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United States Government Accountability Office  
Washington, DC 20548

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B-316592

June 23, 2008

The Honorable Max Baucus  
Chairman  
The Honorable Charles E. Grassley  
Ranking Minority Member  
Committee on Finance  
United States Senate

The Honorable John Conyers, Jr.  
Chairman  
The Honorable Lamar S. Smith  
Ranking Minority Member  
Committee on the Judiciary  
House of Representatives

Subject: *Department of Homeland Security, Bureau of Customs and Border Protection: Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program*

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), Bureau of Customs and Border Protection, entitled “Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program” (RIN: 1651-AA72). We received the rule on June 3, 2008. It was published in the *Federal Register* as an “interim final rule; solicitation of comments” on June 9, 2008. 73 Fed. Reg. 32,440.

The interim final rule amends DHS regulations to implement the ESTA requirements under section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110-53, Aug. 3, 2007, for aliens who wish to enter the United States under the Visa Waiver Program (VWP) at air or sea ports of entry. Currently, aliens from VWP countries must provide certain biographical information to U.S. Customs and Border Protection (CBP) officers at air and sea ports of entry on a paper form, Form I-94W. Under this interim final rule, VWP travelers will provide the same information to CBP electronically before departing for the United States. According to CBP, by automating the I-94W process and establishing a system to provide VWP traveler data in advance of travel, CBP will be able to determine the eligibility of citizens and eligible nations from VWP countries to travel to the United

States and whether such travel poses a law enforcement or security risk, before such individuals begin travel to the United States.

The interim final rule is effective on August 8, 2008. Comments must be received on or before August 8, 2008. ESTA will be implemented as a mandatory program 60 days after publication of a notice in the *Federal Register*. DHS anticipates that the Secretary of Homeland Security will issue that notice in November 2008, for implementation of the mandatory ESTA requirements on or before January 12, 2009.

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: Lorrie Rodbart  
Chief, Border Security Regulations Branch  
Department of Homeland Security

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF HOMELAND SECURITY,  
BUREAU OF CUSTOMS AND BORDER PROTECTION  
ENTITLED  
"CHANGES TO THE VISA WAIVER PROGRAM TO IMPLEMENT  
THE ELECTRONIC SYSTEM FOR  
TRAVEL AUTHORIZATION (ESTA) PROGRAM"  
(RIN: 1651-AA72)

(i) Cost-benefit analysis

DHS conducted a cost-benefit analysis of this interim final rule. DHS estimates that the annualized costs will be \$16 million to \$118 million. These costs are for U.S. and foreign-based air and sea carriers. Quantified benefits of \$17 million to \$29 million to carriers and CBP are for annual travel authorizations denied by ESTA that prevent inadmissible persons from applying for admission under the VWP at a United States port of entry. Non-quantified benefits are enhanced security and efficiency.

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

The rule is published as an interim final rule, and, therefore, a regulatory flexibility analysis is not required under the Act. Nonetheless, DHS has considered the impact of the rule on small entities and determined that this 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 concluded that this interim final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (currently adjusted for inflation to \$127 million), and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the Act.

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

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

DHS issued this rule as an interim final rule. DHS concluded that this rule addresses requirements that are procedural in nature and does not alter the substantive rights of aliens from VWP countries seeking admission to the United States; this final rule is

therefore exempt from notice and comment requirements under 5 U.S.C. § 553(b)(A). DHS also concluded that this rule is exempt from APA rulemaking requirements under the “good cause” exception under 5 U.S.C. § 553(b)(3)(B), because the rule improves the security of the VWP.

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

This interim final rule contains a collection of information that has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB), under Control Number 1651-0111.

Statutory authorization for the rule

This interim final rule is authorized by section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. *See also* 8 U.S.C. §§ 1103, 1187.

Executive Order No. 12,866

OMB reviewed this rule and considers it to be a “significant regulatory action” under Executive Order 12,866.

Executive Order No. 13,132 (Federalism)

DHS determined that this rule will not 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.