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## **TWIC zeal untempered**

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After an extended delay, the Transportation Security Administration (TSA) is moving forward with its plan to implement the transportation worker identification credential (TWIC). The zeal displayed by the TSA may, though, interfere with the orderly and efficient development of the program, may impose excess costs upon the regulated community, and may not materially enhance the maritime security of the United States.

The requirement for a TWIC (or transportation security card) originated with the Maritime Transportation Security Act of 2002 (MTSA). After almost four years of planning, development, and prototype testing, TSA is affording the regulated community only 45 days to review, digest, and comment on its extensive, complex, and far-reaching proposal.

As of this writing, a number of comments have been submitted to the docket, which remains open until July 6, 2006. This article will attempt to organize and summarize some of those comments, all of which deserve careful consideration.

Opportunity for input: Numerous persons complained that there were too few public meetings (only four were scheduled); that the meeting locations were inconvenient for many segments of the industry; and that the 45-day comment period was far too short for preparation and submittal of meaningful comments. Guidance issued by the Office of Management and Budget (OMB) recommends that the public be provided a minimum of 90 days to review and submit comments on proposed rulemakings. TSA does not fully explain why it has provided only this truncated review period.

Small business impact: Federal law requires agencies involved in rulemaking to consider and minimize to the maximum extent feasible the impact of a rulemaking on small businesses that might be included within the ambit of the process. TSA, in its proposed rulemaking, lamely asserts: "At this time, we have not determined if this proposed rule would have a significant economic impact on a substantial number of small entities." Such an assertion leads one to wonder how much analysis actually went into this rulemaking and how much was just filling in the blanks to get the document into print.

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Close review of the transportation security card provision in the MTSA reveals that the TSA has considerable discretion regarding determination of what constitutes a “secure area” for a vessel or waterfront facility. There is nothing in the statute that would prohibit the TSA from determining that, for a small vessel and a small facility, there is no secure area. Indeed, for an open passenger vessel used for whale watching, such a conclusion seems logically mandated. If there is no secure area, then the basic TWIC requirement does not apply. Many small businesses could be exempted from the expenses inherent in the TWIC program if logic is allowed to prevail.

Cost to mariners/employees: TSA estimates that the user fee to be assessed to mariners and employees who come within the TWIC regulation will be approximately \$139 per person. This does not include expenses incurred in traveling to the enrollment site to apply for the card and then returning 60 days or so later to be issued the card. If the individual has to travel a significant distance, room and board expenses will also be incurred. Finally, during these travel periods, the individual will not be performing his or her usual work and, thus, may lose income. If the employer pays these expenses, that will benefit the individual, but will still incur what is sometimes called a “lost opportunity” cost for society as a whole as no productive work is being performed. The cost-benefit analysis accompanying the proposed rulemaking fails to fully address these costs.

Delays in hiring: Many companies commented that the process of applying for and obtaining a TWIC is inherently slow – taking upwards of 60 days in usual cases, according to TSA estimates. In today’s employment environment, marine employers will be placed at a significant disadvantage to other employers if new workers can not be brought on board more rapidly. Companies have suggested that TSA include in the regulation a provision for probationary employees, who could start work while awaiting issuance of the permanent TWIC.

Technology standard: The rulemaking envisions the TWIC utilizing something called the FIPS 201 standard for encryption and retrieval of the biometric data that identifies the individual to whom the card is issued. Several comments indicate, though, that the FIPS 201 standard is still a work in progress. If so, it causes one to wonder whether the rulemaking is premature. This is particularly true given that the contract for card production has only recently been solicited and not yet awarded.

Card reader feasibility: Considerable doubt exists as to whether a machine can be designed to read the TWIC cards in a rapid and reliable manner when used in the typical marine environment. It is one thing to operate card readers in a grocery store – and even then we have all seen customers have difficulty or for the computer located at a distance site to be unable to keep up with all the data being in-put by all the various users. The environment on a ship or at a ship repair facility or oil terminal is significantly more onerous. Humidity, salt, dirt, and grease are only some of the factors with which the card reader will have to cope. Many of the job sites, particularly for ships, will not have broadband or even landline telephone links. Thus, the card reader will have to rely on wireless communication. This will not only be slower than broadband, but also will be more subject to disruption and interception. One can only imagine

the frustration and chaos that will ensue when 100 or more shipyard workers want to all check out at the same time at the end of their shift and try to utilize the card readers to analyze their less than pristine TWIC cards.

Prototype testing: Several comments question whether the prototype testing that was undertaken was realistic, thorough, and sufficient. There is some indication that the TWIC process proposed in the rulemaking differs noticeably from the process that was involved in the testing. If so, then what is being proposed has not been tested. If it hasn't been tested, how does TSA know that it will work after hundreds of thousands of cards and thousands of card readers have been purchased by individuals and companies?

Disadvantage re foreign competition: For various reasons, the TWIC regulation, as proposed, would apply only to US vessels and facilities. The question has been raised regarding whether this places US vessels at a disadvantage regarding foreign vessels. Under the regulation, a US vessel would have to examine the TWIC for each longshore worker coming on board to handle cargo. A foreign vessel would be under no such obligation. Additionally, as written, the regulation would apply to a US vessel in a foreign port – even though none of the workers there would have TWIC cards. There is no easy solution to this paradox, but it deserves consideration.

Recordkeeping: The regulation proposes that the vessels and facilities to which it applies develop extensive records regarding who is on the vessel or facility at any particular time and that such records be maintained for at least two years and made available to government representatives upon request. One has to wonder whether the drafters of the regulation are being paid a stipend by the big software companies.

In summary, while there are some good points to the TWIC concept, this particular proposal appears to go way overboard. These vessels and facilities are not nuclear weapons plants. Why should they be required to institute security systems that are not utilized by most US military installations? It is time to go back to basics. TSA should develop a new proposal that meets several basic parameters: (1) comply with the statute without excess; (2) utilize proven technology throughout the process; and (3) rely on a risk-based formula weighing threat, vulnerability, and consequence. TSA should temper its zeal to accomplish the mission with some common sense regarding the distinction between the technologically possible and the truly practicable.