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U.S. Department of Homeland Security
National Protection and Programs Director
Office of Infrastructure Protection
Infrastructure Security Compliance Division
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RE: AFPM Comments on the Department of Homeland Security’s 60-Day notice and request for comments, “Chemical Facility Anti-Terrorism Standards Personnel Surety Program,” Docket No. DHS-2017-0037 (82 FR 61312, December 27, 2017)

Dear Mrs. Graydon:

The American Fuel & Petrochemical Manufacturers (“AFPM”) appreciates the opportunity to provide comments on the Department of Homeland Security’s (“DHS” or “the Department”) notice and request for comments entitled, “Chemical Facility Anti-Terrorism Standards Personnel Surety Program” (“the Notice”).¹ The Notice seeks feedback on whether to expand the Personnel Surety Program (“PSP”) under the Department’s Chemical Facility Anti-Terrorism Standards (“CFATS”) to Tier 3 and 4 facilities.² AFPM is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM’s member companies produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make millions of products that make modern life possible.

The refining and petrochemical manufacturing industries play a pivotal role in ensuring and maintaining the security of America’s energy critical infrastructure. AFPM members have worked extensively with DHS – and have invested millions of dollars – toward strengthening facility security. Many AFPM member sites are subject to the Department’s CFATS and have a substantial interest in the collection and sharing of employee and contractor personally identifiable information (“PII”) with DHS. AFPM does not currently possess adequate information on the effectiveness of PSP implementation at Tier 1 and 2 sites to support the expansion of PSP to Tier 3 and 4 facilities.

¹ See “Chemical Facility Anti-Terrorism Standards Personnel Surety Program” 60-Day notice and request for comments, 82 *Fed. Reg.* 61312 (December 27, 2017), <https://www.federalregister.gov/documents/2017/12/27/2017-27519/chemical-facility-anti-terrorism-standards-personnel-surety-program>.

² DHS uses a risk-tiering methodology to determine which facilities pose the greatest security risks. Although all facilities regulated by the CFATS program are considered high-risk, Tier 1 facilities are deemed highest risk, while Tier 4 facilities are deemed lowest risk.



I. BACKGROUND

CFATS “is a risk-based regulatory program that sets the standards for security at the Nation’s high-risk chemical facilities.”³ Since the CFATS program was enacted in 2007, DHS’s authority to regulate security at our nation’s chemical facilities was initially tied to appropriations bills. CFATS remained in its original form until December 18, 2014, when the “Protecting and Securing Chemical Facilities from Terrorist Attacks Act”⁴ was enacted. The statute addressed major impediments to completing site security plans and streamlined the vetting process for facility access, updates that AFPM members supported.

In tandem with these statutory changes, DHS has also taken steps to update the CFATS program and corresponding implementation. DHS requires CFATS-covered facilities to submit security plans containing measures that meet all applicable Risk-Based Performance Standards (“RBPS”). RBPS 12 – “Personnel Surety” – mandates CFATS facilities to perform background checks on facility personnel and unescorted visitors who have potential access to restricted areas and/or chemicals. Parts i-iii of RBPS 12 have been in effect since the inception of the CFATS program. In December 2015, DHS published a notice in the *Federal Register*⁵ announcing that Tier 1 and Tier 2 facilities would begin implementing part iv of RBPS 12: screening for terrorist ties for Tier 1 and Tier 2 facilities through PSP.⁶

Facilities may use four options to implement RBPS 12(iv) and verify the credentials of employees and/or guests: 1) direct vetting through a PSP application in DHS’s Chemical Security Assessment Tool (“CSAT”); 2) use of vetting conducted under other DHS programs; 3) electronic verification of the Transportation Worker Identification Card (“TWIC”); and 4) visual verification using any federal screening program that periodically vets individuals against the Terrorist Screening Database (“TSDB”).⁷ However, it is important to note that all four options involve vetting individuals against the TSDB.

On December 27, 2017, DHS released the Notice, seeking feedback on whether to begin requiring PSP at Tier 3 and Tier 4 facilities as well. In addition, the Department is requesting comment on its burden estimates for the proposed collection of information. Below are AFPM’s comments in response to the Notice. In the absence of data showing that the implementation of these PSP measures at Tier 1 and 2 facilities would significantly reduce the risk of a terrorist incident at Tier 3 and 4 facilities, it is impossible for us to provide informed comment on this

³ See “CFATS Personnel Surety Program,” last published January 29, 2018, <https://www.dhs.gov/cfats-personnel-surety-program>.

⁴ See “Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014,” P.L. 113-254, December 18, 2014, <https://www.congress.gov/bill/113th-congress/house-bill/4007/P.L.>

⁵ See “Chemical Facility Anti-Terrorism Standards Personnel Surety Program” Implementation of the CFATS Personnel Surety Program, 80 *Fed. Reg.* 79058 (December 18, 2015), <https://federalregister.gov/a/2015-31625>.

⁶ See AFPM comments on “Information Collection Request; Chemical Facility Anti-Terrorism Standards Personnel Surety Program Notice,” June 4, 2013, <https://www.afpm.org/WorkArea/DownloadAsset.aspx?id=4044>.

⁷ The Terrorist Screening Database is a federal terrorist watchlist used by agencies such as DHS and the Federal Bureau of Investigation to identify and track individuals who may pose terror-related threats to the U.S. See “The Terrorist Screening Database and Preventing Terrorist Travel,” Congressional Research Service, November 2016, <https://fas.org/sgp/crs/terror/R44678.pdf>.



Notice. Accordingly, we do not support this proposed expansion at this time but stand willing to work with DHS on better understanding its costs and benefits.

II. SUMMARY OF COMMENTS

AFPM supports the screening of individuals against the TSDB to further identify potential security threats and increase security at certain CFATS sites. AFPM and its members were actively involved in the development of the PSP regulations for CFATS Tier 1 and 2 sites. AFPM would like to gain a better understanding of any risk mitigation achieved by screening individuals at Tier 1 and 2 facilities against the TSDB. In the Notice, DHS estimates there are 200 Tier 1 and 2 facilities that submit information about affected individuals through PSP and that 3,700 Tier 3 and 4 facilities would be required to submit for the first time. AFPM encourages DHS to examine the effectiveness of such screening before proceeding to subject the bulk of CFATS-regulated facilities to these additional measures.

AFPM further recognizes and appreciates that DHS is proposing to roll out these requirements in a phased method and has adjusted its burden estimates accordingly. Although these are positive steps by DHS, AFPM urges the Department to recognize that most Tier 3 and 4 sites may be smaller, have fewer employees, or may be in remote areas. As such, we encourage DHS to consider a more flexible approach to PSP implementation at CFATS Tier 3 and 4 sites that would also recognize administrative and physical threat mitigation measures already implemented by a site.

Any new DHS security standard or regulation should be feasible, be clearly and consistently applied across all jurisdictions, increase the overall security of the facility, and meet security objectives for both the enforcing agency and industry. Thus, any updates to DHS regulations should address the most flexible and tangible ways in which facilities can comply.

III. COMMENTS

AFPM is concerned that applying PSP to all CFATS Tier 3 and 4 sites is premature, and we present the comments below to assist DHS in determining whether applying PSP to all CFATS sites is warranted.

a. Sites Need Final Tiering

DHS is in the process of retiering all CFATS sites.⁸ Once this process is complete, there will be sites that have tiered up, down, out of, or into the CFATS program. With each tiering adjustment, sites will need to review which RBPS apply, and Tier 1 and 2 facilities will need to implement a PSP for the site.

As currently configured, TSDB screening does not take into consideration that Tier 3 and 4 facilities present a comparatively lower risk profile than Tier 1 and 2 sites. Yet, TSDB screening

⁸ DHS is required to retier sites every three years.



requirements appear to be applied uniformly across all CFATS Tiers. AFPM appreciates the tremendous amount of effort DHS has invested in refining its tiering methodology in recent years. It is our belief that this much more nuanced approach to risk analysis should be reflected in the PSP requirements by recognizing that the lower risk presented by Tier 3 and 4 facilities may be mitigated using measures other than TSDB screening. These lower risk sites already secure their chemicals of interest (“COI”) and conduct background checks in accordance with CFATS RBPS 12(i-iii). However, AFPM encourages DHS to allow Tier 3 and 4 sites to use PSP voluntarily.

In general, Tier 3 and 4 sites pose fewer offsite consequences due to location and chemical volumes. Additionally, many of the chemicals located at these sites can be acquired elsewhere: for example, at local hardware stores where CFATS regulations do not apply. Tier 3 and 4 sites also may be smaller sites with fewer employees and contractors, many of whom have worked at these sites with access to COI and have undergone periodic background checks for decades. Given the factors outlined above, DHS should reconsider whether all Tier 3 and 4 sites truly warrant full PSP implementation requirements.

b. PSP Program Analysis for Tier 1 and 2 Sites

Due to the Department’s phased PSP approach beginning in 2015, many, if not most, Tier 1 and 2 sites are just beginning to implement TSDB screening. As such, it is far too early for DHS and the regulated community to fully understand the challenges and benefits of conducting this screening. Further, DHS has not discussed with companies that own CFATS sites whether existing PSP requirements effectively helped to identify potential terrorists. Accordingly, it is premature to extend these requirements to the bulk of 3,700 Tier 3 and 4 regulated sites before developing a better understanding of the effectiveness of TSDB screening.

There are also many regional inconsistencies in how CFATS inspectors conduct inspections within a region. These inconsistencies create regulatory confusion and uncertainty, and it is therefore important that these inconsistencies be addressed prior to expanding PSP to additional facilities. For these reasons, DHS should conduct a full PSP analysis to identify programmatic flaws and improvements prior to requiring the program at sites with lower risks.

DHS should conduct a comprehensive evaluation of the CFATS PSP program similar to the comprehensive evaluation the Transportation Security Administration (“TSA”) is conducting with respect to its TWIC Program, including: 1) whether the program is unnecessarily redundant; 2) the value of the program (*i.e.*, the extent to which the program as implemented at Tier 1 and 2 facilities addresses known or likely security risks at covered facilities); 3) the spectrum of impacts on covered facilities; 4) the costs and benefits of the program, as implemented, to taxpayers; and 5) any other program deficiencies and the best ways to address them.

DHS should determine whether to apply PSP requirements to all Tier 3 and 4 sites only after completing such a program evaluation.



c. Notification/Liability

Currently, DHS is not obligated to notify a company if there is a hit against the TSDB following a PSP submission. AFPM questions the effectiveness of having a company's employee or guest screened by the PSP against the TSDB, absent a clear national security, homeland security, or law enforcement rationale, if DHS does not follow-up with the company to alert it of the possible threat. The value of conducting TSDB screening is questionable if an identified bad actor is permitted continued access to COI unbeknownst to the facility, which is in the best position to ensure that the person is not afforded that opportunity.

d. DHS Burden Estimates

In the Notice, DHS has updated its burden estimate for PSP implementation. AFPM agrees with most aspects of this burden estimate and do not contest the Department's estimate that it takes 10 minutes to submit each individual employee or contractor record of personally identifiable information.

However, we are concerned about some of the factors DHS excluded from its annual burden estimates. For example, the Notice states the Department has continued to exclude certain activities and costs associated with the PSP data collection process by deeming such activities "usual and customary," such as the time needed for a site security officer to manage data collection, submissions, and tracking. These activities are not usual and customary because they require a site to hire/designate an employee to manage the PSP data collection process.

Many larger Tier 3 and 4 facilities use hundreds of third-party contractors and may already require the contracting companies to perform comprehensive background checks on their employees and some of these facilities may not have an employee on site to manage PII. On the other hand, smaller Tier 3 and 4 facilities with far fewer employees may not have the personnel or resources to designate an employee to manage the site's PSP process. Thus, requiring such sites to begin collecting and submitting PII for each affected contractor and employee would result in *unusual* time and cost burdens.

For these reasons, we urge DHS to reevaluate the factors it has excluded from its burden estimates for full PSP implementation at Tier 3 and 4 sites.

e. Security Vulnerabilities are Already Addressed at All CFATS Sites

Tier 3 and 4 sites, once finalized by DHS through the current retiering process, already have adequate layers of protection in place to protect sites' COI with varying security measures, including manned gates, fences, controlled access to COI, extensive administrative and procedural measures, and other added technologies. Such measures bring into question the need to add PSP as another layer to a smaller site with lower risk.



f. PSP Alternatives

As noted above, CFATS sites greatly restrict access to COI such that only a small, identifiable population is ever permitted direct control of tiered COI. When combined with training of site employees, it would be highly unlikely that an unauthorized bad actor would be discovered entering restricted areas at CFATS facilities. Such measures are certainly more effective than the implementation of a screening program, the results of which owners/operators of CFATS sites may never see.

g. AFPM Supports the Department's Proposed Phased Approach

If, following these recommendations, DHS determines PSP requirements should be applied to Tier 3 and 4 sites, AFPM supports the Department's proposal to implement the changes in a phased approach. This would allow DHS to first apply the program to sites considered the highest risk within those tiers. When planning the phased-in approach, DHS should transparently apply varying weight to a site's various risk factors, including location, number of employees, types and volumes of COI, and likely offsite incident consequences.

IV. CONCLUSION

AFPM supports screening individuals against the TSDB and continues to support the best and most efficient application of PSP to CFATS sites. However, as discussed above, AFPM is concerned that applying PSP to Tier 3 and 4 sites at this time may not be appropriate prior to a thorough evaluation of the program's effectiveness and accompanying time and cost burdens based on data from the application of PSP to Tier 1 and 2 sites. If DHS conducts an evaluation and still determines it is necessary and cost-effective to apply PSP to Tier 3 and 4 sites, AFPM supports the Department's proposal to implement the changes in a phased approach.

AFPM looks forward to continuing working with DHS to develop programs that ensure the utmost security of CFATS sites while not increasing burdens on these facilities. If you need further information or have any questions, please contact the undersigned at JGunnulfsen@afpm.org or (202) 552-4371.

Sincerely,

Jeff Gunnulfsen
Senior Director,
Security and Risk Management Issues