



Homeland  
Security

24 August 2015

Ms. Jennifer C. Gibson  
Vice President, Regulatory Affairs  
National Association of Chemical Distributors  
1560 Wilson Boulevard, Suite 1100  
Arlington, Virginia, 22209

Dear Ms. Gibson:

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.<sup>1</sup> The Homeland Security Act of 2002<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>1</sup> 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.

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

<sup>3</sup> 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,<sup>4</sup> 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.

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<sup>4</sup> 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 National Association of Chemical Distributors (NACD)*

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) NACD suggested that “the [CFATS Personnel Surety Program] ICR creates a regulatory standard for access into CFATS facilities, but instead of complying with the risk based framework that is mandated under CFATS, DHS deviates from Congress’ intent by prescribing a program based on compliance and information gathering instead of a system that focuses on making a [high-risk chemical] facility more secure.”**

The Department has not established a standard for access into high-risk chemical facilities through RBPS 12. Rather, after describing in its SSP how a high-risk chemical facility will manage access to its restricted areas or critical assets under RBPS 3, RBPS 12 requires certain individuals with such access to undergo certain background checks.

The Department believes that it has complied with its initial statutory authorization as well as Department’s most recent statutory authorization by providing sufficient alternative methods for a high-risk chemical facility to satisfy the terrorism ties background check portion of RBPS 12. High-risk chemical facilities have been and are still welcome to propose alternative or supplemental options to the options provided by the Department. High-risk chemical facilities may do so in their SSP. The Department will assess the adequacy of such alternative or supplemental options on a facility-by-facility basis, in the course of evaluating each facility’s SSP.

- (2) NACD suggested that the Department’s choice to “retain the requirement that companies submit information on individuals who will have unescorted access to critical assets 48 hours in advance of that access being granted” does not justify the burden that it will place on [high-risk chemical] facility operations.**

Submission of information to the Department in advance of access under Option 1 and Option 2 is valuable because having more time between identification of an affected individual with terrorist ties and that individual’s access to restricted areas or critical assets within a high-risk chemical facility increases and improves the quality of the possible responses by the Federal Government. Nonetheless, 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.

- (3) NACD expressed concern that “the information collection and submission system DHS proposes is ... duplicative of existing programs. The NACD also suggested “the proposed [CFATS Personnel Surety Program] scheme would increase rather than minimizes the burden for both industry and DHS.”**

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. As a result, the Department believes that collecting information under Option 1 and Option 2 produces vital security value for high-risk chemical facilities and does not duplicate existing programs.

- (4) NACD suggested that the Department “is attempting to regulate an area where Congress has clearly granted authority to other agencies.” Specifically, “that HME-holders should not be subject to any background check ‘applicable to transportation workers if that background check is equivalent to, or less stringent than, the background check required under this section’ (49 USC § 103a(g)(1)(B)(i)(II)).”**

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.

- (5) NACD suggested that “it is difficult to understand how [electronically verifying] enrollment in other programs” under Option 2 “is either different or necessary” when visually relying on the TWIC, HME or FAST credentials.**

The Department believes Option 2 provides additional security when compared to visual verification. As described earlier in this letter, relying on a visual inspection of a credential or document under Option 4 is not as secure as electronic verification under Option 2 because the credential or document could be expired, revoked, or fraudulent.

- (6) NACD suggested that “[f]or a small facility such as a chemical distributor, [purchasing a TWIC card reader to leverage Option 3] is cost-prohibitive option.” NACD suggested developing “a central repository of information gathered through all of the federal credentialing programs such as TWIC, HME, Global Entry, etc... that designated chemical facility operators could directly access through a secure, strict password-protected portal.”**

The Department understands that each high-risk chemical facility should consider the economic impact of security measures before committing to them in its SSP. Hence, the Department suggests that high-risk chemical facilities consider carefully which options they select in order to comply with RBPS 12(iv).

The suggestion to create a central repository is beyond the scope of CFATS and this ICR. However, the comment has been shared with the Department’s Screening Coordination Office.

- (7) NACD suggested that “limiting or restricting areas and/or individuals is highly unrealistic for a small facility with a limited amount of real estate. For facilities with a small footprint, which is not uncommon for chemical distributors, there is no way to segment out areas away from visitors, contractors, etc.”**

The Department understands that for some high-risk chemical facilities it may be unrealistic to limit either who is an affected individual or who has access to restricted areas or critical assets. The Department reiterates its willingness to consider “innovative escorting alternatives” that a small high-risk chemical facility may propose in its SSP or ASP. The Department also encourages facilities to consider the four options the Department has made available for compliance with RBPS 12(iv). Facilities are also welcome to suggest alternative or supplementary options in their SSPs.

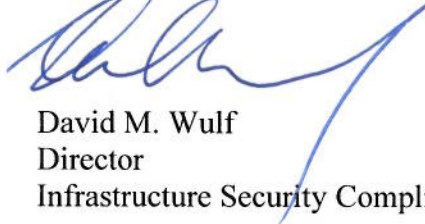
- (8) NACD suggested “that it is unclear in the ICR if or how the Department will inform a [high-risk chemical] facility if an individual whose information that [high-risk chemical] facility has submitted results in a match to the TSDB.”**

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.

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You and NACD 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