



A Voice for Small Business

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***Testimony of
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***U.S. House of Representatives
Committee on Small Business
Subcommittee on Rural Enterprise, Agriculture and Technology***

Date: Tuesday, October 3, 2006
Time: 10:00 A.M.
Location: Owner-Operator Independent Drivers Association
1 Northwest OOIDA Drive, Grain Valley, Missouri
Topic: *"The Intersection of Trucking, Regulation and
Homeland Security"*

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by offices in Washington, D.C., and by Regional Advocates. For more information about the Office of Advocacy, visit <http://www.sba.gov/advo>, or call (202) 205-6533.

Chairman Graves, good morning, and thank you for giving me the opportunity to appear here today. My name is Bruce E. Lundegren, and I am Assistant Chief Counsel in the Office of Advocacy (Advocacy) at the U.S. Small Business Administration (SBA). Congress established the Office of Advocacy under Pub. L. No. 94-305 to advocate the views of small business before Federal agencies and Congress. Because Advocacy is an independent entity within SBA, the views expressed here do not necessarily reflect the position of the Administration or the SBA.

On May 22, 2006, the Transportation Security Administration (TSA) and the U.S. Coast Guard jointly issued the *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. Other provisions of MTSA 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.

I would like to talk about how TSA and Coast Guard’s jointly proposed TWIC rule might impact small business.

The Office of Advocacy

Advocacy is responsible for overseeing federal agency compliance with the Regulatory Flexibility Act (RFA).³ The RFA supplements the traditional Administrative Procedure Act⁴ notice and comment rulemaking process by requiring federal agencies to

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 5 U.S.C. 551 et seq.

analyze the impact of their regulations on small entities (i.e., small business, small governmental jurisdictions, and small nonprofits) and to consider less burdensome alternatives. If a proposed rule is expected to have “a significant economic impact on a substantial number of small entities,” the agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) and publish it in the *Federal Register* for public comment.

The IRFA must include (among other things):

- a description of the reasons why action by the agency is being considered;
- a succinct statement of the objectives of, and legal basis for, the proposed rule;
- a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

Each IRFA must also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

Following the consideration of public comments received on the IRFA, the agency publishes a Final Regulatory Flexibility Analysis (FRFA) along with the final rule. The FRFA must include:

- a succinct statement of the need for, and objectives of, the rule;
- a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;
- a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

- a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, 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 significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The analyses required by the RFA are intended to ensure that the agency considers the impact of its proposed and final rules on small entities and considers less burdensome alternatives that still meet its statutory objectives. Advocacy notes that small entities bear a disproportionate share of the regulatory burden and that is why federal agencies must consider feasible alternatives to their proposed regulations. In 2005, Advocacy funded a study by W. Mark Crain entitled *The Impact of Regulatory Costs on Small Firms*.⁵ That study found that of the nearly \$1.1 trillion annual regulatory burden, small businesses with less than 20 employees faced an annual regulatory cost of \$7,647 per employee, nearly forty-five percent higher than regulatory costs facing large firms (with 500 or more employees).⁶ Given the potential cost and impact of the proposed TWIC rule on small businesses, Advocacy believes the RFA analysis is particularly important in this instance.⁷

⁵ *The Impact of Regulatory Costs on Small Firms* (September 2005) available at <http://www.sba.gov/advo/research/rs264tot.pdf>.

⁶ *Id.* at page v.

⁷ In addition to the RFA, Advocacy also has responsibilities under Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, which President Bush signed on August 13, 2002. (67 Fed. Reg. 53461). Under the Executive Order, federal agencies must 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.

Regulatory Flexibility Act Determination

As an initial matter, Advocacy is mindful that there are important security implications associated with the proposed TWIC rule and defers to TSA, the Coast Guard, and others to assess the security implications of this and other programs.

TSA and the Coast Guard have stated that they are “have not yet determined if this proposed rule would have a significant economic impact on a substantial number of small entities.”⁸ Therefore, the agencies have prepared and published for public comment an IRFA in accordance with the RFA.⁹ Advocacy commends TSA and the Coast Guard for preparing the IRFA, and for their outreach to the business community. Advocacy filed comments on the proposed TWIC rule on July 5, 2006.¹⁰ In addition, the House Small Business Committee held a public hearing on the proposed TWIC rule on September 27, 2006, which included representatives from TSA and the Coast Guard as well as small businesses that would be impacted by the rule.¹¹ Our comments, as well as those of small businesses, their trade associations, and members of Congress who stand up for the small business sector, have clearly been recognized by TSA and the Coast Guard. I am confident that the views expressed here, and in other venues, will be carefully considered prior to the agencies finalizing the TWIC rule.

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. We held one recently on the proposed TWIC rule. Participants at the meeting included representatives from the maritime towing and passenger vessel industries, recreational boating, commercial trucking,

⁸ 71 Fed. Reg. 29434.

⁹ 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>.

¹⁰ Advocacy’s comments letter to TSA and the Coast Guard, dated July 5, 2006, is available on Advocacy’s website at www.sba.gov/advo.

¹¹ See, http://wwwc.house.gov/smbiz/calendarOfEvents/asp_calendar_event_detail.asp?eventId=112.

charter bus operators, and the aviation sector.¹² The following comments are reflective of the issues that small business representatives raised during the meeting.¹³

1. According to roundtable participants, the proposed rule and IRFA failed 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). Participants stated that the economic analysis and IRFA failed 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.
2. The roundtable participants stated that the proposed maritime TWIC rule failed 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.¹⁴ 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.
3. Roundtable participants argued that the limited maritime TWIC being proposed exceeds TSA and Coast Guard's statutory mandate. Specifically, they asserted 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

¹² Representatives from the Department of Homeland Security, the Coast Guard, and the Department of Transportation also attended the meeting to listen to the discussion.

¹³ 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.

¹⁴ 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.

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.
5. Roundtable participants argued that the definition of “secure areas” needed 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.
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.
8. 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 be here and to listen to the concerns of small business. You can be assured that I will take these concerns back to Washington and work with TSA and the Coast Guard as they try to come up with a solution that improves maritime security without unduly harming small business.