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**DEPARTMENT OF HOMELAND SECURITY**  
National Protection and Programs Directorate  
Chemical Facility Anti-Terrorism Standards Personnel Surety Program

Request for Comments (78 FR 17680) on  
New Information Collection Request 1670-NEW  
[Docket No. DHS-2012-0061]

**COMMENTS OF:**  
Industrial Safety Training Council  
Safety Council Security Consortium

May 20, 2013

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**I. INTRODUCTION**

The Industrial Safety Training Council (“ISTC”) and the Safety Council Security Consortium (“SCSC”) appreciate the opportunity to comment on the Department of Homeland Security (“DHS” or “Department”) information collection request (“ICR”) on measures designed to identify people with terrorist ties under the Chemical Facility Anti-Terrorism Standards (“CFATS”) Risk-Based Performance Standard (“RBPS”) 12 on Personnel Surety.

The ISTC is a 501(c)3 non-profit training and educational organization located in Southeast Texas. The ISTC and thirteen other safety councils comprise the SCSC. Through nationally recognized consumer reporting agency vendors (which are fully regulated under the federal Fair Credit Reporting Act), the ISTC/SCSC operates an established, highly successful, comprehensive and privacy-sensitive identification verification and background screening program. The ISTC/SCSC process, after providing a Privacy Act notice and pursuant to that notice collecting personally identifiable information, verifies and validates the identity of employees, contractor employees, and unescorted guests and their current status of authorization by a specific facility to enter that facility. The ISTC/SCSC process also identifies certain individuals with terrorist ties by checking names against the OFAC list.<sup>1</sup> The ISTC/SCSC process is being performed for contractors, and their employees, working at chemical and refining facilities throughout Texas, the Gulf Coast, and also in New Jersey, West Virginia, and several other states. The ISTC's subscriber base includes well over 2,000 contractor companies, and the ISTC implements training for over 4,000 contractor companies. The ISTC provides site-

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<sup>1</sup> The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States

specific, in-house-designed security programs for refineries, petrochemical plants, and manufacturing facilities.

Under Section 550 of the Homeland Security Appropriations Act of 2007,<sup>2</sup> Congress provided DHS with the authority to regulate the security of high-risk chemical facilities. On April 9, 2007, DHS published the CFATS interim final regulations.<sup>3</sup> DHS has also established 18 RBPSs under CFATS for chemical facility security, including RBPS 12 on personnel surety. Under RBPS 12(iv),<sup>4</sup> high-risk chemical facilities are required to implement “measures designed to identify people with terrorist ties” among facility personnel and unescorted visitors with access to restricted areas or critical assets (“affected individuals”). The ISTC/SCSC recognizes that identifying people with terrorist ties is an inherently governmental function and necessarily requires the use of information held in the government-maintained Terrorist Screening Database (“TSDB”).<sup>5</sup> The ISTC/SCSC looks forward to assisting chemical facilities to satisfy this requirement by facilitating the submission of personal information about affected individuals to DHS through the Chemical Security Assessment Tool (“CSAT”). The ISTC/SCSC respectfully submits the following comments.

## II. DISCUSSION

### A. *The ISTC/SCSC strongly supports language in the ICR that recognizes the role that third party service providers can play in facilitating the submission of information about affected individuals to DHS.*

Throughout the ICR, language has been included that recognizes that high-risk chemical facilities can, as appropriate, engage “others acting on their behalf” or “designees or “designated third parties” to assist with RBPS 12(iv) compliance. The ICR expressly states that, “high-risk chemical facilities, or their parent companies, may choose to comply with RBPS 12(iv) by outsourcing the information submission process to third parties.” Further, the ICR recognizes that businesses that provide contract services to high-risk chemical facilities may, “acquire the services of other third party companies to submit appropriate information about affected individuals to the Department.” The ISTC/SCSC approves of this express recognition of third-party vendors, such as the ISTC/SCSC, that can facilitate compliance among high-risk chemical facilities and contractors to reduce the burdens related to complying with the CFATS Personnel

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<sup>2</sup> Pub. L. 109-295, Sec. 550.

<sup>3</sup> 6 CFR Part 27; 72 FR 17688.

<sup>4</sup> Under RBPS 12, high-risk chemical facilities must also perform three other types of background checks in order to comply with CFATS personnel surety requirements. High-risk chemical facilities must also implement: (i) measures designed to verify and validate identity; (ii) measures designed to check criminal history; and (iii) measures designed to verify and validate legal authorization to work. As these three other types of background checks are not the subjects of the ICR, these public comments do not address the ISTC/SCSC third-party personnel surety services available to assist high-risk chemical facilities with these aspects of compliance with RBPS 12.

The ISTC/SCSC supports DHS’ prior statements that the CFATS Personnel Surety Program is not intended to halt, hinder, or replace these three other types of background checks, nor is it intended to halt, hinder, or replace high-risk chemical facilities’ performance of background checks which are currently required for employment or access to secure areas of those facilities. 76 FR 34720, 34721 (June 14, 2011).

<sup>5</sup> 6 CFR 27.230(a)(12)(iv).

Surety Program. The use of the ISTC/SCSC process will also assist high-risk chemical facilities with their responsibilities to comply with other applicable federal and state privacy laws.

With regard to CSATS, the ISTC/SCSC supports the flexibility established by the ICR when stating that, “high-risk chemical facilities would have wide latitude in assigning CSAT user roles to align with their business operations and/or the business operations of third parties that provide contracted services to them.” CFATS was designed to provide high-risk chemical facilities with the discretion to choose and implement security measures that satisfy the RBPSs. The CSAT User Guide<sup>6</sup> even states that the system, “was designed to allow each company to determine the best way to provide information.” The ISTC/SCSC strongly supports DHS’ plans, “to structure the CSAT Personnel Surety application to allow designees of high-risk chemical facilities to submit information about affected individuals to the Department on behalf of high-risk chemical facilities.”

The ISTC/SCSC is well-positioned to assist high-risk chemical facilities to submit information about affected individuals to DHS. The ISTC/SCSC has deep knowledge of each of its members’ facilities through its safety and security training of personnel and contractors. DHS has recognized that many chemical facilities are not prepared to handle “the potential sensitivity of the information uncovered” during a background check, which “are subject to a unique set of laws and regulations to protect employees and consumers in the event of misuse of data or fraud.”<sup>7</sup> Similarly, the information to be collected to perform a check for terrorist ties against the TSDB under the ICR may also involve sensitive personal information that facilities may not be prepared to handle. A private sector third-party vendor, such as the ISTC/SCSC, that specializes in compliance with the Fair Credit Reporting Act and other applicable federal and state information, privacy, and security laws as well as collecting information following appropriate Privacy Act notification, would allow participating chemical facilities to preserve valuable administrative resources.

The ISTC/SCSC member facilities have designated the ISTC/SCSC to perform many of the functions related to affected individuals that involve collecting the types of information proposed in the ICR. The ISTC/SCSC has already considered and dealt with the legal issues associated with collecting information of this kind. The ISTC/SCSC welcomes the expansion and strengthening of this check for its member facilities through CSAT. The ISTC/SCSC is also prepared to submit to facility and/or DHS audits and reviews of ISTC/SCSC information collection and submission processes to ensure that the information about affected individuals is submitted to DHS in an appropriate and privacy-protective manner.

*B. The ISTC/SCSC recommends that DHS require high-risk chemical facilities to establish, at a minimum, a process for the direct vetting of affected individuals, regardless of whether such facilities incorporate any of the other options available to comply with RBPS 12(iv).*

DHS has developed a CFATS personnel surety program that will provide high-risk chemical facilities with options to comply with RBPS 12(iv). DHS also intends to permit high-

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<sup>6</sup> [http://www.dhs.gov/xlibrary/assets/chemsec\\_csatuserregismanual.pdf](http://www.dhs.gov/xlibrary/assets/chemsec_csatuserregismanual.pdf)

<sup>7</sup> [http://www.dhs.gov/xlibrary/assets/chemsec\\_cfats\\_riskbased\\_performance\\_standards.pdf](http://www.dhs.gov/xlibrary/assets/chemsec_cfats_riskbased_performance_standards.pdf)

risk chemical facilities to propose other alternative measures to identify affected individuals with terrorist ties in their Site Security Plans (SSPs) or Alternative Security Programs (ASPs). The ISTC/SCSC recommends that high-risk chemical facilities establish, at a minimum, a process for the direct vetting of affected individuals. Even if some of the affected individuals at a specific facility have previously obtained credentials under another federal program that conducts an equivalent check for terrorist ties, a direct vetting process should be established to ensure that the appropriate level of vetting can be conducted on affected individuals in any unanticipated circumstances.

## 1. Direct Vetting

Under Option 1, high-risk chemical facilities, or others acting on their behalf, would submit certain information about affected individuals to DHS through CSAT. Affected individuals must first be provided DHS' mandatory Privacy Act notice before any such information is collected. The ISTC/SCSC understands that the format of this notice has already been determined by DHS, and the ISTC/SCSC is familiar with the contents of this proposed notice.

For U.S. persons (citizens, nationals, and permanent residents), a high-risk chemical facility must submit: full name, date of birth, and citizenship or gender. For non-U.S. persons, a high-risk chemical facility must submit: full name, date of birth, citizenship, and passport information or alien registration number. The submitted information about affected individuals would be vetted against information contained in the TSDB.

## 2. Use of Vetting Conducted Under Other DHS Programs

Under Option 2, high-risk chemical facilities, or others acting on their behalf, would submit certain information about affected individuals through CSAT. This option is intended to allow high-risk chemical facilities to take advantage of the equivalent vetting for terrorist ties already being conducted on affected individuals enrolled in other federal programs, such as TWIC. For both U.S. persons and non-U.S. persons, a high-risk chemical facility must submit: full name, date of birth, and program specific information, such as a unique number or issuing entity. The submitted information about the affected individual would be used by DHS to verify electronically the affected individual's enrollment in these other federal programs.

However, the ISTC/SCSC agrees with the ICR conclusion that, "the burden to submit information about an affected individual for direct vetting is approximately the same as the burden to submit information in order to verify enrollment." The burden on a high-risk chemical facility to obtain program specific information for all the various federal programs to satisfy Option 2 may even be more burdensome on both the facility and the affected individual than supplying the citizenship information required under Option 1.

The ISTC/SCSC strongly supports DHS' decision not to rely on a visual inspection of a credential or endorsement, which could be expired, revoked, or fraudulent. The ISTC/SCSC agrees that electronic verification and re-verification is required to ensure that an affected individual's TWIC or other federal credential can appropriately be relied on by a high-risk chemical facility.

### 3. Electronic Verification of TWIC

On May 8, 2013, the Government Accountability Office (“GAO”) issued a report on TWIC readers, which concluded that the most recent tests of the TWIC readers had produced results that were “incomplete, inaccurate, and unreliable.”<sup>8</sup> GAO recommended that DHS halt efforts to promulgate a final regulation until the successful completion of an assessment of the effectiveness of using TWIC as a means of enhancing security.

The ISTC/SCSC agrees with the GAO’s conclusions in this report. Efforts to date to verify the use of the TWIC card as a government photo ID have thus far met with failure. The ISTC/SCSC has for some time now been attempting to assist the high-risk chemical facilities that the ISTC/SCSC supports in verifying TWIC cards under the ISTC/SCSC general protocol that a government issued photo ID is essential for ISTC/SCSC’s first step: positive identification. During that process, the ISTC/SCSC has made a significant infrastructure investment in TWIC readers, knowing that the capability for Transportation Security Administration (“TSA”) electronic verification of TWICs was still subject to future rulemaking. While present technology and the present status of the TWIC reader rule still do not enable the ISTC/SCSC to verify that a TWIC is “current”, the ISTC/SCSC has hoped at least to verify that a TWIC is not a forgery. The ISTC/SCSC has assumed that facilities, which wish to use Option 3, would be able to use some assistance from the ISTC/SCSC on using Option 3. While we do not know what impact the GAO report will have on TSA’s TWIC reader rule, the ISTC/SCSC has not identified any effective reader technology at present, even for the simple threshold task of determining whether or not a TWIC is a forgery.

In the ICR, DHS notes that high-risk chemical facilities will have “wide latitude” in how to implement Option 3, but such facilities cannot be expected to incorporate into their SSPs and ASPs the estimated capital/startup costs that would be associated with implementing Option 3 if a final rule is not available with information on the cost to acquire, install, and maintain TWIC readers. We understand DHS’ position to be that high-risk chemical facilities should not be permitted to rely on TWIC as a personnel surety solution until such time as TWIC has been conclusively determined to enhance security and a card reader is available for deployment at high-risk chemical facilities. The ISTC/SCSC strongly supports this position.

### 4. High-risk chemical facilities have discretion to choose among the options

The ISTC/SCSC supports DHS’ decision to provide chemical facilities with the discretion to determine which of the three options is most appropriate for that facility. The ISTC/SCSC also supports language in the ICR indicating that high-risk chemical facilities will submit information through Option 1, but that such facilities may choose to combine Option 1 with either Option 2 or Option 3, but only as appropriate.

Option 1 could be applied to all affected individuals as an adequate check of terrorist ties. High-risk chemical facilities, however, cannot rely solely on either Option 2 or Option 3, as both

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<sup>8</sup> “*Transportation Worker Identification Credential: Card Reader Pilot Results are Unreliable; Security Benefits Need to be Reassessed*,” GAO-13-198 (May 2013).

options would require all affected individuals to have previously obtained a federal credential that incorporates an equivalent check for terrorist ties.

*C. The ISTC/SCSC would be a competent and reliable partner with DHS to ensure that all required information about affected individuals is submitted for proper vetting against the TSDB.*

The ISTC/SCSC is prepared to assist high-risk chemical facilities to submit each category of personal information for affected individuals currently listed in the ICR. The ISTC/SCSC would also be able to leverage its existing infrastructure and network capabilities to establish routine technical processes that can effectively provide these third party services to high-risk chemical facilities while maintaining compliance, not only with CFATS, but with applicable federal, state, and local laws and regulations.

DHS has requested an exception from the requirement that high-risk chemical facilities must collect signatures or other positive affirmations that reasonable privacy notices have been provided to affected individuals. The ISTC/SCSC, however, utilizing its present Privacy Act notice process, with an amplification of the notice to include recommended DHS Privacy Act notice language, can assist high-risk chemical facilities with providing these notices, regardless of whether the Office of Management and Budget grants DHS' request. The ISTC/SCSC has already begun developing various distribution options. The ISTC/SCSC is also prepared to assist high-risk chemical facilities to adhere to other applicable federal, state, local or tribal laws, regulations, or policies pertaining to the privacy of affected individuals.

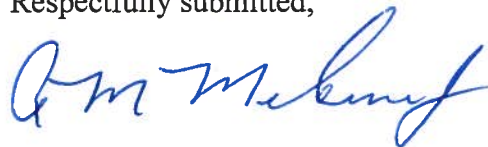
### **III. CONCLUSION**

In the ICR, DHS has expressed a commitment to continuing to work with interested stakeholders to identify additional potential options that could further reduce the burdens related to high-risk chemical facility compliance with the CFATS Personnel Surety Program, while still meeting the national security mandate to reduce the risk of an individual with terrorist ties from obtaining access to the restricted areas or critical assets at a high-risk chemical facility.

The ISTC/SCSC looks forward to participating in this ongoing process by providing DHS with information that DHS may find helpful in implementing the CFATS Personnel Surety Program and working with high-risk chemical facilities to meet their compliance obligations.

We appreciate your consideration of these comments by the ISTC and the SCSC.

Respectfully submitted,



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