this information as part of identifying the primary areas of concern and methods to reduce the risk in these areas.

- 4. Respond to the Department on its intention to seek an exception to the notice requirement under 5 CFR 1320.8(b)(3).**

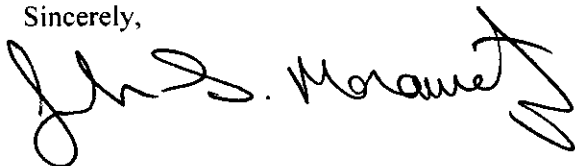
As stated earlier, we believe that an appropriate personal surety system should be conducted by DHS similar to the TWIC system and therefore we request a different structure that the companies play a minor role. If the system is retained with the covered facilities collecting this information, we would be opposed to such a waiver due to the potential of the information to lead to intrusive investigations and and/or adverse employment decisions. Relying on a statement by the company that they have to "affirm that the required Privacy notice has been provided to affected individuals" is not the same as collecting these signatures.

DHS' response in this Notice is troublesome. Although companies may collect signatures, DHS specifically states that "this exemption will then afford high risk facilities with wide latitude in choosing how to collect" this information. We think that the potential consequences are serious enough that each individual whose PII is submitted should sign that they have been notified of:

- the reason for the submission,
- how the information will be used,
- the fact that the potential could be an in depth personal investigation and potentially an adverse employment decision, and
- Whether responses are voluntary or mandatory.

Thank you for your time in reviewing our comments and concerns.

Sincerely,



John S. Morawetz

cc: Frank Cyphers
Greg Villanova
Darrell Hornback
Jo Deutsch, UFCW
Darius Sivin, UAW
Liz Bettinger, USW
Azita Mashayekhi, IBT

PUBLIC SUBMISSION

As of: May 14, 2010 Received: May 13, 2010 Status: Draft Tracking No. 80aed2e7 Comments Due: May 13, 2010 Submission Type: Web

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0036

Comment Submitted by

Submitter Information

Name: Helen R. Nalley

Address:

Post Office Box 2641
Birmingham, AL, 35291

Email: HRNALLEY@southernco.com

Organization: Southern Company

General Comment

Southern Company's comments are attached.

Attachments

DHS-2009-0026-DRAFT-0036.1: Comment Submitted by

Southern Company Generation
600 North 18th Street
Post Office Box 2641
Birmingham, Alabama 35291



May 13, 2010

SUBMITTED VIA WWW.REGULATIONS.GOV
DOCKET NO. DHS-2009-0026

Mr. Dennis Deziel, Deputy Director
Infrastructure Security Compliance Division
Office of Infrastructure Protection
U.S. Department of Homeland Security
Mail Stop #8100
Washington, D.C. 20528

Re: Chemical Facility Anti-Terrorism Standards Personnel Surety

Dear Mr. Deziel:

This letter provides comments on behalf of Southern Company ("Southern") in response to a notice and request for comments regarding a proposed information collection request ("ICR") pertaining to the Chemical Facility Anti-Terrorism Standards ("CFATS"), as published by the Department of Homeland Security ("DHS") on April 13, 2010. 75 Fed. Reg. 18,850. Thank you for the opportunity to comment.

Southern is an investor-owned utility based in Atlanta, Georgia. We serve 4.4 million customers with more than 42,000 megawatts of generating capacity. Southern's operating company subsidiaries include Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company. Some facilities of Southern's operating companies are subject to CFATS by virtue of processes that are necessary for purposes of environmental quality and compliance.

Southern places the very highest priority on the safety and security of its employees, facilities, and neighbors. Any facility subject to CFATS has been subject to robust security measures since before the creation of DHS's chemical security program. Those measures have been designed specifically with electric utility issues in mind. Southern urges DHS to exercise restraint and judgment prior to imposing security measures designed with chemical companies in mind on electric generating facilities. Notwithstanding the applicability of CFATS, the presence of a chemical of interest may

or may not reflect the most important security issues at an electric utility facility. Any use of DHS's chemical facility authority that would result in a diversion of a disproportionate amount of security resources at an electric utility facility has the potential to be counterproductive.

Southern is concerned that the proposed ICR may reflect intent to require particular security measures at regulated facilities. According to the statute, DHS "may not disapprove a site security plan submitted under this section based on the presence or absence of a particular security measure, but the Secretary may disapprove a site security plan if the plan fails to satisfy the risk-based performance standards established by this section." Pub. L. No. 109-295, § 550, 120 Stat. 1355, 1388 (2006). However, the proposed ICR indicates DHS will require all regulated facilities at all risk tiers to produce background checks for all "facility personnel and, as appropriate, unescorted visitors" who are deemed to have access to "restricted areas or critical assets." *See* 75 Fed. Reg. at 18,851, 18,853.

An electric utility's facility is subject to CFATS if it possesses one or more chemicals of interest above the screening threshold quantity. Such facilities, including those of Southern's operating companies, are likely to be "restricted areas" in the sense that there is perimeter fencing and individual screening by trained security personnel at the access point. The particular chemicals giving rise to DHS jurisdiction may or may not be subject to additional fencing or access restrictions. Depending on site-specific situations, there may be operational or safety-related reasons not to further restrict access to the chemical storage area within the larger, facility-wide restricted area. That means anybody on the premises could conceivably be deemed to have access to restricted areas for purposes of the chemical facility program.

In addition, from time to time, electric utility facilities may be subject to construction projects for the installation of new pollution control devices or for other purposes. Those projects may call for hundreds of contractors to be within the fence on some portion of the facility's grounds for several months or years at a time. Contractor employees are not necessarily escorted by facility personnel as they go about their functions. Obviously, that fact raises certain security issues that Southern's operating companies must take into account. However, it would not be appropriate or lawful for DHS to impose a mandatory requirement, subject to penalties of \$25,000 per day per violation, *see* 6 C.F.R. § 27.300, for a covered electric utility to perform background checks on every contractor employee who may be on some portion of the facility at some time. Whether across-the-board background checks are appropriate at a particular covered facility should be determined as the statute requires: on a facility-specific basis, taking into account the particular security risks and conditions at the site.

If DHS were to interpret its own regulations as requiring this particular security measure to be mandatory for all covered facilities at all risk tiers, then the regulations also would be contrary to the statute. However, it is not necessary to read DHS's regulations that way. The personnel surety risk-based performance standard ("RBPS") requires "appropriate background checks on and ensure appropriate credentials for facility

May 13, 2010

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personnel, and as appropriate, for unescorted visitors with access to restricted areas or critical assets” 6 C.F.R. § 27.230(a)(12) (emphases added). The proposed ICR indicates DHS is interpreting the regulations in a manner that ignores the word “appropriate.” That is Southern’s concern.

Accordingly, Southern urges DHS to clarify that it will apply this RBPS and other standards in a risk-based manner, taking into account facility-specific conditions. We further urge DHS to clarify that it will not impose a background check requirement for all persons who may have access to the covered facilities of Southern’s operating companies, except as determined to be necessary for risk-based reasons on a facility-specific basis.

Thank you again for this opportunity to provide comments. Please feel free to contact David Marsh at (205) 257-1809 or dgmarsh@southernco.com or me if we can provide additional information or assistance.

Sincerely,

A handwritten signature in cursive script that reads "Helen A. Nalley".

Helen Nalley
Compliance Director
Southern Company Generation

PUBLIC SUBMISSION

As of: May 14, 2010 Received: May 13, 2010 Status: Draft Tracking No. 80aed333 Comments Due: May 13, 2010 Submission Type: Web

Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0037

Comment Submitted by

Submitter Information

Address:

One Williams Center, MD 27-2
Tulsa, OK, 74172

Email: rick.fahrenkrog@magellanlp.com

Phone: 918-574-7480

Submitter's Representative: Rick Fahrenkrog

Organization: Magellan Midstream Partners

General Comment

Please see attached document.

Attachments

DHS-2009-0026-DRAFT-0037.1: Comment Submitted by



May 13, 2010

Department of Homeland Security
National Protection and Programs Directorate
Office of Infrastructure Protection
Infrastructure Security Compliance Division
Mail Stop 8100
Washington, D.C. 20528

RE: Request for Comments (75 Fed. Reg. 18,850); DHS 2009-0026

Magellan Midstream Partners appreciates this opportunity to comment on DHS-2009-0026. Magellan agrees with the Department of Homeland Security (DHS) that effective chemical security is an important part in protecting American communities. We are, however, concerned that through this proposed rulemaking DHS creates a significant, yet unnecessary regulatory burden on facilities when other measures could suffice. By its choice of approach, DHS appears to be focused more on collecting information on the work routines of ordinary American workers than identifying people with terrorist ties.

1. By establishing this information submittal process, DHS mandates the method by which a facility can achieve compliance with RBPS 12 which is in direct contradiction with the risk-based performance process. Pursuant to Section 550 of the Homeland Security Appropriation Act of 2007, DHS is required to "establish risk-based performance standards for chemical facilities." *A performance standard specifies the outcome required, but leaves the specific measures to achieve that outcome up to the discretion of the regulated entity. In contrast to a design standard or a technology based standard that specifies exactly how to achieve compliance, a performance standard sets a goal and lets each regulated entity decide how to meet it.*¹

By establishing this CSAT information submittal process, DHS specifies exactly how to achieve compliance and leaves no other option. DHS appears to require all facilities submit information through the CSAT Process, stating, "Information will be submitted to DHS through the Chemical Security Assessment Tool...The representatives of each high-risk chemical facility will submit the information...will certify the information...will affirm..."² This requirement appears to be the only measure DHS will accept to identify people with terrorist ties and therefore in direct opposition to a performance standard approach. In addition, DHS appears to mandate that an affected person who does not provide all the information requested in this notice will not be allowed in a restricted area, or in the case of an employee, even allowed in the facility they have worked at for years.

2. The methods to comply with RBPS 12 should be risk-based and "appropriate" for the facility based on the type of anticipated threat. The RPBS as outlined in 6 CFR 27.230 states:

¹ Coglianese, Performance-Based Regulation, 55 Admin. L. Rev. at 709. *See Also* Risk Based Performance Standards Guidance, May 2009 at 10.

² Chemical Facility Anti-Terrorism Standards; Personnel Surety Program Request for Comments, 75 Federal Register 70 (13 April 2010), p. 18851.

(12) *Personnel Surety*. Perform **appropriate** background checks on and ensure **appropriate** credentials for facility personnel, and **as appropriate**, for unescorted visitors with access to restricted areas or critical assets, including... (emphasis provided).

DHS appears to make the information submittal process mandatory and not subject to any appropriateness standard. A facility should be able to decide the appropriateness of its visitor and contractor access policies in light of the actual threats and proven consequences of an incident at a facility. Companies have a vested interest in the uninterrupted operation of their facilities and will protect their operations without government mandates, weighing the risks to the operation against the consequences of an incident. The RBPS Guidance document states, "However, this Guidance document does not require any covered facility to adopt any specific measure or practice; *a covered facility is free to adopt and implement any security measures or practices appropriate to its circumstances*, so long as DHS determines that those measures are adequate to meet the applicable RBPS (*italics provided*)"³

3. DHS, by making this information submittal process mandatory, also conflicts with instructions in the RBPS Guidance document. The document at page 14 states, "Note that the metrics included within the RBPS Guidance document are for exemplary purposes only, and a facility need not necessarily meet any or all of the individual metrics to be in compliance with CFATS." The summary for RBPS 12 states, "Appropriate background checks have been successfully completed for all individuals (e.g., employees, contractors, unescorted visitors) who have access to restricted areas or critical assets."⁴ Since terrorist screening is a metric (12.4) then according to this guidance, a facility need not meet this metric to achieve compliance.

4. DHS steps outside the scope of its authority through this information submittal process. By requiring covered facilities submit information on each employee, detailing which facilities the employee visits or otherwise is employed, DHS goes beyond its mandate in 6 CFR 27.230 to implement "measures designed to identify people with terrorist ties." By implementing this information submittal process, DHS will have developed a database of tracking information. They will know exactly which facilities a contractor will have visited at during his career. They will know the busiest times of the year of each facility, the number of support staff and the number of visitors. They will know the career path of nearly everyone in the industry, as they will know when a person changes locations or changes companies. This type of information collection is above and beyond the mandate of "identifying people with terrorist ties".

DHS' intent to develop a database is evidenced in this notice⁵ where it describes the process of submitting information, "Upon receipt of each affected individual's information in CSAT, DHS will send a copy of the information to TSA". The use of the word 'copy' infers that the original will remain with DHS.

Regardless, this type of information collection may not even achieve DHS' goal of being to identify where to locate an individual whose name appears on the Terrorist Screening Database. A small company, for example, may have a headquarters with dozens of support personnel for dozens of facilities. By this proposed process, an employee would be listed at all

³ Risk Based Performance Standards Guidance, May 2009 at 13.

⁴ Id at 99.

⁵ Chemical Facility Anti-Terrorism Standards; Personnel Surety Program Request for Comments, 75 Federal Register 70 (13 April 2010), p. 18851.

of these facilities, yet not actually office at any of them. Rather than require this massive database DHS could simply call the submitter obtain a person's location.

To demonstrate how this process of linking individuals to facilities can be exponentially demanding, take a small company with 20 facilities and 115 employees. Each facility has 5 full time personnel as well as 15 support personnel that office at company headquarters but regularly visit the facility to perform some sort of function which could include environmental, safety, engineering, marketing, auditing or operations. By this process, each of the 20 facilities would list the 5 full time employees plus the 15 support personnel. This would result in the company inputting the employee's names 400 times [20 x (5+15)] instead of 115 times. Adding in truck drivers further indicates the magnitude of this effort. A large facility, such as a refinery, may have hundreds of employees, hundreds of support personnel and even thousands of contractors who move from facility to facility on a regular basis.

Another example of how this procedure would complicate measures to "identify people with terrorist ties" is the HazMat truck driver. A single truck driver, who has already undergone a background check to receive the HME endorsement may have access to dozens of facilities, each of which would be required to submit his/her information.

DHS also requests information beyond what is required to identify people with terrorist ties. DHS states it may collect information such as work phone numbers and email addresses, and may collect additional information for auditing purposes.⁶ Collecting information for auditing purposes appears to be beyond the scope of the regulation.

5. By this reporting process, DHS creates a reporting burden far in excess of what DHS estimates and shifts other administrative burdens from DHS to the facilities. Through this process, DHS will require facilities notify them when a person no longer has access to the facility. DHS estimates this burden at 10 minutes. While this may seem like a minimal amount of time, a large company with hundreds of contractors may spend days inputting this information. DHS explains in this notice that it wants this information so that it DHS can cease recurrent vetting of the affected individual. It can be safely assumed that the vetting performed by DHS is via computer so that vetting the entire database will most likely take a matter of seconds and not be any sort of administrative inconvenience on DHS. Requiring every company spend days updating information rather than having the DHS computer run a few more seconds appears to be a needless burden.

DHS also underestimates the time spent by a company in maintaining the database and the documentation required for auditing purposes. According to DHS, upon a company's submittal of information, they will send a verification to the representative of the facility. These verifications will be required to be managed so that upon inspection, a facility can prove that it has vetted certain individuals. The facility will also have to manage the company database of which employees have access to which facilities. That in itself requires knowledge of name changes, transfers, hirings, etc., which would require development of policies and procedures, modifying business practices, training and audit, all of which would require a substantial investment of time by the company.

⁶ Id, p. 18851

6. In this notice, DHS responds to commentator's requests that third party professional background check companies be allowed to submit personnel information to DHS⁷. These third-party companies are experienced in ensuring compliance with DHS' requests does not cause noncompliance with other laws. DHS replied that it has historically allowed and will continue to allow third party users access to CSAT as a preparer. Designating these companies as preparers further complicates the process. To designate a company as a preparer, the high-risk facility must log into the CSAT system and enter the preparer's information for each high risk facility. A company with 50 high risk facilities would have to enter the information 50 times⁸.

The preparer would then enter the information and it would be forwarded to the high risk facility submitter, who would then submit the information to DHS. The preparer status also allows the third party user to access CVI outside the scope of the preparer's responsibilities. The third party user could access Top Screens, Security Vulnerability Assessments and Site Security Plans.

It would appear to be more efficient for a third party submittal to have its own portal to submit information on all companies it services.

7. DHS requires that the representative of each company *certify* that the information submitted on an affected individual is *true*, correct and complete.⁹ That requirement should be modified so that the representative certifies it is the same information presented by the affected individual. A company representative is not an expert in discerning what types of identification are valid and should not be held to that standard.

By the process outlined in this notice, DHS has unnecessarily complicated the method to ensure terrorists aren't provided access to critical areas inside a facility. By mandating a process, DHS contradicts the methodology of the risk based performance standards. DHS should allow the facilities to decide the appropriateness of its visitor and contractor access policies in light of the actual threats and proven consequences of an incident at the facility. Companies should be allowed to determine which type of access controls they wish to employ, and be able to benefit from the screening performed in such programs as TWIC and HME. As stated before, companies have a vested interest in the uninterrupted operation of their facilities and will protect their operations without government mandates, carefully weighing the risks to the operation against the consequences of an incident.



Rick Fahrenkrog
Director, Environmental, Health, Safety & Security
Magellan Midstream Partners, L.P.
One Williams Center, MD 27-2
Tulsa, Oklahoma 74172

⁷ Id, p. 18855.

⁸ CSAT User Registration User Guide, July 2008, p. 35.

⁹ Chemical Facility Anti-Terrorism Standards; Personnel Surety Program Request for Comments, 75 Federal Register 70 (13 April 2010), p. 18851.

PUBLIC SUBMISSION

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Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0038

Comment Submitted by

Submitter Information

Name: susan amodeo cathey

Address:

2700 post oak blvd
houston, TX, 77056

Email: susan.amodeo-cathey@airliquide.com

Phone: 7136248214

Organization: Air Liquide

General Comment

See attached file(s)

Attachments

DHS-2009-0026-DRAFT-0038.1: Comment Submitted by



Susan Amodeo-Cathey
Director, Health, Safety, Environment & Security
Air Liquide USA LLC

May 13, 2010

Mr. Dennis Deziel
Infrastructure Security Compliance Division
U.S. Department of Homeland Security
Mail Stop 8100
Washington, D.C. 20528

**Re: Docket Number DHS-2009-0026
Chemical Facility Anti-Terrorism Standards Personnel Surety Program
New Information Collection Request**

Dear Mr. Deziel:

American Air Liquide Holdings, Inc. and its U.S. subsidiaries (collectively, “Air Liquide” or “the Company”) have closely followed the development of the Chemical Facility Anti-Terrorism Standards (“CFATS”). As a responsible operator, the security of Air Liquide employees, facilities, and the communities in which we operate are among the Company’s highest priorities. We remain committed to chemical facility security regulations that meaningfully enhance the protection of our people and assets.

On April 13, 2010, the Department of Homeland Security (“DHS”) published another Information Collection Request in the *Federal Register* regarding the CFATS personnel surety program established by Risk-Based Performance Standard (“RBPS”) 12. As a member of the Compressed Gas Association (“CGA”), Air Liquide incorporates CGA’s comments by reference and is pleased to offer these additional comments to the record:

Comment 1: DHS Continues to Unreasonably Define the “Affected Population”

In the Information Collection Request, DHS has stated that the regulatory text takes precedence over the preamble language. As a result, the “affected population” for the purposes of the CFATS background check covers almost anyone who enters a covered facility. The number of workers, customers, and visitors who could be on our sites is dynamic and, it is our opinion, that DHS has grossly underestimated the number of individuals who could be impacted. This is especially true if the *facility* is the Restricted Area or Critical Asset. That is, due to facility operations, safety considerations, or materials management, the facility is unable to identify specific assets pursuant to RBPS 2.

Furthermore, DHS does not distinguish between a long term contractor (someone onsite for an extended period of time (days, weeks, or months), and a vendor, customer, or emergency responder who may spend only minutes on site. This, in turn, begs a question: what differentiates “facility personnel” (who apparently cannot be escorted) under RBPS 12 from facility “visitors (who can be escorted). Neither term is defined in the regulation, leaving this material compliance consideration unsettled. Additionally, any given vendor may access a dozen or more CFATS sites in one day with their name being entered into the system upon each separate entry. Requirements of this type will dramatically increase the workload on DHS and industry with no corresponding security benefit.

Comment 2: Updating PII Could Create an Undue Burden

As proposed, the Personnel Surety Program is overly burdensome and cumbersome for business, industry, and DHS. DHS intends to impose data gathering and submission requirements that are needlessly redundant, greatly complicate the program, and substantially increase manpower and funding requirements on both industry and government. Individually, and/or working with a third party background check provider, companies will have to gather the required Personally Identifiable Information for affected individuals, provide it to DHS, and regularly cross-reference information to account for changes. These requirements do little to enhance security of the regulated sites themselves and have the appearance of a time consuming and labor intensive task.

Comment 3: Failure to Provide Terrorism Screening Database Results to the Submitting Facility and the Affected Individual Precludes Meaningful Redress

Air Liquide reiterates its previous position: DHS should not withhold Terrorism Screening Database results as a general matter unless there is a legitimate need to do so (e.g., an ongoing law enforcement or national security investigation). Notification to the affected individual affords a meaningful opportunity for redress pursuant to 6 C.F.R. § 27.310(a)(1), and notification to the facility enables the facility itself to take appropriate action. Indeed, as the first line of defense against some security threats – such as who has access to Restricted Areas or Critical Assets – the facility has a personnel management role and obligation. DHS's April 13, 2010 response to public comments received during the 2009 Information Collection Request does not meaningfully address these issues.

Specifically, it remains unclear how a person can seek redress pursuant to 6 C.F.R. § 27.310(a)(1). DHS states that it “does not intend to limit affected individuals’ abilities to request administrative adjudications merely because it will not routinely notify them of TSDB vetting results. Individuals who believe they have been adversely affected by vetting may file Notices of Application for Review with the Department.” 75 Fed. Reg. 18,856. A critical question remains, however: if DHS fails to notify the affected individual regarding screening results, how will a person know to seek redress in the first instance?

Air Liquide appreciates the opportunity to comment on the CFATS personnel surety program. We look forward to a continued partnership with DHS and would be pleased to answer any questions. Please do not hesitate to contact me by telephone (713-624-8214) or by email (susan.amodeo-cathey@Airliquide.com).

Sincerely,



Susan Amodeo-Cathey
Director of Health, Safety, Environment, & Security
Air Liquide USA LLC

PUBLIC SUBMISSION

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Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0039

Comment Submitted by

Submitter Information

Name: Richard D Gupton

Address:

1156 15th Street, NW

Suite 302

Washington, DC, 20005

Email: richard@aradc.org

Phone: 202-457-0825

Fax: 202-457-0864

Organization: Agricultural Retailers Association

General Comment

This document is being submitted on behalf of the Agribusiness Security Working Group, which is comprised of the Agricultural Retailers Association, The Fertilizer Institute, and CropLife America.

Attachments

DHS-2009-0026-DRAFT-0039.1: Comment Submitted by



Agribusiness Security Working Group

May 13, 2010

Todd Keil

National Protection and Programs Directorate

Office of Infrastructure Protection

Infrastructure Security Compliance Division

Department of Homeland Security

245 Murray Lane, S.W., Mail Stop 0610

Arlington, VA 20528-0610

**Re: Docket No. DHS-2009-0026—Chemical Facility Anti-Terrorism
Standards Personnel Surety Program Information Collection Request**

Dear Mr. Keil:

On behalf of The Fertilizer Institute (TFI), the Agricultural Retailers Association (ARA) and CropLife America, we appreciate the opportunity to comment on the Department of Homeland Security's (DHS) *Submission for Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program (PSP) Information Collection Request*.

TFI is the national trade association for the fertilizer industry, representing fertilizer producers, retailers and wholesalers. The mission of TFI is to represent fertilizer from the plant it is produced to the plants where it is used and all points in between.

ARA is a non-profit trade association representing the interests of agricultural retailers and distributors across the United States on legislative and regulatory issues. ARA members range in size from family-held businesses to farmer cooperatives to large companies with many outlet stores. Retail facilities are scattered throughout all 50 states and supply valuable goods and services to our nation's farmers including seed, crop protection chemicals, fertilizer, fuel, crop scouting, soil testing, custom application services and development of comprehensive nutrient management plans.

CropLife America (CLA) represents the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. CropLife America's member companies produce, sell and distribute virtually all the crop protection and biotechnology products used by American farmers.

Our industry has limited resources available to address all security related matters and it is very important that those resources are spent wisely to coincide with the appropriate level of risk for that particular facility and chemical of interest (COI).

Vetting of employees and others who have access to restricted areas where COI are stored at fertilizer and chemical facilities is a priority for our member companies. The fertilizer and crop protection industries are diverse and range from large production facilities with several hundred employees to small retail cooperatives or independent retail fertilizer businesses that, in many cases, have between five and ten employees. In either of these cases, many are subject to the Chemical Facility Anti-Terrorism Standards (CFATS), the Maritime Transportation Security Act (MTSA), and Department of Transportation (DOT) hazardous materials regulations. Background checks on employees and contractors are already conducted and many of these individuals have hazardous material endorsements (HME), possess a Transportation Worker Identification Card (TWIC), or other federally issued credentials.

Under the CFATS Interim Final Rule (DHS-2006-0073; RIN 1601-AA41; 6 CFR Part 27) issued in April 2007, it states that DHS “may disapprove a Site Security Plan (SSP) that fails to satisfy the risk-based performance standards established in 27.230.” Section 27.230 lists the Risk Based Performance Standards (RBPS) each CFATS facility must select, develop in their SSP, and implement appropriate measures to satisfy the performance standards, which includes Personnel Surety.

RBPS #12 was issued for personnel surety and DHS has developed a CSAT application for high-risk chemical facilities to submit information about facility personnel and, as appropriate, unescorted visitors with access to restricted areas or critical assets at those facilities. The goal as stated by DHS is to identify known or suspected terrorists. While we fully agree with this goal we question the manner in which DHS has decided to fulfill this RBPS as we feel it goes beyond the statutory intent of Congress for chemical facilities to take measures designed to identify people with terrorist ties. RBPS #12, as stated in the April 9, 2007 interim final rule states that chemical facilities are to perform appropriate background checks on and ensure appropriate credentials for facility personnel, and as appropriate, for unescorted visitors with access to restricted areas or critical assets, including (1) measures designed to verify and validate identity; (2) measures designed to check criminal history; (3) measures designed to verify and validate legal authorization and work; and (4) measures designed to identify people with terrorist ties.

Prior Vetting Through TSDB for Employees and Contractors

TFI, ARA and CLA believe that our employees and contractors who hold a valid TWIC, HME, or other federally issued credentials satisfy employer’s compliance with the intent of personnel surety requirements of RBPS #12. DHS itself stated in the CFATS interim final rule that those who have successfully undergone a security threat assessment conducted by DHS and who is in possession of a valid DHS credential such as a TWIC, HME, NEXUS or FAST, will not need to undergo additional vetting by DHS through the Terrorist Screening Database (TSDB). In the April 13, 2010 notice, DHS now appears to want these individual’s information submitted, even though it will require “less information” than those who do not possess a federally issued credential. The redundancy is unnecessary for the regulated community and the government. It is our position that DHS should not require any further submission of information for those individuals holding federally issued credentials. We believe DHS’PSP proposal is at odds with the Administration’s position as stated in the *Surface Transportation Security Priority Assessment* (March 2010) which recommended that

federal agencies promote comparability and reciprocity of assessments across credentialing and screening programs.

Entering Restricted Areas

In the agricultural retail business, farm fertilizers such as anhydrous ammonia and ammonium nitrate are stored on site and, as such, subject to CFATS regulations. These facilities range in size and it is not unusual for a retail facility to hire part-time employees during the busy spring planting or fall harvesting seasons. Regardless whether they are full time or part-time employees at some point during the course of a normal working day, they will likely be in a restricted area. As a result, a facility will be required to submit all employees to DHS to check against the TSDB. Often times the farmer customer will come to the facility to pick up his own farm supplies. If a facility individual, cleared through the TSDB, is present in the restricted area and loads the chemical of interest for the farmer, is the farmer considered “escorted” and thus not required to be cleared through the TSDB? What if the farmer arrives in the restricted area to find the loader has left the area? Currently there is an “indefinite time extension” for farms, ranches, nurseries and other agricultural operations. Has DHS taken into consideration the additional facilities that may fall under CFATS and the personnel surety requirements when the extension is lifted? Depending on how DHS defines “unescorted” the number of affected individuals could be far greater than DHS anticipates and this will place an administrative burden on both the facility and DHS with no significant security return.

Duplicate Vetting

Fertilizer and crop protection production and retail companies have multiple facilities. Corporate personnel in areas such as finance, security and information technology visit their facilities throughout the year. Many industries have suggested to DHS that a person’s employer be allowed to submit information once for all corporate personnel but DHS has resisted this approach advising that it wants to associate individuals with “facilities” to assist in investigations. As a result, corporate personnel will have to be repeatedly entered by each facility. We see this as being redundant and burdensome with no security return.

Cost of Compliance with the Personnel Surety Proposal

Our members generally fall into two categories – large manufacturing facilities and smaller, local independent or cooperative retail dealerships who sell fertilizer, crop protection products and other farm supplies directly to farmers. In both cases, these facilities are covered under CFATS.

In a survey of several manufacturers and retailers, one facility has determined that the first year cost for personnel surety compliance for two facilities will total \$598,750 and \$537,869 in subsequent years. Another manufacturing facility anticipates a minimum of \$500,000, with another 1000 to 1500 individuals needing to be submitted when its plants are taken down for routine maintenance. One retailer reports that between managerial and administrative staff its costs will average \$40 and \$20 per hour per facility respectively with 20 facilities covered under CFATS.

Other Comments

We are concerned that the time and money spent to comply with the PSP will reap little to no security benefit. Facilities will have no knowledge of the results of their submissions since DHS appears to have no intention of notifying facilities if there is a match and facilities have 60 to 90 days to submit the information to DHS after an individual has access to a restricted area or leaves the facility and possibility moves on to another facility.

The lack of notification to CFATS facilities of the results of the TSDB check appears contrary to the April 2007 CFATS interim final rule that states “where appropriate, DHS will notify the facility and applicant via U.S. mail, with information concerning the nature of the finding and how the applicant may contest the finding. Applicants will have the opportunity to seek an adjudication proceeding and appeal.”

Conclusion

TFI, ARA, and CLA members remain committed to the implementation of security measures at our facilities. We look forward to continued dialogue with DHS on this very important issue. If you have any questions, please contact TFI Vice President of Member Services Pam Guffain by telephone at (202) 515-2704 or via e-mail at pguffain@tfi.org; ARA’s Vice President of Legislative Policy and Counsel Richard Gupton by telephone at (202) 457-0825 or via e-mail at richard@aradc.org or CropLife America’s Director of Government Affairs Kellie Bray by telephone at 202-872-3899 or kbray@croplifeamerica.org.

Sincerely,



Ford West
President



Daren Coppock
President & CEO



Jay Vroom
President & CEO

PUBLIC SUBMISSION

As of: May 14, 2010 Received: May 13, 2010 Status: Draft Tracking No. 80aed40e Comments Due: May 13, 2010 Submission Type: Web

Docket: DHS-2009-0026

Chemical Facility Anti-Terrorism Standard, PRA Notices for Comments on New Personnel Surety Information Collection Request

Comment On: DHS-2009-0026-0020

Agency Information Collection Activities; Proposals, Submissions, and Approvals: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Document: DHS-2009-0026-DRAFT-0040

Comment Submitted by

Submitter Information

Name: Jim Palmer

Address:

3901 NW 115th Avenue

Miami, FL, 33178

Email: jimp@allieduniversal.com

Phone: 3058882623

Fax: 3054638369

Organization: Allied Universal Corporation

General Comment

See attached file(s)

Attachments

DHS-2009-0026-DRAFT-0040.1: Comment Submitted by



3901 NW 115th Avenue
Miami, Florida 33178
305-888-2623 office
305-885-4671 fax

May 13, 2010

Mr. Thomas Chase Garwood III
Chief Information Officer
National Protection and Programs Directorate
Department of Homeland Security

RE: Docket No. DHS-2009-0026, 75 FR 18850-18857 April 13, 2010

Dear Mr. Garwood,

Our company, Allied Universal Corporation (Allied), is a small business as defined by the U.S. Small Business Administration. It operates eight chemical manufacturing and distributing facilities throughout the Southeastern United States. It employs nearly 350 individuals and provides materials to a number of industries critical to our nation's and several states' economies and public health. We are writing to you to express our concerns regarding the Chemical Facility Anti-Terrorism Standards Personnel Surety Program Information Collection Request.

Security is a high priority for Allied Universal Corp. We are members of the Chlorine Institute and National Association of Chemical Distributors (NACD), which requires our participation in the Responsible Distribution Process, an environmental, health, safety, and security management program. Regulated under CFATS, Allied has attended all chemical security summits and most threat briefings. We have requested DHS compliance assistance reviews as well as site and cyber security vulnerability surveys. We have proactively contacted our area FBI Weapons of Mass Destruction agents and Protective Security Advisors, attended DHS training seminars as well as undertaken a number of company policies, facility, chemical process and information technology physical changes. Allied has budgeted over a million dollars in capital improvement projects for security each of the last four years. We do not embellish when we state that a significant amount of our company's resources, capital, human and other, has been spent and will continue to be spent on security as Allied works to address the CFATS program and any identified vulnerabilities. Being a small business with a limited number of resources, it is a daunting task.

3901 NW 115 Avenue
Miami, Florida 33178
305-888-2623

9501 Rangeline Road
Ft. Pierce, Florida 34987
772-464-6195

30 Neil Gunn Drive
Ellisville, MS 39437
601-477-2550

5215 W. Tyson Avenue
Tampa, Florida 33611
813-832-4868

8350 NW 93rd Street
Miami, Florida 33166
305-888-2623

204 SCM Road
Brunswick, GA 31525
912-267-9470

1405 Possum Hollow Road
Ranger, GA 30734
706-334-7377

2100 Port Road
West Memphis, AR 72301
870-732-3107

We do not understand nor do we see the merit of the proposed Personnel Surety Program. It is redundant in its reporting requirements and an unnecessary burden on our business. This program is in addition to the Commercial Drivers' License Hazardous Material Endorsement (HME) program, the Transportation Worker Identification Card (TWIC) program, and our company's internal employee background verification process (which includes a minimum of seven different background checks). Why are businesses being asked to vet personnel and visitors so many times? Why is a new program being proposed when existing programs, such as the TWIC program, are already in use and working at a number of locations, including chemical facilities similar to CFATS only regulated under MTSA? DHS Assistant Secretary David Hyman states that TWIC holders have undergone a "rigorous vetting program" while testifying before Congress. Given Secretary Hyman's testimony, and the fact the TWIC program is already implemented in a number of MTSA regulated chemical plants, TWICs should be required at all CFATS chemical facilities rather than create an entirely new Personnel Surety Program.

Another problem is, given the small size of our operations, we are limited in our capability of restricting access to the plant as the entire plant is a restricted area. All employees, contractors, truck delivery drivers, corporate personnel, visitors, railcar delivery personnel, public utility workers, package/mail delivery carriers, vending machine suppliers, uniform suppliers, mechanics, etc. have a need to access the plant on a routine basis for work. For a number of these personnel, background performance checks under the proposed program would be completely redundant (i.e. it would be 100% for all HME drivers and those with TWICs).

We also believe that the number estimated for those who will need to undergo this proposed vetting is greatly underestimated. The U.S. Coast Guard originally estimated that under a half-a-million people would need a TWIC. Their estimate was wrong, with well over a million needing a TWIC per current records. Allied has several facilities not in a MTSA regulated area, but numerous employees already have a TWIC as they had to obtain one to conduct business with a number of our customers. We envision having to vet more than a thousand individuals for our facilities in one year under the proposed Personnel Surety Program and at this time do not have anyone to manage such an undertaking given numerous other responsibilities including the day-to-day business operations that sustains our business.

We have serious liability concerns with the proposed Personnel Surety Program. The current proposed program provides no immunity from any legal challenges from disgruntled or un-credentialed employees. Realistically, small chemical businesses like Allied do not have the personnel or expertise to set-up TWIC like redress or redetermination processes, which is an inherently governmental function under the TWIC regulations. With only one human resource manager, one human resource generalist and one assistant for both, along with no internal legal staff, it is a struggle to understand how the regulations will apply in the employment law arena, especially when models of such a procedure do not exist. The demand for hiring law intelligence is now an absolute

necessity for this program, creating a large financial and personnel burden on regulated small businesses. Allied and like businesses cannot sustain such a burden.

In closing, we remain committed to the implementation of suitable security measures at our facilities. We strongly urge DHS to review the economic impact of the proposed Personnel Surety Program on small businesses as it is required to do under the Small Business Regulatory Enforcement Fairness Act of 1996. DHS should also consider meeting with representatives of affected small entities, such as industry trade associations (i.e. National Association of Chemical Distributors and the Chlorine Institute). Finally, we strongly support and request DHS to accept and require a valid TWIC (similar to the U.S. Coast Guard requiring for all MTSA sites) as meeting the CFATS Personnel Surety requirement.

I would like to thank you in advance for your consideration. Please feel free to contact me should you have any questions regarding the above mentioned.

Sincerely,

Jim Palmer
Chief Executive Officer
Allied Universal Corporation
3901 NW 115th Avenue
Miami, Florida 33178-1859
(305) 888 – 2623, extension 109
JimP@Allieduniversal.com
www.allieduniversal.com

cc: *R. Bolte, Regulatory Affairs Manager*
B. Namoff, Chairman of the Board
M. Koven, Chief Financial Officer
T. Tucker, Vice President of Operations