

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

**8 CFR Part 217**

**USCBP-2008-0003**

**CBP Dec. No. 08-18**

**RIN 1651-AA72**

**Changes to the Visa Waiver Program to Implement the Electronic System for  
Travel Authorization (ESTA) Program**

**AGENCY:** Customs and Border Protection, DHS.

**ACTION:** Interim final rule; solicitation of comments.

**SUMMARY:** This rule amends Department of Homeland Security (DHS) regulations to implement the Electronic System for Travel Authorization (ESTA) requirements under section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, for aliens who wish to enter the United States under the Visa Waiver Program (VWP) at air or sea ports of entry. This rule establishes ESTA and delineates the data fields DHS has determined will be collected by the system.

As required under section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, the Secretary of Homeland Security will announce implementation of a mandatory ESTA system by publication of a notice in the **Federal**

**Register** no less than 60 days before the date on which ESTA becomes mandatory for all VWP travelers. Once ESTA is mandatory, all VWP travelers must either obtain travel authorization in advance of travel under ESTA or obtain a visa prior to traveling to the United States.

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 Nonimmigrant Alien Arrival/Departure (Form I-94W). Under this interim final rule, VWP travelers will provide the same information to CBP electronically before departing for the United States. Once ESTA is mandatory and all carriers are capable of receiving and validating messages pertaining to the traveler's ESTA status as part of the traveler's boarding status, DHS will eliminate the I-94W requirement. 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 nationals 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. ESTA will provide for greater efficiencies in the screening of international travelers by allowing CBP to identify subjects of potential interest before they depart for the United States, thereby increasing security and reducing traveler delays upon arrival at U.S. ports of entry.

**DATES:** This interim final rule is effective on [INSERT DATE THAT IS 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must be received on or before [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. 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.

**ADDRESSES:** Please submit comments, identified by docket number, by one of the following methods:

- Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2008-0003.
- Mail:** Border Security Regulations Branch, Office of International Trade, Customs and Border Protection, 1300 Pennsylvania Avenue, NW (Mint Annex), Washington, DC 20229.
- Instructions:** All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.
- Docket:** For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and 19 CFR 103.11(b) on normal business days between the hours of 9 a.m. and 4:30 p.m. at the Border Security Regulations Branch, Office of International Trade, United States Customs and Border Protection, 799 9th Street, NW, 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Beverly Good, Office of Field Operations, CBP.ESTA@dhs.gov or (202)-344-3710.

**SUPPLEMENTARY INFORMATION:**

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### **I. PUBLIC COMMENTS**

Interested persons are invited to submit written comments on all aspects of this interim final rule. U.S. Customs and Border Protection (CBP) also invites comments on the economic, environmental, or federalism effects of this rule. We urge commenters to reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authorities that support such recommended change.

### **II. BACKGROUND**

#### **A. The Visa Waiver Program**

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security (the Secretary), in consultation with the

Secretary of State, may designate certain countries as Visa Waiver Program (VWP) countries if certain requirements are met. Those requirements include, without limitation, (i) meeting the statutory rate of nonimmigrant visa refusal for citizens and nationals of the country, (ii) a government certification that it has a program to issue machine readable, tamper-resistant passports that comply with International Civil Aviation Organization (ICAO) standards, (iii) a U.S. government determination that the country's designation would not negatively affect U.S. law enforcement and security interests, and (iv) government agreement to report, or make available to the U.S. government information about the theft or loss of passports. The INA also sets forth requirements for continued eligibility and, where appropriate, emergency termination of program countries.

Citizens and eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The list of countries which currently are eligible to participate in VWP is set forth in section 217.2(a) of Title 8 of the Code of Federal Regulations (CFR).

To travel to the United States under VWP, an alien currently must (1) present an electronic passport or a machine readable passport issued by a designated VWP participant country to the air or vessel carrier before departure;<sup>1</sup> (2) possess a round trip ticket; and (3) upon arrival at a U.S. port of entry, submit to a CBP Officer a signed and

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<sup>1</sup>For current VWP member countries only, passports issued before October 26, 2006, need not contain the electronic chip that includes the biographic and biometric information of the passport holder provided the passports comply with International Civil Aviation Organization machine readable standards.

completed I-94W Nonimmigrant Alien Arrival/Departure Form (I-94W). Additionally, the alien must comply with the inspection process at the U.S. port of entry and must not have violated the requirements of a prior VWP admission to the United States. See Section 217(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1187(a). See also 8 CFR part 217.

Under VWP, nonimmigrant alien visitors currently are required to complete and sign an I-94W form prior to arriving at a U.S. port of entry and present it to the CBP Officer at the U.S. port of entry where they undergo admissibility screening. In signing the I-94W form, the traveler waives any right to review or appeal of a CBP Officer's determination as to his admissibility, or to contest, except on the basis of an application for asylum, any action in removal. The form instructs the alien to apply for a visa at the appropriate U.S. embassy or consulate if he or she responds in the affirmative to questions on the reverse side of the I-94W. For example, a traveler may be refused admission to the United States under VWP based upon an affirmative response on the I-94W regarding prior criminal activity, deportation, or visa revocation. Upon arrival at the U.S. port of entry, if the CBP Officer determines that the traveler seeking admission under VWP is ineligible to enter the United States, or is inadmissible based on the information submitted via the I-94W form, or information ascertained during an admissibility interview, then the person must then be returned to the country from which they departed at the carrier's expense.

Pursuant to section 217 of the Immigration and Nationality Act (INA, 8 U.S.C. 1187), a VWP alien traveling to the United States by air or sea must arrive in the United States on a carrier that has signed an agreement with DHS guaranteeing to transport inadmissible or deportable VWP travelers out of the United States at no expense to the United States.

This may create significant delays for the VWP traveler who may not have been on notice that he or she is not admissible to the United States until he or she has arrived at a U.S. port of entry.

### **B. Enhancing VWP Screening**

While VWP encourages travel with participating countries, aspects of the program may be exploited by individuals seeking to circumvent immigration or other laws of the United States. Currently, VWP travelers are not subject to the same degree of screening as those travelers who must first obtain a visa before arriving in the United States. Since September 11, 2001, the visa issuance process has taken on greater significance as an antiterrorism tool.<sup>2</sup> Non-VWP travelers must obtain a visa from a U.S. embassy or consulate and undergo an interview by consular officials overseas who conduct a rigorous screening process in deciding whether to approve or deny a visa. At the U.S. consulate, the application is reviewed, fingerprints are collected, and the applicant's name is checked against various government watchlists. The consular officer reviews name check results and determines if additional security checks are required. The consular officer then interviews the visa applicant and reviews his or her supporting documents. During the visa application process, consular officers have ample time to interview applicants and examine the authenticity of their passports, and may also speak the visa applicant's native language. Every visa applicant undergoes extensive security checks before a visa can be issued, including name-based checks against the Department of

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<sup>2</sup> The Government Accountability Office (GAO) has issued a series of reports on how the visa issuance process serves as an antiterrorism tool, including: GAO, *Border Security: Strengthened Visa Process Would Benefit from Improvements in Staffing and Information Sharing*, GAO-05-859 (Washington, D.C.: Sept. 13, 2005); *Border Security: Actions Needed to Strengthen Management of Department of Homeland Security's Visa Security Program*, GAO-05-801 (Washington, D.C.: July 29, 2005); and, *Border Security: Visa Process Should be Strengthened as an Antiterrorism Tool*, GAO-03-132NI (Washington, D.C.: Oct. 21, 2002).



State's (State Department's) Consular Lookout and Support System (CLASS). When a consular officer determines that an applicant is a positive match to a CLASS record, or if the applicant meets other established criteria, the case is referred for an interagency security review. If denied a visa, the individual cannot lawfully board a plane or vessel destined for the United States.

In contrast to travelers who require a visa and are screened by State Department consular officers through the visa issuance process, VWP travelers are not screened in person until they arrive at a U.S. port of entry.<sup>3</sup> Only after arrival at a U.S. port of entry are VWP travelers subject to an admissibility interview in which CBP Officers observe the applicant, examine his or her passport, collect the applicant's fingerprints as part of the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program,<sup>4</sup> and check his or her name against automated databases and watchlists (which contain information regarding the admissibility of aliens, including known terrorists, criminals, and immigration law violators). Thus, only after a VWP traveler has arrived at a U.S. port of entry is a CBP Officer able to determine whether the traveler is admissible to the United States, or ineligible for admission, based on the information submitted via the form I-94W and information ascertained during an admissibility interview. Annually,

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<sup>3</sup> Under the Advance Passenger Information System (APIS) regulations, commercial aircraft carriers bound for the United States from a foreign port must transmit passenger and crew manifest information to CBP no later than 30 minutes prior to departure to allow CBP to vet such information against government databases, including the terrorist watchlist, prior to departure of the aircraft. Vessel carriers departing for the United States from a foreign port must transmit a passenger and crew manifest no later than 60 minutes prior to departure. See 19 CFR 122.49a.

<sup>4</sup> The US-VISIT program is a government-wide program to collect, maintain, and share information on foreign nationals and better control and monitor the entry, visa status, and exit of visitors. Under the program, foreign visitors are required to submit to fingerprint scans of their right and left index finger and have a digital photograph taken upon arrival at U.S. ports of entry. (DHS recently has initiated a transition to collect scans of all ten fingers from travelers enrolling in the US-VISIT program). Foreign nationals entering the United States through VWP are required to enroll in the US-VISIT program upon arrival at U.S. ports of entry.

several thousand VWP travelers arrive in the United States and are deemed inadmissible for VWP entry at the port of entry, causing significant expense, delay, and inconvenience for those aliens, other travelers, the airlines, and the U.S. government.

DHS has taken a number of steps to mitigate VWP security vulnerabilities in recent years, including instituting a biometric collection requirement for VWP travelers at U.S. ports of entry through US-VISIT. See 8 CFR part 235. The procedural and timing changes implemented under this interim final rule, as described below, represent crucial additional improvements to VWP security.

### **C. Implementing the Recommendations of the 9/11 Commission Act of 2007**

On August 3, 2007, the President signed into law the Implementing the Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Public Law 110-53. Section 711 of the 9/11 Act requires that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a fully automated electronic travel authorization system which will collect such biographical and other information as the Secretary determines necessary to evaluate, in advance of travel, the eligibility of the alien to travel to the United States, and whether such travel poses a law enforcement or security risk. ESTA is intended to fulfill the statutory requirements as described in Section 711 of the 9/11 Act. Section 711 of the 9/11 Act also provides the Secretary with discretion to expand VWP to additional countries by waiving the nonimmigrant visa refusal rate requirements in section 217 of the INA for countries that do not satisfy the required threshold. See Public Law 110-53, Section 711(c). To waive those requirements, the Secretary must certify to Congress that ESTA is “fully operational,” and that an air exit system (a separate requirement from ESTA) is in place

that can verify the departure of not less than 97 percent of foreign nationals who exit through U.S. airports.<sup>5</sup> Additionally, according to the statute, the Secretary's waiver authority may be temporarily suspended if the Secretary does not notify Congress that a biometric air exit system is in place by June 30, 2009.

#### **D. Electronic System for Travel Authorization**

To satisfy the requirements of section 711 of the 9/11 Act, this interim final rule establishes ESTA to allow VWP travelers to obtain authorization to travel to the United States by air or sea prior to embarking on such travel. Under ESTA, CBP also will be able to screen travelers seeking to enter the United States under VWP prior to their arrival in the United States. Aliens intending to travel under the VWP will be able to obtain travel authorization in advance of travel to the United States. DHS notes that an authorization to travel to the United States under ESTA is not a determination that the alien ultimately is admissible to the United States. That determination is made by a CBP Officer only after an applicant for admission is inspected by the CBP officer at a U.S. port of entry. In addition, ESTA is not a visa or a process that acts in lieu of any visa issuance determination made by the Department of State. Travel authorization under ESTA allows a VWP participant to travel to the United States, and does not confer admissibility to the United States. ESTA, therefore, allows DHS to identify potential grounds of ineligibility for admission before the VWP traveler embarks on a carrier destined for the United States.

ESTA will reduce the number of travelers who are determined to be inadmissible to the United States during inspection at a port of entry, thereby saving, among other things,

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<sup>5</sup> The Secretary will provide separate certification to Congress and neither this interim final rule nor its effective and compliance dates serve as that certification.

the cost of return travel to the carrier, inspection time, and delays and inconvenience for the traveler. ESTA also will enable the U.S. government to better allocate existing resources towards screening passengers at U.S. ports of entry, thereby facilitating legitimate travel. ESTA increases the amount of information available to DHS regarding VWP travelers before such travelers arrive at U.S. ports of entry; and, by recommending that travelers submit such information a minimum of 72 hours in advance of departure, provides DHS with additional time to screen VWP travelers destined for the United States, thus enhancing security.

### **1. Obtaining Travel Authorization**

This interim final rule establishes data fields by which VWP travelers may electronically submit to CBP, in advance of travel to the United States, biographic and other information specified by the Secretary. The information specified by the Secretary is necessary to determine the eligibility of the alien to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk. This is the same information currently required on the form I-94W, which VWP travelers must present to a CBP officer at a port of entry. This interim final rule does not impose any new data collection requirements on air or vessel carriers. For example, this rule does not require air carriers to transmit any ESTA data elements on behalf of travelers to CBP, nor does it require carriers to submit any additional data.

In determining a traveler's eligibility for ESTA authorization, CBP will assess each application to determine whether the alien is eligible to travel to the United States and whether there exists any law enforcement or security risk in permitting such travel under VWP. The information submitted by the alien in his/her travel authorization application

will be checked by CBP against all appropriate databases, including, but not limited to, lost and stolen passport databases and appropriate watchlists. Additionally, if an alien does not provide the information required or provides false information in his travel authorization application or if any evidence exists indicating that an alien is ineligible to travel to the United States under VWP or that permitting such travel poses a law enforcement or security risk, CBP may deny the alien's application for a travel authorization. Consistent with section 711 of the 9/11 Act, the Secretary, acting through CBP, retains discretion to revoke a travel authorization determination at any time and for any reason. 8 U.S.C. 1187(h)(3)(C)(i). If an alien's travel authorization application is denied, the alien may still seek to obtain a visa to travel to the United States from the appropriate U.S. embassy or consulate.

## **2. Implementation Notice**

Under section 711 of the 9/11 Act, the Secretary also must publish a notice in the **Federal Register**, no less than 60 days before ESTA requirements are implemented. The Secretary will publish a notice in the **Federal Register** 60 days before ESTA is implemented as a mandatory requirement. 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.

## **3. Timeline for Submitting Travel Authorization Data**

Once ESTA is implemented as a mandatory program, 60 days following publication of a notice in the **Federal Register**, each nonimmigrant alien wishing to travel to the United States under the VWP must have a travel authorization prior to embarking on a carrier. DHS, however, recommends that VWP travelers obtain travel authorizations at

the time of reservation or purchase of the ticket, or at least 72 hours before departure to the United States, in order to facilitate timely departures. This timeline will allow accommodation of last minute and emergency travelers.

#### **4. Required Travel Authorization Data Elements**

ESTA will collect the same information currently required on the Form I-94W that is presented to a CBP officer at a port of entry. See 8 U.S.C. 1187(h)(3). This is the information that the Secretary has deemed necessary to evaluate whether an alien is eligible to travel to the United States under VWP and whether such travel poses a law enforcement or security risk. This information is already collected through the I-94W form, which is presented to CBP when the alien arrives in the United States. On the I-94W form, aliens must provide biographical data such as name, birth date, and passport information, as well as travel information such as flight information and the address of the traveler in the United States. Travelers must also answer eligibility questions regarding, for example: communicable diseases, arrests and convictions for certain crimes, and past history of visa revocation or deportation. The information provided in the I-94W form is sufficient for CBP to initially determine if the applicant is eligible to travel under VWP before the alien commences travel to the United States. Therefore, DHS has decided to utilize the I-94W data elements by requiring them to be submitted in advance of travel under ESTA.

In conjunction with CBP's final rule "Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels," which was published in the **Federal Register** on August 23, 2007 (and became effective on February 19, 2008), DHS has been coordinating with commercial aircraft and

commercial vessel carriers on the development and implementation of messaging capabilities for passenger data transmissions that will enable DHS to provide the carriers with messages pertaining to a passenger's boarding status. A prospective VWP traveler's ESTA status is a component of a passenger's boarding status that has been introduced into the plans for implementing messaging capabilities between DHS and the carriers.

The development and implementation of the ESTA program will eventually allow DHS to eliminate the requirement that VWP travelers complete an I-94W prior to being admitted to the United States. As DHS moves towards elimination of the I-94W requirement, a VWP traveler with valid ESTA authorization will not be required to complete the paper Form I-94W when arriving on a carrier that is capable of receiving and validating messages pertaining to the traveler's ESTA status as part of the traveler's boarding status. Once all carriers are capable of receiving and validating messages pertaining to the traveler's ESTA status as part of the traveler's boarding status, DHS will eliminate the I-94W requirement.

## **5. Scope of ESTA**

Consistent with the 9-11 Act, an approved travel authorization only allows an alien to board a conveyance for travel to a U.S. port of entry and does not restrict, limit, or otherwise affect the authority of CBP to determine an alien's admissibility to the United States during inspection at a port of entry.

## **6. Duration**

### **a. General Rule**

Each travel authorization will be valid for a period of no more than two years. An alien may travel to the United States repeatedly within the validity period of the travel

authorization using the same travel authorization. Travelers whose ESTA applications are approved, but whose passports will expire in less than two years, will receive travel authorization that is valid only until the expiration date on the passport.

**b. Exception**

Pursuant to 8 U.S.C. 1182(a)(7)(B)(i)(I) and implementing regulations at 8 CFR 214.1(a)(3)(i), the passport of an alien applying for admission must be valid for a minimum of six months from the expiration date of the contemplated period of stay. Certain foreign governments have entered into agreements with the United States whereby their passports are recognized as valid for the return of the bearer to the country of the foreign-issuing authority for a period of six months beyond the expiration date specified in the passport. These agreements have the effect of extending the validity period of the foreign passport an additional six months notwithstanding the expiration date indicated in the passport. The general rule applies to aliens who are citizens of countries that have entered into such an agreement.

For aliens from countries that have not entered into such an agreement,<sup>6</sup> travel authorizations will be valid for a period of two years under ESTA. However, travel authorizations for aliens from countries that have not entered into such an agreement will not be approved beyond the six months prior to the expiration date of the alien's passport. Travelers from these countries whose passports will expire in six months or less will not receive an approved ESTA.

The Secretary, in his discretion, may issue a travel authorization for a different period of validity, not to exceed a period of three years.

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<sup>6</sup> At this time, Brunei is the only VWP country that has not entered into such an agreement with the United States. The list of countries which have entered into such an agreement is available on the Department of State website at <http://foia.state.gov/masterdocs/09fam/0941104X1.pdf>.



## **7. Events Requiring New Travel Authorizations**

A VWP traveler must obtain a new travel authorization under ESTA in advance of travel to the United States if any of the following occur:

- (1) The alien is issued a new passport;
- (2) The alien changes his or her name;
- (3) The alien changes his or her gender;
- (4) The alien changes his or her country of citizenship; or
- (5) The circumstances underlying the alien's previous responses to any of the ESTA application questions requiring a "yes" or "no" response (eligibility questions) have changed.

## **8. Fee**

As provided under section 711(h)(3)(B) of the 9/11 Act, the Secretary may charge aliens a fee to use ESTA. The fee is intended to cover the full costs of developing and administering the system. At this time, payment of a fee will not be required to obtain a travel authorization. If DHS determines at a later time, however, that collection of a fee is necessary for the efficient administration of ESTA, DHS will implement a fee through a separate rulemaking action or such other manner as is consistent with the Administrative Procedure Act and applicable statutory authorities.

## **9. Judicial Review**

Section 711 of the 9/11 Act expressly provides that "no court shall have jurisdiction to review an eligibility determination under the System." Accordingly, a determination by DHS to not provide a traveler a travel authorization under ESTA will be final and,

notwithstanding any other provision of the law, is not subject to judicial review. See 8 U.S.C. 217(h)(3)(C)(iv).

#### **10. Privacy**

DHS will ensure that all Privacy Act requirements and policies are adhered to in the implementation of this rule and will be issuing a Privacy Act Impact Assessment that will fully outline processes that will ensure compliance with Privacy Act protections.

### **III. STATUTORY AND REGULATORY REQUIREMENTS.**

#### **A. Administrative Procedure Act**

##### **1. Procedural Rule Exception**

This interim final 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 interim final rule, therefore, is exempt from notice and comment requirements under 5 U.S.C. 553(b)(A). This rule is procedural because it merely automates an existing reporting requirement for nonimmigrant aliens, as captured in the “I-94W Nonimmigrant Alien Arrival/Departure Form” pursuant to existing statutes and regulations. See 8 U.S.C. 1103, 1184 and 1187. See also 8 CFR 212.1, 299.1, 299.5 and Parts 2 and 217. By procedurally shifting the paper I-94W form to an electronic form and changing the timing of submission of such information to require travelers to submit the data to CBP in advance of travel, CBP will be able to determine, before the alien departs for the United States, the eligibility of citizens and eligible nationals from VWP countries to travel to the United States under VWP and whether such travel poses a law enforcement or security risk. This procedural change also benefits travelers as it allows

CBP to identify potential grounds of ineligibility for admission before the traveler embarks on a carrier destined for the United States.

## **2. Good Cause Exception**

This interim final rule is also exempt from APA rulemaking requirements under the “good cause” exception set forth at 5 U.S.C. 553(b)(3)(B). By requiring VWP travelers, who currently are not screened in person until they arrive at a U.S. port of entry, to submit I-94W screening information in advance of their departure for the United States, DHS is better positioned to screen VWP aliens before they board carriers or vessels en route to the United States. This rule, therefore, improves the security of the VWP by addressing vulnerabilities in the program identified by GAO and implementing security enhancements included in section 711 of the 9/11 Act.

Specifically, certain inadmissible travelers who need visas to enter the United States may attempt to acquire a passport from a VWP country to avoid the normal visa issuance procedures. Potential terrorists also may use VWP exemption from the visa screening process as a means to gain access to the United States or an aircraft en route to the United States to cause serious damage, injury, or death in the United States. Thus, implementation of this rule prior to notice and comment is necessary to protect the national security of the United States and to prevent potential terrorists from exploiting VWP.

Prolonging the implementation of these regulations could hamper the ability of DHS to address the security vulnerabilities in the VWP and to take effective action to keep persons found by DHS to pose a security threat from entering the country under the VWP. Accordingly, DHS has determined that delaying implementing of this interim

final rule to consider public comment rule would be impracticable, unnecessary and contrary to the public interest.

### **3. Foreign Affairs Function Exception**

This interim final rule is also excluded from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States because it advances the President's foreign policy goals, involves bilateral agreements that the United States has entered into with participating VWP countries, and directly involves relationships between the United States and its alien visitors. Accordingly, DHS is not required to provide public notice and an opportunity to comment before implementing the requirements under this final rule. The Department, however, is interested in public comments on this interim final rule and ESTA and, therefore, is providing the public with the opportunity to comment without delaying implementation of this rule.

Additionally, the public will continue to be provided opportunity to comment on changes to the Arrival and Departure Record, Forms I-94 and I-94W. These forms are in the process of being updated under the Paperwork Reduction Act. A **Federal Register** notice entitled "Proposed Collection; Comment Request; Arrival and Departure Record (Forms I-94 and I-94W)," was published in the **Federal Register** on November 9, 2007 (72 FR 63622). The 60-day comment period expired on January 8, 2008, and CBP has analyzed and responded to those comments received. Pursuant to the requirements of the Paperwork Reduction Act of 1995, CBP advised the public in this notice of its intention to revise its existing collection of information by adding an email address and phone number to the I-94 and the I-94W forms under OMB Control Number 1651-0111. CBP published this 30-day notice document on February 4, 2008, in the **Federal Register** (73

FR 6522) and the comment period expired on March 5, 2008. We note that, upon publication for OMB approval, interested persons had an additional opportunity to provide comments to OMB on CBP's request for the addition of email address and phone number and other data elements to update the I-94W form. All comments received will become a matter of the public record.

#### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA) (5 U.S.C. 603(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions) when the agency is required "to publish a general notice of proposed rulemaking for any proposed rule." Because this rule is being issued as an interim rule, on the grounds set forth above, a regulatory flexibility analysis is not required under the RFA.

Nonetheless, DHS has considered the impact of this rule on small entities and had determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly, there is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.

#### **C. Unfunded Mandates Reform Act of 1995**

This 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, and it

will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **D. Executive Order 12866**

This interim final rule is considered to be a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, OMB has reviewed this regulation under that Executive Order.

The purpose of ESTA is to allow DHS and CBP to establish the eligibility of certain foreign travelers to travel to the United States under the VWP, and whether the alien’s proposed travel to the United States poses a law enforcement or security risk. Upon review of such information, DHS will determine whether the alien is eligible to travel to the United States under the VWP. Once ESTA is implemented as a mandatory program, 60 days following publication of a notice in the **Federal Register**, citizens and eligible nationals of the 27 countries in the current VWP must comply with this rule. The primary parameters for this analysis are as follows—

- The period of analysis is 2008 to 2018.
- Because the order in which countries will potentially be brought into VWP, and thus into ESTA, is unknown, we make the simplifying assumption for this analysis only that all affected travelers will comply with this rule beginning in 2009.
- Air and sea carriers that transport these VWP travelers are not directly regulated under this rule; therefore, they are not responsible for completing ESTA applications on behalf of their passengers. However, carriers may choose to either modify their existing systems or potentially develop new systems to submit

ESTA applications for their customers. For this analysis, we assume that carriers will incur system development costs in 2008 and will incur operation and maintenance costs every year thereafter. We note that CBP will transmit travelers' authorization status through CBP's existing Advance Passenger Information System (APIS), and therefore carriers may not have to make significant changes to their existing systems in response to this rule. Additionally, to minimize the potential impacts to air and sea carriers, CBP is developing a system that carriers will be able to use to submit applications on behalf of their passengers.

- Under this rule, an initial travel authorization is valid for two years. We anticipate that travelers and carriers will update information via CBP's APIS requirements rather than requiring updated ESTA information on each entry during the two-year period. However, for purposes of this analysis, we assume that a travel authorization update would be required for each trip to the United States so as not to underestimate the potential economic impacts of this rule.

### **Impacts to Air & Sea Carriers**

We estimate that eight U.S.-based air carriers and eleven sea carriers will be affected by the rule. An additional 35 foreign-based air carriers and five sea carriers will be affected.

CBP intends to transmit each passenger's travel authorization status to the air carriers using CBP's Advance Passenger Information System (APIS).<sup>7</sup> When a passenger checks in for his/her flight, the passport is swiped and the APIS process begins. CBP will

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<sup>7</sup> See U.S. Customs and Border Protection final rule. "Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels," 72 FR 48320 (Aug. 23, 2007).

provide the passenger's travel authorization status to the carrier in the return APIS message. If a passenger has not applied for and received a travel authorization prior to check-in, the carrier will be able to submit the required information and obtain a travel authorization on behalf of the passenger. It is unknown how many passengers annually may request that their carrier apply for a travel authorization on their behalf or how much it will cost carriers to modify their existing systems to accommodate such requests. During the first years of implementation when passengers are not quite as familiar with the new process, the carriers could face a notable burden if most of their non-U.S. passengers require travel authorization applications to be carrier-transmitted.

Given these unknowns, we have developed a range of costs. For the low end of the range, we assume that carriers will modify their existing systems, interface with CBP's system, and will help few passengers apply for travel authorizations annually. For the high end of the range, we assume that carriers will develop a new system (similar to APIS Quick Query, AQQ) and will assist many passengers annually. We assume that for an air carrier modifying its existing systems the cost would be \$500,000 in the first year and \$125,000 (25 percent of start-up costs) in subsequent years (low cost). The subsequent-year estimate is intended to account not only for annual operation and maintenance of the system but also for the burden incurred by the carriers to assist passengers. For an air carrier developing a new system, the cost would be \$2 million in the first year and \$2 million (100 percent of start-up costs) in subsequent years (high cost). Sea carriers have not previously developed an AQQ-like system, as they have been able to submit advance passenger data through the U.S. Coast Guard's Notice of Arrival/Departure system (called "eNOA/D"). For the low cost estimate, we assume that



modifying systems would cost \$1 million in the first year and \$250,000 in subsequent years. For a sea carrier developing a new system, the cost would be \$2 million in the first year and \$2 million (100 percent of start-up costs) in subsequent years, as with air carriers.

Given this range, should carriers undertake this effort, costs for U.S.-based carriers at the low end of the range would be about \$9 million in the first year and \$2 million in subsequent years (undiscounted). Costs for U.S.-based carriers at the high end of the range will be about \$36 million in the first year and subsequent years (undiscounted). See Exhibit 1.

Exhibit 1. First year and annual costs for carriers to address ESTA requirements (\$millions, 2008–2018, undiscounted)

	Low cost scenario					High cost scenario				
	U.S.		Foreign		Total	U.S.		Foreign		Total
	Air	Sea	Air	Sea		Air	Sea	Air	Sea	
Carriers	8	11	35	5	59	8	11	35	5	59
2008	\$4.0	\$5.5	\$35.0	\$5.0	\$49.5	\$16.0	\$22.0	\$70.0	\$10.0	\$118.0
2009	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2010	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2011	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2012	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2013	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2014	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2015	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2016	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2017	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0
2018	1.0	1.4	8.8	1.3	12.5	16.0	22.0	70.0	10.0	118.0

As estimated, ESTA could cost the carriers about \$137 million to \$1.1 billion (present value) over the next 10 years depending on how the carriers decide to assist passengers,

how many passengers the carriers need to assist, and the discount rate applied (3 or 7 percent). See Exhibit 2.

Exhibit 2. Present value costs for carriers to address ESTA requirements (\$millions, 2008–2018)

3 percent discount rate

	Low cost scenario				High cost scenario			
	U.S.		Foreign		U.S.		Foreign	
	Air	Sea	Air	Sea	Air	Sea	Air	Sea
10-year subtotal	\$12.5	\$17.2	\$109.6	\$15.7	\$152.5	\$209.7	\$667.1	\$95.3
10-year total	\$29.7		\$125.3		\$362.2		\$762.4	
10-year grand total	\$155.0				\$1,124.6			
Annualized subtotal	\$1.3	\$1.8	\$11.5	\$1.6	\$16.0	\$22.0	\$70.0	\$10.0
Annualized total	\$3.1		\$13.1		\$38.0		\$80.0	
Annualized grand total	\$16.2				\$118.0			

7 percent discount rate

	Low cost scenario				High cost scenario			
	U.S.		Foreign		U.S.		Foreign	
	Air	Sea	Air	Sea	Air	Sea	Air	Sea
10-year subtotal	\$11.0	\$15.2	\$96.5	\$13.8	\$128.4	\$176.5	\$561.7	\$80.2
10-year total	\$26.2		\$110.3		\$304.9		\$641.9	
10-year grand total	\$136.5				\$946.8			
Annualized subtotal	\$1.4	\$1.9	\$12.0	\$1.7	\$16.0	\$22.0	\$70.0	\$10.0
Annualized total	\$3.3		\$13.7		\$38.0		\$80.0	
Annualized grand total	\$17.0				\$118.0			

Travel agents and other service providers may incur costs to assist their clients in obtaining travel authorizations. We do not know how many such service providers would be affected, but they would likely need to obtain a software module that allowed them to apply for travel authorizations during the booking process. Affected travel agents are most likely foreign businesses located in the affected countries.

## **Impacts to Travelers**

ESTA will present new costs and burdens to travelers in VWP countries who were not previously required to submit any information to the U.S. Government in advance of travel to the United States. Travelers from Roadmap countries who become VWP will also incur costs and burdens, though these are much less than obtaining a nonimmigrant visa (category B1/B2), which is currently required for short-term pleasure or business to travel to the United States.

For the primary analysis, we explore the following categories of costs.

- Burden to obtain a travel authorization — the time that will be required to obtain a travel authorization and the value of that time (opportunity cost) to the traveler.
- Cost and burden to obtain a visa if a travel authorization is denied — based on the existing process for obtaining a visa, the cost to obtain that document in the event that a travel authorization is denied and the traveler is referred to a U.S. Embassy.

For this analysis, we have developed four methods to predict ESTA-affected travelers to the United States over the next 10 years using information available from the Department of Commerce, Office of Travel and Tourism Industries (OTTI), documenting historic travel levels and future projections. Method 1 employs the travel-projection percentages provided by OTTI and extrapolates them to the end of our period of analysis (OTTI projects travel only through 2010; we calculate a simple, straight-line extrapolation to 2018). Method 2 (modified OTTI projections) presents a more pessimistic outlook on travel: all projected percentages from Method 1 are reduced by 2 percent throughout the period of analysis. Methods 3 and 4 present more optimistic

projections than Methods 1 and 2, but incorporated periodic downturns, which are prevalent (though not necessarily predictable) in international travel. See Exhibit 3.

Exhibit 3. Total visitors to the United States using four methodologies, 2008–2018 (millions)

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
<b>Method 1</b>											
VWP	17.4	18.0	18.7	19.4	20.0	20.7	21.3	21.9	22.4	23.0	23.5
Roadmap	1.2	1.2	1.3	1.3	1.4	1.4	1.5	1.5	1.5	1.6	1.6
Total	18.6	19.2	20.0	20.7	21.4	22.1	22.8	23.4	23.9	24.6	25.1
<b>Method 2</b>											
VWP	17.0	17.4	17.7	17.9	18.2	18.4	18.6	18.7	18.8	18.9	18.9
Roadmap	1.1	1.2	1.2	1.2	1.2	1.3	1.3	1.3	1.3	1.3	1.3
Total	18.1	18.6	18.9	19.1	19.4	19.7	19.9	20.0	20.1	20.2	20.2
<b>Method 3</b>											
VWP	17.4	18.0	18.7	19.4	17.7	20.7	24.1	27.4	26.0	30.1	34.1
Roadmap	1.2	1.2	1.3	1.3	1.2	1.4	1.7	2.0	2.3	2.9	2.7
Total	18.6	19.2	20.0	20.7	18.9	22.1	25.8	29.4	28.3	33.0	36.8
<b>Method 4</b>											
VWP	17.4	15.9	18.5	21.6	24.5	23.3	26.9	30.5	35.6	33.9	38.6
Roadmap	1.2	1.0	1.3	1.5	1.8	2.1	2.0	2.3	2.9	3.3	4.0
Total	18.6	16.9	19.8	23.1	26.3	25.4	28.9	32.8	38.5	37.2	42.6

### *Burden to Obtain Travel Authorization through ESTA*

To estimate the value of a non-U.S. citizen’s time (opportunity cost), we have conducted a brief analysis that takes into account differing wage rates for countries that will be affected by the ESTA requirements. Based on this analysis, we found that countries in Western Europe, Oceania, and Japan generally have a higher value of time than the less developed countries of Eastern Europe and Asia. We also found that air travelers have a higher value of time than the general population. As we did previously for carriers, we develop a range of cost estimates for the value of an individual’s time. For the low cost estimate, the hourly value of time ranges from \$1.42 to \$30.78

depending on the country. For the high cost estimate, the hourly value of time ranges from \$3.00 to \$65.19.

We estimate that it will take 15 minutes of time (0.25 hours) to apply for a travel authorization. Note that this is approximately 5 minutes more than the time currently estimated to complete the I-94W (10 minutes). We estimate additional burden for a travel authorization application because even though the data elements and admissibility questions are identical, the traveler must now register with ESTA, familiarize himself/herself with the system, gather and enter the data, and access an email account to check the status of his/ her travel authorization application. For those applicants who are computer savvy and have little difficulty navigating an electronic system, this may be a high estimate. For those applicants who are not as comfortable using computers and interfacing with websites, this may be a low estimate. We believe the burden estimate of 15 minutes is a reasonable average.

Furthermore, if airlines, cruise lines, travel agents, and other service providers are entering the information on behalf of the passenger, it would almost certainly not take 15 minutes of time because these entities will have most of the information electronically as gathered during the booking process, and travel and ticket agents are certainly comfortable using computer applications. Because we do not know how many travelers will apply independently through the ESTA website versus through a third party, we assign a 15-minute burden to all travelers.

Based on these values and assumptions, we estimate that total opportunity costs in 2009 (the first year that all travelers comply with the ESTA requirements in this analysis) will range from \$86 million (low) to \$207 million (high) depending on the number of

travelers projected and the value of time used. By the end of the period of analysis, costs range from \$102 million to \$444 million. These estimates are all undiscounted. The range between the estimates broadens as differences in the projection methods are more discernable at the end of the period of analysis. See Exhibit 4.

Exhibit 4. Total opportunity costs for visitors to the United States using four methodologies, 2009 and 2018 (in \$millions)

	2009		2018	
	Low estimate	High estimate	Low estimate	High estimate
Method 1	\$98	\$207	\$127	\$269
Method 2	94	199	102	217
Method 3	98	207	184	389
Method 4	86	182	210	444

As estimated, ESTA could cost travelers \$700 million to over \$2.6 billion (present value) over the next 10 years depending on the projection method, the value of opportunity cost, and the discount rate applied (3 or 7 percent). Annualized costs are an estimated \$86 million to \$270 million. See Exhibit 5.

Exhibit 5. Total present value and annualized opportunity costs to travelers, 2008–2018

	Total present value costs (\$billions)				Annualized costs (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$0.957	\$0.781	\$2.026	\$1.653	\$100	\$97	\$213	\$206
Method 2	0.844	0.693	1.788	1.468	89	86	188	183
Method 3	1.071	0.862	2.268	1.825	112	107	238	227
Method 4	1.216	0.972	2.574	2.058	128	121	270	257

### *Cost and Burden to Obtain a Visa If a Travel Authorization Is Denied*

Using the value of time estimates calculated above, we estimate the costs if a travel authorization is denied and the traveler is referred to the nearest U.S. Consulate to apply for a nonimmigrant visa (B1/B2). Absent country-specific information, we assume that it will require 5 hours of time to obtain a visa including time to complete the application, travel time, waiting at the Embassy for the interview, and the interview itself. There are also other incidental costs to consider, such as bank and courier fees, photographs, transportation, and other miscellaneous expenses. We estimate that these out-of-pocket costs will be \$187.

The number of travel authorizations that will be denied is unknown. For a country to have become part of the VWP originally, the visa refusal rate must have been no higher than 3 percent. Currently, the number of VWP travelers found inadmissible upon application for admission is low, only about 1 percent. ESTA, however, will likely affect a relatively small number of the current inadmissible individuals (see next section on benefits) because many individuals are denied entry for reasons that ESTA will not affect. For this analysis, we assume that 1 percent of ESTA applicants from current VWP travelers will subsequently need to apply for a visa. We do not account for visas that must be obtained in the event of an ESTA refusal for new VWP travelers because obtaining a visa is the baseline condition under which those travelers must currently operate in order to travel to the United States. We do, however, subtract out ESTA refusals in our benefits calculations (see next section) because these travelers do not accrue any benefit from ESTA.

We multiply 1 percent of the annual travelers for each country by the burden (5 hours), the out-of-pocket expenses, and the value of time, either high or low. Total present value visa costs over the period of analysis could total \$374 million to \$916 million over the period of analysis. Annualized costs are an estimated \$47 million to \$96 million. See Exhibit 6.

Exhibit 6. Total present value and annualized visa costs to travelers, 2008–2018

	Total present value costs (\$billions)				Annualized costs (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$0.517	\$0.421	\$0.724	\$0.590	\$54	\$53	\$76	\$74
Method 2	0.456	0.374	0.639	0.525	48	47	67	65
Method 3	0.577	0.465	0.809	0.651	61	58	85	81
Method 4	0.654	0.523	0.916	0.733	69	65	96	91

### Total Costs to Travelers

Based on the above calculations, we estimate that the total quantified costs to travelers will range from \$1.1 billion to \$3.5 billion depending on the number of travelers, the value of time, and the discount rate. Annualized costs are estimated to range from \$133 million to \$366 million. See Exhibit 7.

Exhibit 7. Total present value and annualized costs to travelers, 2008–2018

	Total present value costs (\$billions)				Annualized costs (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$1.474	\$1.202	\$2.750	\$2.244	\$154	\$150	\$289	\$280
Method 2	1.300	1.067	2.427	1.993	137	133	255	248
Method 3	1.648	1.327	3.077	2.476	173	165	323	308
Method 4	1.870	1.495	3.490	2.791	197	186	366	348



## Conclusions

We have shown that costs to air and sea carriers to support the requirements of the ESTA program could cost \$137 million to \$1.1 billion over the next 10 years depending on the level of effort required to integrate their systems with ESTA, how many passengers they need to assist in applying for travel authorizations, and the discount rate applied to annual costs. Costs to foreign travelers could total \$1.1 billion to \$3.5 billion depending on traveler volume, their value of time, and the discount rate applied.

## **Benefits**

### *Inadmissibility*

By requiring passenger data in advance of travel, CBP may be able to determine, before the alien departs for the United States, the eligibility of citizens and eligible nationals from VWP countries to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk. In addition to fulfilling a statutory mandate, the rule serves the twin goals of promoting border security and legitimate travel to the United States. By modernizing the VWP, ESTA is intended to both increase national security and provide for greater efficiencies in the screening of international travelers by allowing for the screening of subjects of potential interest well before boarding, thereby reducing traveler delays based on potentially lengthy processes at U.S. ports of entry.

ESTA will allow for advance screening of VWP travelers against all appropriate databases, including, but not limited to, lost and stolen passport databases and appropriate watchlists. Based on data from CBP, we estimate that 0.04 percent of affected

individuals will be prevented from traveling to the United States as a result of the ESTA requirements.

Currently, when ineligible travelers are brought to the United States, they are referred to secondary inspection where a CBP or other law enforcement officer questions them and processes them for return to their country of origin. CBP estimates that it requires 2 hours of time for questioning and processing at a cost of approximately \$1,560 per individual. We estimate that removing an ineligible traveler costs carriers \$1,500 per individual, which includes the air fare and any lodging and meal expenses incurred while the individual is awaiting transportation out of the United States.

Based on these estimates, we calculate that benefits to CBP would total \$85 million to \$151 million over the period of analysis depending on the traveler projection method and the discount rate applied. Benefits to carriers could total \$82 million to \$146 million. Annualized benefits range from \$17 million to \$29 million. See Exhibit 8.

Exhibit 8. Benefits of annual admissions denied attributable to ESTA, 2008–2018 (in \$millions)

	Total admissions denied	3% discount rate				7% discount rate			
		Benefits to CBP	Benefits to carriers	Total benefits	Annualized benefits	Benefits to CBP	Benefits to carriers	Total benefits	Annualized benefits
Method 1	89,000	\$118	\$113	\$231	\$23	\$96	\$92	\$188	\$19
Method 2	78,000	104	100	204	21	85	82	167	17
Method 3	102,000	133	128	261	26	107	103	210	21
Method 4	117,000	151	146	297	29	121	116	237	23

Additionally, asking questions regarding eligibility for admission prior to travel to the United States may keep some VWP travelers from arriving at a United States port of

entry only to then be deemed inadmissible. This rule would provide benefits to CBP and the carriers for those travelers who answer “yes” to any of the eligibility questions who are then deemed inadmissible and must be transported back to their country of origin. It is not known how many entries like this occur on an annual basis, and we are thus unable to quantify the benefits to CBP or the carriers of forgoing such occurrences.

*Benefits of Not Having to Obtain Visas*

The benefits of not having to obtain a B1/B2 visa, but rather obtaining a travel authorization are also quantifiable. These benefits will be realized only by travelers who are citizens of countries that enter the Visa Waiver Program in the future. We must first determine how many travelers are repeat versus first-time travelers in order not to double count benefits from not having to obtain a visa. We estimate the number of first-time visitors under each of the four methods of projecting travelers. Then we estimate a percentage of repeat travelers who would also need to have visas because their old visa will expire during the next 10 years. All of the Roadmap visitors are eligible for 10-year B1/B2 visas, and we thus assume that 10 percent of repeat visitors would have to reapply for visas were it not for the rule. Finally, we subtract out those who are denied a travel authorization and must apply for a visa instead (see previous section on costs).

Benefits of forgoing visa are expected to range from about \$619 million to \$1.6 billion (present value) over 10 years depending on the travel level, the value of time used, and the discount rate applied. Annualized benefits range from \$77 million to \$167 million. See Exhibit 9.

Exhibit 9. Total present value and annualized benefits of forgoing visas, 2008–2018

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$0.856	\$0.697	\$1.042	\$0.850	\$90	\$87	\$109	\$106
Method 2	0.755	0.619	0.920	0.754	79	77	96	84
Method 3	1.053	0.838	1.290	1.026	111	105	135	128
Method 4	1.293	1.019	1.588	1.251	136	127	167	156

*Benefits of Not Having to Complete the I-94W and I-94 Forms*

We can also quantify the benefits of not having to complete the I-94W paper form. These benefits will accrue to all travelers eventually covered by ESTA as the requirement to present a paper I-94W is eliminated. The estimated time to complete either the I-94W or I-94 is 10 minutes (0.17 hours). We then subtract out those travelers who are not able to obtain a travel authorization through ESTA (see previous section on costs) and then apply a low and high value of time to the burden to estimate total savings that are expected to be accrued as a result of this rule.

Benefits of not having to complete the paper forms are expected to range from \$457 million to \$1.7 billion over 10 years depending on the value of time used and the discount rate applied. Annualized benefits range from \$57 million to \$178 million. See Exhibit 10.

Exhibit 10. Total present value and annualized benefits of forgoing the I-94W, 2008–2018

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$0.636	\$0.519	\$1.336	\$1.090	\$67	\$65	\$140	\$136
Method 2	0.557	0.457	1.179	0.968	58	57	124	121
Method 3	0.706	0.568	1.495	1.203	74	71	157	150
Method 4	0.801	0.641	1.697	1.357	84	80	178	169

In addition to these benefits to travelers, CBP and the carriers should also experience the benefit of not having to administer the I-94W. While CBP has not conducted an analysis of the potential savings, it should accrue benefits from not having to produce, ship, and store blank forms. CBP should also be able to accrue savings related to data entry and archiving. Carriers should realize some savings as well, though carriers will still have to administer the I-94 for those passengers not traveling under the VWP and the Customs Declaration forms for all passengers aboard the aircraft and vessel.

Total Benefits to Travelers

Total benefits to travelers could total \$1.1 billion to \$3.3 billion over the period of analysis. Annualized benefits could range from \$134 million to \$345 million. See Exhibit 11.

Exhibit 11. Total present value and annualized benefits to travelers, 2008–2018 (10-year costs in \$billions; annualized costs in \$millions)

	Total present value benefits (\$billions)				Annualized benefits (\$millions)			
	Low estimate		High estimate		Low estimate		High estimate	
	3%	7%	3%	7%	3%	7%	3%	7%
Method 1	\$1.492	\$1.216	\$2.378	\$1.940	\$157	\$152	\$249	\$242
Method 2	1.312	1.076	2.099	1.722	137	134	220	215
Method 3	1.759	1.406	2.785	2.229	185	176	292	278
Method 4	2.094	1.660	3.285	2.608	220	207	345	325

Benefits of Enhanced Security

As set forth in section 711 of the 9/11 Act, it was the intent of Congress to modernize and strengthen the security of the VWP under section 217 of the Immigration and Nationality Act (INA, 8 USC 1187) by simultaneously enhancing program security requirements and extending visa-free travel privileges to citizens and eligible nationals of eligible foreign countries that are partners in the war on terrorism.

In previous DHS analyses, a “breakeven” analysis has been conducted in the absence of information regarding baseline risks of terrorist attacks and risk reduced as the result of a regulatory action. Such an analysis was conducted for CBP’s final rule implementing enhancements to APIS (this rule is familiarly referred to as APIS 30/AQQ).<sup>8</sup> The APIS 30/AQQ and the ESTA rules essentially have the same objective: prevent a traveler who has been matched to an individual on a government watchlist from boarding an aircraft or passenger vessel bound for the United States. This layered approach is a key component of the DHS and CBP goal of safe and secure travel. However, if we were to conduct a breakeven analysis for ESTA without taking into account the breakeven analysis for APIS 30/AQQ, we would be double-counting security benefits, though the extent is unknown. The APIS 30/AQQ analysis accounted for identifying a traveler of concern prior to the issuance of a boarding pass. Thus, we must not take credit for preventing a traveler from boarding an aircraft as a result of ESTA because that benefit has already been counted. We have not conducted a breakeven analysis for this rule because CBP has already accounted for preventing a traveler on a watchlist from boarding an aircraft and coming to the United States. This does not mean, however, that there are no security benefits of this rule—we simply have not quantitatively accounted for them here.

Annualized costs and benefits are presented in the following accounting statement, as required by OMB Circular A-4.

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<sup>8</sup> See 72 FR 48320, 48339.

Accounting statement: classification of expenditures, 2008–2018 (\$2008)

	3% Discount Rate	7% Discount Rate
<b>Costs</b>		
Annualized monetized costs	\$16 million to \$118 million	\$17 million to \$118 million
Annualized quantified, but un-monetized costs	None quantified	None quantified
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	\$21 million to \$29 million	\$17 million to \$23 million
Annualized quantified, but un-monetized benefits	None quantified	None quantified
Qualitative (un-quantified) benefits	Enhanced security and efficiency	Enhanced security and efficiency

We estimate that the annualized costs of this rule 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. Firms participating in the U.S. economy may also face unquantified or indirect burdens if, for example, U.S. travel agents invest in resources to assist their foreign clients in obtaining a travel authorization, if the requirements lead to trips forgone, or if the requirements lead to increased queues in airports or seaports. Under the simplifying assumption for this analysis only that all affected travelers, including those from roadmap countries, will comply with this rule beginning in 2009, there are quantified benefits to those travelers from Roadmap countries who no longer need to obtain a visa to visit the United States. In addition, there are quantified benefits for all ESTA participants who no longer need to complete I-94W forms. Because these benefits accrue to foreign entities, however, we do not include them in the accounting statement. Non-quantified benefits are enhanced security and efficiency.

## Regulatory Alternatives

We consider three alternatives to this rule—

- The ESTA requirements in the rule, but with a \$1.50 fee per each travel authorization (more costly)
- The ESTA requirements in the rule, but with only the name of the passenger and the admissibility questions on the I-94W form (less burdensome)
- The ESTA requirements in the rule, but only for the countries entering the VWP after 2009 (no new requirements for VWP, reduced burden for newly entering countries)

Because this rule only directly affects travelers, these alternatives only directly affect travelers, not air and sea carriers. The first alternative would create additional burden for carriers, who would potentially need to collect credit card information and the fee to cover the costs of the ESTA application. The second alternative would create less burden for the carriers because the biographic information would not be included. The third alternative would be less costly and burdensome for the carriers who would now not need to handle as many ESTA participants. Because the range of high and low cost estimates for carriers presented is so broad in the primary analysis (see previous section), we do not estimate carrier costs for these alternatives. The comparison of alternatives, therefore, is just for affected travelers.

For the sake of brevity, we present the 10-year present value cost of the rule and these alternatives for the high value estimates, Method 1 traveler projection, at the 7 percent discount rate only. Benefits are expressed as negative values in this presentation. See Exhibit 12.



Exhibit 12. Comparison of 10-year impacts of the rule and regulatory alternatives, 2008–2018, in \$billions, Method 1, high estimate, 7 percent discount rate

	Rule	Alternative 1	Alternative 2	Alternative 3
ESTA burden	\$1.653	\$1.653	\$1.102	\$0.045
Visa costs	0.591	0.591	0.591	0
ESTA fee	0	0.231	0	0
Benefit of no visa	(0.850)	(0.850)	(0.850)	(0.850)
Benefit of no I-94W	(1.090)	(1.090)	(1.090)	(0.030)
Net impact	\$0.304	\$0.535	(\$0.247)	(\$0.835)
Comment		Fee will not be charged at this time	All data elements are required for proper screening	Does not meet statutory requirements

DHS has determined that the rule provides the greatest level of enhanced security and efficiency at an acceptable cost to traveling public and potentially affected air carriers.

**E. Executive Order 13132**

The 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. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this interim final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**F. 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.

### **G. Paperwork Reduction Act**

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995, Public Law 104-13, under Control Number 1651-0111.

The information collection provisions of this regulation are in §§ 212.1 and 217.5 of the CFR. CBP will use the information collected under this rule to determine the eligibility of nonimmigrant aliens to travel to the United States under the VWP so as to enhance border security and streamline entry processes at U.S. ports of entry. The respondents to this collection are non-U.S. citizen travelers to the United States. When the Secretary publishes notice in the **Federal Register** that each alien wishing to travel to the United States by air or sea must apply for and obtain ESTA authorization prior to such travel, under 8 CFR 217.5, any nonimmigrant alien wishing to travel to the United States by air or sea under VWP would be required in advance to have a travel authorization before embarking on a carrier for travel to the United States. To obtain a travel authorization, travelers must provide to CBP via a CBP website an application consisting of biographic and other information specified by the Secretary of Homeland Security as necessary to determine the eligibility of the alien to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk.

The collection of information regarding the I-94W Form procedures was previously reviewed and approved by OMB in accordance with the requirements of the Paperwork

Reduction Act of 1995 (44 U.S.C. 3507) under OMB Control Number 1651-0111, and its renewal is currently being vetted through **Federal Register** notice as discussed in the document. 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.

The additional respondents and burden estimates for this collection are as follows:

Estimated annual reporting and/or recordkeeping burden: 4,225,000 hours

Estimated average annual burden per respondent/recordkeeper: 15 minutes (0.25 hours)

Estimated number of respondents and/or recordkeepers: 17,000,000

Estimated annual frequency of responses: once per year

The estimated annual public cost for ESTA is \$63.8 million. This is based on the number of responses (17,000,000) x a response time of 15 minutes x an average hourly rate of \$15 = \$63.8 million.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of Homeland Security, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Border Security Regulations Branch, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, DC 20229.

#### **H. Privacy Interests**

DHS will be publishing a Privacy Impact Assessment (PIA) on its website. DHS also is preparing a separate SORN for publication in conjunction with this interim final

rule.

## LIST OF SUBJECTS

### 8 CFR part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

### AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, DHS amends part 217 of title 8 of the Code of Federal Regulations (8 CFR part 217), as set forth below.

#### **PART 217—VISA WAIVER PROGRAM**

1. The general authority citation for part 217 continues to read as follows:

**Authority:** 8 U.S.C. 1103, 1187; 8 CFR part 2.

\* \* \* \* \*

2. A new Section 217.5 is being added to read as follows:

#### **§ 217.5 Electronic System for Travel Authorization.**

(a) Travel authorization required. Each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must, within the time specified in paragraph (b) of this part, receive a travel authorization, which is a positive determination of eligibility to travel to the United States under the VWP via the Electronic System for Travel Authorization (ESTA), from CBP. In order to receive a travel authorization, each nonimmigrant alien intending to travel to the United States by air or sea under the VWP must provide the data elements set forth in paragraph (c) of this section to CBP, in English, in the manner specified herein.

(b) Time. Each alien falling within the provisions of paragraph (a) of this part must receive a travel authorization prior to embarking on a carrier for travel to the United States.

(c) Required elements. ESTA will collect such information as the Secretary deems necessary to issue a travel authorization, as reflected by the I-94W Nonimmigrant Alien Arrival/Departure Form (I-94W).

(d) Duration. (1) General Rule. A travel authorization issued under ESTA will be valid for a period of two years from the date of issuance, unless the passport of the authorized alien will expire in less than two years, in which case the authorization will be valid until the date of expiration of the passport.

(2) Exception. For travelers from countries which have not entered into agreements with the United States whereby their passports are recognized as valid for the return of the bearer to the country of the foreign-issuing authority for a period of six months beyond the expiration date specified in the passport, a travel authorization issued under ESTA is not valid beyond the six months prior to the expiration date of the passport. Travelers from these countries whose passports will expire in six months or less will not receive a travel authorization.

(e) New travel authorization required. A new travel authorization is required if any of the following occur:

- (1) The alien is issued a new passport;
- (2) The alien changes his or her name;
- (3) The alien changes his or her gender;
- (4) The alien's country of citizenship changes; or

(5) The circumstances underlying the alien's previous responses to any of the ESTA application questions requiring a "yes" or "no" response (eligibility questions) have changed.

(f) Limitations. (1) Current authorization period. An authorization under ESTA is a positive determination that an alien is eligible, and grants the alien permission, to travel to the United States under the VWP and to apply for admission under the VWP during the period of time the travel authorization is valid. An authorization under ESTA is not a determination that the alien is admissible to the United States. A determination of admissibility is made only after an applicant for admission is inspected by a CBP Officer at a U.S. port of entry.

(2) Not a determination of visa eligibility. A determination under ESTA that an alien is not eligible to travel to the United States under the VWP is not a determination that the alien is ineligible for a visa to travel to the United States and does not preclude the alien from applying for a visa before a United States consular officer.

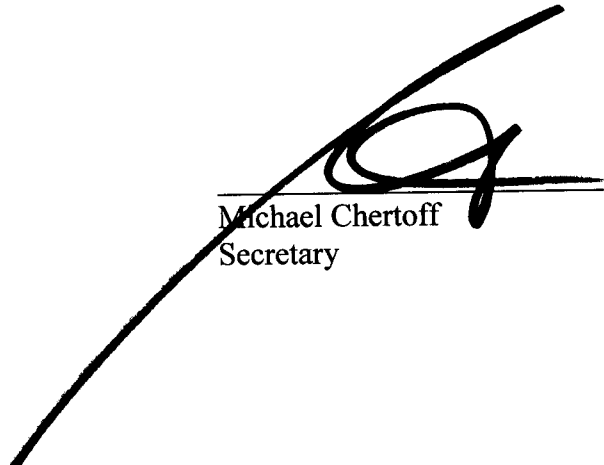
(3) Judicial review. Notwithstanding any other provision of law, a determination under ESTA is not subject to judicial review pursuant to 8 U.S.C. 217(h)(3)(C)(iv).

(4) Revocation. A determination under ESTA that an alien is eligible to travel to the United States to apply for admission under the VWP may be revoked at the discretion of the Secretary.

(g) Compliance date. Once ESTA is implemented as a mandatory program, 60 days following publication by the Secretary of a notice in the **Federal Register**, citizens and eligible nationals of countries that participate in the VWP planning to travel to the United States under the VWP must comply with the requirements of this section. As new countries

are added to the VWP, citizens and eligible nationals of those countries will be required to obtain a travel authorization via ESTA prior to traveling to the United States under the VWP.

Date: 6/2/08



Michael Chertoff  
Secretary

**ORIGINAL**