



National Association of Security Companies

Federal and Congressional Issues Update

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HEALTH CARE REFORM

Repeal and Defunding of the Law

In the 2010 elections, total repeal of the healthcare reform law (the “Affordable Care Act” aka “Obamacare”) was a successful rallying cry with voters for the GOP. While a total repeal of the law this Congress is a non-starter given the Democratic majority in the Senate and a sure veto by the President; nonetheless, there would be no stopping the GOP from bringing up legislation to repeal the law. Accordingly, the first bill passed by the GOP-controlled House last month (with three Democrats joining all the Republicans) was a repeal bill (H.R. 2). In the Senate too, in early February a full repeal measure was brought to the floor for a vote in the form of a GOP amendment to the FAA authorization bill. The Senate measure failed on a party-line vote 51-47. Full repeal will not happen, but the GOP leadership has promised to bring it up again and again, and it will surely remain in play up until the 2012 elections. However, as the GOP pursues what will largely be symbolic healthcare repeal related activities they run the risk of Democrats being able to use these opportunities to play up the popular provision of the law, and to portray the GOP as obsessed with healthcare reform at the expense the number one issue for all Americans – creating jobs.

After full repeal, the GOP’s next line of attack on “Obamacare” is to try to defund it through specific targeting of the funding for agencies, offices and programs that would implement the law. The GOP House is expected to pass a Continuing Resolution (CR) to fund the federal government for the remainder of FY ’11 that will include a provision(s) to "preclude any funding" for the health care law. As will full repeal, eliminating funding for the healthcare law will not pass the Senate, and this effort, along with the many other unrelated deep cuts proposed in the House GOP FY ’11, is setting up a serious government shutdown showdown as the current FY ’11 CR expires on March 4.

Targeted Repeal of Health Care Law Provisions

Repeal of 1099 Requirement for all Goods and Services over \$600.

On February 1, by a vote of 81 to 17, the Senate passed legislation, in the form of an amendment to the FAA reauthorization bill, repealing a universally maligned provision in the healthcare reform law that would require businesses, starting in 2012, to file a 1099 form with the IRS for any vendor (goods or services) to whom they pay more than \$600 in a tax year. The provision was included to help offset the cost of the health care law, and was estimated to bring in \$19.2B over 10 years. For almost a year, Democrats and Republicans have called for the provision to be stricken, and the President even called for its repeal in the State of the Union address. The problem has been finding agreement between the parties on a suitable way to make up for the revenue that would be lost by eliminating the provision. In the end, the Senate legislation gives OMB instructions to identify and cut up to \$44B in unobligated funds in the accounts of federal agencies except the Social Security Administration. The House is expected to move quickly to pass its version of the legislation.

Committee Scrutiny of Specific Provisions of the ACA (the “Employer Mandate”)

With full repeal and/or full defunding not a realistic line of attack, various Committees in the GOP House (Ways and Means, Appropriations, Judiciary and Energy & Commerce) are starting to explore through oversight hearings and other activities ways to dismantle, delay, and defund specific provisions within the bill (“rifle shot repeal”). For business groups, the number one provision being focused upon is the employer mandate. Last Congress, Sen. Orrin Hatch (R-

UT) introduced legislation that would repeal the employer mandate. However, the employer mandate is a financial pillar of the law and its repeal is very unlikely. The GOP may try to defund it by limiting funding for the departments of Health and Human Services, Labor and Treasury to implement the mandate, but again this seems unlikely to succeed. Business groups seem likely to also support more feasible moves to make the provision less onerous by increasing exemptions or reducing the penalties.

Legal Challenges to Healthcare Reform

Several state based challenges of the healthcare law (involving 26 states) are making their way through federal court with the central issue being the constitutionality of the individual mandate. Already, two federal district judges appointed by Democratic presidents have upheld the constitutionality of the law while two judges appointed by Republican presidents have struck it down. While the first ruling against the law only ruled that the individual mandate was not legal (thus the employer mandate and other provisions could remain in effect), the second ruling against the law in a Florida court held that the individual mandate is not severable from the rest of the law, meaning the entire law has to be tossed.

The next stop for these cases is federal appeals court and then, as everyone is predicting, the Supreme Court. It is possible for the Supreme Court to grant the cases “expedited review” allowing them to skip the appeals court level, but this seems very remote. As to when it may hit the Supreme Court, it has been predicted that the 4th Circuit (MD, VA, WV, NC, SC) will be the first Appellate Court to hear oral argument on the law. If other Circuits also act quickly it could reach the Supreme Court in early 2012. Others believe it could slip to 2013. However, unless the Supreme Court agrees with the Florida judge that the individual mandate is not severable from the rest of the law, the employer mandate provisions will still go into effect in 2014 as planned. Many believe that the Supreme Court decision on the law will come down to Justice Anthony Kennedy whose previous decisions on the “commerce clause” and the related “necessary and proper clause” are not definitive.

NATIONAL LABOR RELATIONS BOARD ACTIVITIES

With a 3-1 Democratic majority that includes a very active former SEIU Counsel Craig Becker, plus an aggressive Dem. General Counsel, the NLRB, through expansive precedent challenging case reviews, a willingness to engage in rulemaking, and increased enforcement activities, is a major concern for employers and groups such as the U.S. Chamber. The Chamber warns that “the Obama NLRB could effectively implement almost all of the objectives of the Employee Free Choice Act, plus many other goals of unions, through substantive rulemaking and/or other non-substantive changes in agency rules and regulations, statements of procedure, policies and guidelines.” As with other federal agencies/offices considered to be anti-business/anti-jobs, congressional Republicans have said they will seek to reduce NLRB funding. Given that 90% of the agency’s budget is personnel related and much of its work is staff driven, cuts to the NLRB could have a significant impact on its activities. However, as with similarly proposed pro-business/anti-regulation cuts to EPA, DoL, and other agencies, what the GOP wants is not going to be the final say with a Dem majority Senate.

Challenging State Secret Ballot Protection Constitutional Amendments

In mid-January, the National Labor Relations Board (NLRB) announced its intentions to sue four states—Arizona, South Carolina, South Dakota and Utah—to overturn voter-approved state

constitution amendments requiring any attempts to unionize a workplace be done with a secret ballot election system. The NLRB contends such state amendments clearly conflict with Supreme Court decisions holding that under the National Labor Relations Act (NLRA) employer recognition of “card check” elections is a legal path to union representation. Accordingly, such federal law on the issue “pre-empts” the State amendments, and almost all legal commentators and scholars agree the amendments are unconstitutional. However, the NLRB recently sent a letter to the State AG’s saying they would like to find a solution without litigation. It has been reported that the state AG’s have essentially “backed down” by saying they would look to find ways to construe the amendments as being consistent with federal law.

On a related note, on January 27, 2011, Senate Jim DeMint (R-SC) along with 20 GOP Senate co-sponsors introduced S. 217 the “Secret Ballot Protection Act of 2011.” The bill would amend the NLRA to guarantee the right to secret ballot union representation elections. Basically, it would be deemed an unfair labor practice under the NLRA if an employer recognized a union that has not been selected via secret ballot. In addition, the bill would make it unlawful for a union that has not been chosen as the employees’ exclusive representative in a secret ballot election to cause or attempt to cause an employer to recognize or bargain with it. It’s a reverse EFCA bill, but a Democratic majority in the Senate, the bill has no chance for passage.

Craig Becker Re-Nominated to NLRB

On January 26, 2011, President Obama re-nominated ex-SEIU counsel Craig Becker, who has served as a “recess appointee” on the NLRB since last April, to a full term on the NLRB. A full term would go until 2014 and Becker temporary appointment ends in December 2011. Becker was denied confirmation last year by the Senate before his recess appointment and now with six more GOP members in the Senate, there is no chance for confirmation. The Becker renomination gives unions a rallying issue, but it also seems to contradict recent Obama entreaties to corporate America. However, according to people following the situation, because of the timing of Becker’s recess appointment last year, in order for him to be paid this year, he had to be renominated. Becker cannot be recess appointed again to his current NLRB seat, but he could be recess appointed to another seat if one becomes vacant, and that would allow him to serve until the end of 2012.

Lamons Gaskets (Overturning *Dana Corp* and the right to a secret ballot decertification election)

Last year, the NLRB took up a case (*Lamons Gaskets*) that it said it would use to reconsider (and potentially overrule) the 2007 *Dana Corp* decision which established decertification election parameters. In *Dana*, the NLRB attempted to harmonize voluntary recognition arrangements made by employers and unions with the need to protect employees’ fundamental right of free choice in choosing (or not choosing) a collective bargaining representative. Under *Dana* an employer who voluntarily recognizes a union must first notify employees in a posting that voluntary recognition had been granted. After that, for a limited time (45 days following posting), the NLRB would accept a request from employees (at least 30 percent of the unit) to hold an election on the employer recognition of the union (or to join a rival union). Since 2007, 85 petitions have been filed, resulting in the conducting of 54 elections. In 15 of those elections (approximately 28 percent) employees rejected the recognized union. In two of those elections, employees voted to replace the recognized union with a rival.

In *Lamons Gaskets* the United Steelworkers and the employer challenged a *Dana* election following a decertification petition contesting *Lamons Gasket*’s recognition of the USW. In a

contentious 3-2 party line vote, the Board majority decided that after three years, “the Board is now in a position to evaluate whether its decision in *Dana* and the procedures developed to implement that decision have furthered the principles and policies underlying the Act” with inference that *Dana* has been a hindrance. The Board said it had “an obligation under the Act to continually evaluate whether its decisions and rules are serving their intended purposes, and this is particularly true of novel rules, such as those adopted in *Dana*.”

As supporters of *Dana* point out, “Not every voluntary recognition agreement is free from coercion exerted against either employers to ‘voluntarily’ recognize the union, or against employees to sign union authorization cards, or both.” Without *Dana*, employees could be barred for years from petitioning for decertification. Recognition bar would block their petitions for a year. And if an initial collective bargaining agreement is reached before the recognition bar expires, the contract bar would block an election for up to three additional years.

Expect a decision on *Lamons Gaskets* by mid-year 2011.

NLRB Rulemaking (Notice Posting Rule and Future Possible Rules)

While the NLRA gives the NLRB rulemaking authority, for 75 years it has been rarely exercised. However, in December 2010, the 3-1 Dem majority (Dems last had majority status is 2001) put out a Notice of Proposed Rulemaking requiring employers, subject to the National Labor Relations Act (NLRA) to post notices informing their employees of their rights as employees under the NLRA. While this posting requirement on its face does not seem a big deal there are some specific and general concerns with the proposed rule. Specifically, in addition to requiring physical posting of paper notices, the rule also requires that notices be “distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the employer customarily communicates with its employees by such means.” This could be more problematic for employers. Furthermore, the NLRB has proposed that failure to post the notice would be an unfair labor practice; that a failure to post the notice could be used as evidence of discrimination; and that failure to post would result in tolling the 6-month statute of limitations period for violations of the NLRA.

Of greater significance with the posting rule, is the fact that it shows the NLRB is now issuing rules, and the fear is that more substantive, more damaging rules could follow. Ominously, last year the NLRB put out a “Request for Information” for potential solutions/vendors to conduct electronic, off-site voting (aka “Cyber-Card Check.”) The elimination of voting in the workplace has been a goal of unions for many years.

Also, of most concern to employers related to possible NLRB rulemaking is a live petition at the NLRB for a rule to allow for “mini-unions.” Such a rule would permit the spontaneous formation of small bargaining units that represent only a fraction of a potential bargaining unit under the radical theory that Section 7 “right to self organization” rights trump everything. Mini unions would be much easier to organize and provide unions with all important footholds for greater organizing efforts. The person who submitted the “mini-union” petition is the same person who submitted the petition for the “posting” rule that was accepted and turned into the above described rule.

There is also speculation that the NLRB might look into a rule to shorten the campaigning period in a union election.

Specialty Healthcare (Possible changes to how to determine bargaining units)

On December 22, 2010, the NLRB invited parties to file briefs in *Specialty Healthcare and Rehabilitation Center*, a case that addresses appropriate bargaining unit composition in long-term care facilities. In *Specialty Healthcare*, the United Steelworkers sought to represent a unit of certified nursing assistants (CNAs) at the employer's nursing home. The employer, however, wanted to include support staff in the bargaining unit. The Board found that a bargaining unit of solely CNAs was appropriate and the employer appealed. The Board granted the employer's request for review, using this case to determine if the way the Board makes unit determinations is appropriate – not just for health care workers, but for all other industries as well. Said the Board,

“Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in non health care facilities? Should such a unit be presumptively appropriate as a general matter?”

Thus, while this case appears on the surface to apply only to the health care industry, many believe that its implications could be much farther reaching. In essence, the Board is asking whether it should abandon the community-of-interest approach in favor of an approach that sets the bargaining unit as only those employees who have the same jobs at the same facility. Warned GOP Board member Brian Hayes, *“(my) colleagues are contemplating a broad revision of a test for determination of appropriate units in all industries under our jurisdiction — a test that has stood for at least 50 years.”* Such an approach would lead many companies to be deemed to have a variety of different small bargaining units, rather than a large bargaining unit consisting of all or most of its workers. This ruling could lead to a vastly splintered work force and a large amount of labor unrest.

OBAMA ADMINISTRATION POLICIES AND FEDERAL AGENCY ACTIVITIES PLUS RELATED CONGRESSIONAL ACTIVITIES

Executive Order Mandating Regulatory Review by Executive Agencies

As President Obama mentioned in the State of the Union, on January 18, 2011, he signed Executive Order 13563, which directs executive agencies to review (and potentially repeal and roll back) government regulations that are burdensome on business or outdated. Specifically the EO states “Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” Each agency has 120 days to come up with a plan to “periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.” Accompanying memorandums provide as well for greater transparency in regulatory decision-making through use of the Internet, reviews to avoid regulatory overlap between agencies and steps to “reduce regulatory burdens on small businesses, through increased flexibility.” The EO was hailed by business groups and seen as significant move by Obama to tack to the center and an attempt to make amends with corporate America, which will be crucial to his 2012 re-election prospects. One issue though is that the EO is not binding on independent agencies (such as the NLRB), but the Administration has subsequently encouraged such agencies consider the EO's provisions voluntarily.

On a related matter, the GOP leadership of the House recently unveiled a resolution that instructs the major House committees to "inventory and review existing, pending and proposed regulations and orders from agencies of the federal government, particularly with respect to their effect on jobs and economic growth." Already, the House Oversight and Government Reform Committee, led by its Chairman Rep. Darrell Issa (R-CA), has embarked on a much publicized regulatory review effort involving the solicitation of the views of numerous business groups and companies (no one else) on what regulations they believe are impeding economic and job opportunities. To no surprise, environmental and financial reporting regulations lead the list of corporate regulatory grievances.

High Road Contracting Policy

In 2009, the Obama Administration drafted memos that envisioned changing federal acquisition policy to require positive weight in the federal acquisition source selection process be given to bidders for their labor standards for their workforce. Dubbed the "High Road Contracting Policy", each bidder on a federal contract would be assigned a score based on labor related criteria that would include whether the bidder pays a livable wage, provides "quality, affordable health insurance," an employer-funded retirement plan and paid sick leave. Other factors would include the company's record in complying with tax and labor laws. In addition, the labor and employment information would also be systematically collected from all contractors and be made available through a public database. Of most significance, a bidder's "score" would be based not only on the treatment of its employees working on the government contract but to all company staffers.

The memos intimated that such a policy could result in "higher bids" – a serious understatement. Last year, congressional supporters of "High Road" (Rep. Rob Andrews and now gone Rep. Patrick Murphy) in an attempt to counteract the "higher cost" reality, asked the GAO to do a study of the "cost to taxpayers of contracting with companies that pay their employees low salaries and offer few benefits" with inference being such employees are forced to use federal "safety net" programs that cost the taxpayers. Also, the Congressmen believed that more labor violations would correlate with more contract cost overruns. In October 2010, GAO released its findings that did not support "cost-savings" with High Road. In the current climate of intense pressure to cut federal spending, raising the costs of government contracts with no offsets for a "social policy goal" seems like political suicide for the Administration and Democrats. However, there is still concern that the second part of "High Road", assembling a database of contractor labor and employment information could still be possible and could turn into a de facto method to "blacklist" certain contractors.

Department of Labor "Persuader Activity" Rule Changes

By June of this year, DoL intends to publish a proposed rule to expand the scope of employer-consultant reporting required under Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA). Under the LMRDA, an employer must report any agreement or arrangement with a third-party consultant to persuade employees regarding their collective bargaining rights, or to gather certain information about employee activities or a labor organization in connection with a labor dispute. The labor relations consultant must also report information about such an agreement or arrangement.

Currently, the LMRDA provides for an "advice" exemption from these reporting requirements. The advice exemption permits employers to consult with labor counsel about what is lawful for

the employer to do during a union campaign. It preserves the right to counsel, often critical for employers who want to speak directly and lawfully with their own employees regarding union representation matters. The proposed rule under consideration would narrow the scope of the advice exemption and expand persuader reporting. This in turn would put impediments on employer speech rights and the right to legal counsel during union organizing campaigns. Some believe the new persuader activity standards could make activity by an employer's own managers and other in-house personnel reportable persuader activity.

Federal Contractor Performance Database (FAPIS) – going public in April 2011

Pursuant to a requirement in the 2008 “Clean Contracting Act”, in April 2010 the General Services Administration rolled out the Federal Awardee Performance and Integrity Information System (FAPIS) which provided federal contracting officials and other select Feds and congressional committees a centralized database of previously de-centralized information related to contractor performance and misconduct. The FAPIS database covers contractor activity going back five years on all proposals related to a government contract or grant application with a value expected to exceed \$500,000. Information includes: criminal, civil and administrative proceedings; past performance evaluations; records of suspensions and debarments; administrative agreements issued in lieu of suspension or debarment; nonresponsibility determinations; contracts that were terminated for fault and defective price determinations. Also, a provision in the FY '11 DoD Authorization bill passed in December 2010, requires FAPIS to also include information on incidents when a DoD procurement official denied or reduced a contractor's award fee because of a company's reckless or negligent behavior.

In July 2010, Congress, through a provision in a wartime supplemental appropriations bill, mandated that GSA set up a website to make FAPIS information, except past performance evaluations, available to the public. On January 24, 2011, a “Federal Register” Notice was published that stated that “All information posted in FAPIS on or after April 15, 2011, except for past performance reviews, will be publicly available.” While, as mentioned, much of this information was already available, it was de-centralized and much more difficult to obtain. It is important that GSA take steps to redact data prohibited by the 1974 Privacy Act or that concerns a contractor's proprietary information. Other information also could be withheld based on pending litigation.

TSA Administrator Limits Use of Private Screeners at Airports

Recently, TSA Administrator John Pistole announced that he would essentially stop additional airports from being able to use private screeners under the “Screening Partnership Program.” While not many airports (17) are involved in the program, and only a handful of security/screening companies are involved, support for the new policy from influential Democratic members of Congress and public unions, demonstrated a clear anti-private security sentiments that are applicable to all cases where the federal government is using private security. In a blatantly false statement, AFGE president John Gage said the new policy stopping further airports from using private screeners means “(t)he nation is secure in the sense that the safety of our skies will not be left in the hands of the lowest-bidder contractor, as it was before 9/11.”

In the Aviation and Transportation Security Act (ATSA) which created TSA, a provision in the bill allowed for airports to “opt out” of using TSA government screeners and instead use private screeners that were “qualified” and selected by TSA. Called the “Screening Partnership Program” airports can only use a private screening company if “the level of screening services

and protection provided at the airport under the contract will be equal to or greater than the level that would be provided at the airport by Federal Government personnel.” The private screeners are subject to the same rules and requirements as TSA screeners and overseen by TSA. A total of 17 airports participate in the SPP with the largest airports being San Francisco and Kansas City. Studies have shown that private screeners do perform “equal to or greater” than TSA screeners, and TSA has adopted innovations in airport screening that have emanated from SPP screening companies. Nonetheless, it’s an involved process to switch to a private screener and generally there is little utility or benefit for airports to make a switch.

After the brouhaha over TSA’s implementation of its new enhanced screening/pat down procedures, greater attention was brought to the SPP. Private screeners at SPP airports would still be required to perform enhanced pat downs, but there was a feeling that private screeners, who can be much more easily replaced for poor performance, would be more responsive to increased concerns/sensitivities of passengers with new procedures. Said one airport operator who uses private screeners, "In my opinion, these contract employees — they're not federal employees; they're not guaranteed a job for life," he says. "If they don't meet the performance goals or maybe they're consistently rude, or maybe they miss objects that go through the machine, they are terminated. I can't remember how easy that would be to do with a federal employee. I don't think it is."

In November 2010, Rep. John Mica, the incoming GOP Chairman of the House Transportation and Infrastructure Committee, and a long-time proponent of the SPP, wrote to top 200 U.S. airports asking them to consider the SPP program. He noted that “almost all of the positive innovations that have been adopted by the TSA in the screening process have emanated from private screening operations.” Also, he believes “it is both inappropriate and inefficient for the TSA to serve as the administrator, quality assurance regulator, operator and auditor of its own activities.” He said that “at the Federal level” he would be “making every effort to encourage the utilization of the SPP.”

Even before the Mica letter, several airports had started to their application process for the SPP, and interest in the program started to get very intense. When asked about the program in December, a TSA spokesman said “If airports chose this route, we are going to work with them to do it.”

However, on January 28th, TSA changed its tune. In denying the SPP application of Springfield Branson Airport in Missouri, just a month after it had been submitted, Pistole indicated other applications likewise will be denied. Said Pistole, "I examined the contractor screening program and decided not to expand the program beyond the current 16 airports as I do not see any clear or substantial advantage to do so at this time." To no surprise, the government unions, who are currently fighting over the right to represent over 40,000 TSA screeners, were ecstatic with the decision as were pro-union Democratic members of Congress (such as Bennie Thompson).

However, while the TSA Administrator has the discretion to deny an airport’s request to participate in the SPP, the ATSA clearly shows that the Administrator cannot preemptively refuse to review an airport’s request to participate in the SPP. Furthermore, the legal criterion for approving an SPP program is not that using private screeners will result in “*any clear or substantial advantage*” as Pistole seems to think. Under the ATSA, the standard that must be met by a “qualified” private screening company to take over at an airport is, as mentioned, if “*the*

level of screening services and protection provided at the airport under the contract will be equal to or greater than the level that would be provided at the airport by Federal Government personnel under this chapter.”

Chairman Mica was dumbfounded by the decision and has promised to “launch a full investigation and review” of the matter. At a recent hearing on TSA before the House Homeland Security Subcommittee on Transportation Security (Rep. Mike Rogers Chairman), Administrator Pistole was grilled on the issue, but held to his “clear and compelling” standard and made the argument that growth in the SPP would limit his flexibility to manage and surge screeners to airports as necessary. Rep. Dan Lungren (R-CA) a strong support of the private sector and the contract guard industry, noted that Pistole had exceeded his congressional authority and displayed an unsubstantiated bias for federal workers. He said that the use of private screeners brought competition and best practices to the screening process and said to Pistole, “What is your bias against private sector people being involved in the security -- 85 percent of our critical infrastructure is owned by the private sector. Are you suggesting we need to federalize 85 percent of the critical infrastructure of this country because somehow only federal workers can do the job?” Predictably, some Dem members of the Committee, called the use of private screeners in the SPP “going back” to pre 9/11 airport security and that “there is no reason, seemingly, to retrace those steps again.”

More immediately, Sen. Roy Blunt (R-MO) has submitted legislation (in the form of an amendment to the Senate FAA Reauthorization Act) that will amend the ATSA to require the TSA Administrator to approve, within thirty days, an airport’s application to join the SPP. With the FAA Authorization currently on the Senate floor, a vote on the amendment is expected soon.

Federal Government Insourcing Efforts and Insourcing Legislation

There was a lot of executive branch and congressional activity in 2010 related to insourcing. In March of 2010, the Office of Federal Policy Procurement at OMB issued a proposed policy letter for comment containing long-awaited guidance to Executive Departments and agencies on “circumstances when work must be reserved for performance by Federal government employees” and “clarify when governmental outsourcing of services is, and is not, appropriate.” In addition to guidance on “inherently governmental functions” and “closely associated with inherently governmental functions” the letter also provides new congressionally required guidance on when it is appropriate or not to outsource “critical functions”.

The use of contract security guards by federal agencies was raised directly and indirectly in the letter, and one specific question for public comment is how the function of “physical security” should be classified.

"b. What should guidance say—in place of, or in addition to, the draft guidance or currently existing federal regulations or policies—to address the use (if any) of contractors performing any of the following functions?...

vii. Physical security involving:

- A. Guard services, convoy security services, pass and identification services, plant protection services, the operation of prison or detention facilities;
- B. Security services other than those described in A; or
- C. The use of deadly force, including combat, security operations performed in direct support of combat, and security that could evolve into combat;"

The guidance is accompanied by an "illustrative" list of inherently governmental functions and none of the inherently governmental functions listed are for security services (except those relate to combat situations) and specifically, the supplementary definition of "inherently government functions" states: "The term does not normally include— (2) Any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

The letter also provides guidance on the use of contractors for "Functions That Are Closely Associated With Inherently Governmental Functions" which pursuant to a 2008 law (FY 2009 Defense Authorization Act) agencies now "must give special consideration to reserving these functions to performance by federal employees. A list of these functions (Appendix B) is provided. Of concern on the list is;

"17. Provision of inspection services" (which one media commentator seeming has already concluded includes "airport security screeners")

"19. Provision of special non-law enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and nonmilitary national security details."

Finally, while "Inherently Governmental" and "Closely Associated with Inherently Governmental" functions have been part of the insourcing/outsourcing policy since the early 1990's, the guidance, again pursuant to the FY 2009 NDAA, adds a new class of function -- "Critical" --- which agencies must be wary of outsourcing, and if they outsource, must provide cost-effectiveness and other reasons for doing so. The definition provided for "critical function" is a "function that is necessary to the agency being able to effectively perform and maintain control of its mission and operations. A function that would not expose the agency to risk of mission failure if performed entirely by contractors is not a critical function." No list of "critical functions" is provided in the notice and this is where there could be the most trouble for contract security.

According to the Professional Services Council, a leading voice for the contracting community, the final policy should be out by the end of March 2011.

In Congress, last year Democratic provisions put in two "must pass" bills would have "significantly expanded" the ability of agencies to insource various functions now being performed by private contractors and gone well beyond the proposed Obama Administration guidance. These provisions were contained in both the House passed FY '11 Defense Authorization Bill and in the Senate Committee passed FY '11 Financial Services and General Government Appropriations Bill. However, in December, when Congress passed its final version of the FY '11 Defense Authorization Bill and the FY '11 Continuing Appropriations Resolution, the provisions were not included. In the 112th Congress, with GOP control of the House and a closely divided Senate, insourcing will remain a topic of interest but with the likely focus on stopping insourcing. Several Committees are already planning to look at whether insourcing is being implemented strategically and whether agencies are focusing on truly critical positions. Cost-efficiency is one of the primary drivers behind outsourcing, and in this fiscal climate, the elimination of outsourcing will be highly scrutinized.

In the agencies, insourcing policy is currently all over the place. DHS seems to be taking the lead with insourcing and has just finished a review of nearly 100 service contracts to see which should be insourced. This “pilot project” will pave the way for similar evaluations of all the department’s service contracts (over 10,000.) The result of the initial service contract are now being examined by OMB and it’s not known which contract jobs may be cut. However, the head of the DHS insourcing program said late last year that insourcing efforts at DHS could focus on information technology, security and intelligence jobs. In 2009, Homeland Security identified about 3,500 contractor positions that should be eliminated or converted to federal employee positions, but last year, Deputy Secretary Jane Holl Lute said that progress on insourcing those jobs was inadequate.

At the other end of the insourcing spectrum is DoD. In 2009, mandated by Congress to insource certain categories of function, and seeking even greater insourcing in order to save money, the DoD embarked on a department-wide insourcing initiative. By last summer, DoD had created about 16,000 new Defense civilian jobs through insourcing. However, in August, Defense Secretary Robert Gates said the insourcing effort had not yielded the savings he expected and it was shelved in favor simply cutting service contract budgets. Furthermore, last week, the Army suspended all ongoing insourcing actions pending review and approval by the Army Secretary. The new review requires that insourcing proposals be fully documented and include at least a manpower requirements determination; analysis of all possible alternatives to hiring federal employees to do the job; a certification that the money is available to insource those duties; and a comprehensive legal review. Currently, pursuant to a statutory mandate, all the DoD services are required to continue insourcing contract security guards with the authority to use contract security scheduled to expire at the end of FY 2012. If the Army does a comprehensive review of its security guard contracting and, as is very possible, finds that there is no rational reason to insource, then perhaps Congress can be persuaded to extend the authority of military services.

Federal Protective Service Related Issues

New Training for Protective Security Officers

FPS officials are in the midst of a “priority” effort to improve and standardize the training for contract Protective Security Officers (PSO’s). Such improvements will likely involve an increase the number of training hours (from the current 128 hours) and a change in the method of the delivery of training (more FPS and possibly FLETC provided training). In December, FPS was focusing on one option that would increase PSO training to over 300 hours (all at FLETC) by essentially adopting the current FLETC training program for Infrastructure Protection Officers (IPO). However, FPS has backed off that seemingly unrealistic, overly intensive option and, while parts of the IPO program could likely provide the foundation for a new PSO training program, the amount of hours will much closer to the current 128 hour figure. In January, new FPS personnel were assigned to oversee the training initiative and there is no “deadline” for completion. FPS says it is currently trying to come up with several options that will be first shared with the Director and then with vendors.

House Democratic FPS Reform Bill

On January 5, 2011, former Homeland Security Committee Chairman (now Ranking Member) Bennie Thompson introduced H.R.176, the Federal Protective Service Improvement and Accountability Act of 2011. The bill was referred to both the Transportation and Infrastructure Committee and the Homeland Security Committee. (Last year the bill was just referred to T&I).

This is the same exact problematic FPS bill that Thompson introduced last year which spells out a path to federalizing FPS guards with minimal scrutiny or analysis of such federal guards. For more information see the NASCO website and past memos. The bill's early introduction this Congress seems to have been timed to play off possible federal/congressional fears in the wake of the Tucson shooting of Rep. Gabrielle Giffords. With new Committee Chairman Peter King not at all supportive of the bill, it will go nowhere this year (and did not go anywhere last year).

Senate Homeland Security and Governmental Affairs Committee Legislation

Committee staff reports that Sens. Lieberman and Collins will soon re-introduce their FPS Reform bill from last year with some "minor, largely technical changes." That bill was unanimously passed out of Committee in November 2010 and was endorsed by NASCO as the legislative vehicle for reforming FPS and making improvements to the FPS Contract Guard Program.

Government Accountability Office Study of Possible Federalization of Guards at FPS

Last summer, at the behest of then House HSC Chairman Thompson, the GAO started work on a study/report that would explore the issues surrounding the possible federalization of FPS contract guards. While the focus would be FPS, GAO's review includes a broader look at in-house versus contract security issues at other federal agencies as well as in the private sector. NASCO has met with the GAO investigators on several occasions and through NASCO individual NASCO members with FPS contracts as well as other companies with federal guard/TSA screener contracts have also met with GAO. GAO has also talked with DoD and other federal agencies that use contract and/or in-house security, as well as companies in the hospital/healthcare, commercial real estate, and gaming and entertainment industries. They are still doing more research, but the plan is to issue a report to Congress by the end of June. The findings of the GAO report could be influential in any move by FPS to federalize security officer positions.

New Federal Government Wide Standard for Contract Security Officers

The Interagency Security Committee (ISC) was created after the Oklahoma City bombing to address continuing government-wide security for federal facilities. The ISC is headed by the DHS Infrastructure Protection division and its members are chief security officers and other senior executives from 47 federal agencies and departments. The ISC's mandate is to enhance the quality and effectiveness of physical security in, and the protection of buildings and civilian federal facilities in the United States through, among other things, the creation of standards. ISC standards apply to all civilian federal facilities in the United States—whether government-owned, leased or managed; to be constructed or modernized; or to be purchased.

Currently, the ISC is at the tail end of an effort to create a "Minimum Standards for Armed Security Officers" which will "define a baseline and set of minimum standards for determining the duties and responsibilities of a contract security force in all Federal facilities used for nonmilitary activities." There are approximately 35,000 contract security officers being utilized by non-military federal agencies, with FPS the largest client with 15,000 security officers. ISC officials have told NASCO that the draft standard is completed and that the ISC would like NASCO to review and comment on the standard (through NASCO's membership on the DHS Emergency Services Sector Coordinating Council).

As noted above, FPS also has done an extensive review/analysis of standards related to FPS private security officers and made related changes, and from talking to both ISC and FPS officials, it seems that the ISC standard will map closely the current and future standards for FPS security officers.

DHS “See Something Say Something” Public Awareness Campaign and Related Legislation

In recognition that the “vigilance of Americans continues to help save lives and aid law enforcement and first responders” and is a “critical part of our security” in early February DHS launched a national “See Something Say Something Campaign.” It is public awareness campaign that is an expansion of similarly sounding NY Metro Transit program that was funded in part by DHS. The program is based on those tenets of community-oriented policing that enable the public to work closely with local law enforcement to protect their communities from crime. The campaign has already been launched in a number of state and local jurisdictions, as well as within several key sectors, including Amtrak, the general aviation community, the Washington Metro, New Jersey Transit, with the NFL and the NCAA, the commercial services sector at hotels and major landmarks such as the Mall of America in Minnesota, and national retailers like Walmart; and at federal buildings protected by the Federal Protective Service. Such a campaign is directly related to the mission of a security officer to “Observe and Report.”

On a related note, on January 26th, along with 12 GOP co-sponsors, Homeland Security Chairman Peter King introduced H.R.495, the “See Something Say Something Act of 2011.” Going well beyond a public awareness campaign, this legislation would provide civil immunity in U.S. courts for individuals who, acting in good faith and based on objectively reasonable suspicion, report suspicious activity that may reflect a terrorist threat to appropriate law enforcement officials. Given the primary job function of security officers to be on the lookout for and report suspicious activities this legislation could provide potential legal relief for security officers. The bill is basically an extension of a 2007 law that Congress passed that protects persons from frivolous lawsuits when they report suspicious activity involving transportation systems and arose from the “Flying Imans” case. The “See Something, Say Something Act” extends that protection to those who report suspicious activity anywhere. The legislation would obviously enhance the Department of Homeland Security’s national ‘See Something, Say Something’ awareness campaign.”

Additionally, on January 26th, Rep. Sue Myrick (R-NC) introduced legislation that would provide qualified immunity from civil liability to first responders engaged in lawful efforts to prevent acts of terrorism. (*H.R.504: “First Responders Fighting Terrorism Protection Act of 2011.*) However, the definition of “first responder” in the bill does not include a private security officer.

Department of Justice (BJS) Comprehensive Survey of Private Security

The Bureau of Justice Statistics within DoJ is the independent statistical arm of DoJ responsible for the collection, analysis, publication, and dissemination of statistical information on crime, criminal offenders, victims of crime, and the operations of justice systems at all levels of government. BJS collects and updates extensive information about public law enforcement, and with a new project called the “National Private Security Survey” BJS is looking to start a similar database for “private security.” BJS estimates that there are perhaps three times more persons in private security than public law enforcement, but the current data on private security is not very

reliable or up to date. A review of current literature and the survey design phase in support of the NPSS have already been completed and BJS has also been consulting with an “expert panel” on which sits officials from several NASCO member companies. NASCO has already been in contact with BJS about the survey and BJS officials believe that NASCO’s assistance and support are critical to the success of the project, and for NASCO and contract security companies, it could provide an incredible resource for the industry.

The survey will seek information related to the following topics: Types of services provided; Types of clients; Number of employees; Billable hours; Licensing and liability coverage; Pre-employment screening and training; Salary and turnover; Use of force, weapons, and technology.

A big issue right now for BJS is the scope of the survey. Currently BJS is considering three plans. Plan 1: surveys contract security officer companies; Plan 2: surveys contract security officer companies plus other contract security companies (armored car, investigator, alarm monitoring, etc); Plan 3: plan 2 plus survey of companies with proprietary security. BJS fully recognizes that gathering data on proprietary security is very difficult, and likely the survey (this initial time around) will focus on contract security.

Currently, with the FY ’11 funding freeze, BJS is waiting for further funding, but figures to put out a solicitation in the early spring for a contractor to conduct the survey. With the usual timing of the award process and other necessary preparatory work, BJS is hoping for the survey to start in early 2012.

DHS Emergency Services Sector Coordinating Council Efforts Related to Credentialing

In 2009, NASCO was approved for membership on the DHS Emergency Services Sector Coordinating Council (ESSCC). The ESSCC is non-federal component of the Emergency Service Sector Committee which is one of the 19 committees that make up of the DHS Critical Infrastructure Partnership Advisory Council. Other members on the ESSCC include police, fire, EMS, public works, and emergency management organizations. In addition to NASCO, Securitas is also a member of the ESSCC.

One common issue for ESSCC members is entry/re-entry related to crisis response. With Katrina as the “teachable moment” (including an incident where local law enforcement not permitting armed private security officers to protect LSU cost LSU hundreds of millions of dollars), it is clear that more can be done to facilitate access for critical service providers to disaster/crisis areas. The ESSCC (led by ESSCC member National Sheriffs Association) is currently working on this access issue, and more specifically the related issue of “credentialing”. The goal is to develop ways to allow for “trusted” checkpoint entry/reentry interoperable across municipal, county & state lines. Given the non-uniform (and sometimes non-existent) state licensing and training of private security officers, the entry/credentialing issue is more complex for private security, but there is a recognition within the ESSCC that private security should be part of credentialing efforts and NASCO will continue to work with its ESSCC partners on this important issue. NSA has already suggested to NASCO that NASCO and NSA work on a “Private Security Officer Certification” to increase law enforcement acceptability of private security in crisis areas through a proposed program in which private security firms would certify their employees met the suggested selection/training criteria in the ASIS Guideline for Private Security Officer Selection and Training.

Amending the PSOEEA to add a “channeler” option when a state based check is unavailable

In 2007, NASCO passed a resolution stating “NASCO supports legislative amendments to the Private Security Officer Employment Authorization Act that are intended to permit private employers of security officers to obtain criminal history information regarding employment applicants from the FBI’s national criminal databases, where individual states have not undertaken to establish a process for conducting searches of the FBI databases pursuant to the PSOEEA as currently enacted.” At the time of the resolution, almost two years after the PSOEEA implementing rule was put in place, no states had started doing FBI checks as provided for in the PSOEEA, and the “state only” avenue requirement was clearly a problem. More specifically, the Resolution called for amendment to PSOEEA that would permit a DoJ designated/approved “third party intermediary” to conduct PSOEEA checks when such a check could not be obtained through the state of employment. Since the time of the resolution, DoJ made it clear to NASCO that such “third party intermediaries” (channelers) did indeed exist, and they could conduct PSOEEA checks. DoJ had even encouraged states to use the channelers to do PSOEEA checks if they would not do the checks themselves. In 2010, some states did start setting up PSOEEA check programs (Colorado, Missouri, Kentucky) who were spurred on by a PSOEEA “Alternate State” check program in Minnesota, in which Minnesota, as allowed for under the PSOEEA, started doing PSOEEA FBI checks for security officers in states that were not doing FBI checks on such officers. Minnesota is currently doing checks for security officers in AL, ID, KS, MS, NE, SD and WY. NASCO is working with Minnesota to expand its “Alternate State” program to provide for checks in states that may do FBI checks for some guards (armed) but not others (unarmed), but that will involve Minnesota applying a different standard than the PSOEEA standard. Also, NASCO is working with individual states to set up their own programs.

However, while going through the state of employment will remain the preferred method of background check for an officer, in all those instances/situations where an FBI check cannot be obtained through the state of employment (and going through Minnesota is not feasible or desirable) NASCO is embarking on effort to explore an “channeler option” amendment to the PSOEEA.

In the 110th and the 111th Congress, legislation that would provide for the “channeler option” was introduced by Rep. Rob Andrews, the Democratic Chairman of the House Education and Workforce Subcommittee on Health, Education, Labor and Pensions. However, at the behest of labor unions and employee rights groups, the Andrews legislation also sought to make substantive changes to the PSOEEA that would disadvantage security officer employers and make the checks more cumbersome. Most significantly, the Andrews legislation would have restricted the currently permitted PSOEEA check for all felony convictions to just checks for felony convictions in the past seven years.

Now, with the GOP in control of the House, it is very probable that legislation seeking to simply add a “channeler option” to the PSOEEA could be moved in the House without adding union/employee rights backed provisions, or at least not provisions that would weaken the scope of the existing check. As for the Senate, NASCO has raised the “channeler option” with the original sponsors of the PSOEEA and they were not against it.

While the chance of successful passage of such legislation is not known, it would not be a labor or time intensive effort to pursue it. The amendment language is not complex; the purpose is clear, and most of all, the DoJ designated “channeler” system (with all its information safeguards) is already in place. Getting states to set up their own PSOEAA programs while at the same time setting up a federal “catch all” program will ensure that security officer employer access to FBI record information is maximized.