



**American
Fuel & Petrochemical
Manufacturers**

1800 M Street, NW
Washington, DC
20036

January 5, 2023

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
Docket No. USCG-2022-0052

Submitted via Regulations.gov

Re: **Transportation Worker Identification Credential (TWIC) –
Reader Requirements; Second Delay of Effective Date**

Dear Sir or Madam:

The American Fuel & Petrochemical Manufacturers (AFPM) is pleased to submit these comments in strong support of the U.S. Coast Guard (USCG or the Coast Guard)'s proposed rule to further extend the effective date of TWIC Reader Rule¹ (referred to as the Reader Rule in these comments) as it applies to facilities that handle certain dangerous cargoes (CDCs) in bulk. For the reasons explained below, we urge USCG to extend the effective date for six years, until May 8, 2029, and to do so as quickly as possible.

AFPM is a national trade association whose members comprise most U.S. refining and petrochemical manufacturing capacity. Our members work closely with USCG and the Department of Homeland Security (DHS) in strengthening facility security under the Maritime Transportation Security Act (MTSA) and more broadly. Our members are the owners or operators of MTSA-regulated facilities in many different Captain of the Port Sectors. For this reason, MTSA requirements, particularly involving the use of TWIC readers, are important to AFPM.

¹ "Transportation Worker Identification Credential (TWIC) – Reader Requirements," 81 Fed. Reg. 57652 (Aug. 23, 2016).

AFPM has always supported a practicable, cost-effective TWIC Reader Rule. For over six years, though, AFPM and other associations representing regulated facilities have been engaged in an active dialogue with USCG regarding the appropriate scope of that rule. We appreciated USCG's issuance of the original Delay Rule in March 2020, as it averted a compliance crisis and potential litigation. We also supported USCG's retention of the Homeland Security Operational Analysis Center (HSOAC), operated by RAND, to better understand the impacts of the Reader Rule.

The 2022 RAND Report² provides ample reason for USCG to delay the effective date of the Reader Rule for another six years. As explained below, the Report substantially advances everyone's understanding of:

- the limitations of the Reader Rule and the analysis underlying it, including Maritime Security Risk Assessment Model (MSRAM);
- the nature and extent of risks posed by affected facilities; and
- the costs and benefits of the Rule, including notional options for increasing its cost-effectiveness by limiting its scope.

At the same time, the Report highlights how little we actually know about the foregoing topics. In particular, it confirms that there is still vast uncertainty about the actual number of regulated facilities. Further information collection and analysis, and additional regulatory development, are still required. Given historic experience, this work is only possible if USCG allows six, rather than three, years for it to finish its work (and for facilities to implement the resulting requirements).

Separately, the National Maritime Security Advisory Committee (NMSAC) is working on important recommendations for USCG to consider in revising the current rule. Those recommendations are not expected until March 2023, just two months before the current effective date of the Reader Rule, and hence USCG will not be able to take them into account in determining how long the final extension period should be. The recommendations may also entail work that cannot be concluded within three years. USCG should thus determine now to finalize a six-year extension in order to maximize its leeway to make use of the NMSAC recommendations.

After over a decade of work on the TWIC reader requirement, USCG should ensure that it finally gives itself sufficient time to develop a truly optimal rule that is based on informed public notice and comment and that has broad support.

² HSOAC, "Risk-Informed Analysis of Transportation Worker Identification Credential Reader Requirements" (2022).

I. The RAND Report Highlights the Lack of Reliable Data Regarding the Size of the TWIC Reader Rule-Regulated Universe

The RAND Report does an excellent job of identifying and characterizing the facilities that it interprets as being subject to the Reader Rule. It identifies the limitations of the Marine Information for Safety and Law Enforcement (MISLE) database and demonstrates that USCG’s Risk Groups A-C were “a poor proxy for the population of facilities subject to the reader rule delay.”³

However, the Report does not substantially advance our knowledge of how many facilities are regulated by the Reader Rule, since it limits its focus to facilities handling “the 43 CDCs authorized to be transported by vessels,”⁴ rather than the full range of facilities that are actually subject to the Rule as a matter of law. The Reader Rule applies to facilities handling CDCs as defined in the MTSA rules.⁵ That definition, 33 C.F.R. § 101.105, in turn references the definition contained at 33 C.F.R. § 160.202, which says that “CDC” includes any of a list of nine categories of materials. By the terms of USCG rules, therefore, any facility “handling” *any* of these CDCs is subject to the Reader Rule. The Report cites a 2020 USCG “Job Aid” as the basis for its decision to limit its focus to the 43 authorized CDCs, but that document itself clarifies that it “is for guidance purposes only, and whether a chemical constitutes a CDC is determined by the regulatory definition, which can change. This job aid is not a substitute for the regulatory definition.”⁶ The Job Aid further “confirm[s]” that 466 commodities meet the 33 C.F.R. § 160.202 definition⁷ – ten times as many as RAND evaluated. While USCG may only allow the 43 authorized CDCs to be carried in bulk on vessels, our members can confirm that USCG has been applying the MTSA facility security rules to all 466 CDCs, not just those authorized for vessel transport.

AFPM would be interested in exploring with USCG a Reader Rule definition of “CDC” limited to the 43 authorized CDCs, or – even better – a definition that focuses on the highest-risk CDCs. In the best-case scenario, either approach would extend the rulemaking timeline by 18 to 24 months. A six-year extension would facilitate this possibility.

³ Report at vi.

⁴ *Id.* at 9.

⁵ See 81 Fed. Reg. 57655 n.12.

⁶ USCG Commandant (CG-FAC), “Certain Dangerous Cargo (CDC) Job Aid” (April 2020) at 1.

⁷ *Id.*

II. The RAND Report Improves Our Understanding of the Risk of a Transportation Security Incident and Explains Why USCG Must Develop a Better Risk Assessment to Properly Implement the Intent of the Statute

The MTSA authorizes USCG to regulate security at maritime facilities “that pose a high risk of being involved in a transportation security incident.”⁸ To gain a better view of the risks posed by regulated facilities, the Report applies a modified version of the CFATS risk engine. As the report explains, the CFATS engine allows correlation between particular facilities and particular CDCs and allows for a much more risk-informed categorization of regulated facilities. In particular, the modified risk engine enables one to create rough estimates of consequences based solely on quantity of CDCs handled and the density of the nearby population.

AFPM is eager to explore harmonization of the MTSA and CFATS programs, as recommended by RAND and GAO.⁹ We also agree with RAND that the CFATS risk engine is preferable to the MSRAM for these purposes.¹⁰ But we think RAND could have made further progress in estimating actual risks by taking facility vulnerability and threat into account. A consequence-based risk assessment is less realistic because it ignores the two equally important elements of the risk triad, namely threat and vulnerability.

The Report states that RAND “decided to conduct a consequence-based risk assessment for this study because threat and vulnerability information is typically restricted.”¹¹ While it is certainly true that threat information at the classified level, for example, is restricted. USCG has access to classified information, and many relevant threat data sources are not restricted. USCG also has access to standardized vulnerability information regarding MTSA facilities as a result of the Facility Security Assessments and Facility Security Plans these facilities have prepared and submitted to USCG.

USCG thus has access to the threat and vulnerability information that is necessary in order to have a complete risk assessment profile of sites handling CDCs. But six years is the only timeframe under which it would be feasible for USCG to take that information into account in an updated Reader Rule rulemaking. Many AFPM members are regulated by the CFATS program and are very familiar with applying the CFATS risk assessment methodology in chemical specific contexts. We stand ready to assist the USCG in developing a proper risk assessment methodology for this rule.

⁸ 46 U.S.C. § 70102(a).

⁹ Report at 58.

¹⁰ *Id.* at 42-45.

¹¹ *Id.* at vi.

III. The RAND Report Improves Our Understanding of TWIC Reader Implementation Costs

AFPM supports RAND’s conclusion that cost-effectiveness is the best metric for evaluating the economic impact of the Reader Rule, and that a break-even analysis is the best way to assess that cost-effectiveness. We also believe that the Report’s analysis of costs is superior to that developed in support of the original Reader Rule. Finally, we note that RAND confirms (again) that the 2016 TWIC Reader Rule was an economically significant rule, with capital costs of between \$152-230 million in the first year of implementation, depending on whether one assumes the lower bound estimate of facilities (471) or the upper bound (711).¹² The Rule was even more clearly economically significant if the number of covered facilities is more like we and the prior RAND report estimated (1,500 to 2,000), for the reasons discussed in Part I above.

Nonetheless, the cost analysis is the weakest part of the RAND Report. A principal reason for this weakness is the Report’s reliance on 2015 data, and on RAND’s own assumptions, lacking context or direct experience, to determine cost estimates. For example, the Report states: “[f]rom estimates in CG-REG, 2015, we assumed that a facility security officer (FSO) would take approximately 25 hours to review, update, and submit an amendment to the FSP detailing how TWIC readers would be incorporated into their security measures.”¹³ This estimate, and the other estimates, is unreasonably low – direct experience has shown that this process takes much more time and the involvement of many stakeholders beyond the FSO. That work includes, among other things, amending the Facility Security Assessment, the fact that the Facility Security Plan (FSP) may need to distinguish between areas requiring biometric TWIC verification and visual verification (i.e., in the case of a facility that is able to segregate CDC within its MTSA footprint), consideration of issues such as unreadable biometrics and special circumstances, and engagement of USCG personnel at the local level.

Also, the Report only assesses direct costs of delays attributable to reader failures – presumably, the extra time required to find other working readers or to find escorts. But the real costs of delays are the indirect or knock-on consequences of having trucks backing up outside a plant’s gates, disruption of production, etc. These costs could dwarf those estimated by the Report. Facility “turnarounds” (where facilities are shut down for comprehensive maintenance and upgrading) become much more complicated because of the time it would take for all the contractors to enter the facility. Even if a reader only took 30 seconds and a facility had 10 readers, it could only get 20 people a minute in the gate, or maybe 1,000 an hour. Many of our member facilities can have

¹² *Id.* at 67.

¹³ *Id.* at 64.

4,000-5,000 individuals onsite during a turnaround – so it could take 4-5 hours just to admit them into the facility. As result, turnaround times could be dramatically extended, with weeks or months of additional lost operating revenues and potential fuel supply shortages.

AFPM urges USCG to develop a well-informed understanding of costs as it continues to study the Rule. Again, we stand ready to help USCG in that work. USCG should take as much additional time as needed, which is another reason for a six-year extension.

IV. Options for Making the Rule More Cost Effective

The Report offers two helpful, “notional” options for making the rule more cost-effective. Option 1 would exclude facilities handling <100,000 lbs. of CDCs. Option 2 would do likewise but would also exclude facilities in low-population-density areas unless they handled very high quantities of CDCs. Both options are worthy of consideration, as they could limit regulated universe by 23-36%. The Report highlights the fact that the risks posed by regulated facilities are “highly skewed,”¹⁴ and so the cost/benefit tradeoffs will be very different for the few high-risk facilities vs. the many more lower risk facilities. USCG could also limit applicability of the Rule to the handful of CDCs that really drive risks.¹⁵

Of course, the best option for improving the Rule’s cost-effectiveness would be to exclude non-transfer facilities, consistent with the original proposed 2013 rule. This step would reduce the number of covered facilities by between two-thirds and three-quarters, in the judgment of the first RAND Report and industry and would likely reduce the Rule’s costs by an even greater percentage, since non-transfer facilities are on average larger and have more access points than transfer facilities. The Report notes that facilities transferring CDCs to or from vessels “tended to have fewer physical access points and TWIC enrollments – and thus required fewer TWIC readers – than facilities that did not.”¹⁶ Given that non-transfer facilities are being regulated for their road and rail entry points, these facilities can be expected to have significantly more access points than transfer facilities.

V. Establishing a New Reporting Requirement Would Require a Six-Year Extension

The Report points the way to a possible rulemaking that could establish a requirement for facilities to collect and report data to DHS on the identity and quantity of CDCs that

¹⁴ *Id.* at 43, 58.

¹⁵ *Id.* at 18-19, 55.

¹⁶ *Id.* at 63.

they handle.¹⁷ The Report envisions this information being updated and potentially being provided to DHS as Facility Security Plans are updated every five years.¹⁸ Alternatively, or in addition, such a requirement could possibly be a one-time reporting process designed to inform the final form of the Reader Rule. Capt. Meyers highlighted this recommendation in a recent slide presentation to the Chemical Sector Security Council.

AFPM has not formed a view as to whether it would support such a reporting process, but we acknowledge its potential to result in a revised Reader Rule that would be much more risk based and cost-effective. Such a rulemaking would certainly take 18 months at a minimum to promulgate. Then facilities would have to report. Then USCG would have to analyze the resulting information (or have RAND do so). Then USCG could consider further rulemaking to narrow the scope of the rule. Then facilities would have to have time to comply. Typically, facilities need 18-24 months to plan, purchase and implement capital-intensive measures to meet compliance obligations like those required by the Reader Rule. Some companies have a 5-year capital planning horizon. The USCG would also have to develop the reporting and information collection infrastructure to acquire data to truly develop a risk-based rule. It can easily be seen that only a six-year extension could allow for the possibility of a new reporting rule.

* * *

Once again, we reiterate our support for the TWIC program overall, and we welcome USCG's work to improve the Reader Rule. However, the USCG should recognize the challenges of developing a data collection and information analysis tool in order to potentially develop a revised rule and the amount of time that may take. Therefore, the USCG should recognize the need for a six-year compliance extension and to expeditiously extend the current rule's compliance date. This should be promulgated quickly to avoid regulatory compliance confusion, wasted capital costs and planning, and to avoid a surge of compliance extension requests to the USCG. We stand ready to assist that process in any way we can. Please do not hesitate to contact me if we can be of assistance.

Sincerely,

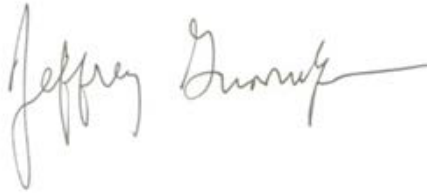
¹⁷ *Id.* at vii, 47.

¹⁸ *Id.*

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A handwritten signature in black ink that reads "Jeffrey Gunnulfsen". The signature is written in a cursive style with a long horizontal stroke at the end.

Jeff Gunnulfsen

Senior Director, Security and Risk Management

American Fuel & Petrochemical Manufacturers

jgunnulfsen@afpm.org

(202) 844-5483