

CRS Report for Congress

The REAL ID Act of 2005: Legal, Regulatory, and Implementation Issues

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Summary

In 2005, Congress addressed the issue of national standards for drivers' licenses and personal identification cards by passing The REAL ID Act of 2005 (REAL ID). The act contains a number of provisions relating to improved security for drivers' licenses and personal identification cards, as well as instructions for states that do not comply with its provisions. In general, while REAL ID does not directly impose federal standards with respect to states' issuance of drivers' licenses and personal identification cards, states nevertheless appear compelled to adopt such standards and modify any conflicting laws or regulations to continue to have such documents recognized by federal agencies for official purposes.

Both at the time that REAL ID was debated in Congress, and during the regulatory comment period, questions about the constitutionality of the statute have been raised. There have been four main constitutional arguments made against REAL ID. First, because REAL ID cannot be premised on Congress's power to regulate interstate commerce, it is a violation of states' rights as protected by the Tenth Amendment. Second, the requirement that REAL IDs be used to board federally regulated aircraft impermissibly encroaches on citizens' right to travel. Third, specific requirements such as the digital photograph potentially violate the Free Exercise Clause of the First Amendment. Finally, REAL ID infringes upon a citizen's right under the First Amendment to freely assemble, associate, and petition the government.

Since its adoption in 2005, REAL ID has been a highly contested issue among state legislatures and governors. According to some advocacy groups, state and federal elected officials — including numerous commentators to the proposed regulations — and other interested parties, REAL ID imposes an unconstitutional “unfunded mandate” on the states. Prior to the publication of the proposed rule in 2007, however, there was little activity at the state-lawmaking level, primarily because officials were uncertain as to precisely what the implementation requirements were going to necessitate, either in terms of cost or potential changes to state law. Since the publication of the proposed rule in 2007, there has been a dramatic increase in state responses to REAL ID and its requirements.

The final regulations were promulgated by the Department of Homeland Security (DHS) on January 29, 2008, and contain 280 pages of explanation as well as responses to over 21,000 comments. This report contains a summary description and analysis of several of the major elements of the REAL ID regulations.

Finally, this report will address REAL ID in relationship to other federal laws and identification programs. This report will be updated as events warrant.

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History and Background

Prior to the passage of the Intelligence Reform and Terrorism Prevention Act of 2004,¹ standards with respect to drivers' licenses and personal identification cards were determined on a state-by-state basis with no national standards in place. In fact, prior to September 11, 2001, legislation aimed at discouraging national standards for identification documents had gained bipartisan support and was thought likely to pass.

Congressional action regarding national standards for state-issued identification documents before September 11, 2001, had proved to be highly controversial. For example, § 656 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996² provided federal standards for state drivers' licenses and birth certificates when used as identification-related documents for federal purposes. Under this provision, a state had two choices. The state could require that each of its licenses include the licensee's Social Security number in machine-readable or visually readable form. Alternatively, a state could more minimally require that each applicant submit the applicant's Social Security number and verify the legitimacy of that number with the Social Security Administration. The section became subject to widespread public criticism shortly after its enactment with opponents most frequently alleging that it could be construed as a step toward a national identification card system. In response, Congress prohibited funding to implement regulations aimed at assisting the states to adopt the Social Security number requirements, and the underlying requirement itself was subsequently repealed in § 355 of the Department of Transportation and Related Agencies Appropriations Act 2000.³

After the events of September 11, 2001, the prevailing view of national standards for so-called "breeder documents," which includes, but is not limited to, drivers' licenses and personal identification cards, changed. Specifically, the final report of The National Commission on Terrorist Attacks Upon the United States (9/11 Commission) recommended that "the federal government should set standards for the issuance of birth certificates, and sources of identification, such as drivers'

¹ Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 §§ 7211-7214, 118 Stat. 3638 (2004) [hereinafter IRTPA].

² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208 § 656, Division C, 118 Stat. 3638 (1996).

³ Department of Transportation and Related Agencies Appropriations Act, 2000, P.L. 106-69 § 355, 113 Stat. 986 (2000).

licenses.”⁴ Responding to this recommendation, in 2004 Congress enacted The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). This act delegated authority to the Secretary of Transportation, in consultation with the Secretary of Homeland Security, empowering them to issue regulations with respect to minimum standards for federal acceptance of drivers’ licenses and personal identification cards.⁵

Pursuant to the IRTPA, the Secretary was required to issue regulations within 18 months of enactment requiring that each driver’s license or identification card, to be accepted for any official purpose by a federal agency, include the individual’s (1) full legal name, (2) date of birth, (3) gender, (4) driver’s license or identification card number, (5) digital photograph, (6) address, and (7) signature.⁶ In addition, the cards were required to contain physical security features designed to prevent tampering, counterfeiting, or duplication for fraudulent purposes; as well as a common machine-readable technology with defined minimum elements.⁷ Moreover, states were required, pursuant to implementing regulations, to confiscate a driver’s license or personal identification card if any of the above security components were compromised.⁸

The statute also required that the implementing regulations address how drivers’ licenses and identification cards were issued by the states. Specifically, the regulations were required to include minimum standards for the documentation required by the applicant, the procedures utilized for verifying the documents used, and the standards for processing the applications.⁹ The regulations were, however, prohibited from not only infringing upon the “State’s power to set criteria concerning what categories of individuals are eligible to obtain a driver’s license or personal identification card from that State,”¹⁰ but also from requiring a state to take an action that “conflicts with or otherwise interferes with the full enforcement of state criteria concerning the categories of individuals that were eligible to obtain a driver’s license or personal identification card.”¹¹ In other words, it appeared that if a state granted a certain category of individuals (i.e., aliens, legal or illegal) permission to obtain a license, nothing in the implementing regulations was to infringe upon that state’s decision or its ability to enforce that decision. In addition, the regulations were not

⁴ THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES, 390 (2004).

⁵ See IRTPA, *supra* note 1 at § 7212.

⁶ *Id.* at § 7212(b)(2)(D)(i)-(vii).

⁷ *Id.* at § 7212(b)(2)(E)-(F).

⁸ *Id.* at § 7212(b)(2)(G).

⁹ *Id.* at § 7212(b)(2)(A)-(C).

¹⁰ *Id.* at § 7212(b)(3)(B).

¹¹ *Id.* at § 7212(b)(3)(C).

to require a single uniform design, and were required to include procedures designed to protect the privacy rights of individual applicants.¹²

Finally, the law required the use of negotiated rulemaking pursuant to the Administrative Procedure Act.¹³ This process was designed to bring together agency representatives and concerned interest groups to negotiate the text of a proposed rule. The rulemaking committee was required to include representatives from (1) state and local offices that issue drivers' licenses and/or personal identification cards, (2) state elected officials, (3) Department of Homeland Security, and (4) interested parties.¹⁴

In 2005, Congress again addressed the issue of national standards for drivers' licenses and personal identification cards by passing The REAL ID Act of 2005 (REAL ID).¹⁵ REAL ID contains a number of provisions relating to improved security for drivers' licenses and personal identification cards, as well as instructions for states that do not comply with its provisions. In addition, REAL ID repealed certain overlapping and potentially conflicting provisions of the IRTPA.

Statutory Provisions and Requirements of REAL ID

In general, although REAL ID does not directly impose federal standards with respect to states' issuance of drivers' licenses and personal identification cards, states nevertheless appear to need to adopt such standards and modify any conflicting laws or regulations to continue to have such documents recognized by federal agencies for official purposes.

REAL ID contains a statutory definition of the phrase "official purpose." For purposes of the act, an "official purpose" is defined as including, but not limited to, "accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary [of Homeland Security] shall determine." In addition, REAL ID contains a provision that specifically repealed § 7212 of the IRTPA, which had contained the preexisting law with respect to national standards for drivers' licenses and personal identification cards.

Minimum Issuance Standards. Section 202(c) of REAL ID establishes minimum issuance standards for federal recognition requiring that before a state can issue a driver's license or photo identification card, a state will have to verify with the issuing agency, the issuance, validity, and completeness of (1) a photo identification document or a non-photo document containing both the individual's full legal name and date of birth, (2) date of birth, (3) proof of a Social Security number (SSN) or verification of the individual's ineligibility for an SSN, and (4)

¹² *Id.* at § 7212(b)(3)(D)-(E).

¹³ See Negotiated Rulemaking Act of 1990, P.L. 101-648, 104 Stat. 4970 (1990) (codified as amended at 5 U.S.C. §§ 581 *et seq.*).

¹⁴ See IRTPA, *supra* note 1 at § 7212(b)(4)(A)-(B).

¹⁵ See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, P.L. 109-13, §§ 201-207, 119 Stat. 231, 312-16 (2005).

name and address of the individual's principal residence. To the extent that information verification requirements previously existed, they were a function of state law and varied from state to state. This REAL ID provision appears to preempt any state verification standards and replace them with the new federal standards as established by this statutory language.

Evidence of Legal Status. Section 202(c)(2)(B) of REAL ID appears to require states to verify an applicant's legal status in the United States before issuing a driver's license or personal identification card. Previously, the categories of persons eligible for drivers' licenses were determined on a state-by-state basis. As indicated above, the IRTPA specifically prevented the Secretary of Transportation from enacting regulations that would interfere with this authority. This section of REAL ID appears to preempt any state law requirements and seems to require the states to verify the legal status of the applicant.

Temporary Drivers' Licenses and Identification Cards. Section 202(c)(2)(C) of REAL ID establishes a system of temporary licenses and identification cards that can be issued by the states to applicants who can present evidence that they fall into one of six categories.¹⁶ Under REAL ID, a state may only issue a temporary driver's license or identification card with an expiration date equal to the period of time of the applicant's authorized stay in the United States. If there is an indefinite end to the period of authorized stay, the card's expiration date is one year. The temporary card must clearly indicate that it is temporary and state its expiration date. Renewals of the temporary cards are to be done only upon presentation of valid documentary evidence that the status had been extended by the Secretary of Homeland Security. If such provisions existed prior to the enactment of REAL ID, they existed as a function of state law and are preempted by the act.

Other Requirements. Pursuant to § 202(d) of REAL ID, states are required to adopt procedures and practices to (1) employ technology to capture digital images of identity source documents, (2) retain paper copies of source documents for a minimum of seven years or images of source documents presented for a minimum of 10 years, (3) subject each applicant to a mandatory facial image capture, (4) establish an effective procedure to confirm or verify a renewing applicant's information, (5) confirm with the Social Security Administration an SSN presented by a person using the full Social Security account number,¹⁷ (6) refuse issuance of

¹⁶ According to REAL ID, persons are only eligible for temporary drivers' licenses or identification cards if evidence is presented that they (1) have a valid, unexpired non-immigrant visa or non-immigrant visa status for entry into the United States; (2) have a pending or approved application for asylum in the United States; (3) have entered into the United States in refugee status; (4) have a pending or approved application for temporary protected status in the United States; (5) have approved deferred action status; or (6) have a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

¹⁷ In the event that an SSN is already registered to or associated with another person to whom any state has issued a driver's license or identification card, the state is required to resolve the discrepancy and take appropriate action.

a driver's license or identification card to a person holding a driver's license issued by another state without confirmation that the person is terminating or has terminated the driver's license, (7) ensure the physical security of locations where cards are produced and the security of document materials and papers from which drivers' licenses and identification cards are produced, (8) subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements, (9) establish fraudulent document recognition training programs for appropriate employees engaged in the issuance of drivers' licenses and identification cards, and (10) limit the length of time a drivers' license or personal identification card is valid to eight years.

In addition to these requirements, REAL ID contains language requiring that states, if they elect to issue a drivers' license or personal identification card that does not conform to the requirements of this act, be required to use a unique color identifier or design to alert officials that the document is not to be accepted for any official purpose. Moreover, the states are required to clearly state on the face of the document that it is not to be accepted for federal identification or for any official purpose. Further, the enacted version of REAL ID includes a provision requiring the states to maintain a motor vehicle database that, at a minimum, contains all data fields printed on the drivers' license or identification card and all motor vehicle driver histories, including violations, suspensions, or "points." Finally, the act requires the states to provide electronic access to their databases to all other states. To the extent that any of these requirements previously existed, they did so as a function of state law. Thus, it appears that the state laws are preempted in favor of the new federal standards.

Trafficking in Authentication Features for Use in False Identification Documents. Section 203 of REAL ID amends 18 U.S.C. § 1028(a)(8), which makes it a federal crime either to actually, or with intent, transport or transfer identification authentication features¹⁸ that are used on a document of the type intended or commonly presented for identification purposes. By replacing the phrase "false identification features" with "false or actual authentication features," this provision appears to broaden the scope of the criminal provision, making it a crime to traffic in identification features regardless of whether the feature is false. In addition, Section 203 requires that the Secretary of Homeland Security enter into the appropriate aviation-screening database the personal information of anyone convicted of using a false drivers' license at an airport.

Additional Provisions. Section 204 of REAL ID authorizes the Secretary of Homeland Security to make grants to the states, for the purpose of assisting them in conforming to the new national standards. The section also contains the necessary language authorizing the appropriation of federal funds for the grant program.

In addition, § 205 provides the Secretary of Homeland Security with the statutory authority to promulgate regulations, set standards, and issue grants. The Secretary is required by the statute to consult with both the Secretary of

¹⁸ These include, but are not limited to, holograms, watermarks, symbols, codes, images, or sequences. *See* 18 U.S.C. § 1028(d)(1) (2000).

Transportation as well as with the states when acting pursuant to this authority. Moreover, the Secretary is authorized to extend the three-year deadline contained in Section 202(a)(1) for any state on the condition that the state provide an adequate justification for their non-compliance.

Promulgation of Regulations. The Department of Homeland Security (DHS) published a Notice of Proposed Rulemaking (NPRM) for REAL ID on March 3, 2007.¹⁹ The NPRM proposed requirements to meet the minimum standards required under the act. The proposed requirements included, *inter alia*, proposed requirements regarding the information and security features that must be incorporated into each card, proposed application information that must be presented to establish the identity and immigration status of an applicant before a card can be issued, and proposed physical security standards for state facilities where drivers' licenses and personal identification cards are produced. In response, DHS received over 21,000 comments to the NPRM during the 60-day public comment period. The final regulations were promulgated by DHS nine months later on January 29, 2008.²⁰

Constitutional Questions

Both at the time that REAL ID was debated in Congress, and during the regulatory comment period, questions about the constitutionality of the statute were raised. There have been four main constitutional arguments made against REAL ID. First, because REAL ID cannot be premised on Congress's power to regulate interstate commerce, it is a violation of states' rights as protected by the Tenth Amendment. Second, the requirement that REAL IDs be used to board federally regulated aircraft impermissibly encroaches on citizen's right to travel. Third, specific requirements such as the digital photograph potentially violate the Free Exercise Clause of the First Amendment. Finally, REAL ID infringes upon a citizen's right under the First Amendment to freely assemble, associate, and petition the government.

Tenth Amendment. Although Congress's power to regulate matters affecting interstate commerce is broad, it is not unlimited and, in recent years, has been constrained by the Court's interpretation of the Tenth Amendment.²¹ Such an interpretation appears to be derived from the Tenth Amendment's protection of state sovereignty, which the Supreme Court has invoked as a limit on Congress's Article I domestic powers. Starting with its decision in *Garcia v. San Antonio Metropolitan Transit Authority*²² — which held that most disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions, and that the states should look for relief from federal regulation through

¹⁹ See 72 Fed. Reg. 10820 (Mar. 3, 2007).

²⁰ 73 Fed. Reg. 5272 (Jan. 29, 2008).

²¹ The Tenth Amendment states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST. Amend. X.

²² 469 U.S. 528 (1985).

the political process²³ — the Court appears to be willing to use the Tenth Amendment to protect the sovereign interests of the states. Immediately after *Garcia*, however, it appeared that the only way to show a Tenth Amendment violation was to demonstrate that there had been a breakdown in the national political process that thwarted the ordinary procedural safeguards inherent in the federal system.²⁴ Several years later in *New York v. United States*,²⁵ which involved the “take title” provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985,²⁶ the Court held that the federal statute at issue effectively commandeered the state lawmaking process because regardless of which option the state chose, “the Act ... compelled them to enact and enforce a federal regulatory program.”²⁷ In reaching this conclusion, the Court held that essential to the concept of state sovereignty is control over the states’ legislative process, which was diminished by the imposition of a federal mandate.²⁸ In addition, the Court held that the “take title” provision threatened state sovereignty because it had the potential to cause confusion among citizens as to which government officials, state or federal, were responsible for particular actions.²⁹ Finally, the Court made clear that the “States are not mere political subdivisions of the United States,” and concluded that commandeering their legislative process treats them as such.³⁰

Building on its holding in *New York*, the Court in *Printz v. United States*³¹ extended the anti-commandeering principle to include not only a state’s legislative process, but also a state’s executive functions, including its enforcement of the law. At issue in *Printz* were specific requirements of the Brady Handgun Violence Prevention Act, which required state and local officials to, *inter alia*, execute federal background checks on potential handgun purchasers.³² The Court, in holding the Brady provisions unconstitutional, also focused on the importance of state sovereignty stating that “[i]t is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere

²³ See *id.* at 552 (stating that limitations on congressional power to limit the states are “more properly protected by procedural safeguards than by judicially created limitations on federal power.”); see also *South Carolina v. Baker*, 485 U.S. 505 (1988).

²⁴ See *Baker*, 485 U.S. at 512-13 (holding that “[w]here ... the national political process did not operate in a defective manner, the Tenth Amendment is not implicated”).

²⁵ 505 U.S. 144 (1992).

²⁶ *Id.* at 505 U.S. at 175. According to the Court, the “take title” provisions “offer[ed] state governments a choice of either accepting ownership of waste or regulating according to the instructions of Congress.” *Id.*

²⁷ *Id.* at 176

²⁸ *Id.* at 188.

²⁹ *Id.* at 168-69.

³⁰ *Id.* at 188.

³¹ 521 U.S. 898 (1997).

³² Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993).

of authority.”³³ Additionally, the Court held that, like the statute in *New York*, the Brady provisions were unconstitutional because they potentially confused citizens with respect to which government officials, state or federal, were to be held accountable in the event of any problems with the requirements.³⁴

In 2000, however, the Supreme Court decided *Reno v. Condon*,³⁵ and upheld, as consistent with the federalism principles established in *New York* and *Printz*, provisions of the Driver’s Privacy Protection Act (DPPA).³⁶ The DPPA regulated the ability of the states to disclose and resell information collected from state motor vehicle departments.³⁷ The Court distinguished the DPPA from the statutes in both *New York* and *Printz*, because, according to the Court, the “DPPA does not require the states in their sovereign capacity to regulate its own citizens.... It does not require the [states] to enact any laws or regulations and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”³⁸ In addition to its holding with respect to the constitutionality of the DPPA, the Court also referred to an argument advanced by the challenging state that Congress may only regulate the states directly when it does so via “generally applicable laws or laws that apply to individuals as well as States.”³⁹ The Court, holding that the DPPA was “generally applicable,” found that it was not necessary to address this question, and thus, has left it reserved for future consideration.⁴⁰

Whether limiting the standards to federal acceptance — as opposed to direct federal requirements on the states — obviates federalism concerns under Supreme Court jurisprudence remains to be seen as no cases have yet been filed challenging the constitutionality of the law. It appears possible to argue, however, that because the issuance of drivers’ licenses remains a function of state law, the minimum issuance and verification requirements established by the act, even if limited to federal agency acceptance, constitute an effective commandeering by Congress of the state process, or a conscription of the state and local officials who issue the licenses.

Right to Travel. Although not expressly defined in the text of the Constitution, the Supreme Court has stated that the right to travel is a “privilege and

³³ *Printz*, 521 U.S. at 928.

³⁴ *See id.* at 929-30 (stating that “[b]y forcing state government to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for solving problems without having to ask their constituents to pay higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects”). *Id.*

³⁵ 528 U.S. 141 (2000).

³⁶ *Id.* at 143 (*citing* the Driver’s Privacy Protection Act, 18 U.S.C. §§ 2721-2725 (1994)).

³⁷ *Id.*

³⁸ *Id.* at 151.

³⁹ *Id.*

⁴⁰ *See id.*

immunity of national citizenship under the Constitution,”⁴¹ as well as a “part of the ‘liberty’ of which the citizens cannot be deprived without due process of law.”⁴² The Court has declared that the constitutional right to travel consists of three different components: first, it protects the right of a citizen of one state to enter and to leave another state; second, it protects the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state; and third, for those travelers who elect to become permanent residents, it protects the right to be treated like other citizens of that state.⁴³

Precedent regarding the right to travel has developed along two primary strands. The first addresses burdens imposed by state governments and involves the Fourteenth Amendment, whereas the second strand involves federally imposed burdens on international travel and appears to involve the Fifth Amendment’s due process clause. Under the Fourteenth Amendment cases, the right to travel from one state to another has been considered a fundamental right under the Constitution.⁴⁴ Consistent with its status as a fundamental right is the requirement that the government’s action satisfy the constitutional standard of review often referred to as strict scrutiny, or heightened scrutiny.⁴⁵ Under strict scrutiny the government must provide a compelling state interest for the burden and show that the means utilized are narrowly tailored to the achievement of the goal or, phrased another way, the least restrictive means available.⁴⁶ In addition to the strict scrutiny cases, there have been cases where the state has placed burdens on the act of travel itself. In these cases, the justification level appears to be much lower.⁴⁷ The Court has held that burdens

⁴¹ *United States v. Guest*, 383 U.S. 745, 764 (1966) (Harlan, J. concurring) (citing *Corfield v. Coryell*, 4 Wash. C.C. 371 (1825)); see also U.S. CONST. Art. 4, § 2, cl. 1; U.S. CONST. Amend. 14, § 1.

⁴² *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

⁴³ See *Sanez v. Roe*, 526 U.S. 489, 500-03 (1999).

⁴⁴ *United States v. Guest*, 383 U.S. 745, 758 (1966) (stating that “[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized”).

⁴⁵ *Att’y General of New York v. Sato-Lopez*, 476 U.S. 898, 906 (1986); see also *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁴⁶ *Id.* at 909-10 (stating that “if there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)) (citing *Memorial Hospital v. Maricopa Hospital*, 415 U.S. 250, 263 (1974)).

⁴⁷ See *United States v. Davis*, 482 F.2d 893, 912-13 (9th Cir. 1973) (upholding the pre-boarding screening of passengers and carry-on articles by stating that the “screening of passengers and of the articles that will be accessible to them in flight does not exceed constitutional limitations provided that the screening process is no more extensive nor intensive than necessary, ... to detect the presence of weapons or explosives, that it is

(continued...)

on travel are justifiable as long as they are uniformly applied and support the safety and integrity of the travel facilities.⁴⁸ Thus, for example, highway tolls and airport fees have been upheld, but a general tax imposed on all individuals leaving a state may impermissibly restrict travel.⁴⁹

Conversely, in right to travel cases involving federally imposed burdens on interstate travel, which implicate the Fifth Amendment, courts appear to reject the Fourteenth Amendment fundamental rights analysis and apply a less stringent rational basis test. The rational basis test simply requires that laws be rationally related to a legitimate government interest.⁵⁰ Here again, the government appears not to be required to show a compelling interest to justify a uniformly applied, non-discriminatory travel-related restriction.⁵¹

Given that the airlines are seemingly authorized to refuse service to anyone who fails to present proper identification, it appears that a strong argument can be made that REAL ID imposes an additional burden on citizens who wish to travel by federally regulated aircraft. Thus, the inquiry should focus on the standard of review that should be applied. That said, it appears difficult to argue that ensuring the security and validity of identification documents will fail to increase passenger safety and transportation facility security, which are likely compelling governmental interests. Thus, it seems that, regardless of which standard of review is applied, the government may be in a strong position to argue that not only are the identification requirements justifiable, but also that their burden on the right to travel is minimal and, in light of the present conditions, entirely reasonable. Moreover, it is important to note that not having a REAL ID will not prevent individuals from boarding aircraft. Rather, the lack of a REAL ID, whether by state non-compliance or personal choice, will simply mean either that alternative identification will have to be produced (such as a military ID, passport, or other documents accepted by the Transportation Security Administration (TSA)) or additional security screening will be required before the individual is allowed to board.

First Amendment Rights.

Free Exercise of Religion. According to some opponents, the fact that REAL ID requires, without exemption, that a digital photograph appear on each

⁴⁷ (...continued)

confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly”).

⁴⁸ See *Evansville-Wanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 711-715 (1972).

⁴⁹ *Id.* at 714-16

⁵⁰ See *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); see also *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-175 (1980); *Vance v. Bradley*, 440 U.S. 93 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

⁵¹ See e.g., *Regan v. Wald*, 468 U.S. 222 (1983); see also *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964).

document violates the religious beliefs of certain sects of Amish Christians, Muslim women, as well as other religions.⁵² Thus, it has been argued that this requirement unconstitutionally impacts the free exercise of their religion.

The Supreme Court has consistently affirmed that the Free Exercise Clause protects religious beliefs; however, protection for religiously motivated conduct has waxed and waned over the years. In recent years, the Court has gradually abandoned any distinction between belief and conduct, developing instead a balancing test to determine when a uniform, nondiscriminatory requirement by government mandating action or non-action by citizens, such as the photo requirement contained in REAL ID, must allow exceptions for citizens whose religious scruples forbid compliance.

In *Sherbert v. Verner*,⁵³ the Court required a religious exemption from a secular, regulatory piece of economic legislation. Ms. Sherbert had been disqualified from receiving unemployment compensation because, as a Seventh Day Adventist, she would not accept Saturday work. According to state officials, this meant she was not complying with the statutory requirement to stand ready to accept suitable employment. The Court held that her denial of benefits could be justified under the Free Exercise Clause if “her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or [if] any incidental burden on the free exercise of appellant’s religions may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate....’”⁵⁴

After *Sherbert*, the Court applied the “compelling state interest” test in several cases, finding, for example, in *Wisconsin v. Yoder*,⁵⁵ that a state compulsory attendance law, as applied to require Amish children to attend 9th and 10th grades of public schools in contravention of Amish religious beliefs, violated the Free Exercise Clause. Conversely, however, the Court held that the government had a “compelling interest” with respect to compulsory participation in the Social Security system,⁵⁶ as well as with regard to the denial of tax exemptions to church-run colleges whose racially discriminatory admissions policies derived from religious beliefs.⁵⁷

Finally, in 1990 the Court decided *Employment Division v. Smith*,⁵⁸ which involved a challenge to a state statute that denied unemployment benefits to drug

⁵² See, e.g., American Civil Liberties Union, “Real ID Scorecard,” available at, [http://www.aclu.org/images/general/asset_upload_file162_33700.pdf].

⁵³ 374 U.S. 398 (1963).

⁵⁴ *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁵⁵ 406 U.S. 205 (1972).

⁵⁶ See *United States v. Lee*, 455 U.S. 252 (1982).

⁵⁷ See *Bob Jones University v. United States*, 461 U.S. 574 (1983).

⁵⁸ 494 U.S. 872 (1990).

users including Native Americans engaged in the sacramental use of peyote.⁵⁹ The Court in *Smith* indicated that the “compelling interest test” does not apply to require exemptions from generally applicable criminal laws. Criminal laws, held the Court, are “generally applicable” when they apply across the board regardless of the religious motivation of the prohibited conduct, and are “not specifically directed at ... religious practices.”⁶⁰ Thus, except in the relatively uncommon circumstance when a statute calls for individualized consideration, then, the Free Exercise Clause affords no basis for exemption from a “neutral, generally applicable law.” As the Court concluded in *Smith*, accommodation for religious practices incompatible with general requirements must ordinarily be found in “the political process.”⁶¹

Subsequently, in 1993, Congress sought to supersede *Smith* and substitute a statutory rule of decision for free exercise cases. The Religious Freedom Restoration Act (RFRA)⁶² provides that laws of general applicability — federal, state, and local — may substantially burden the free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. As Congress declared in the act itself, the purpose was “to restore the compelling interest test as set forth in *Sherbert v. Verner* ... and to guarantee its application in all cases where free exercise of religion is substantially burdened.”⁶³

In the most recent Supreme Court case to address these issues, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*,⁶⁴ the Court affirmed a preliminary injunction preventing the government from using the Controlled Substances Act from prosecuting practitioners of a Amazon Rainforest religious sect that receives communion by drinking a tea that contains *hoasca*, a hallucinogen that is prohibited under the federal Controlled Substances Act (CSA).⁶⁵ Although the case arose on procedural grounds, the Court nevertheless held that the government has a burden of demonstrating a “compelling government interest,” such that no exception can be made to accommodate the religious use of the drug.⁶⁶ According to the Court, the absence of this required showing by the government, even at the preliminary injunction stage, necessitated a finding for the plaintiffs and a granting of the injunction.⁶⁷

Thus, the question for a reviewing court, should a challenge to REAL ID be brought on Free Exercise grounds, will be whether the government has a “compelling

⁵⁹ *Id.* at 890.

⁶⁰ *Id.* at 878.

⁶¹ *Id.* at 890.

⁶² Religious Freedom Restoration Act, P.L. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

⁶³ *Id.* at § 2(b)(1).

⁶⁴ 546 U.S. 418 (2006).

⁶⁵ *Id.* at 423.

⁶⁶ *See id.* at 439.

⁶⁷ *Id.*

interest” in uniform application of the law, such that no exceptions, even on reasonable religious grounds, can be afforded. Given REAL ID’s strong basis as both an anti-terrorism and fraud prevention statute, it appears that the government would have a strong argument that a compelling interest does exist for not granting any exceptions to the act’s requirements. Conversely, it also appears reasonable to argue that although the government’s interest is strong, reasonable accommodations on religious grounds are still possible and are required by the First Amendment.

Right to Assemble and Petition the Government and the Right to Anonymity. Finally, some have argued that REAL ID is a violation of the First Amendment because the measure infringes upon a citizen’s right to freely assemble, associate, and petition the government.⁶⁸

The First Amendment states that “Congress shall make no law ... abridging the ... right of the people peaceably to assemble, and to petition the government for a redress of grievances.”⁶⁹ The argument appears to be that linking a state’s issuance of enhanced identification documents to its citizen’s ability to board a federally regulated aircraft prevents the full exercise of an individual’s liberties, such as those provided by the First Amendment, that depend on a citizen’s ability to freely move throughout the country.⁷⁰ By imposing burdensome requirements on interstate travel the government has arguably prevented persons who wish to refrain from identifying themselves and/or submitting to enhanced security screening from exercising their constitutional rights.

Although it appears that neither the Supreme Court nor any lower federal court has been presented with an analogous situation, the Court has indicated that anonymity is a concept protected by the First Amendment. For example, in *Thomas v. Collins, Sheriff*, the Court invalidated a Texas statute requiring labor organizers to register and obtain an organizer’s card before making speeches to assembled workers as incompatible with the guarantees of the First Amendment.⁷¹ As recently as 2004, the Court has upheld the general notion that citizens have a right to anonymity especially in situations where a citizen is not suspected of a crime.⁷² In light of these precedents, it may be possible to challenge the identification requirement on the grounds that it violates the First Amendment right of citizens to be anonymous; however, claims made regarding the rights of association and petition of the government do not appear to have received the same support.

⁶⁸ See, e.g., American Civil Liberties Union, “Real ID Scorecard,” available at, [http://www.aclu.org/images/general/asset_upload_file162_33700.pdf].

⁶⁹ U.S. CONST. Amend. I.

⁷⁰ *Aptheker v. Sec. of State*, 378 U.S. 500, 520 (1964) (stating that “[f]reedom of movement is akin to the right of assembly and to the right of association”).

⁷¹ *Thomas v. Collins, Sheriff*, 323 U.S. 516, 539 (1944) (stating that “[l]awful public assemblies, involving no element of grave and immediate danger ... are not instruments of harm which require previous identification of speakers”).

⁷² See *Hiibel v. Sixth Judicial Dist. Court*, 124 S.Ct. 2451 (2004).

Although it may be argued that a general right of anonymity exists, it is difficult to connect the implication of this right to the purpose of REAL ID. A strong argument exists that the regulations are in no way intended to impact a person's First Amendment rights; rather, the regulations at issue are aimed at preventing and deterring the use of fraudulent identification documents for federal purposes. Thus, these regulations can arguably be said to have, at most, an incidental or indirect effect on rights protected by the First Amendment. In cases where the regulation at issue was not specifically directed at First Amendment rights, the Court has held such regulations subject to First Amendment scrutiny only when "it was conduct with a significant expressive element that drew the legal remedy in the first place, ... or where a statute based on a non-expressive activity has the inevitable effect of signaling out those engaged in expressive activity."⁷³ Given the indirect effect that these regulations may have on First Amendment rights, it would appear unlikely that challengers could establish the significant or substantial impact on their right to associate or petition the government that would be required to trigger First Amendment scrutiny.

"Unfunded Mandate" Issues

According to some advocacy groups, state and federal elected officials — including numerous commentators to the proposed regulations⁷⁴ — and others, REAL ID imposes an unconstitutional "unfunded mandate" on the states.⁷⁵ Generally speaking, the term "unfunded mandate" refers to requirements that one unit of government imposes on another without providing funds to pay for costs of compliance. In this instance, the argument has often been advanced that the federal government has imposed the requirements of REAL ID on the states without providing adequate funding to cover the implementation costs.

Arguments related to "unfunded mandates" typically take two forms. First, is the argument that unfunded mandates are unconstitutional as violations of the Tenth Amendment. As indicated above, jurisprudence with respect to the Tenth Amendment is limited, and the federal courts have not to date specifically addressed the "unfunded mandate" issue.

⁷³ *Arcara v. Cloud Books*, 478 U.S. 697, 706-07 (1986); see also *Fighting Finest Inc. v. Bratton*, 95 F.3d 224, 228 (2d Cir. 1996) (stating that "to be cognizable, the interference with associational rights must be 'direct and substantial' or 'significant'").

⁷⁴ See 73 Fed. Reg. 5272, 5283 (Jan. 29, 2008) (indicating that states, AAMVA, and "numerous commenters" wrote that REAL ID was an unfunded mandate).

⁷⁵ See, e.g., Robert W. Dalton, *Legislators seeking Real ID Solution*, (March 6, 2008), Spartanburg Herald Journal, [<http://www.goupstate.com/article/20080306/NEWS/803060354/1051/NEWS01>] (noting that South Carolina Governor Mark Sanford has called REAL ID and "unfunded mandate"); Gregg Carlstrom, *Lawmakers: DHS Budget Shortchanges States*, federaltimes.com, (March 6, 2008), [<http://federaltimes.com/index.php?S=3407884>] (quoting Tennessee Senator Lamar Alexander as indicating that REAL ID is an "unfunded mandate").

Second, “unfunded mandate” arguments refer to the statutory requirements of the Unfunded Mandates Reform Act of 1995 (UMRA).⁷⁶ UMRA contains both legislative and regulatory reform provisions designed to limit or prohibit the number of unfunded mandates adopted by Congress and the regulatory agencies. The legislative reforms establish requirements for committees and the Congressional Budget Office (CBO) to study and report on the magnitude and impact of mandates in proposed legislation. In addition, the reforms include point-of-order procedures by which the requirements can be enforced, and by which the consideration of measures containing unfunded intergovernmental mandates can be blocked. With respect to regulations, UMRA requires federal agencies to prepare written statements identifying the costs and benefits of any federal mandate in excess of \$100 million annually (adjusted annually for inflation)⁷⁷ imposed through the rulemaking process. The written assessments must identify the law authorizing the rule, anticipated costs and benefits, the share of costs to be borne by the federal government, and the disproportionate costs on individual regions or components of the private sector. Additionally, the law requires that the assessments include estimates of the effect on the national economy, descriptions of consultations with non-federal government officials, and a summary of the evaluation of comments and concerns obtained throughout the promulgation process.⁷⁸ Moreover, UMRA requires that federal agencies consider “a reasonable number” of policy options and select the most cost-effective or least burdensome alternative.⁷⁹ Judicial review under UMRA is limited to ensuring that the agency complies with the procedural requirements of the statute. Courts may compel the agency to comply with the statute, but failure to do so cannot be used as a basis for invalidating a rule.⁸⁰

Although it appears that REAL ID requires significant expenditures by the states to comply with its requirements, UMRA arguably exempts the REAL ID regulations from the statute’s requirements. Specifically, Section 4 of UMRA excludes from the scope of the law final regulations that are “necessary for the national security.”⁸¹ In addition, UMRA excludes regulations that “incorporate requirements specifically set forth in law.”⁸² DHS relies on both of these provisions in its explanation as to why REAL ID is not an unfunded mandate.⁸³ Nevertheless, in its explanatory statement accompanying the final rule, DHS indicated that it complied with the provisions of

⁷⁶ Unfunded Mandates Reform Act of 1995, P.L. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. § 1501 *et seq.*)[hereinafter UMRA].

⁷⁷ *Id.* at § 202 (codified at 2 U.S.C. § 1532(a)).

⁷⁸ *Id.* at §§ 201-208 (codified at 2 U.S.C. §§ 1531-38).

⁷⁹ *Id.* at § 205 (codified at 2 U.S.C. § 1535).

⁸⁰ *Id.* at § 401 (codified at 2 U.S.C. § 1571); *see also American Trucking Assoc. Inc., v. United States Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999) (noting that failure to comply with the provisions of UMRA could not be a basis for invalidating the agency’s rule); *Associated Builders & Contractors Inc. v. Herman*, 976 F.Supp. 1 (D.D.C. 1997) (same).

⁸¹ *Id.* at § 4 (codified at 2 U.S.C. § 1503).

⁸² *Id.* at § 201 (codified at 2 U.S.C. § 1531).

⁸³ *See* 73 Fed. Reg. 5272, 5321 (Jan. 29, 2008).

UMRA, noting that it analyzed the cost to the states, considered alternatives, and solicited input from state and local governments.⁸⁴

Time Line For State Implementation

In accordance with the effective date of the statute, on May 11, 2008, all drivers' licenses and personal identification cards from non-compliant states will no longer be accepted by federal officials for "official purposes," which includes access to federal facilities, boarding federally regulated commercial aircraft, entry into nuclear power plants, and such other purposes as established by the Secretary of Homeland Security.⁸⁵ This general rule will take effect unless a state has requested an extension from DHS.

Extensions of the May 11, 2008, deadline are authorized by § 205(b) of the REAL ID statute, specifically "to meet the requirements of [the act]." According to the final rule, however, the states requesting such an extension must have notified DHS by March 31, 2008.⁸⁶ If granted, all extensions will be valid until December 31, 2009. As of the writing of this report, 49 states and the District of Columbia have been granted the initial extensions. The only state that has not yet received the extension is Maine.⁸⁷

An issue that has arisen regarding the extensions is what constitutes "to meet the requirements of [the act]." Several states have made clear in their letters requesting the extension that either due to existing state law, or other concerns regarding REAL ID in general, that their request for an extension is not to be viewed as an indication that they intend to fully implement the requirements of REAL ID.⁸⁸ Although it

⁸⁴ *Id.* at 5329.

⁸⁵ *Id.* at 5332; *see also* 6 C.F.R. § 37.3 (2008). In a recent press briefing, the Secretary of Homeland Security, Michael Chertoff, stated that REAL ID goes into effect on May 11, 2008, and that it will be enforced. *See* Remarks by Homeland Security Michael Chertoff at Pen-and-Pad Briefing on the Department's Fifth Anniversary, March 6, 2008, *available at*, [http://www.dhs.gov/xnews/releases/pr_1204843734531.shtm] (stating that "I'm not bluffing about May 11, ... the law makes it clear ... if you don't get a waiver then you're going to have — a driver's license will not be acceptable for federal purposes as an ID").

⁸⁶ *See* 73 Fed. Reg. at 5339; *see also* 6 C.F.R. §37.63 (2008).

⁸⁷ *See* DHS REAL ID website, *available at*, [http://www.dhs.gov/xprevprot/programs/gc_1200062053842.shtm] [hereinafter DHS website]. According to reports, at the time that the deadline expired, DHS and Maine were still negotiating language that would permit the granting of an extension. Maine has been granted two extra days to respond to DHS's concerns. *See* AP, *S.C. Gets Extension On New ID Law*, WASH. POST. A14, *available at*, [<http://www.washingtonpost.com/wp-dyn/content/article/2008/03/31/AR2008033102806.html>] (Apr. 1, 2008) (stating that Maine has been given until 5 p.m. on April 2 to "work out its differences with the government").

⁸⁸ *See, e.g.*, Letter from John J. Barthelmes, Commissioner, State of New Hampshire Department of Safety, to Stewart A. Baker, Assistant Secretary for Policy, U.S. Department of Homeland Security (Mar. 26, 2008), *available at*, [http://blog.wired.com/27bstroke6/files/real_id_extension_letter_2_4.pdf] (stating that "New Hampshire is ... currently prohibited (continued...)")

would appear that such an indication would arguably make the state ineligible for the extension, DHS has, to date, granted each of these extensions, despite such language in the state's request letter.⁸⁹

In addition to the initial extension, states may request a second extension if, by October 11, 2009, states file with DHS a "Material Compliance Checklist" that demonstrates that the state is in "material compliance" with all of the benchmarks established by the final rule.⁹⁰ This extension, if granted, will be valid until May 10, 2011.⁹¹ The final regulation does not indicate precisely what DHS considers to be "material compliance"; therefore, it appears that the decision to grant a second extension is solely at the discretion of the Secretary or his designee.

According to the final rule, states must meet all of the REAL ID requirements by December 1, 2014, for drivers' licenses and personal identification cards issued to persons born after December 1, 1964, and by December 1, 2017, for persons born before December 1, 1964.

State Legislative Responses and Potential Issues for Citizens of Non-Compliant States

Since its adoption in 2005, REAL ID has been a highly contested issue among state legislatures and governors. Prior to the publication of the NPRM in 2007, however, there was little activity at the state lawmaking level, primarily because officials were uncertain as to precisely what the implementation requirements were

⁸⁸ (...continued)

by law from implementing the REAL ID Act"); *see also* Letter from Mike McGrath, Attorney General, State of Montana, to The Honorable Michael Chertoff, Secretary of Homeland Security, U.S. Department of Homeland Security, (Mar. 21, 2008), *available at*, [http://blog.wired.com/27bstroke6/files/mcgrath_fax.pdf]; Letter from George Valverde, Director, State of California, Department of Motor Vehicles, to The Honorable Michael Chertoff, Secretary of Homeland Security, U.S. Department of Homeland Security, (Mar. 18, 2008), *available at*, [<http://blog.wired.com/business/files/californiadmvrealid.pdf>] (stating that "California's request for an extension is not a commitment to implement REAL ID").

⁸⁹ *See* Letter from Stewart A. Baker, Assistant Secretary for Policy, U.S. Department of Homeland Security, to John J. Barthelmes, Commissioner, State of New Hampshire Department of Safety, (Mar. 27, 2008), *available at*, [http://blog.wired.com/27bstroke6/files/real_id_extension_letter_2_4.pdf] (stating that "[u]nder the statute, the Department can only grant an extension of the compliance deadline. Therefore, I can only provide the relief you are seeking by treating your letter as a request for an extension"); *see also* Letter from Stewart A. Baker, Assistant Secretary for Policy, U.S. Department of Homeland Security, to Mike McGrath, Attorney General, State of Montana, (Mar. 21, 2008), *available at*, [http://blog.wired.com/27bstroke6/files/response_to_mt_32108.pdf] (same).

⁹⁰ 73 Fed. Reg. at 5274 & 5339. The benchmarks are delineated in the "Material Compliance Checklist," which is available from the DHS website. *See* DHS website, *supra* note 86, *available at*, [http://www.dhs.gov/xlibrary/assets/real_id_final_rule_part2_2008-01-11.pdf].

⁹¹ *Id.*

going to necessitate, either in terms of cost or potential changes to state law.⁹² Since the publication of the NPRM in 2007, there has been a dramatic increase in state responses to REAL ID and its requirements.

To date, it appears that only six states — Indiana, Nevada, Ohio, Tennessee, Virginia, and Wisconsin — have affirmatively enacted legislation that in some form adopts, or requires to be adopted, the federal minimum standards that are articulated in REAL ID.⁹³ These statutes, however, vary in type, and arguably in effectiveness. For example, in both Tennessee and Virginia, the language appears in annual appropriations acts, which arguably means that compliance may have to be reaffirmed during the state's next appropriations cycle, or it can be eliminated.⁹⁴ Conversely, in Nevada, the legislature adopted into law new provisions of the state's motor vehicle code that appear to be intended to bring the state into full compliance with REAL ID.⁹⁵ It also appears that an additional 12 states have statutory language pending that would require the appropriate state departments to come into compliance with the requirements of REAL ID.⁹⁶

Conversely, there are nine states — Georgia, Idaho, Maine,⁹⁷ Montana, Nebraska, New Hampshire, Oklahoma, South Carolina, and Washington — that have adopted state statutes that appear to indicate a refusal to comply with the requirements of REAL ID.⁹⁸ These statutes vary in their terms and effectiveness as well. Montana, for example, appears to have adopted the strongest non-compliance law, which directs the Montana Department of Justice and the motor vehicle administration not to participate in the federal REAL ID Act and to report to the

⁹² In September 2006, the National Conference of State Legislatures (NCSL), National Governors Association (NGA), and the American Association of Motor Vehicle Administrators (AAMVA) published a *National Impact Analysis*, which contained a 50-state survey of the likely impacts that REAL ID will have on state laws and regulations. See NGA, NCSL, AAMVA, *The REAL ID Act: Final Impact Analysis*, available at, [http://www.ncsl.org/print/statefed/Real_ID_Impact_Report_FINAL_Sept19.pdf].

⁹³ National Conference of State Legislatures (NCSL), "REAL ID State Legislation Database," available at, [<http://www.ncsl.org/standcomm/sctran/RealIDdb.cfm>] [hereinafter NCSL Database].

⁹⁴ See 2007 TENN. PUB. ACTS, ch. 603 § 67, item 10 (2007); see also 2007 VA. ACTS, ch. 847 § 1-432 (2007).

⁹⁵ NV. LAWS 2007, c. 486, § 49 (June 13, 2007).

⁹⁶ These states include California, Kansas, Maryland, Michigan, Missouri, North Carolina, Nebraska, New York, Oregon, Texas, Virginia, and Vermont. See NCSL Database, *supra* note 93.

⁹⁷ It should be noted that Maine's statute specifically prevents the state's participation in a "national identification card" program; therefore, it is unclear whether it will be interpreted as preventing compliance with REAL ID. It is included, however, because many believe that REAL ID is a *de facto* national identification card. See *infra* notes 145-147 and accompanying text.

⁹⁸ See NCSL Database, *supra* note 93.

governor any attempts by DHS to secure implementation of REAL ID.⁹⁹ In other examples, the Idaho legislature appropriated \$0 for implementation in 2008,¹⁰⁰ whereas the Georgia legislature authorized the governor to delay implementation unless certain conditions are met.¹⁰¹ In addition to the statutes directly prohibiting compliance, the legislative chambers in 15 states have adopted non-binding resolutions or memorials that urge Congress to either amend or repeal REAL ID, and/or that indicate the state's intent to not comply.¹⁰² All told, 24 states have passed legislation that either prohibits state compliance with the act or urges Congress to amend or repeal REAL ID.

In addition to those states that have enacted either statutory commands or non-binding resolutions, there are a number of states that have such matters pending before their state lawmakers. Currently, it appears that 11 states have bills that would prohibit compliance pending before their legislatures,¹⁰³ whereas another 20 states and the District of Columbia have non-binding resolutions or memorials awaiting action.¹⁰⁴

The ramifications of having several states that do not opt to comply with the terms of REAL ID are far from clear. As previously discussed, the act itself is voluntary, binding only on federal agencies, not on the states. Thus, the statute contains no penalty for non-compliance. To the extent that there is a penalty for non-compliance by a state, it appears to be borne by the citizens of the non-compliant state. For example, after May, 11, 2008, the citizens of a state such as Montana — which has passed a law prohibiting compliance and has refused to file for an extension — will not be able to use their state-issued drivers' licenses or personal identification cards for official purposes. Therefore, after May 11, Montana citizens will not be able to show their Montana licenses to board a federally regulated aircraft or enter a federal building. Although this does not mean that citizens of the non-compliant states cannot engage in interstate travel via airplane — as many other forms of identification are acceptable by the Transportation Security Administration (TSA) (i.e., passport, military ID, other forms of state or federally issued identification) — or enter a federal court house or other federal building, it arguably does impose an additional burden on the citizen because the state has chosen not to comply.

⁹⁹ See MONT. CODE ANN. § 61-5-128 (2007).

¹⁰⁰ See 2007 ID. SESS. LAWS. ch. 236 § 19 (2007).

¹⁰¹ See GA. CODE ANN., § 40-5-4.1 (2007)

¹⁰² These states include Arkansas, Arizona, Colorado, Hawaii, Idaho, Illinois, Maine, Michigan, Missouri, North Dakota, Nevada, Pennsylvania, South Carolina, Tennessee, and Utah. See NCSL Database, *supra* note 93.

¹⁰³ These include Alaska, Arizona, Kansas, Minnesota, Missouri, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, and West Virginia. See NCSL Database, *supra* note 93.

¹⁰⁴ These include Alabama, Arizona, California, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming. See NCSL Database, *supra* note 93.

In addition, non-compliant states would apparently create holes in the scheme of state-to-state data sharing that is an integral part of REAL ID. Presumably, non-compliant states will not participate in the database creation or information-sharing system envisioned by the REAL ID regulations. Thus, it would appear that potential problems may arise if, for example, an applicant in a compliant state presents a document (i.e., birth certificate or other required paperwork) that requires verification from a non-compliant state. At this early stage of implementation, however, it is unclear precisely what effect this may have.

Moreover, the existence of non-compliant states presents the potential for conflicts among the states, in addition to those between the non-compliant states and the federal government. For example, will a non-REAL ID-compliant driver's license or personal identification card issued by Montana continue to be a valid form of identification in Indiana, a state that has a specific compliance law in place? The converse question also exists; namely, will Montana accept forms of identification that comply with REAL ID as valid within its own jurisdiction? Currently, neither REAL ID itself, nor the existing state laws appear to expressly address these questions; however, they appear likely to arise as implementation advances.

Finally, it has been noted that several of the states that have adopted statutes prohibiting compliance with REAL ID have also filed requests for extensions from DHS.¹⁰⁵ According to DHS, Georgia, Nebraska, Oklahoma, and Washington have all requested the extensions.¹⁰⁶ Although it appears possible to distinguish between a request for an extension and non-compliance, as indicated above, DHS's response to several states suggests that it is not strictly interpreting the statutory language that requires that extensions be granted only to those states evidencing an intent to comply.¹⁰⁷

Selected Regulatory Requirements of REAL ID

The final regulations promulgated by DHS on January 29, 2008,¹⁰⁸ contained over 280 pages and responded to over 21,000 comments. This section contains a summary description and analysis of several of the major elements of the REAL ID regulations.

Full Legal Name. Section 37.17 of the new regulations require that REAL ID-compliant drivers' licenses and personal identification cards contain the name that appears on the source documents presented by the applicant to establish identity. In other words, the name that must appear on a REAL ID-compliant card must be the same as the name that is on the identity document (passport, birth certificate, Social

¹⁰⁵ See, e.g., Declan McCullagh, "States say no (and yes) to Real ID before May deadline," CNETNews.com, Mar. 4, 2008, *available at*, [http://www.news.com/8301-13578_3-9885311-38.html].

¹⁰⁶ DHS website, *supra* note 87.

¹⁰⁷ See *supra* notes 88-90 and accompanying text.

¹⁰⁸ 73 Fed. Reg. 5272 (Jan. 29, 2008).

Security card, etc.) presented at the time an application for the card is submitted.¹⁰⁹ The regulations do provide for an exception for persons whose names appear differently on identity documents due to “marriage, adoption, court order, or other mechanism permitted by State law or regulation.”¹¹⁰

Commentators and critics of this approach have regularly pointed out that given the lack of a uniform convention with respect to this listing of names on federal documents this requirement is potentially burdensome to state officials who may be presented with numerous documents each with variations on the same name.¹¹¹ In addition to the myriad of federal documents that utilize different naming conventions, there are foreign documents, each with their own naming rules and conventions, that may be presented as well. In short, the absence of any uniformity with respect to naming requirements makes the REAL ID standard burdensome to implement. Moreover, commentators noted that not all of the potential name variations will be covered by existing state laws or regulations. Thus, it remains possible that an individual could have their REAL ID application rejected because their name variation, while reasonable and perhaps practically justifiable, does not fall within a state’s established legal exceptions. As a result, it appears that the burden may fall to the individual applicant to reconcile the names on their various documents before applying for a REAL ID. DHS has responded to these concerns by permitting any and all variations to the applicant’s name that are accepted by the issuing state’s laws or regulations. DHS also asserts that it has modified the language in the final rule so that it more closely adheres to the naming conventions utilized by the Social Security Administration, Department of State, and other document-issuing agencies.¹¹²

Principal Residence. The final REAL ID regulations contain two provisions relevant to the applicant’s “principal address.” DHS has defined the phrase “principal residence” to mean the “location where the person is currently domiciled (i.e., presently resides even if at a temporary address).”¹¹³ The first provision relates to what the individual is required to show when applying for a REAL ID. According to § 37.11(f), “to document the address of principal residence, a person must present at least two documents of the State’s choice that include the individual’s name and principal residence.”¹¹⁴ The second provision relates to what address is required to appear both on the face of the REAL ID and in the machine-readable portion. Pursuant to §37.17(f), the principal residence must appear on the REAL ID unless one of the following exceptions applies:

¹⁰⁹ 73 Fed. Reg. at 5334; *see also* 6 C.F.R. § 37.17 (2008).

¹¹⁰ *Id.* at 5333.

¹¹¹ *Id.* at 5300. In one commonly cited example, the name James Joseph Johnson Jr. may have had identity documents issued with the name “Jim Johnson,” “J.J. Johnson,” “Jim Johnson Jr.,” or “Joe Johnson.”

¹¹² *Id.*

¹¹³ *Id.* at 5295.

¹¹⁴ *Id.* at 5333.

(1) a State law, regulation, or DMV procedure permits display of an alternative address, or (2) Individuals who satisfy any of the following: (i) If the individual is enrolled in a State address confidentiality program which allows victims of domestic violence, dating violence, sexual assault, stalking, or a severe form of trafficking, to keep, obtain, and use alternative addresses; and provides that the addresses of such persons must be kept confidential, or other similar program; (ii) If the individual's address is entitled to be suppressed under State or Federal law or suppressed by a court order including an administrative order issued by a State or Federal court; or (iii) If the individual is protected from disclosure of information pursuant to section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.¹¹⁵

Several concerns continue to be raised about this provision. Among them are the impact on homeless and low-income individuals who may not have permanent residences; and the effect of the provision on those persons who, because of personal safety, confidentiality, or other reasons may have a legitimate need to keep their address off of identifying documents, but reside in a state that does not have a formal law, regulation, or DMV procedure permitting them to do so. With respect to the first concern, DHS has indicated that its final rule grants the states “wide latitude to address issues concerning an individual’s address of principal residence within their State-specific exceptions process.”¹¹⁶ In other words, according to DHS, the states will retain sufficient authority to issue REAL IDs to individuals, including those who are homeless, so long as the exceptions are properly documented in the state’s issuing system.

With respect to the second concern — personal security and confidentiality issues — DHS indicates that under the final rule the states have “broad authority to protect the confidentiality of the address of principal residence for certain classes of individuals.”¹¹⁷ One commentator, however, noted that only 24 jurisdictions currently have formal confidentiality programs in place that will satisfy the rule’s specific exception.¹¹⁸ Thus, in those states where formal programs do not currently exist, it is unclear how the confidentiality of those persons who may be placed at risk will be protected. Moreover, how those formal programs may come about, should jurisdictions opt to create them, will vary depending on existing laws and the required changes. For example, in some states it may be possible for confidential programs to be created either directly by the governor or by the agency responsible for issuing drivers’ licenses and personal identification cards, whereas in other states legislative action may be required.

Document Verification Requirements. REAL ID specifically requires states to verify the validity of the supporting documents presented by the applicant with the document’s issuing agency. Section 37.13 of the final regulation provides the general standards for completing this verification. First, § 37.13(a) requires the states to “make reasonable efforts” to ensure that applicants do not have multiple

¹¹⁵ *Id.* at 5335.

¹¹⁶ *Id.* at 5302.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

REAL IDs issued under different identities.¹¹⁹ Second, § 37.13(b) requires the states to verify documents presented via electronic validation systems “as they become available or use alternative methods approved by DHS.”¹²⁰ The regulations proceed to provide for verification requirements for five different types of documents.

First, with respect to documents presented by applicants that are issued by DHS, such as identity documents or documents establishing lawful presence in the United States, the regulations state that they can be verified using the Systemic Alien Verification System for Entitlements (SAVE).¹²¹

Second, concerning Social Security numbers (SSNs), the regulations require verification through either the Social Security Administration, or another method approved by DHS. One such alternative, according to DHS, is “AAMVAnet,” which is the network system that the American Association of Motor Vehicle Administrators (AAMVA) operates to facilitate data verification for state motor vehicle departments and which appears to already support verification of both SSNs and birth certificates.¹²²

Third, regarding birth certificate verification, the regulations indicate that states “should use the Electronic Verification of Vital Events (EVVE) system or other electronic systems whenever the records are available.”¹²³ In the explanatory section of the final rule, however, DHS acknowledges that EVVE is not yet ready for full implementation.¹²⁴ Given the unavailability of the preferred electronic resource, the fact that birth records are retained by the individual states and not the federal government, and the wording of the regulation, it is unclear what other methods of birth-certification verification are available. Therefore, there remains an open question with respect to how the states are going to comply with this requirement.

Fourth, with respect to documents issued by the Department of State (DOS), such as passports, the regulations require that the states verify the document with DOS or by means approved by DHS. No specific electronic system or preferred method, however, is indicated in the final rule.

Finally, regarding REAL IDs issued by other states that may eventually be used as a form of identification, the regulations indicate that they will be required to be verified with the state of issuance.¹²⁵ Similar to DOS documents, no specific verification system is mentioned or discussed. Presumably, the state-to-state information-sharing system envisioned by other sections of the regulations will

¹¹⁹ *Id.* at 5334.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 5275.

¹²³ *Id.* at 5334.

¹²⁴ *Id.* at 5297.

¹²⁵ *Id.* at 5334.

provide a mechanism for the verification of these documents. Since no state is currently issuing REAL IDs, verification does not yet appear to be an issue.

Although the regulations are silent with respect to the verification of an applicant’s “principal residence,” the underlying REAL ID statute appears to include this requirement as well. Several commentators indicated concerns with respect to this, as they noted that no electronic means currently exist at either the state or federal level that will permit such a verification to occur.¹²⁶ DHS concurs with this assessment and responds by noting that “[t]he rule gives States maximum flexibility in determining an individual’s address of principal residence.”¹²⁷ Despite the statutory language, because the text of the final regulation is silent regarding verification of principal residence, it is unclear whether states will actually be required to perform this task to be considered in full compliance.

Machine-Readable Technology. Section 37.19 of the final regulation requires that — to meet the statutory requirement — all REAL IDs use compatible machine-readable technology. Specifically, the regulations state that “States must use the ISO/IEC 15438:2006(E) Information Technology — Automatic identification and data capture techniques — PDF417 symbology specification.”¹²⁸ In addition, the regulations require that the following data elements be contained on the bar code:

- (a) expiration date; (b) full legal name, unless the State permits an applicant to establish a name other than the name that appears on a source document, pursuant to § 37.11(c)(2); (c) date of transaction; (d) date of birth; (e) gender; (f) address as listed on the card pursuant to § 37.17(f); (g) unique driver’s license or identification card number; (h) card design revision date, indicating the most recent change or modification to the visible format of the driver’s license or identification card; (i) inventory control number of the physical document; (j) State or territory of issuance.¹²⁹

The regulations also indicate that 45 states and the District of Columbia already utilize bar codes that comply with the PDF417 standard.¹³⁰ However, it appears that a number of states may have to alter the type of information and method in which said information is stored to comply with the regulations.

Contrary to the assertion of some REAL ID opponents,¹³¹ neither biometric technology nor radio-frequency identification (RFID) is required by the regulations to be used on REAL ID-compliant licenses or personal identification cards. Although these more advanced technologies are not required, the machine-readable

¹²⁶ *Id.* at 5297.

¹²⁷ *Id.*

¹²⁸ *Id.* at 5336.

¹²⁹ *Id.*

¹³⁰ *Id.* at 5305.

¹³¹ *See, e.g.,* Legislators Against REAL ID, *available at*, [<http://legislatorsagainstrealdid.com/realidisintid.php>] (claiming that “The REAL ID Act of 2005 implements an international biometric ID system that ... will most certainly cause an [identification] theft pandemic”).

requirement does raise security and personal privacy concerns that were addressed by DHS in the final rule. With respect to security of the information contained on the bar code, many commentators suggested that DHS prohibit the collection and storage of the data on the bar codes by third parties, specifically private businesses.¹³² DHS responded by noting that although the underlying statute does not provide them with the legal authority to prohibit such data collection, at least four states — California, Nebraska, New Hampshire, and Texas — currently have such provisions in place, and DHS is supportive of additional state efforts in this regard.¹³³

Document Storage. As indicated above, § 202(d) of REAL ID requires states to employ technology to capture digital images of identity source documents and retain paper copies of source documents for a minimum of 7 years or digital images of source documents presented for a minimum of 10 years. Given that these are statutory requirements, § 37.31 of the final regulations contains the necessary language directing their implementation. In response to comments concerning the sensitive nature of storing a potentially vast amount of personally identifiable data, DHS has indicated that if requested by the applicant and permitted by state data retention laws, “a State shall record and retain the applicant’s name, date of birth, certificate numbers, date filed, and issuing agency in lieu of an image or copy of the applicant’s birth certificate.”¹³⁴

Physical Security of Motor Vehicle Facilities. REAL ID requires states to ensure the physical security of locations where cards are produced and the security of document materials and papers from which drivers’ licenses and identification cards are produced. In accordance with this statutory requirement, DHS has promulgated § 37.41, which mandates that the states submit a single security plan that addresses “[motor vehicle department] facilities involved in the enrollment, issuance, manufacturing and production of driver’s licenses and identification cards.”¹³⁵ Specifically, these regulations call for the security plan to address the following: (1) physical security of the “[f]acilities used to produce driver’s licenses and identification cards” as well as the “[s]torage areas for card stock and other materials used in card production;”¹³⁶ (2) the security of personally identifiable information maintained at motor vehicle department locations that are involved in the enrollment, issuance, manufacturing, and production of drivers’ licenses and identification cards; (3) document and physical security features of the card, consistent with the REAL ID regulations; (4) facility and information access controls; (5) periodic training requirements; (6) emergency and incident response plans; (7) internal audit controls; and (8) “affirmation that the State possesses both the authority and the means to produce, revise, expunge, and protect the confidentiality of REAL ID driver’s licenses or [personal] identification cards issued in support of Federal,

¹³² 73 Fed. Reg. at 5304.

¹³³ *Id.*

¹³⁴ *Id.* at 5309; *see also* 6 C.F.R. § 37.31(c) (2008).

¹³⁵ *Id.* at 5279.

¹³⁶ *Id.* at 5337; *see also* 6 C.F.R. § 37.41(b)(1) (2008).

State, or local criminal justice agencies or similar programs that require special licensing or identification to safeguard persons or support their official duties.”¹³⁷

Although the regulations provide requirements for the security plans, several commentators noted the lack of standards and defined best practices.¹³⁸ DHS indicated that it would be working with DOT, AAMVA, and the states to develop such recommended practices and preferred procedures. Other commentators raised concerns about the requirements for protection of personally identifiable information, especially given the mandate that state databases be interconnected.¹³⁹ DHS responded that it believed its regulation provided sufficient guidance for the protection of the data, but indicated that the regulations were flexible enough to require additional protections without embarking on a new rulemaking.¹⁴⁰

DMV Databases. Although the statutory text appears to require the states to provide electronic access to their databases to all other states, it is unclear whether this requirement is contained in the final regulations. Section 37.33 entitled “DMV Databases” requires that the states must maintain a database that contains, at a minimum, the following elements: (1) all data fields printed on the face of the driver’s license or personal identification card, individual serial numbers, and the applicant’s SSN; (2) a record of the full legal name or recorded name without truncation; (3) all additional data fields included in the machine-readable zone but not printed on the card; and (4) all motor vehicle drivers’ histories including points and/or suspensions.¹⁴¹ The provision makes no mention of interconnectivity or access to one state’s database by either other states or the federal government. Other sections of the final regulations appear to indicate that the state-to-state data exchange and the document verification requirements are related.¹⁴² However, it is unclear what precisely DHS envisions with respect to interstate exchange of the information contained in the state databases.¹⁴³

Background Checks. Section 37.45 of the final regulations governs the background checks required by the REAL ID statute on all state motor vehicle employees, including contract employees, who are involved in the “manufacture or production of REAL ID driver’s licenses and [personal] identification cards, or who

¹³⁷ *Id.* at 5338; *see also* 6 C.F.R. § 37.41(b)(8) (2008).

¹³⁸ *Id.* at 5309.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 5337; *see also* 6 C.F.R. § 37.33 (2008).

¹⁴² *See id.* at 5308 (stating that “DHS has provided a brief overview of the proposed architecture for data verification and State-to-State data exchange in the sections above. This architecture will likely build on the existing architecture of AAMVAnet and the systems design principles of its hosted applications”).

¹⁴³ *Id.* (stating that “DHS will work with DOT, AAMVA, and the States to develop a path forward for both verification systems and State-to-State data exchange, including criteria DHS will employ to evaluate the adequacy, security, and reliability of such data exchanges”).

have the ability to affect the identity information that appears on the ... cards, or current employees who will be assigned to such positions.”¹⁴⁴ The contents of the check are to include the following: (1) both a name-based and fingerprint-based criminal history record check (CHRC) using, at a minimum, the FBI’s National Crime Information Center (NCIC), the Integrated Automated Fingerprint Identification (IAFIS) database, and state repository records; (2) an employment-eligibility-status verification to ensure compliance with 8 U.S.C. § 1324a;¹⁴⁵ and (3) a reference check, unless the employee has been employed for at least two consecutive years since May 11, 2006.¹⁴⁶

Employees and applicants for employment can be disqualified if they have been convicted of, or found not guilty by reason of insanity, of any offense that is listed as a felony in 49 C.F.R. § 1572.103(a).¹⁴⁷ In addition, a conviction of a crime as listed at 49 C.F.R. § 1572.103(b)¹⁴⁸ if it was within seven years preceding the date of

¹⁴⁴ *Id.* at 5338; *see also* 6 C.F.R. § 37.45(a) (2008).

¹⁴⁵ States are encouraged to use the United States Customs and Immigration Service’s E-Verify program, but do not appear required to do so. *See id.*

¹⁴⁶ *Id.*

¹⁴⁷ The list of disqualifying offenses includes the following:

(1) espionage or conspiracy to commit espionage; (2) Sediton, or conspiracy to commit sedition; (3) treason, or conspiracy to commit treason; (4) a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g), or comparable State law, or conspiracy to commit such crime; (5) a crime involving a transportation security incident ... resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area, as defined in 46 U.S.C. § 70101; (6) improper transportation of a hazardous material under 49 U.S.C. § 5124, or a comparable State law; (7) unlawful possession, use, sale, distribution, manufacture, purchase, receipt, transfer, shipping, transporting, import, export, storage of, or dealing in an explosive or explosive device as defined in 18 U.S.C. §§ 232(5), 841(c) through 841(f), and 844(j); and a destructive device, as defined in 18 U.S.C. § 921(a)(4) and 26 U.S.C. § 5845(f); (8) murder; (9) making any threat, or maliciously conveying false information knowing the same to be false, concerning the deliverance, placement, or detonation of an explosive or other lethal device in or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility; (10) violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, or a comparable State law, where one of the predicate acts found by a jury or admitted by the defendant, consists of one of the crimes listed in paragraph (a) of this section; (11) attempt to commit the crimes in paragraphs (a)(1) through (a)(4) and; (12) conspiracy or attempt to commit the crimes in paragraphs (a)(5) through (a)(10).

¹⁴⁸ These offenses include the following:

(i) unlawful possession, use, sale, manufacture, purchase, distribution, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in a firearm or other weapon as defined in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a), or items contained on the U.S. Munitions Import List at 27 C.F.R. § 447.21; (ii) extortion; (iii) dishonesty, fraud, or misrepresentation, including identity fraud and money laundering where the money laundering is related to a

(continued...)

employment or release from incarceration within five years preceding the date of employment is grounds for disqualification. Finally, it is a violation for the state motor vehicle department to employ any individual whose employment eligibility under Section 247A of the Immigration and Nationality Act (8 U.S.C. § 1324a) cannot be verified.

Additional Issues

National Identification Card. Opponents of REAL ID have argued that its implementation will create a *de facto* national identification card.¹⁴⁹ Although these arguments have taken many forms, they appear to generally consist of three basic elements. First, opponents argue that the uniform issuance and verification standards imposed by the federal government will result in turning state workers into immigration enforcement officials by forcing them to check the citizenship status of each applicant and will move states away from the purpose of issuing a driver’s license; namely, ensuring that operators of motor vehicles meet the minimum state requirements. Second, opponents point to both the machine-readable technology requirements and state data-sharing proposals as evidence of substantially increased federal government involvement in the traditionally state-run issuance of identification documents. Finally, opponents generally note that there appears to be an unlimited number of potential activities for which REAL ID-compliant licenses could be required. These could potentially include voting, firearm registration, employment, and receipt of subsidies and/or other federal or state benefits.

In its discussion of the final rule, DHS specifically indicates that it “does not intend that REAL ID documents become a *de facto* national ID and does not support the creation of a national ID.”¹⁵⁰ In addition, DHS notes that it has limited the potential uses of REAL IDs to the purposes defined in the statute — accessing federal facilities, boarding federally regulated aircraft, and entering nuclear power plants — thereby limiting the functionality of the card. Finally, with respect to the database-

¹⁴⁸ (...continued)

crime described in paragraphs (a) or (b) of this section; (iv) bribery; (v) smuggling; (vi) immigration violations; (vii) distribution of, possession with intent to distribute, or importation of a controlled substance; (viii) arson. (ix) kidnaping or hostage taking; (x) rape or aggravated sexual abuse; (xi) assault with intent to kill; (xii) robbery; (xiii) fraudulent entry into a seaport as described in 18 U.S.C. § 1036, or a comparable State law; (xiv) violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, or a comparable State law, other than the violations listed in paragraph (a)(10) of this section; (xv) conspiracy or attempt to commit the crimes in this paragraph (b).

¹⁴⁹ See, e.g., Electronic Privacy Information Center, “National ID and the REAL ID Act,” *available at*, [<http://epic.org/privacy/id-cards/>] (arguing that REAL ID creates a *de facto* national ID card); American Civil Liberties Union, “Real ID Scorecard,” *available at*, [http://www.aclu.org/images/general/asset_upload_file162_33700.pdf] (asserting that the final regulations do not prevent REAL ID from becoming a *de facto* national ID card).

¹⁵⁰ 73 Fed. Reg. at 5290.

creation issue, DHS notes that it “does not intend to own or operate a database on all driver’s license and identification card holders.”¹⁵¹

Although no uniformly accepted definition of a “national identification card” exists, it appears reasonable to argue that any such definition should include, at a minimum, that all of the cards be facially identical and that they all be issued by the same federal governmental entity. Under this standard, it appears difficult to argue that REAL ID is, or could potentially lead to, a national identification card. Moreover, as discussed above, participation by either the states or individuals in REAL ID is voluntary, not mandatory. In addition, the act contains specific restrictions on DHS’s ability to regulate the design and/or appearance of the card. Finally, issuance will continue to take place on the state level, not by any entity of the federal government.

Issuance of Drivers’ Licenses and Personal Identification Cards to Non-Citizens and/or Undocumented Persons. By statute, REAL ID establishes a system of temporary licenses and identification cards that can be issued by the states to applicants who are not citizens of the United States, but can present evidence that they are “lawfully present” in the United States.¹⁵² Accordingly, § 37.21 of the final regulations implements these requirements.¹⁵³ Thus, non-citizens in the United States who can demonstrate lawful presence in the United States are eligible to apply for and receive REAL IDs. However, the cards must be limited in validity commensurate with the time limit on the individual’s lawful presence in the United States,¹⁵⁴ and must clearly indicate, both on the face and machine-readable zone, that they are temporary or term-limited.

Recently, some states — Oregon, Washington, and Maryland — have had attention drawn to the fact that by state law they permit the issuance of drivers’ licenses and personal identification cards to any person, regardless of their immigration status in the United States.¹⁵⁵ Other states such as New York, Michigan, and California, have indicated that they will either cease or not take legislative action

¹⁵¹ *Id.* at 5291.

¹⁵² *See supra* note 17 and accompanying text.

¹⁵³ *See* 73 Fed. Reg. at 5336; *see also* 6 C.F.R. § 37.21 (2008).

¹⁵⁴ For example, an individual who presents a valid, verifiable visa permitting residence in the United States for only four years, may only receive a REAL ID that is valid for four years (even if the state law permits REAL IDs to be issued for longer than four years).

¹⁵⁵ Currently, there appear to be nine states that issue drivers’ licenses to undocumented individuals: Hawaii, Maine, Maryland, Michigan, New Mexico, Oregon, Utah, and Washington. *See, e.g.,* Michele R. Marcucci, *Feds may pre-empt license push*, Oakland Tribune, May 5, 2005, *available at*, [http://findarticles.com/p/articles/mi_qn4176/is_20050503/ai_n15826897]. Michigan’s Attorney General on December 27, 2007, however, issued an opinion which held that only lawful residents of Michigan can receive a Michigan driver’s license and that lawful presence in the United States is required to be a Michigan resident under Michigan law. *See* Michigan Att’y Gen. Op. #7210 (Dec. 27, 2007), *available at*, [<http://www.ag.state.mi.us/opinion/datatfiles/2000s/op10286.html>]. Legislation appears to have been introduced in the Michigan legislature to codify this opinion.

to permit undocumented persons to receive drivers' licenses or personal identification cards — *i.e.*, New York and California.

It should be noted that even with the adoption and implementation of REAL ID, the decision to issue drivers' licenses or personal identification cards to persons regardless of their immigration status remains entirely with the issuing states. In other words, this choice of whom to issue non-REAL ID-compliant drivers' licenses and personal identification cards does not appear to be altered or preempted. In fact, the statute clearly contemplates the issuance of documents by states that do not comply with REAL ID. Should states opt to do so, the law requires only that the non-compliant documents use a unique color identifier or design to alert officials that the document is not to be accepted for any official purpose. Thus, it appears that states may opt to issue multiple documents and still be in compliance with the law. For example, as reported, New York's proposal appeared to call for a three-tiered system, with state departments issuing REAL IDs in compliance with the regulations, enhanced drivers' licenses (EDLs)¹⁵⁶ to citizens upon request, and non-compliant drivers' licenses and personal identification cards to those who either did not want or were not eligible for the other two types of documents.¹⁵⁷ Such a scheme, while arguably costly and very complicated, nevertheless, appeared to be in full compliance with REAL ID and all other federal laws.

Relationship of REAL ID to Other Federal Laws and Programs

Western Hemisphere Travel Initiative (WHTI). The Western Hemisphere Travel Initiative, which can be found at § 7209 of the IRTPA, requires that the Secretary of Homeland Security, in consultation with the Secretary of State, expeditiously develop and implement a plan requiring that all travelers, including citizens of the United States, produce a passport, other document, or combination of documents, “deemed by the Secretary of Homeland Security to be sufficient to *denote identity and citizenship*,” when entering the United States.¹⁵⁸ The use of the conjunctive “and” generally indicates that both elements, identity and citizenship, must be denoted by the documents presented.¹⁵⁹

Although REAL ID contains increased security requirements for state-issued drivers' licenses and personal identification cards, these requirements appear to be focused on ensuring that the documents accurately reflect identity. REAL ID does not appear to require that the licenses or identification cards in any way “denote citizenship” in the United States. In fact, as noted above, REAL ID contains specific provisions that permit the issuance of licenses and identification cards to non-citizen

¹⁵⁶ See *infra* note 158 and accompanying text.

¹⁵⁷ See, e.g., Fernanda Santos, *Real ID That Spitzer Now Embraces Has Been Widely Criticized*, NY TIMES, B1 (Oct. 29, 2007), available at, [http://www.nytimes.com/2007/10/29/nyregion/29real.html?_r=1&oref=slogin] (noting the proposal for a three-tiered licensing system, “two that would meet new federal security regulations and a third that would be available to illegal immigrants”).

¹⁵⁸ IRTPA, *supra* note 1 at § 7209(c)(2) (emphasis added).

¹⁵⁹ See, e.g., *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D. N. Mex. 1996).

residents of the United States who, by producing the required documentation and having it verified as authentic by the issuing agency, can demonstrate lawful presence in the country.¹⁶⁰ Given the absence of requirements relating to citizenship, it does not appear that standing alone a driver's license or personal identification card would satisfy the statutory standard established by § 7209 for acceptable documents to be shown upon entrance to the United States. At this time, however, it remains unclear whether or not a driver's license or personal identification card, in conjunction with other presented documents may be considered sufficient to "denote identity and citizenship" as required by the statute. It should be noted, however, that the use of state-issued drivers' licenses or personal identification cards is not included in the Final WHTI Land/Sea Rule issued by the State Department and DHS on March 27, 2008.¹⁶¹

Enhanced Driver's Licenses (EDLs). To implement WHTI, DHS and the Department of State have pursued the development of alternative identification documents that satisfy the standards as required by Congress. Most notably, WHTI requires that the documents shown denote "both identity and citizenship" to be compliant. At the time WHTI was enacted, the only U.S.-issued document that satisfied this requirement was a passport. Since WHTI's adoption, several jurisdictions have expressed interest in creating and issuing a document known as an enhanced driver's license (EDL). EDLs will contain on the face of the license as well as in the electronic components information relating to the holders citizenship; therefore, making the document WHTI compliant. Currently, the state of Washington has a pilot program in place that permits the issuing of EDLs to persons who provide verifiable proof of citizenship and pay an additional fee when they apply for issuance or renewal of their Washington driver's license. According to DHS's Final Rule for WHTI Land/Sea Entry, New York, Vermont, and Arizona are also states that have signed Memoranda of Understanding with DHS for EDL pilot programs of their own.¹⁶²

Although EDLs and REAL ID are being implemented by the same agency, there are two major differences between the programs. First, unlike REAL ID, EDLs require that the cardholder be a U.S. citizen. Second, EDLs will implement radio-frequency identification (RFID) technology, whereas REAL IDs are only required to

¹⁶⁰ See 2005 Emergency Supplemental, *supra* note 15 at §202(C)(2)(c).

¹⁶¹ See DHS/DOS, WHTI LAND/SEA FINAL RULE, 135, *available at*, [http://www.dhs.gov/xlibrary/assets/whiti_landseafinalrule.pdf]. According to the final rule, U.S. citizens must present a valid unexpired passport upon entering the United States unless one of the following documents is presented: (1) Passport Card; (2) Merchant Marine Document; (3) Military Identification; or (4) Trusted Traveler Program Identification Document (includes NEXUS, FAST, SENTRI). *Id.* The only other exception applies to citizens who are passengers on cruise ships that stay entirely within the Western Hemisphere. Those passengers, according to the rule, may present "government issued photo identification ... in combination with either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department of State, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services for entering the United States ..." *Id.* at 136.

¹⁶² *Id.* at 14.

use a two-dimensional bar code system.¹⁶³ Thus, although the two programs are related, they are not interchangeable. It may be possible, however, for an EDL to also qualify as a REAL ID, provided that the document satisfies the requirements of both programs. On the other hand, just because individuals have a REAL ID, it does not automatically follow that they qualify for an EDL, or can use their REAL ID as part of the WHTI program. One way of thinking about the relationship between these two programs may be that some EDLs will comply with REAL ID, but not all REAL IDs will qualify as WHTI-compliant EDLs. In other words, only after a careful review of the issuing requirements and document contents will one be able to determine whether a specific state-issued driver's license or personal identification card qualifies under neither, both, or only one of the two programs.

¹⁶³ *See supra* note 124.