

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 215, 217, 231, and 235

### 19 CFR Parts 4 and 122

RIN 1601-AA34

[DHS-2008-0039]

### Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure; United States Visitor and Immigrant Status Indicator Technology Program (“US-VISIT”)

**AGENCY:** National Protection and Programs Directorate, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Homeland Security (DHS) proposes to establish an exit program at all air and sea ports of departure in the United States. This proposed rule would require aliens who are subject to United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT) biometric requirements upon entering the United States to provide biometric information to commercial air and vessel carriers before departing from the United States at air and sea ports of entry. This rule proposes a performance standard for commercial air and vessel carriers to collect the biometric information and to submit this information to DHS no later than 24 hours after air carrier staff secure the aircraft doors on an international departure, or for sea travel, no later than 24 hours after the vessel’s departure from a U.S. port. DHS does not propose to apply these requirements to persons departing the United States on certain private carriers or small carriers as defined herein.

The exit system proposed under this rule meets the recommendations of the 9-11 Commission Report and the requirements of section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007.

**DATES:** Comments are due no later than June 23, 2008.

**ADDRESSES:** You may submit comments pursuant to the instructions in the Public Comments section of the Supplemental Information, identified by Docket Number DHS-2008-0039, by one of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting the comments.
- *Mail:* Michael Hardin, Senior Policy Advisor, US-VISIT, Department of Homeland Security; 1616 North Fort Myer Drive, 18th Floor, Arlington, VA 22209.

**FOR FURTHER INFORMATION CONTACT:** Michael Hardin, Senior Policy Advisor, US-VISIT, Department of Homeland Security; 1616 North Fort Myer Drive, 18th Floor, Arlington, VA 22209 or by phone at (202) 298-5200.

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#### Table of Abbreviations and Acronyms

*9/11 Recommendations Act—The Implementing Recommendations of the 9/11 Commission Act of 2007*

ADIS—Arrival and Departure Information System

AOIP—Aircraft Operator Implementation Plan

APIS—Advance Passenger Information System

AQQ—APIS Quick Query

CBP—Customs and Border Protection

CEQ—Council on Environmental Quality

CII—Critical Infrastructure Information

CJIS—Criminal Justice Information Services

COI—Countries of Interest

CUG—Consolidated Users Guide

DHS—Department of Homeland Security

DOJ—Department of Justice

DOS—Department of State

DMIA—Immigration and Naturalization Service Data Management Improvement Act of 2000

EBSVERA—Enhanced Border Security and Visa Entry Reform Act of 2002

FBI—Federal Bureau of Investigation

FIN—Fingerprint Identification Number

FOIA—Freedom of Information Act

FONSI—Finding of No Significant Impact

IDENT—Automated Biometric Identification System

INA—Immigration and Nationality Act

INS—Immigration and Naturalization Service

IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004

MRZ—Machine Readable Zone

NEPA—National Environmental Policy Act of 1969

NCTC—National Counterterrorism Center

NIST—National Institute of Standards and Technology

PCII—Protected Critical Infrastructure Information

PEA—Programmatic Environmental Assessment

PIA—Privacy Impact Assessment  
 PII—Personally Identifiable Information  
 PRA—Paperwork Reduction Act  
 SBA—Small Business Administration  
 SFPD—Secure Flight Passenger Data  
 SSI—Sensitive Security Information  
 TRIP—Traveler Redress Inquiry Program  
 TSA—Transportation Security Administration  
 USA PATRIOT Act—Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001  
 US-VISIT—United States Visitor and Immigrant Status Indicator Technology Program  
 VWP—Visa Waiver Program  
 WVPPA—Visa Waiver Permanent Program Act of 2000  
 WSA—Work Station Attendant

## I. Request for Public Comments

The Department of Homeland Security (DHS) requests public comment on this proposed rule. The most helpful comments will specifically address discrete elements of the proposal, including on-point operational and financial data and the potential economic and business impacts from the performance standards proposed under this rule.

This rule proposes a performance standard that requires the carriers to collect biometric information on the premises of the facility from which the alien departs the United States, but provides the carriers with some discretion in the manner of collection and submission to allow the carriers to meet the requirements in the most efficient and cost-effective manner. DHS specifically requests public comments on all of the alternatives discussed in this proposed rule and the underlying assumptions and analyses related to those alternatives.

Although the proposed rule identifies means for collection of biometrics, personnel, and methods of transmission, DHS also welcomes proposals on alternatives that have not been proposed in this rule. The most useful proposals or alternatives would include information on how the proposed alternative would reduce the burden on travelers and the travel industry without sacrificing accuracy in the collection of biometric information.

DHS also solicits comments on the regulatory evaluations supporting this proposed rule, including:

- The cost models of each alternative, including all assumptions that underlie the labor costs;
- Any cost-sharing alternatives to the proposals presented between the carriers and the government;
- The assumptions and numbers used to develop the carrier and government alternatives; and

- The potential for cost savings for alternatives not included as options in this proposed rule.

DHS may select another variation between the outer bounds of the alternatives presented or another alternative if subsequent analysis and public comments warrant.

All comments will be included in the public docket, except those comments that, on their face, contain trade secrets, confidential commercial or financial information, or sensitive security information (SSI) or critical infrastructure information (CII). Comments that include trade secrets, confidential commercial or financial information, or SSI should not be submitted to the public regulatory docket. Submit such comments separately from other comments on the rule. Comments containing this type of information should be appropriately marked and submitted by mail to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section. Upon receipt of such comments, DHS will handle them in accordance with applicable safeguards and restrictions on access. DHS will not place the comments in the public docket, but rather will hold them in a separate file to which the public does not have access and place a note in the public docket that DHS has received such materials from the commenter.

Industry is invited to submit critical infrastructure information (CII) in response to this rulemaking. The CII must be submitted to the Protected Critical Infrastructure Information (PCII) Program Office and validated as PCII in order to be considered PCII. In addition, the submitted CII must be accompanied by an express statement requesting the protections of the Critical Infrastructure Information Act of 2002, Public Law No. 107–296, tit. II, subtit. B, section 211–214, 116 Stat. 2135, 2150 (Nov. 25, 2002) (6 U.S.C. 131–134) (the CII Act), and a signed Certification Statement. Once the PCII Program receives the requisite documentation, and provided that the submitted information meets the definition of CII under the CII Act, the PCII Program Office will validate the information as PCII. Submissions of CII for consideration for validation as PCII should be submitted electronically, if possible, through the PCII Web site at [www.dhs.gov/pcii](http://www.dhs.gov/pcii) and marked with the docket number for this rulemaking. If the comments cannot be submitted electronically for PCII consideration, please contact the PCII Program Office at [pcii-info@dhs.gov](mailto:pcii-info@dhs.gov). DHS will disclose and dispose of CII and PCII only in accordance with the CII Act and 6 CFR part 29.

## II. Background and Purpose

### A. Need for a US-VISIT Exit System

Under the Department's current US-VISIT Program, the U.S. Government, through Customs and Border Protection (CBP) officers or Department of State (DOS) consular offices, collects biometrics (digital finger scans and photographs) from aliens seeking to enter the United States. DHS checks that information against government databases to identify suspected terrorists, known criminals, or individuals who have previously violated U.S. immigration laws. This system assists DHS and DOS in determining whether an alien seeking to enter the United States is, in fact, admissible to the United States under existing law.

Currently, however, there is no exit system to assist DHS or DOS in determining whether an alien has overstayed the terms of his or her visa (or other authorization to be present in the United States). Following the terrorist attacks on the United States in 2001, the National Commission on Terrorist Attacks upon the United States (the 9/11 Commission), in its seminal report, noted:

Looking back, we can see that the routine operations of our immigration laws—that is, aspects of those laws not specifically aimed at protecting against terrorism—inevitably shaped al Qaeda planning and opportunities \* \* \* had the immigration system set a higher bar for determining whether individuals are who or what they claim to be—and ensuring routine consequences for violations—it could potentially have excluded, removed, or come into further contact with several hijackers who did not appear to meet the terms for admitting short-term visitors.

The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (2004) (9/11 Commission Report), p. 384.

The 9/11 Commission's final report illustrated the shortcomings of a system without exit controls. The Commission reported that several of the 9/11 hijackers (Mohamed Atta, Ziad Jarrah, Satam Suqami, Salam al Suqami, and Nawaf al Hazmi) could have been denied admission to the United States based on previous violations of immigrations laws, including having previously overstayed their terms of admission. Had these individuals been denied admission, they would not have been present or available in the United States on September 11, 2001, to carry out the terrorist attacks. See 9/11 Commission Report at 564 note 33, also Staff Statement No. 1 to the Report,

“Entry of the 9/11 Hijackers in the United States” (“Staff Statement”). The Staff Statement emphasizes the consequences of this particular unfinished congressional mandate: “Congress required the Attorney General to develop an entry-exit system in 1996. The system’s purpose was to improve INS’ ability to address illegal migration and overstays for all types of foreign visitors. \* \* \* [W]hen hijackers Suqami and Nawaf al Hazmi overstayed their visas, the system Congress envisaged did not exist. Moreover, when federal law enforcement authorities realized in late August 2001 that [Khalid al] Mihdhar had entered with Hazmi in January 2000 in Los Angeles, they could not reliably determine whether or not Hazmi was still in the United States, along with Mihdhar.” Staff Statement at 8–9.

The purpose of the exit system proposed under this rule is to allow the U.S. Government to better identify aliens who have violated the terms of their stay in the United States. This system will complement the existing entry system and meets the mandates of Congress in the 9/11 Recommendations Act (9/11 Recommendations Act), Public Law No. 110–53, 121 Stat. 266, 338 (Aug. 3, 2007), and the recommendations of the 9/11 Commission.

This rule proposes to amend 8 CFR 215.8 and 231.4 to require commercial air and vessel carriers to collect fingerprints from aliens departing the United States and to transmit those fingerprints to DHS either within 24 hours after securing the cabin doors of the aircraft for departure from the United States or within 24 hours of departure of a vessel from the United States.

DHS also proposes to amend 8 CFR 215.8 to expand the US–VISIT exit program beyond its current limitation of fifteen pilot programs. DHS proposes to require that the air and vessel carriers will submit the information to DHS for comparison against relevant watchlists and immigration information, as required under the Implementing Recommendations of the 9/11 Commission Act of 2007. DHS does not propose to apply these requirements to an air or vessel carrier that is a small entity as defined under Small Business Administration (SBA) regulations. 13 CFR 121.201 (NAIC Codes 481111, 481212, 483112).

This proposed rule is based, in part, on the same statutory authorities under which DHS requires air and vessel carriers to provide passenger manifest information under CBP’s Advanced Passenger Information System (APIS).

Immigration and Nationality Act of 1952, as amended (INA), section 231, 8 U.S.C. 1221. Pursuant to existing DHS regulations, carriers are required to collect, verify, and transmit APIS data before securing the aircraft doors for international flights. Carriers will be required to send the biometric portion of the passenger manifest data to US–VISIT in an XML formatted message that contains the biometric image, US–VISIT specified biographic data (e.g., last name, first name, date of birth, country of citizenship, gender, document type, document number), and carrier specific information (e.g., carrier ID, flight number, port of departure, date and time of fingerprint capture, device identification). US–VISIT will process the biographic data to find the passenger’s entry records in the DHS Automated Biometric Identification System (IDENT) and the Arrival and Departure Information System (ADIS) and then compare the exit biometric to the entry biometric to verify identity.

When an alien arrives at the international departure air or sea port, the carrier will collect the alien’s biometric data. The biometric data and the associated unique identifier will then be transmitted, within 24 hours of departure, to US–VISIT for processing. US–VISIT will use the unique identifier to associate the APIS biographic and biometric data for each alien.

DHS will use the alien biometric data in conjunction with biographic exit data to create an exit record for each departing alien. Biometric exit records will be reconciled against biometric entry records. Aliens who have overstayed their admission period could be subject to adverse action upon subsequent encounters with the U.S. Government, such as during visa application or renewal or application for admission or re-admission to the United States. DHS will also use this data to undertake larger statistical analyses to weigh specific inclusions in the Visa Waiver Program (VWP), as required by INA section 217, 8 U.S.C. 1187.

#### *B. Statutory Authority for US–VISIT*

Numerous Congressional enactments provide for the creation of an integrated and automated system to record the arrival and departure of aliens; the deployment of equipment at all ports of entry to verify aliens’ identities and authenticate travel documents through the comparison of biometric identifiers; and the recording of alien arrival and departure information from biometrically authenticated travel

documents.<sup>1</sup> DHS may control alien travel and inspect aliens under sections 215(a) and 235 of the INA, 8 U.S.C. 1185, 1225. Aliens may be required to provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States, and select classes of aliens may be required to provide information at any time. *See, e.g.*, INA sections 214, 215(a), 235(a), 262(a), 263(a), 264(c), 8 U.S.C. 1184, 1185(a), 1225(a), 1302(a), 1303(a), 1304(c). Pursuant to section 215(a) of the INA, and Executive Order No. 13323, 69 FR 241 (Jan. 2, 2004), the Secretary of Homeland Security, with the concurrence of the Secretary of State, has the authority to require certain aliens to provide requested biographic identifiers and other relevant identifying information as they depart the United States. Under section 214 of the INA, 8 U.S.C. 1184, DHS may make compliance with US–VISIT departure procedures a condition of admission and maintenance of status for nonimmigrant aliens while in the United States.

The creation of an automated entry-exit system that integrates electronic alien arrival and departure information was first authorized in the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law No. 106–215, 114 Stat. 339, 8 U.S.C. 1365a. The DMIA provided that the entry-exit system consist of the integration of all authorized or required alien arrival and departure data that is maintained in electronic format. The DMIA also provided for DHS to use the entry-exit system to match the available arrival and departure data on aliens. DMIA section 2, 8 U.S.C. 1365a(e).

In addition, section 205 of the Visa Waiver Permanent Program Act of 2000 (VWPPA), Public Law No. 106–396, 114 Stat. 1637 (October 30, 2000), amending INA section 217(h), 8 U.S.C. 1187(h), provides for the creation of a system that contains a record of the arrival and departure of every alien admitted under the VWP at air or sea ports of entry. The provisions of the DMIA resulted in the integration of the VWP arrival/departure information into the primary entry-exit system component of US–VISIT.

Following the attacks on the United States on September 11, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA

<sup>1</sup> Implementation of the United States Visitor and Immigrant Status Indicator Technology Program (“US–VISIT”); Biometric Requirements, 69 FR 468, 468 (Jan. 5, 2004).

PATRIOT Act), Public Law No. 107–56, 115 Stat. 353 (October 26, 2001), and the Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSVERA), Public Law No. 107–173, 116 Stat. 553 (May 14, 2002). Section 403(c) of the USA PATRIOT Act, 8 U.S.C. 1379, required DHS and DOS to jointly develop and certify a technology standard that can be used to verify the identity of visa applicants and aliens seeking to enter the United States pursuant to a visa and to do background checks on such aliens. The technology standard was developed through the National Institute of Standards and Technology (NIST), in consultation with the Secretary of the Treasury, other appropriate Federal law enforcement and intelligence agencies, and Congress. The standard includes appropriate biometric identifier standards. The USA PATRIOT Act further provided for DHS and DOS to “particularly focus on the utilization of biometric technology; and the development of tamper-resistant documents readable at ports of entry.” USA PATRIOT Act section 414(b), 8 U.S.C. 1365a and note.

The statutory provisions for biometric identifiers to be utilized in the context of the entry-exit system also were strengthened significantly under EBSVERA. Section 302(a)(1) of EBSVERA provides that the entry-exit system must use the technology and biometric standards required to be certified by DHS and DOS under section 403(c) of the USA PATRIOT Act. 8 U.S.C. 1731. Section 303(b)(1) of EBSVERA provides that the United States may issue to aliens only machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers. 8 U.S.C. 1732(b)(1). Further, DHS and DOS must jointly establish document authentication and biometric identifier standards for alien travel documents from among those recognized by domestic and international standards organizations. *Id.* However, unexpired travel documents that have been issued by the U.S. Government but do not use biometrics are not invalidated under section 302(c)(2) of EBSVERA. 8 U.S.C. 1732(c)(2). Section 303(b)(2) of EBSVERA provided for the installation, at all ports of entry, of equipment and software that allow biometric comparison and authentication of all United States visas and machine-readable, tamper-resistant travel and entry documents issued to aliens, as well as passports that are issued by countries participating in the VWP. 8 U.S.C. 1732(b)(2).

The entry-exit system includes a database that contains alien arrival and

departure data from the machine-readable visas, passports, and other travel and entry documents. EBSVERA section 302(a)(2), 8 U.S.C. 1731(a)(2). In developing the entry-exit system, EBSVERA provided that the Secretaries of Homeland Security and State make interoperable all security databases relevant to making determinations of alien admissibility. EBSVERA section 302(a)(2), 8 U.S.C. 1731(a)(3). In addition, EBSVERA provided that the entry-exit system share information with other systems required by EBSVERA. Section 202 of EBSVERA addresses requirements for an interoperable law enforcement and intelligence data system and requires the integration of all databases and data systems that process or contain information on aliens. 8 U.S.C. 1722.

In December 2004, further statutory provisions were enacted pertaining to the entry-exit system. Section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law No. 108–458, 118 Stat. 3638, 3817 (Dec. 17, 2004), 8 U.S.C. 1365b, provides for DHS to collect biometric exit data for all categories of aliens who are required to provide biometric entry data. IRTPA requires that the system contain, as an interoperable component, the fully integrated databases and data systems maintained by DHS, DOS and the Department of Justice (DOJ) that process or contain information on aliens. IRTPA also requires current and immediate access to information in the databases of Federal law enforcement agencies and the intelligence community, which is relevant in determining whether to issue a visa or the admissibility or deportability of an alien. Section 7208 also provided a complete list of entry-exit system goals, which include, among other things, screening aliens efficiently.

Finally, section 711 of the 9/11 Recommendations Act directs the Secretary of Homeland Security, within one year of enactment, to “establish an exit system that records the departure on a flight leaving the United States of every alien participating in the visa waiver program[.]” INA section 217(i), 8 U.S.C. 1187(i). This air exit system must match the biometric information of aliens against relevant watch lists and immigration information and compare such biometric information against manifest information collected by air carriers on passengers departing the country. *Id.* In addition, subsection (c) of the 9/11 Recommendations Act permits the Secretary of Homeland Security to waive the applicability of INA section 217(c)(2)(A), 8 U.S.C. 1187(c)(2)(A), which restricts eligibility

for designation into the VWP to countries that have a low nonimmigrant visa refusal rate, subject to a determination that certain security-related measures are met. Specifically, DHS must certify the following to exercise the waiver authority: (1) An air exit system is in place that can verify the departure of not less than 97% of foreign nationals who exit through airports of the United States, and (2) an electronic travel authorization system to collect biographic and other information in advance of travel to the United States (as required under 9/11 Recommendations Act) subsection (d)(1)(E), adding INA section 217(h)(3), 8 U.S.C. 1187(h)(3), is fully operational. The VWP waiver authority suspends on July 1, 2009, unless the Secretary of Homeland Security provides notification that the air exit system fully satisfies the biometric requirements of INA section 217(i), 8 U.S.C. 1187(i).<sup>2</sup>

The VWP is important to U.S. international trade and tourism, and preservation of the Secretary’s discretion within the VWP program is critical to balancing U.S. security interests and international trade priorities. The program was established in 1986 with the objective of eliminating unnecessary barriers to travel, stimulating the tourism industry, and permitting the United States to focus resources on other areas of greater risk or with problematic immigration issues. Currently, VWP enables nationals of twenty-seven countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa.<sup>3</sup> All VWP travelers,

<sup>2</sup> The House and Senate Conference Committee reported:

The Conference further agrees to provide the Secretary this waiver authority upon certification by the Secretary to Congress that there is an air exit system in place to verify the departure of not less than 97% of foreign nationals who exit by air, which may or may not be fully biometric. The Conference also agrees that the ultimate goal is to achieve a fully biometric air exit system, as described in subsection (i) of the bill. Therefore, if such a biometric system is not implemented by June 30, 2009, the Secretary’s waiver authority that was based upon his certification of 97 percent accuracy of any non-biometric exit system shall be suspended until a biometric exit system is fully operational. Establishment of this biometric system will implement a 9/11 Commission recommendation and will enhance our border security and immigration enforcement by ensuring our ability to track the arrivals and departures of foreign nationals.

*Implementing Recommendations of the 9/11 Commission Act of 2007: Conference Report to Accompany H.R. 1*, H. R. Rept. 110–259, 110th Cong., 1st Sess., at 318 (July 25, 2007) (H. R. Rept. 110–259). The statutory provisions clearly indicate Congress’s imperative to create a biometric exit system for air travel.

<sup>3</sup> The VWP countries are Andorra; Australia; Austria; Belgium; Brunei; Denmark; Finland;

regardless of age or type of passport used, must present individual machine-readable passports. Effective September 30, 2004, nonimmigrants seeking to enter the United States under the VWP also are required to provide biometric information under US-VISIT. 69 FR 53318 (Aug. 31, 2004).

DHS's broad authority to control alien travel and inspect aliens under INA sections 215(a) and 235, 8 U.S.C. 1185 and 1225, further supports the requirements under US-VISIT that foreign nationals provide biometric identifiers and other relevant identifying information upon admission to, or departure from, the United States.

### C. Program History of US-VISIT

On January 5, 2004, DHS implemented the first phase of the US-VISIT program by requiring that aliens seeking admission into the United States through nonimmigrant visas provide fingerprints, photographs, or other biometric identifiers upon arrival in, or departure from, the United States at air and sea ports of entry. 69 FR 468 (Jan. 5, 2004). Since September 30, 2004, nonimmigrants seeking to enter the United States without visas under the VWP also have been required to provide biometric information under US-VISIT. 69 FR 53318 (Aug. 31, 2004). DHS has expanded US-VISIT entry to 119 airports, 19 seaports, and 154 land border ports of entry.

In many cases, US-VISIT biometric identification begins overseas at DOS consular offices. There, biometrics (digital finger scans and photographs) of aliens applying for visas are collected and checked against a database of known criminals, suspected terrorists, and those who have previously violated the immigration laws of the United States or had other DHS or DOS encounters.

When any person, whether a U.S. citizen or an alien, arrives at a port of entry by air, he or she enters a CBP inspection area for immigration and customs inspection. At that time, every person must show that he or she is either a U.S. citizen or an alien who is admissible to the United States. 8 CFR 235.1.

While the alien remains before CBP, US-VISIT will verify that the alien at the port of entry is the same alien who received the visa by comparing the biometrics of the alien to the record created at the time of visa application. For those aliens whose biometrics were

not captured overseas, such as VWP visitors, a CBP officer at the port of entry will collect digital finger scans and a digital photograph of the alien. These biometrics will be verified at the time of exit and, if required, during subsequent applications for admission to the United States.

DHS's ability to establish and verify the identity of an alien and to determine whether that alien is admissible to the United States is critical to the security of the United States and the enforcement of the laws of the United States. By linking the alien's biometric information with the alien's travel documents, DHS reduces the likelihood that another individual could assume the identity of an alien already recorded in US-VISIT or use an existing recorded identity to gain admission to the United States.

US-VISIT biometrically screens alien arrivals at air and sea ports of entry during primary inspection, but will only screen during secondary inspection at land border ports of entry. At the land border ports of entry, secondary inspection is used rather than primary inspection because of the volume of traffic and facility limitations. Referral of aliens to secondary inspection at the land border ports of entry is premised on processes that already require secondary inspection (e.g., issuance of a Form I-94 Arrival/Departure Record) or an inspecting officer's determination that further investigation of the alien's identity or admissibility is needed to properly determine whether the alien is admissible to the United States.

From its inception on January 5, 2004 through February 29, 2008, US-VISIT has biometrically screened 112,884,097 aliens at the time they applied for admission to the United States. DHS has taken adverse action against more than 3,039 of these aliens based on information obtained through the US-VISIT biometric screening process. By "adverse action," DHS means that the aliens were:

- Arrested pursuant to a criminal arrest warrant;
- Denied admission, placed in expedited removal, or returned to the country of last departure; or
- Otherwise detained and denied admission to the United States.

In addition, by quickly verifying the identities of aliens and the validity of documents, US-VISIT has expedited the travel of millions of legitimate entrants. Adding the biometric records of aliens visiting the United States to the IDENT database will likely result in DHS identifying other aliens who are inadmissible or who otherwise present security and criminal threats, including

those who may be traveling under a previously established identity and potentially pose a threat to the security or law enforcement interests of the United States.

The Secretary of State and the Secretary of Homeland Security may jointly exempt classes of aliens from US-VISIT. The Secretary of State and the Secretary of Homeland Security, as well as the Director of the Central Intelligence Agency, also may exempt any individual from US-VISIT. 8 CFR 235.1(f)(iv)(B). Aliens currently expressly exempt from US-VISIT requirements by DHS regulations include:

- Aliens admitted on an A-1, A-2, C-3, G-1, G-2, G-3, G-4, NATO-1, NATO-3, NATO-4, NATO-5, or NATO-6 visa;
- Children under the age of 14;
- Aliens over the age of 79;
- Taiwan officials admitted on an E-1 visa and members of their immediate families admitted on E-1 visas.

8 CFR 235.1(f)(1)(iv). On July 27, 2006, DHS proposed to expand the population of aliens required to provide biometric information under US-VISIT. See 71 FR 42605. Under that proposed rule, DHS would extend US-VISIT requirements to all aliens, including lawful permanent residents, with the exception of aliens who are specifically exempted and Canadian citizens applying for admission as B1/B2 visitors for business or pleasure. The Department anticipates issuing a final rule before the end of 2008.

### III. US-VISIT Exit Pilot Program

Under current regulations, DHS may conduct exit pilot programs at up to fifteen air or sea ports of entry. 8 CFR 215.8(a). DHS conducted a series of pilot programs from January 2004 through May 2007 at fourteen ports of entry across the United States.<sup>4</sup> The results of the pilot programs, discussed below, were informative to DHS in its determination to propose that the most effective method of collecting biometric information from alien travelers and submitting such information to DHS

<sup>4</sup> Those ports were: Baltimore/Washington International Thurgood Marshall Airport; Chicago O'Hare International Airport; Denver International Airport; Dallas Fort Worth International Airport; Miami Cruise Terminal; San Juan Luis Munoz Marin International Airport; Detroit Metropolitan Wayne County Airport (McNamara Terminal); Newark Liberty International Airport; San Francisco International Airport; Los Angeles Cruise Terminal; Hartsfield-Jackson Atlanta International Airport; Philadelphia International Airport; Ft. Lauderdale/Hollywood International Airport; and Seattle-Tacoma International Airport.

France; Germany; Iceland; Ireland; Italy; Japan; Liechtenstein; Luxembourg; Netherlands; New Zealand; Norway; Portugal; San Marino; Singapore; Slovenia; Spain; Monaco; Sweden; Switzerland; and United Kingdom.

would be to have commercial air and vessel carriers—who have the most information and expertise in collecting information from travelers during the travel process—to collect biometric information in addition to the biographic information already collected by commercial carriers for business purposes and as required under federal law.

Under these pilot programs, aliens admitted to the United States pursuant to a nonimmigrant visa who departed the United States from a designated air or sea port of entry were required to provide: (1) Fingerprints, photograph(s), or other specified biometric identifiers; (2) documentation of his or her immigration status in the United States; and (3) such other evidence as a CBP officer might have requested to determine the alien's identity and whether he or she had properly maintained his or her status while in the United States.

US-VISIT evaluated various technologies and processes to collect biometric data from aliens at the time of departure. The pilot locations were chosen to provide a mix of locations based upon geography, passenger volume, the number of watchlist hits observed from US-VISIT entry, travel industry input, and deployment logistics. US-VISIT conducted site surveys of air and sea ports nationwide.

The US-VISIT exit pilots tested the technical feasibility of three solution alternatives: A biometric exit kiosk, a mobile (handheld) biometric device, and a mobile biometric validation device.

*Kiosk Alternative.* The kiosk alternative provided a stationary self-service device with a touch screen interface, document scanner, finger scanner, digital camera, and a receipt printer. In some locations, a Work Station Attendant (WSA) would assist aliens. These fixed kiosks were located beyond the TSA screening checkpoint (in the sterile sector of the airport), but before the individual airport boarding gates. The alien required to be processed in US-VISIT was responsible for locating the kiosks and using the device to record his or her biometrics to confirm his or her departure.

*Mobile Alternative.* The mobile alternative involved a handheld device, operated by a WSA, that included a document scanner, finger scanner, digital camera, and receipt printer. The WSAs were located in various places in the airport concourse between the TSA checkpoint and the gates. The WSAs attempted to be as close to applicable gates as possible without disrupting the boarding process.

*Mobile Validator Alternative.* The mobile validator alternative used a handheld device as an additional step in the kiosk alternative. This device verified that an alien boarding a departing aircraft was the same alien who had submitted documentation and finger scans to the kiosk. This was, essentially, a combination of the previous two alternatives.

In all three alternatives, the alien was expected to comply with the biometric exit requirements without government enforcement or compulsion. WSAs were not given the authority to require aliens to comply with the biometric exit requirements, but were present only to assist aliens in the exit process, if needed.

During the pilot programs, approximately 6.5 million biometric exit records were collected. During the same time period, however, over 26 million entry records were collected for the same ports of entry. Biometric exit records collection should have been approximately four times higher. This projection is based on analysis of biographic entry and exit data for the same ports where the pilots were in operation. Of those biometric exit records that were collected, approximately 94.7% were successfully matched to biometric entry records.

US-VISIT conducted an evaluation of the pilots between October 2004 and March 2005 and terminated the pilot programs on May 6, 2007, to prepare for the deployment of the follow-on system. From the pilot programs, DHS found the following:

*Biometrics provide a significant enhancement to the existing ability to match arrival and departure records.* Biographic records sometimes contain inaccurate, incomplete, or untimely data that can prevent the matching of exit records to entry records. While using improved algorithms can improve biographic matching of records, it is not as accurate as biometric matching. The pilot established that with two-fingerprint matching, biometric entry and exit records could be matched with 99.73% accuracy, which is significantly higher than the rate obtained through the matching of biographic records. With US-VISIT's change to a "slap" or "flat" capture of the fingerprints from one hand for verification, it is likely that this matching accuracy rate will be higher.<sup>5</sup> Thus, biometric exit collection

<sup>5</sup> The change from a two-index-fingerprint to all fingerprints (no thumb) from one hand system is expected to provide faster processing and more reliable verification.

would permit DHS to match thousands more records annually.

*Exit processing compliance could improve by integration with the departure process.* DHS found that compliance with biometric exit procedures improved depending on the convenience of the process. In certain airports, DHS was unable, due to contractual reasons with the airports and airport authorities, to place as many exit kiosks as it would have liked or in the precise locations where it would have liked. In places such as these, where the kiosks were inconveniently located, the compliance rate was lower. In addition, DHS was often limited due to airport space restrictions in placing signage or other outreach material in places that it felt would have adequately informed the public of obligations for certain aliens to provide biometrics upon exiting the United States at certain airports. Similarly, these locations also had a low compliance rate.

One conclusion from these pilots is that a biometric exit system is beneficial and necessary to the security of the United States and the integrity of its immigration system. In addition, the pilots demonstrated that the technology used to collect biometric exit records worked, but that the process of collecting biometric exit records should be integrated into the existing departure process to improve compliance. Consistency and integration will ensure that each alien subject to US-VISIT requirements will have a biometric exit record created before departing the United States. This proposed rule implements the lessons learned from the pilot programs.

#### IV. Proposed Exit Program

##### A. Purpose

The principal reason for this rulemaking is the need to ascertain with greater certainty the identity of those aliens departing the United States and whether those aliens who have entered for limited times and purposes have, in fact, left the United States in accordance with the terms of their admission. DHS must be able to record which aliens have left the United States with reliable identity information to assess adequately the nature or likelihood of a domestic terrorist threat posed by any given alien and to better allocate interior immigration enforcement resources to enforce the immigration laws of the United States.

Moreover, as discussed above, the 9/11 Recommendations Act requires DHS to establish a biometric air exit system that records the departure of aliens who entered under the VWP on flights

leaving the United States. Unlike past programmatic authorizations, Congress provided a specific consequence that will occur on a date certain if the implementation schedule is not met. As discussed previously, if a fully biometric air exit system is not implemented, the Secretary's authority to waive the low non-immigrant visa refusal rate for participation in the VWP will be suspended on July 1, 2009, until a biometric air exit system is fully operational. H.R. Rept. 110-259, at 318. In this event, the Secretary would lose the authority to waive the visa refusal rate for countries seeking to enter the VWP under INA section 217(c)(2)(A), 8 U.S.C. 1187(c)(2)(A).

The collection of exit biometric data will allow DHS to identify those aliens who have complied with or overstayed their previous period of admission. The system will provide DHS with evidence supporting approval or rejection of any subsequent application for admission to the United States, a visa application, or other immigration benefit. This information will also be used, in the aggregate, to allow DHS and other federal agencies to better tabulate existing statistical reports on alien immigration, travel, and economic activities. Moreover, comprehensive trend analysis might reveal to DHS and DOS specific visa-issuing posts, visa categories, VWP countries, or other information relating to an unacceptably high overstay rate.

Under existing DHS rules, carriers are required to collect, verify, and transmit certain passenger manifest data to CBP through APIS before air carrier personnel secure the aircraft doors for international flights. If CBP's processing of the APIS data through CBP databases produces a Fingerprint Identification Number (FIN) that corresponds to the US-VISIT subject alien passenger, then the FIN will be sent to US-VISIT.

As part of the APIS transmission requirements, carriers create a unique identifier for each passenger on the APIS manifest and submit that identifier as part of their APIS transmission. Under this proposed rule, when an alien arrives at the international departure air or sea port, the carrier will collect the alien's biometric data.<sup>6</sup> The carrier will then transmit to US-VISIT the biometric data and the associated unique

identifier, within 24 hours of departure, to US-VISIT for processing. US-VISIT will match the unique identifier from the APIS biographic data with the biometric record for each alien.

DHS will use the alien biometric data in conjunction with biographic exit data to create an exit record for each departing alien. Biometric exit records will be reconciled against biometric entry records. Aliens who have overstayed their admission period could be subject to adverse action upon subsequent encounters with the U.S. Government, such as during visa application or renewal or application for admission or re-admission to the United States. DHS will also use this data to undertake larger statistical analyses to weigh specific inclusions in the VWP, as required by INA section 217, 8 U.S.C. 1187.

#### *B. Summary of the Exit Proposal and Alternatives Considered*

##### 1. Current Passenger Information Requirements for Carriers

DHS currently requires commercial aircraft and vessels to electronically submit passenger manifest information in accordance with several statutory mandates. These mandates include, but are not limited to the following: Section 115 of the Aviation and Transportation Security Act (ATSA), Public Law 107-71, 115 Stat. 597; 49 U.S.C. 44909 (applicable to passenger and crew manifests for flights arriving in the United States); section 402 of the EBSVERA, INA section 231, 8 U.S.C. 1221 (applicable to passenger and crew manifests for flights and vessels arriving in and departing from the United States); and CBP's general statutory authority under 19 U.S.C. 1431 and 1644a (requiring manifests for vessels and aircraft).

Under APIS regulations, commercial air carriers are required to submit passenger manifest information to DHS before the flight crew secure the aircraft doors for departure. *See Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels*, 72 FR 48319 (Aug. 23, 2007). Air carriers have three options to transmit to DHS manifest data for aircraft departing from or en route to the United States: (1) Transmission of passenger manifests in batch form by an interactive method no later than 30 minutes prior to the securing of the aircraft doors (APIS 30); (2) transmission of individual passenger manifest information as each passenger checks in for the flight up to, but no later than, the time the flight crew secures the aircraft doors (APIS

interactive Quick Query or AQQ); and (3) transmission of passenger manifests in batch form by a non-interactive method no later than 30 minutes prior to the securing of the aircraft doors (APIS 30 "non-interactive").

For commercial sea travel, CBP currently requires vessel carriers to electronically transmit arrival passenger and crew member manifests at least 24 hours (for voyages of fewer than 24 hours) and up to 96 hours (for voyages of 96 or more hours), prior to the vessel's entry at a U.S. port or place of destination, depending on the length of the voyage (for voyages of at least 24 but less than 96 hours, transmission must be prior to departure of the vessel from any place outside the United States). *See* 19 CFR 4.7b(b)(2). A vessel carrier also must electronically transmit passenger and crew member departure manifests to CBP 60 minutes prior to the vessel's departure from the United States. *See* 72 FR 48320, 48325 (Aug. 23, 2007).

DHS also regulates the security of, among others, certain U.S. aircraft operators (49 CFR part 1544) and foreign air carriers (49 CFR parts 1546 and 1550) that conduct passenger and all-cargo operations to, from, within, and overflying the United States. In addition to these regulations, the Transportation Security Administration (TSA) has implemented detailed security requirements tailored for specific sectors of the transportation industry that are implemented through security programs, Security Directives, and Emergency Amendments. *See e.g.*, 49 CFR 1544.305, 1546.105, 1550.5. Under certain Security Directives and Emergency Amendments now in effect, TSA requires the advance submission of crew member and non-crew member manifest information for certain flights operating to, from, continuing within, and overflying the United States.

DHS has made every effort in this notice of proposed rulemaking to harmonize its operational and technical requirements with these programs to reduce the impacts on the carriers and the public. DHS seeks comment regarding ways in which DHS can improve that harmonization and reduce any traveling burdens that this rule may create.

##### 2. Current Process for Individuals Departing the United States by Commercial Air Carrier

Today, the process for individuals (including aliens) departing the United States varies widely, but generally consists of the following steps. An individual leaving the United States by commercial air carrier may purchase a ticket and "check-in" through the

<sup>6</sup>This proposed rule addresses the collection of biometrics from aliens departing the United States from air and sea ports. Land border ports of entry present challenges different from air and sea ports, due in large part from a lack of sufficient public or private infrastructure at land border exits. Therefore, the collection of information from aliens departing the United States from land ports will be addressed in a subsequent rule.

internet in advance of arriving at the airport or terminal. If the individual has not purchased a ticket in advance or must check baggage, he must first approach the carrier's counters and kiosks. CBP requires commercial air carriers to obtain a travel document, typically a passport, from every passenger prior to boarding that passenger on a flight departing the United States. Commercial air carriers typically require the individual to present his travel documents when he approaches a counter or kiosk to acquire a boarding pass. If the individual obtains the boarding pass in advance of arriving at the airport and does not need to check baggage, he may bypass the check-in counter and kiosk and proceed directly to the TSA security screening checkpoint. At TSA's screening, the individual is asked to present appropriate photo identification to TSA or the air carrier, whichever is specified in the TSA-approved existing security programs. *See* 49 CFR 1544.103. If the individual fails to provide appropriate photo identification, the individual will be subject to secondary screening.

Information provided to the carrier prior to or at the time of check-in is used to compile the flight manifest. The carrier uses some of this information for its own commercial business purposes. The majority of this information is also transmitted to DHS, through APIS, as part of the mandatory passenger reporting requirements for carriers.<sup>7</sup> 19 CFR 122.75a.

The TSA security screening checkpoint demarks the line beyond which the airport is "sterile" of prohibited materials as determined by TSA for flight operations.<sup>8</sup> *See* 49 CFR

part 1542. The sterile area of an airport provides passengers access to boarding aircraft. Access to the sterile area is controlled through the screening of persons and property for weapons, explosives and incendiaries by TSA at the security screening checkpoint, or by an aircraft operator under 49 CFR part 1544 or a foreign air carrier under 49 CFR part 1546. *See* 49 CFR 1544.5, 1540.111. With few exceptions, individuals must present a valid boarding pass (including a computer-printed one) and submit their carry-on luggage and themselves to screening. *See* 49 CFR 1540.107.

Those individuals who check-in online and do not present their travel documents for inspection at the check-in counter or kiosk do so at the departure gate. This allows carrier staff to verify their identities and ensure that their documentation is appropriate for admission into their foreign destination.

Carrier staff also must collect the departure portion of any Form I-94 or I-94W, Arrival/Departure Record, which are issued to all nonimmigrant aliens, unless otherwise exempted, as evidence of the terms of their admission. *See id.* Typically, the carrier collects and records all boarding passes. In most instances, the boarding pass collection occurs directly at the door to the jetway or walkway leading directly to emplaning.

Information collected at the boarding gate is used to confirm and complete the final flight close-out message, which is then sent electronically to CBP. This information provides a biographic record of an alien's departure from the United States.

### 3. Proposed Process for Aliens Departing the United States by Commercial Air Carrier

DHS proposes that an alien covered by US-VISIT be required to provide biometrics to an air carrier, consistent with established standards, prior to boarding an international flight. DHS acknowledges this requirement impacts existing carrier business processes. Aliens will be informed of the need to comply with biometric exit screening by the air carrier. Regardless of where the alien checks-in for his or her international flight, the carrier would be required to collect, and the alien would

be required to provide, biometrics prior to the alien boarding an international flight leaving the United States.

Given the unique configuration of airports, air carriers have adapted their business practices to simplify air travel for all passengers, taking steps to eliminate queues and minimize passengers' airport time. For example, many air carriers permit passengers to check in and receive a boarding pass online prior to arriving at the airport. Similarly, passengers may check luggage with a skycap outside the airport and therefore avoid the check-in counter completely. DHS does not seek to inhibit air carriers' business processes. DHS therefore proposes to permit the air carriers latitude in where they collect biometrics from their departing alien passengers.

DHS expects that, in some instances, an alien will be directed to an air carrier's check-in counter or kiosk prior to security screening by TSA where the alien will provide biometrics to the air carrier in addition to the usual proof of identity, typically a passport. In other instances, DHS expects that air carriers will choose to collect biometrics from aliens at their international departure gates. This alternative permits minimal disruption for aliens making connecting flights who must provide biometrics prior to international departure.

Air carriers may also collect biometrics from aliens on connecting flights at the first airport in their departure itinerary. This collection could be made by the air carrier that transports the alien on the international leg or by a domestic or other carrier with which it has reached an agreement on biometric collection.

Notwithstanding any such agreements, however, the air carrier transporting the alien on the international departure flight retains ultimate responsibility for assuring that the biometrics are collected and transmitted in accordance with the proposed rule.

Although there are some general limitations, discussed below, DHS is not designating any specific place within the airport(s) where the biometrics of alien passengers must be collected. Beyond these general limitations, DHS only requires that air carriers collect alien biometrics prior to the alien boarding the flight departing the United States.

DHS seeks comment on other locations for collection of biometrics from aliens traveling by air from a domestic location to a foreign location. As noted above in the connecting flight example, under currently considered options, the air carrier transporting the alien from a domestic location to a

<sup>7</sup> Information for aircraft to be submitted includes: Full name, date of birth, gender, citizenship, country of residence, status on board the aircraft, travel document type, passport information if passport is required (number, country of issuance, expiration date), alien registration number where applicable, address while in the United States (unless a United States citizen, lawful permanent resident, or person in transit to a location outside the United States), Passenger Name Record locator if available, foreign code of foreign port/place where transportation to the United States began, code of port/place of first arrival, code of final foreign port/place of destination for in-transit passengers, airline carrier code, flight number, and date of aircraft arrival. *See* 19 CFR 122.49a-122.49c, 122.75a, and 122.75b. Vessel carriers are governed by 19 CFR 4.7b, 4.64.

<sup>8</sup> TSA is responsible for security in all modes of transportation, including aviation. *See* 49 U.S.C. 114(d). TSA restricts the articles a passenger may carry into the sterile areas of airports and into the cabins of air carrier aircraft. Under TSA's regulations for acceptance and screening of individuals and accessible property, 49 CFR 1540.111, an individual (other than a law enforcement or other authorized individual) may not have a weapon, explosive, or incendiary on or about the individual's person or accessible property

when performance has begun of the inspection of the individual's person or accessible property before entering a sterile area or before boarding an aircraft for which screening is conducted under 49 CFR 1544.201 or 1546.201; when the individual is entering or in a sterile area; or when the individual is attempting to board or is onboard an aircraft for which screening is conducted under 49 CFR 1544.201 or 1546.201.

foreign location is responsible for ensuring the collection and transmission of biometrics in a manner that conforms to the rule. Once the carrier completes the collection of the required biometric information, and collection and verification of APIS data pursuant to other DHS regulations, the carrier may board the alien.

Information provided to the carrier by aliens will continue to be used by the carrier to compile the departure manifest. DHS anticipates that carriers will upgrade their existing systems to allow transmission of the biometric data to DHS through already existing connections the carrier uses to transmit other passenger screening information required under DHS regulations or procedures. Biometric data transmission will be considered to be an additional passenger manifest requirement for commercial air or vessel carriers for flights or vessels departing the United States for foreign destinations.

DHS is proposing that commercial air carriers submit biometric data to DHS no later than 24 hours after the flight is secured. DHS seeks to minimize additional technology development requirements and duplicative data submissions to comply with the requirements of these programs. DHS seeks comment on the potential efficiencies that can be gained by carriers in coordinating the collection and transmission of biometric information by carriers with their processes for complying with existing advance passenger manifest and passenger screening requirements such as APIS.

#### 4. Vessel Carrier Departures

Nine vessel carriers use a total of 33 seaports for international departures. This point of contact between the vessel carrier and the alien passenger must be consistent with port security requirements imposed by CBP, the U.S. Coast Guard and TSA. *See* 19 CFR 4.64(b)(2)(i); 72 FR at 48342. The process for aliens departing from the United States by vessel is different from the process for departing by air. Unlike the air environment, vessel terminals do not have numerous gates from which travelers depart. Further, vessel carriers provide security screening, and TSA does not have a screening checkpoint in most sea environments.

Currently, at the vessel check-in counter, vessel carriers validate all international vessel passenger reservations; check travel documents; collect, verify and transmit APIS data, and issue on-board identification. CBP's APIS regulations, recognizing the differences from the air environment,

require vessel carriers to transmit APIS data 60 minutes prior to the departure of the vessel. 72 FR at 48325.

Accordingly, for international vessel carrier purposes, DHS proposes to require that the vessel owner or operator transmit the biometric data either along with the biographic data required by APIS or at any subsequent point up to 24 hours following the departure of the vessel. Aliens will be informed of these requirements by the vessel carrier.

Vessel carriers may not transmit the data earlier than three hours from the time of the vessel's scheduled departure. DHS seeks comment as to whether this proposal will be effective in the sea environment.

#### 5. Technical Requirements

##### a. Data Transfer

An alien's electronic fingerprint file is substantially larger than an alien's biographic (text) file of manifest information. For this reason, carriers may need to create or enhance systems to handle the larger amount of data inherent in biometric (image) transmissions. DHS proposes operational testing requirements to ensure that all biometric data transferred to DHS can be placed into IDENT.

Overall, the process outlined above is designed to complement CBP's and TSA's biographic data collection with the collection of biometric data, without interfering with existing APIS data collection and transmission processes. DHS believes that to the extent carriers can use the APIS departure manifest transmission system as a means of transmitting the biometric data to DHS, that would ease the cost burden on the carriers. DHS encourages carriers to adjust their systems currently to account for APIS, and US-VISIT exit simultaneously to minimize the later technical changes that will occur over time and maximize their efficiency.

##### b. Time of Transfer

DHS is proposing that carriers submit the biometric data to DHS not later than 24 hours after securing the aircraft doors for departure of the flight, or departure of the vessel, from the United States. DHS notes that the Department may reduce this period of time in which carriers must submit biometric data to DHS through subsequent rulemakings. As technology improves, DHS and the carriers will have increased capacity and ability to provide the biometric data to DHS at an earlier point in time, including up to the point in which APIS data is submitted prior to departure of the aircraft or vessel. The ability to

submit biometric information to DHS before departure of the carrier, would provide DHS with additional security benefits by allowing DHS to compare the biometric information against government databases and terrorist watchlists prior to the departure of the aircraft or vessel.

##### c. Substantive Performance Standard for Biometrics

Air and vessel carriers collecting biometrics on behalf of DHS will be required to register their system with US-VISIT and receive certification of the quality and security of their transmission capabilities. The biometric departure manifest information data files must comply with the Federal Bureau of Investigation, Criminal Justice Information Services, *Electronic Fingerprint Transmission Specifications*, Appendix F, sections 2 and 3 ("IAFIS Image Quality Specifications") (May 2, 2005). Data transmission standards and methods for transmitting biometric departure manifest information are expected to be the current standards for the transmission to DHS of other electronic manifest data for carriers.

Carriers must take steps to protect the privacy of the information collected and should only retain the biometrics collected on behalf of US-VISIT for a reasonable time. Carriers will be required to meet applicable technical standards for transmission of data in the Consolidated User's Guide (CUG).<sup>9</sup>

The proposed rule would establish a performance standard for carriers to provide biometric identification of alien passengers departing the United States, consistent with current Integrated Automated Fingerprint Identification System (IAFIS) technical standards within 24 hours of securing the aircraft doors on an international departure or the vessel's departure. This performance standard expresses carrier requirements in terms of outcomes rather than specifying the means by which the carrier must operate. DHS believes that this approach is superior to specific design, behavior, or manner of compliance standards because a performance standard permits the carriers the flexibility to achieve the required objective in the most cost-effective manner, given the diversity of

<sup>9</sup>The Consolidated User Guide was jointly developed by CBP and TSA to provide consistent guidance to airlines on information and other requirements, including biographic data collection and transfer under APIS. The CUG is SSI and, therefore, is not released to the public. The CUG has been provided to carriers. The CUG will be modified to include biometric data transfer and storage requirements in a similar manner.

their circumstances, including diverse airport layout. DHS believes that this approach permits carriers to achieve the greatest cost efficiency while assuring compliance through monitoring results and other means.

#### d. Enforcement and Penalties on Carrier Performance

The enforcement mechanisms for failure to meet the standards proposed in this rule are similar to those that currently apply to carriers who fail to provide APIS passenger data to DHS. See INA section 231(g), 8 U.S.C. 1221(g) (per passenger fines for failure to comply; limitations on departure clearance while determination of fines pending except on deposit of sufficient sums to cover penalties). For example, a carrier may face enforcement action for failing to create and transmit a biometric departure record for an alien. A carrier may also be penalized if their overall collection and transmission performance is inadequate. For example, if a carrier's biometric transmissions are of insufficient quality to be processed by US-VISIT and thereby degrades the performance of IDENT, in accordance with 8 CFR 217.6, the Secretary may terminate a carrier's authorization to transport aliens under the VWP. Carriers will also be subject to the data transmission requirements of the Consolidated User's Guide developed for carriers by CBP and TSA in developing the APIS Pre-Departure Final Rule. Finally, carriers will remain liable for civil penalties for improper carriage of aliens, as well as potential limitations on their clearance to depart the United States or engage in international commerce under existing law. See INA section 215, 231(g), 8 U.S.C. 1185, 1221(g).

This proposed rule would add one new enforcement provision to ensure security and compliance. The proposed rule would permit DHS to specifically require a carrier to collect biometrics under more restrictive requirements if the carrier fails to collect alien biometric data and transmit adequate data files in a timely fashion. The proposed rule would permit DHS to require a carrier to collect biometrics under supervision at a specified place, including the collection of biometrics before issuing boarding passes to alien passengers, thus restricting the carrier's discretion to manage biometric collection and transmission as is generally provided in the proposed rule. Central to this enforcement mechanism, which DHS considers to be a last resort if compliance and other enforcement mechanisms do not adequately ensure compliance, is the possibility that DHS

will require the carrier to collect biometric information at a specific location to permit DHS to supervise the collection. DHS proposes this penalty provision to ensure that DHS will be able to comply with the requirements of the 9/11 Recommendations Act and other Congressional enactments discussed above.

#### 6. Alternatives Considered

DHS considered several operational alternatives to meet the need of biometric data collection at air and sea exit locations. These alternatives only concentrated on the location of collection and the collecting entity. Specific technological solutions were not taken into account. The alternatives considered were:

*Alternative A: At the Check-in Counter—Air/Vessel Carrier collection.* An air/vessel carrier representative collects biometric data of the alien at the air/vessel carrier check-in counter.

*Alternative B: At the Check-in Counter—DHS Collection.* A DHS representative collects biometric data of the alien at the air/vessel carrier check-in counter.

*Alternative C: At Security Check-Point—DHS Collection.* A DHS representative collects biometric data of the alien at the security checkpoint.

*Alternative D: At Gate—Air/Vessel Carrier Collection.* An air/vessel carrier representative collects biometric data of the alien at the departure gate.

*Alternative E: At Gate—DHS Collection.* A DHS representative collects biometric data of the alien at the departure gate.

*Alternative F: At Check-in Counter—Air/Vessel Carrier collection with verification at gate.* An air/vessel carrier representative collects biometric data of the alien at the air/vessel carrier check-in counter, and a DHS representative randomly verifies the data at the departure gate.

*Alternative G: At Check-in Counter—DHS collection with verification at gate.* A DHS representative collects biometric data of the alien at the air/vessel carrier check-in counter and a DHS representative randomly verifies the data at the departure gate.

*Alternative H: At Security Checkpoint—DHS collection with verification at gate.* A DHS representative collects biometric data of the alien at the security checkpoint and a DHS representative randomly verifies the data at the departure gate.

*Alternative I: Within Sterile Area—DHS collection based on Data from Carriers.* A DHS representative collects biometric data of the alien within the airport's sterile area (and a similar area

within seaports) based on the biographic information (e.g. passport number) provided by carriers on the departing alien.

DHS compared these possible alternatives using the following: confidence of departure; percentage of population captured; operational impacts to aliens, the carriers, and DHS; conceptual financial burden to the carriers and DHS; need for additional network/connectivity; information technology (IT) security concerns; privacy; and cost.

#### a. Confidence of Departure

Confidence of departure measures the perceived ability to provide a level of confidence that the alien subject to US-VISIT processing who submitted biometric information did, in fact, depart the United States. The departure gate alternatives provided a higher level of confidence of departure regardless of the collecting entity. For example, if biometric collection occurs at the departure point, the ability of an alien to submit biometrics and exit the airport, without actually leaving the United States, is very low, thus providing for a higher confidence of departure. In contrast, collection of biometrics at the check-in counter provides the lowest confidence of departure because the alien may exit the airport after submitting biometrics and without actual departure from the United States. The TSA security screening checkpoint has a confidence of departure that was in between the other two locations considered. In addition, random biometric verification of aliens at the departure gate, who were originally processed at the check-in counter, provided a higher level of confidence of departure.

Use of the APIS manifest data in concert with the US-VISIT biometric data is expected to add an extra layer of security and confidence that an alien did, in fact, depart the United States and is the same alien who originally entered the United States under that biographic identity. As explained above, the main purpose of APIS is for screening passengers before boarding the aircraft or departure of the vessel. APIS will continue to collect biographic departure information on passengers traveling internationally. The US-VISIT biometric data will, in turn, support this function by ensuring that an alien claiming an identity with biographic information is that person. The programs, therefore, support each other: US-VISIT exit ensures that an alien really is the person he or she claims to be when supplying their biographic data. Comparison of US-VISIT and

APIS will ensure that the same alien actually departs the United States and does not walk out of the airport after supplying DHS with only biometric or biographic data.

b. Percentage of Population Captured

Each alternative was measured for its ability to capture the biometric information from all affected aliens. Where the alternative relied on a collection location that is a mandatory location that the alien must encounter, the percentage of population collected increases. Since all aliens are processed at the departure gate and at TSA security screening, these alternatives were the most favorable regardless of collecting entity. Since not every alien currently checks in at the check-in counter, this alternative was less favorable.

c. Operational Impacts to the Alien, Carrier, and DHS

The alternatives were compared based on the expected additional time and/or additional process that the alien, carrier, or U.S. Government may experience for each implemented solution. The rankings for operational impacts varied not only with location, but also with the collecting entity as well. Overall, the alternatives where existing processes exist and that rely on staffed collection points that already exist were more favorable than locations where no current process or staffed collection point exists.

For international travel, most aliens currently interface with the carrier at the check-in counter. Therefore, operational impacts to the alien were more favorable for biometric collection by the carrier at the check-in counter. In most cases, the alien is already providing identification and other information at the check-in counter. A biometric collection can be taken in conjunction with these already existing processes at the check-in counter without the alien experiencing significant additional processing time. In addition, DHS expects that information collected through APIS will be verified primarily at the check-in counter, and so collection of biometrics at that location would minimize the impact to the carriers in trying to coordinate requirements from multiple DHS programs. DHS seeks comments and data from the carriers on these assumptions and conclusions.

The remaining alternatives were less favorable to the alien due to possible additional time for that collection. For example, although aliens already proceed through the security checkpoint and are processed by carriers at the

departure gate, biometric collection at these locations would be an entirely separate process and could result in additional time. Likewise, DHS collection at the check-in counter or departure gate adds a DHS process where one currently does not exist.

Currently, carriers process aliens at check-in counters and at the departure gate. However, adding biometric collection at these locations will add a process and lengthen wait times for the carrier. Therefore, for carriers, the carrier collection alternatives rank less favorable to the DHS collection. If DHS collects the biometric information, the carrier experiences a much less significant change in current operations.

DHS has a presence at airports at the TSA security screening checkpoint and, at international arrival airports, at CBP's secure federal inspection service. However, adding biometric collection at the security screening checkpoint was determined to be unfavorable, as the processes at the security screening checkpoint are primarily concerned with the screening of individuals and luggage for prohibited items.

In addition, several security and operational reasons make DHS collection at TSA security screening a less workable solution. Biometric collection at the screening checkpoint could cause delays. In addition, many TSA locations have space limitations that make these areas infeasible for biometric collection. Biometric collection at the security screening checkpoint could not append to an existing process, but rather would add time as a new process for aliens subject to US-VISIT.

Furthermore, DHS biometric collection at the check-in counter or departure gate would also add a process (and time) where none currently exists, and would add also to existing airport space concerns as a government officer would be conducting biometric capture in the same space as airline employees conduct their business. All DHS alternatives were deemed unfavorable to DHS due to the additional DHS processes, while carrier alternatives were deemed more favorable.

Recognizing the need to identify and control aliens subject to US-VISIT departure biometric capture also leads to favoring use of existing system parameters (such as APIS) to generate applicable documentation of aliens to be fingerprinted by DHS, with the limitation that some documentation would need to be created to permit the carrier to board an alien. The alternative encompassing each of these parameters would minimize the burden on airlines and DHS, but would require close

coordination of information flow within a short period of time.

d. Conceptual Financial Burden to the Carriers and DHS

The alternatives analysis assumed that the collecting entity would be responsible for the purchase, deployment, and maintenance of all biometric collection equipment and software needed. Therefore, each alternative was compared based on the conceptual financial burden for the collecting entity to develop, deliver, and implement the solution. Accordingly, financial burden on the carriers was most favorable when DHS collected the biometrics, and financial burden on DHS was most favorable when the carriers collected biometrics.

e. Need for Additional Network or Connectivity

Each alternative was analyzed for its potential need for the DHS-supplied local and wide area data communications infrastructure between the port and the IDENT system that is used to securely transport biometric information. The carrier alternatives were moderately more favorable than the other alternatives, since those locations have existing network and connectivity infrastructure, although biometric collection would have to be integrated into that process. Further, carriers will already be required to make significant efforts to transmit APIS data. DHS proposes similar testing of the transmission of biometric data in this proposal. DHS will attempt to ensure that carriers need not conduct multiple testing and submission requirements to comply with separate but related DHS programs.

f. IT Security Complexity

The alternatives were compared for the possibility that: (1) There would be unauthorized use or misuse of the equipment, data, or network; (2) equipment may be open to intentional or accidental compromise; (3) U.S. Government standards may not be implemented as specified; and/or (4) there would be an intentional compromise of equipment, data, software, or communications infrastructure that would endanger the integrity of the biometric data collected. The alternatives where carriers collected the biometric information were less favorable than the alternatives where DHS collected the biometric information, regardless of location. Information in the sole custody of an entity has less possibility of being breached than information passed from one entity's network to another entity's

network. The carrier collection alternatives require biometric information to pass between the carrier's network and DHS's network. Comparatively, DHS is in sole custody of the biometric information at all times for the DHS collection alternatives.

#### g. Privacy

The privacy criteria looked at the likelihood of satisfying US-VISIT responsibility for compliance with the Privacy Act, 5 U.S.C. 552a, the Homeland Security Act of 2002, Public Law No. 107-296, 116 Stat. 2135 (Nov. 25, 2002) (as amended, found at 6 U.S.C.), the E-Government Act, Public Law 107-347, 116 Stat. 2899 (Dec. 17, 2002) (codified or found in various sections of 40 and 44 U.S.C.), and applicable DHS and US-VISIT policies. Successful compliance requires limiting the collection of personally identifiable information (PII), and securing the PII against unauthorized access, use, disclosure, or retention, such as the use of the PII collected on behalf of the government for non-government purposes. Like the IT security complexity analysis, the carrier collection alternatives were less favorable than the DHS collection alternatives, regardless of location. When DHS does not maintain custody of PII throughout its lifecycle, there is a lower degree of confidence of compliance with privacy requirements than when DHS does maintain full custody over the PII.

#### h. Cost

US-VISIT has prepared a regulatory evaluation of the alternatives considered. See section V.A. The costs and benefits are more fully explained in the *Air/Sea Biometric Exit Project Regulatory Evaluation*, which has been placed on the docket and is available at <http://www.regulations.gov> docket DHS-2008-0039-0002.

#### i. Constraints

After comparing the alternatives based on the identified criteria, DHS further weighed the alternatives against a number of constraints based on DHS goals and the evaluations of the US-VISIT biometric exit program pilot. Crucial among the operating constraints was the need for the biometric exit solution to be, to the extent practical, consistent with, and not redundant of, existing information collection requirements and submission systems for carriers. An additional constraint was to minimize disruption of existing processes from the traveling public's perspective. By making biometric collection consistent with the APIS

departure manifest data collection to the extent practical (such as using the same event, e.g. securing of aircraft doors, for time thresholds, even though the times must be different), DHS has attempted to streamline requirements and promote efficiency. US-VISIT exit requirements will be applicable only to a subset of departing passengers, i.e., departing aliens.

The US-VISIT air exit solution that records any departures by flight for all aliens participating in the VWP must be implemented by August 3, 2008 in order to meet the legislative deadline embodied in the 9/11 Recommendations Act. DHS is committed to meeting statutory mandates and preserving the Secretary's discretion to manage the VWP effectively.

Each airport in the United States has a unique design. No Federal or private infrastructure exists in all international airports specifically for the processing of departing aliens. CBP inspects arriving aliens<sup>10</sup> and TSA inspects all passengers for dangerous materials. Consequently, any implementation of biometric exit capabilities must be worked into existing airport and carrier infrastructure and processes. DHS must, accordingly consider the wide variation in the floor plans and terminal designs from one airport to another in developing an alien biometric exit solution.

Of the alternatives considered by DHS, the most promising alternatives were carrier collection of alien biometrics at the departure check-in counter or at the boarding gate. By offering carriers the alternative of using the check-in counter or the boarding gate, or both, DHS has provided carriers with the flexibility to implement biometric exit collection capabilities that are most convenient to carriers in consideration of airport design variation.

In addition, as recommended from the US-VISIT biometric exit pilot evaluations, integrating biometric collection into an existing process, such as the check-in counter or boarding gate process, improves compliance and provides consistency and integration that will ensure that each alien will have a record collected prior to departure.

The majority of aliens departing the United States by air must check baggage; all aliens must provide identification and present travel documents prior to departure. Concern that aliens could

“drop out” of the travel process following collection of biometrics is mitigated by integration into the standard departure procedures and by the APIS biographic manifest program. The US-VISIT exit program and APIS are able to support each other. DHS will continue to review program integration in the future.

APIS pre-departure verification, additionally, based on biographic information, is applicable to direct departing international flights, not domestic flights. Approximately 27% of all international departing passengers arrive at the international departure airport on a connecting flight from a domestic airport. DHS accordingly scaled the exit program to those carriers and ports with direct international departure flights. This scaling reduces the number of air carriers from approximately 247 to 138, and airports from 450 to 73.

DHS is, therefore, proposing a rule that gives carriers the flexibility to implement biometric exit collection capabilities at the check-in counter, at the boarding gate, or to employ differing locations at differing airports. The proposed rule would not limit an air carrier's ability to collect biometrics at other locations within an airport.

As discussed above, and in the Regulatory Impact Assessment (RIA) accompanying this proposed rule, DHS has analyzed a significant number of alternatives to the performance standards proposed in this rule. DHS welcomes public comment on additional alternatives to the performance standards proposed under this rule, including any combination of alternatives analyzed in the rule and RIA, and the potential economic impacts of such alternatives. DHS may consider implementing a combination of alternatives, such as the use of kiosks operated by DHS to collect biometrics from aliens with concomitant requirements on carriers to verify that aliens have submitted biometrics before boarding a flight or vessel leaving a U.S. port of entry. The Department will take those comments into consideration in development of the final rule.

Similarly, vessel carriers may integrate the biometric collection process into their existing vessel boarding processes. All vessel passengers have their reservations validated, travel documents checked and collected by some carriers, APIS biographic data collected, verified, and transmitted, and on-board identification issued. DHS is proposing the same flexibility for vessel carriers in selection of a location for sea exit biometric collection.

<sup>10</sup> An airport must provide the physical infrastructure to support inspection of all arriving international passengers to be certified as an international airport. 8 CFR 234.4.

## 7. Non-Air/Vessel Carrier Departures

The proposed rule would apply only to certain commercial air and vessel carriers. The proposed rule would not apply to charters and other small carriers for hire. General aviation aircraft and privately owned and operated vessels are not included in this rule, but will be considered separately. Later consideration of general aviation aircraft and privately owned and operated vessels is consistent with the past development of security standards based on risk analysis. See *Advance Information on Private Aircraft Arriving or Departing the United States*, 72 FR 53394 (Sept. 18, 2007) (proposed rule). Similarly, ferry operators are exempt from this rule, as for DHS purposes these are considered as part of initiatives dealing with land ports-of-entry. See *Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere*, 73 FR 18384, 17404 (April 3, 2008) (final rule) (ferries treated as land border port of entry inspections).

## 8. Small Air/Vessel Carriers

In developing this proposed rule, DHS considered whether the rule could be effectively applied to small air and vessel carriers. Small air and vessel carriers appear to handle only a small percentage of alien departures.

After considering the risks relative to the costs of requiring small air and vessel carriers to undertake biometric exit data capture and transmission, DHS has determined to exempt small air and vessel carriers from the requirements of this proposed rule for the time being. Utilizing the definitions of the Small Business Administration (SBA), air carriers (whether scheduled passenger or charter air transportation) that employ fewer than 1,500 employees are exempted. 13 CFR 121.201 (NAICS codes 481111 (Scheduled Passenger Air Transportation) and 481211 (Nonscheduled Chartered Passenger Air Transportation)). Vessel owners or operators that employ fewer than 500 employees are small entities. 13 CFR 121.201 (NAICS code 483112 (Deep Sea Passenger Transportation)).

DHS has determined that the costs of equipment purchases and installation, infrastructure modification, and personnel support outweighs the risks to the United States of not obtaining the biometrics of this small population of aliens departing the United States or the benefits to DHS in requiring these costs to obtain the benefits of biometric acquisition (as compared to only biographic information) from this small

population of aliens departing the United States. Ultimately, US-VISIT estimates that the percentage of biometrics not captured from aliens departing the United States by small air and vessel carriers to be substantially less than 1%. As with US-VISIT and other DHS programs, DHS's incremental development of US-VISIT may decide to remove exemption and apply these requirements to such small air and vessel carriers as necessary in a future rulemaking action.

## 9. Additional "Kiosk" Option

As noted above, DHS did not formally consider a "kiosk" option as part of its alternatives analysis. This was largely due to the conclusions of the exit pilot, as described in section III above, in which DHS concluded that the exit process needed to be made an integral part of the existing departure process to be feasible, and that such an option would face challenges that would make implementation very difficult. Kiosks, for example, require the installation of expensive cabling; negotiation of lease space with port authorities for the placement of kiosk in areas where aliens can have the most effective and efficient access; and the installation of signage instructing aliens as to the location of kiosks, how to use the kiosks, and their responsibilities for compliance with the exit requirements. The exit pilot encountered numerous problems with port authorities regarding space and signage. For example, US-VISIT was restricted in where it could place directional and educational signage. Some ports required that signage be coordinated with other types of signage in that port. This inconsistency in placement and visual appearance caused confusion when aliens attempted to comply.

DHS wishes to solicit comments on a potential kiosk option here and provides this analysis as a means of informing commenters. Additional documentation for this option can be found in the published docket for this rulemaking at <http://www.regulations.gov>.

### a. Requirement for Carrier Participation

The kiosk scenario would require participation by the carriers at two specific points: As part of the boarding pass issuance (whether in-person and on-paper, or remote and electronic) and at the gate as the alien departs. Carriers would be responsible for determining that a specific alien is subject to US-VISIT procedures and also ensuring that those aliens have in fact complied with the law and provided those biometrics, thus providing the at-gate enforcement mechanism that the pilot lacked.

## b. Air Processes

i. *Reservation*: When an international traveler makes the initial travel reservation, whether in person, on-line, at a travel agency, or by telephone, the carrier determines by means of a US-VISIT supplied decision tree if the traveler is subject to US-VISIT procedures upon departure from the United States. If so, the carrier notifies the passenger, when providing him or her with a boarding pass (whether paper or electronic), that they must proceed to a US-VISIT exit kiosk at the time of their departure from the United States.

ii. *Kiosk Location*: An alien originating at an international airport may have the option of using a kiosk located before the security-screening checkpoint or using a kiosk located within the sterile area of the terminal. Kiosks may also be located at domestic terminals of international airports or domestic terminals. Multiple locations allow for ease of compliance and reduce the cost of the system. For example, a system located only at the departure gate would require sufficient kiosks and attendants to enable the entire departing alien population to provide their biometrics within a limited window of time. By enabling aliens to provide their biometrics at multiple locations and over a longer time frame within the departure process, the number of kiosks/attendants required is less than a sole point of compliance solution would require. A connecting alien (*i.e.*, who originated at a domestic airport and is transferring to an international flight) may be able to use a kiosk located within the sterile area.

iii. *Kiosk Procedure*. The alien's boarding pass will have a two-dimension bar code printed on it. The kiosk will read the bar code. After the bar code is read, the alien submits the biometric fingerprints. The kiosk prints a receipt that the alien provides to the carrier upon departure. Carriers will be required to modify their reservations system so that when a boarding pass (either printed or electronic) is printed or sent to the alien, it will include a bar code containing the passenger's name, travel document number, airline code (*e.g.*, "CO" or "UA"), flight number, and date and time of departure. This information is required to build the biometric manifest and to link the biometric with the APIS manifest.

iv. *Gate Procedure*: The alien will be required to provide, to the carrier agent at the gate, either a receipt from the kiosk or a separate boarding pass created by a kiosk that demonstrates the person has complied with the requirement to provide biometrics.

### c. Vessel Processes

The vessel carrier context uses the preferred solution assumption of 33 seaports. The reservation system would be equivalent to the air carrier scenario described above. Because the business model for vessel carriers is slightly different from the business model for an air carrier, however, the kiosk location would be different. All vessel carrier passengers originate at the United States port-of-departure, there are no boarding passes *per se*, and the check-in agent is also the functional gate agent. Therefore, the scenario for vessel carriers would be that the alien provides the biometric at the time of check-in. Since vessel carriers do not provide their passengers a boarding pass, aliens would be required to insert the biographic page of their passport into a document reader. After the passport is read, the passenger provides the biometric fingerprints. The kiosk would print a receipt that the alien would present to the vessel carrier's agent.

There is no equivalent gate procedure to the air scenario as the check-in area is the functional gate area.

### d. Kiosk Scenario Assumptions

This scenario makes several assumptions about carriers and DHS operations that may require further modification:

- Carriers will be required to incorporate into their reservations system a US-VISIT provided "decision tree" to determine if a passenger is an alien subject to US-VISIT and will be required to develop a passenger notification process;
- Air carriers will be required to print a compliance advisement on paper boarding passes and include a compliance advisement on an electronic boarding pass;
- Air carriers will incorporate into their departure control systems a means to identify an alien subject to US-VISIT exit requirements to verify that the passenger has provided their biometric prior to boarding the international flight;
- DHS would be required to develop the software to collect and transmit the biographic and biometric information;
- DHS would use existing communication paths or develop a direct kiosk/US-VISIT communication path;
- DHS would develop new kiosks with a fingerprint scanner, a boarding pass reader, and a printer, and the kiosk would be compliant with the Americans with Disability Act;
- Carriers would be subject to penalties for boarding aliens subject to

US-VISIT exit requirements who have not complied with the exit process;

- The APIS and biometric manifests will be compared by US-VISIT to identify non-compliant passengers;
- The carrier's gate agent would be able to identify the relevant aliens and would deny boarding to any alien who has not complied with US-VISIT exit requirements;
- Carriers would either collect the kiosk receipt and/or build a verification process into their departure control system;
- DHS would be required to negotiate with each individual port authority for kiosk and administrative space;
- DHS would be responsible for "first level" kiosk maintenance, which is defined as tasks such as cleaning the fingerprint platen, changing receipt paper rolls, and ink cartridges;
- DHS would be responsible for providing a kiosk attendant to assist aliens experiencing difficulty using the kiosk or to validate that an alien is physically unable to provide an exit biometric;
- DHS would provide one attendant per cluster of kiosks up to a ratio of one attendant for every three co-located kiosks;
- The attendants would be aligned with a DHS entity such as TSA or CBP for supervision, support, and interface with the port authority and carriers;
- The attendants would require office and storage space, uniforms, and clearance to enter the security area.

### e. Cost of Kiosk Option

US-VISIT estimates that the costs for implementation of this option, to both government and private industry collectively, over a ten-year period, would be \$3,132,900,000. A more detailed analysis, including a breakdown of costs, additional assumptions, and cost comparisons to the proposed option included in this rule, as well as cost breakdowns of the proposed option and other alternatives, can be found in the docket for this proposed rule at <http://www.regulations.gov>.

### C. Statutory Authority To Require Air and Vessel Carriers to Collect Exit Biometrics

The proposed rule would impose on certain commercial air and vessel carriers additional manifest requirements for the collection and transmission of biometric identifiers relative to certain passengers, crew members, and non-crew departing the United States. The biometric manifest information required will depend upon whether an alien is required to satisfy

the biometric exit requirements established under US-VISIT.

Commanding officers, masters, owners and others of any aircraft and vessel transporting any person out of the United States are required to file manifests:

For each commercial vessel or aircraft taking passengers on board at any seaport or airport of the United States, who are destined to any place outside the United States, it shall be the duty of an appropriate official specified in subsection (d) of this section to provide any United States border officer (as defined in subsection (i) of this section) before departure from such port manifest information about each passenger, crew member, and other occupant to be transported.

INA section 231(b), as amended, 8 U.S.C. 1221(b). The contents of the passenger manifest are set forth with particularity in INA section 231(c)(1)-(9), but the Secretary is also delegated authority to add specific requirements in INA section 231(c)(10) to include:

Such other information the [Secretary], in consultation with the Secretary of State, \* \* \* determines as being necessary for the identification of the persons transported and for the enforcement of the immigration laws and to protect safety and national security.

INA section 231(c)(10), 8 U.S.C. 1221(c)(10). Other provisions of law have been historically used to require biographic manifest information. *See* 19 U.S.C. 1431, 1433 and 1644a; 46 U.S.C. 60105; 49 U.S.C. 44909. Currently, advance passenger manifest data for commercial flights and voyages to and from the United States are collected by CBP through APIS. To enforce these requirements, an aircraft or vessel may not be granted departure clearance until the manifest information is provided:

No operator of any private or public carrier that is under a duty to provide manifest information under this section shall be granted clearance papers until the appropriate official specified in subsection (d) of this section has complied with the requirements of this subsection, except that, in the case of commercial vessels or aircraft that the [Secretary] determines are making regular trips to the United States, the [Secretary] may, when expedient, arrange for the provision of manifest information of persons departing the United States at a later date.

INA section 231(f), 8 U.S.C. 1221(f); *see also* 19 U.S.C. 1644a (customs law by which outbound clearance requirements under 46 U.S.C. 60105 are incorporated and made applicable to departing carriers). Additionally, civil penalties may be levied for failure to comply with manifest provisions. INA section 231(g), 8 U.S.C. 1221(g); *see also* 19 U.S.C. 1433, 1436 and 1644a.

The INA prohibits aliens boarding a vessel or aircraft from departing the United States, except as authorized by the Secretary:

Unless otherwise ordered by the President, it shall be unlawful—

(1) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

INA section 215(a), as amended, 8 U.S.C. 1185(a). The President has delegated his authority to prescribe regulations regarding aliens under this provision to the Secretary of Homeland Security. Executive Order 13323, Assignment of Functions Relating to Arrivals in and Departures from the United States, 69 FR 241 (Jan. 2, 2004).

Both the plain language and the history of these statutes supports the Secretary's authority to impose upon carriers the responsibility to positively identify arriving and departing aliens to protect the national security of the United States and the safety of U.S. citizens and aliens and to better enforce the immigration laws of the United States.<sup>11</sup> Positive identification can be achieved with most certainty, and most efficiently, through the use of biometrics. It is well within the Secretary's authority to require carriers to employ today's technology when he effectuates the objectives set forth in INA section 231(c)(10), 8 U.S.C. 1221(c)(10).

The collection of biometrics from departing aliens incident to their departure also supports DHS' missions in developing, analyzing, and sharing intelligence information, both within the U.S. Government and with our international allies. The location of an alien deemed to be a threat may profitably be learned upon a delayed basis and relayed to the appropriate international authority to support U.S.

<sup>11</sup> Vessel and air carriers often have extra responsibilities and obligations that have involved engagement of their own personnel in detailed questioning, and even physical inspections, of passengers. See 25 Ops. Atty. Gen. 336, 339 (1905) (as to the heavy burden on carriers); *McInerney v. United States*, 143 F. 729, 737 (1st Cir. 1906) (as to the quasi-public character of the responsibility of making a manifest and of the manifest itself—assisting the government to enforce its laws, imbuing it with a force it would not otherwise possess); see, e.g., *Oceanic Steam Navigation Company v. Stranahan*, 214 U.S. 320 (1909) (as to medical inspections applied in relation to the manifest under a 1903 law).

intelligence and criminal law enforcement functions. Accordingly, the rule is proposed under the Secretary's authority and responsibility to ensure the security of the homeland.

The rule is also proposed under the Secretary's authority to require air carrier security screening and manifesting. 49 U.S.C. 44909. Accordingly, the Secretary views his authority over homeland security as a whole, not as separate and distinct authorities.

The Secretary relies upon all of the authorities delegated to him and his subordinates under the Homeland Security Act of 2002 (HSA), Public Law No. 107-296, sections 101, 102, 116 Stat. 1135 (Nov. 26, 2002), 6 U.S.C. 111, 112, including his plenary regulatory authority over immigration under INA section 103(a), 8 U.S.C. 1103(a), as well as regulatory authority delegated by the customs and shipping laws. The Secretary exercises all of these authorities to fulfill the provisions of various enactments providing programmatic authority for a comprehensive entry—exit information management system, including biometric identifiers, to match an alien's available arrival data with the alien's available departure data (as authorized or required to be created or collected under law) in an electronic format to assist the United States to identify, through on-line searching procedures, lawfully admitted nonimmigrants who may have remained in the United States beyond the period authorized.

#### *D. Impetus for Carrier Participation*

The 9/11 Recommendations Act requires biometric exit processing by August 3, 2008. As discussed above, the Secretary's authority to waive limitations on the VWP will be suspended on July 1, 2009, unless the Secretary provides notification that the air exit system fully satisfies the biometric requirements of INA section 217(i), 8 U.S.C. 1187(i). A lapse in this waiver authority could be detrimental to air carriers if a significant number of aliens would be removed from VWP and be required to acquire visas to be admitted to the United States.

Biometric collection was required by IRTPA and was contemplated by Congress much earlier. The manner in which such processing can be successfully and efficiently accomplished by the U.S. Government alone, however, has been complicated by several practical constraints that were reinforced in the pilot programs. The chief constraints include the limited, privately owned, high-value space at air and vessel terminals needed

to install equipment at optimal locations for exit processing; the apparent necessity for a concentrated (and potentially expensive) enforcement presence to assure compliance with exit requirements; and the addition of "another separate process" with which aliens and carriers will need to contend before boarding.

Space constraints for exit equipment forced many pilot sites to be located at a considerable distance from the appropriate gates, which worked against passenger participation and contributed to low compliance. The constraints revealed by the pilots are tied to the absence of statutes controlling, and national experience with, rigorous inspection upon departure and the attendant lack of facilities and space that, by contrast, are made available by carriers and authorities for inspection upon arrival.

These factors have led to the conclusion that integration of biometric exit capture into the existing departure process will best serve processing objectives and be least disruptive to the traveling public.

#### **V. Summary of the Proposed Rule**

DHS proposes to add a new 8 CFR 231.4 requiring the collection and transmission of biometric departure manifest information by carriers. This section provides for the collection of biometric departure manifest information from all aliens subject to US-VISIT requirements regardless of the specific commercial air or vessel carrier on which they depart the United States. Proposed section 231.4 specifies that biometrics for any alien who is required to provide biometrics under proposed 8 CFR 215.8 must be collected prior to boarding that alien on transportation for departure from the United States. Initially, the biometrics must be transmitted to DHS within 24 hours of securing the doors of the aircraft for departure from the United States or departure of the vessel from the United States, using existing manifest transmission standards. DHS recognizes that capacity will change over time and further amendment to reduce the time for transmission is likely. The biometrics collected must meet Federal Bureau of Investigation specifications. The carriers are required to use the biometrics for no other purpose except as designated in 8 CFR 231.4 and use the biometrics only pursuant to the CUG.

In addition, the rule updates 8 CFR 217.7, to include, in the last sentence concerning aliens departing the United States, a reference to 8 CFR 231.4. The proposed rule also corrects citation

errors that currently exist in 8 CFR 235.1.

DHS proposes to revise 19 CFR 4.64, 122.75a, and 122.75b (pertaining to electronic departure manifests) to add paragraphs cross-referencing the proposed 8 CFR 231.4, which requires the biometric collection as an additional carrier manifest responsibility. Although the manifest information required by the APIS system is different from the biometric departure manifest information and its underlying system (US-VISIT), and the information has different uses and processing and retention requirements, the requirement for both derive from the same statutes, and the communications medium and transmission standards for the existing system are leveraged for the transmission of the biometric departure manifest information. DHS proposes to amend 8 CFR 215.8 to remove the reference to the number of pilots and the numerical limitation on the number of air or sea ports where aliens are required to provide biometric exit data and to reference new carrier responsibilities.

Finally, although DHS does not expect enforcement of these requirements to be problematic, DHS proposes to add a supplemental enforcement provision to the regulations. Upon making any of the determinations that would result in civil penalties or denial of departure clearance, DHS proposes to retain the authority to require a carrier to collect alien biometric data and transmit that data to DHS under a more restrictive system of DHS oversight, specifically including designating the location where the carrier must collect the biometric data.

## VI. Statutory and Regulatory Requirements

### A. Executive Order 12866

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), as amended, requires a determination whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and subject to the requirements of the Executive Order. DHS has determined that this proposed rule is a "significant regulatory action" under Executive Order 12866, section 3(f) because there is significant public interest in issues pertaining to national security and because this is an economically

significant rule pursuant to this Executive Order. Accordingly, this proposed rule has been submitted to OMB for review and approval.

In order for DHS to maintain the integrity of the United States immigration system, immigration benefits should only be given to those that truly deserve those benefits. Accurate and timely information on an alien's departure can inform decision makers so correct decisions on visa renewal, re-admittance into the United States, and granting of permanent residence or citizenship can be made.

Biometric confirmation that an alien has departed the United States provides two key elements for immigration and border security management: (1) Certainty that the alien in question did, in fact, leave; and (2) an accurate identification of that alien.

Presently, DHS is able to match the vast majority of international aliens' entry and exit records with biographic information. Biographic (i.e. name, date of birth, etc.) information can sometimes be inaccurate, however, for a variety of reasons. For example, names and other biographic data are sometimes inadvertently changed when manually typed (if the machine-readable zone of the passport is worn or unreadable), or the data can differ from travel document to boarding pass. Other factors can make it difficult for DHS to match some sets of records. Consistent with the authorizing legislation, DHS proposes to require air and vessel carriers to collect alien fingerprints prior to departure and transmit that data to DHS. Biometric collection will increase the confidence that an alien did, in fact, depart, as opposed to carrier biographic manifest data, which are tied more to an alien's document than to the alien in question.

DHS has performed a preliminary analysis of the expected costs and benefits of this proposed rule.

#### 1. Alternatives to the Proposed Rule Evaluated

This proposed rule would require air and vessel carriers to collect biometrics from aliens departing the United States. As discussed more fully in section III.B, there are four alternatives being evaluated for the regulatory evaluation of air and sea exit. Alternatives vary by the location of the biometric collection and the entity which pays for and operates the system:

*Proposed Rule:* At a Location at the Carrier's Discretion—Air and Vessel

carriers implement and manage. An air or vessel carrier representative collects biometric data of the aliens at any international airport or seaport location selected at the discretion of the carrier based on airport or seaport terminal layout, current and future business practices and operational efficiency. Possible locations for collection include, but are not limited to, the ticket counter and the boarding gate.

*Alternative 1:* At Airline Check-in Counter—Air and Vessel carriers implement and manage. An air or vessel carrier representative collects biometric data of the aliens at the air or vessel check-in counter. No boarding pass or other vessel identification documentation may be issued prior to the collection of biometrics.

*Alternative 2:* At Security Check-Point—United States Government implements and manages. A U.S. Government representative collects biometric data of the alien traveler at the TSA security checkpoint. This is not applicable to vessel carriers because there are no TSA checkpoint at seaports.

*Alternative 3:* At a Location at the Carrier's Discretion—United States Government implements and manages. A U.S. Government representative collects biometric data from aliens at any airport or seaport location selected at the discretion of the carrier based on air or sea port terminal layout, current and future business practices and operational efficiency.

*Alternative 4:* At a Kiosk—United States Government implements and manages. An alien passenger will be instructed by the carrier to proceed to a US-VISIT exit kiosk at the time of their departure. The carrier will be required to notate on the boarding pass (whether paper or electronic) that the person must provide biometrics before departure. The kiosk will be available before or after the security checkpoint. The carrier is subject to penalty for boarding an alien passenger who has not complied with exit requirements. A vessel carrier passenger provides biometrics at the time of check-in.

#### 2. Costs

Table 1 shows that the proposed rule expenditure and delay costs for a ten-year period are estimated at \$3.5 billion. That estimate is approximately \$2.6 billion using a discount rate of 7% and \$3.1 billion using a discount rate of 3%.

TABLE 1.—AIR/SEA BIOMETRIC EXIT COST SUMMARY  
[\$ millions, 2008 dollars]

Expenditure and delay costs estimates	Proposed Rule: carrier discretion	Alt 1: carrier check-in counter	Alt 2: TSA security checkpoint	Alt 3: carrier determined location	Alt 4: fixed kiosk
10 Year total Expenditure plus Delay Costs .....	\$3,549.3	\$6,404.4	\$4,775.6	\$3,696.3	\$3,123.9
20 Year total Expenditure plus Delay Costs .....	7,457.0	13,330.2	10,079.0	7,960.3	6,772.5
10 Year Present Value 7% discounting .....	2,623.6	4,725.8	3,480.9	2,685.9	2,303.6
10 Year Present Value 3% discounting .....	3,096.3	5,583.2	4,142.9	3,202.0	2,722.5

The analysis incorporates risk analysis to estimate a range of costs to carriers resulting from the proposed rule.

Table 2 provides a summary of the costs to carriers. For the high end of each range, US-VISIT assumes that first

year costs will be \$379.2 million with an average recurring annual cost of \$443.6 million. This would result in a 10 year present value total of \$3,685.1 million at a 3% discount rate and \$3,116.5 million at a 7% discount rate. For the low end of each range, US-

VISIT assumes that first year costs will be \$223.0 million with an average recurring annual cost of \$206.1 million. This would result in a 10 year present value of \$1,855.6 million at a 3% discount rate and \$1,594.1 million at a 7% discount rate.

TABLE 2.—AIR/SEA BIOMETRIC EXIT COSTS TO CARRIERS SUMMARY  
[\$ millions, 2008 dollars]

	First year costs	Avg. recurring costs	10 year present value (3%)	10 year present value (7%)
Median Estimates:				
Large Airlines .....	229.1	270.4	2,301.8	1,955.5
Medium Airlines .....	7.1	8.4	71.2	60.5
Vessel Carriers .....	57.6	34.3	317.9	273.4
Total .....	282.7	313.1	2,690.9	2,289.4
High Estimates:				
Large Airlines .....	295.7	382.5	3,151.5	2,662.6
Medium Airlines .....	9.1	11.8	97.5	82.3
Vessel Carriers .....	74.4	49.2	436.1	371.5
Total .....	379.2	443.6	3,685.1	3,116.5
Low Estimates:				
Large Airlines .....	174.0	178.1	1,582.8	1,356.9
Medium Airlines .....	5.4	5.5	49.0	42.0
Vessel Carriers .....	43.6	22.5	223.8	195.2
Total .....	223.0	206.1	1,855.6	1,594.1

US-VISIT has assessed seven categories of economic impacts other than direct expenditures. Of these two are economic costs.

- Social costs resulting from increased traveler queue and processing time; and
- Social costs resulting from increased flight delays.

### 3. Benefits

Table 3 shows that the ten-year benefits are estimated at \$1,093.6 million, which is about \$771.7 million with a discount rate of 7% and \$935.6 million with a discount rate of 3%.

TABLE 3.—AIR/SEA BIOMETRIC EXIT BENEFIT SUMMARY  
[\$ millions, 2008 dollars]

Benefits estimates	Proposed Rule: carrier discretion	Alt 1: carrier check-in counter	Alt 2: TSA security checkpoint	Alt 3: carrier determined location	Alt 4: fixed kiosk
10 Year total Economic Benefits .....	\$1,093.3	\$1,093.3	\$1,093.3	\$1,093.3	\$1,093.3
20 Year total Economic Benefits .....	2,901.5	2,901.5	2,901.5	2,901.5	2,901.5
10 Year Present Value 7% discounting .....	771.7	771.7	771.7	771.7	771.7
10 Year Present Value 3% discounting .....	935.6	935.6	935.6	935.6	935.6

US-VISIT has assessed seven categories of economic impacts other than direct expenditures. Of these five

are benefits, which include costs that could be avoided, for each alternative:

- Cost avoidance resulting from improved detection of aliens overstaying visas;

- Cost avoidance resulting from improved U.S. Immigrations and Customs Enforcement (ICE) efficiency attempting apprehension of overstays;
- Cost avoidance resulting from improved efficiency processing Exit/Entry data;
- Improved compliance with NSEERS requirements due to the improvement in ease of compliance; and
- Improved National Security Environment.

These benefits are measured quantitatively or qualitatively. For a more detailed assessment of the benefits, see section 5.3. of the Regulatory Evaluation.<sup>12</sup>

As DHS has noted in prior US-VISIT program rulemakings, the anticipated benefits of this proposed rule include: *Better Allocated Enforcement Resources.* ICE is responsible for locating aliens who overstay their admission period. With a greater certainty of who has left the United States comes a greater certainty of who has not. With biometric exit, US-VISIT can more accurately tell if an alien has overstayed their admission period. If so, ICE will be notified. This improves the efficiency of ICE's allocation of scarce interior enforcement resources to track down "confirmed" overstays, as opposed to those that may have left, but due to biographic data inaccuracies appear to have overstayed.

*Ability to Determine Eligibility for Future Immigration Benefits.* A more accurate assessment of an individual

alien's compliance with immigration law allows for a more accurate adjudication of subsequent immigration benefit applications, such as visa adjudication, re-admission to the United States, or adjustment to lawful permanent resident status. Biometric exit data will enhance the U.S. Government's ability to restrict those benefits to aliens who have complied with their previous admission periods.

*Visa Waiver Program Eligibility.* Biometric exit data will be used in the aggregate to assist in the calculation of overstay rates for nationals of countries designated in the VWP. Overstay rates are used to evaluate whether the designation of countries in the VWP are inconsistent with the interest of the United States in enforcing its immigration laws. See, e.g., *Attorney General's Evaluations of the Designations of Belgium, Italy, Portugal, and Uruguay as Participants Under the Visa Waiver Program*, 68 FR 10,954, 10,956 (2003) (terminating designation of Uruguay in part because of apparent overstay rate of 37%, more than twice the rate of average apparent overstay rate for all air arrival nonimmigrants); see generally INA section 217(c)(2)(C), 8 U.S.C. 1187(c)(2)(C). Finally, INA section 217(h)(1), 8 U.S.C. 1187(h)(1), requires DHS to calculate a VWP overstay rate and to include that rate as part of the annual report required by DMIA section 2, 8 U.S.C. 1365a(e)(1).

*Improved Analysis Capabilities.* Exit information will be analyzed in the

aggregate to identify weak areas in our immigration and border management system where overstays are prevalent. This will require the development of new analytic capabilities within DHS and DOS. Comprehensive trend analysis will allow DHS and DOS to identify specific visa-issuing posts, visa categories, or other locations or factors reflecting an unacceptably high overstay rate, allowing opportunities for self-assessment and more focused enforcement, including increased areas for scrutiny when deciding on immigration benefit or visa renewal applications.

4. Accounting Statement

As required by OMB Circular A-4, US-VISIT has prepared an accounting statement indicating the classification of the expenditures associated with this proposed rule. Table 4 provides our best estimate of the dollar amount of these costs and benefits, expressed in 2008 dollars, at 3% and 7% discount rates. US-VISIT estimates that the cost of this rule will be approximately \$366.9 million annualized (7% discount rate) and approximately \$369.9 million annualized (3% discount rate). Quantified benefits are \$99.9 million annualized (7% discount rate) and \$103.5 million annualized (3% discount rate). The non-quantified benefits are enhanced security and enabling the expansion of the VWP.

TABLE 4.—ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES, 2008 THROUGH 2017

	Estimates primary estimate	Low estimate	High estimate	Units year dollar	Discount rate (percent)	Period covered
Benefits Annualized .....	\$99.9	\$47.9	\$164.4	2008	7	2008–2017
Monetized (\$millions/year) .....	103.5	49.6	170.4	2008	3	2008–2017
Annualized Quantified .....	0	0	0	.....	7	.....
	0	0	0	.....	3	.....
Qualitative .....	Improvement to National Security; Enables Expansion of the VWP Program					
Costs Annualized .....	366.9	252.9	495.8	2008	7	2008–2017
Monetized (\$millions/year) .....	369.9	254.5	500.6	2008	3	2008–2017
Annualized Quantified .....	0	0	0	.....	7	.....
	0	0	0	.....	3	.....
Qualitative .....						

DHS lacks data concerning several of the variables used in this analysis. Therefore, DHS made assumptions and calculated estimates in an environment of uncertainty and variance in industry and government operations. The key assumptions that drive the cost and

<sup>12</sup> Some negative economic impacts, such as an increase in air and sea carrier personnel and

benefit analyses are described in detail in the regulatory evaluation, which may be found on the docket, DHS-2008-0039-0002. DHS solicits comments to improve the analysis to the greatest extent possible. Comments may be submitted to the regulatory docket using

government employee processing time have been addressed as direct costs, i.e., the financial value of

any of the methods listed under **ADDRESSES** in the preamble to this proposed rule.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 604, as amended by the Small additional resources needed to staff any new operational processes.

Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). A “small entity” is defined under the RFA to be the same as a “small business concern” as defined under the Small Business Act, 15 U.S.C. 632. Thus, a small entity (also referred to as a small business or small carrier) for RFA purposes is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria set forth under the SBA.

In accordance with provisions of the SBA, air carriers (scheduled passenger air transportation) that employ fewer than 1,500 employees are small entities. 13 CFR 121.201 (NAICS codes 481111 (Scheduled Passenger Air Transportation) and 481211 (Nonscheduled Chartered Passenger Air Transportation)). Vessel owners or operators that employ fewer than 500 employees are small entities. 13 CFR 121.201 (NAICS code 483112 (Deep Sea Passenger Transportation)).

As discussed in section IV.B.8, these carriers would be exempt from collecting biometric information for US-VISIT exit requirements under this proposed rule. Based on information obtained from CBP regarding current eAPIS users, DHS estimates that approximately 500 small U.S. air carriers could be affected by the proposed rule if the proposed rule did not contain the proposed exemption. DHS estimates that three small U.S. vessel carriers could be affected by the proposed rule if the proposed rule did not contain the proposed exemption. DHS continues to analyze the potential number of air and vessel carriers that would be directly affected by the proposed rule were it not for the exemption.

Additionally, costs to airports owned by small governmental jurisdictions must be considered. DHS estimates that 73 international airports would be directly affected by this proposed rule. These airports host primarily the large carriers that will be required to comply with the proposed rule. In addition to these 73 airports, an additional 40 smaller airports could be affected by this proposed rule because they service a small number of international flights. However, DHS does not believe that these airports will be affected because they service primarily chartered international flights by small air carriers that are exempted from the proposed

rule. Finally, DHS estimates that 13 seaports are likely to be directly affected by this proposed rule.

The number of exempted small carriers is not known with certainty. Thousands of entities are registered to use CBP’s eAPIS, a Web-based, no-fee transmission system that is used to transmit APIS data to CBP prior to an aircraft’s departure. eAPIS users include not only small air passenger carriers but also large air passenger carriers, air ambulance providers, aircraft leasing companies, flight instruction schools, large and small air cargo carriers, large and small passenger vessel carriers, large and small cargo vessel carriers, and several bus and truck operators. CBP reviewed the eAPIS users (as of February 2007), and based on a representative sample of this database estimated that approximately 500 small air carriers would be affected by the proposed US-VISIT exit requirements except for the exemptions set forth in the proposed rule.<sup>13</sup> Additionally, CBP identified three small passenger vessel carriers that would be affected.

Additionally, some airports may need to work with the large air carriers to make modifications to accommodate the US-VISIT exit process. As presented in the analysis for Executive Order 12866 above, US-VISIT identified 73 airports where significant modifications would need to be made due to the large number of international passengers that these airports host. Additionally, US-VISIT identified 40 airports that service international passengers but because of the exemptions proposed are unlikely to be affected, as they host small air carriers.

Of the 73 airports included in the primary cost-benefit analysis, 24 are owned by a city, 17 are owned by a local airport authority, 17 are owned by a county, 11 are owned by a port authority, 12 are owned by a state or U.S. territory, and one is privately owned. Of those airports owned by cities, none are owned by small jurisdictions, i.e. a jurisdiction with a population 50,000 people or less based on 2006 Census data.<sup>14</sup> Of those airports owned by counties, none are owned by small jurisdictions. None of the airport authorities or port authorities, usually quasi-government organizations at the local, regional, or state level, serves a small jurisdiction. The one privately

<sup>13</sup> The line of business and size of business for eAPIS users was determined using the Dun & Bradstreet Business Database (<http://www.dnb.com>) and ReferenceUSA’s Business Database (<http://www.referenceusa.com>) accessed September 17 to September 20, 2007.

<sup>14</sup> “Population Finder” on <http://www.census.gov>, accessed September 17, 2007.

owned airport (in Kenmore, WA), is a small business based on the threshold for airport services (NAICS code 488119 (Other Airport Operations)) because it earns revenues of less than \$6.5 million annually.

Of the 13 seaports included in the primary cost-benefit analysis, all are owned by a port authority serving a large jurisdiction.

Of the 40 airports not included in the primary cost-benefit analysis due to the proposed exemption of the small air carriers, 12 are owned by a city, eight are owned by a local airport authority, eight are owned by a county, eight are owned by a port authority, two are owned by the U.S. Government, and two are privately owned. Of those airports owned by cities, four are owned by small jurisdictions (Bangor, ME; Del Rio, TX; International Falls, MN; and Juneau, AK). Of those airports owned by counties, none are owned by small jurisdictions. One airport authority (Portsmouth, NH) serves a small jurisdiction. US-VISIT does not believe that these 40 smaller airports will be directly affected by the rule because they will not host carriers that must comply with US-VISIT exit requirements.

None of the seaport authorities serves a small jurisdiction.

The two privately owned airports (in Kenmore, WA; and Sandusky, OH) are both small businesses based on the threshold for airport services.

Based on this analysis, DHS does not believe the rule would have a significant economic impact on a substantial number of small entities. Individual aliens to whom this rule applies are not considered small entities as that term is defined in 5 U.S.C. 601(6). Indirect economic impacts are not considered within the scope of the Regulatory Flexibility Act. See *Mid-Tex Elect. Coop. Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985).

As discussed above, US-VISIT considered a host of regulatory alternatives. See section IV.B. The chosen alternative, the proposed rule, minimizes the burden to small entities to the extent possible because it specifically exempts small air and vessel carriers.

DHS has posted the assessment of the costs and benefits of the rule on the public docket at DHS-2008-0039-0002. DHS invites public comments from small entities on the impact of the proposed rule.

*C. Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA),

Public Law 104–4, 109 Stat. 48 (March 22, 1995), 2 U.S.C. 1531–1538, requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector of more than \$100 million in any one year (adjusted for inflation with 1995 base year). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA requires DHS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome option that achieves the objective of the rule. Section 205 allows DHS to adopt an alternative, other than the least costly, most cost-effective, or least burdensome option if DHS publishes an explanation with the final rule.

As summarized previously, DHS acknowledges that this proposed rule will have an impact of \$100 million in any one year, and DHS has considered a number of regulatory options to achieve the objective of the rule. The economic impacts of the rule to air and vessel carriers and ports where these carriers operate were described above (see section on Executive Order 12866). Impacts to the private sector include costs to the affected air and vessel carriers. Additionally, DHS estimates that 73 airports and 13 seaports are likely to be affected by the proposed rule, as these ports will need to work with the large carriers to make modifications to accommodate the US–VISIT exit process.

Of the 73 airports included in the primary cost-benefit analysis, 23 are owned by a city, 17 are owned by a local airport authority, 15 are owned by a county, 11 are owned by a port authority, and seven are owned by a State or U.S. territory. Of the 13 seaports included in the primary cost-benefit analysis, all are owned by a port authority.

DHS has posted the assessment of the costs and benefits of the rule on the public docket at DHS–2008–0039–0002. DHS invites public comments from State, local or tribal governments on the impact of the proposed rule.

#### D. Executive Order 13132

Executive Order 13132 requires DHS 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.” Such policies 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 has analyzed this proposed rule in accordance with the principles and criteria in the Executive Order and has determined that the provisions of the proposed rule will not have a substantial direct effect 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. Therefore, DHS has determined that this rule does not have federalism implications. This rule provides for the collection by international air carriers and vessel operators, for use by the U.S. Government, of biometric identifiers from a defined group of aliens seeking to exit and possibly re-enter the United States, for the purpose of improving the administration of federal immigration laws and for national security. States do not conduct activities with which the provisions of this specific rule would interfere.

#### E. Executive Order 12988

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

#### F. Trade Impact Assessment

The Trade Impact Agreement Act of 1979, 19 U.S.C. 2531–2533, prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for United States standards. DHS has determined that this proposed rule will not create unnecessary obstacles to

the foreign commerce of the United States and that any minimal impact on trade that may occur is legitimate in light of this rule’s benefits for the national security and public safety interests of the United States. In addition, DHS notes that this effort considers and utilizes international standards concerning biometrics, and will continue to consider these standards when monitoring and modifying the program. Finally, implementation of biometric exit will permit the Secretary to waive the 3 percent nonimmigrant visa refusal rate requirements under INA section 217(c)(2)(A), 8 U.S.C. 1187(c)(2)(A), after June 30, 2009, pursuant to the 9/11 Recommendations Act, and thus enhance, rather than restrict, foreign trade.

#### G. National Environmental Policy Act

DHS is required to analyze the proposed rule for purposes of complying with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Council on Environmental Quality (CEQ) regulations, 40 CFR parts 1501–1508, and DHS Management Directive 5100.1. 71 FR 16790 (April 4, 2006).

In April 2006, DHS analyzed potential changes to the immigration and border management processes in the US–VISIT Programmatic Environmental Assessment (PEA), which resulted in a Finding of No Significant Impact (FONSI). (US–VISIT Programmatic Environmental Assessment on Potential Changes to Immigration and Border Management, April 10, 2006; Finding of No Significant Impact on Potential Changes to Immigration and Border Management, April 11, 2006.) The PEA examined the environmental impacts of implementing strategic, high-level changes to the immigration and border management environment. The Proposed Action in the PEA examined implementation of a system for capturing the unique identity of aliens, including establishing a biometrically-based unique identity for aliens, such as finger scans. The PEA was available for public comment for a 30-day period prior to being published. The FONSI concluded that, unless extraordinary circumstances existed that could impact the environment (e.g., expansion of physical infrastructure), no further NEPA analysis is needed for implementation of the Proposed Action at air and sea ports of entry.

The implementation of the proposed rule will occur wholly within the previously analyzed air and sea port environment. Biometric collection will occur within the existing departure

process and is expected to not require expansion of existing physical infrastructure. These changes have been analyzed in the PEA, and will not require further NEPA analysis.

US-VISIT commits to monitoring the rulemaking process, as necessary, in accordance with NEPA, the White House Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), the DHS Management Directive 5100.1, and the US-VISIT PEA and FONSI.

#### H. Paperwork Reduction Act

This proposed rule will permit DHS to require aliens who exit the United States on commercial air carriers and vessels to provide biometric identifiers to the carrier or vessel owner or operator for transmission to DHS. These requirements constitute an information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 507 *et seq.* OMB, in accordance with the Paperwork Reduction Act, has previously approved this information collection for use. The OMB Control Number for this collection is 1600–0006.

This proposed rule would require air and vessel carriers to electronically provide biometric data on certain passengers and crew as manifest information for commercial vessels departing from the United States and crew members and non-crew members onboard commercial aircraft operating, serving on, and traveling on flights from within the United States. This requirement is considered an information collection requirement under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*).

The collection of information in this proposed rule, with respect to passenger manifests for commercial vessels and aircraft departing from the United States, had in part already been reviewed by OMB and assigned OMB Control Numbers 1651–0088 (Electronic manifest information required for passengers and crew on board commercial aircraft arriving in the United States) and 1651–0104 (Electronic manifest information required for passengers and crew on board commercial vessels and aircraft arriving in and departing from the United States). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. This final rule's collection of information is contained in 8 CFR 231.4 (some of which are referenced in 19 CFR part 4 and 19 CFR 122.75a and 122.75b).

This information is necessary to ensure national security and the security of commercial vessel travel to and from the United States and commercial air travel to, from, continuing within (foreign air carriers only), the United States. The information will also enhance enforcement of the immigration and customs laws relating to passengers and crew members traveling to and from the United States on board commercial vessels and aircraft. The likely respondents and record keepers are commercial passenger and cargo air and vessel carriers. The fingerprint collection covered by 1600–0006 is unchanged from the previously published documentation.

#### I. Public Privacy Interests

This proposed rule would amend DHS regulations pertaining to the filing of commercial vessel and aircraft manifests for alien passengers and crew members. The amendments include expanding the number of ports of departure supporting the biometric collection from aliens covered by US-VISIT and requiring carriers to collect biometric information from alien passengers departing the United States in addition to their responsibilities to collect biographic passenger manifest information and terrorist watch-list matching information.

The primary privacy risk raised by the proposed rule includes unauthorized use, disclosure and retention of the biometrics collected by the carrier, in violation of this proposed rule and the duly published System of Records Notice (SORN) for IDENT. Furthermore, there is the risk of identity theft that often accompanies collections of PII. The addition of biometric data to biographic data already collected by the carrier represents a qualitative change to that risk, and may alter the threat posed by identity theft as operations and technologies develop. These privacy risks are mitigated with technical, physical, and administrative controls. Carriers will be required to ensure that their systems and transmission methods of biometric data would meet the standards of the CUG, which provides specific technical and other details regarding the collection, storage, and transmission of personally identifiable information. As part of the technical specifications, US-VISIT is soliciting comment on the use of encryption at the point of biometric collection to provide additional mitigation against the risk of carrier misuse, modification, or disclosure of biometrics. Furthermore, carriers will be prohibited from using the biometrics for purposes other than transmitting a biometric departure

manifest to US-VISIT. Compliance with the system and data transmission requirements, to potentially include encryption upon collection, is subject to the penalties associated with performance failure.

Upon receipt of the aliens' biometric data from the carriers, US-VISIT secures the data in accordance with a robust privacy and security program. As discussed in the January 5 and August 31, 2004, interim rules, US-VISIT records will be protected consistent with all applicable privacy laws and regulations. Personal information on aliens will be kept secure and confidential and will not be discussed with, nor disclosed to, any person within or outside DHS other than as authorized by law and as required for the performance of official duties. In addition, careful safeguards, including appropriate security controls, will ensure that the data is not used or accessed improperly. Affected persons can seek redress through the DHS Traveler Redress Inquiry Program (TRIP), at <http://www.dhs.gov/trip>, if there is concern about the accuracy of information.

The DHS Privacy Office continues to exercise privacy oversight of US-VISIT to ensure that the information collected and stored in IDENT and other systems associated with US-VISIT is being properly protected under the privacy laws and guidance. US-VISIT also has a program-dedicated Privacy Officer to handle specific inquiries and to provide additional oversight of the program. A compilation of US-VISIT Privacy Impact Assessments is available online at <http://www.dhs.gov/us-visit>, and a complete discussion of the privacy implications of this proposed rule can be found in the US-VISIT Privacy Impact Assessment Update.

US-VISIT is committed to providing transparency about the US-VISIT Exit program. To inform covered individuals about the use of their PII, US-VISIT will publish on its Web site a privacy notice that explains why US-VISIT is collecting this information, how it will use the information, and the effect of not providing this information. US-VISIT is also soliciting comment on whether carriers should make a privacy notice available before the carrier collects the information potentially through their Web sites, through a link to US-VISIT's Web site, or through a posting at the point of collection.

Finally, DHS will continue to maintain secure computer systems that will ensure that the confidentiality of an individual's PII is maintained. In doing so, DHS and its information technology personnel will comply with all laws and

regulations applicable to government systems, such as the Federal Information Security Management Act of 2002, Title X, Public Law 107–296, 116 Stat. 2259–2273 (2002) (codified at various sections of 5, 6, 10, 15, 40, and 44 U.S.C.); Information Management Technology Reform Act (Clinger-Cohen Act), Public Law No. 104–106, Div. E, codified at 40 U.S.C. 11101 *et seq.*; Computer Security Act of 1987, Public Law 100–235, 40 U.S.C. 1441 *et seq.* (as amended); Government Paperwork Elimination Act, Title XVII, Public Law 105–277, 112 Stat. 2681–749–2681–751 (1998) (codified, as amended, at 44 U.S.C. 101; 3504 note); and Electronic Freedom of Information Act of 1996, 5 U.S.C. 552.

Individuals with further questions about how the US–VISIT program is applying the Privacy Act to enrollees may contact the US–VISIT Privacy Officer, by mail addressed to US–VISIT Privacy Officer, National Protection and Programs Directorate, Department of Homeland Security, 1616 North Ft. Myer Drive, 18th Floor, Arlington, VA 22209; by telephone at (202) 298–5200; or by e-mail at [USVISITPRIVACY@dhs.gov](mailto:USVISITPRIVACY@dhs.gov).

#### List of Subjects

##### 8 CFR Part 215

Administrative practice and procedure, Aliens, Travel restrictions.

##### 8 CFR Part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

##### 8 CFR Part 231

Arrival and Departure manifests.

##### 8 CFR Part 235

Aliens, Immigration, Registration, Reporting and recordkeeping requirements.

##### 19 CFR Part 4

Aliens, Customs duties and inspection, Immigration, Maritime carriers, Passenger vessels, Reporting and recordkeeping requirements, Vessels.

##### 19 CFR Part 122

Air carriers, Aircraft, Airports, Air transportation, Commercial aircraft, Customs duties and inspection, Entry procedure, Reporting and recordkeeping requirements, Security measures.

Accordingly, for the reasons set forth in the preamble 8 CFR chapter I and 19 CFR chapter 1 are proposed to be amended as follows:

## TITLE 8—ALIENS AND NATIONALITY

1. The authority citation for part 215 is revised to read as follows:

**Authority:** 8 U.S.C. 1104; 1184; 1185 (pursuant to E.O. 13323, published January 2, 2004), 1365a and note, 1365b, 1379, 1731–32.

2. Section 215.8 is amended by revising paragraph (a)(1) to read as follows:

### § 215.8 Requirements for biometric identifiers from aliens on departure from the United States.

(a)(1) An alien required to provide fingerprints, photograph(s) or other specified biometric identifiers upon application for admission to the United States is also required to provide biometric identifiers to an appropriate official of the air carrier or vessel owner or operator prior to departure from the United States. The collection of the biometric identifiers covered by this section for subsequent transmission to the Secretary is governed by 8 CFR 231.4. The Secretary of Homeland Security may also establish pilot programs for biometric collection at land border ports of entry through which the Secretary or his delegate may require any alien admitted to the United States to provide biometric identifiers or other evidence upon exiting the United States.

\* \* \* \* \*

## PART 217—VISA WAIVER PROGRAM

3. The authority citation for part 217 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1187; 8 CFR part 2.

4. Paragraph (a) of § 217.7 is revised to read as follows:

### § 217.7 Electronic data transmission requirement.

(a) An alien who applies for admission under the provisions of section 217 of the Act after arriving via sea or air at a port of entry will not be admitted under the Visa Waiver Program unless an appropriate official of the carrier transporting the alien electronically transmits to Customs and Border Protection (CBP) the passenger arrival manifest data relative to that alien passenger in accordance with 19 CFR 4.7b or 19 CFR 122.49a. Upon departure from the United States by sea or air of an alien admitted under the Visa Waiver Program, an appropriate official of the transporting carrier must electronically transmit to CBP departure manifest data, including any biometric data required by 8 CFR 231.4, relative to

that alien passenger in accordance with 19 CFR 4.64 and 19 CFR 122.75a.

\* \* \* \* \*

## PART 231—ARRIVAL AND DEPARTURE MANIFESTS

5. The authority citation for part 231 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1185, 1187, 1221, 1228, 1229; 8 CFR part 2; 19 U.S.C. 1431, 1433, 1434, 1644, 1644a; 46 U.S.C. 60105.

6. Paragraph (a) of § 231.2 is amended by adding, at the end, the following sentence:

### § 231.2 Electronic manifest and I–94 requirement for passengers and crew onboard arriving vessels and aircraft.

(a) \* \* \* Additional provisions setting forth requirements applicable to commercial carriers regarding the collection and transmission of biometric information covering passengers and crew and non-crew members as part of their departure manifest responsibilities under section 231 of the Act are set forth in 8 CFR 231.4.

\* \* \* \* \*

7. New § 231.4 is added to read as follows:

### § 231.4 Biometric manifest information for passengers, crew, and non-crew onboard departing aircraft and vessels.

(a) *Definitions.* (1) The definitions set forth in 19 CFR 122.49a(a) apply for purposes of this section except as provided in this section.

(2) *Biometric collection location*, for the purposes of this section, means a location within an airport or seaport, and within the path of the departing alien, such that they would not need to significantly deviate from that path to comply with biometric exit requirements at which air or vessel carrier employees, as applicable, either present or routinely available if an alien needs processing assistance; and which is equipped with a device with network connectivity for data collection and transmission of biometric departure manifest information to DHS in accordance with the standards established in the Consolidated User's Guide.

(b) *Biometric Departure Manifest Information*—(1) *Biometric collection requirement.* Except as provided in paragraph (c) of this section, an appropriate official of each commercial aircraft or vessel departing from the United States to any port or place outside the United States must ensure transmission to Customs and Border Protection (CBP) biometric departure manifest information covering alien

passengers, crew, and non-crew to whom the requirements for biometric identifiers apply under 8 CFR 215.8. The biometric departure manifest information must be transmitted to CBP at the place and time specified in paragraph (b)(3) of this section by means approved by the Secretary and must set forth the information specified in paragraph (b)(4) of this section or as otherwise required by the Secretary.

(2) *Manner of collection.* Carriers boarding alien passengers, crew, and non-crew subject to US-VISIT processing shall collect biometric departure manifest information from each alien at a biometric collection location at the airport or seaport before boarding that alien on transportation for departure from the United States, no more than 3 hours prior to the originally scheduled departure of that passenger's aircraft or sea vessel.

(3) *Time and manner of submission.* The appropriate official specified in paragraph (b)(1) of this section must ensure transmission of the biometric departure manifest information required and collected under paragraphs (b)(1) and (2) of this section to the CBP Data Center, CBP Headquarters, or such other data center as may be designated by the Secretary, by not later than 24 hours after securing the aircraft for departure. The biometric departure manifest information may be transmitted to DHS over any means of communication authorized by the Secretary for the transmission of other electronic manifest information containing personally identifiable information and under transmission standards currently applicable to other electronic manifest information. Files containing the biometric departure manifest information may be sent with other electronic manifest data prior to departure or may be sent separately from any topically related electronic manifest data. Files containing the biometric departure manifest information may be sent in batch mode.

(4) *Information Required.* The biometric departure manifest information required under paragraphs (b)(1)–(b)(3) of this section for each covered passenger or crew member must contain an electronic scan of the fingers (not thumb) of one hand that complies with the technical standards in Federal Bureau of Investigation (FBI), Criminal Justice Information Services (CJIS) *Electronic Fingerprint Transmission Specifications*, Appendix F (“IAFIS Image Quality Specifications”), sections 2 and 3 (May 2, 2005), or any subsequent standard adopted for IAFIS or subsequent system. Data transmission standards and methods for transmitting

biometric departure manifest information must meet the current standards for the transmission of other electronic manifest data for air and vessel carriers.

(c) *Exception.* The biometric departure manifest information specified in this section is not required for any alien active duty military personnel traveling as passengers on board a departing Department of Defense commercial chartered aircraft.

(d) *Carrier Maintenance and Use of Biometric Departure Manifest Information.* Carrier use of biometric departure manifest information for purposes other than as described in standards set by DHS in the Consolidated User's Guide (CUG) is prohibited. Carriers shall immediately notify the Chief Privacy Officer of US-VISIT in writing in event of unauthorized use or access, or breach, of biometric departure manifest information.

(e) *Limitation on Air and Vessel Carriers Affected.* This section does not apply to an air or vessel carrier that is a small entity as defined in 13 CFR 121.201 (NAIC Codes 481111, 481212, 483112), or such other category as may be determined by the Secretary.

(f) *Additional Requirements.* If the Secretary determines that an air or vessel carrier has not adequately complied with the provisions of this section, and imposes any penalty or fine under section 215 or 231 of the Act or denies departure clearance, the Secretary may, in his discretion, require the air or vessel carrier to collect biometric departure manifest information at a specific location prior to the issuance of a boarding pass or other document on the international departure, or the boarding of crew, in any port through which it boards aliens for international departure under the supervision of the Department of Homeland Security for such period as the Secretary considers appropriate to ensure the adequate collection and transmission of biometric departure manifest information.

#### PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

8. The authority citation for part 235 continues to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323 published on January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.

##### § 235.1 [Amended]

9. Section 235.1 is amended in paragraphs (f)(1)(iii), (1)(iv), and (1)(iv)(B) by removing the citation to

“(d)(1)(ii)”, whenever that term appears, and adding in its place “(f)(1)(ii)”.

#### TITLE 19—CUSTOMS DUTIES

##### PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

10. The general authority citation for part 4 and the specific authority for section 4.64 continue to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 2071 note; 46 U.S.C. 60105.

\* \* \* \* \*

Section 4.64 also issued under 8 U.S.C. 1221;

\* \* \* \* \*

11. Section 4.64 is amended by adding paragraph (b)(4) to read as follows:

##### § 4.64 Electric passenger and crew member departure manifests.

\* \* \* \* \*

(b) \* \* \*

(4) *Biometric Information.* Biometric manifest information is governed by 8 CFR 231.4.

\* \* \* \* \*

##### PART 122—AIR COMMERCE REGULATIONS

12. The general authority citation for part 122 and the specific authority for section 122.75a and 122.75b continue to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1431, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note.

\* \* \* \* \*

Section 122.75a also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114. Section 122.75b also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114.

\* \* \* \* \*

13. Section 122.75a is amended by adding a paragraph (b)(2)(iv) and paragraph (b)(4) to read as follows:

##### § 122.75a Electric manifest requirement for passengers onboard commercial aircraft departing from the United States.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(iv) For biometric portions of the manifest pursuant to 8 CFR 231.4, within 24 hours of the departure of the aircraft from the United States.

\* \* \* \* \*

(4) *Biometric Information.* Biometric manifest information is governed by 8 CFR 231.4.

\* \* \* \* \*

14. Section 122.75b is amended by revising adding paragraph (b)(2)(iv) and

adding paragraph (b)(4) to read as follows:

**§ 122.75b Electronic manifest requirement for crew members and non-crew members onboard commercial aircraft departing from the United States.**

\* \* \* \* \*

(b) \* \* \*  
(2) \* \* \*

(iv) For biometric portions of the manifest pursuant to 8 CFR 231.4, within 24 hours of the departure of the aircraft from the United States.

\* \* \* \* \*

(4) *Biometric Information.* Biometric manifest information is governed by 8 CFR 231.4.

\* \* \* \* \*

**Michael Chertoff,**

*Secretary.*

[FR Doc. E8-8956 Filed 4-23-08; 8:45 am]

**BILLING CODE 4410-10-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA-2008-0412; Directorate Identifier 2007-NM-346-AD]

RIN 2120-AA64

**Airworthiness Directives; Boeing Model 737-300, -400, and -500 Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede an existing airworthiness directive (AD) that applies to all Boeing Model 737-300, -400, and -500 series airplanes. The existing AD currently requires repetitive inspections for discrepancies of the fuselage skin under the dorsal fin assembly, and repairing if necessary. This proposed AD would require an inspection for any chafing or crack in the fuselage skin and abrasion resistant coating at the dorsal fin landing, an inspection for damage to the dorsal fin seals, attach clip, and seal retainer, and other specified and corrective actions as necessary. The new proposed requirements would end the need for the existing repetitive inspections. This proposed AD results from a report of an 18-inch crack found in the fuselage skin area under the blade seals of the nose cap of the dorsal fin due to previous wear damage, and additional reports of fuselage skin wear.

We are proposing this AD to prevent discrepancies of the fuselage skin, which could result in fatigue cracking due to cabin pressurization and consequent rapid in-flight decompression of the airplane fuselage.

**DATES:** We must receive comments on this proposed AD by June 9, 2008.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124-2207.

**Examining the AD Docket**

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800-647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Wayne Lockett, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 917-6447; fax (425) 917-6590.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2008-0412; Directorate Identifier 2007-NM-346-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the

closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

**Discussion**

On October 18, 2004, we issued AD 2004-22-05, amendment 39-13833 (69 FR 62567, October 27, 2004), for all Boeing Model 737-300, -400, and -500 series airplanes. That AD requires inspecting for discrepancies of the fuselage skin under the dorsal fin assembly, and repairing if necessary. That AD resulted from a report of an 18-inch crack found in the fuselage skin area under the blade seals of the nose cap of the dorsal fin due to previous wear damage. We issued that AD to find and fix discrepancies of the fuselage skin, which could result in fatigue cracking due to cabin pressurization, and consequent rapid in-flight decompression of the airplane fuselage.

**Actions Since Existing AD Was Issued**

Since we issued AD 2004-22-05, we have received additional reports of fuselage skin wear found during routine maintenance inspections and accomplishment of Boeing Service Bulletin 737-55-1057, dated December 12, 1996, and Revision 1, dated July 22, 1999. (Revision 1 of Boeing Service Bulletin 737-55-1057 was cited as an additional source of service information for inspecting for discrepancies of the fuselage skin under the dorsal fin assembly.) As a result, the manufacturer has developed a new corrective action and terminating action to adequately address the unsafe condition.

**Relevant Service Information**

We have reviewed Boeing Alert Service Bulletin 737-53A1266, dated August 30, 2007. The service bulletin describes procedures for doing a detailed inspection for any chafing or crack in the fuselage skin and abrasion resistant coating at the dorsal fin landing and a detailed inspection for damage to the dorsal fin seals, attach clip, and seal retainer.

The service bulletin also describes procedures for doing other specified and corrective actions as necessary. The other specified action is to install wear strips if no skin wear is found during the inspection. The corrective actions include (1) replacing the dorsal fin seals with new seals if any damaged seal is found, (2) replacing the seal retainers