



Homeland
Security

24 August 2015

Mr. Boyd Stephenson
Vice President, International Supply Chain Operations
American Trucking Associations
950 N. Glebe Road, Suite 210
Arlington, Virginia 22203

Dear Mr. Stephenson:

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 Trucking Associations (ATA)

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) ATA suggested that the Department “could more efficiently use resources by allowing regulated facilities to accept proof that a prospective unescorted visitor meets the background check requirements laid out in CFATS’ Personnel Surety Risk-Based Performance Standards through other federally-vetted credentials.”**

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 RBPS12, 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) ATA suggested that the Department “could more efficiently use resources and avoid duplicative government effort by leveraging other credentials that require equivalent or superior screening to that required under the CFATS’ Personnel Surety Program.”**

The Department appreciates ATA’s support in its March 5, 2014, letter of Option 1 – Direct Vetting⁵ for affected individuals “not otherwise vetted.” ATA asserts that a name-based terrorism check under Option 1 is inferior to the fingerprint-based terrorism check required to obtain an HME on a Commercial Drivers License, a TWIC, or to be a member of the Free And Secure Trade (FAST) program. As a result, ATA suggests that for individuals that possess an HME endorsed CDL, TWIC, or FAST Option 1 is duplicative.

The type of terrorist background check used by the TWIC, HME, and the Trusted Traveler programs, as well as the background check performed under Option 1 of the CFATS Personnel Surety Program, all rely on a biographic-based check against the TSDB. The TWIC, HME, and

⁵ Option 1 is described in more detail in the 30-day Federal Register notice that solicited comment about the CFATS Personnel Surety Program ICR which may be viewed at <https://federalregister.gov/a/2014-02082>.

the Trusted Traveler programs do not use fingerprints to conduct terrorist ties vetting. The fingerprints collected as part of those programs are used for other purposes. The terrorist ties vetting performed under each of these programs is equivalent to the terrorist tiers checks to be performed under Option 1 of the CFATS Personnel Surety Program by the Department.

Affected individuals enrolled in the TWIC, HME, and the Trusted Traveler programs have undergone additional non-terrorist related background checks, some of which do rely on fingerprints. These other background checks have security value and the Department has routinely suggested that high-risk chemical facilities may consider these non-terrorist background checks sufficient to meet RBPS 12(i)-(iii).

- (3) ATA suggested that “ISCD fails to demonstrate how these credentialed individuals—who have all received a ‘Determination of No Security Threat’ from TSA—become a security threat by entering a regulated chemical facility.” ATA further suggested that “ISCD has failed to demonstrate how redundantly seeking a second and inferior security threat determination from TSA (which has already issued the credential-holder a ‘Determination of No Security Threat’), provides any security benefits beyond those conferred by receiving the determination for the initial credential.”**

With respect to Option 2, the Department previously noted that electronic verification is important and provides substantially more security value when compared to visual verification of the same credentials. The information collected under Option 2 is necessary to electronically verify an affected individual’s enrollment in the TWIC, HME or Trusted Traveler programs. Security value is realized under Option 2 when TSA or CBP updates the security threat assessment underlying the TWIC, HME, or Trusted Traveler programs. Only electronic verification, not visual inspection of the TWIC, HME, or Trusted Traveler program credentials can reveal that the credential or endorsement was revoked (e.g., the security threat assessment was updated and the individual previously issued the credential is now potentially considered a threat).

ATA’s March 6, 2014, letter implied that under Option 2 the verification of an affected individual’s enrollment in the TWIC, HME, or Trusted Traveler programs creates a second security threat assessment. However, verification, under Option 2, does not create another security threat assessment. Verification under Option 2 accesses the existing and current security threat assessment and verifies its status.

- (4) ATA suggested that the Department “allow facilities to implement the personnel surety requirements in the manner that best suits their particularized needs.”**

The Department agrees with ATA that a high-risk chemical facility should have the discretion to select which option(s) to use for an affected individual. For example, even though a high-risk chemical facility could comply with RBPS 12(iv) for certain affected individuals by using Option 2, the high-risk chemical facility could choose to use Option 1 for those affected individuals. Similarly, a high-risk chemical facility, at its discretion, may choose to use Option 1 or Option 2 rather than Option 3 or Option 4 for affected individuals who have TWICs. High-

risk chemical facilities also may choose to combine Option 1 with Option 2, Option 3, and/or Option 4, as appropriate, to ensure that adequate terrorist ties checks are performed on different types of affected individuals (e.g., employees, contractors, unescorted visitors). Each high-risk chemical facility will need to describe how it will comply with RBPS 12(iv) in its SSP.

- (5) ATA suggested that the Department “could minimize the burden on regulated facilities and unescorted visitors holding credentials that meet the CFATS Personnel Surety Program’s requirements by accepting those credentials via the normal validation method used for each credential.”**

As mentioned earlier in this letter, the Department will accept visual verification as a method to comply with RBPS 12(iv). As a result, a high-risk chemical facility may verify that a credential or document is current based upon visual inspection, if the processes for conducting such visual inspections are described in its SSP. The Department will encourage, but not require, high-risk chemical facilities to consider any rules, processes, and procedures prescribed by the entity issuing the credential or document about how to verify the credential or document.

- (6) ATA asserted that “the proposed ICR manifestly conflicts with Executive Order 12866 and its amendments in Executive Order 13563 in several ways. First, it conflicts with Executive Order 12866 § 1(b)(8), directing agencies to “specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.” It further falls afoul of Executive Order 13563’s command that agencies “to the extent permitted by law...reduce the burden and maintain flexibility and freedom of choice for the public.” As demonstrated above, because the checks for those holding superior credentials like the HME and the TWIC will simply be duplicated, the Proposed ICR further runs afoul of Executive Order 12866 § 1(b)(10)’s instruction that agencies “avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.”**

This ICR does not constitute rulemaking. When the Department published CFATS, however, it did consider CFATS to be a significant rulemaking assessment. Therefore, in compliance with the requirements of Executive Order 12866, 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.

Similar to other elements of CFATS, the CFATS Personnel Surety Program at 6 CFR § 27.230(a)(12)(iv) establishes a specific RBPS. The Department provides each high-risk chemical facility at least four alternatives to comply with the standard while not precluding the high-risk chemical facility the ability to propose alternative or supplemental options in their SSPs or ASPs.

For reasons described previously in this letter, the Department believes that the CFATS Personnel Surety Program is consistent, compatible, and leverages other DHS regulations or those of other Federal agencies.

- (7) ATA suggested that the Department “failed to follow Congressional direction excluding commercial driver’s license holders with a hazardous materials endorsement (HME) from other security background checks less stringent than the background check required for the HME.”**

Collecting information to verify an affected individual’s enrollment in another DHS screening program, so that if verified the Department may rely on the results of the security threat assessment already performed and being recurrently performed, is not prohibited by 49 U.S.C. 5103a(g)(1)(B)(i), and comports with the means of vetting verification described in the CFATS Interim Final Rule. As stated earlier in this letter, as a result of the CFATS Act of 2014, high-risk chemical facilities may use Option 4 to conduct visual verifications on existing credentials (like commercial driver’s licenses containing HME endorsements) instead of collecting information from those credentials and their holders and submitting that information to DHS under Option 2.

- (8) ATA suggested that the Department’s proposal to require the submission of information about a new affected individual 48 hours prior to access by the affected individual to restricted areas or critical assets is “commercially unworkable.”**

RBPS 12(iv) is a performance standard requiring background checks and should not be confused with an access control measure. The Department expects submissions under Option 1 or Option 2 to be a part of the normal and routine background check process impose during routine hiring process or in compliance with contract clauses between the high-risk chemical facility and its contractors. The Department provided several illustrative scenarios in the 30-day PRA notice based upon its discussion with stakeholders.

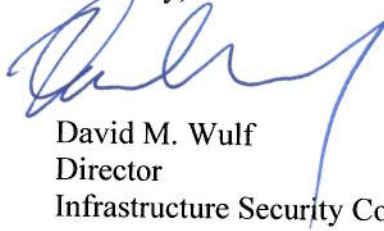
Nevertheless, in response to comments, the Department has removed the requirement that a high-risk chemical facility must submit information about new affected individuals 48 hours in advance of access being granted to the restricted areas or critical assets at a high-risk chemical facility.

- (9) ATA suggested that the Department “[r]equire no information from those leveraging pre-existing credentials including the TWIC, HME, and FAST card or, at a minimum, less information than for those lacking any credential.”**

As mentioned earlier in this letter, the Department will accept visual verification as a method to comply with RBPS 12(iv). As a result, a high-risk chemical facility may verify that a credential or document is current based upon visual inspection. The Department believes that visual verification provides less security value than the other options available to high-risk chemical facilities under the CFATS Personnel Surety Program. However, the Department encourages high-risk chemical facilities to consider other means of verification, consistent with the facility’s assessment of the threat posed by acceptance of such credentials.

You and ATA 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,

A handwritten signature in blue ink, appearing to read 'D. Wulf', with a long, sweeping underline that extends to the right.

David M. Wulf
Director
Infrastructure Security Compliance Division