

TABLE OF CONCENTRATION LIMITS

List I chemicals	DEA chemical code number	Concentration (percent)	Special conditions
Iodine .....	6699	2.2	*

(d) \* \* \*  
\* \* \* \* \*

(4) Iodine products classified as iodophors which exist as an iodine complex to include poloxamer-iodine complex, polyvinyl pyrrolidone-iodine complex (i.e. povidone-iodine), undecylium chloride iodine, nonylphenoxypoly (ethyleneoxy) ethanol-iodine complex, iodine complex with phosphate ester of alkylaryloxy polyethylene glycol, and iodine complex with ammonium ether sulfate/polyoxyethylene sorbitan monolaurate.

Dated: July 6, 2006.  
**Michele M. Leonhart,**  
*Deputy Administrator.*  
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**DEPARTMENT OF HOMELAND SECURITY**

**Bureau of Customs and Border Protection**

**8 CFR Parts 212 and 235**

[USCBP 2006-0097]

RIN 1651-AA66

**DEPARTMENT OF STATE**

**22 CFR Parts 41 and 53**

RIN 1400-AC10

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

**AGENCY:** Bureau of Customs and Border Protection, Department of Homeland Security; Bureau of Consular Affairs, Department of State.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Intelligence Reform and Terrorism Prevention Act of 2004 provides that by January 1, 2008, United States citizens and nonimmigrant aliens may enter the United States only with passports or such alternative documents as the Secretary of Homeland Security may designate as satisfactorily

establishing identity and citizenship. This notice of proposed rulemaking (NPRM) is the first phase of a joint Department of Homeland Security and Department of State plan to implement these new requirements. This NPRM proposes that, beginning January 8, 2007, United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at air ports-of-entry and most sea ports-of-entry, with certain limited exceptions, will generally be required to present a valid passport. This NPRM does not propose to change the requirements for United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at land border ports-of-entry and certain types of arrivals by sea (ferries and pleasure vessels) which will be addressed in a separate, future rulemaking.

**DATES:** Written comments must be submitted on or before September 25, 2006.

**ADDRESSES:** Comments, identified by docket number USCBP 2006-0097, must be submitted by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Comments by mail are to be addressed to the Bureau of Customs and Border Protection, Office of Regulations and Rulings, Border Security Regulations Branch, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. Submitted comments by mail may be inspected at the Bureau of Customs and Border Protection at 799 9th Street, NW., Washington, DC. To inspect comments, please call (202) 572-8768 to arrange for an appointment.

**Instructions:** All submissions must include the agency name and docket number USCBP 2006-0097. All comments will be posted without change to <http://www.regulations.gov>, including any personal information sent with each comment. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Participation in Rulemaking Process"

heading of the **SUPPLEMENTARY INFORMATION** section of this document.

**Docket:** For access to the docket to read background documents or submitted comments, go to <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Department of Homeland Security: Robert Rawls, Office of Field Operations, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 5.4-D, Washington, DC 20229, telephone number (202) 344-2847.

**Department of State:** Consuelo Pachon, Office of Passport Policy, Planning and Advisory Services, Bureau of Consular Affairs, telephone number (202) 663-2662.

**SUPPLEMENTARY INFORMATION:**

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#### Abbreviations and Terms Used in This Document

- ANPRM—Advance Notice of Proposed Rulemaking  
 APIS—Advance Passenger Information System  
 BCC—Form DSP-150, B-1/B-2 Visa and Border Crossing Card  
 CBP—Bureau of Customs and Border Protection  
 DHS—Department of Homeland Security  
 DMV—Department of Motor Vehicles  
 DOS—Department of State  
 FAST—Free and Secure Trade  
 IBWC—International Boundary and Water Commission  
 INA—Immigration and Nationality Act  
 INS—Immigration and Naturalization Service  
 IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004  
 LPR—Lawful Permanent Resident  
 MMD—Merchant Mariner Document  
 MODU—Mobile Offshore Drilling Unit  
 NATO—North Atlantic Treaty Organization  
 NPRM—Notice of Proposed Rulemaking  
 OCS—Outer Continental Shelf  
 OTTI—Office of Travel & Tourism Industries  
 SENTRI—Secure Electronic Network for Travelers Rapid Inspection  
 TSA—Transportation Security Administration  
 TWIC—Transportation Worker Identification Card

- US-VISIT—United States Visitor and Immigrant Status Indicator Technology Program  
 WHTT—Western Hemisphere Travel Initiative

#### I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. The Department of Homeland Security (DHS) and the Department of State (DOS) also invite comments that relate to the economic or environmental effects or the federalism implications that might result from this proposed rule. Comments that will provide the most assistance to DHS and DOS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. See **ADDRESSES** above for information on how to submit comments.

#### II. Background

##### A. Current Entry Requirements for United States Citizens Arriving by Air or Sea

In general, under federal law it is “unlawful for any citizen of the United States to depart from or enter \* \* \* the United States unless he bears a valid United States passport.”<sup>1</sup> However, the statutory passport requirement has not been applied to United States citizens when departing from or entering into the United States from within the Western Hemisphere other than from Cuba.<sup>2</sup> Currently, a United States citizen entering the United States from within the Western Hemisphere, other than from Cuba, is inspected at an air or sea port-of-entry by a DHS Bureau of Customs and Border Protection (CBP) officer.<sup>3</sup> To lawfully enter the United States, a person need only satisfy the CBP officer of his or her United States citizenship.<sup>4</sup> In addition to assessing the verbal declaration and examining the documentation the person submits, the CBP officer may ask for additional identification and evidence of citizenship until the officer is satisfied

<sup>1</sup> Section 215(b) of the Immigration and Nationality Act (INA), 8 U.S.C. 1185(b).

<sup>2</sup> See 22 CFR 53.2(b), which waived the passport requirement pursuant to section 215(b) of the INA, 8 U.S.C. 1185(b).

<sup>3</sup> United States citizens entering the United States at land border ports-of-entry from within the Western Hemisphere are also inspected by a CBP officer. However, such travelers are outside the scope of this proposed rulemaking and will be addressed in a separate, future rulemaking.

<sup>4</sup> 8 CFR 235.1(b).

that the person is a United States citizen.

As a result of this procedure, United States citizens arriving at air or sea ports-of-entry from within the Western Hemisphere currently produce a variety of documents to establish their citizenship and right to enter the United States. A driver's license issued by a state motor vehicle administration or other competent state government authority is a common form of identity document now accepted by CBP at the border even though such documents do not denote citizenship. Citizenship documents currently accepted at ports-of-entry generally include birth certificates issued by a United States jurisdiction, Consular Reports of Birth Abroad, Certificates of Naturalization, and Certificates of Citizenship.

##### B. Current Entry Requirements for Nonimmigrant Aliens Arriving by Air or Sea

Currently, each nonimmigrant alien arriving in the United States must present to the CBP officer at the port-of-entry a valid unexpired passport issued by his or her country of citizenship and, if required, a valid unexpired visa issued by a United States embassy or consulate abroad.<sup>5</sup> Nonimmigrant aliens entering the United States must also satisfy any other applicable entry requirements (e.g., United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT)). For nonimmigrant aliens arriving in the United States, the only current general exceptions to the passport requirement apply to the admission of (1) citizens of Canada and Bermuda arriving from anywhere in the Western Hemisphere and (2) Mexican nationals with a Border Crossing Card (BCC) arriving from contiguous territory.

##### 1. Canadian Citizens and Citizens of the British Overseas Territory of Bermuda

In most cases, Canadian citizens and citizens of the British Overseas Territory of Bermuda (Bermuda) currently are not required to present a valid passport and visa when entering the United States as nonimmigrant visitors from countries in the Western Hemisphere.<sup>6</sup> Nevertheless, these travelers are currently required to satisfy the inspecting CBP officer of their identity and citizenship at the time of their application for admission. Entering aliens may present any evidence of identity and citizenship in their possession. Individuals who

<sup>5</sup> Section 212(a)(7)(B)(i) of the INA, 8 U.S.C. 1182(a)(7)(B)(i).

<sup>6</sup> 8 CFR 212.1(a)(1)(Canadian citizens) and 8 CFR 212.1(a)(2)(Citizens of Bermuda). See also 22 CFR 41.2.

initially fail to satisfy the examining CBP officer may then be required to provide further identification and evidence of citizenship such as a birth certificate, passport, or citizenship card.

## 2. Mexican Citizens

Mexican citizens arriving in the United States at ports-of-entry who possess a Form DSP-150, B-1/B-2 Visa and Border Crossing Card (BCC) are currently admitted without presenting a valid passport if they are coming from contiguous territory.<sup>7</sup> A BCC is a machine-readable, biometric card, issued by the Department of State, Bureau of Consular Affairs. The use of a BCC without a passport is atypical in the air/sea environment, but it continues to be permitted. Although the use of a BCC is much more common in the land environment, this NPRM deals solely with arrivals at air and sea ports-of-entry.

### C. Intelligence Reform and Terrorism Prevention Act of 2004

This NPRM is the first phase of the joint DHS and DOS implementation of section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. 108-458, 118 Stat. 3638 (Dec. 17, 2004). Section 7209 of IRTPA requires that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require travelers entering the United States to present a passport, other document, or combination of documents, that are “deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship.” Section 7209 expressly limits the waiver of documentation requirements for United States citizens under section 215(b) of the Immigration and Nationality Act (INA)<sup>8</sup> and eliminates the waiver of documentation requirements for categories of individuals for whom documentation requirements have previously been waived (citizens of Canada, Mexico, and Bermuda) under section 212(d)(4)(B) of the INA.<sup>9</sup> United States citizens and nonimmigrant aliens from Canada, Mexico, and Bermuda will be required to comply with the new document requirements of section

<sup>7</sup> 8 CFR 212.1(c)(1)(i). See also 22 CFR 41.2(g). If they are only traveling within a certain geographic area along the United States border with Mexico: usually up to 25 miles from the border but within 75 miles under the exception for Tucson, Arizona, they do not need to obtain a form I-94. If they travel outside of that geographic area, they must obtain an I-94 from CBP at the port-of-entry. 8 CFR 235.1(f)(1).

<sup>8</sup> U.S.C. 1185(b).

<sup>9</sup> U.S.C. 1182(d)(4)(B).

7209.<sup>10</sup> IRTPA requires that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement the plan by January 1, 2008.

Section 7209 limits the Secretaries' respective authorities<sup>11</sup> to waive generally applicable documentation requirements by providing that, after the complete implementation of the plan, neither the Secretary of State nor the Secretary of Homeland Security may exercise the authority of section 212(d)(4)(B) of the INA<sup>12</sup> to waive the passport requirement on the basis of reciprocity for nonimmigrant aliens who are nationals of foreign contiguous territory or adjacent islands. In addition, section 7209 of IRTPA provides that the President may exercise the authority of section 215(b) of the INA<sup>13</sup> to waive the new documentation requirements for United States citizens departing from or entering the United States only in three specific circumstances: (1) When the Secretary of Homeland Security determines that “alternative documentation” different from what is required under section 7209 is sufficient to denote citizenship and identity; (2) in an individual case of an unforeseen emergency; or (3) in an individual case based on “humanitarian or national interest reasons.”<sup>14</sup>

United States citizens and nonimmigrant aliens, who currently are not required to have passports pursuant to sections 215(b) and 212(d)(4)(B) of the INA<sup>15</sup> respectively, would be required to present a passport or other identity and citizenship document deemed sufficient by the Secretary of Homeland Security when entering the United States from countries within the Western Hemisphere. The principal groups affected by this provision of IRTPA are United States citizens, Canadian citizens, citizens of Bermuda, and Mexican citizens holding BCC cards. These groups of individuals are currently exempt from the general

<sup>10</sup> Section 7209 does not apply to Lawful Permanent Residents, who will continue to be able to enter the United States upon presentation of a valid Form I-551, Alien Registration Card, or other valid evidence of permanent resident status. Section 211(b) of the INA, 8 U.S.C. 1181(b). It also does not apply to alien members of United States Armed Forces traveling under official orders. Section 284 of INA, 8 U.S.C. 1354. Additionally, section 7209 does not apply to nonimmigrant aliens from anywhere other than Canada, Mexico, or Bermuda. See section 212(d)(4)(B) of the INA, 8 U.S.C. 1182(d)(4)(B) and 8 C.F.R. 212.1.

<sup>11</sup> See section 212(d)(4)(B) of the INA, 8 U.S.C. 1182(d)(4)(B), and section 215(b) of the INA, 8 U.S.C. 1185(b).

<sup>12</sup> 8 U.S.C. 1182(d)(4)(B).

<sup>13</sup> 8 U.S.C. 1185(b).

<sup>14</sup> Section 7209(c)(2) of IRTPA.

<sup>15</sup> 8 U.S.C. 1185(b) and 8 U.S.C. 1182(d)(4)(B).

passport requirement when entering the United States from within the Western Hemisphere.<sup>16</sup>

### D. Advance Notice of Proposed Rulemaking

On September 1, 2005, DHS and DOS published in the **Federal Register** (70 FR 52037) an advance notice of proposed rulemaking (ANPRM) that announced that DHS and DOS were planning to amend their respective regulations to implement section 7209 of IRTPA. The DHS and DOS plan to implement section 7209 is also known as the Western Hemisphere Travel Initiative (WHTI). As stated in the ANPRM, DHS and DOS proposed to develop a plan that would require citizens of the United States, Canada, Bermuda, and Mexico to possess a passport or other acceptable secure document to enter the United States from within the Western Hemisphere by January 1, 2008. The ANPRM invited comments on the possible means of implementation and specifically invited comments on what documents, other than passports, should be accepted as sufficient under section 7209.

The ANPRM announced that DHS and DOS anticipated implementing the documentation requirements of section 7209 in two stages. The first stage would affect travelers entering the United States at air and sea ports-of-entry beginning January 1, 2007. The second stage would address travelers arriving at land border ports-of-entry beginning January 1, 2008. The two-stage approach is intended to ensure an orderly transition, provide affected persons with adequate notice to obtain necessary documents, and ensure that adequate resources are available to issue additional passports or other authorized documents.

In the ANPRM, DHS and DOS sought public comment to assist the Secretary of Homeland Security to make a final determination of which document or combination of documents other than valid passports will be accepted at ports-of-entry to satisfy section 7209. DHS and DOS also solicited public comments regarding the economic impact of implementing section 7209, the costs anticipated to be incurred by United States citizens and others as a result of new document requirements, potential benefits of the rulemaking, alternative methods of complying with the legislation, and the proposed stages for implementation. In addition to receiving written comments, DHS and

<sup>16</sup> Section 212(d)(4)(B) of the INA, 8 U.S.C. 1182(d)(4)(B) and section 215(b) of the INA, 8 U.S.C. 1185(b).

DOS representatives attended over 30 public sessions and town hall meetings throughout the country and met with community leaders and stakeholders to discuss the initiative.

DHS and DOS received 2,062 written comments in response to the ANPRM. The majority of the comments (1,910) addressed only potential changes to the documentation requirements at land border ports-of-entry. One hundred and fifty-two comments addressed changes to the documentation requirements for persons arriving at air or sea ports-of-entry. Comments were received from a wide range of United States and Canadian sources including: private citizens; businesses and associations; local, state, federal, and tribal governments; and members of the United States Congress and Canadian Parliament.

Some of the comments pertaining to arrivals at air and sea ports-of-entry were also applicable to land border crossings and will therefore be addressed in both this rulemaking and a separate, future rulemaking specific to land border crossings. As this proposed rule deals only with changes to arrivals at air and sea ports-of-entry, the comments received regarding only land border crossings will not be addressed here.

A general discussion of the comments relevant to this rulemaking follows. Complete responses to the comments from both the ANPRM and this NPRM regarding air and sea travel will be presented in the final rule.

#### 1. Passport as Only Acceptable Document for WHTI Air-and-Sea Arrivals

Forty commenters contended that DHS should accept only a valid passport to satisfy documentary requirements for air and sea arrivals beginning January 1, 2007. Thirty-six of the 40 comments were submitted by United States citizens and four comments were submitted by associations or businesses located in the United States. Eight commenters recommended that the implementation of a "passport only" requirement should not be delayed. Among the reasons for supporting a "passport only" requirement, commenters expressed the need to enhance border security, prevent document forgeries, and simplify document review for CBP officers by utilizing one standardized document.

One hundred and twelve commenters opposed any proposal that would require a valid passport to satisfy the documentation requirements for air and sea arrivals, but supported the goal of improving border security.

Thirty-two comments stated that a "passport only" requirement would significantly impede travel and tourism either by causing lengthy delays at the border or by preventing individuals who did not possess a passport from traveling. Some of these comments asserted that requiring passports could essentially prevent travelers from making spontaneous decisions to travel by air or sea within the Western Hemisphere.

Thirty-four comments contended that due to the cost of a passport, a passport only requirement would be an unreasonable financial burden for many families. Citing the \$97 cost of an initial adult passport and the \$82 cost of a child's passport, several commenters asserted that the costs are multiplied for a family traveling together. Thirty-nine comments contended that a "passport only" requirement would have a significant negative economic impact on businesses and local economies. Many of these commenters provided quantitative and qualitative information to illustrate their proffered economic impact.

In addition, five commenters raised the concern that the demand for passports could exceed the passport processing capacity of DOS.

#### 2. Alternative Forms of Identification

Eighty-one commenters submitted recommendations about the types of alternate documentation that could satisfy the requirements of section 7209 of IRTPA. Many of these commenters noted that section 7209 of IRTPA provides that a passport substitute could be another document or combination of documents that sufficiently denote identity and citizenship. Fifty-nine commenters asserted that DHS should identify acceptable alternative documents that would be more convenient, affordable and easier to obtain than a passport. Many of these commenters noted that DHS has not identified other low-cost and easily obtainable documents in lieu of a passport. Several commenters also recommended that any new document should be small enough to carry in a wallet as opposed to the current booklet-style passport.

Ten commenters recommended that DHS continue to accept a state-issued driver's license and an original birth certificate as evidence of identity and citizenship. Numerous commenters asserted that a driver's license combined with a birth certificate is the best-known and most generally accepted combination of documents that denote identity and citizenship. Several commenters reasoned that since these

documents are sufficient to establish nationality and identity for the purpose of obtaining a passport, they should be acceptable at the border as well.

One commenter recommended that the current NEXUS Air program<sup>17</sup> should be expanded to additional Canadian airports. Another commenter noted that acquiring a NEXUS Air card requires a lengthy processing time of approximately 6 to 8 weeks for the individual to become enrolled.

#### 3. One Implementation Date of January 1, 2008

Fifty-seven comments recommended that DHS and DOS delay the first stage of implementation for air and sea travelers by changing the implementation date from January 1, 2007, to January 1, 2008, or an unspecified later date. Many of these commenters asserted that the January 1, 2007, implementation date for air and sea travel does not allow adequate time for the traveling public and industry to prepare for the new regulations.

Some commenters expressed concern that a phased-in approach would unnecessarily discriminate against one mode of travel in favor of another because those traveling by air and sea will be subject to more stringent documentation requirements than those traveling by land during 2007. Several comments asserted that there is no basis for treating travelers who arrive by air or sea any differently from those who travel over land borders.

One commenter argued that the statutory deadline for implementation is January 1, 2008, and that IRTPA does not require implementation to be phased-in prior to that date. Several comments suggested that one implementation date would be less confusing to the traveling public and allow more time to educate the public about the new requirements and for proper consideration of alternative secure documents other than a passport.

Finally, a few commenters recommended delaying the implementation date of January 1, 2007, for air and sea travelers by at least one week, until after the holiday travel season.

#### 4. Effective Communications Plan

Thirty-eight commenters recommended that DHS and DOS work

<sup>17</sup> NEXUS Air is an airport border clearance pilot project implemented at one airport in Vancouver, Canada by CBP and the Canada Border Services Agency, pursuant to the Shared Border Accord and Smart Border Declaration between the United States and Canada. The NEXUS Air alternative inspection program allows pre-screened, low-risk travelers to be processed more efficiently by United States and Canadian border officials.

with the travel industry to launch an effective communications campaign to inform and educate the traveling public about any new documentation requirements. According to several commenters, some Canadian and United States citizens mistakenly believe that a "passport only" requirement is already in effect. One commenter noted that due to confusion around the implementation phase-in dates, many members of the public believe that the first phase-in period will apply to all persons traveling to the United States whether or not they travel by air, sea or land. Another commenter suggested that educating the public about changes to the documentation requirements is best accomplished by beginning outreach and public relations efforts far in advance of any new requirement.

#### 5. Passport Exemption for Children Under the Age of 16

Thirty-one commenters recommended that children under the age of 16 should be exempt from a passport requirement and instead be able to use a citizenship document such as a birth certificate. Several commenters asserted that very few children possess passports so that for children under the age of 16 from both Canada and the United States, the current documentation requirements should be maintained.

#### 6. Reduce Cost of Passports or Institute Pricing Incentives

Eleven commenters recommended that passports should be either less expensive or pricing incentives should be introduced for United States citizens who are obtaining a passport for the first time in advance of the implementation deadline. One commenter asserted that financial incentives would encourage United States citizens to obtain a first-time passport or renew an existing passport. Several commenters specifically requested that passport costs be reduced for children less than 16 years of age, students, senior citizens, and families. One commenter recommended that the federal government provide a financial subsidy or discount the cost of passports for low-income earners, welfare recipients, and families with more than two children.

#### 7. Bilateral or Multilateral Process

Three commenters recommended that the implementation of new documentation requirements should be a collaborative, multilateral process with a United States-Canadian partnership and a United States-Mexican partnership. Commenters recommended that the United States

and Canadian governments work together to explore acceptable forms of documents in lieu of a passport for Canadian citizens. Certain commenters noted that if the United States unilaterally develops a new form of alternative document for entry into the United States, there would be no guarantee that the Canadian and Mexican governments would accept the new form of documentation as an entry document. These commenters suggested that the United States Government should not act unilaterally because of the potential negative effects that this rulemaking might have on the economy, and international relations, including a negative public reaction.

#### 8. Native Americans

Three commenters opposed any regulation that would require Native Americans traveling from Canada into the United States to carry and produce a United States or Canadian passport as identification. These commenters asserted that such a requirement would infringe upon the treaty rights of indigenous peoples living within the United States and Canada to travel freely across the border on the basis of their membership in a particular Native American tribe or nation.

#### 9. Mobile Offshore Drilling Units Working on the United States Outer Continental Shelf

Three commenters recommended that offshore workers of United States citizenship working aboard Mobile Offshore Drilling Units (MODUs) on the United States Outer Continental Shelf (OCS) be specifically excluded from any new documentation requirements when traveling between the United States and MODUs.

#### 10. Passengers Traveling by Ferry

Eight commenters raised concerns that the new documentation requirements might create long waits and substantial disruption at ferry terminals, resulting in a decrease in ferry traffic. Some of these commenters recommended that any change to the documentation requirements for ferry passengers should be postponed until the implementation of any new documentation requirements at land border ports-of-entry.

#### 11. Military Personnel

Two commenters recommended that fees for passports, including fees for expedited processing, be eliminated for active duty military personnel and their dependents.

### III. Proposed Requirements for United States Citizens and Nonimmigrant Aliens Traveling by Air and Sea to the United States

This NPRM proposes that, with some exceptions, United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico traveling into the United States by air and sea from Western Hemisphere countries, be required to show a passport. This NPRM does not propose changes to the documentation requirements at land border ports-of-entry.

This passport requirement would apply to most air and sea travel, including commercial air travel and commercial sea travel (including cruise ships). There are two categories of travel and one category of traveler, discussed in more detail below, which would not be subject to the passport requirement proposed here. First, this proposal would not apply to pleasure vessels used exclusively for pleasure and which are not for the transportation of persons or property for compensation or hire. Second, this proposal would not apply to travel by ferry. Finally, this proposal would not apply to United States citizen members of the Armed Forces on active duty.

This NPRM also proposes to designate two documents, in addition to the passport, as sufficient to denote identity and citizenship under section 7209, and acceptable for air and sea travel. The first document is the Merchant Mariner Document (MMD) or "z-card" issued by the United States Coast Guard (Coast Guard) to Merchant Mariners. The second document is the NEXUS Air card when used with a NEXUS Air kiosk. Finally, this proposal would not apply to United States citizen members of the Armed Forces on active duty.

#### A. Passports for Air and Sea Arrivals

After reviewing the comments received and taking them into consideration, DHS and DOS jointly propose that, beginning January 8, 2007, most United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at air or sea ports-of-entry from Western Hemisphere countries will be required to present a valid passport. DHS and DOS note that in response to comments, the originally proposed implementation date of January 1, 2007, for air and sea travelers is being delayed until January 8, 2007, to better accommodate the holiday travel season. The Departments do not believe that there will be an adverse effect on national security by delaying the implementation of this rule by one

week. Persons traveling prior to the effective date of the final rule implementing the air and sea stages of WHTI should plan to depart from the United States with documents sufficient to meet requirements that will be in place when they return.

This proposed rule would implement Congress' direction in IRTPA by eliminating the passport waiver for United States citizens,<sup>18</sup> who enter the United States at air and sea ports-of-entry when traveling between the United States and any country, territory, or island adjacent thereto in North, South or Central America.<sup>19</sup> In addition, this proposed rule would eliminate the passport waiver for nonimmigrant aliens who are Canadian citizens, citizens of Bermuda, and Mexican nationals entering the United States at air and sea ports-of-entry from any country, territory, or island adjacent thereto in North, South or Central America.<sup>20</sup>

As required by IRTPA, both DHS and DOS reviewed a variety of options for implementing the WHTI requirements, and jointly decided to phase-in the documentation requirement based upon risk management and operational considerations. As the ANPRM discussed, this phased approach is essential because a staggered implementation at air and sea ports-of-entry one year before the statutory deadline will enhance security requirements using existing infrastructure while allowing the Departments time to acquire and develop resources to meet the increased demand for the largest sector, the land border crossings.

Requiring travelers to carry and produce passports for the air and sea environments has multiple security and operational benefits. WHTI will reduce the vulnerabilities identified in the final report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission). WHTI is intended not only to enhance security efforts at our Nation's borders, but also to expedite the movement of legitimate travel within the Western Hemisphere.

As the report of the 9/11 Commission observed, travel documents are as

valuable as weapons to terrorists, and the passport is regarded as the most secure travel identity document in the world. After a review of current international travel documents and the available alternatives, DHS and DOS believe that the passport is the most reliable travel document to optimize safety and efficiency in the air and sea environments.

Standardizing documentation requirements for all air and sea travelers entering the United States will enhance our national security and secure and streamline the entry process into the United States. A passport requirement for the majority of travelers would allow border security officials to quickly, efficiently, accurately, and reliably review documentation, identify persons of concern to national security, and determine eligibility for entry of legitimate travelers without disrupting the critically important movement of people and goods across our air and sea borders. Implementing standardized travel documents (i.e., passports) for citizens of the United States, Canada, Bermuda, and Mexico entering the United States at air and sea ports-of-entry would also reduce confusion for the airline industry and make the entry process more efficient for CBP officers and the public alike since the majority of travelers traveling internationally to or from an airport or seaport would require the passport as a travel document, regardless of destination.

The 9/11 Commission noted that the current exemptions to the passport requirement are a weak link in our layered approach to security that can no longer be ignored. Cognizant of this concern and the realities of the modern world, DHS and DOS agree that any acceptable alternative documents must establish the identity and citizenship of the bearer in a way that can be electronically verified and must include significant security features.

Passports incorporate a host of security features not normally found or available on other documents such as birth certificates and driver's licenses. Security features include, but are not limited to, rigorous adjudication standards and document security features. The adjudication standards establish the individual's citizenship and identity and ensure that the individual meets the qualifications for a United States passport. The document authentication features include digitized photographs, embossed seals, watermarks, ultraviolet and fluorescent light verification features, security laminations, micro-printing, and holograms. A United States passport is a document that is adjudicated by

trained DOS experts and issued to persons who have documented their United States identity and citizenship by birth, naturalization or derivation. Applications are subject to additional Federal government checks to ensure the applicants are eligible to receive a U.S. passport under applicable standards (for example, those subject to outstanding federal warrants for arrest are not eligible for a U.S. passport). Finally, CBP Officers can verify and authenticate a U.S. passport through connectivity with the DOS passport database, allowing a real-time check on the validity of the passport. The primary purpose of the passport has always been to establish citizenship and identity. It has been used to facilitate travel to foreign countries by displaying any appropriate visas or entry/exit stamps. Passports are globally interoperable, consistent with worldwide standards, and usable regardless of the international destination of the traveler.

Requiring passports for most air and sea travel would allow CBP officers to more efficiently process these travelers because there is a standard document to review which contains features that allow for quick reading of the relevant information. Reducing the number of acceptable travel documents would eliminate the need to examine a host of distinct and sometimes illegible, birth certificates and other documents—over 8,000 types may be presented today. By requiring most air and sea passengers to possess a passport, CBP officers would reduce the time and effort used to manually enter passenger information into the computer system on arrival because the officer can quickly scan the machine-readable zone of the passport to process the information using standard passport readers used for all machine readable passports worldwide. It is difficult to precisely determine the improved efficiencies resulting from limiting the acceptable documents at air and sea environments. Based on information from CBP field operations, CBP estimates that presenting secure and machine-readable documentation may typically save CBP officers from 5 to 30 seconds per air and sea passenger processed. This could result in an annual cost savings of \$2.5 million to \$15.0 million.<sup>21</sup>

<sup>21</sup> This is based on the estimated time savings (5 to 30 seconds) multiplied by the number of new passengers with a passport (5,905,462; from Chapter 2 of the Regulatory Assessment) multiplied by the hourly cost of a CBP officer. The annual base salary for a GS-11/1 (in 2005) is \$45,239. This is multiplied by a load factor of 1.4 to account for fringe benefits and locality pay, for an annual salary of \$63,335. This is divided by 2,080 hours to reach an hourly rate of \$30.45.

<sup>18</sup> In addition to affecting U.S. citizens who currently leave and enter the United States without a passport for travel within the Western Hemisphere, section 7209 requires the elimination of the exception to the U.S. passport requirement for U.S. citizen children under the age of 12 included in the foreign parent's passport and for U.S. citizens under age 21 who are members of the household of an official or employee of a foreign government or the United Nations and in possession of or included in a foreign passport. See 22 CFR 53.2 (e) and (f).

<sup>19</sup> See 22 CFR 53.2(b).

<sup>20</sup> See 8 CFR 212.1 and 22 CFR 41.2.

Protecting the national security is a fundamental mission of DHS. Initiating the first phase for all air and most sea travelers by January 8, 2007, will remedy significant vulnerabilities identified by the 9/11 Commission associated with the millions of travelers who enter the United States through air and sea ports-of-entry. This improvement will utilize the existing operational capabilities of both Departments without unduly burdening the traveling public. Phasing in the air and sea travel prior to land border crossings will provide near term border security benefits with regard to a significant number of arriving passengers without significant investment in new port-of-entry infrastructure. DHS estimates that CBP will be able to facilitate the processing of arriving passengers more efficiently when all arriving air and sea passengers carry and produce passports, MMD, or NEXUS Air card, instead of the broad range of documents now presented by arriving United States citizens and citizens of Canada, Bermuda, and Mexico.

CBP estimates that approximately 21 million United States citizens travel to Canada, Mexico, and the Caribbean annually, and that approximately six million of those air and sea travelers do not possess a passport (see section IV below, regarding the Regulatory Analyses). Airports and seaports currently have the personnel and equipment to inspect incoming passengers who carry passports, so the major operational requirement of the final rule resulting from this NPRM is for DOS to expand passport production capacity to meet passport demand. DOS is already expanding passport production capacity to meet the additional demand for passports and will be able to meet a significant increase in demand from the more than 10 million passports produced in fiscal year 2005. DOS reports an estimated 25 percent increase in passport applications so far in fiscal year 2006. DOS has increased passport production capacity with an aim towards processing 16 million passports in fiscal year 2007 and 19 million passports in fiscal year 2008.

#### *B. Exceptions to the Passport Proposal*

DHS and DOS do not propose any change in the requirements for travel by pleasure vessel and ferry at this time. The Departments also propose to

(5,905,462 travelers)(5 seconds)(\$30.45/hour) = \$2,497,463

(5,905,462 travelers)(30 seconds)(\$30.45/hour) = \$14,984,778.

postpone any change in the requirements for United States citizen members of the United States Armed Forces also discussed below.

#### 1. Passengers Arriving by Pleasure Vessel

For purposes of this proposed rule, a pleasure vessel will be defined as a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire. A day sailer or bareboat charter that is rented without a captain or crew and is used for recreational or personal purposes would be considered a pleasure vessel. This rule would not propose changes to the documentation requirements for United States citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico who are aboard pleasure vessels arriving in the United States from a foreign port or place from within the Western Hemisphere.

Pleasure vessel arrivals are treated similarly to land border crossings rather than like commercial vessel arrivals. These pleasure vessel passengers, who are frequent, short duration travelers, are similar to land border crossers and will be addressed in the WHTI second phase rulemaking. This will allow for more consistent processing of these travelers and the use of land border based inspection systems including registered/trusted traveler programs. Many of the pleasure vessel crossings are similar to bridge crossings because they are crossings of a short expanse of river or other waterway and are relatively short in duration.

#### 2. Passengers Arriving by Ferry

For purposes of this proposed rule, a ferry is defined as any vessel: (1) Operating on a pre-determined fixed schedule; (2) providing transportation only between places that are no more than 300 miles apart; and (3) transporting passengers, vehicles, and/or railroad cars. Since ferries will be subject to land border type entry processing on arrival from or departure to a foreign port or place, DHS and DOS propose that ferries be exempt from the new requirements of this rulemaking. Ferries will be addressed in the second phase rulemaking. Thus, current documentation requirements for ferry passengers will not change at this time.

#### 3. Members of the United States Armed Forces

When this rule is promulgated, all active duty members of the United States Armed Forces regardless of citizenship will be exempt from the requirement to present a valid passport when entering the United States.

Currently, under 22 CFR 53.2(d), citizens of the United States are not required to possess a valid passport to enter or depart the United States when traveling as a member of the Armed Forces of the United States on active duty.<sup>22</sup> Under this proposed rule, travel document requirements for United States citizens who are members of the United States Armed Forces would not change from the current requirements. Future changes, if any, to the current documentation requirements will be addressed during the second phase of the WHTI rulemaking process.

Spouses and dependents of these military members would be required to present a passport or other document or combination of documents sufficient to denote identity and citizenship as discussed below, and a valid visa, if required, when entering the United States at air or sea ports-of-entry.

#### **C. Other Documents Deemed Acceptable To Denote Citizenship and Identity**

This NPRM also proposes to designate two documents, in addition to the passport, as sufficient to denote identity and citizenship under section 7209, and acceptable for air and sea travel. IRTPA gives the Secretary of Homeland Security the authority to determine what documents other than the passport are sufficient to denote identity and citizenship for all travel into the United States by United States citizens and citizens of Canada, Mexico, and Bermuda.<sup>23</sup> Accordingly, the Merchant Mariner Document (MMD) when used in conjunction with maritime business, and the NEXUS Air card when used at a designated kiosk, are proposed as acceptable for air and sea travel into the United States from within the Western Hemisphere.

##### 1. Merchant Mariner Document

Currently, an MMD or "z-card" is accepted for United States citizen crewmembers in lieu of a passport.<sup>24</sup> To obtain an MMD, United States citizen Merchant Mariners must provide proof of their citizenship, must provide proof of their identity and must undergo an application process that includes a fingerprint background check submitted to the Federal Bureau of Investigation, a National Driver Register check, and a drug test from an authorized official that administers a drug testing program.

The Secretary of Homeland Security proposes that an MMD when used in

<sup>22</sup> For a discussion regarding the documentation requirements for alien members of the United States Armed Forces, see section III.D.6. of this document.

<sup>23</sup> Section 7209(b)(1) of IRTPA.

<sup>24</sup> See 22 CFR 53.2(c).

conjunction with maritime business would be sufficient to denote identity and citizenship when presented upon arrival at an air or sea port-of-entry. Accordingly, under this proposed rule, United States citizens who possess an MMD would continue to be exempt from the requirement to present a passport when arriving in the United States at air or sea ports-of-entry. However, the Coast Guard has proposed to phase-out the MMD over the next five years and streamline all existing Merchant Mariner credentials.<sup>25</sup> DHS proposes to accept the MMD as long as it is an unexpired document. We also note that United States citizen Merchant Marines serving on U.S. flag vessels are eligible for no fee U.S. passports upon presentation of a letter from the employer and an MMD, in addition to the standard evidence of citizenship and identity.

## 2. NEXUS Air Program Membership Card

NEXUS Air is an airport border clearance pilot project implemented by CBP and the Canada Border Services Agency, pursuant to the Shared Border Accord and Smart Border Declaration between the United States and Canada. The NEXUS Air program is an alternative inspection program designed to facilitate the entry formalities by registered users which allows pre-screened, low-risk travelers to be processed more efficiently by United States and Canadian border officials.

Enrollment in the program is limited to citizens of the United States and Canada, Lawful Permanent Residents (LPRs) of the United States, and permanent residents of Canada. To enroll in the NEXUS Air program, a participant must provide acceptable proof of citizenship or permanent resident status in Canada or the United States. United States citizens must provide an original birth certificate, along with a government-issued photo identification, a valid passport, or a certificate of naturalization. Canadian citizens must provide an original birth certificate, along with a government-issued photo identification, a valid passport, citizenship certificate with photo identification, or a citizenship card.

LPRs of the United States must provide evidence of citizenship and of permanent resident status to enroll in NEXUS Air. Because the scope of section 7209 of IRTPA does not include LPRs, membership in Nexus Air does not change their document requirements. Therefore, LPRs of the

United States, whether or not participating in the NEXUS Air program, will continue to be required to present a valid Form I-551, Alien Registration Card, or other valid evidence of permanent resident status to enter the United States. Canadian permanent residents must provide an original birth certificate, along with a government-issued photo identification, a valid passport (and visa if applicable), and proof of permanent resident status when applying for NEXUS Air enrollment.

An extensive background check against law enforcement databases and terrorist indices, including fingerprint checks, as well as a personal interview with a CBP officer is required of each applicant. Each NEXUS Air membership card has physical security features including digital photographs of the participant's face. When a participant uses a NEXUS Air kiosk, he or she is prompted to look into a camera, which then biometrically verifies membership in NEXUS Air by taking a picture of the participant's iris and matching it to the image stored in the database.

The Secretary of Homeland Security proposes that a NEXUS Air membership card would be a document sufficient to denote identity and citizenship for United States citizens, Canadian citizens, and permanent residents of Canada when arriving in the United States as a NEXUS Air program participant and when using a NEXUS Air kiosk at designated airports.

LPRs of the United States, whether or not participating in the NEXUS Air program, will continue to be required to present a valid Form I-551, Alien Registration Card, or other valid evidence of permanent resident status to enter the United States.

### *D. Impact of This Rulemaking on Specific Groups and Populations*

#### 1. Charter and Commercial Vessels

Under this proposed rule, a commercial vessel will be defined as any civilian vessel being used to transport persons or property for compensation or hire to or from any port or place including all cruise ships. A charter vessel, that is leased or contracted to transport persons or property for compensation or hire to or from any port or place, would be considered a commercial vessel. In contrast, a day sailer or bareboat charter that is rented without a captain or crew and is used for recreational or personal purposes would be considered a pleasure vessel as described above in section III.B.1. Under this proposed rule, commercial vessels will be treated

as arrivals at sea ports-of-entry under this proposed rule. Passengers and crew aboard commercial vessels will need to possess a valid passport when arriving in the United States from a foreign port or place.

Under applicable immigration law, sailing from a United States port into international waters, without a call at a foreign port, and returning to the United States, does not constitute a "departure" from the United States and, consequently, is not an "entry" into the United States that requires a passport under section 215(b) of the INA.<sup>26</sup> Therefore, passports will not be required for persons (including commercial fishermen) onboard a vessel that sails from a United States port and returns without calling at a foreign port or place as the vessel is not considered to have departed the United States. Therefore, commercial fishermen would not be required to possess a passport unless they call at a foreign port or place.

#### 2. Aviation Passengers and Crew

Under this proposed rule, all aviation passengers and crew, including commercial flights and general aviation flights (i.e., private planes), who arrive at air ports-of-entry in the United States from countries within the Western Hemisphere will be required to possess a valid passport beginning January 8, 2007. The only exceptions to this requirement would be for United States citizens who are members of the United States Armed Forces traveling on active duty and travelers who possess either an MMD or NEXUS Air card, as described above.

#### 3. Lawful Permanent Residents

Section 7209 of IRTPA applies to documentation requirements waived under section 212(d)(4)(B) of the INA<sup>27,27</sup> which applies to nonimmigrant aliens, and section 215(b) of the INA,<sup>28</sup> which applies to United States citizens. LPRs are exempt from the requirement to present a passport when arriving in the United States under Section 211 of the INA<sup>29</sup>—section 7209 does not apply to LPRs. LPRs will continue to be able to enter the United States upon presentation of a valid Form I-551, Alien Registration Card, or other valid evidence of permanent resident status.<sup>30</sup> Form I-551 is a secure, fully adjudicated document that can be verified and authenticated

<sup>26</sup> 8 U.S.C. 1185(b).

<sup>27</sup> 8 U.S.C. 1182(d)(4)(B).

<sup>28</sup> 8 U.S.C. 1185(b).

<sup>29</sup> 8 U.S.C. 1181.

<sup>30</sup> See section 211(b) of the INA, 8 U.S.C. 1181(b).

<sup>25</sup> 71 FR 29462 (May 22, 2006).



by CBP at ports-of-entry. DHS published a notice of proposed rulemaking in the **Federal Register** on July 27, 2006, that proposes to collect and verify the identity of LPRs arriving at air and sea ports-of-entry, or requiring secondary inspection at land ports of entry, through US-VISIT.<sup>31</sup>

#### 4. Mexican Citizens

Currently, Mexican citizens traveling to the United States for business or pleasure who are in possession of a BCC may be admitted, subject to certain limitations,<sup>32</sup> without presenting a valid passport when coming from a contiguous territory.<sup>33</sup> IRTPA, however, does not exempt Mexican citizens who possess a BCC from providing a passport or other document designated by DHS upon arrival in the United States. By this rulemaking, Mexican citizens, whether in possession of a BCC or not, would be required to present a valid passport when entering the United States by air or commercial sea vessel, except by ferry or pleasure vessel.

This requirement for Mexican BCC holders is consistent with the requirements that are imposed on both other aliens and United States citizens.

#### 5. Children Under the Age of 16

The United States government currently requires children under the age of 16 arriving from countries outside the Western Hemisphere to provide a passport when entering the United States. IRTPA does not contain an exemption from providing a passport or other document designated by DHS for children under the age of 16 when entering the United States from Western Hemisphere countries. Consequently, as there is no other statutory exemption, children under the age of 16 arriving from Western Hemisphere countries would be required to present a passport when entering the United States by air or commercial sea vessel, except by ferry or pleasure vessel.

#### 6. Alien Members of the United States Armed Forces

Pursuant to section 284 of the INA,<sup>34</sup> alien members of the United States Armed Forces entering under official

orders presenting military identification are not required to present a passport and visa.<sup>35</sup> Because this statutory exemption does not fall within the scope of section 7209 of IRTPA, under this proposed rule alien members of the United States Armed Forces traveling on orders would continue to be exempt from the requirement to present a passport when arriving in the United States at air or sea ports-of-entry. Accordingly, under this NPRM, these individuals would continue to be required to present a military identification card and official orders. However, spouses and dependents of military members are not covered by the exemption set forth in section 284 of the INA.<sup>36</sup> Under the proposed regulation they would continue to be required to present a passport (and visa if required) when entering the United States at air or sea ports-of-entry even when returning from travel in the Western Hemisphere.

#### 7. Members of NATO Armed Forces

Pursuant to Article III of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951,<sup>37</sup> North Atlantic Treaty Organization (NATO) military personnel on official duty are normally exempt from passport and visa regulations and immigration inspection on entering and leaving the territory of a NATO party, but if asked must present a personal I.D. card issued by their NATO party of nationality and official orders from an appropriate agency of that country or from NATO.<sup>38</sup> Because their exemption from the passport requirement is based on the NATO Status of Forces Agreement rather than a waiver under section 212(d)(4)(B) of the INA,<sup>39</sup> they are not subject to section 7209 of IRTPA. Therefore, notwithstanding this proposed rule, NATO military personnel would not be subject to the requirement to present a passport when arriving in the United States at air or sea ports-of-entry.

<sup>35</sup> See also 8 CFR 235.1(c).

<sup>36</sup> 8 U.S.C. 1354.

<sup>37</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953, pt.2] 4 U.S.T. 1792, T.I.A.S. No. 2846 (effective Aug. 23, 1953). NATO member countries are: Belgium, Bulgaria, Canada, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the United States.

<sup>38</sup> See also 8 CFR 235.1(c).

<sup>39</sup> 8 U.S.C. 1182(d)(4)(B).

#### 8. Native Americans Born in Canada

Section 289 of the INA<sup>40</sup> provides that nothing in the INA affects "the right" of Native Americans born in Canada to "pass the borders of the United States," provided they possess at least 50 percentum of Native American blood.<sup>41</sup> Historically, the courts have addressed the right of Native Americans born in Canada to "pass the borders of the United States" in the context of land border crossings.<sup>42</sup> Subsequent case law has not expressly addressed the extension of the right to "pass the borders of the United States" by air or sea.<sup>43</sup> Moreover, any right or privilege to "pass the border" does not necessarily encompass a right to "pass the border" without sufficient proof of identity and citizenship. Under this proposed rule, Native Americans born in Canada would now be required to present a valid passport when entering the United States by air and commercial sea vessel, except by ferry or pleasure vessel.

#### 9. Native Americans Born in the United States

Federal statutes apply to Native Americans born in the United States absent some clear indication that Congress did not intend for them to apply.<sup>44</sup> IRTPA expressly applies to United States citizens and as a matter of law Native Americans born in the United States are United States citizens.<sup>45</sup> Moreover, Congress did not indicate any intention to exclude Native Americans born in the United States from the requirements of IRTPA. Under this proposed rule, therefore, Native Americans born in the United States would now be required to present a valid passport when entering the United States by air and commercial sea vessel, except by ferry or pleasure vessel.

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

DHS issues American Indian Cards (Form I-872) to both United States-born

<sup>40</sup> 8 U.S.C. 1359.

<sup>41</sup> Canadian-born Inuits (Eskimos) do not have the same right to "pass" the borders of the United States.

<sup>42</sup> See *Akins v. Saxbe*, 380 F.Supp. 1210, 1221 (D. Maine 1974) ("[I]t is reasonable to assume that Congress' purpose in using the Jay Treaty language in the 1928 Act was to recognize and secure the right of free passage as it had been guaranteed by that Treaty.") See also *United States ex rel. Diabo v. McCandless*, 18 F.2d 282 (E.D. Pa. 1927), aff'd, 25 F.2d 71 (3rd Cir. 1928).

<sup>43</sup> See *Matter of Yellowquill*, 16 I.&N. Dec. 576 (BIA 1978).

<sup>44</sup> See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034-1035 (11th Cir. 2001).

<sup>45</sup> 8 U.S.C. 1401(b).

<sup>31</sup> See 71 FR 42605.

<sup>32</sup> See 8 CFR 235.1(f).

<sup>33</sup> 8 CFR 212.1(c)(1)(i). Also, Mexican citizens who enter the United States from Mexico solely to apply for a Mexican passport or other "official Mexican document" at a Mexican consulate in the United States have not been required to present a valid passport. This type of entry generally occurs at land borders. Land border entry for this purpose will be addressed in a separate, future rulemaking regarding documentation requirements at land border ports-of-entry. See 8 CFR 212.1(c)(1)(ii).

<sup>34</sup> 8 U.S.C. 1354.

Kickapoo Indians and Mexican-born Kickapoo Indians to document their status. The American Indian Card is issued pursuant to the Texas Band of Kickapoo Act of 1983 (TBKA).<sup>46</sup> There are two versions of the American Indian Card: (1) For Kickapoos who opted to become United States citizens under the TBKA (the filing deadline for this benefit closed in 1989) and (2) for Kickapoos who opted not to become United States citizens, but instead were afforded "pass/repass" status.

While certain Mexican born Kickapoo Indians may "pass the borders" between Mexico and the United States<sup>47</sup> under this authority, this authority has historically been used at land border crossings. Therefore, under this proposed rule, both United States and Mexican-born Kickapoo Indians would be required to present a valid passport when entering the United States by air and sea. Any changes to the land border requirements for Kickapoo Indians will be addressed in the WHTI second phase rulemaking. Mexican-born Kickapoo Indians arriving at air or sea ports-of-entry would be required to present their Mexican passport.

As stated previously, federal statutes apply to Native Americans born in the United States absent some clear indication that Congress did not intend for them to apply. IRTPA expressly applies to United States citizens and as a matter of law American Indians born in the United States are United States citizens. As a result, American-born Kickapoo Indians will be required to present a valid passport when entering the United States by air and commercial sea vessel, except by ferry or pleasure vessel.

#### 11. Travel From Territories Subject to the Jurisdiction of the United States

Pursuant to section 215(c) of the INA,<sup>48</sup> the term "United States" as used in section 215 includes all territory and waters, continental or insular, subject to the jurisdiction of the United States. The United States, for purposes of section 215 of the INA and IRTPA section 7209, includes Guam, Puerto Rico, the U.S. Virgin Islands, American Samoa, Swains Island, and the Commonwealth of the Northern Mariana Islands. Because section 7209's requirements apply only to persons traveling between the United States and foreign countries, these requirements will not apply to United States citizens and nationals who travel directly

between parts of the United States, as defined in section 215(c) of the INA, without touching at a foreign port or place.

#### 12. Outer Continental Shelf Employees

In response to comments received to the ANPRM, DHS and DOS are clarifying that, under this proposed rule, offshore workers who work aboard Mobile Offshore Drilling Units (MODUs) attached to the United States Outer Continental Shelf (OCS) and travel to and from them would not need to possess a passport to re-enter the United States if they depart the United States and do not enter a foreign port or place. Upon return to the United States from a MODU, such an individual would not be considered a new "entry" for inspection purposes under 8 CFR 235.1. Therefore, this individual would not need to possess a passport when returning to the United States. However, an individual who travels to a MODU from outside of the United States and, therefore has not been previously inspected and admitted to the United States, would be required to possess a passport and visa when arriving at the U.S. port-of-entry by air or commercial sea vessel, except by ferry.

#### 13. International Boundary and Water Commission Employees

In response to comments received to the ANPRM, DHS and DOS are clarifying that, under this proposed rule, documentation requirements for direct and indirect employees of the International Boundary and Water Commission crossing the United States-Mexico border while on official business will not change.<sup>49</sup>

#### *E. Section-by-Section Discussion of Proposed Amendments*

Based on the discussion above, the following changes are necessary to the regulations.

##### 8 CFR 212.1

The amendment to this section would revise paragraphs (a)(1) and (a)(2), which provide a passport exemption for Canadian citizens and citizens of the British Overseas Territory of Bermuda. New language would be added that requires a passport for these groups when they enter the United States from within the Western Hemisphere except by land, ferry, or pleasure vessel. Canadian citizens who are participants in the NEXUS Air program may present

other documentation in the form of a NEXUS Air membership card pursuant to 8 CFR 235.1(e).

In addition, this section involves a revision of paragraph (c)(1)(i), which concerns Mexican nationals entering the United States who are in possession of a BCC. New language would be added that specifies that the passport exemption applies when entering the United States from contiguous territory by land, ferry, or pleasure vessel.

##### 8 CFR 235.1

The amendment to this section would involve adding a new paragraph (d), which provides that United States citizens who are holders of a Merchant Mariner Document (MMD or "z-card") issued by the Coast Guard traveling on maritime business may present, in lieu of a passport, an MMD. This new paragraph would be added because the Secretary of Homeland Security proposes that an MMD, when used on maritime business and presented upon arrival, will be deemed sufficient documentation to denote identity and citizenship under IRTPA.

In addition, this section involves adding a new paragraph (e), which provides that United States citizens, Canadian citizens, and permanent residents of Canada who enter the United States as NEXUS Air participants by using a NEXUS Air kiosk, may present, in lieu of a passport, a valid NEXUS Air membership card when entering the United States.

##### 22 CFR 41.1

The amendment to this section would revise paragraph (b), which provides a passport exemption for American Indians born in Canada, having at least 50 per centum of blood of the American Indian race. New language would be added to clarify that the passport exemption applies only to those persons entering from contiguous territory by land, ferry, pleasure vessel, or as participants in the NEXUS Air program.

##### 22 CFR 41.2

The amendment to this section would revise paragraphs (a) and (b), which provide a passport exemption for Canadian citizens and citizens of Bermuda. New language would be added to clarify that the passport exemption applies only to travel into the United States from within the Western Hemisphere by land, ferry, pleasure vessel, or in conjunction with the NEXUS Air program, as applicable. In addition, this section would revise paragraph (g), which concerns Mexican nationals entering the United States who are in possession of a Form DSP-

<sup>46</sup> Pub. L. 97-429, 96 Stat. 2269 (1983), codified at 25 U.S.C. 1300b-11-1300b-16.

<sup>47</sup> TBKA, 25 U.S.C. 1300b-13.

<sup>48</sup> 8 U.S.C. 1185(c).

<sup>49</sup> Article 20 of the 1944 Treaty Between the United States and Mexico (regarding division of boundary water and the functions of International Boundary and Water Commission), TS 922, Bevans 1166, 59 Stat. 1219; 8 CFR 212.1(c)(5).

150, B-1/B-2 Visa and Border Crossing Card. Subparagraph (g)(2) would be eliminated as redundant because Form DSP-150 is a B-1/B-2 visa as well as a Border Crossing Card. Subparagraph (g)(4) would be eliminated because 22 CFR 41.32 has been amended to require that all applicants for Border Crossing Cards present a valid passport; section 41.32 no longer provides conditions for a waiver of the passport requirement. New language would be added that specifies that the passport exemption applies only when entering the United States at a land border port-of-entry or by pleasure vessel or ferry.

#### 22 CFR 53.1

The amendments to this part would revise 22 CFR 53.1 to provide that it is unlawful for a United States citizen, except as provided in 22 CFR 53.2, to depart from or enter, or attempt to depart from or enter, the United States unless he or she bears a valid passport. They also revise 22 CFR 53.1 to provide definitions of “commercial vessel,” “ferry,” “pleasure vessel,” and “United States.”

#### 22 CFR 53.2

The amendments to this part would revise the exceptions to the passport requirement stated in 22 CFR 53.2 so that they are consistent with this rulemaking. One change would narrow the so-called “Western Hemisphere” exception so that it only applies to entries to and departures from Canada and Mexico by land, while another provides exceptions for entries and departures aboard pleasure vessels and ferries. In addition, the amendments would make it clear that the exception for members of the U.S. Armed Forces traveling on active duty will be maintained. The amendment would also contain an exception for U.S. citizen

seamen on maritime business who are carrying Merchant Marine Documents (MMDs or Z-cards). The amendment would also contain an exception for United States citizens who are carrying a NEXUS Air membership card and participating in the NEXUS Air program by using a NEXUS Air kiosk.

The amendments would eliminate the exception for cards of identity or registration issued at consular offices abroad because such cards are no longer issued; for U.S. citizen children included in a foreign passport of an alien parent; for child of members of a foreign government or the United Nations included on a foreign passport; and the current broad exception for waivers authorized by the Secretary of State in 22 CFR 53.2(h). Instead, new exceptions that are consistent with IRTPA would be substituted for those that would be eliminated (i.e., providing exceptions for documentation deemed sufficient to denote identity and citizenship by the Secretary of Homeland Security, and allowing for waiver in individual cases when an unforeseen emergency occurs and individual cases for humanitarian or national interest reasons).

#### 22 CFR 53.4

The amendments to this part would clarify the point that nothing in this rule would prevent a United States citizen from presenting a U.S. passport in circumstances where that passport is not required.

### IV. Regulatory Analyses

#### A. Executive Order 12866: Regulatory Planning and Review

This rule is considered to be an economically significant regulatory action under Executive Order 12866 because it may result in the expenditure

of over \$100 million in any one year. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget (OMB). The following summary presents the costs and benefits of the proposed rule plus a range of alternatives considered. The complete and detailed “Regulatory Assessment” can be found in the docket for this rulemaking: <http://www.regulations.gov> (see also <http://www.cbp.gov>). Comments regarding the analysis and the underlying assumptions are encouraged and may be submitted by any of the methods described under the **ADDRESSES** section of this document.

This rule will affect certain travelers to the Western Hemisphere countries for whom there are no current requirements to present a United States passport for entry. While United States citizens may not need a passport to enter these countries, they would need to carry a passport to leave the United States and for inspection upon re-entry to the United States. This analysis considers air travelers on commercial flights, travelers using general aviation, and cruise ship passengers.

Based on data from the Department of Commerce, approximately 22 million travelers will be covered by the proposed rule. Based on additional available data sources, DHS and DOS assume that a large portion of these travelers already hold passports and thus will not be affected (i.e., they will not need to obtain a passport as a result of this rule). If the provisions of the proposed rule are finalized, DHS and DOS estimate that approximately 6 million passports will be required in the first year the rule is in effect, at a direct cost to traveling individuals of \$941 million. These estimates are presented in Table 1.

TABLE 1.—FIRST YEAR DIRECT COSTS TO TRAVELERS OF THE PROPOSED RULE

Travelers to WHTI countries, first year .....	21,792,788 1st quartile	..... Median	..... 3rd quartile
Passports demanded:			
Air travelers .....	3,942,859	4,084,204	4,364,197
Cruise passengers .....	1,751,988	1,821,258	1,877,324
Total .....	5,694,846	5,905,462	6,241,521
Total cost of passports demanded:			
Air travelers .....	\$579,379,344	\$600,142,162	\$641,283,623
Cruise passengers .....	259,398,916	269,658,495	277,962,482
Total .....	\$838,778,260	\$869,800,657	\$919,246,105
Expedited service fees (20% of passports):			
Number of passports .....	1,138,969	1,181,092	1,248,304
Cost of expedited service .....	\$68,338,158	\$70,865,540	\$74,898,252
Grand total cost .....	\$907,116,418	\$940,666,196	\$994,144,357

Following the first year, the costs will diminish as most United States travelers in the air and sea environments would then hold passports. Because the number of travelers to the affected

Western Hemisphere countries has been growing, a small number of “new” travelers who did not previously hold passports will now have to obtain them in order to travel. The estimated costs

for new passport acquisition in the second year the rule is in effect are presented in Table 2.

TABLE 2.—SECOND YEAR DIRECT COSTS TO TRAVELERS OF THE PROPOSED RULE

“New” travelers to WHTI countries, second year .....	1,313,091 1st quartile	..... Median	..... 3rd quartile
Passports demanded:			
Air travelers .....	195,638	202,409	216,428
Cruise passengers .....	140,159	145,701	150,186
Total .....	335,797	348,110	366,614
Total cost of passports demanded:			
Air travelers .....	\$28,744,708	\$29,742,623	\$31,801,499
Cruise passengers .....	20,751,913	21,572,680	22,236,999
Total .....	\$49,496,622	\$51,315,302	\$54,038,497
Expedited service fees (20% of passports):			
Number of passports .....	67,159	69,622	73,323
Cost of expedited service .....	\$4,029,570	\$4,177,321	\$4,399,366
Grand total cost .....	\$53,526,192	\$55,492,623	\$58,437,863

This rule could also impose indirect costs to those industries that support the traveling public. If some travelers do not obtain passports because of the cost or inconvenience and forego travel to Western Hemisphere destinations, certain industries would incur the indirect consequences of the foregone foreign travel. These industries include (but are not limited to):

- Air carriers and cruise ship companies;
- Airports, cruise terminals, and their support services;
- Traveler accommodations; travel agents; dining services; retail shopping;
- Tour operators;
- Scenic and sightseeing transportation;
- Hired transportation (rental cars, taxis, buses);
- Arts, entertainment, and recreation.

DHS and DOS expect that foreign businesses whose services are consumed largely outside of the United States (with the exception of United States air carriers, cruise ship companies, travel agents, and airport and cruise terminal services) will primarily be impacted. If domestic travel is substituted for international travel, domestic industries in these areas would gain. DHS and DOS expect, however, that United States travel and tourism could also be indirectly affected by the proposed rule if fewer Canadian, Mexican BCC holders, and Bermudan travelers visit the United States (these travelers do not currently need a passport for entry to the United States but will require one under the proposed rule). In this case, United States businesses in these sectors would be

affected. Thus, gains in domestic consumption may be offset by losses in services provided to the citizens and residents of the Western Hemisphere countries affected. In both cases, we expect the gains and losses to be marginal as the vast majority of travelers (based on our Regulatory Assessment, an estimated 96 percent of United States air and sea travelers and 99 percent of Canadian, Mexican, and Bermudan air and sea travelers) are expected to obtain passports and continue traveling internationally.

The benefits of the proposed rule are virtually impossible to quantify in monetary terms. The benefits of the proposed rule are significant and real in terms of increased security in the air and sea environments provided by more secure documents and facilitation of inspections provided by the limited types of documents that would be accepted. In fact, this proposed rule addresses a vulnerability of the United States to entry by terrorists or other persons by false documents or fraud under the current documentary exemptions for travel within the Western Hemisphere, which has been noted extensively by Congress and others:

- During the debate on IRTPA, several members of Congress, including the Chairman of the House Judiciary Committee commented on the need for more secure documents for travelers.<sup>50</sup>

<sup>50</sup>“As the 9/11 staff report on terrorist travel declared, ‘The challenge for national security in an age of terrorism is to prevent the people who may pose overwhelming risk from entering the United States undetected.’ The Judiciary sections of title III require Americans returning from most parts of the

- The 9/11 Commission recommendations, which provide much of the foundation for IRTPA, specifically include a recommendation to address travel documents in the Western Hemisphere.<sup>51</sup>

Finally, in May 2003, a subcommittee of the House Judiciary Committee held a hearing focused on a fraudulent U.S. document ring in the Caribbean, the exploitation of which allowed the notorious Washington D.C. “sniper,” John Allen Muhammad, to support himself while living in Antigua. A Government Accountability Office (GAO) investigator at that hearing testified as to the ease of entering the United States with fraudulent birth certificates and drivers’ licenses.

A uniform document requirement would assist CBP officers in verifying the identity and citizenship of travelers who enter the United States, and

Western Hemisphere to possess passports; require Canadians seeking entry into the United States to present a passport or other secure identification; authorize additional immigration agents and investigators; reduce the risk of identity and document fraud; provide for the expedited removal of illegal aliens; limit asylum abuse by terrorists; and streamline the removal of terrorists and other criminal aliens. These provisions reflect both commission recommendations and legislation that was pending in the House.” *Congressional Record, October 7, 2004, H8685.*

<sup>51</sup>“Americans should not be exempt from carrying biometric passports or otherwise enabling their identities to be securely verified when they enter the United States; nor should Canadians or Mexicans. Currently U.S. persons are exempt from carrying passports when returning from Canada, Mexico, and the Caribbean. The current system enables non-U.S. citizens to gain entry by showing minimal identification. The 9/11 experience shows that terrorists study and exploit America’s vulnerabilities.” *The 9/11 Commission Report, p. 388.*

improving their ability to detect fraudulent documents or false claims to citizenship and deny entry to such persons. Further, such standardized documents would enable more rapid processing of travelers who enter the United States because an individual's identity would be easier to confirm and he or she could be processed through CBP more efficiently.

#### Alternatives to the Proposed Rule

CBP considered the following five alternatives to the proposed rulemaking:

1. The No Action alternative (status quo);

2. Require United States travelers to present a state-issued photo ID and proof of citizenship (such as birth certificates) upon return to the United States from countries in the Western Hemisphere;

3. Allow United States citizens who possess a Transportation Worker Identification Card (TWIC) to use the card as a travel document in the air and sea environments;

4. Allow Mexican citizens to present their Border Crossing Cards (BCCs) in the air and sea environments in lieu of a passport; and

5. Develop and designate a low-cost PASS card as an acceptable document for United States citizens.

Calculations of costs (if any) for the alternatives can be found in the Regulatory Assessment.

#### *Alternative 1: The No Action Alternative*

The No Action alternative would have zero costs (or benefits) associated with it. This alternative was rejected because section 7209 of the IRTPA specifically provides that, by January 1, 2008, United States citizens and nonimmigrant aliens may enter the United States only with passports or such alternative documents as the Secretary of Homeland Security may designate as satisfactorily establishing identity and citizenship. Current documentation requirements leave major gaps in security at U.S. airports and seaports and do not satisfy the requirements under the IRTPA that travel documents for entry into the United States must denote identity and citizenship.

#### *Alternative 2: Require United States Travelers To Present a State-Issued Photo ID and Proof of Citizenship*

The second alternative would require United States citizens to present state-issued photo identification in combination with a birth certificate to establish citizenship and identity. This alternative is similar to the status quo. The U.S. birth certificate can be used as

evidence of birth in the United States; however, it does not provide definitive proof of citizenship (e.g., children born in the U.S. to foreign diplomats do not acquire U.S. citizenship at birth). Highly trained passport specialists and consular officers abroad adjudicate passport applications, utilizing identity and citizenship documents (like U.S. birth certificates, naturalization certificates, consular reports of birth abroad, etc.). These specialists have resources available, including fraud and document experts, to assist when reviewing documents and are not faced with the same time constraints as officers at ports-of-entry. These factors are critical in determining that a birth certificate and driver's license may be presented as documentary evidence of citizenship and identity for an application for a passport but are not sufficient under WHTI for entry to the United States. There are, in addition, other circumstances where a non-U.S. birth certificate does not provide definitive proof of citizenship (e.g., dual-nationals, foreign birth to U.S. citizen parents, foreign-born adopted children, and naturalized citizens). In addition, there is no current way to validate that the person presenting the birth certificate for inspection is, in fact, the same person to whom it was issued. The lack of security features and the plethora of birth certificates issued in the United States (issued by more than 8,000 entities) currently make it difficult to reliably verify or authenticate a birth certificate. A state-issued photo identification provides positive identification with name, address, and photograph. However, a state-issued photo identification does not provide proof of citizenship.

Alternative 2 was rejected for several reasons. Because birth certificates and driver's licenses are issued by numerous government entities, there is no standard format for either document, and, at present, it is not possible to authenticate quickly and reliably either document. Some states only issue photocopies as replacements of birth certificates, some states issue replacement birth certificates by mail or through the Internet, and some states will not issue photo identification to minors. Both documents lack security features and are susceptible to counterfeiting or alteration. While most states require that driver's licenses contain correct address information, it is not uncommon for the address information to be outdated. Neither the birth certificate nor the state-issued identification was designed to be a travel document. Birth certificates can

easily deteriorate when used frequently as travel documents because they are normally made from some sort of paper with a raised seal, so they cannot be laminated or otherwise protected when under repeated use.

Because these documents are not standardized, CBP officers require additional time to locate the necessary information on the documents. This may result in cumulative delays at air and sea ports of entry. If the information is not current, travelers may need to be referred to secondary inspection for additional processing. CBP, DHS, and DOS believe that the risk of counterfeiting and fraud associated with these documents makes them unacceptable documents for travel under IRTPA.

Because neither document has a machine-readable zone, CBP will not be able to front-load information on the traveler to expedite the initial inspection processing, including checks necessary to protect the national security of the United States. Birth certificates are issued by thousands of authorities, and are currently impossible to validate or vet sufficiently. Both documents are readily available for purchase to assume a false identity. Because the birth certificate and state-issued photo ID have limited or non-existent security features, they are more susceptible to alteration. Therefore, the actual, rather than claimed, identity and citizenship of the traveler using these documents cannot always be determined.

The costs of this alternative are associated with minors obtaining photo identification for travel. Currently, all adult travelers in the air and sea environments must present photo identification (usually a driver's license) along with proof of citizenship (usually a birth certificate) when they check in for their flights and voyages (per the requirements of the air and sea carriers). Additionally, all countries in the Western Hemisphere require a passport or these documents for entry into their countries. The exception, however, is for minor travelers. Currently, parents may orally vouch for their children upon exit and entry into the United States to and from the Western Hemisphere, and some Western Hemisphere countries allow children to present school identification as sufficient proof of identity. To comply with a requirement that would allow a photo ID in combination with a birth certificate for travel in the Western Hemisphere, minors would most likely need to obtain state-issued photo identification. There could also be additional costs in the form of lost

efficiency upon entry to United States ports-of-entry. If CBP officers need to spend more time examining a variety of documents to determine what they are and if they are fraudulent, and if CBP officers need to enter data by hand rather than routinely utilize machine-readable technology to obtain information on arriving passengers, this would have time-delay impacts at airports and seaports. CBP is unable to quantify this loss of efficiency and presents only the cost to minors to obtain a photo ID.

Based on data from the Department of Commerce's Office of Travel & Tourism Industries (OTTI), eleven states with the highest number of international travelers (to the Western Hemisphere or otherwise) (California, New York, New Jersey, Florida, Texas, Illinois, Virginia, Pennsylvania, Washington, Massachusetts, and Ohio) account for almost three-quarters of international air travelers.<sup>52</sup> Most requirements for obtaining a photo identification are similar across these states: completion of a department of motor vehicles (DMV) form, submission of a form or declaration attesting that the applicant is the parent or legal guardian of the minor receiving the identification, and presentation of a birth certificate and social security card. If the applicant is a minor, he or she must appear in person with a parent or guardian. Fees for these states range from \$3 (Florida) to \$21 (California), and identifications are valid for an average of five years.<sup>53</sup> As stated previously, some states will not issue photo ID to minors under a certain age.<sup>54</sup> For the purposes of this analysis only, we assume all minors would be able to obtain state-issued photo identification.

CBP estimates that there are 1,643,606 minors that will be covered by this proposed rule, 557,365 of whom do not currently hold a passport. CBP has used the average of the photo identification fees from the 11 states above (\$15) and added the cost of the time it takes to complete the forms and submit them to the DMV (\$41, the same time cost CBP estimated to obtain the passport) for a total of approximately \$55 per minor. Thus, assuming that a birth certificate is readily available, the cost of this

alternative ID for minors would be \$30.7 million.

*Alternative 3: Designate TWIC as an Acceptable Document for United States Citizens*

The third alternative would allow U.S. transportation workers to use their TWICs in lieu of a passport. Section 102 of the Maritime Transportation Security Act of 2002 requires the Secretary of Homeland Security to issue a biometric transportation security card to individuals with unescorted access to secure areas of vessels and facilities.<sup>55</sup> In addition, these individuals must undergo a security threat assessment to determine that they do not pose a security threat prior to receiving the biometric card and access to the secure areas. The security threat assessment must include a review of criminal, immigration, and pertinent intelligence records in determining whether the individual poses a threat, and individuals must have the opportunity to appeal an adverse determination or apply for a waiver of the standards. The regulations to implement the TWIC in the maritime environment are in the proposed rule stage and are pending finalization subject to public comment and revision.<sup>56</sup> For the sake of comparison, CBP assumes that TWICs are available to all transportation workers covered by the proposed rule. Additionally, analysis of this alternative assumes that CBP would accept the TWIC for any travel.

The Transportation Security Administration (TSA) and Coast Guard estimate that the initial population of cards holders will be approximately 750,000.<sup>57</sup> This population includes such individuals as United States MMD holders, port truck drivers, contractors, longshoremen, and rail workers. As discussed previously, MMD holders will not be affected by the proposed WHTI air and sea rule, because the MMD will be an acceptable document under the proposed rule. The other TWIC holders do not likely leave the country on vessels for the purposes of work-related activities. For the purposes of this economic analysis only, CBP estimates the cost savings to these individuals of using TWICs in the air and sea

environments for non-work-related travel.

CBP does not know how TWIC holders overlap with the United States population traveling to the affected WHTI countries. As calculated previously, CBP estimates there are approximately 22 million unique travelers covered by the proposed rule, and approximately 6 million (27 percent) of them will require passports since they do not already have them. For the purposes of this analysis of alternatives, CBP assumes that the population requiring passports fully encompasses TWIC holders. This is an extreme best-case assumption, as most of the TWIC holders will not be traveling internationally in the air and sea environments as part of their work. Thus in the best-case, 27 percent of the 750,000 TWIC holders (approximately 203,000 individuals) would not need passports. At a cost of \$149 per passport (\$97 application fee for an adult, \$11 for photos and \$41 for the time costs of completing the necessary paperwork), this would result in a savings of, at best, \$30.2 million. This is approximately 3 percent of the total rule cost. The savings are likely to be lower than that because the TWIC-holding population in the maritime environment is unlikely to be entirely included in the United States traveling population covered by the proposed rule.

The TWIC cannot be read by current CBP technology installed in air and sea ports-of-entry. While there is information embedded in the chip on the TWIC, only the name of the individual and a photo ID are apparent to a CBP officer upon presentation. DHS would have to install chip readers in all air and sea ports-of-entry to access other information and verify the validity of the document. TSA estimates that this cost could be \$7,200 per card reader. Additionally, CBP believes that it would cost \$500,000 to develop databases, cross-reference information and coordinate with TSA and Coast Guard, and test equipment installed in airports and seaports.

For this analysis CBP assumes that a card reader would need to be installed in each CBP booth in airports and 4 mobile readers would be required in seaports that receive cruise passengers. CBP estimates that there are 2,000 air and sea "lanes" nationwide that would need a TWIC reader. The cost for readers is thus \$14.4 million and with the additional cost for reprogramming and adapting existing systems, the total cost is \$14.9 million in the first year. Following the first year, CBP would expect to pay approximately 25 percent of the initial cost for operations and

<sup>52</sup> Table 22, U.S. Travelers to Overseas Countries 2004, State of Residence of Travelers, OTTI, 2005.

<sup>53</sup> See the nationwide DMV guide at [www.dmv.org](http://www.dmv.org).

<sup>54</sup> Of the 11 states examined in the analysis of this alternative, Florida, Massachusetts, New Jersey, and Pennsylvania have a minimum age requirement for obtaining a photo ID. The minimum age to obtain a photo ID in Florida is 12, in Massachusetts is 16, in New Jersey is 17, and in Pennsylvania is 16.

<sup>55</sup> Pub. L. 107-295, 116 Stat. 2064 (Nov. 25, 2002).

<sup>56</sup> 71 FR 29396 and 29462 (May 22, 2006).

<sup>57</sup> Department of Homeland Security, Transportation Security Administration, and U.S. Coast Guard, Regulatory Evaluation for the Notice of Proposed Rulemaking Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector, 49 (2006). Dockets TSA-2006-24191 or USCG-2006-24196.

maintenance. The net first-year savings would be, again at best, \$15.3 million. This is a 2 percent difference from the costs of the chosen alternative (i.e., \$15.3 million divided by \$941 million).

This alternative was rejected because the TWIC does not denote citizenship on its face and it was not designed as a travel document but rather, to positively identify the holder and hold the results of a security threat assessment, and as a tool for use in access control systems. Because the TWIC does not provide citizenship information on its face, the holder would need to present at least one other document that proves citizenship. CBP would need to take additional time at primary inspection to establish citizenship, or the traveler would have to be referred to secondary inspections for further processing. The overall result could be increased delays at ports of entry.

*Alternative 4: Designate the BCC as an Acceptable Document for Mexican Citizens*

Alternative 4 would allow Mexican citizens to present their BCCs upon entry to this country. This alternative would have no impact on the cost of the rule to United States citizens. The BCC is a credit card-size document with many security features and 10-year validity. Also called a "laser visa," the card is both a BCC and a B1/B2 visitor's visa. This alternative could be less expensive for a percentage of Mexican citizens. A Mexican passport is required to obtain a BCC; however, there are some Mexican citizens that hold a BCC without a valid passport because the passport has expired prior to the expiration of the BCC. The BCC is

currently limited to use on the southern land border and the traveler is required to remain within 25 miles of the border unless the traveler obtains an I-94 prior to traveling further into the United States.<sup>58</sup>

This alternative was rejected because the BCC cannot be used with CBP's Advance Passenger Information System (APIS), which collects data from travelers prior to their arrival in and departure from the United States.<sup>59</sup> The passport requirement for Mexican citizens who hold BCC in the air and sea environments is consistent with the requirement for passports for most United States citizens and foreign nationals.

*Alternative 5: Develop and Designate a Low Cost PASS Card as an Acceptable Document for United States Citizens*

DOS, in consultation with DHS, has begun developing an alternative travel document, a card-format, limited use passport called a People Access Security Service card (PASS card). Like a traditional passport booklet, the PASS card will be a secure travel document that establishes the identity and citizenship of the bearer. The PASS card is being designed to benefit those citizens in border communities who regularly cross the northern and southern borders every day and where such travel is an integral part of their daily lives. As currently envisioned, it will be the size of a credit card and will have a fee structure that is lower than for a traditional passport booklet. The application process for the PASS card will be comparable to that for the passport booklet in that each applicant will have to establish United States

citizenship, personal identity, and entitlement to obtain the document.

The cost of the PASS card has yet to be determined. Strictly for the purposes of this analysis of alternatives, we assume the fee for a first-time adult PASS card would be \$45 and for a minor would be \$35. The cost for photos is \$11. Because the application process would be comparable to that for a traditional passport, the personal time cost would continue to be \$41, as estimated previously for the primary analysis of the cost of the proposed rule. Using the same methodology as used for the primary analysis (most likely scenario) but assuming that all travelers who do not currently hold a passport obtain a PASS card rather than the traditional passport booklet, we estimate that the first-year cost would be \$668 million. At this lower cost, approximately 6.2 million PASS cards would be demanded, approximately 300,000 more than under the proposed rule, an increase of 5 percent.

Use of this alternative passport card was rejected for the air and sea environments for a number of reasons. This rule is proposed to take effect on January 8, 2007, and there is not sufficient time for the Department of State to develop and issue the PASS card by that time. The PASS card is intended to be a limited-use passport and will not meet all the international standards for passports and other official travel documents (for example, the size of the PASS card does not comport with the International Civil Aviation Organization 9303 travel document standards).

The following table presents a comparison of the costs of the proposed rule and the alternatives considered.

COMPARISON OF REGULATORY ALTERNATIVES IN FIRST YEAR  
[Costs in millions]

Alternative	First-year cost	Cost compared to status quo	Cost compared to proposed rule	Reason rejected
Proposed rule (passports, MMDs, Air Nexus).	\$941	+\$941	n/a .....	Status quo does not meet requirements of IRTPA. Identity and citizenship of the traveler cannot always be reasonably assumed or ascertained using these documents; minors may not be able to obtain IDs in all states; delays in processing entries because neither document is standardized.
Status quo .....	\$0	n/a	-\$941 .....	
State-issued photo ID + birth certificate in lieu of U.S. passport.	\$31	+\$31	-\$910 .....	

<sup>58</sup> With the exception of Tucson, Arizona, where travel is limited to 75 miles.

<sup>59</sup> Information for aircraft to be submitted includes: full name, date of birth, gender, citizenship, country of residence, status on board the aircraft, travel document type, passport information if passport is required (number, country of issuance, expiration date), alien

registration number where applicable, address while in the United States (unless a U.S. citizen, lawful permanent resident, or person in transit to a location outside the United States), Passenger Name Record locator if available, foreign code of foreign port/place where transportation to the United States began, code of port/place of first arrival, code of final foreign port/place of

destination for in-transit passengers, airline carrier code, flight number, and date of aircraft arrival. Information for vessels is comparable, with requirements appropriate to vessels: vessel name, vessel country of registry/flag, vessel number, and voyage number (for multiple arrivals on the same calendar day).

COMPARISON OF REGULATORY ALTERNATIVES IN FIRST YEAR—Continued  
[Costs in millions]

Alternative	First-year cost	Cost compared to status quo	Cost compared to proposed rule	Reason rejected
TWICs in lieu of U.S. passport.	\$910	+\$910	-\$15 .....	TWICs do not yet exist in the maritime environment; TWIC not designed as a travel document; citizenship not included; CBP would have to install card readers and modify their own systems to accept TWICs.
BCCs in lieu of Mexican passport.	No direct costs for U.S. citizens	\$0	May be slightly less expensive for BCC holders.	Cannot be used in conjunction with APIS in the air and sea environments.
PASS card in lieu of traditional passport booklet.	\$668	+\$668	-\$273 .....	PASS cards cannot be used because they do not yet exist.

Accounting Statement

As required by OMB Circular A-4 (available at [www.whitehouse.gov/omb/circulars/index.html](http://www.whitehouse.gov/omb/circulars/index.html)), CBP has prepared an accounting statement showing the classification of the expenditures

associated with this rule. The table provides an estimate of the dollar amount of these costs and benefits, expressed in 2005 dollars, at three percent and seven percent discount rates. DHS and DOS estimate that the

cost of this rule will be approximately \$237 million annualized (7 percent discount rate) and approximately \$233 million annualized (3 percent discount rate). Non-quantified benefits are enhanced security and efficiency.

ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES, 2006 THROUGH 2016  
[2005 dollars]

	3% discount rate	7% discount rate
<b>COSTS</b>		
Annualized monetized costs .....	\$233 million .....	\$237 million.
Annualized quantified, but un-monetized costs .....	None .....	None.
Qualitative (un-quantified) costs .....	Indirect costs to the travel and tourism industry.	Indirect costs to the travel and tourism industry.
<b>BENEFITS</b>		
Annualized monetized benefits .....	None quantified .....	None quantified.
Annualized quantified, but un-monetized costs .....	None quantified .....	None quantified.
Qualitative (un-quantified) costs .....	Enhanced security and efficiency	Enhanced security and efficiency.

In accordance with the provisions of EO 12866, this regulation was reviewed by OMB.

B. Regulatory Flexibility Act

We have prepared this section to examine the impacts of the proposed rule on small entities as required by the Regulatory Flexibility Act (RFA).<sup>60</sup> A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

When considering the impacts on small entities for the purpose of complying with the RFA, we consulted the Small Business Administration's guidance document for conducting

regulatory flexibility analysis.<sup>61</sup> Per this guidance, a regulatory flexibility analysis is required when an agency determines that the rule will have a significant economic impact on a substantial number of small entities that are *subject to the requirements of the rule*.<sup>62</sup> This guidance document also includes a good discussion describing how direct and indirect costs of a regulation are considered differently for the purposes of the RFA. We do not believe that small entities are subject to the requirements of the proposed rule; individuals are subject to the requirements, and individuals are not considered small entities. To wit, "The courts have held that the RFA requires an agency to perform a regulatory

flexibility analysis of small entity impacts only when a rule directly regulates them."<sup>63</sup>

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

Many of the small entities indirectly affected will be foreign owned and will be located outside the United States. Additionally, reductions in international travel that result from the proposed rule could lead to gains for the domestic travel and tourism industry. Most travelers—an estimated 96 percent of United States travelers and 99 percent of Canadian, Mexican, and Bermudan travelers (based on the Regulatory

<sup>60</sup> 5 U.S.C. 601-612.

<sup>61</sup> Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, May 2003.

<sup>62</sup> *Id.* at 69.

<sup>63</sup> *Id.* at 20.



Assessment summarized above)—are expected to obtain passports and continue traveling. Consequently, indirect effects are expected to be spread over wide swaths of domestic and foreign economies.

Small businesses may be indirectly affected by the proposed rule if international travelers forego travel to affected Western Hemisphere countries. Industries likely affected include (but may not be limited to):

- Air carriers;
- Cruise ship companies;
- Airports;
- Cruise terminals and their support services;
- Traveler accommodations;
- Travel agents;
- Dining services;
- Retail shopping;
- Tour operators;
- Scenic and sightseeing transportation;
- Hired transportation (rental cars, taxis, buses);
- Arts, entertainment, and recreation.

Because this rule does not directly regulate small entities, we do not believe that this rule has a significant economic impact on a substantial number of small entities. However, we welcome comments on that assumption. The most helpful comments are those that can provide specific information or examples of a direct impact on small entities. If we do not receive comments that demonstrate that the rule causes small entities to incur direct costs, we may certify that this action does not have a significant economic impact on a substantial number of small entities during the final rule.

The complete analysis of impacts to small entities for this proposed rulemaking is available on the CBP Web site at: <http://www.regulations.gov>; see also <http://www.cbp.gov>. Comments regarding the analysis and the underlying assumptions are encouraged and may be submitted by any of the methods described under the **ADDRESSES** section of this document.

### C. Executive Order 13132: Federalism

Executive Order 13132 requires DHS and DOS to develop a process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” Policies that have federalism implications are defined in the Executive Order to include rules that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” DHS and DOS

have analyzed the proposed rule in accordance with the principles and criteria in the Executive Order and have determined that it does not have federalism implications or a substantial direct effect on the States. The proposed rule requires United States citizens and nonimmigrant aliens from Canada, Bermuda and Mexico entering the United States by air or sea from Western Hemisphere countries to present a valid passport. States do not conduct activities with which this rule would interfere. For these reasons, this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

### D. Executive Order 12988: Civil Justice Reform

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

### E. Unfunded Mandates Reform Act Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the UMRA, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed “significant intergovernmental mandate.” A “significant intergovernmental mandate” under the UMRA is any provision in a Federal agency regulation that will impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of

\$100 million (adjusted annually for inflation) in any one year. Section 203 of the UMRA, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This proposal would not impose a significant cost or uniquely affect small governments. The proposal does have an effect on the private sector of \$100 million or more. This impact is discussed under the Executive Order 12866 discussion.

### F. Paperwork Reduction Act

The collection of information requirement for passports is contained in 22 CFR 51.20 and 51.21. The required information is necessary for DOS Passport Services to issue a United States passport in the exercise of authorities granted to the Secretary of State in 22 U.S.C. Section 211a *et seq.* and Executive Order 11295 (August 5, 1966) for the issuance of passports to United States citizens and non-citizen nationals. The issuance of U.S. passports requires the determination of identity and nationality with reference to the provisions of Title III of the Immigration and Nationality Act (8 U.S.C. sections 1401–1504), the 14th Amendment to the Constitution of the United States, and other applicable treaties and laws. The primary purpose for soliciting the information is to establish nationality, identity, and entitlement to the issuance of a United States passport or related service and to properly administer and enforce the laws pertaining to issuance thereof.

There are currently two OMB-approved application forms for passports, the DS–11 Application for a U.S. Passport (OMB Approval No. 1405–0004) and the DS–82 Application for a U.S. Passport by Mail. First time applicants must use the DS–11. The proposed rule would not create any new collection of information requiring OMB approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). It would result in an increase in the number of persons filing the DS–11, and a corresponding increase in the annual reporting and/or record-keeping burden. In conjunction with publication of the final rule, DOS will amend the OMB form 83I (Paperwork Reduction Act Submission) relating to the DS–11 to reflect these increases.

The collection of information encompassed within this proposed rule has been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

*Estimated total reporting and/or recordkeeping burden over 3 years:* 37.4 million hours.

*Estimated annual average reporting and/or recordkeeping burden:* 12.5 million hours.

*Estimated total number of respondents over 3 years:* 26.4 million.

*Estimated annual average number of respondents:* 8.8 million.

*Estimated average burden per respondent:* 1 hour 25 minutes.

*Estimated frequency of responses:* every 10 years (adult passport application); every 5 years (minor passport application).

Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer of the Department of State, Office of Information and Regulatory Affairs, Washington, DC 20503. Comments should be submitted within the time frame that comments are due regarding the substance of the proposal.

Comments are invited on: (a) Whether the collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or startup costs and costs of operations, maintenance, and purchases of services to provide information.

#### G. Privacy Statement

A Privacy Impact Assessment (PIA) is being posted to the DHS Web site (at [http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0511.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0511.xml)) in conjunction with the publication of this proposed rule in the **Federal Register**. The changes proposed in this rule involve the removal of an exception for United States citizens from having to present a passport in connection with Western Hemisphere travel, such that those individuals must now present a passport when traveling from points of

origin both within and without of the Western Hemisphere. The rule expands the number of individuals submitting passport information for travel within the Western Hemisphere, but does not involve the collection of any new data elements. Presently, CBP collects and stores passport information from all travelers, required to provide such information pursuant to the Aviation and Transportation Security Act of 2001 (ATSA) and the Enhanced Border Security and Visa Reform Act of 2002 (EBSA), in the Treasury Enforcement Communications System (TECS) (a System of Records Notice for which is published at 66 FR 53029). By removing the exception for submitting passport information from United States citizens traveling within the Western Hemisphere, DOS and CBP are requiring these individuals to comply with the general requirement to submit passport information when traveling to and from the United States.

#### List of Subjects

##### 8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

##### 8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

##### 22 CFR Part 41

Aliens, Nonimmigrants, Passports and visas.

##### 22 CFR Part 53

Passport Requirement and Exceptions; parameters for U.S. citizen travel and definitions.

#### Amendment of the Regulations

For the reasons stated in the preamble, DHS and DOS propose to amend 8 CFR parts 211 and 235 and 22 CFR parts 41 and 53 as set forth below.

#### **PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

1. The authority citation for part 212 is amended to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458).

2. Section 212.1 is amended by:  
a. Revising paragraphs (a)(1) and (a)(2); and

b. Revising paragraphs (c)(1)(i), as follows:

#### **§ 212.1 Documentary requirements for nonimmigrants.**

\* \* \* \* \*

(a) *Citizens of Canada or Bermuda, Bahamian nationals or British subjects resident in certain islands.*—(1) *Canadian citizens.* A visa is not required. A passport is not required for Canadian citizens entering the United States from within the Western Hemisphere by land, ferry, pleasure vessel as defined in 22 CFR 53.1(b), or as participants in the NEXUS Air program pursuant to 8 CFR 235.1(e). A passport is otherwise required for Canadian citizens arriving in the United States by aircraft or by commercial sea vessels as defined in 22 CFR 53.1(b).

(2) *Citizens of the British Overseas Territory of Bermuda.* A visa is not required. A passport is not required for Citizens of the British Overseas Territory of Bermuda entering the United States from within the Western Hemisphere by land, ferry, or pleasure vessel, as defined in 22 CFR 53.1(b). A passport is otherwise required for Citizens of the British Overseas Territory of Bermuda arriving in the United States by aircraft or by commercial sea vessels as defined in 22 CFR 53.1(b).

\* \* \* \* \*

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

(i) Is in possession of a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, containing a machine-readable biometric identifier, issued by the DOS and is applying for admission as a temporary visitor for business or pleasure from a contiguous territory by land, ferry, or pleasure vessel, as defined in 22 CFR 53.1(b).

\* \* \* \* \*

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

3. The authority citation for part 235 is amended to read as follows:

**Authority:** 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, published January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458).

4. Section 235.1 is amended by:  
a. Redesignating current paragraphs (d), (e), and (f) as paragraphs (f), (g), and (h);  
b. Adding a new paragraph (d); and  
c. Adding a new paragraph (e).  
The additions and revisions read as follows:

**§ 235.1 Scope of Examination.**

\* \* \* \* \*

(d) *U.S. Merchant Mariners.* United States citizens who are holders of a Merchant Mariner Document (MMD or Z-card) issued by the U.S. Coast Guard may present, in lieu of a passport, an MMD used in conjunction with maritime business when entering the United States.

(e) *NEXUS Air Program Participants.* United States citizens, Canadian citizens, and permanent residents of Canada who are traveling as participants in the NEXUS Air program, may present, in lieu of a passport, a valid NEXUS Air membership card when using a NEXUS Air kiosk prior to entering the United States.

\* \* \* \* \*

**PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED**

5. The authority citation for part 41 is amended to read as follows:

**Authority:** 8 U.S.C. 1104; Pub. L. 105–277, 112 Stat. 2681–795 through 2681–801; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458).

6. Section 41.1 is amended revising paragraph (b) to read as follows:

\* \* \* \* \*

(b) American Indians born in Canada. An American Indian born in Canada, having at least 50 per centum of blood of the American Indian race, entering from contiguous territory by land, ferry, pleasure vessel as defined in 22 CFR 53.1(b), or as participants in the NEXUS Air program pursuant to 8 CFR 235.1(e) (sec. 289, 66 Stat. 234; 8 U.S.C. 1359).

\* \* \* \* \*

7. Section 41.2 is amended by:  
 a. Revising paragraphs (a) and (b);  
 b. Revising paragraph (g)(1);  
 c. Removing paragraphs (g)(2) and (g)(4); and  
 d. Redesignating paragraphs (g)(3) as (g)(2), (g)(5) as (g)(3), and (g)(6) as (g)(4);

\* \* \* \* \*

(a) *Canadian nationals.* A visa is not required. A passport is not required for Canadian citizens entering the United States from within the Western Hemisphere by land, ferry, pleasure vessel as defined in 22 CFR 53.1(b), or as participants in the NEXUS Air program pursuant to 8 CFR 235.1(e). A passport is required for Canadian citizens arriving in the United States by aircraft or by commercial sea vessels as defined in 22 CFR 53.1(b).

(b) *Citizens of the British Overseas Territory of Bermuda.* A visa is not required. A passport is not required for

Citizens of the British Overseas Territory of Bermuda entering the United States from within the Western Hemisphere by land, ferry, or pleasure vessel, as defined in 22 CFR 53.1(b). A passport is required for Citizens of the British Overseas Territory of Bermuda arriving in the United States by aircraft or by commercial sea vessels as defined in 22 CFR 53.1(b).

\* \* \* \* \*

(g) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national in possession of a Form DSP–150, B–1/B–2 Visa and Border Crossing Card, containing a machine-readable biometric identifier, applying for admission as a temporary visitor for business or pleasure from a contiguous territory by land, ferry, or pleasure vessel, as defined in 22 CFR 53.1(b).

\* \* \* \* \*

8. Part 53 is revised to read as follows:

**PART 53—PASSPORT REQUIREMENT AND EXCEPTIONS**

Sec.

53.1 Passport requirement; definitions.

53.2 Exceptions.

53.3 Attempt of a citizen to enter without a valid passport.

53.4 Optional use of a valid passport.

**Authority:** 8 U.S.C. 1185; 8 U.S.C. 1185 note (section 7209 of Pub.L. 108–458); E.O. 13323, 69 FR 241 (Dec. 30, 2003).

**§ 53.1 Passport requirement; definitions.**

(a) It is unlawful for a citizen of the United States, unless excepted under 22 CFR 53.2, to enter or depart, or attempt to enter or depart, the United States, without a valid U.S. passport.

(b) For purposes of this part:

(1) *Commercial sea vessel* means any civilian vessel being used to transport persons or property for compensation or hire to or from any port or place including all cruise ships.

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

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

(4) *United States* means “United States” as defined in § 215(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1185(c)).

**§ 53.2 Exceptions.**

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

(a) When traveling directly between parts of the United States as defined in § 50.1 of this chapter; or

(b) When entering the United States from, or departing the United States for, Mexico or Canada by land; or

(c) When entering from or departing to a foreign port or place within the Western Hemisphere, excluding Cuba, by pleasure vessel; or

(d) When entering from or departing to a foreign port or place within the Western Hemisphere, excluding Cuba, by ferry; or

(e) When traveling as a member of the Armed Forces of the United States on active duty; or

(f) When traveling as a U.S. citizen seaman, carrying a Merchant Marine Document (MMD or Z-card) in conjunction with maritime business.

The MMD is not sufficient to establish citizenship for purposes of issuance of a United States passport under 22 CFR Part 51; or

(g) When traveling as a participant in the NEXUS Air program with a valid NEXUS Air membership card. United States citizens who are traveling as participants in the NEXUS Air program, may present, in lieu of a passport, a valid NEXUS Air membership card when using a NEXUS Air kiosk prior to entering the United States. The NEXUS Air card is not sufficient to establish citizenship for purposes of issuance of a U.S. passport under 22 CFR Part 51; or

(h) When the U.S. citizen bears another document, or combination of documents, that the Secretary of Homeland Security has determined under Section 7209(b) of Public Law 108–458 (8 U.S.C. 1185 note) to be sufficient to denote identity and citizenship; or

(i) When the U.S. citizen is employed directly or indirectly on the construction, operation, or maintenance of works undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission (IBWC), TS 994, 9 Bevans 1166, 59 Stat. 1219, or other related agreements provided that the U.S. citizen bears an official identification card issued by the IBWC; or

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

(k) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Sec 2, the requirement with respect to the U.S.

citizen for humanitarian or national interest reasons.

**§ 53.3 Attempt of a citizen to enter without a valid passport.**

The appropriate officer at the port of entry shall report to the Department of State any citizen of the United States who attempts to enter the United States contrary to the provisions of this part, so that the Department of State may apply the waiver provisions of § 53.2 (i) and § 53.2(j) to such citizen, if appropriate.

**§ 53.4 Optional use of a valid passport.**

Nothing in this part shall be construed to prevent a citizen from using a valid U.S. passport in a case in which that passport is not required by this part 53, provided such travel is not otherwise prohibited.

Dated: August 7, 2006,

**Michael Chertoff,**

*Secretary of Homeland Security, Department of Homeland Security.*

**Henrietta H. Fore,**

*Under Secretary for Management, Department of State.*

[FR Doc. 06-6854 Filed 8-10-06; 8:45 am]

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**DEPARTMENT OF JUSTICE**

**Bureau of Alcohol, Tobacco, Firearms, and Explosives**

**27 CFR Part 555**

[Docket No. ATF 9P; AG Order No. 2830-2006]

RIN 1140-AA24

**Commerce in Explosives—Amended Definition of “Propellant Actuated Device” (2004R-3P)**

**AGENCY:** Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Justice is proposing to amend the regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to clarify that the term “propellant actuated device” does not include hobby rocket motors or rocket-motor reload kits consisting of or containing ammonium perchlorate composite propellant (APCP), black powder, or other similar low explosives.

**DATES:** Comments must be submitted on or before November 9, 2006.

**ADDRESSES:** Send written comments to: James P. Ficaretta, Program Manager; Room 5250; Bureau of Alcohol,

Tobacco, Firearms, and Explosives; P.O. Box 50221; Washington, DC 20091-0221; *ATTN: ATF 9P*. Written comments must include your mailing address and be signed, and may be of any length.

Comments may also be submitted electronically to ATF at *nprm@atf.gov* or to *http://www.regulations.gov* by using the electronic comment form provided on that site. You may also view an electronic version of this proposed rule at the *http://www.regulations.gov* site. Comments submitted electronically must contain your name, mailing address and, if submitted by e-mail, your e-mail address. They must also reference this document docket number, as noted above, and be legible when printed on 8½” x 11” paper. ATF will treat comments submitted electronically as originals and ATF will not acknowledge receipt of comments submitted electronically. See the Public Participation section at the end of the **SUPPLEMENTARY INFORMATION** section for requirements for submitting written comments by facsimile.

**FOR FURTHER INFORMATION CONTACT:**

James P. Ficaretta; Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms, and Explosives; U.S. Department of Justice; 650 Massachusetts Avenue, NW., Washington, DC 20226, telephone (202) 927-8203.

**SUPPLEMENTARY INFORMATION:**

**Background**

ATF is responsible for implementing Title XI, Regulation of Explosives (18 United States Code chapter 40), of the Organized Crime Control Act of 1970 (“Title XI”). One of the stated purposes of that Act is to reduce the hazards to persons and property arising from misuse and unsafe or insecure storage of explosive materials. Under section 847 of title 18, United States Code, the Attorney General “may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter.” Regulations that implement the provisions of chapter 40 are contained in title 27, Code of Federal Regulations (CFR), part 555 (“Commerce in Explosives”).

Section 841(d) of title 18 sets forth the definition of “explosives.” “Propellant actuated devices” along with gasoline, fertilizers, and propellant actuated industrial tools manufactured, imported, or distributed for their intended purposes are exempted from this statutory definition by 27 CFR 555.141(a)(8).

In 1970, when Title XI was enacted by Congress, the Judiciary Committee of

the United States House of Representatives specifically considered and supported an exception for propellant actuated devices. H.R. Rep. No. 91-1549, 91st Cong., 2nd Sess. 64 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4041. Neither the statute nor the legislative history defines “propellant actuated device.” In 1981, however, ATF added the following definition of “propellant actuated device” to its regulations: “[a]ny tool or special mechanized device or gas generator system which is actuated by a propellant or which releases and directs work through a propellant charge.” 27 CFR 555.11.

In applying the regulatory definition, ATF has classified certain products as propellant actuated devices: aircraft slide inflation cartridges, inflatable automobile occupant restraint systems, nail guns, and diesel and jet engine starter cartridges. ATF also examined hobby rocket motors to determine whether they could be classified as propellant actuated devices. To be classified as a “propellant actuated device,” it is, in view of the definition set forth at 27 CFR 555.11, at a minimum necessary that a particular item be susceptible of being deemed a “tool,” a “special mechanized device,” or a “gas generator system.” Additionally, logic dictates that it is necessary that a propellant actuated device contain and be actuated by propellant.

To ascertain the common, contemporary meanings of “tool,” “special mechanized device,” and “gas generator system,” it is useful to look to Merriam-Webster’s Collegiate Dictionary (10th Ed., 1997) (“Webster’s”). Webster’s defines “tool” in pertinent part as follows: “a handheld device that aids in accomplishing a task \* \* \* [;] the cutting or shaping part in a machine or machine tool \* \* \* [;] a machine for shaping metal \* \* \* ” Id. at 1243. “Device” is defined as “something \* \* \* contrived” and, more specifically, as “a piece of equipment or a mechanism designed to perform a special function.” Id. at 317. For a particular device to be a “special mechanized device,” Webster’s suggests it would be necessary that it be both unique and of a mechanical nature. (See definition of “special,” id. at 1128; definition of “mechanize,” id. at 721.) As to the term “gas generator system,” Webster’s defines “generator” as “an apparatus in which vapor or gas is formed” and as “a machine by which mechanical energy is changed into electrical energy.” Id. at 485. Further, Webster’s defines “system” as “a regularly interacting or interdependent