

May 21, 2013

Via Regulations.gov

Deputy Chief Information Officer Scott Libby
Department of Homeland Security
245 Murray Lane, SW, Mail Stop 0610
Arlington, VA 20528-0610

Dear Deputy Chief Information Officer Libby:

Re: Docket DHS-2012-0061: Information Collection Request: Chemical Facility Anti-Terrorism Standards Personnel Surety Program

In the March 22, 2013 issue of the *Federal Register*, the Department of Homeland Security's (DHS) National Protection and Programs Directorate (NPPD) published a proposed information request announcing its intended required methods for screening the background of employees and unescorted visitors at facilities subject to the Chemical Facility Anti-Terrorism Standards (CFATS).¹ ATA believes that NPPD's proposal is not optimally designed. We suggest that significant modifications will increase CFATS regulatory flexibility without compromising security. Specifically, ATA supports:

- Excluding Hazardous Materials Endorsement holders from any additional background vetting;
- Recognizing CFATS-covered facilities may accept other credentials that require a Terrorist Screening Database check;
- Requiring no background information from individuals leveraging an equivalent or superior credential or screening; and
- Verifying other programs' leveraged credentials via the method normally required to verify the credential.

The Proposed Information Collection Covers Statutorily Excluded Populations and Is Unnecessarily Broad

Congress first gave the Department of Homeland Security authority to promulgate the CFATS program in the 2007 DHS Appropriations Act.² That Act specifically provided that "the Secretary may not disapprove a site security plan...based on the presence or absence of a particular security measure."³ On April 9, 2007, DHS duly issued 18 "Risk-based Performance Standards" that regulated chemical

¹ See 78 Federal Register 56, *Information Collection Request: Chemical Facility Anti-Terrorism Standards Personnel Surety Program*, March 22, 2013. 17680-17701.

² Public Law 109-295, §550(a), October 4, 2006.

³ *Id.*

facilities must meet.⁴ Of those performance standards, 17 can be accomplished without any government assistance. Risk-Based Performance Standard 12, Personnel Surety, requires affirmation that individuals with unescorted access to the site do not have terrorist ties.⁵

NPPD proposed the Chemical Security Assessment Tool (CSAT) so that covered chemical facilities could perform the terrorism ties checks required under 6 CFR 27.230(a)(12)(iv).⁶ Two main flaws continue to persist in applying DHS' planned CSAT personnel surety program.

First, NPPD proposes to screen drivers carrying hazardous materials. However, the CFATS program is not responsible for truck or rail hazardous materials transportation security.⁷ In fact, Congress has vested responsibility for the safety and security of hazardous materials truck transportation between the Department of Transportation's (DOT) Federal Motor Carrier Safety Administration (FMCSA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and DHS' Transportation Security Administration (TSA).⁸ Congress has also defined 'transportation' to include the loading and unloading of hazardous materials.⁹ These agencies already vet drivers carrying hazardous materials far more thoroughly than NPPD plans to do.

Further, Congress has explicitly stated that those holding Hazardous Materials Endorsements (HME) should be excluded from any background check equivalent to or less stringent than that required for the HME.¹⁰ The HME check is more stringent than the name-only check contemplated under the proposed Personnel Surety CSAT tool. An HME requires a fingerprint-based criminal history record check and provides perpetual vetting of the holder through the Terrorist Screening Data-Base (TSDB).¹¹ Thus, the Personnel Surety Standards should recognize that drivers carrying hazardous materials are already vetted and consider possession of a Commercial Driver's License (CDL) with the HME acting as a superior substitute for CSAT vetting.¹²

Secondly, NPPD's proposal attempts to restrict how a facility may implement any of the Risk-Based Performance Standards. Although DHS is correct that the Personnel Surety Standard requires government involvement to demonstrate that an individual has no terrorist ties, there is no corresponding requirement that the facility determine that such an individual has no terrorist ties *through the CSAT system*. Facilities are not required to conduct a check of the TSDB. Rather, they must ensure individuals are not listed on the TSDB. There are a panoply of government-issued credentials that require an individual not to have terrorist ties. Possessing one of these credentials demonstrates that an

⁴ See 72 Federal Register 67, *Chemical Facility Anti-Terrorism Standards*, April 9, 2007. 17733.

⁵ 6 CFR §27.230(a)(12)(iv).

⁶ See 75 Federal Register 70, *National Protection and Programs Directorate: Chemical Facility Anti-Terrorism Standards Personnel Surety Program*, April 13, 2010. 18850-18857.

⁷ See 72 Federal Register 223, *Appendix to Chemical Facility Anti-Terrorism Standards*, November 20, 2007. 65396-435, 65415.

⁸ See 49 USC §§ 5103, 5103a.

⁹ See 49 USC § 5102.

¹⁰ 49 USC § 5103a(g)(1)(B)(i)(I)-(II).

¹¹ See <http://www.tsa.gov/stakeholders/frequently-asked-questions-0>. (Accessed May 16, 2013). See also DHS Inspector General Report, *Effectiveness of the Infrastructure Security Compliance Division's Management Practices to Implement the Chemical Facility Anti-Terrorism Standards (CFATS) Program*, OIG-13-55. p. 29 (Noting that one reason NPPD has likely chosen not to require a higher screening standard is because it "has no authority or ability to investigate a chemical terrorist threat.")

¹² 49 CFR § 383.141 (mandating CDL-HME applicants pass a background check before receiving a CDL with an HME).

individual is not present on the TSDB. Again, because of recurrent vetting, those whose cards are disqualified can quickly be identified.

Chemical facilities should be able to leverage other credentials that include TSDB vetting. In addition to the HME, which, as noted above, is statutorily exempted, the Transportation Worker Identification Credential (TWIC), the Free And Secure Trade (FAST) card, any airport's Secure Identity Display Area card, or U.S. Customs and Border Protection Trusted Traveler cards, and any others that require an equivalent or greater background check should also be deemed sufficient.

DHS must determine whether or not facilities comply with the requirements. DHS lacks authority to approve of how a facility implements the required standards, so long as the facility implements them effectively. Thus, in addition to mandating acceptance of the HME, DHS should expand the information collection so that facilities can accept other credentials that include TSDB vetting.

NPPD's Compliance Schedule Could Unnecessarily Limit Availability of Commercial Deliveries

Presently, the ICR proposes that all visitors must be run through the CSAT system at least 48 hours in advance of entering the site.¹³ However, such a requirement does not comport to the operational realities of the trucking industry. The ICR assumes a turnover rate of 71 percent for delivery personnel.¹⁴ Unfortunately, this assumed turnover rate is far too low. For 2012, ATA's Economics Department estimated driver turnover in the truckload sector (likely to encompass most chemical deliveries) at 81.75%.¹⁵ While there may be merits in imposing wait times on those who have yet to be vetted, NPPD can significantly lower the information collection burden without compromising security by exempting HME-holders from CSAT requirements and giving facilities the option to exclude holders of other TSDB-screening credentials.

The Proposed Information Collection Fails to Minimize the Collection Burden on Respondents

NPPD's Proposal to minimize the collection burden actually increases it. The proposal claims to leverage programs like TWIC, FAST, HME and others.¹⁶ However, under this plan an individual must actually submit more, rather than less information to "leverage" the other background check.¹⁷ Someone utilizing a pre-existing background check must submit 5-9 pieces of information.¹⁸ Yet, someone with no background check at all must submit only 4-7 pieces of information.¹⁹ Thus, those who have already been screened face more burdens and greater scrutiny than those lacking any screening at all.

Other programs have faced this issue before. TSA's Air Cargo Security Program and the Bureau of Alcohol, Tobacco, and Firearms (ATF) encountered similar background vetting issues in the past. Both of those programs ultimately came to the same solution: leverage the TWIC, HME, and FAST cards at face value. TSA chose to update its Air Cargo Security Program specifically because requiring

¹³ See 78 Federal Register 56 at 17687 (Table 3).

¹⁴ *Id.* at 17690.

¹⁵ American Trucking Associations Driver Turnover Figures, 2012.

¹⁶ See 78 Federal Register 56 at 17681-82.

¹⁷ *Id.* at 17695-86.

¹⁸ *Id.* at 17685.

¹⁹ *Id.*

duplicative checks would pose too great a burden on business and because it explicitly found the HME, TWIC, and FAST programs to be comparable.²⁰ ATF exempted holders of DOT security credentials because Congress had already recognized that the DOT regulation was sufficient.²¹

A recent DHS Inspector General report investigated the Personnel Surety Performance Standard and noted that, “Some ISCD staff said they wanted to identify alternate ways to conduct TSDB searches, but were prohibited from doing so.”²² ATA suggests that NPPD immediately examine ways to utilize and leverage already existing credentials and to free up those that are statutorily excluded from this program. ATA suggests that, like TSA and ATF, NPPD accept these credentials at face value without requiring any further information. However, if this cannot be achieved, individuals with pre-existing TSDB checks should never be required to submit more information than those without.

The Proposed Information Collection’s Methodology Contains Questionable Assumptions

In addition to the issues raised above, ATA notes several other questionable methodological assumptions or deficiencies in the ICR:

- NPPD proposes to exempt federal employees and law enforcement from the CSAT requirements.²³ Rather, facilities would admit federal and state personnel based upon a visual inspection of their credential.²⁴ However, NPPD plans to require electronic verification to show that TWIC cards are not “expired, revoked or fraudulent.”²⁵ NPPD’s ICR fails to explain why TWIC cards (and other private sector credentials) differ from those issued to law enforcement. Doesn’t this rule actually just incentivize terrorists to assume the identities of law enforcement officials rather than workers? Given law enforcement’s greater facility access, this could make facilities less safe.
- In calculating its ICR burden, Table 18 lists the personnel turnover number for infrequent visitors (20%) rather than for frequent visitors (71%), which is too low. This should be split out and/or the Department should be using an accurate number for frequent visitors that incorporates more accurate trucking turnover figures as cited above.²⁶
- NPPD’s burden analysis restricts TWIC use analysis to 32 facilities only.²⁷ However, this ignores TSA’s recent move to expand TWIC usage. TSA is currently revising its language to remove the affidavit that the TWIC-applicant will use the card in maritime or port commerce. Expanding the TWIC-holding universe means that NPPD should consider TWIC as a more common method for proving Personnel Surety compliance to access regulated facilities.

²⁰ 74 Federal Register 178, *Air Cargo Screening*, September 16, 2009, 47672, 47702.

²¹ 68 Federal Register 54, *Implementation of the Safe Explosives Act, Title XI, Subtitle C of Public Law 107-296*, March 20, 2003, 13768, 13775.

²² DHS Inspector General Report, *Effectiveness of the Infrastructure Security Compliance Division’s Management Practices to Implement the Chemical Facility Anti-Terrorism Standards (CFATS) Program*, OIG-13-55. p. 30 (Noting that one reason NPPD has likely chosen not to require a higher screening standard is because it “has no authority or ability to investigate a chemical terrorist threat.”)

²³ 78 Federal Register at 17683.

²⁴ *Id.*

²⁵ *Id.* at 17682.

²⁶ *Id.* at 17698.

²⁷ *Id.* at 17698-00 (See Tables 20 & 21).

- NPPD's burden analysis assumes no recordkeeping costs for Privacy Act waiver notices.²⁸ However, NPPD proposal exempts only DHS from verifying that facilities are providing such notices; facilities are still bound to retain them.²⁹
- Despite holding events concerned with protecting worker privacy in the fall of 2012, DHS has not updated the CFATS Privacy Impact Assessment from the July 2011 version.³⁰

Proposed Solution

DHS should be praised for offering the CSAT tool. There are many possible unescorted visitors to CFATS facilities that must be vetted and the CSAT tool will provide an effective method for doing so. But, for those that already possess a security threat assessment vetted credential, CSAT is an unnecessary burden. ATA suggests that DHS implement Personnel Surety in the following manner:

- Exempt those holding Hazardous Materials Endorsements from any CFATS Personnel Surety check, in accordance with 49 USC § 5103a(g)(1)(B)(i)(I)-(II);
- Allow facilities to implement the Personnel Surety Performance Standard in whatever method best functions for that facility, as required by § 550 of Public Law 109-295;
- Require 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;
- Allow facilities to accept other credentials through the method the credential's program specifies for credential verification; and
- Offer the CSAT tool to screen those individuals not otherwise covered.

Conclusion

The CFATS regulation was not supposed to cover the trucking industry at all. Truck terminals were specifically exempted. Yet again, a program designed to protect one type of critical infrastructure has enmeshed truck drivers. ATA does not seek to undermine CFATS' mission. Security is important and should be given great consideration. However, ATA believes that DHS does nothing to improve security and wastes resources when it refuses to leverage credentials across comparable programs. ATA asks that the CFATS program follow TSA and ATF's lead in accepting these credentials and thereby save taxpayer funds without compromising security. Should you wish to discuss this matter in greater detail, please contact the undersigned at bstephenson@trucking.org or at (703) 838-7982.

Best,



Boyd Stephenson
Director, Hazardous Materials & Licensing Policy
American Trucking Associations

²⁸ *Id.* at 17700.

²⁹ *Id.* at 17687.

³⁰ *Id.*