



November 24, 2008

Mr. Dennis Deziel
U.S. Department of Homeland Security
National Protection and Programs Directorate
Office of Infrastructure Protection
Infrastructure Security Compliance Division
Mail Stop 8100
Washington, DC 20528.

**Re: Docket No. DHS-2006-0073
Chemical Facility Anti-Terrorism Standards (CFATS)
Risk-Based Performance Standards Guidance
Version 2.4, October 2008**

Dear Mr. Deziel:

First Advantage Background Services Corporation (“First Advantage” or “the Company”) is a leading provider of risk mitigation and background screening solutions. In 2007 alone, First Advantage conducted 9,000,000 individual background checks for clients around the world. Among the U.S. chemical and petrochemical critical infrastructure in particular, over 75 refineries and chemical processing facilities and 2,200 contractor companies are enrolled in a First Advantage background screening program, which operates in conjunction with the Industrial Safety Training Council (“ISTC”) and the thirteen other members of the Safety Council Security Consortium (“SCSC”).¹

First Advantage is acutely aware of the importance of background checks for prospective and current workers with job responsibilities that include oversight of and access to critical infrastructure. By comprehensively screening certain records related to an individual’s identity and criminal history, companies may assess risks posed by facility personnel. For “high-risk” chemical facilities, such measures are an essential aspect of controlling and mitigating potential risks, liabilities, and other dangerous conditions that may arise.

As part of its Chemical Facility Anti-Terrorism Standards (“CFATS”), the Department of Homeland Security (“DHS”) requires “high-risk” chemical facilities to develop and implement a Site Security Plan (“SSP”) or Alternative Security Plan. The security measures employed by a facility will depend largely on the level of “security risk” posed by that facility. Once DHS makes this determination following review of a facility’s Security Vulnerability Assessment, DHS will place each facility into one of four tiers, with Tier 1 and Tier 2 representing those sites with the highest levels of “security risk,” and consequently requiring more robust mitigation measures relative to sites in Tier 3 and Tier 4.

On October 27, 2008, DHS published the Final Draft of its Risk-Based Performance Standards Guidance (“RBPS Guidance” or “the Guidance”), providing “DHS’s interpretation of the level of performance facilities

¹First Advantage’s relationship with ISTC and the other thirteen SCSC members provides many benefits to the chemical industry, some of which include an effective, systematic screening process, broad geographic coverage, consistency of applied screening standards, cost effectiveness of screening “reciprocity,” timeliness of processing, and standardized application of compliance efforts.

in each of the risk-based tiers created by CFATS should strive to achieve under each RBPS.”² DHS has invited interested persons to comment on the RBPS Guidance until November 26, 2008.

Because several of the Risk Based Performance Standards (“RBPSs”) described call for measures germane to the products and solutions First Advantage offers to the chemical industry, the Company has considerable insight regarding how to effectively and efficiently perform these services as well as knowledge of particular compliance issues which may arise in the context of personnel surety. First Advantage is pleased to offer the following comments, suggestions, and in some cases, requests for clarification:

I. DHS Must Provide Additional Guidance on Visitor Controls

Under RBPS 7 – Sabotage, the Guidance states that “[e]xamining the background of employees or contractors can greatly reduce the likelihood of insider sabotage, as does ensuring that visitors and contractors have legitimate business on-site and are escorted when necessary.”³ First Advantage strongly supports this assertion and believes that proper vetting of all personnel, contractors, and visitors with access to secure areas is critical to mitigate insider sabotage. Nonetheless, First Advantage believes that DHS must include additional guidance regarding the breadth and scope of visitor control procedures.

For instance, Metric 7.3 – Visitor Controls suggests that Tier 2 sites should have “...documented and implemented visitor identification, escort, and access control procedures that include verification of visitor background suitability or constant visitor escort by appropriately vetted personnel in restricted areas.”⁴ The same Metric advises Tier 1 sites to “... implement[] *strict* visitor identification, escort, and access control procedures that include verification of visitor background suitability or constant visitor escort by appropriately vetted personnel in restricted areas.”⁵

DHS does not explain how the procedures that a facility may employ at a Tier 2 site differs from the “*strict*” procedures suggested for Tier 1 sites. It is important for DHS to provide examples of the possible measures to satisfy this Metric for Tier 1 and Tier 2 sites. For example, a Tier 1 site may require certain visitors to undergo identity verification and a full background screening before gaining unescorted access to a restricted area whereas a Tier 2 site may only require identity verification for the same visitors to gain such access.

Further, the RBPS Guidance fails to provide detail regarding the possible extent of these procedures and controls for the varying categories of facility visitors (e.g., persons with whom the facility has business, persons sponsored by or representing the government, or persons on guided tours, etc.). It is unlikely that a visitor on a *guided* tour of a facility would require as robust a background screening (if any) as a visitor requiring unescorted access to a sensitive area of the facility.

II. DHS Must Provide Additional Guidance Regarding Background Screening Audits Under RBPS 12

In RBPS 12 – Personnel Surety, Metric 12.4 advises Tier 1 and Tier 2 facilities to audit their background check programs regularly. DHS, however, does not suggest what is meant by the term “regularly.” The only guidepost comes directly from the CFATS regulation which states that “[a] covered facility must conduct an annual audit of its compliance with its Site Security Plan.”⁶ While this does not speak directly to background

² RBPS Guidance at 8.

³ *Id.* at 71.

⁴ *Id.* at 73.

⁵ *Id.* (emphasis added).

⁶ 6 CFR § 27.225(e).

check program audits, with no additional guidance from DHS, Tier 1 and Tier 2 facilities must assume that RBPS 12 audits must only be conducted annually.

For Tier 3 and Tier 4 facilities, “N/A” appears under Metric 12.4, indicating that auditing of background screening programs is not required. If this is correct, then it contradicts the regulatory mandate cited above, which requires all covered facilities (i.e., Tier 1, 2, 3, and 4 sites) to conduct annual audits of their SSP – which would include RBPS 12. This also implies that there may be variation regarding the scope and complexity of SSP audits that depend – at least to some extent – on a facility’s tier level. DHS must clarify this inconsistency. Audits also raise operational considerations imposed by laws other than CFATS (e.g., record retention and chain of custody and control) that must be understood.

III. 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 considers the protection of applicant information among its highest priorities and supports DHS’s mention of several of the laws and regulations applicable to certain types of background checks that may be contemplated by RBPS 12. As the RBPS Guidance correctly notes, “...employment screening is subject to a set of laws and regulations to protect individuals in the event of misuse of data or fraud.”⁷ This includes, among others, the Fair Credit Reporting Act (“FCRA”), the Driver’s Privacy Protection Act, and state laws.

Facilities that conduct background screenings without the assistance of a third party contractor specializing in personnel surety must do so with great caution – so as not to run afoul of federal or state law. First Advantage believes that it is important for the RBPS Guidance to emphasize that if a facility violates a federal or state law in the process of conducting a background screening, CFATS will not shield that facility from potential liability. This is recognized in 6 CFR § 27.405(a)(1), which states that “[n]othing in ... [CFATS] is intended to displace other federal requirements administered by the Environmental Protection Agency, U.S. Department of Justice, U.S. Department of Labor, U.S. Department of Transportation, or *other federal agencies*.” (emphasis added). For example, a facility that violates the FCRA – a law administered and enforced by the Federal Trade Commission⁸ – may not attempt to circumvent liability by relying on its CFATS obligations as a defense.

IV. DHS Must Clarify Whether There Is Any Variance In The Scope of Criminal Background Checks for Differently Tiered Sites

Pursuant to 6 CFR § 27.230(a)(12)(ii), regulated facilities must “[p]erform appropriate background checks on ... facility personnel, and as appropriate, for unescorted visitors with access to restricted areas or critical assets, including, ... [m]easures designed to check criminal history.” The RBPS Guidance further explains that “[t]his typically involves a search of publicly or commercially available databases, such as county, state and/or federal criminal record repositories *for jurisdictions in which an individual has worked or resided*.”⁹ The Guidance also describes a second type of search – a national criminal scan – that can “serve[] as a supplement to Criminal History Searches by searching to identify criminal activity *in jurisdictions outside of current and previous residence and employment geographic locations*.”¹⁰

DHS fails to indicate when a facility might utilize the national criminal scan (i.e., a search of multiple jurisdictions outside of where the applicant has worked or resided) in addition to the standard criminal scan

⁷ RBPS Guidance at 103.

⁸ See 15 U.S.C. § 1681 *et seq.*

⁹ RBPS Guidance at 101 (emphasis added).

¹⁰ *Id.* at 102 (emphasis added).

(i.e., a search of only the jurisdictions in which the applicant has worked or resided). Metric 12.3 – Contents of Background Checks simply instructs all facilities to conduct background checks in accordance with their corporate practices and policies.¹¹ The Metric does not make any differentiation regarding the suggested stringency of background screening for facility personnel at differently tiered sites. Presumably then, according to the Metric, a Tier 1 site will conduct the same type of background check – in terms of geographic scope – as a Tier 4 site – even though such an outcome contravenes the very nature of the *risk-based* regulatory model.

V. TWIC will Not Always Apply to Drivers Transporting Theft COIs

The Guidance for RBPS 5 – Shipping, Receipt, and Storage suggests that in order to enhance inventory control procedures for COIs, “...drivers transporting theft chemicals of interest ... [be] issued facility badges pursuant to 3rd party verification of background suitability or have other proof of suitability, such as a [Transportation Worker Identification Credential (TWIC)].”¹² However, *many* drivers do not require unescorted access to Maritime Transportation Security Act (“MTSA”) facilities and, as such, will not – and effectively cannot – possess a TWIC.¹³

VI. DHS Must Clarify Whether A TWIC Satisfies RBPS 12 for All Regulated Facilities

The RBPS Guidance suggests that when “...conducting or evaluating [a criminal history search], a facility may wish to consult the federally established list of crimes applicable to hazmat drivers and transportation workers at ports (see 49 CFR § 1572.103).”¹⁴ This list – which is utilized by the TWIC program – consists of two dozen felony crimes ranging from espionage to murder. Among other crimes, violent misdemeanors are not on the list.

DHS has indicated both informally at conferences and public presentations, and formally,¹⁵ that possession of a TWIC card should satisfy RBPS 12. However, this conclusion would seem unlikely given the extent of the background checks suggested by the RPBS Guidance – which includes “...state, county (or equivalent) felony and *misdemeanor convictions, deferred adjudication, pleas of no contest, and unresolved indictments or other charges of crimes or offenses*”¹⁶ It is possible for a TWIC holder to have been convicted of any number of violent misdemeanors or felonies not included in 49 CFR § 1572.103. Therefore, it is important for DHS to clarify its position on TWIC, including (1) whether possession of a TWIC will satisfy RBPS 12 for all risk-tiers and (2) whether TWIC holders still must be entered into the Chemical Security Assessment Tool (“CSAT”) Portal for Terrorist Screening Database (“TSDB”) purposes.

VII. DHS Must Provide Additional Information Regarding the Operation and Implementation of TSDB Checks

CFATS requires “covered facilities” to “[p]erform appropriate background checks on and ensure appropriate credentials for facility personnel, and, as appropriate, for unescorted visitors with access to restricted areas or

¹¹ *See id.* at 104.

¹² *Id.* at 62.

¹³ In a recent “Information Bulletin,” TSA indicated that TWICs are only available to current or prospective port workers, requiring unescorted access to “secure areas” of MTSA facilities. It further clarified that “[a]ll applicants must certify that they need a TWIC to perform their job.” TSA Information Bulletin: TWIC Program, August 28, 2008 at 1.

¹⁴ RBPS Guidance at 101-02.

¹⁵ *See* 72 Fed. Reg. 17,709 (“To minimize the 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 a TWIC ... will not need to undergo additional vetting by DHS.”).

¹⁶ RBPS Guidance at 102 (emphasis added).

critical assets, including...[m]easures designed to identify people with *terrorist ties*.”¹⁷ While the RBPS Guidance explains that access to TSDBs are not commercially available, it further indicates that DHS is currently “developing a system through which regulated facilities will be able to have relevant individuals screened by DHS through the ... [TSDB].”¹⁸

In particular, the role that First Advantage, the ISTC/SCSC, and other third party providers will play in the TSDB screening process is unclear. For instance, would third party providers be granted access to the secure CSAT portal, wherein applicant information could be entered? In other words, could a third party provider such as First Advantage – which generally develops and manages *complete* personnel surety programs for facilities – play a role in the TSDB screening process by, for instance, entering applicant information into the CSAT portal and receiving notification of adverse findings? First Advantage believes that the answer is yes: chemical and petrochemical facilities rely on First Advantage, the ISTC/SCSC, and other third party providers for personnel surety solutions, and there is nothing to suggest that they will not do so in the future – *specifically for CFATS-compliance purposes*.

Yet, DHS’s limited guidance regarding this piece has left the regulated community with nothing more than mere presumptions about the TSDB. Considering that many Tier 1 and 2 facilities will begin developing their SSPs in Q1 and Q2 of 2009, DHS must provide additional information quickly. It is unreasonable to begin developing personnel surety programs for CFATS-regulated facilities when neither the facility nor third party providers have any information regarding the operation of the TSDB – a significant piece of the background check requirement under the CFATS regulation and RBPS 12.¹⁹

VIII. DHS Must Provide Additional Guidance Regarding the Waiver/Appeals Process for TSDB Checks Under RBPS 12

As indicated in the RBPS Guidance, CFATS “...provides specific administrative adjudication and appeal procedures for any individual receiving a negative determination under 6 CFR § 27.230(a)(12)(iv) (identification of persons with terrorist ties) in connection with RBPS 12.”²⁰ The Guidance also suggests that “[c]overed chemical facilities ... consider adopting a vigorous *internal* redress process for adversely affected applicants and personnel, including an appeal and waiver process similar to the system established for ... [TWIC].”²¹

The scope of this internal waiver and appeals process is unclear. Though the Guidance recognizes that adverse findings related to a TSDB screening have their own administrative procedures, it fails to indicate whether facilities must incorporate any internal procedures to address adverse TSDB findings when developing a waiver and appeal process. A possible interpretation suggests that because TSDB screening is an inherently governmental function, the facility redress process discussed in the Guidance is *only applicable to the identity verification, criminal history check, and verification of legal authorization to work components of RBPS 12*.

¹⁷ 6 CFR § 27.230(a)(12)(iv) (emphasis added).

¹⁸ RBPS Guidance at 102. This is consistent with DHS’s previous position as first outlined in the preamble to CFATS: “DHS will designate a secure portal or other method for the submission of application data for each employee or contractor for whom a TSDB check is required in the SSP.” 72 Fed. Reg. 17,709. Presumably, DHS will utilize the already existing CSAT Portal for this purpose.

¹⁹ As the Guidance explains, “...facilities are required to address four types of background checks on facility personnel ...” RBPS Guidance at 101. These include (1) Measures designed to verify and validate identity, (2) Measures designed to check criminal history, (3) Measures designed to verify and validate legal authorization to work, and (4) Measures designed to identify people with terrorist ties. See 6 CFR § 27.230(a)(12)(i)-(iv).

²⁰ RBPS Guidance at 103; see also 6 CFR § 27.305-45.

²¹ RBPS Guidance at 103 (emphasis added).

This is an important consideration, as the preamble to CFATS indicates that when an applicant is screened in the TSDB and found to pose a security threat "...DHS will notify the facility and the applicant via U.S. mail, with information concerning the nature of the finding and how the applicant may contest the finding."²² Because the Guidance does not clarify whether an applicant wishing to contest an adverse TSDB finding would do so *solely* through administrative processes, as provided by regulation,²³ it is unclear whether a CFATS-regulated facility's personnel surety program must create an internal procedure for handling such findings. Does an applicant who receives an adverse TSDB finding via the U.S. mail and who wishes to appeal that finding do so directly through the administrative process, without facility involvement of any kind?

IX. DHS Must Clarify Its Policy Regarding Background Check Renewals for Existing Employees Under RBPS 12

The RBPS Guidance suggests, under Metric 12.2 – Existing Employees, that Tier 1, 2, and 3 facilities conduct repeated background investigations "...for all individuals in regular intervals..."²⁴ Repeated background investigations are not suggested for Tier 4 facilities.²⁵ For those employees at Tier 1, 2, and 3 facilities, DHS must clarify the term "regular intervals" as it relates to differently tiered sites under the *risk-based compliance* model. A Tier 1 site may repeat background investigations of existing employees annually while Tier 2 and 3 sites might repeat background investigations of existing employees at eighteen month and two year intervals, respectively.

X. DHS Must Clarify Background Check Reciprocity Under RBPS 12

Based on the previously described characteristics of the chemical industry workforce, First Advantage supports reciprocity as a key element of any background screening program. Reciprocity allows a background check to be shared with different employers or owners. If a worker changes his/her employer, job function, or facility, then the prior RBPS 12 background check may be used to assess the risk that the worker presents to the new assignment for CFATS-compliance purposes. A subsequent employer or owner can also obtain additional checks, as appropriate, to the new assignment. This may occur, for instance, when a worker leaves employment at a Tier 4 facility and then accepts employment at a Tier 1 facility.

Because the chemical and petrochemical workforce is characterized by high mobility and turnover, reciprocity is paramount to a timely and cost-effective background screening program. First Advantage requests that DHS provide guidance on this important personnel surety issue.

XI. CFATS Personnel Surety and the Railroads

Due to the nature of the chemical and petrochemical industries, attention must be paid not only to the employees and contractors of high-risk chemical facilities, but also to employees and contractors of rail carriers that interact with high-risk facilities.

On August 3, 2007, President Bush signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007. The law includes Section 1520 – Railroad Threat Assessment that requires DHS to "...complete a name-based security background check against the consolidated terrorist watchlist and an immigration status check for all railroad frontline employees..."²⁶ The law also includes Section 1522

²² 72 Fed. Reg. 17,709.

²³ See 6 CFR § 27.305-45.

²⁴ RBPS Guidance at 104.

²⁵ *Id.*

²⁶ Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No 110-53, § 1520, 121 Stat. 266, 444 (2007).

mandating that “[a]ny guidance, recommendations, suggested action items, or any other widely disseminated voluntary action items issued by the Secretary to a railroad carrier or a contractor or subcontractor of a railroad carrier relating to performing a security background check of a covered individual shall contain recommendations on the appropriate scope and application of such a security background check, including the time period covered, the types of disqualifying offenses, and a redress process for adversely impacted covered individuals....”²⁷ The RBPS Guidance must consider these statutory mandates in light of RBPS 12 and, to the extent possible, harmonize personnel surety processes.

First Advantage hopes that these comments help DHS further develop the RBPS Guidance. Should you have any questions or require additional information, please contact me by telephone (727-214-1067) or by email (carolyn.myerssimmonds@fadv.com).

Sincerely,

Carolyn Myers-Simmonds, Esquire

Chief Regulatory Counsel
First Advantage Corporation

²⁷ *Id.* § 1522.