



March 11, 2020

DHS Desk Officer  
Office of Information & Regulatory Affairs  
Office of Management & Budget  
Washington, DC 20503  
Via [dhsdeskofficer@omb.eob.gov](mailto:dhsdeskofficer@omb.eob.gov)

Re: **Comments on 30-Day Notice for Assessing the Risk-Mitigation Value of TWIC at Maritime Facilities, Docket No. DHS-2019-0023**

Dear Sir or Madam:

The American Chemistry Council (“ACC”), the American Fuel & Petrochemical Manufacturers (“AFPM”), and the International Liquid Terminals Association (“ILTA”) (collectively, the “Associations”) appreciate the opportunity to provide comments to OMB in response to the 30-day notice regarding the information collection request (“ICR”) submitted by the Department of Homeland Security (“DHS” or “the Department”) in connection with the study entitled “Assessing the Risk-Mitigation Value of TWIC at Maritime Facilities” (“the Notice”).<sup>1</sup>

### **Summary**

The Notice is just one outgrowth of DHS’s effort, since 2016, to impose costly requirements on numerous maritime facilities to conduct electronic verifications of Transportation Worker Identification Credentials (“TWICs”) via the TWIC Reader Rule.<sup>2</sup> In the short time since the Notice was published, two much more significant events have occurred. Two weeks ago, DHS filed with Congress a report of the study that is the subject of the Notice (the “Report to Congress”).<sup>3</sup> And two days ago, DHS

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<sup>1</sup> 85 Fed. Reg. 7558 (Feb. 10, 2020).

<sup>2</sup> 81 Fed. Reg. 57652 (Aug. 23, 2016).

<sup>3</sup> DHS, “Results from the Assessment of the Risk Mitigation Value of the Transportation Worker Identification Credential” (Feb. 28, 2020) (attached).

published a final rule postponing the effective date of the TWIC reader rule (the “Delay Rule”).<sup>4</sup>

The Associations are grateful for the Delay Rule, which extends the compliance date for the TWIC Reader Rule until May 2023. This resolves a huge uncertainty, as many of those facilities were faced with having to comply by next month.

On the other hand, these developments do not address the fundamental controversy engendered by the TWIC Reader Rule, which expanded the universe of covered facilities by a factor of three or four compared to the scope of the proposed rule, based on an unexplained legal interpretation that was not discussed in the proposed rule. This failure to provide adequate notice and opportunity to comment violated both the Administrative Procedure Act (“APA”) and the statute authorizing the rule (the Maritime Transportation Security Act, or “MTSA”). A federal judge and Congress have both delayed the effective date of the rule for that reason, among others.

The preamble to the Delay Rule concedes that the proposed TWIC Reader Rule “may have affected the ability of some facility operators to effectively comment on the full costs of the rule . . . .”<sup>5</sup> The Associations appreciate DHS’s promise to “attempt to get a much fuller estimate of the [affected] population in future studies . . . .”<sup>6</sup> But the law requires DHS to publish another Federal Register notice seeking public comment on the scope of coverage of the final TWIC Reader Rule. Doing so is especially important now that DHS has published the Report to Congress, which concludes that “the benefits of the TWIC Reader Rule are unlikely to exceed the associated costs of the regulation as proposed. A more favorable break-even point could be achieved by . . . changing the regulation to reduce the number of facilities that are subject to the TWIC Reader Rule.”<sup>7</sup> The Report to Congress also confirms, as the Associations have argued, that the final rule’s expanded scope converted it into an economically significant rulemaking.

The law mandating the Report to Congress also required DHS to issue a Corrective Action Plan, and obliges DHS to “consider” the Plan “in any rulemaking . . . relating to the [TWIC] Program.”<sup>8</sup> DHS still owes Congress a Corrective Action Plan, which should be provided to OMB’s Office of Legislative Affairs in the near future. The Administration should use that opportunity to ensure that DHS completes its legal obligations in connection with the TWIC Reader Rule.

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<sup>4</sup> 85 Fed. Reg. 13493 (Mar. 9, 2020).

<sup>5</sup> 85 Fed. Reg. 13498.

<sup>6</sup> *Id.* at 13502.

<sup>7</sup> Report to Congress at vi, 16.

<sup>8</sup> Pub. L. No. 114-278, § 1(c)(4).

## Statement of Interest

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 nearly 90% of U.S. refining and petrochemical manufacturing capacity. ILTA represents nearly 90 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, AFPM, and ILTA members work closely with U.S. Coast Guard ("USCG") and DHS in strengthening facility security. The Associations' members are the owners or operators of MTSA-regulated facilities in practically every Captain of the Port Sector. For this reason, MTSA requirements, particularly involving the use of TWIC readers, are important to the Associations.

### I. Legal Issues Associated with the TWIC Reader Rulemaking

#### A. The APA and the MTSA

When the MTSA was enacted in 2002, it directed DHS to create a new biometric credential – the TWIC – for persons seeking unescorted access to the secure areas of vessels or facilities subject to the Act. Controversy over the ability of electronic TWIC readers to function reliably in harsh marine environments led Congress in 2006 to require DHS to conduct a TWIC reader pilot program and to initiate a notice-and-comment rulemaking that was to be “consistent with the findings of the pilot program.”<sup>9</sup> However, the TWIC program, and TWIC readers in particular, have continued to be criticized intensely. Both the Government Accountability Office and the DHS Inspector General have repeatedly assailed them, with GAO noting in 2013 that, “[e]ven years after initiation, DHS has not demonstrated how, if at all, TWIC will improve maritime security.”<sup>10</sup> In response to this criticism, Congress in December 2016 gave DHS 14 months to commission a study and prepare the report that gave rise to this ICR.<sup>11</sup>

In August 2016, DHS had moved ahead with the TWIC Reader Rule, requiring facilities with docks that handle “certain dangerous cargos” to install TWIC readers. Unfortunately, at many MTSA facilities the final rule required those readers

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<sup>9</sup> See 46 U.S.C. § 70105(k).

<sup>10</sup> See GAO-13-198, “Transportation Worker Identification Credential: Card Reader Pilot Results Are Unreliable; Security Benefits Need to be Reassessed” (2013) at “What GAO Found,” available at <https://www.gao.gov/assets/660/654431.pdf>.

<sup>11</sup> See Pub. L. No. 114-278, § 1(b).

to be used at truck and rail entry points, not just docks, as the agency had originally proposed. The proposed version of the rule did not discuss this potential expansion in scope – a clear violation of the APA. It also increased by several multiples the number of facilities subject to the rule and roughly doubled the per-facility compliance cost, without addressing issues of risk and practicability that the MTSA required DHS to address (for example, potential dangers from hazardous materials trucks being backed up onto public highways). Indeed, the Associations estimated that the expansion in scope converted the rulemaking into an economically significant one, something DHS's Report to Congress now confirms (*see* Part II, below).

Initially, DHS indicated that it had not fully appreciated the consequences of the final rule's expanded scope, and said that it would conduct an additional rulemaking to address them. But this never happened, and as the August 2018 compliance date for the rule approached, two of the Associations reluctantly sued.<sup>12</sup> As the judge was considering the lawsuit, DHS proposed the Delay Rule to extend the compliance date of the rule until 2021 for some facilities, but not others. It did not, however, solicit comment on the appropriateness of expanding the rule beyond its originally proposed scope. In July 2018, the judge stayed the rule's effective date. In doing so, she necessarily concluded that the Associations had made a clear showing that they were likely to succeed on the merits of their claims that the final rule violated the APA and the MTSA. Just one month later, Congress — by voice vote in each house — stayed the rule as well. Congress also instructed DHS to conduct the study that Congress originally mandated in 2016. Finally, the new law prevented DHS from implementing the TWIC Reader Rule, or taking any other rulemaking action on the topic (except to delay the rule's effective date), until 60 days after DHS filed its Report to Congress.<sup>13</sup>

## **B. The Paperwork Reduction Act**

As just noted, in December 2016, Congress mandated a report on the effectiveness of the TWIC. DHS was to commission it by February 2017, to complete it within a year, and to submit it to Congress within 60 days thereafter – or by April 2018.<sup>14</sup> DHS retained a contractor to conduct the study in April 2018. The contractor, the Homeland Security Operational Analysis Center (HSOAC), operated by RAND Corporation, got to work promptly, conducting site visits and holding conference

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<sup>12</sup> *International Liquid Terminals Ass'n, et al. v. DHS*, No. 1:18-cv-00467 (E.D. Va. filed April 20, 2018).

<sup>13</sup> *See* Pub. L. No. 115-230.

<sup>14</sup> Pub. L. No. 114-278, §§ 1(b)(1), (4) & (5).

calls with industry. But DHS did not publish a 60-day ICR notice regarding those information collection activities until almost a year later, in February 2019.<sup>15</sup>

HSOAC originally projected an April-May 2019 completion date. HSOAC ultimately completed its work on August 2, 2019. And at some point in October 2019, the draft Report to Congress was submitted to OMB. Yet DHS only last month published a 30-day notice regarding the ICR for the study. And last week, DHS submitted the final Report to Congress to Congress. Thus, DHS completed the relevant work before ever obtaining an ICR approval.

## **II. DHS's Legal Obligations in Light of the Report to Congress and the TWIC Reader Delay Rule**

### **A. The Report to Congress**

Under the terms of the 2016 law that required the Report to Congress, the Report must transmit the results of a third-party assessment of the effectiveness of the TWIC program. DHS finally submitted the Report to Congress last month and made it publicly available last week.<sup>16</sup> The Report to Congress and the associated assessment confirm the problems with the TWIC Reader Rule that the Associations identified in 2017-2018.

In the litigation to stay the TWIC Reader Rule from going into effect, the Associations estimated that, as compared to the proposed rule, the final rule had:

- Increased the number of facilities subject to the rule from slightly over 500 to as many as 2,000;
- Increased the number of entry points subject to TWIC at covered facilities (and thus the number of readers required); and
- Increased the annualized cost of the rule over 10 years from \$26.5 million to over \$100 million – thus making the rule an economically significant rule under E.O. 12866.

The HSOAC assessment confirms each of these contentions:

- “[T]he lack of clarity regarding the definition of CDC facility could increase the number of facilities potentially subject to the final reader rule. We estimated that up to three times as many facilities could fall under the

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<sup>15</sup> 84 Fed. Reg. 2564 (Feb. 7, 2019).

<sup>16</sup> The full HSOAC Report is available at

<https://www.regulations.gov/document?D=USCG-2017-0711-0016>. The Report to Congress is attached.

broader definition of CDC facility. . . . Using these criteria, we estimated that about 1,500 facilities could fall under the broader definition of CDC facility and therefore be subject to the TWIC-reader rule.”<sup>17</sup>

- “We assess, based on our review of pilot program data and FEMA port security grant data and our observations of access point configurations at high-risk facilities, that the 2015 regulatory analysis underestimated the average number of readers required per facility for compliance.”<sup>18</sup>
- The Report projects costs of over \$100 million in each of the first two years of implementation, for total undiscounted costs of \$321 million over ten years.<sup>19</sup>

The assessment concludes that the TWIC Reader Rule likely cannot be cost-justified – but would be more cost-effective if restored to the scope of the proposed rule:

HSOAC doubts the benefits of the program would exceed the costs, because historical data does not indicate a high enough frequency of attempted terrorist attacks in the maritime industry to achieve the necessary break-even level of activity. . . . HSOAC’s analysis suggests the benefits of the TWIC Reader Rule are unlikely to exceed the associated costs of the regulation as proposed. A more favorable break-even point could be achieved by . . . changing the regulation to reduce the number of facilities that are subject to the TWIC Reader Rule.<sup>20</sup>

## **B. The TWIC Reader Delay Rule**

As noted earlier, in an apparent effort to defuse the pending lawsuit, DHS in June 2018 proposed to extend the compliance date of the TWIC Reader Rule until 2021 for some (but not all) affected facilities. DHS submitted the final Delay Rule to OIRA last September 25, and OIRA cleared the rule just four business days later. DHS published the final Delay Rule in the Federal Register the day before yesterday.

The Delay Rule extends the compliance date of the TWIC Reader Rule for *all* facilities handling certain dangerous cargos for three years from this coming May, or until May 2023. The Associations appreciate this breathing room. We are concerned, however, that the Delay Rule ignores the findings of the Report to Congress, maintaining that, “[a]t the time of analysis, [DHS] did not have a draft final

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<sup>17</sup> HSOAC Report at 165.

<sup>18</sup> *Id.* at 151.

<sup>19</sup> *Id.* at 154.

<sup>20</sup> Report to Congress at vi, 16.

[study report].” As noted earlier, DHS has actually had the HSOAC report since last August – before the draft Delay Rule was even submitted to OIRA. But the benefit to DHS of ignoring the Report is apparent: by sticking with its 2015 analysis of the rule, DHS can now claim that the Delay Rule reduces the costs to industry of complying with the TWIC Reader Rule by delaying them for three years.<sup>21</sup>

The preamble to the Delay Rule concedes the chief criticisms leveled by the Associations against the final TWIC Reader Rule:

Based on the comments received, and the information presented in the HSOAC assessment, we recognize the similarity between the phrases “CDC facilities” and “Facilities that handle CDC in bulk,” which contributed to some confusion among commenters. . . . [W]e do understand it may have affected the ability of some facility operators to effectively comment on the full costs of the rule.<sup>22</sup>

The [Associations] “estimated that there are closer to 1,500 Non-Transfer Facilities nationwide, most of which handle bulk CDC by non-maritime means.” . . . Based on the information provided by both the commenter and HSOAC, we will attempt to get a much fuller estimate of the population in future studies, as described in the TWIC Delay NPRM.<sup>23</sup>

The clear solution – as required by the APA – would be to reopen the TWIC Reader Rule docket to incorporate the Report to Congress and the HSOAC report and to invite public comment on the scope of the final rule and its costs and benefits. DHS does not do that, however, saying instead that “we are expanding on the proposal in the NPRM to delay the implementation of the TWIC Reader rule at facilities that handle CDC in bulk and transfer such cargoes from or to a vessel.” The problem with this approach is that, three years from now, the TWIC Reader Rule’s lack of notice problem will still remain.<sup>24</sup>

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<sup>21</sup> DHS also justifies ignoring the Report by saying “as the HSOAC assessment was published after the publication of the NPRM, the public would not have had the opportunity to review and comment on those cost estimates.” 85 Fed. Reg. 13496 n. 20. In fact, the HSOAC report was published last week, before the NPRM. The public has also never had an opportunity to comment on the actual costs of the TWIC Reader Rule – and never will, unless DHS changes course.

<sup>22</sup> 85 Fed. Reg. 13498.

<sup>23</sup> *Id.* at 13502.

<sup>24</sup> *Cf. Shell Oil Co. v. EPA*, 950 F.2d 941 (D.C. Cir. 1991) (EPA “mixture” and “derived-from” rules invalidated – *eleven years after promulgation* – for EPA’s failure to give sufficient notice and opportunity for public comment).

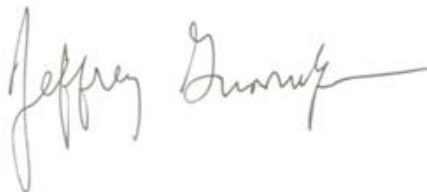
The statute that required the Report to Congress also provided that, if the assessment found any deficiencies, the report also must include a Corrective Action Plan. DHS is required by statute to “consider” the Corrective Action Plan “in any rulemaking related to the program.”<sup>25</sup> DHS is still working on the Corrective Action Plan. It will first have to submit that Plan to OMB’s Office of Legislative Affairs. At that point, if not sooner, the Executive Office of the President could make clear to DHS that the single most important corrective action that it could take – and by law must do – would be to finally meet its obligations under the APA and the MTSA.

We hope DHS, and the Administration, will take the time and effort required to do what the law requires. We request a meeting with Administrator Ray to start that process. As noted at the outset, we have supported DHS’s efforts to promote maritime security under the MTSA and more generally, and we will continue to do so. We will be in touch shortly to schedule the meeting.

Sincerely,



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<sup>25</sup> Pub. L. No. 114-278, § 1(c)(4).



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A handwritten signature in cursive script that reads "Peter J. Lidiak".

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