

DEPARTMENT OF HOMELAND SECURITY

[USCBP 2007–0061]

RIN 1651–AA69

8 CFR Parts 212 and 235**DEPARTMENT OF STATE****22 CFR Parts 41 and 53****Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere**

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

ACTION: Final rule.

SUMMARY: This rule finalizes the second 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 U.S. citizens and certain nonimmigrant aliens entering the United States. This final rule details the documents U.S. citizens¹ and nonimmigrant citizens of Canada, Bermuda, and Mexico will be required to present when entering the United States from within the Western Hemisphere at sea and land ports-of-entry.

DATES: This final rule is effective on June 1, 2009.

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Abbreviations and Terms Used in This Document

- ANPRM—Advance Notice of Proposed Rulemaking
BCC—Form DSP–150, B–1/B–2 Visa and Border Crossing Card
CBP—U.S. Customs and Border Protection
CBSA—Canada Border Services Agency
DHS—Department of Homeland Security
DOS—Department of State
FAST—Free and Secure Trade
FBI—Federal Bureau of Investigation
IBWC—International Boundary and Water Commission
INA—Immigration and Nationality Act
IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004
LPR—Lawful Permanent Resident
MMD—Merchant Mariner Document
MODU—Mobile Offshore Drilling Unit
MRZ—Machine Readable Zone
NATO—North Atlantic Treaty Organization
NEPA—National Environmental Policy Act of 1969
NPRM—Notice of Proposed Rulemaking
OARS—Outlying Area Reporting System
OCS—Outer Continental Shelf
PEA—Programmatic Environmental Assessment
SENTRI—Secure Electronic Network for Travelers Rapid Inspection
TBKA—Texas Band of Kickapoo Act
UMRA—Unfunded Mandates Reform Act
USCIS—U.S. Citizenship and Immigration Services
US-VISIT—United States Visitor and Immigrant Status Indicator Technology Program
WHTI—Western Hemisphere Travel Initiative

I. Background

For a detailed discussion of the document requirements for travelers entering the United States from within the Western Hemisphere before January 31, 2008, the statutory and regulatory histories through June 26, 2007, and the applicability of the rule related to specific groups, please see the NPRM published at 72 FR 35088. For the document requirements which went into effect on January 31, 2008, please see the Notice “Oral Declarations No Longer Satisfactory as Evidence of Citizenship and Identity” which was published in the **Federal Register** on December 21, 2007, at 72 FR 72744.

¹ “U.S. citizens” as used in this rule refers to both U.S. citizens and U.S. non-citizen nationals.

A. Documentation Requirements for Arrivals at Land and Sea Ports-of-Entry Prior to the Effective Date of This Rule

The following is an overview of the documentation requirements for citizens of the United States, Canada, British Overseas Territory of Bermuda (Bermuda), and Mexico who enter the United States at sea and land ports-of-entry prior to the effective date of this rule.

1. U.S. Citizens

Generally, U.S. citizens must possess a valid U.S. passport to depart from or enter the United States.² However, U.S. citizens who depart from or enter the United States by land or sea from within the Western Hemisphere other than from Cuba have historically been exempt from this passport requirement.³ U.S. citizens have always been required to satisfy the inspecting officers of their identity and citizenship.⁴ Since January 31, 2008, U.S. citizens ages 19 and older have been asked to present documents proving citizenship, such as a birth certificate, and government-issued documents proving identity, such as a driver's license, when entering the United States through land and sea ports-of-entry. Children under the age of 19 have only been asked to present proof of citizenship, such as a birth certificate.⁵

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 nationality and, if required, a valid unexpired visa issued by a U.S. embassy or consulate abroad.⁶ Nonimmigrant aliens entering the United States must also satisfy any other applicable admission requirements (e.g., United States Visitor and Immigrant Status Indicator Technology Program

(US-VISIT)). However, the passport requirement is currently waived for most citizens of Canada and Bermuda when entering the United States as nonimmigrant visitors from countries in the Western Hemisphere at land or sea ports-of-entry.⁷ These travelers have been required to satisfy the inspecting CBP officer of their identities and citizenship at the time of their applications for admission. Since January 31, 2008, these nonimmigrant aliens also have been asked to present document proving citizenship, such as a birth certificate, and government-issued documents proving identity, such as a driver's license, when entering the United States through land and sea ports-of-entry.⁸

3. Mexican Nationals

Mexican nationals are generally required to present a valid unexpired passport and visa when entering the United States. However, Mexican nationals arriving in the United States at land and sea ports-of-entry who possess a Form DSP-150, B-1/B-2 Visa and Border Crossing Card (BCC)⁹ currently may be admitted without presenting a valid passport if they are coming by land or sea from contiguous territory.¹⁰

B. Statutory and Regulatory History

This final rule sets forth the second phase of a joint Department of Homeland Security (DHS) and Department of State (DOS) plan, known as the Western Hemisphere Travel Initiative (WHTI), to implement section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004, as amended (IRTPA) on June 1, 2009.¹¹ A brief discussion of IRTPA, amendments to IRTPA, and related regulatory efforts follows. For a more detailed description of these efforts through June 26, 2007, please refer to the NPRM at 72 FR 35088.

1. Intelligence Reform and Terrorism Prevention Act

On December 17, 2004, the President signed IRTPA into law.¹² IRTPA mandates that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require travelers for whom the President had waived the

passport requirement to present a passport or other document, or combination of documents, that are "deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship" when entering the United States. WHTI thus requires U.S. citizens and nonimmigrant aliens from Canada, Mexico, and Bermuda to comply with the new documentation requirements.

2. Advance Notice of Proposed Rulemaking

On September 1, 2005, DHS and DOS published in the **Federal Register** 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. Comments to the ANPRM related to arrivals at sea and land ports-of-entry are addressed in this final rule.

3. Rules for Air Travel From Within the Western Hemisphere

On August 11, 2006, DHS and DOS published an NPRM for air and sea arrivals. The NPRM proposed that, subject to certain narrow exceptions, beginning January 2007, all U.S. citizens and nonimmigrant aliens, including those from Canada, Bermuda, and Mexico, entering the United States by air and sea would be required to present a valid passport or NEXUS Air card; U.S. citizens would also be permitted to present a Merchant Mariner Document (MMD). The NPRM provided that the requirements would not apply to members of the United States Armed Forces. For a detailed discussion of what was proposed for air and sea arrivals, please see the NPRM at 71 FR 41655 (hereinafter, Air and Sea NPRM).

The final rule for travelers entering or departing the United States at air ports-of-entry (hereinafter, Air Final Rule) was published in the **Federal Register** on November 24, 2006. Beginning January 23, 2007,¹³ U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering and departing the United States at air ports-of-entry, which now includes from within the Western Hemisphere, are generally required to bear a valid passport. The main exceptions to this requirement are for U.S. citizens who present a valid, unexpired MMD

² Section 215(b) of the Immigration and Nationality Act (INA), 8 U.S.C. 1185(b).

³ 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).

⁴ In lieu of a passport, travelers claiming U.S. citizenship long have been permitted to enter on an oral declaration or to present a variety of documents to establish their identity and citizenship and right to enter the United States as requested by the CBP officer. 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.

⁵ 72 FR 72744.

⁶ Section 212(a)(7)(B)(i) of the INA, 8 U.S.C. 1182(a)(7)(B)(i).

⁷ 8 CFR 212.1(a)(1) (Canadian citizens) and 8 CFR 212.1(a)(2) (Citizens of Bermuda). See also 22 CFR 41.2.

⁸ 72 FR 72744.

⁹ A BCC is a machine-readable, biometric card, issued by the Department of State, Bureau of Consular Affairs.

¹⁰ 8 CFR 212.1(c)(1)(i). See also 22 CFR 41.2(g).

¹¹ Pub. L. 108-458, as amended, 118 Stat. 3638 (Dec. 17, 2004).

¹² Pub. L. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

¹³ DHS and DOS determined that delaying the effective date of the Air Rule to January 23, 2007, was appropriate for air travel because of operational considerations and available resources. See *id.*

traveling in conjunction with maritime business and U.S. and Canadian citizens who present a NEXUS Air card for use at a NEXUS Air kiosk.¹⁴ The Air Rule made no changes to the requirements for members of the United States Armed Forces. Please see the Air Final Rule at 71 FR 68412 for a full discussion of documentation requirements in the air environment.

In the Air Final Rule, DHS and DOS deferred a final decision on the document requirements for arrivals by sea until the second phase. Complete responses to the comments relating to sea travel that were submitted in response to the Air and Sea NPRM are presented in this final rule.

4. Amendments to Section 7209 of IRTPA

On October 4, 2006, the President signed into law the Department of Homeland Security Appropriations Act of 2007 (DHS Appropriations Act of 2007).¹⁵ 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 WHTI requirements no later than 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 required “expeditious[]” action and stated that requirements must be satisfied by the “earlier” of the dates identified.¹⁶ Congress also expressed an interest in having the requirements for sea and land implemented at the same time and having alternative procedures for groups of children traveling under adult supervision.¹⁷ However, on December 26, 2007, the President signed into law the Department of Homeland Security Appropriations Act of 2008 (“Omnibus Bill”, Pub. L. 110–161) which amended section 7209(b)(1) of IRTPA to require that WHTI “may not be implemented earlier than the date that is the later of 3 months after the Secretary of State and the Secretary of Homeland Security make the certification required in subparagraph (B) or June 1, 2009.” (Section 545, Omnibus Bill).

¹⁴ The Air Rule did not change the requirements for lawful permanent residents. Lawful Permanent Residents of the United States continue to need to carry their I-551 cards and permanent residents of Canada continue to be required to present a passport and a visa, if necessary, as they did before the rule came into effect.

¹⁵ Pub. L. 109–295, 120 Stat. 1355 (Oct. 4, 2006).

¹⁶ *Id.* at 546. See Congressional Record, 109th Cong., 2nd sess., September 29, 2006 at H7964.

¹⁷ *Id.*

5. Other Relevant Legislation

On August 4, 2007, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act of 2007).¹⁸ Section 723 of the 9/11 Commission Act of 2007 called on the Secretary of Homeland Security to begin to develop pilot programs with states to develop state-issued secure documents that would denote identity and citizenship. Section 724 of the 9/11 Commission Act of 2007 called on the Secretary of State to examine the feasibility of lowering the execution fee for the proposed passport card.

6. Passport Cards

On October 17, 2006, to meet the documentation requirements of WHTI and to facilitate the frequent travel of persons living in border communities, DOS, in consultation with DHS, proposed to develop a card-format passport for international travel by U.S. citizens through land and sea ports-of-entry between the United States and Canada, Mexico, or the Caribbean and Bermuda.¹⁹ The passport card will contain security features similar to the traditional passport book. The passport card will be particularly useful for citizens in border communities who regularly cross the border and will be considerably less expensive than a traditional passport. The validity period for the passport card will be the same as for the traditional passport—ten years for adults and five years for minors under age 16. The final rule on the passport card was published on December 31, 2007 at 72 FR 74169.

7. Certifications to Congress

In Section 546 of the DHS Appropriations Act of 2007, Congress called for DHS and DOS to make certain certifications before completing the implementation of the WHTI plan. The Departments have been working toward making these certifications since October 2006. In Section 723 of the 9/11 Commission Act, Congress required the submission of a report to the appropriate congressional committees regarding the state enhanced driver’s license pilot program required by a separate provision of the Act.

Congress has asked for the following certifications:

1. *National Institute of Standards and Technology (NIST) Certification.* Acquire NIST certification for the passport card concerning security

standards and best practices for protection of personal identification documents.

On May 1, 2007, NIST certified that the proposed card architecture of the passport card meets or exceeds the relevant standard and best practices, as specified in the statute.

2. *Technology Sharing.* Certify that passport card technology has been shared with Canada and Mexico.

DHS and DOS continue to share information and meet regularly with both Mexican and Canadian officials regarding the radio frequency identification (RFID) technology for the passport card.

3. *Postal Service Fee Agreement.*

Certify that an agreement has been reached and reported to Congress on the fee collected by the U.S. Postal Service for acceptance agent services.

DOS and the Postal Service have memorialized their agreement on the fees for the passport card set by DOS, including the execution fee which the Postal Service retains.

4. *Groups of Children.* Certify that an alternative procedure has been developed for border crossings by groups of children.

The final rule contains an alternative procedure for groups of children traveling across an international border under adult supervision with parental consent as proposed in the land and sea NPRM.

5. *Infrastructure.* Certify that the necessary passport card infrastructure has been installed and employees have been trained.

WHTI is a significant operational change in a series of changes that are aimed at transforming the land border management system. DHS will utilize the technology currently in place at all ports-of-entry to read any travel document with a machine-readable zone, including passports and the new passport card. CBP Officers have been trained in use of this infrastructure. In addition, CBP will deploy an integrated RFID technical infrastructure to support advanced identity verification in incremental deployment phases. CBP Officers receive ongoing training on WHTI policies and procedures and that will continue as we approach full WHTI implementation, including technology deployment, technology capability, and documentary requirements. CBP will develop training requirements and plans, perform the required training, provide on-site training support and monitor its effectiveness through assessment and ongoing support. Initial training was completed in January 2008.

¹⁸ Pub. L. 110–53, 121 Stat. 266 (Aug. 4, 2007).

¹⁹ 71 FR 60928.

6. *Passport Card Issuance*. Certify that the passport card is available to U.S. citizens.

DOS has developed an ambitious and aggressive schedule to develop the passport card and is making progress toward that goal. DOS issued the final rule on December 31, 2007. DOS has accepted applications for the passport card since February 1, 2008, and expects to issue cards in spring 2008.

7. *Common Land and Sea Implementation*. Certify to one implementation date.

The final rule provides for one implementation date for land and sea travel.

8. *State Enhanced Driver's License Projects*. Certify to agreement for at least one voluntary program with a state to test a state-issued enhanced driver's license and identification document.

On March 23, 2007, the Secretary of Homeland Security and the Governor of Washington signed a Memorandum of Agreement to develop, issue, test, and evaluate an enhanced driver's license and identification card with facilitative technology to be used for border crossing purposes. On September 26, 2007, the Secretary of Homeland Security and the Governor of Vermont signed a similar Memorandum of Agreement for an enhanced driver's license and identification card to be used for border crossing purposes; on October 27, 2007, the Secretary and the Governor of New York also signed a Memorandum of Agreement. On December 6, 2007, the Secretary of Homeland Security and the Governor of Arizona also signed a similar Memorandum of Agreement to develop, issue, test, and evaluate an enhanced driver's license and identification card.²⁰

The Departments have worked very closely to update the appropriate congressional committees on the status of these certifications and will continue to do so until final certifications are made. DOS and DHS believe that these certifications will be made well in advance of the June 1, 2009, deadline for implementation. In the unlikely event that the Departments are unable to complete all the necessary certifications by June 1, 2009, the Departments will provide notice to the public and amend the date(s) for compliance with the document requirements for land and sea border crossings as necessary.

II. Documentation at the Border

In the Land and Sea NPRM, the Departments announced that, separate

²⁰ For more information on these enhanced driver's license projects, see <http://www.dhs.gov>.

from WHTI implementation, beginning January 31, 2008, CBP would begin requesting documents that help establish identity and citizenship from all U.S. and Canadian citizens entering the United States. This announcement was made to reduce the well-known vulnerability posed by those who might illegally purport to be U.S. or foreign citizens trying to enter the U.S. by land or sea on a mere oral declaration. A person claiming U.S. citizenship must establish that fact to the examining CBP Officer's satisfaction, including by presenting documentation as necessary. Historically, a U.S. citizen has had to present a U.S. passport only if such passport is required under the provisions of 22 CFR part 53. Since January 31, 2008, DHS has expected the evidence of U.S., Bermudian, or Canadian citizenship to include either of the following documents or groups of documents: (1) Document specified in CBP's regulations as WHTI-compliant for that individual's entry; or (2) a government-issued photo identification document presented with proof of citizenship, such as a birth certificate. CBP retains its discretionary authority to request additional documentation when warranted and to make individual exceptions in extraordinary circumstances when oral declarations alone or with other alternative documents may be accepted.

As of January 31, 2008, CBP has required proof of citizenship, such as a birth certificate or other similar documentation as noted in the final rule for U.S. and Canadian children under age 19.

III. Summary of Document Requirements in the Proposed Rule

In the June 26, 2007, NPRM, the Departments proposed new documentation requirements for U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States by land from Canada and Mexico, or by sea²¹ from within the Western Hemisphere. The proposed document requirements are summarized below; for a full discussion of the proposed requirements, please refer to the NPRM at 72 FR 35088 (hereinafter Land and Sea NPRM).

The Departments proposed that most U.S. citizens entering the United States at all sea or land ports-of-entry would be required to present either: (1) A U.S. passport book; (2) a U.S. passport card; (3) a valid trusted traveler card (NEXUS,

²¹ In some circumstances under this rule, it is important to distinguish between types of sea travel. Those circumstances are so noted in the discussion of the final requirements.

FAST, or SENTRI); (4) a valid MMD when traveling in conjunction with official maritime business; or (5) a valid U.S. Military identification card when traveling on official orders or permit.

The Departments proposed that Canadian citizens entering the United States at sea and land ports-of-entry would be required to present, in addition to a visa, if required:²²

1. A passport issued by the Government of Canada; or
2. A valid trusted traveler program card issued by the Canada Border Services Agency (CBSA) or DHS, e.g. FAST, NEXUS, or SENTRI.²³

In the Land and Sea NPRM, DHS and DOS also noted that they had engaged with the Government of Canada in discussions of alternative documents that could be considered for border crossing use at land and sea ports-of-entry under the proposed rule. DHS and DOS pledged continued engagement in discussions of alternatives and welcomed comments suggesting alternative Canadian documents.

Under the proposed rule, all Bermudian citizens would be required to present a passport issued by the Government of Bermuda or the United Kingdom when seeking admission to the United States at all sea or land ports-of-entry, including travel from within the Western Hemisphere.

In the Land and Sea NPRM, the Departments proposed that all Mexican nationals would be required to present either: (1) A passport issued by the Government of Mexico and a visa when seeking admission to the United States or (2) a valid Form DSP-150, B-1/B-2 visa Border Crossing Card (BCC) when seeking admission to the United States at land ports-of-entry or arriving by pleasure vessel or by ferry from Mexico. The Departments proposed that BCCs alone would no longer be acceptable by a Mexican national to enter the United States from Canada; instead, a Mexican national would need to present a passport and visa when entering the United States from Canada.

The Departments proposed that Mexican nationals who hold BCCs would be allowed to use their BCCs for

²² See 8 CFR 212.1(h), (l), and (m) and 22 CFR 41.2(k) and (m).

²³ Canadian citizens who demonstrate a need may enroll in the SENTRI program and currently may use the SENTRI card in lieu of a passport. To enroll in SENTRI, a Canadian participant must present a valid passport and a valid visa, if required. Other foreign participants in the SENTRI program must present a valid passport and a valid visa, if required, when seeking admission to the United States, in addition to the SENTRI Card. The proposed rule did not alter the passport and visa requirements for other foreign enrollees in SENTRI (i.e., other than Canadian foreign enrollees).

entry at the land border from Mexico and, when arriving by ferry or pleasure vessel from Mexico. For travel outside of certain geographical limits or for a stay over 30 days, Mexican nationals who entered the United States from Mexico possessing a BCC would also be required to obtain a Form I-94 from CBP as is currently the practice.²⁴ The BCC would not be permitted in lieu of a passport for commercial or other sea arrivals in the United States.

The Departments also proposed continuing the current practice that Mexican nationals may not use the FAST or SENTRI card in lieu of a passport or BCC. Mexican national FAST and SENTRI participants, however, would continue to benefit from expedited border processing.

The Departments also proposed to eliminate the exception to the passport requirement for Mexican nationals who enter the United States from Mexico solely to apply for a Mexican passport or other "official Mexican document" at a Mexican consulate in the United States located directly adjacent to a land port-of-entry and who currently are not required to present a valid passport. This type of entry generally occurs at land borders.²⁵

In the Land and Sea NPRM, DHS and DOS encouraged U.S. states to consider participation in enhanced driver's license pilot programs and the Government of Canada to propose acceptable WHTI-compliant documents that it would issue to its citizens. DHS proposed to consider, as appropriate, documents such as driver's licenses that satisfy WHTI requirements by denoting identity and citizenship. These documents could be from a state, tribe, band, province, territory, or foreign government if developed in accordance with enhanced driver's license project agreements between those entities and DHS. In addition to denoting identity and citizenship, these documents will have compatible technology, security criteria, and respond to CBP's operational concerns.

On January 29, 2008, DHS published in the **Federal Register** a final rule concerning minimum standards for state-issued driver's licenses and identification cards that can be accepted for official purposes in accordance with

the REAL ID Act.²⁶ In the January 29, 2008 rule, DHS indicated its intent to work with states interested in developing driver's licenses that will meet both the REAL ID and WHTI requirements.

In the Land and Sea NPRM, the Departments also proposed special circumstances for specific groups of travelers permitting other documents:

- U.S. citizens on cruise ship voyages that originate and end in the United States may carry government-issued photo identification (IDs) and birth certificates, consular reports of birth abroad or certificates of naturalization;
- U.S. and Canadian citizen children under age 16 and children age 16 to 18 traveling in groups may carry originals or certified copies of birth certificates; U.S. citizen children may also carry consular reports of birth abroad or certificates of naturalization;
- Members of the Kickapoo Band of Texas and Tribe of Oklahoma may carry the Form I-872, American Indian Card;

The Land and Sea NPRM indicated that document requirements for Lawful Permanent Residents (LPRs) of the United States, employees of the International Boundary and Water Commission (IBWC) between the United States and Mexico, workers on the Outer Continental Shelf (OCS), active duty alien members of the U.S. Armed Forces, and members of NATO-Member Armed Forces would remain unchanged.

The Departments also outlined certain approaches with regard to Native Americans and Canadian Indians, as well as alternative approaches to children and requested comments on the proposed alternatives for inclusion in this final rule. A discussion of those approaches and the comments received follows in the comment response section.

IV. Discussion of Comments

In the ANPRM, the Air and Sea NPRM, and Land and Sea 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 sea and land ports-of-entry.

DHS and DOS received 2,062 written comments in response to the ANPRM and over 1,350 written comments in response to the Land and Sea NPRM. The Departments also received several comments to the August 11, 2006, Air and Sea NPRM that addressed sea or land travel or the WHTI plan generally,

which have been included and addressed in these comment responses. 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 the Land and Sea 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.

The comments received in response to the ANPRM and the Land and Sea NPRM regarding arrivals by land and sea are addressed in this rulemaking. A summary of the comments from the ANPRM, the Air and Sea NPRM, and the Land and Sea NPRM follows with complete responses to the comments.

A. General

DHS and DOS received thirty-nine comments to the Land and Sea NPRM expressing general agreement with the proposed requirements.

DHS and DOS received several comments to the August 11, 2006, Air and Sea NPRM for implementation of WHTI in the air and sea environments that opposed any requirements for land-border crossings. DHS and DOS received thirty comments to the Land and Sea NPRM expressing general disagreement with the proposed rule. One commenter requested more stringent document requirements than proposed.

B. Implementation

1. General

Comment: One commenter to the Land and Sea NPRM noted that a U.S. citizen cannot be denied entry to the United States.

Response: U.S. citizens cannot be denied entry to the United States; however, the documents that this rule requires are designed to establish citizenship and identity. Travelers without WHTI-compliant documents who claim U.S. citizenship will undergo additional inspection and processing until the inspecting officer is satisfied that the traveler is a U.S. citizen, which could lead to lengthy delays.

Comment: Two commenters to the Land and Sea NPRM expressed concern that the manner by which DHS is certifying itself as being ready to implement WHTI does not allow

²⁴ See 8 CFR 212.1(c)(1)(i); also 22 CFR 41.2(g). If Mexicans 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(h)(1).

²⁵ See 8 CFR 212.1(c)(1)(ii).

²⁶ See REAL ID Final Rule at 73 FR 5272.

Congress to exercise the necessary oversight of the WHTI program.

Response: DOS and DHS disagree. The Departments are in the process of taking the necessary steps to be able to make all certifications to Congress as required by statute. WHTI is a significant operational change in a series of changes that are aimed at transforming the land border management system. DHS will utilize the technology currently in place at all ports-of-entry to read any travel document with a machine-readable zone, including passports and the new passport card. CBP Officers have been trained in use of this infrastructure. In addition, CBP will deploy an integrated RFID technical infrastructure to support advanced identity verification in incremental deployment phases. CBP Officers receive ongoing training on WHTI policies and procedures and that will continue as we approach full WHTI implementation, including technology deployment, technology capability, and documentary requirements. CBP will develop training requirements and plans, perform the required training, provide on-site training support and monitor its effectiveness through assessment and ongoing support, with initial training having been completed in January 2008.

The Departments have worked very closely to update the appropriate congressional committees on the status of the certifications and will continue to do so until final certifications are made. Moreover, the National Institute of Standards and Technology (NIST) certified on May 1, 2007, that the architecture of the passport card meets or exceeds the relevant standard and the best practices for protection of personal identification documents as specified in the statute. DOS and DHS are on track to make all certifications well in advance of the June 1, 2009 implementation date.

Comment: Approximately two hundred commenters to the Land and Sea NPRM requested that the Departments commit sufficient resources to fully implement WHTI, including technology, staffing, funding, training, and marketing.

Response: DOS and DHS are fully committed to providing the necessary resources to implement WHTI, including technology, staffing, funding, training, and outreach to the traveling public.

Comment: Several commenters raised concerns about requiring passports or other forms of documentation during emergency situations. One commenter stated that the passport waiver for U.S. citizens during unforeseen emergencies

or for humanitarian or national interest reasons should also extend to Canadian and Mexican citizens. One commenter to the Land and Sea NPRM requested that DHS consult with local emergency responders so that WHTI does not compromise their ability to protect American and Canadian communities.

Response: Pursuant to IRTPA, this final rule provides for situations in which documentation requirements may be waived for U.S. citizens on a case-by-case basis for unforeseen emergencies or "humanitarian or national interest reasons." Similarly, CBP has authority to temporarily admit non-immigrant aliens into the United States on a temporary basis in case of a medical or other emergency, which is not changed by this final rule. Finally, local emergency responders routinely consult with local CBP offices regarding entry procedures into the United States during emergency situations.

Comment: One commenter stated that the Land and Sea NPRM would be 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: DHS and DOS are not denying U.S. or non-U.S. citizens the ability to travel to and from the United States by requiring an appropriate document for admission. Pursuant to 8 U.S.C. 1182(a)(7)(A) and 1185, DHS and DOS have authority to require sufficient proof of identity and citizenship via presentation of a passport or alternative document when seeking entry to the United States. By requiring a valid passport or other alternative document for entry to the United States from within the Western Hemisphere, DHS and DOS are eliminating a historical exemption of the requirement that all U.S. citizens and other travelers must possess a passport to enter the country.

2. Timeline

Comment: DHS and DOS received one hundred and ten comments to the ANPRM regarding the timeline for implementation of WHTI. Ten of the ANPRM commenters believed that WHTI should be implemented sooner than proposed. Nine of these commenters approved of the timelines proposed, and ninety-four commenters believed that the timeline should be extended.

Several comments to the Air and Sea NPRM and to the Land and Sea NPRM asked for an extended implementation timeline. One commenter stated that WHTI in the land and sea environments should be implemented as soon as possible. A few commenters urged that the Departments give the public ample opportunity to prepare for the final implementation. Twenty-four commenters recommended delaying implementation until pilot projects and field trials had been completed. Two hundred and six commenters recommended that DHS should set a clear implementation date of June 2009.

Six commenters requested a flexible and phased implementation approach for WHTI. Thirty-six commenters recommended ensuring that there is a critical mass of WHTI-compliant documentation (*i.e.*, passports, NEXUS, FAST, and enhanced driver's licenses) in circulation prior to WHTI implementation at land and sea ports-of-entry. One commenter to the Land and Sea NPRM requested that key benchmarks relating to document availability and installation of required infrastructure be developed to determine the timeline for full implementation.

Response: Since the publication of the NPRM, Congress has amended section 7209 by the 200 Omnibus Bill, to prohibit WHTI from being implemented before June 1, 2009, at the earliest. DHS and DOS will transition toward WHTI secure document requirements over the next 16 months, with implementation on June 1, 2009. This allows ample time for the public to prepare for the change.

Comment: Two commenters stated that ending oral declarations on January 31, 2008, without a plan would cause substantial delays at ports-of-entry and suggested a single implementation date of 2009 rather than a phased implementation. Three commenters were concerned about how the elimination of the practice of accepting oral declarations of citizenship and how processing of travelers without documents in the transition phase will impact the flow of traffic at busy border crossings.

Response: In the Land and Sea NPRM, the Departments announced that, separate from WHTI implementation, beginning January 31, 2008, CBP would begin requesting documents that evidence identity and citizenship from all U.S. and Canadian citizens entering the United States at land and sea ports-of-entry. This change was made to reduce the well-known vulnerability posed by those who might illegally purport to be U.S. or foreign citizens trying to enter the United States by land

or sea on a mere oral declaration. As of January 31, 2008, a person claiming U.S. citizenship must establish that fact to the examining CBP Officer's satisfaction, generally through the presentation of a birth certificate and government-issued photo identification. CBP retains its discretionary authority to request additional documentation when warranted and to make individual exceptions in extraordinary circumstances when oral declarations alone or with other alternative documents may be accepted.

CBP has relied on its operational experience in processing travelers entering the United States by land to ensure that the elimination of oral declarations is implemented in a manner that will minimize delays while achieving the security benefit underlying WHTI. The changes that took place January 31, 2008, have gone smoothly. Compliance rates are high and continue to increase. There have been no increases in wait times attributable to the end of accepting oral declarations alone at the border.

Comment: One commenter to the Land and Sea NPRM stated that WHTI implementation should be delayed until a study underway at the Government Accountability Office (GAO) is completed. Another commenter called upon DHS to conduct a more comprehensive economic impact analysis before the proposed rule is promulgated.

Response: The Departments welcome congressional oversight and have cooperated with several GAO engagements that have directly or indirectly touched on WHTI. The Departments intend to fully implement WHTI on June 1, 2009, the earliest possible date, which the Departments believe is in the best interests of national security. Additionally, the Departments are providing ample time for robust communication efforts to and preparation by the traveling public. While the Departments will consider the findings of these GAO engagements with regard to WHTI implementation, it is not necessary, nor would it be appropriate, to delay implementation of WHTI until any particular GAO report is completed. Moreover, CBP has also conducted a robust economic analysis of the proposed rule, as detailed in the Land and Sea NPRM and elsewhere in this document, in accordance with applicable laws, regulations, and policies.

3. Security and Other Operational Considerations

Comment: DHS and DOS received approximately thirty-five comments to

the ANPRM stating that the implementation of WHTI at the land borders would result in travel delays at the ports-of-entry. Ten commenters to the Land and Sea NPRM recommended that the "border crossing agencies" implement a plan to anticipate and mitigate longer waits at key border crossings.

Response: DHS has analyzed the potential for travel delays at the ports-of-entry in the document "Western Hemisphere Travel Initiative in the Land and Sea Environments: Programmatic Environmental Assessment." The public was invited to comment on this analysis. DHS has concluded that implementation of WHTI in the land environment will not have an adverse impact on wait times. By using documents that contain an MRZ or employ RFID technology, the Departments anticipate that wait times will decrease. The final Programmatic Environmental Assessment is available at <http://www.cbp.gov>.

4. Technology

Comment: Eight commenters to the Land and Sea NPRM stated that WHTI should not be implemented until RFID technology has been deployed. These commenters also stated that RFID technology should be deployed at all land-border crossings. Six hundred and thirty-eight commenters stated that appropriate infrastructure and personnel should be in place for a program of this magnitude.

Response: DHS is committed to ensuring that infrastructure and fully trained personnel are in place to successfully implement WHTI in the land environment. DHS believes that deploying new RFID technology at certain land ports-of-entry, in combination with existing technology, is the most cost-effective way to enhance security while ensuring the efficient flow of trade and travelers. DHS believes that RFID deployment to low-volume land-border ports-of-entry in the near future is unnecessary given the current traffic volumes.

Comment: Two commenters to the Land and Sea NPRM stated that DHS and DOS should reconsider the use of vicinity RFID technology in the passport card because of the substantial privacy and security risks. Four commenters stated that the implementation of WHTI should protect the personal privacy of travelers.

Response: Based on experience to date with the use of RFID technology, DHS is confident that existing and future vicinity RFID-enabled documents can be used at the border in a manner that safeguards personal privacy. RFID

technology is currently used as part of existing trusted traveler programs. The RFID chip contained in the passport card issued by DOS will not contain any personal information. The vicinity RFID technology to be deployed would act as a pointer to a secure CBP database and does not transmit personal information. The information is presented to CBP officers as the traveler pulls up to an inspection booth, thus facilitating faster processing of the individual.

5. Cruise Ships

Comment: Four commenters to the Land and Sea NPRM stated their appreciation that passports will not be required for those cruise passengers departing and returning to the United States. One commenter disagreed with the proposed alternative document requirement for certain U.S. citizen cruise ship passengers.

Response: DHS and DOS appreciate these comments, and have decided to adopt in the final rule the NPRM provision addressing U.S. citizens on round-trip cruises. Thus, U.S. citizens traveling entirely within the Western Hemisphere may present a government-issued photo ID along with an original or a copy of a birth certificate instead of a document designated in this final rule if they: (1) Board a cruise ship at a port or place within the United States and (2) return to the same U.S. port or place from where they originally departed. In addition, DHS and DOS added a new provision that clarifies that U.S. citizens under the age of 16 are required to present either an original or a copy of his or her birth certificate without having to provide a photo ID.

Regarding the comment opposing alternative document requirements for cruise ship passengers, because of the nature of round trip cruise ship travel, DHS has determined that when U.S. citizens depart from and reenter the United States on board the same cruise ship, they pose a low security risk in contrast to cruise ship passengers who embark in foreign ports. Therefore, under certain conditions, U.S. citizen cruise ship passengers traveling within the Western Hemisphere will be permitted to present alternative documentation as described in section V.A. of this document.

6. MODUs/OCS

Comment: One commenter to the Land and Sea NPRM supported the clarification on document requirements for workers returning to and from Mobile Offshore Drilling Units (MODUs) within the United States Outer Continental Shelf (OCS).

Response: DHS and DOS appreciate this comment. DHS and DOS clarified in the Land and Sea NPRM that offshore workers who work aboard Mobile Offshore Drilling Units (MODUs) attached to the United States Outer Continental Shelf (OCS), and who travel to and from MODUs, would not need to possess a passport or other designated document to re-enter the United States if they do not enter a foreign port or place. Upon return to the United States from a MODU, such an individual would not be considered an applicant for admission for inspection purposes under 8 CFR 235.1. Therefore, this individual would not need to possess a passport or other designated document when returning to the United States. DHS and DOS note that, for immigration purposes, offshore employees on MODUs underway, which are not considered attached to the OCS, would not need to present a passport or other designated document for re-entry to the United States mainland or other territory if they do not enter a foreign port or place during transit. However, an individual who travels to a MODU directly from a foreign port or place and, therefore, has not been previously inspected and admitted to the United States, would be required to possess a passport or other designated document when arriving at the United States port-of-entry by sea.

C. Passports

1. General

Comment: Thirty-one commenters to the Land and Sea NPRM stated that increasing the number of documents in circulation will increase the number of documents that are lost, stolen or misplaced, and thus individuals in these circumstances will need expedited replacement. One commenter to the Land and Sea NPRM expressed concern about how to enter the United States if his passport had been lost or stolen.

Response: U.S. citizens whose passports are lost or stolen can apply for replacements and request expedited service if necessary. Individuals who are abroad and have an urgent need to travel are generally issued a one-year, limited validity passport that will enable them to continue their trips. That passport will be replaced within the year for no additional fee either domestically or abroad. Individuals who are within the United States and have an urgent need to travel may pay a fee for expedited processing as defined in 22 CFR 51.56.

Comment: One commenter to the Land and Sea NRPM raised concerns about the security of U.S. and foreign

passports, stating that passports are easily falsified or altered. One commenter stated that passports can be intercepted in the mail and falsified.

Response: A 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. As such, we recognize that false passports are valuable assets for dangerous people. We take precautionary measures to verify passports and share information with international partners regarding lost and stolen passports.

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 authentication features include digitized photographs, embossed seals, watermarks, ultraviolet and fluorescent light verification features, security laminations, micro-printing, and holograms.

An application for a U.S. passport is adjudicated by trained DOS experts and issued to persons who have documented their identity and United States 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.

U.S. passports are delivered by priority mail with delivery confirmation providing proof of receipt at the addressee's zip code. Mail carriers are instructed to scan the Priority Mail piece at the time it is delivered to the address indicated on the envelope. Priority Mail envelopes also help protect the passport from loss or theft. The envelopes are sturdy and less likely to become damaged or unsealed during mail processing.

Foreign passports accepted for admission to the United States must meet the standards set out in the International Civil Aviation Organization (ICAO) 9303, and a CBP inspecting officer verifies and authenticates such passports presented for admission to the United States.

2. Cost of Passports

Comment: In response to the Air and Sea NPRM and Land and Sea NPRM,

DHS and DOS received many comments stating that passports are too expensive for routine cross-border visits and that the cost of the passport book should be reduced or eliminated. Several commenters requested that DOS offer lower rates for families, the elderly, and children under 18. One commenter was concerned about the eventual cost of the passport card. One commenter stated that the cost of the passport card should be reasonable and it should remain less expensive than a passport. One commenter to the Land and Sea NPRM requested a no-cost passport card for travelers who cross international borders at unique geographical locations. One commenter urged the State Department to provide expedited passport service to truck drivers at no additional charge. Five commenters to the Land and Sea NPRM suggested that U.S. passport fees be waived for Indian tribal members. One commenter stated that the cost of obtaining a passport would cause people not to travel, negatively affecting commerce.

Response: Title 22 of the United States Code mandates that DOS charge a fee for each passport application and a fee for executing each application, where applicable. The law and implementing regulations provide for certain exemptions from passport fees, but the law does not provide DOS the discretion to create additional exemptions or a reduced fee category based on the personal circumstances of the individual. Children do benefit from a lower application fee but it reflects the reduced validity period of the passport rather than a concession based on age. Please see the passport card final rule () for more information on the cost structure of the passport card. See 72 FR 74169.

3. Obtaining Passports

Comment: DHS and DOS received seven comments to the Land and Sea NPRM asking why a birth certificate had to be submitted with the passport application or an old passport had to be submitted along with a renewal application, thus potentially leaving travelers without a passport or a birth certificate to use for international travel.

Response: To prevent fraud, original birth certificates must be examined by passport examiners who are trained in fraud detection before they are returned to the applicant. For the same reason, a person is not permitted to hold two valid passports of the same type except on DOS authorization. DOS physically cancels current passports when it issues new passports, therefore, current or old passports have to be submitted during the renewal process. If a passport is

needed for urgent travel, the traveler can request expedited service.

4. DOS Issuance Capacity

Comment: DHS and DOS received one hundred eighty-four comments to the Land and Sea NPRM that expressed concern that DOS would not be able to timely process the increased numbers of passport applications that will result from implementation of the rule. One commenter stated that standard applications should be processed in six weeks and expedited applications in one week. One commenter stated that with the increase of passport applications, adjudicators within DOS are not given enough time to thoroughly check them. One commenter stated that the wait time in applying for the passport card should be less than thirty days.

Response: Prior to the implementation of the first phase of WHTI in January 2007, DHS and DOS conducted a successful campaign to alert the traveling public and stakeholders in the private sector to the new document requirements implemented in the air phase, particularly in the aviation and travel and tourism industries.

DOS has taken numerous measures in response to the increased demand resulting from the implementation of WHTI. DOS has created hundreds of new positions and is currently producing more than 1.6 million passports per month. DOS anticipates increasing passport issuance to 500,000 documents a week. DOS is also planning to open additional passport facilities around the country. Through these efforts, DOS expects to be able to meet the increased demand resulting from the implementation of WHTI in the land and sea environments.

5. Passport Cards

Comment: DHS and DOS received four comments to the Air and Sea NPRM for implementation of WHTI in the air and sea environments requesting that the passport card be designated as an acceptable document in the air environment. Two commenters to the Land and Sea NPRM did not support the issuance of passport cards because the cards cannot be used for international travel beyond Canada, Mexico, the Caribbean, or Bermuda.

Response: The passport card is intended as a lower cost means of establishing identity and nationality for U.S. citizens in two limited situations—for U.S. citizens crossing U.S. land borders and traveling by sea between the United States, Canada, Mexico, the Caribbean, or Bermuda. The passport card is not designed to be a globally

interoperable travel document as defined by the International Civil Aviation Organization (ICAO). In fact, designating the card format passport for wider 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 because it would not meet all the international standards for passports and other official travel documents. Moreover, in its consideration of the 2007 Appropriations Act for the Department of Homeland Security, Congress, while allowing for the use of the passport card by citizens traveling by sea between the United States, Canada, Mexico, the Caribbean, or Bermuda, did not make parallel changes regarding international air travel.

Comment: DHS and DOS received five comments to the Land and Sea NPRM stating that the implementation of WHTI should not take place until the passport card is available. One commenter suggested that the passport card should be issued in conjunction with existing state licensing agencies with federal support. Four commenters stated that the passport card could not possibly be designed, tested, publicized, and be readily obtainable by the summer of 2008. One commenter stated that the issuance of a passport card would not facilitate spontaneous travel.

Response: As stated in the Land and Sea NPRM, in which the Departments jointly announced the next phase of WHTI addressing entry into U.S. land and sea ports-of-entry, DHS and DOS have considered the operational challenges posed by the new requirements. As a result, the Departments are taking a flexible, practical approach to land implementation that considers a variety of factors, including the availability of passports, passport cards, and state-issued enhanced driver's licenses pursuant to project agreements with DHS. During this transition period, U.S. citizens will be able to obtain the documents necessary to satisfy WHTI.

Comment: The Government of Canada commented on the Land and Sea NPRM and encouraged the sharing of the technological and procurement specifications of the U.S. passport card in order to assist in the development of comparable passport card options in other countries.

Response: DHS and DOS have engaged with the Government of Canada in discussions of alternative documents proposed by the Canadian federal government and several provinces that

could be considered for border crossing use at land and sea ports-of-entry. DHS and DOS have shared technology and procurement specifications with the Government of Canada regarding alternative travel documents and welcome continued engagement with Canadian counterparts to implement WHTI. Alternative identity and citizenship documents issued by the Government of Canada will be considered in the future.

Comment: One commenter to the NPRM recommended that the card should expire not less than ten years from the date issued.

Response: Passport cards, like passport books, will be valid for ten years for adults and five years for children less than 16 years of age.

D. Alternative Documents

1. General

Comment: DHS and DOS received approximately 230 comments to the ANPRM requesting alternative documentation to the traditional passport book. Almost half of those commenters wanted a low-cost identification card that could be used for crossing the border. Many commenters requested that existing CBP Trusted Traveler cards be accepted. Several commenters asked for a clear definition of the documents that would be acceptable under WHTI for land travel. A few commenters stated that only the passport should be acceptable. Two commenters asked that a Transportation Worker Identification Card (TWIC) be designated as an acceptable document.

DHS and DOS received three comments to the Land and Sea NPRM requesting a low-cost identification card that could be used for crossing the border. Eleven commenters to the Land and Sea NPRM supported the opportunity for travelers to present a variety of government-approved identifications. Three commenters requested DHS and DOS to further study the possibility for alternative identification that would be accepted in place of a passport.

Response: Other acceptable documents are designated in this rule by the Secretary of Homeland Security as sufficient to establish identity and citizenship at land and sea ports-of-entry. For U.S. citizens, along with the passport and lower-cost passport card, CBP Trusted Traveler cards under the NEXUS, SENTRI, and FAST programs will be accepted under this rule. In addition, identification cards issued to military members of the U.S. Armed Forces will be accepted when such

personnel are traveling on official travel orders. Merchant Mariner Documents (MMDs) issued by the U.S. Coast Guard to U.S. citizens will also be accepted when traveling for official maritime business.

Canadian citizens will be able to present CBP Trusted Traveler Cards. The Border Crossing Card (BCC) issued by DOS to Mexican nationals will be accepted when coming from Mexico.

Documents issued as part of a DHS-approved state enhanced driver's license project will be acceptable according to the agreement between the individual state and DHS, or the Government of Canada and DHS. Details on state enhanced driver's license projects will be published as notices in the **Federal Register** as they are finalized.

In addition to the documents described above, DHS and DOS are providing alternatives to the passport requirement for children under 16, children under 18 traveling in groups, Native American U.S. citizens, Canadian Indians, and certain U.S. cruise passengers on "closed-loop" voyages that originate in the United States. DHS and DOS encourage U.S. states and Canadian provinces (through the Government of Canada) to participate in enhanced driver's license projects.

Comment: Four commenters to the Land and Sea NPRM asked for a definition of "availability" concerning documents that will be accepted under WHTI.

Response: In the Land and Sea NPRM, the Departments stated, in the context of implementation and the effective date of the final rule:

At a date to be determined by the Secretary of Homeland Security, in consultation with the Secretary of State, the Departments will implement the full requirements of the land and sea phase of WHTI. The implementation date will be determined based on a number of factors, including the progress of actions undertaken by the Department of Homeland Security to implement the WHTI requirements and the availability of WHTI compliant documents on both sides of the border. * * * 27

In this context, "availability" means that WHTI-designated documents exist and the public can obtain them. The Departments are publishing this final rule with ample notice to the traveling public. This will also allow sufficient time for the traveling public to obtain documents before June 1, 2009.

Comment: Thirteen commenters to the Land and Sea NPRM asked that the Departments include a provision in the

final rule for a non-photo identification document (e.g., fingerprint verification) for persons who object to being photographed based on their religious beliefs.

Response: While DHS and DOS remain sensitive to the concerns of different religious groups, the Departments must balance those concerns against the need to secure our borders through the implementation of the document standards required by WHTI. In particular, photographs serve a unique and essential function and significantly minimize the opportunities for document fraud, unlike fingerprints, by allowing an inspecting CBP officer or any law enforcement officer to immediately compare the picture on the document against the traveler. In order to be consistent with international travel standards, DHS is requiring all adult travelers to carry a government-issued photographic identification document. Failure to do so may result in delays at the border as officers try to determine identity and citizenship.

2. Driver's License and Birth Certificate

Comment: DHS and DOS received almost 300 comments to the ANPRM stating that the combination of a driver's license and birth certificate should be acceptable to denote an individual's citizenship and identity. DOS and DHS received several comments to the Land and Sea NPRM stating that a driver's license and birth certificate should be acceptable to denote an individual's citizenship and identity. One commenter stated that because Native Americans can use their tribal identification cards, northern-border citizens should be allowed to use their state or province-issued birth certificates and driver's licenses. Thirty-eight commenters stated that they should be exempt from a passport requirement due to their unique geographic location. Two commenters requested special provisions for waiving passport requirements for North American Indians traveling through the U.S. border. One commenter disagreed with the cruise ship exemption for U.S. citizens.

Response: The Departments agree that U.S. citizens may use the combination of a driver's license and birth certificate when traveling on "closed loop" cruise ship voyages, where the U.S. citizen departs from a U.S. port or place and returns to the same U.S. port upon completion of the voyage. Accordingly, we disagree with the commenter advocating that the Departments not adopt a special provision for cruise travel. DHS and DOS have determined that exempting certain cruise passengers

from a passport requirement is the best approach to balance security and travel efficiency considerations in the cruise ship environment. In contrast, because of the myriad government entities that issue birth certificates and because of the greater potential for counterfeiting or adulteration associated with general use in the land and sea environments, the Departments have determined that it is not prudent to permit the combination of birth certificates and driver's licenses generally for adults when single, secure documents are available. CBP recognizes that residents of unique geographic locations face special challenges in that some must travel through Canada to get from their homes in the United States to their schools, jobs, and hospitals in other areas of the United States. CBP has worked with many of these communities over the years to facilitate travel. Full implementation of WHTI will not diminish CBP's ability to utilize existing protocols and other inspection processes to admit travelers to and from unique geographic locations. The Departments have elected not to adopt any of the remaining comments.

Comment: DHS and DOS received several comments to the Land and Sea NPRM stating that because the combination of a driver's license and birth certificate is acceptable aboard a cruise ship, it should also be acceptable documentation for land-border entries. One commenter stated that because the land-border tourist industry has a far larger impact on the U.S. economy than the cruise-ship industry, the land border deserves no less protection and consideration.

Response: DHS and DOS disagree. As mentioned previously, due to the operational environment and the security risks assessed, the Departments have determined that U.S. citizens may use the combination of a driver's license and birth certificate when traveling on certain cruise-ship voyages. As detailed in the Land and Sea NPRM, the security risks associated with designating this document combination for U.S. citizens on round-trip cruises are low. See 72 FR 35096. DHS and DOS have carefully considered the issues surrounding protection of our land borders and have determined that the documents designated in this rule for entry at land ports-of-entry reflect the best approach to balance security and travel efficiency considerations in the land environment.

Comment: Three commenters to the Land and Sea NPRM recommended that senior citizens be permitted entry to the United States using government-issued photo identification with proof of citizenship based on their low security

²⁷ 72 FR at 35096.

risk, significant cross-border linkages, and limited financial resources.

Response: DHS and DOS appreciate this comment. DHS and DOS are sensitive to the needs of senior citizens and note that DOS will be offering a lower cost passport card as an alternative to the passport book. Senior citizens who live in participating states or provinces may also be eligible to obtain an enhanced driver's license.

3. Trusted Traveler Documents

Comment: Three commenters to the Land and Sea NPRM expressed concern that the existing NEXUS card is not considered an acceptable form of ID at the border. One commenter sought early written assurances that NEXUS cards will be recognized as entry documents in non-dedicated commuter lanes. One commenter stated that DHS should make it a priority to expand both NEXUS and FAST.

Response: Existing NEXUS cards are already acceptable documents for entry at land and sea ports-of-entry. CBP is upgrading the card format/features and is conducting a robust training program for its personnel at these ports of entry to ensure that CBP Officers enforce both the current documentation procedures recognizing trusted traveler cards and the WHTI requirements uniformly.

Comment: Twenty-six commenters to the Land and Sea NPRM requested the expansion of the NEXUS, SENTRI, and FAST programs. Four commenters requested that the Trusted Traveler Programs be promoted more aggressively. Two commenters requested that the government explore opportunities and technologies to further develop frequent border crossing programs. Two commenters requested the expansion of the NEXUS program to include driver's licenses. Three commenters stated it is imperative that the phrase "as a participant in the program" be interpreted broadly enough to cover situations where truck drivers are crossing the border in a regular commercial or traveler lane for both NEXUS and FAST.

Response: CBP is expanding the NEXUS, SENTRI, and FAST Trusted Traveler programs to accommodate an increase in applications expected as a result of the implementation of WHTI.

4. Children/Groups of Children/ Alternative Approaches/Parental Consent

Comment: Thirty-one commenters to the ANPRM asked to allow travelers under the age of 16 to use a birth certificate as sufficient proof of identity and citizenship. Ninety-three commenters to the Land and Sea NPRM

supported the proposed requirements for children. Four commenters to the Land and Sea NPRM suggested the exemption from presenting a passport be raised to age 16 and under. One commenter stated that it would be appropriate to exempt children under the age of 18. Sixty-eight commenters supported the provisions being made for children traveling with their families, in groups, or with chaperones. One commenter stated that there was concern for the treatment of children if they have lost their documentation and were detained at the border. One commenter asked that U.S. and Canadian children traveling in groups for short trips should not be required to carry an original or certified copy of a birth certificate if accompanied by a chaperone. One commenter stated that attendance by students who are not members of athletic teams at high school events is jeopardized by this proposal.

Response: Under this final rule, all U.S. citizen children under the age of 16 are permitted to present at all sea and land ports-of-entry when arriving from contiguous territory either: (1) An original or a copy of a birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services. The Departments have decided to expand the list of documents Canadian children may present. Under the final rule, Canadian citizen children under the age of 16 are permitted to present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate at all sea and land ports-of-entry when arriving from contiguous territory. The final rule relaxes the birth certificate requirement by allowing presentation of either an original or copy of a birth certificate, rather than an original or a certified copy as proposed in the NPRM.

DHS and DOS have determined that age 16 is the most appropriate age to begin the requirement to present a passport book, passport card (for U.S. citizens), or other approved document because at that age most states begin issuing photo identification to children, such as a driver's license, and at that point, the child would, consequently, have a known and established identity that could be readily accessed by border security and law enforcement personnel. Also, age 16 is the age at which DOS begins to issue adult passports, valid for 10 years instead of 5 years for children. DHS and DOS also recognize that it is difficult for the majority of children under age 16 to obtain a form of government-issued

photo identification other than a passport.

Under this final rule, U.S. citizen children under age 19, who are traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth sport organizations that arrive at U.S. sea or land ports-of-entry from contiguous territory, are permitted to present either: (1) An original or a copy of a birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by USCIS. Under this provision, groups of children must be under the supervision of an adult affiliated with the organization (including a parent of one of the accompanied children who is only affiliated with the organization for purposes of a particular trip) and all the children have parental or legal guardian consent to travel. Canadian citizen children under age 19 who are traveling in groups are permitted to present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate under the same circumstances. For purposes of this alternative procedure, an adult would be considered to be a person age 19 or older, and a group would consist of two or more people.

While DHS and DOS are sensitive to the needs of school groups, carrying an original or copy of a birth certificate represents the minimum travel requirement a person would possess to enable us to secure our borders through the implementation of WHTI.

Comment: Six commenters to the Land and Sea NPRM requested that children of Mexican citizenship be included in the special requirements for children under the age of 16 or under the age of 19 when traveling in groups. One of these commenters questioned why Mexican children under the age of 16 were not included under the special requirements for children as Canadian children were.

Response: IRTPA directs DHS and DOS to implement a plan to require documents for citizens for whom the general passport requirements have previously been waived, not to eliminate document requirements currently in place. All Mexican citizens, including children, are currently required to present either a passport and visa, or a BCC upon arrival in the United States. DHS and DOS are not changing the current document requirements for children of Mexican citizenship entering the United States.

Question From the Proposed Rule:
Alternative Approach for Children;
Parental Consent

In the Land and Sea NPRM, the Departments solicited comments on whether a traditional passport or a passport card should be required for any child under 16 entering the United States without his/her parents and not in a group. DOS and DHS also solicited comments on what would be the advantages and disadvantages to requiring a traditional passport or a passport card, and not allowing child travelers in such circumstances to rely upon a birth certificate, Consular Record of Birth Abroad, or Certificate of Naturalization.

Comment: Two commenters to the Land and Sea NPRM requested that a child under the age of 16 who is traveling with only one parent not be required to have a letter of consent to travel from the other parent. One commenter stated that there needs to be a solution concerning a child traveling across the border with an extended family member who is not the parent.

Response: While the Departments take seriously the issue of child abduction, the final rule does not require a passport or passport card for children or evidence of parental consent for the child to cross the international border. Parents are strongly encouraged to check the requirements of the governments of Mexico and Canada for child travelers as well as review the guidance on the DOS and DHS Web sites when planning international travel for their children.

Under this final rule, a U.S. citizen who is under the age of 16 is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by DOS, or a Certificate of Naturalization issued by USCIS when entering the United States from contiguous territory at sea or land ports-of-entry.

Based upon a review of the alternative approach for children and the parental consent questions asked in the Land and Sea NPRM and the comments received in response, DHS and DOS are not implementing any additional requirements regarding children or evidence of parental consent to travel other than those proposed in the Land and Sea NPRM, which are adopted in this final rule. The Departments note that obtaining a passport book or card or other document with an MRZ or RFID technology may result in faster processing at the border.

5. State Enhanced Driver's License
Projects

Comment: DHS and DOS received two comments to the Air and Sea NPRM stating that the best solution to increasing security at our borders is one that incorporates improved technology in existing documentation, such as a driver's license. Thirty commenters to the Land and Sea NPRM stated that WHTI should not be implemented until all state or provincial enhanced driver's license pilot programs are in place. Six Canadian provinces urged DHS to explicitly recognize their proposed enhanced driver's license in the final rule. Twelve commenters supported proposed state pilot programs. One hundred-eight commenters recommended that DHS recognize an enhanced driver's license denoting identity and citizenship for entry by both Canadian and American citizens. One commenter stated that programs for producing an enhanced driver's license need more time for development and distribution prior to the summer of 2008. Eleven commenters recommended completing an enhanced driver's license pilot project prior to implementation of WHTI. Fifty-six commenters to the Land and Sea NPRM requested financial and technical assistance from the Federal government so that states could produce enhanced driver's licenses.

Response: DHS encourages U.S. states and Canadian provinces acting through the Canadian Government to undertake enhanced driver's license projects. In a separate notice published concurrently in the **Federal Register** with this final rule, DHS will designate the Washington State enhanced driver's license as acceptable and notes that additional such documents will be added by notice. DHS will consider documents such as U.S. state and Canadian provincial enhanced driver's licenses that satisfy the WHTI requirements by denoting identity and citizenship undertaken pursuant to agreements with DHS. These documents also will have compatible facilitative technology and must meet minimum standards of issuance to meet CBP's operational needs. As noted above, the State of Washington has begun a voluntary program to develop an enhanced driver's license and identification card that would denote identity and citizenship. On March 23, 2007, the Secretary of Homeland Security and the Governor of Washington signed a Memorandum of Agreement to develop, issue, test, and evaluate an enhanced driver's license and identification card with facilitative technology to be used for border

crossing purposes. Under this final rule, U.S. citizens arriving from contiguous territory and adjacent islands may present the enhanced driver's license and identification card issued by the State of Washington at land and sea ports-of-entry.

To establish an EDL program, each entity individually enters into agreement with DHS based on specific factors such as the entity's level of interest, funding, technology, and other development and implementation factors. As each EDL program is specific to each entity, DHS does not intend to delay the implementation of WHTI until all potential state and provincial enhanced driver's license projects are operational. However, DHS will continue to welcome states and provinces interested in implementing EDL programs—even those that start after WHTI implementation.

Comment: Two commenters recommended a meeting with all state driver's license directors by January 2008 before the completion of the Washington State pilot program.

Response: DHS appreciates this comment and remains committed to working on a continuing basis with and coordinating efforts among states interested in developing, testing, and implementing pilot programs for enhanced driver's licenses. DHS encourages states interested in developing enhanced driver's licenses to work closely with DHS to that end.

6. Mexican/Canadian/Bermudian
Documents

Comment: Two commenters to the Land and Sea NPRM mistakenly believed that DHS had accepted Canadian provincial driver's licenses under the proposed rule. Eleven commenters appreciated DHS's acceptance of alternative Canadian citizenship and identity documents. Four commenters urged DHS and DOS to work with border states and Canadian provinces toward acceptable upgrades of existing documents. In its comments to the Land and Sea NPRM, the Government of Canada noted that DHS and DOS would accept the U.S. Merchant Mariner Document (MMD) as a WHTI-compliant document for U.S. citizens traveling on official maritime business and requested that the modernized Canadian Seafarer's Identity Document (SID) issued by Canada also be recognized by DHS and DOS as a WHTI-compliant document at sea and land ports-of-entry.

Response: While DHS appreciates these comments, DHS is not designating the provincial driver's license or the Canadian Seafarer's Identity Document

as acceptable documents in this final rule. As stated in the Land and Sea NPRM, DHS and DOS have engaged with the Government of Canada and various provinces in discussions of alternative documents that could be considered for border crossing use at land and sea ports-of-entry under this rule. DHS and DOS will continue working with the Canadian government to explore potential alternative documents in the future. The Departments clarify that the MMD is being phased out and is not a document that will be accepted in the long term.

7. REAL ID Driver's Licenses

Comment: Four commenters to the Land and Sea NPRM asked for clarification whether enhanced driver's licenses issued as part of a state pilot program under WHTI would comply with the REAL ID requirements as well. Two commenters cautioned against the action of implementing WHTI using the requirements of REAL ID due to concerns regarding privacy, costs, a complicated verification system, and the issues of federalism. One commenter stated that DHS must definitively declare that WHTI-compliant driver's licenses meet the improved driver's license requirements of the REAL ID Act.

Response: DHS has worked to align REAL ID and EDL requirements. EDLs are being developed consistent with the requirements of REAL ID and, as such, can be used for official purposes such as accessing a Federal facility, boarding Federally-regulated commercial aircraft, and entering nuclear power plants. While the REAL ID requirements include proof of legal status in the U.S., the EDL will require that the cardholder be a U.S. citizen. In addition, the EDL will also include technologies that facilitate electronic verification and travel at ports-of-entry. DHS is extremely cognizant of the need to protect privacy, and as such institutes best practices with regard to the collection and use of personal data for all of its programs.

8. IBWC

Comment: DHS and DOS received one comment to the Air and Sea NPRM for implementation of WHTI in the air and sea environments requesting that International Boundary and Water Commission (IBWC) identification be acceptable for land and sea travel. DHS and DOS received one comment to the Land and Sea NPRM requesting that IBWC identification be acceptable for land and sea travel. The comment also noted several improvements in the

security of IBWC identification documents.

Response: The Departments appreciate this comment. As stated in the Land and Sea NPRM, U.S. citizens and Mexican national direct and indirect employees of the IBWC crossing the United States-Mexico border may continue to use their IBWC cards while on official business under this final rule.

E. U.S. Native Americans and Canadian Indians

1. Proposed Rule

In the Land and Sea NPRM, the Departments sought comments on what Native American tribal documents could be designated as acceptable in the final rule. The Departments specified general criteria for acceptable Native American documents to meet. To satisfy Section 7209 of IRTPA, the documents must establish the identity and citizenship of each individual. In the Land and Sea NPRM, DHS and DOS proposed to accept tribal enrollment documents only if members of the issuing tribe continue to cross the land border of the United States for a historic, religious or other cultural purpose. It was also proposed that the tribal enrollment card must be satisfactory to CBP, may only be used at that tribe's traditional border crossing points and will only be accepted so long as that tribe cooperates with the verification and validation of the document. Tribes were also obligated to cooperate with CBP on the enhancement of their documents in the future as a condition for the acceptance of the document.

DHS and DOS specifically invited comments from those United States tribes with members who continue to cross the border for a traditional purpose. The Departments sought comments from any tribe wishing to propose its tribal enrollment card as an acceptable alternative document. The Land and Sea NPRM asked that such comments include detailed information about traditional border crossings and the locations of those crossings. The Departments also requested information about the enrollment qualifications employed by each such U.S. tribe. A detailed description of the information sought by the Departments is provided in the Land and Sea NPRM. *See* 72 FR at 35099–35100.

DHS and DOS also stated that they were considering alternative approaches and invited comments on these alternative approaches for U.S. Native Americans:

- Make no special provision for U.S. Native Americans because they have an

equal opportunity to obtain the same documents that are available to all other U.S. citizens.

- Consider broader issuance of the American Indian Card now issued to members of the federally recognized Kickapoo Tribes or a similar card.
- Accept tribal enrollment cards from tribes whose members continue traditional border crossings without any limitation on the border crossing point or points where each such tribal enrollment card is accepted.
- Accept all tribal enrollment cards from all federally recognized Native American tribes at some or all border crossing points.

The Land and Sea NPRM proposed that, for Canadian Indians:

Canadian members of First Nations or "bands" would be permitted to enter the United States at traditional border crossing points with tribal membership documents subject to the same conditions applicable to United States Native Americans. Canadian First Nations or bands who seek to have their tribal enrollment cards accepted for border crossing purposes should submit comments for the record which contain the information requested * * * for comparable federally recognized U.S. tribes.²⁸

The Land and Sea NPRM also proposed acceptance of the new document to be issued by the Canadian Department of Indian Affairs and Northern Development (hereinafter "INAC Card")

2. Summary of Comments

Many tribes and bands commented on the NPRM asking that the Departments include their tribal enrollment cards or other tribal documents as acceptable documents under WHTI. These commenters also proposed that all tribal cards issued by U.S. tribes should be accepted.

Several Canadian First Nations commented on the Land and Sea NPRM to propose that their tribal enrollment cards or other tribal documents be designated as acceptable documents. These commenters also proposed that all such band cards for Canadian Indians be accepted. Commenters suggested that, in the alternative, the Departments should accept the proposed, revised INAC card as an acceptable alternative document.

3. Final Rule—U.S. Native Americans

As stated in the Land and Sea NPRM, the United States has a special relationship, founded in the Constitution, with its Native American tribes.²⁹ This relationship allows the

²⁸ 72 FR at 35100.

²⁹ *See* Constitution, I, § section 8, cl.3; *Cherokee Nation v Georgia*, 30 U.S. 1, 17 (1831); *Worcester*

federal government, where appropriate, to designate Native American members of federally recognized U.S. tribes for special treatment.³⁰

Comments throughout the rulemaking process and consultations with U.S. Native American tribes have emphasized the particular impact which a new document requirement may have on Native Americans belonging to U.S. tribes who continue to cross the land borders for traditional historic, religious, and other cultural purposes. Several of these tribes are concerned that their members will be required to obtain a passport, passport card, or alternative document to maintain contact with ethnically related communities, including, for some tribes, members who live on traditional land in Mexico or Canada.

Based on the record of this rulemaking proceeding, the Departments have adopted an alternative approach from the Land and Sea NPRM for U.S. Native Americans. DHS will work with tribes recognized by the United States government if each tribe (1) Continues to have strong cultural, historic, and religious cross-border ties; and (2) is willing to improve the security of the tribal enrollment documents in the future. Accordingly, paragraph (e) in 8 CFR 235.1 has been revised to capture this change.

As stated in the proposed rule, acceptance of a tribal enrollment document would be contingent upon: (1) The tribe satisfactorily establishing identity and citizenship in connection with the use of its document; (2) the tribe providing CBP with access to appropriate parts of its tribal enrollment records; and (3) the tribe agreeing to improve the security of its tribal documents in cooperation with CBP.

4. Final Rule—Canadian Indians

As requested by Congress, DHS has consulted with the Government of Canada regarding several alternative documents, including a proposed more secure INAC Card. It is anticipated that this new INAC card will be issued by the Canadian Department of Indian Affairs and Northern Development, Director of Land and Trust Services (LTS). DHS proposes to accept this document for Canadian Indians if and when it is available in connection with features and procedures to satisfactorily evidence identity and citizenship.

LTS is responsible for determining the status of all Canadian Indians under Canada's Indian Act of 1876 for

purposes of entitlements. Since 1951, the Canadian Government has maintained Indian Registration Lists, which confirm the heritage of each individual for entitlement purposes. Through this long-standing registration process, Canada has formally conferred "registered" Indian status on individuals. Only registered Canadian Indians can apply for the LTS issued "status" card i.e., the INAC card.

LTS currently issues an INAC card with some security features such as a photograph of the document holder. The Government of Canada proposes to issue a new INAC card that would comply with international document security standards agreed by the Governments of Canada and the United States as part of the Security and Prosperity Partnership (SPP). When the document is issued in accordance with the SPP 1.1.3 security standard it is expected to include a machine-readable zone (MRZ).

It is anticipated that Canada will begin to issue the new INAC cards beginning in 2008. DHS continues to have discussions with the Government of Canada about how to ensure that DHS and CBP will have the capability to electronically validate and verify the identity and citizenship of INAC card holders. Permanent designation of the INAC as an acceptable travel document by the Secretary of Homeland Security will be conditioned on the satisfactory establishment of a process to achieve this validation.

If designated by the Secretary of Homeland Security, the proposed new INAC card will also be accepted as satisfactory evidence of the citizenship and identity of registered Canadian Indians.

In light of the decision to accept an appropriate document issued by the Government of Canada to those recognized by that government as Canadian Indians, the Departments have decided not to accept the multitude of documents issued by the many Canadian First Nations.

5. Specific Comments Objecting to any Document Requirement

Comments: CBP received approximately one hundred comments to the ANPRM and several commenters to the Land and Sea NPRM opposing any regulations that would require Native Americans or Canadian Indians traveling to and from the United States to carry and produce a U.S. or Canadian passport upon entry. These commenters asserted that such a requirement would infringe upon an asserted "right" of indigenous peoples living within the United States and Canada to travel freely across the border. Twenty-two

tribes and their representatives commented to the Land and Sea NPRM that WHTI infringed upon an asserted "right" to unrestricted passage across the U.S.-Canadian border granted under the Jay Treaty and other treaties. DHS and DOS received one comment to the Air and Sea NPRM for implementation of WHTI in the air and sea environments similarly stating that Native Americans should not have any restrictions on travel across the borders of the United States. Two commenters stated that assurance was needed that document requirements would not obstruct or discourage them from obtaining those documents or inhibiting the movement of their people. One commenter to the Land and Sea NPRM observed that while Native Americans are eligible to obtain passports as Canadian or U.S. citizens, many choose not to because they perceive it as a threat to their sovereign status. One commenter is concerned that such documents are required to denote citizenship and identity and many believe that accepting citizenship from the U.S. or Canada would undermine the federal government's treaty obligations. Six individuals and one tribe commented that the rule would have a negative impact on Native Americans' ability to maintain familial ties and exercise religious and cultural practices across international borders. One tribe commented that international crossings were based on proximity to water. One tribe commented that the Departments' attempts to fit border crossing needs into a box are simply unrealistic.

Response: The INA requires the inspection of all applicants for admission, with the purpose of verifying identity and citizenship. The Jay Treaty of 1794 and other treaties do not prevent the Departments from requiring documentary evidence of identity and citizenship from Native Americans and Canadian Indians.

Congress, through the enactment of Section 7209 of IRTPA, specifically mandated that the Departments develop a plan to require documentary evidence of identity and citizenship at the borders. Section 289 of the INA³¹ refers to the "right" of "American Indians" born in Canada to "pass the borders of the United States," provided they possess at least 50 percent of Native American blood. Section 289, however, benefits individuals who establish their identity, their Canadian citizenship, and that they are "American Indians."

DHS and DOS have proposed to accept certain tribal documents as an

^v *Georgia*, 31 U.S. 515, 561 (1832); *U.S. v Sandoval*, 231 U.S. 28, 46-47 (1913).

³⁰ *Morton v. Mancari*, 417 U.S. 535, 551-55.

³¹ See 8 U.S.C. 1359.

appropriate accommodation to U.S. Native Americans.

6. Specific Native American and Canadian Indian Comments Directed to the Rulemaking Process

Comment: Ten commenters to the Land and Sea NPRM requested that DHS and DOS meet with their tribal governments. One tribe and one individual commented that DHS and DOS have failed to adequately consult with federally recognized Indian tribes on the implementation of this rule in accordance with the law and consequently requested that the entire Land and Sea NPRM be retracted until proper "government-to-government" consultations can take place. One tribe expressed concerns that the Land and Sea NPRM would be the "only opportunity" for tribal governments to engage in dialogue regarding the proposed regulation. One commenter encouraged DHS to continue the open dialogue with tribal governments along the international borders and to view tribal governments as an asset for protecting and providing security for the international borders.

Response: Throughout the rulemaking process, DHS has met with Native Americans to discuss the WHTI document requirements and tribal concerns. Moreover, DHS specifically solicited comments from Native Americans in an August 6, 2007, letter to all federally recognized tribes. Comment procedures outlined in the Land and Sea NPRM provided Native Americans with the opportunity to provide information about their tribal enrollment documents. The Departments received comments from numerous tribes, and these comments were fully considered in the decision to issue this final rule.

Comment: Two tribes requested an extension of the comment period for the Land and Sea NPRM to be able to study the options available to them.

Response: We have carefully considered the comments and determined that it is not advisable to reopen the comment period for the Land and Sea NPRM. Section 7209 of IRTPA, as amended, calls on the Departments to act expeditiously to implement WHTI. The Departments believe that the expeditious issuance of this Final Rule best advances our national security. Throughout the entire WHTI rulemaking process, DHS has met with Native Americans and Canadian Indians to discuss the WHTI document requirements and tribal concerns. DHS specifically solicited comments from Native Americans in an August 6, 2007, letter to all federally recognized tribes.

As stated above, the Departments received comments from numerous tribes, and these comments were fully considered and are addressed in this final rule. Delaying issuance of the final rule would delay notice to the public and consequently the time available for travelers to obtain designated documentation. For these reasons, DHS and DOS did not reopen the comment period for the Land and Sea NPRM.

7. Comments on the Acceptance of Tribal Documents

Comment: Twenty-six tribes, along with three individuals, commented that members should be allowed to use their existing tribal cards at any crossing point. One tribe commented that an independent pilot project is underway for a secure identification document that can be used by that tribe. Seven commenters welcomed the proposal to accept tribal enrollment documents as long as those documents are approved by DHS. Many commenters recommended using tribal documents as an alternative to the passport. Several commenters encouraged DHS to continue working with indigenous peoples to provide a mechanism for border crossing that is as streamlined as possible. One tribe's comment requested that Native Americans be granted the same privileges as U.S. Merchant Mariners if the Departments decide that requiring passports is the only option for entry documents. One commenter requested broader issuance of the American Indian Card now issued to members of the federally recognized Kickapoo Tribe or a similar card. Two commenters requested that existing Canadian Certificates of Indian Status (CIS) be accepted as a WHTI-compliant document for entry into the United States. One commenter urges that secure indigenous, tribal or CIS Identity Cards for the purposes of entry into and from the U.S. and Canada be established within the provisions of WHTI. One tribe requested the acceptance of Canadian First Nations' tribal IDs at all border crossings. One tribe argued that their tribal enrollment records were sufficient to prove citizenship and objected to any notion that state-issued birth certificates were superior to their tribal records. One tribe commented that they support the comments by other tribal governments to develop a national tribal ID card for identification purposes for crossing international borders. One tribe did not understand the reluctance of DHS to accept tribal membership documents as sufficient evidence of identity and citizenship to support the right to enter the United States.

Response: DHS and DOS appreciate these comments. As indicated above, based on the comments received and the information provided to the Departments on the particular impact the document requirement would have on Native American tribes, the Departments have determined that, at the time of full implementation of this final rule, U.S. citizens belonging to a federally-recognized tribe may present tribal enrollment documents designated by the Secretary of Homeland Security as meeting the WHTI standards at land ports-of-entry. If designated by the Secretary of Homeland Security as satisfactory, Canadian citizens may present the new proposed INAC card at land ports-of-entry when arriving from contiguous territory.

Documents that will be designated by the Secretary must establish the identity and citizenship of the Native American and Canadian Indian document holders. Documents that will be designated by the Secretary must be secure, and U.S. tribes must also cooperate with CBP on the enhancement of their documents in the future as a condition for the continued acceptance of the document.

8. Native American Privacy Issues

Comment: Twelve tribes commenting to the Land and Sea NPRM were concerned with disclosure and privacy issues regarding religious and cultural information. One tribe noted that information presumably related to traditional border crossings, which they consider private, was not requested from other state or government entities. These commenters insisted that the request for this information was not necessary.

Response: DHS and DOS remain sensitive to related privacy concerns. In the Land and Sea NPRM, DHS and DOS invited any tribe that wished to propose its tribal enrollment card as an acceptable alternative document at one or more traditional border crossing points to submit comments explaining fully why its card should be accepted for travel while noting any privacy concerns. The privacy of tribes and their members will be of the utmost importance to the Departments when consulting with tribes to enhance their documents to be WHTI compliant.

9. Miscellaneous Comments

Comment: One commenter to the Land and Sea NPRM sought clarification on what would be considered a "qualifying tribal entity" under the proposed rule.

Response: A qualifying tribal entity is one that is federally recognized by the government of the U.S. that agrees to

meet WHTI tribal document security standards, including agreeing to provide CBP access to the appropriate entries in its enrollment records. DHS will work with federally recognized tribes to develop, test and produce WHTI-compliant documents. Documents could be produced on behalf of a single tribe or a group of tribes who have agreed to produce a WHTI-compliant tribal document.

Comment: One tribe commented to the Land and Sea NPRM that most members are born at home or on reservations and have difficulty producing a birth certificate, which is an important source document used to obtain documents under the proposed rule.

Response: DHS and DOS have procedures in place to make determinations of citizenship when birth certificates are unavailable.

10. Kickapoo Tribe American Indian Card

Comment: Two commenters to the Land and Sea NPRM asked that DHS and DOS maintain the current practice of allowing members of the Kickapoo Tribe to cross the border under the Texas Band of Kickapoo Act. One commenter is concerned that USCIS has not issued new documents for several years and asks that USCIS resume issuing such form I-872 American Indian Cards.

Response: DHS and DOS agree to continue the current practice of allowing U.S. citizen and Mexican national Kickapoo Indians to enter and exit the United States using their American Indian Cards, issued by USCIS, as an alternative to the traditional passport or passport card at all land and sea border ports-of-entry. There are currently no plans to issue new form I-872 American Indian cards.

F. Outside the Scope of the NPRM and Final Rule

1. General

Comment: DHS and DOS received three comments to the Air and Sea NPRM regarding implementation of WHTI in the air and sea environments that proposed various 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, the public had the opportunity to comment on DOS's proposed passport card NPRM at 71 FR 60928 (October 17, 2006).

Comment: Two commenters to the Land and Sea NPRM stated that while the economic analysis predicts job

losses in border communities, the federal government is not providing a remedy or addressing the impact in any way.

Response: The Departments continue to strive to minimize the potential impact of WHTI implementation, especially on border communities. However, the WHTI plan was mandated by Congress in section 7209 of the IRTPA in response to an important national security imperative identified by the 9/11 Commission. Further, the Departments believe that implementation of WHTI will help facilitate legitimate trade and travel over time. It should also be recognized that a number of factors have a greater effect on the economies of border communities, including overall economic conditions and the current exchange rate. Providing financial support to those communities is beyond the scope of this rule, however.

Comment: Two commenters stated that FAST enrollees are not currently treated as trusted travelers, which defeats the purpose of the FAST program.

Response: Comments regarding the administration of CBP Trusted Traveler programs are beyond the scope of this rule; however, it should be noted that commercial drivers enrolled in FAST are trusted travelers.

Comment: Ten commenters recommended the creation of a NEXUS appeals board. These commenters also recommended a streamlined renewal process for NEXUS. One commenter suggested several changes to the NEXUS program such as a one card/one fee per family program; extending the validity period of the NEXUS card to ten years; streamlining the renewal process; and recognizing NEXUS and FAST cards for entry in non-dedicated commuter lanes. One commenter suggested a clear NEXUS renewal process that ensures no down time for NEXUS members.

Response: Comments regarding the administration of CBP Trusted Traveler programs are beyond the scope of this rule. DHS would note, however, that under the final rule, all CBP Trusted Traveler documents will be acceptable entry documents for United States and Canadian citizens at all lanes and all land ports-of-entry. DHS further notes that, if an individual feels that an application to a CBP Trusted Traveler program was denied based upon inaccurate information, redress may be sought through contacting the local trusted traveler Enrollment Center to schedule an appointment to speak with a supervisor, writing the CBP Trusted Traveler Ombudsman, or using the DHS Traveler Redress Inquire Program (DHS

TRIP). CBP has also been making incremental improvements to its trusted traveler programs. See http://cbp.gov/xp/cgov/travel/trusted_traveler/.

Comment: Two commenters to the Land and Sea NPRM stated that the cost for a Canadian passport is high and that the process for obtaining a passport should be made easier. Another commenter stated that the process for obtaining a Mexican passport and visa should be made less onerous.

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 or Mexican government-issued document is outside the scope of this rule and outside the Departments' authorities.

Comment: One commenter requested that a "full environmental statement" be prepared prior to implementation of passport or documentation control.

Response: DHS and DOS documented their assessment of the potential for impact on the quality of the human environment in the "Western Hemisphere Travel Initiative in the Land and Sea Environments: Programmatic Environmental Assessment" dated September 10, 2007. The public was given an opportunity to comment on a draft of the Programmatic Environmental Assessment (PEA) upon the publication of the Notice of Availability on June 25, 2007. See 72 FR 34710. Comments regarding the draft PEA were addressed in the Final PEA. Based on the final PEA, a determination was made that the travel documents proposed for WHTI and use of the travel documents for implementation of IRTPA will not have a significant impact on the quality of the human environment and that further analysis under the National Environmental Policy Act of 1969 (NEPA) would not be necessary. A Finding of No Significant Impact (FONSI) was issued on September 10, 2007, a copy of which is contained in the final PEA.

Comment: One commenter to the Land and Sea NPRM disagreed with the employee citizenship requirement for the enhanced driver's license projects because it would result in the loss of valuable workforce for state governments.

Response: While DHS appreciates this comment, policies regarding state employee citizenship requirements are beyond the scope of this rule. DHS remains committed to working with and coordinating efforts among states

interested in developing, testing, and implementing enhanced driver's license projects. DHS encourages states interested in developing enhanced driver's licenses to work closely with DHS to that end.

Comment: Two comments to the Land and Sea NPRM requested that DHS support the proposal to establish DOS offices in border communities to provide flexibility for spontaneous trips. Two commenters recommended an increase in the capacity of one of the regional passport offices specifically for passport service companies.

Response: While DHS and DOS appreciate these comments, expansion of DOS passport offices in specific border communities is beyond the scope of this rule.

Comment: One commenter to the Land and Sea NPRM recommended that the number of expedited applications for individual passports submitted by service companies be increased.

Response: While DHS and DOS appreciate these comments, operational policies between passport service providers and DOS are beyond the scope of this rule.

Comment: One commenter to the Land and Sea NPRM recommended that the Departments explore, as part of the proposed pilot project concept, the development of an "Indigenous lane" for border crossing/passage purposes.

Response: While DHS remains committed to working with tribal groups, operational policies regarding "dedicated lanes" are beyond the scope of this rule.

2. Air Rule

Comment: One commenter to the Land and Sea NPRM requested that the alternative procedure for U.S. and Canadian children entering the United States under age 19 traveling as part of school groups, religious groups, social or cultural organizations, or teams associated with youth support organizations be extended to the air environment in addition to land and sea ports-of-entry.

Response: Comments regarding documentation requirements for U.S. and Canadian children entering the U.S. at air ports-of-entry are beyond the scope of this rule; however, the public had the opportunity to comment on these requirements in the August 11, 2006, NPRM for the air environment. Children under the age of 16 arriving from Western Hemisphere countries are required to present a passport when entering the United States by air. For a more detailed description of documentation requirements for children entering the U.S. through air

ports-of-entry, see the Air Final Rule at 71 FR 68416 (November 24, 2006).

Comment: One commenter to the Land and Sea NPRM requested that an alternative procedure for the transfer of medical patients be established for all modes of travel.

Response: The air mode of travel is beyond the scope of this rule; however, 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." Please see the Air Final Rule, 71 FR at 68419, for more information.

3. Lawful Permanent Residents

Comment: Three commenters to the Land and Sea NPRM stated that a Lawful Permanent Resident card should be sufficient to travel to and from the United States without the presentation of a passport. One commenter to the NPRM expressed concern about waiting to renew an expired Lawful Permanent Resident card when applying for entry into the United States.

Response: Lawful Permanent Residents (LPRs) of the United States will continue to be able to enter the United States upon presenting a Lawful Permanent Resident card (I-551) or other valid evidence of permanent resident status. There are current regulations that already address the entry of LPRs into the United States, which remain unchanged by WHTI.

4. Dual Nationals

Comment: One commenter to the Land and Sea NPRM sought clarification on what documents would be required for travelers who have dual citizenship.

Response: The WHTI rule lists the new documentation requirements for U.S., Canadian, Bermudan citizens, and Mexican nationals entering the United States by land or sea from within the Western Hemisphere. WHTI does not alter United States immigration law or regulations regarding citizenship.

G. Public Relations

1. General

Comment: DHS and DOS received fifty comments to the ANPRM asking for a partnership between the U.S. and Canada to address WHTI issues. One hundred commenters to the Land and Sea NPRM expressed a strong desire to see a more robust coordination between Canada and the United States. Nineteen commenters recommended a joint public communications campaign with Canada.

Response: The Secretaries of DHS and DOS have worked and continue to work

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: One commenter stated that a new comment period should be opened or else the Land and Sea NPRM should be withdrawn.

Response: The Departments have carefully considered the comment and determined that it is not advisable to reopen the comment period for the Land and Sea NPRM. Section 7209 of the IRTPA, as amended, calls on the Departments to implement WHTI expeditiously, which the Departments believe is in the best interests of national security. The procedures for the 60-day comment period outlined in the Land and Sea NPRM provided the public the opportunity to provide meaningful comments on the proposed rule and questions asked. The Departments received over 1,350 comments, which were fully considered and are addressed in this document. Moreover, delaying issuance of the final rule would delay notice to the public and shorten the time available to the traveling public to obtain designated documentation. For these reasons, DHS and DOS did not open a new comment period and did not withdraw the Land and Sea NPRM.

2. Outreach

Comment: DHS and DOS received thirteen comments to the ANPRM that recommended the Departments work with the travel industry to launch an effective communications campaign to inform and educate the traveling public about any new documentation requirements. One hundred seventy comments were received to the Land and Sea NPRM stating that all the changes taking place during implementation of WHTI are confusing. Seven hundred and seventeen commenters encouraged DHS to formulate, implement, and fully fund a public awareness communications campaign immediately, particularly as it could add clarity. Six commenters recommended that a public relations/marketing firm be hired. One

commenter encouraged DHS and DOS to timely convey information concerning the plan to end oral declarations on January 31, 2008. One commenter requested that the DHS undertake a full review of the public education plan for WHTI.

Response: DHS and DOS are committed to an effective and intensive communications strategy during the implementation of WHTI. As was done in preparation for the changes at the border that took place on January 31, 2008, 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. During the early phase of the implementation of WHTI in the air environment, DHS and CBP worked closely with the travel industry and other industries to disseminate timely, accurate information, and aggressively publicize the new requirements. CBP found that the overwhelming majority of affected air travelers, approximately 99 percent, presented acceptable documentation upon entry to the United States from within the Western Hemisphere from the earliest stages of implementation. This figure included not only U.S. citizens but also the citizens of Canada, Mexico, and Bermuda. The Departments believe that this coordinated public outreach effort will continue to serve as a useful model for implementation in the land and sea phase of WHTI.

H. Regulatory Analyses

1. Regulatory Assessment

Comment: DHS and DOS received over 1,700 comments to the ANPRM that expressed concern that WHTI would have a negative impact on trade and tourism. Twenty-four comments to the Air and Sea NPRM for WHTI stated that implementation would have a negative impact on cross-border travel. Five commenters to the Land and Sea NPRM stated that implementation would have a negative impact on day trips across the border. Approximately nine hundred commenters stated that WHTI would have a negative impact on trade and tourism resulting in revenue losses. Twenty-two commenters to the Land and Sea NPRM recommended that security be improved without damaging healthy cross-border trade and commerce.

Response: Pursuant to Executive Order 12866, CBP conducted an economic analysis to address the potential impacts of reduced travel that could result from the implementation of WHTI in the land and sea environments.

This analysis was published concurrently with the Land and Sea NPRM, and CBP requested comments on the documents. Based on the Regulatory Assessment, CBP acknowledges that WHTI could have a negative impact on travel in both environments; however, as demonstrated in intensive case studies of eight representative U.S. communities along both the Canadian and Mexican borders, reduced travel attributable to WHTI is predicted to have a less-than-1 percent impact on local output and employment levels in those communities. Additionally, CBP found that the cruises covered by the rule would not likely be greatly affected because obtaining a travel document represents a small portion of overall cost for most cruise passengers. Finally, the analysis for travel in the air environment was finalized with the Air Final Rule (Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere published November 24, 2006 (71 FR 68412)).

Comment: CBP received three comments to the Regulatory Assessment for the Land and Sea NPRM stating that the analysis understated the economic losses that would result from implementation of the rule. Eight commenters to the Regulatory Assessment for the Land and Sea NPRM contended that the economic analysis was incomplete and insufficient. Two commenters stated that the underlying assumptions in the analysis were arbitrary and low. Several commenters stated that there must be a meaningful, third-party economic impact assessment of any proposed measures before proceeding.

Response: While these commenters were dissatisfied with the economic analysis, they did not submit specific information that would enhance the current analysis, nor did they submit alternative analyses that more robustly considered the impacts on the U.S. and foreign economies. The analysis prepared by CBP for the Land and Sea NPRM was reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866 and OMB Circular A-4. According to OMB Circular A-4, a good regulatory analysis should include: (1) A statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis. The two Regulatory Assessments that were published in the public docket concurrently with the

Land and Sea NPRM (see USCBP-2007-0061-0002 and USCBP-2007-0061-0004) fully met these criteria. A regulatory analysis conducted by a "third party" is not a requirement under either Executive Order 12866 or OMB Circular A-4.

Comment: CBP received one comment to the Regulatory Assessment of the Land and Sea NPRM stating that it did not make sense for predicted forgone cruise travel to have a higher percentage of reduced travel than forgone land travel.

Response: CBP notes that estimated forgone travel was predicted using elasticities of demand for cruise travel and derived demand elasticities for land travel. CBP estimates that cruise travel is more elastic than land-border travel because cruise passengers travel almost exclusively for leisure purposes. Cruise passengers, thus, have many potential substitutes for their cruise trips; in economic terms, cruise passengers' demand for travel is very "elastic." Conversely, land travelers cross the border for a myriad of reasons, including work, shopping, visiting family and friends, as well as vacation purposes. Because land-border trips are less "elastic" than cruise trips, the percent of forgone travelers is lower in the land environment than the cruise environment.

Comment: Two commenters to the Land and Sea 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 Land and Sea NPRM was reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866 and OMB Circular A-4.

Comment: Two commenters to the Land and Sea NPRM stated that the Regulatory Assessment erroneously analyzed expenditure flows from the Mexican and Canadian border together, when they should actually be analyzed separately.

Response: As described in the detailed Regulatory Assessment for implementation of WHTI in the land environment (USCBP-2007-0061-0002) published concurrently with the Land and Sea NPRM and this final rule, the analysis did address economic impacts on the northern and southern borders separately.

Comment: Two commenters to the Land and Sea NPRM asked about calculated risk reduction that would occur as a result of implementation of WHTI. One commenter stated that a third-party assessment of improved border security should be conducted.

Response: Typically, reductions in the probability of a terrorist attack resulting from a regulation are measured against the baseline probability of occurrence (the current likelihood that a terrorist attack involving an individual arriving in the United States in the sea environment will be attempted and be successful) and combined with information about the consequences of the attack. The difference between the baseline probability of occurrence and the probability of occurrence after the regulation is implemented would represent the incremental probability reduction attributable to the rule.

Historical data on the frequency of terrorist attacks to estimate the current baseline probability of attack within the United States cannot be used for several reasons: existing data does not provide information about whether documented attacks were attributable to the lack of a passport requirement; the data on international events occurring within the United States in the last decade are limited, and little information is available to describe the consequences of most of these events; and use of these data to project future probability of attack requires an understanding of the socioeconomic and political conditions motivating and facilitating these events historically and foresight with regard to how these factors may change in the future. In the absence of more detailed data, DHS and DOS are unable to quantitatively estimate the incremental reduction in the probability of terrorist attack that will result from this rule.

Instead, CBP conducted a "breakeven analysis" to determine what the reduction in risk would have to be given the estimated costs of the implementation of WHTI (land environment only). Using the Risk Management Solutions U.S. Terrorism Risk Model (RMS model), CBP estimated the critical risk reduction that would have to occur in order for the costs of the rule to equal the benefits—or break even. As calculated, critical risk reduction required for the rule to break even ranges from 3 percent to 34 percent (for more detail see the section below on Executive Order 12866).

This breakeven analysis prepared by CBP for the Land and Sea NPRM was reviewed by OMB in accordance with Executive Order 12866 and OMB Circular A-4. An analysis conducted by a "third party" is not a requirement

under either Executive Order 12866 or OMB Circular A-4.

Comment: Two commenters to the Land and Sea NPRM stated that the costs to the State Department to "catch up" on the backlog of passport applications were not considered.

Response: The commenter is correct. CBP did not consider the costs to DOS in the Regulatory Assessment because the increased costs to DOS as a result of increased demand for passports due to WHTI can be recouped by a surcharge on the fee for the application of a passport. See 22 U.S.C. 214(b). It would be inappropriate, therefore, to present these as costs of the regulation.

Comment: One commenter to the Land and Sea NPRM stated that she was "mystified" by the assertion that an economic analysis was not necessary.

Response: DHS and DOS did not make this assertion in the Land and Sea NPRM. CBP conducted two extensive Regulatory Assessments for implementation of WHTI in the land and sea environments that were summarized in the preamble to the Land and Sea NPRM and were available in full for public comment (see USCBP-2007-0061-0002 and USCBP-2007-0061-0004).

Comment: Four commenters to the Land and Sea NPRM stated that the estimated costs of lost trips by Canadian travelers were incorrectly calculated in the Regulatory Assessment for the implementation of WHTI in the land environment.

Response: DHS and DOS appreciate these comments. CBP has modified the Regulatory Assessment for this final rule to more accurately account for potential lost trips from Canadian visitors to the United States. Please refer to the section below titled "Executive Order 12866" for a summary of the revised analysis and refer to the public docket and <http://www.cbp.gov> for the complete Regulatory Assessments for the final rule.

Comment: Three commenters to the Land and Sea NPRM stated that the Regulatory Assessment erroneously assumed that lost spending in Canada and Mexico resulting from forgone travel to those countries would instead be spent in border communities. One commenter stated that the Regulatory Assessment erroneously assumed that U.S. dollars that would have been spent in Canada and Mexico would now remain in the United States.

Response: These commenters appear to have misread the Regulatory Assessments. As described in the detailed Regulatory Assessment for Implementation of WHTI in the Land Environment (USCBP-2007-0061-0002)

published concurrently with the Land and Sea NPRM, the analysis did not assume that all lost spending in Canada and Mexico would instead be spent exclusively in border communities. CBP made several simplifying assumptions in order to estimate increases in U.S. spending within the regional areas designated for case study. The analysis assumed that only a subset of the U.S. travelers who choose not to obtain documentation and stay in the United States spend in the regional study area what they would have spent in Mexico or Canada. In other words, the analysis assumed U.S. travelers visiting Mexico and Canada for tourist reasons will substitute their forgone trips abroad with trips within the United States outside of the regional study area.

Additionally, as noted in the Regulatory Assessment, CBP made the simplifying assumption that the money these travelers would have spent on foreign travel remains in their home country. The analysis did not attempt to determine the portion of forgone travel-related expenditures that might be used instead for purchasing goods from foreign entities via mail order or the Internet. This factor was acknowledged as a source of uncertainty in the cost estimates for WHTI implementation in the land environment.

Comment: One commenter stated that the analysis of tourism expenditures did not consider the impact of the cost of acquiring documentation on spend rates.

Response: CBP agrees that the impact of the cost of acquiring WHTI-compliant documentation should be included in the estimate of lost expenditures in U.S. border communities. Specifically, in the final Regulatory Assessment, CBP considered whether the costs of obtaining documentation would be offset by reduced spending on the trip itself, or whether the traveler would reduce household spending locally by a commensurate amount. A review of the travel economics literature was inconclusive, but suggests that travelers often do not adhere to a budget while on a trip, particularly vacations. Also, CBP was unable to identify literature predicting whether travelers would amortize documentation costs across all the trips taken in a given time period, or whether they might reduce spending on the first trip taken after obtaining acceptable documentation to offset documentation costs. For these reasons, CBP believes it is most appropriate to assume that individuals who continue traveling after the implementation of WHTI will not spend less on cross-border trips. Rather, the costs of obtaining acceptable documentation

will result in reduced household spending in the travelers' home communities. Therefore, the analysis of the distributional impacts of the final rule includes a reduction in household expenditures by U.S. citizens to offset the cost of obtaining WHTI-compliant documents. Similar changes in spending by Mexican and Canadian travelers are assumed to occur in those travelers' home communities, and as a result, do not affect expenditures in the United States. Please refer to the section below titled "Executive Order 12866" for a summary of the revised analysis and refer to the public docket and <http://www.cbp.gov> for the complete Regulatory Assessments for the final rule.

Comment: One commenter stated that some of the findings of the Regulatory Assessments analysis is based on surveys of traveler responses that may not be accurate.

Response: CBP disagrees with this comment. Estimation of lost consumer surplus under each of the regulatory alternatives considered requires information about travelers' willingness to pay for access to Mexico or Canada. Willingness to pay is the maximum sum of money an individual would be willing to pay rather than do without a good or amenity. If the cost of access to Mexico or Canada is within the range of costs below this maximum value, the traveler will pay for access and continue to travel. Likewise, if the cost of access exceeds this maximum, travelers will forgo future travel. Therefore, because it represents a maximum value, willingness to pay for access to these countries will not vary depending on the regulatory alternative considered. It is calculated once, and then that value, or in this case demand curve, can be used to evaluate decisions about future travel based on a range of regulatory alternatives with varying access costs.

The Regulatory Assessment relies on the results of a survey conducted for the Department of State. The surveyors informed respondents that after the implementation of WHTI, they would be required to have a valid passport for travel to Mexico and Canada. While the survey did not specify the cost of obtaining the document, a passport is a well-known, familiar form of identification with published fees that has been available for decades. Therefore, CBP believes it is acceptable to assume that the survey respondents had a reasonable idea of the cost of the document when responding to this question. The response to this question and information about the number of travelers making trips is used to estimate travelers' willingness to pay for

access to these countries in the form of a linear demand curve. For the reasons discussed previously, this demand curve is relevant regardless of the regulatory option considered. Therefore, CBP used it to predict responses to varying regulatory alternatives not considered in the original survey that incorporate ranges of compliance options and costs.

2. Regulatory Flexibility Act

Comment: One commenter noted several examples of individuals who would be considered small businesses, including sole proprietors, self-employed individuals, and freelancers.

Response: CBP agrees that these "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, but we acknowledge that the number could be considered "substantial." However, as estimated in the Regulatory Assessment for implementation of WHTI in the land environment, the cost to such businesses would be only \$125 for a first-time passport applicant, \$70 for a first-time passport card applicant plus an additional \$60 if expedited service were requested.

V. Final Document Requirements

Based on the analysis of the comments and section 7209 of IRTPA, as amended, DHS and DOS have determined that U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at land and sea ports-of-entry from the Western Hemisphere will be required to present documents or combinations of documents designated by this final rule. DHS and DOS expect the date of full WHTI implementation to be June 1, 2009. As noted, the Congress has mandated that WHTI shall be implemented no earlier than the date that is the later of 3 months after the Secretary of State and the Secretary of Homeland Security make the certification required in subparagraph (B) or June 1, 2009. (Section 545, Omnibus Bill). The Departments will implement on June 1, 2009.

A. U.S. Citizens Arriving by Sea or Land

Under the final rule, most U.S. citizens³² entering the United States at all sea or land ports-of-entry are

³² Unless the U.S. citizen falls into one of the special rule categories listed below.

required to have either: (1) A U.S. passport; (2) a U.S. passport card; (3) a valid trusted traveler card (NEXUS, FAST, or SENTRI); (4) a valid MMD when traveling in conjunction with official maritime business; or (5) a valid U.S. Military identification card when traveling on official orders or permit.

Under the final rule, cards issued for the DHS Trusted Traveler Programs NEXUS, Free and Secure Trade (FAST), and Secure Electronic Network for Travelers Rapid Inspection (SENTRI) are designated as entry documents for U.S. citizens at all lanes at all land and sea ports-of-entry when traveling from contiguous territory or adjacent islands. Additionally, U.S. citizens who have been pre-screened as part of the NEXUS or Canadian Border Boat Landing Program who arrive by pleasure vessel from Canada are permitted to report their arrival by telephone or by remote video inspection, respectively.

U.S. citizens who arrive by pleasure vessel from Canada are permitted to show the NEXUS card in lieu of a passport or passport card along the northern border under the auspices of the remote inspection system for pleasure vessels, such as the Outlying Area Reporting System (OARS). Currently, as NEXUS members, U.S. citizen recreational boaters can report their arrival to CBP by telephone. Otherwise, these U.S. citizen pleasure vessel travelers arriving from Canada are required to report in person to a port-of-entry in order to enter the United States.³³

After full implementation of WHTI, dedicated lanes for trusted traveler programs will still exist at certain land ports-of-entry, which will provide program members with the opportunity for expedited inspections.

B. Canadian Citizens and Citizens of Bermuda Arriving by Sea or Land

1. Canadians

Under this final rule, Canadian citizens entering the United States at sea and land ports-of-entry are required to

³³ See 8 CFR 235.1(g). U.S. citizen holders of a Canadian Border Boat Landing Permit (Form I-68) are required to possess a passport, passport card, or trusted traveler program document when arriving in the United States in combination with the Form I-68 and are required to show this documentation when applying for or renewing the Form I-68. Participants would continue to benefit from entering the United States from time to time without having to wait for a physical inspection, subject to the applicable regulations. More information on the Canadian Border Boat Landing Program (I-68 Permit Program) is available on the CBP Web site at <http://www.cbp.gov>.

present, in addition to any visa required:³⁴

- A valid passport issued by the Government of Canada;³⁵ or
- A valid trusted traveler program card issued by CBSA or DHS, e.g., FAST, NEXUS, or SENTRI.³⁶

Additionally, Canadian citizens in the NEXUS program who arrive by pleasure vessel from Canada are permitted to present a NEXUS membership card in lieu of a passport along the northern border under the auspices of the remote inspection system for pleasure vessels, such as the Outlying Area Reporting System (OARS).³⁷ Currently, as NEXUS members, Canadian recreational boaters can report their arrival to CBP by telephone.³⁸ Otherwise, these Canadian pleasure vessel travelers arriving from Canada are required to report in person to a port-of-entry in order to enter the United States.³⁹

2. Bermudians

Under this final rule, all Bermudian citizens are required to present a passport⁴⁰ issued by the Government of Bermuda or the United Kingdom when seeking admission to the United States at all sea or land ports-of-entry, including travel from within the Western Hemisphere.

C. Mexican Nationals Arriving by Sea or Land

Under this final rule, all Mexican nationals are required to present either: (1) A passport issued by the Government of Mexico and a visa when

³⁴ See 8 CFR 212.1(h), (l), and (m) and 22 CFR 41.2(k) and (m).

³⁵ Foreign passports remain an acceptable travel document under section 7209 of the IRTPA.

³⁶ Canadian citizens who demonstrate a need may enroll in the SENTRI program and currently may use the SENTRI card in lieu of a passport. To enroll in SENTRI, a Canadian participant must present a valid passport and a valid visa, if required, when applying for SENTRI membership. Other foreign participants in the SENTRI program must present a valid passport and a valid visa, if required, when seeking admission to the United States, in addition to the SENTRI card. This final rule does not alter the passport and visa requirements for other foreign enrollees in SENTRI (i.e., other than Canadian foreign enrollees). Currently, Canadian citizens can show a SENTRI, NEXUS, or FAST card for entry into the United States only at designated lanes at designated land border ports-of-entry.

³⁷ Permanent residents of Canada must also carry a valid passport and valid visa, if required.

³⁸ Remote pleasure vessel inspection locations are only located on the northern border.

³⁹ See 8 CFR 235.1(g). Canadian holders of a Canadian Border Boat Landing Permit (Form I-68) are required to possess a passport or trusted traveler card when arriving in the United States in combination with the Form I-68 and would be required to show this documentation when applying for or renewing the Form I-68.

⁴⁰ Bermudian citizens must also satisfy any applicable visa requirements. See 8 CFR 212.1(h), (l), and (m) and 22 CFR 41.2(k) and (m).

seeking admission to the United States, or (2) a valid BCC when seeking admission to the United States at land ports-of-entry or arriving by pleasure vessel or by ferry from Mexico.

For purposes of this rule, a pleasure vessel is defined as a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire. A ferry is defined as any vessel: (1) Operating on a pre-determined fixed schedule; (2) providing transportation only between places that are no more than 300 miles apart; and (3) transporting passengers, vehicles, and/or railroad cars. We note that ferries are subject to land border-type processing on arrival from, or departure to, a foreign port or place. Arrivals aboard all vessels other than ferries and pleasure vessels would be treated as sea arrivals.⁴¹

Mexican nationals who hold BCCs will continue to be allowed to use their BCCs in lieu of a passport for admission at the land border from Mexico and when arriving by ferry or pleasure vessel from Mexico when traveling within the border zone for a limited time period. For travel beyond certain geographical limits or a stay over 30 days, Mexican nationals who enter the United States from Mexico possessing BCCs are required to obtain a Form I-94 from CBP.⁴² The BCC is not permitted in lieu of a passport for commercial or other sea arrivals to the United States.

Under current regulations, Mexican nationals may not use the FAST or SENTRI card in lieu of a passport or BCC. This will continue under the final rule, however, these participants would continue to benefit from expedited border processing.

Currently, Mexican nationals who are admitted to the United States from Mexico solely to apply for a Mexican passport or other "official Mexican

⁴¹ For example, commercial vessels are treated as arrivals at sea ports-of-entry for purposes of this final rule. A commercial vessel is any civilian vessel being used to transport persons or property for compensation or hire to or from any port or place. A charter vessel that is leased or contracted to transport persons or property for compensation or hire to or from any port or place would be considered an arrival by sea under this rule. Arrivals by travelers on fishing vessels, research or seismic vessels, other service-type vessels (such as salvage, cable layers, etc.), or humanitarian service vessels (such as rescue vessels or hospital ships) are considered as arrivals by sea.

⁴² See 8 CFR 212.1(c)(1)(i); also 22 CFR 41.2 (g). If Mexicans 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(h)(1).

document" at a Mexican consulate in the United States located directly adjacent to a land port-of-entry are not currently required to present a valid passport.⁴³ This final rule eliminates this exception to the passport requirement for Mexican nationals. Under the final rule, Mexican nationals will be required to have a BCC or a passport with a visa to enter the United States for all purposes.

D. State Enhanced Driver's License Projects

DHS remains committed to considering travel documents developed by the various U.S. states and the Governments of Canada and Mexico in the future that would denote identity and citizenship and would also satisfy section 7209 of IRTPA, as amended by section 723 of the 9/11 Commission Act of 2007.

Under this final rule, DHS will consider as appropriate documents such as state driver's licenses and identification cards that satisfy the WHTI requirements by denoting identity and citizenship. These documents must also have compatible technology, security criteria, and must respond to CBP's operational concerns.

Such acceptable documents will be announced and updated by publishing a notice in the **Federal Register**. A list of such programs and documents will also be maintained on the CBP Web site. It is still anticipated that the Secretary of Homeland Security will designate documents that satisfy section 7209 and the technology, security, and operational concerns discussed above as documents acceptable for travel under section 7209.

To date, DHS has entered into formal Memoranda of Agreement (MOAs) with the States of Washington, Vermont, New York, and Arizona which have begun voluntary programs to develop an "enhanced driver's license" and identification card that would denote identity and citizenship.⁴⁴ Concurrent with this final rule, DHS is also publishing a separate notice in today's **Federal Register** wherein the Secretary of Homeland Security is designating that the State of Washington enhanced

⁴³ See 8 CFR 212.1(c)(1)(ii).

⁴⁴ On September 26, 2007, the Secretary of Homeland Security and the Governor of Vermont signed a similar Memorandum of Agreement for an enhanced driver's license and identification card to be used for border crossing purposes; on October 27, 2007, the Secretary and the Governor of New York also signed a similar Memorandum of Agreement. The state of Arizona has also announced its intention to sign an MOA with DHS to begin an enhanced driver's license project. For more information on these projects, see <http://www.dhs.gov>.

driver's license document is secure. Therefore, U.S. citizens may present the enhanced driver's licenses and identification cards issued by the State of Washington pursuant to the MOA at land and sea ports-of-entry when arriving from contiguous territory and adjacent islands.

DHS is continuing discussions on the development of enhanced driver's license projects with several other states and the Government of Canada. CBSA and several Canadian provinces are planning and developing EDL projects. DHS remains committed to working with and coordinating efforts among states interested in developing, testing, and implementing programs for enhanced driver's licenses on a continuing basis. DHS encourages states interested in developing enhanced driver's licenses to work closely with DHS to that end.

On January 28, 2008, DHS published a final rule in the **Federal Register** concerning minimum standards for state-issued driver's licenses and identification cards that can be accepted for official purposes in accordance with the REAL ID Act of 2005.⁴⁵ DHS has worked to align REAL ID and EDL requirements. EDLs are being developed consistent with the requirements of REAL ID and, as such, can be used for official purposes such as accessing a Federal facility, boarding Federally-regulated commercial aircraft, and entering nuclear power plants. The enhanced driver's license will also include technologies that facilitate electronic verification and travel at ports-of-entry. While the proposed REAL ID requirements include proof of legal status in the U.S., the enhanced driver's license will require that the card holder be a U.S. citizen.

E. Future Documents

Additionally, DHS and DOS remain committed to considering travel documents developed by the various U.S. states, Native American tribes and nations, and the Government of Canada in the future that would satisfy section 7209 of IRTPA.

Both DHS and DOS continue to engage with the Government of Canada

and various provinces in discussions of alternative documents that could be considered for border crossing use at land and sea ports of entry. Other alternative identity and citizenship documents issued by the Government of Canada will be considered, as appropriate. The Departments welcome comments suggesting alternative Canadian documents.

Various Canadian provinces have indicated their interest or intention in pursuing projects with enhanced driver's licenses similar to the Washington State, Vermont and Arizona programs with DHS. Because documents accepted for border crossing under WHTI must denote citizenship, the participation of the Government of Canada in determinations of citizenship on behalf of its citizens, and recognition of this determination, is a strong consideration by the United States in the acceptance of documents for Canadian citizens. We will consider additional documents in the future, as appropriate.

VI. Special Rules for Specific Populations

A. U.S. Citizen Cruise Ship Passengers

Because of the nature of round trip cruise ship travel, DHS has determined that when U.S. citizens depart from and reenter the United States on board the same cruise ship, they pose a low security risk in contrast to cruise ship passengers who embark in foreign ports.

DHS and DOS have adopted the following alternative document requirement for U.S. cruise ship passengers. For purposes of the final rule, a cruise ship is defined as a passenger vessel over 100 gross tons, carrying more than twelve passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.⁴⁶

U.S. citizen cruise ship passengers traveling within the Western Hemisphere are permitted to present a government-issued photo identification document in combination with either: (1) An original or a copy of a birth certificate, (2) a Consular Report of Birth Abroad issued by DOS, or (3) a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services (USCIS), when returning to the United States, under certain conditions:

- The passengers must board the cruise ship at a port or place within the United States; and

- The passengers must return on the same ship to the same U.S. port or place from where they originally departed.

On such cruises, U.S. Citizens under the age of 16 may present an original or a copy of a birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services. All passengers arriving on a cruise ship that originated at a foreign port or place are required to present travel documents that comply with applicable document requirements otherwise specified in this final rule when arriving in the United States. For voyages where the cruise ship originated in the United States, if any new passengers board the ship at a foreign port or place or another location in the United States, the new passengers will have to present travel documents that comply with applicable document requirements otherwise specified in this final rule when arriving in the United States. U.S. citizen cruise ship passengers that fall under this alternative document requirement are reminded to carry appropriate travel documentation to enter any foreign countries on the cruise. If the ship returns to a U.S. port different from the point of embarkation, all passengers must carry a passport or other WHTI compliant documentation.

B. U.S. and Canadian Citizen Children

The U.S. government currently requires all children arriving from countries outside the Western Hemisphere to present a passport when entering the United States. Currently, children (like adults) from the United States, Canada, and Bermuda are not required to present a passport when entering the United States by land or sea from contiguous territory or adjacent islands, other than Cuba. Mexican children are currently required to present either a passport and visa, or a BCC upon arrival in the United States, as discussed above. DHS, in consultation with DOS, has adopted the procedures below in this final rule.

1. Children Under Age 16

Under the final rule, all U.S. citizen children under age 16 are permitted to present either: (1) An original or a copy of a birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by USCIS, at all sea and land ports-of-entry when arriving from contiguous territory. Canadian citizen children under age 16 are permitted to present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate at all sea and land ports-of-entry when

⁴⁵ The REAL ID Act of 2005 prohibits Federal agencies, effective May 11, 2008, from accepting a driver's license or personal identification card for any official purpose unless the license or card has been issued by a State that is meeting the requirements set forth in the Act. See Pub. L. 109-13m 119 Stat. 231, 302 (May 11, 2005) (codified at 49 U.S.C. 30301 note). On March 9, 2007, DHS issued a rule proposing to establish minimum standards for State-issued driver's licenses and identification cards that Federal agencies would accept for official purposes after May 11, 2008. See 72 FR 10820.

⁴⁶ For this final rule, DHS adopts the definition of a cruise ship used by the U.S. Coast Guard. See 33 CFR 101.105.

arriving from contiguous territory. U.S. and Canadian children age 16 and over who arrive from contiguous territory are subject to the WHTI document requirements otherwise specified in this final rule.

All Canadian birth certificates are issued from a centralized location within the provinces and territories. Each province or territory can issue two types of birth certificates: a long form, which is a one-page paper document similar to U.S. birth certificates, or a short form, which is a laminated card version of the long form. All versions of the birth certificate throughout the provinces are similar in format (paper form or laminated card).

All Canadian-issued birth certificates are considered by the Government of Canada as certified and are accepted by CBSA. Both the long and short forms of certified Canadian birth certificates issued by the provinces and territories are permissible documents under the final rule.

2. Children Under Age 19 Traveling in Groups

Under this final rule, U.S. citizen children under age 19 who are traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth sport organizations that arrive at U.S. sea or land ports-of-entry from contiguous territory, may present either: (1) An original or a copy of a birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by USCIS, when the groups are under the supervision of an adult affiliated with the organization (including a parent of one of the accompanied children who is only affiliated with the organization for purposes of a particular trip) and when all the children have parental or legal guardian consent to travel. Canadian citizen children under age 19 may present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate at all sea and land ports-of-entry when arriving from contiguous territory. For purposes of this alternative procedure, an adult would be considered to be a person age 19 or older, and a group would consist of two or more people.

The group, organization, or team will be required to contact CBP upon crossing the border at the port-of-entry and provide on organizational

letterhead: (1) The name of the group, organization or team and the name of the supervising adult; (2) a list of the children on the trip; (3) for each child, the primary address, primary phone number, date of birth, place of birth, and name of at least one parent or legal guardian; and (4) the written and signed statement of the supervising adult certifying that he or she has obtained parental or legal guardian consent for each participating child. The group, organization, or team would be able to demonstrate parental or legal guardian consent by having the adult leading the group sign and certify in writing that he or she has obtained parental or legal guardian consent for each participating child. For Canadian children, in addition to the information indicated above, a trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay would be required.

To avoid delays upon arrival at a port-of-entry, CBP would recommend that the group, organization, or team provide this information to that port-of-entry well in advance of arrival, and would recommend that each participant traveling on the trip carry in addition to the above mentioned documents a government or school issued photo identification document, if available. Travelers with the group who are age 19 and over are subject to the generally applicable travel document requirements specified in 8 CFR parts 211, 212 or 235 and 22 CFR parts 41 or 53.

Based upon a review of the alternative approach for children and the parental consent questions asked in the Land and Sea NPRM, DHS and DOS are not implementing any additional requirements regarding children such as parental consent to travel.

C. American Indian Card Holders From Kickapoo Band of Texas and Tribe of Oklahoma

Under the final rule, U.S. citizen members of the Kickapoo Band of Texas and Tribe of Oklahoma are permitted to present the Form I-872 American Indian Card in lieu of a passport or passport card at all sea and land ports of entry when arriving from contiguous territory or adjacent islands. Mexican national members of the Kickapoo Band of Texas and Tribe of Oklahoma are permitted to present the I-872 in lieu of either a passport and visa, or a BCC at

sea and land ports-of-entry when arriving from contiguous territory or adjacent islands.

D. Members of United States Native American Tribes

For the reasons discussed above, upon full implementation of this final rule and if designated by the Secretary of Homeland Security as acceptable under WHTI, Native American enrollment or identification cards from a federally-recognized tribe or group of federally-recognized tribes will be permitted for use at entry at any land and sea port-of-entry when arriving from contiguous territory or adjacent islands.

E. Canadian Indians

For the reasons discussed above, upon full implementation of this final rule and if designated by the Secretary of Homeland Security, the proposed new Indian and Northern Affairs Canada (INAC) card to be issued by LTS and to contain a photograph and an MRZ, may also be presented as evidence of the citizenship and identity of Canadian Indians when they seek to enter the United States from Canada at land ports-of-entry.

F. Individual Cases of Passport Waivers

The passport requirement may be waived for U.S. citizens in certain individual situations on a case-by-case basis, such as an unforeseen emergency or cases of humanitarian or national interest.⁴⁷ Existing individual passport waivers for non-immigrant aliens are not changed by the final rule.⁴⁸

G. Summary of Document Requirements

The following chart summarizes the acceptable documents for sea and land arrivals from the Western Hemisphere under WHTI.

The Departments note that document requirements for Lawful Permanent Residents (LPRs) of the United States, employees of the International Boundary and Water Commission (IBWC) between the United States and Mexico, OCS workers, active duty alien members of the U.S. Armed Forces, and members of NATO-member Armed Forces, as discussed in the Land and Sea NPRM, remain unchanged.

⁴⁷See section 7209(c)(2) of IRTPA. See also 22 CFR 53.2.

⁴⁸See 8 CFR Part 212.

Group/population	Acceptable document(s)	Land	Ferry	Pleasure vessel	Sea (all other vessels)
All Travelers (U.S., Can., Mex., Berm.) at all sea and land POEs.	Valid Passport book (and valid visa, if necessary for foreign travelers).	Yes	Yes	Yes	Yes.
U.S. Citizens at all sea and land POEs when arriving from Canada, Mexico, the Caribbean, and Bermuda.	Valid Passport card	Yes	Yes	Yes	Yes.
U.S. and Canadian citizen Trusted Traveler Members at all sea and land POEs when arriving from contiguous territory or adjacent islands.	Trusted Traveler Cards (NEXUS, FAST, SENTRI).	Yes*	Yes*	Yes*	* Yes.
U.S. Citizen Merchant Mariners on official mariner business at all sea and land POEs.	U.S. Merchant Mariner Document (MMD).	Yes	Yes	Yes	Yes.
Mexican Nationals arriving from Mexico	Border Crossing Card (BCC)	Yes**	Yes**	Yes**	No.
U.S. Citizen Cruise Ship Passengers on round trip voyages that begin and end in the same U.S. port.	Government-issued photo ID and original or copy of birth certificate; under age 16, birth certificate.	N/A	N/A	N/A	Yes—for round trip voyages that originate in U.S.
U.S. and Canadian Citizen Children Under 16 at all sea and land POEs when arriving from contiguous territory.	Original or copy of birth certificate*** (government-issued photo ID recommended, but not required).	Yes	Yes	Yes	Yes.
U.S. and Canadian Citizen Children—Groups of Children Under Age 19, under adult supervision with parental/guardian consent at all sea and land POEs when arriving from contiguous territory.	Original or copy of birth certificate*** and parental/guardian consent (government issued photo ID recommended, but not required).	Yes	Yes	Yes	Yes.
U.S. Citizen/Alien Members of U.S. Armed Forces traveling under official orders or permit at all air, sea and land POEs.	Military ID and Official Orders	Yes	Yes	Yes	Yes.
U.S. and Mexican Kickapoo at land and sea POEs when arriving from contiguous territory and adjacent islands.	Form I-872 American Indian Card	Yes	Yes	Yes	Yes.
U.S. citizen members of Native American tribes recognized by the U.S. Government when arriving from contiguous territory at land and sea POEs.	Tribal Enrollment Documents designated by the Secretary of Homeland Security as meeting WHTI tribal document security.	Yes	Yes	Yes	Yes.
Canadian citizen members of First Nations or bands recognized by the Canadian Government when arriving from Canada at land POEs.	If designated by the Secretary of Homeland Security, the proposed new INAC card issued by the Government of Canada containing an MRZ.	Yes	Yes	Nos	No.

* Approved for Mexican national members traveling with BCC or a passport and visa.

** In conjunction with a valid I-94 for travel outside the 25- or 75-mile geographic limits of the BCC.

*** U.S. children would also be permitted to present a Certificate of Birth Abroad or Certificate of Naturalization; Canadian children would be permitted to present a Canadian Citizenship Card or Canadian Naturalization Certificate.

VII. Regulatory Analyses

A. Executive Order 12866: Regulatory Planning and Review

This final rule implementing the second phase of WHTI for entries by land and sea 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, this rule has been reviewed by the Office of Management and Budget (OMB). The following summary presents the costs and benefits of requirements for U.S. citizens entering the United States from other countries in the Western Hemisphere by land and sea, plus the costs and benefits of several alternatives considered during the rulemaking process.

The regulatory assessments summarized here consider U.S. travelers

entering the United States via land ports-of-entry on the northern and southern borders (including arrivals by ferry and pleasure boat) as well as certain cruise ship passengers. Costs to obtain the necessary documentation for air travel were considered in a previous analysis examining the implementation of WHTI in the air environment (the Regulatory Assessment for the November 2006 Final Rule for implementation of WHTI in the air environment can be found at www.regulations.gov; document number USCBP-2006-0097-0108). If travelers have already purchased a passport for travel in the air environment, they would not need to purchase a passport for travel in the land or sea environments. CBP does not attempt to estimate with any precision the number of travelers who travel in more than one environment, and, therefore, may have

already obtained a passport due to the air rule and will not incur any burden due to this rule. To the extent that the three traveling populations overlap in the air, land, and sea environments, we have potentially overestimated the direct costs of the rule presented here.

The period of analysis is 2005–2018 (14 years). We calculate costs beginning in 2005 because although the suite of WHTI rules was not yet in place, DOS experienced a dramatic increase in passport applications since the WHTI plan was announced in early 2005. We account for those passports obtained prior to full implementation to more accurately estimate the economic impacts of the rule as well as to incorporate the fairly sizable percentage of travelers who currently hold passports in anticipation of the new requirements.

The Secretary of Homeland Security is designating CBP trusted traveler cards (NEXUS, SENTRI, FAST), the Merchant Mariner Document (MMD), and specified documents from DHS-approved enhanced driver's license programs as acceptable travel documents for U.S. citizens to enter the United States at land and sea ports-of-entry. Because DHS and DOS believe that children under the age of 16 pose a low security threat in the land and sea environments, U.S. children may present a birth certificate in lieu of other designated documents. Additionally, DHS and DOS have determined that exempting certain cruise passengers from a passport requirement is the best approach to balance security and travel efficiency considerations in the cruise ship environment. To meet the cruise exemption, a passenger must board the cruise ship at a port or place within the United States and the passenger must return on the same ship to the same U.S. port or place from where he or she originally departed.

For the summary of the analysis presented here, CBP assumes that only the passport, trusted traveler cards, and the MMD were available in the first years of the analysis (recalling that the period of analysis begins in 2005 when passport cards and enhanced driver's licenses were not yet available). CBP also assumes that most children under 16 will not obtain a passport or passport card but will instead use alternative documentation (birth certificates). The estimates reflect that CBP trusted traveler cards will be accepted at land and sea ports-of-entry. Finally, CBP assumes that most of the U.S. cruise passenger population will present alternative documentation (government-issued photo ID and birth certificate) because they meet the alternative documentation provision in the rule.

To estimate the costs of the rule, we follow this general analytical framework:

- Determine the number of U.S. travelers that will be covered
- Determine how many already hold acceptable documents
- Determine how many will opt to obtain passports (and passport cards) and estimate their lost "consumer surplus"
- Determine how many will forgo travel instead of obtaining passports or passport cards and estimate their lost "consumer surplus"

We estimate covered land travelers using multiple sources, including: crossing data from the Bureau of Transportation Statistics (BTS, 2004 data), a study of passport demand

conducted by DOS (completed in 2005), and a host of regional studies conducted by state and local governments and academic research centers.

Other than DOS's passport demand study, no source exists to our knowledge that has estimated the total number of land entrants nationwide. Researchers almost always count or estimate crossings, not crossers and focus on a region or locality, not an entire border. Building on the work conducted for DOS's passport study, we distilled approximately 300 million annual crossings into the number of frequent (defined as at least once a year), infrequent (once every three years), and rare (once every ten years) "unique U.S. adult travelers." We then estimate the number of travelers without acceptable documentation and estimate the cost to obtain a document. The fee for the passport varies depending on the age of the applicant, whether or not the applicant is renewing a passport, whether or not the applicant is requesting expedited service, and whether or not the applicant obtains a passport or a passport card. Additionally, we consider the amount of time required to obtain the document and the value of that time. To estimate the value of an applicant's time in the land environment, we conducted new research that built on existing estimates from the Department of Transportation. To estimate the value of an applicant's time in the sea environment, we use estimates for air travelers' value of time (air and sea travelers share very similar characteristics) from the Federal Aviation Administration (FAA, 2005 data). We use the 2005 DOS passport demand study and CBP statistics on the trusted traveler programs to estimate how many unique U.S. travelers already hold acceptable documents.

We estimate covered cruise passengers using data from the Maritime Administration (MARAD, 2006 data) and itineraries available on the cruise line Web sites (for 2007). The overwhelming majority of Western Hemisphere cruise passengers—92 percent—would fall under the cruise-passenger alternative documentation provision. Passengers not covered by the alternative documentation provision fall into four trade markets—Alaska (72 percent), Trans-Panama Canal (16 percent), U.S. Pacific Coast (8 percent), and Canada/New England (4 percent). We estimate that these passengers will have to obtain a passport rather than one of the other acceptable documents because these travelers will likely have an international flight as part of their cruise vacation, and only the passport is a globally accepted travel document. We

use a comment to the August 2006 NPRM for implementation of WHTI in the air and sea environments (71 FR 46155) from the International Council of Cruise Lines to estimate how many unique U.S. cruise travelers already hold acceptable documentation.

Based on CBP's analysis, approximately 3.6 million U.S. travelers are affected in the first year of implementation, 2009 (note that the analysis anticipates a significant number of travelers will obtain WHTI-compliant documents in 2005 through 2008, prior to the implementation of the rule. In addition, travelers who only make trips in the first half of 2009 will not be covered by the rule). Of these, approximately 3.5 million enter through a land-border crossing (via privately owned vehicle, commercial truck, bus, train, on foot) and ferry and recreational boat landing sites. An estimated 0.1 million are cruise passengers who do not meet the alternative documentation provision in the final rule (note that over 90 percent of U.S. cruise passengers are expected to meet the exemption criteria). CBP estimates that the traveling public will acquire approximately 3.1 million passports in 2009, at a direct cost to traveling individuals of \$283 million. These estimates are summarized in Table A.

TABLE A.—FIRST-YEAR ESTIMATES FOR U.S. ADULT TRAVELERS
[All estimates in millions]

Affected travelers:	
Land/ferry/pleasure boat crossers	3.5
Cruise passengers	0.1
Total	3.6
Passports demanded:	
Land/ferry/pleasure boat crossers	3.1
Cruise passengers	0.1
Total	3.2
Total cost of passports:	
Land-border crossers	\$272
Cruise passengers	11
Total	\$283

To estimate potential forgone travel in the land environment, we derive traveler demand curves for access to Mexico and Canada based on survey responses collected in DOS's passport study. We estimate that when the rule is implemented, the number of unique U.S. travelers to Mexico who are frequent travelers decreases by 5.7 percent, the unique U.S. travelers who are infrequent travelers decreases by 6.4 percent, and the unique U.S. travelers who are rare travelers decreases by 15.7 percent. The number of U.S. travelers visiting Canada who are frequent

travelers decreases by 3.3 percent, the unique U.S. travelers who are infrequent travelers decreases by 9.5 percent, and the unique U.S. travelers who are rare travelers decreases by 9.6 percent. These estimates account for the use of a passport card for those travelers who choose to obtain one. For unique travelers deciding to forgo future visits, their implied value for access to these countries is less than the cost of obtaining a passport card.

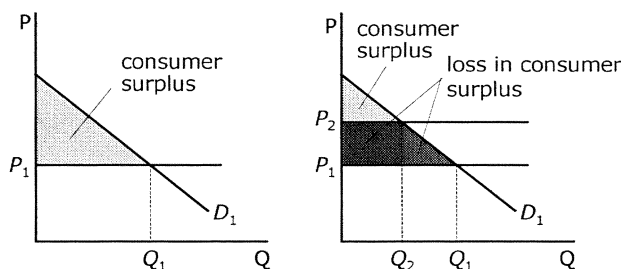
To estimate potential forgone travel in the sea environment, we use a study from Coleman, Meyer, and Scheffman

(2003), which described the Federal Trade Commission investigation into potential impacts of two cruise-line mergers and estimated a demand elasticity for cruise travel. We estimate that the number of travelers decreases by 24 percent, 13 percent, 7 percent, and 6 percent for travelers on short (1 to 5 nights), medium (6 to 8 nights), long (9 to 17 nights), and very long cruises (over 17 nights) once the rule is implemented.

We then estimate total losses in consumer surplus. The first figure below represents U.S. travelers' willingness to

pay (D_1) for access to Mexico and Canada. At price P_1 , the number of U.S. travelers without passports currently making trips to these countries is represented by Q_1 . As seen in the second figure, if the government requires travelers to obtain a passport or passport card in order to take trips to Mexico and Canada, the price of access increases by the cost of obtaining the new document, to P_2 . As a result, the number of travelers making trips to these countries decreases to Q_2 .

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All travelers in this figure experience a loss in consumer surplus; the size of the surplus loss depends on their willingness to pay for access to these countries. The lost surplus experienced by travelers whose willingness to pay exceeds P_2 is shown in the dark blue rectangle, and is calculated as $(P_2 - P_1) * Q_2$. Travelers whose willingness to pay for access to these countries is less than the price of the passport or passport card will experience a loss equal to the area of the aqua triangle, calculated as $1/2 * (Q_1 - Q_2) * (P_2 - P_1)$.

Costs of the rule (expressed as losses in consumer surplus) are summed by year of the analysis. We then add the government costs of implementing WHTI over the period of analysis. Fourteen-year costs are \$3.3 billion at the 3 percent discount rate and \$2.7 billion at 7 percent, as shown in Table B. Annualized costs are \$296 million at 3 percent and \$314 million at 7 percent.

TABLE B.—TOTAL COSTS FOR U.S. TRAVELERS OVER THE PERIOD OF ANALYSIS
[2005–2018, in \$millions]

Year	Cost	3% discount rate	7% discount rate
2005	\$435	\$435	\$435
2006	153	148	143
2007	91	85	79
2008	493	451	406

TABLE B.—TOTAL COSTS FOR U.S. TRAVELERS OVER THE PERIOD OF ANALYSIS—Continued
[2005–2018, in \$millions]

Year	Cost	3% discount rate	7% discount rate
2009	431	383	333
2010	352	304	255
2011	270	226	183
2012	235	191	149
2013	235	186	140
2014	290	222	159
2015	314	234	161
2016	250	181	120
2017	225	158	101
2018	201	137	84
Total	\$3,340	\$2,748

The primary analysis for land summarized here assumes a constant number of border crossers over the period of analysis; in the complete Regulatory Assessment we also consider scenarios where the number of border crossers both increases and decreases over the period of analysis. It is worth noting that border crossings have been mostly decreasing at both the northern and southern borders since 1999. The analysis for sea travel assumes a 6 percent annual increase in passenger counts over the period of analysis as the Western Hemisphere cruise industry continues to experience growth.

Finally, we conduct a formal uncertainty (Monte Carlo) analysis to

test our assumptions for the analysis in the land environment. We first conducted a preliminary sensitivity analysis to identify the variables that have the most significant effect on consumer welfare losses. We found that the frequency of travel (frequent, infrequent, rare), crossings at multiple ports-of-entry, future annual affected individuals, and the amount of time spent applying for documentation were the most sensitive variables in the analysis. The variables that did not appear to have an impact on consumer losses were the estimated number of crossings by Lawful Permanent Residents or Native Americans and estimated future timing with which travelers will apply for acceptable documentation. After we conducted our formal Monte Carlo analysis we found that our most sensitive assumptions are: The projected crossing growth rate, the frequency of travel, and the number of new unique travelers that enter the population annually. The results of the Monte Carlo analysis are presented in Table C. Note that these estimates do not include the government costs of implementation, estimated to be \$0.8 billion over the time period of the analysis (3 percent discount rate) because we have no basis for assigning uncertainty parameters for government costs.

TABLE C.—SUMMARY OF KEY CHARACTERISTICS OF PROBABILITY DISTRIBUTIONS OF TOTAL WELFARE LOSSES IN THE LAND ENVIRONMENT (2005–2018, IN \$BILLIONS), 3 PERCENT DISCOUNT RATE

Statistic	Value
Trials	10,000
Mean	\$2.2
Median	\$2.1
Std Dev	\$0.5
Variance	2.4E+08
5th Percentile	\$1.5
95th Percentile	\$3.1
Point Estimate	\$2.3

We then consider the secondary impacts of forgone travel in the land and sea environments. Forgone travel will result in gains and losses in the United States, Canada, and Mexico. For this analysis, we made the simplifying assumption that if U.S. citizens forgo travel to Canada and Mexico, their expenditures that would have been spent outside the country now remain here. In this case, industries receiving the diverted expenditure in the United States experience a gain, while the travel and related industries in Canada and Mexico suffer a loss. Conversely, if Canadian and Mexican citizens forgo travel to the United States, their potential expenditures remain abroad—a loss for the travel and related industries in the United States, but a gain to Canada and Mexico. Note that “gains” and “losses” in this analysis cannot readily be compared to the costs and benefits of the rule, since they

represent primarily transfers in and out of the U.S. economy.

For cruise passengers, we have only rough estimates of where U.S. passengers come from, how they travel to and from the ports where they embark, where they go, and the activities they engage in while cruising. We know even less about how they will alter their behavior if they do, in fact, forgo obtaining a passport. Ideally, we could model the indirect impacts of the rule with an input-output model (either static or dynamic) that could give us a reasonable estimation of the level the impact, the sectors affected, and regional impacts. Unfortunately, given the dearth of data, the assumptions we had to make, the very small numbers of travelers who are estimated to forgo travel, and the fact that much of their travel experience occurs outside the United States, using such a model would not likely produce meaningful results. We recognize, however, that multiple industries could be indirectly affected by forgone cruise travel, including (but not limited to): Cruise lines; cruise terminals and their support services; air carriers and their support services; travel agents; traveler accommodations; dining services; retail shopping; tour operators; scenic and sightseeing transportation; hired transportation (taxis, buses); and arts, entertainment, and recreation.

According to the MARAD dataset used for the sea analysis, there are 17 cruise lines operating in the Western Hemisphere, 9 of which are currently offering cruises that would be indirectly affected by a passport requirement.

While we expect that cruise lines will be indirectly affected by the rule, how they will be affected depends on their itineraries, the length of their cruises, their current capacity, and future expansion, as well as by travelers’ decisions. We expect short cruises (1 to 5 nights) to be most notably affected because the passport represents a greater percentage of the overall trip cost, passengers on these cruises are less likely to already hold a passport, and travel plans for these cruises are frequently made closer to voyage time. Longer cruises are less likely to be affected because these trips are planned well in advance, passengers on these voyages are more likely to already possess a passport, and the passport cost is a smaller fraction of the total trip cost.

Because border-crossing activity is predominantly a localized phenomenon, and the activities engaged in while visiting the United States are well documented in existing studies, we can explore the potential impacts of forgone travel more quantitatively in the land environment. Using various studies on average spending per trip in the United States, Canada, and Mexico, we estimate the net results of changes in expenditure flows in 2008 (the presumed first year the requirements will be implemented) and subsequent years. Because Mexican crossers already possess acceptable documentation to enter the United States (passport or Border Crossing Card), we do not estimate that Mexican travelers will forgo travel to the United States. The summary of expenditure flows is presented in Table D.

TABLE D.—NET EXPENDITURE FLOWS IN NORTH AMERICA, 2009, 2010, AND SUBSEQUENT YEARS
[In millions]

2009:	
Spending by U.S. travelers who forgo travel to Mexico	+\$160
Spending by Mexican travelers who forgo travel to the United States	0
Spending by U.S. travelers who forgo travel to Canada	+60
Spending by Canadian travelers who forgo travel to United States	–400
Net	–180
2010:	
Spending by U.S. travelers who forgo travel to Mexico	+280
Spending by Mexican travelers who forgo travel to the United States	0
Spending by U.S. travelers who forgo travel to Canada	+110
Spending by Canadian travelers who forgo travel to United States	–440
Net	–50
Subsequent years (annual):	
Spending by U.S. travelers who forgo travel to Mexico	+280
Spending by Mexican travelers who forgo travel to United States	0
Spending by U.S. travelers who forgo travel to Canada	+110
Spending by Canadian travelers who forgo travel to United States	–330
Net	+60

To examine these impacts more locally, we conduct eight case studies using a commonly applied input-output model (IMPLAN), which examines regional changes in economic activity

given an external stimulus affecting those activities. In all of our case studies but one, forgone border crossings attributable to WHTI have a less-than-1-percent impact on the regional economy

both in terms of output and employment. The results of these eight case studies are presented in Table E.

TABLE E.—MODELED DISTRIBUTIONAL EFFECTS IN EIGHT CASE STUDIES

Study area (counties)	State	Change as % of total* * *	
		Output	Employment
San Diego	California	+0.02	+0.03
Pima, Santa Cruz	Arizona	+0.02	+0.02
Hidalgo, Cameron	Texas	+0.1	+0.1
Presidio	Texas	+0.4	+0.4
Niagara, Erie	New York	-0.2	-0.3
Washington	Maine	-1.4	-3.2
Macomb, Wayne, Oakland	Michigan	-0.02	-0.04
Whatcom	Washington	-0.5	-1.3

As shown, we anticipate very small net positive changes in the southern-border case studies because Mexican travelers to the United States use existing documentation, and their travel is not affected. The net change in regional output and employment is negative (though still very small) in the northern-border case studies because Canadian travelers forgoing trips outnumber U.S. travelers staying in the United States and because Canadian travelers to the United States generally spend more per trip than U.S. travelers to Canada. On both borders, those U.S. travelers that forgo travel do not necessarily spend the money they would have spent outside the United States in the case-study region; they may spend it outside the region, and thus outside the model.

Finally, because the benefits of homeland security regulations cannot readily be quantified using traditional analytical methods, we conduct a “breakeven analysis” to determine what the reduction in risk would have to be given the estimated costs of the implementation of WHTI (land environment only). Using the Risk Management Solutions U.S. Terrorism Risk Model (RMS model), we estimated the critical risk reduction that would have to occur in order for the costs of the rule to equal the benefits—or break even.

The RMS model has been developed for use by the insurance industry and provides a comprehensive assessment of the overall terrorism risk from both foreign and domestic terrorist organizations. The RMS model generates a probabilistic estimate of the overall terrorism risk from loss estimates for dozens of types of potential attacks against several thousand potential targets of terrorism across the United States. For each attack

mode-target pair (constituting an individual scenario) the model accounts for the probability that a successful attack will occur and the consequences of the attack. RMS derives attack probabilities from a semi-annual structured expert elicitation process focusing on terrorists’ intentions and capabilities. It bases scenario consequences on physical modeling of attack phenomena and casts target characteristics in terms of property damage and casualties of interest to insurers. Specifically, property damages include costs of damaged buildings, loss of building contents, and loss from business interruption associated with property to which law enforcement prohibits entry immediately following a terrorist attack. RMS classifies casualties based on injury-severity categories used by the worker compensation insurance industry.

The results in Table F are based on the annualized cost estimate (assuming a seven percent discount rate) of the rule presented above. These results show that a decrease in perceived risk (the “low risk” scenario generated by RAND to characterize the expected annual losses in the United States from terrorist attacks) leads to a smaller annualized loss and a greater required critical risk reduction for the benefits of the rule to break even with costs. Conversely, an increase in perceived risk (the “high risk” scenario) leads to a greater annualized loss and a smaller required critical risk reduction. The total range in critical risk reduction under the standard threat outlook produced by the RMS model is a factor of three and ranges from 5.5 to 14 percent depending on the methodology used to value the benefits of avoided terrorist attacks (the value of avoided injuries and deaths).

TABLE F.—CRITICAL RISK REDUCTION FOR THE RULE [7 percent discount rate]

Valuation methodology	Critical risk reduction (%)		
	Low	Standard	High
Cost of injury (fatality = \$1.1m)	27	14	6.8
Willingness to pay (VSL = \$3m)	21	10	5.2
Quality of life (VSL = \$3m)	18	8.8	4.4
Willingness to pay (VSL = \$6m)	14	7.0	3.5
Quality of life (VSL = \$6m)	11	5.5	2.8

Several key factors affect estimates of the critical risk reduction required for the benefits of the rule to equal or exceed the costs. These factors include: the uncertainty in the risk estimate produced by the RMS model; the potential for other types of baseline losses not captured in the RMS model; and the size of other non-quantified direct and ancillary benefits of the rule. The RMS model likely underestimates total baseline terrorism loss because it only reflects the direct, insurable costs of terrorism. It does not include any indirect losses that would result from continued change in consumption patterns or preferences or that would result from propagating consequences of interdependent infrastructure systems. For example, the RMS model does not capture the economic disruption of a terrorism event beyond the immediate insured losses. Furthermore, the model also excludes non-worker casualty losses and losses associated with government buildings and employees. Finally, the model may not capture less-tangible components of losses that the

public wishes to avoid, such as the fear and anxiety associated with experiencing a terrorist attack. Omission of these losses will cause us to overstate the necessary risk reductions.

Although the risk reduction associated with the final rule cannot be quantified due to data limitations, a separate analysis of the potential benefits resulting from reductions in wait time at the border suggests that the net benefits of the rule (total benefits minus total costs) have the potential to be positive. In a separate effort, CBP estimated the costs and benefits of processing technology investments at ports-of-entry. As part of this analysis, analysts evaluated the wait time impact attributable to each technology alternative. The results suggest that implementing standard documents and RFID technology could result in reductions in wait time valued as highly as \$2.4 billion to \$3.3 billion between 2009 and 2018 (discount rates of 7 and 3 percent, respectively). Subtracting total present value costs suggests the potential for net benefits as high as \$0.9 billion to \$1.7 billion (discount rates of 7 and 3 percent, respectively).

Alternatives to the Rule

CBP considered the following alternatives to the final rule—

1. Require all U.S. travelers (including children) to present a valid passport book upon return to the United States from countries in the Western Hemisphere.

2. Require all U.S. travelers (including children) to present a valid passport book, passport card, or CBP trusted traveler document upon return to the

United States from countries in the Western Hemisphere.

3. Alternative 2, but without RFID-enabled passport cards.

Calculations of costs for the alternatives can be found in the two Regulatory Assessments for the final rule.

Alternative 1: Require all U.S. travelers (including children) to present a valid passport book.

The first alternative would require all U.S. citizens, including minors under 16 and all cruise passengers, to present a valid passport book only. This alternative was rejected as potentially too costly and burdensome for low-risk populations of travelers. While the passport book will always be an acceptable document for a U.S. citizen to present upon entry to the United States, DHS and DOS believe that the cost of a traditional passport book may be too expensive for some U.S. citizens, particularly those living in border communities where land-border crossings are an integral part of everyday life. As stated previously, DHS and DOS believe that children under the age of 16 pose a low security threat in the land and sea environments and will be permitted to present a birth certificate when arriving in the United States at all land and sea ports-of-entry from contiguous territory. DHS and DOS have also determined that designating alternative documentation for certain cruise passengers from a passport requirement is the best approach to balance security and travel efficiency considerations in the cruise ship environment.

Alternative 2: Require all U.S. travelers (including children) to present a valid passport book, passport card, or trusted traveler document.

The second alternative is similar to the final rule, though it includes children and does not provide a passport exception for cruise passengers. While this alternative incorporates the low-cost passport card and CBP trusted traveler cards as acceptable travel documents, this alternative was ultimately rejected as potentially too costly and burdensome for low-risk populations of travelers (certain cruise passengers and minors under 16).

Alternative 3: Require all U.S. travelers (including children) to present a valid passport book, passport card, or trusted traveler document; no RFID-enabled passport card.

The third alternative is similar to the second; it just now assumes that the passport card is not enabled with RFID technology. For this analysis, we assume that this does not change the fee charged for the passport card; we assume, however, that government costs to test and deploy the appropriate technology at the land borders to read the passport cards are eliminated. This alternative was rejected because DHS and DOS strongly believe that facilitation of travel, particularly at the land borders where wait times are a major concern, should be a primary achievement of WHTI implementation.

Table G presents a comparison of the costs of the final rule and the alternatives considered.

TABLE G.—COMPARISON OF REGULATORY ALTERNATIVES
[In \$millions]

Alternative	13-year cost (7%)	Compared to final rule	Reason rejected
Final rule	\$2,748	n/a	
Alternative 1: Passport book only for all U.S. travelers	\$6,728	+\$3,979	Cost of a passport considered too high for citizens in border communities; low-risk traveling populations (certain cruise passengers, children under 16) unduly burdened.
Alternative 2: Passport book, passport card, and other designated documents for all U.S. travelers.	\$5,751	+\$3,003	Low-risk traveling populations (certain cruise passengers, children under 16) unduly burdened.
Alternative 3: Passport book, passport card, and other designated documents for all U.S. travelers; no RFID-enabled passport card.	\$5,340	+\$2,591	Low-risk traveling populations (certain cruise passengers, children under 16) unduly burdened, unacceptable wait times at land-border ports of entry.

It is important to note that for scenarios where the RFID-capable passport card is acceptable (the final rule and Alternative 2), the estimates include government implementation costs for CBP to install the appropriate technology at land ports-of-entry to read RFID-enabled passport cards and the

next generation of CBP trusted traveler documents. These technology deployment costs are estimated to be substantial, particularly in the early phases of implementation. As a result, the alternatives allowing more documents than just the passport book result higher government costs over

thirteen years than alternatives allowing only the passport book or the passport card that is not RFID-enabled, which can be processed with existing readers that scan the passport's machine-readable zone. Allowing presentation of alternative documentation for minors and most cruise passengers results in

notable cost savings over thirteen years (about \$2.5 billion to \$4.0 billion depending on the documents considered).

Accounting statement

As required by OMB Circular A-4, CBP has prepared an accounting

statement showing the classification of the expenditures associated with this rule. The table below provides an estimate of the dollar amount of these costs and benefits, expressed in 2005 dollars, at 7 percent and 3 percent discount rates. We estimate that the cost

of this rule will be approximately \$314 million annualized (7 percent discount rate) and approximately \$296 million annualized (3 percent discount rate). Non-quantified benefits are enhanced security and efficiency.

ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES, 2005–2017
[2005 Dollars]

	3% discount rate	7% discount rate
Costs:		
Annualized monetized costs	\$296 million	\$314 million.
Annualized quantified, but un-monetized costs.	Indirect costs to the travel and tourism industry.	Indirect costs to the travel and tourism industry.
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 benefits.	None quantified	None quantified.
Qualitative (un-quantified) benefits	Enhanced security and efficiency	Enhanced security and efficiency.

B. Regulatory Flexibility Act

CBP has prepared this section to examine the impacts of the final rule on small entities as required by the Regulatory Flexibility Act (RFA).⁴⁹ 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, CBP consulted the Small Business Administration’s guidance document for conducting regulatory flexibility analyses.⁵⁰ 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.⁵¹ 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. CBP does 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. To wit, “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.”⁵²

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

Some 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 domestic industries. Most travelers are expected to eventually 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 forego travel to affected Western Hemisphere countries. These industry sectors may include (but are not limited to):

- Manufacturing
- Wholesale trade
- Retail trade
- Transportation (including water, air, truck, bus, and rail)
- Real estate
- Arts, entertainment, and recreation
- Accommodation and food services

Because this rule does not directly regulate small entities, we do not believe that this rule has a significant economic impact on a substantial number of small entities. The exception

could be certain “sole proprietors” who could be considered small businesses and could be directly affected by the rule if their occupations required travel within the Western Hemisphere where a passport was not previously required. However, as estimated in the Regulatory Assessment for implementation of WHTI in the land environment, the cost to such businesses would be only \$125 for a first-time passport applicant, \$70 for a first-time passport card applicant, plus an additional \$60 if expedited service were requested. We believe such an expense would not rise to the level of being a “significant economic impact.”

CBP thus certifies that this regulatory action does 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

⁴⁹ See 5 U.S.C. 601–612.

⁵⁰ See Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, May 2003.

⁵¹ See *id.* at 69.

⁵² See *id.* at 20.

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 U.S. citizens and nonimmigrant aliens from Canada, Bermuda and Mexico entering the United States by land or by sea from Western Hemisphere countries to present a valid passport or other identified alternative document. States do not conduct activities subject to this rule. For these reasons, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

D. Unfunded Mandates Reform Act Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 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 in the Executive Order 12866 discussion.

E. National Environmental Policy Act of 1969

DHS, in consultation with DOS, the Environmental Protection Agency and the General Services Administration have reviewed the potential environmental and other impacts of this proposed rule in accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and DHS Management Directive 5100.1, *Environmental Planning Program of April 19, 2006*. A programmatic environmental assessment (PEA) was prepared that examined, among other things, potential alternatives regarding implementation of the proposed rule at the various land and sea ports of entry and what, if any, environmental impacts may result from the rule and its implementation.

The final PEA was published on September 10, 2007, and resulted in a Finding of No Significant Impact (FONSI) for the WHTI sea and land plan. A review of the relative impacts showed that none of the alternatives analyzed would result in a significant impact on the human environment.

A Notice of Availability for the final PEA and FONSI was published on September 26, 2007, in the **Federal Register**, and the PEA and FONSI are available for viewing on <http://www.dhs.gov> and <http://www.cbp.gov>. In addition, copies may be obtained by writing to: U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 5.4D, Attn: WHTI Environmental Assessment, Washington, DC 20229.

F. Paperwork Reduction Act

1. Passports/Passport Cards

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. sections 1401-1504), the Fourteenth Amendment to the Constitution of the United States, and other applicable 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. Applicants for the passport cards would use the same application forms (DS-11 and DS-82). The forms have been modified to allow the applicant to elect a card or book formal passport, or both. First time applicants must use the DS-11. The rule would result in an increase in the number of persons filing the DS-11 and could result in an increase in the number of persons filing the DS-82, 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 83-I (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.

Estimated annual average reporting and/or recordkeeping burden: 14.7 million hours.

Estimated annual average number of respondents: 9 million.

Estimated average burden per respondent: 1 hour 25 minutes.

Estimated frequency of responses:

Every 10 years (adult passport and passport card applications); every 5 years (minor passport and passport card applications) Comments on this collection of information should be sent to the Office of Management and Budget, *Attention:* Desk Officer of the Department of State, Office of Information and Regulatory Affairs, Washington, DC 20503.

2. Groups of Children

The collection of information requirements for groups of children would be contained in 8 CFR 212.1 and 235.1. The required information is necessary to comply with section 7209 of IRTPA, as amended, to develop an alternative procedure for groups of children traveling across an international border under adult supervision with parental consent. DHS, in consultation with DOS, has developed alternate procedures

requiring that certain information be provided to CBP so that these children would not be required to present a passport. Consequently, U.S. and Canadian citizen children through age 18, who are traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth sport organizations that arrive at U.S. sea or land ports-of-entry, would be permitted to present an original or a copy of a birth certificate (rather than a passport), when the groups are under the supervision of an adult affiliated with the organization and when all the children have parental or legal guardian consent to travel. U.S. citizen children would also be permitted to present a Certificate of Naturalization or a Consular Report of Birth Abroad. Canadian children would also be permitted to present a Canadian Citizenship Card or Canadian Naturalization Certificate.

When crossing the border at the port-of-entry, the U.S. group, organization, or team would be required to provide to CBP on organizational letterhead the following information: (1) The name of the group; (2) the name of each child on the trip; (3) the primary address, primary phone number, date of birth, place of birth, and name of at least one parent or legal guardian for each child on the trip; (4) the name of the chaperone or supervising adult; and (5) the signed statement of the supervising adult certifying that he or she has obtained parental or legal guardian consent for each child.

The primary purpose for soliciting the information is to allow groups of children arriving at the U.S. border under adult supervision with parental consent to present either an original or a copy of a birth certificate, (either for U.S. children: a Consular Report of Birth Abroad, or Certificate of Naturalization; or for Canadian children: a Canadian Citizenship Card or Canadian Naturalization Certificate), rather than a passport, when the requested information is provided to CBP. This information is necessary for CBP to verify that the group of children entering the United States is eligible for this alternative procedure so that the children would not be required to present a passport or other generally acceptable document.

The collection of information encompassed within this proposed 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.

Estimated annual reporting and/or recordkeeping burden: 1,625 hours.

Estimated average annual respondent or recordkeeping burden: 15 minutes.

Estimated number of respondents and/or recordkeepers: 6,500 respondents.

Estimated annual frequency of responses: 6,500 responses.

Comments on this collection of information should be sent to the Office of Management and Budget, *Attention: Desk Officer of the Department of Homeland Security, Office of Information and Regulatory Affairs*, Washington, DC 20503.

G. Privacy Statement

A Privacy Impact Assessment (PIA) was posted to the DHS Web site (at http://www.dhs.gov/xinfoshare/publications/editorial_0511.shtm) regarding the proposed rule. The changes adopted in this final rule involve the removal of an exception for U.S. citizens from having to present a passport in connection with Western Hemisphere travel other than Cuba, such that said individuals would now be required to present a passport or other identified alternative document when traveling from foreign 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) (for which a System of Records Notice is published at 66 FR 53029). By removing the passport exception for U.S. Citizens traveling within the Western Hemisphere, DHS and DOS 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

Passports and visas, travel restrictions.

Amendments to the Regulations

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

Title 8—Aliens and Nationality

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, 1359; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458, as amended by section 546 of Pub. L. 109–295 and by section 723 of Pub. L. 110–53).

■ 2. A new § 212.0 is added to read as follows:

§ 212.0 Definitions.

For purposes of § 212.1 and § 235.1 of this chapter:

Adjacent islands means Bermuda and the islands located in the Caribbean Sea, except Cuba.

Cruise ship means a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.

Ferry means any vessel operating on a pre-determined fixed schedule and route, which is being used solely to provide transportation between places that are no more than 300 miles apart and which is being used to transport passengers, vehicles, and/or railroad cars.

Pleasure vessel means a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire.

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)).

U.S. citizen means a United States citizen or a U.S. non-citizen national.

United States qualifying tribal entity means a tribe, band, or other group of Native Americans formally recognized by the United States Government which agrees to meet WHTI document standards.

* * * * *

- 3. Section 212.1 is amended by:
 - a. Revising paragraphs (a)(1) and (a)(2); and
 - b. Revising paragraph (c)(1).
 The revisions read 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 generally not required for Canadian citizens, except those Canadians that fall under nonimmigrant visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2. A valid unexpired passport is required for Canadian citizens arriving in the United States, except when meeting one of the following requirements:

(i) *NEXUS Program.* A Canadian citizen who is traveling as a participant in the NEXUS program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired NEXUS program card when using a NEXUS Air kiosk or when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry. A Canadian citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may present a valid unexpired NEXUS program card.

(ii) *FAST Program.* A Canadian citizen who is traveling as a participant in the FAST program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired FAST card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(iii) *SENTRI Program.* A Canadian citizen who is traveling as a participant in the SENTRI program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired SENTRI card at a land or sea port-of-entry prior to entering the United States

from contiguous territory or adjacent islands.

(iv) *Canadian Indians.* If designated by the Secretary of Homeland Security, a Canadian citizen holder of a Indian and Northern Affairs Canada (“INAC”) card issued by the Canadian Department of Indian Affairs and North Development, Director of Land and Trust Services (“LTS”) in conformance with security standards agreed upon by the Governments of Canada and the United States, and containing a machine readable zone and who is arriving from Canada may present the card prior to entering the United States at a land port-of-entry.

(v) *Children.* A child who is a Canadian citizen arriving from contiguous territory may present for admission to the United States at sea or land ports-of-entry certain other documents if the arrival meets the requirements described below.

(A) *Children Under Age 16.* A Canadian citizen who is under the age of 16 is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry.

(B) *Groups of Children Under Age 19.* A Canadian citizen, under age 19 who is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older.

The following requirements will apply:

(1) The group, organization, or team must provide to CBP upon crossing the border, on organizational letterhead:

(i) The name of the group, organization or team, and the name of the supervising adult;

(ii) A trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay;

(iii) A list of the children on the trip;

(iv) For each child, the primary address, primary phone number, date of birth, place of birth, and name of a parent or legal guardian.

(2) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (a)(1)(v)(B)(1) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(3) The inspection procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part or parts 211 or 235 of this subchapter.

(2) *Citizens of the British Overseas Territory of Bermuda.* A visa is generally not required for Citizens of the British Overseas Territory of Bermuda, except those Bermudians that fall under nonimmigrant visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2. A passport is required for Citizens of the British Overseas Territory of Bermuda arriving in the United States.

* * * * *

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

(i) Is applying for admission as a temporary visitor for business or pleasure from Mexico at a land port-of-entry, or arriving by pleasure vessel or ferry, if the national is in possession of a Form DSP-150, B-1/B-2 Visa and Border Crossing Card issued by the Department of State, containing a machine-readable biometric identifier; or

(ii) Is applying for admission from contiguous territory or adjacent islands at a land or sea port-of-entry, if the national is a member of the Texas Band of Kickapoo Indians or Kickapoo Tribe of Oklahoma who is in possession of a Form I-872 American Indian Card.

* * * * *

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

- 4. 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, as amended by section 546 of Pub. L. 109–295 and by section 723 of Pub. L. 110–53).

- 5. Section 235.1 is amended by:
 - a. Revising paragraph (b);
 - b. Revising paragraph (d); and
 - c. Revise paragraph (e).

The revised text reads as follows:

§ 235.1 Scope of examination.

* * * * *

(b) *U.S. Citizens.* A person claiming U.S. citizenship must establish that fact to the examining officer's satisfaction and must present a U.S. passport or alternative documentation as required by 22 CFR part 53. If such applicant for admission fails to satisfy the examining immigration officer that he or she is a U.S. citizen, he or she shall thereafter be inspected as an alien. A U.S. citizen must present a valid unexpired U.S. passport book upon entering the United States, unless he or she presents one of the following documents:

(1) *Passport Card.* A U.S. citizen who possesses a valid unexpired United States passport card, as defined in 22 CFR 53.1, may present the passport card when entering the United States from contiguous territory or adjacent islands at land or sea ports-of-entry.

(2) *Merchant Mariner Document.* A U.S. citizen who holds a valid Merchant Mariner Document (MMD) issued by the U.S. Coast Guard may present an unexpired MMD used in conjunction with official maritime business when entering the United States.

(3) *Military Identification.* Any U.S. citizen member of the U.S. Armed Forces who is in the uniform of, or bears documents identifying him or her as a member of, such Armed Forces, and who is coming to or departing from the United States under official orders or permit of such Armed Forces, may present a military identification card and the official orders when entering the United States.

(4) *Trusted Traveler Programs.* A U.S. citizen who travels as a participant in the NEXUS, FAST, or SENTRI programs may present a valid NEXUS program card when using a NEXUS Air kiosk or a valid NEXUS, FAST, or SENTRI card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands. A U.S. citizen who enters the United States by pleasure vessel from Canada using the remote inspection system may present a NEXUS program card.

(5) *Certain Cruise Ship Passengers.* A U.S. citizen traveling entirely within the Western Hemisphere is permitted to present a government-issued photo identification document in combination with either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department of State, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services for entering the United States when the United States citizen:

(i) Boards a cruise ship at a port or place within the United States; and,

(ii) Returns on the return voyage of the same cruise ship to the same United States port or place from where he or she originally departed.

On such cruises, U.S. Citizens under the age of 16 may present an original or a copy of a birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services.

(6) *Native American Holders of an American Indian Card.* A Native American holder of a Form I-872 American Indian Card arriving from contiguous territory or adjacent islands may present the Form I-872 card prior to entering the United States at a land or sea port-of-entry.

(7) *Native American Holders of Tribal Documents.* A U.S. citizen holder of a tribal document issued by a United States qualifying tribal entity or group of United States qualifying tribal entities, as provided in paragraph (e) of this section, who is arriving from contiguous territory or adjacent islands may present the tribal document prior to entering the United States at a land or sea port-of-entry.

(8) *Children.* A child who is a United States citizen entering the United States from contiguous territory at a sea or land ports-of-entry may present certain other documents, if the arrival falls under subsection (i) or (ii).

(i) *Children Under Age 16.* A U.S. citizen who is under the age of 16 is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department of State, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when entering the United States from contiguous territory at land or sea ports-of-entry.

(ii) *Groups of Children Under Age 19.* A U.S. citizen, who is under age 19 and is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department of State, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when arriving from contiguous territory at land or sea ports-of-entry, when the group, organization, or team is under the supervision of an adult affiliated with the group, organization, or team and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is

considered to be a person age 19 or older. The following requirements will apply:

(A) The group or organization must provide to CBP upon crossing the border, on organizational letterhead:

(1) The name of the group, organization or team, and the name of the supervising adult;

(2) A list of the children on the trip;

(3) For each child, the primary address, primary phone number, date of birth, place of birth, and name of a parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (b)(8)(ii)(A) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The inspection procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part.

* * * * *

(d) *Enhanced Driver's License Projects; alternative requirements.* Upon the designation by the Secretary of Homeland Security of an enhanced driver's license as an acceptable document to denote identity and citizenship for purposes of entering the United States, U.S. and Canadian citizens may be permitted to present these documents in lieu of a passport upon entering or seeking admission to the United States according to the terms of the agreements entered between the Secretary of Homeland Security and the entity. The Secretary of Homeland Security will announce, by publication of a notice in the **Federal Register**, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

(e) *Native American Tribal Cards; alternative requirements.* Upon the designation by the Secretary of Homeland Security of a United States qualifying tribal entity document as an acceptable document to denote identity and citizenship for purposes of entering the United States, Native Americans may be permitted to present tribal cards upon entering or seeking admission to the United States according to the terms of the voluntary agreement entered between the Secretary of Homeland Security and the tribe. The Secretary of Homeland Security will announce, by publication of a notice in the **Federal**

Register, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

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Title 22—Foreign Relations

PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT

Subpart A—Passport and Visas Not Required for Certain Nonimmigrants

■ 1. 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, as amended by section 546 of Pub. L. 109–295).

■ 2. A new § 41.0 is added to read as follows:

§ 41.0 Definitions.

For purposes of this part and part 53:

Adjacent islands means Bermuda and the islands located in the Caribbean Sea, except Cuba.

Cruise ship means a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.

Ferry means any vessel operating on a pre-determined fixed schedule and route, which is being used solely to provide transportation between places that are no more than 300 miles apart and which is being used to transport passengers, vehicles, and/or railroad cars.

Pleasure vessel means a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire.

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)).

U.S. citizen means a United States citizen or a U.S. non-citizen national.

United States qualifying tribal entity means a tribe, band, or other group of Native Americans formally recognized by the United States Government which agrees to meet WHTI document standards.

§ 41.1 [Amended]

■ 3. Section 41.1 is amended by removing and reserving paragraph (b).

■ 4. Section 41.2 is amended by revising the heading, the introductory text, and paragraphs (a), (b), (g)(1) and (g)(2) to read as follows:

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

Pursuant to the authority of the Secretary of State and the Secretary of Homeland Security under the INA, as amended, a passport and/or visa is not required for the following categories of nonimmigrants:

(a) *Canadian citizens*. A visa is not required for an American Indian born in Canada having at least 50 percentum of blood of the American Indian race. A visa is not required for other Canadian citizens except for those who apply for admission in E, K, V, or S nonimmigrant classifications as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1. A passport is required for Canadian citizens applying for admission to the United States, except when one of the following exceptions applies:

(1) *NEXUS Program*. A Canadian citizen who is traveling as a participant in the NEXUS program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid NEXUS program card when using a NEXUS Air kiosk or when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry. A Canadian citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may present a NEXUS program card.

(2) *FAST Program*. A Canadian citizen who is traveling as a participant in the FAST program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid FAST card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(3) *SENTRI Program*. A Canadian citizen who is traveling as a participant in the SENTRI program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid SENTRI card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(4) *Canadian Indians*. If designated by the Secretary of Homeland Security, a Canadian citizen holder of an Indian and Northern Affairs Canada (“INAC”) card issued by the Canadian Department of Indian Affairs and North Development, Director of Land and Trust Services (LTS) in conformance with security standards agreed upon by the Governments of Canada and the United States, and containing a machine readable zone, and who is arriving from Canada, may present the card prior to entering the United States at a land port-of-entry.

(5) *Children*. A child who is a Canadian citizen who is seeking admission to the United States when arriving from contiguous territory at a sea or land port-of-entry, may present certain other documents if the arrival meets the requirements described in either paragraph (i) or (ii) of this section.

(i) *Children Under Age 16*. A Canadian citizen who is under the age of 16 is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry.

(ii) *Groups of Children Under Age 19*. A Canadian citizen who is under age 19 and who is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization may present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when applying for admission to the United States from contiguous territory at all land and sea ports-of-entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older. The following requirements will apply:

(A) The group, organization, or team must provide to CBP upon crossing the border, on organizational letterhead:

(1) The name of the group, organization or team, and the name of the supervising adult;

(2) A trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay;

(3) A list of the children on the trip;

(4) For each child, the primary address, primary phone number, date of birth, place of birth, and the name of at least one parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (a)(5)(ii)(A) of this section

that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The procedure described in this paragraph is limited to members of the group, organization, or team that are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part and 8 CFR parts 212 and 235.

(6) *Enhanced Driver's License Programs.* Upon the designation by the Secretary of Homeland Security of an enhanced driver's license as an acceptable document to denote identity and citizenship for purposes of entering the United States, Canadian citizens may be permitted to present these documents in lieu of a passport when seeking admission to the United States according to the terms of the agreements entered between the Secretary of Homeland Security and the entity. The Secretary of Homeland Security will announce, by publication of a notice in the **Federal Register**, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

(b) *Citizens of the British Overseas Territory of Bermuda.* A visa is not required, except for Citizens of the British Overseas Territory of Bermuda who apply for admission in E, K, V, or S nonimmigrant visa classification as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1. A passport is required for Citizens of the British Overseas Territory of Bermuda applying for admission to the United States.

* * * * *

(g) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national who is applying for admission from Mexico as a temporary visitor for business or pleasure at a land port-of-entry, or arriving by pleasure vessel or ferry, if the national 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 Department of State.

(2) A visa and a passport are not required of a Mexican national who is applying for admission from contiguous territory or adjacent islands at a land or sea port-of-entry, if the national is a member of the Texas Band of Kickapoo Indians or Kickapoo Tribe of Oklahoma who is in possession of a Form I-872 American Indian Card issued by U.S. Citizenship and Immigration Services (USCIS).

* * * * *

PART 53—PASSPORT REQUIREMENT AND EXCEPTIONS

■ 5. The authority citation for part 53 continues to read as follows:

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. 23, 2003).

■ 6. Section 53.2 is revised to read as follows:

§ 53.2 Exceptions.

(a) U.S. citizens, as defined in § 41.0 of this chapter, are not required to bear U.S. passports when traveling directly between parts of the United States as defined in § 51.1 of this chapter.

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

(1) When traveling as a member of the Armed Forces of the United States on active duty and when he or she is in the uniform of, or bears documents identifying him or her as a member of, such Armed Forces, when under official orders or permit of such Armed Forces, and when carrying a military identification card; or

(2) When traveling entirely within the Western Hemisphere on a cruise ship, and when the U.S. citizen boards the cruise ship at a port or place within the United States and returns on the return voyage of the same cruise ship to the same United States port or place from where he or she originally departed. That U.S. citizen may present a government-issued photo identification document in combination with either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services before entering the United States; if the U.S. citizen is under the age of 16, he or she may present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services; or

(3) When traveling as a U.S. citizen seaman, carrying an unexpired Merchant Marine Document (MMD) in conjunction with maritime business. The MMD is not sufficient to establish citizenship for purposes of issuance of a United States passport under part 51 of this chapter; or

(4) *Trusted Traveler Programs.* (i) *NEXUS Program.* When traveling as a participant in the NEXUS program, he or she may present a valid NEXUS program card when using a NEXUS Air kiosk or when entering the United

States from contiguous territory or adjacent islands at a land or sea port-of-entry. A U.S. citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may also present a NEXUS program card;

(ii) *FAST Program.* A U.S. citizen who is traveling as a participant in the FAST program may present a valid FAST card when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry;

(iii) *SENTRI Program.* A U.S. citizen who is traveling as a participant in the SENTRI program may present a valid SENTRI card when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry; The NEXUS, FAST, and SENTRI cards are not sufficient to establish citizenship for purposes of issuance of a U.S. passport under part 51 of this chapter; or

(5) When arriving at land ports of entry and sea ports of entry from contiguous territory or adjacent islands, Native American holders of American Indian Cards (Form I-872) issued by U.S. Citizenship and Immigration Services (USCIS) may present those cards; or

(6) When arriving at land or sea ports of entry from contiguous territory or adjacent islands, U.S. citizen holders of a tribal document issued by a United States qualifying tribal entity or group of United States qualifying tribal entities as provided in 8 CFR 235.1(e) may present that document. Tribal documents are not sufficient to establish citizenship for purposes of issuance of a United States passport under part 51 of this chapter; or

(7) When bearing documents or combinations of documents the Secretary of Homeland Security has determined under Section 7209(b) of Public Law 108-458 (8 U.S.C. 1185 note) are sufficient to denote identity and citizenship. Such documents are not sufficient to establish citizenship for purposes of issuance of a U.S. passport under part 51 of this chapter; or

(8) 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 and is traveling in connection with such employment; or

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

(10) 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; or

(11) When the U.S. citizen is a child under the age of 19 arriving from contiguous territory in the following circumstances:

(i) *Children Under Age 16.* A United States citizen who is under the age of 16 is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when entering the United States from contiguous territory at land or sea ports-of-entry; or

(ii) *Groups of Children Under Age 19.* A U.S. citizen who is under age 19 and who is traveling with a public or private

school group, religious group, social or cultural organization, or team associated with a youth sport organization may present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when arriving in the United States from contiguous territory at all land or sea ports of entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older.

The following requirements will apply:

(A) The group, organization, or team must provide to CBP upon crossing the border on organizational letterhead:

(1) The name of the group, organization or team, and the name of the supervising adult;

(2) A list of the children on the trip; and

(3) For each child, the primary address, primary phone number, date of

birth, place of birth, and the name of at least one parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (b)(11)(ii)(A) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in 8 CFR parts 211, 212, or 235.

Dated: March 26, 2008.

Michael Chertoff,

Secretary of Homeland Security, Department of Homeland Security.

Patrick Kennedy,

Under Secretary of State for Management, Department of State.

[FR Doc. E8-6725 Filed 4-2-08; 8:45 am]

BILLING CODE 9111-14-P