



1156 15TH STREET, NW • SUITE 500 • WASHINGTON, DC 20005
T 202.457.0825 • F 202.457.0864 • www.aradc.org

June 3rd, 2013

U.S. Department of Homeland Security
National Protection and Programs Directorate
245 Murray Lane, S.W.
Arlington, VA 20528

**Re: Docket No. DHS-2012-0061—Chemical Facility Anti-Terrorism Standards
Personnel Surety Program New Information Collection Request: 1670-NEW**

To CFATS Program Manager:

On behalf of the Agricultural Retailers Association (ARA), we appreciate the opportunity to comment on the Department of Homeland Security's (DHS) Submission for Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program (PSP) New Information Collection Request.

ARA is a non-profit trade association representing the interests of agricultural retailers and distributors across the United States on legislative and regulatory issues. ARA members range in size from family-held businesses to farmer cooperatives to large companies with many outlet stores. Retail facilities are scattered throughout all 50 states and supply valuable goods and services to our nation's farmers including seed, crop protection chemicals, fertilizer, fuel, crop scouting, soil testing, custom application services and development of comprehensive nutrient management plans. Many of our member company facilities are lower tiered 3s and 4s.

Our industry has limited resources available to address all security related matters and it is very important that those resources are spent wisely to coincide with the appropriate level of risk for that particular facility and chemical of interest (COI).

PARTNERSHIP DIALOGUES SHOULD BE A MODEL FOR REGULATORY ENHANCEMENT

In July of 2012, we were pleased that DHS withdrew the CFATS Personnel Surety Program Information Collection Request (ICR) from OMB review. It was clear that the program evolved based upon industry's comments, especially considering the political atmosphere surrounding the electronic verification of TWIC cards. Since the withdraw, ARA and other stakeholders engaged DHS in a series of substantive dialogues. Topics included the program designs, DHS tools; and additional short and long terms options commented below. DHS also held several meetings with Chemical Sector Coordinating Council (CSCC) leadership and Oil and Natural Gas Sector Coordinating Council leadership. During these engagements, CSCC leadership raised a number of topics and issues which enriched DHS's deeper appreciation of the challenges presented with the program as presented. Many of the new ideas expressed in this letter are a direct reflection of partnership dialog that resulted in the free flow of information outside exparte communication caused by rulemaking. We believe that this continuing dialogue has been a productive one and should be a model for other regulations. *(See Docket Number DHS 2008-0076 RIN 1601.AA.52 Secure Handling of Ammonium Nitrate Program)*

PSP LIMITATION TO TIER 1 AND TIER 2 FACILITIES IS A GOOD INITIAL STEP

DHS is proposing to limit the PSP information collection, and the initial PSP implementation, to only Tier 1 and Tier 2 high risk chemical facilities. ARA believes this approach is reasonable and cost effective. A limited implementation would enable DHS to properly focus the PSP for facilities presenting the highest risk, while not imposing the electronic verification burden on all CFATS regulated facilities. Any subsequent ICR should be published and submitted to OMB for approval to incorporate any lessons learned and potential improvements to the CFATS PSP prior to collecting information from Tier 3 and Tier 4 high-risk chemical facilities. A tier 3/4 pilot program can be utilized to scale the practices and options from the higher to lower tiered facilities.

THE REVISED ICR CONTAINS INFORMATION ESSENTIAL TO ESTIMATING BURDENS

A fundamental part of an agency's responsibility under the Paperwork Reduction Act is to invite public comments on "the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used."¹ In order for the public to be able to do that, it must be provided with information from which it can conduct its own estimates of burden. This issue seems to be rectified in the latest DHS comments.

AGRICULTURAL RETAILERS ARE COVERED BY OTHER BACKGROUND CHECK REGULATIONS: REDUCING REDUNDANCY IS A PRIORITY

Vetting of employees and others who have access to restricted areas where COI (chemicals of interest) are stored at fertilizer and chemical facilities is a priority for our member companies. The fertilizer and crop protection industries are diverse and range from large production facilities with several hundred employees to small retail cooperatives or independent retail fertilizer businesses that, in many cases, have between five and ten employees.

In either of these cases, many are subject to the CFATS, the Maritime Transportation Security Act (MTSA), and Department of Transportation (DOT) hazardous materials regulations. Background checks on employees and contractors are already conducted and many of these individuals have hazardous material endorsements (HME), possess a Transportation Worker Identification Card (TWIC), or other federally issued credentials.

Under the CFATS Interim Final Rule² it states that DHS "may disapprove a Site Security Plan (SSP) that fails to satisfy the risk-based performance standards established in 27.230." Section 27.230 lists the Risk Based Performance Standards (RBPS) each CFATS facility must select, develop in their SSP, and implement appropriate measures to satisfy the performance standards, which includes Personnel Surety.

RBPS #12 was issued for personnel surety and DHS has developed a CSAT application for high-risk chemical facilities to submit information about facility personnel and, as

¹ 5 C.F.R. § 1320.8(d)(1)(ii).

² DHS-2006-0073; RIN 1601-AA41; 6 CFR Part 27

appropriate, unescorted visitors with access to restricted areas or critical assets at those facilities. The goal as stated by DHS is to identify known or suspected terrorists. While we fully agree with this goal we question the manner in which DHS has decided to fulfill this RBPS as we believe that it goes beyond the statutory intent of Congress for chemical facilities to take measures designed to identify people with terrorist ties. RBPS #12, as stated in the April 9, 2007 interim final rule states that chemical facilities are to perform appropriate background checks on and ensure appropriate credentials for facility personnel, and as appropriate, for unescorted visitors with access to restricted areas or critical assets, including (1) measures designed to verify and validate identity; (2) measures designed to check criminal history; (3) measures designed to verify and validate legal authorization and work; and (4) measures designed to identify people with terrorist ties.

SAFE HARBOR NOTICE TO FACILITIES AGAINST TERRORISM

No ARA facility wants a terrorist working for them at their facility and a prudent notification would be an added benefit and safe harbor for the facility and DHS to combat terrorism. Although facilities do not want to interfere with DHS's investigation, the results of vetting an individual for terrorist ties who is requesting access to sensitive areas of high-risk chemical facilities should be a joint partnership. The goal of PSP is to ensure that personnel who have access to sensitive areas of high-risk chemical facilities do not pose a security threat to the facility, its workers or to the surrounding community. However, the current proposal does not provide the level of assurance necessary to ensure such threats are minimized. Details regarding DHS's vetting procedures, including how and under what circumstances DHS will notify a facility that their personnel have been successfully vetted and how matches against the TSDB should be resolved. It is crucial, that such personnel are vetted and cleared *prior* to being granted access to such sensitive areas. ARA facilities and DHS should work together to provide proper and timely notification to the covered facility that such persons have been vetted and are cleared for access *prior* to entry.

UNESCORTED VISITORS WITH ACCESS TO RESTRICTED AREAS OR CRITICAL ASSETS AT THOSE FACILITIES NEEDS SOME LEVEL OF INTERPERTATION

Although we appreciate the latitude for facilities to define “unescorted visitors” in our SSP(s), for inspection purposes it would be helpful for DHS to provide compliance/non-compliance examples for each tier. Further direction is needed for ARA members to understand and comply with these regulations. The scope of the entire program hinges on how owners and operator interpret this definition. DHS may want to look into incorporating this into their FAQs in the future.

PRIOR DHS VETTING THROUGH TSDB FOR EMPLOYEES AND CONTRACTORS WHO HOLD HME IS NOT TAKING ADVANTAGE OF OTHER PROGRAMS

ARA believes that facility employees and contractors who hold a valid HME, or other federally issued credentials satisfy employer’s compliance with the intent of personnel surety requirements of RBPS #12.

DHS itself stated in the CFATS interim final rule that those who have successfully undergone a security threat assessment conducted by DHS and who is in possession of a valid DHS credential such as a TWIC, HME, NEXUS or FAST, will not need to undergo additional vetting by DHS through the Terrorist Screening Database (TSDB).

DHS now appears to want these individual’s information submitted, even though it will require “less information” than those who do not possess a federally issued credential. The redundancy is unnecessary for the regulated community and the government. It is our position that DHS should not require any further submission of information for those individuals holding federally issued credentials.

CONCLUSION

Overall, ARA supports the March 2013 ICR, which proves immense improvements from previous PSP proposals. ARA is committed to creating an effective chemical security program that allows our industry to continue to develop innovative solutions, create jobs, enhance security and protect the community. ARA appreciates the opportunity to provide these comments on DHS’ proposal. We look forward to working with DHS in order to address PSP enhancements and implementation at agricultural retail facilities.

We look forward to continued dialogue with your agency on this important matter.

Respectfully submitted,



Michael Kennedy Esq.
Public Policy Counsel
Agricultural Retailers Association
1156 15th St. NW, Suite 500
Washington, DC 20005
Office: (202)595-1706
Fax: (202)457-0864
michael@aradc.org