DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

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Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security; Bureau of Consular Affairs, Department of State.

ACTION: Final rule.

SUMMARY: This rule finalizes the first phase of a joint Department of Homeland Security and Department of State plan, known as the Western Hemisphere Travel Initiative, to implement new documentation requirements for certain United States citizens and nonimmigrant aliens entering the United States. As a result of this final rule, with limited exceptions discussed below, beginning January 23, 2007, all United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico departing from or entering the United States from within the Western Hemisphere at air ports-of-entry will be required to present a valid passport. This final rule differs from the Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** on August 11, 2006, by finalizing new documentation requirements for only travelers arriving in the United States by air. The portion of the NPRM that proposed changes in documentation requirements for travelers arriving by sea will not be finalized under this rule. Requirements for United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico departing from or entering the United States at land and sea ports-of-entry will be addressed in a separate, future rulemaking.

DATES: This final rule is effective on January 23, 2007.

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Abbreviations and Terms Used in This Document

ANPRM—Advance Notice of Proposed Rulemaking
APIS—Advance Passenger Information System
BCC—Form DSP–150, B–1/B–2 Visa and Border Crossing Card
CBP—Bureau of Customs and Border Protection
DHS—Department of Homeland Security
DMV—Department of Motor Vehicles
DOS—Department of State
FAST—Free and Secure Trade
IBWC—International Boundary and Water Commission
ICAO—International Civil Aviation Organization
INA—Immigration and Nationality Act
INS—Immigration and Naturalization Service
IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004
LPR—Lawful Permanent Resident
MMD—Merchant Mariner Document
MODU—Mobile Offshore Drilling Unit
NATO—North Atlantic Treaty Organization
NPRM—Notice of Proposed Rulemaking
OCS—Outer Continental Shelf
OTTI—Office of Travel & Tourism Industries
SENTRI—Secure Electronic Network for Travelers Rapid Inspection
TSA—Transportation Security Administration
TWIC—Transportation Worker Identification Card
US–VISIT—United States Visitor and Immigrant Status Indicator Technology Program
WHTI—Western Hemisphere Travel Initiative

I. Background

For a detailed discussion of the current documentation requirements for travelers entering the United States from within the Western Hemisphere, the statutory and regulatory histories, and the applicability of the rule related to specific groups, please see the NPRM published on August 11, 2006, at 71 FR 46155.

A. Documentation Requirements Prior to the Effective Date of This Rule

The documentation requirements for travelers entering the United States by air generally depend on the nationality of the traveler and whether or not the traveler is entering the United States from a country within the Western Hemisphere. The following is an overview of the documentation requirements for citizens of the United States, Canada, British Overseas Territory of Bermuda, and Mexico who enter the United States at air ports-of-entry prior to the effective date of this rule.

1. U.S. Citizens

U.S. citizens must possess a valid U.S. passport to depart from or enter the

United States.[1] However, this passport requirement has not applied to U.S. citizens who depart from or enter the United States from within the Western Hemisphere other than from Cuba.[2] United States citizens have been required to satisfy the inspecting officers of their identities and citizenship. Accordingly, U.S. citizens have not been required to present a valid passport when entering the United States by air from within the Western Hemisphere other than Cuba.[3]

2. Nonimmigrant Aliens From Canada and the British Overseas Territory of Bermuda

Each nonimmigrant alien arriving in the United States must present a valid unexpired passport issued by his or her country of citizenship and, if required, a valid unexpired visa issued by a United States embassy or consulate abroad.[4] Nonimmigrant aliens entering the United States must also satisfy any other applicable entry requirements (*e.g.*, United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT)). In most cases, Canadian citizens and citizens of the British Overseas Territory of Bermuda (Bermuda) have not been required to present a valid passport and visa when entering the United States as nonimmigrant visitors from countries in the Western Hemisphere.[5] These travelers have been required to satisfy the inspecting CBP officer of their identities and citizenship at the time of their application for admission.[6]

3. Mexican Citizens

Mexican citizens are generally required to present a valid unexpired passport and visa when entering the United States. However, Mexican citizens arriving in the United States at ports-of-entry who possess a Form DSP–150, B–1/B–2 Visa and Border Crossing Card (BCC)[7] currently may be admitted without presenting a valid passport if they are coming from contiguous territory.[8] While the use of a BCC without a passport is atypical in the air environment, it has been permitted.

B. Statutory and Regulatory History

On December 17, 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA).[9] Section 7209 of IRTPA, as amended by the Department of Homeland Security Appropriations Act of 2007, provides that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require travelers entering the United States to present a passport, other document, or combination of documents, that are ''deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship.'' As a result, United States citizens and nonimmigrant aliens from Canada, Mexico, and Bermuda will be required to comply with the new documentation requirements.

On September 1, 2005, the Department of Homeland Security (DHS) and the Department of State (DOS) published in the **Federal Register** at 70 FR 52037, an advance notice of proposed rulemaking (ANPRM) that announced that DHS and DOS were planning to amend their respective regulations to implement section 7209 of IRTPA. For further information, please see the ANPRM document that was published in the **Federal Register** on September 1, 2005, at 70 FR 52037.

On August 11, 2006, DHS and DOS published in the **Federal Register** at 71 FR 46155, an NPRM that announced that DHS and DOS were planning to amend their respective regulations to implement section 7209 of IRTPA. The NPRM proposed that, with some exceptions, United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico traveling into the United States by air and sea from Western Hemisphere countries, be required to show a passport. The NPRM did not propose changes to the documentation requirements at land border ports-of-entry.

The NPRM proposed that the passport requirement would apply to all air and most sea travel, including commercial air travel and commercial sea travel. According to the NPRM, there were two categories of travel and one category of traveler that would not be subject to the passport requirement proposed for air and sea travel, but would be addressed in the second phase rulemaking for land border travel. First, the NPRM provided that the passport requirement would not apply to pleasure vessels used exclusively for pleasure and which are not for the transportation of persons or property for compensation or hire. Second, the NPRM stated that the passport requirement would not apply to travel by ferry. Finally, the NPRM provided that the passport requirement would not apply to United States citizen members of the Armed Forces on active duty.

The NPRM also proposed to designate two documents, in addition to the passport, as sufficient to denote identity and citizenship under section 7209, and acceptable for air and sea travel. The first document was the Merchant Mariner Document (MMD) or ''z-card'' issued by the United States Coast Guard (Coast Guard) to Merchant Mariners. The second document was the NEXUS Air card when used with a NEXUS Air kiosk.[10]

On October 4, 2006, the President signed into law the Department of Homeland Security Appropriations Act of 2007 (DHS Appropriations Act of 2007).[11] Section 546 of the DHS Appropriations Act of 2007 amended section 7209 of IRTPA by stressing the need for DHS and DOS to expeditiously implement the requirements by the earlier of two dates, June 1, 2009, or three months after the Secretaries of Homeland Security and State certify that certain criteria have been met. The section requires ''expeditious[ ]'' action and states that requirements must be satisfied by the ''earlier'' of dates identified. By using this language, the drafters expressed an intention for rapid action.[12] Congress also expressed an interest in having the requirements for land and sea implemented at the same

[1] Section 215(b) of the Immigration and Nationality Act (INA), 8 U.S.C. 1185(b).

[2] *See* 22 CFR 53.2(b), which waived the passport requirement pursuant to section 215(b) of the INA, 8 U.S.C. 1185(b).

[3] In lieu of a passport, U.S. citizens have been permitted to present a variety of documents to establish their identity and citizenship and right to enter the United States. A driver's license issued by a state motor vehicle administration or other competent state government authority is a common form of identity document. Citizenship documents generally include birth certificates issued by a United States jurisdiction, Consular Reports of Birth Abroad, Certificates of Naturalization, and Certificates of Citizenship.

[4] Section 212(a)(7)(B)(i) of the INA, 8 U.S.C. 1182(a)(7)(B)(i).

[5] 8 CFR 212.1(a)(1) (Canadian citizens) and 8 CFR 212.1(a)(2) (Citizens of Bermuda). *See also* 22 CFR 41.2.

[6] Entering aliens may present any evidence of identity and citizenship in their possession. Individuals who initially fail to satisfy the examining CBP officer may then be required to provide further identification and evidence of citizenship such as a birth certificate, passport, or citizenship card.

[7] A BCC is a machine-readable, biometric card, issued by the Department of State, Bureau of Consular Affairs.

[8] 8 CFR 212.1(c)(1)(i). *See also* 22 CFR 41.2(g). If they are only traveling within a certain geographic area along the United States' border with Mexico: usually up to 25 miles from the border but within 75 miles under the exception for Tucson, Arizona, they do not need to obtain a form I–94. If they travel outside of that geographic area, they must obtain an I–94 from CBP at the port-of-entry. 8 CFR 235.1(f)(1).

[9] Pub. L. 108–458, 118 Stat. 3638 (Dec. 17, 2004).

[10] Air Nexus is an airport border clearance pilot project.

[11] Pub. L. 109–295, 120 Stat. 1355 (Oct. 4, 2006).

[12] *Id.* at § 546. See Congressional Record, 109th cong. 2nd sess., September 29, 2006 at H7964.

time as part of the DHS Appropriations Act of 2007.[13]

On October 17, 2006, to meet the documentary requirements of the Western Hemisphere Travel Initiative and to facilitate the frequent travel of persons living in border communities, the Department of State, in consultation with the Department of Homeland Security, proposed to develop a card-format passport, called the Passport Card, for international travel by United States citizens through land and sea ports of entry between the United States, Canada, Mexico, or the Caribbean and Bermuda.[14]

II. Summary of Changes From NPRM and New Document Requirements

Under this final rule, beginning January 23, 2007, United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at air ports-of-entry will generally be required to present a valid passport. Accordingly, all aviation passengers and crew, including commercial flights and general aviation flights (i.e., private planes), who arrive at air ports-of-entry in the United States from countries within the Western Hemisphere will be required to possess a valid passport beginning January 23, 2007. The only exceptions to this requirement would be for United States citizens who are members of the United States Armed Forces traveling on active duty; travelers who present a Merchant Mariner Document traveling in conjunction with maritime business; and travelers who present a NEXUS Air card used at a NEXUS Air kiosk.

This final rule does not change the documentation requirements for United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico who arrive at sea ports-of-entry. Based on DOS' recent proposal to allow the use of the Passport Card in the sea environment, Congress' intent with respect to the land and sea environments, and the public comments, DHS and DOS have decided to defer decisions on the proposed changes to documentation requirements for arrivals by sea. Arrivals by sea and land will be addressed in a separate, future rulemaking.

III. Discussion of Comments

In both the ANPRM and NPRM, DHS and DOS sought public comment to assist the Secretary of Homeland Security to make a final determination concerning which document, or combination of documents, other than valid passports, would be accepted at ports-of-entry.

DHS and DOS received 2,062 written comments in response to the ANPRM and 104 written comments in response to the NPRM. The majority of the comments (1,910 from the ANPRM) addressed only potential changes to the documentation requirements at land border ports-of-entry. One hundred and fifty-two comments from the ANPRM addressed changes to the documentation requirements for persons arriving at air or sea ports-of-entry. Comments in response to both the ANPRM and NPRM were received from a wide range of sources including: private citizens; businesses and associations; local, state, federal, and tribal governments; members of the United States Congress; and foreign government officials.

Since this final rule addresses solely the changes to the documentation requirements for travelers arriving at air ports-of-entry, the comments received in response to the ANPRM and NPRM regarding arrivals by land and sea will not be addressed in this rulemaking. A summary of the comments from both the ANPRM and the NPRM primarily regarding air travel follows with complete responses to the comments.

A. General

Forty-nine commenters agreed with a passport requirement.

In contrast, eleven commenters expressed general disagreement with a passport requirement for travel within the Western Hemisphere where such documentation was previously not required.

B. Timeline

Comment

We received many comments regarding the implementation timeline for new documentation requirements. Nine commenters stated that the requirements for all air, sea, and land-border crossings should be implemented without delay. Two commenters agreed with the timelines for a phased-in approach. One commenter stated that the January 1, 2007, timeline announced in the ANPRM should be maintained.

Forty-five commenters asked for a single implementation date for land, air, and sea. Fifty-seven commenters requested that the implementation date be delayed to December 31, 2007, or later. Several commenters asserted that the implementation date for cruise passengers not occur earlier than the statutory deadline. Among the reasons to support a single and delayed implementation date, commenters asserted that one timeline would be more fair, provide adequate time for travelers to comply with the new regulations, and allow time to communicate the requirements to the public. One commenter reasoned that one timeline would ensure that infrastructure and technology is in place to support the initiative. Another commenter requested that changes to the requirements for commercial fishermen transiting between Alaska and Washington be delayed and addressed with persons arriving by pleasure boats and ferries, not with commercial vessels as proposed. One commenter requested that general aviation have the same implementation date as pleasure boats and land-border crossings.

Response

DHS and DOS agree with the commenters that the implementation date for new documentation requirements for travelers arriving by sea should be delayed. In the NPRM, DHS and DOS proposed to implement new documentation requirements for travelers arriving at air ports-of-entry and most sea ports-of-entry. However, based on DOS' recent Passport Card proposal which would allow the Passport Card for sea travel, the Departments have decided to delay new requirements for arrivals by sea until the Passport Card is available for use in the sea environment. Delaying the implementation date for the sea environment will allow the Departments to develop the Passport Card and enhance the infrastructure and technology to support the Passport Card for arrivals by sea. This is also consistent with Congress' intent to implement the land and sea environments at the same time as expressed in section 546 of the DHS Appropriations Act of 2007. Additionally, this delay will address the concerns for commercial fishermen transiting between Alaska and the United States by not implementing new requirements until the Passport Card is operational. It will also be less confusing to the public to implement sea and land requirements, both of which would accept the Passport Card, at the same time. Therefore, the documentation requirements for travelers arriving by sea, whether aboard commercial vessels, pleasure vessels, or ferries, will not change under this final rule.

DHS and DOS have determined that the proposed implementation date of January 23, 2007, is appropriate for air travel because of operational considerations and available resources. This phased approach is essential

[13] *Id.*

[14] 71 FR 60928.

because a staggered implementation in advance of the statutory deadline will enhance security requirements using existing infrastructure while allowing the Departments time to acquire and develop resources to meet the increased demand for sea and land-border entries.

C. Passports

1. General

Comment

One commenter raised concerns about the security of U.S. and foreign passports, stating that passports may be easily falsified or altered. Another commenter stated that terrorists could misuse passports. One commenter stated that Radio Frequency Identification (RFID), as related to electronic passports, poses a safety concern because it can be read from a distance.

Response

Passports are acceptable at the border as a matter of law.

The primary purpose of the passport has always been to establish citizenship and identity. It has been used to facilitate travel to foreign countries by displaying any appropriate visas or entry/exit stamps. Passports are globally interoperable, consistent with worldwide standards, and usable regardless of the international destination of the traveler.

U.S. passports incorporate a host of security features. These security features include, but are not limited to, rigorous adjudication standards and document security features. The adjudication standards establish the individual's citizenship and identity and ensure that the individual meets the qualifications for a U.S. passport. The document security features include digitized photographs, embossed seals, watermarks, ultraviolet and fluorescent light verification features, security laminations, micro-printing, and holograms to authenticate passports. A U.S. passport is a document that is adjudicated by trained DOS experts and issued to persons who have documented their United States identity and citizenship by birth, naturalization or derivation. Applications are subject to additional Federal government checks to ensure the applicants are eligible to receive a U.S. passport under applicable standards (for example, those subject to outstanding federal warrants for arrest are not eligible for a U.S. passport).

Foreign passports accepted for admission to the United States must meet the standards set out in International Civil Aviation Organization (ICAO) 9303. Passports issued by Canada, Mexico, and Bermuda meet these international standards and are, therefore, acceptable. Finally, the Customs and Border Protection (CBP) Officer verifies and authenticates the passport presented for entry.

Privacy and security concerns related to RFID technology were addressed in extensive detail in the final rule for electronic passports published by DOS on October 25, 2005, at 70 FR 61553.

Comment

Two commenters asked if non-U.S. citizens would be allowed to depart the United States without a passport, regardless of their intent to return to the United States.

Response

Currently, if an individual is not required to present a passport upon entry to the United States, that individual does not need to present a passport upon exit. Under this final rule, however, if an individual must present a passport upon entry, then that individual will also need to bear one upon exit. In the event that non-U.S. citizens' passports are lost or stolen, those individuals would need to contact their nearest consular office to have the documents replaced prior to departing the United States.

2. Cost of Passports

Comment

Nineteen commenters stated that the cost for a U.S. passport is high and that the process for obtaining a passport should be made easier. One commenter stated that while the passport cost is ''high'' it should not outweigh safety and security. Twenty-one commenters stated that the cost for a U.S. passport is high. Several commenters requested that DOS offer discounted or free passports to certain groups such as students, senior citizens, families with children, welfare recipients, group purchases, and early purchasers. Two commenters stated that the cost of a passport should be significantly lessened for citizens below the poverty level. Six commenters stated that the passport cost should be greatly reduced.

Response

At this time, DOS does not intend to offer discounts or no-fee passports for any of the specific groups mentioned. The passport fee reflects the actual costs of adjudicating a passport application and producing a passport. Because the requirements for adjudication and production remain the same for all applicants, DOS does not intend to offer discounts.

Comment

One commenter to the NPRM stated that the cost for a Canadian passport is high and that the process for obtaining a passport should be made easier.

Response

While the U.S. Government is working closely with passport agencies throughout the Western Hemisphere on WHTI and other travel document security matters, each nation's government ultimately controls the process and cost for obtaining a passport. The application process for and cost of a Canadian Government issued document is outside the scope of this rulemaking.

3. Obtaining Passports

Comment

One commenter stated that the process for obtaining a passport should be made easier. One commenter stated that the passport application process is very burdensome for travelers in remote areas.

Response

While some applicants may find the current process burdensome, the application process is standard across the U.S. and is intended to establish nationality, identity, and entitlement to the issuance of a U.S. passport. Due to statutory requirements and established regulations, a complete end-to-end electronic submission for the DS–11 form (Application for a U.S. Passport) is currently not possible. However, in an effort to provide customers with an electronic alternative to the paper-based form, the DS–11 form is posted on the DOS Web site, where it can be filled out online and printed for submission. There are over 7,500 acceptance facilities nationwide including many Federal, state and probate courts, post offices, some public libraries and a number of county and municipal offices. Additionally, there are 14 regional passport agencies and 1 Gateway City Agency that serve customers who are traveling within 2 weeks or who need foreign visas for travel. Complete information on how to obtain, replace, or change a passport can be found at the DOS Web site: *http://travel.state.gov/passport/passport_1738.html.*

4. Children

Comment

Thirty-nine commenters asked to allow travelers under the age of 16 to be exempt from a passport requirement and able to use a birth certificate as sufficient proof of identity and

citizenship. One commenter suggested simplifying passport procedures for children under 16.

One commenter stated that children under 16 should not be exempt from a passport requirement in the Western Hemisphere.

Response

The United States Government currently requires all U.S. citizens, including children, arriving from countries outside the Western Hemisphere to provide a passport when entering the United States. IRTPA, as amended, does not contain a general exemption from providing a passport or other document designated by DHS for children under the age of 16 when entering the United States from Western Hemisphere countries. Consequently, children under the age of 16 arriving from Western Hemisphere countries will be required to present a passport when entering the United States by air. Requiring passports for children departing from or entering the United States will also assist the U.S. Government, as well as foreign governments within the Western Hemisphere, to prevent child abductions. Of the nearly 600 international parental child abductions brought to the attention of the State Department each year, outgoing parental abductions of American children from the U.S. to Canada and Mexico represent about one-quarter.

5. DOS Issuance Capacity

Comment

Seven commenters expressed concern that DOS may not be able to issue several million new passports in the timeframe required and without significant delay.

Two commenters to the NPRM expressed concern about whether DHS and DOS would be able to successfully implement the new passport requirements by January 8, 2007.

Response

DOS appreciates the commenters' concerns and is already expanding passport production capacity to meet the additional demand for passports. DOS will be able to meet a significant increase in demand from the more than 10 million passports produced in fiscal year 2005. DOS estimates a 25 percent increase in passport applications so far in fiscal year 2006. DOS has increased passport production capacity with an aim towards processing 16 million passports in fiscal year 2007 and 19 million passports in fiscal year 2008. The Departments have taken the appropriate measures to ensure the implementation of the new requirements by the implementation date.

D. Alternative Documents

1. General

Comment

Twenty-four commenters asked for a clear definition of other secure documents that will be accepted in addition to a passport. Eight commenters asked that NEXUS, SENTRI, and FAST cards be accepted in lieu of a passport. Three commenters stated that other travel documents should be used in lieu of a passport where practicable.

One commenter asked that WHTI should be linked to the evolution of the Registered Traveler program.

Response

Other acceptable documents are designated in this rule by the Secretary of DHS to sufficiently establish identity and citizenship at airports. The documents designated in this rule are sufficiently secure to impede counterfeiting and alterations for fraudulent purposes. Along with the passport, the Secretary of Homeland Security is designating the MMD and the NEXUS Air card when used at a NEXUS Air kiosk as sufficient to denote identity and citizenship under section 7209 and acceptable for air travel. Currently, the rest of the NEXUS program cards, as well as SENTRI and FAST cards, are accepted only at designated lanes at land-border ports-of-entry and not in the air environment. Currently, the Transportation Security Administration's (TSA) Registered Traveler program is for domestic travel only.

Comment

One commenter asked that a Transportation Worker Identification Card (TWIC) be designated as an acceptable document to denote citizenship and identity.

Response

A TWIC card will not be suitable as an alternative document because it does not denote citizenship and is not intended as a travel document. Although a TWIC card would positively identify the bearer of the card, citizenship would have to be established through a paper-based document because a TWIC card does not provide citizenship information. Because, as proposed, TWIC cards may be issued to non-U.S. citizens and they do not denote citizenship, they could not be used in place of passports. In addition, the TWIC could not be read by current CBP technology installed in air ports-of-entry. While there will be information embedded in the chip on the TWIC, only the name of the individual and a photo ID are apparent to a CBP officer upon presentation. CBP could not validate this document at primary inspection for the reasons outlined in the next section addressing the use of birth certificates.

Comment

One commenter asked that an International Boundary Water Commission (IBWC) identification be acceptable for land, air, and sea travel.

Response

In the NPRM, DHS and DOS clarified that documentation requirements for direct and indirect employees of the IBWC (Article 20 of the 1944 Treaty Between the United States and Mexico regarding division of boundary water and the functions of (IBWC), TS 922, Bevan 1166, 59 Stat. 1219; 8 CFR 212.1(c)(5)) crossing the United States-Mexico border while on official business would not change under this final rule.

2. Driver's License and Birth Certificate

Comment

We received many comments stating that driver's licenses and birth certificates should be acceptable to denote an individual's citizenship and identity. Many commenters stated that these documents are affordable and easily obtainable and their acceptance would not dissuade travel. Several commenters stated that because a driver's license and birth certificate are most commonly used to obtain a passport, these documents should also be sufficient to establish citizenship and identity at ports-of-entry.

Response

DHS and DOS disagree with the commenters. Because birth certificates and driver's licenses are issued by numerous government entities, there is no standard format for either document, and, at present, it is not possible to authenticate either document quickly or reliably. Some states only issue photocopies as replacements of birth certificates, some states issue replacement birth certificates by mail or through the Internet, and some states will not issue photo identification to minors. Both documents lack security features and are susceptible to counterfeiting or alteration. Neither the birth certificate nor the state-issued identification is designed to be a travel document. Birth certificates can easily

deteriorate when used frequently as travel documents because they are normally made from paper with a raised seal, and they cannot be laminated or otherwise protected from repeated use.

The U.S. birth certificate can be used as evidence of birth in the United States; however, it does not provide definitive proof of citizenship (e.g., children born in the U.S. to foreign diplomats do not acquire U.S. citizenship at birth). Highly trained passport specialists and consular officers abroad adjudicate passport applications, utilizing identity and citizenship documents (U.S. birth certificates, naturalization certificates, consular reports of birth abroad, etc.). These specialists have resources available, including fraud and document experts, to assist when reviewing documents and are not faced with the same time constraints as CBP officers at ports-of-entry. These factors explain why a birth certificate and driver's license may be sufficient documentary evidence of citizenship and identity for an application for a passport, but are not sufficient under WHTI for entry to the United States. In addition, there is no current way to validate that the person presenting the birth certificate for inspection is, in fact, the same person to whom it was issued. The lack of security features and the plethora of birth certificate issuers in the United States (more than 8,000 entities) currently make it difficult to reliably verify or authenticate a birth certificate. A state-issued photo identification provides positive identification with name, address, and photograph. However, a state-issued photo identification does not provide proof of citizenship.

3. Real ID Act Compliant Driver's Licenses

Comment

In response to the ANPRM, twenty commenters asked DHS and DOS to work with state governments on possible use of driver's licenses to verify U.S. citizenship. In response to the NPRM, eleven commenters asked DHS and DOS to accept driver's licenses that are in compliance with the REAL ID Act of 2005.[15]

Response

As previously stated, driver's licenses currently do not denote citizenship. The REAL ID specifications are still under consideration, therefore the Secretary of Homeland Security cannot designate these documents for travel in the Western Hemisphere. Once documents are available that comply with the requirements of the REAL ID Act, the Secretary may consider these documents for WHTI purposes. DHS will be issuing a proposed rule implementing REAL ID driver's license standards. At that time, DHS would encourage States interested in developing driver's licenses that will meet both the REAL ID and WHIT requirements to work closely with us to that end.

4. Border Crossing Cards

Comment

In response to the ANPRM, two commenters recommended that Border Crossing Cards (BCCs) be acceptable documentation for citizens of Mexico entering the United States through airports. One commenter to the NPRM stated that the proposed rule would eliminate the BCC as an acceptable entry document.

Response

At this time, DHS and DOS do not support allowing the BCC without any additional documents in the air environment. The BCC is not compatible with CBP's Advance Passenger Information System (APIS), which collects data from travelers prior to their arrival in and departure from the United States, and thus the BCC does not meet the security objectives of WHTI. Accordingly, DHS has not designated the BCC as a document sufficient to denote identity and citizenship for the purposes of air travel into the United States when used by itself. However, this final rule does not change the status of the BCC as a valid entry document at sea and land-border ports-of-entry.

5. Merchant Mariner Cards

Comment

We received two comments to the NPRM that endorse the proposal that a Merchant Mariners' Document (MMD) be accepted as proof of citizenship and identity. These commenters also asserted that the MMD should also be accepted for legal aliens because a U.S. Coast Guard-issued MMD will provide the required proof of citizenship and identity for these individuals.

Response

The U.S. Coast Guard primarily issues MMDs to U.S. citizen Merchant Mariners.[16] The Secretary of Homeland Security has determined that an MMD, when used in conjunction with maritime business, would be sufficient to denote identity and citizenship when presented upon arrival at an air port-of-entry. Accordingly, under this rule, United States citizens who possess an MMD would continue to be exempt from the requirement to present a passport when arriving in the United States at air ports-of-entry. However, the Coast Guard has proposed to phase-out the MMD over the next five years and streamline all existing Merchant Mariner credentials. DHS will accept the MMD as long as it is an unexpired document. We also note that United States citizen Merchant Mariners serving on U.S. flag vessels are eligible for no-fee U.S. passports upon presentation of a letter from the employer and an MMD, in addition to the standard evidence of citizenship and identity.

6. NEXUS Air Cards

Comment

Eleven commenters recommended that the NEXUS Air program be accelerated and expanded. One commenter also added that the U.S. government should attempt to reduce the costs of programs such as NEXUS Air.

Response

NEXUS Air is an airport border clearance pilot project implemented at one airport in Vancouver, Canada, by CBP and the Canada Border Services Agency pursuant to the Shared Border Accord and Smart Border Declaration between the United States and Canada. The NEXUS Air alternative inspection program allows pre-screened, low-risk travelers to be processed more efficiently by United States and Canadian border officials. CBP is planning to expand the program beyond the Vancouver international airport to other Canadian airports, but does not intend to lower the costs of the program at this time. Travelers interested in joining the NEXUS Air or any other CBP-sponsored trusted traveler program should consult the CBP Web site (*http://www.cbp.gov*) for future expansion plans, current availability, acceptance, and instructions on how to enroll in the program.

[15] Pub. L. 109–13, codified at 49 U.S.C. 30301 note.

[16] In very limited circumstances, foreign nationals who are enrolled as students at the U.S. Merchant Marine Academy may obtain an MMD. However, the number of international students who may attend the Academy at any one time is 30 (46 CFR 310.66); therefore, the number of MMDs issued to foreign nationals at any one time is limited to 30. These MMDs denote citizenship on their face and are valid only while a cadet in the U.S. Merchant Marine Academy (46 CFR 12.25–25). These foreign nationals will not be permitted to use the MMD for entry purposes.

7. Passport Cards

Comment

We received many comments asking DHS and DOS to develop low-cost alternative travel documents. Eight commenters stated that an alternative, secure travel document must be cost-effective and available in a timely fashion for the average traveler. Fifteen commenters asked that a low-cost travel card be developed. One commenter asked that a card replace the traditional passport book, stating that paper documentation is outdated. One commenter stated that the document should fit in a wallet and be more durable than the traditional passport book.

Two commenters stated that any technology contained in a secure travel document should be determined before an implementation date is finalized. Nine commenters stated that the Passport Card's scope should be expanded to all modes of travel between the U.S., Mexico, and Canada. One commenter stressed that the U.S. should work with Canada to develop a similar low-cost travel document in Canada. One commenter asked that a Passport Card be available for infrequent, as well as frequent, travelers.

Response

DOS, in consultation with DHS, has begun developing an alternative format passport: a card-format, limited-use Passport Card. Like a traditional passport book, the Passport Card will be a secure travel document that establishes the identity and citizenship of the bearer. The Passport Card is being designed to benefit those citizens in border communities who regularly cross the northern and southern borders every day where such travel is an integral part of their daily lives. As currently envisioned, it will be the size of a credit card and will be less expensive than a traditional passport book. The application process for the Passport Card will be the same as that for the passport book in that each applicant will have to establish United States citizenship, personal identity, and entitlement to obtain the document. DOS intends to make the Passport Card available by summer 2007. For more information see 71 FR 60928 (October 17, 2006). The Secretaries of DHS and DOS have worked closely with the Canadian and Mexican governments on numerous fronts, including the Security and Prosperity Partnership (SPP) of North America, the Smart Border Declaration, and the Shared Border Accord.

8. Tribal Documents

Comment

Three commenters to the NPRM stated that Native Americans should be able to use their Tribal documents in the air environment because treaty rights assure cross-border travel between the U.S. and Canada.

Response

Section 289 of the INA [17] provides that Native Americans born in Canada may ''pass the borders of the United States,'' provided they possess at least 50 percentum of Native American blood. Historically, the courts have addressed the right of Native Americans born in Canada to ''pass the borders of the United States'' in the context of land border crossings.[18] Case law has not expressly addressed the extension of the right to ''pass the borders of the United States'' by air.[19] Moreover, any right or privilege to ''pass the border'' does not necessarily encompass a right to ''pass the border'' without sufficient proof of identity and citizenship. Under the final rule, Native Americans born in Canada will be required to present a valid passport when departing from or entering the United States by air.

Regarding Native Americans born in the United States, Federal statutes apply absent some clear indication that Congress did not intend for them to apply.[20] IRTPA expressly applies to United States citizens and as a matter of law Native Americans born in the United States are United States citizens.[21] Moreover, Congress did not indicate any intention to exclude Native Americans born in the United States from the requirements of IRTPA. Under this final rule, therefore, Native Americans born in the United States will be required to present a valid passport when entering the United States by air.

E. Implementation and Effect on Specific Populations

Numerous commenters raised questions about how the new rule would be implemented and how it would affect specific populations.

1. General

Comment

Two commenters to the NPRM noted that a U.S. citizen cannot be denied entry to the United States. One commenter stated that the NPRM did not address U.S. citizens that arrive at ports-of-entry without a valid travel document.

Response

Section 215(b) of the INA requires U.S. citizens to bear passports unless excepted by the President. By section 7209, Congress has limited this exception authority to those individuals bearing other documents acceptable to the Secretary of Homeland Security.

Comment

Three commenters asked if they would need passports if the effective date of the rule falls between their departure and return dates. One commenter asked that CBP refrain from penalizing air carriers that transport travelers who, under the new passport requirements, are improperly documented.

Response

Persons returning to the United States after the effective date of implementation should plan to depart from the United States with documents sufficient to meet requirements that will be in place when they return. Current regulations do not contain penalty provisions for carriers that transport U.S. citizens to the United States without proper documentation. However, under the current law (8 U.S.C. 1323) carriers that transport non-U.S. citizens into the United States who are not properly documented are subject to penalties.

Comment

One commenter stated that the NPRM is contrary to U.S. obligations under international human rights law, free trade agreements, and U.S. statutes, including the International Covenant on Civil and Political Rights, the Charter of the Organization of American States, the North American Free Trade Agreement (NAFTA), and the NAFTA Implementation Act, because the rules restrict free movement of people in the Western Hemisphere.

Response

By requiring a valid passport as an entry document, DHS and DOS are not denying U.S. or non-U.S. citizens the ability to travel to and from the United

[17] 8 U.S.C. 1359.

[18] *See Akins* v. *Saxbe,* 380 F. Supp. 1210, 1221 (D. Maine 1974) (''[I]t is reasonable to assume that Congress'' purpose in using the Jay Treaty language in the 1928 Act was to recognize and secure the right of free passage as it had been guaranteed by that Treaty.'') *See also United States ex rel. Diabo* v. *McCandless,* 18 F.2d 282 (E.D. Pa. 1927), aff'd, 25 F.2d 71 (3rd Cir. 1928).

[19] *See Matter of Yellowquill,* 16 I. & N. Dec. 576 (BIA 1978).

[20] *See Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 120 (1960); *Taylor* v. *Ala. Intertribal Council Title IV J.T.P.A.,* 261 F.3d 1032, 1034–1035 (11th Cir. 2001).

[21] 8 U.S.C. 1401(b).

States. Requiring sufficient proof of identity and citizenship through presentation of a passport or other acceptable document upon entry to the United States is fully within DHS and DOS's authority pursuant to 8 U.S.C. 1182(d)(4)(B) and 1185(b).

Comment

One commenter to the NPRM stated that this rule violates the Convention on International Civil Aviation (ICAO), claiming that, under Annex 9, a contracting State shall allow airline crew possessing a crewmember certificate to enter the country without a passport or visa.

Response

The commenter cited provision 3.74 in Annex 9 of the Convention on ICAO. However, on March 25, 2004, provision 3.74 was amended and replaced with a new provision 3.76 (Amendment 19). Under the new provision, contracting states shall waive the visa requirement for arriving crewmembers presenting crewmember certificates, when arriving in a duty status on an international flight and seeking temporary entry for the period allowed by the receiving state before joining their next assigned flight in a duty status. Therefore, the exception cited by the commenter only applies to visas and not to passports. Therefore, requiring a valid passport does not violate the Convention on ICAO.

Comment

One commenter to the NPRM stated that because the passport is machine readable, it would speed up the immigration process. Another commenter stated that such timesavings are not benefits because the cost has been ''shifted'' to citizens.

Response

As stated in the NPRM, by requiring the vast majority of air passengers to possess a passport, CBP officers would reduce the time and effort used to manually enter passenger information into the computer system on arrival because the officer can quickly scan the machine-readable zone of the passport to process the information using standard passport readers used for all machine readable passports worldwide. It is difficult to precisely determine the improved efficiencies resulting from limiting the acceptable documents in the air environment. Based on information from CBP field operations, CBP estimates that presenting secure and machine-readable documentation may typically save CBP officers from 5 to 30 seconds per air passenger processed. This could result in an annual cost savings of $1.7 million to $10.4 million.

2. Outer Continental Shelf

Comment

One commenter to the NPRM stated that the proposed regulations do not clearly address the offshore community, creating ambiguity for CBP officers to either not require a passport or to require them based on the CBP officer's knowledge of offshore operations. This commenter also suggested that the regulations be amended to include a definition of a Mobile Offshore Drilling Units (MODU). Six commenters suggested that the regulations expressly provide that U.S. citizens should be exempt from bearing a valid passport when entering or departing the United States when traveling as an employee of an offshore drilling company directly between the United States and a MODU operating, attached, or transiting between well sites on the United States Outer Continental Shelf (OCS).

Response

DHS and DOS do not intend to create an exemption in the regulations specifically for employees on the United States OCS. When these employees have not departed the United States or have already been cleared by CBP upon entry from a foreign port or place, they will not be required to present a passport upon re-entry. As described in the NPRM, offshore workers who work aboard a MODU attached to the United States OCS and travel to and from such a MODU would not need to possess a passport to re-enter the United States if they depart the United States and do not enter a foreign port or place. DHS and DOS note that offshore employees on MODUs underway, which are not considered attached, would not need to present a passport for re-entry to the United States mainland if they do not enter a foreign port or place during transit. However, an individual who travels to a MODU from outside the United States OCS and, therefore, has not been previously inspected and admitted to the United States, would be required to possess a passport and visa when arriving at the United States port-of-entry by air. Likewise, an individual who travels by air to a foreign flagged MODU, who has not been previously inspected or admitted to the United States by CBP, must present a passport or alternative document and, if required, a visa because they have traveled to a foreign port or place.

As stated previously, arrivals by sea will not be finalized in this rule but will be addressed in a future rulemaking for sea and land-border ports-of-entry.

3. Emergencies

Comment

Three commenters expressed concern about the passport requirement and emergencies (medical, natural disasters) that might require air transport across a border.

Response

IRTPA provides for situations in which documentation requirements may be waived on a case-by-case basis for unforeseen emergencies or ''humanitarian or national interest reasons.'' See section 7209(c)(2) of IRTPA.

F. Outside the Scope of This Rulemaking

Comment

One commenter to the NPRM made numerous comments on the technical specifications for DOS's Passport Card.

Response

Comments regarding the technical specifications for the DOS-issued Passport Card are beyond the scope of this rule; however, please see the recently published NPRM at 71 FR 60928 (Oct. 17, 2006).

Comment

One commenter stated that the NPRM correctly acknowledges that the Lawful Permanent Resident (LPR) card is a sufficiently secure document issued by the U.S. government.

Response

DHS and DOS are allowing the Permanent Resident Card to be presented upon entry to the U.S. not because the Secretary has made a determination that this is an acceptable alternative document, but because LPRs are not covered by section 7209 of IRTPA. Section 211(b) of the INA specifically establishes that an LPR can present a valid, unexpired Form I–551 (Permanent Resident Card) alone when applying for readmission to the U.S. after being absent from the U.S. for less than one year. Form I–551 is a secure, fully adjudicated document that can be verified and authenticated by CBP at ports-of-entry. DHS published a notice of proposed rulemaking in the **Federal Register** on July 27, 2006, that proposes to collect and verify the identity of LPRs arriving at air and sea ports-of-entry, or requiring secondary inspection at land ports of entry, through US–VISIT. [22]

[22] See 71 FR 42605.

G. Public Relations

Comment

We received seven comments recommending that the U.S. Government work multilaterally with Canada and Mexico to address WHTI issues.

Response

The Secretaries of DHS and DOS have worked closely with the Canadian and Mexican governments on numerous fronts, including the Security and Prosperity Partnership (SPP) of North America, the Smart Border Declaration, and the Shared Border Accord. The objectives of the initiatives are to establish a common approach to security to protect North America from external threats, prevent and respond to threats within North America, and further streamline the secure and efficient movement of legitimate traffic across our shared borders. The Secretaries are committed to working with our international partners to establish a common security strategy.

Comment

We received fifty-seven comments to the ANPRM on public outreach and the importance of educating the traveling public about the passport requirements for the Western Hemisphere. Several commenters asked that DHS and DOS work with the private sector on an aggressive outreach campaign.

Response

DHS and DOS are committed to an effective and intensive communications strategy during the implementation of WHTI. To that end, the Departments will continue to issue detailed press releases, address the public's frequently asked questions, supply travel information on their Web sites, and hold public meetings in affected communities.

H. Regulatory Analyses

1. General

Comment

We received ten comments expressing concern that this rule will adversely affect spontaneous travel to destinations in the Western Hemisphere.

Response

This rule may have an impact on unplanned travel within the Western Hemisphere. We found that most air travelers make their plans in advance of their travel date and can obtain or already possess a passport (see the Regulatory Assessment that accompanies this rule which is available on the public docket). Additionally, travelers in need of a passport quickly may request expedited processing at an additional cost. We believe that the majority of travelers will be able to obtain a passport in time to make their scheduled trips. Travelers are strongly encouraged to obtain the necessary documentation in advance of all international travel.

Comment

We received thirty-eight comments expressing concern that the rule would negatively affect tourism by impeding travel within the Western Hemisphere. Several commenters stated they would no longer take trips to Canada, Mexico, and the Caribbean if these rules go into effect.

Response

This rule could have an impact on tourism. These impacts were explored in detail in the Regulatory Assessment for this rule, which was made available upon publication of the NPRM. [23] An updated Regulatory Assessment is published with this final rule and is available on the docket.

2. Executive Order 12866

Comment

Nine commenters to the NPRM argued that the economic analysis does not sufficiently address negative impacts to the economy.

Response

While these commenters were dissatisfied with the economic analysis, none of them submitted specific information that would enhance the current analysis, nor did they submit alternative analyses that more robustly consider the impacts on the U.S. and foreign economies. The direct costs to the traveling public, which were the focus of the Regulatory Assessment, were extensively explored, researched, and analyzed.

According to the Office of Management and Budget (OMB) Circular A–4, an economic analysis should ''look beyond the direct benefits and direct costs and consider any important ancillary benefits and countervailing risks'' (page 26). This Circular notes, however, ''some important benefits and costs * * * may be inherently too difficult to quantify or monetize given current data and methods'' (pages 26–27). Given the data available for this analysis and the limitations of using this data to assess indirect costs of the rule, CBP's Regulatory Assessment concentrated on the direct impacts to U.S. citizens who will need to obtain a passport in order to continue traveling by air in the Western Hemisphere, including the costs to the traveler of opting to forgo travel. In that assessment, CBP anticipated that the vast majority (96 percent) of U.S. travelers to Western Hemisphere destinations already have or will obtain a passport and will continue traveling in the Western Hemisphere. As stated in the assessment, we cannot look at the number of travelers who choose to forgo travel as a result of the rule and determine what the welfare losses to travelers or gains and losses to different players in different economies will be—we simply cannot determine adequately what each individual traveler (or even bloc of travelers) will do to express his preferences for goods and services given a change in price in one portion of his travel cost. Thus, again per Circular A–4, we presented the relevant quantitative information available, its strengths and weaknesses, and a description of the non-quantified effects. Furthermore, CBP conducted a formal probabilistic modeling in the form of a Monte Carlo analysis to measure the uncertainty and variance of the estimates presented. We discussed the industries we expect to be affected by this rule and noted that any impacts will be spread over wide swaths of the domestic and foreign economies.

It is extremely difficult to estimate the indirect costs with any certainty. The analysis made many assumptions regarding direct costs that may carry errors or over- or underestimate indirect costs. Travelers are faced with complex decisions and myriad substitutes for particular trips that could still maximize their utility. There is evidence in the travel literature cited throughout the analysis that price may not be a very big determinant of destination selection. CBP chose to estimate direct costs using demand elasticities to avoid misrepresenting direct costs (we would not want to assume that travelers' decisions will be completely unaffected by the passport requirement), knowing that we may then be overstating the simplicity of the traveler's decision-making process. In doing this, we have likely overstated indirect costs.

Because such a small percentage of the covered traveling population is likely to forgo travel (even with our application of the binary choice for the traveler), the macro-economic impacts of the proposed rule are likely small as well. Unfortunately, given the dearth of specific data, we have only rough estimates of how many people travel, where they come from, and where they

[23] *See* NPRM at 71 FR 46155.

go. We know even less about how they will alter their behavior if they do, in fact, forgo obtaining a passport.

Comment

One commenter to the NPRM stated that the economic analysis cannot be considered reliable because it examines a program that is not yet in place.

Response

Per Executive Order 12866, an economic analysis is required for all major rulemakings prior to final implementation. This analysis must contain an identification of the regulatory ''baseline'' as well as the anticipated costs and benefits of the rule on relevant stakeholders. The analysis prepared for the NPRM was reviewed by OMB in accordance with Executive Order 12866 and OMB Circular A–4.

Comment

One commenter stated that the only alternative to the proposed rule considered was the current practice of accepting existing documents (driver's licenses and birth certificates).

Response

Executive Order 12866 and OMB Circular A–4 require the full analysis of regulatory alternatives as part of the rulemaking development process. As presented in the Regulatory Assessment published with the NPRM and finalized with this final rule, there were five alternatives to the proposed rule considered and analyzed. The first was the ''No Action'' alternative. The second was to require United States travelers to present a state-issued photo ID and proof of citizenship. The third was to designate TWIC as an acceptable document for United States citizens. The fourth was to designate the Border Crossing Card (BCC) as an acceptable document for Mexican citizens. The fifth was to develop and designate a low-cost Passport Card as an acceptable document for United States citizens. OMB reviewed the analysis prepared for the NPRM in accordance with Executive Order 12866.

Comment

One commenter stated that the Regulatory Assessment's assertion that primarily foreign businesses will be affected by the rule is false because Canadians spend more money in the U.S. than Americans spend in Canada.

Response

This commenter appears to have incorrectly focused exclusively on travel between the U.S. and Canada. It is important to remember that U.S. travelers to Mexico, the Caribbean, Central America, and South America will also be affected by this rule. As estimated, almost twice as many U.S. citizens will be covered by this rule as non-U.S. citizens (14.2 million versus 7.7 million, of which 4.4 million are Canadian). Thus, foreign businesses in these regions are most likely to experience adverse impacts as a result of this rule because there are more U.S. travelers covered by the rule than non-U.S. travelers, and U.S. citizens and a very small percentage of these travelers (an estimated 4 percent) may choose to forgo travel by air to these regions given the passport requirement.

Comment

One commenter argued that the cost to obtain a passport is significantly underestimated because the time estimated to obtain a passport is too low.

Response

We appreciate this comment and the detail that accompanied the estimate provided in the comment. However, the commenter presented an estimate that was overly pessimistic and represented an absolute ''worst-case'' scenario that would rarely, if ever, be realized. The time estimate presented in the Regulatory Assessment is from DOS's Supporting Statement for the Paperwork Reduction Act Submission for DS–11—Application for a U.S. Passport (OMB Control #1405–0004). The estimated number of minutes required per response is based on a recent sampling of the time required to search existing data sources, gather the necessary information, provide the information required, review the final collection, and submit the collection to Passport Services for processing. The sampling was completed through consultation with a small group of actual respondents. Passport Services found that the overall average for the estimated time required for this information collection was 1 hour and 25 minutes per response. This Collection of Information was reviewed and approved by OMB in September 2005.

Comment

One commenter argued that many passports are never used, but are needed: people obtain them in order to be able to travel whenever it may be necessary. These costs were not included in the analysis.

Response

The commenter is correct that we did not include these costs in the Regulatory Assessment. The purpose of an economic analysis is to estimate the costs and benefits of a rulemaking based on an identified baseline and the anticipated change from that baseline that is directly attributable to the regulation under consideration. Individuals that choose to obtain a passport ''just to have one'' should not be considered in this regulatory analysis because they are not obtaining a passport specifically for air travel in the Western Hemisphere, but worldwide as circumstances arise.

Comment

One commenter argued that the assumption that gains in domestic travel would be offset by losses from reduced travelers from Canada, Mexico, and Bermuda trivialized the impact of Canadian visitors who spent $10 billion in the United States in 2005.

Response

It is important to note that this analysis does not assert that domestic gains will equal losses from reduced foreign travelers; it simply states that while the U.S. economy may gain slightly if a small percentage of U.S. citizens travel domestically rather than in the rest of the Western Hemisphere, the U.S. economy will also likely lose slightly if a small percentage of non-U.S. citizens forgo travel to the United States. The net impacts are not known. Furthermore, it is important to note that the majority of the $10 billion spent by Canadians in this country in 2005 is through cross-border trade and tourism conducted via land-border ports-of-entry. Economic impacts for land-border entries will be addressed in a future rulemaking for land and sea entries.

3. Regulatory Flexibility Act

Comment

Six commenters asserted the rule would have a disproportionate effect on small entities and argued that DHS and DOS should conduct a small business analysis for any proposed rule.

Response

When considering the impacts on small entities for the purpose of complying with the Regulatory Flexibility Act (RFA), we consulted the Small Business Administration's guidance document for conducting regulatory flexibility analysis. Per this guidance, a regulatory flexibility analysis is required when an agency determines that the rule will have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. This guidance document also includes a good discussion describing

how direct and indirect costs of a regulation are considered differently for the purposes of the RFA. With the possible exception of certain ''sole proprietors,'' we do not believe that small entities are subject to the requirements of the proposed rule; individuals are subject to the requirements, and individuals are not considered small entities. As stated in the Small Business Administration's guidance document, ''[t]he courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them.'' Consequently, CBP prepared an extensive analysis of the direct economic impacts of this rule and believes that it adequately considered the economic impacts of this rule on small businesses for the purposes of the RFA. Additionally, our analysis did not reveal any ''disproportionate effect'' of the rule on small entities.

Comment

One commenter noted several examples of individuals who would be considered small businesses, including a freelance graphic artist, a self-employed provider of business training services, and a sole proprietor soliciting bids for fabrication or assembly of a new product, that would be directly impacted by the proposed rule.

Response

We agree that certain ''sole proprietors'' would be considered small businesses and could be directly affected by the rule if their occupation requires travel within the Western Hemisphere where a passport was not previously required. The number of such sole proprietors is not available from the Small Business Administration or other available business databases. However, as estimated in the Regulatory Assessment available in the public docket, the cost to such businesses would be only $149 for a first-time passport applicant, or $209 if expedited service were requested, and would only be incurred if the individual needed a passport. We believe such an expense would not rise to the level of being a ''significant economic impact.''

IV. Conclusion

Based on the analysis of comments, the recently issued DOS NPRM proposing to create a Passport Card, and section 7209 of IRTPA, DHS and DOS have determined that beginning January 23, 2007, United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at air ports-of-entry from the Western Hemisphere will be required to present a valid passport, a NEXUS Air Card, or a Merchant Mariner Document.

An MMD is a document sufficient to denote identity and citizenship for United States citizens. Accordingly, United States citizens who present an MMD in conjunction with maritime business would continue to be exempt from the requirement to present a passport when arriving in the United States at air ports-of-entry. In addition, a NEXUS Air membership card is a document sufficient to denote identity and citizenship for United States citizens, Canadian citizens, and permanent residents of Canada when arriving in the United States as a NEXUS Air program participant and when using a NEXUS Air kiosk at designated airports. Accordingly, United States and Canadian citizens who present an NEXUS Air card when using a NEXUS Air kiosk, would continue to be exempt from the requirement to present a passport when arriving in the United States at air ports-of-entry.

In addition, all active duty members of the United States Armed Forces regardless of citizenship will be exempt from the requirement to present a valid passport when entering the United States. Therefore, travel document requirements for United States citizens who are members of the United States Armed Forces will not change from the current requirements.

The new passport requirement does not apply to travelers arriving at land or sea ports-of-entry. Additionally, U.S. citizens and nationals who travel directly between parts of the United States,[24] which includes Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa, Swains Island, and the Commonwealth of the Northern Mariana Islands, without touching at a foreign port or place, are not required to present a valid passport.

V. Regulatory Analyses

A. Executive Order 12866: Regulatory Planning and Review

This rule is considered to be an economically significant regulatory action under Executive Order 12866 because it may result in the expenditure of over $100 million in any one year. Accordingly, the Office of Management and Budget (OMB) has reviewed this rule. The following summary presents the costs and benefits of the rule plus a range of alternatives considered. The complete and detailed ''Regulatory Assessment'' can be found in the docket for this rulemaking: *http://www.regulations.gov*; see also *http://www.cbp.gov*.

This rule will affect certain travelers to the Western Hemisphere countries for whom there are no current requirements to present a United States passport for entry. While United States citizens may not need a passport to enter these countries, they would need to carry a passport to leave the United States and for inspection upon re-entry to the United States. This analysis considers air travelers on commercial flights and travelers using general aviation.

Based on data from the Department of Commerce, approximately 14 million travelers will be covered by the rule. Based on additional available data sources, DHS and DOS assume that a large portion of these travelers already hold passports and thus will not be affected (i.e., they will not need to obtain a passport as a result of this rule). DHS and DOS estimate that approximately 4 million passports will be required in the first year the rule is in effect, at a direct cost to traveling individuals of $649 million. These estimates are presented in Table 1.

TABLE 1.—FIRST YEAR DIRECT COSTS TO TRAVELERS OF THE RULE

Travelers to WHTI countries, first year	14,299,093		
	1st quartile	Median	3rd quartile
Passports demanded	3,942,859	4,084,204	4,364,197
Total cost of passports demanded	$579,379,344	$600,142,162	$641,283,623
Expedited service fees (20% of passports):			
Number of passports	788,572	816,841	872,839

[24] As defined in section 215(c) of the INA (8 U.S.C. 1185(c)), the term ''United States'' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

TABLE 1.—FIRST YEAR DIRECT COSTS TO TRAVELERS OF THE RULE—Continued

Cost of expedited service	$47,314,302	$49,010,449	$52,370,370
Grand total cost	$626,693,646	$649,152,611	$693,653,992

Following the first year, the costs will diminish as most United States travelers in the air environment would then hold passports. Because the number of travelers to the affected Western Hemisphere countries has been growing and turnover in the traveling population is not 100 percent on an annual basis, a small number of ''new'' travelers who did not previously hold passports will now have to obtain them in order to travel. The estimated costs for new passport acquisition in the second year the rule is in effect are presented in Table 2.

TABLE 2.—SECOND YEAR DIRECT COSTS TO TRAVELERS OF THE RULE

''New'' travelers to WHTI countries, second year	1,994,380		
	1st quartile	Median	3rd quartile
Passports demanded	566,350	584,364	625,893
Total cost of passports demanded	$83,213,742	$85,866,599	$91,966,740
Expedited service fees (20% of passports):			
Number of passports	113,270	116,873	125,179
Cost of expedited service	$6,796,196	$7,012,365	$7,510,711
Grand total cost	$90,009,938	$92,878,964	$99,477,450

This rule could also impose indirect costs to those industries that support the traveling public. If some travelers do not obtain passports because of the cost or inconvenience and forgo travel to Western Hemisphere destinations, certain industries would incur the indirect consequences of the forgone foreign travel. These industries include (but are not limited to):

- Air carriers;
- Airports and their support services;
- Traveler accommodations; travel agents; dining services; retail shopping;
- Tour operators;
- Scenic and sightseeing transportation;
- Hired transportation (rental cars, taxis, buses);
- Arts, entertainment, and recreation.

DHS and DOS expect that foreign businesses whose services are consumed largely outside of the United States (with the exception of United States air carriers, travel agents, and airport services) will primarily be impacted. If domestic travel is substituted for international travel, domestic industries in these areas would gain. DHS and DOS expect, however, that United States travel and tourism could also be indirectly affected by the rule if fewer Canadian, Mexican BCC holders, and Bermudan travelers visit the United States (these travelers do not currently need a passport for entry to the United States but will require one under the rule). In this case, United States businesses in these sectors would be affected. Thus, gains in domestic consumption may be offset by losses in services provided to the citizens and residents of the Western Hemisphere countries affected. In both cases, we expect the gains and losses to be marginal as the vast majority of travelers (based on our Regulatory Assessment available in the public docket, an estimated 96 percent of United States air travelers and 99 percent of Canadian, Mexican, and Bermudan air travelers) are expected to obtain passports and continue traveling internationally.

The benefits of the rule are virtually impossible to quantify in monetary terms. The benefits of the rule are significant and real in terms of increased security in the air environment provided by more secure documents and facilitation of inspections provided by the limited types of documents that would be accepted. In fact, this rule addresses a vulnerability of the United States to entry by terrorists or other persons by false documents or fraud under the current documentary exemptions for travel within the Western Hemisphere, which has been noted extensively by Congress and others:

- During the debate on IRTPA, several members of Congress, including the Chairman of the House Judiciary Committee commented on the need for more secure documents for travelers.[25]
- The 9/11 Commission recommendations, which provide much of the foundation for IRTPA, specifically include a recommendation to address travel documents in the Western Hemisphere.[26]
- Finally, in May 2003, a subcommittee of the House Judiciary Committee held a hearing focused on a fraudulent U.S. document ring in the Caribbean, the exploitation of which allowed the notorious Washington D.C. ''sniper,'' John Allen Muhammad to support himself while living in Antigua. A Government Accountability Office (GAO) investigator at that hearing testified as to the ease of entering the United States with fraudulent birth certificates and drivers' licenses.

A uniform document requirement would assist CBP officers in verifying the identity and citizenship of travelers who enter the United States, and

[25] ''As the 9/11 staff report on terrorist travel declared, 'The challenge for national security in an age of terrorism is to prevent the people who may pose overwhelming risk from entering the United States undetected.' The Judiciary sections of title III require Americans returning from most parts of the Western Hemisphere to possess passports; require Canadians seeking entry into the United States to present a passport or other secure identification; authorize additional immigration agents and investigators; reduce the risk of identity and document fraud; provide for the expedited removal of illegal aliens; limit asylum abuse by terrorists; and streamline the removal of terrorists and other criminal aliens. These provisions reflect both commission recommendations and legislation that was pending in the House.'' Congressional Record, October 7, 2004, H8685.

[26] ''Americans should not be exempt from carrying biometric passports or otherwise enabling their identities to be securely verified when they enter the United States; nor should Canadians or Mexicans. Currently U.S. persons are exempt from carrying passports when returning from Canada, Mexico, and the Caribbean. The current system enables non-U.S. citizens to gain entry by showing minimal identification. The 9/11 experience shows that terrorists study and exploit America's vulnerabilities.'' The 9/11 Commission Report, p. 388.

improving their ability to detect fraudulent documents or false claims to citizenship and deny entry to such persons. Further, such standardized documents would enable more rapid processing of travelers who enter the United States because an individual's identity would be easier to confirm and he or she could be processed through CBP more efficiently.

Alternatives to the Rule

CBP considered the following five alternatives to the rule:

1. The No Action alternative (status quo);
2. Require United States travelers to present a state-issued photo ID and proof of citizenship (such as birth certificates) upon return to the United States from countries in the Western Hemisphere;
3. Allow United States citizens who possess a Transportation Worker Identification Card (TWIC) to use the card as a travel document in the air environment;
4. Allow Mexican citizens to present their Border Crossing Cards (BCCs) in the air in lieu of a passport; and
5. Develop and designate a low-cost Passport Card as an acceptable document for United States citizens.

Calculations of costs (if any) for the alternatives can be found in the Regulatory Assessment.

Alternative 1: The No Action Alternative

The No Action alternative would have zero costs (or benefits) associated with it. This alternative was rejected because section 7209 of IRTPA specifically provides for the expeditious implementation of the requirement that United States citizens and nonimmigrant aliens must have passports or such alternative documents as the Secretary of Homeland Security may designate as satisfactorily establishing identity and citizenship to depart from or enter the United States. Current documentation requirements leave major gaps in security at U.S. airports and do not satisfy the requirements under the IRTPA that travel documents for entry into the United States must denote identity and citizenship.

Alternative 2: Require United States Travelers to Present a State-Issued Photo ID and Proof of Citizenship

The second alternative would require United States citizens to present state-issued photo identification in combination with a birth certificate to establish citizenship and identity. This alternative is similar to the status quo. The U.S. birth certificate can be used as evidence of birth in the United States; however, it does not provide definitive proof of citizenship (*e.g.*, children born in the U.S. to foreign diplomats do not acquire U.S. citizenship at birth). Highly trained passport specialists and consular officers abroad adjudicate passport applications, utilizing identity and citizenship documents (like U.S. birth certificates, naturalization certificates, consular reports of birth abroad, etc.). These specialists have resources available, including fraud and document experts, to assist when reviewing documents and are not faced with the same time constraints as officers at ports-of-entry. These factors are critical in determining that a birth certificate and driver's license may be presented as documentary evidence of citizenship and identity for an application for a passport but are not sufficient under WHTI for entry to the United States. In addition, there is no current way to validate that the person presenting the birth certificate for inspection is, in fact, the same person to whom it was issued. The lack of security features and the plethora of birth certificates issued in the United States (issued by more than 8,000 entities) currently make it difficult to reliably verify or authenticate a birth certificate. A state-issued photo identification provides positive identification with name, address, and photograph. However, a state-issued photo identification does not provide proof of citizenship.

Alternative 2 was rejected for several reasons. Section 7209 requires that U.S. citizens have a passport, other documents or combination of documents deemed sufficient by the Secretary of DHS to denote citizenship and identity when departing or entering the United States. Because birth certificates and driver's licenses are issued by numerous government entities, there is no standard format for either document, and, at present, it is not possible to authenticate quickly and reliably either document. Some states only issue photocopies as replacements of birth certificates, some states issue replacement birth certificates by mail or through the Internet, and some states will not issue photo identification to minors. Both documents lack security features and are susceptible to counterfeiting or alteration. While most states require that driver's licenses contain correct address information, it is not uncommon for the address information to be outdated. Neither the birth certificate nor the state-issued identification was designed to be a travel document. Birth certificates can easily deteriorate when used frequently as travel documents because they are normally made from some sort of paper with a raised seal, so they cannot be laminated or otherwise protected when under repeated use.

Because these documents are not standardized, CBP officers require additional time to locate the necessary information on the documents. This may result in cumulative delays at airports of entry.

Because neither document has a machine-readable zone, CBP will not be able to front-load information on the traveler to expedite the initial inspection processing, including checks necessary to protect the national security of the United States. Birth certificates are issued by thousands of authorities, and are currently impossible to validate or vet sufficiently. Both documents are readily available for purchase to assume a false identity. Because the birth certificate and state-issued photo ID have limited or non-existent security features, they are more susceptible to alteration. Therefore, the actual, rather than claimed, identity and citizenship of the traveler using these documents cannot always be determined. DHS and DOS believe that the risk of counterfeiting and fraud associated with these documents makes them unacceptable documents for travel under IRTPA. For all of these reasons, these documents are not sufficient to reliably establish citizenship and identity.

The costs of this alternative include those for minors to obtain photo identification for travel. Currently, all adult travelers in the air environment must present photo identification (usually a driver's license) along with proof of citizenship (usually a birth certificate) when they check in for their flights (per the requirements of the air carriers). Additionally, all countries in the Western Hemisphere require a passport or other proof of citizenship (*i.e.*, birth certificate) and photo identification for entry into their countries via air. The exception, however, is for minor travelers. Currently, parents may orally vouch for their children upon exit and entry into the United States to and from the Western Hemisphere, and some Western Hemisphere countries allow children to present school identification as sufficient proof of identity. To comply with a requirement that would allow a photo ID in combination with a birth certificate for travel in the Western Hemisphere, minors would most likely need to obtain state-issued photo identification. There could also be

additional costs in the form of lost efficiency upon entry to United States ports-of-entry. If CBP officers need to spend more time examining a variety of documents to determine what they are and if they are fraudulent, and if CBP officers need to enter data by hand rather than routinely utilize machine-readable technology to obtain information on arriving passengers, this would result in delays at airports. CBP is unable to quantify this loss of efficiency and presents only the cost to minors to obtain a photo ID.

Based on data from the Department of Commerce's Office of Travel & Tourism Industries (OTTI), eleven states (California, New York, New Jersey, Florida, Texas, Illinois, Virginia, Pennsylvania, Washington, Massachusetts, and Ohio) account for almost three-quarters of international air travelers.[27] Most requirements for obtaining a photo identification are similar across these states: Completion of a department of motor vehicles (DMV) form, submission of a form or declaration attesting that the applicant is the parent or legal guardian of the minor receiving the identification, and presentation of a birth certificate and social security card. If the applicant is a minor, he or she must appear in person with a parent or guardian. Fees for these states range from $3 (Florida) to $21 (California), and identifications are valid for an average of five years.[28] As stated previously, some states will not issue photo ID to minors under a certain age.[29] For the purposes of this analysis only, we assume all minors would be able to obtain state-issued photo identification.

CBP estimates that there are 496,597 minors that will be covered by this rule, 416,858 of whom do not currently hold a passport. CBP has used the average of the photo identification fees from the 11 states above ($15) and added the cost of the time it takes to complete the forms and submit them to the DMV ($41, the same time cost CBP estimated to obtain the passport) for a total of approximately $55 per minor. Thus, assuming that a birth certificate is readily available, the cost of this alternative ID for minors would be $27.4 million.

Alternative 3: Designate TWIC as an Acceptable Document for United States Citizens

The third alternative would allow U.S. transportation workers to use their TWICs in lieu of a passport. Section 102 of the Maritime Transportation Security Act of 2002 requires the Secretary of Homeland Security to issue a biometric transportation security card to individuals with unescorted access to secure areas of vessels and facilities.[30] In addition, these individuals must undergo a security threat assessment to determine that they do not pose a security threat prior to receiving the biometric card and access to secure areas. The security threat assessment must include a review of criminal, immigration, and pertinent intelligence records in determining whether the individual poses a threat, and individuals must have the opportunity to appeal an adverse determination or apply for a waiver of the standards. The regulations to implement the TWIC in the maritime environment have been proposed and were subject to public comment.[31] For the sake of comparison, CBP assumes that TWICs are available to all transportation workers covered by the rule. Additionally, analysis of this alternative assumes that CBP would accept the TWIC for any travel.

The Transportation Security Administration (TSA) and Coast Guard estimate that the initial population of cards holders will be approximately 750,000.[32] This population includes such individuals as United States MMD holders, port truck drivers, contractors, longshoremen, and some rail workers. Again, for the purposes of this economic analysis only, we estimate the cost savings to these individuals of using TWICs in the air environment for non-work-related travel. (These TWIC holders would not likely leave the country via air for the purposes of work-related activities.)

CBP does not know how TWIC holders overlap with the United States population traveling to the affected WHTI countries. As calculated previously, CBP estimates there are approximately 14 million unique travelers covered by the rule, and approximately 4 million (29 percent) of them will require passports since they do not already have them. For the purposes of this analysis of alternatives, CBP assumes that the population requiring passports fully encompasses TWIC holders. This is an extreme best-case assumption, as most of the TWIC holders will not be traveling internationally in the air environment as part of their work. Thus in the best-case, 29 percent of the 750,000 TWIC holders (approximately 227,000 individuals) would not need passports. At a cost of $149 per passport ($97 application fee for an adult, $11 for photos and $41 for the time costs of completing the necessary paperwork), this would result in a savings of, at best, $21.9 million. This is approximately 3 percent of the total rule cost. The savings are likely to be lower because the TWIC-holders are unlikely to be entirely included in the United States air-traveling population covered by the rule.

The TWIC cannot be read by current CBP technology installed in air ports-of-entry. While there is information embedded in the chip on the TWIC, only the name of the individual and a photo ID are apparent to a CBP officer upon presentation. DHS would have to install chip readers in airports to access other information and verify the validity of the document. TSA estimates that this cost could be $7,200 per card reader. Additionally, CBP believes that it would cost $500,000 to develop databases, cross-reference information and coordinate with TSA and Coast Guard, and test equipment installed in airports.

For this analysis CBP assumes that a card reader would need to be installed in each CBP booth in airports. CBP estimates that there are 2,000 air ''lanes'' nationwide that would need a TWIC reader. The cost for readers is thus $14.4 million and with the additional cost for reprogramming and adapting existing systems, the total cost is $14.9 million in the first year. Following the first year, CBP would expect to pay approximately 25 percent of the initial cost for operations and maintenance. The net first-year savings would be, again, at best $15.3 million. This is a 2 percent difference from the costs of the chosen alternative ($649 million).

This alternative was rejected because the TWIC does not denote citizenship and it was not designed as a travel document but rather, to positively identify the holder and hold the results of a security threat assessment, and as a tool for use in access control systems. Because the TWIC does not provide citizenship information, the holder would need to present at least one other document that proves citizenship. CBP would need to take additional time at

[27] Table 22, U.S. Travelers to Overseas Countries 2004, State of Residence of Travelers, OTTI, 2005.

[28] See the nationwide DMV guide at *http://www.dmv.org*.

[29] Of the 11 states examined in the analysis of this alternative, Florida, Massachusetts, New Jersey, and Pennsylvania have a minimum age requirement for obtaining a photo ID. The minimum age to obtain a photo ID in Florida is 12, in Massachusetts is 16, in New Jersey is 17, and in Pennsylvania is 16.

[30] Pub. L. 107–295, 116 Stat. 2064 (Nov. 25, 2002).

[31] 71 FR 29396 and 29462 (May 22, 2006).

[32] Department of Homeland Security, Transportation Security Administration, and U.S. Coast Guard, Regulatory Evaluation for the Notice of Proposed Rulemaking Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector, 49 (2006). Dockets TSA–2006–24191 or USCG–2006–24196.

primary inspection to establish citizenship, or the traveler would have to be referred to secondary inspections for further processing. The overall result could be increased delays at ports of entry.

Alternative 4: Designate the BCC as an Acceptable Document for Mexican Citizens

Alternative 4 would allow Mexican citizens to present their BCCs upon entry to this country, without also presenting a passport. This alternative would have no impact on the cost of the rule to United States citizens. The BCC is a credit card-size document with many security features and 10-year validity. Also called a ''laser visa,'' the card is both a BCC and a B1/B2 visitor's visa. This alternative could be less expensive for a percentage of Mexican citizens. Mexican citizens must have a passport to apply for and obtain a BCC. However, there are some Mexican citizens that hold a BCC without a valid passport because the passport has expired prior to the expiration of the BCC.

This alternative was rejected because the BCC cannot be used with CBP's Advance Passenger Information System (APIS), which collects data from travelers prior to their arrival in and departure from the United States.[33] The passport requirement for Mexican citizens who hold BCC in the air environment is consistent with the requirement for passports for most United States citizens and foreign nationals.

Alternative 5: Develop and Designate a Low Cost Passport Card as an Acceptable Document for United States Citizens

DOS, in consultation with DHS, has begun developing an alternative travel document, a card-format passport. Like a traditional passport book, the Passport Card will be a secure travel document that establishes the identity and citizenship of the bearer. The Passport Card is being designed to primarily benefit those citizens in border communities who regularly cross the northern and southern borders every day where such travel is an integral part of their daily lives. As currently envisioned, it will be the size of a credit card and will have a fee structure that is lower than for a traditional passport book. The application process for the Passport Card will be identical to that for the passport book in that each applicant will have to establish United States citizenship, personal identity, and entitlement to obtain the document.

The cost of the Passport Card has yet to be finalized. However, in the NPRM published October 17, 2006, DOS proposed the application fees for the Passport Card. For the purposes of this analysis of alternatives, using the fees proposed in the NPRM, the fee for a first-time adult Passport Card would be $45 and for a minor would be $35. The cost for photos is $11. Because the application process would be comparable to that for a traditional passport, the personal time cost would continue to be $41, as estimated previously for the primary analysis of the cost of the rule. Using the same methodology as used for the primary analysis (most likely scenario) but assuming that all travelers who do not currently hold a passport obtain a Passport Card rather than the traditional passport book, we estimate that the first-year cost would be $463 million. At this lower cost, approximately 4.3 million Passport Cards would be demanded, approximately 230,000 more than under this rule, an increase of 5 percent.

Use of this alternative Passport Card was rejected for the air environment for a number of reasons. DHS and DOS believe that accepting the Passport Card in the air environment for air travel within the Western Hemisphere could potentially lead to confusion for air travelers who may attempt to use the Passport Card, rather than a traditional passport book, to fly outside of the Western Hemisphere. As developed by the Department of State, the Passport Card is intended to be a limited-use passport designed to address the needs of border communities, but not the operational needs of inspection at airports. *See* 71 FR 60928, 60930 (Oct. 17, 2006). Because the Passport Card is not designed to be a globally interoperable document as defined by the International Civil Aviation Organization (ICAO), it does not meet all the international standards for passports and other official travel documents (for example, the size of the Passport Card does not comport with ICAO 9303 travel document standards). The DOS Passport Card NPRM explained that ''[d]esigning a card format passport for wide use, including by air travelers, would inadvertently undercut the broad based international effort to strengthen civil aviation security and travel document specifications to address the post 9/11 threat environment.'' *Id.* at 60928. Therefore, excluding the Passport Card for air travel within the Western Hemisphere would reduce the possibility that travelers would attempt to fly outside of the Western Hemisphere to countries where the Passport Card may not be accepted. Finally, as stated in the Regulatory Assessment, many air travelers already possess a passport book for ease of use, because air carriers require it, or because the countries they are visiting require it.

The following table presents a comparison of the costs of this rule and the alternatives considered.

COMPARISON OF REGULATORY ALTERNATIVES IN FIRST YEAR

[Costs in millions]

Alternative	First-year cost	Cost compared to status quo	Cost compared to final rule	Reason rejected
Final rule (passports, Air Nexus)	$649	+$649	n/a	
Status quo	0	n/a	−$649	Status quo does not meet requirements of IRTPA.

[33] Information for aircraft to be submitted includes: Full name, date of birth, gender, citizenship, country of residence, status on board the aircraft, travel document type, passport information if passport is required (number, country of issuance, expiration date), alien registration number where applicable, address while in the United States (unless a U.S. citizen, lawful permanent resident, or person in transit to a location outside the United States), Passenger Name Record locator if available, foreign code of foreign port/place where transportation to the United States began, code of port/place of first arrival, code of final foreign port/place of destination for in-transit passengers, airline carrier code, flight number, and date of aircraft arrival.

COMPARISON OF REGULATORY ALTERNATIVES IN FIRST YEAR—Continued

[Costs in millions]

Alternative	First-year cost	Cost compared to status quo	Cost compared to final rule	Reason rejected
State-issued photo ID + birth certificate in lieu of U.S. passport.	27	+$27	−622	Identity and citizenship of the traveler cannot always be reasonably assumed or ascertained using these documents; minors may not be able to obtain IDs in all states; delays in processing entries because neither document is standardized.
TWICs in lieu of U.S. passport	642	+642	−7	TWIC is not designed as a travel document; citizenship not included; CBP would have to install card readers and modify their own systems to accept TWICs.
BCCs in lieu of Mexican passport	No direct costs for U.S. citizens.	0	May be slightly less expensive for BCC holders.	Cannot be used in conjunction with APIS in the air environment.
Passport card in lieu of traditional passport book.	463	+463	−186	Passport cards cannot be used because they do not yet exist.

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/index.html*), CBP has prepared an accounting statement showing the classification of the expenditures associated with this rule. The table provides an estimate of the dollar amount of these costs and benefits, expressed in 2005 dollars, at three percent and seven percent discount rates. DHS and DOS estimate that the cost of this rule will be approximately $206 million annualized (7 percent discount rate) and approximately $204 million annualized (3 percent discount rate). Non-quantified benefits are enhanced security and efficiency.

ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES, 2006 THROUGH 2016

[2005 Dollars]

	3% discount rate	7% discount rate
Costs:		
Annualized monetized costs	$204 million	$206 million.
Annualized quantified, but un-monetized costs.	None	None.
Qualitative (un-quantified) costs	Indirect costs to the travel and tourism industry.	Indirect costs to the travel and tourism industry.
Benefits:		
Annualized monetized benefits	None quantified	None quantified.
Annualized quantified, but un-monetized costs.	None quantified	None quantified.
Qualitative (un-quantified) costs	Enhanced security and efficiency	Enhanced security and efficiency.

In accordance with the provisions of EO 12866, this regulation was reviewed by OMB.

B. Regulatory Flexibility Act

We have prepared this section to examine the impacts of the rule on small entities as required by the Regulatory Flexibility Act (RFA).[34] A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

When considering the impacts on small entities for the purpose of complying with the RFA, we consulted the Small Business Administration's guidance document for conducting regulatory flexibility analysis.[35] Per this guidance, a regulatory flexibility analysis is required when an agency determines that the rule will have a significant economic impact on a substantial number of small entities that are *subject to the requirements of the rule*.[36] This guidance document also includes a good discussion describing how direct and indirect costs of a regulation are considered differently for the purposes of the RFA. With the exception of certain sole proprietors, we do not believe that small entities are subject to the requirements of the rule; individuals are subject to the requirements, and individuals are not considered small entities. As stated in the Small Business Administration's guidance document, ''The courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them.'' [37]

As described in the Regulatory Assessment for this rule, we could not quantify the indirect impacts of the rule with any degree of certainty; we instead focused our analysis on the direct costs to individuals recognizing that some small entities will face indirect impacts.

[34] 5 U.S.C. 601–612.

[35] Small Business Administration, Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act, May 2003.

[36] Id. at 69.

[37] Id. at 20.

Many of the small entities indirectly affected will be foreign owned and will be located outside the United States. Additionally, reductions in international travel that result from the rule could lead to gains for the domestic travel and tourism industry. Most air travelers—an estimated 96 percent of United States travelers and 99 percent of Canadian, Mexican, and Bermudan travelers (based on the Regulatory Assessment summarized above)—are expected to obtain passports and continue traveling. Consequently, indirect effects are expected to be spread over wide swaths of domestic and foreign economies.

Small businesses may be indirectly affected by the rule if international travelers forgo travel to affected Western Hemisphere countries. Industries likely affected include (but may not be limited to):

- Air carriers;
- Airports and their support services;
- Traveler accommodations;
- Travel agents;
- Dining services;
- Retail shopping;
- Tour operators;
- Scenic and sightseeing transportation;
- Hired transportation (rental cars, taxis, buses);
- Arts, entertainment, and recreation.

In the NPRM, we asked specifically for comments on direct impacts to small entities. No comments were received that addressed direct impacts to small entities with the exception of certain ''sole proprietors.'' Notwithstanding this exception for certain ''sole proprietors,'' this rule does not directly regulate small entities. Based on our extensive analysis of the direct economic effects of this rule (which is available in the public docket) and the consideration of comments to the proposed rule, we certify that this rule will not have a significant economic impact on a substantial number of small entities.

The complete analysis of impacts to small entities for this rule is available on the CBP Web site at: *http://www.regulations.gov*; see also *http://www.cbp.gov*.

C. Executive Order 13132: Federalism

Executive Order 13132 requires DHS and DOS to develop a process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' Policies that have federalism implications are defined in the Executive Order to include rules that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' DHS and DOS have analyzed the rule in accordance with the principles and criteria in the Executive Order and have determined that it does not have federalism implications or a substantial direct effect on the States. The rule requires United States citizens and nonimmigrant aliens from Canada, Bermuda and Mexico departing from or entering the United States by air from Western Hemisphere countries to bear a valid passport or other document designated by the Secretary of Homeland Security. States are not subject to this rule. For these reasons, this rule would not have sufficient federalism implications warranting the preparation of a federalism summary impact statement.

D. Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988. Executive Order 12988 requires agencies to conduct reviews on civil justice and litigation impact issues before proposing legislation or issuing proposed regulations. The order requires agencies to exert reasonable efforts to ensure that the regulation identifies clearly preemptive effects, identifies effects on existing federal laws or regulations, identifies any retroactive effects of the regulation, and identifies other matters. DHS and DOS have determined that this regulation meets the requirements of Executive Order 12988 because it does not involve retroactive effects, preemptive effects, or the other matters addressed in the Executive Order.

E. Unfunded Mandates Reform Act Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the UMRA, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the UMRA is any provision in a Federal agency regulation that will impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year. Section 203 of the UMRA, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This rule would not impose a significant cost or uniquely affect small governments. The rule does have an effect on the private sector of $100 million or more. This impact is discussed under the Executive Order 12866 discussion.

F. Paperwork Reduction Act

The collection of information requirement for passports is contained in 22 CFR 51.20 and 51.21. The required information is necessary for DOS Passport Services to issue a United States passport in the exercise of authorities granted to the Secretary of State in 22 U.S.C. section 211a *et seq.* and Executive Order 11295 (August 5, 1966) for the issuance of passports to United States citizens and non-citizen nationals. The issuance of U.S. passports requires the determination of identity and nationality with reference to the provisions of Title III of the Immigration and Nationality Act (8 U.S.C. 1401–1504), the 14th Amendment to the Constitution of the United States, and other applicable treaties and laws. The primary purpose for soliciting the information is to establish nationality, identity, and entitlement to the issuance of a United States passport or related service and to properly administer and enforce the laws pertaining to issuance thereof.

There are currently two OMB-approved application forms for passports, the DS–11 Application for a U.S. Passport (OMB Approval No. 1405–0004) and the DS–82 Application for a U.S. Passport by Mail. First time applicants must use the DS–11. The rule would not create any new collection of information requiring OMB approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). It would result in an increase in the number of persons filing the DS–11, and a corresponding increase in the annual reporting and/or record-keeping burden. In conjunction with publication of the final rule, DOS

will amend the OMB form 83I (Paperwork Reduction Act Submission) relating to the DS–11 to reflect these increases.

The collection of information encompassed within this rule has been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The estimated average burden per respondent is 1 hour and 25 minutes. The estimated frequency of responses is once every 10 years (adult passport application) and once every 5 years (minor passport application).

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden, should be directed to the Office of Management and Budget, Attention: Desk Officer of the Department of State, Office of Information and Regulatory Affairs, Washington, DC 20503.

G. Privacy Statement

A Privacy Impact Assessment (PIA) is being posted to the DHS Web site (at *http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0511.xml*) in conjunction with the publication of this rule in the **Federal Register**. The changes made by this rule involve the removal of an exception for United States citizens from having to present a passport in connection with Western Hemisphere air travel, such that those individuals must now present a passport when traveling by air from points of origin both within and without of the Western Hemisphere. The rule expands the number of individuals submitting passport information for travel within the Western Hemisphere, but does not involve the collection of any new data elements. Presently, CBP collects and stores passport information from all travelers, required to provide such information pursuant to the Aviation and Transportation Security Act of 2001 (ATSA) and the Enhanced Border Security and Visa Reform Act of 2002 (EBSA), in the Treasury Enforcement Communications System (TECS) (a System of Records Notice for which is published at 66 FR 53029). By removing the exception for submitting passport information from United States citizens traveling by air within the Western Hemisphere, DOS and CBP are requiring these individuals to comply with the general requirement to submit passport information when traveling to and from the United States.

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

22 CFR Part 41

Aliens, Nonimmigrants, Passports and visas.

22 CFR Part 53

Passport requirement and exceptions; parameters for U.S. citizen travel and definitions.

Amendment of the Regulations

■ For the reasons stated in the preamble, DHS and DOS amend 8 CFR parts 212 and 235 and 22 CFR parts 41 and 53 as set forth below.

8 CFR PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 1. The authority citation for part 212 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458).

■ 2. Section 212.1 is amended by:
■ a. Revising paragraphs (a)(1) and (a)(2); and
■ b. Revising paragraph (c)(1)(i), as follows:

§ 212.1 Documentary requirements for nonimmigrants.

* * * * *

(a) *Citizens of Canada or Bermuda, Bahamian nationals or British subjects resident in certain islands*—(1) *Canadian citizens.* A visa is not required. A passport is not required for Canadian citizens entering the United States from within the Western Hemisphere by land or sea, or as participants in the NEXUS Air program at a NEXUS Air kiosk pursuant to 8 CFR 235.1(e). A passport is otherwise required for Canadian citizens arriving in the United States by aircraft.

(2) *Citizens of the British Overseas Territory of Bermuda.* A visa is not required. A passport is not required for Citizens of the British Overseas Territory of Bermuda entering the United States from within the Western Hemisphere by land or sea. A passport is required for Citizens of the British Overseas Territory of Bermuda arriving in the United States by aircraft.

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(c) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national who:

(i) Is in possession of a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, containing a machine-readable biometric identifier, issued by the DOS and is applying for admission as a temporary visitor for business or pleasure from a contiguous territory by land or sea.

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8 CFR PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 3. The authority citation for part 235 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, published January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458).

■ 4. Section 235.1 is amended by:
■ a. Redesignating current paragraphs (d), (e), and (f) as paragraphs (f), (g), and (h); and
■ b. Adding a new paragraphs (d) and (e).

The additions read as follows:

§ 235.1 Scope of examination.

* * * * *

(d) *U.S. Merchant Mariners.* United States citizens who are holders of a Merchant Mariner Document (MMD or Z-card) issued by the U.S. Coast Guard may present, in lieu of a passport, an unexpired MMD used in conjunction with maritime business when entering the United States.

(e) *NEXUS Air Program Participants.* United States citizens, Canadian citizens, and permanent residents of Canada who are traveling as participants in the NEXUS Air program, may present, in lieu of a passport, a valid NEXUS Air membership card when using a NEXUS Air kiosk prior to entering the United States.

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22 CFR PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

■ 5. The authority citation for part 41 is revised to read as follows:

Authority: 8 U.S.C. 1104; Pub. L. 105–277, 112 Stat. 2681–795 through 2681–801; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458).

■ 6. Section 41.1 is amended by revising paragraph (b) to read as follows:

§ 41.1 Exemption by law or treaty from passport and visa requirements.

* * * * *

(b) *American Indians born in Canada.* An American Indian born in Canada, having at least 50 per centum of blood of the American Indian race, entering from contiguous territory by land or sea (sec. 289, 66 Stat. 234; 8 U.S.C. 1359).

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■ 7. Section 41.2 is amended by:

■ a. Revising paragraphs (a) and (b);

■ b. Revising paragraph (g)(1);

■ c. Removing paragraphs (g)(2) and (g)(4); and

■ d. Redesignating paragraphs (g)(3) as (g)(2), (g)(5) as (g)(3), and (g)(6) as (g)(4).

§ 41.2 Waiver by Secretary of State and Secretary of Homeland Security of passport and/or visa requirements for certain categories of nonimmigrants.

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(a) *Canadian nationals.* A visa is not required. A passport is not required for Canadian citizens entering the United States from within the Western Hemisphere by land or sea, or by air as participants in the NEXUS Air program pursuant to 8 CFR 235.1(e). A passport is otherwise required for Canadian citizens arriving in the United States by aircraft.

(b) *Citizens of the British Overseas Territory of Bermuda.* A visa is not required. A passport is not required for Citizens of the British Overseas Territory of Bermuda entering the United States from within the Western Hemisphere by land or sea. A passport is required for Citizens of the British Overseas Territory of Bermuda arriving in the United States by aircraft.

* * * * *

(g) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national in possession of a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, containing a machine-readable biometric identifier, applying for admission as a temporary visitor for business or pleasure from a contiguous territory by land or sea.

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■ 8. Part 53 is revised to read as follows:

22 CFR PART 53—PASSPORT REQUIREMENT AND EXCEPTIONS

Sec.
53.1 Passport requirement; definitions.
53.2 Exceptions.
53.3 Attempt of a citizen to enter without a valid passport.
53.4 Optional use of a valid passport.

Authority: 8 U.S.C. 1185; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); E.O. 13323, 69 FR 241 (Dec. 30, 2003).

§ 53.1 Passport requirement; definitions.

(a) It is unlawful for a citizen of the United States, unless excepted under 22 CFR 53.2, to enter or depart, or attempt to enter or depart, the United States, without a valid U.S. passport.

(b) For purposes of this part ''United States'' means ''United States'' as defined in section 215(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1185(c)).

§ 53.2 Exceptions.

A U.S. citizen is not required to bear a valid U.S. passport to enter or depart the United States:

(a) When traveling directly between parts of the United States as defined in § 50.1 of this chapter; or

(b) When entering from or departing to a foreign port or place within the Western Hemisphere, excluding Cuba, by land or by sea; or

(c) When traveling as a member of the Armed Forces of the United States on active duty; or

(d) When traveling as a U.S. citizen seaman, carrying a Merchant Marine Document (MMD or Z-card) in conjunction with maritime business. The MMD is not sufficient to establish citizenship for purposes of issuance of a United States passport under 22 CFR part 51; or

(e) When traveling as a participant in the NEXUS Air program with a valid NEXUS Air membership card. United States citizens who are traveling as participants in the NEXUS Air program, may present, in lieu of a passport, a valid NEXUS Air membership card when using a NEXUS Air kiosk prior to entering the United States. The NEXUS Air card is not sufficient to establish citizenship for purposes of issuance of a U.S. passport under 22 CFR part 51; or

(f) When the U.S. citizen bears another document, or combination of documents, that the Secretary of Homeland Security has determined under Section 7209(b) of Pub. L. 108–458 (8 U.S.C. 1185 note) to be sufficient to denote identity and citizenship; or

(g) When the U.S. citizen is employed directly or indirectly on the construction, operation, or maintenance of works undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission (IBWC), TS 994, 9 Bevans 1166, 59 Stat. 1219, or other related agreements provided that the U.S. citizen bears an official identification card issued by the IBWC; or

(h) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Sec 2, the requirement with respect to the U.S. citizen because there is an unforeseen emergency; or

(i) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Sec 2, the requirement with respect to the U.S. citizen for humanitarian or national interest reasons.

§ 53.3 Attempt of a citizen to enter without a valid passport.

The appropriate officer at the port of entry shall report to the Department of State any citizen of the United States who attempts to enter the United States contrary to the provisions of this part, so that the Department of State may apply the waiver provisions of § 53.2(h) and § 53.2(i) to such citizen, if appropriate.

§ 53.4 Optional use of a valid passport.

Nothing in this part shall be construed to prevent a citizen from using a valid U.S. passport in a case in which that passport is not required by this part 53, provided such travel is not otherwise prohibited.

Dated: November 17, 2006.

Michael Chertoff,

Secretary of Homeland Security, Department of Homeland Security.

Dated: November 17, 2006.

Henrietta H. Fore,

Under Secretary for Management, Department of State.

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