



Homeland
Security

24 August 2015

Mr. Michael Rush
Associate General Counsel
Association of American Railroads
425 Third Street, SW, Suite 1000
Washington, DC 20024

Dear Mr. Rush:

The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) has forwarded to the Department of Homeland Security your March 2014 letter regarding the February 2014 Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program Information Collection Request (ICR). We are responding to your letter in concert with OMB's approval of the ICR.

Background--Statutory and Regulatory Framework

In the time since the CFATS Personnel Surety Program ICR was submitted to OMB, the President signed into law the Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (the CFATS Act of 2014), Pub. L. No. 113-254, which adds provisions related to CFATS to the Homeland Security Act of 2002, as amended, Pub. L. No. 107-296.¹ The Homeland Security Act of 2002² affirmed that the Department must implement a Personnel Surety Program in which the Department is required to establish a capability for high-risk chemical facilities to comply with Risk-Based Performance Standard (RBPS) 12(iv) of CFATS.³ The CFATS Act of 2014 also established additional provisions for the CFATS Personnel Surety Program, to include allowing a high-risk chemical facility to visually verify certain credentials or documents that are issued by a Federal screening program that periodically vets enrolled individuals against the Terrorist Screening Database (TSDB). Under RBPS 12(iv) high-risk chemical facilities are required to implement security measures to identify individuals with terrorist ties. The approved CFATS Personnel Surety Program ICR aligns with the CFATS regulations and section 2102(d)(2) of the Homeland Security Act of 2002.

¹ Section 2 of the CFATS Act of 2014 adds a new Title XXI to the Homeland Security Act of 2002. Title XXI contains new sections numbered 2101 through 2109. Citations to the Homeland Security Act of 2002 throughout this document reference those sections of Title XXI. In addition to being found in amended versions of the Homeland Security Act of 2002, those sections of Title XXI can also be found in section 2 of the CFATS Act of 2014, or in 6 USC §§ 621 – 629.

² The CFATS Act of 2014 specifically adds Section 2102(d)(2) which requires the Department to implement a Personnel Surety Program.

³ The specific requirement is found at 6 CFR § 27.230(a)(12)(iv).

The CFATS Act of 2014 does not conflict with 6 CFR § 27.230(a)(12)(iv) as promulgated on April 9, 2007 and is consistent with the regulatory text of the CFATS Interim Final Rule (IFR). However, the CFATS Act of 2014 does conflict with IFR preamble because the preamble did not consider visual verification as a means to sufficiently verify an affected individual's enrollment in the Transportation Worker Identification Credential (TWIC) program, Hazardous Materials Endorsement (HME) program, or the Trusted Traveler program. The Department continues to believe that visual verification has significant security limitations. However, as a result of the CFATS Act of 2014, the Department will now accept visual verification of certain credentials or documents as a means to meet RBPS 12(iv).

It bears noting that the burden estimates of the ICR have not changed as a result of the CFATS Act of 2014 or as a result of any programmatic changes to the CFATS Personnel Surety Program. Therefore, the Department has the authority to implement the CFATS Personnel Surety Program as described in the CFATS IFR with modifications to account for new statutory requirements in the CFATS Act of 2104.

Multiple Options for Compliance with RBPS12(iv)

As mentioned above, in view of the Personnel-Surety-focused language of the CFATS Act of 2014, the Department will accept visual verification as a method to comply with RBPS 12(iv). Thus, in addition to the three options for complying with RBPS 12(iv) described in the 30-day Paperwork Reduction Act (PRA) notice,⁴ the Department is making available a fourth option for high-risk chemical facilities to comply with RBPS 12(iv): Option 4 – *Visual Verification Of Credentials Conducting Periodic Vetting*. Option 4 will allow a high-risk chemical facility to satisfy its obligation under 6 CFR § 27.230(a)(12)(iv) to identify individuals with terrorist ties using any Federal screening program that periodically vets individuals against the TSDB if:

- The Federal screening program issues a credential or document;
- The high-risk chemical facility is presented a credential or document by the affected individual; and
- The high-risk chemical facility verifies that the credential or document is current in accordance with its Site Security Plan (SSP).

As noted previously, however, visual verification of existing credentials carries with it inherent security limitations and provides less security value than the other options available under the CFATS Personnel Surety Program because a visual inspection of a credential alone cannot necessarily confirm whether a credential is expired, revoked, fraudulent or otherwise not valid. For example:

- The visual verification of a TWIC will not reveal if the TWIC has been revoked by the Transportation Security Administration (TSA); and
- The visual verification of an HME on a commercial driver's license will not reveal if the endorsement has expired or been revoked.

⁴ The 30-day Federal Register notice that solicited comment about the CFATS Personnel Surety Program ICR may be viewed at <https://federalregister.gov/a/2014-02082>.

High-risk chemical facilities are encouraged to review all the available options and carefully consider which option (or combination of options) best addresses their specific security situation. In addition to the options described in the 30-day notice and in this letter, high-risk chemical facilities are welcome to propose in their SSPs or Alternative Security Programs (ASP) options not described in this document. The Department will assess the adequacy of such alternative or supplemental options on a facility-by-facility basis.

Specific Questions Raised by Association of American Railroads (AAR)

Having taken note of the changed landscape and additional options afforded by the CFATS Act of 2014 and noting that your letter to OMB was drafted several months prior to enactment of this significant piece of legislation, the Department would like to take this opportunity to address the specific questions and concerns you raised in your March 2014 letter.

(1) AAR suggested “that the [CFATS Personnel Surety] program is unnecessary for railroad employees, particularly in light of TSA’s railroad security measures and railroad security programs.”

While TSA’s railroad security measures and railroad security programs do enhance the security of railroad employees, the Department does not intend to provide a blanket exemption for railroad employees from RBPS 12. The current statute and rule do not list a separate exemption for railroad employees. The Department suggests that AAR coordinate directly with CFATS facilities to better understand ways in which high-risk chemical facilities may tailor their SSPs to best balance the needs of railroad employees with how the high-risk chemical facility identifies as affected individuals. For example high-risk chemical facilities may:

- Restrict the numbers and types of persons whom they allow to access their restricted areas and critical assets, thus limiting the number of persons who will need to be checked for terrorist ties;
- Define their restricted areas and critical assets in their SSPs, thus potentially limiting the number of persons who will need to be checked for terrorist ties; and
- Choose to escort visitors to restricted areas and critical assets in lieu of performing the background checks required by RBPS 12 (e.g., propose in their SSPs traditional escorting solutions and/or innovative escorting alternatives such as video monitoring as appropriate, to address the unique security risks present at each high-risk chemical facility).

(2) AAR expressed disappointment in the Department’s statement in the 30 day PRA notice that “many railroad employees have TWICs and encourages high-risk chemical facilities to consider whether Option 2 or Option 3 may provide a reasonable solution.” AAR also suggested that the Department’s response was “inaccurate.”

The Department’s complete response in the 30-day notice was:

Railroad employees may be affected individuals if the high-risk chemical facility has defined railroad employees in their SSP or ASP as either (1) high-risk chemical facility personnel who have access, either unescorted or otherwise, to restricted areas or critical assets, or (2) unescorted visitors who have access to restricted areas or critical assets.

Each high-risk chemical facility can choose which option or options it wishes to implement with regard to railroad employees that would be affected individuals. The Department notes that many railroad employees have TWICs and encourages high-risk chemical to consider whether Option 2 Option 3 may provide a reasonable solution.

The Department has reviewed its response and agrees that it lacks sufficient information to support the statement that “many” railroad employees have TWICs. However, some railroad employees do possess TWICs and potentially other credentials or documents issued by federal screening programs that conduct periodic vetting against the TSDB. The Department also believes that in addition to Option 1, Option 2, Option 3, and Option 4 may provide a reasonable solution for high-risk chemical facilities regulated under CFATS to meet the requirements of RBPS 12(iv) when a railroad employee is an affected individuals. How and when the requirement is met should be coordinated with high-risk chemical facilities, in accordance with their SSPs.

(3) AAR suggested that the Department “failed to respond to AAR’s point, [submitted in a comment during the 60-day comment period,] that that because of existing industry and government security programs, there are no benefits to offset the significant burdens that the proposed CFATS Personnel Surety Program would impose on the railroad industry.”

The Department believes that when implemented, RBPS 12(iv) provides significant benefit to high-risk chemical facilities and the public (i.e., the identification of affected individuals with terrorist ties). Furthermore, the Department believes that the CFATS Personnel Surety Program complements, rather than duplicates, existing industry and government security programs because the Department allows high-risk chemical facilities ways to leverage the vetting performed by other existing industry and government security programs. Through the CFATS Personnel Surety Program, the Department can provide support and information about relevant high-risk chemical facilities, at which affected individuals with terrorist ties have access, to appropriate federal law enforcement officials.

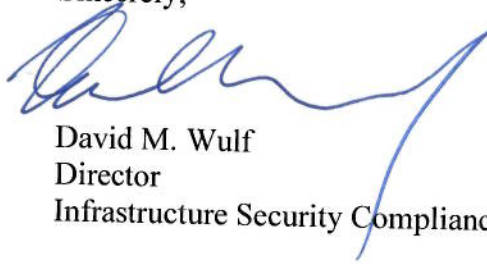
(4) AAR also suggested that “the proposed [CFATS] Personnel Surety Program fails to satisfy Executive Order 13563.”

Executive Order 13563 requires certain improvements to regulation and regulatory review. When the Department published CFATS, it did consider CFATS to be a significant rulemaking. Therefore, in compliance with the requirements of Executive Order in effect at the time of the CFATS rulemaking, the Department outlined in the CFATS Regulatory Assessment the

assumptions it used to estimate the costs of CFATS, which included the Department's estimates related to Personnel Surety in section 6.3.10 of the CFATS Regulatory Assessment.

You and AAR have been leaders in the personnel surety arena and in furthering the overall objectives of the CFATS program, and the Department is appreciative of your continuing efforts to secure America's highest-risk chemical facilities - an effort that is essential to the Nation's critical infrastructure security and resilience.

Sincerely,



David M. Wulf
Director
Infrastructure Security Compliance Division