



May 13, 2010

Todd M. Keil  
Assistant Secretary  
Office of Infrastructure Protection  
National Protection and Programs Directorate  
Department of Homeland Security

**Re: Second Request for Comments by DHS on its Chemical Facility Anti-Terrorism Standards Personnel Surety Program, Docket No. DHS-2009-0026**

Dear Assistant Secretary Keil:

The International Liquid Terminals Association (ILTA) is pleased to submit additional comments on the above-referenced Department of Homeland Security (DHS) information collection request for submittal to the Office of Management and Budget. The following comments augment an earlier submission by ILTA on August 10, 2009, which responded to DHS's initial information collection request, 74 *Fed. Reg.* 27555.

ILTA is an international trade association that represents eighty commercial operators of bulk liquid terminals, aboveground storage tank facilities and pipelines located in the United States and 42 other countries. In addition, ILTA includes in its membership more than three hundred companies that supply products and services to the bulk liquid storage industry.

ILTA member facilities include deepwater, barge, and pipeline terminals whose bulk liquid commodities are essential to our economy. These terminals interconnect with and provide services to the various modes of bulk liquid transportation, including oceangoing tankers, barges, tank trucks, rail cars, and pipelines. The commodities handled include chemicals, crude oil, petroleum products, renewable fuels, asphalt, animal fats and oils, vegetable oils, molasses, and fertilizers. Customers who store products at these terminals include oil producers, chemical manufacturers, product manufacturers, food growers and producers, utilities, transportation companies, commodity brokers, government agencies, and the military.

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

ILTA and its terminal member companies recognize the importance of providing effective personnel surety at our nation's high-risk chemical facilities in order to ensure that individuals with unescorted access to restricted areas or critical assets have suitable backgrounds for their level of access. Effective personnel surety includes a comparison of appropriate personally identifiable information (PII) against that of known and suspected terrorists as maintained in the government's Terrorist Screening Database (TSDB). ILTA strongly agrees with DHS's May 2009 Risk-Based Performance Standards (RBPS) guidance for personnel surety in that regard.

In the Department's April 13, 2010 notice and request for comments, 75 *Fed. Reg.* 18850, DHS requested "additional comments" on its personnel surety program (PSP) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (PRA). Through this submittal, ILTA is responding to new OMB and DHS questions with additional comments, including the following main points:

1. PSP violates the statutory Congressional requirement for performance standards in DHS's regulation of the Chemical Facility Anti-Terrorism Standards (CFATS).
2. PSP is fundamentally at odds with DHS's guidance for its performance standard on personnel surety, RBPS-12, by failing to provide a mechanism for facilities to ensure that individuals have suitable backgrounds for their level of access. This raises the question as to whether DHS plans to utilize the PSP, *not* to ensure that individuals who are known to be threats are prohibited from accessing our nation's critical infrastructure, but rather to leverage private sector resources for the purpose of tracking all individuals with access to these facilities, regardless of whether they have been identified as security threats.
3. Submissions of PII by facilities to DHS for personnel or unescorted visitors who can demonstrate through an existing credential that they have been successfully screened against the TSDB is duplicative, wasteful, and serves no legitimate purpose.
4. DHS has underestimated the likely affected population and, correspondingly, the cost and burden of administering the proposed PSP. The accuracy of its estimates may be further undermined by the potential for future additions of currently exempted maritime or agricultural facilities.
5. DHS's request for an exemption from the PRA is unwarranted and raises privacy concerns.

The proposed PSP raises concerns important issues about DHS's objectives in implementing CFATS. To address these issues, ILTA poses the following questions:

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

- If DHS's Infrastructure Security Compliance Division (ISCD) believes that an individual listed on the TSDB should be prohibited from accessing a "high risk chemical facility," then why wouldn't the PSP include measures to enable a facility to recognize whether its employees, contractors, truck drivers, or unescorted visitors were identified on that list?
- Why does ISCD believe that is relevant to national security to identify the high-risk chemical facilities to which an *approved* individual might require access?
- How does ISCD intend to manage redundant submissions of PII that it would obtain from multiple facilities submitting information on personnel, including truck drivers and contractors? How will ISCD effectively update its database when an individual is removed from one facility yet not from others where he has also been granted access? ILTA maintains that such a duplicative process would likely increase the probability of data entry error or breaches in data security.
- How is a facility to determine whether truck drivers or certain contractors will be visiting the facility on a future occasion? When such information is unknown, would it be appropriate to submit the individual's data to ISCD within the time allowed and at a later date, report that the individual no longer has access? Would this process repeat upon a future return of the individual to perform work the facility?
- Can ISCD explain why it would need to verify that a background check was completed for an individual who already holds a government-issued security credential, which requires a successful check against the TSDB prior to its issuance?
- Why is it that ISCD has chosen to decouple the four required background check elements required by 27.230(a)(12), rather than address them in a single process as has been accomplished, for instance, by both the Coast Guard and Department of Transportation?
- Finally, would ISCD articulate its specific objectives for PSP and explain how it will efficiently or effectively meet these objectives?

**General ILTA Comments**

**1. PSP Conflicts with the Congressional Mandate to Implement Performance Standards**

The proposed PSP prescribes specific protocols for administering background checks with a categorically distinct approach from other TSDB background check programs currently administered in the United States. This proposal goes against the foundational "performance standards" basis of the CFATS interim final rule.

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

In the initial authorization language for CFATS, Congress explicitly directed DHS to issue regulations "establishing risk-based performance standards for security chemical facilities." At that time, performance standards were deemed particularly appropriate in the security context because they provided individual facilities with the flexibility to address their unique security challenges. Using performance standards rather than prescriptive standards would further help increase overall chemical sector security by varying the security practices used by different facilities as differing facility-specific security measures present new and unique problems for an adversary to overcome.

Office of Management and Budget (OMB) Circular A-119 (Feb. 10, 1998) explains that performance standards "state requirements in terms of required result with criteria for verifying compliance but without stating the methods for achieving required results." This OMB Circular is referenced in DHS's May 2009 RBPS guidance. But PSP is in direct conflict with both the OMB Circular and the intention of Congress with regard to performance rather than prescriptive standards. If mandated, PSP would remove a high-risk facility's flexibility to achieve compliance in accord with the guidance for RBPS-12 which allows for the facility to determine the sufficiency of federal vetting and credentialing programs, rather than ISCD.

For these reasons, it would be appropriate for ISCD to offer PSP as an option for facilities to consider for checking personnel against the TSDB as required under RBPS-12. But such a prescriptive measure cannot be required under CFATS. Facilities should be allowed to utilize any of the numerous equivalent federal programs to check such individuals against the TSDB, including the Coast Guard's Transportation Worker Identification Credential (TWIC), the Department of Transportation's Hazardous Materials Endorsement (HME), or the United States and Canada's joint Free and Secure Trade (FAST) program.

## **2. DHS's Personnel Surety Program Conflicts with RBPS 12.**

ILTA maintains that the proposed PSP is significantly flawed. This is due to the program's inability to achieve the inherent goal of TSDB screening, as stated in RBPS 12, to "ensure that individuals allowed on-site have suitable backgrounds for their level of access." DHS's first request for comments on the PSP was published in the *Federal Register* on June 10, 2009, just one month after its RBPS guidance was issued.

According to the PSP, a high-risk facility may grant access to any individual, including those who may be listed on the TSDB, long before PII is submitted to DHS. Additional weeks could pass before any actions were initiated that might inhibit the individual's access. At no point would such a facility be able to verify that the individual has a "suitable background," based on exclusion from the TSDB.

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

A disclaimer in the guidance states that it “reflects DHS’s current views on certain aspects of the Risk-Based Performance Standards” and “does not establish legally enforceable requirements.” The disclaimer continues, stating that “(h)igh risk facility owners/operators have the ability to choose and implement other measures to meet the RBPSs...” and that specific security measures and practices in the document are “neither mandatory or necessarily the ‘preferred solution.’” Nevertheless, given the highly subjective nature of CFATS obligations, it is reasonable to expect that a facility that complies with the guidance would be in compliance with the regulation.

In addition, each of DHS’s relevant metrics supporting personnel surety compliance (guidance metrics 12.1 through 12.5) is in conflict with the PSP:

**Metric 12.1**

RBPS 12:

“All new/prospective employees and contractors, as well as any unescorted visitors, who have access to restricted areas or critical assets have appropriate background checks. Access to restricted areas or critical assets is allowed after appropriate background checks have been successfully completed.”

PSP:

The PSP would do nothing to prevent an employee, contractor or unescorted visitor from being given access to restricted areas or critical assets at any time. “Initial Submission of Affected Individual’s information” would not be required for submission to ISCD until 90 days *after* the individual is first allowed on site at a tier 3 or tier 4 regulated facility (60 days for tier 1 and tier 2 facilities). Only then would the information be available to DHS for submission to the Transportation Security Administration (TSA) for an obligatory review against the TSDB. Regardless of the time required for the government to complete this process, the facility would never receive any information as to whether the individual poses a known threat. Thus, according to PSP, the facility would not be prompted to further restrict access to facility personnel, nor would it know whether an individual has had his data submitted for background investigations, know whether appropriate background checks have been completed, or receive the results of the investigation. Therefore, a facility would be unable to demonstrate compliance with Metric 12.1 if it adheres strictly to the PSP.

Additionally, the PSP only references affected populations as “facility personnel” and “unescorted visitors.” This reference to facility personnel does not align with RBPS-12 categorizations of “employees” and “contractors.” Under PSP, it remains ambiguous whether a DHS inspector would characterize an escorted contractor as part of the

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

“affected population.” For instance, would a truck driver be an “employee” or could he be an “escorted visitor”? This confusion persists through Metric 12.2 and 12.4 as well.

**Metric 12.2**

RBPS 12:

“All existing employees and contractors who have access to restricted areas or critical assets undergo background investigations in an expedited but reasonable period from the date of preliminary approval of the [Site Security Plan]. [For tiers 1, 2, and 3,] investigations are repeated for all individuals at regular intervals thereafter.”

PSP:

The PSP requires that the affected population have their data submitted to ISCD within 60 or 90 days, depending on tier. It also requires that all facilities submit notification within 90 days of when “an affected individual no longer has access,” regardless of tier. ISCD has stated that this requirement is intended to assist DHS in the elimination of unnecessary repeat investigations. However PSP fails to recognize that RBPS guidance excludes any requirement for persons with access to restricted areas or critical assets at tier 4 facilities to undergo repeat background checks.

**Metric 12.3**

RBPS 12:

“The background checks are conducted in accordance with documented requirements established by the corporation, facility, or FSO.”

PSP:

The PSP is highly prescriptive, requiring that the facility submit data on each “affected individual,” regardless of whether that employee, unescorted visitor, contractor or truck driver can demonstrate a current and successful completion of all required government background checks. Such a requirement conflicts directly with Metric 12.3 which allows the background check process to be determined by the corporation, facility or FSO.

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

**Metric 12.4**

RBPS 12:

“Processes are in place to provide DHS with the necessary information to allow DHS to screen individuals (e.g., employees, contractors, unescorted visitors) who have access to restricted areas or critical assets against the TSDB.”

PSP:

PSP language apparently presupposes that “DHS” does not include TSA, the agency responsible for coordinating access to the TSDB. While the FBI, not TSA, manages this list, TSA coordinates access to the TSDB for *all* the current government vetting programs. PSP would obligate facilities to present background information on individuals to ISCD, through use of its Chemical Security Assessment Tool (CSAT). ISCD would then be expected to forward the received information to TSA. It is unclear why this would be required for individuals who have already submitted their data to TSA directly in obtaining effectively the same background check, as administered under programs such as TWIC, HME or FAST. ILTA respectfully requests ISCD to explain what it intends to achieve by requiring direct submissions to the CSAT even when individuals have previously submitted to DHS background checks against the TSDB.

**Metric 12.5**

RBPS 12:

“The background check program is audited annually.”

PSP:

Company or facility audits of background check programs are not addressed in the PSP.

**3. Requiring the Submission of PII to Verify Individuals Successfully Screened Against the TSDB is Duplicative, Wasteful, and Serves No Legitimate Purpose.**

According to the April 21, 2010 written testimony of David Heyman, DHS Assistance Secretary for Policy before the Senate Commerce, Science and Transportation Committee, TSA’s security threat assessment for the HME vetting program “covers approximately three million drivers authorized to transport hazardous materials.” Heyman noted that “TSA has conducted a full security threat assessment of, and issued a Transportation Worker Identification Credential (TWIC), to 1.6 million workers requiring unescorted access to secure areas of port facilities.”

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

HME drivers are already one of the largest groups of TWIC holders, and individuals with these credentials go through a “rigorous vetting program.” These workers may also be directly employed by a high-risk facility or provide service to these facilities as contractors or truck drivers delivering and /or picking up a chemical of interest (COI). Many of these workers will require access to one or more CFATS-regulated facilities. The proliferation of federal security screening programs has already led to many thousands of individuals being subject to one or more screening programs.

The Interim Final Rule for CFATS published in the *Federal Register* on April 9, 2007 states: “To minimize redundant background checks of workers, DHS agrees that a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential such as TWIC, HME, or FAST, will not need to undergo additional vetting by DHS.” ILTA strongly supports this position.

However, the proposed PSP indicates that ISCD is unwilling to accept these equivalent federal background checks as sufficient for the CFATS standard. The proposal requires facilities to “submit the name and credential information for these persons along with the application data for other employees [and directs] facilities ... not [to] allow unescorted access to a critical asset or restricted area to a person in possession of a DHS credential unless information on that person has been submitted [because] **DHS [needs to] determine whether the applicant poses a security threat.**” Such a position is simply without merit for individuals who have already undergone and maintain current, comparable background checks.

DHS should not require duplicative submissions for persons who are known *not* to be on the TSDB. There is no legitimate security purpose for tracking these individuals. Equally important, the quality and reliability of information collected on personnel *not* previously screened against the TSDB through an alternate and comparable program would be enhanced by not loading the system with records of cleared individuals.

The submission of data for individuals at each high-risk facility where access is granted, as required under the proposed PSP, would be redundant for all individuals already holding a valid credential demonstrating successful vetting against the TSDB. Such a requirement would also exceed the guidance provided for personnel surety under RBPS-12. Such redundancy is unnecessary and wasteful and can adversely impact both the regulated population and the government.

During a *Surface Transportation Security Priority Assessment* in March 2010, the White House issued recommendations to federal agencies to (1) promote comparability and reciprocity of assessments across credentialing and screening programs and (2) implement “the principle of ‘enroll once, use many’ to reuse the information of individuals applying for multiple access

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

privileges. The PSP proposal is at odds with the Administration's overall effort to harmonize existing federal background check programs. Establishing another federal background check program for the same individuals will not further enhance security at these high-risk facilities. ILTA cannot envision how the ISCD approach will enhance security when limited resources are diverted to tracking individuals who have already been cleared against the TSDB.

The practice of tracking approved citizens with access to high-risk facilities introduces potentially significant privacy concerns. PSP is overly prescriptive, unnecessarily burdensome and highly duplicative. It demands the reporting of significant quantities of data yet it fails to achieve the objectives of RBPS-12. ILTA contends that the administrative burden on ISCD if this duplicative requirement persists will be onerous and conducive to error while providing no security return. Therefore, the information collection, as stated, is *not* necessary for many, if not most, potentially impacted individuals.

#### **4. DHS has Understated the Likely Size of an Affected Population**

ILTA believes that ISCD is significantly underestimating the number of affected individuals that will be impacted by this proposal given the large universe of existing credentialed employees and contractors working at high-risk facilities. ISCD may also be significantly underestimating the number of facilities that certain affected individuals will be required to access. Furthermore, it overestimates the ability of facilities, especially storage terminals, to isolate restricted areas or critical assets from selected employees or visitors. It also appears as though ISCD has not considered a persistent uncertainty that exists regarding whether certain individuals, such as truck drivers or project contractors, require ongoing access. In addition, the estimation of a likely affected population has a unique complexity under CFATS in that the definition of an "asset," particularly with networked computer systems, can extend beyond the physical perimeter of the facility. As such, ILTA believes that the DHS estimate of 354,400 respondents is likely off by an order of magnitude when considering the current population of 5,333 tiered facilities.

Currently, an exemption exists for facilities regulated by the Maritime Transportation Security Act (MTSA). If the exemption is eliminated at some point in the future, as is currently being considered by Congress, approximately 3,200 MTSA-regulated facilities could become subject to regulation under CFATS, increasing the number of affected facilities by 50%. The number of affected individuals and facility submissions would likely increase disproportionately, based on the larger size of certain marine facilities relative to their inland counterparts.

The DHS estimate also excludes consideration of the farms, ranches, nurseries and other agricultural operations that may fall under the CFATS program at some later date once the

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

“indefinite time extension,” issued by DHS in January 2008, is removed. Depending on how DHS defines “unescorted visitor,” the number of affected individuals at these facilities alone could far outweigh DHS’s current estimated number of respondents.

Based on likely populations and multiple facility access requirements, the Chemical Sector Coordinating Council (CSCC) has estimated that the current scope of DHS’s proposed PSP would require upwards of 10 million individual submissions of PII. For comparison, the Coast Guard’s original estimate of 400,000 TWIC holders has already proven to be understated by a factor of four. The administrative burden that ISCD’s proposal would create for both the public and private sectors is simply enormous. DHS estimates that the amount of time for a responsible entity to submit the information on each affected individual into the CSAT portal is 0.59 hours per individual for activities listed in 5 CFR 1320.3(b)(1). Using this value as well as the CSCC estimate for the required number of submissions, the total time burden associated with collecting, verifying, reporting, maintaining and protecting information for each affected individual would approach six million man hours. Assuming an average hourly wage of \$20 per hour for an appropriate individual with the proper security level and training, the total cost burden imposed on the regulated community would be nearly \$120 million.

Executive Order 12866 directs agencies to assess the effects of Federal regulatory actions on state, local, and tribal governments, as well as the private sector. It also requires a qualitative and quantitative assessment of the anticipated costs and benefits of a Federal mandate resulting in annual expenditures of \$100 million or more among all referenced parties. ILTA believes that the PSP qualifies as a significant rulemaking, and should it become a requirement rather than an option, it must be held to the appropriate administrative procedures.

## **5. DHS’s Request for an Exemption to the PRA is Unwarranted**

ISCD claims that its request for an exemption to the Paperwork Reduction Act (PRA) is for the purpose of efficiency so that facilities would not be obligated to collect signatures from individuals from whom PII is collected. ILTA maintains that the signature collection burden would be minimal in comparison to the burden of obtaining the PII itself. The PRA exemption request is simply unwarranted.

ILTA has articulated its concerns regarding the PRA exemption request in its August 10, 2009 submission to this docket. Those comments addressed ILTA’s belief that such an exemption would inappropriately allow the use of information about an individual without his or her knowledge or consent, regardless of DHS’s intent.

**CFATS Personnel Surety Program, Docket No. DHS-2009-0026**  
**Additional Comments of the International Liquid Terminals Association**  
**May 13, 2010**

**ILTA Recommendation**

ILTA recommends that DHS offer PSP as an option for facilities to consider in meeting the objectives of RBPS 12. To require individual facilities to constantly update and correct information about affected individuals will neither “increase the accuracy of data collected,” nor “decrease the probability of incorrect matches” with the TSDB. It will, however, significantly increase the administrative burden on companies required to provide the information. In so doing, it increases the likelihood that the data, at times, will be incomplete and/or inaccurate.

While certain entities regulated under the CFATS program may elect to adopt some or all of the practices proposed in the PSP, ILTA objects to utilizing it as a means of enforcing certain practices at high-risk chemical facilities where the facility is otherwise able to demonstrate adherence to official DHS guidance on RBPS-12 through other mechanisms.

Mandating PSP to achieve personnel surety for all personnel at every CFATS-regulated facility is not an effective means of improving our nation’s overall security posture.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'R. Peter Weaver', with a stylized, cursive script.

R. Peter Weaver  
Director of Regulatory Compliance and Safety