



**American
Fuel & Petrochemical
Manufacturers**

1800 M Street, NW
Suite 900 North
Washington, DC
20036

202.457.0480 office
202.457.0486 fax
afpm.org

July 18, 2018

OMB Desk Officer
Department of Homeland Security
National Protection and Programs Directorate

Attention: Docket Number DHS-2017-0037; OMB Control Number 1670-0029

Submitted electronically to dhsdeskofficer@omb.eop.gov

Re: AFPM Comments on the Department of Homeland Security's 30-day Notice and Request for Comments; Revision of Information Collection Request: 1670-0029, "Chemical Facility Anti-Terrorism Standards Personnel Surety Program," Docket No. DHS-2017-0037 (83 FR 28244, June 18, 2018)

Dear OMB Desk Officer, DHS, NPPD:

The American Fuel & Petrochemical Manufacturers ("AFPM") appreciates the opportunity to provide comments on the Department of Homeland Security's ("DHS" or "the Department") 30-day notice and request for comments entitled, "Chemical Facility Anti-Terrorism Standards Personnel Surety Program" ("the Notice").¹ The Notice seeks public input on DHS efforts to expand the Personnel Surety Program ("PSP") under the Department's Chemical Facility Anti-Terrorism Standards ("CFATS") to Tier 3 and 4 facilities.

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 regulatory program and are in each of the program's four risk tiering groups. Therefore, our members have a substantial interest in the collection and sharing of employee and contractor personally identifiable information ("PII") with DHS. However, AFPM does not support the program expansion to Tier 3 and 4 sites. We are concerned that the Department is moving forward on this expansion without having sufficiently analyzed the costs, benefits, and ultimate necessity of PSP implementation at lower-risk facilities.

¹ See "Chemical Facility Anti-Terrorism Standards Personnel Surety Program" 30-day notice and request for comments; revision of information collection request: 1670-0029, 83 *Fed. Reg.* 28244 (June 18, 2018), <https://www.federalregister.gov/documents/2018/06/18/2018-12523/chemical-facility-anti-terrorism-standards-personnel-surety-program>.



I. BACKGROUND

CFATS “is a risk-based regulatory program that sets the standards for security at the Nation’s high-risk chemical facilities.”² Congress enacted CFATS in 2007, and amended it in 2016 with the passage of “Protecting and Security Chemical Facilities from Terrorist Attacks Act”³. That statute addressed major impediments to completing site security plans (“SSPs”) and streamlined the vetting process for facility access, updates that AFPM members supported.

Subsequently, DHS requires CFATS-covered facilities to submit SSPs containing measures that meet applicable Risk-Based Performance Standards (“RBPS”). RBPS 12 – “Personnel Surety” – mandates CFATS facilities to perform background checks on facility personnel and unescorted visitors, including contractors and seasonal employees, 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*⁴ requiring Tier 1 and 2 facilities to begin implementing part iv of RBPS 12: screening for terrorist ties for these higher-risk facilities through PSP.⁵

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 the Department’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”); or 4) visual verification using any federal screening program that periodically vets individuals against the Terrorist Screening Database (“TSDB”).⁶ All four options require vetting individuals against the TSDB.

Since the December 2015 notice was published in the *Federal Register*, Tier 1 and 2 facilities have been implementing PSP using a phased-in approach, in which the facilities DHS determines are the highest risk within a specific Tier began implementing the program first, followed by the remaining facilities within that Tier. On December 27, 2017, DHS released a 60-day notice and request for comments (“the 60-day Notice”),⁷ seeking feedback on whether to also begin requiring PSP at Tier 3 and 4 facilities. AFPM submitted comments⁸ in response to the 60-day Notice, commenting that applying PSP to all CFATS Tier 3 and 4 sites may be premature and urging the Department to first analyze PSP implementation at Tier 1

² See “CFATS Personnel Surety Program,” last published May 3, 2018, <https://www.dhs.gov/cfats-personnel-surety-program>.

³ See “Protecting and Security 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%20P.L.>

⁴ 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>.

⁵ 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>.

⁶ 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>.

⁷ 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>.

⁸ See “AFPM Comments on the Department of Homeland Security’s 60-Day notice and request for comments, ‘Chemical Facility Anti-Terrorism Standards Personnel Surety Program,’” February 26, 2018, https://www.afpm.org/uploadedFiles/Content/Policy_Positions/Agency_Comments/AFPM-Comments-on-PSP-Notice_02262018.pdf.



and 2 facilities. We also raised concerns that DHS has not shared with relevant stakeholders any analysis of the costs, benefits, and efficacy of PSP implementation, yet is continuing to take steps that would expand the program to lower-risk facilities. The June 18, 2018 Notice serves as the next step following the Department's 60-day Notice and corresponding public comments submitted to DHS and the White House Office of Management and Budget ("OMB").

II. COMMENTS

AFPM generally supports the screening of individuals against the TSDB to further identify potential security threats and increase security at certain CFATS sites for certain types of facilities. AFPM and its members were actively involved in the development of the PSP regulations for CFATS Tier 1 and 2 sites. We believe that it would be premature to expand the program to Tier 3 and 4 sites until there is a better understanding of the effectiveness of the program at Tier 1 and 2 sites. This could be accomplished through a comprehensive evaluation of the value of, and actual risks averted by, PSP implementation at Tier 1 and 2 sites.

We similarly encourage DHS to evaluate the security, training, and background check measures already implemented across Tier 3 and 4 sites before determining whether it is necessary, from a risk-based perspective, to require PSP implementation at these lower-risk sites.

We present the comments below to assist DHS and OMB in determining whether applying PSP to all CFATS sites is warranted at this time.

a. DHS Should First Analyze PSP Implementation at Tier 1 and 2 Sites

Due to the Department's phased PSP approach beginning in 2016, a comprehensive evaluation of the benefits and difficulties associated with TSDB implementation has yet to be done, or at least shared with stakeholders. Such an analysis should be done before expanding the program to Tier 3 and 4 sites.

We are concerned about the ability to take an asset-based approach to security as specifically contemplated by DHS guidance. In other words, TSDB screening could be manageable when through a layering of administrative and/or physical security measures, a facility is able to limit the population of "affected persons" to only those who specifically require access to the Chemical of Interest ("COI") storage area. Otherwise, a facility would be in a position where it had to submit information for hundreds, even thousands, of temporary and ever-changing contractors during maintenance and turnarounds. This is onerous – and perhaps even impossible – for many facilities because of the burden it would place on these sites to collect and submit data on such a large number of individuals, often in a short period of time. The ability to restrict areas to take an asset-based approach is hampered by inconsistencies between, and even within, regions as discussed below. It is therefore imperative that DHS take time to evaluate and resolve some of these issues.

It is far too early for DHS and the regulated community to fully understand the challenges and actual benefits – if any – achieved through this screening. Further, DHS has not discussed with companies that own CFATS sites whether existing PSP requirements effectively help to address security risks by



identifying potential terrorists. It would be premature to extend these requirements to the bulk of nearly 4,000 regulated sites⁹ before developing a better understanding of the effectiveness and necessity of TSDB screening.

DHS should conduct a comprehensive evaluation of the CFATS PSP similar to the evaluation the Transportation Security Administration 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 currently implemented, to taxpayers; and 5) any other program deficiencies and the best ways to address them.

b. Security Vulnerabilities Are Already Addressed at All CFATS Sites

Tier 3 and 4 facilities already deploy a combination of security measures to protect sites' COIs such as manned gates, fences, controlled access to a COI, extensive administrative and procedural measures, and/or other added technologies. The relatively lower risk, as determined by DHS, when considered in light of security measures in place, many of which often satisfy security metrics for higher-tiered facilities, should be reflected in the determination as to whether a Tier 3 or 4 facility should be required to submit TSDB screening information. Otherwise, risk-based distinctions end up being negated by a one-size-fits-all requirement. AFPM asks that DHS reconsider adding PSP as another layer to a site the Department deems lower-risk.

When giving careful consideration to the security, training, and background check and other security measures already in place at Tier 3 and 4 facilities, DHS may conclude that these are at least as effective, if not more so, as submission of information to the TSDB, the results of which owners/operators of CFATS are unlikely to see, as discussed below. Therefore, should DHS choose to proceed with TSDB screening for Tiers 3 and 4, AFPM requests that it determine certain performance standards, that if met, would provide equivalent security and relieve a facility from having to submit data – in particular, those configured in a way that would make an asset-based security approach difficult.

c. Expanding the Scope of PSP May Further Highlight Inspector Inconsistency Issues

There are many inconsistencies in how CFATS inspectors conduct inspections within a region. These inconsistencies create regulatory confusion and uncertainty, which can be detrimental to a facility's implementation of sound security measures. As things currently stand, it is entirely possible that one facility could receive a plan approval, while another, with identical security measures as the first but in another region, could be denied.

This is highly problematic from a PSP standpoint as it could make the difference between submitting information for a manageable number of affected persons and an unmanageable situation where the entire population of a facility, including hundreds or thousands of temporary contractors onsite for a turnaround, few of whom have access to the COI, is subjected to TSDB screening. Expanding the scope of

⁹ DHS has estimated there are 200 Tier 1 and Tier 2 CFATS facilities and 3,700 Tier 3 and 4 facilities under the CFATS program. See 83 FR 28244 at 28248.



PSP prior to conducting a thorough evaluation of the program and corresponding inspections at Tier 1 and 2 facilities could only highlight these inconsistencies by placing additional requirements and burdens on the regulated community and inspectors. For these reasons, AFPM recommends that DHS conduct a full PSP analysis to identify programmatic flaws and improvements prior to requiring the program at sites with lower security risks.

d. DHS Does Not Notify Facilities of a TSDB Hit

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 alert the company of a possible threat. The value of conducting TSDB screening is therefore 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 person is not afforded the opportunity to continue posing a security risk.

e. AFPM Appreciates the Discretion Given to CFATS Sites in Drafting SSPs

In the Notice, DHS responds to a public comment received on its 60-day Notice regarding whether to include railroad employees within the scope of a facility's CFATS requirements, noting, "A covered chemical facility has the discretion to decide if they want to escort railroad employees as visitors, identify railroad employees as affected individuals, or treat them in some other way consistent with CFATS requirements."¹⁰ AFPM applauds this response and such discretion given to CFATS facilities in drafting their SSPs. We urge the Department to continue this approach, which will allow sites to deploy the appropriate and most effective measures for ensuring facility safety and security.

f. AFPM Supports the Department's Proposed Phased Approach

If, following an analysis of the efficacy of the program as applied to Tier 1 and 2 sites as outlined above, DHS determines PSP requirements should be applied to Tier 3 and 4 sites, AFPM strongly supports the Department's proposal to implement the changes using 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 appropriate weight to a site's various risk factors, including geographic location, number of employees, types and volumes of COI, and likely offsite incident consequences.

III. CONCLUSION

AFPM generally supports screening individuals against the TSDB for certain facilities and continues to support the best and most efficient application of PSP to CFATS sites. However, AFPM is concerned that applying PSP to Tier 3 and 4 sites may not be appropriate. Performing a comprehensive PSP evaluation is particularly important considering the unknown risk mitigation results of PSP at Tier 1

¹⁰ 83 *Fed. Reg.* 28244 at 28248.



and 2 sites, the adequate security measures already in place at Tier 3 and 4 sites, and any potential adverse effects of broadening PSP requirements (*e.g.*, exacerbating regional inspection inconsistencies). If DHS conducts a comprehensive evaluation of all these factors and still determines it is in the best interest to expand PSP to Tier 3 and 4 facilities, AFPM strongly supports the Department's proposal to implement the program using a phased approach and the continued facility discretion to employ one of four personnel surety elements at their site.

AFPM looks forward to continuing working with DHS and OMB to develop programs that ensure the utmost security of CFATS sites while not increasing unnecessary burdens on these facilities. If you need further information or have any questions, please contact the undersigned at JGunnulfsen@afpm.org or (202) 844-5483.

Sincerely,

Jeff Gunnulfsen
Senior Director, Security and Risk Management