



MEMORANDUM

TO: First Advantage Chemical/Petrochemical Vertical Market Team

FROM: Michael Russell

DATE: May 22, 2009

RE: Response to Comments Submitted to DHS Regarding the Risk-Based Performance Standards Guidance Document

On May 15, 2009, the Department of Homeland Security (“DHS”) responded to comments submitted by First Advantage Background Services Corporation (“First Advantage”) on November 24, 2008 regarding DHS’s Risk-Based Performance Standards (“RBPS”) Guidance. Below are a summary of both the comments submitted by First Advantage and DHS’s response to those comments.

DHS responded to most, but not all, of the comments submitted. “In notice and comment rulemaking, an agency need not respond to every comment so long as it responds in a reasoned manner to significant comments received.” *United States Broad. Co. v. FCC*, 740 F.2d 1177 (D.C. Cir. 1984).

Of particular note is the statement that “DHS has revised the final Guidance to clarify that a facility may hire a third-party to help manage the facility’s personnel surety program.”

I. First Advantage Commented: *DHS Must Provide Additional Guidance on Visitor Controls*

First Advantage sought clarification on the appropriate breadth and scope of visitor controls, noting that it is unclear how those requirements vary for different tiers and/or categories of facility visitors.

DHS Responded: DHS stated that it “believes that the current guidance on visitor controls (see, e.g., the chapter on RBPS 3; Appendix C) provides sufficient clarity on the subject of visitor controls. Accordingly, DHS did not modify the Guidance based on this comment.”

II. First Advantage Commented: *DHS Must Provide Additional Guidance Regarding Background Screening Audits Under RPBS 12*

First Advantage requested DHS to clarify how frequently covered facilities are required to perform personnel surety audits for Tier 1 and 2 facilities. First Advantage also noted that the RBPS Guidance and regulations are contradictory: the regulations require all covered facilities to audit their Site Security Plans (“SSPs”) annually, but the RPBS Guidance indicated that Tier 3 and 4 facilities need not audit their personnel surety program.

DHS Responded: DHS noted that First Advantage was correct that “pursuant to 6 CFR § 27.225(e), a covered facility must conduct an annual audit of its compliance with its SSP[]” and that “[a]s part of this annual compliance audit, a facility should audit its personnel surety program, which is part of the facility’s SSP.” Therefore, “DHS [] changed Metric 12.4 to acknowledge that each facility, regardless of tier, must audit its personnel surety program annually.”

III. First Advantage Commented: *Facilities Should Be Cautioned That CFATS Will Not Shield Them From Liability For Failing to Comply With Laws Regulating Personally Identifiable Information and Credit Data*

First Advantage suggested that the RBPS Guidance should emphasize that CFATS will not shield a facility from liability for violating Federal or state law when performing background screening services.

DHS Responded: DHS acknowledged that SSP approval “merely reflects DHS’s determination that the SSP satisfies the applicable RPBSs under CFATS” – and it is “not an implicit or explicit statement on the compliance of the facility’s personnel surety program with Federal, state, or local employment, labor, or privacy laws.” Toward that end, “it is the facility’s responsibility to ensure that those laws are being met” and CFATS will not shield a facility from liability “if their personnel surety programs violate other Federal, state, or local law.” Finally, DHS noted that “if a facility believes that a state or local law is in direct conflict with CFATS, and thus preempted, the facility may seek an opinion from DHS under 6 CFR § 27.405.”

IV. First Advantage Commented: *DHS Must Clarify Whether There Is Any Variance In The Scope Of Criminal Background Checks For Differently Tiered Sites*

First Advantage commented that the RBPS Guidance is unclear regarding the scope of criminal history checks for differently tiered facilities.

DHS Responded: DHS stated that it “believes that it has provided the appropriate level of guidance on background checks and that providing additional guidance on what type of criminal history checks should be applied to each tier could be perceived as prescriptive.” As such, DHS “has not modified the Guidance based on this comment.”

V. First Advantage Commented: *TWIC Will Not Always Apply To Drivers Transporting Theft COIs*

First Advantage noted that many drivers will not require unescorted access to Maritime Transportation Security Act facilities and therefore will not – and cannot – possess a TWIC.

DHS Responded: DHS explained that “[t]hroughout the discussions on identification verification contained in RBPS 5 and elsewhere in the Guidance, the Department explicitly stated that a facility can choose from a wide variety of approaches to comply with identity verification and personnel surety standards, and that the use of TWIC cards is simply one of many options that a facility may wish to consider.” Further, DHS noted that “[a]s stated in the preamble to the CFATS IFR, the use of a TWIC card or other valid DHS credentials (e.g., a hazardous materials endorsement (HME) license, NEXUS card, Free and Secure Trade (FAST) credential) for CFATS purposes can help minimize redundant background checks and reduce the overall burden on regulated facilities and the employees

and contractors who work there. See 72 FR 17709 (April 9, 2007).” As a result, “DHS did not change the Guidance based on this comment.”

VI. First Advantage Commented: *DHS Must Clarify Whether A TWIC Satisfies RBPS 12 For All Regulated Facilities*

First Advantage asked DHS to clarify whether possession of a TWIC satisfies RBPS 12 for all risk tiers as well as whether TWIC holders must be screened through the Terrorist Screening Database (“TSDB”). First Advantage referenced language in the preamble to the CFATS regulation indicating that individuals who a TWIC can forgo additional background screening by DHS.

DHS Responded: DHS specifically acknowledged the preamble language quoted by First Advantage and noted that it “has added a statement to that effect to the Guidance.” Additionally, DHS stated that it “has added a section to the Guidance making it clear that an individual who possesses a current, authentic TWIC meets the background check requirements in 6 CFR § 27.230(12)(i)-(iv).”

VII. First Advantage Commented: *DHS Must Provide Additional Information Regarding The Operation and Implementation of TSDB Checks*

First Advantage requested additional guidance regarding the role that third-party providers would play in the TSDB screening process.

DHS Responded: DHS stated that it “is still determining the mechanism through which facilities will satisfy 6 CFR §27.230(12)(iv), and so cannot state with certainty if there will be a role for third-party providers in that process.”

VIII. First Advantage Commented: *DHS Must Provide Additional Guidance Regarding the Waiver/Appeals Process for TSDB Checks Under RBPS 12*

First Advantage sought clarification as to whether an internal redress/appeals process was necessary at the facility level for adverse TSDB findings.

DHS Responded: After reviewing this and other related comments, DHS noted that it “understands how a facility might construe the redress process described in the draft Guidance as going beyond the requirements of RBPS 12 ... [and] [] realizes that this area is the subject of well-established employment law.” Therefore, DHS “decided to remove all discussion of company redress processes from the discussion of RBPS 12 [as well as from Appendix C].”

DHS stated that “[c]hallenges to any finding under RBPS 12 that a person has terrorist ties and is a potential security threat may be made through the adjudication and appeals proceedings established by CFATS. See 6 CFR §§ 27.305 – 27.345.” Finally, it noted that “whether or not an individual involves the facility in such a redress proceeding would typically depend on the specific circumstances.”

IX. First Advantage Commented: *DHS Must Clarify Its Policy Regarding Background Check Renewals For Existing Employees Under RBPS 12*

First Advantage requested additional clarification regarding background check renewals for existing employees under RBPS 12, and specifically that DHS clarify the term “regular intervals” as it relates to the repeated background investigation requirement for Tier 1, 2 and 3 facilities.

DHS Responded: While DHS acknowledged the Company’s request for clarification of the term “regular intervals,” it did not provide any additional clarification.

X. First Advantage Commented: *DHS Must Clarify Background Check Reciprocity Under RBPS 12*

First Advantage requested that DHS clarify whether facilities could use the results of employee background checks conducted by a previous employer.

DHS Responded: DHS stated that “[w]hether or not a facility can use the results of a background check that a previous employer performed on an employee is dependent on the specific circumstances[,]” and DHS “will determine the acceptability of this approach during a review of the facility’s SSP.” Thus, DHS indicated that “no change to the Guidance is required.”

XI. First Advantage Commented: *CFATS Personnel Surety and the Railroads*

First Advantage observed that due to the nature of the chemical and petrochemical industry, the personnel surety measures described under RBPS 12 should be harmonized, to the extent possible, with the personnel surety mandates required under recent federal rail security regulations.

DHS Responded: DHS stated that “[t]he comments on harmonizing CFATS with other federal programs are beyond the scope of the draft Guidance and require no response.” However, DHS also noted that “[i]n the future, as DHS continues to implement CFATS, [it] will continue to look for and pursue opportunities to harmonize this regulation with other Federal regulations.”