



April 8, 2019

Department of Homeland Security
Science and Technology Directorate
ATTN: Chief Information Office – Mary Cantey
245 Murray Drive
Mail Stop 0202
Washington, D.C. 20528

Attention: Docket Number DHS-2018-0052
Submitted electronically to regulations.gov

Re: ACC, AFPM, and ILTA Comments on the Department of Homeland Security’s 60-day Notice of Information Collection and New Request for Comment; “Assessing the Risk-Mitigation Value of TWIC® at Maritime Facilities,” Docket No. DHS-2018-0052 (84 FR 2564, February 7, 2019)

Dear Ms. Cantey:

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 on the Department of Homeland Security’s (“DHS” or “the Department”) 60-day notice of information collection (“ICR”) and request for comments entitled, “Assessing the Risk-Mitigation Value of TWIC® at Maritime Facilities” (“the Notice”).¹ The Notice seeks public input on DHS’ efforts to assess the effectiveness of the transportation security card program in enhancing security and reducing risks for regulated maritime facilities and vessels.

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. 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 are the owners and operators of Maritime Transportation Security Act (“MTSA”)-regulated facilities in practically every Captain of the Port (“COPT”) Sector. It is for this reason that MTSA requirements, such as TWIC, are of particular interest to the Associations.

ACC, AFPM, and ILTA members work closely with U.S. Coast Guard (“USCG”) and DHS in strengthening facility security. The Associations have previously submitted comments calling into question both the effectiveness of the TWIC card in preventing and mitigating risk at MTSA-regulated facilities and the transparency of the rulemaking by which USCG expanded the population of facilities required to

¹ See “Assessing the Risk-Mitigation Value of TWIC® at Maritime Facilities,” 60-day Notice of Information Request; New request for comment: 84 *Fed. Reg.* 2564 (February 7, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-02-07/pdf/2019-01377.pdf>.

comply with the TWIC program.² The Associations applaud the Department for undertaking its congressional mandate³ to complete an updated, risk-based assessment of the effectiveness of the TWIC program, including assessing the utility and security value of the electronic TWIC inspections. The Associations strongly believe this assessment is necessary to address the efficacy of the TWIC program. However, this ICR should have been published prior to the RAND Corporation beginning its assessment, which has been ongoing for the last year. As such, the Associations encourage DHS to expedite release of the public report and research findings in order to finalize the TWIC rulemaking for the benefit of all regulated facilities.

I. BACKGROUND

On August 23, 2016, the USCG published the TWIC Final Rule⁴, which dramatically expanded the population of facilities subject to the TWIC program to include not only facilities that transfer Certain Dangerous Cargoes (“CDCs”) in bulk to or from a marine vessel but also facilities that store or handle bulk CDC by non-maritime means. This Final Rule was slated to go into effect on August 23, 2018. To develop its Final Rule, USCG used impractical assumptions from the Maritime Security Risk Analysis Model (“MSRAM”), significantly overstating the security value of TWIC readers and reversed longstanding policy regarding what it means to “handle” CDC in bulk. On May 15, 2017, the ACC, AFPM, and ILTA submitted a Petition for Rulemaking (“Petition”) to USCG, calling attention to the fact that the expansion was not announced in the Proposed Rule, and requesting that USCG revise the scope of the Final Rule to apply only to transfer facilities and delay the effective date. In March 2018, ACC, ILTA, and the Fertilizer Institute (“TFI”) filed litigation against USCG, seeking rescission of the rule and extension of the compliance date. On July 24, 2018, the United States District Court for the Eastern District of Virginia issued a stay of the rule until further notice.

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 signed into law on August 2, 2018, delays 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*⁵ (“TWIC Assessment Act”). The Katko Bill also prohibits 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.

II. COMMENTS

The Associations’ members support strong security measures at their facilities. They work diligently with USCG and DHS to ensure that Facility Security Plans (“FSPs”) and FSP amendments are comprehensive, enforceable, and in compliance with all applicable regulations. Several years have passed since Congress authorized the TWIC program and with the benefit of experience, ACC, AFPM, and ILTA have begun to seriously question the value of the TWIC program and, in particular, the expansion of TWIC readers beyond the dock area in the absence of strong risk and economic justification. As a result, the

² See Comment Submitted on behalf of the International Liquid Terminals Association, American Chemistry Council, American Fuel & Petrochemical Manufacturers, and the Fertilizer Institute, 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 (July 20, 2018).

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

⁴ See 83 Fed. Reg. 57,681.

⁵ Pub. L. No. 114-278, 130 Stat. 1410 (2016).

Associations strongly support this program assessment as a step toward finalizing the TWIC program Final Rule. Moreover, many of the Associations' members have participated in interviews with the RAND Corporation as it has conducted this information collection with TWIC program stakeholders over the last year. The fact that this ICR is just now being published despite the ongoing work of the RAND Corporation is a violation of the Paperwork Reduction Act and another example of how this rulemaking is flawed.

DHS should have had an approved ICR prior to RAND beginning its work in 2018. In accordance with the timeline of this ICR as determined by the statutory framework set forth in the Paperwork Reduction Act ("PRA"),⁶ DHS would not have been authorized to initiate the RAND study until June 2019 or later. This is a blatant violation of the PRA, and also means that a valid TWIC reader extension Final Rule should not be published until these PRA issues are resolved. Given this long overdue process and the looming regulatory uncertainty over the unannounced TWIC program expansion, ACC, AFPM, and ILTA strongly encourage DHS to expedite the release of the public report and research findings.

a. The Associations Support the Congressionally-Mandated TWIC Assessment

A 2013 Government Accountability Office ("GAO") review found that the TWIC Reader Pilot Program results should not be relied upon to develop reader requirements because 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.⁷

The DHS Inspector General ("DHS IG") acknowledged the GAO's 2013 findings when it issued its own report on September 1, 2016, uncovering programmatic challenges that cast doubt on core elements of the TWIC as a meaningful security credential.⁸

In response to the GAO report, DHS 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. 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 2018,⁹ despite a letter to DHS from House and Senate committee leadership.¹⁰

⁶ See Paperwork Reduction Act §3507

⁷ 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).

⁸ See DHS Office of Inspector General, TWIC Background Checks are Not as Reliable as They Could Be, OIG-16- 128 (Sept. 1, 2016).

⁹ See TWIC Assessment Act at § (b)(3)(C).

¹⁰ 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.").

Given that the Associations, GAO, DHS IG, Congress and, most recently, the Department of Justice Inspector General (“DOJ IG”)¹¹ have all questioned the value of TWIC as a risk mitigation tool, it is imperative that DHS completes this congressionally-mandated assessment so that USCG can incorporate the relevant findings into its revised rulemaking.

b. The Associations Encourage the Expedited Release of the RAND Report

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 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 DHS Secretary Kirstjen Nielsen.¹²

Many of the Associations’ member companies detrimentally relied, in good faith, upon Admiral Thomas’ assurances. Despite repeated requests, USCG did not officially clarify that the delay would only apply to some CDC facilities until it published the *TWIC—Reader Requirements; Delay of Effective Date* Notice of Proposed Rulemaking (“NPRM”) (“Delay NPRM”), published by USCG on June 22, 2018¹³ just two months before the Final Rule’s effective date.

The Associations’ member companies effectively lost 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. Coupled with the aforementioned litigation and Congressional action, the Associations are ready for regulatory clarity from USCG on the scope of facilities under the purview of the TWIC program and strongly encourage an expeditious release of the RAND Report and its accompanying findings.

III. CONCLUSION

Security is of the utmost importance to ACC, AFPM, and ILTA members. The Associations support programs that ensure the rational and efficient use of resources and technologies for security at its members’ facilities. In the absence of economic and risk data justifying the expansion of the TWIC program beyond the dock areas to all entrances or areas of sites that contain CDCs, the Associations believe that it is not practicable to require TWIC inspections at Non-Transfer Facilities. ACC, AFPM, and ILTA have long called attention to the Administrative Procedure Act violations in this rulemaking and are somewhat relieved that DHS is finally undertaking the overdue congressionally-mandated study of the effectiveness of the TWIC program. The Associations and their members have cooperated with RAND in their information collection on this program assessment over the last year, sharing important and real-time information on the practicality of TWIC at their facilities. In order to ensure regulatory certainty and encourage the rational management of security risks at maritime facilities, ACC, AFPM, and ILTA encourage DHS to expedite the release of the RAND Report and research findings so that USCG can finalize its rulemaking.

¹¹ See DOJ Office of Inspector General, Audit of the Federal Bureau of Investigation’s Management of Maritime Terrorism Threats, Audit Division 19-18 (March 2019).

¹² See Letter from Garret Graves, U.S. Congressman to Kirstjen Nielsen, Secretary of Homeland Security (February 8, 2018).

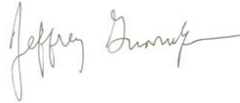
¹³ 83 Fed. Reg. 29,067.

The Associations look forward to continuing to work with DHS and USCG to ensure the utmost security of MTSA sites while not increasing unnecessary burdens on these facilities. If you need further information or have any questions, please contact the undersigned.

Sincerely,



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