

Before the

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

and the

**BUREAU OF CONSULAR AFFAIRS
DEPARTMENT OF STATE**

Washington, DC 20229

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

USCBP-2006-0097

**COMMENTS OF
THE IDENTITY PROJECT (IDP)**

The Identity Project (IDP)

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

A project of the First Amendment Project

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The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 71 Federal Register 46155-46174 (August 11, 2006), docket number USCBP-2006-0097-0001, and the associated Regulatory Assessment, “The Western Hemisphere Travel Initiative Implemented in the Air and Sea Environments”, docket number USCBP-2006-0097-0002.

Under this NPRM, the Departments of State (Bureau of Consular Affairs) and Homeland Security (Bureau of Customs and Border Protection, CBP) propose two major changes to the requirements for people wishing to enter or leave the U.S., effective January 8, 2007, as follows:

First, the NPRM would rescind the current provisions of 22 C.F.R. § 53.2 (b), “A U.S. citizen is not required to bear a valid passport to enter or depart the United States: ... (b) When traveling between the United States and any country, territory, or island adjacent thereto in North, South or Central America excluding Cuba”. 22 C.F.R. § 53.1(b) is an exception to the general requirement of 22 C.F.R. § 53.1(a), which would be retained, that “It is unlawful for a citizen of the United States ... to enter or depart, or attempt to enter or depart, the United States, without a valid U.S. passport.”

Second, the NPRM would replace the current provisions in 8 C.F.R. § 212.1(a)(1) and (a)(2), repeated at 21 C.F.R. § 41.2 (a) and (b), “A passport is not required except after a visit outside the Western Hemisphere” for citizens and nationals of Canada and the British Overseas Territory of Bermuda with a new requirement without any such exception. The new rules would require that, “a passport is ... required for Canadian citizens [and citizens of Bermuda] arriving in the United States by aircraft or by commercial sea vessels”.

These changes, imposing new requirements for passports for air travel by U.S. and Canadian citizens within the Western Hemisphere and the North American Free Trade Agreement (NAFTA) area, would be contrary to U.S. obligations under international human rights law, free trade agreements, and U.S. statutes, including the International Covenant on Civil and Political Rights (ICCPR), the Charter of the Organization of American States, NAFTA, and the NAFTA Implementation Act.

The regulatory Regulatory Assessment associated with this NPRM fails to consider significant costs, grossly underestimates those costs it does quantify, and fails to quantify the largest costs that the proposed rules would impose on travelers, travel-related businesses, and other businesses (including, and with disproportionate negative effect, small businesses) whose work involves, or might involve, cross-

border travel. Both the NPRM and the Regulatory Assessment fail to include the small business impact assessment required by the Regulatory Flexibility Act.

The Identity Project respectfully requests that the NPRM be withdrawn in its entirety. If the NPRM is not withdrawn, we request that the NPRM be republished together with a revised Regulatory Assessment, taking into consideration the costs identified in these comments, and the additional analysis required by the Regulatory Flexibility Act, and that a new comment period be provided. Further, if the proposed rules are adopted, their adoption should be reported to the United Nations Human Rights Committee, in accordance with the requirements of the ICCPR.

I. ABOUT THE IDENTITY PROJECT

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.

II. THE PROPOSED RULES ARE CONTRARY TO U.S. OBLIGATIONS UNDER INTERNATIONAL TREATIES AND AGREEMENTS AND U.S. STATUTES.

A. The proposed rules are inconsistent with U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR).

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.” Executive Order 13107 on Implementation of Human Rights Treaties, 61 Fed. Reg. 68991, issued by the President on December 10, 1998, provides in Section 1(a) that, “It shall be the policy and practice of the Government of the United States . . . fully to respect and implement its obligations under the international human rights treaties to which is a party, including the ICCPR”, and requires in Section 2(a) that, “All executive departments and agencies . . . shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.” The Departments which promulgated this NPRM are required to

consider in this rulemaking, and to respect and conduct themselves in accordance with, U.S. obligations under international human rights law, specifically including those in the ICCPR – but have not done so.

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.”

The meaning of this section is interpreted in Paragraph 21 of U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, issued under Article 40(4) of the ICCPR, CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999, available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument)>:

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 enter the U.S. by air or sea, the requirement for a U.S. passport in the proposed regulations fails to satisfy this standard, and is contrary to U.S. obligations under the ICCPR.

As applied to citizens of the U.S., Canada, or Bermuda (those for whom the U.S. exit requirements would be altered by the proposed rules) wishing to leave the USA by air or sea, 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, 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.

Since there is no such showing of “necessity” in the NPRM, the proposed rules are flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn.

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*.

The Department of State 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>).

In addition, 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.

Face-to-face assembly between people from the U.S. and Canada, Mexico, and/or Bermuda is impossible without the ability of such people to cross the U.S. border, and in many cases (for example, to and from Bermuda) there is no alternative to air or sea travel. The NPRM would thus condition the exercise of the internationally recognized human right of assembly on the possession of a passport. 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.

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.

Since the passport requirements in the proposed rules would be, for the U.S., one of the “legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners” within the meaning of this paragraph and of the ICCPR, they must be included in the reports by the U.S. pursuant to Article 40 of the ICCPR. Failure to include the rules proposed in this NPRM in those reports would be inconsistent with the U.S. obligations embodied in the ICCPR.

B. The proposed rules are inconsistent with U.S. obligations under the Charter of the Organization of American States.

Article 17 of the Charter of the Organization of American States (OAS), ratified by the U.S. June 15, 1951, available at <<http://www.oas.org/juridico/English/charter.html>>, provides that, “the State shall respect the rights of the individual”. The customary international law of human rights, which defines the rights of the individual protected by this Article, includes the Universal Declaration of Human Rights, adopted with the affirmative vote of the U.S. as United Nations General Assembly Resolution G217 A (III) of 10 December 1948, available at <<http://www.un.org/Overview/rights.html>>.

Article 13 (2) of the Universal Declaration of Human Rights provides, without exception, that, “Everyone has the right to leave any country, including his own, and to return to his country.”

The prohibition in the NPRM on departure from the U.S. by air or sea by citizens of the U.S., Canada, and Bermuda who do not have valid passports of those countries, and the prohibition on entry to the U.S. by air or sea by U.S. citizens who do not have valid U.S. passports, would, on their face, violate Article 13 (2) of the Universal Declaration of Human Rights. Since this is among “the rights of the individual” protected by Article 17 of the Charter of the OAS, these provisions of the proposed rules would be contrary to U.S. obligations under that Article of the Charter of the OAS.

C. The proposed rules are inconsistent with U.S. obligations under the North American Free Trade Agreement (NAFTA) and the NAFTA Implementation Act.

The North American Free Trade Agreement (NAFTA) between the U.S., Mexico, and Canada was signed by the U.S. on December 17, 1992, and was approved by Congress in Section 101 of the North American Free Trade Agreement Implementation Act, Public Law 103-182, available at <<http://www.cbp.gov/nafta/nafta004.htm>>.

NAFTA Chapter 12, "Cross-Border Trade in Services", Article 1202, available at <http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=162#A1202>, provides as follows:

Article 1202: National Treatment

1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.

2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

The proposed rules in the NPRM would impact cross-border trade in services by requiring Canadian- and Mexican-citizen service providers to have passports for on-site visits, meetings, negotiations, or provision of any type of on-site services in the territory of the U.S., while U.S.-citizen service providers would not be required to have passports to provide such on-site services within the U.S. This requirement would be, on its face, contrary to the requirements of Article 1202 of NAFTA, as approved by the NAFTA Implementation Act.

The proposed rules should be withdrawn as contrary to NAFTA. If they are not withdrawn, the Regulatory Assessment should be revised to address the costs of the sanctions that could be imposed on the U.S. for imposing such a passport requirement in violation of NAFTA.

III. THE REGULATORY ASSESSMENT GROSSLY UNDERESTIMATES 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 travelers, travel-related businesses, and other businesses (including in particular, and with disproportionate negative effect, small businesses, especially sole proprietors and self-employed professionals, freelancers, and contractors in all industries and categories of services) whose work involves, or might involve, cross-border travel.

The Regulatory Assessment fails to consider significant direct and indirect costs of compliance with the proposed rules, grossly underestimates those costs it does quantify, and fails to quantify the largest costs that the proposed rules would impose.

A. The Regulatory Assessment grossly underestimates the cost of obtaining a passport.

The Regulatory Assessment omits significant *costs* of obtaining a passport, particularly for the first time, and underestimates how much *time* it takes an applicant to obtain a passport.

The typical process of obtaining a new passport, and our estimates of the costs, are as follows:

1. Research passport application procedures and requirements. (30 minutes)
2. Search home files for prerequisite documentary evidence of citizenship such as a birth certificate or expired passport. (30 minutes if it is kept at home; 1 hour if it is kept in another secure location such as safe deposit box, which is typically accessible only during bankers' hours and requires time off from work)
3. If you don't already have a certified copy of a birth certificate, expired passport, or other acceptable evidence of citizenship (estimated 50% of applicants), research procedures for obtaining a birth certificate or other acceptable documents. (60 minutes, more in some cases if records are difficult to locate)
4. If the vital statistics office doesn't accept personal checks or credit cards (estimated 50% of cases) go to a bank or Post Office and obtain a bank check or money order for fees. (1 hour; average \$5 money order or bank fee)
5. Obtain and fill out request forms for a birth certificate. (45 minutes; average \$20 fee for certified copy of birth certificate)
6. Find and go to a notary if the request for a birth certificate must be notarized. (estimated 75% of cases; 1 hour and average \$20 notary fee)
7. Mail check/money order and application for a birth certificate. (30 minutes; Priority Mail \$8.10 round trip for 3-4 week turnaround, Express Mail \$28.80 round trip for 2 week turnaround from a typical vital records office)
8. Have passport photos taken. (30 minutes, average \$15 cost)
9. Obtain and fill out passport application forms. (45 minutes)

10. Go to a Post Office or other application location and mail application, supporting documents, photos, and check for fees (1 hour, Express Mail \$28.80 round trip)

The total time required is, according to this estimate, an average of 3.5-7 hours per person, plus costs of \$43.80-\$118.20 in addition to the Department of State fees for issuance of the passport.

Using the value of \$28.60/hour in the regulatory assessment, we estimate that the average total cost of obtaining a first-time adult passport is:

\$97 Department of State fee for standard service + (5 hours x \$28.60/hour) + \$81 other costs = \$321

This optimistic scenario is more than twice the “best case” estimate of \$149 for six-week service in the Regulatory Assessment, and more than 65% more than the “worst case” estimate of \$194.

The Paperwork Reduction Act notice in the NPRM estimates the average burden for the respondent of completing passport application forms at 1 hour 25 minutes per person. We believe that this is a severe underestimate, and that the average total time burden is three to four times this amount. Therefore, the Regulatory Assessment should be adjusted to reflect this more realistic estimate of time and these additional costs we have identified.

B. The Regulatory Assessment fails to consider the additional direct and indirect costs of expedited passports.

The Regulatory Assessment considers only two categories of passport processing: (1) passports obtained in six weeks or more by standard mail service, and (2) passports needed in less than six weeks and issued by expedited two-week mail service for an additional fee. But there are actually four categories of urgency of need for passports. The Regulatory Assessment ignores, and fails to consider any of the additional direct or indirect costs of, (3) passports that are needed in less than two weeks and thus must be obtained in person at Passport Agency offices, or (4) passports that are needed in less than 1-4 days (depending on where the applicant lives relative to a Passport Agency, and whether the passport is needed on a weekend or weekday) and thus that cannot be obtained at all in time for the desired trip.

The Regulatory Assessment assumes that 20% of passports would be needed in less than six weeks, and thus would require an additional Department of State fee for expedited service. However, the Regulatory Assessment fails to consider the percentage of passports that would be needed in less than two weeks, and thus could only be obtained quickly enough by the applicant making an appointment, traveling to, and appearing in person at one of the 15 regional Passport Agency offices.

We estimate that half of the passports needed in less than six weeks are needed much sooner, in less than two weeks, and thus would need to be issued in person at Passport Agency offices.

We further estimate that half of those applicants would be able to make a same-trip by car and/or public transport to a Passport Agency office. Their costs, in addition to those listed above, would typically be a full day's lost income (8 hours x \$28.60 = \$228.80) plus transportation costs (transit fares and/or mileage, tolls, and downtown big-city parking) of perhaps \$20-200 depending on location. Assuming an average of \$100 in transportation costs, the total incremental cost for these applicants relatively near Passport Agencies would be \$328.80 more than for two-week expedited service by mail.

The other half the applicants live further from any Passport Agency. Depending on their location, and the time of their appointment at the Passport Agency, some would need to spend one night in the city of the nearest Passport Agency, and some two nights, plus a full day's travel in each direction.

Government estimates of per diem costs of lodging, meals, and incidentals in the expensive big cities where the Passport Agencies are located range from about \$150-300. Assuming an average of \$200 per night, assuming that half of these applicants would only need to stay one night in the city (and lose two full days income) and the other half would have to stay two nights (and lose three days income), and assuming that their transportation costs would average \$500, their incremental costs would average: $(20 \text{ hours} \times \$28.60) + (1.5 \times \$200) + \$500 = \$1372$ more than for two-week expedited service by mail.

With half the rush applicants making an average \$328 same-day trip into the city to a Passport Agency, and half making an average \$1372 overnight trip, the overall average would be \$850 in additional costs per person for less than two-week service, for this 10% of all newly required passports.

A smaller percentage of passport applicants would have to fly to the nearest Passport Agency (with less than 14 days, perhaps less than 7 days, advance purchase, and thus at higher than average fares). By far the greatest burden would be placed on residents of Alaska, which has a long border with Canada and no Passport Agency. All Alaskan residents needing to fly to Canada on short notice would first have to fly at least as far as Seattle for a day to get passports. At a minimum, if the proposed rules are adopted, a new Passport Agency should be opened in Alaska. But that will only slightly mitigate the disproportionate burden of the proposed rules on Alaskans, given the distances and the costs of airfare from points throughout the state, including those near the Canadian border, to Anchorage or whatever single location in Alaska might be chosen for a Passport Agency.

Some percentage of passports would be needed too quickly to be obtained in person at a Passport Agency. Getting a rush passport at a Passport Agency is, at best, an all-day affair, and is possible only on a weekday. Even if you live in a city with a Passport Agency, if you find out on Friday afternoon that you need to take a trip that will require a passport, you probably can't have your passport in hand until Monday afternoon, three days later, at the earliest. If you live far from any Passport Agency, and/or you suddenly need to travel around a holiday, the time to obtain a passport could stretch to four days.

In some additional percentage of cases, would-be travelers would be unable to obtain a passport in time for a desired trip, even on a weekday and even if they live near a Passport Agency, because they don't have, and could not obtain quickly enough, the prerequisite documents (such as a certified copy of a birth certificate) needed to obtain a passport. Many documents that would be sufficient, particularly in an emergency, for travel to and from Canada and/or Mexico, would not be sufficient to obtain a passport.

Turnaround time for obtaining documents by mail from a vital records office, even by Express Mail, can be two weeks or more. So a substantial percentage of trips currently taken on less than two weeks notice would have to be cancelled because of the impossibility of obtaining a passport in time.

What types of international trips are taken on such short notice? Last-minute international trips are rarely pure pleasure jaunts. Usually they are either trips to visit friends and relatives ("VFR" travel), typically because of family or personal emergencies, or unexpected urgent business trips.

What they have in common is that they are important trips, and that the costs of not taking them – emotional and/or economic – are typically high. Some of these costs are hard to quantify: How much is it worth to see a dying relative for a last time? Not being able to take a business trip, or having to postpone it by several days, may rule out some business opportunities entirely, as discussed further below in relation to the effect of the proposed rules on small business entities. But for present purposes, we estimate the average opportunity cost and other damages to the traveler of a trip that would have been taken on such short notice that there isn't time to get a passport (less than 1-4 days) as \$2,000.

Similar costs for each of these four categories of urgency should be calculated for rush passports for would-be inbound travelers to the U.S. from Canada, Mexico, and Bermuda, and the Regulatory Assessment should be revised accordingly, both for inbound and outbound travel.

In addition to revising the estimates of direct costs in the Regulatory Assessment, the calculations of indirect impacts in reduced travel both from and to the U.S. should be revised, using the

estimated travel demand elasticity curves in the Regulatory Assessment and these revised and substantially higher costs for each of the categories of urgency of passport issuance.

C. The Regulatory Assessment grossly underestimates the number of people who would need passports for possible cross-border air travel within the NAFTA area.

The Regulatory Assessment erroneously equates the number of passports that would be needed with the number of people who actually travel by air and don't currently have passports. But the need for a passport is a function of the need for *preparedness and availability* for travel, not just of the need for, or actual frequency of, travel itself. A passport would be needed not merely in order to travel by air between the U.S., Canada, and Mexico, but in order to be *able and available to travel by air on short notice*, should travel be required. We estimate that at least five times as many people would need to obtain passports if the proposed rules are adopted than actually take trips that would require passports.

Many passports are never used, but are needed: people obtain them in order to be able to travel whenever it might be necessary. Some people obtain passports to be able to take international pleasure trips, but never take such a trip. Much larger numbers obtain passports in order to be prepared for possible short-notice international business travel, or possible short-notice travel to attend to family or personal matters across the border. They may need to have these passports, as an employment condition or business necessity as a sole proprietor or self-employed person, even if they never use them.

The proposed rules in the NPRM would extend this pattern – already evident with intercontinental travel – to travel within the NAFTA area between the U.S., Mexico, and Canada.

Under the proposed rules, many people who normally travel across the U.S.-Canada and/or U.S.-Mexico border by land would also need passports, in case they ever need to travel by air on shorter notice, when business, family, or personal needs don't allow time for land travel. So the appropriate question is not how many people would need passports to travel, but how many people would need passports to be *able* to travel, particularly by air at short notice.

For example, if a U.S. firm supplies manufacturing equipment to a customer who uses it in a facility in Mexico, there may be ten or more employees each of whom has unique expertise with respect to some aspect of the equipment. In the event of a failure or malfunction involving that component, any one of those ten employees might need to make a site visit, on short notice (failure of the equipment might shut down production at the customer's site) to diagnose and repair it. There might never be such

a failure, and none of them might ever be required to make such a trip. Or a single component might fail, and the one employee with knowledge of that particular component might have to make a field service trip. But in order to offer the customer a contract for on-site service within 72 hours, should it be needed, the U.S. firm would have to obtain passports for all ten of those employees.

Similarly, a self-employed freelancer would need to have a passport and be available for travel to Canada or Mexico in order to offer cross-border services and bid on work involving cross-border clients or that might require cross-border travel, even if they don't actually obtain any such cross-border contracts, or those contracts don't turn out to require cross-border travel.

Moreover, a person who normally visits their relatives in Mexico by bus, or in Canada by car, may need to get a passport in order to be able to get to their family more quickly by air in the event of a medical or other emergency. Only a fraction of such people may ever have to make such a trip, but their need for a passport for preparedness and peace of mind is real and substantial. People obtaining passports in preparation for possible air travel in the event of a personal or family emergency – including a substantial percentage of all those in the U.S. with relatives in Mexico or Canada and who don't already have U.S. passports – might be the one of the two largest categories of people (along with Canadian tourists and shoppers) required to obtain passports as a result of the proposed rules.

Again, we estimate that at least five times as many potential VFR and business travelers need to be prepared for possible cross-border U.S.-Canada and/or U.S.-Mexico travel by air on short notice as actually take such trips, and would need to obtain passports if the proposed rules are adopted. The cost estimates in the Regulatory Assessment for new passports needed by VFR and business travelers should be increased by a factor of at least five. Further investigation would be needed to determine if the actual multiple would be still greater.

D. The Regulatory Assessment underestimates the numbers of travelers who would need passports for travel between the U.S. and countries outside the NAFTA area.

The Regulatory Assessment erroneously assumes that because “Most countries in the Western Hemisphere require a valid passport for entry; thus, travelers to these countries already carry a passport and will not be affected by the new requirements for entry into the United States.” There are at least three errors in this assumption, and the conclusion drawn from it in the Regulatory Assessment:

First, the fact that travelers to and/or from those countries are required by their governments to have a *passport* (if they enter or leave as U.S. citizens) does not mean that they are required to have a *U.S. passport*. A substantial percentage of travelers between the U.S. and many countries in the Western Hemisphere are dual or multiple citizens, and/or were born outside the U.S.

For example, a dual citizen of the U.S. and Brazil may, and probably does, enter and leave Brazil using a Brazilian passport, to avoid the cost and hassle of visa and entry requirements to for those using U.S. passports, which are reciprocal with those imposed on those using Brazilian passports to enter the U.S. For the same reasons, they probably enter and leave the U.S. as a U.S. citizen, not a Brazilian citizen, using any evidence of U.S. citizenship (such as a certificate of birth in the U.S. or to a U.S. parent) acceptable by the U.S. for travel within the Western Hemisphere. Currently, therefore, they can travel back and forth freely between the U.S. and Brazil, either directly or via other Western Hemisphere countries, without having a U.S. passport. That would be changed by the proposed rules.

The Regulatory Assessment fails to assess the number of dual and multiple citizens who would be required by the proposed rules to get new U.S. passports for Western Hemisphere travel.

Second, other countries' laws requiring passports, like those of the U.S., have a variety of exceptions for categories of travelers and circumstances of travel in which passports are not required. The Regulatory Assessment fails to assess how many travelers between the U.S. and any of these Western Hemisphere countries currently qualify for these exceptions, and travel without passports.

Third, a child born abroad to a U.S. parent, or adopted abroad by a U.S. parent, is entitled to U.S. citizenship. But since they never "entered" the country of their birth by crossing a border, there is no requirement for them to have had a passport from any country in order to be born there. They may or may not need a passport from the country of their birth, depending on the laws of that country, in order to leave that country. But they don't need a U.S. passport to leave the country of their birth, even if that country would require a U.S. passport for them to enter as a U.S. citizen. Nor do they currently need a U.S. passport to enter the U.S. from any country in the Western Hemisphere. That would be changed by the proposed rules: U.S. citizens born or adopted abroad would need to obtain U.S. passports before being allowed to enter the U.S., the country of their citizenship, for the first time.

The Regulatory Assessment fails to assess the numbers of U.S. citizens born or adopted abroad in countries within the Western Hemisphere that generally require passports for entry by U.S. citizens.

All of these three categories of omissions from the Regulatory Assessment are especially significant because from most of the Western Hemisphere countries impacted by the proposed rules, but erroneously dismissed as ones to and from which all travelers already need U.S. passports, there is no option of land travel as there is for the countries within the NAFTA area. There is no road across the Darien Gap. A prohibition on air and sea travel between the U.S. and any country in South America is a prohibition on all travel by all publicly available means, and is thus subject to a higher standard of justification – not yet met in this rulemaking – than a restriction on only some means of travel.

E. The Regulatory Assessment underestimates the effect of the proposed rules on travel to the U.S. from within the NAFTA area.

The Regulatory Assessment erroneously assumes that the proposed rules will affect tourist and shopping travel to the U.S. from other countries, particularly those in the NAFTA area (Canada and Mexico), solely by adding the cost of obtaining a passport to the other costs of such a visit. But, as tourism researchers have long recognized, travel and tourism demand is determined at least as much, usually more, by perceived attractiveness or unattractiveness of the destination as by the cost of travel. If things were as the Regulatory Assessment assumes them to be, the world's cheapest destinations would be the most popular and most visited. In fact, it's just the reverse: the most popular (i.e. perceived to be attractive) destinations are typically both the most visited and the most expensive.

The proposed rules would directly affect the perceived attractiveness or unattractiveness of the U.S. as a destination, especially for potential visitors from Canada, Mexico, and Bermuda newly affected by its requirements. It's irrelevant whether that is the intent of the proposed rules, and it's largely irrelevant, particularly at first, whether the proposed rules actually affect the travel experience (except, of course, to the extent that preparing for the trip, to which would be added the bureaucratic nuisance of obtaining a passport, is a part of the total experience, and is considered in choosing destinations).

Decisions of whether and to what country to travel are made in advance, on the basis of perceptions. There can be no serious doubt that the proposed rules have been widely reported in Canada and Mexico, and that they are widely perceived by the public in Canada and Mexico – again, regardless of their intent or effect – as unfriendly, unwelcoming, and indicative of a generally less attractive experience, relative to the past, that foreigners can expect as visitors to the U.S.

The Regulatory Assessment fails to assess the extent of this perception and its likely direct effect on the attractiveness of the U.S. as a destination for Canadian, Mexican, and Bermudan visitors, the degree to which they want (and are willing to jump the new documentary hurdles) to visit the U.S., and the expected visitor numbers, frequency of visits, duration of visits, and visitor spending.

We believe that, taking this factor into account, the prediction in the Regulatory Assessment of only a 1% reduction in visitors and spending by Canadians and Mexicans as a result of the proposed rules grossly underestimates the negative economic impact of the proposed rules on travel to the U.S. Further research would be required, but it should include an assessment of the reduction in demand for travel to the U.S. due to the imposition of the passport requirement, and extrapolation from the impact on visitor numbers between the U.S. and other countries of changes in whether a visa is required (typically at least an order of magnitude greater change than the 1% estimate in the NPRM).

IV. THE NPRM AND REGULATORY ASSESSMENT FAIL TO INCLUDE THE ASSESSMENT REQUIRED BY THE REGULATORY FLEXIBILITY ACT.

According to the NPRM (71 Fed. Reg. 46155, 46170-46171):

We do not believe that small entities are subject to the requirements of the proposed rule; individuals are subject to the requirements, and individuals are not considered small entities. . . . Because this rule does not directly regulate small entities, we do not believe that this rule has a significant economic impact on a substantial number of small entities. However, we welcome comments on that assumption. The most helpful comments are those that can provide specific information or examples of a direct impact on small entities.

The error in this analysis in the NPRM is the implicit and unwarranted assumption that, because individuals are not necessarily small business entities *per se*, individuals can never be small business “entities” as that term is defined for purposes of the Regulatory Flexibility Act.

A large and growing number of individual U.S. citizens: (a) are sole proprietors or self-employed professionals, freelancers, or contractors; (b) are small business “entities” as that term is defined for purposes of the Regulatory Flexibility Act; (c) engage in or seek to engage in cross-border trade in goods or services within the NAFTA area, or business activities that involve cross-border business travel for meetings or negotiations; and thus (d) would be directly affected by the proposed new passport requirement for cross-border business-related air travel within the NAFTA area.

Nothing in the language of the regulatory Flexibility Act, or the definitions incorporated in it by reference, excludes individuals if they otherwise satisfy the definition of small business entities.

Other small businesses that would need to obtain passports for their employees' cross-border air travel within the NAFTA area would also be directly affected by the proposed rules. As was intended, NAFTA has greatly increased the numbers of small businesses, including sole proprietorships and self-employed individuals, involved in cross-border business activities. For example:

- A freelance graphic artist in the U.S., bidding on a contract to design an annual report that may require on-site approval of proofs during the press run, and which is to be printed in Canada or Mexico (or for which the client has not yet sourced the printing, and wants to allow for the possibility of entertaining bids, on an equal basis, from printers with facilities throughout the NAFTA area), would be required to obtain a U.S. passport in order to bid on the job and assure the potential client that they would be able to provide the potentially required on-site services in Canada or Mexico.
- A self-employed provider of business training services in the U.S. would be required to obtain a U.S. passport in order to compete for contracts as a provider of on-site services in Mexico or Canada.
- A sole proprietor soliciting bids for fabrication or assembly of a new product, but who might need to be able to inspect questionable bidders' facilities for quality control purposes, would be required to obtain a U.S. passport in order to be able to entertain bids from throughout the NAFTA area.
- A small business producing software which might require field support would have to obtain U.S. passports for each of its U.S.-citizen employees who might be required to perform such on-site services, in order to offer potential customers a support contract valid throughout the NAFTA area.

All of these are examples, as were solicited in the NPRM, of small entities that would incur direct costs as a result of the proposed rules. Further research would be needed to determine the percentage of self-employed independent contractors, sole proprietors, and employees of small business among cross-border air travelers within the NAFTA area and among those whose business requires them to be able and available for such travel at short notice, should it be required. 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 sole proprietors and the self-employed would not only be impacted, but disproportionately and negatively impacted, by the proposed rule. Larger businesses would be more likely than smaller businesses to have alternate staff who already have passports, or who are based on the other side of the border, and able to fulfill a contract, if one employee doesn't have a U.S. passport.

The cost of a passport or passports for certain employees may not be "significant" for a large business, but could be significant for small entities, especially sole proprietors or self-employed business people, as an initial cost barrier to entry (or even attempted entry) into NAFTA-area cross-border trade in services or goods. This is precisely the sort of barrier to cross-border trade that NAFTA was intended to forbid. NAFTA should be leading to the elimination of passport requirements for travel within the NAFTA area, as has happened within the Schengen zone, not the imposition of new passport requirements for travel within the NAFTA area by citizens of NAFTA signatory countries.

V. CONCLUSION AND RECOMMENDATIONS

The NPRM should be withdrawn. If the NPRM is not withdrawn, the Regulatory Assessment should be revised and republished to incorporate the additional costs identified in these comments, the assessment required by the Regulatory Flexibility Act should be completed and published, and a new comment period should be provided, before any new rules are finalized. And if the proposed rules are adopted, their adoption should be reported to the Human Rights Committee of the United Nations, in accordance with the requirements of the International Covenant on Civil and Political Rights.

Respectfully submitted,

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