



**Homeland
Security**

24 August 2015

Mr. Jeff Gunnulfsen
Director, Security and Risk Management
American Fuel & Petrochemical Manufacturers
1667 K Street, NW, Suite 700
Washington, DC 20006

Dear Mr. Gunnulfsen:

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 American Fuel & Petrochemical Manufacturers (AFPM)

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) **AFPM suggested that the Department should approve SSPs in which a high-risk chemical facility agrees to accept “ANY Federal TSDB check from ANY US Federal Agency[.]”**

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—essentially, a fourth option—to comply with RBPS 12(iv). With four options now available to comply with the terrorist ties portion of RBPS 12, high-risk chemical facilities may choose the option or options that best meet their individual circumstances, with the ability to fully leverage existing Federal programs that vet individuals for terrorist ties. High-risk chemical facilities are encouraged to review all the available options available and carefully consider which option (or combination of options) best meets their specific security situation.

- (2) **AFPM suggested that “[r]equiring the submission of personally identifiable information (PII) on valid TWIC and other Federally vetted program holders” is “beyond the scope of DHS’s authorization[.]”**

The Department believes that it is within the scope of the Department’s authority to establish the parameters and policies with regard to how Option 2 will function, which among other policies will require the submission of certain information by the high-risk chemical facility.

- (3) **AFPM suggested that “[r]equiring information [about affected individuals under Option 1 or Option 2 must] be submitted to DHS 48 hours in advance of a contractor’s arrival at the [high-risk chemical] facility” is “outside the scope of DHS’s authorization[.]”**

The Department believes that such a policy is within the scope of the Department’s authority. Nonetheless, in response to comments the Department has also removed the requirement that a high-risk chemical facility must submit information about new affected individuals 48 hours in advance of access being granted to the restricted areas or critical assets at a high-risk chemical facility.

- (4) AFPM suggested that “[r]equiring notifications ... when personnel depart a regulated site” is “outside the scope of DHS’s authorization.”**

The Department believes that Section 550 of P.L. 109-295 did not prohibit the Department from requiring notification by the high-risk chemical facility when an affected individual whose information has been submitted to DHS under Option 1 or Option 2 no longer has or is seeking access. However, the CFATS Act of 2014 prohibits the Department from requiring a high-risk chemical facility to submit information about an individual more than one time. Therefore, under Option 1 or Option 2, a high-risk chemical facility has the option (but is not required) to notify the Department when the affected individual no longer has access to any restricted areas or critical assets. Notification helps to ensure the accuracy of the Department’s data and to stop the recurrent vetting on the person who is no longer an affected individual.

- (5) AFPM suggested “that the 60-day compliance requirement for implementing [the CFATS Personnel Surety Program] at Tier 1/Tier2 [high-risk chemical] facilities will not allow enough time for [high-risk chemical facilities] to prepare for this program.”**

For affected individuals with existing access, the Department will expect, unless otherwise noted in an authorized or approved SSP or ASP, that the terrorist ties check will be completed within 60 days after receiving authorization or approval of an SSP requiring compliance with RBPS 12(iv). High-risk chemical facilities that believe the 60-day timeframe is not achievable are encouraged to suggest alternative schedules based on their unique circumstances in their SSPs.

- (6) AFPM suggested that the Department reconsider the industry proposal “to set up a web site where individuals could, on a strictly voluntary basis, submit their own PII directly to DHS via a DHS managed secured portal prior to visiting a CFATS regulated site” that the AFPM and other industry stakeholders proposed in earlier comments submitted on June 4, 2013.**

Through the PRA, the Department has not sought to expand or change the 6 CFR Part 27. The proposal you reference would at a minimum require rulemaking activities and/or statutory changes.⁵ CFATS enables the Department to collect biographic terrorist ties screening information from high-risk chemical facilities, not from affected individuals themselves.

The Department recently initiated new rulemaking activities for CFATS generally, and intends to use the rulemaking process (not the PRA process) to make any future changes to the rule. In response to the Department’s solicitation of comment as part of a CFATS Advance Notice of Proposed Rulemaking on August 18, 2014, AFPM submitted comments. The Department will review and consider AFPM’s comments to amend 6 CFR Part 27 (and RBPS 12 in particular) as part of future rulemaking efforts.

⁵ The AFPM proposal may be viewed at <http://www.regulations.gov/#!documentDetail;D=DHS-2012-0061-0029>.

- (7) **AFPM suggested that the Department not implement the CFATS Personnel Surety Program until after the Department corrects “deficiencies” identified in its tiering protocols.**

The Department strongly believes that implementation of the CFATS Personnel Surety Program as soon as possible at Tier 1 and Tier 2 is an important step towards closing the existing security gap in the CFATS program. The Department believes that identifying affected individuals with terrorist ties as soon as possible provides a significant security value and should not be delayed.

- (8) **AFPM suggested concern “that [the 30-day PRA notice] is identified as an Information Collection Request (ICR), but in reality it is a rulemaking setting out specific requirements that an ICR does not normally do.”**

The Department 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 that is appropriate in a PRA notice, because it allows the Department 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.

- (9) **AFPM expressed concern that “there is no specific procedure described in the [30-day PRA] notice that discusse[d] any type of DHS warning process to facilities or companies when an individual has been identified as having known or suspected ties to terrorism when vetted against the TSDB.” AFPM further stated that, “DHS has not provided any details regarding vetting procedures, including how and under what circumstances DHS will notify a facility and how matches against the TSDB are resolved.” AFPM requested “far better transparency and clarification be provided to the regulated community on vetting procedures and corrective action.”**

In the event of a positive match against the TSDB and in order to prevent a significant threat to a high-risk chemical facility or loss of life, a high-risk chemical facility will be contacted where appropriate and in accordance with federal law and policy, as well as law enforcement and intelligence requirements. This policy is consistent with other federal security vetting programs and is consistent with RBPS 12.

- (10) **AFPM suggested that the CFATS Personnel Surety Program “is in contradiction to the 9/11 Commission Report and HSPD-6 which recommended and prescribed serious changes to address duplication of efforts within the security agencies in the collection and analysis of information.”**

The CFATS Personnel Surety Program has been evaluated by the Department and has been determined to be consistent with and align with the appropriate agreements, infrastructure, and processes related to terrorist screening within the U.S. Government.

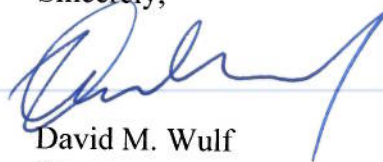
- (11) AFPM reiterated some of the assertions made in the March 2013 Office of the Inspector General Report. AFPM also stated that “[i]t is also unclear, from the IG report and from the current ICR, why DHS needed to establish ‘specific CFATS vetting capabilities.’”**

The March 2013 Office of the Inspector General (OIG) Report contained 24 findings of which Finding #7 concerned the CFATS Personnel Surety Program. In its written response to the OIG Report, the Department non-concurred with Finding #7 and provided a substantive response to the assertions described in the OIG Report on pages 95 and 96 of the OIG Report.

In its report, the OIG stated that although National Protection and Programs Directorate (NPPD) did not concur with the recommendation, it considers the actions NPPD had taken to have been responsive to Recommendation 7 and considers this recommendation resolved, but open, pending receipt of documentation showing that OMB has approved the CFATS Personnel Surety Program ICR and that ISCD has sent names to the TSA for vetting.

You and AFPM 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