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The TWIC program and a failure of imagination

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The Transportation Worker Identification Credential (TWIC) program has had more than its share of technological challenges and missed deadlines. For most of those problems, the agencies involved – the Transportation Security Administration (TSA) and the US Coast Guard (USCG) – are largely blameless. These agencies did not write the statute mandating the TWIC (the Maritime Transportation Security Act of 2002), establish the deadlines, or select the technology (FIPS 201). The mandate and the deadlines were set by Congress. The technology was selected by the Administration.

Where the agencies involved in the implementation of the TWIC program have let us down is with regard to the failure to utilize their imagination to reduce to a necessary minimum the impact of the program by not adopting a risk-based approach. It must be conceded that Congress, in enacting the Maritime Transportation Security Act (MTSA), did not direct the agencies to utilize a risk-based approach (as they did with the more-recent Chemical Facility Anti-Terrorism program). On the other hand, Congress did not prohibit the agencies from making proper use of risk in developing the TWIC implementation process.

Executive Order 12866, entitled “Regulatory Planning and Review”, directs federal agencies developing regulatory programs (to the extent permitted by law) to consider the degree and nature of the risks posed and to adopt a regulation only upon a reasoned determination that the benefits justify its costs. Both the proposed rule and the final rule include statements indicating that the agencies complied with the Executive Order in the development and promulgation of the rulemaking. There is, though, little to indicate that the risk analysis portion of the Executive Order ever received meaningful consideration.

The Regulatory Flexibility Act of 1980 requires an agency engaged in rulemaking to analyze all significant alternatives to the proposed and/or final rule. Among the alternatives that must be considered is the possible exemption from coverage of the rule, or any part thereof, for small entities. When it promulgates the final rule, the agency must also conduct a regulatory flexibility analysis that includes a description of the steps taken by the agency to minimize the significant economic impact on small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other

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significant alternatives to the rule considered by the agency which would affect the impact on small entities was rejected. This is precisely where the two agencies let us down.

In the Notice of Proposed Rulemaking of May 22, 2006, the agencies delayed facing the issue by stating: “At this time, we have not determined if this proposed rule would have a significant economic impact on a substantial number of small entities.” In the Final Rule of January 25, 2007, the agencies were more forthcoming, admitting: “We have determined that the final rule will have a significant economic impact on a substantial number of small entities.” What brought about this change of heart? There were three events that primarily altered the view of the agencies on this important point. First, the docket was flooded with comments from small entities complaining of the costs that would be incurred in complying with the TWIC requirements. Second, on July 5, 2006, the Small Business Administration (SBA) wrote the agencies an official letter summarizing the serious concerns expressed by small entities regarding the proposed rule and recommending that the agencies revise and update their economic analysis. Third, the House Committee on Small Business, on September 27, 2006, issued a statement concluding that the TWIC rulemaking as drafted failed to fully consider the impact on small businesses, as required by federal law.

Unfortunately, other than admitting the obvious – that the rulemaking would be particularly expensive for small businesses, the agencies did little to lessen the financial impact. This is where their imagination failed in a big way. As indicated above, the agencies were required to consider alternative methods of implementing the statutory requirement and explain why the alternatives that might have a lesser impact on small businesses were not selected. The agencies suggested three alternatives and then summarily rejected them. The first alternative would have required only a security threat assessment for credentialed mariners and individuals seeking unescorted access to secure areas. This alternative was rejected because it did not meet the requirements of the Maritime Transportation Security Act, which requires the issuance of biometric transportation security cards. The second alternative would have allowed a more decentralized approach to producing and issuing identification credentials. This second alternative was rejected because it did not meet the provisions of the 2006 Department of Homeland Security Appropriations Act, which required the credentials to be produced at an existing federal card production facility. The third alternative would have exempted certain small entities because they represented a smaller risk than large facilities. This third alternative was rejected with the following statement: “We firmly believe that all vessels, facilities, and OCS facilities regulated under 33 CFR subchapter H are at risk of being involved in a transportation security incident, and therefore we cannot exempt any from the escort provisions of the rule.”

It is quite interesting that the Department of Homeland Security has been wholly unable to distinguish between low risk and high risk of an entity being involved in a maritime transportation security incident, with the result that all maritime entities are required to comply with all portions of the TWIC rulemaking. This same Department, when implementing the Chemical Facility Anti-Terrorism Standards, has clearly stated that its security requirements will be scaled in accordance with the level of risk presented by the various regulated entities. Why

are risk factors a major element of the latter rulemaking, yet are wholly ignored in the earlier rule? What did Homeland Security Secretary Michael Chertoff mean when, while announcing the port security grants on September 13, 2005, he said that security measures should be considered with regard to a “risk-based formula weighing threat, vulnerability, and consequence. Consequence considers risks to people, the economy, and national security. Vulnerability involves factors such as distance from open water, number of port calls, and presence of tankers. Threat includes credible threats and incidents and vessels of interest information.”?

The MTSA provides the Secretary (as well as the TSA and the Coast Guard) with broad authority to define what constitutes a “secure area” within which a TWIC would be required for unescorted access. There is nothing in the statute that requires the agencies to equate the “restricted area” regarding which a security plan is required and the “secure area” within which a TWIC is required. I would contend that a whale-watching boat or inland tug should have no secure area, thus exempting them from the TWIC requirement. Both are so small that no unauthorized person could come aboard pretending to be an employee without being noticed. This is not to say that these small vessels (or similar small facilities) should not have security plans. But the TWIC program provides a much higher level of security, one that is realistically unnecessary on low-risk vessels and facilities. Just for a moment, imagine the two crewmembers on a whale-watching boat inspecting each other’s TWIC!

Even now, as the Transportation Security Administration and the US Coast Guard commence the TWIC enrollment process, it is not too late to insert a modicum of logic into the application formula. After all, on September 28, 2007, the agencies amended the TWIC final rule to, among other things, provide that marine facilities located in the Commonwealth of the Northern Mariana Islands will “have no secure areas.” This change was made because non-resident alien workers in the Commonwealth are not required to have visas and, thus, are ineligible for TWIC cards. The amendment also provides that mariners serving aboard a vessel located at a facility will not be required to have a TWIC when they are working at the facility in secure areas immediately adjacent to the vessel. These amendments, albeit somewhat belated, are logical and both amendments required the agencies to exercise of some degree of imagination in order to achieve a necessary balance between the needs of security and the needs of commerce. It is time for further exercise of imagination, so that well-meaning security measures don’t end up doing more damage to the maritime economy than a terrorist could likely inflict.