



Homeland  
Security

24 August 2015

Mr. John S. Morawetz  
Director, ICWUC Center for Worker Health and Safety  
International Chemical Workers Union  
329 Race Street  
Cincinnati, OH, 45202

Dear Mr. Morawetz:

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.

<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 Unions and Organizations*

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) Unions and Organizations suggested that the Department should consider “the entire Personnel Surety Program mandate” and that such a consideration should be “open to public comment.” You further suggested that “the vetting of individuals for terrorist ties can[not] be adequately considered in a vacuum that does not address the other three elements.**

The Department agrees that RBPS 12 should be discussed as a whole and has recently initiated new rulemaking activities for the CFATS program generally. The Department intends to make all changes to the CFATS regulation through the rulemaking process, including public comment. In response to the Department’s solicitation of comments as part of a CFATS Advance Notice of Proposed Rulemaking on August 18, 2014, Unions and Organizations submitted comments. The Department will review and consider those comments in amending 6 C.F.R. Part 27 through future rulemaking.

The Department, under this ICR, was limited to seeking comment on the burden associated with collecting information to conduct terrorist ties checks under Option 1 and Option 2. The issues regarding background checks went through public comment prior to the CFATS IFR being promulgated in April of 2007.

- (2) Unions and Organizations suggested that the Department “cannot have it both ways: asserting that elements i, ii and iii are important to evaluate the burden on companies but then say they are beyond the scope in another section (page 6435).”**

The Department is fulfilling its obligations to solicit and respond to public comment under PRA. The Department’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. The discussion about RBPS 12(i-iii) is relevant to the question of burden in this ICR only in that some of the Department’s assumptions with regard to the burden estimate assumes that high-risk chemical facilities (or their designees) are already in possession of much of the information about affected individuals as a result of conducting background checks for RBPS 12(i)-(iii); therefore, the

Department discusses RBPS 12(i)-(iii) with regard to their impact on the burden of this ICR. However, the Department does not collect information to conduct background checks under RBPS 12(i)-(iii), and thus the burden related to RBPS 12(i)-(iii) is captured only as a function of completing the SSP instrument in IC 1670-0007.

- (3) Unions and Organizations suggested that the “list in Appendix C of the Department’s RBPS document issued in May 2009 goes significantly beyond the preamble comments of the Department in finalizing CFATS regulations on April 9, 2007[.]”**

The Department expects high-risk chemical facilities to implement appropriate security measures to conduct identity, criminal history, and legal authorization to work background checks. These security measures can vary from high-risk chemical facility to facility commensurate with facility-specific risks, security issues, and business practices. The guidance referenced by the commenter (see pages 180 to 186 of the Risk-Based Performance Standards Guidance) addressing identity, criminal history, and legal authorization to work background checks is not guidance addressing compliance with the vetting for terrorist ties required by 6 CFR § 27.230(a)(12)(iv), and as such is not the subject of this notice, nor is it the subject of the underlying ICR or of the 60-day notice preceding this notice.

- (4) Unions and Organizations requested two clarifications about (1) whether the Department is proposing they have no responsibility if a covered facility fires an individual with no terrorist ties due to these elements recommended by CFATS?, and (2) whether the Department believes they have a responsibility to have an appeals or waiver procedure or is this area “not regulated by CFATS?”**

In response to your first question, the Department is not authorized by statute to intervene between an employee and a high-risk chemical facility, unless the employment decision was based on whistleblower retaliation; and therefore, the Department cannot intervene if either a high-risk chemical facility makes an adverse employment decision based on screening for terrorist ties or as a result of background check results. The Department also does not require that any specific employment actions be taken as a result of any of these checks.

- (5) Unions and Organizations requested “that DHS require that any worker who presents a TWIC credential for screening cannot be asked under the CFATS requirements to provide, or agree to a review of, additional personnel surety information outside of what is necessary to confirm the authenticity of the TWIC credential. This is only a request for DHS to clearly state what their response on page 6434 already states; that the TWIC procedure is a “verification of identity, legal authorization to work, and a criminal background check” (the other 3 personal surety elements).”**

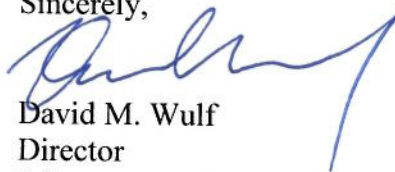
A high-risk chemical facility may comply with RBPS 12(i)-(iii) by leveraging an affected individual’s participation in the TWIC program. A high-risk chemical facility may leverage the background checks (i.e., identity, legal authorization to work, and a criminal background check) performed by the Department on an individual prior to being issued a TWIC to comply with

RBPS 12(i)-(iii). The Department expects that the TWIC would be authenticated (and potentially re-authenticated on a periodic basis) by the high-risk chemical facility or designee.

However, some high-risk chemical facilities in their SSP may establish additional criteria above and beyond the possession of a valid and unexpired TWIC in order to comply with RBPS 12(i)-(iii). The Department does not object to such additional security measures in a high-risk chemical facility's SSP if the facility deems it necessary. Furthermore, the Department is limited in its authority in that it may not approve or disapprove a SSP based upon the presence or absence of a specific security measure and therefore could arguably not disapprove an SSP if it requires additional security measures.

You and the Unions and Organizations who submitted comments to the ICR 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 "David M. Wulf", with a long, sweeping underline that extends to the right.

David M. Wulf  
Director

Infrastructure Security Compliance Division