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TWIC program – phase one

Dennis L. Bryant

On January 3, 2007, the Transportation Security Administration (TSA) released an unofficial copy of its final rule implementing Phase One of the Transportation Worker Identification Credential (TWIC) Program. As of this writing, the rule has yet to be published in the Federal Register.

The TWIC Program has been troubled since being mandated by Congress in 2002. Congress determined that biometric identification procedures for individuals having access to secure areas in port facilities are important tools to deter and prevent port cargo crimes, smuggling, and terrorist actions. In pursuit of that laudable, but vague, goal, it directed the TSA to prescribe regulations to prevent an individual from entering a secure area on a vessel or facility unless the individual holds a TWIC card and is authorized to be in the secure area or is accompanied by an individual who holds a TWIC card and is authorized to be in the area.

The TWIC Program applies to US merchant mariners and other persons working on US vessels and US onshore and offshore facilities who need unescorted access to secure areas on those vessels and/or facilities. Such persons must apply for a TWIC card, pay a user fee, submit copies of their fingerprints, be photographed, and undergo a background check. Once issued, the TWIC card will remain valid for up to five years, unless revoked earlier for cause. It is estimated that this program will involve issuance of approximately 750,000 TWIC cards.

Problems with the program have been legion. A Congressman insisted that the TWIC cards be manufactured in his District, resulting in construction of a new facility to satisfy his directive. The technology to accurately read the biometric information on the cards and compare it immediately with a central database has yet to be developed. This setback led to bifurcation of the program into two phases. Phase Two, involving production, distribution, and use of TWIC card readers at maritime access points is being delayed until the technology catches up with the Congressional mandate. In the meantime, Phase One will go ahead – meaning that the high-tech TWIC card will actually be an expensive photo-ID card for the foreseeable future.

The initial proposal for implementation of the TWIC Program was promulgated in May 2006. It was met with a round of criticisms. It was argued by the maritime industry that the

costs of the program were underestimated, particularly with regard to small businesses. The impact on the ability of the industry to hire new employees was not considered in the proposal. The broad definition of the areas in which a TWIC card or an escort would be required was criticized.

The final rule, at least in its unofficial form, addresses some but not all of the complaints. TSA concedes that it seriously underestimated the impact on small business. It declined, though, to adopt the proposal to exclude many small businesses (such as whale-watching boats) from the TWIC Program. A concession was made with regard to new hires, allowing such individual to be put to work as soon as his or her application for a TWIC card has been submitted to TSA and an initial name check has been completed. In the interim between submittal of the application and receipt of the TWIC card, the employer is required to have the new-hire "accompanied" by an employee with a TWIC card while within a secure area. The definition of secure area was clarified and the term "employee access area" was added. Employee access area is a defined space, within the area over which the owner or operator has implemented security measures for access control, of a ferry or passenger vessel (excluding cruise ships) that is open only to employees and not to passengers. The employee access area is not a secure area and does not require a TWIC card for unescorted access. Adjustments were also made with regard to such issues as application to US vessels when in foreign waters; access by emergency responders; disqualifying crimes; review of denials by an administrative law judge (ALJ); and access by foreign maritime students and certain professionals and specialists on restricted visas.

Implementation will be phased in, with US mariners and US vessels coming into compliance 20 months after publication of the final rule in the Federal Register. Facilities will be phased in by USCG Captain of the Port (COTP) zone. No specific timeline is provided for facility implementation, but it is assumed to be within the same general timeframe as that for vessels (about 18 to 24 months after publication).

There is much to be accomplished between now and the compliance date. Application forms will have to be developed and distributed. Processing centers where applicants will go to submit their applications and be fingerprinted must be identified and staffed. Each applicant will have to complete the application form, travel to the processing center, submit his or her completed form, be fingerprinted and photographed, and pay the user fee. The applications must be vetted through background checks on the basis of criminal records, security threat, immigration status, and sanity (this last point raises some interesting possibilities). The TWIC cards will have to be manufactured and sent to the distribution centers. The applicants who have survived this process will then go to the distribution center to receive their TWIC cards.

Meanwhile, the vessels and facilities must develop procedures for checking the TWIC cards prior to allowing individuals unescorted access to secure areas. Facilities have the option of adjusting their previously-designated secure areas so as to exempt as many workers as possible. US vessels do not have this option, with the entire ship being considered a secure area for most purposes (except for passenger access areas on passenger ships and maybe all US vessels when in foreign waters). The Coast Guard will be conducting random checks of vessels

and facilities in order to ensure compliance. The access points will have to be manned, since there are no card readers to be deployed. Bear in mind that the above is a loose summary of the unofficial rulemaking, which is 469 pages in length.

While the Department of Homeland Security (DHS) has convened a special team to advise on the card reader problem, the problem actually lies elsewhere. DHS and TSA elected early on to utilize the technology being developed by the federal government for biometric identification credentials for its own employees and contractors. [I believe this was a wise choice, rather than trying to invent its own unique system.] Unfortunately, the federal system is way behind schedule, leaving the TWIC Program out on a limb.

The card reader is not the only problem. TSA may still be exposed to litigation over its handling (or mishandling) of the small business issue. The government concedes that the databases that are intended to be utilized for the TWIC background checks are seriously flawed. Labor unions will continue to challenge TSA regarding the adverse impact of criminal activity for members needing TWIC cards to retain employment. One should not be surprised if further adjustments are made to the TWIC Program over the upcoming 20 months.

One good aspect of Phase One is that, when implemented, it will result in marine workers having successfully completed a security check, albeit at a very high cost.

I have a basic problem with the entire TWIC Program, as mandated by Congress. When finally and fully implemented, it will establish a higher level of security than now exists at most US military installations. I am retired from active duty in the Coast Guard. I can go to almost any military base in the United States. When I present my retired military ID card to the gate guard, he or she examines it, checks to see that I have at least a passing resemblance to the person in the photograph on the ID card, and then says: "Welcome aboard, Captain." I still do not understand why the Congress and TSA are imposing this higher standard on grain terminals and whale-watching boats (which no self-respecting terrorist would attack).

Many say that TSA has shot itself in the foot with the TWIC Program. Let us not forget that Congress gave TSA the gun and the bullets and then told the agency where to point. When TSA told Congress that there were major problems with the program, Congress enacted a law establishing hard (and short) deadlines. Is it just me, or are there problems with this picture?

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