

Before the

**BUREAU OF CUSTOMS AND BORDER PROTECTION  
DEPARTMENT OF HOMELAND SECURITY**

**Washington, DC 20229**

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Passenger Manifests for Commercial Aircraft  
Arriving in and Departing From the United  
States;  
Passenger and Crew Manifests for Commercial  
Vessels Departing From the United States

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USCBP-2005-0003

**COMMENTS OF  
THE IDENTITY PROJECT (IDP),  
WORLD PRIVACY FORUM,  
AND JOHN GILMORE**

The Identity Project (IDP)

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The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 71 Federal Register 40035-40048 (July 14, 2006), docket number USCBP-2005-0003-0003, and the associated “Regulatory Assessment” published July 18, 2006 on the Web site at <<http://www.regulations.gov>> and docketed as USCBP-2005-0003-0005.

In the guise of an NPRM alleged to propose a change only in the required timing of transmission of information already required to be provided to the Bureau of Customs and Border Protection (CBP), the CBP has actually proposed a fundamental regulatory change with far-reaching (literally and figuratively) legal, policy, and logistical implications: The NPRM would replace a requirement for *ex post facto* notice to the CBP of information about who is on each vessel (ship or plane) with an unconstitutional system of prior restraint of international travel, entirely unauthorized by statute and inconsistent with the U.S. obligations embodied in the International Covenant on Civil and Political Rights.

Under the proposed rules, orders by the CBP to common carriers not to transport specific persons would not be based on restraining orders (injunctions) issued by competent judicial authorities. Instead, they would be based on an undefined, secret, administrative permission-to-travel (“clearance”) procedure subject to none of the procedural or substantive due process required for orders prohibiting or restricting the exercise of protected First Amendment rights. From the authority of law enforcement officers and agencies to *enforce* certain types of orders, once lawfully issued by competent judicial authorities, the NPRM would usurp for the CBP the authority to *issue* those orders on its own. It’s as though the FBI were to construe its authority to maintain in the NCIC a list of persons for whose arrest warrants have been issued by competent judicial authorities, and execute those warrants, as authority for the FBI to issue and execute its own warrantless administrative arrest orders.

The NPRM would create a clearly invalid administrative presumption, reversing the presumptions of innocence and of entitlement to the exercise of First Amendment rights, that all those persons not affirmatively “cleared” in advance by the CBP – according to decision-making procedures and criteria specified nowhere in the NPRM – are barred from travel.

The proposed rules would burden equally, and infringe the rights to varying degrees of, U.S. citizens, resident aliens, immigrants, nonimmigrant visitors, and even those with no intention to enter the U.S. who merely wish to travel on flights that will, or might, transit through U.S. airspace. Reciprocal

adoption of similar rules by other countries would further burden travel worldwide by U.S. citizens and residents, including their international travel and their travel within the USA. Since both the current rules and the proposed rules are incompatible with current European Union privacy and data protection laws, their retention or adoption would make it impossible for airlines to operate direct flights between the USA and the E.U. without violating the laws of one or both jurisdictions, and would thus require an enormously disruptive and costly cessation of such flights.

The Regulatory Analysis published subsequent to the NPRM makes clear that the NPRM is based on clearly erroneous assumptions, fails to consider important implications and incidental and consequential costs, and grossly underestimates – by at least an order of magnitude – the burden of at least tens of billions of U.S. dollars in costs that the proposed rules would impose on the travel industry, travelers, and travelers’ employers, families, and associates. Both the NPRM and the Regulatory Assessment misstate the impact and implications of the proposed rules, and fail to include specific assessments required by the Privacy Act and the Regulatory Flexibility Act.

The Identity Project respectfully requests that the NPRM be withdrawn in its entirety, and instead that the CBP promptly repeal the portions of its current rules that are incompatible with current European Union law, to avoid a cessation of direct USA-E.U. flights. If the NPRM is not withdrawn, we request that the NPRM be republished together with the additional assessments required by the Privacy Act and the Regulatory Flexibility Act, and that a new comment period be provided.

## **I. ABOUT THE IDENTITY PROJECT AND THE WORLD PRIVACY FORUM**

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

The World Privacy Forum, <<http://www.worldprivacyforum.org>>, is a nonprofit, non partisan 501© (3) public interest research group focused on conducting in-depth research and consumer education in the intersecting areas of technology and privacy, including identity issues.

## **II. THE PROHIBITIONS ON TRAVEL AND ASSEMBLY IN THE PROPOSED RULES WOULD BE UNCONSTITUTIONAL.**

Under the rules proposed by this NPRM, “A carrier must not board any passenger subject to a ‘not-cleared’ instruction, or any other passenger, or their baggage, unless cleared by CBP.” This rule would authorize prior restraint on, and presumptive denial of, the Constitutional right to travel.

### **A. International travel is a Constitutionally protected right.**

The CBP has conceded in an earlier stage of this rulemaking that, “CBP recognizes, as the Supreme Court has stated, that the right to travel is an important and long-cherished liberty.” 68 Federal Register 292 (January 3, 2003).

The Supreme Court has long recognized that there is a Constitutional right to travel internationally. The right to travel is "not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards . . .," but "a virtually unconditional personal right." *Shapiro v. Thompson*, 394 U.S. 618, 642-643 (1969); see also *Aptheker v. Secretary of State*, 378 U.S. 500, 505 (1964); *Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic to our scheme of values.").

The U.S. government has reiterated in its most recent report to the United Nations Human Rights Committee that, “As reported in the Initial Report, in the United States, the right to travel – both domestically and internationally – is constitutionally protected.” (*Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights*, Paragraph 203, 28 November 2005, CCPR/C/USA/3, available at <[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/\\$FILE/G0545268.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf)>, referring to *Initial Report by the U.S. Concerning Its Compliance with the International Covenant on Civil and Political Rights*, July 1994, CCPR/C/81/Add.4 and HRI/CORE/1/Add.49, available at <[http://dosfan.lib.uic.edu/erc/law/covenant94/Specific\\_Articles/12.html](http://dosfan.lib.uic.edu/erc/law/covenant94/Specific_Articles/12.html)>).

The proposed rules would violate these Constitutional rights.

### **B. Travel by international air and sea vessels is, in most cases, an act of assembly protected by the First Amendment to the U.S. Constitution.**

The assembly clause of the First Amendment protects “the right of the people peaceably to assemble”. “To assemble” means not merely or primarily to *be* together in an assembly. “To assemble” is to gather or come together, that is, to *move* into an assembly. Movement of people – in other words, travel – is an essential element of the act of assembly. “To travel” is, in most cases, “to assemble”, and as such is an act directly protected by the First Amendment.

The right to assemble in one’s own home or premises, or in a public building, would be empty if the government could bar the door to prevent people from walking in. The right to assemble in a public commons would be empty if the government could encircle the area of the planned assembly with barricades to prevent entry, or create a checkpoint to prevent access by travel along a public right of way. In the same way, and for the same reasons, the right to assemble internationally would be meaningless if the government could prevent people from traveling internationally by air or sea.

The right to travel by air or sea vessel is, quite obviously, essential to the ability to assemble internationally. Unless the CBP wishes to suggest, “Let them swim”, there is no available alternative way for people in the U.S. to assemble with people from most other countries, or vice versa.

**C. The proposed rules would prohibit air and sea common carriers from transporting any person without the express prior permission of the CBP, creating a regime of prior restraint and presumptive denial of the right to travel and to assemble.**

The title and summary in the NPRM describe the proposed changes to regulations solely in terms of changes in the requirements for common carriers to transmit passenger and crew manifest information to the CBP; that is, as mere modifications of the current requirements that notice be given to the CBP of who is on the vessel. (The implications for airlines, travelers, and civil liberties of these changes in notice and information collection requirements are discussed in a later section of these comments.)

But the essence of the NPRM is the new language proposed for 49 CFR § 122.49a (b)(1): “A carrier must not board any passenger subject to a ‘not-cleared’ instruction, or any other passenger, or their baggage, unless cleared by CBP.” This identical language is repeated in each of the three alternative sub-sections of the proposed new 49 CFR § 122.49a (b)(1).

This is not, and cannot under any plausible interpretation be represented as, a notice requirement. This is a binding prohibitory regime of prior restraint on all available means of travel and assembly.

To the extent that, as is typically the case, no alternative means to travel or to assemble exists, this section is binding on the would-be traveler as well as the carrier.

It is important to note that the phrase, “any other passenger” in the cited portion of the proposed rule refers specifically to a would-be traveler about whom neither a “cleared” nor a “not cleared” message – nor, perhaps, any message at all – has been received from the CBP. In other words, the proposed rule forbidding the transportation by common carriers (who are required by law to transport all would-be passengers complying with the conditions in their tariff) and thus the travel and assembly, of “any other person” is, by definition, warrantless, suspicionless, and not based on probable cause or any particularized information concerning the persons being deprived of their right to travel and assemble.

**D. The prior restraint on international travel and assembly in the proposed rules would be unconstitutional.**

Prior restraints on the exercise of rights protected by the First Amendment, such as the right of the people to assemble at issue in this rulemaking, are subject to strict scrutiny, and to Constitutional standards both of substantive and procedural due process.

None of these standards are satisfied by the proposed regulations. Nor could they possibly be: suspicionless unwarranted non-particularized prior restraint on activity protected by the First Amendment is on its face unconstitutional. Even if the default ban on transportation, travel, and assembly by non-suspects were removed from the proposed regulations, the proposed rule would still be unconstitutional: it fails to specify anything about the substantive or procedural criteria for the issuance of such prohibitory orders, much less to provide the guarantees of due process that would Constitutionally be required for the valid issuance and enforcement of such orders.

**E. The restrictions on travel and assembly in the proposed rules would unconstitutionally burden the exercise of other rights protected by the First Amendment.**

In addition to its effect on activities directly protected by the assembly clause of the First Amendment, the suspicionless, unwarranted, presumptive prior restraint on travel and assembly in the proposed regulations would unconstitutionally interfere with the ability of U.S. persons to exercise other rights protected by the First Amendment.

In many circumstances, travel is essential to the exercise of other First Amendment rights. For example, it's often necessary for persons outside the U.S. – including U.S. citizens – to travel to the U.S. in order to petition U.S. legislative, judicial, or executive authorities for redress of their grievances.

In addition, travel is a significant component of many expressive activities, so that regulations which burden movement on public rights-of-way or by common carrier also burden that expressive conduct. (On the inextricability of personal movement, assembly, and expressive conduct, see e.g. Rebecca Solnit, *The Right of the People Peaceably to Assemble in Unusual Clothing: Notes on the Streets of San Francisco*, Harvard Design Magazine, April 1998, available at <<http://www.gsd.harvard.edu/research/publications/hdm/back/4solnit.pdf>>.)

Even when freedom of travel is not per se essential to freedom of speech, of the press, or to petition for redress of grievances, restrictions on travel – including international travel – can greatly impair the ability of U.S. persons to exercise those rights.

Travel is essential to many modes of expression and expressive conduct that depend on personal presence, and to the in-person reporting of a free press. Without the ability to travel to, and report from, places around the world where news is being made, the press in the USA would depend entirely on the news of the world reported by those “vetted” and approved to travel by the CBP. And the same would be true for U.S. citizens abroad wishing to report to the world press and public about events in the USA.

The proposed regulations fail to satisfy the standards for regulations that burden First Amendment activity, and are therefore unconstitutional.

**F. The proposed rules would unconstitutionally infringe the right to anonymous association.**

The Supreme Court has long recognized a right to associate anonymously. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). See also *Shelton v. Tucker*, 364 U.S. 479, 485 (1960). To the extent that the proposed collection of personally identifying information would enhance the government's ability to track the movements and associations of United States persons, it would clearly implicate individuals' right to travel internationally and to associate anonymously.

**G. The proposed rules would exert an unconstitutional chilling effect on the exercise of rights protected by the First Amendment.**

Under the proposed regulations, anyone traveling overseas, to or from the U.S., for any length of time and for any reason, risks not being “cleared” by the CBP to return by air or sea, and being stranded for life on the other side of an ocean from their family, friends, and home – unless they can walk on water, or swim home across the ocean.

There is no requirement in the proposed regulations for the CBP to respond at all, or to respond within any particular time, to a request from a common carrier for “clearance” of a manifest, or of any particular name on that manifest. There is no requirement for the CBP to tell the carrier, or the would-be passenger or crew member, why they have not been “cleared”, and no defined redress or “clearance” procedure (much less one which would or could pass Constitutional muster). In the absence of any response, or in the event of a “not cleared” response, all carriers are prohibited from boarding the would-be passenger, and that would-be passenger is effectively prevented from traveling – indefinitely, unpredictably, without warrant or suspicion or probable cause, and perhaps permanently.

Since there is no requirement or procedure by which a would-be traveler can determine in advance whether they will ever be “cleared” to return, or how long it might take for them to be “cleared”, the risk of being stranded for life would be inherent in any overseas journey to or from the USA.

This risk is real, not hypothetical. From April 21, 2006, until October 1, 2006, Jaber Ismail, a native-born Californian and citizen of the USA who holds no other citizenship and has never held any other citizenship, was prevented from returning to the U.S. to resume his high school studies, following a stay overseas, as a result of orders from the DHS to airline common carriers forbidding them to transport him, according to news reports. Shaun Waterman, *Analysis: From Lodi, Calif. to Pakistan*, United Press International (August 28, 2006),

<<http://www.upi.com/SecurityTerrorism/view.php?StoryID=20060828-105251-1148r>>; Randal C.

Archibold, *U.S. Blocks Men's Return to California From Pakistan*, New York Times (August 29, 2006),

available at <<http://www.nytimes.com/2006/08/29/us/29hayat.html>>; Gina Keating, *Pakistani-American teen, father barred from U.S.*, Reuters (August 31, 2006),

<[http://today.reuters.com/news/articlenues.aspx?type=domesticNews&storyID=2006-08-31T002935Z\\_01\\_N30222713\\_RTRUKOC\\_0\\_US-SECURITY-TEENAGER.xml](http://today.reuters.com/news/articlenues.aspx?type=domesticNews&storyID=2006-08-31T002935Z_01_N30222713_RTRUKOC_0_US-SECURITY-TEENAGER.xml)>.

The Identity Project

<<http://www.PapersPlease.org>>

Comments on USCBP-2005-0003

October 12, 2006

There is no indication that any agency of the U.S. ever sought Mr. Ismail's arrest or detention as a criminal suspect or material witness, or on any other grounds, or ever sought – much less obtained – any injunction or other judicial order restricting his movements.

Reportedly, Mr. Ismail learned of the DHS administrative order prohibiting any airline from transporting him to the U.S. only when he tried to board a flight home in April 2006. He and his father, a naturalized U.S. citizen similarly barred from travel to the U.S. by DHS order, were allowed to return home only after the DHS removed their names from its “no-fly” list in October 2006, after five months they had to spend couch-surfing with relatives abroad and separated from their family in California. Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, New York Times (October 2, 2006), available at <<http://www.nytimes.com/2006/10/02/us/02terror.html>>; Jeff Hood, *Hayats' relatives return home after five months: Men stuck abroad when names turned up on Fed's no-fly list*, Stockton Record (October 3, 2006), available at <<http://www.recordnet.com/apps/pbcs.dll/article?AID=/20061003/NEWS01/610030339/1001>>.

Under the proposed rules, all U.S. citizens leaving the country will face the same risk of being unable to return to the U.S., for an indefinite period of time or forever, if the DHS does not “clear” them to come home. This would exert a dramatic chilling effect on the exercise of the First Amendment rights of travel and assembly, as well as of other First Amendment rights when they entail overseas travel.

#### **H. The DHS has failed to provide a Constitutional justification for the proposed rules.**

Commenters to the previous APIS NPRM, 68 Fed. Reg. 292 (January 3, 2003), expressed concerns on some of these issues to which the DHS issued this response:

Several commenters remarked that collection of information through APIS would infringe on the right to travel as recognized by the Supreme Court in *Kent v. Dulles*, 357 U.S. 116 (1958).

Response: CBP recognizes, as the Supreme Court has stated, that the right to travel is an important and long-cherished liberty. Although a passenger's refusal to supply the information required by the regulatory text will result in denying that person access to international travel on commercial vessels and aircraft, the new provisions will not violate a constitutional right to travel. The Supreme Court has recognized that the right to travel abroad is not an absolute right, and the Court has recognized that no government interest is more compelling than the security of the nation. *Haig v. Agee*, 453 U.S. 280, 307 (1981). The government may place reasonable restrictions on the right to travel in order to protect this compelling interest. *Id.*; see also *Eunique v. Powell*, 302 F. 3d 971, 974 (9th Cir. 2002); *Hutchins v. District of Columbia*, 188 F. 3d 531, 537 (D.C. Cir. 1999).

The restrictions this final rule places on certain modes of travel (here, by effectively denying access to certain international travel if a passenger or crew member refuses to provide the information required) are reasonable and narrowly drawn to ensure accurate identification of individuals. Moreover, the restrictions imposed through the required submission of information are far more likely to promote the ability to travel than to restrict it. In fact, as recent events have shown, the ability to travel can be severely restricted by terrorist threats to our means of transportation. See National Commission on Terrorist Attacks Upon the United States, Final Report 29 (Norton 2004) (noting FAA's September 11, 2001, instruction to all aircraft to land at the nearest airport). Congress, through legislation discussed throughout this document, has required certain safeguards involving the collection of information to protect our national security. The new regulatory text published today is designed to enhance the ability to travel, not to restrict it for law-abiding U.S. citizens, lawful permanent residents (LPRs), or foreign visitors.

This "We had to burn the village in order to save it" argument that restrictions on travel enhance the ability to travel for law-abiding citizens is intellectually dishonest. It ignores the effect these restrictions have on civil liberties and human rights. The world is not a gated community in which the United States can use mass transport security as a dragnet for its law enforcement network. Until it becomes transparent who is on "no-fly" lists, and on the basis of what judicial process orders are issued that one be placed on or off these lists, the abandonment of basic due process rights in the name of "security" makes our nation's promotion of democracy and freedom seem hollow and contrived.

The argument that any identification based security measure enhances the ability to travel for law-abiding citizens is debatable (see e.g. <<http://www.papersplease.org>>) and ignores the effect it has on the law-abiding citizen's ability to dissent or associate. Safety is not paid for at any price. "We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country." Judge Gerald Tjoflat in *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2002).

There is no evidence, in the NPRM or otherwise, that the proposed rules would actually have any positive effect on transportation safety or security against terrorism or other threats. Compelled identification of travelers would be relevant to the protection of passengers if and only if, inter alia, the DHS has available a complete and accurate list of identifying information which would be presented by would-be terrorists, seeking to travel by airline common carriers, who pose a threat to travel, but against whom there is insufficient evidence to support the issuance of an arrest warrant and insufficient probable cause for arrest or detention without a warrant. There is no support in the NPRM for such a claim.

The Constitutional deficiencies in the proposed rules are both substantive and procedural. These regulations impact a variety of substantive rights, and for each of those rights there are no substantive standards for the issuance or non-issuance of “clearance” messages, and no procedural safeguards against arbitrary or unjustified deprivations of the rights implicated by those decisions. Although the complete absence of defined substantive or procedural standards makes it impossible to say with certainty, the CBP’s past practices suggest that any information relied on in making such decisions would be considered exempt from disclosure as “Sensitive Security Information” (SSI), precluding accountability or effective oversight of the “clearance” decision-making process.

Existing judicial mechanisms are available to serve any lawful purpose of the DHS in this rulemaking. If there is sufficient evidence that a specific person – against whom there is insufficient evidence to justify an arrest warrant or a warrantless arrest or detention – poses a danger sufficient to justify a prohibition or restriction on international travel, the CBP or other appropriate authorities can seek an injunction or temporary restraining order from a court of competent jurisdiction.

Even if the DHS were to provide evidence of the necessity and likely efficacy of restrictive or prohibitory orders to common carriers regarding the transportation of specific persons, or for access to evidence from airline reservations to enforce such orders, the DHS has made no attempt to show why those orders could not be issued, and this evidence could not be obtained, through normal legal and judicial processes (such as the issuance of injunctions and warrants), and why they would require the use of the extra-judicial orders and presumption of “non-clearance” provided for by the proposed rules. So far as we can determine, there is no precedent for the DHS ever attempting to obtain a “no-fly” injunction through existing and available judicial and law enforcement processes, and no basis for a belief that those procedures for restraining orders – relied on in thousands of cases daily of imminent threat to life in domestic violence cases – are in any way inadequate to achieve any lawful DHS goals in this rulemaking.

### **III. THE PROPOSED RULES ARE INCONSISTENT WITH THE U.S. OBLIGATIONS EMBODIED IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.**

Travel is a fundamental and internationally recognized human right, and a vital prerequisite for the exercise of other fundamental rights. “Liberty of movement is an indispensable condition for the free

development of a person.” United Nations Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, issued under Article 40(4) of the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999, available at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument)>.

Under Article VI, Section 2 of the U.S. Constitution, “treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land.”

Article 12, section 4 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. Senate on April 2, 1992 (138 Congressional Record S4782), provides that, “No one shall be arbitrarily deprived of the right to enter his own country.”

This right of return embodied in the ICCPR is central to the meaning of nationality and of the passport as defining the place to which the citizen is entitled to repatriation. See Mark B. Salter, *Rights of Passage: The Passport in International Relations* 4, (Lynne Rienner, 2003). It also expresses deeply-held American values of long standing, as expressed by our poet laureate Robert Frost:

‘Home is the place where, when you have to go there,  
They have to take you in.’

“The death of the hired man”, in *North of Boston* (1915), reprinted in *The Complete Poems of Robert Frost* 49-55 at 52, Holt, Rinehart and Winston, 1949.

The meaning of Section 4 of Article 12 of the ICCPR is interpreted in Paragraph 21 of U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.

As applied to U.S. citizens wishing to return home from overseas, the default prohibition on travel by commercial air or sea vessel in the proposed regulations, in the absence of any defined substantive or procedure criteria or safeguards and, by definition, the absence of any warrant, probable cause, suspicion, or individualized basis, constitutes on its face an arbitrary deprivation of the right of return embodied in Section 4 of Article 12 of the ICCPR.

As applied to anyone wishing to leave the USA, the proposed rules are inconsistent with Sections 2 and 3 of Article 12 of the ICCPR, which provide:

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

To be “necessary”, as is required by Section 3 of Article 12 of the ICCPR, requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes.

“Necessity” requires a showing that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of “necessity” is supported by the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, which provides in Paragraph 14:

Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

Paragraph 17 of the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement* suggests that strict scrutiny is appropriate for “rules and practice [which] include, inter alia, ... the need for ... exact description of the travel route”, as in the proposed rules.

Since there is no such showing of necessity in the NPRM, and in fact the CBP has not even attempted to make any such showing or asserted such a claim of necessity, the proposed rules are flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn.

In addition, for the same reasons that they violate the assembly clause of the First Amendment to the U.S. Constitution, as discussed above, the proposed rules are inconsistent with Article 21 of the ICCPR, which provides:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The same analysis of the CBP's failure to make or support a showing of necessity applies with respect to this Article 21 as with respect to Sections 2 and 3 of Article 12, as discussed above. The proposed rules thus are inconsistent with Article 21 of the ICCPR as well, and must be withdrawn.

The lack of a deadline for the CBP to decide on a request for "clearance" (permission to travel) or any explicitly defined substantive or procedural criteria in the proposed rules for the granting or denial by the CBP of "clearance" is also inconsistent with the ICCPR, as interpreted in Paragraphs 15-16 of the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement* :

The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided. . . .

The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality.

Finally, the ICCPR embodies reporting obligations, as interpreted by Paragraph 10 of the U.N.

Human Rights Committee, *General Comment No. 27 on Freedom of Movement*:

The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.

Since the CBP "clearance" message to the carrier required by the proposed rules would be a "document" within the meaning of this paragraph and of the ICCPR, failure to include the rules proposed in this NPRM in the reports by the U.S. pursuant to Article 40 of the ICCPR would be inconsistent with the U.S. obligations embodied in the ICCPR.

#### **IV. ORDERS PROHIBITING TRANSPORTATION ARE NOT AUTHORIZED BY ANY OF THE STATUTES CITED AS AUTHORITY FOR THE PROPOSED RULES.**

As noted above, the NPRM proposes to add to 19 CFR §122.49 a rule that, in the absence of an affirmative and individualized "clearance" message from the CBP, no air or sea common carrier may permit any person to board any vessel scheduled to travel to, from, or over the territory of the U.S.:

“A carrier must not board any passenger subject to a ‘not-cleared’ instruction, or any other passenger, or their baggage, unless cleared by CBP.”

The NPRM cites as authority for the proposed new 19 CFR §122.49 the following statutes:

The general authority citation for part 122 and the specific authority citations for § 122.49a and 122.75a continue to read as follows: Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note. Section 122.49a also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 44909.

It’s impossible to tell which of these 17 sections of statutes is purported to provide the specific authority for orders to common carriers not to allow certain otherwise qualified would-be passengers to board, or for the presumptive prior restraint on travel and assembly embodied in the proposed new regulatory language.

These statutes contain a variety of requirements for reporting, provision of information, presentment for inspection and customs clearance on arrival, and the transportation of cargo. But none of these statutes contains any provision authorizing the CBP to issue orders prohibiting the transportation of certain would-be passengers, much less authorizing a default order against transportation of all passengers or the regime of pre-departure “clearance” checkpoints contemplated by the proposed regulations. So long as passenger and crew manifest information is provided in the prescribed form, nothing in the cited statutes authorizes the CBP, by regulation or otherwise, to order a common carrier not to transport a passenger.

Since they lack any authority in the statutory sections cited in the NPRM, the provisions of the proposed regulations ordering, and permitting the CBP to order, carriers and vessels not to transport some or all passengers must be withdrawn from any final rule.

**V. BOTH THE CURRENT AND PROPOSED RULES ARE INCOMPATIBLE WITH EUROPEAN UNION PRIVACY AND DATA PROTECTION LAWS, AND WOULD REQUIRE THE CESSATION OF FLIGHTS BETWEEN THE E.U. AND THE USA.**

Pursuant to the judgement of the Court of Justice of the European Communities in cases C-317/04 and C-318/04 (decided 30 May 2006; published 29 July 2006 in the Official Journal of the European Union 2006/C 178/02), the agreement between the European Community and the USA on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the CBP, and the

decision of the Council of the European Union on the adequacy of protection of personal data contained in PNR's of air passengers transferred from the E.U. to the CBP, was annulled as of September 30, 2006.

The Court of Justice found that the subject matter of the annulled agreement and decision were outside the scope of authority of the E.C. In accordance with that decision, the purposes of the agreement and decision could only be accomplished by a binding international instrument, i.e a treaty, duly adopted by the participating states. In the E.U., that would require ratification under the laws of each E.U. member state. In the USA, that would require signing by the President and ratification by the Senate.

As of October 1, 2006, since no such treaty has been ratified by the U.S. Senate and by the appropriate bodies in each E.U. member state, or has entered into force, any airline or airline database hosting service that accepts data originally collected in such an E.U. member (regardless of whether that data relates to reservations for domestic or international flights, or flights to, from within, or entirely outside the E.U.), and that complies with either the current or proposed CBP rules, is liable to sanctions under both E.U. law and the national laws of that E.U. country where it operates or from which it accepts data which it provides to the CBP.

The CBP and the Department of Homeland Security (DHS) have announced that they have negotiated a new "agreement" on this issue with the E.U., in some form other than that of a treaty. But no form of international agreement other than a treaty duly signed by the President and ratified by the Senate would or could Constitutionally be binding on the U.S. government, the DHS, or the CBP, or be enforceable in any U.S. court. No "agreement" not binding on the U.S. could satisfy the requirements of E.U. law, as interpreted by the judgement of the Court of Justice. And, most important in this context, neither the DHS nor the CBP – nor any other executive, legislative, or administrative agency of the U.S. government – has the Constitutional authority to alter or abrogate U.S. legal obligations under a treaty duly signed by the President and ratified by the Senate, such as the International Covenant on Civil and Political Rights as discussed above.

The CBP should, therefore, either withdraw the proposal and the current rule until a new treaty or treaties enters into effect, or should consider in its regulatory assessment the implications of the cessation of direct flights between the USA and E.U. members that would result from a rule incompatible with airlines' obligations under E.U. members' laws, to which they are subject as of October 1, 2006.

In addition, *Council Regulation (EEC) No 2299/89 of 24 July 1989 on a Code of Conduct for Computerized Reservation Systems* (Official Journal of the European Union L 220, 29 July 1989), as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 (Official Journal L 278 of 11 November 1993) and Council Regulation (EC) No 323/1999 of 8 February 1999 (Official Journal L 40 of 13 February 1999), Article 6(d), requires that, “personal information concerning a consumer and generated by a travel agent shall be made available to others not involved in the transaction only with the consent of the consumer.” This consent requirement is categorical and admits of no exception.

Travel agents can create and enter data in PNR’s for flights up to a year in advance, and it is impossible to eradicate data once it is entered in the PNR. “Deleted” data is archived permanently in the PNR “history”, as are PNR’s that are entirely cancelled. So to allow for those existing PNR’s for which consent to transfer data to the CBP has not been granted, the CRS’s that host airlines’ PNR databases could not, without violating the E.U. *Code of Conduct for CRS’s*, provide any PNR data to the CBP until at least one year after the complete implementation of a system under which all CRS users (travel agents, tour operators, airlines, hotels, car rental companies, etc.) obtain consent, prior to creating or entering any data in a PNR, for the transfer of that data to the CBP. Given the number of sources of data entered in PNR’s, implementation of such a system would take at least 6 months, perhaps much longer.

Accordingly, the CBP should provide that the effective date of any final rule issued in this rulemaking is not until at least 18 months after the date it is finalized, or should consider in its regulatory assessment the implications of the incompatibility of the rule with the E.U. *Code of Conduct for CRS’s*, which would effectively preclude airline use of CRS’s for PNR hosting or reservations connectivity.

**VI. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT GROSSLY UNDERESTIMATE THE COST OF COMPLIANCE WITH THE PROPOSED RULES.**

The proposed rules would impose new direct, incidental, and consequential costs, not proposed to be reimbursed by the government (“unfunded mandates”), on air carriers, travelers, and travelers’ friends, families, employers, and other associates.

A week after the announcement of the NPRM, the CBP posted a “Regulatory Assessment” dated April 2006 that purports to estimate those costs. The Regulatory Assessment is based on clearly and

materially erroneous assumptions and a fundamentally deficient model of the airline boarding process, omits major categories of costs and of entities on whom those costs would be imposed by the proposed rules, and grossly underestimates some of the costs it identifies.

Because of the extent of the omissions from the Regulatory Assessment, the lack of research or factual information and the fundamentally erroneous assumptions on which it is based, and the uncertainty as to how or even if it would be possible for the airline industry to comply with the proposed rules while remaining economically viable, it is impossible at this time to determine the total cost of the proposed rules. But we believe that, even if airlines find ways to continue to operate while complying with the proposed rules, the total cost to travelers, their employers and associates, and the travel industry will be, conservatively, at least an order of magnitude greater than estimated in the Regulatory Assessment. If the costs of compliance with the proposed rules would be prohibitive – as some airlines have already suggested in their comments on this NPRM – the cost of a collapse of international common carrier airline service to and from the USA would be dramatically higher still.

**A. Passengers routinely board airplanes less than 15 minutes before they are pushed back from the departure gate.**

The Regulatory Assessment proceeds from the false assumption that, “Carriers typically close the gate doors and do not allow any more passengers to board 10 minutes prior to scheduled departure.”

In fact, as noted by Qantas in their comments on this NPRM, the final 15-minutes before the doors of the aircraft close are typically used for processing “stand-by” (and other last-minute) passengers.

Boarding typically proceeds in two distinct phases, with the second wave of passengers boarding less than 15 minutes before “departure”. (We assume that the Regulatory Assessment uses the term “departure” in accordance with the definition of departure as “push-back” in the proposed rules, not in its meaning under the current rules – and in conventional industry usage – as “wheels up”. We shall also use that proposed new definition in these comments, except where specifically noted otherwise.)

Most of that second wave of passengers are issued boarding passes immediately before they board.

Airlines have no way to know how many would-be passengers will present themselves for boarding. Almost all airlines overbook (although sometimes only in coach/economy class, not in first or business class, as discussed further below). There are “no-shows” for almost every flight who hold confirmed reservations, and sometimes boarding passes, but who do not present themselves for boarding.

No-shows include those for whom reservations were made but for whom a ticket was never purchased (airlines cannot always tell whether a ticket has been issued for travel on a given reservation); those who cancelled or changed their plans without notifying the airline prior to the scheduled boarding time; those who failed to make connections from other flights (some of whom have already been issued boarding passes when they checked in for their originating flight, and some of whom have not); those who failed to make it to the airport in time; and those who checked in but who got diverted by urgent events or changes in plans, distracted, or drunk in the airport and missed the boarding call.

As a result, the airline cannot tell how many empty seats will be available until the initial phase of boarding is complete. Boarding passes are issued until the airline's reservation system shows that all (or, to allow a margin for error and for accommodation of last-minute VIP passengers, slightly less than all) seats have been assigned to passengers who have checked in or are expected from connecting or other flights. If there is any chance that the plane may be full, other passengers presenting themselves at the gate (with tickets, but not yet with boarding passes; some with reservations for the flight and some not), are allowed only as far as the gate, and kept waiting during the first wave of boarding.

After the first wave of boarding is complete, and shortly before departure – typically less than 15 minutes – the airline checks how many seats on the aircraft remain vacant.

For a variety of reasons that are difficult to eliminate, the actual number of seats remaining empty may be slightly different from what is shown in the airline's reservation system. A seat may be shown in the reservation system as available when it is actually taken (for example, if two passengers were issued boarding passes for the same seat, as every frequent flyer has seen happen from time to time), or may show as occupied when in fact it is empty. So if there are more passengers at the gate (and in some cases, depending on the time needed to get from the ticketing or check-in counter to the gate, at one or both of those counters as well) than there might be empty seats, and the plane might depart entirely full, the cabin crew will "count the plane" by walking the aisles to verify the count of empty seats.

Normally, the airline waits as long as possible before counting the empty seats and boarding the second wave of passengers, to avoid having to turn away connecting passengers, passengers already in the concourse who are slow in responding to the boarding call, and other expected passengers who present themselves at the gate late, but still with time to board before scheduled departure.

Only after checking the count of empty seats do the gate staff issue boarding passes to as many as possible of the would-be passengers waiting at the gate (and, if there is still time for passengers to get to the gate from the ticketing and/or check-in counters, advise the counter staff how many last-minute ticket sales and/or late check-ins to allow), as close to the departure time as possible while still allowing the second wave of passengers time to board, get seated, and stow their carry-on bags before departure.

Typically, the last few passengers board the plane less than five minutes before scheduled departure. The aircraft doors are closed almost immediately behind the last passengers, and the cockpit crew requests permission to push back as soon the last passengers to board are seated and have stowed their carry-on bags, typically less than five minutes later and frequently no more than one or two minutes.

Some passengers board almost every international flight less than 15 minutes before departure. We've boarded international flights to the USA less than two minutes before push-back, and been issued boarding passes at the check-in counter of a major international airport, for a long-haul intercontinental flight (that had been thought to be oversold) less than 10 minutes before push-back – with the admonition from the counter agent, “You must run to the gate. Your flight is waiting for you.”

**B. Last-minute passengers pay higher than average fares and will incur much greater costs than other passengers if they aren't allowed to board.**

The second of the two waves of boarding, as described above, includes several categories of passengers: walk-up last-minute ticket purchasers (typically either business travelers with unexpected time-critical business needs or opportunities, or urgent family emergencies, and who in either case have paid much higher than average fares and will suffer much greater than average incidental and consequential damages if they are delayed or unable to be boarded); passengers with “open” tickets but no reservations (typically a feature of higher than average fares); passengers who have or had reservations on another flight, but who are seeking to change to a different flight (a type of change that is likely to be much less costly, and thus is much more likely to be sought, by those who originally bought more expensive and therefore less restricted tickets); passengers who have been involuntarily rebooked and/or rerouted as a result of cancellations, delays, missed flights, or missed connections on the same or a different airline (for whom the incremental cost of further delay is likely to be higher than average, and increasing); passengers making connections (particularly connections from one international flight to another, where the world's most common recommended minimum connecting time is 60 minutes, and

passengers routinely don't get to the departure gate of the onward flight until less than 15 minutes before scheduled departure); passengers with reservations waitlisted or "on request" (unticketed or with tickets issued with "RQ" status); and a variety of categories of standby passengers.

Last-minute passengers typically pay higher than average fares and will incur much greater than average costs if they aren't allowed to board. Last-minute walk-up fares are typically higher than tickets purchased even a few days in advance, both because of advance purchase requirements for lower fares, and because at the last minute, as the flight gets more heavily booked, the last booking classes remaining available are those corresponding to the highest fares. In addition, because airlines overbook less, if at all, in business and first class than in coach/economy class, business and/or first class often remain available well after coach class on the same flight is sold out. So a dramatically higher percentage of last-minute walk-up ticket purchasers, and of last-minute boarders, have paid business or first class fares.

**C. The Regulatory Assessment grossly underestimates the cost of prohibiting boarding within 15 minutes before departure.**

Depending on which option in the NPRM ("APIS 60" or "AQQ") airlines choose, the proposed rules would require them to close boarding either 15 minutes or 60 minutes prior to departure and prior to the time when they currently board the last passengers – those in the second wave of boarding, as described above. That is at least 15 minutes earlier than under current government requirements and airline operating procedures, under which passengers can be, and are, boarded up until departure.

A similar requirement for at least 15 minutes of additional time between the close of boarding and departure (depending on the time between push-back and 'wheels up', which is typically at least 15 minutes, often more, at the large, busy airports where most international flights originate) would apply to flights overflying the USA, as a consequence of the application to 19 CFR § 122.49b(a) of the proposed change in the definition of 'departure' in 19 CFR § 122.49a(a).

There are only two ways that an airline could satisfy this proposed new requirement for additional time between the boarding of the last passenger and push-back of the aircraft from the gate: either move the close of boarding for each flight earlier, or move the departure of each flight later.

Airlines would have to choose either to (1) hold the flight at the gate for at least 15 (or 60) minutes before pushing back, after all passengers including the second wave of last-minute walk-up ticket purchasers, late arrivals at the gate, standby passengers, etc., have boarded; or (2) close boarding

15 minutes (or 60) before departure, which would be 15 (or 60) minutes earlier than at present, leave behind all those passengers who would have boarded in the last 15 (or 60) minutes before departure, and leave the seats that were assigned to no-shows unsold and unoccupied.

As discussed below, either of these methods of compliance by airlines with the proposed rule – even under the less costly 15 minute AQQ option – would have costs to airlines and travelers of at least billions of U.S. dollars per year, and tens of billions of dollars over the next ten years. Those costs would be at least an order of magnitude greater than the “low estimate” of the costs of the proposed rule in the NPRM and Regulatory Assessment, or than any estimate of the likely benefits of the proposed rule.

### **1. Costs of 15 minute gate hold after completion of boarding**

Holding the aircraft at the gate for a minimum of 15 minutes after all passengers and crew have boarded would impose one-time rescheduling and transition costs on airlines; continuing costs in lost passenger time, lost airline and airport gate and ramp staff time, increased aircraft capital and operating costs due to reduced equipment availability, and one-time and continuing airport gate capacity expansion costs due to slower gate turnarounds.

All of the estimates in the NPRM and Regulatory Assessment of the percentages of passengers who would be delayed (cockpit and cabin crew and ground staff delays are ignored in the NPRM) are based on the erroneous assumption that no boarding is allowed within 15 minutes of departure.

Under the proposed rule, allowing any passengers to board within 15 minutes of departure would require delaying everyone on the plane, and all of the ground staff on duty during departure.

The Regulatory Assessment (Table 1, page 5) estimates the number of passengers on international flights to and from the USA as approximately 76 million in 2007, the first full year in which the proposed rule would be effective. The Regulatory Assessment ignores overflights of the USA, which we initially estimate (subject to further input from airlines and air traffic control authorities) would add at least 5 percent to the number of passengers impacted by the proposed rule, bringing the total number of passengers impacted to at least 80 million per year.

The Regulatory Assessment values passenger time at US\$28.60/hour (p. 9). We believe that this estimate is too low because of the fact that, as noted in the regulatory assessment at note 10, p. 9, the average income of international air travelers is substantially greater than the average income of domestic air travelers within the USA, which in turn is higher than the average for all people in the USA.

Using the value of passenger time relied on by the Regulatory Assessment, however, the total cost to passengers of a 15 minute delay for 100% of passengers on flights to, from, via, or overflying the USA would be  $0.25 \text{ hours} \times \$28.60/\text{passenger-hour} \times 80 \text{ million passengers/year} = \$572 \text{ million annual direct costs to passengers of time lost to newly imposed regulatory delays.}$

Airlines would bear the cost (or pass it on to ticket purchasers) of keeping the cockpit crew, cabin crew, gate staff, and ramp staff on duty during the 15 minutes per flight gate hold. In addition, a gate hold of 15 minutes per flight would take the aircraft out of service availability for that amount of time, increasing airlines' capital and other equipment costs proportionately.

The Regulatory Assessment assumes an average of 250 passengers per flight, and an average cost to an airline of delay of \$3372 per aircraft-hour. Using these same estimates, 80 million passengers per year subject to the impacts of the proposed rule would correspond to 320,000 flights, each delayed by 15 minutes, for a total of 80,000 aircraft-hours of delay and costs of delay of  $80,000 \text{ aircraft-hours/year} \times \$3372/\text{aircraft-hour} = \$270 \text{ million annual direct costs to airlines of newly imposed regulatory delays.}$

Assuming that the average turnaround time (gate occupancy) for aircraft in international service is 2 hours ( a generous estimate to allow for slow turnaround of long-haul aircraft, compared with turnaround times of small short-haul aircraft of as little as 30 minutes), a 15-minute gate hold would increase the total gate time – and thus the gate cost – by 12.5%. Airports would incur one-time capital and transition costs, and well as ongoing maintenance, operation, and overhead costs – all likely passed on by them to airlines, and by them to ticket purchasers – to expand gate capacity proportionately.

More information from airports and airlines would be required to estimate the one-time transition costs to airlines and airports of revising flight, gate, aircraft, crew, staff, and maintenance schedules, and the one-time and continuing costs to airports of being unable to accommodate as many flights per gate per day. But added to \$572 million in annual costs to passengers and \$270 million in annual costs to airlines, the total costs if airlines choose the “gate hold” option would clearly total more than \$1 billion per year, or more than \$10 billion over the ten year period covered by the Regulatory Assessment.

## **2. Costs of closing boarding 15 minutes earlier than under current procedures**

To retain current departure times while allowing 15 minutes after the completion of boarding before departure, airlines could close boarding 15 minutes earlier than at present. This would impose direct and consequential costs of delay on those passengers who currently board less than 15 minutes

before departure, as well as costs to the airline in lost revenue from seats left vacant by no-shows, which could no longer be filled with last-minute ticket purchasers or other passengers allowed to board within 15 minutes of departure, after no-shows have forfeited their reservations and their seats can be confirmed to be vacant and available.

We estimate that approximately 2 percent of the 80 million annual passengers on international flights to, from, via, or overflying the USA – on average, 5 people on each 250-passenger flight – currently board within 15 minutes of departure. If airlines choose this option, all of these 1.6 million passengers per year would be delayed.

The NPRM and Regulatory Assessment assume that the average delay for a passenger who misses or is not allowed to board a flight would be 4 hours. The Regulatory Assessment includes a “sensitivity analysis” for average delays up to at most 8 hours. These figures are unsupported and unsupportable: 4 hours is a “best case” delay for a small minority of passengers on some flights on a few of the international routes with the most frequent service at varied times of day and night.

Most international flights operate daily. Some operate less than daily, and only a few more frequently than daily. One of the first things airlines do when they receive permission to coordinate their schedules with other members of a marketing “alliance” is to cancel duplicate flights by alliance members. Few airlines operate international flights to the hub airports of competing airlines or alliances. Direct competition between multiple airlines on international routes is dramatically less common than on domestic routes. When multiple airlines compete on an international route, they typically schedule their flights at around the same time of day or night, making it unlikely (especially so under the proposed rules changes, which will greatly complicate, or in many cases prohibit outright, last-minute accommodation of displaced passengers) for passengers who miss one airline’s flight to make it onto another airlines’ flight on the same route that leaves at almost the same time.

As noted by airlines including Qantas and BMI (British Midland) in their comments on this NPRM, the modal and median delay for a missed international flight is unquestionably 24 hours. In some cases, if the next daily flight is fully booked, the delay could be more than 24 hours. It’s unlikely that the small number of passengers on certain routes who could be accommodated on alternate flights in less than 24 hours would reduce the mean delay to less than 18 hours, which would still require essentially the same per diem costs of accommodation, meals, and incidentals.

Most passengers who are denied last-minute boarding under the proposed rules change will be subjected to an involuntary, unplanned 24-hour layover at an international gateway and connection hub for flights to the USA, such as London, Tokyo, Mexico City, or Toronto.

Per-diem allowances for travel in foreign areas are specified by the U.S. Department of State at <http://www.state.gov/m/a/als/prdm/69965.htm>, including the following figures (in USD) for some of the most common international gateways and hubs for flights to or overflying the USA:

London (including Heathrow Airport): \$480

Paris: \$440

Frankfurt: \$374

Amsterdam: \$350

Narita Airport (Tokyo area, but not Tokyo city): \$271

Hong Kong: \$392

Mexico City: \$285

Toronto: \$311

Montreal: \$340

Vancouver: \$220/290 (seasonal)

These are average figures for all trips, including trips planned in advance. Unplanned layovers in unfamiliar cities, where the traveler may have intended to do no more than change planes, may not have appropriate clothing for the climate, may be unfamiliar with how to find the cheaper accommodations, and will likely find that the less expensive accommodations are already booked in advance and/or require advance reservations for their lowest rates, are likely to be substantially more expensive. We believe that \$500 is a more reasonable estimate of average per diem direct costs for an 18-24 hour layover in the event of being unable to board a planned flight in such a city.

But that's only the *direct* costs to passengers of delay. As we have noted above, last-minute boarders include a large percentage of last-minute ticket purchasers, primarily people with urgent business or urgent family emergencies. An international ticket for same-day travel is typically purchased directly from the airline, or from a travel agent, at the unrestricted full published fare (frequently in business or first class, often because those are the only seats available), and typically costs at least \$1000 more than a ticket for travel even as little as a day later, when there is time to shop around and probably

time to locate a consolidator or ticket for less than full fare, or at least to confirm a full-fare coach seat and not have to pay the business or first-class fare solely because of lack of coach availability.

By buying a ticket at the full walk-up fare, a last-minute passenger has indicated that it is worth at least \$1000 more to them to depart today than to wait until tomorrow, and has directly expressed that valuation in willingness to pay. Absent some reason to believe that travelers are unable properly to value their own time, that must be accepted as an appropriate valuation of the incidental, consequential, and emotional (e.g. in the case of family emergency) value to them of being delayed until the next day.

Accordingly, a reasonable estimate of total direct and consequential costs to last-minute ticket buyers of not being boarded is  $\$500 + \$1000 = \$1500$  per person. Total annual costs to the 1.6 million passengers delayed as a result of the proposed rule would be  $\$1500 \times 1.6 \text{ million} = \$2.4 \text{ billion}$  per year.

Airlines would also suffer costs if they chose this option, including costs of rebooking passengers and rerouting their luggage as well lost revenue from seats assigned to no-shows and left vacant.

The Regulatory Assessment estimates the cost to the airline of rebooking a passenger at \$4.47, but ignores the cost of locating, re-tagging, and rerouting their baggage, which is likely to be an order of magnitude greater than that even if the luggage is successfully re-routed, more if it isn't and has to be delivered to the passenger and/or if the passenger has to return to the airport, after their arrival (and perhaps after continuing on a connecting flight beyond the port of entry), to clear it through customs.

The greatest cost to airlines of this option, however, would be in lost revenue from empty seats of no-shows and reduced passenger load factors.

Even without quantifying the costs to airlines, however, we estimate the costs to passengers of this option as at least \$2.4 billion per year – more each year than the “high” estimate of total costs over 10 years in the Regulatory Assessment and NPRM – or \$24 billion (plus inflation) over 10 years.

Last-minute boarders include a range from non-revenue standby passengers to walk-up purchasers of full-fare coach, business class, and first class tickets. More information from airlines would be needed accurately to estimate the percentage of boarders within 15 minutes before departure, the average fares they have paid, and airlines' total passenger revenues from flights to, from, via, or overflying the USA. But given the huge over-representation of full fare coach, business class, and first class ticket purchasers among last-minute boarders, and the high ratio of full fare and front-cabin fares to advance-purchase coach ticket prices, the estimated 2 percent of passengers who board at the last minute

might represent as much as 5 percent of airline revenues – which would be lost under this option.

Comments should be sought from airlines as to the direct, incidental, and consequential costs of such a revenue reduction, far greater than airlines' profit margins, on flights subject to the proposed rule.

**VII. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT FAIL TO CONSIDER SIGNIFICANT CONSEQUENCES AND COSTS OF COMPLIANCE WITH THE PROPOSED RULES.**

**A. Overflights of U.S. airspace**

In the NPRM (71 FR 40037) , “CBP notes the current APIS regulations providing for electronic transmission of manifest data 60 minutes prior to departure for crew and non-crew on flights to, from, continuing within, and overflying the United States are unchanged”. And the Regulatory Assessment does not include any assessment of costs related to the impact of the proposed rules on overflights of U.S. airspace by flights not traveling to or from the USA.

But, as the NPRM itself acknowledges on the same page, “this rule proposes to revise the definition of ‘departure’ in 19 CFR 122.49a(a) accordingly (which will also be applicable to other APIS aircraft provisions as well: 19 CFR 122.49b, 122.75a, 122.75b).” Those sections apply to all flights that transit U.S. airspace: domestic flights within other countries – mainly within Canada (e.g. Toronto-Vancouver) but also some within Mexico (e.g. Ciudad Juarez-Tijuana) and some between points in other countries, such as within France between Metropolitan France and French Polynesia – as well as international flights between countries other than the USA.

Whatever the time relative to the “departure” of the flight at which any act (such as the termination of boarding or the transmission of APIS data) is now required, changing the definition of departure from “wheels-up” to “push-back” will move that deadline “15 to 25 or more minutes” (according to the NPRM) earlier than under the current rules.

The Regulatory Assessment assumes (page 9) that, “It is unusual for a passenger to fly from London to Miami, then switch planes and fly to Mexico City; the passenger is more likely to take a direct flight from London to Mexico City.” This is unsupported in the Regulatory Assessment, and untrue.

There are few direct flights between Mexico and the U.K., and the vast majority of traffic on such routes goes via the USA in spite of the abolition by the USA of transit without visa (TWOV) and

the imposition of onerous visa and US-VISIT processing requirements for transit passengers. The example in the Regulatory Analysis is particularly inapposite, since even the few direct flights between Mexico City and London overfly U.S. airspace, and would be impacted by the proposed rules change.

There are few direct flights between Canada or Europe and Mexico, the Caribbean, Central America, and South America, and most of those few direct flights overfly U.S. airspace. There are no nonstop flights between anywhere in Asia and anywhere in Mexico, the Caribbean, Central America, and South America. The vast majority of passenger traffic on all these routes either connects in, transits, or overflies the airspace of the USA, and in any of these cases would be impacted by the proposed changes.

Further information from airlines (including, of course, airlines such as Cubana de Aviación that don't fly to or from the USA, but that overfly U.S. airspace) and air traffic control authorities is needed to determine the number of flights and passengers that overfly U.S. airspace between points in other countries, and to incorporate the impacts on those flights and passengers in the Regulatory Assessment.

#### **B. Redirecting baggage of delayed passengers**

As noted earlier in these comments, the NPRM and Regulatory Assessment include an estimate of the cost of re-booking a traveler who is unable to board a flight due to the proposed rule changes, but ignore the typically much greater cost of locating, re-tagging, and rerouting that traveler's checked luggage. Because locating and rerouting baggage is not always possible or reliable, the attempt to do so carries a substantial risk that the bag(s) may arrive at the destination or port of entry separately from the passenger, and have to be stored (if they arrive early), forwarded, or delivered to the passenger (if they arrive late). This is always costly, especially if the passenger is now far from any airport. In the worst case, the passenger may have cleared customs and continued on to a location far from any port of entry, and may have to make a new trip back to a port of entry to clear their delayed bags through customs.

#### **C. Shorter baggage loading time**

Under the current rules, the airline can begin loading bags at any time (subject to potential offloading if the corresponding passenger does not board). Typically, loading of baggage – both for originating and connecting passengers – begins well before the start of passenger boarding. Bags for ticketed connecting passengers may be on board the aircraft before those passengers receive their boarding passes at the boarding gate for the connecting flight.

Under the proposed rule, no bag could be loaded until individualized approval is given by the CBP for the corresponding passenger to board and for their luggage to be loaded. As a result, the time available to the airline for baggage loading would be substantially reduced. This would require more ramp staff for each flight, to load baggage more quickly during the shorter window of time. It would also increase the likelihood of errors in loading bags, and hence the percentage of bags left behind or misdirected, with consequential costs for airlines and passengers alike, as discussed in the preceding section. None of these costs are considered in the NPRM or the Regulatory Assessment.

**D. Incompatibility with other countries' laws**

As discussed earlier in these comments, both the current international APIS rules and the rules proposed in the NPRM are incompatible with current laws in the European Union and with the laws of other countries, including those of significant trade and travel partners of the USA in Latin America which have adapted their privacy and data protection laws from those of Spain and other E.U. countries, including the provisions at issue between the USA and the E.U. with respect to the APIS regulations.

Unless the current and proposed international APIS rules are withdrawn, it is now and will continue to be impossible for any airline to operate flights between the USA and the E.U. without violating the laws or regulations of the USA or of one or more E.U. member states. Enforcement of those rules awaits only complaints on which the relevant authorities will be required to act. The multi-billion dollar per year implications of the resultant cessation of direct flights between the USA and the E.U. should be considered in the Regulatory Assessment and the NPRM, but is ignored.

**E. Reciprocal adoption of similar rules by other countries**

Since the USA cannot reasonably object to the reciprocal imposition by other countries of rules similar to those imposed by the USA, the CBP should take into account, in its consideration of rules such as those in the NPRM, the implications of their adoption by other countries as well as the USA.

Even many domestic flights between points in the USA overfly Canada or Mexico. What would U.S. citizens think if they were required to provide complete identifying personal information to the government of Canada an hour before takeoff, and obtain individual approval from Canada in advance, before they could board a flight between Boston and Chicago scheduled to transit Canadian airspace? What if a flight between San Diego and Houston that files a pre-departure flight plan entirely over the USA were forbidden to modify its course, while en route, to transit Mexican airspace – as is often done

in response to unanticipated weather changes – unless it had obtained conditional Mexican approval for each passenger and crew member an hour before departure?

Many travelers’ greatest and most legitimate fears of persecution concern the governments of countries near those to or from which they are traveling, and perhaps including countries that they will, or might, overfly en route. To what extent will travelers’ exercise of their rights to free movement and assembly – under the U.S. Constitution and international human rights law and treaties – be chilled by the knowledge that their personal information, including their travel details, may be sent to governments of hostile neighbors of the country to or from which they are traveling?

International flights routinely transit the airspace of many more countries, and avoiding doing so may require detours of thousands of miles. Should personal details on all passengers and crew members on each flight between Miami and South America be provided to the government of Cuba an hour before departure, and no passengers be permitted to board until an hour after all passengers and crew have been individually approved by Cuban authorities for transit of Cuban airspace?

Long-haul intercontinental flights and flights over regions of many small countries, such as across the Caribbean or across Europe, routinely transit the airspace of a dozen or more countries. What are the implications of multiplying the cost of dealing with a single country, and instead having to send passenger data to, and receive approval from, each of those countries, before departure?

All of these costs and implications are ignored in the NPRM and Regulatory Assessment.

**F. Misidentified or erroneously “not cleared” would-be travelers**

Based on the most recent audits and reports on current traveler screening systems, most of those would-be travelers who will be denied boarding on the basis of “not cleared” messages will be innocent. The “not cleared” messages ordering carriers not to transport them will be the result of misidentifications by the CBP, the Terrorist Screening Center (TSC), or other sources relied on by them.

The most recent Government Accountability Office audit of watch list screening programs, including those of airline passengers, reported that of inquiries concerning matches with watch lists referred to the Terrorist Screening Center, “about half were misidentifications, according to TSC”:

During the 26-month period we studied—from December 2003 (when the Terrorist Screening Center began operations) to January 2006—the center received tens of thousands of screening-encounter referrals from frontline-screening agencies and determined that approximately half involved misidentified persons with names the same as or similar to someone whose name was contained on the terrorist watch list. The

number of referrals to the Terrorist Screening Center does not constitute the universe of all persons initially misidentified by terrorist watch list screening because the names of many persons initially misidentified are not forwarded to the Terrorist Screening Center.

Government Accountability Office, *Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public*, GAO-06-1031 (September 2006).

Thus, including those misidentified “matches” that were not referred to the TSC, it is likely that the *majority* of persons prevented from traveling by “not cleared” messages will be innocent. (An unknown additional number, impossible to determine from the NPRM, will be denied boarding on the basis of the proposed rule against boarding in the absence of any message from the CBP.)

Further support for the likely predominance of misidentifications is provided by the contents of the “no-fly list” used as part of the basis for screening decisions:

60 Minutes managed to obtain a copy of the No Fly List and without giving away any national secrets, found it to be incomplete, inaccurate, outdated and a source of aggravation for thousand of innocent Americans.... The government won't divulge the criteria it uses in making up the list or even how many names are on it. But last spring, working with a government watchdog group called the National Security News Service, 60 Minutes was able to obtain a copy of the No Fly List from someone in aviation security....

In paper form it is more than 540 pages long. Before 9/11, the government's list of suspected terrorists banned from air travel totaled just 16 names; today there are 44,000. And that doesn't include people the government thinks should be pulled aside for additional security screening. There are another 75,000 people on that list. With Joe Trento of the National Security News Service, 60 Minutes spent months going over the names on the No Fly List. While it is classified as sensitive, even members of Congress have been denied access to it. But that may have less to do with national security than avoiding embarrassment.....

"[Y]ou've got people who are dead on the list. You've got people you know are 80 years old on the list. It makes no sense."

60 Minutes certainly didn't expect to find the names of 14 of the 19 9/11 hijackers on the list since they have been dead for five years. 60 Minutes also found a number of high profile people who aren't likely to turn up at an airline ticket counter any time soon, like convicted terrorist Zacarias Moussaoui, now serving a life sentence in Colorado, and Saddam Hussein, currently on trial for his life in Baghdad.... [S]ome of the names are among the most common in America. Like Gary Smith, John Williams or Robert Johnson.

CBS News, *Unlikely Terrorists On No Fly List: Steve Kroft Reports List Includes President Of Bolivia*,

*Dead 9/11 Hijackers*, “60 Minutes” (October 8, 2006), available at

<<http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624.shtml>>.

Many countries impose strict liability and statutory damages on air carriers for denied boarding. The Regulatory Assessment should have included, but did not, an assessment of the liability of the government and of air and sea carriers, both under U.S. law and the law of other jurisdictions where flights originate and boarding might be denied, for erroneous denial of boarding as a result of misidentification – probably in the majority of cases in which would-be passengers are denied boarding as a result of “not cleared” messages.

**VIII. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT FAIL TO INCLUDE STATUTORILY REQUIRED IMPACT ASSESSMENTS.**

**A. Privacy Act**

The Privacy Act applies to an agency's creation and maintenance of a "system of records," which is defined as a group of records under the control of an agency "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). The proposed collection of detailed travel information concerning United States persons clearly raises serious questions under subsection (e)(7) of the Act. The subsection provides that an agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment, unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7).

Government collection of information detailing the international travel of United States persons would appear to run afoul of that prohibition as it documents the exercise of the right of association, a right protected by the First Amendment. Does INS contend that the creation of a system of records pertaining to United States persons exercising their right of association is exempt from 5 U.S.C. § 552a(e)(7) because it is expressly authorized by statute or is an authorized law enforcement activity?

In addition, the NPRM (71 FR at 40046) claims that:

A Privacy Impact Assessment (PIA) was published in the Federal Register (70 FR 17857) in conjunction with the April 7, 2005, APIS final rule (70 FR 17820). As the changes proposed in this rule do not impact the data collected or the use and storage of the data, and only affect the timing of data transmission, the existing System of Records Notice (SORN) (the Treasury Enforcement Communications System (TECS) published at 66 FR 53029) and the PIA continue to cover the collection, maintenance, and use of APIS data.

This claim in the NPRM that “the changes proposed in this rule do not impact the data collected or the use and storage of the data” is clearly erroneous, for at least two reasons:

First, because APIS data under the current rule is provided only after departure, it is not and cannot be used for making decisions about whether to permit boarding, or to prevent departure from the country of origin of the flight. This use under the proposed rules for boarding and departure decision making is an entirely new use of this data, fundamentally different from the current purely informational use of APIS data, or even its potential use in determining admissibility to the USA of non-citizens.

Second, under the current rules the provision of international APIS data by passengers (or more accurately, by airlines about passengers) is “voluntary” for U.S. citizens. According to the PIA for the current rules (70 FR at 17858), “United States citizens who refuse to provide the information to the air or sea carrier may be subject to action by that particular carrier”, although of course the permissible actions by the carrier would be limited by their obligation as a common carrier to transport all passengers complying with their published tariff of fares and conditions of carriage. (And the terms they could lawfully include in their conditions of carriage would be limited by the U.S. Constitution, including the First Amendment, and by international human rights law embodied in treaties ratified by the USA.) At most, “if the carrier allows the passenger to board without providing the required information, the person will be subject to security checks upon arrival.” Using APIS data to decide before departure whether to allow U.S. citizens to board a flight, to depart from the place and country of origin of the flight, or to be transported by common carrier, is a fundamentally different use than using that data to decide whether to subject a U.S. citizen to additional “security checks on arrival”.

Because the provision of international APIS data was not mandatory for U.S. citizens, and because the data was not to be used to decide whether to permit U.S. citizens to exercise their rights to travel, assembly, and movement, the provisions of the Privacy Act applicable to the collection of data “when the information may be result in adverse determinations about an individual’s rights, benefits, and privileges under Federal programs” (5 USC § 552a(e)(2)) and to records “describing how any individual exercises rights guaranteed by the First Amendment” were not addressed by either the PIA or the SORN for the present rule.

Clearly mandatory airline passenger screening and/or “clearance” by the U.S. government, or by airlines or other third parties acting under compulsion of the government, is a right benefit, or privilege under a Federal program. And clearly APIS data required by the proposed rule describes how individual travelers exercise the right to assemble guaranteed by the First Amendment: when they assemble, where they assemble, by what means of transport they assemble, with whom they assemble, and so forth.

For these reasons, the existing SORN and PIA do not cover the newly mandatory collection (for U.S. citizens) or new uses of APIS data under the proposed rules. Both a new SORN and a new PIA must be completed and published before the proposed new rules are finalized.

#### **B. Regulatory Flexibility Act**

The CBP claims in the NPRM (71 FR at 40045) that, “We have examined the impacts of this proposed rulemaking on small entities as required by the Regulatory Flexibility Act.... We conclude, therefore, that this rule will not have a significant impact on a substantial number of small entities.”

These claims are in error, because the CBP considered only small air carriers as “small entities”. As discussed in detail above, the majority of the costs of the proposed rule would be imposed on airline passengers. A substantial portion of those millions of passengers would be business travelers, and of those a substantial portion would be small business entities and their employees: self-employed independent contractors, sole proprietors, and employees of small businesses.

Further research would be needed to determine the percentage of self-employed independent contractors, sole proprietors, and employees of small business among international travelers and specifically among the last-minute boarders who would be most affected by the proposed rule changes, as well as the impact on them of not being able to board flights at the last minute (or not having their employees be able to board), of the carrier not receiving permission from the CBP for them or their employees to board, or of not being able to predict whether such permission will be given. But the number of such small business entities impacted is clearly “substantial”, and the impact on them “significant”, within the meaning of the Regulatory Flexibility Act. An assessment of the impact of the proposed rules on small entities among travelers and their employers must be completed and published, and an opportunity provided for comment, before any new rules are finalized.

Small businesses including the self-employed would not only be impacted, but disproportionately and negatively impacted by the proposed rule, particularly by the uncertainty as to whether approval for them or their employees to travel would be granted by the CBP. Larger businesses would be more likely to have alternate staff able to travel, or already on site, and able to fulfill a contract, if one employee was not given permission to travel by the CBP. The assessment under the Regulatory Flexibility Act should include, inter alia, an assessment of the degree to which inability to predict whether travel would be permitted would disadvantage small entities, especially self-employed independent contractors and sole proprietors, in bidding on consulting, service, maintenance, or other contracts that might require travel.

## **IX. CONCLUSION AND RECOMMENDATIONS**

The current and proposed international APIS rules should be withdrawn in their entirety, effective as soon as possible, to avoid the cessation of USA-E.U. flights and the statutory and Constitutional violations, inconsistencies with treaty obligations, and economic impacts described in these comments, and to permit U.S. and foreign persons to exercise their Constitutional civil liberties and

internationally recognized human rights to travel, assemble, and move about the world, including to and from the USA and within and between other countries.

For the foregoing reasons, we also submit that if the NPRM is not withdrawn, the additional assessment required by the Regulatory Flexibility Act must be completed and published, and a new comment period must be provided, before any new rules are finalized. The DHS is also required to publish an amended notice of its proposed rulemaking, expressly addressing the matters that the Privacy Act mandates. Compliance with the Act's requirements is particularly critical here, where the agency proposes an unprecedented practice of collecting and maintaining detailed information about the international travel of United States citizens absent particularized suspicion. Upon publication of a revised notice, IDP and the public at large should be provided an opportunity to submit additional comments addressing the Privacy Act and constitutional implications of the proposed rules.

Respectfully submitted,

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