



Homeland
Security

24 August 2015

Ms. Cynthia Hilton
Executive Vice President
Institute of Makers of Explosives
1120 Nineteenth Street, NW, Suite 310
Washington, DC 20036

Dear Ms. Hilton:

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 2014.

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 the Institute of Makers of Explosives (IME)

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.

COMMENTS RELATED TO LEVERGING VETTING UNDER OTHER PROGRAMS

- (1) IME suggested that the Department has “failed to demonstrate why the information collection needs to include those who have already been determined not to present a threat of terrorist ties by other Federal agencies.”**

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 and carefully consider which option (or combination of options) best meets their specific security situation.

- (2) IME suggested that the Department “rejected the approach to vetting taken by [other vetting] programs,” noting that “[o]ther DHS vetting programs are based on a direct relationship between the government and the individuals applying for access privileges.” IME has also noted that “regulated companies that employ or otherwise use these individuals are not forced to serve as the middleman in the collection, storage, and sharing of [Personally Identifiable Information].”**

The Department agrees that, under Option 1 or Option 2, the CFATS Personnel Surety Program is different from many other vetting programs due to the fact that individuals do not directly provide information about themselves in order to receive a status, benefit, or credential. This framework, however, aligns with the CFATS program generally in that CFATS does not create a relationship directly between individuals and the Department. Rather, the SSP developed by high-risk chemical facilities to account for the various Risk-Based Performance Standards - to include RBPS 12 - becomes, in essence, a contract between the high-risk chemical facility and the Department.

The Department recognizes that the chemical industry has largely been historically successful conducting identity, legal authorization to work, and criminal history background checks on its facility personnel and unescorted visitors. A requirement to conduct background checks for terrorist ties, however, requires the ability to compare information contained in databases not available to the public and information about affected individuals at high-risk chemical facilities. Because the Department regulates high-risk chemical facilities and not individuals, regulated facilities and their designees become middlemen between the affected individual and the Department.

Notwithstanding those aspects of CFATS and its Personnel Surety Program that make Options 1 and 2 somewhat unique, high-risk chemical facilities may also opt to use Option 3 or Option 4 to comply with RBPS 12(iv). Option 3 and Option 4 allow a high-risk chemical facility to comply with RBPS 12(iv) without being required to submit information to the Department.

- (3) IME suggested that the Department “has an obligation to accept TSDB screening performed by any other federal agency without preconditions or demonstrate ... program objectives that are prevented by utilizing established methods.” IME also suggested that “the regulated community has the right to rely upon the vetting performed by a federal agency as sufficient proof that an individual does not have terrorist ties.” IME further suggests that the Department “has inexplicably refused to grant reciprocity without preconditions even to the Department’s own, well-established vetting and credentialing programs.”**

Under Option 2, the Department has provided reciprocity to several of its own well-established vetting and credentialing programs after electronic verification. Electronic verification enables the Department to ascertain whether a person’s TSDB status has changed in the time since the initial issuance of the credential as a result of new derogatory information. The collection of information under Option 2 aligns with the Recommendation 16 of the Surface Transportation Security Priority Assessment issued by the White House in 2010.⁵

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). 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; and
- 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).

Of particular significance to IME and the explosives industry, it bears noting that the Department has determined that vetting conducted by the Bureau of Alcohol, Tobacco, Firearms and

⁵ Recommendation 16 of the Surface Transportation Security Priority Assessment may be found on page 21 of the 2010 White House report at http://www.whitehouse.gov/sites/default/files/rss_viewer/STSA.

Explosives (ATF) in conjunction with the issuance of ATF explosives licenses or permits may be leveraged by high-risk chemical facilities under Option 4.

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 periodically vet individuals for terrorist ties. High-risk chemical facilities are encouraged to review all the available options and carefully consider which option (or combination of options) best meets their specific security situation.

- (4) IME suggested that the Department “should not force companies to invest in [TWIC] readers that ultimately will not meet USCG standards or deployment protocols.” IME also stated that the Department “should allow [high-risk chemical] facilities to accept TWICs as meeting the RBPS 12 terrorist ties test if they use the [Canceled Card List].”**

The Department is not requiring companies to invest in TWIC readers; however, a high-risk chemical facility may choose to pursue Option 3 and invest in a TWIC reader or Physical Access Control System (PACS) as a means to comply with RBPS 12(iv).

As suggested in IME’s letter, high-risk chemical facilities that select Option 3 in their SSP should consider using the Canceled Card List (CCL) or the Certificate Revocation List (CRL) to confirm that an affected individual’s TWIC has not been revoked and that the affected individual continues to be vetted recurrently for terrorist ties.

- (5) IME suggested that the Department “refuses to accept ATF clearances because it alleges that ATF ‘does not conduct recurrent vetting against the TSDB.’”**

The Department has evaluated the ATF Employee Possessor Program and has noted that the Employee Possessor Program conducts point-in-time vetting against the TSDB, which means that ATF’s checks are conducted at a specified time, not on a recurrent basis. Recurrent vetting is a Department best practice and compares an affected individual’s information against new and/or updated TSDB records as new and/or updated records become available. ATF’s vetting does, however, occur periodically. Therefore, consistent with the personnel-surety-focused language of the CFATS Act of 2014, a high-risk chemical facility may choose under Option 4 to leverage TSDB vetting conducted by ATF on affected individuals. For example, a high-risk chemical facility may rely on a “letter of clearance” issued by ATF when presented by an individual who is an “Employee Possessor” of explosives. The high-risk chemical facility should describe in its SSP the procedures it proposes to use to verify the letter of clearance is current.

- (6) IME suggested that it is a common practice that [high-risk chemical] facilities accept credentials and clearances as proof that holders have been identified by the federal government and determined not to be a security risk, and thus the Department is incorrect in its statement that “data submission is likely to be accomplished in concert with the other routine hiring and access control involving background checks related to RBPS 12(i)-(iii).”**

The Department’s statement in the 30-day notice which IME has suggested was incorrect related specifically to record keeping costs.⁶ The Department intended to convey in the 30 day notice that high-risk chemical facilities perform routine hiring and access control checks that already involve reviewing and collecting the very data elements (sometimes from credentials issued by Federal screening programs and sometimes not) being requested under the CFATS Personnel Surety Program ICR. Because high-risk chemical facilities or their designees, “as a common practice” use these credentials as well as retain the data elements on them, in accordance with PRA regulation 5 CFR § 1320.3(b)(2) it would be inappropriate for the Department to count the record keeping costs associated with the time, effort, and financial resources incurred in the normal course of this activity under the CFATS Personnel Surety Program ICR.

COMMENTS RELATED TO COST

- (7) IME suggested that the Department “does not account for ancillary costs that will occur due to the agency’s refusal to accept, without preconditions, TSA-issued security credentials.” IME suggested that “trucking companies, for example, [will no longer] be able to dispatch the closest truck to deliver or pick up shipments from a high-risk chemical] facility; it will have to dispatch the truck with a driver whose PII [personally identifiable information] has been submitted for that particular [high-risk chemical] facility at least 48-hours in advance of the truck’s arrival at the gate.” IME also suggested that “[t]he inefficiencies spawned by this needless restriction adds nothing to security for TSA-vetted drivers, impacts the environment through wasted fuel, and increases the relative risk of an accident.”**

In a review of the SSPs submitted to comply with CFATS, the Department has found that high-risk chemical facilities have not proposed in their SSPs to allow large numbers of visitors who visit the facilities infrequently (e.g. truck drivers) to have unescorted access to restricted areas and critical assets. Some high-risk chemical facilities have modified their business practices as a result of RBPS 12, and these costs were anticipated in the CFATS Regulatory Impact Assessment published in 2007.

With four options now available to comply with the terrorist ties portion of RBPS 12, it again bears noting that high-risk chemical facilities may choose the option or options that best meet their individual circumstances, with the ability to fully leverage (including through option 4—visual verification) 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.

⁶ The Department’s assumptions with regard to estimated record keeping costs can be read in the 30-day PRA notice at <http://www.federalregister.gov/a/2014-02082/p-444>.

Furthermore, 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.

- (8) IME has suggested that the Department's statements "that [the Department] will not 'revet' individuals that have already undergone a TSDB check under one of DHS' other vetting programs and that this is a cost-saver to the agency is fallacious." IME stated that each time ISCD pings the name to determine the validity of the credential, it is 'revetting.'" IME also stated that "there is no cost savings to [high-risk chemical] facilities."**

Vetting and recurrent vetting occur only when an affected individual's identifying information is compared against the TSDB and its information on individuals with terrorist ties. Vetting and recurrent vetting occurs only under Option 1. Under Option 2, the Department is verifying enrollment. Under Option 2, the Department compares the affected individual's information against information about individuals enrolled in the TWIC, HME, or Trusted Traveler programs. Verifying enrollment in the TWIC, HME, or Trusted Traveler programs under Option 2 is not vetting nor is it "revetting."

The Department agrees that a high-risk chemical facility is unlikely to experience any cost savings when comparing Option 1 and Option 2. The ICR reflects this assumption by treating the submission of affected individuals' information under Option 1 or Option 2 as imposing the same burden.

The Department will, however, experience a cost savings when a high-risk chemical facility opts to use Option 2 instead of Option 1 because the cost to verify enrollment is less than the cost to conduct vetting against the TSDB.

- (9) IME suggested that "[t]he ICR does not account for the cost" to high-risk chemical facilities if they are required "to provide other pieces of information pertaining to affected individuals including visa information, the submission and transmission of records such as electronic verification that the facility provided a particular record, points of contact at a facility, and information supporting any adjudications or redress requests."**

Although these are not discretely broken down in the ICR as separate cost categories, the conservative estimated time per respondent covers the *de minimis* costs associated with the activities IME has mentioned.

MISCELLANEOUS COMMENTS

- (10) IME expressed opposition to the Department collecting "information that identifies the high-risk chemical facility or facilities at which each affected individual has or is seeking access."**

The information about the high-risk chemical facility or facilities at which an affected individual may have or be seeking access to is necessary to ensure that federal law enforcement can identify which high-risk chemical facility or designee it should contact, if such a contact is warranted as a result of terrorist ties vetting.

(11) IME suggested that the Department “should expand the TWIC program to the CFATS community[.]”

National Protection and Programs Directorate (NPPD) has provided IME’s comment on this issue to the Transportation Security Administration.

(12) IME suggested that “[w]hen [high-risk chemical] facilities no longer grant access to individuals, they are required to resubmit individual’s names to de-register them.” IME suggested that “[th]e likely result is that [high-risk chemical] facilities will be required to register and deregister transportation workers on a daily basis, and this process will be repeated at each CFATS facility that the transportation worker enters.”

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 under Option 1 or Option 2.⁷ 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. The Department strongly encourages high-risk chemical facilities to notify the Department when an affected individual no longer has access to restricted areas or critical assets to ensure the accuracy of the Department’s data and, in so doing, to stop the recurrent vetting of the person who is no longer an affected individual.

The Department believes that there are substantial privacy risks if a high-risk chemical facility opts to not provide updates and corrections about affected individuals. Specifically, the accuracy of an affected individual’s personal data being vetted against the TSDB for terrorist ties may be affected. Accurate information both (1) increases the likelihood of correct matches against information about known or suspected terrorists, and (2) decreases the likelihood of false positives. As a result, the Department encourages high-risk chemical facilities to submit updates and corrections as they become known so that the Department’s checks for terrorist ties, which are done on a recurrent basis, are accurate. If a high-risk chemical facility is either unable or unwilling to update or correct an affected individual’s information, an affected individual may seek redress as described in the CFATS Personnel Surety Program Privacy Impact Assessment.

Under the CFATS Personnel Surety Program, the Department does not intend or expect high-risk chemical facilities to register and “de-register” affected individual on a daily basis. RBPS 12(iv) is a background check requirement and should not be thought of as an access control measure. Although a high-risk chemical facility could in its SSP describe such a process, the Department expects submissions to be a part of the normal and routine background check process implemented during routine hiring processes or in compliance with the provisions of contracts

⁷ See section 2102(d)(2)(A)(i) of the Homeland Security Act.

between the high-risk chemical facility and its contractors. Based upon discussions with stakeholders, the Department provided several illustrative scenarios in the 30-day PRA notice.

- (13) IME has suggested that the Department has not complied with 49 USC 5103a(g)(1)(B)(i) when requiring information about affected individuals if a high-risk chemical facility opts to use Option 2. Specifically, IME has stated that the Department “offer[ed] no legislative or regulatory support for this position.”**

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 IFR. 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.

- (14) IME suggested that the Department “has not explained why the information collection for individuals without [a credential which relies on a Security Threat Assessment] must be held and processed in a system separate from that used by other DHS or Federal programs.”**

The information collected to support TSDB vetting under Option 1 will be held in the same U.S. Government systems used by other Department programs. The Department established the Chemical Security Assessment Tool (CSAT) Personnel Surety application to provide high-risk chemical facilities or their designees with a mechanism to submit the information if they choose to use Option 1 or Option 2.

- (15) IME disagreed with the Department’s assertion that high-risk chemical “facilities ‘have wide latitude in how they define their restricted areas and critical assets’ as a remedy to reduce the burden associated with the CFATS [Personnel Surety Program].”**

The Department has had several years of experience working with high-risk chemical facilities to implement CFATS and has found that high-risk chemical facilities have defined their restricted areas and critical assets in a multitude of fashions. For instance, some have taken an “asset-by-asset” approach to security, while others have defined restricted areas more broadly, applying security measures across their facilities.

- (16) IME suggested that the Department “policy that it ‘will not routinely notify high-risk chemical facilities of [CFATS] Personnel Surety Program vetting results’ is inconsistent with other federal security vetting programs used by the private sector, and it is inconsistent with RBPS 12.”**

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.

(17) IME reiterated some of the assertions made in the March 2013 Office of the Inspector General Report “Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards Program.”

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 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.

(18) IME has suggested that the Department has not met the statutory requirement that prohibits the Department from disapproving a site security plan submitted under this section based on the presence or absence of a particular security measure.

The CFATS Personnel Surety Program will not exceed the Department's statutory authority, nor will it violate or conflict with its statutory prohibition to not disapprove an SSP based on the presence or absence of a particular security measure. With at least four options now available to comply with the terrorist ties portion of RBPS 12, high-risk chemical facilities have a significant amount of flexibility and may choose the option or options that best meet their individual circumstances, with the ability to fully leverage (including through option 4—visual verification) existing Federal programs that vet individuals for terrorist ties. High-risk chemical facilities are encouraged to review all the options available and carefully consider which option (or combination of options) best meets their specific security situation.

In addition to these four options, facilities may propose (and the Department will review and approve on a case-by-case basis) alternative methods to comply with the terrorist ties background check portion of RBPS 12.

(19) IME has suggested that the Department “is using the ICR process as a substitute for rulemaking.”

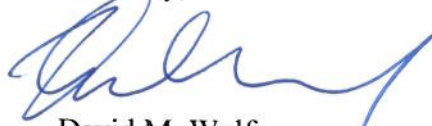
The Department is not seeking to modify 6 CFR Part 27 through PRA processes, and initiation of an information collection as part of the CFATS Personnel Surety Program will not serve to modify the CFATS rule. The Department recently initiated new rulemaking activities for CFATS generally, and intends 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, IME submitted

comments. The Department will review and consider IME's comments to amend 6 CFR Part 27 (and RBPS 12 in particular) as part of future rulemaking efforts.

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.

You and IME 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 horizontal stroke extending to the right.

David M. Wulf
Director
Infrastructure Security Compliance Division