Homeland Security Laws and Regulations: Current and Anticipated Issues for the Port Attorney and Risk Manager

Presented to the:

AAPA
American Association of Port Authorities
Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

April 17, 2009
Chemical Facility Anti-Terrorism Standards: CFATS
The Chemical Facility Anti-Terrorism Standards (CFATS)

- Applies to chemical facilities that “present a high level of security risk.”
- CFATS is a staggered process consisting of four phases: The Top-Screen, the SVA, the SSP, and ongoing compliance.
- CFATS compliance is based on Risk-Based Performance Standards rather than prescriptive guidelines.
- CFATS will expire in October 2009; something must occur during the 111th Congress.
The Impact of Homeland Security Regulations: Contract Guards

Risk-Based Performance Standards Guidance
Chemical Facility Anti-Terrorism Standards

October 2008
Version 2.4

(1) Restrict Area Perimeter
(2) Secure Site Assets
(3) Screen and Control Access
(4) Deter, Detect, and Delay
(5) Shipping, Receipt, and Storage
(6) Theft and Diversion
(7) Sabotage
(8) Cyber
(9) Response
(10) Monitoring
(11) Training
(12) Personnel Surety
(13) Elevated Threats
(14) Specific Threats/Risks
(15) Reporting of Security Incidents
(16) Security Incidents/Activities
(17) Officials and Organization
(18) Records
Congress Required the Adoption of Performance Standards… Therefore DHS cannot Mandate the Precise Manner to Achieve a Specific Security Outcome:

**Example: Restrict Area Perimeter**

**Company A Tier 1 Facility:** 12 foot chain-link fence, razor ribbon, microwave intrusion detection system, low-light, pan, tilt, zoom cameras with motion activation, 10 foot clear zone, vehicle cabling.

**Company B Tier 1 Facility:** 6 foot chain link fence with three strands of barbwire as outer perimeter fence with jersey barriers, 8 foot concrete wall as secondary perimeter, fiber-optic intrusion detection system, combination of fixed cameras and low-light, pan, tilt, zoom cameras.

**Company C Tier 1 Facility:** Dig a deep moat and …………………
Because the Performance Standards are Risk-Based, a Tier 1 Facility Requires More Stringent Security Than a Tier 4 Facility:

**Example: Restrict Area Perimeter**

**Company A Tier 1 Facility:** 12 foot chain-link fence, razor ribbon, microwave intrusion detection system, low-light, pan, tilt, zoom cameras with motion activation, 10 foot clear zone, vehicle cabling.

**Company B Tier 4 Facility:** 12 foot chain-link fence and razor ribbon.
CFATS: 4 Risk Tiers

Tier 1

Tier 2

Tier 3 and Tier 4

Stringency & Complexity of Security Measures
Section 550 – Statute (Congress)

§ 27.400 – Implementing CVI Regulations (DHS)

CVI Guidance – (DHS)

“Day to Day” Compliance
MARKING CVI

WARNING: This record contains Chemical-Terrorism Vulnerability Information controlled by 6 CFR § 27.400. Do not disclose to persons without a “need to know” in accordance with 6 CFR § 27.400(e). Unauthorized release may result in civil penalties or other action. In any administrative or judicial proceeding, this information shall be treated as classified information in accordance with 6 CFR § 27.400(h) and (i).
Requires facilities to submit the SVA and SSPs developed pursuant to MTSA (i.e., those facilities that are now statutorily exempt from CFATS) to DHS.

- “The Secretary shall determine the extent to which actions taken by such a chemical facility pursuant to another provision of law fulfill the requirements of this section and may require such a chemical facility to complete any additional action required by this section.”
- This could significantly increase the number of covered facilities.
MTSA 105 Facility

6 Tanks of Phosgene

CFATS Tier 2 Facility

4 Tanks of Phosgene
Transportation Worker Identification Credential (TWIC)
The Maritime Transportation Security Act (MTSA) & TWIC

- Applies to vessels, OCS facilities, and other maritime facilities on navigable waterways.

- Requires the development of a COTP-approved Facility Security Plan (FSP). FSPs must be renewed every 5 years with the first round of renewals occurring in 2009.

- Unescorted access to certain areas of MTSA-regulated sites requires the possession of a TWIC (and hence more compliance actions).
Who Gets a TWIC?

• All credentialed merchant mariners

• Anyone with unescorted access to secure areas of U.S. vessels, facilities, and OCS facilities subject to 33 CFR 104, 105, and 106

• Vessel pilots

• All individuals working aboard towing vessels that push, pull, or haul alongside tank vessels.
Who Gets a TWIC?

- Vessel crew
- Longshoremen
- Drayage truckers
- Facility employees
- Truckers
- Surveyors
- Agents
- Chandlers
- Port chaplains
- Casual laborers
- Other maritime professionals

1. PURPOSE. This Navigation and Inspection Circular (VIC) provides guidance on implementation of the Final Rule – Transportation Worker Identification Credential Implementation in the Maritime Sector: Hazardous Material Endorsement for a Commercial Driver’s License (72 FR 3492) (referred to as the TWIC rule) – which made major changes to 33 CFR Chapter I Subchapter H, 46 CFR Chapter I Subchapter B, and 49 CFR Chapter XII Subchapter D. The Transportation Worker Identification Credential (TWIC) will satisfy the requirement for a biometric credential as mandated by 46 U.S.C. § 70105, which was enacted by the Maritime Transportation Security Act of 2002 (MTSA) and then amended by the Security and Accountability For Every (SAFE) Port Act of 2006. The information in this VIC details the enrollment and issuance process, provides guidance for successful execution of compliance requirements, provides clarification of the regulations found in references (a) and (b), and includes a more detailed discussion of the actions required by those regulations, with examples, to increase understanding and promote nationwide consistency. These guidelines are intended to help industry comply with the new regulations and the Coast Guard Captains of the Port (COTP) implement the TWIC Program.
## TWIC Enrollment: Disqualifying Crimes

<table>
<thead>
<tr>
<th>No waiver permitted</th>
<th>STA: Permanently Disqualifying Crimes (1572.103 et seq.)</th>
<th>STA: Interim (7 year) Disqualifying Crimes (1572.103 et seq.) *NOTE: No violent misdemeanors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Espionage</td>
<td>Bribery</td>
<td></td>
</tr>
<tr>
<td>Sedition</td>
<td>Extortion</td>
<td></td>
</tr>
<tr>
<td>Treason</td>
<td>Dishonesty, fraud, or misrepresentation, including money laundering and identity fraud, in some instances</td>
<td></td>
</tr>
<tr>
<td>Crime of terrorism (defined in 18 U.S.C. 2332(g) or comparable State law)</td>
<td>Immigration violations</td>
<td></td>
</tr>
<tr>
<td>Crime involving a TSI (transportation security incident)</td>
<td>Smuggling</td>
<td></td>
</tr>
<tr>
<td>Improper transportation of a hazardous material (49 U.S.C. 5124)</td>
<td>Certain drug offenses</td>
<td></td>
</tr>
<tr>
<td>Unlawful activities concerning explosives</td>
<td>Unlawful activities involving a firearm or other weapon</td>
<td></td>
</tr>
<tr>
<td>Murder</td>
<td>Arson</td>
<td></td>
</tr>
<tr>
<td>Making any threat - or maliciously conveying false information known to be false - concerning the deliverance, placement, or detonation of explosive or other lethal device in/against place of public use, state or government facility, public transportation system, or infrastructure facility</td>
<td>Kidnapping or hostage taking</td>
<td></td>
</tr>
<tr>
<td>Certain RICO Act violations where one of the predicate acts consists of one of the permanently disqualifying crimes</td>
<td>Lesser violations of RICO</td>
<td></td>
</tr>
</tbody>
</table>

**NOTE:** Conspiracy or attempt to commit any of these crimes will also disqualify
**Twic Dashboard**

**April 2, 2009**

**Explanation of Dashboard**
The TWIC Dashboard provides point-in-time program information on:
- Enrollment and adjudication-related statistics
- Graph depicting pre-enrollment, enrollment, cards printed & activated trends
- Contact information for TWIC resources
- Total enrollments and activations by location (including total enrollments broken out by occupation type)

**Program Statistics**

<table>
<thead>
<tr>
<th>Enrollment/Activation</th>
<th>Measurement (as of 04/01/09)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-Enrollments</td>
<td>990,907</td>
</tr>
<tr>
<td>Enrollments</td>
<td>1,078,881</td>
</tr>
<tr>
<td>Cards Printed</td>
<td>1,025,593</td>
</tr>
<tr>
<td>Cards Activated</td>
<td>865,470</td>
</tr>
<tr>
<td>Average Enrollment Time</td>
<td>8.83</td>
</tr>
</tbody>
</table>

**Security Threat Assessment**

<table>
<thead>
<tr>
<th>Security Threat Assessment</th>
<th>Measurement (as of 03/29/09)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Disqualification Letters</td>
<td>36,390</td>
</tr>
<tr>
<td>Appeals Requested</td>
<td>19,875</td>
</tr>
<tr>
<td>Appeals Granted</td>
<td>17,868</td>
</tr>
<tr>
<td>Waivers Requested</td>
<td>3,082</td>
</tr>
<tr>
<td>Waivers Granted</td>
<td>1,433</td>
</tr>
<tr>
<td>ALJ Review Requested/Granted</td>
<td>11</td>
</tr>
<tr>
<td>Final Disqualification Letters</td>
<td>144</td>
</tr>
<tr>
<td>Number of Expired IDTAs</td>
<td>10,204</td>
</tr>
</tbody>
</table>

**Twic Information and Resources**

Help Desk: 1-866-DHS-TWIC (1-866-347-8942)  
5:00 AM ET - 12:00 AM ET  
http://twicinformation.tsa.dhs.gov/twicinfo/contact.jsp

Website: www.tsa.gov/twic
Transportation Worker Identification Credential (TWIC) Program
August 28, 2008

In response to a number of inquiries concerning TWIC requirements and the comparability between TWIC and Hazardous Materials Endorsement (HME), we are providing the following questions and answers.

Can employers require their employees to enroll for a TWIC even if their job does not require them to have unescorted access to facilities and vessels regulated by the Maritime Transportation Security Act (MTSA)?

No. All applicants must certify that they need a TWIC to perform their job. Applicants must currently be, or are applying to be, a port worker who requires unescorted access to secure areas of maritime facilities and vessels regulated by MTSA; or they are a commercial HME driver licensed in Canada or Mexico. Applicants also certify that the information they provide during the enrollment process is true, complete, and correct. If required, civil or criminal action may be taken if an individual provides false information or makes false certifications (per 49 CFR 1570.5 and 18 U.S.C. 1001).

Where in the TWIC regulation is this topic covered?
49 CFR § 1570.5 Fraud and intentional falsification of records. No person may make, cause to be made, attempt, or cause to attempt any of the following:
(a) Any fraudulent or intentionally false statement in any record or report that is kept, made, or used to show compliance with the subchapter, or exercise any privileges under this subchapter.
49 CFR § 1572.17 Applicant information required for TWIC security threat assessment.
(e) The applicant must certify the following statement in writing: As part of my employment duties, I am required to have unescorted access to secure areas of maritime facilities or vessels in which a Transportation Worker Identification Credential is required; I am now, or I am applying to be, a credentialled merchant mariner; or I am a commercial driver licensed in Canada or Mexico transporting hazardous materials in accordance with 49 CFR 1572.201.
Background: The TWIC final rule allows facility owners and operators to redefine their secure areas for purposes of TWIC. However, it is unclear which facilities may redesign their secure areas, and how much of the previously included facility area can be excluded through redesignation.

Issues:
• If certain mixed-use MTSA facilities are allowed to redefine their secure area for TWIC purposes, what guidelines should they use during their redesignation?
• What measures will be expected/accepted by the USCG for access control to these newly defined secure areas?

TWIC/MTSA Policy Advisory Council discussion: The USCG employs a 3-step process for determining whether to approve amendments to a Facility Security Plan:
1. Does the facility have a significant non-maritime transportation related portion?
   1. Yes $\rightarrow$ proceed to Step 2
   2. No $\rightarrow$ deny the request
2. Is the area to be excluded non-maritime transportation related?
   1. Yes $\rightarrow$ approve the request
   2. No $\rightarrow$ deny the request
   3. Yes and no $\rightarrow$ proceed to Step 3
3. Is the area to be excluded at risk of a TSI (transportation security incident)?
   1. No $\rightarrow$ approve the request
   2. Yes $\rightarrow$ deny the request and/or ask for differently defined secure area
TWIC Access to Marine Terminal in a Refinery/Industrial Complex

- Non-Maritime Transportation Portion
- Restricted Area (Not Part of Secure Area)
- Perimeter Fence
- Secure Area
- Restricted Area (Part of Secure Area)
Rail Hazmat
Rail Security Considerations – Toxic Inhalation Hazards (TIH) – Regulation Took Effect on 12/26/08

• Applies to both passenger and freight rail.
• New security obligations include the appointment of a Rail Security Coordinator, chain of custody/control procedures, and the reporting of significant security concerns.
• Designates 46 High-Threat Urban Areas which necessitate increased security.
• Applies to rail as well as select facilities that ship and receive certain classes and quantities of hazmat → Could include a facility within a port complex.

• New security obligations include the appointment of a Rail Security Coordinator, chain of custody & control procedures, and the reporting of significant security concerns, among other things.

• Designates 46 High-Threat Urban Areas.
Chapter XII—Transportation Security Administration, Department of Homeland Security

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

1. The authority citation for part 1520 continues to read as follows:

   Authority: 46 U.S.C. 70102–70106, 70117
   49 U.S.C. 114, 40113, 44901–44907, 44913–
   44914, 44916–44918, 44935–44936, 44942,
   46105.

2. In § 1520.3, add definitions of “Rail
   hazardous materials receiver,” “Rail
   hazardous materials shipper,” “Rail
   facility,” “Rail secure area,” “Rail
   transit facility,” “Rail transit system,”
   “Railroad,” and “Railroad carrier,”
   amend the definition of “Vulnerability
   assessment” to read as follows, and
   insert in alphabetical order:
Homeland Security Laws and Regulations: Current and Anticipated Issues for the Port Attorney and Risk Manager

Presented to the:

AAPA
American Association of Port Authorities
Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

April 17, 2009