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Advocacy: the voice of small business in government

July 5, 2006

BY ELECTRONIC MAIL
Admiral Thad W. Allen
Commandant of the United States Coast Guard
U.S. Department of Homeland Security
2100 Second Street, SW
Washington, DC 20593
Electronic Address: http://dms.dot.gov (Coast Guard Docket No. USGG-2006-24169)

The Honorable Kip Hawley
Administrator, Transportation Safety Administration
U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 22202
Electronic Address: http://dms.dot.gov (TSA Docket No. TSA-2006-24191)

Re: Proposed Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver's License Rule

Dear Admiral Allen and Administrator Hawley:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the Transportation Safety Administration (TSA) and the U.S. Coast Guard's joint *Proposed Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector Rule*.[1] The proposed rule would implement Section 102 of the Maritime Transportation Security Act (MTSA)[2] (and other statutory provisions) that requires the Secretary (of Homeland Security) to issue a biometric transportation security card to individuals with unescorted access to secure areas of ports, vessels, and other facilities.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),[3] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[4] gives small entities a voice in the

[1] 71 Fed. Reg. 29396 (May 22, 2006).
[2] Pub. L. 107-295, November 25, 2002, 116 Stat. 2064.
[3] 5 U.S.C. § 601 et seq.
[4] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272,[5] which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

As indicated above, the proposed rule would implement Section 102 of the MTSA that requires the Secretary to issue a biometric transportation security card to individuals with unescorted access to secure areas of ports, vessels, and other facilities. Other provisions of MTSA had previously required owners and operators of these maritime facilities to prepare and submit to the Coast Guard for approval a detailed "security assessment" of their respective vessels and facilities to identify security vulnerabilities. These approved security assessments define "secure areas" and are not publicly available.

The proposed rule would require individuals with unescorted access to secure areas of ports, vessels, and other facilities to undergo a security threat assessment (including criminal history, immigration status, and intelligence records) to determine that they do not pose a security threat prior to receiving the biometric card and unescorted access to the secure areas. The security check is identical to that needed to obtain a "hazardous materials endorsement" for commercial truck drivers. TSA and the Coast Guard have proposed a sophisticated biometric card with a computer chip that contains personal and digital biometric information (i.e., fingerprint) about the holder and links to a centralized computer system maintained by TSA. The proposed "Transportation Worker Identification Credential" (TWIC) would replace and eliminate four existing credentials that mariners currently hold.

The objectives of the proposed rule are to enhance the security of ports and vessels (by ensuring the identity of the TWIC holder) and to facilitate commerce (by reducing the number of separate credentials a holder must possess). Owners and operators would need to obtain smart card "readers" and other equipment to read the TWIC, while TSA would maintain and update the database. TSA and the Coast Guard estimate that 750,000 people would initially need to obtain a maritime TWIC and that the rule will cost $1.028 billion over ten years. It is assumed that the TWIC program could be expanded to cover other sectors over time.

Regulatory Flexibility Act Determination

TSA and the Coast Guard have stated that they are unable to determine whether the proposed maritime TWIC rule will "have a significant economic impact on a substantial number of small

[5] Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (67 Fed. Reg. 53461) (August 16, 2002).

entities." Therefore, the agencies have prepared and published for public comment an Initial Regulatory Flexibility Analysis (IRFA) in accordance with the RFA.[6] Advocacy commends TSA and the Coast Guard for preparing the IRFA and recommends that the agencies revise and update the analysis based on this and other public comments it receives, particularly with respect to the number of small businesses that will be affected, the projected costs of the proposed rule, and less costly alternatives that still meet the agencies' statutory objectives.

Small Entities Have Expressed Serious Concerns About The Proposed Rule

Advocacy periodically hosts informal regulatory roundtables for small business representatives to discuss issues of concern. At one of our recent roundtables on transportation safety, this rule was identified as one that could have a very significant economic impact on small businesses across the transportation sector. In fact, the participants were so concerned with this proposed rule that Advocacy agreed to host a separate meeting just to discuss it. Participants at the follow-up meeting included representatives from the maritime towing and passenger vessel industries, recreational boating, commercial trucking, charter bus operators, and the aviation sector.[7] The following comments are reflective of the issues that these small business representatives raised during the meeting.[8]

1. According to roundtable participants, the proposed rule and IRFA fail to include many small businesses in the maritime towing (e.g., tugboats, towboats, and barges) and passenger vessel industries (e.g., ferries; sightseeing, excursion, and dinner boats; gaming vessels; whale watching boats; and eco-tour vessels). Further, other participants stated that the economic analysis and IRFA fail to include other affected sectors as well. For example, one participant noted that a charter bus operator picking up cruise ship passengers at a port would need a maritime TWIC (or have a credentialed escort) if they accessed secure areas. Advocacy recommends that TSA and the Coast Guard re-assess whether the economic analysis and IRFA encompass all regulated sectors.

2. The roundtable participants stated that the proposed maritime TWIC rule fails to meet the objectives of the TWIC concept as originally envisioned: that is, a single biometric card and a single background check for the entire transportation sector. Participants argued that duplicative credentials and clearances (including state and local requirements) will still be needed because the proposed TWIC is limited to the maritime sector.[9] Also, the participants stated that the original intent of the TWIC was to help ease access to secure areas, not to require a TWIC to enter them.

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[6] The IRFA is on pages 90-100 of the Regulatory Evaluation for this proposed rule, which is available in the docket at http://dmses.dot.gov/docimages/p85/399640.pdf.

[7] Representatives from the Department of Homeland Security, the Coast Guard, and the Department of Transportation also attended the meeting to listen to the discussion.

[8] Advocacy also participated in the public meeting of the Coast Guard's Merchant Marine Personnel Advisory Committee (MERPAC) on June 29, 2006, and notes that many of the same concerns raised by the small business representatives during our roundtable were echoed by the Coast Guard's own advisory committee.

[9] One roundtable participant stated that, as an example, a trucker who picked up a package at an airport in one state and delivered it to the secure area of a port (or to a vessel) in another state would still require multiple credentials.

3. Roundtable participants also argued that the limited maritime TWIC being proposed exceeds TSA and Coast Guard's statutory mandate. Specifically, they assert that the MTSA statute only requires a simple "biometric" card and not the complex and costly design (or the expensive smart card "readers") that TSA and the Coast Guard have proposed. The participants stated that if there cannot be a "single card and single background check" for the entire transportation sector, they would prefer a less costly and less complex alternative to the proposed maritime TWIC.

4. Roundtable participants expressed serious concerns about whether the technology required to implement the proposed rule (e.g., computer system, smart card "readers," wireless technology, etc.) currently exists for such a large undertaking and whether it has been perfected. Advocacy notes that similar concerns were expressed by the Coast Guard's Merchant Marine Personnel Advisory Committee during its June 29, 2006 meeting. Advocacy recommends that TSA and the Coast Guard evaluate the merits of these concerns before proceeding and considers pilot testing the system in advance.

5. Roundtable participants argued that the definition of "secure areas" needs to be clarified. Specifically, since secure areas are defined in the owner or operator's threat assessment (which is approved by the Coast Guard, but is not publicly available), a business operating at the port, vessel, or facility for the first time would not know what areas are designated as "secure" and whether they need a maritime TWIC.

6. Roundtable participants noted that it is likely that many businesses will seek to avoid the maritime TWIC requirements by providing (or requiring) the use of dedicated, credentialed escorts as an alternative. Advocacy recommends that TSA and the Coast Guard consider the likelihood that this will occur and whether it changes the cost projections for the proposed rule.

7. Roundtable participants expressed concern that businesses utilizing "seasonal or temporary" workers could be significantly impacted by the rule. For example, small tour boats and sightseeing vessels frequently hire high school and college students to work on the boats during the summer. However, because these employees could be required to obtain a maritime TWIC before they could begin work, the proposed rule could impose significant costs and time burdens on these small businesses. Advocacy recommends that TSA and the Coast Guard consider the impact of the proposed rule on small businesses that utilize seasonal or temporary workers.

8. Finally, roundtable participants questioned whether the proposed rule accomplishes the agencies' stated objectives of improving security and facilitating commerce. In fact, several participants stated that the rule could have the opposite, unintended effect. For example, one participant noted that the proposed rule could deter community residents from participating in port and marina security committees because these volunteers (who would be required to obtain a maritime TWIC) might be reluctant to pay the fee and

undergo the background check.[10] Another participant noted that since the TWIC only verifies the identity of the holder, it does nothing to prevent a dangerous person with a clean background from obtaining a card. In fact, this participant noted that the TWIC could actually harm security by facilitating access to secure areas by such a person. Finally, several participants stated that the proposed rule could also impede commerce by imposing significant new costs on business, disrupting labor markets, requiring duplicative credentials, and creating uncertainty.

Conclusion

Advocacy appreciates the opportunity to comment on Transportation Safety Administration and U.S. Coast Guard's *Proposed Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector Rule* and recommends that the agencies revise and update their economic analysis and IRFA based on this and other public comments they receive. Advocacy is mindful that that there are important security implications associated with this proposed rule and defers to TSA, the Coast Guard, and others to assess the security implications of this and other programs. However, Advocacy notes that this rule is very costly and that the small business representatives we have met with have raised serious concerns about it.

Again, we appreciate the opportunity to comment on this proposed rule and would be happy to assist you in any way we can. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Copy to: Steven G. Aitkin, Acting Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

[10] This participant believes that the best security comes from local people who are familiar with local conditions and can spot unusual or suspicious activities.