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February 12, 2008

The Honorable Patrick J. Leahy
Chairman
The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary
United States Senate

The Honorable Henry A. Waxman
Chairman
The Honorable Tom Davis
Ranking Minority Member
Committee on Oversight and Government Reform
House of Representatives

Subject: *Department of Homeland Security, Office of the Secretary: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Homeland Security (DHS), entitled "Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes" (RIN: 1601-AA37). We received the rule on January 11, 2008. It was published in the *Federal Register* as a final rule on January 29, 2008. 73 Fed. Reg. 5,272.

The final rule establishes minimum standards for state-issued drivers' licenses and identification cards that federal agencies can accept for official purposes, including access to federal facilities and security at airports, on or after May 11, 2008. The final rule specifies the required format of the drivers' licenses and identification cards, the evidence a state must verify before issuing a REAL ID, and the security procedures a state must have in place at its facilities. States are not required to comply with the rule; however, individuals from states that have not complied will not be able to use their state-issued driver's license for federal official purposes.

Enclosed is our assessment of the DHS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that DHS complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

cc: Mary Kate Whalen
Deputy Associate General Counsel
for Regulatory Affairs
Department of Homeland Security

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
OFFICE OF THE SECRETARY
DEPARTMENT OF HOMELAND SECURITY
ENTITLED
"MINIMUM STANDARDS FOR DRIVER'S LICENSES AND
IDENTIFICATION CARDS ACCEPTABLE BY
FEDERAL AGENCIES FOR OFFICIAL PURPOSES"
(RIN: 1601-AA37)

(i) Cost-benefit analysis

The final rule will have an economic impact on all 56 jurisdictions, more than 240 million applicants for and holders of a state driver's license or identification card, private sector organizations, and federal government agencies. DHS estimates that the total, undiscounted 11-year cost of the rule to be \$9.9 billion. Estimated at \$5.2 billion dollars, the largest cost area is opportunity costs to individuals, which includes the cost of obtaining birth certificates and social security cards and preparing applications. The next three largest costs areas fall directly on the states. Creating and maintaining the necessary data and interconnectivity systems will cost states approximately \$1.5 billion over the next 11 years. It is expected that increased transactions and wait times will lead to customer service costs of \$970 million and that the upgrade and production of REAL ID's will cost \$953 million over 11 years.

DHS states that the benefits of the final rule are difficult to quantify. The primary benefit of REAL ID will be to improve the security and lessen the vulnerability of federal buildings, nuclear facilities, and aircraft to terrorist attack. DHS provides a "break-even" analysis to determine the point at which the final rule would be cost-beneficial given the likelihood of a 9/11-like terrorist attack within the next 11 years and the effectiveness of preventing such an attack. DHS also mentions potential ancillary benefits of making it more difficult to obtain a legitimate license fraudulently and increasing the costs of creating a false license. Additionally, the final rule could reduce fraudulent activities facilitated by less secure drivers' licenses, such as fraudulent access to government subsidies and welfare programs, illegal immigration, unlawful employment, unlawful access to firearms, and voter fraud.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

DHS has determined that the final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

DHS believes that the REAL ID Act does not constitute an unfunded mandate on the states, because the law is binding on the federal government rather than the states. Additionally, the rule does not fall within the Unfunded Mandates Reform Act because the final rule is issued for national security reasons.

DHS acknowledges that many states may find noncompliance with the requirements of the final rule to be an unattractive option. As a result, DHS analyzed the estimated costs to states and considered appropriate alternatives to, and benefits derived from, the final regulation, in addition to soliciting input from state and local governments.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

DHS issued a notice of proposed rulemaking on March 9, 2007. 72 Fed. Reg. 10,820. DHS received over 21,000 comments on the proposed rule during the 60-day public comment period. DHS responds to these comments in the final rule. 73 Fed. Reg. 5,272.

The rule has an effective date of March 31, 2008. As of May 11, 2008, federal agencies are prohibited from accepting state-issued drivers' licenses or identification cards for official purposes, unless the issuing state certifies, and DHS determines, that it has met the minimum requirements of the REAL ID Act or the state has filed a timely request for an extension. DHS will allow states up to two extensions, the first ending on December 11, 2009, and a second extension that will be granted only if states can demonstrate that they have met certain milestones towards compliance with the final rule that could extend until May 11, 2011. The final rule allows states to use phased enrollment periods, giving states a period of time to work to replace existing licenses. Once a state certifies compliance with the final rule, the state may focus on issuing REAL ID-compliant cards to individuals under the age of 50 as of December 1, 2014, and may delay full enrollment of persons born before December 1, 1964, until December 1, 2017.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule includes three new information collection requirements. Each state will be required to submit a certificate of compliance or request for an extension, with a security plan, and to re-certify its compliance with the REAL ID Act every 3 years on a rolling basis. DHS estimates that states will spend approximately 42,000 hours in the first year, at a cost of \$1.11 million, and 56,000 hours, at a cost of \$1.48 million annually, in subsequent years. States must also subject covered employees

to a background check, including a name-based and fingerprint-based criminal history records check, which DHS estimates will result in an annualized cost over 3 years of \$0.80 million. Finally, states must maintain photographs of applicants and records of certain source documents, which DHS estimates will result in an annualized burden of 990,333 hours and cost of \$26.26 million over 3 years. DHS submitted a copy of these sections to the Office of Management and Budget (OMB) for review, and the collection will not take place until the collections are approved and have a valid OMB control number.

Statutory authorization for the rule

The final rule is authorized by the REAL ID Act of 2005, Public Law 109-13, Division B, 119 Stat. 231, 302 (May 11, 2005).

Executive Order No. 12,866

DHS has determined that the final rule raises novel or complex policy issues and is economically significant. The final rule has been reviewed by the Office of Management and Budget. DHS prepared a cost-benefit analysis as required under the Order.

Executive Order No. 13,132 (Federalism)

The final rule has federalism implications. DHS acknowledges that the issuance of drivers' licenses has traditionally been the province of state governments; however, the threat to national security and the economy posed by identity fraud creates the need for certain uniform standards at the federal level to protect drivers' licenses. In the final rule, DHS states that it attempted to balance state prerogatives with the national interests at stake. DHS also adhered to the federal policymaking criteria and consultation requirements of the Executive Order.

To the extent permitted by law, agencies are to adhere to four federal policymaking criteria, and DHS prepared a consideration of each factor. The first criterion is a strict adherence to constitutional principles and statutory authority, and DHS states that it carefully considered the limits of its constitutional and statutory authority. The second criterion requires an agency to make efforts to maximize the states' policymaking discretion. DHS has done this by making state participation in REAL ID optional and by giving the states' discretion to determine which employees must undergo background investigations and to determine the best way to determine an individual applicant's address of principal residence. DHS plans to avoid intrusive federal oversight in accordance with the third criterion by making states that participate in the REAL ID program responsible for monitoring their own compliance. Finally, in compliance with the fourth criterion, DHS consulted with states to ensure that state discretion was maximized where possible and to ensure that the uniform standards reflected the accumulated security experience of state

motor vehicle administrations and could be attained by states where allowing discretion was not possible.

The Order also requires agencies when promulgating a regulation that has federalism implications engage in consultation with the states, which DHS says it has done extensively.