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June 30, 2017

Captain Jennifer F. Williams
Director, Inspections
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Captain Ryan Manning
Chief, Office of Port & Facility Compliance
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U.S. Coast Guard
2703 Martin Luther King Jr. Ave., SE
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Docket No. USCG-2017-0447

Re: Review of Analytical Documents Supporting TWIC Reader Rule

Dear Captains Williams & Manning:

On behalf of the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, and the International Liquid Terminals Association, I want to thank you and your staff for meeting with us on May 23 to discuss our TWIC reader rulemaking petition. The meeting was productive and we trust it has helped contribute toward a successful resolution of the issues we raised in the petition.

Indications of that progress came the week before last when representatives of several of our member companies were able to participate in two meetings that included Admiral Thomas: one with Representative Graves on June 13 and another at ACC on June 14. In both those meetings, Admiral Thomas indicated that the Coast Guard intended to initiate a rulemaking to extend the compliance date of the TWIC reader rule until August 2021 for all CDC facilities, and during that time to conduct another rulemaking to address the issues raised in the petition. As AFPM expressed to Admiral Thomas last week, we were very heartened by this news, and greatly appreciate the Coast Guard's willingness to reconsider those issues head-on and with public participation.

Admiral Thomas stated at both meetings the importance of re-running the risk and cost/benefit analyses that the Coast Guard previously conducted so as to generate a comprehensive view of the costs and benefits associated with applying an electronic verification requirement to all potentially relevant CDC scenarios. As indicated in our petition, we support that approach, and are willing to contribute data toward that effort.

A new rulemaking will require more complete analyses of risks, costs and benefits. Immediately after our May meeting, we took a closer look at the analyses that were conducted to support the current rule. We were interested in gaining a better understanding of a key question identified during the meeting: the timing and rationale behind adding to Risk Group A (i) facilities that receive vessels carrying CDCs, even though CDCs are not loaded or unloaded, and (ii) facilities that receive bulk CDCs by non-maritime means. With the thought that it might be helpful for the Coast Guard's future work, this letter describes our findings and discusses what a revised analysis should address, in our view. First, we identify the documents we reviewed. We then describe our conclusions and recommendations based on our review of those documents.

Documents We Reviewed

We identified and reviewed the following analytical documents in the Regulations.gov docket for the TWIC reader rule:

1. USCG, "Analysis of Transportation Worker Identification Credential (TWIC) Electronic Reader Requirements in the Maritime Sector" (March 6, 2008), available at <https://www.regulations.gov/document?D=USCG-2007-28915-0007>. This document explains how USCG initially used its Maritime Security Risk Analysis Model (MSRAM) and the Analytical Hierarchy Process (AHP) to determine which facilities and vessels would fall into which risk groups and what reader requirements would be appropriate for each group.
2. Homeland Security Institute (HSI), "Independent Verification and Validation of Development of Transportation Worker Identification Credential (TWIC) Reader Requirements" (Oct. 21, 2008), available at <https://www.regulations.gov/document?D=USCG-2007-28915-0008>. This is an independent peer review of document #1, required by OMB.
3. USCG, "Preliminary Regulatory Analysis and Initial Regulatory Flexibility Analysis" (Feb. 2013), available at <https://www.regulations.gov/document?D=USCG-2007-28915-0120>. This is the cost/benefit analysis supporting the proposed rule.
4. USCG, "Final Regulatory Analysis and Initial Regulatory Flexibility Analysis" (Nov. 2015), available at <https://www.regulations.gov/document?D=USCG-2007-28915-0231>. This is the cost/benefit analysis supporting the final rule.
5. USCG, "Final Programmatic Environmental Assessment" (undated, but looks like 2015-2016), available at <https://www.regulations.gov/document?D=USCG-2007->

[28915-0230](#). This was prepared to comply with NEPA. It found only de minimis environmental impacts.

TWIC Reader Utility

Review of the analytical documents reveals that, when the Coast Guard originally established the risk groups, it sought to take into account the utility of TWIC in preventing successful attacks. This effort proved uninformative, however, for the following reasons.

First, the “TWIC utility factor” that USCG devised did not distinguish between the current requirement to have a TWIC and electronic verification of TWIC. Analysis (Document #1 above) at 9-10. The facilities and operations added by the Final Rule already were required to use TWICs for people seeking unescorted entry into secure areas, so the analysis did not address what additional risks might be averted by requiring those TWICs to be electronically verified — even though this was the purpose of the Final Rule.

Second, the USCG staff and a group of independent peer reviewers both thought the TWIC utility factor was “the most subjective and uncertain” element of the risk analysis process. HSI (Document #2 above) at 19, 23. The peer reviewers were particularly critical, saying: “This utility criterion is perhaps the most uncertain of the three evaluation criteria,” HSI at 2, and that USCG should “consider better defining TWIC utility,” *id.* at 3.

The TWIC utility factor ultimately had no influence on which categories of facilities were included in particular risk groups. Rather, the risk group assignments, in both the proposed and final rules, were driven by the average maximum consequences of a successful terrorist attack at a vessel or facility in that category, which were weighted twice as much as other factors. HSI at 13. This is a significant departure from generally accepted practice, which defines risk as a function of both consequence and probability. As USCG said (Analysis at 11), the risk groups were in effect “ranked by the hazards of the cargo (or passenger quantities) carried by the vessel or handled by the facility.” The peer reviewers agreed: “Risk Group A is naturally dominated by all asset categories assigned the highest MSRAM scale, a conclusion that can be reached without the need for any AHP synthesis.” HSI at 3. *See also* pp. 18 (“Thus, there is really no need to use the AHP.”), 20.

USCG assigned more demanding TWIC requirements to the higher risk groups, but without any analysis of how those requirements reduced the associated risks. Analysis at 12.

In a new rulemaking, it will be important for the Coast Guard to do several things:

- First, USCG should strive to base its analysis on risk, rather than consequence. This will entail additional effort to capture the concepts of vulnerability and threat, not just consequences.
- Second, USCG should reevaluate the concept of a TWIC utility factor. In particular, it should seek to measure the incremental risk reduction attributable to electronic verification of TWIC over and above the risk reduction already attributable to the current requirement of TWIC presentation.

We do not mean to imply we are confident that such steps *can* be taken successfully, only that we believe they *need to be taken* if the Coast Guard is to effectuate the MTSA's requirement that TWIC requirements be "based on . . . risk."¹

Cost/Benefit Analysis of Facility Coverage Options

None of the analytical documents developed before or in connection with the proposed rule (Documents 1-3 above) even mentions the idea of Risk Group A including the two groups of facilities that were added in the Final Rule. The decision to add them clearly happened after the proposed rule was issued in 2013.

By the time the Coast Guard issued the final regulatory analysis (Nov. 2015) (Document #4 above), it had decided to expand the scope of Risk Group A to cover facilities that merely receive vessels carrying CDCs in bulk, because the final regulatory analysis describes those facilities. *Id.* at 22. But the final regulatory analysis gives no indication that USCG recognized that this expansion would increase the number of facilities subject to electronic verification. In fact, the number of Risk Group A facilities in the final analysis (525) is unchanged from the preliminary analysis that supported the proposed rule (525, plus seven barge fleeting facilities that were deleted in the end). *Compare* Preliminary Regulatory Analysis at 19 *with* Final Regulatory Analysis at 18.

By contrast, the final regulatory analysis contains no discussion of the idea of coverage being triggered by non-maritime handling of bulk CDCs. In addition to the fact, just noted, that the number of covered facilities was the same as in the preliminary analysis, the numbers of projected facility access points and TWIC readers required by the rule was unchanged from the preliminary analysis. *Compare* Preliminary Regulatory Analysis at 25-26 *with* Final Regulatory Analysis at 28-29. As we noted in our petition, these two changes may actually have quadrupled the number of facilities covered by the rule and increased the number of

¹ See 46 U.S.C. § 70105(i)(2).

electronic points of entry at previously covered facilities by at least 50%, and in some cases significantly more.

To estimate the benefits of the rule, defined as the consequences mitigated or avoided by the rule, USCG analyzed three attack scenarios where a TWIC reader requirement might marginally reduce the chances of a successful attack or reduce its consequences. But USCG was not able to quantify the “incremental enhancement” of risk reduction attributable to electronic verification of TWIC in these scenarios:

In order to monetize the benefits from an anti-terrorism regulation, we would need to know the incremental reduction in risk of a successful terrorist attack that would accrue from the regulatory action being analyzed. However, the data needed to estimate this reduction in risk are not available.

Final Regulatory Analysis at 86 n. 89. This inability prevented the Coast Guard from being able to compare the costs and benefits of various rule coverage options. It also prevented the Coast Guard from being able to identify the option that imposes the least burden on society, a key element of effective regulatory development.² So instead USCG adopted a “break-even” approach — that is, it figured out how much risk reduction would justify the costs.

As noted above, a key task facing USCG in reassessing the utility of an electronic verification requirement for CDC facilities will be to determine whether it is possible to obtain data that would shed light on the “incremental enhancement” of risk reduction attributable to electronic verification. This evaluation is essential both to determining what facilities should be subject to such a requirement and to assessing the benefit of doing so. In that connection, we note that Congress in December passed a law (Public Law No. 114-278) that requires DHS to commission an assessment of the effectiveness of the TWIC program, including “evaluating the extent to which the Program, as implemented, addresses known or likely security risks in the maritime and port environments.”³ That assessment was to have been commissioned by February 14, though we understand that this has not yet happened. The study is to be completed within a year.⁴ Clearly, it would make sense for USCG to await the outcome of this study and to base its TWIC reader risk assessment efforts on data and methods that the study recommends.

² See Executive Order 12866, Regulatory Analysis & Review (Sept. 30, 1993), 58 Fed. Reg. 51735 (Oct. 4, 1993), § 1(b)(11) (“Each agency shall tailor its regulations to impose the least burden on society . . . consistent with obtaining the regulatory objectives . . .”)

³ Pub. L. No. 114-278, § 1(b)(3)(C)(i).

⁴ *Id.* § 1(b)(4).

A second key task for a revised TWIC reader rule will be to assess the costs of imposing such a requirement on the categories of facilities being considere, in order to comply with the MTSA's direction that any such requirements be "practicable."⁵ The study just referenced is also to "(iii) identify[] 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 [and] (iv) assess[] the costs and benefits of the Program, as implemented."⁶ Similarly, we recommend that USCG base its evaluation of the costs of any electronic verification requirement for CDC facilities on data and methods recommended by the study.

We trust that the foregoing is helpful. We would be happy to respond to any questions you have about it or other issues relevant to the deliberations of the Marine Safety and Security Council in connection with our petition.

Sincerely,

A handwritten signature in blue ink, appearing to read "JW Conrad Jr", is positioned above the printed name.

James W. Conrad, Jr.

cc: Katia Kroutil (DHS/USCG/JAG/LRA)
Ari Scott (DHS/USCG/JAG/LRA)
Joseph B. Maher (DHS/OGC)
Christina McDonald (DHS/OGC)

⁵ 46 U.S.C. § 70103(c)(1).

⁶ Pub. L. No. 114-278, §§ 1(b)(3)(C)(iii) & (iv).