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**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Part 217**

**Docket Nos. USCBP-2008-003 and USCBP-2010-0025**

**CBP Dec. No. 15-08**

**RIN 1651-AA72 and RIN 1651-AA83**

**Changes to the Visa Waiver Program to Implement the Electronic System for Travel**

**Authorization (ESTA) Program and the Fee for Use of the System.**

**AGENCY:** U.S. Customs and Border Protection; DHS.

**ACTION:** Final rule.

**SUMMARY:** This rule adopts as final, with one substantive change, interim amendments to DHS regulations published in the **Federal Register** on June 9, 2008 and August 9, 2010 regarding the Electronic System for Travel Authorization (ESTA). ESTA is the online system through which nonimmigrant aliens intending to enter the United States under the Visa Waiver Program (VWP) must obtain a travel authorization in advance of travel to the United States. The June 9, 2008 interim final rule established ESTA and set the requirements for use for travel

through air and sea ports of entry. The August 9, 2010 interim final rule established the fee for ESTA. This document addresses comments received in response to both rules and some operational modifications affecting VWP applicants and travelers since the publication of the interim rules.

**DATES:** This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

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### **Executive Summary**

Prior to implementing the Electronic System for Travel Authorization (ESTA), international travelers from Visa Waiver Program (VWP) countries<sup>1</sup> were not evaluated, in advance of travel, for eligibility to travel to the United States under the VWP. In the wake of the tragedy of September 11, 2001, Congress enacted the Implementing Recommendations of the

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<sup>1</sup> With respect to all references to “country” or “countries” in this document, it should be noted that the Taiwan Relations Act of 1979, Pub. L. No. 96-8, Section 4(b)(1), provides that “[w]henver the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.” 22 U.S.C. § 3303(b)(1). Accordingly, all references to “country” or “countries” in the Visa Waiver Program authorizing legislation, Section 217 of the Immigration and Nationality Act, 8 U.S.C. 1187, are read to include Taiwan. This is consistent with the United States’ one-China policy, under which the United States has maintained unofficial relations with Taiwan since 1979.

9/11 Commission Act of 2007, Pub. L. No. 110-53. To address this identified vulnerability of the VWP, section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (section 711 of the 9/11 Act), was enacted, requiring the Secretary of Homeland Security to implement a system that would provide for the advance screening of international travelers by allowing DHS to identify subjects of potential interest before they board a conveyance destined for the United States.

On June 9, 2008, the Department of Homeland Security (DHS) published an interim final rule in the **Federal Register** (73 FR 32440) announcing the creation of the ESTA program for nonimmigrant aliens traveling to the United States by air or sea under the VWP. On November 13, 2008, DHS published a notice in the **Federal Register** (73 FR 67354) announcing that ESTA would be mandatory for all VWP participants traveling to the United States at air or sea ports of entry beginning January 12, 2009.

On March 4, 2010, the United States Capitol Police Administrative Technical Corrections Act of 2009, Pub. L. No. 111-145, was enacted. Section 9 of this law, the Travel Promotion Act of 2009 (TPA), mandated the Secretary of Homeland Security to establish a fee for the use of ESTA and begin assessing and collecting the fee.

On August 9, 2010, DHS published an interim final rule in the **Federal Register** (75 FR 47701) announcing that, beginning September 8, 2010, a \$4 ESTA fee would be charged to each ESTA applicant to ensure recovery of the full costs of providing and administering the system and an additional \$10 TPA fee would be charged to each applicant receiving travel authorization through September 30, 2015.<sup>2</sup>

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<sup>2</sup> The TPA authorized collection of the \$10 TPA fee through September 30, 2014. However, on July 2, 2010, the Homebuyer Assistance and Improvement Act of 2010, in part, amended the TPA by extending the sunset provision of the TPA fee and authorizing the Secretary to collect this fee through September 30, 2015. See Pub. L. No. 111-

DHS received a total of 39 submissions in response to the June 9, 2008 and August 9, 2010 interim final rules. Most of these submissions contained comments providing support, voicing concerns, highlighting issues, or offering suggestions for modifications to the ESTA program.

After review of the comments, this rule finalizes the June 9, 2008 interim final rule regarding the ESTA program and the August 9, 2010 interim final rule regarding the ESTA fee for nonimmigrant aliens traveling to the United States by air or sea under the VWP with one substantive regulatory change allowing the Secretary of Homeland Security to adjust ESTA travel authorization validity periods on a per country basis to the three year maximum or to a lesser period of time. This final rule also contains one minor technical change that removes the specific reference to the Pay.gov payment system. In addition, based on the experience gained from operating the ESTA program since its inception and the comments received, DHS has made a few operational changes to ESTA as it was described in the two interim final rules. For example, VWP travelers no longer need to complete the Form I-94W Nonimmigrant Visa Waiver Arrival/Departure paper form upon arrival in the United States at air and sea ports of entry. Also, VWP travelers who provide an email address to DHS when they submit their application will receive an automated email notification indicating that their ESTA travel authorization will be expiring soon. DHS has also updated the information on the ESTA website to address some of the comments. Additionally, DHS has made some changes to the required ESTA application and paper Form I-94W.

On November 26, 2013, DHS published a 60-day notice and request for comments in the **Federal Register** (78 FR 70570) regarding the extension and revision of information collection

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198 at § 5. The sunset provision was further extended by the Travel Promotion, Enhancement, and Modernization Act of 2014 through September 30, 2020.

1651-0111. On February 14, 2014, DHS published a 30-day notice and request for comments in the **Federal Register** (79 FR 8984) regarding the extension and revision of that information collection. Both notices describe various proposed changes to the ESTA application and paper Form I-94W questions to make them more understandable to VWP travelers, including revisions to the questions about communicable diseases, crimes involving moral turpitude, engagement in terrorist activities, fraud, employment in the U.S., visa denials, and visa overstays. DHS also proposed to remove a question about the custody of children. On December 9, 2014, DHS published another 60-day notice and request for comments in the **Federal Register** (79 FR 73096) regarding the extension and revision of information collection 1651-0111. This notice concerns additional changes to the ESTA application and paper Form I-94W that will allow DHS to collect more detailed information about VWP travelers by making previously optional questions mandatory and by adding questions concerning aliases, employment, and emergency contact information among other data elements. These changes are necessary to improve the screening of travelers before their admittance into the U.S. All of the changes in the referenced notices took effect on November 3, 2014.

This rule is considered an economically significant regulatory action because it will have an annual effect on the U.S. economy of \$100 million or more in any one year. Costs to U.S. entities include the cost to carriers to modify or develop systems to transmit ESTA information to DHS.

ESTA provides benefits to U.S. entities by reducing the number of inadmissible aliens who would arrive in the United States by more than 40,000 per year. This reduces the number of aliens DHS will have to process in the United States who would be found to be inadmissible upon their arrival, reduces the number of inadmissible aliens carriers would need to transport

back to their points of origin, and reduces wait times for other international travelers arriving at U.S. ports of entry. Though not a quantifiable benefit, this rule will enhance security by providing DHS with information on travelers before they board a conveyance destined for the United States. Table ES-1 shows the range of annualized costs and benefits of this rule to each U.S. entity from 2008-2018, using 3 and 7 percent discount rates.

**ES-1: Annualized Costs and Benefits of the Rule to U.S. Entities, 2008–2018 (\$2013)**

|                                      | 3% Discount Rate             | 7% Discount Rate             |
|--------------------------------------|------------------------------|------------------------------|
| <b>Costs</b>                         |                              |                              |
| Carriers – Systems                   | \$22 million                 | \$24 million                 |
| <b>Benefits</b>                      |                              |                              |
| Carriers – Inadmissibility Savings   | \$65 million to \$69 million | \$63 million to \$66 million |
| CBP – Inadmissibility Savings        | \$6 million                  | \$6 million                  |
| Total Inadmissibility Savings        | \$71 million to \$75 million | \$69 million to \$72 million |
| Carriers – Forms Maintenance Savings | \$2 million                  | \$2 million                  |
| CBP – Forms Maintenance Savings      | \$0.2 million                | \$0.2 million                |
| Total Forms Maintenance Savings      | \$2 million                  | \$2 million                  |

In addition to costs and benefits to U.S. entities, this rule will affect foreign entities. Costs to foreign entities include the cost (the \$14 fee and related expenses) and time burden for foreign travelers to obtain a travel authorization, and the cost and time burden for foreign travelers to obtain a B-1/B-2 visa if a travel authorization is denied. Benefits to foreign entities include the savings to foreign travelers in new VWP countries for no longer needing to apply for visas and the savings to foreign travelers in no longer needing to fill out a paper Form I-94W or

Form I-94. Table ES-2 shows the range of annualized costs and benefits of this rule to each foreign entity from 2008-2018, using 3 and 7 percent discount rates.

**ES-2: Annualized Costs and Benefits of the Rule to Foreign Entities, 2008–2018 (\$2013)**

|                                                  | 3% Discount Rate               | 7% Discount Rate               |
|--------------------------------------------------|--------------------------------|--------------------------------|
| <b>Costs</b>                                     |                                |                                |
| Travelers – Fee for Travel Authorization         | \$131 million to \$138 million | \$127 million to \$133 million |
| Travelers – Time Burden for Travel Authorization | \$126 million to \$282 million | \$122 million to \$271 million |
| Travelers – Visa Costs                           | \$14 million to \$21 million   | \$14 million to \$21 million   |
| <b>Benefits</b>                                  |                                |                                |
| Travelers – Visa Savings                         | \$182 million to \$244 million | \$173 million to \$231 million |
| Travelers – I-94/I-94W Savings                   | \$67 million to \$150 million  | \$65 million to \$144 million  |

## **I. Background and Purpose**

### **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, in consultation with the Secretary of State, may designate countries for participation in the Visa Waiver Program (VWP) if certain requirements are met.<sup>3</sup> Eligible citizens and nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant visitors 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. Other nonimmigrant

<sup>3</sup> The current list of VWP countries is set forth in 8 CFR 217.2(a).

visitors must obtain a visa from a U.S. embassy or consulate and generally must undergo an interview by consular officials overseas in advance of travel to the United States.

## **B. The Electronic System for Travel Authorization (ESTA)**

On August 3, 2007, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Public Law 110-53. Section 711 of the 9/11 Act required that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a fully automated electronic travel authorization system to collect biographical and other information as the Secretary determines necessary to evaluate, in advance of travel, the eligibility of the applicant to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk. See 8 U.S.C. 1187(h)(3)(A).

On June 9, 2008, DHS published an interim final rule in the **Federal Register** (73 FR 32440) announcing the creation of the ESTA program for nonimmigrant visitors traveling to the United States by air or sea under the VWP. See 8 CFR 217.5. ESTA provided for an automated collection of the information required on the Form I-94W Nonimmigrant Visa Waiver Arrival/Departure paper form (Form I-94W) in advance of travel. ESTA is intended to fulfill the statutory requirements described in Section 711 of the 9/11 Act. For purposes of this document, the June 9, 2008 interim final rule is referred to as the ESTA IFR.

On November 13, 2008, DHS published a notice in the **Federal Register** (73 FR 67354) announcing that use of ESTA would be mandatory for all VWP travelers traveling to the United States seeking admission at air and sea ports of entry beginning January 12, 2009. Since that date, VWP travelers have been required to receive travel authorization through ESTA prior to boarding a conveyance destined for an air or sea port of entry in the United States. Travelers

unable to receive authorization through ESTA may still apply for a visa to travel to the United States.

### **C. The Fee for Use of ESTA and the Travel Promotion Act Fee**

On March 4, 2010, the United States Capitol Police Administrative Technical Corrections Act of 2009, Pub. L. No. 111-145, was enacted. Section 9 of this law, the Travel Promotion Act of 2009 (TPA), mandated the Secretary of Homeland Security to establish a fee for the use of ESTA and begin assessing and collecting the fee no later than six months after enactment. See 8 U.S.C. 1187(h)(3)(B).

The TPA provided that the required fee consist of the sum of \$10 per travel authorization (TPA fee) to fund the newly authorized Corporation for Travel Promotion and an amount that will at least ensure recovery of the full costs of providing and administering the System (ESTA fee), as determined by the Secretary. See 8 U.S.C. 1187 (h)(3)(B). The TPA fee has a sunset provision and the Secretary is authorized to collect this fee only through September 30, 2020.<sup>4</sup> The ESTA fee, in contrast, does not include a sunset provision, but will be reassessed on a regular basis to ensure it is set at a level to fully recover ESTA operating costs.

On August 9, 2010, DHS published an interim final rule in the **Federal Register** (75 FR 47701) announcing that, beginning September 8, 2010, a \$4 ESTA fee would be charged to each ESTA applicant to ensure recovery of the full costs of providing and administering the system and an additional \$10 TPA fee would be charged to each applicant receiving a travel authorization through September 30, 2020. See 8 CFR 217.5(h). For purposes of this document, the August 9, 2010 interim final rule is referred to as the ESTA Fee IFR.

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<sup>4</sup> See Footnote 3 above regarding the extension of the sunset provision of the Travel Promotion Act fee through September 30, 2020.

For more details regarding ESTA, please see the ESTA IFR (73 FR 32440). For more details regarding the fees associated with ESTA, please see the ESTA Fee IFR (75 FR 47701). Additional information may also be found on the ESTA website at <https://esta.cbp.dhs.gov>.

## **II. Discussion of Comments Submitted in Response to the Interim Final Rule Announcing ESTA and Interim Final Rule Announcing the ESTA Fee**

### **A. Overview**

DHS issued the ESTA IFR on June 8, 2008 and the ESTA Fee IFR on August 9, 2010. Although DHS promulgated both IFRs without first soliciting public notice and comment procedures, DHS provided a sixty day post-promulgation comment period for each rule. Each IFR solicited public comments that DHS would consider before adopting the interim regulations as final. The ESTA IFR went into effect on January 12, 2009 and the ESTA Fee IFR became effective on September 8, 2010. DHS received twenty-two submissions in response to the ESTA IFR and seventeen submissions in response to the ESTA Fee IFR. Many of the submissions contained multiple comments. This final rule addresses all the comments submitted within the comment periods that are within the scope of the two interim final rules.

Of the twenty-two submissions for the ESTA IFR, most included comments seeking clarification on specific issues, highlighting concerns or issues with ESTA, or offering solutions to issues or alternatives to ESTA. Many of the operational issues raised by commenters have already been addressed by DHS during implementation of ESTA, which our responses reflect. Of the seventeen submissions to the ESTA Fee IFR, some commenters objected to the fees generally and others sought clarification regarding the fees, such as why there were two components and when the fees would be incurred.

Due to the evolution of ESTA and the occasional overlap of comments received in response to both interim final rules, all of the following comments are grouped by category. Except where necessary, comments to the ESTA IFR and comments to the ESTA Fee IFR are not distinguished.

## **B. Discussion of Comments**

### **1. Impact on Travel**

Comment: Some commenters expressed support for ESTA because it will allow VWP travelers the opportunity to learn of travel eligibility problems in advance of arrival.

Response: DHS agrees that one benefit of ESTA is that it informs travelers of their eligibility to travel to the United States under the VWP before departing for the United States. Applicants who are not eligible to travel to the United States through the VWP can attempt to make alternative arrangements in advance, such as obtaining a visa from a U.S. embassy or consulate. For more information about visa application procedures, please visit <http://www.travel.state.gov>.

Comment: A few commenters expressed concern that the ESTA fee and the TPA fee could negatively impact how the world views the United States and could be perceived as an obstacle to legitimate travel. The commenters claimed this could result in some travelers avoiding the United States, which would hurt tourism, business interests, and the travel industry.

Response: There are a lot of variables that can influence the numbers of VWP travelers who come to the United States. DHS is confident that ESTA is not a significant deterrent. Despite the assertion that ESTA and the ESTA fee would negatively affect tourism to the United States, DHS has seen no decrease in VWP travel coming to the United States since ESTA was announced, even after accounting for countries that have joined the VWP since ESTA was

implemented. Through the end of 2012, there have been over 50 million travel authorizations granted through ESTA.

Comment: Some commenters noted that significant burdens could be placed on airlines due to passengers attempting to board without having first obtained ESTA travel authorization.

Response: Prior to implementation, DHS conducted significant outreach to the travel industry and the traveling public to ensure that they were aware of the ESTA requirements, including the need to have a valid ESTA travel authorization prior to boarding a conveyance destined for an air or sea port in the United States. In addition to outreach, DHS took various steps, including delaying implementation and establishing an informed-compliance period, to enable the travel industry and the traveling public to adjust to the new requirements. This is explained in more detail in Section II. B. 3 (Implementation of ESTA). As a result of these steps and the outreach, the concerns raised in this comment never materialized.

## **2. Impact on Short Notice Travelers**

Comment: A number of comments were received regarding the timeline for ESTA approval and the impact on last minute travelers applying at the airport on the day of scheduled travel. One commenter asked DHS to monitor the system for problems to determine if there are negative impacts on last minute business travelers and to provide guidance on what a last minute traveler should do in the case where he or she has not received an ESTA determination, but needs to depart for the United States. Some commenters said that DHS' recommended timeline for applying for an ESTA travel authorization (no later than 72 hours prior to departure) is not sufficient to accommodate last minute business travelers.

Response: An ESTA travel authorization is generally valid for two years so concerns about last minute travel will only be for those who have not already received travel authorization

through the ESTA website. Also, potential VWP travelers may apply for an ESTA travel authorization even if they do not have immediate plans to travel to the United States. This enables VWP travelers to know whether they are eligible to travel to the United States under the VWP even before purchasing tickets. Furthermore, ESTA was designed to accommodate last minute or emergency travel. ESTA allows travelers to apply for a travel authorization on the day of departure and provides almost an immediate response to the applicant for the vast majority of applications.

Applicants should be aware, however, that they risk not having the required authorization to travel to the United States if their application requires additional processing beyond the time between when they submit their application and when their voyage to the United States begins. VWP travelers without a valid ESTA travel authorization cannot board conveyances destined for the United States.

In cases in which a determination is not granted immediately, it may take anywhere from a few minutes to a few days for a decision to be made. In most cases, the applicant will receive an ESTA decision within 72 hours. However, additional time may be necessary if manual vetting is required or there is a system overload. An applicant may contact the ESTA Telephone Help Desk at 202-344-3710 between the hours of 8:00am to 4:00pm (ET) Monday through Friday for assistance in processing their pending application. However, there is no guarantee that a determination will be made in time to allow the traveler to board a conveyance destined for the United States. This is why DHS recommends that travelers apply for an ESTA travel authorization early in the planning process.

### **3. Implementation of ESTA**

Comment: One commenter stated that if DHS were to maintain ESTA's original timetable, then cumbersome, manual solutions would have to be developed and promulgated for those carriers who cannot manage automated solutions. Another commenter stated that DHS should offer a discretionary period during which airlines allow VWP travelers without ESTA travel authorization to travel to the United States under the condition that they complete the I-94W paperwork upon arrival and educate these passengers on how to use ESTA for future VWP travel.

Response: In promulgating the ESTA IFR, DHS built in a delayed effective date for the rule to allow air carriers and VWP travelers to adjust to the new ESTA process. Specifically, the ESTA IFR provided that ESTA would become mandatory sixty days after the Secretary published notice in the Federal Register. See 72 FR 32440. On November 13, 2008, DHS published a notice in the **Federal Register**, which announced that ESTA would be mandatory for all VWP travelers beginning January 12, 2009. See 73 FR 67354. The January 12, 2009 date provided five months advance notice before DHS would implement the rule. It also was the beginning of what DHS termed the Informed Compliance period. This meant that while all travelers and carriers were expected to be ESTA-compliant, DHS established a transition period to enable travelers and carriers to adjust to the new requirements. During the Informed Compliance period, travelers arriving without prior ESTA authorization were not refused admission on this basis. Instead, they were permitted to complete the paper form I-94W upon arrival in the United States. Also, during this period, DHS did not levy fines on carriers for boarding travelers without prior ESTA authorization. This enabled the carriers to make the necessary system-adjustments for ESTA. As a result of the advance notice and the informed compliance period, there was no need for the manual solutions referenced in the above comment.

Further, DHS set up an internet-accessible system where certain carriers could check the ESTA status for VWP travelers without having to make the extensive system modifications required for carriers regularly transporting VWP travelers. For the most part, the internet-accessible system could be used by smaller or private carriers that transport VWP travelers on an irregular basis, or for emergency situations that may arise from time to time. For more information on this internet-accessible system, please contact the ESTA Help Desk at 202-344-3710.

Comment: Some commenters stated that ESTA was announced too quickly and prevented the travel industry from assessing the required changes and evaluating the ramifications and costs. Other commenters asked DHS to provide a transition period during which DHS would not levy penalties on carriers.

Response: As explained above, DHS provided a significant amount of notice before implementing ESTA as a mandatory requirement on January 12, 2009. This was followed by approximately one year of an Informed Compliance period during which travelers and carriers were expected to be ESTA-compliant but were not penalized for noncompliance. The Informed Compliance period ended on January 20, 2010. As of that date, individuals without an ESTA travel authorization would be refused admission and, as allowed for under § 217(e) of the INA (Carrier Agreements), fines would be issued against non-compliant carriers. DHS also provided an additional 60-day grace period after January 20, 2010 for carriers having difficulty with the systems modifications.

From the date the ESTA IFR published, the travel industry had more than two years (and more than one year from the date it became mandatory) to evaluate and adjust to the ESTA requirements and to assess the costs related to ESTA and implement appropriate systems

modifications. During the time between when ESTA was announced and when it became mandatory, DHS sought input and worked with the travel industry to address operational issues. DHS believes that this program has been highly successful in large part due to the cooperation between DHS and the travel industry.

Comment: Many commenters had suggestions for the implementation of ESTA, such as beginning ESTA as a pilot program to adequately measure its impact, phasing it in over time rather than all at once, or waiting until a certain percentage of VWP travelers are compliant before making ESTA mandatory.

Response: As explained above, DHS implemented ESTA by using an Informed Compliance period to facilitate the transition to the new requirements. The ESTA IFR provided travelers and the travel industry with the needed information about the new requirements and provided ample notice and time to prepare for ESTA. DHS believed that the most effective way to implement ESTA was to inform all VWP travelers and the travel industry about the new requirements and to implement them for all VWP countries and carriers at the same time. To facilitate a smooth transition, DHS also conducted significant public outreach and worked closely with the carriers involved with the VWP.

Implementing ESTA as a pilot program, based on country of embarkation, port of arrival, language, or by any other piecemeal approach would have meant multiple processes for carriers and DHS staff at ports of entry. Moreover, DHS believes that such an approach would not have aided the transition to the new requirements but rather would have been confusing to the traveling public and travel industry. Additionally, waiting until after a certain percentage of VWP travelers were compliant would have been ineffective in strengthening the VWP in a timely manner. DHS believes that ESTA was implemented in a way that allowed for substantial

analysis of the program and its impact, as well as providing adequate notice to allow affected travelers and the travel industry to adjust to ESTA's requirements comfortably.

Comment: One commenter stated that DHS should process ESTA applications upon arrival for the small minority of passengers who arrive without ESTA authorization.

Response: The 9/11 Act specifically required the Secretary to collect the necessary biographical and other information "to evaluate, in advance of travel," the traveler's eligibility to travel to the United States under the VWP. See 8 U.S.C. 1187(h)(3)(A). Therefore, allowing VWP travelers to obtain an ESTA upon arrival in the United States would contradict the language of the 9/11 Act and undercut DHS's ability to evaluate the traveler's eligibility to enter the United States under the VWP, in advance of travel. DHS believes that such a process also could disincentivize VWP travelers from obtaining an ESTA before departing for the United States.

DHS provided VWP travelers with the necessary information to comply with ESTA requirements, as well as the transitional periods described above prior to requiring compliance. Currently all VWP travelers are responsible for obtaining ESTA authorization prior to boarding an air carrier or sea vessel destined for the United States. As such, a VWP traveler should not attempt to board and a carrier should not allow a VWP traveler to board without ESTA travel authorization.

Comment: One commenter stated that DHS should have considered proposals from the private sector to develop an ESTA-like system, rather than developing ESTA as a government designed online system.

Response: DHS considered many alternatives and possible solutions during the ESTA planning, design, and development process. DHS decided to develop ESTA as a DHS system

based on a variety of factors, including the impact that the VWP has on national security, the need to coordinate with other programs, and time constraints.

Comment: Two commenters agreed with the way that DHS implemented ESTA. One commenter liked the fact that DHS moved aggressively to implement new security measures required to expand the VWP and in concluding bilateral agreements with qualified prospective VWP countries. Another commenter stated that DHS is fulfilling a critical role in accommodating and responding to the needs of last minute travelers.

Response: DHS appreciates the comments expressing support for the implementation and expansion of ESTA and the VWP.

Comment: A few commenters asked DHS to provide alternative means for submitting an ESTA application such as integrating ESTA into the travel industry's reservation system, providing a staffed telephone hotline to permit users to report their information to the ESTA system, or allowing carriers to apply on behalf of travelers.

Response: In order to meet the statutory requirement that DHS create a fully automated electronic travel authorization, DHS established the online ESTA website for submitting the ESTA application. Other options, such as allowing carriers to apply on behalf of travelers using their reservation system or a telephone number where VWP travelers could call in and report the information, would not have met the requirement to establish a fully automated electronic travel authorization system and would have raised security and privacy concerns.

#### **4. Plain Language and ESTA Website Assistance**

Comment: A few commenters requested that DHS use plain language on the ESTA website, including the eligibility questions, in order to avoid confusion about eligibility requirements or about when a new ESTA application is required.

Response: DHS has used plain language in the ESTA application and on the ESTA website wherever possible and, in an effort to accommodate the majority of the VWP traveling public, the ESTA website has been translated into 23 languages. On November 3, 2014, DHS revised the eligibility questions on the ESTA website in order to make them clearer while still providing DHS with the information needed to make ESTA eligibility determinations. The website also features a “Help” section to assist applicants by providing definitions of certain terms and clear answers to questions on a variety of subjects, including situations in which an applicant is required to reapply before the expiration date of their ESTA. As specified on the website, a traveler must obtain a new travel authorization under any of the following circumstances:

1. The individual is issued a new passport;
2. The individual’s name changes;
3. The individual changes gender;
4. The individual changes their country of citizenship; or
5. The circumstances underlying the traveler’s previous responses to any of the ESTA application questions requiring a “yes” or “no” response have changed.

Comment: One commenter notes that the Frequently Asked Questions (FAQs) posted on the ESTA website are very useful and asked DHS to post more of them.

Response: FAQs are posted on the ESTA website under the HELP section at [https://esta.cbp.dhs.gov/esta/WebHelp/ESTA\\_Screen-Level\\_Online\\_Help\\_1.htm](https://esta.cbp.dhs.gov/esta/WebHelp/ESTA_Screen-Level_Online_Help_1.htm). Questions and answers are posted on an ad hoc basis to address issues as they arise. DHS will continue to monitor feedback and post appropriate general information when it is determined to be helpful to the traveling public.

## **5. Internet Concerns and Third Party Applications**

Comment: Several commenters raised concerns about whether the ESTA online system will be able to handle the web traffic as more travelers fill out their ESTA applications online.

Response: ESTA is designed to accommodate a significant amount of web traffic. DHS takes necessary measures to ensure that the ESTA website is readily available throughout the day and to minimize any technical disruptions. To date, ESTA has experienced no significant delays stemming from an increase in web traffic.

Comment: Some commenters expressed concerns about fraudulent ESTA emails designed to solicit personal information and fraudulent websites attempting to gather information for criminal purposes by imitating ESTA and asked how DHS plans to address these types of issues.

Response: All ESTA applicants should apply for an ESTA travel authorization at the following ESTA website: <https://esta.cbp.dhs.gov>. DHS takes necessary measures to ensure the safety and reliability of personal identification information furnished to DHS through this website. The ESTA website is a secure website under DHS protocol. Each approved application is assigned a unique identifier that corresponds to the designated traveler. These unique identifiers directly correspond to an approved traveler and verification is only done electronically between the carriers and DHS. Therefore, the confirmation cannot be copied or manipulated.

DHS monitors websites that purport to offer ESTA authorization and will continue to provide outreach to the VWP traveling public to ensure they know how to submit the ESTA application. If an ESTA applicant receives emails claiming to be ESTA related that ask for personal information, the applicant should report this to the ESTA Help Desk at 202-344-3710.

Comment: Many commenters stated that the ESTA fee could create opportunities for other websites to charge users to complete the ESTA applications.

Response: DHS has no control over third parties providing assistance in applying for travel authorization. However, DHS has designed the system to be user friendly so as to minimize the need to seek assistance. For instance, the ESTA website is available in 23 languages and has information on the ESTA home page about traveler eligibility and passport requirements as well as a HELP feature that includes answers to frequently asked questions.

Comment: Some commenters asked about alternatives for ESTA applicants without internet access. One commenter asked if an individual within the United States could apply for an ESTA on behalf of the traveler. One commenter asked if applicants who use a third party to complete an ESTA application should provide the traveler's email address or that of the third party who applies on the traveler's behalf.

Response: In order to accommodate people who may not have familiarity with or access to computers or the internet, DHS designed ESTA to allow a third party, such as a relative, friend, or travel agent, to submit an application on behalf of the traveler. The location of the third party filling out the ESTA application is immaterial. The traveler or third party can apply within or outside the United States. In all cases, the traveler is responsible for the answers submitted on his or her behalf by a third party and the third party must check the box on the ESTA application indicating that he or she completed the application on the traveler's behalf. The email address provided should be the traveler's email address. If the traveler does not have an email address, he or she may provide an alternative third-party email address belonging to a point of contact (e.g. a family member, friend, or business associate).

Comment: One commenter stated that DHS should ascertain the percentage of travelers entering the United States who will use the internet and other means (such as a travel agent) to make travel arrangements to demonstrate how many travelers do not book travel through the internet and would thus have difficulty obtaining authorization through the ESTA website.

Response: DHS has seen no evidence that VWP travelers are having difficulty obtaining ESTA authorization through the ESTA website. Additionally, in the economic analysis posted on the docket with the ESTA IFR (Regulatory Assessment for the Interim Final Rule: Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization), DHS provided extensive information on historic booking patterns, internet penetration, and computer prevalence. This information has been updated in the economic analysis prepared for this final rule (Regulatory Assessment for the Final Rule: Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization and the Fee for Use of the System), posted on the docket with this final rule. To see detailed information relevant to this comment, please refer to Chapter 2 (Regulatory Baseline: Historic & Projected Traveler Levels) of this document. In summary, internet penetration and computer access is high in VWP countries and has grown since the ESTA IFR published in 2008. Twenty-four of the 37 countries in the VWP have internet penetration rates above 75 percent and only one country (Greece) has an internet penetration rate of less than 50 percent. As discussed above, VWP travelers who do not have direct access to the internet may submit the application through a third party. DHS continues to believe that these third parties, such as relatives, friends, and travel agents, will be key players in the continued success of ESTA.

## **6. The Role of ESTA for VWP Travelers**

Comment: One commenter stated that requiring VWP travelers to obtain ESTA travel authorization is the functional equivalent of a visa because passengers do not need any documentation other than a valid passport before traveling to the United States. Another commenter stated that ESTA requires certain foreign citizens to obtain an exit permit from the U.S. government before they may leave their own country.

Response: These comments do not accurately portray ESTA. Under the VWP, eligible citizens, nationals and passport holders from designated VWP countries may apply for admission to the United States as nonimmigrant visitors for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa. ESTA, however, is not the functional equivalent of a visa because eligible travelers from participating countries are exempt from the visa requirement. Application for a nonimmigrant visa to travel to the United States involves the payment of a higher fee and generally requires travel to a U.S. embassy or consulate for an in person interview.

Rather, ESTA is the functional equivalent of the Form I-94W that VWP travelers were previously required to complete upon arrival in the United States. As a result of the ESTA IFR, only eligible travelers from VWP countries arriving by air and sea now present the information collected on the Form I-94W through ESTA in advance of their travel to the United States. VWP travelers arriving in the United States by land are still required to complete a paper Form I-94W. VWP travelers who receive ESTA travel authorization are not required to report to a State Department consular office and obtain a visa before traveling to the United States.

ESTA is not equivalent to an exit permit from the foreign country and does not require anyone to obtain an exit permit from a foreign country. Rather, ESTA fulfills a requirement for VWP travelers intending to enter the United States by air and sea.

## **7. In-Transit Travel**

Comment: One commenter remarked that ESTA should provide clear instructions to passengers who transit through the United States onward to other destinations as to whether they are required to comply with ESTA requirements.

Response: DHS does not currently operate a transit without visa program. Travelers who transit through the United States en route to another country must either obtain travel authorization via ESTA to travel under the VWP or they must have a visa. This is true even if the individual is leaving the United States on the same day or even on the same plane. Travelers who will transit through the United States en route to another country can simply enter the words "In Transit" in the address lines under the heading "Address While In The United States" on the ESTA application.

## **8. ESTA Enforcement**

Comment: One commenter stated that ESTA is impracticable and unenforceable because it does not specify any enforcement mechanisms.

Response: DHS disagrees. There are enforcement mechanisms that apply to individuals and carriers involved in the VWP. All VWP travelers are responsible for obtaining ESTA authorization prior to boarding an air or sea vessel destined for the United States and may be prevented from boarding and/or denied admission to the United States upon arrival if they do not have ESTA travel authorization. Carriers that transport VWP travelers are required to enter into agreements with the United States, pursuant to §§103 and 217 of the INA, to become VWP signatory carriers. These agreements impose certain obligations upon carriers and provide for the imposition of fines if certain obligations are not met. For example, VWP signatory carriers

incur fines if they transport travelers who require a valid ESTA travel authorization but do not have one.

Comment: One commenter stated that the phrase “prior to embarking on a carrier for travel to the United States” is too vague and that it should define the relevant terms. Another commenter stated that the regulation should specify the manner of providing data to obtain an ESTA travel authorization.

Response: Based on the plain language meaning of the phrase “prior to embarking on a carrier for travel to the United States,” travelers must have ESTA travel authorization prior to boarding an air carrier or sea vessel destined for the United States. The term “United States” is defined at 8 U.S.C. § 1101(a)(38). With regard to the manner of submitting the ESTA application, DHS has made substantial efforts to educate the public on how to obtain an ESTA travel authorization, and has also provided such information in the ESTA IFR and this document. Over 50 million ESTA travelers arrived in the United States between 2009 and 2011, an indication that applicants are aware of how to submit an ESTA application.

Comment: Some commenters stated that ESTA will cause logistical problems because carriers will have to determine the visa class of travelers.

Response: This is not accurate. Only travelers coming to the United States under the VWP are required to obtain an ESTA travel authorization and these travelers are exempt from visa requirements. Carriers will not have to determine the visa class for these VWP travelers.

Comment: One commenter claimed that airlines will incur significant penalties and liabilities if they deny boarding to passengers who arrive without an ESTA travel authorization or when a passenger arrives at the port of entry and must be returned to his point of departure at the carrier’s expense.

Response: For the purposes of ESTA, a carrier's responsibility is limited to the verification of the traveler's ESTA application status. Carriers that wish to transport travelers under the VWP are required to become VWP signatory carriers. VWP signatory carriers will incur fines if they transport travelers who require a valid ESTA travel authorization but do not have one. It should be noted that ESTA is not a determination of admissibility; it merely authorizes the traveler to board a conveyance destined for the United States. Passengers determined to be inadmissible to the United States are required to return to their country of origin and carriers are responsible to provide these passengers transportation back to their point of departure. The fact that travel authorization was granted does not absolve the carrier from this responsibility. Carriers agree to the following in the VWP carrier agreement:

“The carrier will remove from the United States (on the first available means of transportation to the alien's point of departure to the United States) any alien transported by the carrier to the United States for admission under the Visa Waiver Program in the event that the alien is determined by a U.S. Customs and Border Protection officer at the Port of Entry to be not admissible to the United States or is determined by a U.S. Customs and Border Protection officer to have remained unlawfully in the United States beyond the 90-day period of admission under the Visa Waiver Program. The carrier will carry out the responsibilities under this paragraph in a manner that does not impose on the United States expenses related to the transportation of such alien from the point of arrival in the U.S.”

Comment: One commenter indicated that there is no provision in the 9/11 Act about the carrier's role in implementing and enforcing ESTA. As such, DHS is not authorized to compel carriers to assume a function which Congress mandated on individuals.

Response: DHS agrees that the 9/11 Act requires certain individuals to obtain a travel authorization prior to traveling to the United States. However, VWP signatory carriers are responsible for verifying that the traveler has a valid ESTA travel authorization prior to allowing a VWP traveler to board a conveyance destined for the United States. This responsibility is set forth in the VWP carrier agreements described above.

#### **9. State Department Coordination**

Comment: One commenter stated that DHS and the State Department must work together to ensure travelers are well-informed regarding their responsibilities under the ESTA program.

Response: DHS coordinated closely with the State Department during the development and implementation of ESTA and this coordination was essential to the efficient implementation of ESTA. DHS's ongoing coordination with the State Department remains essential to the ongoing administration of the ESTA. DHS partnered with the State Department to develop a strategic communications and outreach plan aimed at notifying VWP travelers of the new ESTA requirements. DHS personnel traveled extensively to VWP countries, attended major international travel conferences, distributed printed materials, and spoke with the travel industry and the public regarding ESTA. DHS continues to conduct extensive public outreach at U.S. ports of entry and overseas with the assistance of the State Department, to ensure that the traveling public and the travel industry as a whole are sufficiently informed regarding ESTA.

Comment: Some commenters noted that a significant number of ESTA denials could result in increased visa demand, thereby causing significant delays, and asked that DHS coordinate with the State Department as needed.

Response: Since January 12, 2009, when ESTA became mandatory for all VWP travelers traveling to the United States at air or sea ports of entry, DHS has processed over 50 million VWP traveler applications and denied approximately one-third of one percent (0.23%) of all applications. As such, there have not been a significant number of denials. Moreover, as stated elsewhere in this document, DHS continues to work with the State Department to ensure the efficient administration of ESTA.

Comment: One commenter stated that DHS and the State Department should offer clear direction and access to entry alternatives to those that do not have a travel authorization via ESTA.

Response: ESTA is required for VWP travelers arriving in the United States at air and sea ports of entry. As explained on the ESTA website, persons who do not have an ESTA travel authorization may apply for a visa issued by the State Department. Individuals traveling to the United States with a passport and valid visa are not traveling under the VWP and these individuals would not need to obtain an ESTA travel authorization.

## **10. ESTA Expansion to Land Arrivals**

Comment: One commenter stated that to be effective, ESTA should apply to all modes of transportation and asked how ESTA will function at the land borders.

Response: Currently, ESTA is required only for VWP travelers arriving in the United States by air or sea. VWP travelers who arrive in the United States at a land border port of entry are not required to obtain ESTA authorization. These travelers must submit a completed paper Form I-94W at the land border port of entry. However, DHS is considering expanding ESTA to VWP travelers arriving at a land border by way of a separate rulemaking.

## **11. Impact on Existing Laws and Agreements**

Comment: One commenter stated that the ESTA rule exceeds the statutory authority of Section 217 of the INA by imposing additional requirements beyond what is imposed by the statute. The commenter claims the statute only obliges travelers to “electronically provide information,” whereas the ESTA IFR requires that the traveler providing information also receive a travel authorization.

Response: DHS disagrees. Section 217(a)(11) of the INA (8 U.S.C. § 1187(a)(11)), as amended, specifically requires the Secretary of Homeland Security to determine whether the person submitting the electronic travel authorization is eligible to travel to the United States under the VWP. It provides that each alien traveling under the program shall, before applying for admission to the United States, electronically provide biographical information and such other information as the Secretary of Homeland Security determines necessary to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting, the alien to travel to the United States and that upon review of such information, the Secretary of Homeland Security shall determine whether the alien is eligible to travel to the United States under the program. Moreover, section 217(h)(3)(C)(i) of the INA (8 U.S.C. § 1187 (h)(3)(C)(i)) provides for regulations “that provide for a period, not to exceed three years, during which a determination of eligibility to travel under the program will be valid.” As such, the statutory provisions anticipate a determination of eligibility to travel. Therefore requiring a VWP traveler to receive ESTA travel authorization does not exceed the statutory authority.

Comment: Some commenters claimed that ESTA limits the freedom of movement of individuals and that this violates international agreements, including Article 13 of the Universal

Declaration of Human Rights (UDHR)<sup>5</sup> and Articles 10, 12, and 21 of the International Covenant on Civil and Political Rights (ICCPR).<sup>6</sup>

Response: DHS disagrees that ESTA limits the freedom of movement of individuals and that this violates international agreements. The referenced provisions do not pertain to ESTA and they are outside the scope of the ESTA rulemakings. Article 13 of the UDHR refers to freedom of movement and residence within the borders of each state as well as the right to leave a country or return to one's own country. Article 10 of the ICCPR applies to persons deprived of their liberty in relation to the penitentiary system. Article 12 of the ICCPR concerns the right to liberty of movement when lawfully in the territory of a state, the freedom to leave a country including one's own, and the right to reenter one's own country. Article 21 of the ICCPR concerns the right to peaceful assembly. ESTA does not limit an individual's rights to leave a country, limit an individual's right to reenter one's own country, relate to individuals in the penitentiary system, or have any impact on an individual's right to peaceful assembly.

Comment: Some commenters expressed concerns that the ESTA website may contravene disability laws and raise discrimination issues because it discriminates against those who are unable to access the internet due to a disability.

Response: DHS endeavors to take the necessary steps to ensure that persons with disabilities can comply with the regulatory requirements. Persons that are unable to access the internet due to a disability may apply for an ESTA travel authorization through a third party.

## **12. I-94W Paper Form**

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<sup>5</sup> The UDHR, a United Nations General Assembly declaration, consists of 30 articles relating to the respect for and observance of human rights and fundamental freedoms. For more information, please see <http://www.un.org/en/documents/udhr/index.shtml>.

<sup>6</sup> The ICCPR, a United Nations General Assembly covenant, commits its parties to respect the civil and political rights of individuals. The United States ratified the ICCPR with reservations not applicable to the articles referenced in this comment (Articles 10, 12, and 21). For more information, please see <http://treaties.un.org/doc/db/survey/CovenantCivPo.pdf>.

Comment: One commenter stated that ESTA duplicates the information required by the paper Form I-94W that has to be completed upon arrival in the United States. Some commenters stated that ESTA will have a negative impact on travel to the United States because obtaining an ESTA travel authorization is an additional hurdle for VWP travelers who must also answer the same questions on the paper Form I-94W upon arrival. Other commenters stated that DHS should eliminate the paper Form I-94W to facilitate improved processing of travelers. One commenter said that the elimination of the paper Form I-94W should not be completed until all carriers are capable of validating a traveler's ESTA authorization status. Another commenter said that DHS should eliminate the paper Form I-94W on a carrier-by-carrier basis to provide an early incentive to carriers to comply at an early stage.

Response: ESTA was designed to automate the paper Form I-94W with the ultimate goal of replacing it, not duplicating it. The ESTA IFR stated: "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 application status as part of the traveler's boarding status." See 73 FR 32440 at 32443.

The requirement to complete the paper Form I-94W was eliminated for VWP travelers arriving in the United States at air or sea ports of entry on or after June 29, 2010. Eliminating the paper Form I-94W for these VWP travelers ensured that there was no further duplication.<sup>7</sup> Prior

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<sup>7</sup> The elimination of the paper Form I-94W for VWP travelers arriving at air and sea ports of entry was announced as a goal in the ESTA IFR and communicated with the public and carriers through outreach. Secretary Napolitano also released a statement announcing the elimination as well: [http://www.dhs.gov/ynews/releases/pr\\_1274366942074.shtm](http://www.dhs.gov/ynews/releases/pr_1274366942074.shtm).

to eliminating the paper Form I-94W for air and sea VWP travelers, DHS provided adequate time to allow carriers to make the necessary adjustments in their systems to enable them to verify VWP traveler's ESTA authorization status. As explained more fully in the ESTA Application Status Notifications for Travelers and Carriers section below, DHS worked closely with the affected carriers to ensure that their systems were able to send and receive ESTA application status messages. DHS decided not to eliminate the paper Form I-94W on a carrier-by-carrier basis because this would have created confusion at the ports for carriers, travelers, and DHS personnel and could have increased wait or processing times and resulted in missed connections for travelers.

Comment: One commenter stated that the Form I-94W should be eliminated for non-VWP countries.

Response: The Form I-94W is only required for nationals from VWP countries.

### **13. Preclearance Ports**

Comment: One commenter stated that ESTA should not be required for passengers traveling from preclearance ports in Canada to the United States, given that they have already been vetted.

Response: The 9/11 Act required the Secretary of Homeland Security, in consultation with the Secretary of State, to develop and implement a fully automated electronic travel authorization system to collect certain information in advance of travel to the United States. ESTA fulfills this statutory requirement. Therefore, ESTA is required for all VWP travelers arriving in the United States at air or sea ports of entry, regardless of their last foreign location prior to arriving at the United States. Preclearance locations are locations outside the United States where travelers are inspected and examined by DHS personnel to ensure compliance with

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U.S. customs, immigration, and agriculture laws, as well as other laws enforced at the U.S. border. Such inspections and examinations prior to arrival in the United States generally enable passengers to exit the domestic terminal or connect directly to a U.S. domestic flight without undergoing further processing. However, travelers who are inspected and examined at these preclearance locations are still required to have a visa, or if eligible, to comply with the requirements of the VWP.

#### **14. ESTA Applications at Airports**

Comment: Some commenters stated that DHS should provide internet-accessible kiosks for day of departure applications because some foreign airports lack internet access. One commenter asked DHS to install ESTA kiosks in preclearance locations.

Response: DHS does not have the authority or the resources to establish internet-access kiosks in foreign airports, including preclearance locations. Nonetheless, travelers may be able to apply for an ESTA travel authorization on the day of departure if other internet access is available. In fact, some global airports have kiosks or dedicated links at internet cafes in international terminals available for use by travelers. However, simply having internet access, and thus the ability to apply for an ESTA travel authorization does not guarantee an ESTA travel authorization will be granted or granted in time. ESTA applicants who apply early and are denied a travel authorization may still have time to obtain a visa.

Comment: One commenter disagrees with DHS's estimate (15 minutes) of the time required for a VWP traveler to apply for an ESTA travel authorization. The commenter believes that oftentimes passenger check-in times are longer and access to public internet facilities is either unavailable or limited.

Response: The 15 minute estimate of the time required for the VWP traveler to apply for an ESTA authorization is based on the traveler's interaction with the ESTA website. This time estimate did not consider factors such as a lack of computer or limited or unavailable internet connectivity at passenger check-in. DHS encourages VWP travelers to apply for an ESTA authorization well before arriving at the airport.

### **15. ESTA Validity Period**

Comment: Multiple comments were received regarding ESTA's two year validity period. Some commenters noted that it is unnecessarily restrictive or will result in more travelers applying for a visa. One commenter asked DHS to describe circumstances where the validity period would be extended to three years, which is the upper limit allowed under the 9/11 Act. One commenter stated that the two year validity period and accompanying fee creates a burden for European citizens wishing to travel to the United States because European citizens make up a significant portion of total travelers to the United States.

Response: Section 711 of the 9/11 Act directs the Secretary of Homeland Security, in consultation with the Secretary of State, to prescribe regulations that provide for a period of validity for a travel eligibility determination, not to exceed three years. See 8 U.S.C. § 1187(h)(3)(C)(i); 8 CFR 217.5(d). DHS believes that, generally, a two year validity period provides DHS with a reasonable timeframe to reevaluate a VWP applicant's eligibility to travel without overburdening VWP travelers. After considering the comments and in light of the statutorily authorized maximum validity of three years, DHS believes that it would be beneficial for the Secretary of Homeland Security to retain discretion to adjust validity periods on a per country basis to the three year maximum or to a lesser period of time. Therefore, this final rule now provides that the ESTA validity period is two years unless the Secretary Homeland

Security, in consultation with the Secretary of State, decides to increase or decrease the validity period for a designated VWP country on a case-by-case basis. Under this final rule, notice of any change to ESTA travel authorization periods will be published in the **Federal Register** and updated on the ESTA website. DHS believes that this change enhances the Secretary's flexibility to recognize countries' bilateral information sharing and further promotes compliance standards for member countries' participation in the VWP. To effect this change, the regulations will be amended by adding a new 8 CFR § 217.5(d)(3).

Regarding the claims that the two year validity period and accompanying fee are burdensome and may lead some travelers to decide to obtain a visa, DHS believes that obtaining an ESTA travel authorization is less burdensome than obtaining a visa. In fact, DHS believes that the ease with which an ESTA travel authorization can be obtained leads most VWP-eligible travelers to obtain an ESTA travel authorization rather than a visa before traveling to the United States. VWP travelers who obtain an ESTA travel authorization do not have to apply for a visa nor do they have to pay the costs associated with obtaining a visa to travel to the United States.

## **16. Passport Issues**

Comment: One commenter stated that the passport expiration date's impact on the ESTA validity period is complicated.

Response: Generally, an ESTA travel authorization is valid for a period of either two years from the date of authorization or the date the traveler's passport expires – whichever is sooner. See 8 CFR 217.5(d)(1). However, there is an exception at 8 CFR 217.5(d)(2) for travelers from certain countries who have not entered into agreements with the United States regarding the expiration date of passports; specifically, agreements providing that 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. For travelers from these countries, an ESTA travel authorization is not valid beyond six months prior to the expiration date of the passport. In addition, travelers from these countries whose passports will expire in six months or less will not receive ESTA travel authorization. Moreover, as specified elsewhere in this document and on the ESTA website, a traveler must obtain a new travel authorization under any of the following circumstances:

1. The individual is issued a new passport;
2. The individual's name changes;
3. The individual changes gender;
4. The individual changes their country of citizenship; or
5. The circumstances underlying the traveler's previous responses to any of the ESTA application questions requiring a "yes" or "no" response have changed.

In order to make things clear, DHS provides the exact ESTA expiration date on the ESTA website screen granting approval for travel authorization. In addition, as explained more fully in the ESTA Application Status Notification for Travelers and Carriers section, DHS has updated the ESTA system to provide email notification to individuals approximately 30 days before the expiration of their ESTA travel authorization, informing them that their ESTA travel authorization will expire in approximately 30 days. However, this feature is only available if the VWP traveler provided an email address through the ESTA website.

Comment: One commenter stated that passport validity should have no bearing on the validity of a travel authorization via ESTA.

Response: A valid passport is essential for travel to the United States. Under the INA, any immigrant or nonimmigrant alien seeking admission to the United States must have proper

documentation, including a valid and unexpired passport. See 8 U.S.C. § 1182(a)(7). An ESTA travel authorization is not valid unless the traveler has a valid and unexpired passport. For those wishing to travel to the United States under the VWP, an expired passport necessitates obtaining both a new passport and applying for a new ESTA travel authorization.

Comment: Some commenters highlighted system limitations related to the passport section of the ESTA website. For example, United Kingdom passports are valid for more than the maximum 10-year period allowed by ESTA and the German passport contains 10 characters and ESTA only accepts 9 characters.

Response: Based on commenter input, DHS has made the necessary modifications to the ESTA website to ensure that passport information can be properly entered in the ESTA application. With regard to the examples provided, DHS has modified the ESTA website to allow passports that are valid for more than 10 years to be entered and to allow more than 9 characters for passport identification numbers.

### **17. Denied Travel Authorization**

Comment: One commenter stated that approximately 85,000 travelers a year could be denied travel authorizations based on errors when submitting information and that reapplying would be costly and time consuming.

Response: As stated above, on average, a total of 0.23% of ESTA travel authorization applications are denied each year. This amounts to an average of 52,000 denials per year. While it is unknown what percentage of these denials are based on user error when submitting information, DHS has taken steps to minimize the number of applications denied based on keystroke errors. For example, the ESTA website prompts each applicant to review the data submitted for the overall application prior to submission. If the applicant finds an error, a

correction may be made. In addition, the ESTA website requires the applicant to reaffirm the passport number and family name prior to submission of the application. DHS believes that the opportunity to review data prior to submission should minimize the incidences of keystroke errors. If an applicant makes a mistake when filling out the passport information, identifying biographic information, or eligibility questions, and he or she realizes the mistake after the applicant submits the ESTA application and the application for travel authorization is denied, he or she will need to submit a new ESTA application and pay the applicable fee. However, there is no guarantee that the subsequent application will result in travel authorization. Any other mistakes, including email address, telephone number, carrier name, flight number, city where the applicant is boarding, and address while in the United States, may be corrected or updated by using the ESTA update function, which can be done free of charge.

Comment: One commenter stated that the costs to the air carrier industry and travelers are high when compared to the small percentage of VWP travelers who are denied travel authorization. Another commenter stated that the cost to airlines of returning passengers found inadmissible is significant. According to the commenter, that cost is over \$10 million per year (7,200 passengers at a cost of \$1,500 each in fines).

Response: The 9/11 Act directed DHS to create an electronic system to collect certain biographical and other information to evaluate, in advance of travel, the eligibility of the applicant to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk. The security benefits of ESTA cannot only be quantified based solely on the number of ESTA applicants refused travel authorization. The VWP was created in recognition of the high percentage of travelers from the specified countries that will be deemed eligible to travel to the United States without a visa. ESTA also provides other benefits to

travelers and carriers. It saves VWP-eligible travelers time and effort upon arrival in the United States and informs those who are not eligible before they board the carrier to the United States.

Though the commenter's calculations of the cost incurred by airlines to return inadmissible travelers is correct based on the commenter's assumptions, DHS believes that ESTA presents additional cost saving opportunities to the carriers that are responsible for returning inadmissible travelers to their points of origin. Carriers transporting VWP travelers always have been required to transport inadmissible travelers who arrive in the United States back to their point of origin. Therefore, ESTA does not impose additional costs in this regard. Moreover, because ESTA is designed to prevent inadmissible travelers from arriving at U.S. ports of entry, carriers will have fewer inadmissible travelers to transport from the United States, which should decrease their transportation costs. As stated in the Executive Order 12866 section below, no longer needing to transport and inspect inadmissible travelers will save carriers and DHS between \$78 and \$84 million annually.

Comment: Some commenters would like DHS to advise applicants why travel authorization was denied so that the issue could be addressed to enable travel under the VWP.

Response: DHS does not share information related to the denial of an ESTA travel authorization due to the complexities of the travel eligibility decision-making process, which is based on a combination of factors, including those related to security. However, an applicant who feels that the denial was improper may contact the ESTA Help Desk at 202-344-3710 or file a redress request through the DHS Travel Redress Inquiry Program (TRIP) website, <http://www.dhs.gov/dhs-trip>. If the denial was based on a genuine misunderstanding, for instance, where the applicant misunderstood a question and provided an answer resulting in the denial, then the application may be approved. However, DHS cannot guarantee that contacting

the ESTA Help Desk or using the DHS TRIP website will result in an application being approved. As always, a traveler may apply for a nonimmigrant visa at a U.S. embassy or consulate.

### **18. Expedited Review**

Comment: Some commenters would like to be able to request an expedited review through ESTA.

Response: As stated above, most applications receive an immediate response. However, if necessary, an individual may request an expedited review by calling the ESTA Help Desk at 202-344-3710.

### **19. ESTA Application Status Notifications for Travelers and Carriers**

Comment: Some commenters asked how travelers will be notified of their approval for travel.

Response: ESTA applicants are notified of their travel eligibility on the screen at the ESTA website. In most cases, ESTA applicants are notified of their status within seconds of submitting their application, with travel authorization either being granted or denied. In other cases, the ESTA applicant may be in a “pending” status, where a final determination of travel eligibility has not been reached. For an applicant who provides an email address during the application process, DHS sends an email indicating that there has been an update to the travel authorization status and that the decision can be viewed at the ESTA website. Applicants who did not provide an email address will need to refer back to the ESTA website at a later time to check for changes in status. As of November 3, 2014, email addresses are a mandatory data element.

Comment: Some commenters would like DHS to send a notification about when an ESTA authorization will expire.

Response: Based on feedback, DHS updated the system to provide email notification to individuals approximately 30 days before the expiration of their ESTA travel authorization, informing them that their ESTA travel authorization will expire in approximately 30 days. The email notification advises recipients to go to the official ESTA website to reapply as follows:

ESTA Expiration Warning: ATTENTION! Your travel authorization submitted on (date of application) (application number) via ESTA will expire within the next 30 days. It is not possible to extend or renew a current ESTA travel authorization. You will need to reapply at <https://esta.cbp.dhs.gov> if travel to the United States is intended in the near future.

Comment: A few commenters stated that applicants receiving a pending message, rather than an authorized or denied message, should be authorized to travel to the United States because the traveler would still submit their information on the Form I-94W and will be inspected upon arrival.

Response: Generally, a decision on an individual's ESTA application is issued within seconds of submission. However, travelers with a "pending" status will have to wait until the pending status is resolved to "Authorization Approved" prior to a carrier allowing a VWP traveler to board an aircraft or vessel destined for the United States. DHS cannot allow ESTA applicants without an approved authorization to travel to the United States, as to do so would prevent DHS from being able to fully screen the applicant, and thus contradict the Congressional mandates under the 9/11 Act. Because an exact timeline for travel authorization decisions

cannot be provided in all cases, DHS encourages travelers to apply early for an ESTA travel authorization, such as before they purchase their tickets to the United States.

Comment: One commenter stated that the “travel not authorized” message is vague and should be changed to inform applicants that they were unsuccessful and to inform them that they may still apply for a visa.

Response: DHS has amended the “travel not authorized” message to inform the applicant about the next steps in the process of seeking travel to the United States. The response now reads as follows:

“You are not authorized to travel to the United States under the Visa Waiver Program. You may be able to obtain a visa from the Department of State for your travel. Please visit the Department of State website at [www.travel.state.gov](http://www.travel.state.gov) for additional information about applying for a visa.”

Comment: One commenter stated that instead of using the system-generated 16-digit reference number, passengers should be able to use a passport or other travel document number to access their ESTA application.

Response: The 16-digit reference number is a unique number generated by ESTA that may be used to check the status of an applicant’s status and to update optional information, such as flight itinerary and address in the United States. This number is linked to each ESTA application and approval. A travel document number cannot be used as a reference number for several reasons. First, it may lack sufficient security to uniquely identify a person. Second, since passports are generally issued for 10 years and an ESTA travel authorization is generally valid for two years, DHS would be unable to distinguish between applications from the same

individual. Also, it would be confusing where a person possesses more than one passport, such as those who have dual citizenship.

Comment: Some commenters wanted to know the specific content of the ESTA application status messages carriers will be shown on pre-departure and if there will be a distinction between flights departing the United States and arriving flights.

Response: DHS sends a clear message to carriers to inform them whether the VWP traveler has the required travel authorization prior to boarding. Carriers will receive one of the following messages for travelers: A – ESTA on file OK to board; B – No ESTA on file; C – ESTA denied; Z – ESTA not applicable OK to board. Carriers may board travelers associated with messages A and Z. Carriers may not board travelers associated with messages B and C. ESTA authorization is not required for flights departing the United States so there is no need for ESTA messaging for departing flights.

## **20. Proof of Travel Authorization**

Comment: Some commenters asked DHS to provide a receipt to serve as proof of ESTA travel authorization and asked what to do in airports that lack printers. Other commenters described situations where travelers were not allowed to board despite having ESTA travel authorization and were asked to present a paper printout of their travel authorization.

Response: ESTA travel authorization only may be validated electronically. The air or sea carrier must receive an electronic message directly from DHS stating that the traveler has a valid ESTA travel authorization prior to allowing the individual to board the conveyance destined for the United States. A printout showing that ESTA travel authorization was granted is not proper proof and DHS does not require VWP travelers to present a paper printout as evidence of having obtained ESTA travel authorization. If travelers are interested in having something

tangible for their own records, such as a receipt, they may print the screen on the ESTA website showing that travel authorization has been granted, but this will not serve as proof for travel purposes.

Comment: Some commenters had concerns about the possibility of a forged ESTA approval.

Response: As explained in the previous response, ESTA travel authorization can only be verified electronically with an electronic status message from DHS and as such, cannot be forged.

## **21. Mandatory and Optional Data Elements**

Comment: Many comments were received requesting clarification about which data elements are mandatory and which are optional.

Response: On December 9, 2014, DHS published a notice regarding changes to the ESTA application and paper Form I-94W in the Federal Register (79 FR 73096). These changes collect more detailed information about a traveler by making previously optional data elements mandatory and by adding additional data elements concerning other names or aliases, current or previous employment, and emergency contact information among other questions.

The mandatory data elements are clearly indicated by a red asterisk on the ESTA website. They are: Applicant's Name (Family Name and First (Given) Name); Known other names or aliases (Yes or No); Birth Date (Day, Month, and Year); City of Birth; Country of Birth; Gender (Male or Female); Parents' Names (Family Name, First (Given) Name); Passport Number; Passport Issuing Country (Country of Citizenship); Passport Issuance Date (Day, Month, and Year); Passport Expiration Date (Day, Month, and Year); Country of Citizenship; Citizen of any other country (Yes or No); Contact E-mail Address; Contact Telephone Number (Type, Country

Code, and Number); Contact Home Address (Address Line 1, Apartment Number, Address Line 2, City, State/Province/Region, and Country); Emergency Contact (Family Name and First (Given) Name); Emergency Contact Telephone Number (Type, Country Code, and Number); Emergency Contact E-mail Address; Travel to U.S. occurring in transit to another country (Yes or No); and Current or previous employer (Yes or No). Applicants must also answer eight eligibility questions regarding, for example: questions about physical and mental disorders, drug abuse and addiction, and communicable diseases, arrests and convictions for certain crimes, and past history of visa revocation or deportation, and they must complete the Certification field (or third-parties field, if applicable). The above mandatory information is the information the Secretary deems necessary to evaluate whether an alien is admissible to the United States under VWP and whether such travel poses a law enforcement or security risk. Optional data elements, which should be provided if known, are as follows: address while in the United States (Address Lines 1 and 2, City, and State); employer's telephone number (country code and number); and job title. Upon submission, ESTA will automatically collect the Internet Protocol address (IP address) associated with the application for vetting purposes, as explained in the Privacy Impact Assessment Update for the Electronic System for Travel Authorization – Internet Protocol Address and System of Records Notice Update, dated July 18, 2012, available at <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

## **22. ESTA Interaction with Other Systems**

Comment: Some commenters asked DHS to link ESTA with other government systems or programs, such as the State Department's visa issuance system or the Global Entry trusted traveler program.

Response: DHS is committed to achieving high levels of efficiency through the integration of its programs and policies. To this end, DHS coordinated ESTA with other government systems and programs to the extent possible. However, some systems or programs, are not suitable for linking with ESTA. For example, ESTA should not be linked with the State Department's visa issuance system because an ESTA travel authorization enables VWP travelers to travel to the United States without a visa. Further, ESTA should not be linked with Global Entry because the two programs have different purposes. ESTA travel authorization is a determination of suitability to travel to the United States, whereas Global Entry is intended to expedite low risk travelers upon arrival in the United States.

Comment: One commenter believes that ESTA is unnecessary because it duplicates APIS/AQQ and is costly to the airline industry.

Response: ESTA does not duplicate APIS/AQQ. While both programs promote the security of the United States and some data elements may overlap, the programs are distinct. Advance Passenger Information System (APIS) data consists of certain biographical information and conveyance details collected via the passenger reservation and check-in processes. This information is transmitted to DHS in advance of arrival through the Quick Query system. This is known to carriers as APIS/AQQ. APIS/AQQ does not include an eligibility screening process and applies to all flights beginning or ending in the United States. In contrast, ESTA is specific to the VWP and includes basic biographical questions as well as questions to determine a person's eligibility to travel under the VWP. Although DHS is mindful of the costs to the travel industry to implement ESTA, DHS has tried to implement ESTA in a way that minimizes costs while at the same time adhering to the Congressional mandate to develop ESTA within certain timeframes.

Comment: Some commenters stated that ESTA complicates carriers' efforts to meet the pre-departure APIS requirements as they adapt their systems. Other commenters asked whether a carrier that has received APIS/AQQ accreditation is required to go through a future accreditation process once ESTA messages have been incorporated. Some commenters noted that the Consolidated User Guide, UN/EDIFACT, arrived in late July 2008 and that this provided insufficient time for carriers to be compliant with the initial January 2009 deadline for ESTA.

Response: This comment was submitted in response to the ESTA IFR. At the time, DHS recognized the challenges facing the carriers to ensure that their systems were compatible with ESTA and APIS in order to receive and validate ESTA messages. To this end, DHS established an ESTA testing process for all VWP signatory carriers to demonstrate the carrier's ability to successfully transmit and receive ESTA messages through APIS/AQQ. All VWP signatory carriers successfully completed the testing process. DHS worked closely with each carrier to enable them to make modifications to attain compliance with ESTA requirements in a timely manner. DHS made a concerted effort to accommodate carriers as time became an issue and allowed carriers to demonstrate a plan and schedule to achieve compliance if they were not on schedule to be compliant by the stated date. As the results showed, the joint effort between DHS and the carriers was highly successful despite concerns at the time that the necessary user guide information was late when provided in July 2008.

Comment: One commenter stated that there may be passenger processing delays caused by travelers who confuse APIS data requirements with ESTA requirements. They may believe that the submission of the APIS data elements to the travel agent or carrier in advance of travel fulfills the ESTA requirement or vice versa and thus arrive at the airport on the day of departure without an ESTA travel authorization. Additionally, the commenter stated that DHS should

make it clear in public outreach that ESTA's requirements are distinct from the APIS requirements, and that providing information for one program does not cover the other.

Response: VWP travelers are not responsible for providing DHS with APIS data. The carriers provide this information to DHS. It is the responsibility of the VWP traveler to apply for and obtain ESTA travel authorization prior to boarding an air or sea carrier destined for the United States. DHS has conducted outreach to ensure VWP travelers are aware of their responsibilities regarding the need to have a valid ESTA travel authorization prior to boarding a conveyance destined for the United States and is confident that there will be no passenger processing delays arising due to confusion regarding APIS requirements and ESTA requirements.

Comment: One commenter asked if APIS data would suffice as an alternative to having a valid ESTA travel authorization and another asked if APIS submissions would suffice for updates to information on the ESTA website.

Response: There is no alternative to having ESTA travel authorization for VWP travel. Each VWP traveler must receive travel authorization through the ESTA website prior to boarding a conveyance destined for an air or sea port of entry in the United States. Additionally, APIS data is not an acceptable means for updating changes to any of the mandatory data elements. As noted above in the Mandatory and Optional Data Elements section, changes to any of the mandatory data elements require a new travel authorization.

Comment: One commenter stated that the address and passport information collected through ESTA should be defaulted to read, "Refer to APIS Entry" to avoid the need for the carrier to adapt their APIS system to accommodate ESTA. Several commenters stated that ESTA should be harmonized with APIS/AQQ.

Response: Though the two systems are distinct, ESTA does work in conjunction with APIS/AQQ. For carriers that transport VWP travelers, the APIS/AQQ system was configured to selectively activate inclusion of ESTA application status in the message response to the carrier, thereby allowing carriers to know if the traveler has ESTA travel authorization and is eligible to board without a visa. As such, a “Refer to APIS Entry” message is unnecessary.

Comment: Some commenters had concerns regarding travel eligibility or carrier penalties if a VWP traveler failed to update his or her information, such as flight itinerary, or if this information differed from the APIS transmission made by carriers.

Response: As communicated through public outreach, carriers will not be penalized in situations where an ESTA application does not reflect the current address or flight details for the traveler’s trip to the United States. Should the travelers wish to update their address and flight itinerary details, they are able to do so by accessing their application on the ESTA website and updating the information, free of charge.

### **23. Method of Payment**

Comment: One commenter stated that DHS should permit different forms of payment in addition to credit cards for paying the ESTA fees. Some commenters pointed out that credit card use is not as widespread in the European Union as it is in the United States and that some prospective travelers may not have credit cards.

Response: DHS currently uses the system Pay.gov to process payment information. This system collects and processes payments from credit cards and credit/debit cards from the following institutions: MasterCard, VISA, American Express, Discover, Japan Credit Bureau, and Diners Club. However, based on the feedback received, DHS is currently investigating the option of allowing payments to be made from additional sources. If DHS decides to expand the

allowable methods of payment, DHS will announce this to the public through outreach programs, travel websites, and postings on the ESTA website. An applicant who does not have a credit card may arrange for a third party, such as a relative or travel agent, to submit the payment.

Additionally, DHS has made changes to the payment functionality on the ESTA website to allow for groups of up to 50 applications to be paid with a single transaction. This functionality was added to accommodate those applications filed in group situations, such as a travel agent working on behalf of a group of travelers or a family applying together. A group is formed when a user adds an application to an existing application at which time a group of two applications is formed. At that time, the system will request information on the Group Point of Contact (POC) who will be paying for the applications. The Group POC can add to that initial group of two by creating new applications or retrieving existing ones. The system will monitor the number of applications in a group and will not allow the group to exceed 50 applications. After the creation of the group is complete, the system will ask the Group POC to submit payment. The ESTA fee will be charged for each application submitted and the TPA fee will be charged for each travel authorization granted.

#### **24. ESTA Fee and the TPA Fee**

Comment: A few commenters oppose the ESTA fee stating that there are too many fees already. One commenter acknowledged the need to offset the cost of maintaining a program such as ESTA with a fee, but thought that the \$4 charge would more than be made up by what these travelers spend in the United States.

Response: The TPA directed DHS to establish a fee for ESTA that consists of the sum of \$10 per travel authorization (TPA fee) and an amount that will at least ensure recovery of the full costs of providing and administering the System, as determined by the Secretary (ESTA fee).

DHS has determined that the \$4 ESTA fee is necessary to ensure the full costs of providing and administering the System. The statute does not permit DHS to consider benefits to the travel industry that result from VWP travelers coming to the United States in determining the ESTA fee.

Comment: One commenter stated that a \$.050 administrative fee would be more appropriate than a \$4 administrative charge for collecting the \$10 TPA fee.

Response: The \$4 ESTA fee is unrelated to the \$10 TPA fee. The \$4 ESTA fee goes to DHS to pay the costs associated with operating ESTA. The \$10 TPA fee goes to a fund in the Department of the Treasury established by the Travel Promotion Act of 2009 to fund the activities of the Corporation for Travel Promotion.

Comment: One commenter supports the \$10 TPA fee in order to provide a well-funded mechanism to reach out to actual and prospective travelers to explain the rationale and details of ESTA.

Response: The TPA established the Corporation for Travel Promotion as a nonprofit corporation for the purpose of promoting foreign leisure, business, and scholarly travel to the U.S. and maximizing the economic and social benefits of that travel for communities across the country. The purpose of the \$10 TPA fee is to provide funds for the Corporation for Travel Promotion to attract visitors to the United States. The \$10 TPA Fee does not fund any outreach regarding ESTA.

Comment: Some commenters oppose the \$10 TPA fee because they believe that VWP travelers would receive no benefit from such fee. They indicate that the \$10 TPA fee should not be paid by visitors already coming to the United States. Some commenters believe that the \$10

TPA fee is a hidden subsidy for the commercial tourism sector and that the travel industry should advertise on its own to entice potential visitors.

Response: Eligible travelers from VWP countries who receive an ESTA travel authorization may benefit from the \$10 TPA fee, as these fees fund the Corporation for Travel Promotion that is mandated to help communicate travel requirements to travelers to the United States. In addition, they do not have to pay to obtain a visa and do not need to report for an interview at a U.S. embassy or consulate. In addition, the \$10 TPA fee is only required with the initial application or renewal of the ESTA, and will cover as many trips as the traveler takes to the United States during the ESTA travel authorization's validity period.

The \$10 TPA fee amount was set by the TPA to fund the Corporation for Travel Promotion, which was established by the TPA as a partnership between the travel industry and the federal government to create a marketing and promotion program to compete for international visitors and to create jobs and economic growth.

Comment: Some commenters were concerned that other countries could reciprocate with a travel promotion fee of their own which would harm U.S. travelers.

Response: DHS has no control over foreign governments charging travel promotion fees of their own. Some countries, including Visa Waiver Program countries, have established their own version of a travel promotion fee.

Comment: A few commenters asked whether the \$4 ESTA fee and the \$10 TPA fee would be charged for updating information.

Response: The \$4 ESTA fee is charged each time a new ESTA application is submitted. The \$10 TPA fee will be charged whenever a new ESTA travel authorization is granted. For example, if an applicant applies for an ESTA travel authorization but the ESTA application is

denied, the applicant will be charged the \$4 ESTA fee but not the \$10 TPA fee. Updates to non-mandatory fields of information, such as flight number or address in the United States, will not require a new travel authorization and as such, will not require a new ESTA application.

However, changes to one of the required data fields will necessitate a new ESTA application. In order to obtain travel authorization, the applicant will have to pay the \$4 ESTA fee and the \$10 TPA fee if travel authorization is granted.

Comment: Some commenters stated that they understand the need to charge the \$4 ESTA fee for a new ESTA travel authorization due to changes such as name, gender, or country of citizenship within the two year validity period, but feel that charging the additional \$10 TPA fee is not consistent with the issuance of an ESTA travel authorization that is valid for two years.

Response: The Travel Promotion Act of 2009 explicitly stated that the fee would be “\$10 per travel authorization.” Therefore, until September 30, 2020 when the TPA fee provision expires, the \$10 TPA fee must be collected whenever a new travel authorization is granted.

## **25. APA Procedures**

Comment: A few commenters state that DHS should have implemented ESTA through prior notice and comment procedures instead of as an interim final rule.

Response: DHS is committed to ensuring that the public has an opportunity to comment on rulemakings and publishes proposed rules for public notice and comment whenever possible. In order to mitigate the security vulnerabilities of the VWP and fulfill the mandates of the 9/11 Act, consistent with the Administrative Procedure Act, DHS implemented ESTA as an interim final rule under the “procedural,” “good cause,” and “foreign affairs” exceptions to the APA’s rulemaking requirements. See 5 U.S.C. 553. Discussion by DHS on how the ESTA IFR met these exceptions is set forth at 73 FR 32440 at 32444. In addition, DHS sought feedback from

interested persons and provided 60 days for the public to submit comments on both the ESTA IFR and the ESTA Fee IFR. DHS has reviewed these comments thoroughly and as discussed in this document, has implemented many of the commenters' suggestions.

Comment: One commenter stated that the ESTA IFR's good cause exception does not apply because the national security justification is not fully explained and that the ESTA IFR's Regulatory Analysis found no new security benefits.

Response: The ESTA IFR was properly implemented under the APA's good cause exception as provided in 5 U.S.C. 553(b)(B). DHS determined that prior notice and comment rulemaking was impracticable and contrary to the public interest because it would hinder DHS's ability to address security vulnerabilities of the VWP that Congress asked DHS to address in the 9/11 Act. As stated in the ESTA IFR, implementation of this rule prior to notice and comment was necessary to protect the national security of the United States and to prevent potential terrorists from exploiting VWP. See 73 FR 32440 at 32444.

Comment: One commenter stated that the economic analysis in the Executive Order 12866 section of the ESTA IFR contradicted DHS's national security justification because an effective date was established six months after publication of the ESTA IFR.

Response: The ESTA IFR became effective on August 8, 2008, 30 days after the date of publication. See 73 FR 32440. However, in the ESTA IFR, DHS stated that it would provide a 60 day prior notice to the public via publication in the **Federal Register** before mandatory implementation. Consistent with this, DHS published a notice in the **Federal Register** on November 13, 2008, and announced that mandatory compliance would be required for VWP travelers on January 12, 2009. See 73 FR 67354. The time period between the ESTA IFR's effective date and the date it became mandatory allowed DHS to address the numerous

operational issues inherent in designing and building an electronic system. It also enabled DHS to request and receive public comments. Even though ESTA did not become mandatory right away, the system was established at the time of implementation and could be used by VWP travelers to submit advance information. Therefore, it did provide some immediate security benefits.

Comment: Some commenters stated that DHS's use of the APA's procedural exception in the ESTA IFR was improper because the procedures established by the ESTA IFR are substantively different from what they were previously and because it imposes expensive burdens on carriers and travelers.

Response: DHS believes the procedural exception in 5 U.S.C. 553(b)(A) was appropriately used in the ESTA IFR. As explained in the ESTA IFR, ESTA merely automated an existing reporting requirement for nonimmigrant aliens, as captured in the Nonimmigrant Alien Arrival/Departure (I-94W) paper form. See 73 FR 32440 at 32444. Although ESTA altered the method and time for VWP travelers to provide DHS with required information, it did not substantively affect nonimmigrant aliens' rights to apply for admission under the VWP; nor did it alter the criteria aliens must meet to be admitted to the United States under the VWP.

Additionally, there were no substantive changes affecting carriers. The INA already required carriers to ensure that passengers have appropriate documentation to travel to the United States. In addition, carriers were already required to electronically verify and transmit passenger information to DHS through APIS/AQQ.

DHS is mindful of the fact that ESTA imposed some external costs on the travel industry and some inconveniences to the traveler. However, as described elsewhere in this document, ESTA also facilitates travel and provides cost savings. In any case, the fact that an agency's rule

imposes a burden, even a substantial burden, does not automatically mean that prior notice and comment rulemaking is required.

Comment: One commenter stated that the foreign affairs exception to the APA requirements was not justified because the IFR failed to cite to undesirable international consequences.

Response: DHS believes the foreign affairs exception in 5 U.S.C. 553(a)(1) was justified. The foreign affairs function applies because ESTA “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.” See 73 FR 32440 at 32444.

## **26. Effective Date**

Comment: Several commenters had questions regarding the six month implementation requirement of the TPA and asked DHS to explain how the September 8, 2010 effective date for the ESTA Fee IFR was reached.

Response: The TPA was signed March 4, 2010. The ESTA Fee IFR published in the **Federal Register** on August 9, 2010. DHS decided to provide a full 30 days of notice post-publication in order to give the public sufficient time to adjust to the changes. This resulted in the September 8, 2010 effective date.

## **27. Privacy**

Comment: Some commenters claimed that requiring carriers to submit ESTA applications on behalf of travelers would violate European Union data privacy regulations or lead to other difficult situations, such as applications submitted on the day of departure in crowded airports.

Response: DHS does not require carriers or any other third party to submit ESTA applications on behalf of travelers. ESTA allows VWP travelers the option of seeking assistance from a third party in submitting an ESTA application. Travelers who do not wish to use ESTA may apply to the U.S. State Department for a visa.

DHS addresses privacy concerns associated with ESTA in the ESTA Privacy Impact Assessment (PIA) and subsequent ESTA PIA updates which may be found at: <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

Comment: Some commenters were concerned that the credit card information submitted by the ESTA applicant could be used improperly. They would like DHS to clarify which credit card details, if any, are retained or used for purposes other than those for which they were collected and to provide information about how DHS safeguards this information.

Response: The ESTA website is operated by the United States Government and employs technology to prevent unauthorized access to information. Personal information submitted through the ESTA website is protected in accordance with U.S. law and DHS Privacy Policy. The ESTA website employs software programs to identify unauthorized attempts to upload or change information, or otherwise cause damage.

The credit card information that is entered in the ESTA website is not retained in the ESTA database. Currently, the data entered on the ESTA website is forwarded to Pay.gov for payment processing and Pay.gov forwards the traveler's name and an ESTA tracking number to DHS's Credit/Debit Card Data System (CDCDS) for payment reconciliation. Pay.gov sends a nightly activity file, including the last four digits of the credit card, authorization number, billing name, address, ESTA tracking number, and Pay.gov tracking numbers, to CDCDS. Pay.gov also sends a daily batch file with the necessary payment information to a commercial bank for

settlement processing. After processing, the commercial bank sends a settlement file, including the full credit card number, authorization number, card type, transaction date, amount, and ESTA tracking number to CDCDS. CDCDS retains the data from these transactions on different tables.

CDCDS matches the data transmitted from ESTA, Pay.gov, and the commercial bank by the ESTA tracking number and posts payments to DHS's account. DHS uses the data in CDCDS to manually research and reconcile unmatched transactions to the proper account, and to research and respond to charge-backs by the applicant, if necessary.

ESTA fee procedures, including collection, use, and retention of credit card information, are detailed in the PIA Update for the ESTA Fee, which can be found at <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

Comment: One commenter asked DHS to clarify data retention periods that were referenced in the ESTA IFR.

Response: ESTA data retention periods are detailed in the ESTA PIA and subsequent updates found at <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>. ESTA application data remains active for the period of time that the ESTA travel authorization is valid, which, as explained above, is generally two years or until the traveler's passport expires, unless one of the situations listed at 8 CFR 217.5(e) occurs requiring a new travel authorization. DHS will then maintain this information for an additional year, after which it will be archived for twelve years to allow retrieval of the information for law enforcement, national security, or investigatory purposes. Once the information is archived, the number of officials with access to it will be further limited. These retention periods are consistent both with border search authority and with the border security mission mandated by Congress. Data linked to active law enforcement lookout records, enforcement activities, and/or investigations or cases, including

ESTA applications that are denied, will remain accessible for the life of the law enforcement activities to which they are related.

In those instances when a VWP traveler's ESTA application data is used for purposes of processing their application for admission to the United States, the ESTA application data will be used to create a corresponding admission record in DHS's Non-Immigrant Information System (NIIS). This corresponding admission record will be retained in accordance with the NIIS retention schedule, which is 75 years.

Payment information is not stored in ESTA, but is forwarded to Pay.gov and stored in DHS's financial processing system, CDCDS. Records are retained there for nine months in an active state to reconcile accounts and six years and three months in an archived state in conformance with National Archives and Records Administration (NARA) General Schedule 6 Item 1 Financial Records management requirements, which may be found online at: <http://www.archives.gov/records-mgmt/grs/grs06.html>. The nine month active status is necessary to handle reconciliation issues (including chargeback requests and retrievals).

Comment: One commenter stated that the agreement between the United States and the European Union on Passenger Name Records (PNR) data does not adequately cover the security questions posed in ESTA.

Response: This comment was received in response to the ESTA IFR and as such, is likely referring to the 2007 agreement between the United States of America and the European Union on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security" (PNR Agreement). An updated version of this agreement was signed on December 14, 2011, and went into effect on July 1, 2012.<sup>8</sup> Although there are no material

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<sup>8</sup> For more information on the 2011 PNR agreement, please see

differences between the 2007 version and the updated PNR Agreement, this response applies to the version that went into effect on July 1, 2012.

PNR data is submitted by airlines to DHS and contains a variety of traveler information including the passenger's name, contact details, travel itinerary, and other reservation details, as described in the DHS Automated Targeting System (ATS) Privacy Impact Assessment. The PNR Agreement addresses the privacy and security of PNR data transferred from the EU and does not pertain to ESTA. A Privacy Impact Assessment of ESTA, which includes a discussion of related security issues, can be found at <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

## **28. Economic analysis; Regulatory Flexibility Act; Paperwork Reduction Act**

Comment: One commenter stated that a Regulatory Flexibility Act analysis was required for the ESTA IFR.

Response: The commenter is incorrect. 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 was issued as an interim final rule under the procedural, good cause, and foreign affairs function exceptions of the Administrative Procedure Act, a regulatory flexibility analysis was not required. See 5 U.S.C. 553; 73 FR 32440 at 32444.

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[http://www.dhs.gov/sites/default/files/publications/privacy/Reports/dhsprivacy\\_PNR%20Agreement\\_12\\_14\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/privacy/Reports/dhsprivacy_PNR%20Agreement_12_14_2011.pdf).

Comment: One commenter stated that a review under the Paperwork Reduction Act (PRA) is warranted because there was no OMB Information Collection Request review and chance for public comment.

Response: This data collection was reviewed by OMB under Control Number 1651-0111, in accordance with the Paperwork Reduction Act of 1995 (PRA), Public Law 104-113. See 73 FR 32440 at 32452. Additionally, the public had multiple opportunities to comment on the information collection requirements concerning ESTA. The ESTA IFR requested comments on all aspects of this rule, including PRA-related comments. See 72 FR 32440. Additionally, DHS published a 60-Day Notice and request for comments; Extension of an existing information collection: 1651–0111 in the **Federal Register** on December 12, 2008, specifically requesting comments on the information collection requirement concerning ESTA. See 73 FR 75730. DHS published a subsequent 30-Day notice requesting comments concerning the information collection requirements of ESTA on February 13, 2009. See 74 FR 7243. On July 25, 2011, DHS published a 30-Day notice and request for comments regarding the addition of “Country of Birth” as a required data element. See 76 FR 44349. Also, on November 26, 2013, DHS published a 60-day notice and request for comments concerning changes to the ESTA application and paper Form I-94W in the **Federal Register**. See 78 FR 70570. On February 14, 2014, DHS published a 30-day notice and request for comments concerning changes to the ESTA application and paper Form I-94W in the **Federal Register**. See 79 FR 8984. These notices concerned revised questions to make the ESTA application more easily understandable to the traveling public. DHS continues to provide the public with the opportunity to comment on information collections concerning ESTA and has done so as recently as December 9, 2014,

when DHS published a 60-day notice regarding additional changes to the ESTA application and paper Form I-94W in the Federal Register. See 79 FR 73096.

Comment: A few comments were received regarding the information contained in the economic analysis. Some commenters stated that the economic analysis did not consider things such as the economic impact of missed flights, lost tourism, lost commercial opportunities, and the impact of foreign governments imposing ESTA-like requirements on U.S. citizens traveling to VWP countries.

Response: The commenters are correct that the economic analysis did not quantify the impacts of missed flights and lost tourism as a result of ESTA implementation; however, DHS discussed this potential qualitatively in the chapter of the analysis devoted to the cost impacts of ESTA. As stated in the economic analysis, some travelers may not be able to travel to the United States even when they apply for a visa at a U.S. embassy or consulate. DHS does not know how many travelers this represents, but the percentage is likely very small. The State Department may make accommodations for certain last-minute travelers who are scheduled to travel in the next 72 hours, have applied for an authorization, and have been denied. Nevertheless, some travelers may not receive their travel authorization or visa in time to make their scheduled trip. Through the end of 2012, over 99% of ESTA applicants have been approved; therefore, the impact of potential denied travel authorizations is limited.

Additionally, the economic analysis did not quantify the impacts of potential “reciprocity” from other governments requiring information from U.S. citizens in advance of travel; however, DHS acknowledged this potential in the chapter of the analysis devoted to the cost impacts of ESTA. As stated, other VWP countries may choose to collect advance admissibility data from U.S. citizens prior to entering their country as a consequence of this rule

(and Australia currently does as part of their ETA program). The European Union, for example, reportedly is considering a system similar to ESTA. DHS does not know which countries, if any, could establish similar requirements to ESTA, but any such requirements would affect U.S. citizens and U.S. carriers. However, the purpose of the economic analysis is to estimate the costs and benefits of the U.S. regulation under consideration, not other travel requirements that may or may not be implemented in the future in other countries.

The cost to obtain an ESTA travel authorization places a minimal burden on the traveler. DHS does not know if ESTA created a monetary disincentive to travel to the United States, but notes that travel to the United States has grown under the VWP after the establishment of ESTA. Although DHS does not explicitly estimate a decrease in travel as a result of the rule, such effects were presumably captured in the sensitivity analysis available in the appendix to the regulatory assessment, which is available in the docket of this rule.

Comment: One commenter stated that the cost of ESTA would be \$10,000 per business traveler (minimum mean per person impact of the rule) if lost clients and lost business from a denied travel authorization are factored into the analysis. The commenter estimates that for leisure travelers, the costs would be less but still substantial (average cost of \$500).

Response: Although the commenter may believe that \$10,000 and \$500 are reasonable estimates of the average per-traveler impacts of ESTA, the commenter provides only limited explanation on how those figures were estimated. This estimate seems to include costs such as the time and expense to get a visa (which is estimated in the economic analysis below), but it is mostly the cost of lost business for travelers who are unable to travel to the United States if their ESTA is denied and they are unable to obtain a visa. DHS notes that only 0.23 percent of ESTA applications are denied and, absent the rule, these people would likely be denied entry to the

United States upon arrival anyway. Since travelers normally apply for an ESTA when they purchase their ticket, there is ample time for most denied applicants to apply for a visa. The State Department may make accommodations for last minute travelers who are scheduled to travel in the next 72 hours and have been denied an ESTA. DHS does not have data on the number of travelers who are denied an ESTA and are subsequently denied a visa. However, DHS notes that these travelers are likely to have been deemed inadmissible upon arrival in the United States absent this rule. DHS, therefore, believes that the losses to business and leisure travelers who, absent this rule, would have been admitted to the United States are small. We discuss these costs qualitatively in the economic analysis.

Comment: One commenter stated that the economic analysis did not analyze the number of passengers who will arrive at foreign airports without a travel authorization in place.

Response: This commenter is correct. This is because DHS does not track how many travelers arrive without first having obtained travel authorization. However, DHS does estimate the cost to carriers to implement ESTA. Since the publication of the interim rule, DHS has done outreach to carriers to determine the true magnitude of their costs in implementing ESTA, including their costs in assisting passengers who arrive at foreign airports without a travel authorization in place. We estimate that carriers spent \$108 million to implement ESTA in the first year and \$12 million in subsequent years. These costs are discussed in the economic analysis below.

Comment: One commenter stated that using 62 as the number of air carriers potentially affected by the systems and processes modifications required for ESTA was an underestimation in the economic analysis. This commenter claimed that virtually every carrier in the world would incur costs to develop ESTA capabilities.

Response: Based on this comment, DHS has conducted further research and agrees that the number of air carriers potentially affected by the IFR was underestimated. DHS has modified its cost estimates to include additional carriers.

For the ESTA IFR, DHS consulted the International Air Transport Association (IATA) website for member details. DHS then accessed individual carrier websites to determine if the carriers flew to or from the United States and if the carrier country was an original VWP country, a new VWP country,<sup>9</sup> or the United States. DHS determined that 8 U.S.-based carriers and 35 foreign-based carriers would likely have to develop ESTA capabilities. Based on further research of U.S. airports and airlines servicing these airports, it was determined that there are an additional 10 foreign carriers that should be included in the analysis that are based in original VWP or new VWP countries but are not members of IATA.

Furthermore, there are foreign carriers that are not based in original or new VWP countries that offer direct flights from VWP countries to the United States. It is likely that these airlines will be carrying a significant number of VWP-eligible passengers and will thus wish to develop ESTA capabilities in order to best serve their customers. Based on further research of U.S. airports and airlines servicing these airports, it was determined that there are an additional eight foreign carriers that should be included in the analysis. These airlines are from the Middle East and Asia and offer direct flights to the United States from Japan, Singapore, and the United Kingdom. As a result of this further research, the analysis now includes cost estimates for 8 U.S.-based air carriers and 53 foreign-based air carriers. This analysis is summarized below in the section for Executive Order 12866 and 13563.

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<sup>9</sup> For the purpose of this document, we will use the term “original VWP countries” to refer to the 27 countries that were part of the VWP prior to the establishment of ESTA, and the term “new VWP countries” to refer to the 10 countries that were added to the VWP after that date, including Taiwan.

DHS disagrees that every airline around the world would be “affected significantly” by ESTA. Air carriers are not required to develop ESTA capabilities; the 9/11 Act has put the burden squarely on traveling individuals to obtain authorizations in advance of travel. Carriers who do not fly to the United States or who carry few VWP-eligible travelers are not likely to develop ESTA capabilities to assist those customers who arrive at the airport without a travel authorization. DHS has conducted a sensitivity analysis that includes all foreign-based airlines with flights to the United States but that most likely only carry a few VWP passengers. This analysis is included in the full Regulatory Assessment that can be found in the public docket for this rule.

#### **29. Comments that are Beyond the Scope of the IFRs**

Comment: One commenter stated that the DHS does not address the lack of system database integration of ESTA with the legacy INS IDENT and the FBI/IAFIS databases.

Response: Questions regarding other systems unrelated to ESTA (e.g. IDENT and IAFIS) are beyond the scope of this rulemaking. ESTA is a system that collects biographic information and IDENT and IAFIS are biometric systems capturing fingerprints for identification purposes. Please refer to the ESTA Privacy Impact Assessments for more information on system integration, which may be found online at: <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

Comment: One commenter remarked that VWP countries should monitor and limit the fees that third party vendors may charge a passenger for filling out ESTA applications on the passenger’s behalf.

Response: It would be inappropriate for DHS to comment on how foreign governments regulate businesses or to dictate what fees a third party vendor charges for passengers to have an

ESTA application filled out. DHS is aware that there have been several sites that were charging inordinate fees for information on the program and to apply for an ESTA travel authorization. DHS issued an Advisory about these websites in November 2008 to inform the traveling public that these sites are not affiliated with the United States government and travelers who accidentally go to those sites should exit and go to the official ESTA website at <https://esta.cbp.dhs.gov>. DHS also has claimed rights for ESTA via an application submitted to the U.S. Patent and Trade Office to protect against unauthorized use of the ESTA symbol and name. DHS continues to work on outreach and communications to the public to provide the most up to date information to assist travelers in complying with the requirement. As such, this comment is beyond the scope of these rulemakings.

Comment: One commenter stated that ESTA should be implemented at a later date because there are too many current visa holders who are overstaying in the United States, thus burdening American taxpayers with the costs of deporting overstaying visa holders.

Response: Although DHS recognizes that there may be cases where visa holders are overstaying their allowed time period for visiting the United States, the purpose of ESTA is to allow DHS to determine travel eligibility and enhance the security of the United States and the VWP, and not to identify possible enforcement actions against visa holders or VWP travelers who have overstayed their authorized period of admission. As such, this comment is beyond the scope of these rulemakings.

Comment: Some commenters claimed that the ESTA rule violated the Airline Deregulation Act because it is an “attempt to restrict the obligation of airlines to transport all passengers complying with their published tariffs” and that DHS failed to consider “the public right of freedom of transit of the navigable airspace” as required by the Airline Deregulation Act.

Response: The main purpose of the Airline Deregulation Act (Public Law 95-504), signed into law on October 24, 1978, was to remove government control over fares, routes, and market entry (of new airlines) from commercial aviation. ESTA does not impose any restrictions on fares, routes, or market entry from commercial aviation and as such, this comment is beyond the scope of these rulemakings.

### **III. Conclusion**

#### **A. Regulatory Amendments**

The amendments to title 8 of the Code of Federal Regulations, as set forth in the ESTA IFR, published June 8, 2008, and the ESTA Fee IFR, published August 9, 2010, are adopted as final with the following changes:

The ESTA regulations are being modified by adding a new §217.5(d)(3) to allow for flexibility to adjust the validity period for a designated VWP country and to state that notice of any such change will be published in the **Federal Register** and reflected on the ESTA website. In addition to addressing comments regarding the extension of the validity period discussed above, DHS's decision to include this new section providing the Secretary with the flexibility to extend or shorten the ESTA travel authorization validity period for a designated VWP country is being done under the authority of the foreign affairs function of the United States to administer the VWP and is exempt from notice and comment rulemaking and delayed effective date requirements generally required under 5 U.S.C. § 553. See 5 U.S.C. 553(a)(1). Additionally, section 217.5(h)(2) of the ESTA regulations contains a reference to the Treasury Department's Pay.gov financial system (Pay.gov). In light of the possibility that DHS may want to offer alternative methods of submitting payment in the future, DHS is removing the sentence that refers to Pay.gov.

## **B. Operational Modifications**

As discussed in this document, DHS has made various minor changes to ESTA in response to comments received, such as the creation of the email notification regarding a traveler's impending ESTA travel authorization expiration and various changes made to the language used on the ESTA website to ensure clarity. Despite making only one substantive and one technical changes to the regulations in this final rule, DHS would like to highlight five operational modifications affecting ESTA applicants and VWP travelers since the publication of the interim final rules:

### **1. Elimination of the Paper Form I-94W**

The requirement to complete the Nonimmigrant Alien Arrival/Departure (I-94W) paper form was eliminated for VWP travelers arriving in the United States at air or sea ports of entry on or after June 29, 2010. For these travelers, ESTA satisfies the requirement to complete and submit a paper Form I-94W upon arrival in the United States. DHS worked extensively with carriers to bring about an orderly transition to remove the paper Form I-94W from circulation and to ensure that all affected parties were aware of the updated requirements. Currently, only VWP travelers arriving at the United States at land ports of entry are required to complete the paper Form I-94W.

### **2. Addition of Country of Birth to the Form I-94W**

On May 16, 2011 and July 25, 2011, DHS published notices in the **Federal Register** proposing to revise the Form I-94W collection of information by adding a data field for "Country of Birth" to ESTA and to the paper Form I-94W. These notices also solicited comments regarding the proposed revision. No comments were received. As of December 11, 2011, country of birth is a required data element on all ESTA applications. Individuals who

obtained travel authorizations prior to this date do not need to provide “Country of Birth” to maintain travel authorization; however, such individuals must provide “Country of Birth” information if and when applying for a new travel authorization after their current ESTA travel authorization expires.

### **3. Collection of Internet Protocol Address**

On July 30, 2012, DHS published an updated System of Records Notice in the **Federal Register** (77 FR 44642) notifying the public that DHS would begin collecting the Internet Protocol address (IP address) associated with a submitted ESTA application. The IP address will be used along with other application data for vetting purposes.

### **4. Multiple Application Payment Function**

As discussed above, DHS modified the payment functionality to allow for a single credit card transaction to pay for up to 50 ESTA applications. A group point of contact must submit payment after inputting or retrieving the relevant applications. This modification will allow groups such as businesses or a family to submit ESTA applications without having to submit payment information for each individual application.

### **5. Modification of the Eligibility Questions on the Form I-94W and ESTA Application**

On November 26, 2013 and February 14, 2014, DHS published notices in the **Federal Register** proposing to revise the Form I-94W collection of information by amending the eligibility questions to the ESTA application and to the paper Form I-94W to make the questions clearer and easier to understand while still providing DHS with the information needed to make eligibility determinations. See 78 FR 70570 and 79 FR 8984. These notices also solicited comments regarding the proposed revisions. No comments were received. On December 9,

2014, DHS published a 60-day notice regarding additional changes to the ESTA application and paper Form I-94W in **the Federal Register**. See 79 FR 73096. These changes collect more detailed information about a traveler by making previously optional questions mandatory and by adding additional questions concerning other names or aliases, current or previous employment, and emergency contact information among other questions. These changes are necessary to improve the screening of travelers before their admittance into the U.S. On November 3, 2014, DHS amended the questions accordingly.

#### **IV. STATUTORY AND REGULATORY REQUIREMENTS**

##### **A. Executive Order 13563 and Executive Order 12866**

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is an economically significant regulatory action under section 3(f) of Executive Order 12866 as it has an annual effect on the economy of \$100 million or more in any one year. As a result, this rule has been reviewed by the Office of Management and Budget. The following summary presents the costs and benefits to applicant carriers and DHS.<sup>10</sup>

The purpose of ESTA is to allow DHS to establish, in advance of travel, the eligibility of certain foreign travelers to enter the United States and whether the alien's proposed travel to the U.S. 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. There are currently 37

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<sup>10</sup> The complete Regulatory Assessment can be found in the docket for this rulemaking: <http://www.regulations.gov>.

countries in the VWP.<sup>11</sup> Furthermore, as additional countries are brought into the VWP, their citizens are also required to comply with ESTA. Additionally, because the information provided by the traveler through ESTA is the same information that was previously collected on the I-94W form (Arrival and Departure Record), travelers who receive a travel authorization through ESTA do not have to complete this form while en route to the United States.

The primary parameters for this analysis are as follows—

- The period of analysis is 2008 to 2018.
- For the purpose of this analysis, DHS assumes that travelers from all VWP countries began complying with the ESTA requirements on January 1, 2009, except for Greece and Taiwan, which DHS assumes began complying with the ESTA requirements on January 1, 2010 and January 1, 2013, respectively.<sup>12</sup>
- 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 have chosen to either modify their existing systems or potentially develop new systems to submit ESTA applications for their customers. For this analysis, DHS assumes that carriers incurred system development costs in 2008 and incur operation and maintenance costs every year thereafter (2009–2018). DHS notes that it transmits travelers’ authorization status through its existing

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<sup>11</sup> The current VWP countries are Andorra, Australia, Austria, Belgium, Brunei, the Czech Republic, Estonia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, and the U.K. Since the June 9, 2008, publication of the interim final rule, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Slovakia, South Korea, and Taiwan have entered the VWP. With the exception of Taiwan, which was designated for participation in the VWP effective November 1, 2012, these countries were previously designated as “Roadmap” countries.

<sup>12</sup> DHS notes that Taiwan entered the VWP on November 1, 2012. However, DHS uses January 1, 2013 as Taiwan’s ESTA start date for the analysis because data on I-94/I-94W arrivals by country are only available on an annual basis.

Advance Passenger Information System (APIS), and therefore carriers did not have to make significant changes to their existing systems in response to this rule.

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

DHS estimates that 8 U.S.-based air carriers and 13 sea carriers are indirectly affected by the rule. An additional 53 foreign-based air carriers and 6 sea carriers are indirectly affected. As noted previously, DHS transmits a passenger's ESTA application or authorization status to the air carriers using APIS. When a passenger checks in for her flight, the passport is swiped and the APIS process begins. DHS provides the passenger's ESTA application or 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 the authorization on behalf of the passenger. It is unknown how many passengers rely on their carrier to apply for an ESTA travel authorization on their behalf.

At the time of the publication of the ESTA Interim Final Rule, it was unknown how much it would cost carriers to modify their existing systems. DHS therefore developed a range of costs for the analysis in the Interim Final Rule. Since the publication of the Interim Final Rule, CBP has done outreach to carriers to determine the true magnitude of their costs in implementing ESTA. Based on communications with carriers, we now estimate that carriers spend an average of \$1,350,000 in the first year and \$150,000 in subsequent years. Each 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.

Given this range, costs for U.S. based carriers are about \$28.4 million in the first year and \$3.2 million in subsequent years (undiscounted). Costs for foreign-based carriers are about

\$79.7 million in the first year and \$8.9 million in subsequent years (undiscounted). See Exhibit 1.

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

|          | U.S.   |        | Foreign |       | Total   |
|----------|--------|--------|---------|-------|---------|
|          | Air    | Sea    | Air     | Sea   |         |
| Carriers | 8      | 13     | 53      | 6     | 80      |
| 2008     | \$10.8 | \$17.6 | \$71.6  | \$8.1 | \$108.0 |
| 2009     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2010     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2011     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2012     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2013     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2014     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2015     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2016     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2017     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |
| 2018     | 1.2    | 2.0    | 8.0     | 0.9   | 12.0    |

Detail may not calculate to total due to independent rounding.

As estimated, ESTA will cost the carriers about \$244 million to \$270 million (2013 dollars) over the 11 year period of analysis depending on 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**

|                               | U.S.           |        | Foreign |        |
|-------------------------------|----------------|--------|---------|--------|
|                               | Air            | Sea    | Air     | Sea    |
| 11-year modal total           | \$24.4         | \$39.6 | \$161.6 | \$18.3 |
| 11-year subtotal              | \$64.0         |        | \$179.9 |        |
| <b>11-year grand total</b>    | <b>\$243.9</b> |        |         |        |
| Annualized modal total        | \$2.2          | \$3.6  | \$14.6  | \$1.7  |
| Annualized subtotal           | \$5.8          |        | \$16.3  |        |
| <b>Annualized grand total</b> | <b>\$22.1</b>  |        |         |        |

**7 percent discount rate**

|                               | US             |        | Foreign |        |
|-------------------------------|----------------|--------|---------|--------|
|                               | Air            | Sea    | Air     | Sea    |
| 11-year modal total           | \$27.0         | \$43.8 | \$178.7 | \$20.2 |
| 11-year subtotal              | \$70.8         |        | \$198.9 |        |
| <b>11-year grand total</b>    | <b>\$269.7</b> |        |         |        |
| Annualized modal total        | \$2.4          | \$3.9  | \$15.9  | \$1.8  |
| Annualized subtotal           | \$6.3          |        | \$17.7  |        |
| <b>Annualized grand total</b> | <b>\$24.0</b>  |        |         |        |

Detail may not calculate to total due to independent rounding.

Travel agents and other service providers may incur costs to assist their clients in obtaining travel authorizations. Affected travel agents are mostly foreign businesses located in the VWP countries. DHS has worked to minimize the costs for travel agents, building functionality into the ESTA website that allows travel agents to upload ESTA applications for up to 50 individuals at a time. Thanks to this upgrade, travel agents have not needed to obtain software modules to allow them to apply for authorizations for their clients.

**Impacts on Travelers**

ESTA presents new costs and time burdens to travelers in original VWP countries who were not previously required to submit any information in advance of travel to the United States. Travelers from new VWP countries also incur costs and burdens, though these are much less than obtaining a nonimmigrant visa (category B-1/B-2), which is currently required for short-term business and leisure travel to the United States, absent eligibility for visa-free travel.

For the primary analysis, DHS explores the following categories of costs—

- Cost and time burden to obtain a travel authorization—DHS estimates the cost of applying for the authorization, the time that will be required to obtain an authorization, and the value of that time (opportunity cost) to the traveler.

- Cost and time burden to obtain a nonimmigrant (B-1/B-2) visa if travel authorization is denied—based on the existing process for obtaining a visa, DHS estimates the cost to obtain that document in the event that a travel authorization is denied and the traveler is directed to go to a U.S. embassy or consulate to obtain permission to travel to the United States.

For this analysis, DHS predicts ESTA-affected travelers to the United States over the period of analysis using information available from the Department of Commerce, National Travel and Tourism Office (NTTO), documenting historic travel levels and future projections. We use the travel-projection percentages through 2018 provided by NTTO. In addition to total travelers, DHS estimates the number of applicants based on an analysis of early ESTA applications. An ESTA travel authorization is valid for two years, so the number of applicants for an ESTA travel authorization is lower than the number of arrivals under the VWP. See Exhibit 3.

**Exhibit 3. Total visitors to the United States, 2009–2018 (millions)**

|                 | 2009  | 2010  | 2011  | 2012  | 2013* | 2014* | 2015* | 2016* | 2017* | 2018* |
|-----------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Total Travelers | 17.66 | 18.74 | 19.82 | 20.60 | 21.54 | 22.44 | 23.01 | 23.52 | 24.09 | 24.66 |
| Applicants      | 14.54 | 15.44 | 16.31 | 16.96 | 17.74 | 18.47 | 18.93 | 19.35 | 19.83 | 20.30 |

Asterisk denotes projected values

### Cost to obtain a travel authorization

The TPA mandates that DHS establish a fee for the use of ESTA. In 2010, DHS published an interim final rule setting this fee at \$4 per application. The Travel Promotion Act also established a temporary \$10 travel promotion fee to be collected through September 30, 2020. For the purposes of this analysis, DHS assumes the ESTA operational fee and the travel promotion fee are in effect from 2011 to 2018, the last year of our period of analysis. In

addition, DHS estimates the cost of credit card fees for foreign transactions. In total, the cost per traveler will be \$14.35 from 2011-2018.

Exhibit 4 presents the total and annualized costs to applicants over the period of analysis using 3 and 7 percent discount rates. Total costs to applicants over the period of analysis are estimated at \$1.9 billion to \$2.0 billion. Annualized costs to applicants are estimated at \$171 million to \$183 million.

**Exhibit 4. Total Present Value and Annualized Costs of the ESTA Fee to Applicants, 2008-2018**

| Total present value costs (\$billions) |       | Annualized costs (\$millions) |     |
|----------------------------------------|-------|-------------------------------|-----|
| 3%                                     | 7%    | 3%                            | 7%  |
| 2.025                                  | 1.920 | 183                           | 171 |

Time Burden to obtain a travel authorization

To estimate the value of a non-U.S. citizen’s time (opportunity cost), DHS has conducted a brief analysis that takes into account wage rates for each country that will be affected by ESTA requirements. Based on this analysis, DHS found that Japan, Australia, New Zealand, and countries in Western Europe generally have a higher value of time than the less developed countries of Eastern Europe and Asia. DHS also found that air travelers have a higher value of time than the general population. DHS developed 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 \$4.70 to \$49.08 depending on the country. For the high cost estimate, the hourly value of time ranges from \$9.95 to \$103.99.

DHS estimates that it takes 15 minutes of time (0.25 hours) to apply for a travel authorization. Note that this is 7 minutes more than the time estimated to complete the I-94W (8 minutes). DHS estimates additional time burden for an ESTA application because even though

the data elements and admissibility questions are identical, travelers must now register with ESTA, familiarize themselves with the system, and gather and enter the data. 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. DHS believes the time 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 almost certainly does not take 15 minutes of time because these entities have most of the information electronically gathered during the booking process, and travel and ticket agents are certainly comfortable using computer applications. Because DHS does not know how many travelers apply independently through the ESTA website versus through a third party, DHS assigns a 15-minute burden to all travelers.

Based on these values and assumptions, DHS estimates that total opportunity costs in 2009 (the first year that travelers comply with the ESTA requirements in this analysis) range from \$118 million (low) to \$250 million (high) depending on the value of time used. By the end of the period of analysis (2018), costs range from \$163 million to \$345 million. These estimates are all undiscounted. See Exhibit 5.

**Exhibit 5. Total opportunity costs for visitors to the United States, 2009 and 2018 (millions, undiscounted)**

| 2009         |               | 2018         |               |
|--------------|---------------|--------------|---------------|
| Low estimate | High estimate | Low estimate | High estimate |
| \$118        | \$250         | \$163        | \$345         |

As estimated, ESTA could have an opportunity cost to travelers of \$1.4 billion to \$3.0 billion (present value) over the period of analysis depending, the value of opportunity cost and the discount rate applied (3 or 7 percent). Annualized costs are an estimated \$123 million to \$270 million. See Exhibit 6.

**Exhibit 6. 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%  |
| 1.409                                  | 1.389 | 2.985         | 2.941 | 128                           | 123 | 270           | 261 |

Cost and burden to obtain a visa if a travel authorization is denied

Using the values of time noted above, DHS estimates the costs if an authorization is denied and the traveler is referred to the nearest U.S. embassy or consulate to apply for a nonimmigrant visa (B-1/B-2). Absent country-specific information, DHS assumes that it requires 5 hours of time to obtain a visa including time to complete the application, travel time, waiting at the embassy or consulate 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. DHS estimates that these out-of-pocket costs will be \$216.

The number of travel authorizations that are denied for each country is unknown. Based on the results of ESTA implementation since January 2009, DHS uses the overall ESTA denial rate of 0.23 percent for each original VWP country (the travelers from the new VWP countries are so new to the VWP that obtaining a visa would still be considered the baseline condition). DHS does, however, subtract out ESTA refusals in our benefits calculations because these travelers do not accrue any benefit from ESTA.

DHS multiplies 0.23 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 \$156 million to \$227 billion over the period of analysis. Annualized costs are an estimated \$14 million to \$21 million. See Exhibit 7.

**Exhibit 7. 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% |
| 0.158                                  | 0.156 | 0.227         | 0.224 | 14                            | 14 | 21            | 20 |

Total costs to travelers

Based on the above calculations, DHS estimates that the total quantified costs to travelers will range from \$3.5 billion to \$5.2 billion depending on the number of travelers, the value of time, and the discount rate (3 or 7 percent). Annualized costs are estimated to range from \$308 million to \$474 million. See Exhibit 8.

**Exhibit 8. 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%  |
| 3.592                                  | 3.464 | 5.237         | 5.085 | 325                           | 308 | 474           | 452 |

DHS has shown that costs to air and sea carriers to support the requirements of the ESTA program could cost \$244 million to \$270 million over the period of analysis depending on the discount rate applied to annual costs. Costs to foreign travelers could total \$3.3 billion to \$5.2 billion depending on traveler levels, their value of time, and the discount rate applied.

In addition to the costs quantified here, there are other impacts that DHS is unable to quantify with any degree of confidence but should be considered. These include: costs to travel agents and other third-parties applying for ESTA travel authorizations on their clients’ behalf; losses due to denied travel authorizations and visas (some travelers may not be able to travel to the United States even when they apply for a visa at a U.S. embassy or consulate); trips forgone

due to cost, attitude, or confusion; reciprocity by foreign governments; and, impacts on queues in airports and seaports.

## **Benefits**

### Benefits of ESTA advance screening

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 screening of subjects of potential interest well before boarding, thereby reducing traveler delays based on potentially lengthy processes at U.S. ports of entry.

Before ESTA implementation, a very small percentage of visitors to the United States are inadmissible for a variety of reasons, including but not limited to certain health problems and certain criminal activity. These aliens may be returned to their country of origin at the commercial carrier's expense, and the carrier may be fined for transporting an alien visitor not in possession of proper documentation.

One of the stated purposes of this rule is to prevent inadmissible travelers and travelers not eligible for VWP travel from arriving in the United States. Prior to ESTA, VWP visitors answered questions concerning admissibility by completing their Form I-94Ws as they were en route to the United States (non-VWP visitors answer the admissibility questions on their visa applications). Based on the answers to these questions, other information available, and personal judgment, the CBP officer would then make the determination to admit the person to the United States or refer the traveler to secondary inspection for further processing.

A travel authorization provided through ESTA permits travel to the United States but does not guarantee admissibility. Thus, even with ESTA, certain travelers are found inadmissible once they arrive in the United States. A crucial element to determining admissibility is the face-to-face interaction between the CBP officer and the potential entrant after arrival at the United States. Thus, carriers are still responsible for returning passengers to their last foreign point of departure at the carriers' expense if travelers cannot overcome the inadmissibility determination of the CBP officer during secondary processing.

ESTA allows for advance screening of VWP travelers against databases for lost and stolen passports, visa revocations, terrorists and by asking admissibility questions. Based on actual ESTA denial data, DHS estimates that 0.23 percent of affected individuals are denied an ESTA authorization to travel to the United States annually as a result of the ESTA requirements and must obtain a visa in order to travel.

When inadmissible 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. DHS estimates that it costs \$136 per individual for questioning and processing. DHS estimates that returning inadmissible travelers to their country of origin 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, DHS calculates that benefits to DHS will total \$65 million to \$66 million over the period of analysis depending on the discount rate applied. Benefits to carriers could total \$721 million to \$732 million. Annualized benefits range from \$70 million to \$72 million. See Exhibit 9.

**Exhibit 9. Benefits of admissions denied attributable to ESTA, 2008–2018 (in \$millions)**

| Total admissions denied | 3% Discount Rate |                      |                |                     | 7% Discount Rate |                      |                |                     |
|-------------------------|------------------|----------------------|----------------|---------------------|------------------|----------------------|----------------|---------------------|
|                         | Benefits to DHS  | Benefits to carriers | Total benefits | Annualized benefits | Benefits to DHS  | Benefits to carriers | Total benefits | Annualized benefits |
| 496,960                 | 66.2             | 732.1                | 798.4          | 72.3                | 65.2             | 721.1                | 786.3          | 69.9                |

Detail may not calculate to total due to independent rounding.

Benefits of not having to obtain visas for travelers from new VWP countries

The benefits of not having to obtain a B-1/B-2 visa, but rather obtaining a travel authorization, are also quantifiable. These benefits are realized only by travelers from new VWP countries, i.e., countries that became part of the VWP after publication of the ESTA IFR. DHS 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. Prior to this rule, these visitors would all have needed visas if they were not part of the VWP. Then DHS estimates a percentage of repeat travelers who would also need to have visas because their old visa would expire during the next 10 years. Most VWP visitors are eligible for 10-year B-1/B-2 visas, so on average, one tenth of these visas expire every year. DHS thus assumes that 10 percent of repeat visitors would have to reapply for visas were it not for the rule.<sup>13</sup> Finally, DHS subtracts out those who are denied a travel authorization and must apply for a visa instead.

Benefits of forgoing visas are expected to range from about \$2.0 billion to \$2.6 billion (present value) from 2008 to 2018 depending on the travel level, the value of time used, and the discount rate applied (3 or 7 percent). Annualized benefits range from \$180 million to \$238 million. See Exhibit 10.

<sup>13</sup> DHS notes that Taiwan has a 5-year validity period for B-1/B-2 visas. Travelers from Taiwan make up only about 1 percent of the total number of VWP travelers, so assuming a 10 year validity period for Taiwan does not materially affect the analysis.

**Exhibit 10. 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%  |
| 2.089                                     | 2.022 | 2.632         | 2.549 | 189                              | 180 | 238           | 227 |

Benefits of not having to complete the Form I-94W and Form I-94

DHS can also quantify the benefits of not having to complete the Form I-94W (for travelers from the original VWP countries) and paper Form I-94 (for travelers from new VWP countries). These benefits will accrue to all travelers covered by ESTA. The estimated time to complete either the Form I-94W or Form I-94 is 8 minutes (0.13 hours). DHS subtracts 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 expected as a result of this rule.

Benefits of not having to complete the paper forms are expected to range from \$739 million to \$1.6 billion from 2008 to 2018 depending on the value of time used and the discount rate applied (3 or 7 percent). Annualized benefits range from \$66 million to \$144 million. See Exhibit 11.

**Exhibit 11. Total present value and annualized benefits of forgoing the I-94/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%  |
| 0.750                                     | 0.739 | 1.588         | 1.565 | 68                               | 66 | 144           | 139 |

In addition to these benefits to travelers, DHS and the carriers should also experience the benefit of not having to print and store the Form I-94W. In March, 2013, DHS published an interim final rule entitled, “Definition of Form I-94 to Include Electronic Format.” As part of the

regulatory analysis for this rule, DHS estimated the cost savings to DHS and carriers attributed to the automation of the Form I-94 in the air and sea environments, which is very similar to the Form I-94W. In this rule, DHS estimated that automating 16,586,753 Forms I-94 in the air and sea environments would save CBP \$153,306 and carriers \$1,344,450 in 2011. To apply these cost savings to the ESTA Final Rule, DHS scales these costs proportionally with the number of Forms I-94W being eliminated each year as part of this rule. DHS notes that carriers will still have to administer the Customs Declaration forms for all passengers aboard the aircraft and vessel.

Benefits of not having to administer paper forms are expected to range from \$1.9 million to \$2.0 million for DHS and from \$16.9 million to \$17.2 million for carriers from 2009 to 2018 depending on the value of time used and the discount rate applied (3 or 7 percent). Annualized benefits are \$1.7 million. See Exhibit 12.

**Exhibit 12. Form Management Benefits for DHS and Carriers, 2008–2018 (in \$millions)**

| 3% Discount Rate |                      |                |                     | 7% Discount Rate |                      |                |                     |
|------------------|----------------------|----------------|---------------------|------------------|----------------------|----------------|---------------------|
| Benefits to DHS  | Benefits to carriers | Total benefits | Annualized benefits | Benefits to DHS  | Benefits to carriers | Total benefits | Annualized benefits |
| 1.957            | 17.168               | 19.125         | 1.7                 | 1.928            | 16.908               | 18.836         | 1.7                 |

Detail may not calculate to total due to independent rounding.

Total benefits to travelers

Total benefits to travelers could total \$2.8 billion to \$4.2 billion over the period of analysis. Annualized benefits could range from \$246 million to \$382 million. See Exhibit 13.

**Exhibit 13. Total present value and annualized benefits to travelers, 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% |
|                                           |    |               |    |                                  |    |               |    |

### 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 U.S.C. 1187) by enhancing program security requirements.

This rule and the APIS 30/AQQ rule published on August 23, 2007<sup>14</sup> have similar security objectives: To prevent a traveler who has been matched to an individual on a government watch list from boarding an aircraft or cruise ship bound for the United States. As these benefits have already been accounted for in the regulatory assessment for the APIS rule, we do not repeat them here. ESTA has the additional security benefit of preventing those on a government watch list from purchasing a ticket. This allows CBP to focus its targeting resources on unknown threats rather than known threats (those on a watch list). Since the publication of the Interim Final Rule, DHS has added questions to ESTA to further improve security. The addition of these data elements improves the Department's ability to screen prospective VWP travelers while more accurately and effectively identifying those who pose a security risk to the United States. We note that since the publication of the Interim Final Rule, ESTA has been successful in denying travel authorizations to known or suspected terrorists. In 2014, 817 known or suspected terrorists were denied ESTA authorizations.<sup>15</sup>

This rule allows CBP to comply with the TPA's mandate that the Secretary establish a fee for the use of the ESTA system and also establish a \$10 travel promotion fee. The U.S. travel and tourism industry may benefit to the extent that travel promotion efforts made possible

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<sup>14</sup> FR 48320. U.S. Customs and Border Protection. *Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels; final rule*. August 23, 2007.

<sup>15</sup> Source: Internal tracking system maintained by CBP's Office of Field Operations.

by the Travel Promotion Fund are successful in increasing travel to the United States. Likewise, the TPA has a mandate to provide information to communicate travel requirements, including ESTA, to travelers. To the extent that this outreach increases the travelers' understanding of U.S. travel requirements, they will benefit.

The total net benefits of the rule are presented in Exhibit 14. Net benefits range from a net loss of \$158 million to a net loss of \$443 million, depending on the value of time and discount rate used. We note that, though the monetized net benefits of this rule are negative, the non-monetized security benefits are large enough to for this rule's benefits to exceed the costs.

**Exhibit 14. Total Net Benefits, 2009–2018**

|                    | Total present values (\$billions) |                  |                  |                  | Annualized values (\$millions) |                  |                  |                  |
|--------------------|-----------------------------------|------------------|------------------|------------------|--------------------------------|------------------|------------------|------------------|
|                    | Low estimate                      |                  | High estimate    |                  | Low estimate                   |                  | High estimate    |                  |
|                    | 3% discount rate                  | 7% discount rate | 3% discount rate | 7% discount rate | 3% discount rate               | 7% discount rate | 3% discount rate | 7% discount rate |
| Costs              | (3.836)                           | (3.734)          | (5.481)          | (5.355)          | (347)                          | (332)            | (496)            | (476)            |
| Benefits           | 3.664                             | 3.575            | 5.037            | 4.919            | 332                            | 318              | 456              | 437              |
| <b>Net Benefit</b> | <b>(0.172)</b>                    | <b>(0.158)</b>   | <b>(0.443)</b>   | <b>(0.435)</b>   | <b>(16)</b>                    | <b>(14)</b>      | <b>(40)</b>      | <b>(39)</b>      |

Detail may not calculate to total due to independent rounding. Parentheses indicate a negative value. Note that annualized values are not additive.

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

**Accounting statement: classification of expenditures to U.S. entities, 2008–2018 (\$2013)**

|                                                | 3% Discount Rate                                  | 7% Discount Rate                                  |
|------------------------------------------------|---------------------------------------------------|---------------------------------------------------|
| <b>Costs</b>                                   |                                                   |                                                   |
| Annualized monetized costs                     | \$22 million                                      | \$24 million                                      |
| Annualized quantified, but non-monetized costs | None quantified                                   | None quantified                                   |
| Qualitative (non-quantified) costs             | Indirect costs to the travel and tourism industry | Indirect costs to the travel and tourism industry |

**Benefits**

|                                                   |                                                                                        |                                                                                        |
|---------------------------------------------------|----------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|
| Annualized monetized benefits                     | \$71 million to \$74 million                                                           | \$69 million to \$72 million                                                           |
| Annualized quantified, but non-monetized benefits | None quantified                                                                        | None quantified                                                                        |
| Qualitative (non-quantified) benefits             | Enhanced security and efficiency, indirect benefits to the travel and tourism industry | Enhanced security and efficiency, indirect benefits to the travel and tourism industry |

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DHS estimates that the carrier costs of this rule are approximately \$22 million to \$24 million annualized. Quantified benefits of \$69 million to \$74 million to U.S. entities (carriers and DHS) are for forgone costs associated with processing and transporting inadmissible travelers and forgone form administration costs. There are also quantified costs and benefits for travelers; however, because these are attributable solely to foreign individuals, DHS does not include them in the accounting statement. There are non-quantified costs to the travel and tourism industry if the United States receives fewer visitors as a result of this rule. Conversely, there are non-quantified benefits to the travel and tourism industry if this rule results in more visitors. Additional non-quantified benefits are enhanced security and efficiency.

**Regulatory Alternatives**

DHS considers three alternatives to this rule—

- Alternative 1: The ESTA requirements in the rule, but with no application fee (more costly for DHS, less burdensome for traveler)
- Alternative 2: The ESTA requirements in the rule, but with only the name of the passenger and the admissibility questions on the Form I-94W (less burdensome for the traveler)
- Alternative 3: The ESTA requirements in the rule, but only for the 10 new VWP countries (no new requirements for travelers from the original VWP countries, reduced burden for new VWP travelers)

For the sake of brevity, DHS presents the high value estimates at the 7 percent discount rate only. Costs are expressed as negative values (denoted by parentheses) in this presentation of impacts. See Exhibit 15.

**Exhibit 15. Comparison of 11-year impacts of the rule and regulatory alternatives, 2008–2018, in \$billions, high estimate, 7 percent discount rate**

|                                   | Rule             | Alternative 1                        | Alternative 2                                          | Alternative 3                        |
|-----------------------------------|------------------|--------------------------------------|--------------------------------------------------------|--------------------------------------|
| Carrier costs                     | \$(0.270)        | \$(0.270)                            | \$(0.270)                                              | \$(0.270)                            |
| ESTA time burden                  | (2.941)          | (2.941)                              | (1.961)                                                | (0.127)                              |
| Visa costs                        | (0.224)          | (0.224)                              | (0.224)                                                | 0                                    |
| ESTA fee                          | (1.920)          | 0                                    | (1.920)                                                | (0.187)                              |
| CBP costs                         | 0                | (1.920)                              | 0                                                      | (1.733)                              |
| Inadmissibility savings           | 0.810            | 0.810                                | 0.810                                                  | 0.068                                |
| Benefit of no visa                | 2.549            | 2.549                                | 2.549                                                  | 2.549                                |
| Benefit of no I-94/94W            | 1.565            | 1.565                                | 1.565                                                  | 0.068                                |
| Benefit of no form administration | 0.019            | 0.019                                | 0.019                                                  | 0.019                                |
| <b>Net impact</b>                 | <b>\$(0.412)</b> | <b>\$(0.412)</b>                     | <b>\$0.568</b>                                         | <b>0.387</b>                         |
| Comment                           |                  | Does not meet statutory requirements | All data elements are required for effective screening | Does not meet statutory requirements |

Detail may not calculate to total due to independent rounding. Parentheses indicate a negative value. Note that annualized values are not additive.

DHS has determined that this rule provides the greatest level of enhanced security and efficiency at an acceptable cost to the traveling public and potentially affected air and sea carriers. Alternative 2 would provide less security as it does not include the additional questions

on the ESTA application that CBP uses for targeting purposes. Alternative 3 would provide less security because we would only get advance information from a relatively small subset of the VWP population.

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

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare a regulatory flexibility analysis that describes the effect of a proposed rule on small entities when the agency is required to publish a general notice of proposed rulemaking. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). Since a general notice of proposed rulemaking was not necessary, a regulatory flexibility analysis was not required. Nonetheless, DHS has considered the impact of this rule on small entities. The individuals to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6).

### **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 are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### **D. 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, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **E. 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.

#### **F. Paperwork Reduction Act**

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. OMB has already approved the collection of the ESTA information in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under OMB Control Number 1651-0111.

#### **G. Privacy**

DHS published an ESTA Privacy Impact Assessment (PIA) for the Interim Final Rule announcing ESTA on June 9, 2008. Additionally, at that time, DHS prepared a separate System of Records Notice (SORN) which was published in conjunction with the ESTA IFR on June 9, 2008. DHS has updated these documents since that time and the most current ESTA PIA and SORN are available for viewing at <http://www.dhs.gov/privacy-documents-us-customs-and-border-protection>.

#### **List of Subjects in 8 CFR Part 217**

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

#### **Amendments to Regulations**

Accordingly, the interim rules amending part 217 of the CBP regulations (8 CFR part 217), which were published at 73 FR 32440 on June 9, 2008 and 75 FR 47701 on August 9, 2010, are adopted as final with the following changes:

**PART 217—VISA WAIVER PROGRAM**

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

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

2. Section 217.5 is amended by adding paragraph (d)(3) and revising paragraph (h)(2) to read as follows:

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

\* \* \* \* \*

(d) \* \* \*

(3) The Secretary, in consultation with the Secretary of State, may increase or decrease ESTA travel authorization validity period otherwise authorized by subparagraph (1) for a designated VWP country. Notice of any change to ESTA travel authorization validity periods will be published in the Federal Register. The ESTA website will be updated to reflect the specific ESTA travel authorization validity period for each VWP country.

\* \* \* \* \*

(h) \* \* \*

(2) Beginning October 1, 2020, the fee for using ESTA is an operational fee of \$4.00 to at least ensure recovery of the full costs of providing and administering the system.

Dated: June 03, 2015

Jeh Charles Johnson,  
Secretary.

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