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OF THE
UNITED STATES OF AMERICA

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By electronic submission: www.regulations.gov.

Michael Hardin
Senior Policy Advisor, US-VISIT
Department of Homeland Security
1616 North Fort Myer Drive
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Arlington, VA 22209

Re: Docket No. DHS-2008-0039 – Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure; United States Visitor and Immigration Status Indicator Technology Program (“US-VISIT”).

Dear Mr. Hardin,

On behalf of the United States Chamber of Commerce (“Chamber”), the world’s largest business federation representing more than three million businesses and organizations from every size, sector and region, we would like to present our comments on the notice of proposed rulemaking (“NPRM”) cited above pertaining to the implementation of the Department of Homeland Security (“DHS”) United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”) air and sea exit proposal.

The Chamber has monitored and been involved in the implementation of US-VISIT since its inception. The Chamber founded and chairs the Americans for Better Borders Coalition, which unites regional business organizations, a wide array of companies, and national trade associations, working to ensure the efficient flow of exports and tourism across our borders while addressing national security concerns.

The Chamber was also part of the Data Management Improvement Act Task Force which issued two reports specifically relating to an entry-exit system. Likewise, the Secure Borders Open Doors Advisory Committee to the Departments of Homeland Security and State, in which the Chamber also serves, issued a report in January 2008 dealing in part with entry-exit systems at our ports.

Overview

The Department of Homeland Security proposes in this NPRM to establish an exit program at all air and sea ports of departure in the United States.¹ Most international visitors are subject to US-VISIT biometric requirements, which currently consist of digital fingerprints and photographs, upon entering the United States. This proposed rule would expand the program by requiring commercial airlines and cruise lines to both collect the biometric information before these visitors depart from the United States at air and sea ports of departure and submit it to DHS no later than 24 hours after departure.²

The Chamber fully supports the efforts of the Department of Homeland Security to improve the security at our air and sea ports of entry/departure. The US-VISIT project team has worked extremely hard to implement the first phases of the US-VISIT program. The US-VISIT entry process has worked well at most ports and has not created long lines or backlogs, and the Chamber has received no reports of significant delays, to date. The collection of the biometric data and the security checks have been integrated almost seamlessly into the entry inspection process for most travelers.

However, the Chamber has serious concerns with this NPRM. The US-VISIT exit rule as proposed is essentially an unfunded mandate on the private sector, and would be detrimental to the currently weakened American economy. In addition to the NPRM's cost on the private sector, there are some particular issues dealing with sea vessels that should be taken into consideration before final implementation. Finally, the Chamber believes that DHS should engage in additional and expanded outreach to the traveling public regarding the new US-VISIT exit requirements. Our concerns are outlined in detail below.

Cost and Burden to the Private Sector

While we compliment the Department on the success of US-VISIT to date, this NPRM is an unacceptable unfunded mandate on the private sector, and places the burden of implementing the entire US-VISIT exit system solely on the shoulders of private industry. The stated primary mission of DHS includes the charge to: "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland."³ This NPRM, as written, would be extremely detrimental to the American economy, and there are estimates that the air/sea biometric exit cost would be \$3.549 billion over 10 years, and about \$7.457 billion over 20 years.⁴ Some estimates have put the cost of US-VISIT exit for 10 years at over \$10 billion.⁵

¹ FR Vol. 73, No. 80, p. 22065.

² FR Vol. 73, No. 80, p. 22065.

³ Homeland Security Act of 2002, Pub. L. No. 107-296, §101(b)(1)(F).

⁴ See Table 1, FR Vol. 73, No. 80, p. 22081.

⁵ Comments submitted to the record by the International Transport Association on the notice of proposed rulemaking, DHS-2008-0039.

In addition, US-VISIT's stated goals are to 1) enhance the security of U.S. citizens and visitors, 2) facilitate legitimate trade and travel, 3) ensure the integrity of the U.S. immigration system, and 4) protect the privacy of visitors.⁶ This NPRM would directly contradict the second of US-VISIT's goals to facilitate legitimate trade and travel. By placing the burden of the entire US-VISIT exit system on the private sector—including the procurement and purchasing of equipment, altering check-in procedures, and determining how to transmit extremely large files to DHS in a short period of time—facilitation of legitimate travel and trade will be undermined. It could also be expected that part of the \$7.457 billion in costs would be passed on to travelers, causing further harm to our economy.

The increased cost would have a negative effect on travel, particularly when combined with other cost increases, such as to higher oil prices. Airlines, in particular, are facing economic realities that challenge their future ability to even remain in business. Adding billions of dollars in expense and requiring these companies to change their business model will unfairly burden these companies and perhaps push many of them into bankruptcy.

Many private companies have been awarded contracts and have worked with DHS and the US-VISIT office on different parts of the US-VISIT system, and the Chamber strongly encourages private sector solutions. But never before in the history of US-VISIT has DHS simply mandated that the private sector implement a program, without a contract with DHS and without any compensation. Ensuring the integrity of the U.S. immigration system, US-VISIT goal number three, is a government responsibility. As such, Customs and Border Protection ("CBP") currently collects US-VISIT biometric at entry, not private entities, and it is puzzling why this NPRM should veer so far from current practice. The Chamber strongly objects to DHS's attempt to mandate such an expensive program and of such great magnitude on the private sector.

Improper and Costly Law Enforcement Role

As the NPRM noted, certain commercial information sharing is already mandated, but the NPRM is incorrect in assuming that taking and transmitting US-VISIT biometric information will be a relatively easy addition to these already burdensome processes. Current passenger information transmitted to DHS is biographical information, and the file size is small. Taking on transferring biometric information, which are huge files and must be secured, is an entirely different enterprise. The NPRM also requires foreign companies to take the biometric exit and transmit them to DHS, which brings up privacy concerns as well. Carriers will have to substantially upgrade their electronic systems, while bearing the full cost of implementation and processing.

⁶ As stated on DHS's US-VISIT homepage found on 6/17/08 at:
http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0006.shtm

The current NPRM requires airlines and sea vessel operators to submit biometric data to DHS no later than 24 hours after securing the aircraft doors or departure of the vessel, but ultimately envisions real time submissions. During the early stages of the exit system, carriers would not be expected to detain individuals who “hit” a watch list or a criminal database upon exit. However, it seems only a matter of time before carrier personnel will become *de facto* law enforcement officers. The NPRM states that “DHS has taken adverse action against [arrested, detained, or removed] more than 3,039 ... aliens based on information obtained through the US-VISIT biometric screening process.”⁷ Airline and sea vessel personnel are not law enforcement officers, nor should they be, and this NPRM inevitably would lead civilian personnel into an improper role that they are not trained or equipped to handle.

Avoiding Redundancies

The Government Accountability Office stated that “the US-VISIT program office has yet to fully define its relationships with other immigration and border management programs. As a result, the department is at increased risk of introducing inefficiencies and reduced effectiveness that result from suboptimizing how these programs collectively support its immigration and border management goals and objectives.”⁸

DHS has not “articulated how US-VISIT is to strategically fit with other...border security initiatives and mandates and could not ensure that these programs work in harmony to meet mission goals and operate cost effectively.”⁹ There are now several layers of different data collection processes which all must be submitted to DHS at different times, which add time and cost to the carriers and passengers.

For example, in the past few years the Passenger Name Recognition (“PNR”) system and the Advance Passenger Information System (“APIS”) have been implemented. There has also been a proposed rule recently issued for the Electronic System for Travel Authorization (“ESTA”), and Secure Flight is anticipated to take effect in the summer of 2009. As the Chamber has noted previously, it is also unclear how US-VISIT ties in with the Western Hemisphere Travel Initiative.¹⁰

These initiatives are all very similar in nature, yet there has been little or no coordination within DHS to reduce redundancies or to ensure consistency. The US-VISIT exit process should be viewed holistically as part of the overall process that is already in place, instead of simply

⁷ FR Vol. 73, No. 80, p. 22609.

⁸ Government Accountability Office, “Strategic Solution for US-VISIT Program Needs to Be Better Defined, Justified, and Coordinated,” February 2008, <http://www.gao.gov/new.items/d08361.pdf>.

⁹ Government Accountability Office, statement of Richard Stana, “US-VISIT Program Faces Operational, Technological and Management Challenges,” March 20, 2007, <http://www.gao.gov/new.items/d07632t.pdf>.

¹⁰ Chamber comments to Department of Commerce Report, “Restoring America’s Travel Brand,” February 9, 2007. <http://www.uschamber.com/NR/rdonlyres/e7e3cnkmaviri6wvimnqdvk4tb26srwnamxgdzdg4vqx42p6fwo6t4fjstiwnndxudj2ulnk2kxtavrob6lhrddlmic/Travelreportcommentsfeb92007.pdf>

adding on another layer of complexity without evaluating its place in larger scheme of travel facilitation and security.

DHS Should Bear the Burden of US-VISIT Exit

Many of US-VISIT's stated goals, such as monitoring compliance with immigration laws, are inherent governmental functions, not to be simply mandated onto the private sector. The Chamber supports private sector solutions, but opposes unfunded mandates. DHS currently collects US-VISIT entry data through CBP at air and sea ports, and DHS should continue to retain operational control and the fiscal burden for the US-VISIT program and should not require air or sea carriers to collect this information.

During the pilot testing phase for US-VISIT exit at several airports, DHS tested "self-service" kiosks. According to the Department of Homeland Security, the technology was proven to be sound, but the location of the kiosks was often a problem. "DHS found that compliance with biometric exit procedures improved depending on the convenience of the process."¹¹ The Chamber understands the need for the US-VISIT exit procedure to be part of the existing process, but believes DHS should incorporate it into the existing security process at the airport.

The Transportation Security Administration ("TSA") security checkpoints for the airport environment present an excellent possibility for incorporating the US-VISIT exit process. Having the exit procedure at the TSA location is ideal because it is already built into the travel process.

Even if it is not a TSA officer who collects the information at exit, rather a CBP or another agency's officer working at the same location, for the traveler, the security process would be seamless. Furthermore, as identified in the Air/Sea Biometric Exit Project Regulatory Impact Analysis, this alternative lowers the risk of non-governmental use of private identity information combined with a high level of information technology ("IT") security because DHS would have sole custody of the biometric information from collection to transmission to storage and retrieval.¹²

The NPRM says that "adding biometric collection at the security screening checkpoint was determined to be unfavorable, as the process at the security screening checkpoint are primarily concerned with screening individuals and luggage for prohibited items."¹³ However, TSA officials check every person's documents upon entering the security checkpoint to ensure that the person's identity documents match their boarding pass. Collecting biometrics and verifying identity are not too far removed from their current duties.

¹¹ FR Vol. 73, No. 80, p. 22070.

¹² DHS, "Air/Sea Biometric Exit Project Regulatory Impact Analysis," DHS-2008-0039-0002, April 17, 2008, pp. 31-33.

¹³ FR Vol. 73, No. 80, p. 22075.

The Department of Homeland Security also claimed that using the security checkpoint would cause delays, but there are inevitably going to be delays with new biometric exit procedures, wherever they are located. Incorporating the exit procedure into a security process that currently exists has the potential to make it more efficient. DHS noted in the NPRM that there are sometimes space limitations to the security checkpoint option. There are going to be space constraints with every biometric option location, and incorporating a security check makes the most sense within the context of a security checkpoint that already exists, instead of attempting to turn the airport check-in counter or gate into another separate security procedure.

Furthermore, the newly unveiled “Checkpoint Evolution” program, which recently began full operation at Baltimore-Washington International Airport (“BWI”), shows how TSA is able to strengthen security while decreasing the hassle factor for travelers. The layered security elements of Checkpoint Evolution are both modular and flexible and designed to work individually, as well as part of an integrated package that with minimal adaptation could include US-VISIT data collection upon exit.

There would be costs for DHS to implement US-VISIT exit, which it should bear given that collecting and verifying private identity information at the border is an inherent government function. However, cost savings may be obtained through contracting with private sector entities. Further, the US-VISIT office did not “formally consider” using kiosks, but this could be a successful alternative, and cheaper than all other options according to DHS estimates.¹⁴ The kiosk technology was proven to work in the pilots. This option could be particularly attractive if manned and placed in the appropriate locations with clear signage, such as at the very beginning or the end of the TSA checkpoint, depending on the airport.

Requiring air carriers to implement US-VISIT exit would increase travel delays, as it would be a security process tacked on top of an existing registration process. Space constraints at the check-in counters are a problem at many airports, and airlines are moving away from counter check-ins to self-serve kiosks and online check-ins, which conflicts with the Department of Homeland Security’s conclusion that “the process of collecting biometric exit records should be integrated into the existing departure process.”¹⁵ Further, the gate process is designed for boarding, not checking documents, and requiring US-VISIT exit at the gates would cause longer turn times for aircraft, more missed connections for travelers, and increased flight delays.¹⁶

Cruise Lines

The cruise industry is very different from the air travel industry, in that the vast majority of cruise passengers are not using the cruise ship as their means to exit the United States. Most cruises are closed loops, meaning that travelers start their trip at a U.S. port and end their trip at a U.S. port. The Chamber urges the department to exempt cruises from collecting biometric exit

¹⁴ See Table 1, FR Vol. 73, No. 80, p. 22081.

¹⁵ FR Vol. 73, No. 80, pg 22070

¹⁶ Testimony of the International Air Transport Association before the National Protection and Programs Directorate, 13 Jun 2008.

for their passengers, and at a minimum, closed loop cruises should be exempt. Within the context of the Western Hemisphere Travel Initiative, DHS has recognized that closed loop cruises are unique travel situations that merit different considerations when determining security measures. The Chamber believes the same thoughtful consideration should apply to biometric exit.

One of the main goals of the US-VISIT biometric exit proposal is to ensure that travelers comply with the terms of their visa, hence requiring cruise lines to collect biometric exit information will often be a meaningless process, although expensive and time-consuming, because very few cruises are used as transportation for travelers to leave the United States. Requiring cruise lines to collect biometrics upon exit and upon re-entry is redundant and has no real added security benefit, but a very high cost. Terminal space is also a problem, and the time and burden this would place on cruise lines is enormous.

Currently, cruise ships electronically submit a passenger and crew list prior to departure, and before arrival at a U.S. port. The lists are submitted 96 hours in advance of arrival at a U.S. port to both the U.S. Coast Guard and the Bureau of Customs and Border Protection. These lists include detailed information about all the passengers, including name, birthday, nationality, proper identification number, and port of embarkation. The lists are then checked against law enforcement databases before the cruise ship is cleared for departure and later upon their return to the U.S. Extensive additional security measures are in place at all times. These measures ensure that all passengers and crew members are accounted for during the trip.

Sea Vessels Crew

The NPRM also raises the question of how a cruise line or cargo ship vessel would handle its foreign workers and crew changes. Under current law, immigration officials already receive in advance a complete list of all crew members, including those that are joining or leaving the vessel in the United States. Given these and other comprehensive security safeguards, the Chamber believes that the crew and employees for sea vessel operations should not be required to participate in the exit program, as this would be costly and duplicate of current requirements.¹⁷

The NPRM also seems to apply only to passenger vessels, but the Chamber requests clarification to ensure that the US-VISIT exit does not apply to cargo vessels. Lastly, when crew members arrive or depart vessels in the U.S., they usually do so via an airport. Given the other requirements applicable to these seamen, the Chamber requests for the regulations to clearly state that crew members of sea vessels are exempt from the biometrics requirements when joining or leaving vessels in the U.S.

¹⁷ See, for example, 8 U.S.C. § 1281 and the accompanying regulations at 8 C.F.R. Part 251.

Measured Implementation and Outreach

In order to ensure that the implementation of the US-VISIT system meets its goals to enhance the security of U.S. citizens and visitors and facilitate legitimate travel and trade, adequate resources, both technological and personnel, must be allocated.

For such a complex system to work, it is imperative that the foreign traveler be made clear as to the requirement for exit verification at such kiosks or stations, and the kiosks or stations must be easily accessible to the traveler. Many of the pilot kiosks were available only with English language signage and directions, and were not necessarily intuitive in their use for the average traveler.

Any method of exit verification must include clear directions to the traveler upon entry as to the need to “check out” upon departure and the means by which to do so. A great deal of outreach to travelers in multiple languages must be made to avoid inadvertent noncompliance with any requirements for exit verification. Clearly visible and multilingual signage at airports would also minimize traveler confusion. The Chamber strongly urges a period of time during which any negative impacts from failure to register are waived until it is clear that most travelers understand and are able to comply with the exit requirements.

The DMIA Task Force addressed this issue in its recommendations to Congress stating:

As the entry/exit requirements change for the U.S., it is imperative that an effective coordinated communications outreach program be developed to ensure not only the compliance of the traveler but also a proactive message from government and industry to explain any new procedures so as not to hamper travel and commerce to the U.S.¹⁸

A major requirement for successful implementation of the US-VISIT system is systematic and concerted outreach to the traveling public to educate them regarding the operation and their responsibilities under US-VISIT. Any outreach campaign must also work to counter the increasingly negative perceptions attributed to these programs abroad. Such news reports, widespread overseas, reinforce the perception that it is growing more difficult to travel to the United States, and discourages legitimate would-be tourists and business persons from continuing to think of the United States as a vacation or investment destination.

Conclusion

We wish to reiterate our support for the overall mission of the US-VISIT system. Our comments are meant to highlight areas of concern with the current and proposed implementation of the program in order to avoid potential negative impacts on legitimate travel and trade. The Chamber encourages the US-VISIT office to work closely with industry stakeholders on any

¹⁸ Data Management Improvement Act Task Force; 1st Annual Report to Congress, December 2002, Rec. No. 9.

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revision to the NPRM, so it can properly understand industry processes and determine how to best implement a biometric exit.

We greatly appreciate the excellent relationship we have developed with the department and the US-VISIT office and hope to continue and expand that relationship in the future.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Randel K. Johnson", written in a cursive style.

Randel K. Johnson

Vice President

Labor, Immigration and Employee Benefits

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