



July 20, 2018

United States Coast Guard
Office of Port and Facility Activities (CG-FAC)
U.S. Coast Guard Headquarters
2703 Martin Luther King Avenue, SE
Washington, D.C. 20593-7501

RE: Request for Comments on Transportation Worker Identification Credential (TWIC) – Reader Requirements; Delay of Effective Date – Department of Homeland Security Docket No. USCG-2017-0711

The International Liquid Terminals Association (ILTA), American Chemistry Council (ACC), American Fuel & Petrochemical Manufacturers (AFPM), and The Fertilizer Institute (TFI) (collectively, the Associations) are pleased to submit these comments on the *TWIC – Reader Requirements; Delay of Effective Date* Notice of Proposed Rulemaking (NPRM) (Delay NPRM), published by the U.S. Coast Guard (USCG) in the *Federal Register* on June 22, 2018.¹ The Delay NPRM proposes suspending the effective date of the TWIC Reader Final Rule (Final Rule)² until August 23, 2021 for facilities that (1) handle Certain Dangerous Cargo (CDC) in bulk but do not transfer it to or from a vessel; and/or (2) receive vessels carrying CDC in bulk but, during the vessel-to-facility interface, do not transfer it to or from the vessel (collectively, Non-Transfer Facilities). Facilities that handle CDC in bulk and transfer that CDC to or from a vessel (Transfer Facilities) would still be required to comply with the Final Rule by August 23, 2018, which creates significant implementation issues for many of the Associations' members.

ILTA represents 82 commercial operators of over 600 aboveground liquid storage terminals that handle a wide range of liquid commodities, including crude oil, refined petroleum products, chemicals, fertilizers, animal fats, and vegetable oils. ACC represents the leading companies engaged in the business of chemistry, which is a \$797 billion enterprise and the nation's largest exporter, accounting for 14 percent of all U.S. exports. AFPM is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. TFI is the voice of the fertilizer industry, representing the public policy, communication, stewardship and sustainability, and market intelligence needs of fertilizer producers, wholesalers, and retailers, as well as the businesses that support them with goods and services.

Collectively, the Associations represent the owners and operators of hundreds of Maritime Transportation Security Act (MTSA)-regulated facilities in practically every Captain of the Port (COTP) Sector. For this reason, MTSA requirements are of special interest to the Associations.

¹ 83 Fed. Reg. 29,067.

² 81 Fed. Reg. 57,652 (Aug. 23, 2016).

For the reasons described below, the Associations strongly urge that the USCG take the following actions:

- Issue a final Delay Rule that delays the effective date of the Final Rule for *all* facilities under its coverage, including Transfer Facilities, until the Department of Homeland Security (DHS):
 - Completes a comprehensive study of the effectiveness of the TWIC program, as required by Public Law 114-278;³ and
 - Completes a second rulemaking that incorporates the findings from the study and seeks public comment regarding whether Non-Transfer Facilities are “high-risk” and whether it is “practicable” to require electronic TWIC inspections at such facilities.
- Develop a new and more accurate regulatory analysis and cost estimate in support of the latter rulemaking that includes (and solicits public comment on):
 - Reviewing and updating the underlying TWIC reader risk assessment methodology to identify what security risks electronic TWIC inspection requirements could reasonably be expected to prevent or mitigate beyond the level of prevention and mitigation provided by facilities’ current MTSA security measures; and
 - Re-evaluating the total number of affected facilities, particularly the number of Non-Transfer Facilities.
- Immediately develop and deploy better internal controls and institutionalize more rigid training to ensure that USCG personnel responsible for Facility Security Plan (FSP) reviews, FSP amendments, and Final Rule enforcement have baseline knowledge and act consistently from USCG Sector to USCG Sector.

BACKGROUND AND HISTORY

On August 23, 2016, the USCG published the Final Rule, requiring certain “Risk Group A” MTSA-regulated facilities to perform electronic TWIC inspections starting on August 23, 2018. While most aspects of the Final Rule remained consistent with the proposed version of the rule (Proposed Rule), issued by the USCG on March 22, 2013, the Final Rule dramatically expanded the population of facilities affected to include not only facilities that transfer CDCs in bulk to or from a marine vessel (i.e., Transfer Facilities) but also facilities that store or handle bulk CDC by non-maritime means (i.e., CDC located within a facility’s TWIC area that does not have a maritime nexus, such as CDC produced, stored, shipped, and/or received by truck, rail, or pipeline).⁴ In doing so, the USCG reversed long-standing policy regarding what it means to “handle” CDC in bulk. The Final Rule also expanded Risk Group A to capture facilities that receive vessels carrying CDC in bulk but, during the vessel-to-facility interface, do not transfer it to or from the vessel.

On May 15, 2017, ACC, AFPM, and ILTA submitted a Petition for Rulemaking (Petition) to the USCG. The Petition alerted the USCG of the expansion, which was not announced in the Proposed Rule, and asked the USCG to (1) revise the scope of the Final Rule to apply it only to Transfer Facilities, consistent

³ Transportation Security Card Program Assessment Act, Pub. L. No. 114-278, 130 Stat. 1410 (2016).

⁴ See 83 Fed. Reg. 57,681.

with Policy Advisory Council Decision 20-04;⁵ and (2) delay the Final Rule's effective date for all facilities until two years after the USCG publishes a revised Final Rule.⁶

Approximately 11 months later, on April 20, 2018, ILTA, ACC, and TFI filed a complaint in United States District Court for the Eastern District of Virginia asserting that the Final Rule is arbitrary and capricious and violates the notice and comment requirement of the Administrative Procedure Act (APA). This lawsuit asks the court to order the USCG to grant the Petition and delay the Final Rule's effective date for *all* facilities, both Transfer and Non-Transfer Facilities. On July 10, 2018, the USCG denied the Petition (Petition Response).⁷

On May 9, 2018, Representative John Katko (R-NY) introduced HR 5729, the *Transportation Worker Identification Credential Accountability Act of 2018* (Katko Bill). The Katko Bill, which was reported by the House Homeland Security Committee on June 6, 2018⁸ and passed the full House by voice vote on July 10, 2018, would delay implementation of the Final Rule for all facilities until 60 days after DHS completes a comprehensive study of the effectiveness of the TWIC program, as was mandated in 2016 by the *Transportation Security Card Program Assessment Act*⁹ (TWIC Assessment Act). The Katko Bill would also prohibit the USCG from conducting any rulemaking on the topic of electronic TWIC inspections – except to extend the effective date of the Final Rule – until the same date. Senators Dan Sullivan (R-AK) and Gary Peters (D-MI) introduced a companion version of the bill in the Senate, S. 3094, which was passed by the Senate Committee on Commerce, Science, and Transportation on June 27, 2018.

COMMENTS AND RECOMMENDATIONS

COMMENT 1 - DHS HAS FAILED TO COMPLY WITH A CONGRESSIONAL MANDATE TO COMPLETE AN UPDATED, RISK-BASED ASSESSMENT OF THE EFFECTIVENESS OF THE TWIC PROGRAM, INCLUDING ASSESSING THE UTILITY AND SECURITY VALUE OF ELECTRONIC TWIC INSPECTIONS.

RECOMMENDATION 1 - THE USCG SHOULD DELAY IMPLEMENTATION OF THE FINAL RULE FOR ALL FACILITIES UNTIL DHS COMPLETES A COMPREHENSIVE STUDY OF THE EFFECTIVENESS OF THE TWIC PROGRAM AND INCORPORATES THE FINDINGS FROM THE STUDY INTO A REVISED RULEMAKING FOR THE BENEFIT OF ALL FACILITIES.

A 2013 Government Accountability Office (GAO) review of the TWIC program found that the TWIC Reader Pilot Program results should not be relied upon to develop TWIC reader requirements because

⁵ PAC 20-04 (Certain Dangerous Cargo Facilities) (May 4, 2004) (recognizing that “facilities that handle . . . CDCs are considered CDC Facilities” and explaining that “[i]n order for a facility to be classified as a CDC Facility, a vessel-to-facility interface must occur, or be capable of occurring, and involve the transfer of CDCs in bulk.”) (emphasis added).

⁶ The USCG erroneously states in the Delay NPRM that the Petition did not request that electronic TWIC inspection requirements be delayed for Transfer Facilities. See 83 Fed. Reg. 29,073. To the contrary, the Petition specifically requests that the USCG “...initiate an expedited rulemaking that would extend the August 23, 2018 compliance date for *all* CDC facilities to the date two years after publication of the revised final rule.” Docket number USCG – 2017 – 0447, 22, available at www.regulations.gov (emphasis added).

⁷ Letter from R.D. Manning, Captain, U.S. Coast Guard, to Michael P. Walls, David N. Friedman, and Peter Lidiak (July 10, 2018).

⁸ See H.R. Rep. No. 115-790 (June 27, 2018), available at <https://www.congress.gov/115/crpt/hrpt790/CRPT-115hrpt790-pt1.pdf>.

⁹ Pub. L. No. 114-278, 130 Stat. 1410 (2016).

the results were incomplete, inaccurate, and unreliable. The GAO report provided the following recommendation:

*Congress should consider repealing the requirement that the Secretary of Homeland Security promulgate final regulations that require the deployment of card readers that are consistent with the findings of the pilot program. Instead, Congress should require that the Secretary of Homeland Security first complete an assessment that evaluates the effectiveness of using TWIC with readers for enhancing port security.*¹⁰

The DHS Inspector General (IG) acknowledged the GAO's 2013 findings when it issued its own TWIC report on September 1, 2016 which uncovered programmatic challenges that cast doubt on core elements of the TWIC as a meaningful security credential.¹¹ The IG report stated:

[The Transportation Security Administration's (TSA's)] leadership, responsible for issuing [TWICs], does not provide sufficient oversight and guidance to ensure that the TWIC program operates effectively. Specifically, within the background check process, which TSA calls the security threat assessment:

- *Fraud detection techniques are not monitored and used in completing the background checks;*
- *Adjudicators [who are responsible for reviewing background data on a TWIC applicant when necessary] may grant TWICs even if questionable circumstances exist;*
- *Key quality assurance and internal control procedures are missing from the background check and terrorism vetting process; and*
- *New efforts tested for continuous vetting for disqualifying criminal or immigration offenses lack measures to determine the best solution.*¹²

It should be noted that the IG issued its report less than two weeks after publication of the Final Rule. This, in turn, means that some of the IG's findings and recommendations remained open and unaddressed within one component of DHS (TSA) while another component of DHS (USCG) required affected facilities to implement electronic TWIC inspections despite fundamental flaws in the processes utilized by TSA to issue and adjudicate TWICs in the first instance.

In response to the GAO report, IG findings, and corroborating feedback from industry stakeholders, Congress passed the TWIC Assessment Act in December 2016, directing DHS to conduct a comprehensive assessment of the effectiveness of the TWIC program in enhancing security and reducing security risk. This assessment must review the security value of the TWIC program by specifically:

1. Evaluating the extent to which the TWIC program, as implemented, addresses known or likely security risks in the maritime and port environments;
2. Evaluating the potential for a non-biometric credential alternative;
3. Identifying the technology, business process, and operational impacts of the use of the transportation security card and transportation security card readers in the maritime and port environments;

¹⁰ U.S. Government Accountability Office, *Transportation Worker Identification Credential – Card Reader Pilot Results Are Unreliable; Security Benefits Need to Be Reassessed*, GAO-13-198, May 8, 2013, at 43, available at <https://www.gao.gov/assets/660/654431.pdf> (TWIC GAO Report).

¹¹ See DHS Office of Inspector General, *TWIC Background Checks are Not as Reliable as They Could Be*, OIG-16-128 (Sept. 1, 2016).

¹² *Id.*

4. Assessing the costs and benefits of the TWIC program, as implemented; and
5. Evaluating the extent to which DHS has addressed the deficiencies in the TWIC program identified by the GAO and the IG.¹³

Congress directed that the assessment be commissioned no later than 60 days after passage of the TWIC Assessment Act and completed no later than one year thereafter (i.e., commissioned no later than February 14, 2017 and completed no later than February 14, 2018). However, DHS failed to take any action in response to this congressional directive until April of this year,¹⁴ despite a letter to DHS from House and Senate committee leadership.¹⁵ It is the Associations' understanding that the assessment will not be complete until approximately the second quarter of 2019 – or until at least six months *after* the USCG begins enforcing the Final Rule on August 23, 2018.

This is the very definition of arbitrary and capricious action. DHS should not impose an enormously expensive and burdensome requirement with a questionable security benefit prior to completing the congressionally-mandated study to inform the very same issue. Given that the Associations, GAO, DHS IG, and Congress have all questioned the underlying costs and benefits of TWIC generally, and most have challenged the utility of electronic TWIC inspections specifically, the USCG should delay implementation of the Final Rule for all facilities until DHS has completed its congressionally-mandated obligation and can incorporate relevant findings into a revised rulemaking.

COMMENT 2 - BY ONLY PARTIALLY DELAYING IMPLEMENTATION OF THE FINAL RULE, THE USCG IS UNNECESSARILY CREATING UNCERTAINTY AND FORCING MANY AFFECTED FACILITIES TO MAKE DECISIONS THAT COULD RESULT IN WASTED TIME, EFFORT, RESOURCES, AND MONEY.

RECOMMENDATION 2 - THE USCG SHOULD DELAY IMPLEMENTATION OF THE FINAL RULE FOR ALL FACILITIES, INCLUDING TRANSFER FACILITIES, UNTIL IT COMPLETES A RULEMAKING TO DETERMINE WHETHER BULK CDC HANDLED BY NON-MARITIME MEANS WILL REQUIRE ELECTRONIC TWIC INSPECTIONS.

As noted above, the Delay NPRM would suspend the Final Rule only for Non-Transfer Facilities (which include facilities that handle bulk CDC by non-maritime means (e.g., producing, storing, shipping, and/or receiving CDC by truck, rail or pipeline in a facility's secure area)). Transfer Facilities must still implement electronic TWIC inspections by August 23, 2018.

Many of the Associations' member facilities handle CDC in bulk in multiple locations throughout their TWIC footprint. This may include producing, storing, shipping, and/or receiving CDC by truck, rail or pipeline in some secure areas of a facility while transferring CDC to or from a vessel in other secure areas of a facility. Such facilities would still be required to implement electronic TWIC inspections no later than August 23, 2018. To reduce the operational and financial impact of the electronic TWIC inspection requirement, however, many such facilities are now attempting to isolate the discrete area(s)

¹³ See TWIC Assessment Act at § (b)(3)(C).

¹⁴ See H.R. Rep. 115-790 at 3 (“Despite a requirement to commission a study within 60 days of enactment of the law, DHS did not commission the study until 14 months after enactment and has not provided sufficient information to Congress to explain the delay.”).

¹⁵ See Letter from Senators Thune and Fischer and Representatives Katko and McSally to Secretary Duke (Dec. 4, 2017).

where the bulk CDC is actually transferred to or from a vessel (e.g., with fencing, etc.) and limit electronic TWIC inspection requirements to those isolated area(s) when and where possible for safe operations.

The USCG suggested this approach, which is useful depending on the facility's configuration and the location(s) of the CDC:

If bulk CDC is contained in a discrete area of the facility, it may be possible to isolate that area from other areas of the facility. Any areas where bulk CDC is transferred, passed through, or stored (permanently or temporarily) would be subject to the electronic TWIC inspection access control requirements. If the owner or operator of a facility were to take this approach, we would still consider the facility a Risk Group A facility. However, the owner or operator would be permitted to delineate in the FSP a portion of the facility as not subject to the electronic TWIC inspection requirements.¹⁶

Recent experience has shown that there are initial costs to isolating the CDC area(s) (in terms of capital dollars, planning, engineering, erecting physical barriers, training, etc.), but most companies have calculated that the long-term benefits of isolating CDC, and applying electronic TWIC inspections to the smallest area possible, will outweigh these initial costs. *These calculations are based on the assumption that electronic TWIC inspections will only be required in those locations where bulk CDC is actually transferred to or from a vessel (i.e., where a facility-to-vessel interface occurs, in accordance with PAC 20-04).*

Such an assumption is now fraught with uncertainty - as explained in the Delay NPRM, the USCG expects to evaluate whether bulk CDC handled by non-maritime means (e.g., producing, storing, shipping, and/or receiving CDC by truck, rail, or pipeline in a facility's secure area) might create the risk of a Transportation Security Incident (TSI) in certain circumstances and also be subject to electronic TWIC inspections by August 23, 2021. As a result, such facilities are left with two untenable compliance options now - each of which has the high probability of resulting in wasted time, effort, resources, and money:

- Option 1 - A facility chooses to isolate the discrete area(s) where bulk CDC is transferred to or from a vessel now. Doing so has an initial cost (which has shown to be several hundred thousand dollars in many cases) but reduces the number of TWIC readers and associated infrastructure the facility must purchase as well as the number of personnel who require electronic TWIC inspections for unescorted access to those areas. If after the three-year delay period, the USCG determines the bulk CDC handled by non-maritime means in many locations throughout the facility *does* require electronic TWIC inspections, then the facility will have no choice but to expand electronic TWIC inspections to its perimeter fence-line (which also defines its secure area). In this option, the time, effort, resources, and money spent now isolating the discrete area(s) where bulk CDC is transferred to or from a vessel will have been wasted.
- Option 2 - Rather than isolating the discrete area(s) where bulk CDC is transferred to or from a vessel, a facility chooses to conduct electronic TWIC inspections of all personnel seeking unescorted access into its secure area (i.e., at its perimeter fence-line). The facility incurs initial and ongoing costs, including, among other things, the purchase of multiple TWIC readers and related infrastructure to cover each of its active perimeter access points, additional uniformed security officers to support the requirement, and operational impacts associated with hundreds, and sometimes thousands, of personnel entering through the perimeter access points each day

¹⁶ 81 Fed. Reg. 57,682.

(e.g., TWIC reader malfunctions, unreadable biometrics, etc.). If after the three-year delay period, the USCG determines the bulk CDC handled by non-maritime means at the facility *does not* require electronic TWIC inspections, then the facility will have wasted significant time, effort, resources, and money: the electronic TWIC inspections could have been focused on the discrete area(s) where bulk CDC is transferred to or from a vessel and *not the entire perimeter*.

By only partially delaying implementation of the Final Rule, and by leaving open the question of whether CDC handled by non-maritime means ultimately will require electronic TWIC inspections for another three years, the USCG is creating widespread uncertainty and offering nothing more than a high-stakes gamble. The Associations urge the USCG to offer certainty by delaying implementation of the Final Rule for all facilities that handle bulk CDC, including those that transfer bulk CDC to or from a vessel, until it determines whether bulk CDC handled by non-maritime means will require electronic TWIC inspections and issues a revised rulemaking for the benefit of *all* facilities.

COMMENT 3 - THE RISK ASSESSMENT METHODOLOGY USED BY THE USCG TO DETERMINE FINAL RULE APPLICABILITY RELIES ON IMPRACTICAL ASSUMPTIONS WHICH EXAGGERATE THE SECURITY VALUE OF TWIC READERS.

RECOMMENDATION 3 - THE USCG SHOULD REVIEW AND UPDATE THE UNDERLYING TWIC READER RISK ASSESSMENT METHODOLOGY TO IDENTIFY PRACTICAL, COMMON-SENSE SECURITY RISKS THAT ELECTRONIC TWIC INSPECTION REQUIREMENTS COULD REASONABLY PREVENT AND/OR MITIGATE AND USE THE FINDINGS TO INFORM A REVISED RULEMAKING FOR ALL FACILITIES.

To develop the Final Rule, the USCG utilized the Maritime Security Risk Analysis Model (MSRAM) and identified three attack scenarios:

1. A truck bomb;
2. A terrorist assault team; and
3. An explosive attack carried out by a passenger or passerby (who is not an insider).¹⁷

The USCG believed that the use of TWIC readers would prevent or mitigate these attack vectors against an MTSA-regulated facility. The assertion that a TWIC reader would prevent or mitigate a truck bomb, terrorist assault team, or explosive attack carried out by a passenger or passerby is simply preposterous and defies logic, common-sense, and historical data. An individual or group intent on executing such an attack(s) would not be deterred simply because the targeted facility requires electronic TWIC inspections *rather than* visual TWIC inspections. As incidents in the U.S. and abroad have demonstrated, terrorists generally use brute force when attacking a target – *particularly when carrying out the types of attacks identified by MSRAM* (i.e., terrorist assault teams more often drive through, shoot through, or blow up a checkpoint or other barrier rather than stop to use false credentials to gain access).

In February 2013, the USCG published the *TWIC Reader Requirements Preliminary Regulatory Analysis and Initial Regulatory Flexibility Analysis* (Preliminary Regulatory Analysis).¹⁸ The Preliminary

¹⁷ See *id.* at 57,659.

¹⁸ *TWIC Reader Requirements Preliminary Regulatory Analysis and Initial Regulatory Flexibility Analysis*, USCG—2007—28915 (2013) (Preliminary Regulatory Analysis).

Regulatory Analysis, designed to provide an assessment of potential costs and benefits from the Proposed Rule, acknowledges the limited value TWIC readers would have in preventing one of the MSRAM-utilized attack scenarios:

For the truck bomb scenario, use of TWIC readers would preclude terrorists from driving a truck into the facility without an operative TWIC card. However, it would not stop terrorists from detonating a truck at the perimeter of the facility, attempting to break through the gates or protective barriers at a facility, or obtaining a TWIC card using fraudulent documents....

For the terrorist assault team scenario, use of TWIC readers would preclude persons not holding a duly issued TWIC from obtaining unescorted access to a secure area of a facility or vessel, thus reducing the potential for a terrorist action to take place within a secure area of a facility or vessel. As with the truck bomb scenario, TWIC readers would not prevent or mitigate an incident being perpetrated from outside the perimeter of a facility or from the terrorist assault team breaking through the gates or barriers by force.

Lastly, for the passenger/passersby [Improvised Explosive Device (IED)] scenario, by ensuring that only those persons possessing a duly issued TWIC can access secure areas, TWIC readers will mitigate the possibility of a person bringing an explosive device into a secure area. TWIC readers will have the same shortcomings in preventing these attacks as they will for the truck bomb and terrorist assault team attack scenarios.¹⁹

Despite the USCG's admitted doubts regarding the utility of TWIC readers in these contexts, the Preliminary Regulatory Analysis reasons that TWIC readers would result in better detection of potential TSIs and require the attackers to carry out their attack(s) closer to the perimeter of the facility rather than at the intended target within the facility.²⁰ Assuming, *arguendo*, that the truck bomb vehicle driver, assault team members, and passerby with an IED are unable to fully penetrate a facility because they do not possess a valid TWIC that is biometrically verified, *it would not be the TWIC reader that would deter them – if anything at all, it would be the security checkpoint, associated physical barriers, security officer(s), and/or awareness of facility personnel.* Yet, the Preliminary Regulatory Analysis and underlying risk assessment methodology do not acknowledge this fundamental gap in logic and reasoning and fail to quantify the *de minimis*, incremental security benefit that a TWIC reader would provide beyond the existing security measures required by each FSP in accordance with existing MTSA regulation.

The Delay NPRM states that it is the USCG's "...goal to impose a requirement only where there is clear evidence that the [security] benefits will justify the costs [of TWIC readers]...." It is for this reason that the USCG "...believe[s] that these issues warrant additional study."²¹ The Associations agree and ask that the USCG review and revise the TWIC reader applicability risk assessment methodology, *de novo*, to identify what security risks electronic TWIC inspection requirements could reasonably be expected to prevent or mitigate beyond the level of prevention and mitigation provided by facilities' current MTSA security measures, and use those findings to inform a revised rulemaking applicable to *all* facilities.

It is not enough to delay the Final Rule *only* for facilities that store or handle bulk CDC by non-maritime means. For the same reason that the USCG now rejects the conclusion "...that the presence of CDC in bulk within the MTSA footprint was enough justification for a facility to be considered Risk Group

¹⁹ *Id.* at 73.

²⁰ *See id.* at 73-74.

²¹ 83 Fed. Reg. 29,072.

A...[.]”²² without additional risk-based analysis, it is similarly unreasonable to continue to require facilities that transfer CDC to or from a marine vessel to implement the Final Rule by August 23, 2018. Continuing to assume that a facility-to-vessel interface involving a CDC, itself, justifies Risk Group A categorization is equally conclusory. All facilities must receive the benefit of further analysis to ensure that a facility “...warrants the additional regulatory burden of requiring electronic TWIC inspection.”²³ Promulgating regulatory requirements in the absence of this relevant and congressionally-mandated analysis is arbitrary and capricious.

COMMENT 4 - THE USCG SIGNIFICANTLY UNDERESTIMATES THE NUMBER OF NON-TRANSFER FACILITIES, RESULTING IN AN INACCURATE REGULATORY ANALYSIS AND COST ESTIMATE.

RECOMMENDATION 4 - THE USCG SHOULD RE-EVALUATE THE UNDERLYING NUMBER OF AFFECTED FACILITIES (INCLUDING SPECIFICALLY NON-TRANSFER FACILITIES), DEVELOP A NEW AND MORE ACCURATE REGULATORY ANALYSIS AND COST ESTIMATE, AND USE THE FINDINGS TO INFORM A REVISED RULEMAKING FOR THE BENEFIT OF ALL FACILITIES.

The Delay NPRM purports to describe the extent to which the Final Rule’s Regulatory Analysis evaluated the universe of Non-Transfer Facilities and also claims to estimate how many such facilities exist. These two discussions are, respectively, demonstrably wrong and wildly inaccurate. The Final Rule’s Regulatory Analysis estimated that electronic TWIC inspection requirements would apply to a total of 525 MTSA-regulated facilities (290 bulk liquid facilities, 16 break bulk and solid facilities, 3 container facilities, 61 “mixed use” facilities, and 165 passenger facilities).²⁴

The USCG now concludes that 122 of the 525 originally affected facilities handle bulk CDC by non-maritime means, and hence would be subject to the Delay NPRM’s effective date extension.²⁵ This conclusion has two problems. First, neither the Preliminary Regulatory Analysis nor the Final Regulatory Analysis ever discusses this class of facilities. Second, the Delay NPRM does not indicate from where it derived its estimate that there are exactly 122 such facilities. The figure did not come from the Preliminary or Final Regulatory Analyses – in a word search of these documents, that number comes up only as the number of container facilities subject to the MTSA.²⁶

The Delay NPRM goes on to say that, by contrast, the USCG did not include within the Final Regulatory Analysis vessels that carry bulk CDC but, during the vessel-to-facility interface, do not transfer the bulk CDC to or from the vessel.²⁷ In fact, however, the Final Regulatory Analysis states that it *did* discuss such facilities.²⁸ This was a change from the Preliminary Regulatory Analysis, which did not

²² *Id.*

²³ *Id.*

²⁴ See 81 Fed. Reg. 57,698.

²⁵ See 83 Fed. Reg. 29,074.

²⁶ See Preliminary Regulatory Analysis at 22, 57; *TWIC Reader Requirements Regulatory Analysis and Final Regulatory Flexibility Analysis*, USCG – 2007 – 28915 (2015) (Final Regulatory Analysis) at 26, 62.

²⁷ See 83 Fed. Reg. 29,074.

²⁸ See Final Regulatory Analysis at 22, Figure 2.2 (referring to “Facilities that handle CDC in bulk or receive vessels carrying CDC in bulk.”) (emphasis added).

discuss such facilities.²⁹ The Delay NPRM also says it “cannot determine” how many such facilities there are, which is baffling if, in fact, the USCG analyzed such facilities.

The Delay NPRM’s conclusion that only 122 facilities handle bulk CDC by non-maritime means is certainly a huge underestimate. The Associations have determined that, among their membership alone, it is likely that approximately 525 (or more) facilities handle bulk CDC by non-maritime means. In other words, the number of affected facilities that would be postponed from implementing the Final Rule on account of the Delay NPRM exceeds the *total* number of affected facilities estimated in the Final Regulatory Analysis. In fact, the Petition estimated that there are closer to 1,500 Non-Transfer Facilities nationwide, most of which handle bulk CDC by non-maritime means (relatively few facilities that receive vessels carrying CDC without transferring them do not also handle bulk CDC by non-maritime means).

The USCG’s various claims about accounting for Non-Transfer Facilities are so suspect that they should be ignored. Indeed, when comparing the Preliminary Regulatory Analysis used to support the 2013 Proposed Rule relative to the Final Regulatory Analysis used to support the Final Rule, the number of facilities, 525, remained unchanged despite the unnoticed expansion of the Final Rule by the USCG’s inclusion of facilities that handle bulk CDC by non-maritime means and/or receive vessels carrying CDC in bulk but, during the vessel-to-facility interface, do not transfer it to or from the vessel.³⁰

Finally, the Delay NPRM gives no indication that the USCG intends to collect new cost data – rather, it appears that the USCG will make the “practicability” decisions required by MTSA based on the same faulty cost information that it used in the Final Rule: “Several other issues raised by the petitioner[s], such as . . . economic analysis, are not addressed in this document.”³¹ That cost data, partially derived from the TWIC Reader Pilot Program, is at least three years old and could be almost five years old if and when the USCG reconsiders the scope of the Final Rule. This contravenes the GAO’s finding that “use of cost data derived from the pilot should be limited and used with caution, if at all.”³²

The USCG is proposing to use the delay period to, among other things, study and re-evaluate facility-specific risk factors, including a physical analysis of individual facilities by USCG field inspectors. Instead, or in addition, the USCG should initiate a new rulemaking on the scope of the Final Rule that will determine – and solicit public comment on – the number of affected facilities and the actual costs of compliance.

COMMENT 5 - THE USCG IS NOT APPLYING THE FLEXIBILITY AND OPTIONS AFFORDED UNDER THE FINAL RULE UNIFORMLY BETWEEN DIFFERENT USCG SECTORS, RESULTING IN INCONSISTENT AND INEQUITABLE OUTCOMES.

RECOMMENDATION 5 - THE USCG SHOULD IMMEDIATELY DEVELOP AND DEPLOY BETTER INTERNAL CONTROLS AND INSTITUTIONALIZE MORE RIGID TRAINING TO ENSURE THAT USCG PERSONNEL RESPONSIBLE FOR FSP REVIEWS, FSP AMENDMENTS,

²⁹ See Preliminary Regulatory Analysis at 17, Figure 2.2.

³⁰ Compare Final Regulatory Analysis at 18 (525 facilities) with Preliminary Regulatory Analysis at 19 (525 facilities, plus seven barge fleeting facilities that were deleted in the final analysis).

³¹ 83 Fed. Reg. 29,072.

³² See TWIC GAO Report at 18 n.51.

AND FINAL RULE ENFORCEMENT HAVE BASELINE KNOWLEDGE AND ACT CONSISTENTLY FROM USCG SECTOR TO USCG SECTOR.

In official documents, and during presentations to and discussions with industry, the USCG has stressed the performance-based nature of the Final Rule, which "...incorporates additional flexibility for vessel and facility operators in direct response to comments in which specific requests for flexibility were made."³³ For example, the Final Rule explains that where "...bulk CDC is not a part of the maritime transportation activities, it may be that a facility could define its MTSA footprint in such a way as to exclude that area."³⁴ As noted above, the Final Rule also states that "it may be possible to isolate" bulk CDC in "discrete area[s]," presumably with fencing or some other compliance barrier, and to limit electronic TWIC inspections to those areas.³⁵ Finally, the Final Rule discusses the possibility of a facility obtaining a waiver where electronic TWIC inspection is inefficient or redundant.³⁶

Doing exactly what the USCG suggests, many of the Associations' members have submitted FSP amendments seeking to redefine their TWIC areas, redraw their MTSA footprints, and/or isolate discrete bulk CDC locations. While some USCG Sectors have approved these amendments, and have a proficient understanding of the applicable law, policy, and intent governing such issues, other USCG Sectors have rejected them without any legal basis or meaningful explanation. In still other instances, facilities that have met with USCG Sector personnel to discuss possible FSP changes to lessen the impact of the Final Rule have been met with unfounded skepticism, an obvious lack of technical expertise in the subject matter, and even assertions that are plainly inaccurate.

Uneven knowledge and inconsistent application of law and policy continues to prevail. While the Associations are optimistic that USCG "...officers are working together diligently to ensure a smooth transition and consistent enforcement nationally," as stated by the USCG in the Petition Response, recent experience demonstrates that the USCG has much room for improvement in this area.³⁷ For these reasons, the Associations reiterate the need for the USCG to develop better internal controls and institutionalize more rigid training to ensure that the personnel responsible for FSP reviews, FSP amendments, and Final Rule enforcement have baseline knowledge and act more consistently from USCG Sector to USCG Sector.

COMMENT 6 - MANY COMPANIES DETRIMENTALLY RELIED ON A HIGH-RANKING USCG OFFICIAL'S ASSURANCES THAT THE FINAL RULE WOULD BE DELAYED FOR ALL FACILITIES AND ARE NOW UNABLE TO COMPLY BY THE AUGUST 23, 2018 EFFECTIVE DATE.

RECOMMENDATION 6 - THE USCG SHOULD DELAY IMPLEMENTATION OF THE FINAL RULE FOR ALL FACILITIES, INCLUDING TRANSFER FACILITIES, SO THAT THOSE FACILITIES THAT DETRIMENTALLY RELIED ON USCG ASSURANCES ARE AFFORDED THE TIME NECESSARY TO IMPLEMENT ELECTRONIC TWIC INSPECTIONS CAREFULLY AND SYSTEMATICALLY.

³³ 81 Fed. Reg. 57,657.

³⁴ *Id.* at 57,681.

³⁵ *Id.* at 57,682.

³⁶ *See id.* (citing 33 CFR § 105.130).

³⁷ Petition Response, Page 4.

On June 12, 2017, USCG Rear Admiral Paul Thomas met with Louisiana Congressman Garret Graves to discuss the USCG's planned response to the Petition. At that meeting, Admiral Thomas indicated that the USCG would likely publish, by September 2017, a proposed rule to extend the compliance date of the Final Rule for all facilities while it reconsidered the application of the Final Rule. This statement is documented in a letter from Representative Graves to Kirstjen Nielsen, Secretary of DHS.³⁸ A description of that meeting is also included as an exhibit to the *Plaintiffs' Memorandum in Support of Stay/Preliminary Injunction* filed on June 25, 2018 as part of the ongoing litigation.³⁹

Many of the Associations' member companies detrimentally relied, in good faith, upon Admiral Thomas' assurances by deferring electronic TWIC inspection compliance projects at *all* facilities that handle CDC, including Transfer Facilities. Despite repeated requests, the USCG did not officially clarify that the delay would only apply to some CDC facilities until it published the Delay NPRM – just two months before the Final Rule's effective date.

After effectively losing more than a year of compliance planning (including an entire budget cycle) between Admiral Thomas' comments on June 12, 2017 and the publication of the Delay NPRM, compliance projects are underway in earnest at many facilities. Rather than having the time for careful coordination and systematic execution required for a major project, such as the acquisition, installation, and utilization of TWIC readers, it is now a race to the finish. Some facilities have had trouble procuring equipment while others have had no choice but to seek additional time to comply from the USCG and have submitted Requests for Waiver under 33 CFR § 105.130 and/or documentation to permit “non-compliant” operation under 33 CFR § 105.125. This alone justifies delaying the Final Rule for all facilities, and the Associations' request that the USCG do so.

CONCLUSION

For the forgoing reasons, the Associations strongly urge the USCG to take the following actions:

- Issue a final Delay Rule that delays the effective date of the Final Rule for *all* facilities under its coverage, including Transfer Facilities, until DHS:
 - Completes a comprehensive study of the effectiveness of the TWIC program, as required by Public Law 114-278; and
 - Completes a second rulemaking that incorporates the findings from the study and seeks public comment regarding whether Non-Transfer Facilities are “high-risk” and whether it is “practicable” to require electronic TWIC inspections at such facilities.

³⁸ See Letter from Garret Graves, U.S. Congressman to Kirstjen Nielsen, Secretary of Homeland Security (February 8, 2018).

³⁹ See Declaration of Scott Whelchel, Exhibit 7, *Plaintiffs Memorandum in Support of Stay/Preliminary Injunction* (recounting Admiral Thomas stating that “the [USCG] would be issuing a proposed rule to extend the effective date ‘in a matter of weeks, not months’” and that “...it should be published by September, and hopefully by Labor Day, 2017.”). Mr. Whelchel also stated that “[i]n discussing the rulemaking to extend the compliance date, Admiral Thomas did not make any distinction between facilities that would have been covered under the proposed version of the rule and facilities that were only covered under the expanded scope of the final rule. It was my impression, and I believe the impression of everyone else in the room, that the rule would extend the compliance date for all facilities subject to the [Final] Rule.”

- Develop a new and more accurate regulatory analysis and cost estimate in support of the latter rulemaking that includes (and solicits public comment on):
 - Reviewing and updating the underlying TWIC reader risk assessment methodology to identify what security risks electronic TWIC inspection requirements could reasonably be expected to prevent or mitigate beyond the level of prevention and mitigation provided by facilities' current MTSA security measures; and
 - Re-evaluating the total number of affected facilities, particularly the number of Non-Transfer Facilities.
- Immediately develop and deploy better internal controls and institutionalize more rigid training to ensure that USCG personnel responsible for FSP reviews, FSP amendments, and Final Rule enforcement have baseline knowledge and act consistently from USCG Sector to USCG Sector.

Thank you for the opportunity to comment on the Delay NPRM. Should you have any questions or require additional clarification, please do not hesitate to contact the undersigned.

Sincerely,




Peter T. Lidiak
Vice President of Government Affairs
International Liquid Terminals Association
(703) 875-2011
plidiak@ilta.org



William J. Erny
Senior Director
American Chemistry Council
(202) 249 6412
bill_erny@americanchemistry.com



Jeff Gunnulfsen
Senior Director, Security and Risk Management
American Fuel & Petrochemical Manufacturers
(202) 457-0480
jgunnulfesen@afpm.org



Andrew T. O'Hare
Vice President, Public Policy
The Fertilizer Institute
(202) 515-2704
aohare@tfi.org