BEFORE THE
DEPARTMENT OF HOMELAND SECURITY
WASHINGTON, DC

In the matter of	:	
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Notice of Proposed Rulemaking Concerning	:	
Collection of Alien Biometric Data Upon	:	**Docket DHS-2008-0039**
Exit From the United States at Air and Sea	:	
Ports of Departure; United States Visitor and	:	
Immigrant Status Indicator Technology	:	
Program ("US-VISIT")	:	

COMMENTS OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc. ("ATA") submits these comments in response to the proposed US-VISIT Exit system notice of proposed rulemaking. 73 Fed. Reg. 22065 (April 24, 2008) ("Air Exit", "US-VISIT Exit" or "the NPRM")[1]. We oppose the proposal.

I. SUMMARY OF THE ATA POSITION

This rulemaking proceeding is unjustifiable and would produce an unlawful rule. It should be terminated.

The Air Exit proposal would require airlines to collect the fingerprints of foreign air travelers departing the United States. That is a border control function that is an

[1] ATA is the principal trade and service organization of the U.S. scheduled airline industry. The members of the association are: ABX, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Midwest Airlines; Northwest Airlines, Inc.; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. ATA's associate members are Air Canada; Air Jamaica; and Mexicana.

inherently sovereign responsibility. Congress has repeatedly instructed the Department of Homeland Security to perform that responsibility. The various laws dating back to 1996 that DHS cites in the NPRM conspicuously omit any instruction that carriers collect biometric information; in fact, one specifically prohibits it. DHS unmistakably recognized that fact in its US-VISIT Exit pilot program: carrier collection of biometric information was not part of the three-year pilot program.

Moreover, no one can reasonably assume that Congress would have silently authorized DHS to impose costs of the magnitude projected in this proceeding's regulatory impact statement and the associated interference with the efficient processing of passengers. That is not how Congress operates. Until recently, DHS recognized that reality.

DHS's regulatory impact analysis starkly reveals that the costs of the proposal would be vastly greater than the identified benefits — $3.5 billion in costs versus $1.09 billion in benefits over the next ten years. Other commenters in this proceeding project far higher costs. Nevertheless, relying on DHS's projection, not only is the benefit-to-cost ratio grossly disproportionate and consequently unacceptable — worse than 1:3—the extraordinary amount of projected costs to be imposed on airlines is indefensible. DHS proposes that the airline industry bear the burden of well over $3 billion in additional expenses in the next decade for a program that Congress has not mandated that they perform and which, as presently constituted, merely audits after the fact the departure of foreign travelers. DHS's proposal would be unjustifiable in any circumstances but particularly now for the financially battered U.S. airline industry, which analysts estimate will experience operating losses in the $7-13 billion range in 2008.

Despite these considerations, which should have been dispositive, DHS seeks to transfer to the private sector the immense expense and predictable operational disruptions of complying with a program that Congress has repeatedly directed DHS and its predecessor, the Immigration and Naturalization Service, to carry out. This proposal reflects a cost avoidance decision on the part of the government; it is as simple as that. There is no justification for that in statute or in administrative law principles.

II. BACKGROUND

A. Overview

This is the second decade of the congressional mandate to the executive branch to develop a system to record the entry and exit of foreign visitors. Congress has repeatedly signified in half-a-dozen laws since 1996 that this system was to be a governmental responsibility. Indeed, until only a little more than a year ago, DHS had acted accordingly. The indications of that congressional intent have been unmistakable. US-VISIT Entry, which was implemented in early 2004, is an entirely governmental program. Moreover, implicitly recognizing that congressional intent, DHS conducted the US-VISIT Exit pilot program as an exclusively governmental effort.

DHS and the airlines closely collaborated in developing both the US-VISIT Entry Program and the US-VISIT Exit pilot program. We repeatedly offered to work with DHS to develop a permanent US-VISIT Exit program and were assured that we would have the opportunity to continue our collaboration with the Department. We looked forward to that. Those pledges, however, have not been fulfilled. DHS informed us in the spring of 2007 that it had decided, regrettably without prior consultation, to require airlines to

collect the biometric information for US-VISIT Exit. The result of that disappointing decision is this misconceived rulemaking proceeding.

This NPRM is very bad news for airline customers and it will get worse for them in the future. Airlines are increasingly offering their customers the opportunity to check in before they get to the airport, through online and other communications technologies. Customers appreciate the ease of pre-airport check-in and, consequently, airlines are working to minimize airport-based transactions. This is 21st century customer service — more precisely, customer-demanded service. DHS, in contrast, envisions a system of continued airline physical interaction with every customer at the airport who is departing the United States. This is not where the airline industry is headed, and the divide between the capabilities of emerging technologies and the retarding effect of DHS policy will only widen over time. The industry should not be forced to abandon its expanding efforts to harness technologies that promise to ease the air traveler's experience and enable airlines to more economically process their customers.

Impeding those efforts would be especially unfathomable because of the Department's role in shepherding the Secure Borders and Open Doors Advisory Committee. SBODAC, which is the joint creation of the Departments of Homeland Security and State, issued a report in January proposing initiatives to attract more foreign visitors to the United States. Prominently included in that report was a recommendation for a "campaign to promote the United States as the premier visitor destination in the world." Secure Borders and Open Doors Advisory Committee, Secure Borders and Open Doors: Preserving Our Welcome to the World in an Age of Terrorism at 13 (2008). This NPRM, if made final, would thwart realization of that recommendation by exposing

foreign travelers to unnecessary, frustrating complications as they depart the United States. That would badly tarnish the attractiveness of our country as a travel destination.

ATA members have supported DHS in its efforts to create and implement US-VISIT. We have consistently stated, however, that airlines should not be involved in the collection of biometric data for the exit element of the program. That position is faithful to the 12-year congressional design that the government be responsible for both exit and entry information collection. Finally, of the 80 countries served by ATA member carriers where passenger fingerprints are required, not one imposes this responsibility on the airlines. If the NPRM goes forward, the United States would be the only country in the world to mandate that airlines take on what is otherwise universally regarded as a government function.

B. Legislative History of the Entry/Exit Information Collection System

The entry/exit information collection system has always been a federal responsibility, dating back to when Congress first assigned the task to the Attorney General in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law No. 104-208, §110, 110 Stat. 3009-546, 3009-558 (1996), 8 U.S.C. §1221 note ("IIRIRA"). Section 110 of IIRIRA directed the Attorney General to develop an automated entry and exit control system to collect the records of arrival and departure from every non-U.S. citizen entering and leaving the United States. This automated system would match arrival records with the departure records, enabling the Attorney General to identify visa overstays. In addition, the automated system was expected to generate reports about the number of departure records collected by country of nationality, the number of departure records matched to arrival records by country of

nationality and classification as an immigrant or nonimmigrant, and the number of travelers who arrived as nonimmigrants, or under the Visa Waiver Program, who failed to depart the country at the end of the authorized period of stay.

In June 2000, Congress amended Section 110 of IIRIRA in the Immigration and Naturalization Service Data Management Improvement Act, Public Law No. 106-215, 114 Stat. 337 (2000), 8 U.S.C. §1365a ("DMIA"), which set forth specific dates and other requirements for the Attorney General to follow in introducing an automated entry/exit system. In addition, DMIA mandated the establishment of a task force comprised of both government and private sector groups to evaluate how the Attorney General could effectively carry out Section 110 of IIRIRA and how the United States could improve the flow of traffic at its ports of entry through enhancing or modifying information technology systems. The Attorney General appointed ATA to this task force. The task force never considered the issue of airlines performing exit biometric information collection.

This is not surprising because DMIA prohibited such a role. Subsection (c)(1) of 8 U.S.C. §1365a, which was enacted in DMIA, states:

> "Nothing in this section shall be construed to permit the Attorney General [DHS] or the Secretary of State to impose any new documentary or data collection requirements on any person in order to satisfy the requirements of this section…."[2]

That is a clear, emphatic prohibition against the government imposing any additional information collection burdens on airlines, including the biometric collection requirement

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[2] The heading of subsection (c)(1) is "No additional authority to impose documentary or data collection requirements."

proposed in the NPRM. This language unquestionably reveals that Congress intended that the entry and exit system would be an exclusively governmental responsibility. There can be no misunderstanding of its meaning. Indeed, it is a part of a pattern in the statute.

Other provisions in Section 1365a are equally indicative of that intent. Subsection (d)(1) states that:

> "Such implementation [of the entry and exit system] shall include ensuring that such data, when collected or created by an immigration officer at an airport or seaport, are entered into the system and can be accessed by immigration officers at other airports and seaports." (Emphasis added.)

This temporal reference to entry of the data — "when collected or created by an immigration officer" — plainly reveals that Congress assigned government personnel, and only government personnel, the responsibility for collecting the data. Moreover, subsection (f), which concerns authority to access data in the system, is structured in a way that reinforces that conclusion. It states that:

> "the Attorney General [DHS], in consultation with the Secretary of State, shall determine which officers and employees of the Departments of Justice and State may enter data into …the integrated entry and exit data system."

This again indicates that Congress intended when it enacted Section 1365a that government personnel were to be responsible for the data collection and entry process. One — and only one — conclusion can be drawn from these three provisions of Section 1365a: DHS has no authority to assign to the private sector the responsibility that Congress has assigned it. This is a non-delegable function that Congress has instructed the Department of Homeland Security to perform.

Subsequent congressional action has adhered to this approach.

In October 2000, the Visa Waiver Permanent Program Act, Public Law No. 106-396, §101, 114 Stat. 1637 (2000), was enacted. It directed the Attorney General to develop and implement an entry/exit control system for Visa Waiver Program travelers.

Following the events of 9/11, Congress enacted the USA PATRIOT Act of 2001, Public Law No. 107-56, 115 Stat. 272 (2001) in October 2001. Sections 414 and 415 of the Act specifically addressed visa integrity and security, and the participation by the then-Office of Homeland Security in the development and implementation of the entry/exit program. 115 Stat. 353-54, 8 U.S.C. §1365a note. In addition, the PATRIOT Act added two components, the "utilization of biometric technology" and "the development of tamper-resistant documents readable at ports of entry," to the entry/exit process. *Id.*

In 2002, Congress enacted the Enhanced Border Security and Visa Reform Act of 2002, Public Law No. 107-173, §302, 116 Stat. 543, 552-53 (2002), 8 U.S.C. §1731, which reiterated the requirements of the PATRIOT Act for an integrated entry/exit process and directed the Attorney General to fund the development and implementation of the program.

This legislative architecture is striking. Each of these Acts unmistakably contemplated that the executive branch would be responsible for exit duties. None suggested, much less specified, that the airline industry was to be responsible for that process or that DHS could delegate its responsibility. At no point in this long history of congressional deliberations and action was there such an indication. Given the urgency with which Congress has approached the issue of entry and exit information collection,

most recently expressed without mention of air carriers in Section 7208 of the Intelligence Reform and Terrorism Protection Act of 2004 ("IRTPA"), Public Law No. 108-458, 118 Stat, 3638, 3817-18 (2004), 8 U.S.C. §1365b, that is a very telling omission.

Section 7208 of IRTPA neatly sums up the situation. It was enacted to implement a recommendation of the 9/11 Commission. *See* H.R. Rep. No. 796, 108th Congress, 2d Session 241 (2004)(conference report). That recommendation was that the "Department of Homeland Security...should complete, as quickly as possible, a biometric entry-exit screening system, including a single system for speeding qualified travelers." The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States 389 (2004)("9/11 Commission Report"). The Commission's recommendation was aimed exclusively at the Department. The recommendation includes no reference to air carrier involvement.[3] Section 7208, as would be expected given this background, does not mention air carriers. The lesson of Section 7208 is that neither the 9/11 Commission nor Congress envisioned a role for airlines in the entry or exit system.

DHS, quite simply, does not have authority — explicit or implicit — to force airlines to assume a function that Congress for over a dozen years has instructed federal border control authorities to perform.

[3] The Commission clearly understood how to suggest air carrier involvement in government programs. For example, it recommended that "[a]ir carriers should be required to supply the information needed to test and implement" the successor to the Computer Assisted Passenger Prescreening System. 9/11 Commission Report 393 (2004).

C. Airline Industry Passenger Processing Implications

In addition to its unexplained departure from clear, unbroken legislative intent, DHS' decision will impose new burdens on airlines and their customers at airports, at a time when carriers are working hard to simplify, and thereby ease, passenger check-in processes. The check-in process of today is not static; it is evolving and increasingly migrating away from the airport setting.

Currently, approximately 30 percent of passengers check-in online and that proportion is growing. Because of its popularity and efficiency, airlines are implementing procedures and spending significant resources to expand their off-airport check-in capabilities, which include the use of PDAs and cell phones.

Injecting an at-airport physical process, which the DHS proposal would do, into this customer-driven, electronic environment will be a costly step backward for both airlines and their customers. The NPRM's statement that "integration of biometric exit capture into the existing [airline] departure process will best serve processing objectives and be least disruptive to the traveling public" is erroneous today and will be more so in the future. 73 Fed. Reg. at 22079, col. 3.

D. Impact on the All-Cargo Airlines

While the greatest adverse effect of the proposed rule may be on the passenger airlines and their customers, the burden on the all-cargo airlines should not be overlooked. Under the rule, all-cargo airlines would be required to collect biometric data from each non-U.S. citizen traveling on their flights. Although the number of affected individuals is relatively small, all-cargo airlines are neither equipped nor positioned to

assume the biometric data collection function. Also, the security value, if any, of such data would be quite low.

The proposed rule fails to take into account that individuals traveling on all-cargo flights often do not access the aircraft through a central location. Indeed, at certain all-cargo airlines, due to the character of their operations, well over 75 percent of the individuals either piloting or being transported on the aircraft do not even transit the airline's own facilities. For instance, they may be transported from their hotel or an off-airport facility directly to the aircraft.

Performing biometric collection functions at the large number of U.S. air freight facilities at which all-cargo airlines operate is not a viable option. To meet the proposed rule's requirements, it would be necessary to outfit each of those many facilities with new equipment, even though the total number of non-U.S. travelers on all-cargo flights is small. The cost of the biometric collection equipment would be substantial and yet the likelihood that it would be needed to collect data from a non-citizen departing from any particular location would be very low.

In addition, the nature of all-cargo operations makes them ill-suited to biometric data collection by existing airline employees. Unlike most passenger airlines, all-cargo airlines operate 24 hours per day and during many of those hours have only skeleton staffs to perform a variety of critical safety and security functions. Indeed, when all-cargo airline warehousing is outsourced, only a loadmaster and TSA-required Ground Security Coordinator are likely to be present. These individuals cannot be diverted from their safety and security responsibilities to collect biometric data for most flights.

Finally, and of most import, all-cargo operations do not involve transportation of the public at large. The individuals traveling on an all-cargo flight are well known to the airline and take the trip in order to perform their jobs. The vast majority are the airline's own employees (typically flight crewmembers and management personnel), another airline's flight crewmembers and supernumeraries employed by the all-cargo airline's customers. The carrier's own employees are subject to extensive background checks and other types of vetting. The same is true of another airline's "jump seating" flight crewmembers. Supernumeraries employed by others are subject to work history reviews by the all-cargo airline, receive continuing scrutiny by TSA and are fully vetted before each flight.

III. The Perilous State of the U.S. Airline Industry

U.S. airlines are beset by unprecedented financial pressures. Jet fuel is at an all-time high. Most recently, it has exceeded $160 per barrel or nearly $4.00 per gallon on the spot market. The U.S. airline industry's 2008 fuel bill is projected to be $20 billion more than last year. The portion of an airline ticket needed to pay for fuel has risen from 15 percent in 2000 to 40 percent in 2008. Because of this unrelenting increase in fuel costs, ATA members lost a total of approximately $1.7 billion in the first quarter of 2008. That translates into an average loss of nearly $11 per passenger carried in that period. Some analysts of the U.S. airline industry predict that it will suffer operating losses as high as $13 billion in 2008.[4]

For some airlines, these miserable economic realities have already been too much. Eight U.S. airlines have shutdown since the end of 2007. They are: MAXjet; Big Sky;

[4] For a description of this dire situation, see ATA's presentation "Coping With Sky-High Jet Fuel Prices" which is accessible at http://www.airlines.org/NR/rdonlyres/73AADEC2-D5A2-4169-B590-1EE83A747CDA/0/Airlines_Fuel.pdf

Aloha; ATA; Skybus; EOS; Champion; and Air Midwest. One airline, Frontier, is in Chapter 11.

This bleak financial landscape has meant that airlines have retired aircraft, withdrawn service and cut employment. This trend is expected to accelerate throughout the year and into 2009, its ultimate severity depending in large measure on the cost of jet fuel. According to published reports, as many as 100 U.S. communities may loose scheduled air service by the end of 2008. That is a grim prospect.

In this harsh economic climate, U.S. airlines obviously cannot bear the staggering additional costs that the Department projects the Air Exit rule will generate. Airlines do not have the wherewithal to absorb such unjustified government-imposed costs and no one should assume that our customers will pay for them. The industry has demonstrated repeatedly that it cannot recoup the costs of fuel price increases. That is why the industry's financial position is so precarious and continues to deteriorate. The NPRM is oblivious to that oppressive reality. The Air Exit rule's projected costs of $3.5 billion in the next decade will significantly worsen the airlines' plight and inevitably will harm employees, communities and our nation's economy.

IV. The Department's Proposal

A. Overview

In issuing nearly four and one-half years ago the rule that started US-VISIT, the Department described a program that the government would exclusively conduct. The Department stated at that time that it was establishing the program:

> "in accordance with several Congressional mandates requiring that the Department create an integrated, automated entry exit system that records the

arrival and departure of aliens; that equipment be deployed at all ports of entry to allow for the verification of aliens' identities and the authentication of their travel documents through the comparison of biometric identifiers; and that the entry exit system record alien arrival and departure information from those biometrically authenticated documents." 69 Fed. Reg. at 468, col.1 (Jan. 5, 2004).

That very descriptive summary of both the exit and entry elements of the program is wordless about airline involvement. Had DHS concluded that such a role would be "in accordance with several Congressional mandates", the Department surely would have said so in the document that launched US-VISIT. Instead, it took off without us.

The NPRM must consequently be evaluated not only in light of the absence of any Congressional command but also in light of the Department's years of silence about an airline role in the exit program.

B. Summary of the NPRM

The NPRM proposes that air carriers and foreign air carriers[5] be required to collect the fingerprints[6] of foreign air travelers covered by US-VISIT leaving the United States before boarding her or his flight departing the United States. Proposed Section 231.4(b)(2); *see* 73 Fed. Reg. at 22072, cols. 2-3. Fingerprint collection would be permitted no more than three hours before the originally scheduled departure of the passenger's flight. Proposed Section 231.4(b)(2). The carrier would be required to transmit fingerprint departure manifest information to Customs and Border Protection

[5] Passenger vessels would also be subject to the NPRM. Land border travelers would not be subject to the NPRM. 73 Fed. Reg. at 22071 n.6. Smaller air carriers would also be exempt from the proposed rule. *Id.* at 22077, col. 1.

[6] Proposed Section 231.4(b)(4).

within 24 hours of "securing the aircraft for departure." Proposed Section 231.4(b)(3); *see* 73 Fed. Reg. at 22073, col. 1.[7]

The NPRM proposes that there be "latitude" about where airlines can collect fingerprint information, although the Department assumes that "air carriers will choose to collect biometrics from aliens at their international departure gates." 73 Fed. Reg. at 22072, col. 3. Nevertheless, fingerprint information could be collected at the originating airport for a passenger with a connecting itinerary. Consequently, the airline transporting the foreign traveler from a U.S. gateway who was on a multi-segment journey could make arrangements with the airline transporting the traveler from the originating domestic airport to collect the fingerprints at that airport. The airline transporting the traveler from the U.S. gateway, however, would remain legally responsible for the collection. *Id.* at 22702-73, col. 1.

Fingerprint data transmission will be considered to be an additional passenger manifest requirement for commercial aircraft departing the United States. Proposed Section 217.7(a); *see* 73 Fed. Reg. at 22073, col. 1. The NPRM acknowledges that a fingerprint file is "substantially larger" than a manifest biographic file. *Id.* at col. 2. Airlines will be required to meet FBI technical standards and transmission standards of the Consolidated User's Guide. Proposed Sections 231.4(b)(4), (d). DHS anticipates that airlines will upgrade their existing systems for transmitting passenger information to DHS to enable transmission of fingerprint information. 73 Fed. Reg. at 22073, col. 1.

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[7] DHS notes that this transmission deadline may be subsequently reduced (although it does not propose to do so in the NPRM), including to as soon as the time at which APIS data are transmitted to CBP before aircraft departure. 73 Fed. Reg. at 22073, cols. 2-3.

Implicitly recognizing the complexity of this undertaking, DHS proposes operational testing of the requirements of the proposed rule. *Id.* at 22073, col. 2.

Finally, the NPRM proposes a new enforcement provision. Under it, DHS could require a carrier to collect fingerprints under more restrictive procedures — e.g., at a specific location (which would enable DHS to supervise collection) and before issuing a boarding pass — if the carrier failed to comply with the proposed rule's requirements. Proposed Section 231.4(f); 73 Fed. Reg. at 22074, cols. 1-2.

C. The Department's Unconvincing Statutory Justification for the Proposal

The NPRM cites a number of immigration-related statutes, codified principally in title 8 of the U.S. Code, to support the proposed imposition on the airlines of the exit biometric collection requirement. Neither individually nor collectively does the authority that the Department cites support that proposal.

From a statutory perspective, therefore, the proposal has no foundation. It is unlawful.

The following brief review of those cited laws, which builds upon the legislative history discussion on pages 5-9 above, illustrates that the legal justification for the NPRM is baseless. In what the 9/11 Commission characterized as an "astonishingly long list of congressional mandates", 9/11 Commission Report 564 n.36, no mention was made of airlines collecting biometric data.

8 U.S.C. §1103. Section 1103 is a general *administrative* provision that provides the Secretary of Homeland Security the authority, for example, to issue

regulations. It provides the Department no *programmatic* authority to impose an exit requirement on airlines.

8 U.S.C. §1184. Section 1184 in considerable detail establishes the practices for processing *inbound* nonimmigrant aliens in a number of different contexts. It, for example, deals with aliens seeking entry for a motion picture or television production. Section 1184, however, does not authorize a biometric exit system for aliens whose entry it governs.

8 U.S.C. §1185. Section 1185 enumerates a series of prohibitions and restrictions applicable to the entry and exit of both aliens and U.S. citizens. It creates certain universal travel control rules that apply to land, sea and air travelers. Section 1185, for example, makes departure from or entry to the United States subject to applicable regulations. This authority to perform general border control formalities, however, does not explicitly or by implication establish an exit biometric system and certainly does not mandate an airline role in such a system.

8 U.S.C. §1187. Section 1187 sets forth the criteria for a nation's participation in the visa waiver program and the periodic evaluation of the program. It also authorizes the Department to enter into agreements with air carriers in which a carrier agrees to indemnify the U.S. government against the cost of transporting aliens refused admission; provide DHS with immigration forms; be subject to fines for transporting an alien without a passport; and collect and submit passenger data. Although airlines were recognized in this statute, absent from this congressional enumeration of carrier responsibilities is any reference to either an exit biometric requirement or any assignment of carrier responsibility to fulfill

such an unenumerated requirement. Congress clearly did not contemplate any such role in enacting this statute.

8 U.S.C. §1225. Section 1225 creates the authority for DHS's personnel to inspect aliens seeking admission to the United States. The statute goes into great specificity about searches, detention, subpoenas, and removal from the United States but is silent about a biometric exit program.

8 U.S.C. §1302. Section 1302 imposes registration and fingerprinting requirements on aliens. It does not establish exit formalities of any kind for such individuals.

8 U.S.C. §1303. Section 1303 is a companion to Section 1302. It authorizes the Department to specify means of registration and fingerprinting of several categories of aliens, including crewmen. Like Section 1302, it does not establish exit formalities for such individuals.

8 U.S.C. §1304. Section 1304 authorizes DHS and the Department of State to develop forms for the registration and fingerprinting of aliens who are subject to Section 1302. It, however, does not create an exit recordation system.

8 U.S.C. §1365a. See discussion on pages 6-7 above.

8 U.S.C. §1365b. Section 1365b was intended to accelerate the introduction of a biometric entry and exit system. Among other actions, subsection (f)(4)(C) instructs the Secretary to issue rules that "strictly limit the agency personnel authorized to enter data into the system…." Referring only to "agency personnel" underscores, once again, that Congress intended that the government — and not carriers — collect and transmit fingerprints for departing foreign air travelers. The

significance of this provision of Section 1365b is magnified because it is such a recent expression of congressional will. It was enacted less than four years ago in Section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law No. 108-458, 118 Stat. 3638, 3817-18 (Dec. 17, 2004).

8 U.S.C. §1372. Section 1372 establishes a program to collect immigration status information from foreign students in the United States. It requires collection of "the date of entry and port of entry" of the student. It, however, does not require collection of any departure information for foreign students or anyone else.

8 U.S.C. §1731. Section 1731 briefly describes the required elements of the integrated entry and exit data system. It does not require airlines to collect biometric data.

49 U.S.C. §44909. The NPRM's citation of this section illustrates with particular clarity the analytical shortcomings of the assertions of statutory authority in it. Section 44909 imposes passenger manifest collection and transmission requirements — but for purposes entirely unrelated to this NPRM. Subsection (a), which was enacted in Section 203 of the Aviation Security Improvement Act of 1990, Public Law No. 101-604, 104 Stat. 3066 (1990), requires that air carriers provide the Department of State a passenger manifest immediately after an aviation disaster that occurs outside of the United States. This legislation was enacted in response to the 1988 sabotage of Pan Am Flight 103. It was intended to facilitate the State Department's performance of accident victim and family assistance responsibilities overseas, which Section 207 of the act created. *See also* 49 U.S.C. §1136(d) (air carrier transmission of passenger manifest to the National

Transportation Safety Board to enable the NTSB to assist families of passengers involved in an aircraft accident). It thus was never designed to serve as an immigration control measure. Subsection (c) was enacted in Section 115 of the Aviation and Transportation Security Act, Public Law No. 107-71, 115 Stat. 597, 623-24 (2001). This subsection requires U.S. and foreign air carriers to provide electronically to Customs, now CBP, advance passenger and crew manifest information for *inbound* flights. Nothing is said in it about *outbound* flights. Thus, neither provision was designed to set up a departure control structure. In addition, both provisions deal with a category of passenger information — manifests — that Congress clearly distinguishes from biometric data, as the foregoing summary of border control legislation demonstrates. The NPRM, in contrast, does not make that distinction. They, however, are not interchangeable systems in Congress' mind. Congress understands the difference between *biographic* and *biometric* data, just as it understands the difference between assigning a responsibility to the Department and to the airlines. Finally, as Section 44909 shows, Congress will specify air carriers in legislation when it wants them to perform a function. It did not do that here.

This brief review of what the Department cites as the statutory underpinnings of the proposed rule plainly reveal that they are nonexistent.

Beyond that, the review highlights the fluency of Congress in this area. Congress has legislated with considerable knowledge, with precision and with specificity about these matters. Hence, we are not interpreting a high-level grant of authority, in which

Congress expected the Department to fill-in the interstices. On the contrary, there is a well-crafted design to what Congress has legislated here — and what it has omitted.

Congress has been purposeful about this subject. The statutes that the Department relies upon in this proceeding demonstrate, ironically, that Congress has repeatedly instructed the Department (and its predecessor, INS) to implement an entry-exit biometric system, that Congress has been very detailed in those instructions, and that it never included airlines in those instructions. The reciprocal is also self-evident. Section 44909 of title 49, which the NPRM cites, actually shows that Congress has spoken directly and unequivocally when it wants to assign a statutory responsibility to air carriers.

Given the specificity of the congressional mandates, which began in 1996, there is no warrant for the Department's supposition that it has the discretion to lay off the biometric collection of exit data on airlines. That is made irrefutably clear in the straightforward prohibition in Section 1365a against the Department imposing "any new documentary or data collection requirements on any person…."

What the Department is proposing thus is unlawful and will not withstand judicial scrutiny.

C. The Pilot Program

i. Overview

DHS conducted a US-VISIT/Exit pilot program at 12 airports and two ocean-vessel terminals between January 2004 and May 2007. It tested three alternative biometric collection methods in the pilot program: kiosk; mobile handheld device; and mobile validator (which was designed to verify the use of a kiosk). 73 Fed. Reg. at 22069-70. Quite significantly, there was no DHS enforcement of foreign air traveler

compliance with the pilot program's requirements. *Id.* at 22070, col. 2. Consequently, for such travelers, this functioned as a voluntary program. The pilot program's mixed results reflected that.[8]

The pilot program did not include airlines as collectors of biometric information. *See id.* at 22070, col. 1. Hence, there is no experience that illuminates the cost and operational implications of using airlines for that purpose. This makes DHS's proposal to require airlines to collect fingerprints — a course of action that was never tested — all the more inexplicable. The NPRM does not explain why DHS has proposed a solution that has never been tested for a program that will so profoundly affect the Department, air travelers, airports and airlines.

From the outset of the pilot program, there was no intention to include airlines in the evaluation of possible biometric collection alternatives. The DHS notice announcing the pilot program made that clear:

> "The objective of the exit pilot program is to allow DHS to evaluate processes for obtaining biometric identifiers and other information from aliens departing the United States and determine which process provides the best method of collecting this information in an expeditious and accurate manner. The goal of the pilot program is to provide DHS with a flexible system (both technically and operationally), which is also compatible with other DHS agencies, port authorities and with the travel industry." 69 Fed. Reg.46556, 46557 (Aug. 3, 2004).

[8] DHS seems to have recognized from the beginning that enforcement limitations would emerge from the pilot program. It stated in the interim final rule implementing the US-VISIT program that "[t]he rule does *not*, however, state that an alien's failure to comply with departure procedures in every instance will necessarily result in a denial of a future visa, admission or other immigration benefit." 69 Fed. Reg. 468, 474, col. 1 (Jan. 5, 2004)(emphasis in the original). In retrospect, that very indefinite statement about enforcement consequences appears to signal DHS's recognition of inherent limitations of the exit pilot program.

From its very introduction, therefore, the pilot program envisioned DHS as the actor in the Air Exit system, not the airlines. It was designed "to provide *DHS* with a flexible system…." *Id.* at 46557, col. 1 (emphasis added). Involving air carriers was not a "method of collecting information" included in the program. The requirement that the pilot program was to be "compatible with other agencies, port authorities and with the travel industry" signifies that those entities were recognized from the outset but regarded as passive third parties. *See id.* The pilot program, therefore, was not structured to lay the foundation for any of those other entities — including airlines — to be responsible for the collection of the biometric data. That was never expected.

ii. Exit Pilot Program Evaluation Report

The Department has placed the June 14, 2005, Exit Pilot Evaluation Report in the docket.[9] ("The Report" or "Report".) We had requested that and we appreciate the Department's responsiveness.

The Report reviews DHS' experience with the pilot program and offers recommendations based on that experience.[10] Despite the problems that the Report describes, it did not conclude that air carrier involvement should be considered as a way to resolve them. For those evaluating the pilot program, that was not a "lesson learned." The Report's conclusion was that DHS needed to improve the program, not that it needed to be recast into a private-sector responsibility. Because the purpose of the evaluation was to provide DHS officials with "sufficient analysis" to assist in future system deployment

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[9] http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480622706

[10] A notable issue revealed in the Report is that, at least at the time of its issuance, "each pilot location [was] responsible for writing their own [sic] Standard Operating Procedures…." Report §12.2.2 at 83. The Report does not delve into the implications of permitting that individuality rather than imposing procedural uniformity at all of the pilot locations.

decisions, that conclusion must be regarded as a categorical judgment about the implications of the pilot program. *See generally* Report §2.2 at 5.

That perspective is most succinctly illustrated in the "Opportunities for Improvement" subsection of the Report. It concluded:

> "As the US-VISIT Exit process matures there are significant opportunities for improvement across multiple disciplines: public awareness and outreach; training and deploying the WSA staff [DHS-employed Workstation Attendants to assist at kiosks]; improvements in facilities to ensure exit devices are accessible; technology improvements to refine and enhance the process; and security to protect traveler privacy." Report §12.2 at 82.

Not a word was uttered in this passage about converting the program into a private-sector undertaking. Most notably, the airline industry was not one of the enumerated "disciplines" and was not suggested to take part in the "maturation" of the program. This Department-focused set of recommendations accordingly builds upon the transparent assumption in the August 3, 2004, notice quoted above that the Department would be responsible for the exit program.

iii. Relationship to the NPRM

The NPRM declares that "[t]his proposed rule implements the lessons learned from the pilot programs." 73 Fed. Reg. at 22070, col. 3. Unfortunately for all concerned, it clearly does not. Indeed, that conclusion is incomprehensible.

We are confronted with a situation where by word and deed the Department has for years recognized its exclusive statutory responsibility to perform the exit function. At some point more recently, however, the Department chose to forsake that, for reasons that

it has not revealed. In doing that, the Department has neither explained that turnabout nor resolved the pilot program issues that the Report catalogued, many of which are significant. There, consequently, is an unbridgeable chasm between the assumptions, results and contemporaneous assessment of the pilot program and what the Department has now proposed in the NPRM.

Airline collection of biometric data was not part of the pilot program. The record is therefore completely void about the central element of this NPRM: airline collection of foreign air travelers' fingerprints. More particularly, the pilot program offers no insight into what the cost and operational implications — to passengers, airport operators and carriers — would be of requiring airlines to perform that task. The pilot program consequently provides no support for the Department's proposal in its current form. The NPRM does not, and cannot, rehabilitate that failure.

Finally, the NPRM expresses two other critical conclusions about the pilot program experience. Both require more scrutiny.

First, the NPRM states that a "biometric exit system is beneficial and necessary to the security of the United States and the integrity of the immigration system." 73 Fed. Reg. at 22070, col. 3. The efficacy of the biometric exit system as tested in the pilot program as a security measure is open to serious question. The pilot program was not a test of a security system; it was a test of what can be most accurately described as an audit system.

Second, the NPRM concludes that the "pilots demonstrated that the technology used to collect biometric exit records worked, but that the process of collecting biometric exit records should be integrated into the existing departure process to improve

compliance." *Id.* Intuitively that conclusion may be appealing but in this instance it is not empirically demonstrable. The NPRM acknowledges that the pilot program suffered from problems reflecting significant compliance, equipment location and signage shortcomings. *Id.* These are fundamental problems with the design and execution of the pilot program. Based on the results that DHS has described in the NPRM, the Department encountered critical cost, operational, passenger processing, data transmission and privacy issues in the program. It thus is not a reliable foundation for regulatory action.

D. Alternatives To The Proposed Rule Considered By DHS

The NPRM states that DHS considered several operational alternatives for the collection of fingerprints. 73 Fed. Reg. at 22074, col. 2. Not surprisingly, some of the results of this evaluation were mixed. Importantly, however, the NPRM's analysis of those alternatives does not substantiate its proposal that airlines be responsible for that collection. It clearly does not demonstrate that airline involvement in such collection would be a superior solution. The Department's conclusions repeatedly and unmistakably underscore the serious adverse effects on airlines of requiring them to collect fingerprints.

Several DHS conclusions are worth highlighting:

First, the NPRM correctly notes that biometric collection at check-in and gate locations would lengthen wait times for the airlines and that these alternatives rank less favorably than DHS collection of the data. 73 Fed. Reg. at 22075, col. 2.

Second, the NPRM also correctly notes that the financial burden on the airlines would be far less were DHS to collect the biometrics. 73 Fed. Reg. at 22075, col. 3.

Third, the NPRM concludes that the operational effect on foreign air travelers is least burdensome at the check-in counter because most travelers use check-in counters.

73 Fed. Reg. at 22075, col. 1. As we stated on page 4 above, airlines have been introducing electronic-based systems that enable customers to bypass lobby check-in. That trend will accelerate in the future and, as a consequence, check-in counter use assumptions will increasingly need to match the evolving check-in technologies.

Fourth, with respect to information technology security concerns, "alternatives where carriers collected the biometric information were less favorable than the alternatives where DHS collected the biometric information, regardless of location." 73 Fed. Reg. at 22075, col. 3. That is indisputable and underscores that collection of such information is a governmental function that for security reasons should occur by the government through governmental channels.

Fifth, with respect to privacy considerations, the NPRM concludes that "[l]ike the IT security complexity analysis, the carrier collection alternatives were less favorable than the DHS collection alternatives, regardless of location." 73 Fed. Reg. at 22076, col. 1. Again, this conclusion calls attention to the overarching principle that this is a governmental function that airlines should not be undertaking.

DHS' evaluation of its alternatives reinforces the conclusion that airlines should not be responsible for fingerprint collection. Indeed, the NPRM straightforwardly acknowledges various problems with airline collection. One point that bears further emphasizing, however, is that passenger processing in the airline industry is relying increasingly on electronic-based practices that none of the alternatives or accompanying analyses appropriately recognizes. Assigning the airlines any type of role would ignore the fundamental problem that airline business models, today and anticipated in the future,

do not match up with DHS' approach. That disparity, if it is allowed to occur, will increasingly harm airline customers and airport operators.

E. Unresolved Privacy Issues

Appropriate resolution of privacy issues is indispensable to the development of an acceptable Air Exit rule.[11] The Report stated that "protecting privacy is one of the four primary goals of the US-VISIT program.... Report §2.3 at 6. The legitimacy of any rule that emerges will depend upon how successfully the Department resolves that issue. This is particularly so because of the intense interest that U.S. government passenger data requirements generate overseas.

The Department acknowledges that with respect to privacy considerations, carrier biometric collection alternatives are less favorable than DHS collection. 73 Fed. Reg. at 22076, col. 1. As the NPRM states:

> "When DHS does not maintain custody of PII [personally identifiable information] throughout its lifecycle, there is a lower degree of confidence of compliance with privacy requirements than when DHS does maintain full custody over PII. *Id.*

Despite that commendable candor, the Department has proposed a solution that it has found wanting. That outcome would be irreconcilable with what it has acknowledged in the NPRM.

Compounding that failing is the conclusion of the Department's evaluation of the pilot program that privacy risks existed in the program. In other words, the Department is proposing a solution that it acknowledges is less secure than the

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[11] ATA will respond to the two US-VISIT Privacy Act notices that the Department has recently issued. 73 Fed. Reg. 33928, 34028 (June 16, 2008).

alternatives tested in the pilot program, which, in turn, it acknowledges had hazards. Although it stated that privacy risks had been mitigated, the Report observed that:

"Specific privacy risks still exist, including risks associated with the following:

- Issuing receipts containing personal information
- Using wireless communication
- Using mobile devices because of their portability
- Capturing personal information in the relatively unstructured port environment" Report §2.3 at 6.

The NPRM does not suggest how these generic risks will be resolved in the airline environment. This is another instance in which the results of the pilot program evaluation are not harmonized with the proposed rule. The consequence is that a high-profile issue that goes to the core of the proposal remains at loose ends.

That situation will have two predictable adverse consequences.

First, foreign skepticism of the U.S. Government's handling of personal information will resurface.

Second, airlines will be caught up in that customer skepticism. Airlines will have to explain a governmental decision but will be unable to resolve concerns about that decision. That occurred earlier this decade as CBP's passenger name record access requirement was implemented. We do not want to see it happen again.

The Department is far better positioned to protect passenger privacy than are airlines. As with other considerations in this proceeding, the superior position of the Department underscores that it should collect exit biometric information.

V. REGULATORY IMPACT ANALYSIS

A. Overview

One of the purposes of Executive Order 12866 is to avoid the imposition of unreasonable or unnecessary costs in federal regulatory proceedings. The proposed rule would impose precisely those types of costs on the airline industry — on an enormous scale. The Department's April 17, 2008, Regulatory Impact Analysis lays out in great detail that perverse outcome.[12]

DHS projects that the ten-year expenditure and delay costs for the Air Exit program will be $3.5 billion. 73 Fed. Reg. at 22080, col. 3. Arrayed against that extraordinary cost are ten-year benefits projected at only $1.09 billion. 73 Fed. Reg. at 22081, col. 3. Few of the specified benefits are very tangible; the Regulatory Impact Analysis describes many as qualitative benefits (RIA at 64-66). They reflect the nature of the proposal: a program designed not for security purposes but instead to audit the departure of foreign air travelers. They are identified as:

- Better allocated enforcement resources
- More accurate ability to determine eligibility for future immigration requests
- Determination of visa waiver program eligibility
- Improved immigration and border management analysis capabilities. 73 Fed. Reg. at 22082, cols. 1-3.

These are essentially administrative benefits that can be achieved without the involvement of airlines. Beyond being generally soft benefits, they come nowhere near

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[12] DHS has placed the Regulatory Impact Analysis in the docket for this proceeding. The "Air/Sea Biometric Exit Project Regulatory Impact Analysis" (hereinafter cited as "RIA") is accessible at http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480524b61

justifying imposing expenses on airlines of the magnitude that the RIA estimates will be generated.

B. Particular Issues

The RIA describes alternatives to the "Carrier Discretion" solution in the NPRM, including government implemented (checkpoint and kiosk alternatives) and a government-financed alternative, all of which are less costly or cost in the same range as the Carrier Discretion proposal. The RIA shows that these government alternatives are superior in terms of IT security and data privacy and it calls the TSA biometric data collection solution the best in terms of minimizing disruption and delay. The RIA shows no reasonable basis in terms of cost, facilitation, IT security or privacy to prefer a carrier-led program to a government-conducted program.

By way of illustration, of the ten-year net present value ("NPV") of \$3.4-\$6 billion of the proposed rule (RIA at 3), the RIA estimates total costs to the government of about 10 percent of total carrier costs, and as little as two percent, depending on estimates. RIA at 50 and A-9.

Furthermore, the proposal's 10-year NPV of costs minus NPV of quantified benefits are highly negative at minus \$1.8 billion over 10 years. RIA at 80. While the Carrier Discretion solution will require carriers and passengers to pay, quantified benefits accrue primarily to DHS in terms of better resource use, fewer deportations and similar matters. In other words, the government will avoid substantial costs by shifting them to carriers and, ultimately, their customers.

The RIA acknowledges that the cost estimates are highly uncertain and that they may understate costs by up to 100 percent (or overstate them by up to 50 percent), noting

that "the point estimate should not be viewed as the most probable cost...." RIA at A-2; *see also* RIA at 4. Placing this in some perspective, the approximately 5,000 additional visa overstays that are expected to be identified by Air Exit must be contrasted with the RIA estimate of approximately $3 billion in costs over ten years. Viewed this way, the cost to detect one identified visa overstay — someone who is leaving the country — would be approximately $60,000 ($3 billion divided by the 50,000 additional overstays identified over 10 years). RIA at 71.

Moreover, although the NPRM asks how the Department can harmonize the operational and technical requirements of the proposed rule with other DHS programs, and reduce any burdens that the proposed rule may create, both the RIA and the NPRM seem to proceed on the assumption that Air Exit can function in harmony with the requirements of various other DHS passenger data collection systems—AQQ, Secure Flight and the recently announced Electronic System for Travel Authorization. 73 Fed. Reg. at 22071, col. 3. There is no evidence to substantiate that assumption.

Indeed, the NPRM reveals how misplaced that assumption is. The NPRM:

- Acknowledges that fingerprint file is larger than a manifest biographic file. 73 Fed. Reg. at 22073, col. 2.
- States that airlines will be required to meet FBI technical standards and transmission standards of the Consolidated User's Guide. Proposed Sections 231.4(b)(4), (d).
- Expects that airlines will upgrade their existing systems for transmitting passenger information to DHS to enable transmission of fingerprint information. 73 Fed. Reg. at 22073, col. 1.

- Recognizes the need for operational testing. 73 Fed. Reg. at 22073, col. 2.

The airline industry is once again confronted with a DHS rulemaking proceeding that will impose substantial new IT resource demands on it without resolving the fundamental, longstanding issue of how to coordinate the Department's disparate and expanding passenger data requirements. The required information may travel through a portal that also transmits data for other DHS programs but it is not harmonized with those programs.

Ultimately what the 243 page Regulatory Impact Analysis illuminates is a cost-transfer objective. Quite literally, the RIA does not add up. What is apparent, though, is that the Department does not want to be saddled with the cost and resource demands of the Air Exit legislation. However understandable that aversion may be, it is no justification for imposing extraordinarily expensive and burdensome tasks on an industry that Congress never contemplated being responsible for them and whose future is increasingly imperiled because of unprecedented fuel costs.

VI. Legal Infirmities

The Department does not have the statutory authority to proceed with this proposal. As shown above, Congress has neither explicitly assigned the exit responsibility to the airlines nor provided the Department the authority to delegate such a responsibility to airlines. Indeed, 8 U.S.C. §1365a prohibits what the Department proposes.

Section 553(b)(2) of the Administrative Procedure Act requires that a notice of proposed rulemaking contain a "reference to the legal authority under which the rule is proposed…." 5 U.S.C. §553(b)(2). The NPRM did not identify applicable authority and thereby fails to meet this APA requirement. The absence of such authority dooms this proceeding.

As the Supreme Court has said, there is a "need for harmony between statutory language and the regulation." Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981). No such harmony exists here. The Department's proposal cannot be reconciled with a reasonable reading of the statutory authority cited in the NPRM. Any attempt to do so would be implausible.

Regulations "must be rooted in a grant of [quasi-legislative] power by the Congress…." Pearce v. United States, 261 F.3d 643, 648 (6th Cir. 2001)(citing Chrysler v. Brown, 441 U.S. 281, 302 (1979)). No such grant is evident here. On the contrary, what is apparent are series of well-informed, very detailed legislative actions that unmistakably and consistently specify that the Department is to perform the Air Exit program. The proposal is thus outside of the scope of the authority under the cited statutes and is manifestly contrary to those statutes. *See, e.g.,* Rite Aid Corp. v. United States, 255 F.3d 446, 452 (4th Cir. 2004).

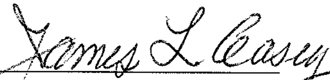
The upshot is that the Department's proposal is an unlawful assertion of authority and would not withstand judicial scrutiny.

VII. CONCLUSION

The Department does not have the legal authority to do what it proposes. Congress has not instructed airlines to collect biometric exit information. DHS cannot

erect a regulatory requirement on a nonexistent statutory foundation. The proposed rule should therefore be withdrawn.

Respectfully submitted,



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