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CBP Decisions

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8 CFR Parts 212 and 235

DEPARTMENT OF STATE

22 CFR Parts 41 and 53

Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere

AGENCIES: U.S. Customs and Border Protection, Department of Homeland Security; Bureau of Consular Affairs, Department of State.

ACTION: Final rule.

SUMMARY: This rule finalizes the second phase of a joint Department of Homeland Security and Department of State plan, known as the Western Hemisphere Travel Initiative, to implement new documentation requirements for U.S. citizens and certain nonimmigrant aliens entering the United States. This final rule details the documents U.S. citizens¹ and nonimmigrant citizens of Canada, Bermuda, and Mexico will be required to present when entering the United States from within the Western Hemisphere at sea and land ports-of-entry.

DATES: This final rule is effective on June 1, 2009.

FOR FURTHER INFORMATION CONTACT:

Department of Homeland Security: Colleen Manaher, WHTI, Office of Field Operations, U.S. Customs and Border Protection, 1300

¹“U.S. citizens” as used in this rule refers to both U.S. citizens and U.S. non-citizen nationals.

Pennsylvania Avenue, NW., Room 5.4–D, Washington, DC 20229, telephone number (202) 344–1220.

Department of State: Consuelo Pachon, Office of Passport Policy, Planning and Advisory Services, Bureau of Consular Affairs, telephone number (202) 663–2662.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
 - A. Documentation Requirements for Arrivals at Sea and Land Ports-of-Entry Prior to This Rule
 - 1. U.S. Citizens
 - 2. Nonimmigrant Aliens From Canada and the British Overseas Territory of Bermuda
 - 3. Mexican Nationals
 - B. Statutory and Regulatory History
 - 1. Intelligence Reform and Terrorism Prevention Act
 - 2. Advance Notice of Proposed Rulemaking
 - 3. Rules for Air Travel From Within the Western Hemisphere
 - 4. Amendments to Section 7209 of IRTPA
 - 5. Other Relevant Legislation
 - 6. Passport Cards
 - 7. Certifications to Congress
- II. Documentation at the Border
- III. Summary of Document Requirements in the Proposed Rule
- IV. Discussion of Comments
 - A. General
 - B. Implementation
 - 1. General
 - 2. Timeline
 - 3. Security/Operational Considerations
 - 4. Technology
 - 5. Cruise Ships
 - 6. MODUs/OCS
 - C. Passports
 - 1. General
 - 2. Cost of Passports
 - 3. Obtaining Passports
 - 4. DOS Issuance Capacity
 - 5. Passport Cards
 - D. Alternative Documents
 - 1. General
 - 2. Driver's License and Birth Certificate
 - 3. Trusted Traveler Documents
 - 4. Children/Groups of Children/Alternative Approaches/Parental Consent

- 5. State Enhanced Driver's License Projects
 - 6. Mexican/Canadian/Bermudian Documents
 - 7. REAL ID Driver's Licenses
 - E. Native Americans and Canadian Indians
 - F. Outside the Scope of This Rulemaking
 - 1. General
 - 2. Air Rule
 - 3. IBWC
 - 4. Lawful Permanent Residents
 - 5. Dual Nationals
 - G. Public Relations
 - 1. General
 - 2. Outreach
 - H. Regulatory Analyses
 - 1. Regulatory Assessment
 - 2. Regulatory Flexibility Act
 - V. Final Document Requirements
 - A. U.S. Citizens Arriving by Sea or Land
 - B. Canadian Citizens and Citizens of Bermuda Arriving by Sea or Land
 - C. Mexican Nationals Arriving by Sea or Land
 - D. State Enhanced Driver's Licenses and Identification Documents
 - E. Future Documents
 - VI. Special Rules for Specific Populations
 - A. U.S. Citizen Cruise Ship Passengers
 - B. U.S. and Canadian Citizen Children
 - 1. Children Under Age 16
 - 2. Children Under Age 19 Traveling in Groups
 - C. American Indian Card Holders from Kickapoo Band of Texas and Tribe of Oklahoma
 - D. Members of United States Native American Tribes
 - E. Canadian Indians
 - F. Individual Passport Waivers
 - G. Summary of Document Requirements
 - VII. Regulatory Analyses
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Regulatory Flexibility Act
 - C. Executive Order 13132: Federalism
 - D. Executive Order 12988: Civil Justice Reform
 - E. Unfunded Mandates Reform Act Assessment
 - F. Paperwork Reduction Act
 - G. Privacy Statement
- List of Subjects
Amendments to the Regulations

Abbreviations and Terms Used in This Document

ANPRM—Advance Notice of Proposed Rulemaking
 BCC—Form DSP-150, B-1/B-2 Visa and Border Crossing Card
 CBP—U.S. Customs and Border Protection
 CBSA—Canada Border Services Agency
 DHS—Department of Homeland Security
 DOS—Department of State
 FAST—Free and Secure Trade
 FBI—Federal Bureau of Investigation
 IBWC—International Boundary and Water Commission
 INA—Immigration and Nationality Act
 IRTPA—Intelligence Reform and Terrorism Prevention Act of 2004
 LPR—Lawful Permanent Resident
 MMD—Merchant Mariner Document
 MODU—Mobile Offshore Drilling Unit
 MRZ—Machine Readable Zone
 NATO—North Atlantic Treaty Organization
 NEPA—National Environmental Policy Act of 1969
 NPRM—Notice of Proposed Rulemaking
 OARS—Outlying Area Reporting System
 OCS—Outer Continental Shelf
 PEA—Programmatic Environmental Assessment
 SENTRI—Secure Electronic Network for Travelers Rapid
 Inspection
 TBKA—Texas Band of Kickapoo Act
 UMRA—Unfunded Mandates Reform Act
 USCIS—U.S. Citizenship and Immigration Services
 US-VISIT—United States Visitor and Immigrant Status Indicator
 Technology Program
 WHTI—Western Hemisphere Travel Initiative

I. Background

For a detailed discussion of the document requirements for travelers entering the United States from within the Western Hemisphere before January 31, 2008, the statutory and regulatory histories through June 26, 2007, and the applicability of the rule related to specific groups, please see the NPRM published at 72 FR 35088. For the document requirements which went into effect on January 31, 2008, please see the Notice “Oral Declarations No Longer Satisfactory as Evidence of Citizenship and Identity” which was published in the **Federal Register** on December 21, 2007, at 72 FR 72744.

A. *Documentation Requirements for Arrivals at Land and Sea Ports-of-Entry Prior to the Effective Date of This Rule*

The following is an overview of the documentation requirements for citizens of the United States, Canada, British Overseas Territory

of Bermuda (Bermuda), and Mexico who enter the United States at sea and land ports-of-entry prior to the effective date of this rule.

1. U.S. Citizens

Generally, U.S. citizens must possess a valid U.S. passport to depart from or enter the United States.² However, U.S. citizens who depart from or enter the United States by land or sea from within the Western Hemisphere other than from Cuba have historically been exempt from this passport requirement.³ U.S. citizens have always been required to satisfy the inspecting officers of their identity and citizenship.⁴ Since January 31, 2008, U.S. citizens ages 19 and older have been asked to present documents proving citizenship, such as a birth certificate, and government-issued documents proving identity, such as a driver's license, when entering the United States through land and sea ports-of-entry. Children under the age of 19 have only been asked to present proof of citizenship, such as a birth certificate.⁵

2. Nonimmigrant Aliens From Canada and the British Overseas Territory of Bermuda

Each nonimmigrant alien arriving in the United States must present a valid unexpired passport issued by his or her country of nationality and, if required, a valid unexpired visa issued by a U.S. embassy or consulate abroad.⁶ Nonimmigrant aliens entering the United States must also satisfy any other applicable admission requirements (e.g., United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT)). However, the passport requirement is currently waived for most citizens of Canada and Bermuda when entering the United States as nonimmigrant visitors from countries in the Western Hemisphere at land or sea ports-of-entry.⁷ These travelers have been required to satisfy the inspecting CBP officer of their identities and citizenship at the time of their applications for admission. Since January 31, 2008, these nonim-

²Section 215(b) of the Immigration and Nationality Act (INA), 8 U.S.C. 1185(b).

³ See 22 CFR 53.2(b), which waived the passport requirement pursuant to section 215(b) of the INA, 8 U.S.C. 1185(b).

⁴ In lieu of a passport, travelers claiming U.S. citizenship long have been permitted to enter on an oral declaration or to present a variety of documents to establish their identity and citizenship and right to enter the United States as requested by the CBP officer. A driver's license issued by a state motor vehicle administration or other competent state government authority is a common form of identity document. Citizenship documents generally include birth certificates issued by a United States jurisdiction, Consular Reports of Birth Abroad, Certificates of Naturalization, and Certificates of Citizenship.

⁵72 FR 72744.

⁶Section 212(a)(7)(B)(i) of the INA, 8 U.S.C. 1182(a)(7)(B)(i).

⁷ 8 CFR 212.1(a)(1) (Canadian citizens) and 8 CFR 212.1(a)(2) (Citizens of Bermuda). See also 22 CFR 41.2.

migrant aliens also have been asked to present document proving citizenship, such as a birth certificate, and government-issued documents proving identity, such as a driver's license, when entering the United States through land and sea ports-of-entry.⁸

3. Mexican Nationals

Mexican nationals are generally required to present a valid unexpired passport and visa when entering the United States. However, Mexican nationals arriving in the United States at land and sea ports-of-entry who possess a Form DSP-150, B-1/B-2 Visa and Border Crossing Card (BCC)⁹ currently may be admitted without presenting a valid passport if they are coming by land or sea from contiguous territory.¹⁰

B. Statutory and Regulatory History

This final rule sets forth the second phase of a joint Department of Homeland Security (DHS) and Department of State (DOS) plan, known as the Western Hemisphere Travel Initiative (WHTI), to implement section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004, as amended (IRTPA) on June 1, 2009.¹¹ A brief discussion of IRTPA, amendments to IRTPA, and related regulatory efforts follows. For a more detailed description of these efforts through June 26, 2007, please refer to the NPRM at 72 FR 35088.

1. Intelligence Reform and Terrorism Prevention Act

On December 17, 2004, the President signed IRTPA into law.¹² IRTPA mandates that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement a plan to require travelers for whom the President had waived the passport requirement to present a passport or other document, or combination of documents, that are "deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship" when entering the United States. WHTI thus requires U.S. citizens and nonimmigrant aliens from Canada, Mexico, and Bermuda to comply with the new documentation requirements.

2. Advance Notice of Proposed Rulemaking

On September 1, 2005, DHS and DOS published in the **Federal Register** an advance notice of proposed rulemaking (ANPRM) that

⁸ 72 FR 72744.

⁹ A BCC is a machine-readable, biometric card, issued by the Department of State, Bureau of Consular Affairs.

¹⁰ 8 CFR 212.1(c)(1)(i). *See also* 22 CFR 41.2(g).

¹¹ Pub. L. 108-458, as amended, 118 Stat. 3638 (Dec. 17, 2004).

¹² Pub. L. 108-458, 118 Stat. 3638 (Dec. 17, 2004).

announced that DHS and DOS were planning to amend their respective regulations to implement section 7209 of IRTPA. For further information, please see the ANPRM document that was published in the **Federal Register** on September 1, 2005, at 70 FR 52037. Comments to the ANPRM related to arrivals at sea and land ports-of-entry are addressed in this final rule.

3. Rules for Air Travel From Within the Western Hemisphere

On August 11, 2006, DHS and DOS published an NPRM for air and sea arrivals. The NPRM proposed that, subject to certain narrow exceptions, beginning January 2007, all U.S. citizens and nonimmigrant aliens, including those from Canada, Bermuda, and Mexico, entering the United States by air and sea would be required to present a valid passport or NEXUS Air card; U.S. citizens would also be permitted to present a Merchant Mariner Document (MMD). The NPRM provided that the requirements would not apply to members of the United States Armed Forces. For a detailed discussion of what was proposed for air and sea arrivals, please see the NPRM at 71 FR 41655 (hereinafter, Air and Sea NPRM).

The final rule for travelers entering or departing the United States at air ports-of-entry (hereinafter, Air Final Rule) was published in the **Federal Register** on November 24, 2006. Beginning January 23, 2007,¹³ U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering and departing the United States at air ports-of-entry, which now includes from within the Western Hemisphere, are generally required to bear a valid passport. The main exceptions to this requirement are for U.S. citizens who present a valid, unexpired MMD traveling in conjunction with maritime business and U.S. and Canadian citizens who present a NEXUS Air card for use at a NEXUS Air kiosk.¹⁴ The Air Rule made no changes to the requirements for members of the United States Armed Forces. Please see the Air Final Rule at 71 FR 68412 for a full discussion of documentation requirements in the air environment.

In the Air Final Rule, DHS and DOS deferred a final decision on the document requirements for arrivals by sea until the second phase. Complete responses to the comments relating to sea travel that were submitted in response to the Air and Sea NPRM are presented in this final rule.

¹³DHS and DOS determined that delaying the effective date of the Air Rule to January 23, 2007, was appropriate for air travel because of operational considerations and available resources. *See id.*

¹⁴The Air Rule did not change the requirements for lawful permanent residents. Lawful Permanent Residents of the United States continue to need to carry their I-551 cards and permanent residents of Canada continue to be required to present a passport and a visa, if necessary, as they did before the rule came into effect.

4. Amendments to Section 7209 of IRTPA

On October 4, 2006, the President signed into law the Department of Homeland Security Appropriations Act of 2007 (DHS Appropriations Act of 2007).¹⁵ Section 546 of the DHS Appropriations Act of 2007 amended section 7209 of IRTPA by stressing the need for DHS and DOS to expeditiously implement the WHTI requirements no later than the earlier of two dates, June 1, 2009, or three months after the Secretaries of Homeland Security and State certify that certain criteria have been met. The section required “expeditious[]” action and stated that requirements must be satisfied by the “earlier” of the dates identified.¹⁶ Congress also expressed an interest in having the requirements for sea and land implemented at the same time and having alternative procedures for groups of children traveling under adult supervision.¹⁷ However, on December 26, 2007, the President signed into law the Department of Homeland Security Appropriations Act of 2008 (“Omnibus Bill”, Pub. L. 110–161) which amended section 7209(b)(1) of IRTPA to require that WHTI “may not be implemented earlier than the date that is the later of 3 months after the Secretary of State and the Secretary of Homeland Security make the certification required in subparagraph (B) or June 1, 2009.” (Section 545, Omnibus Bill).

5. Other Relevant Legislation

On August 4, 2007, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act of 2007).¹⁸ Section 723 of the 9/11 Commission Act of 2007 called on the Secretary of Homeland Security to begin to develop pilot programs with states to develop state-issued secure documents that would denote identity and citizenship. Section 724 of the 9/11 Commission Act of 2007 called on the Secretary of State to examine the feasibility of lowering the execution fee for the proposed passport card.

6. Passport Cards

On October 17, 2006, to meet the documentation requirements of WHTI and to facilitate the frequent travel of persons living in border communities, DOS, in consultation with DHS, proposed to develop a card-format passport for international travel by U.S. citizens through land and sea ports-of-entry between the United States and

¹⁵ Pub. L. 109–295, 120 Stat. 1355 (Oct. 4, 2006).

¹⁶ *Id.* at 546. See Congressional Record, 109th Cong., 2nd sess., September 29, 2006 at H7964.

¹⁷ *Id.*

¹⁸ Pub. L. 110–53, 121 Stat. 266 (Aug. 4, 2007).

Canada, Mexico, or the Caribbean and Bermuda.¹⁹ The passport card will contain security features similar to the traditional passport book. The passport card will be particularly useful for citizens in border communities who regularly cross the border and will be considerably less expensive than a traditional passport. The validity period for the passport card will be the same as for the traditional passport—ten years for adults and five years for minors under age 16. The final rule on the passport card was published on December 31, 2007 at 72 FR 74169.

7. Certifications to Congress

In Section 546 of the DHS Appropriations Act of 2007, Congress called for DHS and DOS to make certain certifications before completing the implementation of the WHTI plan. The Departments have been working toward making these certifications since October 2006. In Section 723 of the 9/11 Commission Act, Congress required the submission of a report to the appropriate congressional committees regarding the state enhanced driver's license pilot program required by a separate provision of the Act.

Congress has asked for the following certifications:

1. *National Institute of Standards and Technology (NIST) Certification.* Acquire NIST certification for the passport card concerning security standards and best practices for protection of personal identification documents.

On May 1, 2007, NIST certified that the proposed card architecture of the passport card meets or exceeds the relevant standard and best practices, as specified in the statute.

2. *Technology Sharing.* Certify that passport card technology has been shared with Canada and Mexico.

DHS and DOS continue to share information and meet regularly with both Mexican and Canadian officials regarding the radio frequency identification (RFID) technology for the passport card.

3. *Postal Service Fee Agreement.* Certify that an agreement has been reached and reported to Congress on the fee collected by the U.S. Postal Service for acceptance agent services.

DOS and the Postal Service have memorialized their agreement on the fees for the passport card set by DOS, including the execution fee which the Postal Service retains.

4. *Groups of Children.* Certify that an alternative procedure has been developed for border crossings by groups of children.

The final rule contains an international border under adult supervision with parental consent as proposed in the land and sea NPRM.

¹⁹ 71 FR 60928.

5. *Infrastructure.* Certify that the necessary passport card infrastructure has been installed and employees have been trained.

WHTI is a significant operational change in a series of changes that are aimed at transforming the land border management system. DHS will utilize the technology currently in place at all ports-of-entry to read any travel document with a machine-readable zone, including passports and the new passport card. CBP Officers have been trained in use of this infrastructure. In addition, CBP will deploy an integrated RFID technical infrastructure to support advanced identity verification in incremental deployment phases. CBP Officers receive ongoing training on WHTI policies and procedures and that will continue as we approach full WHTI implementation, including technology deployment, technology capability, and documentary requirements. CBP will develop training requirements and plans, perform the required training, provide on-site training support and monitor its effectiveness through assessment and ongoing support. Initial training was completed in January 2008.

6. *Passport Card Issuance.* Certify that the passport card is available to U.S. citizens.

DOS has developed an ambitious and aggressive schedule to develop the passport card and is making progress toward that goal. DOS issued the final rule on December 31, 2007. DOS has accepted applications for the passport card since February 1, 2008, and expects to issue cards in spring 2008.

7. *Common Land and Sea Implementation.* Certify to one implementation date.

The final rule provides for one implementation date for land and sea travel.

8. *State Enhanced Driver's License Projects.* Certify to agreement for at least one voluntary program with a state to test a state-issued enhanced driver's license and identification document.

On March 23, 2007, the Secretary of Homeland Security and the Governor of Washington signed a Memorandum of Agreement to develop, issue, test, and evaluate an enhanced driver's license and identification card with facilitative technology to be used for border crossing purposes. On September 26, 2007, the Secretary of Homeland Security and the Governor of Vermont signed a similar Memorandum of Agreement for an enhanced driver's license and identification card to be used for border crossing purposes; on October 27, 2007, the Secretary and the Governor of New York also signed a Memorandum of Agreement. On December 6, 2007, the Secretary of Homeland Security and the Governor of Arizona also signed a similar Memorandum of Agreement to develop, issue, test, and evaluate

an enhanced driver's license and identification card.²⁰

The Departments have worked very closely to update the appropriate congressional committees on the status of these certifications and will continue to do so until final certifications are made. DOS and DHS believe that these certifications will be made well in advance of the June 1, 2009, deadline for implementation. In the unlikely event that the Departments are unable to complete all the necessary certifications by June 1, 2009, the Departments will provide notice to the public and amend the date(s) for compliance with the document requirements for land and sea border crossings as necessary.

II. Documentation at the Border

In the Land and Sea NPRM, the Departments announced that, separate from WHTI implementation, beginning January 31, 2008, CBP would begin requesting documents that help establish identity and citizenship from all U.S. and Canadian citizens entering the United States. This announcement was made to reduce the well-known vulnerability posed by those who might illegally purport to be U.S. or foreign citizens trying to enter the U.S. by land or sea on a mere oral declaration. A person claiming U.S. citizenship must establish that fact to the examining CBP Officer's satisfaction, including by presenting documentation as necessary. Historically, a U.S. citizen has had to present a U.S. passport only if such passport is required under the provisions of 22 CFR part 53. Since January 31, 2008, DHS has expected the evidence of U.S., Bermudian, or Canadian citizenship to include either of the following documents or groups of documents: (1) Document specified in CBP's regulations as WHTI-compliant for that individual's entry; or (2) a government-issued photo identification document presented with proof of citizenship, such as a birth certificate. CBP retains its discretionary authority to request additional documentation when warranted and to make individual exceptions in extraordinary circumstances when oral declarations alone or with other alternative documents may be accepted.

As of January 31, 2008, CBP has required proof of citizenship, such as a birth certificate or other similar documentation as noted in the final rule for U.S. and Canadian children under age 19.

III. Summary of Document Requirements in the Proposed Rule

In the June 26, 2007, NPRM, the Departments proposed new documentation requirements for U.S. citizens and nonimmigrant

²⁰ For more information on these enhanced driver's license projects, see <http://www.dhs.gov>.

aliens from Canada, Bermuda, and Mexico entering the United States by land from Canada and Mexico, or by sea²¹ from within the Western Hemisphere. The proposed document requirements are summarized below; for a full discussion of the proposed requirements, please refer to the NPRM at 72 FR 35088 (hereinafter Land and Sea NPRM).

The Departments proposed that most U.S. citizens entering the United States at all sea or land ports-of-entry would be required to present either: (1) A U.S. passport book; (2) a U.S. passport card; (3) a valid trusted traveler card (NEXUS, FAST, or SENTRI); (4) a valid MMD when traveling in conjunction with official maritime business; or (5) a valid U.S. Military identification card when traveling on official orders or permit.

The Departments proposed that Canadian citizens entering the United States at sea and land ports-of-entry would be required to present, in addition to a visa, if required.²²

1. A passport issued by the Government of Canada; or
2. A valid trusted traveler program card issued by the Canada Border Services Agency (CBSA) or DHS, e.g. FAST, NEXUS, or SENTRI.²³

In the Land and Sea NPRM, DHS and DOS also noted that they had engaged with the Government of Canada in discussions of alternative documents that could be considered for border crossing use at land and sea ports-of-entry under the proposed rule. DHS and DOS pledged continued engagement in discussions of alternatives and welcomed comments suggesting alternative Canadian documents.

Under the proposed rule, all Bermudian citizens would be required to present a passport issued by the Government of Bermuda or the United Kingdom when seeking admission to the United States at all sea or land ports-of-entry, including travel from within the Western Hemisphere.

In the Land and Sea NPRM, the Departments proposed that all Mexican nationals would be required to present either: (1) A passport issued by the Government of Mexico and a visa when seeking admission to the United States or (2) a valid Form DSP-150, B-1/B-2 visa Border Crossing Card (BCC) when seeking admission to

²¹In some circumstances under this rule, it is important to distinguish between types of sea travel. Those circumstances are so noted in the discussion of the final requirements.

²²See 8 CFR 212.1(h), (l), and (m) and 22 CFR 41.2(k) and (m).

²³Canadian citizens who demonstrate a need may enroll in the SENTRI program and currently may use the SENTRI card in lieu of a passport. To enroll in SENTRI, a Canadian participant must present a valid passport and a valid visa, if required. Other foreign participants in the SENTRI program must present a valid passport and a valid visa, if required, when seeking admission to the United States, in addition to the SENTRI Card. The proposed rule did not alter the passport and visa requirements for other foreign enrollees in SENTRI (i.e., other than Canadian foreign enrollees).

the United States at land ports-of-entry or arriving by pleasure vessel or by ferry from Mexico.

The Departments proposed that BCCs alone would no longer be acceptable by a Mexican national to enter the United States from Canada; instead, a Mexican national would need to present a passport and visa when entering the United States from Canada. The Departments proposed that Mexican nationals who hold BCCs would be allowed to use their BCCs for entry at the land border from Mexico and, when arriving by ferry or pleasure vessel from Mexico. For travel outside of certain geographical limits or for a stay over 30 days, Mexican nationals who entered the United States from Mexico possessing a BCC would also be required to obtain a Form I-94 from CBP as is currently the practice.²⁴ The BCC would not be permitted in lieu of a passport for commercial or other sea arrivals in the United States.

The Departments also proposed continuing the current practice that Mexican nationals may not use the FAST or SENTRI card in lieu of a passport or BCC. Mexican national FAST and SENTRI participants, however, would continue to benefit from expedited border processing.

The Departments also proposed to eliminate the exception to the passport requirement for Mexican nationals who enter the United States from Mexico solely to apply for a Mexican passport or other “official Mexican document” at a Mexican consulate in the United States located directly adjacent to a land port-of-entry and who currently are not required to present a valid passport. This type of entry generally occurs at land borders.²⁵

In the Land and Sea NPRM, DHS and DOS encouraged U.S. states to consider participation in enhanced driver’s license pilot programs and the Government of Canada to propose acceptable WHTI-compliant documents that it would issue to its citizens. DHS proposed to consider, as appropriate, documents such as driver’s licenses that satisfy WHTI requirements by denoting identity and citizenship. These documents could be from a state, tribe, band, province, territory, or foreign government if developed in accordance with enhanced driver’s license project agreements between those entities and DHS. In addition to denoting identity and citizenship, these documents will have compatible technology, security criteria, and respond to CBP’s operational concerns.

²⁴See 8 CFR 212.1(c)(1)(i); also 22 CFR 41.2(g). If Mexicans are only traveling within a certain geographic area along the United States’ border with Mexico; usually up to 25 miles from the border but within 75 miles under the exception for Tucson, Arizona, they do not need to obtain a form I-94. If they travel outside of that geographic area, they must obtain an I-94 from CBP at the port-of-entry. 8 CFR 235.1(h)(1).

²⁵See 8 CFR 212.1(c)(1)(ii).

On January 29, 2008, DHS published in the **Federal Register** a final rule concerning minimum standards for state-issued driver's licenses and identification cards that can be accepted for official purposes in accordance with the REAL ID Act.²⁶ In the January 29, 2008 rule, DHS indicated its intent to work with states interested in developing driver's licenses that will meet both the REAL ID and WHTI requirements.

In the Land and Sea NPRM, the Departments also proposed special circumstances for specific groups of travelers permitting other documents:

- U.S. citizens on cruise ship voyages that originate and end in the United States may carry government-issued photo identification (IDs) and birth certificates, consular reports of birth abroad or certificates of naturalization;
- U.S. and Canadian citizen children under age 16 and children age 16 to 18 traveling in groups may carry originals or certified copies of birth certificates; U.S. citizen children may also carry consular reports of birth abroad or certificates of naturalization;
- Members of the Kickapoo Band of Texas and Tribe of Oklahoma may carry the Form I-872, American Indian Card;

The Land and Sea NPRM indicated that document requirements for Lawful Permanent Residents (LPRs) of the United States, employees of the International Boundary and Water Commission (IBWC) between the United States and Mexico, workers on the Outer Continental Shelf (OCS), active duty alien members of the U.S. Armed Forces, and members of NATO-Member Armed Forces would remain unchanged.

The Departments also outlined certain approaches with regard to Native Americans and Canadian Indians, as well as alternative approaches to children and requested comments on the proposed alternatives for inclusion in this final rule. A discussion of those approaches and the comments received follows in the comment response section.

IV. Discussion of Comments

In the ANPRM, the Air and Sea NPRM, and Land and Sea NPRM, DHS and DOS sought public comment to assist the Secretary of Homeland Security to make a final determination concerning which document, or combination of documents, other than valid passports, would be accepted at sea and land ports-of-entry.

DHS and DOS received 2,062 written comments in response to the ANPRM and over 1,350 written comments in response to the Land and Sea NPRM. The Departments also received several comments to the August 11, 2006, Air and Sea NPRM that addressed sea or land

²⁶See REAL ID Final Rule at 73 FR 5272.

travel or the WHTI plan generally, which have been included and addressed in these comment responses. The majority of the comments (1,910 from the ANPRM) addressed only potential changes to the documentation requirements at land border ports-of-entry. One hundred and fifty-two comments from the ANPRM addressed changes to the documentation requirements for persons arriving at air or sea ports-of-entry. Comments in response to both the ANPRM and the Land and Sea NPRM were received from a wide range of sources including: Private citizens; businesses and associations; local, state, federal, and tribal governments; members of the United States Congress; and foreign government officials.

The comments received in response to the ANPRM and the Land and Sea NPRM regarding arrivals by land and sea are addressed in this rulemaking. A summary of the comments from the ANPRM, the Air and Sea NPRM, and the Land and Sea NPRM follows with complete responses to the comments.

A. General

DHS and DOS received thirty-nine comments to the Land and Sea NPRM expressing general agreement with the proposed requirements.

DHS and DOS received several comments to the August 11, 2006, Air and Sea NPRM for implementation of WHTI in the air and sea environments that opposed any requirements for land-border crossings. DHS and DOS received thirty comments to the Land and Sea NPRM expressing general disagreement with the proposed rule. One commenter requested more stringent document requirements than proposed.

B. Implementation

1. General

Comment: One commenter to the Land and Sea NPRM noted that a U.S. citizen cannot be denied entry to the United States.

Response: U.S. citizens cannot be denied entry to the United States; however, the documents that this rule requires are designed to establish citizenship and identity. Travelers without WHTI-compliant documents who claim U.S. citizenship will undergo additional inspection and processing until the inspecting officer is satisfied that the traveler is a U.S. citizen, which could lead to lengthy delays.

Comment: Two commenters to the Land and Sea NPRM expressed concern that the manner by which DHS is certifying itself as being ready to implement WHTI does not allow Congress to exercise the necessary oversight of the WHTI program.

Response: DOS and DHS disagree. The Departments are in the process of taking the necessary steps to be able to make all certifications to Congress as required by statute. WHTI is a significant op-

erational change in a series of changes that are aimed at transforming the land border management system. DHS will utilize the technology currently in place at all ports-of-entry to read any travel document with a machine-readable zone, including passports and the new passport card. CBP Officers have been trained in use of this infrastructure. In addition, CBP will deploy an integrated RFID technical infrastructure to support advanced identity verification in incremental deployment phases. CBP Officers receive ongoing training on WHTI policies and procedures and that will continue as we approach full WHTI implementation, including technology deployment, technology capability, and documentary requirements. CBP will develop training requirements and plans, perform the required training, provide on-site training support and monitor its effectiveness through assessment and ongoing support, with initial training having been completed in January 2008.

The Departments have worked very closely to update the appropriate congressional committees on the status of the certifications and will continue to do so until final certifications are made. Moreover, the National Institute of Standards and Technology (NIST) certified on May 1, 2007, that the architecture of the passport card meets or exceeds the relevant standard and the best practices for protection of personal identification documents as specified in the statute. DOS and DHS are on track to make all certifications well in advance of the June 1, 2009 implementation date.

Comment: Approximately two hundred commenters to the Land and Sea NPRM requested that the Departments commit sufficient resources to fully implement WHTI, including technology, staffing, funding, training, and marketing.

Response: DOS and DHS are fully committed to providing the necessary resources to implement WHTI, including technology, staffing, funding, training, and outreach to the traveling public.

Comment: Several commenters raised concerns about requiring passports or other forms of documentation during emergency situations. One commenter stated that the passport waiver for U.S. citizens during unforeseen emergencies or for humanitarian or national interest reasons should also extend to Canadian and Mexican citizens. One commenter to the Land and Sea NPRM requested that DHS consult with local emergency responders so that WHTI does not compromise their ability to protect American and Canadian communities.

Response: Pursuant to IRTPA, this final rule provides for situations in which documentation requirements may be waived for U.S. citizens on a case-by-case basis for unforeseen emergencies or "humanitarian or national interest reasons." Similarly, CBP has authority to temporarily admit non-immigrant aliens into the United States on a temporary basis in case of a medical or other emergency, which is not changed by this final rule. Finally, local emergency re-

sponders routinely consult with local CBP offices regarding entry procedures into the United States during emergency situations.

Comment: One commenter stated that the Land and Sea NPRM would be contrary to U.S. obligations under international human rights law, free trade agreements, and U.S. statutes, including the International Covenant on Civil and Political Rights, the Charter of the Organization of American States, the North American Free Trade Agreement (NAFTA), and the NAFTA Implementation Act because the rules restrict free movement of people in the Western Hemisphere.

Response: DHS and DOS are not denying U.S. or non-U.S. citizens the ability to travel to and from the United States by requiring an appropriate document for admission. Pursuant to 8 U.S.C. 1182(a)(7)(A) and 1185, DHS and DOS have authority to require sufficient proof of identity and citizenship via presentation of a passport or alternative document when seeking entry to the United States. By requiring a valid passport or other alternative document for entry to the United States from within the Western Hemisphere, DHS and DOS are eliminating a historical exemption of the requirement that all U.S. citizens and other travelers must possess a passport to enter the country.

2. Timeline

Comment: DHS and DOS received one hundred and ten comments to the ANPRM regarding the timeline for implementation of WHTI. Ten of the ANPRM commenters believed that WHTI should be implemented sooner than proposed. Nine of these commenters approved of the timelines proposed, and ninety-four commenters believed that the timeline should be extended.

Several comments to the Air and Sea NPRM and to the Land and Sea NPRM asked for an extended implementation timeline. One commenter stated that WHTI in the land and sea environments should be implemented as soon as possible. A few commenters urged that the Departments give the public ample opportunity to prepare for the final implementation. Twenty-four commenters recommended delaying implementation until pilot projects and field trials had been completed. Two hundred and six commenters recommended that DHS should set a clear implementation date of June 2009.

Six commenters requested a flexible and phased implementation approach for WHTI. Thirty-six commenters recommended ensuring that there is a critical mass of WHTI-compliant documentation (*i.e.*, passports, NEXUS, FAST, and enhanced driver's licenses) in circulation prior to WHTI implementation at land and sea ports-of-entry. One commenter to the Land and Sea NPRM requested that key benchmarks relating to document availability and installation of re-

quired infrastructure be developed to determine the timeline for full implementation.

Response: Since the publication of the NPRM, Congress has amended section 7209 by the 200 Omnibus Bill, to prohibit WHTI from being implemented before June 1, 2009, at the earliest. DHS and DOS will transition toward WHTI secure document requirements over the next 16 months, with implementation on June 1, 2009. This allows ample time for the public to prepare for the change.

Comment: Two commenters stated that ending oral declarations on January 31, 2008, without a plan would cause substantial delays at ports-of-entry and suggested a single implementation date of 2009 rather than a phased implementation. Three commenters were concerned about how the elimination of the practice of accepting oral declarations of citizenship and how processing of travelers without documents in the transition phase will impact the flow of traffic at busy border crossings.

Response: In the Land and Sea NPRM, the Departments announced that, separate from WHTI implementation, beginning January 31, 2008, CBP would begin requesting documents that evidence identity and citizenship from all U.S. and Canadian citizens entering the United States at land and sea ports-of-entry. This change was made to reduce the well-known vulnerability posed by those who might illegally purport to be U.S. or foreign citizens trying to enter the United States by land or sea on a mere oral declaration. As of January 31, 2008, a person claiming U.S. citizenship must establish that fact to the examining CBP Officer's satisfaction, generally through the presentation of a birth certificate and government-issued photo identification. CBP retains its discretionary authority to request additional documentation when warranted and to make individual exceptions in extraordinary circumstances when oral declarations alone or with other alternative documents may be accepted.

CBP has relied on its operational experience in processing travelers entering the United States by land to ensure that the elimination of oral declarations is implemented in a manner that will minimize delays while achieving the security benefit underlying WHTI. The changes that took place January 31, 2008, have gone smoothly. Compliance rates are high and continue to increase. There have been no increases in wait times attributable to the end of accepting oral declarations alone at the border.

Comment: One commenter to the Land and Sea NPRM stated that WHTI implementation should be delayed until a study underway at the Government Accountability Office (GAO) is completed. Another commenter called upon DHS to conduct a more comprehensive economic impact analysis before the proposed rule is promulgated.

Response: The Departments welcome congressional oversight and have cooperated with several GAO engagements that have directly or indirectly touched on WHTI. The Departments intend to fully implement WHTI on June 1, 2009, the earliest possible date, which the Departments believe is in the best interests of national security. Additionally, the Departments are providing ample time for robust communication efforts to and preparation by the traveling public. While the Departments will consider the findings of these GAO engagements with regard to WHTI implementation, it is not necessary, nor would it be appropriate, to delay implementation of WHTI until any particular GAO report is completed. Moreover, CBP has also conducted a robust economic analysis of the proposed rule, as detailed in the Land and Sea NPRM and elsewhere in this document, in accordance with applicable laws, regulations, and policies.

3. Security and Other Operational Considerations

Comment: DHS and DOS received approximately thirty-five comments to the ANPRM stating that the implementation of WHTI at the land borders would result in travel delays at the ports-of-entry. Ten commenters to the Land and Sea NPRM recommended that the “border crossing agencies” implement a plan to anticipate and mitigate longer waits at key border crossings.

Response: DHS has analyzed the potential for travel delays at the ports-of-entry in the document “Western Hemisphere Travel Initiative in the Land and Sea Environments: Programmatic Environmental Assessment.” The public was invited to comment on this analysis. DHS has concluded that implementation of WHTI in the land environment will not have an adverse impact on wait times. By using documents that contain an MRZ or employ RFID technology, the Departments anticipate that wait times will decrease. The final Programmatic Environmental Assessment is available at <http://www.cbp.gov>.

4. Technology

Comment: Eight commenters to the Land and Sea NPRM stated that WHTI should not be implemented until RFID technology has been deployed. These commenters also stated that RFID technology should be deployed at all land-border crossings. Six hundred and thirty-eight commenters stated that appropriate infrastructure and personnel should be in place for a program of this magnitude.

Response: DHS is committed to ensuring that infrastructure and fully trained personnel are in place to successfully implement WHTI in the land environment. DHS believes that deploying new RFID technology at certain land ports-of-entry, in combination with existing technology, is the most cost-effective way to enhance security while ensuring the efficient flow of trade and travelers. DHS be-

lieves that RFID deployment to low-volume land-border ports-of-entry in the near future is unnecessary given the current traffic volumes.

Comment: Two commenters to the Land and Sea NPRM stated that DHS and DOS should reconsider the use of vicinity RFID technology in the passport card because of the substantial privacy and security risks. Four commenters stated that the implementation of WHTI should protect the personal privacy of travelers.

Response: Based on experience to date with the use of RFID technology, DHS is confident that existing and future vicinity RFID-enabled documents can be used at the border in a manner that safeguards personal privacy. RFID technology is currently used as part of existing trusted traveler programs. The RFID chip contained in the passport card issued by DOS will not contain any personal information. The vicinity RFID technology to be deployed would act as a pointer to a secure CBP database and does not transmit personal information. The information is presented to CBP officers as the traveler pulls up to an inspection booth, thus facilitating faster processing of the individual.

5. Cruise Ships

Comment: Four commenters to the Land and Sea NPRM stated their appreciation that passports will not be required for those cruise passengers departing and returning to the United States. One commenter disagreed with the proposed alternative document requirement for certain U.S. citizen cruise ship passengers.

Response: DHS and DOS appreciate these comments, and have decided to adopt in the final rule the NPRM provision addressing U.S. citizens on round-trip cruises. Thus, U.S. citizens traveling entirely within the Western Hemisphere may present a government-issued photo ID along with an original or a copy of a birth certificate instead of a document designated in this final rule if they: (1) Board a cruise ship at a port or place within the United States and (2) return to the same U.S. port or place from where they originally departed. In addition, DHS and DOS added a new provision that clarifies that U.S. citizens under the age of 16 are required to present either an original or a copy of his or her birth certificate without having to provide a photo ID.

Regarding the comment opposing alternative document requirements for cruise ship passengers, because of the nature of round trip cruise ship travel, DHS has determined that when U.S. citizens depart from and reenter the United States on board the same cruise ship, they pose a low security risk in contrast to cruise ship passengers who embark in foreign ports. Therefore, under certain conditions, U.S. citizen cruise ship passengers traveling within the Western Hemisphere will be permitted to present alternative documentation as described in section V.A. of this document.

6. MODUs/OCS

Comment: One commenter to the Land and Sea NPRM supported the clarification on document requirements for workers returning to and from Mobile Offshore Drilling Units (MODUs) within the United States Outer Continental Shelf (OCS).

Response: DHS and DOS appreciate this comment. DHS and DOS clarified in the Land and Sea NPRM that offshore workers who work aboard Mobile Offshore Drilling Units (MODUs) attached to the United States Outer Continental Shelf (OCS), and who travel to and from MODUs, would not need to possess a passport or other designated document to re-enter the United States if they do not enter a foreign port or place. Upon return to the United States from a MODU, such an individual would not be considered an applicant for admission for inspection purposes under 8 CFR 235.1. Therefore, this individual would not need to possess a passport or other designated document when returning to the United States. DHS and DOS note that, for immigration purposes, offshore employees on MODUs underway, which are not considered attached to the OCS, would not need to present a passport or other designated document for re-entry to the United States mainland or other territory if they do not enter a foreign port or place during transit. However, an individual who travels to a MODU directly from a foreign port or place and, therefore, has not been previously inspected and admitted to the United States, would be required to possess a passport or other designated document when arriving at the United States port-of-entry by sea.

C. Passports

1. General

Comment: Thirty-one commenters to the Land and Sea NPRM stated that increasing the number of documents in circulation will increase the number of documents that are lost, stolen or misplaced, and thus individuals in these circumstances will need expedited replacement. One commenter to the Land and Sea NPRM expressed concern about how to enter the United States if his passport had been lost or stolen.

Response: U.S. citizens whose passports are lost or stolen can apply for replacements and request expedited service if necessary. Individuals who are abroad and have an urgent need to travel are generally issued a one-year, limited validity passport that will enable them to continue their trips. That passport will be replaced within the year for no additional fee either domestically or abroad. Individuals who are within the United States and have an urgent need to travel may pay a fee for expedited processing as defined in 22 CFR 51.56.

Comment: One commenter to the Land and Sea NRPM raised concerns about the security of U.S. and foreign passports, stating that

passports are easily falsified or altered. One commenter stated that passports can be intercepted in the mail and falsified.

Response: A primary purpose of the passport has always been to establish citizenship and identity. It has been used to facilitate travel to foreign countries by displaying any appropriate visas or entry/exit stamps. Passports are globally interoperable, consistent with worldwide standards, and usable regardless of the international destination of the traveler. As such, we recognize that false passports are valuable assets for dangerous people. We take precautionary measures to verify passports and share information with international partners regarding lost and stolen passports.

U.S. passports incorporate a host of security features. These security features include, but are not limited to, rigorous adjudication standards and document security features. The adjudication standards establish the individual's citizenship and identity and ensure that the individual meets the qualifications for a U.S. passport. The document authentication features include digitized photographs, embossed seals, watermarks, ultraviolet and fluorescent light verification features, security laminations, micro-printing, and holograms.

An application for a U.S. passport is adjudicated by trained DOS experts and issued to persons who have documented their identity and United States citizenship by birth, naturalization or derivation. Applications are subject to additional Federal government checks to ensure the applicants are eligible to receive a U.S. passport under applicable standards.

U.S. passports are delivered by priority mail with delivery confirmation providing proof of receipt at the addressee's zip code. Mail carriers are instructed to scan the Priority Mail piece at the time it is delivered to the address indicated on the envelope. Priority Mail envelopes also help protect the passport from loss or theft. The envelopes are sturdy and less likely to become damaged or unsealed during mail processing.

Foreign passports accepted for admission to the United States must meet the standards set out in the International Civil Aviation Organization (ICAO) 9303, and a CBP inspecting officer verifies and authenticates such passports presented for admission to the United States.

2. Cost of Passports

Comment: In response to the Air and Sea NPRM and Land and Sea NPRM, DHS and DOS received many comments stating that passports are too expensive for routine cross-border visits and that the cost of the passport book should be reduced or eliminated. Several commenters requested that DOS offer lower rates for families, the elderly, and children under 18. One commenter was concerned about the eventual cost of the passport card. One commenter stated that the cost of the passport card should be reasonable and it should

remain less expensive than a passport. One commenter to the Land and Sea NPRM requested a no-cost passport card for travelers who cross international borders at unique geographical locations. One commenter urged the State Department to provide expedited passport service to truck drivers at no additional charge. Five commenters to the Land and Sea NPRM suggested that U.S. passport fees be waived for Indian tribal members. One commenter stated that the cost of obtaining a passport would cause people not to travel, negatively affecting commerce.

Response: Title 22 of the United States Code mandates that DOS charge a fee for each passport application and a fee for executing each application, where applicable. The law and implementing regulations provide for certain exemptions from passport fees, but the law does not provide DOS the discretion to create additional exemptions or a reduced fee category based on the personal circumstances of the individual. Children do benefit from a lower application fee but it reflects the reduced validity period of the passport rather than a concession based on age. Please see the passport card final rule () for more information on the cost structure of the passport card. See 72 FR 74169.

3. Obtaining Passports

Comment: DHS and DOS received seven comments to the Land and Sea NPRM asking why a birth certificate had to be submitted with the passport application or an old passport had to be submitted along with a renewal application, thus potentially leaving travelers without a passport or a birth certificate to use for international travel.

Response: To prevent fraud, original birth certificates must be examined by passport examiners who are trained in fraud detection before they are returned to the applicant. For the same reason, a person is not permitted to hold two valid passports of the same type except on DOS authorization. DOS physically cancels current passports when it issues new passports, therefore, current or old passports have to be submitted during the renewal process. If a passport is needed for urgent travel, the traveler can request expedited service.

4. DOS Issuance Capacity

Comment: DHS and DOS received one hundred eighty-four comments to the Land and Sea NPRM that expressed concern that DOS would not be able to timely process the increased numbers of passport applications that will result from implementation of the rule. One commenter stated that standard applications should be processed in six weeks and expedited applications in one week. One commenter stated that with the increase of passport applications, adjudicators within DOS are not given enough time to thoroughly

check them. One commenter stated that the wait time in applying for the passport card should be less than thirty days.

Response: Prior to the implementation of the first phase of WHTI in January 2007, DHS and DOS conducted a successful campaign to alert the traveling public and stakeholders in the private sector to the new document requirements implemented in the air phase, particularly in the aviation and travel and tourism industries.

DOS has taken numerous measures in response to the increased demand resulting from the implementation of WHTI. DOS has created hundreds of new positions and is currently producing more than 1.6 million passports per month. DOS anticipates increasing passport issuance to 500,000 documents a week. DOS is also planning to open additional passport facilities around the country. Through these efforts, DOS expects to be able to meet the increased demand resulting from the implementation of WHTI in the land and sea environments.

5. Passport Cards

Comment: DHS and DOS received four comments to the Air and Sea NPRM for implementation of WHTI in the air and sea environments requesting that the passport card be designated as an acceptable document in the air environment. Two commenters to the Land and Sea NPRM did not support the issuance of passport cards because the cards cannot be used for international travel beyond Canada, Mexico, the Caribbean, or Bermuda.

Response: The passport card is intended as a lower cost means of establishing identity and nationality for U.S. citizens in two limited situations—for U.S. citizens crossing U.S. land borders and traveling by sea between the United States, Canada, Mexico, the Caribbean, or Bermuda. The passport card is not designed to be a globally interoperable travel document as defined by the International Civil Aviation Organization (ICAO). In fact, designating the card format passport for wider use, including by air travelers, would inadvertently undercut the broad-based international effort to strengthen civil aviation security and travel document specifications to address the post 9/11 threat environment because it would not meet all the international standards for passports and other official travel documents. Moreover, in its consideration of the 2007 Appropriations Act for the Department of Homeland Security, Congress, while allowing for the use of the passport card by citizens traveling by sea between the United States, Canada, Mexico, the Caribbean, or Bermuda, did not make parallel changes regarding international air travel.

Comment: DHS and DOS received five comments to the Land and Sea NPRM stating that the implementation of WHTI should not take place until the passport card is available. One commenter suggested that the passport card should be issued in conjunction with existing state licensing agencies with federal support. Four com-

menters stated that the passport card could not possibly be designed, tested, publicized, and be readily obtainable by the summer of 2008. One commenter stated that the issuance of a passport card would not facilitate spontaneous travel.

Response: As stated in the Land and Sea NPRM, in which the Departments jointly announced the next phase of WHTI addressing entry into U.S. land and sea ports-of-entry, DHS and DOS have considered the operational challenges posed by the new requirements. As a result, the Departments are taking a flexible, practical approach to land implementation that considers a variety of factors, including the availability of passports, passport cards, and state-issued enhanced driver's licenses pursuant to project agreements with DHS. During this transition period, U.S. citizens will be able to obtain the documents necessary to satisfy WHTI.

Comment: The Government of Canada commented on the Land and Sea NPRM and encouraged the sharing of the technological and procurement specifications of the U.S. passport card in order to assist in the development of comparable passport card options in other countries.

Response: DHS and DOS have engaged with the Government of Canada in discussions of alternative documents proposed by the Canadian federal government and several provinces that could be considered for border crossing use at land and sea ports-of-entry. DHS and DOS have shared technology and procurement specifications with the Government of Canada regarding alternative travel documents and welcome continued engagement with Canadian counterparts to implement WHTI. Alternative identity and citizenship documents issued by the Government of Canada will be considered in the future.

Comment: One commenter to the NPRM recommended that the card should expire not less than ten years from the date issued.

Response: Passport cards, like passport books, will be valid for ten years for adults and five years for children less than 16 years of age.

D. Alternative Documents

1. General

Comment: DHS and DOS received approximately 230 comments to the ANPRM requesting alternative documentation to the traditional passport book. Almost half of those commenters wanted a low-cost identification card that could be used for crossing the border. Many commenters requested that existing CBP Trusted Traveler cards be accepted. Several commenters asked for a clear definition of the documents that would be acceptable under WHTI for land travel. A few commenters stated that only the passport should be acceptable. Two commenters asked that a Transportation Worker Identification Card (TWIC) be designated as an acceptable document.

DHS and DOS received three comments to the Land and Sea NPRM requesting a low-cost identification card that could be used for crossing the border. Eleven commenters to the Land and Sea NPRM supported the opportunity for travelers to present a variety of government-approved identifications. Three commenters requested DHS and DOS to further study the possibility for alternative identification that would be accepted in place of a passport.

Response: Other acceptable documents are designated in this rule by the Secretary of Homeland Security as sufficient to establish identity and citizenship at land and sea ports-of-entry. For U.S. citizens, along with the passport and lower-cost passport card, CBP Trusted Traveler cards under the NEXUS, SENTRI, and FAST programs will be accepted under this rule. In addition, identification cards issued to military members of the U.S. Armed Forces will be accepted when such personnel are traveling on official travel orders. Merchant Mariner Documents (MMDs) issued by the U.S. Coast Guard to U.S. citizens will also be accepted when traveling for official maritime business.

Canadian citizens will be able to present CBP Trusted Traveler Cards. The Border Crossing Card (BCC) issued by DOS to Mexican nationals will be accepted when coming from Mexico.

Documents issued as part of a DHS-approved state enhanced driver's license project will be acceptable according to the agreement between the individual state and DHS, or the Government of Canada and DHS. Details on state enhanced driver's license projects will be published as notices in the **Federal Register** as they are finalized.

In addition to the documents described above, DHS and DOS are providing alternatives to the passport requirement for children under 16, children under 18 traveling in groups, Native American U.S. citizens, Canadian Indians, and certain U.S. cruise passengers on "closed-loop" voyages that originate in the United States. DHS and DOS encourage U.S. states and Canadian provinces (through the Government of Canada) to participate in enhanced driver's license projects.

Comment: Four commenters to the Land and Sea NPRM asked for a definition of "availability" concerning documents that will be accepted under WHTI.

Response: In the Land and Sea NPRM, the Departments stated, in the context of implementation and the effective date of the final rule:

At a date to be determined by the Secretary of Homeland Security, in consultation with the Secretary of State, the Departments will implement the full requirements of the land and sea phase of WHTI. The implementation date will be determined based on a number of factors, including the progress of actions undertaken by the Department of Homeland Security to implement the WHTI requirements

and the availability of WHTI compliant documents on both sides of the border. * * *²⁷

In this context, “availability” means that WHTI-designated documents exist and the public can obtain them. The Departments are publishing this final rule with ample notice to the traveling public. This will also allow sufficient time for the traveling public to obtain documents before June 1, 2009.

Comment: Thirteen commenters to the Land and Sea NPRM asked that the Departments include a provision in the final rule for a non-photo identification document (e.g., fingerprint verification) for persons who object to being photographed based on their religious beliefs.

Response: While DHS and DOS remain sensitive to the concerns of different religious groups, the Departments must balance those concerns against the need to secure our borders through the implementation of the document standards required by WHTI. In particular, photographs serve a unique and essential function and significantly minimize the opportunities for document fraud, unlike fingerprints, by allowing an inspecting CBP officer or any law enforcement officer to immediately compare the picture on the document against the traveler. In order to be consistent with international travel standards, DHS is requiring all adult travelers to carry a government-issued photographic identification document. Failure to do so may result in delays at the border as officers try to determine identity and citizenship.

2. Driver’s License and Birth Certificate

Comment: DHS and DOS received almost 300 comments to the ANPRM stating that the combination of a driver’s license and birth certificate should be acceptable to denote an individual’s citizenship and identity. DOS and DHS received several comments to the Land and Sea NPRM stating that a driver’s license and birth certificate should be acceptable to denote an individual’s citizenship and identity. One commenter stated that because Native Americans can use their tribal identification cards, northern-border citizens should be allowed to use their state or province-issued birth certificates and driver’s licenses. Thirty-eight commenters stated that they should be exempt from a passport requirement due to their unique geographic location. Two commenters requested special provisions for waiving passport requirements for North American Indians traveling through the U.S. border. One commenter disagreed with the cruise ship exemption for U.S. citizens.

Response: The Departments agree that U.S. citizens may use the combination of a driver’s license and birth certificate when traveling

²⁷ 72 FR at 35096.

on “closed loop” cruise ship voyages, where the U.S. citizen departs from a U.S. port or place and returns to the same U.S. port upon completion of the voyage. Accordingly, we disagree with the commenter advocating that the Departments not adopt a special provision for cruise travel. DHS and DOS have determined that exempting certain cruise passengers from a passport requirement is the best approach to balance security and travel efficiency considerations in the cruise ship environment. In contrast, because of the myriad government entities that issue birth certificates and because of the greater potential for counterfeiting or adulteration associated with general use in the land and sea environments, the Departments have determined that it is not prudent to permit the combination of birth certificates and driver’s licenses generally for adults when single, secure documents are available. CBP recognizes that residents of unique geographic locations face special challenges in that some must travel through Canada to get from their homes in the United States to their schools, jobs, and hospitals in other areas of the United States. CBP has worked with many of these communities over the years to facilitate travel. Full implementation of WHTI will not diminish CBP’s ability to utilize existing protocols and other inspection processes to admit travelers to and from unique geographic locations. The Departments have elected not to adopt any of the remaining comments.

Comment: DHS and DOS received several comments to the Land and Sea NPRM stating that because the combination of a driver’s license and birth certificate is acceptable aboard a cruise ship, it should also be acceptable documentation for land-border entries. One commenter stated that because the land-border tourist industry has a far larger impact on the U.S. economy than the cruise-ship industry, the land border deserves no less protection and consideration.

Response: DHS and DOS disagree. As mentioned previously, due to the operational environment and the security risks assessed, the Departments have determined that U.S. citizens may use the combination of a driver’s license and birth certificate when traveling on certain cruise-ship voyages. As detailed in the Land and Sea NPRM, the security risks associated with designating this document combination for U.S. citizens on round-trip cruises are low. *See* 72 FR 35096. DHS and DOS have carefully considered the issues surrounding protection of our land borders and have determined that the documents designated in this rule for entry at land ports-of-entry reflect the best approach to balance security and travel efficiency considerations in the land environment.

Comment: Three commenters to the Land and Sea NPRM recommended that senior citizens be permitted entry to the United States using government-issued photo identification with proof of citizen-

ship based on their low security risk, significant cross-border linkages, and limited financial resources.

Response: DHS and DOS appreciate this comment. DHS and DOS are sensitive to the needs of senior citizens and note that DOS will be offering a lower cost passport card as an alternative to the passport book. Senior citizens who live in participating states or provinces may also be eligible to obtain an enhanced driver's license.

3. Trusted Traveler Documents

Comment: Three commenters to the Land and Sea NPRM expressed concern that the existing NEXUS card is not considered an acceptable form of ID at the border. One commenter sought early written assurances that NEXUS cards will be recognized as entry documents in non-dedicated commuter lanes. One commenter stated that DHS should make it a priority to expand both NEXUS and FAST.

Response: Existing NEXUS cards are already acceptable documents for entry at land and sea ports-of-entry. CBP is upgrading the card format/features and is conducting a robust training program for its personnel at these ports of entry to ensure that CBP Officers enforce both the current documentation procedures recognizing trusted traveler cards and the WHTI requirements uniformly.

Comment: Twenty-six commenters to the Land and Sea NPRM requested the expansion of the NEXUS, SENTRI, and FAST programs. Four commenters requested that the Trusted Traveler Programs be promoted more aggressively. Two commenters requested that the government explore opportunities and technologies to further develop frequent border crossing programs. Two commenters requested the expansion of the NEXUS program to include driver's licenses. Three commenters stated it is imperative that the phrase "as a participant in the program" be interpreted broadly enough to cover situations where truck drivers are crossing the border in a regular commercial or traveler lane for both NEXUS and FAST.

Response: CBP is expanding the NEXUS, SENTRI, and FAST Trusted Traveler programs to accommodate an increase in applications expected as a result of the implementation of WHTI.

4. Children/Groups of Children/ Alternative Approaches/Parental Consent

Comment: Thirty-one commenters to the ANPRM asked to allow travelers under the age of 16 to use a birth certificate as sufficient proof of identity and citizenship. Ninety-three commenters to the Land and Sea NPRM supported the proposed requirements for children. Four commenters to the Land and Sea NPRM suggested the exemption from presenting a passport be raised to age 16 and under. One commenter stated that it would be appropriate to exempt children under the age of 18. Sixty-eight commenters supported the pro-

visions being made for children traveling with their families, in groups, or with chaperones. One commenter stated that there was concern for the treatment of children if they have lost their documentation and were detained at the border. One commenter asked that U.S. and Canadian children traveling in groups for short trips should not be required to carry an original or certified copy of a birth certificate if accompanied by a chaperone. One commenter stated that attendance by students who are not members of athletic teams at high school events is jeopardized by this proposal.

Response: Under this final rule, all U.S. citizen children under the age of 16 are permitted to present at all sea and land ports-of-entry when arriving from contiguous territory either: (1) An original or a copy of a birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services. The Departments have decided to expand the list of documents Canadian children may present. Under the final rule, Canadian citizen children under the age of 16 are permitted to present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate at all sea and land ports-of-entry when arriving from contiguous territory. The final rule relaxes the birth certificate requirement by allowing presentation of either an original or copy of a birth certificate, rather than an original or a certified copy as proposed in the NPRM.

DHS and DOS have determined that age 16 is the most appropriate age to begin the requirement to present a passport book, passport card (for U.S. citizens), or other approved document because at that age most states begin issuing photo identification to children, such as a driver's license, and at that point, the child would, consequently, have a known and established identity that could be readily accessed by border security and law enforcement personnel. Also, age 16 is the age at which DOS begins to issue adult passports, valid for 10 years instead of 5 years for children. DHS and DOS also recognize that it is difficult for the majority of children under age 16 to obtain a form of government-issued photo identification other than a passport.

Under this final rule, U.S. citizen children under age 19, who are traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth sport organizations that arrive at U.S. sea or land ports-of-entry from contiguous territory, are permitted to present either: (1) An original or a copy of a birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by USCIS. Under this provision, groups of children must be under the supervision of an adult affiliated with the organization (including a parent of one of the accompanied children who is only affiliated with the organization for purposes of a particular trip) and all the children have

parental or legal guardian consent to travel. Canadian citizen children under age 19 who are traveling in groups are permitted to present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate under the same circumstances. For purposes of this alternative procedure, an adult would be considered to be a person age 19 or older, and a group would consist of two or more people.

While DHS and DOS are sensitive to the needs of school groups, carrying an original or copy of a birth certificate represents the minimum travel requirement a person would possess to enable us to secure our borders through the implementation of WHTI.

Comment: Six commenters to the Land and Sea NPRM requested that children of Mexican citizenship be included in the special requirements for children under the age of 16 or under the age of 19 when traveling in groups. One of these commenters questioned why Mexican children under the age of 16 were not included under the special requirements for children as Canadian children were.

Response: IRTPA directs DHS and DOS to implement a plan to require documents for citizens for whom the general passport requirements have previously been waived, not to eliminate document requirements currently in place. All Mexican citizens, including children, are currently required to present either a passport and visa, or a BCC upon arrival in the United States. DHS and DOS are not changing the current document requirements for children of Mexican citizenship entering the United States.

Question From the Proposed Rule: Alternative Approach for Children; Parental Consent

In the Land and Sea NPRM, the Departments solicited comments on whether a traditional passport or a passport card should be required for any child under 16 entering the United States without his/her parents and not in a group. DOS and DHS also solicited comments on what would be the advantages and disadvantages to requiring a traditional passport or a passport card, and not allowing child travelers in such circumstances to rely upon a birth certificate, Consular Record of Birth Abroad, or Certificate of Naturalization.

Comment: Two commenters to the Land and Sea NPRM requested that a child under the age of 16 who is traveling with only one parent not be required to have a letter of consent to travel from the other parent. One commenter stated that there needs to be a solution concerning a child traveling across the border with an extended family member who is not the parent.

Response: While the Departments take seriously the issue of child abduction, the final rule does not require a passport or passport card for children or evidence of parental consent for the child to cross the international border. Parents are strongly encouraged to check the requirements of the governments of Mexico and Canada for child

travelers as well as review the guidance on the DOS and DHS Web sites when planning international travel for their children.

Under this final rule, a U.S. citizen who is under the age of 16 is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by DOS, or a Certificate of Naturalization issued by USCIS when entering the United States from contiguous territory at sea or land ports-of-entry.

Based upon a review of the alternative approach for children and the parental consent questions asked in the Land and Sea NPRM and the comments received in response, DHS and DOS are not implementing any additional requirements regarding children or evidence of parental consent to travel other than those proposed in the Land Sea NPRM, which are adopted in this final rule. The Departments note that obtaining a passport book or card or other document with an MRZ or RFID technology may result in faster processing at the border.

5. State Enhanced Driver's License Projects

Comment: DHS and DOS received two comments to the Air and Sea NPRM stating that the best solution to increasing security at our borders is one that incorporates improved technology in existing documentation, such as a driver's license. Thirty commenters to the Land and Sea NPRM stated that WHTI should not be implemented until all state or provincial enhanced driver's license pilot programs are in place. Six Canadian provinces urged DHS to explicitly recognize their proposed enhanced driver's license in the final rule. Twelve commenters supported proposed state pilot programs. One hundred-eight commenters recommended that DHS recognize an enhanced driver's license denoting identity and citizenship for entry by both Canadian and American citizens. One commenter stated that programs for producing an enhanced driver's license need more time for development and distribution prior to the summer of 2008. Eleven commenters recommended completing an enhanced driver's license pilot project prior to implementation of WHTI. Fifty-six commenters to the Land and Sea NPRM requested financial and technical assistance from the Federal government so that states could produce enhanced driver's licenses.

Response: DHS encourages U.S. states and Canadian provinces acting through the Canadian Government to undertake enhanced driver's license projects. In a separate notice published concurrently in the **Federal Register** with this final rule, DHS will designate the Washington State enhanced driver's license as acceptable and notes that additional such documents will be added by notice. DHS will consider documents such as U.S. state and Canadian provincial enhanced driver's licenses that satisfy the WHTI requirements by denoting identity and citizenship undertaken pursuant to agreements with DHS. These documents also will have compatible facili-

tative technology and must meet minimum standards of issuance to meet CBP's operational needs. As noted above, the State of Washington has begun a voluntary program to develop an enhanced driver's license and identification card that would denote identity and citizenship. On March 23, 2007, the Secretary of Homeland Security and the Governor of Washington signed a Memorandum of Agreement to develop, issue, test, and evaluate an enhanced driver's license and identification card with facilitative technology to be used for border crossing purposes. Under this final rule, U.S. citizens arriving from contiguous territory and adjacent islands may present the enhanced driver's license and identification card issued by the State of Washington at land and sea ports-of-entry.

To establish an EDL program, each entity individually enters into agreement with DHS based on specific factors such as the entity's level of interest, funding, technology, and other development and implementation factors. As each EDL program is specific to each entity, DHS does not intend to delay the implementation of WHTI until all potential state and provincial enhanced driver's license projects are operational. However, DHS will continue to welcome states and provinces interested in implementing EDL programs—even those that start after WHTI implementation.

Comment: Two commenters recommended a meeting with all state driver's license directors by January 2008 before the completion of the Washington State pilot program.

Response: DHS appreciates this comment and remains committed to working on a continuing basis with and coordinating efforts among states interested in developing, testing, and implementing pilot programs for enhanced driver's licenses. DHS encourages states interested in developing enhanced driver's licenses to work closely with DHS to that end.

6. Mexican/Canadian/Bermudian Documents

Comment: Two commenters to the Land and Sea NPRM mistakenly believed that DHS had accepted Canadian provincial driver's licenses under the proposed rule. Eleven commenters appreciated DHS's acceptance of alternative Canadian citizenship and identity documents. Four commenters urged DHS and DOS to work with border states and Canadian provinces toward acceptable upgrades of existing documents. In its comments to the Land and Sea NPRM, the Government of Canada noted that DHS and DOS would accept the U.S. Merchant Mariner Document (MMD) as a WHTI-compliant document for U.S. citizens traveling on official maritime business and requested that the modernized Canadian Seafarer's Identity Document (SID) issued by Canada also be recognized by DHS and DOS as a WHTI-compliant document at sea and land ports-of-entry.

Response: While DHS appreciates these comments, DHS is not designating the provincial driver's license or the Canadian Seafar-

er's Identity Document as acceptable documents in this final rule. As stated in the Land and Sea NPRM, DHS and DOS have engaged with the Government of Canada and various provinces in discussions of alternative documents that could be considered for border crossing use at land and sea ports-of-entry under this rule. DHS and DOS will continue working with the Canadian government to explore potential alternative documents in the future. The Departments clarify that the MMD is being phased out and is not a document that will be accepted in the long term.

7. REAL ID Driver's Licenses

Comment: Four commenters to the Land and Sea NPRM asked for clarification whether enhanced driver's licenses issued as part of a state pilot program under WHTI would comply with the REAL ID requirements as well. Two commenters cautioned against the action of implementing WHTI using the requirements of REAL ID due to concerns regarding privacy, costs, a complicated verification system, and the issues of federalism. One commenter stated that DHS must definitively declare that WHTI-compliant driver's licenses meet the improved driver's license requirements of the REAL ID Act.

Response: DHS has worked to align REAL ID and EDL requirements. EDLs are being developed consistent with the requirements of REAL ID and, as such, can be used for official purposes such as accessing a Federal facility, boarding Federally-regulated commercial aircraft, and entering nuclear power plants. While the REAL ID requirements include proof of legal status in the U.S., the EDL will require that the cardholder be a U.S. citizen. In addition, the EDL will also include technologies that facilitate electronic verification and travel at ports-of-entry. DHS is extremely cognizant of the need to protect privacy, and as such institutes best practices with regard to the collection and use of personal data for all of its programs.

8. IBWC

Comment: DHS and DOS received one comment to the Air and Sea NPRM for implementation of WHTI in the air and sea environments requesting that International Boundary and Water Commission (IBWC) identification be acceptable for land and sea travel. DHS and DOS received one comment to the Land and Sea NPRM requesting that IBWC identification be acceptable for land and sea travel. The comment also noted several improvements in the security of IBWC identification documents.

Response: The Departments appreciate this comment. As stated in the Land and Sea NPRM, U.S. citizens and Mexican national direct and indirect employees of the IBWC crossing the United States-Mexico border may continue to use their IBWC cards while on official business under this final rule.

E. U.S. Native Americans and Canadian Indians

1. Proposed Rule

In the Land and Sea NPRM, the Departments sought comments on what Native American tribal documents could be designated as acceptable in the final rule. The Departments specified general criteria for acceptable Native American documents to meet. To satisfy Section 7209 of IRTPA, the documents must establish the identity and citizenship of each individual. In the Land and Sea NPRM, DHS and DOS proposed to accept tribal enrollment documents only if members of the issuing tribe continue to cross the land border of the United States for a historic, religious or other cultural purpose. It was also proposed that the tribal enrollment card must be satisfactory to CBP, may only be used at that tribe's traditional border crossing points and will only be accepted so long as that tribe cooperates with the verification and validation of the document. Tribes were also obligated to cooperate with CBP on the enhancement of their documents in the future as a condition for the acceptance of the document.

DHS and DOS specifically invited comments from those United States tribes with members who continue to cross the border for a traditional purpose. The Departments sought comments from any tribe wishing to propose its tribal enrollment card as an acceptable alternative document. The Land and Sea NPRM asked that such comments include detailed information about traditional border crossings and the locations of those crossings. The Departments also requested information about the enrollment qualifications employed by each such U.S. tribe. A detailed description of the information sought by the Departments is provided in the Land and Sea NPRM. *See* 72 FR at 35099–35100.

DHS and DOS also stated that they were considering alternative approaches and invited comments on these alternative approaches for U.S. Native Americans:

- Make no special provision for U.S. Native Americans because they have an equal opportunity to obtain the same documents that are available to all other U.S. citizens.
- Consider broader issuance of the American Indian Card now issued to members of the federally recognized Kickapoo Tribes or a similar card.
- Accept tribal enrollment cards from tribes whose members continue traditional border crossings without any limitation on the border crossing point or points where each such tribal enrollment card is accepted.
- Accept all tribal enrollment cards from all federally recognized Native American tribes at some or all border crossing points.

The Land and Sea NPRM proposed that, for Canadian Indians:

Canadian members of First Nations or “bands” would be permitted to enter the United States at traditional border crossing points with tribal membership documents subject to the same conditions applicable to United States Native Americans. Canadian First Nations or bands who seek to have their tribal enrollment cards accepted for border crossing purposes should submit comments for the record which contain the information requested * * *for comparable federally recognized U.S. tribes.²⁸

The Land and Sea NPRM also proposed acceptance of the new document to be issued by the Canadian Department of Indian Affairs and Northern Development (hereinafter “INAC Card”)

2. Summary of Comments

Many tribes and bands commented on the NPRM asking that the Departments include their tribal enrollment cards or other tribal documents as acceptable documents under WHTI. These commenters also proposed that all tribal cards issued by U.S. tribes should be accepted.

Several Canadian First Nations commented on the Land and Sea NPRM to propose that their tribal enrollment cards or other tribal documents be designated as acceptable documents. These commenters also proposed that all such band cards for Canadian Indians be accepted. Commenters suggested that, in the alternative, the Departments should accept the proposed, revised INAC card as an acceptable alternative document.

3. Final Rule—U.S. Native Americans

As stated in the Land and Sea NPRM, the United States has a special relationship, founded in the Constitution, with its Native American tribes.²⁹ This relationship allows the federal government, where appropriate, to designate Native American members of federally recognized U.S. tribes for special treatment.³⁰

Comments throughout the rulemaking process and consultations with U.S. Native American tribes have emphasized the particular impact which a new document requirement may have on Native Americans belonging to U.S. tribes who continue to cross the land borders for traditional historic, religious, and other cultural purposes. Several of these tribes are concerned that their members will be required to obtain a passport, passport card, or alternative docu-

²⁸ 72 FR at 35100.

²⁹ See Constitution, I, § **section** 8, cl.3; *Cherokee Nation v Georgia*, 30 U.S. 1, 17 (1831); *Worcester v Georgia*, 31 U.S. 515, 561 (1832); *U.S. v Sandoval*, 231 U.S. 28, 46–47 (1913).

³⁰ *Morton v Mancari*, 417 U.S. 535, 551–55.

ment to maintain contact with ethnically related communities, including, for some tribes, members who live on traditional land in Mexico or Canada.

Based on the record of this rulemaking proceeding, the Departments have adopted an alternative approach from the Land and Sea NPRM for U.S. Native Americans. DHS will work with tribes recognized by the United States government if each tribe (1) Continues to have strong cultural, historic, and religious cross-border ties; and (2) is willing to improve the security of the tribal enrollment documents in the future. Accordingly, paragraph (e) in 8 CFR 235.1 has been revised to capture this change.

As stated in the proposed rule, acceptance of a tribal enrollment document would be contingent upon: (1) The tribe satisfactorily establishing identity and citizenship in connection with the use of its document; (2) the tribe providing CBP with access to appropriate parts of its tribal enrollment records; and (3) the tribe agreeing to improve the security of its tribal documents in cooperation with CBP.

4. Final Rule—Canadian Indians

As requested by Congress, DHS has consulted with the Government of Canada regarding several alternative documents, including a proposed more secure INAC Card. It is anticipated that this new INAC card will be issued by the Canadian Department of Indian Affairs and Northern Development, Director of Land and Trust Services (LTS). DHS proposes to accept this document for Canadian Indians if and when it is available in connection with features and procedures to satisfactorily evidence identity and citizenship.

LTS is responsible for determining the status of all Canadian Indians under Canada's Indian Act of 1876 for purposes of entitlements. Since 1951, the Canadian Government has maintained Indian Registration Lists, which confirm the heritage of each individual for entitlement purposes. Through this long-standing registration process, Canada has formally conferred "registered" Indian status on individuals. Only registered Canadian Indians can apply for the LTS issued "status" card i.e., the INAC card.

LTS currently issues an INAC card with some security features such as a photograph of the document holder. The Government of Canada proposes to issue a new INAC card that would comply with international document security standards agreed by the Governments of Canada and the United States as part of the Security and Prosperity Partnership (SPP). When the document is issued in accordance with the SPP 1.1.3 security standard it is expected to include a machine-readable zone (MRZ).

It is anticipated that Canada will begin to issue the new INAC cards beginning in 2008. DHS continues to have discussions with the Government of Canada about how to ensure that DHS and CBP will have the capability to electronically validate and verify the identity

and citizenship of INAC card holders. Permanent designation of the INAC as an acceptable travel document by the Secretary of Homeland Security will be conditioned on the satisfactory establishment of a process to achieve this validation.

If designated by the Secretary of Homeland Security, the proposed new INAC card will also be accepted as satisfactory evidence of the citizenship and identity of registered Canadian Indians.

In light of the decision to accept an appropriate document issued by the Government of Canada to those recognized by that government as Canadian Indians, the Departments have decided not to accept the multitude of documents issued by the many Canadian First Nations.

5. Specific Comments Objecting to any Document Requirement

Comments: CBP received approximately one hundred comments to the ANPRM and several commenters to the Land and Sea NPRM opposing any regulations that would require Native Americans or Canadian Indians traveling to and from the United States to carry and produce a U.S. or Canadian passport upon entry. These commenters asserted that such a requirement would infringe upon an asserted “right” of indigenous peoples living within the United States and Canada to travel freely across the border. Twenty-two tribes and their representatives commented to the Land and Sea NPRM that WHTI infringed upon an asserted “right” to unrestricted passage across the U.S.-Canadian border granted under the Jay Treaty and other treaties. DHS and DOS received one comment to the Air and Sea NPRM for implementation of WHTI in the air and sea environments similarly stating that Native Americans should not have any restrictions on travel across the borders of the United States. Two commenters stated that assurance was needed that document requirements would not obstruct or discourage them from obtaining those documents or inhibiting the movement of their people. One commenter to the Land and Sea NPRM observed that while Native Americans are eligible to obtain passports as Canadian or U.S. citizens, many choose not to because they perceive it as a threat to their sovereign status. One commenter is concerned that such documents are required to denote citizenship and identity and many believe that accepting citizenship from the U.S. or Canada would undermine the federal government’s treaty obligations. Six individuals and one tribe commented that the rule would have a negative impact on Native Americans’ ability to maintain familial ties and exercise religious and cultural practices across international borders. One tribe commented that international crossings were based on proximity to water. One tribe commented that the Departments’ attempts to fit border crossing needs into a box are simply unrealistic.

Response: The INA requires the inspection of all applicants for admission, with the purpose of verifying identity and citizenship. The Jay Treaty of 1794 and other treaties do not prevent the Departments from requiring documentary evidence of identity and citizenship from Native Americans and Canadian Indians.

Congress, through the enactment of Section 7209 of IRTPA, specifically mandated that the Departments develop a plan to require documentary evidence of identity and citizenship at the borders. Section 289 of the INA³¹ refers to the “right” of “American Indians” born in Canada to “pass the borders of the United States,” provided they possess at least 50 percent of Native American blood. Section 289, however, benefits individuals who establish their identity, their Canadian citizenship, and that they are “American Indians.”

DHS and DOS have proposed to accept certain tribal documents as an appropriate accommodation to U.S. Native Americans.

6. Specific Native American and Canadian Indian Comments Directed to the Rulemaking Process

Comment: Ten commenters to the Land and Sea NPRM requested that DHS and DOS meet with their tribal governments. One tribe and one individual commented that DHS and DOS have failed to adequately consult with federally recognized Indian tribes on the implementation of this rule in accordance with the law and consequently requested that the entire Land and Sea NPRM be retracted until proper “government-to-government” consultations can take place. One tribe expressed concerns that the Land and Sea NPRM would be the “only opportunity” for tribal governments to engage in dialogue regarding the proposed regulation. One commenter encouraged DHS to continue the open dialogue with tribal governments along the international borders and to view tribal governments as an asset for protecting and providing security for the international borders.

Response: Throughout the rulemaking process, DHS has met with Native Americans to discuss the WHTI document requirements and tribal concerns. Moreover, DHS specifically solicited comments from Native Americans in an August 6, 2007, letter to all federally recognized tribes. Comment procedures outlined in the Land and Sea NPRM provided Native Americans with the opportunity to provide information about their tribal enrollment documents. The Departments received comments from numerous tribes, and these comments were fully considered in the decision to issue this final rule.

Comment: Two tribes requested an extension of the comment period for the Land and Sea NPRM to be able to study the options available to them.

³¹ See 8 U.S.C. 1359.

Response: We have carefully considered the comments and determined that it is not advisable to reopen the comment period for the Land and Sea NPRM. Section 7209 of IRTPA, as amended, calls on the Departments to act expeditiously to implement WHTI. The Departments believe that the expeditious issuance of this Final Rule best advances our national security. Throughout the entire WHTI rulemaking process, DHS has met with Native Americans and Canadian Indians to discuss the WHTI document requirements and tribal concerns. DHS specifically solicited comments from Native Americans in an August 6, 2007, letter to all federally recognized tribes. As stated above, the Departments received comments from numerous tribes, and these comments were fully considered and are addressed in this final rule. Delaying issuance of the final rule would delay notice to the public and consequently the time available for travelers to obtain designated documentation. For these reasons, DHS and DOS did not reopen the comment period for the Land and Sea NPRM.

7. Comments on the Acceptance of Tribal Documents

Comment: Twenty-six tribes, along with three individuals, commented that members should be allowed to use their existing tribal cards at any crossing point. One tribe commented that an independent pilot project is underway for a secure identification document that can be used by that tribe. Seven commenters welcomed the proposal to accept tribal enrollment documents as long as those documents are approved by DHS. Many commenters recommended using tribal documents as an alternative to the passport. Several commenters encouraged DHS to continue working with indigenous peoples to provide a mechanism for border crossing that is as streamlined as possible. One tribe's comment requested that Native Americans be granted the same privileges as U.S. Merchant Mariners if the Departments decide that requiring passports is the only option for entry documents. One commenter requested broader issuance of the American Indian Card now issued to members of the federally recognized Kickapoo Tribe or a similar card. Two commenters requested that existing Canadian Certificates of Indian Status (CIS) be accepted as a WHTI-compliant document for entry into the United States. One commenter urges that secure indigenous, tribal or CIS Identity Cards for the purposes of entry into and from the U.S. and Canada be established within the provisions of WHTI. One tribe requested the acceptance of Canadian First Nations' tribal IDs at all border crossings. One tribe argued that their tribal enrollment records were sufficient to prove citizenship and objected to any notion that state-issued birth certificates were superior to their tribal records. One tribe commented that they support the comments by other tribal governments to develop a national tribal ID card for identification purposes for crossing international borders. One tribe did not understand the reluctance of DHS to accept tribal member-

ship documents as sufficient evidence of identity and citizenship to support the right to enter the United States.

Response: DHS and DOS appreciate these comments. As indicated above, based on the comments received and the information provided to the Departments on the particular impact the document requirement would have on Native American tribes, the Departments have determined that, at the time of full implementation of this final rule, U.S. citizens belonging to a federally-recognized tribe may present tribal enrollment documents designated by the Secretary of Homeland Security as meeting the WHTI standards at land ports-of-entry. If designated by the Secretary of Homeland Security as satisfactory, Canadian citizens may present the new proposed INAC card at land ports-of-entry when arriving from contiguous territory.

Documents that will be designated by the Secretary must establish the identity and citizenship of the Native American and Canadian Indian document holders. Documents that will be designated by the Secretary must be secure, and U.S. tribes must also cooperate with CBP on the enhancement of their documents in the future as a condition for the continued acceptance of the document.

8. Native American Privacy Issues

Comment: Twelve tribes commenting to the Land and Sea NPRM were concerned with disclosure and privacy issues regarding religious and cultural information. One tribe noted that information presumably related to traditional border crossings, which they consider private, was not requested from other state or government entities. These commenters insisted that the request for this information was not necessary.

Response: DHS and DOS remain sensitive to related privacy concerns. In the Land and Sea NPRM, DHS and DOS invited any tribe that wished to propose its tribal enrollment card as an acceptable alternative document at one or more traditional border crossing points to submit comments explaining fully why its card should be accepted for travel while noting any privacy concerns. The privacy of tribes and their members will be of the utmost importance to the Departments when consulting with tribes to enhance their documents to be WHTI compliant.

9. Miscellaneous Comments

Comment: One commenter to the Land and Sea NPRM sought clarification on what would be considered a “qualifying tribal entity” under the proposed rule.

Response: A qualifying tribal entity is one that is federally recognized by the government of the U.S. that agrees to meet WHTI tribal document security standards, including agreeing to provide CBP access to the appropriate entries in its enrollment records. DHS will work with federally recognized tribes to develop, test and produce

WHTI-compliant documents. Documents could be produced on behalf of a single tribe or a group of tribes who have agreed to produce a WHTI-compliant tribal document.

Comment: One tribe commented to the Land and Sea NPRM that most members are born at home or on reservations and have difficulty producing a birth certificate, which is an important source document used to obtain documents under the proposed rule.

Response: DHS and DOS have procedures in place to make determinations of citizenship when birth certificates are unavailable.

10. Kickapoo Tribe American Indian Card

Comment: Two commenters to the Land and Sea NPRM asked that DHS and DOS maintain the current practice of allowing members of the Kickapoo Tribe to cross the border under the Texas Band of Kickapoo Act. One commenter is concerned that USCIS has not issued new documents for several years and asks that USCIS resume issuing such form I-872 American Indian Cards.

Response: DHS and DOS agree to continue the current practice of allowing U.S. citizen and Mexican national Kickapoo Indians to enter and exit the United States using their American Indian Cards, issued by USCIS, as an alternative to the traditional passport or passport card at all land and sea border ports-of-entry. There are currently no plans to issue new form I-872 American Indian cards.

F. Outside the Scope of the NPRM and Final Rule

1. General

Comment: DHS and DOS received three comments to the Air and Sea NPRM regarding implementation of WHTI in the air and sea environments that proposed various technical specifications for DOS's passport card.

Response: Comments regarding the technical specifications for the DOS-issued passport card are beyond the scope of this rule; however, the public had the opportunity to comment on DOS's proposed passport card NPRM at 71 FR 60928 (October 17, 2006).

Comment: Two commenters to the Land and Sea NPRM stated that while the economic analysis predicts job losses in border communities, the federal government is not providing a remedy or addressing the impact in any way.

Response: The Departments continue to strive to minimize the potential impact of WHTI implementation, especially on border communities. However, the WHTI plan was mandated by Congress in section 7209 of the IRTPA in response to an important national security imperative identified by the 9/11 Commission. Further, the Departments believe that implementation of WHTI will help facilitate legitimate trade and travel over time. It should also be recognized that a number of factors have a greater effect on the economies of border communities, including overall economic conditions and the

current exchange rate. Providing financial support to those communities is beyond the scope of this rule, however.

Comment: Two commenters stated that FAST enrollees are not currently treated as trusted travelers, which defeats the purpose of the FAST program.

Response: Comments regarding the administration of CBP Trusted Traveler programs are beyond the scope of this rule; however, it should be noted that commercial drivers enrolled in FAST are trusted travelers.

Comment: Ten commenters recommended the creation of a NEXUS appeals board. These commenters also recommended a streamlined renewal process for NEXUS. One commenter suggested several changes to the NEXUS program such as a one card/one fee per family program; extending the validity period of the NEXUS card to ten years; streamlining the renewal process; and recognizing NEXUS and FAST cards for entry in non-dedicated commuter lanes. One commenter suggested a clear NEXUS renewal process that ensures no down time for NEXUS members.

Response: Comments regarding the administration of CBP Trusted Traveler programs are beyond the scope of this rule. DHS would note, however, that under the final rule, all CBP Trusted Traveler documents will be acceptable entry documents for United States and Canadian citizens at all lanes and all land ports-of-entry. DHS further notes that, if an individual feels that an application to a CBP Trusted Traveler program was denied based upon inaccurate information, redress may be sought through contacting the local trusted traveler Enrollment Center to schedule an appointment to speak with a supervisor, writing the CBP Trusted Traveler Ombudsman, or using the DHS Traveler Redress Inquire Program (DHS TRIP). CBP has also been making incremental improvements to its trusted traveler programs. See http://cbp.gov/xp/cgov/travel/trusted_traveler/.

Comment: Two commenters to the Land and Sea NPRM stated that the cost for a Canadian passport is high and that the process for obtaining a passport should be made easier. Another commenter stated that the process for obtaining a Mexican passport and visa should be made less onerous.

Response: While the U.S. government is working closely with passport agencies throughout the Western Hemisphere on WHTI and other travel document security matters, each nation's government ultimately controls the process and cost for obtaining a passport. The application process for and cost of a Canadian or Mexican government-issued document is outside the scope of this rule and outside the Departments' authorities.

Comment: One commenter requested that a "full environmental statement" be prepared prior to implementation of passport or documentation control.

Response: DHS and DOS documented their assessment of the potential for impact on the quality of the human environment in the “Western Hemisphere Travel Initiative in the Land and Sea Environments: Programmatic Environmental Assessment” dated September 10, 2007. The public was given an opportunity to comment on a draft of the Programmatic Environmental Assessment (PEA) upon the publication of the Notice of Availability on June 25, 2007. See 72 FR 34710. Comments regarding the draft PEA were addressed in the Final PEA. Based on the final PEA, a determination was made that the travel documents proposed for WHTI and use of the travel documents for implementation of IRTPA will not have a significant impact on the quality of the human environment and that further analysis under the National Environmental Policy Act of 1969 (NEPA) would not be necessary. A Finding of No Significant Impact (FONSI) was issued on September 10, 2007, a copy of which is contained in the final PEA.

Comment: One commenter to the Land and Sea NPRM disagreed with the employee citizenship requirement for the enhanced driver’s license projects because it would result in the loss of valuable workforce for state governments.

Response: While DHS appreciates this comment, policies regarding state employee citizenship requirements are beyond the scope of this rule. DHS remains committed to working with and coordinating efforts among states interested in developing, testing, and implementing enhanced driver’s license projects. DHS encourages states interested in developing enhanced driver’s licenses to work closely with DHS to that end.

Comment: Two comments to the Land and Sea NPRM requested that DHS support the proposal to establish DOS offices in border communities to provide flexibility for spontaneous trips. Two commenters recommended an increase in the capacity of one of the regional passport offices specifically for passport service companies.

Response: While DHS and DOS appreciate these comments, expansion of DOS passport offices in specific border communities is beyond the scope of this rule.

Comment: One commenter to the Land and Sea NPRM recommended that the number of expedited applications for individual passports submitted by service companies be increased.

Response: While DHS and DOS appreciate these comments, operational policies between passport service providers and DOS are beyond the scope of this rule.

Comment: One commenter to the Land and Sea NPRM recommended that the Departments explore, as part of the proposed pilot project concept, the development of an “Indigenous lane” for border crossing/passage purposes.

Response: While DHS remains committed to working with tribal groups, operational policies regarding “dedicated lanes” are beyond the scope of this rule.

2. Air Rule

Comment: One commenter to the Land and Sea NPRM requested that the alternative procedure for U.S. and Canadian children entering the United States under age 19 traveling as part of school groups, religious groups, social or cultural organizations, or teams associated with youth support organizations be extended to the air environment in addition to land and sea ports-of-entry.

Response: Comments regarding documentation requirements for U.S. and Canadian children entering the U.S. at air ports-of-entry are beyond the scope of this rule; however, the public had the opportunity to comment on these requirements in the August 11, 2006, NPRM for the air environment. Children under the age of 16 arriving from Western Hemisphere countries are required to present a passport when entering the United States by air. For a more detailed description of documentation requirements for children entering the U.S. through air ports-of-entry, see the Air Final Rule at 71 FR 68416 (November 24, 2006).

Comment: One commenter to the Land and Sea NPRM requested that an alternative procedure for the transfer of medical patients be established for all modes of travel.

Response: The air mode of travel is beyond the scope of this rule; however, IRTPA provides for situations in which documentation requirements may be waived on a case-by-case basis for unforeseen emergencies or “humanitarian or national interest reasons.” Please see the Air Final Rule, 71 FR at 68419, for more information.

3. Lawful Permanent Residents

Comment: Three commenters to the Land and Sea NPRM stated that a Lawful Permanent Resident card should be sufficient to travel to and from the United States without the presentation of a passport. One commenter to the NPRM expressed concern about waiting to renew an expired Lawful Permanent Resident card when applying for entry into the United States.

Response: Lawful Permanent Residents (LPRs) of the United States will continue to be able to enter the United States upon presenting a Lawful Permanent Resident card (I-551) or other valid evidence of permanent resident status. There are current regulations that already address the entry of LPRs into the United States, which remain unchanged by WHTI.

4. Dual Nationals

Comment: One commenter to the Land and Sea NPRM sought clarification on what documents would be required for travelers who have dual citizenship.

Response: The WHTI rule lists the new documentation requirements for U.S., Canadian, Bermudan citizens, and Mexican nationals entering the United States by land or sea from within the Western Hemisphere. WHTI does not alter United States immigration law or regulations regarding citizenship.

G. Public Relations

1. General

Comment: DHS and DOS received fifty comments to the ANPRM asking for a partnership between the U.S. and Canada to address WHTI issues. One hundred commenters to the Land and Sea NPRM expressed a strong desire to see a more robust coordination between Canada and the United States. Nineteen commenters recommended a joint public communications campaign with Canada.

Response: The Secretaries of DHS and DOS have worked and continue to work closely with the Canadian and Mexican governments on numerous fronts, including the Security and Prosperity Partnership (SPP) of North America, the Smart Border Declaration, and the Shared Border Accord. The objectives of the initiatives are to establish a common approach to security to protect North America from external threats, prevent and respond to threats within North America, and further streamline the secure and efficient movement of legitimate traffic across our shared borders. The Secretaries are committed to working with our international partners to establish a common security strategy.

Comment: One commenter stated that a new comment period should be opened or else the Land and Sea NPRM should be withdrawn.

Response: The Departments have carefully considered the comment and determined that it is not advisable to reopen the comment period for the Land and Sea NPRM. Section 7209 of the IRTPA, as amended, calls on the Departments to implement WHTI expeditiously, which the Departments believe is in the best interests of national security. The procedures for the 60-day comment period outlined in the Land and Sea NPRM provided the public the opportunity to provide meaningful comments on the proposed rule and questions asked. The Departments received over 1,350 comments, which were fully considered and are addressed in this document. Moreover, delaying issuance of the final rule would delay notice to the public and shorten the time available to the traveling public to obtain designated documentation. For these reasons, DHS

and DOS did not open a new comment period and did not withdraw the Land and Sea NPRM.

2. Outreach

Comment: DHS and DOS received thirteen comments to the ANPRM that recommended the Departments work with the travel industry to launch an effective communications campaign to inform and educate the traveling public about any new documentation requirements. One hundred seventy comments were received to the Land and Sea NPRM stating that all the changes taking place during implementation of WHTI are confusing. Seven hundred and seventeen commenters encouraged DHS to formulate, implement, and fully fund a public awareness communications campaign immediately, particularly as it could add clarity. Six commenters recommended that a public relations/ marketing firm be hired. One commenter encouraged DHS and DOS to timely convey information concerning the plan to end oral declarations on January 31, 2008. One commenter requested that the DHS undertake a full review of the public education plan for WHTI.

Response: DHS and DOS are committed to an effective and intensive communications strategy during the implementation of WHTI. As was done in preparation for the changes at the border that took place on January 31, 2008, the Departments will continue to issue detailed press releases, address the public's frequently asked questions, supply travel information on their Web sites, and hold public meetings in affected communities. During the early phase of the implementation of WHTI in the air environment, DHS and CBP worked closely with the travel industry and other industries to disseminate timely, accurate information, and aggressively publicize the new requirements. CBP found that the overwhelming majority of affected air travelers, approximately 99 percent, presented acceptable documentation upon entry to the United States from within the Western Hemisphere from the earliest stages of implementation. This figure included not only U.S. citizens but also the citizens of Canada, Mexico, and Bermuda. The Departments believe that this coordinated public outreach effort will continue to serve as a useful model for implementation in the land and sea phase of WHTI.

H. Regulatory Analyses

1. Regulatory Assessment

Comment: DHS and DOS received over 1,700 comments to the ANPRM that expressed concern that WHTI would have a negative impact on trade and tourism. Twenty-four comments to the Air and Sea NPRM for WHTI stated that implementation would have a negative impact on cross-border travel. Five commenters to the Land and Sea NPRM stated that implementation would have a negative impact on day trips across the border. Approximately nine hundred

commenters stated that WHTI would have a negative impact on trade and tourism resulting in revenue losses. Twenty-two commenters to the Land and Sea NPRM recommended that security be improved without damaging healthy cross-border trade and commerce.

Response: Pursuant to Executive Order 12866, CBP conducted an economic analysis to address the potential impacts of reduced travel that could result from the implementation of WHTI in the land and sea environments. This analysis was published concurrently with the Land and Sea NPRM, and CBP requested comments on the documents. Based on the Regulatory Assessment, CBP acknowledges that WHTI could have a negative impact on travel in both environments; however, as demonstrated in intensive case studies of eight representative U.S. communities along both the Canadian and Mexican borders, reduced travel attributable to WHTI is predicted to have a less-than-1 percent impact on local output and employment levels in those communities. Additionally, CBP found that the cruises covered by the rule would not likely be greatly affected because obtaining a travel document represents a small portion of overall cost for most cruise passengers. Finally, the analysis for travel in the air environment was finalized with the Air Final Rule (Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere published November 24, 2006 (71 FR 68412)).

Comment: CBP received three comments to the Regulatory Assessment for the Land and Sea NPRM stating that the analysis understated the economic losses that would result from implementation of the rule. Eight commenters to the Regulatory Assessment for the Land and Sea NPRM contended that the economic analysis was incomplete and insufficient. Two commenters stated that the underlying assumptions in the analysis were arbitrary and low. Several commenters stated that there must be a meaningful, third-party economic impact assessment of any proposed measures before proceeding.

Response: While these commenters were dissatisfied with the economic analysis, they did not submit specific information that would enhance the current analysis, nor did they submit alternative analyses that more robustly considered the impacts on the U.S. and foreign economies. The analysis prepared by CBP for the Land and Sea NPRM was reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866 and OMB Circular A-4. According to OMB Circular A-4, a good regulatory analysis should include: (1) A statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs—quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis. The two Regulatory Assessments that were published in the public docket concurrently with the Land and Sea NPRM (see USCBP-

2007–0061–0002 and USCBP–2007–0061–0004) fully met these criteria. A regulatory analysis conducted by a “third party” is not a requirement under either Executive Order 12866 or OMB Circular A–4.

Comment: CBP received one comment to the Regulatory Assessment of the Land and Sea NPRM stating that it did not make sense for predicted forgone cruise travel to have a higher percentage of reduced travel than forgone land travel.

Response: CBP notes that estimated forgone travel was predicted using elasticities of demand for cruise travel and derived demand elasticities for land travel. CBP estimates that cruise travel is more elastic than land-border travel because cruise passengers travel almost exclusively for leisure purposes. Cruise passengers, thus, have many potential substitutes for their cruise trips; in economic terms, cruise passengers’ demand for travel is very “elastic.” Conversely, land travelers cross the border for a myriad of reasons, including work, shopping, visiting family and friends, as well as vacation purposes. Because land-border trips are less “elastic” than cruise trips, the percent of forgone travelers is lower in the land environment than the cruise environment.

Comment: Two commenters to the Land and Sea NPRM stated that the economic analysis cannot be considered reliable because it examines a program that is not yet in place.

Response: Per Executive Order 12866, an economic analysis is required for all major rulemakings prior to final implementation. This analysis must contain an identification of the regulatory “baseline” as well as the anticipated costs and benefits of the rule on relevant stakeholders. The analysis prepared for the Land and Sea NPRM was reviewed by the Office of Management and Budget (OMB) in accordance with Executive Order 12866 and OMB Circular A–4.

Comment: Two commenters to the Land and Sea NPRM stated that the Regulatory Assessment erroneously analyzed expenditure flows from the Mexican and Canadian border together, when they should actually be analyzed separately.

Response: As described in the detailed Regulatory Assessment for implementation of WHTI in the land environment (USCBP–2007–0061–0002) published concurrently with the Land and Sea NPRM and this final rule, the analysis did address economic impacts on the northern and southern borders separately.

Comment: Two commenters to the Land and Sea NPRM asked about calculated risk reduction that would occur as a result of implementation of WHTI. One commenter stated that a third-party assessment of improved border security should be conducted.

Response: Typically, reductions in the probability of a terrorist attack resulting from a regulation are measured against the baseline probability of occurrence (the current likelihood that a terrorist attack involving an individual arriving in the United States in the sea

environment will be attempted and be successful) and combined with information about the consequences of the attack. The difference between the baseline probability of occurrence and the probability of occurrence after the regulation is implemented would represent the incremental probability reduction attributable to the rule.

Historical data on the frequency of terrorist attacks to estimate the current baseline probability of attack within the United States cannot be used for several reasons: existing data does not provide information about whether documented attacks were attributable to the lack of a passport requirement; the data on international events occurring within the United States in the last decade are limited, and little information is available to describe the consequences of most of these events; and use of these data to project future probability of attack requires an understanding of the socioeconomic and political conditions motivating and facilitating these events historically and foresight with regard to how these factors may change in the future. In the absence of more detailed data, DHS and DOS are unable to quantitatively estimate the incremental reduction in the probability of terrorist attack that will result from this rule.

Instead, CBP conducted a “breakeven analysis” to determine what the reduction in risk would have to be given the estimated costs of the implementation of WHTI (land environment only). Using the Risk Management Solutions U.S. Terrorism Risk Model (RMS model), CBP estimated the critical risk reduction that would have to occur in order for the costs of the rule to equal the benefits—or break even. As calculated, critical risk reduction required for the rule to break even ranges from 3 percent to 34 percent (for more detail see the section below on Executive Order 12866).

This breakeven analysis prepared by CBP for the Land and Sea NPRM was reviewed by OMB in accordance with Executive Order 12866 and OMB Circular A-4. An analysis conducted by a “third party” is not a requirement under either Executive Order 12866 or OMB Circular A-4.

Comment: Two commenters to the Land and Sea NPRM stated that the costs to the State Department to “catch up” on the backlog of passport applications were not considered.

Response: The commenter is correct. CBP did not consider the costs to DOS in the Regulatory Assessment because the increased costs to DOS as a result of increased demand for passports due to WHTI can be recouped by a surcharge on the fee for the application of a passport. *See* 22 U.S.C. 214(b). It would be inappropriate, therefore, to present these as costs of the regulation.

Comment: One commenter to the Land and Sea NPRM stated that she was “mystified” by the assertion that an economic analysis was not necessary.

Response: DHS and DOS did not make this assertion in the Land and Sea NPRM. CBP conducted two extensive Regulatory Assess-

ments for implementation of WHTI in the land and sea environments that were summarized in the preamble to the Land and Sea NPRM and were available in full for public comment (see USCBP-2007-0061-0002 and USCBP-2007-0061-0004).

Comment: Four commenters to the Land and Sea NPRM stated that the estimated costs of lost trips by Canadian travelers were incorrectly calculated in the Regulatory Assessment for the implementation of WHTI in the land environment.

Response: DHS and DOS appreciate these comments. CBP has modified the Regulatory Assessment for this final rule to more accurately account for potential lost trips from Canadian visitors to the United States. Please refer to the section below titled “Executive Order 12866” for a summary of the revised analysis and refer to the public docket and <http://www.cbp.gov> for the complete Regulatory Assessments for the final rule.

Comment: Three commenters to the Land and Sea NPRM stated that the Regulatory Assessment erroneously assumed that lost spending in Canada and Mexico resulting from forgone travel to those countries would instead be spent in border communities. One commenter stated that the Regulatory Assessment erroneously assumed that U.S. dollars that would have been spent in Canada and Mexico would now remain in the United States.

Response: These commenters appear to have misread the Regulatory Assessments. As described in the detailed Regulatory Assessment for Implementation of WHTI in the Land Environment (USCBP-2007-0061-0002) published concurrently with the Land and Sea NPRM, the analysis did not assume that all lost spending in Canada and Mexico would instead be spent exclusively in border communities. CBP made several simplifying assumptions in order to estimate increases in U.S. spending within the regional areas designated for case study. The analysis assumed that only a subset of the U.S. travelers who choose not to obtain documentation and stay in the United States spend in the regional study area what they would have spent in Mexico or Canada. In other words, the analysis assumed U.S. travelers visiting Mexico and Canada for tourist reasons will substitute their forgone trips abroad with trips within the United States outside of the regional study area.

Additionally, as noted in the Regulatory Assessment, CBP made the simplifying assumption that the money these travelers would have spent on foreign travel remains in their home country. The analysis did not attempt to determine the portion of forgone travel-related expenditures that might be used instead for purchasing goods from foreign entities via mail order or the Internet. This factor was acknowledged as a source of uncertainty in the cost estimates for WHTI implementation in the land environment.

Comment: One commenter stated that the analysis of tourism expenditures did not consider the impact of the cost of acquiring documentation on spend rates.

Response: CBP agrees that the impact of the cost of acquiring WHTI-compliant documentation should be included in the estimate of lost expenditures in U.S. border communities. Specifically, in the final Regulatory Assessment, CBP considered whether the costs of obtaining documentation would be offset by reduced spending on the trip itself, or whether the traveler would reduce household spending locally by a commensurate amount. A review of the travel economics literature was inconclusive, but suggests that travelers often do not adhere to a budget while on a trip, particularly vacations. Also, CBP was unable to identify literature predicting whether travelers would amortize documentation costs across all the trips taken in a given time period, or whether they might reduce spending on the first trip taken after obtaining acceptable documentation to offset documentation costs. For these reasons, CBP believes it is most appropriate to assume that individuals who continue traveling after the implementation of WHTI will not spend less on cross-border trips. Rather, the costs of obtaining acceptable documentation will result in reduced household spending in the travelers' home communities. Therefore, the analysis of the distributional impacts of the final rule includes a reduction in household expenditures by U.S. citizens to offset the cost of obtaining WHTI-compliant documents. Similar changes in spending by Mexican and Canadian travelers are assumed to occur in those travelers home communities, and as a result, do not affect expenditures in the United States. Please refer to the section below titled "Executive Order 12866" for a summary of the revised analysis and refer to the public docket and <http://www.cbp.gov> for the complete Regulatory Assessments for the final rule.

Comment: One commenter stated that some of the findings of the Regulatory Assessments analysis is based on surveys of traveler responses that may not be accurate.

Response: CBP disagrees with this comment. Estimation of lost consumer surplus under each of the regulatory alternatives considered requires information about travelers' willingness to pay for access to Mexico or Canada. Willingness to pay is the maximum sum of money an individual would be willing to pay rather than do without a good or amenity. If the cost of access to Mexico or Canada is within the range of costs below this maximum value, the traveler will pay for access and continue to travel. Likewise, if the cost of access exceeds this maximum, travelers will forgo future travel. Therefore, because it represents a maximum value, willingness to pay for access to these countries will not vary depending on the regulatory alternative considered. It is calculated once, and then that value, or in this case demand curve, can be used to evaluate decisions about fu-

ture travel based on a range of regulatory alternatives with varying access costs.

The Regulatory Assessment relies on the results of a survey conducted for the Department of State. The surveyors informed respondents that after the implementation of WHTI, they would be required to have a valid passport for travel to Mexico and Canada. While the survey did not specify the cost of obtaining the document, a passport is a well-known, familiar form of identification with published fees that has been available for decades. Therefore, CBP believes it is acceptable to assume that the survey respondents had a reasonable idea of the cost of the document when responding to this question. The response to this question and information about the number of travelers making trips is used to estimate travelers' willingness to pay for access to these countries in the form of a linear demand curve. For the reasons discussed previously, this demand curve is relevant regardless of the regulatory option considered. Therefore, CBP used it to predict responses to varying regulatory alternatives not considered in the original survey that incorporate ranges of compliance options and costs.

2. Regulatory Flexibility Act

Comment: One commenter noted several examples of individuals who would be considered small businesses, including sole proprietors, self-employed individuals, and freelancers.

Response: CBP agrees that these "sole proprietors" would be considered small businesses and could be directly affected by the rule if their occupation requires travel within the Western Hemisphere where a passport was not previously required. The number of such sole proprietors is not available from the Small Business Administration or other available business databases, but we acknowledge that the number could be considered "substantial." However, as estimated in the Regulatory Assessment for implementation of WHTI in the land environment, the cost to such businesses would be only \$125 for a first-time passport applicant, \$70 for a first-time passport card applicant plus an additional \$60 if expedited service were requested.

V. Final Document Requirements

Based on the analysis of the comments and section 7209 of IRTPA, as amended, DHS and DOS have determined that U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico entering the United States at land and sea ports-of-entry from the Western Hemisphere will be required to present documents or combinations of documents designated by this final rule. DHS and DOS expect the date of full WHTI implementation to be June 1, 2009. As noted, the Congress has mandated that WHTI shall be implemented no earlier than the date that is the later of 3 months after the Secretary of

State and the Secretary of Homeland Security make the certification required in subparagraph (B) or June 1, 2009. (Section 545, Omnibus Bill). The Departments will implement on June 1, 2009.

A. U.S. Citizens Arriving by Sea or Land

Under the final rule, most U.S. citizens³² entering the United States at all sea or land ports-of-entry are required to have either: (1) A U.S. passport; (2) a U.S. passport card; (3) a valid trusted traveler card (NEXUS, FAST, or SENTRI); (4) a valid MMD when traveling in conjunction with official maritime business; or (5) a valid U.S. Military identification card when traveling on official orders or permit.

Under the final rule, cards issued for the DHS Trusted Traveler Programs NEXUS, Free and Secure Trade (FAST), and Secure Electronic Network for Travelers Rapid Inspection (SENTRI) are designated as entry documents for U.S. citizens at all lanes at all land and sea ports-of-entry when traveling from contiguous territory or adjacent islands. Additionally, U.S. citizens who have been pre-screened as part of the NEXUS or Canadian Border Boat Landing Program who arrive by pleasure vessel from Canada are permitted to report their arrival by telephone or by remote video inspection, respectively.

U.S. citizens who arrive by pleasure vessel from Canada are permitted to show the NEXUS card in lieu of a passport or passport card along the northern border under the auspices of the remote inspection system for pleasure vessels, such as the Outlying Area Reporting System (OARS). Currently, as NEXUS members, U.S. citizen recreational boaters can report their arrival to CBP by telephone. Otherwise, these U.S. citizen pleasure vessel travelers arriving from Canada are required to report in person to a port-of-entry in order to enter the United States.³³

After full implementation of WHTI, dedicated lanes for trusted traveler programs will still exist at certain land ports-of-entry, which will provide program members with the opportunity for expedited inspections.

³²Unless the U.S. citizen falls into one of the special rule categories listed below.

³³See 8 CFR 235.1(g). U.S. citizen holders of a Canadian Border Boat Landing Permit (Form I-68) are required to possess a passport, passport card, or trusted traveler program document when arriving in the United States in combination with the Form I-68 and are required to show this documentation when applying for or renewing the Form I-68. Participants would continue to benefit from entering the United States from time to time without having to wait for a physical inspection, subject to the applicable regulations. More information on the Canadian Border Boat Landing Program (I-68 Permit Program) is available on the CBP Web site at <http://www.cbp.gov>.

B. Canadian Citizens and Citizens of Bermuda Arriving by Sea or Land

1. Canadians

Under this final rule, Canadian citizens entering the United States at sea and land ports-of-entry are required to present, in addition to any visa required:³⁴

- A valid passport issued by the Government of Canada,³⁵ or
- A valid trusted traveler program card issued by CBSA or DHS, e.g., FAST, NEXUS, or SENTRI.³⁶

Additionally, Canadian citizens in the NEXUS program who arrive by pleasure vessel from Canada are permitted to present a NEXUS membership card in lieu of a passport along the northern border under the auspices of the remote inspection system for pleasure vessels, such as the Outlying Area Reporting System (OARS).³⁷ Currently, as NEXUS members, Canadian recreational boaters can report their arrival to CBP by telephone.³⁸ Otherwise, these Canadian pleasure vessel travelers arriving from Canada are required to report in person to a port-of-entry in order to enter the United States.³⁹

2. Bermudians

Under this final rule, all Bermudian citizens are required to present a passport⁴⁰ issued by the Government of Bermuda or the United Kingdom when seeking admission to the United States at all sea or land ports-of-entry, including travel from within the Western Hemisphere.

³⁴See 8 CFR 212.1(h), (l), and (m) and 22 CFR 41.2(k) and (m).

³⁵Foreign passports remain an acceptable travel document under section 7209 of the IRTPA.

³⁶Canadian citizens who demonstrate a need may enroll in the SENTRI program and currently may use the SENTRI card in lieu of a passport. To enroll in SENTRI, a Canadian participant must present a valid passport and a valid visa, if required, when applying for SENTRI membership. Other foreign participants in the SENTRI program must present a valid passport and a valid visa, if required, when seeking admission to the United States, in addition to the SENTRI card. This final rule does not alter the passport and visa requirements for other foreign enrollees in SENTRI (i.e., other than Canadian foreign enrollees). Currently, Canadian citizens can show a SENTRI, NEXUS, or FAST card for entry into the United States only at designated lanes at designated land border ports-of-entry.

³⁷Permanent residents of Canada must also carry a valid passport and valid visa, if required.

³⁸Remote pleasure vessel inspection locations are only located on the northern border.

³⁹See 8 CFR 235.1(g). Canadian holders of a Canadian Border Boat Landing Permit (Form I-68) are required to possess a passport or trusted traveler card when arriving in the United States in combination with the Form I-68 and would be required to show this documentation when applying for or renewing the Form I-68.

⁴⁰Bermudian citizens must also satisfy any applicable visa requirements. See 8 CFR 212.1(h), (l), and (m) and 22 CFR 41.2(k) and (m).

C. Mexican Nationals Arriving by Sea or Land

Under this final rule, all Mexican nationals are required to present either: (1) A passport issued by the Government of Mexico and a visa when seeking admission to the United States, or (2) a valid BCC when seeking admission to the United States at land ports-of-entry or arriving by pleasure vessel or by ferry from Mexico.

For purposes of this rule, a pleasure vessel is defined as a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire. A ferry is defined as any vessel: (1) Operating on a pre-determined fixed schedule; (2) providing transportation only between places that are no more than 300 miles apart; and (3) transporting passengers, vehicles, and/or railroad cars. We note that ferries are subject to land border-type processing on arrival from, or departure to, a foreign port or place. Arrivals aboard all vessels other than ferries and pleasure vessels would be treated as sea arrivals.⁴¹

Mexican nationals who hold BCCs will continue to be allowed to use their BCCs in lieu of a passport for admission at the land border from Mexico and when arriving by ferry or pleasure vessel from Mexico when traveling within the border zone for a limited time period. For travel beyond certain geographical limits or a stay over 30 days, Mexican nationals who enter the United States from Mexico possessing BCCs are required to obtain a Form I-94 from CBP.⁴² The BCC is not permitted in lieu of a passport for commercial or other sea arrivals to the United States.

Under current regulations, Mexican nationals may not use the FAST or SENTRI card in lieu of a passport or BCC. This will continue under the final rule, however, these participants would continue to benefit from expedited border processing.

Currently, Mexican nationals who are admitted to the United States from Mexico solely to apply for a Mexican passport or other "official Mexican document" at a Mexican consulate in the United States located directly adjacent to a land port-of-entry are not cur-

⁴¹ For example, commercial vessels are treated as arrivals at sea ports-of-entry for purposes of this final rule. A commercial vessel is any civilian vessel being used to transport persons or property for compensation or hire to or from any port or place. A charter vessel that is leased or contracted to transport persons or property for compensation or hire to or from any port or place would be considered an arrival by sea under this rule. Arrivals by travelers on fishing vessels, research or seismic vessels, other service-type vessels (such as salvage, cable layers, etc.), or humanitarian service vessels (such as rescue vessels or hospital ships) are considered as arrivals by sea.

⁴² See 8 CFR 212.1(c)(1)(i); also 22 CFR 41.2 (g). If Mexicans are only traveling within a certain geographic area along the United States border with Mexico, usually up to 25 miles from the border but within 75 miles under the exception for Tucson, Arizona, they do not need to obtain a form I-94. If they travel outside of that geographic area, they must obtain an I-94 from CBP at the port-of-entry. 8 CFR 235.1(h)(1).

rently required to present a valid passport.⁴³ This final rule eliminates this exception to the passport requirement for Mexican nationals. Under the final rule, Mexican nationals will be required to have a BCC or a passport with a visa to enter the United States for all purposes.

D. State Enhanced Driver's License Projects

DHS remains committed to considering travel documents developed by the various U.S. states and the Governments of Canada and Mexico in the future that would denote identity and citizenship and would also satisfy section 7209 of IRTPA, as amended by section 723 of the 9/11 Commission Act of 2007.

Under this final rule, DHS will consider as appropriate documents such as state driver's licenses and identification cards that satisfy the WHTI requirements by denoting identity and citizenship. These documents must also have compatible technology, security criteria, and must respond to CBP's operational concerns.

Such acceptable documents will be announced and updated by publishing a notice in the **Federal Register**. A list of such programs and documents will also be maintained on the CBP Web site. It is still anticipated that the Secretary of Homeland Security will designate documents that satisfy section 7209 and the technology, security, and operational concerns discussed above as documents acceptable for travel under section 7209.

To date, DHS has entered into formal Memoranda of Agreement (MOAs) with the States of Washington, Vermont, New York, and Arizona which have begun voluntary programs to develop an "enhanced driver's license" and identification card that would denote identity and citizenship.⁴⁴ Concurrent with this final rule, DHS is also publishing a separate notice in today's **Federal Register** wherein the Secretary of Homeland Security is designating that the State of Washington enhanced driver's license document is secure. Therefore, U.S. citizens may present the enhanced driver's licenses and identification cards issued by the State of Washington pursuant to the MOA at land and sea ports-of-entry when arriving from contiguous territory and adjacent islands.

DHS is continuing discussions on the development of enhanced driver's license projects with several other states and the Government of Canada. CBSA and several Canadian provinces are planning

⁴³ See 8 CFR 212.1(c)(1)(ii).

⁴⁴ On September 26, 2007, the Secretary of Homeland Security and the Governor of Vermont signed a similar Memorandum of Agreement for an enhanced driver's license and identification card to be used for border crossing purposes; on October 27, 2007, the Secretary and the Governor of New York also signed a similar Memorandum of Agreement. The state of Arizona has also announced its intention to sign an MOA with DHS to begin an enhanced driver's license project. For more information on these projects, see <http://www.dhs.gov>.

and developing EDL projects. DHS remains committed to working with and coordinating efforts among states interested in developing, testing, and implementing programs for enhanced driver's licenses on a continuing basis. DHS encourages states interested in developing enhanced driver's licenses to work closely with DHS to that end.

On January 28, 2008, DHS published a final rule in the **Federal Register** concerning minimum standards for state-issued driver's licenses and identification cards that can be accepted for official purposes in accordance with the REAL ID Act of 2005.⁴⁵ DHS has worked to align REAL ID and EDL requirements. EDLs are being developed consistent with the requirements of REAL ID and, as such, can be used for official purposes such as accessing a Federal facility, boarding Federally-regulated commercial aircraft, and entering nuclear power plants. The enhanced driver's license will also include technologies that facilitate electronic verification and travel at ports-of-entry. While the proposed REAL ID requirements include proof of legal status in the U.S., the enhanced driver's license will require that the card holder be a U.S. citizen.

E. Future Documents

Additionally, DHS and DOS remain committed to considering travel documents developed by the various U.S. states, Native American tribes and nations, and the Government of Canada in the future that would satisfy section 7209 of IRTPA.

Both DHS and DOS continue to engage with the Government of Canada and various provinces in discussions of alternative documents that could be considered for border crossing use at land and sea ports of entry. Other alternative identity and citizenship documents issued by the Government of Canada will be considered, as appropriate. The Departments welcome comments suggesting alternative Canadian documents.

Various Canadian provinces have indicated their interest or intention in pursuing projects with enhanced driver's licenses similar to the Washington State, Vermont and Arizona programs with DHS. Because documents accepted for border crossing under WHTI must denote citizenship, the participation of the Government of Canada in determinations of citizenship on behalf of its citizens, and recognition of this determination, is a strong consideration by the United States in the acceptance of documents for Canadian citizens. We will consider additional documents in the future, as appropriate.

⁴⁵The REAL ID Act of 2005 prohibits Federal agencies, effective May 11, 2008, from accepting a driver's license or personal identification card for any official purpose unless the license or card has been issued by a State that is meeting the requirements set forth in the Act. See Pub. L. 109-13m 119 Stat. 231, 302 (May 11, 2005) (codified at 49 U.S.C. 30301 note). On March 9, 2007, DHS issued a rule proposing to establish minimum standards for State-issued driver's licenses and identification cards that Federal agencies would accept for official purposes after May 11, 2008. See 72 FR 10820.

VI. Special Rules for Specific Populations

A. U.S. Citizen Cruise Ship Passengers

Because of the nature of round trip cruise ship travel, DHS has determined that when U.S. citizens depart from and reenter the United States on board the same cruise ship, they pose a low security risk in contrast to cruise ship passengers who embark in foreign ports.

DHS and DOS have adopted the following alternative document requirement for U.S. cruise ship passengers. For purposes of the final rule, a cruise ship is defined as a passenger vessel over 100 gross tons, carrying more than twelve passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.⁴⁶

U.S. citizen cruise ship passengers traveling within the Western Hemisphere are permitted to present a government-issued photo identification document in combination with either: (1) An original or a copy of a birth certificate, (2) a Consular Report of Birth Abroad issued by DOS, or (3) a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services (USCIS), when returning to the United States, under certain conditions:

- The passengers must board the cruise ship at a port or place within the United States; and
- The passengers must return on the same ship to the same U.S. port or place from where they originally departed.

On such cruises, U.S. Citizens under the age of 16 may present an original or a copy of a birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services. All passengers arriving on a cruise ship that originated at a foreign port or place are required to present travel documents that comply with applicable document requirements otherwise specified in this final rule when arriving in the United States. For voyages where the cruise ship originated in the United States, if any new passengers board the ship at a foreign port or place or another location in the United States, the new passengers will have to present travel documents that comply with applicable document requirements otherwise specified in this final rule when arriving in the United States. U.S. citizen cruise ship passengers that fall under this alternative document requirement are reminded to carry appropriate travel documentation to enter any foreign countries on the cruise. If the ship returns to a U.S. port different from

⁴⁶ For this final rule, DHS adopts the definition of a cruise ship used by the U.S. Coast Guard. See 33 CFR 101.105.

the point of embarkation, all passengers must carry a passport or other WHTI compliant documentation.

B. U.S. and Canadian Citizen Children

The U.S. government currently requires all children arriving from countries outside the Western Hemisphere to present a passport when entering the United States. Currently, children (like adults) from the United States, Canada, and Bermuda are not required to present a passport when entering the United States by land or sea from contiguous territory or adjacent islands, other than Cuba. Mexican children are currently required to present either a passport and visa, or a BCC upon arrival in the United States, as discussed above. DHS, in consultation with DOS, has adopted the procedures below in this final rule.

1. Children Under Age 16

Under the final rule, all U.S. citizen children under age 16 are permitted to present either: (1) An original or a copy of a birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by USCIS, at all sea and land ports-of-entry when arriving from contiguous territory. Canadian citizen children under age 16 are permitted to present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate at all sea and land ports-of-entry when arriving from contiguous territory. U.S. and Canadian children age 16 and over who arrive from contiguous territory are subject to the WHTI document requirements otherwise specified in this final rule.

All Canadian birth certificates are issued from a centralized location within the provinces and territories. Each province or territory can issue two types of birth certificates: a long form, which is a one-page paper document similar to U.S. birth certificates, or a short form, which is a laminated card version of the long form. All versions of the birth certificate throughout the provinces are similar in format (paper form or laminated card).

All Canadian-issued birth certificates are considered by the Government of Canada as certified and are accepted by CBSA. Both the long and short forms of certified Canadian birth certificates issued by the provinces and territories are permissible documents under the final rule.

2. Children Under Age 19 Traveling in Groups

Under this final rule, U.S. citizen children under age 19 who are traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth sport organizations that arrive at U.S. sea or land ports-of-entry from contiguous territory, may present either: (1) An original or a copy of a

birth certificate; (2) a Consular Report of Birth Abroad issued by DOS; or (3) a Certificate of Naturalization issued by USCIS, when the groups are under the supervision of an adult affiliated with the organization (including a parent of one of the accompanied children who is only affiliated with the organization for purposes of a particular trip) and when all the children have parental or legal guardian consent to travel. Canadian citizen children under age 19 may present an original or a copy of a birth certificate, a Canadian Citizenship Card, or Canadian Naturalization Certificate at all sea and land ports-of-entry when arriving from contiguous territory. For purposes of this alternative procedure, an adult would be considered to be a person age 19 or older, and a group would consist of two or more people.

The group, organization, or team will be required to contact CBP upon crossing the border at the port-of-entry and provide on organizational letterhead: (1) The name of the group, organization or team and the name of the supervising adult; (2) a list of the children on the trip; (3) for each child, the primary address, primary phone number, date of birth, place of birth, and name of at least one parent or legal guardian; and (4) the written and signed statement of the supervising adult certifying that he or she has obtained parental or legal guardian consent for each participating child. The group, organization, or team would be able to demonstrate parental or legal guardian consent by having the adult leading the group sign and certify in writing that he or she has obtained parental or legal guardian consent for each participating child. For Canadian children, in addition to the information indicated above, a trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay would be required.

To avoid delays upon arrival at a port-of-entry, CBP would recommend that the group, organization, or team provide this information to that port-of-entry well in advance of arrival, and would recommend that each participant traveling on the trip carry in addition to the above mentioned documents a government or school issued photo identification document, if available. Travelers with the group who are age 19 and over are subject to the generally applicable travel document requirements specified in 8 CFR parts 211, 212 or 235 and 22 CFR parts 41 or 53.

Based upon a review of the alternative approach for children and the parental consent questions asked in the Land and Sea NPRM, DHS and DOS are not implementing any additional requirements regarding children such as parental consent to travel.

C. American Indian Card Holders From Kickapoo Band of Texas and Tribe of Oklahoma

Under the final rule, U.S. citizen members of the Kickapoo Band of Texas and Tribe of Oklahoma are permitted to present the Form

I-872 American Indian Card in lieu of a passport or passport card at all sea and land ports of entry when arriving from contiguous territory or adjacent islands. Mexican national members of the Kickapoo Band of Texas and Tribe of Oklahoma are permitted to present the I-872 in lieu of either a passport and visa, or a BCC at sea and land ports-of-entry when arriving from contiguous territory or adjacent islands.

D. Members of United States Native American Tribes

For the reasons discussed above, upon full implementation of this final rule and if designated by the Secretary of Homeland Security as acceptable under WHTI, Native American enrollment or identification cards from a federally-recognized tribe or group of federally recognized tribes will be permitted for use at entry at any land and sea port-of-entry when arriving from contiguous territory or adjacent islands.

E. Canadian Indians

For the reasons discussed above, upon full implementation of this final rule and if designated by the Secretary of Homeland Security, the proposed new Indian and Northern Affairs Canada (INAC) card to be issued by LTS and to contain a photograph and an MRZ, may also be presented as evidence of the citizenship and identity of Canadian Indians when they seek to enter the United States from Canada at land ports-of-entry.

F. Individual Cases of Passport Waivers

The passport requirement may be waived for U.S. citizens in certain individual situations on a case-by-case basis, such as an unforeseen emergency or cases of humanitarian or national interest.⁴⁷ Existing individual passport waivers for non-immigrant aliens are not changed by the final rule.⁴⁸

G. Summary of Document Requirements

The following chart summarizes the acceptable documents for sea and land arrivals from the Western Hemisphere under WHTI.

The Departments note that document requirements for Lawful Permanent Residents (LPRs) of the United States, employees of the International Boundary and Water Commission (IBWC) between the United States and Mexico, OCS workers, active duty alien members of the U.S. Armed Forces, and members of NATO-member Armed Forces, as discussed in the Land and Sea NPRM, remain unchanged.

⁴⁷ See section 7209(c)(2) of IRTPA. See also 22 CFR 53.2.

⁴⁸ See 8 CFR Part 212.

Group/population	Acceptable document(s)	Land	Ferry	Pleasure vessel	Sea (all other vessels)
All Travelers (U.S., Can., Mex., Berm.) at all sea and land POEs.	Valid Passport book (and valid visa, if necessary for foreign travelers).	Yes	Yes	Yes	Yes.
U.S. Citizens at all sea and land POEs when arriving from Canada, Mexico, the Caribbean, and Bermuda.	Valid Passport card	Yes	Yes	Yes	Yes.
U.S. and Canadian citizen Trusted Traveler Members at all sea and land POEs when arriving from contiguous territory or adjacent islands.	Trusted Traveler Cards (NEXUS, FAST, SENTRI).	Yes*	Yes*	Yes*	* Yes.
U.S. Citizen Merchant Mariners on official mariner business at all sea and land POEs.	U.S. Merchant Mariner Documentation (MMD).	Yes	Yes	Yes	Yes.
Mexican Nationals arriving from Mexico	Border Crossing Card (BCC)	Yes**	Yes**	Yes**	No.
U.S. Citizen Cruise Ship Passengers on round trip voyages that begin and end in the same U.S. port.	Government-issued photo ID and original or copy of birth certificate; under age 16, birth certificate.	N/A	N/A	N/A	Yes—for round trip voyages that originate in U.S.
U.S. and Canadian Citizen Children Under 16 at all sea and land POEs when arriving from contiguous territory.	Original or copy of birth certificate*** (government-issued photo ID recommended, but not required).	Yes	Yes	Yes	Yes.

Group/population	Acceptable document(s)	Land	Ferry	Pleasure vessel	Sea (all other vessels)
U.S. and Canadian Citizen Children—Groups of Children Under Age 19, under adult supervision with parental/ guardian consent at all sea and land POEs when arriving from contiguous territory.	Original or copy of birth certificate** and parental/guardian consent (government -issued photo ID recommended, but not required).	Yes	Yes	Yes	Yes.
U.S. Citizen/Alien Members of U.S. Armed Forces traveling under official orders or permit at all air, sea and land POEs.	Military ID and Official Orders	Yes	Yes	Yes	Yes.
U.S. and Mexican Kickapoo at land and sea POEs when arriving from contiguous territory and adjacent islands.	Form I-872 American Indian Card	Yes	Yes	Yes	Yes.
U.S. citizen members of Native American tribes recognized by the U.S. Government when arriving from contiguous territory at land and sea POEs.	Tribal Enrollment Documents designated by the Secretary of Homeland Security as meeting WHTI tribal document security.	Yes	Yes	Yes	Yes.
Canadian citizen members of First Nations or bands recognized by the Canadian Government when arriving from Canada at land POEs.	If designated by the Secretary of Homeland Security, the proposed new INAC card issued by the Government of Canada containing an MRZ.	Yes	Yes	Nos	No.

* Approved for Mexican national members traveling with BCC or a passport and visa.

** In conjunction with a valid I-94 for travel outside the 25- or 75-mile geographic limits of the BCC.

*** U.S. children would also be permitted to present a Certificate of Birth Abroad or Certificate of Naturalization; Canadian children would be permitted to present a Canadian Citizenship Card or Canadian Naturalization Certificate.

VII. Regulatory Analyses

A. Executive Order 12866: Regulatory Planning and Review

This final rule implementing the second phase of WHTI for entries by land and sea is considered to be an economically significant regulatory action under Executive Order 12866 because it may result in the expenditure of over \$100 million in any one year. Accordingly, this rule has been reviewed by the Office of Management and Budget (OMB). The following summary presents the costs and benefits of requirements for U.S. citizens entering the United States from other countries in the Western Hemisphere by land and sea, plus the costs and benefits of several alternatives considered during the rulemaking process.

The regulatory assessments summarized here consider U.S. travelers entering the United States via land ports-of-entry on the northern and southern borders (including arrivals by ferry and pleasure boat) as well as certain cruise ship passengers. Costs to obtain the necessary documentation for air travel were considered in a previous analysis examining the implementation of WHTI in the air environment (the Regulatory Assessment for the November 2006 Final Rule for implementation of WHTI in the air environment can be found at www.regulations.gov; document number USCBP-2006-0097-0108). If travelers have already purchased a passport for travel in the air environment, they would not need to purchase a passport for travel in the land or sea environments. CBP does not attempt to estimate with any precision the number of travelers who travel in more than one environment, and, therefore, may have already obtained a passport due to the air rule and will not incur any burden due to this rule. To the extent that the three traveling populations overlap in the air, land, and sea environments, we have potentially overestimated the direct costs of the rule presented here.

The period of analysis is 2005–2018 (14 years). We calculate costs beginning in 2005 because although the suite of WHTI rules was not yet in place, DOS experienced a dramatic increase in passport applications since the WHTI plan was announced in early 2005. We account for those passports obtained prior to full implementation to more accurately estimate the economic impacts of the rule as well as to incorporate the fairly sizable percentage of travelers who currently hold passports in anticipation of the new requirements.

The Secretary of Homeland Security is designating CBP trusted traveler cards (NEXUS, SENTRI, FAST), the Merchant Mariner Document (MMD), and specified documents from DHS-approved enhanced driver's license programs as acceptable travel documents for U.S. citizens to enter the United States at land and sea ports-of-entry. Because DHS and DOS believe that children under the age of 16 pose a low security threat in the land and sea environments, U.S. children may present a birth certificate in lieu of other designated documents. Additionally, DHS and DOS have determined that ex-

empting certain cruise passengers from a passport requirement is the best approach to balance security and travel efficiency considerations in the cruise ship environment. To meet the cruise exemption, a passenger must board the cruise ship at a port or place within the United States and the passenger must return on the same ship to the same U.S. port or place from where he or she originally departed.

For the summary of the analysis presented here, CBP assumes that only the passport, trusted traveler cards, and the MMD were available in the first years of the analysis (recalling that the period of analysis begins in 2005 when passport cards and enhanced driver's licenses were not yet available). CBP also assumes that most children under 16 will not obtain a passport or passport card but will instead use alternative documentation (birth certificates). The estimates reflect that CBP trusted traveler cards will be accepted at land and sea ports-of-entry. Finally, CBP assumes that most of the U.S. cruise passenger population will present alternative documentation (government-issued photo ID and birth certificate) because they meet the alternative documentation provision in the rule.

To estimate the costs of the rule, we follow this general analytical framework:

- Determine the number of U.S. travelers that will be covered
- Determine how many already hold acceptable documents
- Determine how many will opt to obtain passports (and passport cards) and estimate their lost “consumer surplus”
- Determine how many will forgo travel instead of obtaining passports or passport cards and estimate their lost “consumer surplus”

We estimate covered land travelers using multiple sources, including: crossing data from the Bureau of Transportation Statistics (BTS, 2004 data), a study of passport demand conducted by DOS (completed in 2005), and a host of regional studies conducted by state and local governments and academic research centers.

Other than DOS's passport demand study, no source exists to our knowledge that has estimated the total number of land entrants nationwide. Researchers almost always count or estimate crossings, not crossers and focus on a region or locality, not an entire border. Building on the work conducted for DOS's passport study, we distilled approximately 300 million annual crossings into the number of frequent (defined as at least once a year), infrequent (once every three years), and rare (once every ten years) “unique U.S. adult travelers.” We then estimate the number of travelers without acceptable documentation and estimate the cost to obtain a document. The fee for the passport varies depending on the age of the applicant, whether or not the applicant is renewing a passport, whether or not the applicant is requesting expedited service, and whether or not the applicant obtains a passport or a passport card. Additionally, we consider the amount of time required to obtain the document and the

value of that time. To estimate the value of an applicant's time in the land environment, we conducted new research that built on existing estimates from the Department of Transportation. To estimate the value of an applicant's time in the sea environment, we use estimates for air travelers' value of time (air and sea travelers share very similar characteristics) from the Federal Aviation Administration (FAA, 2005 data). We use the 2005 DOS passport demand study and CBP statistics on the trusted traveler programs to estimate how many unique U.S. travelers already hold acceptable documents.

We estimate covered cruise passengers using data from the Maritime Administration (MARAD, 2006 data) and itineraries available on the cruise line Web sites (for 2007). The overwhelming majority of Western Hemisphere cruise passengers—92 percent—would fall under the cruise-passenger alternative documentation provision. Passengers not covered by the alternative documentation provision fall into four trade markets—Alaska (72 percent), Trans-Panama Canal (16 percent), U.S. Pacific Coast (8 percent), and Canada/New England (4 percent).

We estimate that these passengers will have to obtain a passport rather than one of the other acceptable documents because these travelers will likely have an international flight as part of their cruise vacation, and only the passport is a globally accepted travel document. We use a comment to the August 2006 NPRM for implementation of WHTI in the air and sea environments (71 FR 46155) from the International Council of Cruise Lines to estimate how many unique U.S. cruise travelers already hold acceptable documentation.

Based on CBP's analysis, approximately 3.6 million U.S. travelers are affected in the first year of implementation, 2009 (note that the analysis anticipates a significant number of travelers will obtain WHTI-compliant documents in 2005 through 2008, prior to the implementation of the rule. In addition, travelers who only make trips in the first half of 2009 will not be covered by the rule). Of these, approximately 3.5 million enter through a land-border crossing (via privately owned vehicle, commercial truck, bus, train, on foot) and ferry and recreational boat landing sites. An estimated 0.1 million are cruise passengers who do not meet the alternative documentation provision in the final rule (note that over 90 percent of U.S. cruise passengers are expected to meet the exemption criteria). CBP estimates that the traveling public will acquire approximately 3.1 million passports in 2009, at a direct cost to traveling individuals of \$283 million. These estimates are summarized in Table A.

TABLE A.—FIRST-YEAR ESTIMATES
FOR U.S. ADULT TRAVELERS
[All estimates in millions]

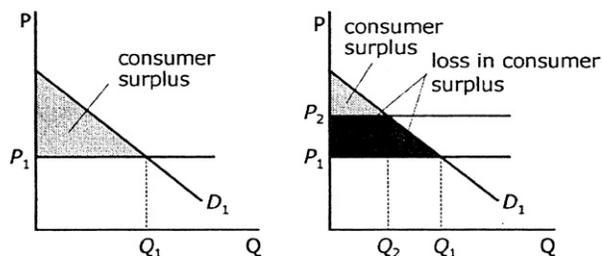
Affected travelers:	
Land/ferry/pleasure boat crossers	3.5
Cruise passengers	0.1
Total	3.6
Passports demanded:	
Land/ferry/pleasure boat crossers	3.1
Cruise passengers	0.1
Total	3.2
Total cost of passports:	
Land-border crossers	\$272
Cruise passengers	11
Total	\$283

To estimate potential forgone travel in the land environment, we derive traveler demand curves for access to Mexico and Canada based on survey responses collected in DOS's passport study. We estimate that when the rule is implemented, the number of unique U.S. travelers to Mexico who are frequent travelers decreases by 5.7 percent, the unique U.S. travelers who are infrequent travelers decreases by 6.4 percent, and the unique U.S. travelers who are rare travelers decreases by 15.7 percent. The number of U.S. travelers visiting Canada who are frequent travelers decreases by 3.3 percent, the unique U.S. travelers who are infrequent travelers decreases by 9.5 percent, and the unique U.S. travelers who are rare travelers decreases by 9.6 percent. These estimates account for the use of a passport card for those travelers who choose to obtain one. For unique travelers deciding to forgo future visits, their implied value for access to these countries is less than the cost of obtaining a passport card.

To estimate potential forgone travel in the sea environment, we use a study from Coleman, Meyer, and Scheffman (2003), which described the Federal Trade Commission investigation into potential impacts of two cruise-line mergers and estimated a demand elasticity for cruise travel. We estimate that the number of travelers decreases by 24 percent, 13 percent, 7 percent, and 6 percent for travelers on short (1 to 5 nights), medium (6 to 8 nights), long (9 to 17 nights), and very long cruises (over 17 nights) once the rule is implemented.

We then estimate total losses in consumer surplus. The first figure below represents U.S. travelers' willingness to pay (D_1) for access to

Mexico and Canada. At price P_1 , the number of U.S. travelers without passports currently making trips to these countries is represented by Q_1 . As seen in the second figure, if the government requires travelers to obtain a passport or passport card in order to take trips to Mexico and Canada, the price of access increases by the cost of obtaining the new document, to P_2 . As a result, the number of travelers making trips to these countries decreases to Q_2 .



All travelers in this figure experience a loss in consumer surplus; the size of the surplus loss depends on their willingness to pay for access to these countries. The lost surplus experienced by travelers whose willingness to pay exceeds P_2 is shown in the dark blue rectangle, and is calculated as $(P_2 - P_1) * Q_2$. Travelers whose willingness to pay for access to these countries is less than the price of the passport or passport card will experience a loss equal to the area of the aqua triangle, calculated as $\frac{1}{2} * (Q_1 - Q_2) * (P_2 - P_1)$.

Costs of the rule (expressed as losses in consumer surplus) are summed by year of the analysis. We then add the government costs of implementing WHTI over the period of analysis. Fourteen-year costs are \$3.3 billion at the 3 percent discount rate and \$2.7 billion at 7 percent, as shown in Table B. Annualized costs are \$296 million at 3 percent and \$314 million at 7 percent.

TABLE B.—TOTAL COSTS FOR U.S. TRAVELERS
OVER THE PERIOD OF ANALYSIS
[2005–2018, in \$millions]

Year	Cost	3% discount rate	7% discount rate
2005	\$435	\$435	\$435
2006	153	148	143
2007	91	85	79
2008	493	451	406
2009	431	383	333
2010	352	304	255
2011	270	226	183
2012	235	191	149
2013	235	186	140

Year	Cost	3% discount rate	7% discount rate
2014	290	222	159
2015	314	234	161
2016	250	181	120
2017	225	158	101
2018	201	137	84
Total	\$3,340	\$2,748

The primary analysis for land summarized here assumes a constant number of border crossers over the period of analysis; in the complete Regulatory Assessment we also consider scenarios where the number of border crossers both increases and decreases over the period of analysis. It is worth noting that border crossings have been mostly decreasing at both the northern and southern borders since 1999. The analysis for sea travel assumes a 6 percent annual increase in passenger counts over the period of analysis as the Western Hemisphere cruise industry continues to experience growth.

Finally, we conduct a formal uncertainty (Monte Carlo) analysis to test our assumptions for the analysis in the land environment. We first conducted a preliminary sensitivity analysis to identify the variables that have the most significant effect on consumer welfare losses. We found that the frequency of travel (frequent, infrequent, rare), crossings at multiple ports-of-entry, future annual affected individuals, and the amount of time spent applying for documentation were the most sensitive variables in the analysis. The variables that did not appear to have an impact on consumer losses were the estimated number of crossings by Lawful Permanent Residents or Native Americans and estimated future timing with which travelers will apply for acceptable documentation. After we conducted our formal Monte Carlo analysis we found that our most sensitive assumptions are: The projected crossing growth rate, the frequency of travel, and the number of new unique travelers that enter the population annually. The results of the Monte Carlo analysis are presented in Table C. Note that these estimates do not include the government costs of implementation, estimated to be \$0.8 billion over the time period of the analysis (3 percent discount rate) because we have no basis for assigning uncertainty parameters for government costs.

TABLE C.—SUMMARY OF KEY CHARACTERISTICS OF PROBABILITY DISTRIBUTIONS OF TOTAL WELFARE LOSSES IN THE LAND ENVIRONMENT (2005–2018, IN \$BILLIONS), 3 PERCENT DISCOUNT RATE

Statistic	Value
Trials	10,000
Mean	\$2.2
Median	\$2.1
Std Dev	\$0.5
Variance	2.4E+08
5th Percentile	\$1.5
95th Percentile	\$3.1
Point Estimate	\$2.3

We then consider the secondary impacts of forgone travel in the land and sea environments. Forgone travel will result in gains and losses in the United States, Canada, and Mexico. For this analysis, we made the simplifying assumption that if U.S. citizens forgo travel to Canada and Mexico, their expenditures that would have been spent outside the country now remain here. In this case, industries receiving the diverted expenditure in the United States experience a gain, while the travel and related industries in Canada and Mexico suffer a loss. Conversely, if Canadian and Mexican citizens forgo travel to the United States, their potential expenditures remain abroad—a loss for the travel and related industries in the United States, but a gain to Canada and Mexico. Note that “gains” and “losses” in this analysis cannot readily be compared to the costs and benefits of the rule, since they represent primarily transfers in and out of the U.S. economy.

For cruise passengers, we have only rough estimates of where U.S. passengers come from, how they travel to and from the ports where they embark, where they go, and the activities they engage in while cruising. We know even less about how they will alter their behavior if they do, in fact, forgo obtaining a passport. Ideally, we could model the indirect impacts of the rule with an input-output model (either static or dynamic) that could give us a reasonable estimation of the level the impact, the sectors affected, and regional impacts. Unfortunately, given the dearth of data, the assumptions we had to make, the very small numbers of travelers who are estimated to forgo travel, and the fact that much of their travel experience occurs outside the United States, using such a model would not likely produce meaningful results. We recognize, however, that multiple industries could be indirectly affected by forgone cruise travel, including (but not limited to): Cruise lines; cruise terminals and their support services; air carriers and their support services; travel agents; traveler

accommodations; dining services; retail shopping; tour operators; scenic and sightseeing transportation; hired transportation (taxis, buses); and arts, entertainment, and recreation.

According to the MARAD dataset used for the sea analysis, there are 17 cruise lines operating in the Western Hemisphere, 9 of which are currently offering cruises that would be indirectly affected by a passport requirement. While we expect that cruise lines will be indirectly affected by the rule, how they will be affected depends on their itineraries, the length of their cruises, their current capacity, and future expansion, as well as by travelers' decisions. We expect short cruises (1 to 5 nights) to be most notably affected because the passport represents a greater percentage of the overall trip cost, passengers on these cruises are less likely to already hold a passport, and travel plans for these cruises are frequently made closer to voyage time. Longer cruises are less likely to be affected because these trips are planned well in advance, passengers on these voyages are more likely to already possess a passport, and the passport cost is a smaller fraction of the total trip cost.

Because border-crossing activity is predominantly a localized phenomenon, and the activities engaged in while visiting the United States are well documented in existing studies, we can explore the potential impacts of forgone travel more quantitatively in the land environment. Using various studies on average spending per trip in the United States, Canada, and Mexico, we estimate the net results of changes in expenditure flows in 2008 (the presumed first year the requirements will be implemented) and subsequent years. Because Mexican crossers already possess acceptable documentation to enter the United States (passport or Border Crossing Card), we do not estimate that Mexican travelers will forgo travel to the United States. The summary of expenditure flows is presented in Table D.

TABLE D.—NET EXPENDITURE FLOWS IN NORTH AMERICA, 2009,
2010, AND SUBSEQUENT YEARS
[In millions]

2009:	
Spending by U.S. travelers who forgo travel to Mexico	+\$160
Spending by Mexican travelers who forgo travel to the United States	0
Spending by U.S. travelers who forgo travel to Canada	+60
Spending by Canadian travelers who forgo travel to United States	-400
Net	-180

2010:	
Spending by U.S. travelers who forgo travel to Mexico	+280
Spending by Mexican travelers who forgo travel to the United States	0
Spending by U.S. travelers who forgo travel to Canada	+110
Spending by Canadian travelers who forgo travel to United States	-440
Net	-50
Subsequent years (annual):	
Spending by U.S. travelers who forgo travel to Mexico	+280
Spending by Mexican travelers who forgo travel to United States	0
Spending by U.S. travelers who forgo travel to Canada	+110
Spending by Canadian travelers who forgo travel to United States	-330
Net	+60

To examine these impacts more locally, we conduct eight case studies using a commonly applied input-output model (IMPLAN), which examines regional changes in economic activity given an external stimulus affecting those activities. In all of our case studies but one, forgone border crossings attributable to WHTI have a less-than-1-percent impact on the regional economy both in terms of output and employment. The results of these eight case studies are presented in Table E.

TABLE E.—MODELED DISTRIBUTIONAL EFFECTS IN EIGHT CASE STUDIES

Study area (counties)	State	Change as % of total* * *	
		Output	Employment
San Diego	California	+0.02	+0.03
Pima, Santa Cruz	Arizona	+0.02	+0.02
Hidalgo, Cameron	Texas	+0.1	+0.1
Presidio	Texas	+0.4	+0.4
Niagara, Erie	New York	-0.2	-0.3
Washington	Maine	-1.4	-3.2
Macomb, Wayne, Oakland ...	Michigan	-0.02	-0.04
Whatcom	Washington ...	-0.5	-1.3

As shown, we anticipate very small net positive changes in the southern-border case studies because Mexican travelers to the United States use existing documentation, and their travel is not affected. The net change in regional output and employment is negative (though still very small) in the northern-border case studies be-

cause Canadian travelers forgoing trips outnumber U.S. travelers staying in the United States and because Canadian travelers to the United States generally spend more per trip than U.S. travelers to Canada. On both borders, those U.S. travelers that forgo travel do not necessarily spend the money they would have spent outside the United States in the case-study region; they may spend it outside the region, and thus outside the model.

Finally, because the benefits of homeland security regulations cannot readily be quantified using traditional analytical methods, we conduct a “breakeven analysis” to determine what the reduction in risk would have to be given the estimated costs of the implementation of WHTI (land environment only). Using the Risk Management Solutions U.S. Terrorism Risk Model (RMS model), we estimated the critical risk reduction that would have to occur in order for the costs of the rule to equal the benefits—or break even.

The RMS model has been developed for use by the insurance industry and provides a comprehensive assessment of the overall terrorism risk from both foreign and domestic terrorist organizations. The RMS model generates a probabilistic estimate of the overall terrorism risk from loss estimates for dozens of types of potential attacks against several thousand potential targets of terrorism across the United States. For each attack mode-target pair (constituting an individual scenario) the model accounts for the probability that a successful attack will occur and the consequences of the attack. RMS derives attack probabilities from a semi-annual structured expert elicitation process focusing on terrorists’ intentions and capabilities. It bases scenario consequences on physical modeling of attack phenomena and casts target characteristics in terms of property damage and casualties of interest to insurers. Specifically, property damages include costs of damaged buildings, loss of building contents, and loss from business interruption associated with property to which law enforcement prohibits entry immediately following a terrorist attack. RMS classifies casualties based on injury-severity categories used by the worker compensation insurance industry.

The results in Table F are based on the annualized cost estimate (assuming a seven percent discount rate) of the rule presented above. These results show that a decrease in perceived risk (the “low risk” scenario generated by RAND to characterize the expected annual losses in the United States from terrorist attacks) leads to a smaller annualized loss and a greater required critical risk reduction for the benefits of the rule to break even with costs. Conversely, an increase in perceived risk (the “high risk” scenario) leads to a greater annualized loss and a smaller required critical risk reduction. The total range in critical risk reduction under the standard threat outlook produced by the RMS model is a factor of three and ranges from 5.5 to 14 percent depending on the methodology used to value the

benefits of avoided terrorist attacks (the value of avoided injuries and deaths).

TABLE F.—CRITICAL RISK REDUCTION FOR THE RULE
[7 percent discount rate]

Valuation methodology	Critical risk reduction (%)		
	Low	Standard	High
Cost of injury (fatality = \$1.1m)	27	14	6.8
Willingness to pay (VSL = \$3m)	21	10	5.2
Quality of life (VSL = \$3m)	18	8.8	4.4
Willingness to pay (VSL = \$6m)	14	7.0	3.5
Quality of life (VSL = \$6m)	11	5.5	2.8

Several key factors affect estimates of the critical risk reduction required for the benefits of the rule to equal or exceed the costs. These factors include: the uncertainty in the risk estimate produced by the RMS model; the potential for other types of baseline losses not captured in the RMS model; and the size of other non-quantified direct and ancillary benefits of the rule. The RMS model likely underestimates total baseline terrorism loss because it only reflects the direct, insurable costs of terrorism. It does not include any indirect losses that would result from continued change in consumption patterns or preferences or that would result from propagating consequences of interdependent infrastructure systems. For example, the RMS model does not capture the economic disruption of a terrorism event beyond the immediate insured losses. Furthermore, the model also excludes non-worker casualty losses and losses associated with government buildings and employees. Finally, the model may not capture less-tangible components of losses that the public wishes to avoid, such as the fear and anxiety associated with experiencing a terrorist attack. Omission of these losses will cause us to overstate the necessary risk reductions.

Although the risk reduction associated with the final rule cannot be quantified due to data limitations, a separate analysis of the potential benefits resulting from reductions in wait time at the border suggests that the net benefits of the rule (total benefits minus total costs) have the potential to be positive. In a separate effort, CBP estimated the costs and benefits of processing technology investments at ports-of-entry. As part of this analysis, analysts evaluated the wait time impact attributable to each technology alternative. The results suggest that implementing standard documents and RFID technology could result in reductions in wait time valued as highly as \$2.4 billion to \$3.3 billion between 2009 and 2018 (discount rates of 7 and 3 percent, respectively). Subtracting total present value

costs suggests the potential for net benefits as high as \$0.9 billion to \$1.7 billion (discount rates of 7 and 3 percent, respectively).

Alternatives to the Rule

CBP considered the following alternatives to the final rule—

1. Require all U.S. travelers (including children) to present a valid passport book upon return to the United States from countries in the Western Hemisphere.

2. Require all U.S. travelers (including children) to present a valid passport book, passport card, or CBP trusted traveler document upon return to the United States from countries in the Western Hemisphere.

3. Alternative 2, but without RFID-enabled passport cards.

Calculations of costs for the alternatives can be found in the two Regulatory Assessments for the final rule.

Alternative 1: Require all U.S. travelers (including children) to present a valid passport book.

The first alternative would require all U.S. citizens, including minors under 16 and all cruise passengers, to present a valid passport book only. This alternative was rejected as potentially too costly and burdensome for low-risk populations of travelers. While the passport book will always be an acceptable document for a U.S. citizen to present upon entry to the United States, DHS and DOS believe that the cost of a traditional passport book may be too expensive for some U.S. citizens, particularly those living in border communities where land-border crossings are an integral part of everyday life. As stated previously, DHS and DOS, believe that children under the age of 16 pose a low security threat in the land and sea environments and will be permitted to present a birth certificate when arriving in the United States at all land and sea ports-of-entry from contiguous territory. DHS and DOS have also determined that designating alternative documentation for certain cruise passengers from a passport requirement is the best approach to balance security and travel efficiency considerations in the cruise ship environment.

Alternative 2: Require all U.S. travelers (including children) to present a valid passport book, passport card, or trusted traveler document.

The second alternative is similar to the final rule, though it includes children and does not provide a passport exception for cruise passengers. While this alternative incorporates the low-cost passport card and CBP trusted traveler cards as acceptable travel documents, this alternative was ultimately rejected as potentially too costly and burdensome for low-risk populations of travelers (certain cruise passengers and minors under 16).

Alternative 3: Require all U.S. travelers (including children) to present a valid passport book, passport card, or trusted traveler document; no RFID-enabled passport card.

The third alternative is similar to the second; it just now assumes that the passport card is not enabled with RFID technology. For this analysis, we assume that this does not change the fee charged for the passport card; we assume, however, that government costs to test and deploy the appropriate technology at the land borders to read the passport cards are eliminated. This alternative was rejected because DHS and DOS strongly believe that facilitation of travel, particularly at the land borders where wait times are a major concern, should be a primary achievement of WHTI implementation.

Table G presents a comparison of the costs of the final rule and the alternatives considered.

TABLE G.—COMPARISON OF REGULATORY ALTERNATIVES
 [In \$millions]

Alternative	13-year cost (7%)	Compared to final rule	Reason rejected
Final rule	\$2,748	n/a	
Alternative 1: Passport book only for all U.S. travelers	\$6,728	+\$3,979	Cost of a passport considered too high for citizens in border communities; low-risk traveling populations (certain cruise passengers, children under 16) unduly burdened.
Alternative 2: Passport book, passport card, and other designated documents for all U.S. travelers.	\$5,751	+\$3,003	Low-risk traveling populations (certain cruise passengers, children under 16) unduly burdened.
Alternative 3: Passport book, passport card, and other designated documents for all U.S. travelers; no RFID-enabled passport card.	\$5,340	+\$2,591	Low-risk traveling populations (certain cruise passengers, children under 16) unduly burdened, unacceptable wait times at land-border ports of entry.

It is important to note that for scenarios where the RFID-capable passport card is acceptable (the final rule and Alternative 2), the estimates include government implementation costs for CBP to install the appropriate technology at land ports-of-entry to read RFID-enabled passport cards and the next generation of CBP trusted traveler documents. These technology deployment costs are estimated to be substantial, particularly in the early phases of implementation. As a result, the alternatives allowing more documents than just the passport book result higher government costs over thirteen years than alternatives allowing only the passport book or the passport card that is not RFID-enabled, which can be processed with existing readers that scan the passport's machine-readable zone. Allowing presentation of alternative documentation for minors and most cruise passengers results in notable cost savings over thirteen years (about \$2.5 billion to \$4.0 billion depending on the documents considered).

Accounting statement

As required by OMB Circular A-4, CBP has prepared an accounting statement showing the classification of the expenditures associated with this rule. The table below provides an estimate of the dollar amount of these costs and benefits, expressed in 2005 dollars, at 7 percent and 3 percent discount rates. We estimate that the cost of this rule will be approximately \$314 million annualized (7 percent discount rate) and approximately \$296 million annualized (3 percent discount rate). Non-quantified benefits are enhanced security and efficiency.

ACCOUNTING STATEMENT: CLASSIFICATION OF EXPENDITURES, 2005–2017
[2005 Dollars]

	3% discount rate	7% discount rate
Costs:		
Annualized monetized costs	\$296 million	\$314 million.
Annualized quantified, but un-monetized costs.	Indirect costs to the travel and tourism industry.	Indirect costs to the travel and tourism industry.
Qualitative (un-quantified) costs .	Indirect costs to the travel and tourism industry.	Indirect costs to the travel and tourism industry.
Benefits:		
Annualized monetized benefits . . .	None quantified	None quantified.
Annualized quantified, but un-monetized benefits.	None quantified	None quantified.
Qualitative (un-quantified) benefits	Enhanced security and efficiency . .	Enhanced security and efficiency.

B. Regulatory Flexibility Act

CBP has prepared this section to examine the impacts of the final rule on small entities as required by the Regulatory Flexibility Act (RFA).⁴⁹ 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).

When considering the impacts on small entities for the purpose of complying with the RFA, CBP consulted the Small Business Administration's guidance document for conducting regulatory flexibility analyses.⁵⁰ Per this guidance, a regulatory flexibility analysis is required when an agency determines that the rule will have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.⁵¹ This guidance document also includes a good discussion describing how direct and indirect costs of a regulation are considered differently for the purposes of the RFA. CBP does not believe that small entities are subject to the requirements of the rule; individuals are subject to the requirements, and individuals are not considered small entities. To wit, "The courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them."⁵²

As described in the Regulatory Assessment for this rule, CBP could not quantify the indirect impacts of the rule with any degree of certainty; it instead focused the analysis on the direct costs to individuals recognizing that some small entities will face indirect impacts.

Some of the small entities indirectly affected will be foreign owned and will be located outside the United States. Additionally, reductions in international travel that result from the rule could lead to gains for domestic industries. Most travelers are expected to eventually obtain passports and continue traveling. Consequently, indirect effects are expected to be spread over wide swaths of domestic and foreign economies.

Small businesses may be indirectly affected by the rule if international travelers forego travel to affected Western Hemisphere countries. These industry sectors may include (but are not limited to):

- Manufacturing
- Wholesale trade

⁴⁹ See 5 U.S.C. 601–612.

⁵⁰ See Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, May 2003.

⁵¹ See *id.* at 69.

⁵² See *id.* at 20.

- Retail trade
- Transportation (including water, air, truck, bus, and rail)
- Real estate
- Arts, entertainment, and recreation
- Accommodation and food services

Because this rule does not directly regulate small entities, we do not believe that this rule has a significant economic impact on a substantial number of small entities. The exception could be certain “sole proprietors” who could be considered small businesses and could be directly affected by the rule if their occupations required travel within the Western Hemisphere where a passport was not previously required. However, as estimated in the Regulatory Assessment for implementation of WHTI in the land environment, the cost to such businesses would be only \$125 for a first-time passport applicant, \$70 for a first-time passport card applicant, plus an additional \$60 if expedited service were requested. We believe such an expense would not rise to the level of being a “significant economic impact.”

CBP thus certifies that this regulatory action does not have a significant economic impact on a substantial number of small entities.

The complete analysis of impacts to small entities for this rule is available on the CBP Web site at: <http://www.regulations.gov>; see also <http://www.cbp.gov>.

C. Executive Order 13132: Federalism

Executive Order 13132 requires DHS and DOS to develop a process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” Policies that have federalism implications are defined in the Executive Order to include rules that 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.” DHS and DOS have analyzed the rule in accordance with the principles and criteria in the Executive Order and have determined that it does not have federalism implications or a substantial direct effect on the States. The rule requires U.S. citizens and nonimmigrant aliens from Canada, Bermuda and Mexico entering the United States by land or by sea from Western Hemisphere countries to present a valid passport or other identified alternative document. States do not conduct activities subject to this rule. For these reasons, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

D. Unfunded Mandates Reform Act Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 104–4 on March 22, 1995, requires each Fed-

eral agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the UMRA, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a proposed “significant intergovernmental mandate.” A “significant intergovernmental mandate” under the UMRA is any provision in a Federal agency regulation that will impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of \$100 million (adjusted annually for inflation) in any one year. Section 203 of the UMRA, 2 U.S.C. 1533, which supplements section 204(a), provides that, before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This rule would not impose a significant cost or uniquely affect small governments. The rule does have an effect on the private sector of \$100 million or more. This impact is discussed in the Executive Order 12866 discussion.

E. National Environmental Policy Act of 1969

DHS, in consultation with DOS, the Environmental Protection Agency and the General Services Administration have reviewed the potential environmental and other impacts of this proposed rule in accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and DHS Management Directive 5100.1, *Environmental Planning Program of April 19, 2006*. A programmatic environmental assessment (PEA) was prepared that examined, among other things, potential alternatives regarding implementation of the proposed rule at the various land and sea ports of entry and what, if any, environmental impacts may result from the rule and its implementation.

The final PEA was published on September 10, 2007, and resulted in a Finding of No Significant Impact (FONSI) for the WHTI sea and land plan. A review of the relative impacts showed that none of the alternatives analyzed would result in a significant impact on the human environment.

A Notice of Availability for the final PEA and FONSI was published on September 26, 2007, in the **Federal Register**, and the PEA and FONSI are available for viewing on <http://www.dhs.gov> and <http://www.cbp.gov>. In addition, copies may be obtained by

writing to: U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 5.4D, Attn: WHTI Environmental Assessment, Washington, DC 20229.

F. Paperwork Reduction Act

1. Passports/Passport Cards

The collection of information requirement for passports is contained in 22 CFR 51.20 and 51.21. The required information is necessary for DOS Passport Services to issue a United States passport in the exercise of authorities granted to the Secretary of State in 22 U.S.C. Section 211a *et seq.* and Executive Order 11295 (August 5, 1966) for the issuance of passports to United States citizens and non-citizen nationals. The issuance of U.S. passports requires the determination of identity and nationality with reference to the provisions of Title III of the Immigration and Nationality Act (8 U.S.C. sections 1401–1504), the Fourteenth Amendment to the Constitution of the United States, and other applicable laws. The primary purpose for soliciting the information is to establish nationality, identity, and entitlement to the issuance of a United States passport or related service and to properly administer and enforce the laws pertaining to issuance thereof.

There are currently two OMB-approved application forms for passports, the DS–11 Application for a U.S. Passport (OMB Approval No. 1405–0004) and the DS–82 Application for a U.S. Passport by Mail. Applicants for the passport cards would use the same application forms (DS–11 and DS–82). The forms have been modified to allow the applicant to elect a card or book formal passport, or both. First time applicants must use the DS–11. The rule would result in an increase in the number of persons filing the DS–11 and could result in an increase in the number of persons filing the DS–82, and a corresponding increase in the annual reporting and/or record-keeping burden. In conjunction with publication of the final rule, DOS will amend the OMB form 83–I (Paperwork Reduction Act Submission) relating to the DS–11 to reflect these increases.

The collection of information encompassed within this rule has been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). 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.

Estimated annual average reporting and/or recordkeeping burden: 14.7 million hours.

Estimated annual average number of respondents: 9 million.

Estimated average burden per respondent: 1 hour 25 minutes.

Estimated frequency of responses: Every 10 years (adult passport and passport card applications); every 5 years (minor passport and passport card applications) Comments on this collection of informa-

tion should be sent to the Office of Management and Budget, *Attention*: Desk Officer of the Department of State, Office of Information and Regulatory Affairs, Washington, DC 20503.

2. Groups of Children

The collection of information requirements for groups of children would be contained in 8 CFR 212.1 and 235.1. The required information is necessary to comply with section 7209 of IRTPA, as amended, to develop an alternative procedure for groups of children traveling across an international border under adult supervision with parental consent. DHS, in consultation with DOS, has developed alternate procedures requiring that certain information be provided to CBP so that these children would not be required to present a passport. Consequently, U.S. and Canadian citizen children through age 18, who are traveling with public or private school groups, religious groups, social or cultural organizations, or teams associated with youth sport organizations that arrive at U.S. sea or land ports-of-entry, would be permitted to present an original or a copy of a birth certificate (rather than a passport), when the groups are under the supervision of an adult affiliated with the organization and when all the children have parental or legal guardian consent to travel. U.S. citizen children would also be permitted to present a Certificate of Naturalization or a Consular Report of Birth Abroad. Canadian children would also be permitted to present a Canadian Citizenship Card or Canadian Naturalization Certificate.

When crossing the border at the port-of-entry, the U.S. group, organization, or team would be required to provide to CBP on organizational letterhead the following information: (1) The name of the group; (2) the name of each child on the trip; (3) the primary address, primary phone number, date of birth, place of birth, and name of at least one parent or legal guardian for each child on the trip; (4) the name of the chaperone or supervising adult; and (5) the signed statement of the supervising adult certifying that he or she has obtained parental or legal guardian consent for each child.

The primary purpose for soliciting the information is to allow groups of children arriving at the U.S. border under adult supervision with parental consent to present either an original or a copy of a birth certificate, (either for U.S. children: a Consular Report of Birth Abroad, or Certificate of Naturalization; or for Canadian children: a Canadian Citizenship Card or Canadian Naturalization Certificate), rather than a passport, when the requested information is provided to CBP. This information is necessary for CBP to verify that the group of children entering the United States is eligible for this alternative procedure so that the children would not be required to present a passport or other generally acceptable document.

The collection of information encompassed within this proposed rule has been submitted to the OMB for review in accordance with

the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). 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.

Estimated annual reporting and/or recordkeeping burden: 1,625 hours.

Estimated average annual respondent or recordkeeping burden: 15 minutes.

Estimated number of respondents and/or recordkeepers: 6,500 respondents.

Estimated annual frequency of responses: 6,500 responses.

Comments on this collection of information should be sent to the Office of Management and Budget, *Attention:* Desk Officer of the Department of Homeland Security, Office of Information and Regulatory Affairs, Washington, DC 20503.

G. Privacy Statement

A Privacy Impact Assessment (PIA) was posted to the DHS Web site (at http://www.dhs.gov/xinfo/share/publications/editorial_0511.shtm) regarding the proposed rule. The changes adopted in this final rule involve the removal of an exception for U.S. citizens from having to present a passport in connection with Western Hemisphere travel other than Cuba, such that said individuals would now be required to present a passport or other identified alternative document when traveling from foreign points of origin both within and without of the Western Hemisphere. The rule expands the number of individuals submitting passport information for travel within the Western Hemisphere, but does not involve the collection of any new data elements. Presently, CBP collects and stores passport information from all travelers required to provide such information pursuant to the Aviation and Transportation Security Act of 2001 (ATSA) and the Enhanced Border Security and Visa Reform Act of 2002 (EBSA), in the Treasury Enforcement Communications System (TECS) (for which a System of Records Notice is published at 66 FR 53029). By removing the passport exception for U.S. Citizens traveling within the Western Hemisphere, DHS and DOS are requiring these individuals to comply with the general requirement to submit passport information when traveling to and from the United States.

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

22 CFR Part 41

Aliens, Nonimmigrants, Passports and visas.

22 CFR Part 53

Passports and visas, travel restrictions.

Amendments to the Regulations

■ For the reasons stated above, DHS and DOS amend 8 CFR parts 212 and 235 and 22 CFR parts 41 and 53 as set forth below.

Title 8—Aliens and Nationality**PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

■ 1. The authority citation for part 212 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1359; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458, as amended by section 546 of Pub. L. 109–295 and by section 723 of Pub. L. 110–53).

■ 2. A new § 212.0 is added to read as follows:

§ 212.0 Definitions.

For purposes of § 212.1 and § 235.1 of this chapter:

Adjacent islands means Bermuda and the islands located in the Caribbean Sea, except Cuba.

Cruise ship means a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.

Ferry means any vessel operating on a pre-determined fixed schedule and route, which is being used solely to provide transportation between places that are no more than 300 miles apart and which is being used to transport passengers, vehicles, and/or railroad cars.

Pleasure vessel means a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire.

United States means “United States” as defined in section 215(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1185(c)).

U.S. citizen means a United States citizen or a U.S. non-citizen national.

United States qualifying tribal entity means a tribe, band, or other group of Native Americans formally recognized by the United States Government which agrees to meet WHTI document standards.

* * * * *

■ 3. Section 212.1 is amended by:

■ a. Revising paragraphs (a)(1) and (a)(2); and

■ b. Revising paragraph (c)(1). The revisions read as follows:

§ 212.1 Documentary requirements for nonimmigrants.

* * * * *

(a) *Citizens of Canada or Bermuda, Bahamian nationals or British subjects resident in certain islands.* (1) *Canadian citizens.* A visa is generally not required for Canadian citizens, except those Canadians that fall under nonimmigrant visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2. A valid unexpired passport is required for Canadian citizens arriving in the United States, except when meeting one of the following requirements:

(i) *NEXUS Program.* A Canadian citizen who is traveling as a participant in the NEXUS program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired NEXUS program card when using a NEXUS Air kiosk or when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry. A Canadian citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may present a valid unexpired NEXUS program card.

(ii) *FAST Program.* A Canadian citizen who is traveling as a participant in the FAST program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired FAST card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(iii) *SENTRI Program.* A Canadian citizen who is traveling as a participant in the SENTRI program, and who is not otherwise required to present a passport and visa as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2, may present a valid unexpired SENTRI card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(iv) *Canadian Indians.* If designated by the Secretary of Homeland Security, a Canadian citizen holder of a Indian and Northern Affairs Canada (“INAC”) card issued by the Canadian Department of Indian Affairs and North Development, Director of Land and Trust Services (“LTS”) in conformance with security standards agreed

upon by the Governments of Canada and the United States, and containing a machine readable zone and who is arriving from Canada may present the card prior to entering the United States at a land port-of-entry.

(v) *Children*. A child who is a Canadian citizen arriving from contiguous territory may present for admission to the United States at sea or land ports-of-entry certain other documents if the arrival meets the requirements described below.

(A) *Children Under Age 16*. A Canadian citizen who is under the age of 16 is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry.

(B) *Groups of Children Under Age 19*. A Canadian citizen, under age 19 who is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older.

The following requirements will apply:

(1) The group, organization, or team must provide to CBP upon crossing the border, on organizational letterhead:

(i) The name of the group, organization or team, and the name of the supervising adult;

(ii) *A trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay;*

(iii) A list of the children on the trip;

(iv) For each child, the primary address, primary phone number, date of birth, place of birth, and name of a parent or legal guardian.

(2) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (a)(1)(v)(B)(1) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(3) The inspection procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part or parts 211 or 235 of this subchapter.

(2) *Citizens of the British Overseas Territory of Bermuda*. A visa is generally not required for Citizens of the British Overseas Territory of Bermuda, except those Bermudians that fall under nonimmigrant

visa categories E, K, S, or V as provided in paragraphs (h), (l), and (m) of this section and 22 CFR 41.2. A passport is required for Citizens of the British Overseas Territory of Bermuda arriving in the United States.

* * * * *

(c) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national who:

(i) Is applying for admission as a temporary visitor for business or pleasure from Mexico at a land port-of-entry, or arriving by pleasure vessel or ferry, if the national is in possession of a Form DSP-150, B-1/B-2 Visa and Border Crossing Card issued by the Department of State, containing a machine-readable biometric identifier; or

(ii) Is applying for admission from contiguous territory or adjacent islands at a land or sea port-of-entry, if the national is a member of the Texas Band of Kickapoo Indians or Kickapoo Tribe of Oklahoma who is in possession of a Form I-872 American Indian Card.

* * * * *

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 4. The authority citation for part 235 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, published January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731-32; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458, as amended by section 546 of Pub. L. 109-295 and by section 723 of Pub. L. 110-53).

■ 5. Section 235.1 is amended by:

- a. Revising paragraph (b);
- b. Revising paragraph (d); and
- c. Revise paragraph (e).

The revised text reads as follows:

§ 235.1 Scope of examination.

* * * * *

(b) *U.S. Citizens.* A person claiming U.S. citizenship must establish that fact to the examining officer's satisfaction and must present a U.S. passport or alternative documentation as required by 22 CFR part 53. If such applicant for admission fails to satisfy the examining immigration officer that he or she is a U.S. citizen, he or she shall thereafter be inspected as an alien. A U.S. citizen must present a

valid unexpired U.S. passport book upon entering the United States, unless he or she presents one of the following documents:

(1) *Passport Card*. A U.S. citizen who possesses a valid unexpired United States passport card, as defined in 22 CFR 53.1, may present the passport card when entering the United States from contiguous territory or adjacent islands at land or sea ports-of-entry.

(2) *Merchant Mariner Document*. A U.S. citizen who holds a valid Merchant Mariner Document (MMD) issued by the U.S. Coast Guard may present an unexpired MMD used in conjunction with official maritime business when entering the United States.

(3) *Military Identification*. Any U.S. citizen member of the U.S. Armed Forces who is in the uniform of, or bears documents identifying him or her as a member of, such Armed Forces, and who is coming to or departing from the United States under official orders or permit of such Armed Forces, may present a military identification card and the official orders when entering the United States.

(4) *Trusted Traveler Programs*. A U.S. citizen who travels as a participant in the NEXUS, FAST, or SENTRI programs may present a valid NEXUS program card when using a NEXUS Air kiosk or a valid NEXUS, FAST, or SENTRI card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands. A U.S. citizen who enters the United States by pleasure vessel from Canada using the remote inspection system may present a NEXUS program card.

(5) *Certain Cruise Ship Passengers*. A U.S. citizen traveling entirely within the Western Hemisphere is permitted to present a government-issued photo identification document in combination with either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department of State, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services for entering the United States when the United States citizen:

(i) Boards a cruise ship at a port or place within the United States; and,

(ii) Returns on the return voyage of the same cruise ship to the same United States port or place from where he or she originally departed.

On such cruises, U.S. Citizens under the age of 16 may present an original or a copy of a birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services.

(6) *Native American Holders of an American Indian Card*. A Native American holder of a Form I-872 American Indian Card arriving from contiguous territory or adjacent islands may present the Form I-872 card prior to entering the United States at a land or sea port-of-entry.

(7) *Native American Holders of Tribal Documents.* A U.S. citizen holder of a tribal document issued by a United States qualifying tribal entity or group of United States qualifying tribal entities, as provided in paragraph (e) of this section, who is arriving from contiguous territory or adjacent islands may present the tribal document prior to entering the United States at a land or sea port-of-entry.

(8) *Children.* A child who is a United States citizen entering the United States from contiguous territory at a sea or land ports-of-entry may present certain other documents, if the arrival falls under subsection (i) or (ii).

(i) *Children Under Age 16.* A U.S. citizen who is under the age of 16 is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department of State, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when entering the United States from contiguous territory at land or sea ports-of-entry.

(ii) *Groups of Children Under Age 19.* A U.S. citizen, who is under age 19 and is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department of State, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when arriving from contiguous territory at land or sea ports-of-entry, when the group, organization, or team is under the supervision of an adult affiliated with the group, organization, or team and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person age 19 or older. The following requirements will apply:

(A) The group or organization must provide to CBP upon crossing the border, on organizational letterhead:

(1) The name of the group, organization or team, and the name of the supervising adult;

(2) A list of the children on the trip;

(3) For each child, the primary address, primary phone number, date of birth, place of birth, and name of a parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (b)(8)(ii)(A) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The inspection procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part.

* * * * *

(d) *Enhanced Driver's License Projects; alternative requirements.* Upon the designation by the Secretary of Homeland Security of an enhanced driver's license as an acceptable document to denote identity and citizenship for purposes of entering the United States, U.S. and Canadian citizens may be permitted to present these documents in lieu of a passport upon entering or seeking admission to the United States according to the terms of the agreements entered between the Secretary of Homeland Security and the entity. The Secretary of Homeland Security will announce, by publication of a notice in the **Federal Register**, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

(e) *Native American Tribal Cards; alternative requirements.* Upon the designation by the Secretary of Homeland Security of a United States qualifying tribal entity document as an acceptable document to denote identity and citizenship for purposes of entering the United States, Native Americans may be permitted to present tribal cards upon entering or seeking admission to the United States according to the terms of the voluntary agreement entered between the Secretary of Homeland Security and the tribe. The Secretary of Homeland Security will announce, by publication of a notice in the **Federal Register**, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

* * * * *

Title 22—Foreign Relations

PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT ppSubpart A—Passport and Visas Not Required for Certain Nonimmigrants

■ 1. The authority citation for part 41 is revised to read as follows:

Authority: 8 U.S.C. 1104; Pub. L. 105–277, 112 Stat. 2681–795 through 2681–801; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458, as amended by section 546 of Pub. L. 109–295).

■ 2. A new § 41.0 is added to read as follows:

§ 41.0 Definitions.

For purposes of this part and part 53:

Adjacent islands means Bermuda and the islands located in the Caribbean Sea, except Cuba.

Cruise ship means a passenger vessel over 100 gross tons, carrying more than 12 passengers for hire, making a voyage lasting more

than 24 hours any part of which is on the high seas, and for which passengers are embarked or disembarked in the United States or its territories.

Ferry means any vessel operating on a pre-determined fixed schedule and route, which is being used solely to provide transportation between places that are no more than 300 miles apart and which is being used to transport passengers, vehicles, and/or railroad cars.

Pleasure vessel means a vessel that is used exclusively for recreational or personal purposes and not to transport passengers or property for hire.

United States means “United States” as defined in section 215(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1185(c)).

U.S. citizen means a United States citizen or a U.S. non-citizen national.

United States qualifying tribal entity means a tribe, band, or other group of Native Americans formally recognized by the United States Government which agrees to meet WHTI document standards.

§ 41.1 [Amended]

■ 3. Section 41.1 is amended by removing and reserving paragraph (b).

■ 4. Section 41.2 is amended by revising the heading, the introductory text, and paragraphs (a), (b), (g)(1) and (g)(2) to read as follows:

§ 41.2 Exemption or Waiver by Secretary of State and Secretary of Homeland Security of passport and/or visa requirements for certain categories of nonimmigrants.

Pursuant to the authority of the Secretary of State and the Secretary of Homeland Security under the INA, as amended, a passport and/or visa is not required for the following categories of nonimmigrants:

(a) *Canadian citizens*. A visa is not required for an American Indian born in Canada having at least 50 percentum of blood of the American Indian race. A visa is not required for other Canadian citizens except for those who apply for admission in E, K, V, or S nonimmigrant classifications as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1. A passport is required for Canadian citizens applying for admission to the United States, except when one of the following exceptions applies:

(1) *NEXUS Program*. A Canadian citizen who is traveling as a participant in the NEXUS program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid NEXUS program card when using a NEXUS Air kiosk or when entering the United States from contiguous territory or adjacent islands at a land

or sea port-of-entry. A Canadian citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may present a NEXUS program card.

(2) *FAST Program.* A Canadian citizen who is traveling as a participant in the FAST program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid FAST card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(3) *SENTRI Program.* A Canadian citizen who is traveling as a participant in the SENTRI program, and who is not otherwise required to present a passport and visa as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1, may present a valid SENTRI card at a land or sea port-of-entry prior to entering the United States from contiguous territory or adjacent islands.

(4) *Canadian Indians.* If designated by the Secretary of Homeland Security, a Canadian citizen holder of an Indian and Northern Affairs Canada (“INAC”) card issued by the Canadian Department of Indian Affairs and North Development, Director of Land and Trust Services (LTS) in conformance with security standards agreed upon by the Governments of Canada and the United States, and containing a machine readable zone, and who is arriving from Canada, may present the card prior to entering the United States at a land port-of-entry.

(5) *Children.* A child who is a Canadian citizen who is seeking admission to the United States when arriving from contiguous territory at a sea or land port-of-entry, may present certain other documents if the arrival meets the requirements described in either paragraph (i) or (ii) of this section.

(i) *Children Under Age 16.* A Canadian citizen who is under the age of 16 is permitted to present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when arriving in the United States from contiguous territory at land or sea ports-of-entry.

(ii) *Groups of Children Under Age 19.* A Canadian citizen who is under age 19 and who is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization may present an original or a copy of his or her birth certificate, a Canadian Citizenship Card, or a Canadian Naturalization Certificate when applying for admission to the United States from contiguous territory at all land and sea ports-of-entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older. The following requirements will apply:

(A) The group, organization, or team must provide to CBP upon crossing the border, on organizational letterhead:

(1) The name of the group, organization or team, and the name of the supervising adult;

(2) A trip itinerary, including the stated purpose of the trip, the location of the destination, and the length of stay;

(3) A list of the children on the trip;

(4) For each child, the primary address, primary phone number, date of birth, place of birth, and the name of at least one parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (a)(5)(ii)(A) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The procedure described in this paragraph is limited to members of the group, organization, or team that are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in this part and 8 CFR parts 212 and 235.

(6) *Enhanced Driver's License Programs.* Upon the designation by the Secretary of Homeland Security of an enhanced driver's license as an acceptable document to denote identity and citizenship for purposes of entering the United States, Canadian citizens may be permitted to present these documents in lieu of a passport when seeking admission to the United States according to the terms of the agreements entered between the Secretary of Homeland Security and the entity. The Secretary of Homeland Security will announce, by publication of a notice in the **Federal Register**, documents designated under this paragraph. A list of the documents designated under this paragraph will also be made available to the public.

(b) *Citizens of the British Overseas Territory of Bermuda.* A visa is not required, except for Citizens of the British Overseas Territory of Bermuda who apply for admission in E, K, V, or S nonimmigrant visa classification as provided in paragraphs (k) and (m) of this section and 8 CFR 212.1. A passport is required for Citizens of the British Overseas Territory of Bermuda applying for admission to the United States.

* * * * *

(g) *Mexican nationals.* (1) A visa and a passport are not required of a Mexican national who is applying for admission from Mexico as a temporary visitor for business or pleasure at a land port-of-entry, or arriving by pleasure vessel or ferry, if the national is in possession of a Form DSP-150, B-1/B-2 Visa and Border Crossing Card, containing a machine-readable biometric identifier, issued by the Department of State.

(2) A visa and a passport are not required of a Mexican national who is applying for admission from contiguous territory or adjacent islands at a land or sea port-of-entry, if the national is a member of the Texas Band of Kickapoo Indians or Kickapoo Tribe of Oklahoma who is in possession of a Form I-872 American Indian Card issued by U.S. Citizenship and Immigration Services (USCIS).

* * * * *

PART 53—PASSPORT REQUIREMENT AND EXCEPTIONS

■ 5. The authority citation for part 53 continues to read as follows: Authority: 8 U.S.C. 1185; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108-458); E.O. 13323, 69 FR 241 (Dec. 23, 2003).

■ 6. Section 53.2 is revised to read as follows:

§ 53.2 Exceptions.

(a) U.S. citizens, as defined in § 41.0 of this chapter, are not required to bear U.S. passports when traveling directly between parts of the United States as defined in § 51.1 of this chapter.

(b) A U.S. citizen is not required to bear a valid U.S. passport to enter or depart the United States:

(1) When traveling as a member of the Armed Forces of the United States on active duty and when he or she is in the uniform of, or bears documents identifying him or her as a member of, such Armed Forces, when under official orders or permit of such Armed Forces, and when carrying a military identification card; or

(2) When traveling entirely within the Western Hemisphere on a cruise ship, and when the U.S. citizen boards the cruise ship at a port or place within the United States and returns on the return voyage of the same cruise ship to the same United States port or place from where he or she originally departed. That U.S. citizen may present a government-issued photo identification document in combination with either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services before entering the United States; if the U.S. citizen is under the age of 16, he or she may present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad issued by the Department, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services; or

(3) When traveling as a U.S. citizen seaman, carrying an unexpired Merchant Marine Document (MMD) in conjunction with maritime business. The MMD is not sufficient to establish citizenship for purposes of issuance of a United States passport under part 51 of this chapter; or

(4) Trusted Traveler Programs. (i) *NEXUS Program*. When traveling as a participant in the NEXUS program, he or she may present a valid NEXUS program card when using a NEXUS Air kiosk or when

entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry. A U.S. citizen who enters the United States by pleasure vessel from Canada under the remote inspection system may also present a NEXUS program card;

(ii) *FAST Program*. A U.S. citizen who is traveling as a participant in the FAST program may present a valid FAST card when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry;

(iii) *SENTRI Program*. A U.S. citizen who is traveling as a participant in the SENTRI program may present a valid SENTRI card when entering the United States from contiguous territory or adjacent islands at a land or sea port-of-entry; The NEXUS, FAST, and SENTRI cards are not sufficient to establish citizenship for purposes of issuance of a U.S. passport under part 51 of this chapter; or

(5) When arriving at land ports of entry and sea ports of entry from contiguous territory or adjacent islands, Native American holders of American Indian Cards (Form I-872) issued by U.S. Citizenship and Immigration Services (USCIS) may present those cards; or

(6) When arriving at land or sea ports of entry from contiguous territory or adjacent islands, U.S. citizen holders of a tribal document issued by a United States qualifying tribal entity or group of United States qualifying tribal entities as provided in 8 CFR 235.1(e) may present that document. Tribal documents are not sufficient to establish citizenship for purposes of issuance of a United States passport under part 51 of this chapter; or

(7) When bearing documents or combinations of documents the Secretary of Homeland Security has determined under Section 7209(b) of Public Law 108-458 (8 U.S.C. 1185 note) are sufficient to denote identity and citizenship. Such documents are not sufficient to establish citizenship for purposes of issuance of a U.S. passport under part 51 of this chapter; or

(8) When the U.S. citizen is employed directly or indirectly on the construction, operation, or maintenance of works undertaken in accordance with the treaty concluded on February 3, 1944, between the United States and Mexico regarding the functions of the International Boundary and Water Commission (IBWC), TS 994, 9 Bevans 1166, 59 Stat. 1219, or other related agreements, provided that the U.S. citizen bears an official identification card issued by the IBWC and is traveling in connection with such employment; or

(9) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Section 2, the requirement with respect to the U.S. citizen because there is an unforeseen emergency; or

(10) When the Department of State waives, pursuant to EO 13323 of December 30, 2003, Sec 2, the requirement with respect to the U.S. citizen for humanitarian or national interest reasons; or

(11) When the U.S. citizen is a child under the age of 19 arriving from contiguous territory in the following circumstances:

(i) *Children Under Age 16*. A United States citizen who is under the age of 16 is permitted to present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when entering the United States from contiguous territory at land or sea ports-of-entry; or

(ii) *Groups of Children Under Age 19*. A U.S. citizen who is under age 19 and who is traveling with a public or private school group, religious group, social or cultural organization, or team associated with a youth sport organization may present either an original or a copy of his or her birth certificate, a Consular Report of Birth Abroad, or a Certificate of Naturalization issued by U.S. Citizenship and Immigration Services when arriving in the United States from contiguous territory at all land or sea ports of entry, when the group, organization or team is under the supervision of an adult affiliated with the organization and when the child has parental or legal guardian consent to travel. For purposes of this paragraph, an adult is considered to be a person who is age 19 or older.

The following requirements will apply:

(A) The group, organization, or team must provide to CBP upon crossing the border on organizational letterhead:

(1) The name of the group, organization or team, and the name of the supervising adult;

(2) A list of the children on the trip; and

(3) For each child, the primary address, primary phone number, date of birth, place of birth, and the name of at least one parent or legal guardian.

(B) The adult leading the group, organization, or team must demonstrate parental or legal guardian consent by certifying in the writing submitted in paragraph (b)(11)(ii)(A) of this section that he or she has obtained for each child the consent of at least one parent or legal guardian.

(C) The procedure described in this paragraph is limited to members of the group, organization, or team who are under age 19. Other members of the group, organization, or team must comply with other applicable document and/or inspection requirements found in 8 CFR parts 211, 212, or 235.

Dated: March 26, 2008.

MICHAEL CHERTOFF,
Secretary of Homeland Security,
Department of Homeland Security.

PATRICK KENNEDY,
Under Secretary of State for Management,
Department of State.

[USCBP-2007-0084; CBP Dec. 08-41]

RIN 1651-AA71

Issuance of a Visa and Authorization for Temporary Admission Into the United States for Certain Nonimmigrant Aliens Infected With HIV

AGENCY: Customs and Border Protection; DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security (DHS) is amending its regulations to provide, on a limited and categorical basis, a more streamlined process for nonimmigrant aliens infected with the human immunodeficiency virus (HIV) to enter the United States as visitors on temporary visas (for business or pleasure) for up to 30 days. Nonimmigrant aliens who do not meet the specific requirements of the rule or who do not wish to consent to the conditions imposed by this rule may elect to seek admission under current procedures and obtain a case-by-case determination of their eligibility for a waiver of the nonimmigrant visa requirements concerning inadmissibility for aliens who are infected with HIV.

DATES: This rule is effective on October 6, 2008.

FOR FURTHER INFORMATION CONTACT:

Michael D. Olszak, Customs and Border Protection, Office of Field Operations, (703) 261-8424.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background and Purpose
- II. The Final Rule
- III. Discussion of Comments
 - A. Objections to the Inadmissibility of HIV-Positive Aliens
 - B. Opposition to Admission of HIV-Positive Aliens
 - C. Asylees and the Required Waiver of Adjustment of Status
 - D. Privacy Rights/Annotation of Visas
 - E. Whether the Rule Is More Stringent Than the Existing Process
 - F. Sufficient Insurance and Medication
 - G. Human Rights Concerns
 - H. Public Health Reasons for the Rule
 - I. Disparate Treatment Applied to Contagious Diseases
 - J. The 30-Day Temporary Admission Limit
 - K. Extension of the Comment Period
 - L. Vagueness in Criteria and Medical Expertise of Consular Officers
 - M. Negative Impact on United States Citizens

- N. Focus on Illegal Aliens
 - O. Aliens Who Are Unaware of Their HIV Status
 - P. Appeal of Decision
 - Q. Future Bar Due to Noncompliance
 - R. Effect on Naturalization and Aliens From Visa Waiver Countries
 - S. Returning Permanent Residents
- IV. Statutory and Regulatory Reviews

I. Background and Purpose

Section 212 of the Immigration and Nationality Act (INA) makes ineligible for admission into the United States any nonimmigrant alien “who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance.” See INA section 212(a)(1)(A)(i); 8 U.S.C. 1182(a)(1)(A)(i); 42 CFR 34.2.¹ The Secretary of Homeland Security may authorize visa issuance and temporary admission of such nonimmigrants despite existing grounds of inadmissibility, subject to conditions prescribed by the Secretary. See INA section 212(d)(3)(A); 8 U.S.C. 1182(d)(3)(A).

On December 1, 2006, the President directed the Secretaries of State and Homeland Security to initiate a rulemaking action to propose a categorical authorization to allow HIV-positive nonimmigrant aliens to enter the United States through a streamlined process. See White House, *Fact Sheet: World AIDS Day 2006*, (December 1, 2006), <http://www.whitehouse.gov/news/releases>. On November 6, 2007, DHS published a notice of proposed rulemaking proposing a streamlined process for HIV-infected nonimmigrant aliens to more easily enter the United States through a streamlined process. See 72 FR 62593.

This final rule adopts the proposed amendments to the regulations and simplifies the process for authorization of admission with some modifications in light of the public comments received. Under the final rule, DHS will allow aliens who are HIV-positive to enter the United States as visitors (for business or pleasure) for a temporary period not to exceed 30 days, without being required to seek such admission under the current, more complex (individualized, case-by-case) process provided under the current DHS procedures.

The current process requires the Department of State (DOS) to make individual recommendations to DHS, which must make a case-

¹At the time the proposed rule was published, INA section 212a(1)(A)(i) specifically listed the etiologic agent that causes acquired immune deficiency syndrome. That language was deleted by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008. Public Law 110–293, section 305, 122 Stat. 2918 (July 30, 2008). As Discussed below, however, the Department of Health and Human Services (HHS) regulatory text implementing the deleted prohibition continues to exist at the time of promulgation of this final rule.

by-case evaluation and decision to authorize the issuance of the visa and the applicant's temporary admission. This process takes significant time. In fiscal year (FY) 2007, the average processing time for DHS to make decisions on such consular nonimmigrant recommendations (for issuance of visas and authorization for temporary admission) was 18 days. This final rule streamlines this process and will make visa authorization and issuance available to many aliens who are HIV-positive on the same day as their interview with the consular officer.

II. The Final Rule

An alien who is HIV-positive is currently inadmissible to the United States under INA section 212(a)(1)(A)(i), 8 U.S.C. 1182(a)(1)(A)(i), as implemented through 42 CFR 34.2. As more fully discussed in the proposed rule, such aliens have been, and are currently, able to apply for admission to the United States pursuant to INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), and applicable DHS regulations (8 CFR 212.4(a)), which allow the Secretary of Homeland Security to authorize issuance of a visa and temporary admission despite certain grounds for inadmissibility. 72 FR 62593, 62594–5 (Nov. 6, 2007). These existing processes require specific, individualized action by DHS upon submission of eligibility information by the alien (the same kind of information that is required under the proposed regulations) that must be reviewed, evaluated, and ruled upon on a case-by-case basis. In contrast, the process established in this final rule would authorize a consular officer or the Secretary of State to categorically grant a nonimmigrant visa and authorize the applicant to apply for admission into the United States, notwithstanding an applicant's inadmissibility due to HIV infection, if the applicant meets applicable requirements and conditions, without the additional step of seeking review and decision by DHS prior to the granting of the nonimmigrant visa. This categorical authorization provides a more streamlined and rapid process for obtaining temporary admission under INA section 212(d)(3)(A)(i), 8 U.S.C. 1182(d)(3)(A)(i).

Under current criteria for authorizing admission of otherwise inadmissible nonimmigrant aliens generally, DHS must take into consideration the risk of harm to society if the applicant is admitted into the United States, the seriousness of any immigration law or criminal law violations (if any), and the nature of the reason for travel. See *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978). These are general criteria applicable to any application for authorization of a visa under INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A).

DHS currently allows otherwise inadmissible aliens to apply for admission on a case-by-case basis by employing a balancing test involving several factors that incorporates the criteria required under *Hranka* (regardless of whether the authorization is applied for be-

fore a consular officer, the Secretary of State, or directly to DHS). As discussed in the proposed rule, DHS applies these criteria to HIV-positive aliens seeking admission to the United States on a temporary basis by considering whether: (1) The danger to the public health from admission of the nonimmigrant alien is minimal; (2) the possibility of the transmission of the infection is minimal; and (3) any cost will be incurred by any level of government agency in the United States (local, State, or Federal) without the prior consent of that agency. Consular officers must find (based on evidence provided by the applicant that satisfies reviewing officials) that the first two factors are no more than minimal and that there will not be a cost to an agency absent prior consent.

This final rule incorporates these criteria, as well as additional factors applied under current policy that were developed in a series of instructions from the former Immigration and Naturalization Service (INS) and the Department of Justice (DOJ). Nonimmigrant aliens who are HIV-positive who do not meet the specific circumstances of these clarifying instructions or who do not wish to consent to the conditions imposed by this rule may still elect a case-by-case determination of their eligibility for issuance of nonimmigrant visas and admission.

This final rule provides an additional avenue for temporary admission of HIV-positive nonimmigrant aliens while minimizing costs to the government and the risk to public health. These goals are accomplished by setting requirements and conditions that govern an alien's admission, affect certain aspects of his or her activities while in the United States (e.g., using proper medication when medically appropriate, avoiding behavior that can transmit the infection), and ensure his or her departure after a short stay. This final rule facilitates the temporary admission to the United States of HIV-positive nonimmigrant aliens.

The final rule is consistent with Congress' humanitarian purpose in enacting the limited waiver of INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), and complies with the statute regarding aliens inadmissible due to health reasons by prescribing "conditions * * * to control and regulate the admission and return of inadmissible aliens applying for temporary admission." INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A). Thus, under the final rule, an HIV-positive applicant for a nonimmigrant visitor visa would be required to satisfy criteria designed to ensure that the risk to the public health is minimized to the greatest reasonable extent and that no cost will be imposed on any level of government in the United States (local, State, or Federal). The short duration of admission under the amended regulation, and the various conditions designed to control the alien's temporary stay and ensure his or her return (departure from the United States), minimize the risk of disease transmission in the United States, as well as the risk of increased burden on our public

health resources. HIV-positive aliens not meeting the criteria under the amended regulation would still be able to seek individualized (case-by-case) consideration for admission pursuant to INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), under current DHS policy. *See* 8 CFR 212.4(a) or (b).

The final rule includes specific requirements (based in large part on the existing criteria) discussed in the proposed rule. 72 FR at 62595–6. After consulting with the HHS’ Centers for Disease Control and Prevention, and National Institutes of Health, and careful consideration of the comments received from the public on the proposed rule, DHS has determined not to change the criteria relating to medical etiology, personal understanding, limited potential health danger, continuity of health care, temporary admission, general enforcement, and general duration. DHS has made several modifications in light of the public comments, as discussed more fully below.

Several commenters questioned whether it was appropriate to impose a waiver of adjustment of status pursuant to a grant of asylum under INA section 208, 8 U.S.C. 1158. After further consideration, DHS agrees that asylees have continued eligibility for permanent resident status; therefore, under the final rule, an alien who has been granted asylum after having been admitted pursuant to the proposed categorical authorization will have continued eligibility to apply to adjust status under the asylum statute and regulations. However, nothing within the rule exempts the alien from the requirement that the alien establish his or her eligibility to adjust under INA section 209, 8 U.S.C. 1159. Specifically, nothing within this rule waives any of the requirements for adjustment of status including, but not limited to, the requirements in 8 CFR part 209.

Additionally, the short duration raised a number of questions about extensions. After further consideration, DHS has decided to permit an additional period or periods of satisfactory departure in exigent circumstances under a provision modeled after the Visa Waiver Program. *See* 8 CFR 212.4(f)(5) of this final rule.

Some commenters questioned whether aliens who receive this visa authorization will receive visas that identify them as HIV-positive. The visa will not be annotated in a manner that would allow the public to identify the alien as HIV-positive.

This final rule does not create the provision for temporary admission of HIV-positive aliens; such a provision exists in statute and regulation. This rule merely provides an alternative, quicker process for obtaining admission to the United States under INA section 212(d)(3)(A)(i) 8 U.S.C. 1182(d)(3)(A)(i).²

²The final rule adopts, without change, the technical amendments to 8 CFR 212.4(e).

III. Discussion of Comments

The proposed rule solicited public comments over a 30-day comment period. DHS received over 700 comments.

A. *Objections to the Inadmissibility of HIV-Positive Aliens*

By far the most numerous of all the comments are those objecting to the inadmissibility of HIV-positive aliens. Many of these commenters objected to the proposed rule's process and called for repeal of the governing statute's ban on HIV-positive aliens for various reasons, including the following: It is unnecessary and ineffective to protect the American public; it is discriminatory; it is unconstitutional; it is outdated and does not reflect current medical science. Others among these commenters expressed approval of the proposed process to streamline temporary admission for these aliens as a first step but also stated that the rule does not go far enough to make it easier for these aliens to travel to the United States. These latter commenters called also for the repeal of the statute's HIV admission ban as a next step. One commenter suggested that the United States mirror Australia's approach to admitting HIV-positive aliens (described only as less restrictive). Several commenters stated that the international AIDS conference are not held in the United States as a result of the inadmissibility of HIV-positive aliens.

Some commenters objected to the governing statute's inadmissibility provision that imposes the travel and immigration ban on HIV-positive aliens and to the proposed rule which, they claimed, creates the impression that the alleged discriminatory statute can be mitigated by the proposed process for temporary admission of these aliens. Some comments called upon the Secretary of Homeland Security and the President to withhold publication of a final rule and support repeal of the statute that imposes this inadmissibility.

Repeal of the statutory inadmissibility provision (the admission ban) applicable to HIV-positive aliens is within the province of Congress as a matter of law, and the President recently signed legislation that removes from applicable law the language requiring that HIV must be included in the list of communicable diseases of public health significance. *See* Public Law 110-293, 122 Stat. 2918 (July 30, 2008). The INA, as amended, makes inadmissible to the United States any alien "who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance * * *" INA section 212(a)(1)(A)(i), 8 U.S.C. 1182(a)(1)(A)(i). Although Public Law 110-293 eliminates the requirement that HIV be included in the list of communicable diseases of public health significance (as defined at 42 CFR 34.2), HIV remains on that list until HHS amends its regulation. *See* 42 CFR 34.2. HHS has indicated its intention to do so by rulemaking; pending such action, any alien who is HIV-positive is still inadmissible to the United States.

This regulation will permit short-term admission while HHS completes a rulemaking to remove HIV from the list of communicable diseases of public health significance. 42 CFR 34.2.

B. Opposition to Admission of HIV-Positive Aliens

A few commenters expressed objection to admission of HIV-positive aliens under the discretionary authority provision of the governing statute and urged its repeal.

In the statute that imposed the ban on admission of aliens with communicable diseases of public health significance, Congress also provided for the discretionary exercise of authority to admit these aliens (among others) for a temporary period under certain circumstances. INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A). Congress restricted the availability of this discretionary authority by precluding its application to aliens who are inadmissible due to several of the security and related grounds; Congress imposed no such restriction on aliens inadmissible on other grounds, including health-related reasons. Also, Congress has made available a waiver of inadmissibility for immigrants seeking admission to the United States who are inadmissible due to a communicable disease listed by HHS. INA sections 209(c) and 212(g), 8 U.S.C. 1159(c) and 1182(g).

This rule does not create a new regulatory provision allowing HIV-positive aliens to enter the United States temporarily; the rule merely provides an alternative process in the regulations to streamline issuance of nonimmigrant visas to, and the temporary admission of, HIV-positive aliens under existing statutory authority within the Secretary's discretion. While the existing process provides for case-by-case authorization (by DHS) for issuing visas and authorizing temporary admission, the authorization process provided in this rule is categorical, i.e., authorization is granted through this rulemaking to any alien applicant who meets the requirements and conditions. The Secretary may exercise his discretion by rulemaking rather than on a case-by-case basis and is doing so here. *Lopez v. Davis*, 531 U.S. 230, 243–44 (2001) (quoting *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1999)) (emphasis added); *Yang v. INS*, 79 F.3d 932, 936 (9th Cir.), cert. denied, 519 U.S. 824 (1996).

The final rule contains several requirements to minimize to the greatest reasonable extent public health risks and risk of cost to any agency of any level of government in the United States. The final rule also imposes conditions to control and regulate the admission and return (to their home countries) of beneficiaries of the categorical authorization.

C. Asylees and the Required Waiver of Adjustment of Status

Several commenters objected to the requirement of the proposed rule that an applicant must waive his right to file for an adjustment of status to that of lawful permanent resident if he applied for and

was granted asylum in the United States. Some commenters objected also to the requirement that an applicant must waive his right to file, after entering the United States under the proposed categorical authorization, an application for a change of nonimmigrant status or extension of stay.

DHS agrees that asylees obtain a special status under INA section 208, 8 U.S.C. 1158, that, where possible, should be recognized consistently. Therefore, DHS has modified the adjustment of status waiver in the final rule to clarify that applicants for the categorical authorization will not be required to waive the opportunity to apply for adjustment of status should they be granted asylum after entering the United States via the categorical process. The final rule will retain the required waivers relating to change of nonimmigrant status, extension of stay, and adjustment of status other than through the asylum process. Any alien who is unwilling to agree to these waivers may apply for temporary admission under the existing process of 8 CFR 212.4(a) which is not conditioned on the making of these waivers. However, this waiver is for admission as a nonimmigrant. These visas are not available for aliens who intend to stay permanently in the United States as immigrants. Aliens seeking permanent resident status must apply for immigrant visas and fulfill the requirement for immigrants set out in the INA.

D. Privacy Rights/Annotation of Visas

Many commenters expressed concern about the privacy of applicants for the proposed categorical authorization. Primarily, the concern relates to whether the alien's visa (included within his or her passport) would be annotated to indicate admission under the rule's categorical authorization process. These commenters emphasized the stigma attached to HIV status and the risk that annotation could subject these aliens to discrimination. Some of these commenters expressed privacy concerns relative to a DHS database for HIV-positive aliens.

Some commenters questioned whether aliens who receive this visa authorization will receive visas that identify them as HIV-positive. The visa will not be annotated in a manner that would allow the public to identify the alien as HIV-positive.

Section 222(f) of the INA, 8 U.S.C. 1202(f), provides that DOS records pertaining to visa issuance or refusal are confidential, and shall be used only for the formulation, amendment, administration, or enforcement of the immigration and other laws of the United States, with exceptions not relevant here. These confidentiality provisions serve to protect disclosures made as part of an application for a nonimmigrant visa by an alien who is HIV-positive. Moreover, under the final rule's categorical authorization process, unlike the existing process, there is no need for DHS to make case-by-case determinations on individual recommendations from the DOS. DHS will

necessarily create the same records relative to aliens receiving authorization for visa issuance under the process (e.g., electronic records), as DHS normally creates for all aliens with visas who gain temporary admission as nonimmigrants. DHS will not maintain a separate database of aliens who are admitted under the categorical authorization process.

DOS scrupulously adheres to the statutory requirement regarding the confidentiality of information submitted during the consular interview process. Record information on applicants will be maintained by the DOS in accordance with confidentiality and security requirements, as well as any DOS System of Records Notices and Privacy Impact Assessments relative to any applicable systems covering this data collection.

E. Whether the Rule Is More Stringent Than the Existing Process

Many commenters contended that the requirements and conditions of the proposed process make it more stringent than the existing process. These commenters therefore questioned that it is a “streamlined” process. Some recommended simplifying the process. One commenter suggested that DHS not make any change to the regulations, leaving the existing case-by-case process as the sole option.

The characterization of the categorical authorization process under the proposed rule and this final rule as “streamlined” refers to the fact that the process, unlike the existing process, does not require the alien’s application for a visa and temporary admission to be submitted to DHS with the consular officer’s recommendation. Under the existing process, DHS must make a case-by-case evaluation and decision to authorize the issuance of the visa and the applicant’s temporary admission. This step in the process necessarily takes time. In FY 2007, the average DHS processing time for all consular nonimmigrant recommendations (for issuance of visas and authorization for temporary admission) was 18 days. The categorical authorization process under this final rule does not require that step, and, therefore, the rule is less cumbersome and permits consular officers to issue visas on the same day the alien applies for the visa in many cases. The process is, therefore, more streamlined.

DHS is authorizing issuance of visas and temporary admission on a categorical basis only to those aliens who meet the rule’s specific requirements and conditions. An alien may choose to apply for temporary admission under the existing case-by-case decision process if he or she wishes.

The existing process also imposes conditions that an applicant must meet to gain temporary admission, many of which are the same or similar to the conditions of this final rule’s process. The conditions of the existing process have been developed through adjudication (see *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978)) and sev-

eral instructions issued by the former INS. With this final rule, DHS is consolidating into one transparent source, the conditions and instructions applicable to HIV-positive aliens who wish to apply for categorical authorization for admission to the United States; the same conditions that have historically governed discretionary temporary admission under INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A). The process implemented under this final rule retains the same evidentiary requirements as the existing process while providing an alternative to the case-by-case review by DHS that is required under the existing regulation. The rule, however, adds restrictions on application for extension of stay, change of nonimmigrant status, and adjustment of status to that of permanent resident (other than through asylum). These restrictions are necessary to control the admission and return of these aliens since DHS is not performing a case-by-case review.

F. Sufficient Insurance and Medication

Many commenters objected to the requirement in the proposed rule (8 CFR 212.4(f)(2)(v)), that an alien admitted under the proposed process for categorical authorization have possession of or access to an adequate supply of antiretroviral drugs (if medically appropriate) for the length of anticipated stay, and sufficient assets, such as medical insurance, to cover any medical care that may be necessary while in the United States. Some of these commenters mentioned that an alien may not have insurance or enough money to cover a medical event, some referring particularly to aliens from poor countries. Others questioned how an alien could establish adequate assets, some referring again to aliens from poor or third world countries. Still others asked about unanticipated expenses, and objected to requiring assets for these expenses. Lastly, several commenters suggested that this rule is racist because HIV-positive populations from developing countries are less likely to have access to medication and medical insurance.

The requirement to demonstrate availability of assets, such as through proof of insurance, is a reasonable condition meant to ensure that the applicant's short-term visit will not cause a financial burden to the American public and that there will be no cost to any agency of the United States without that agency's prior consent. An alien who is likely to become a public charge is inadmissible to the United States under INA section 212(a)(4), 8 U.S.C. 1182(a)(4). The totality of circumstances must be considered in determining whether or not a person is likely to become a public charge. The requirement that an alien possess an adequate supply of medication (if medically appropriate), or have access to such a supply in the United States, would reduce this risk. DHS is aware that prescribed medication is not always necessary; the treatment protocol is determined by the patient's medical service provider. As with other medical determina-

tions for visa purposes, the appropriateness of the alien's treatment protocol is subject to review by DOS' panel physicians. The requirement that the applicant not currently be exhibiting symptoms of an active, contagious infection with AIDS is also relevant to this determination.

Another consideration in deciding whether to exercise discretion favorably for an applicant for categorical authorization is whether any cost will be incurred by any agency of the United States (including State and local government) without that agency's prior written consent. Thus, applicants who do not have sufficient assets to cover the cost of their stay will not benefit from this new provision. Any written offer by a United States agency to provide medication and/or funding that is adequate for the applicant's travel will be considered a favorable factor. Any credible offer from any other financially stable source to provide medication and/or funding that is adequate for the applicant's travel will also be considered a favorable factor. In addition, the nature and duration of the applicant's travel plan and his or her present health are factors for consideration.

An applicant may establish that resources are available to cover medical expenses through several means. First, some medical facilities are operated by State or Federal agencies and, as a matter of policy, do not make provisions for collecting fees from patients accepted for treatment. If an applicant establishes, through documentation provided by a medical facility, that the facility has agreed to provide the applicant services without reimbursement, or that its free services are available to the applicant or to similarly situated persons (such as nonimmigrant aliens) without specific mention of the applicant, the applicant is eligible for visa issuance and temporary admission even if the facility is supported by public funds.

An applicant may have sufficient personal assets to cover anticipated treatment. The assets must be available in the United States within the time frame required for payment by the medical facility. Assets can be established by commonly available documentation. Sponsors (individuals or organizations) may offer to cover potential medical expenses. Such sources should be able to provide documentation of intent and capability to provide that coverage. Finally, short-term medical trip insurance may be available to cover medical costs that the applicant may incur during the relatively short (30-day) period of admission. In every instance above, the applicant must, and should be able to, satisfy the consular officer that assets will be available within the United States to cover anticipated expenses. Again, an alien may seek admission under the existing process if he is unwilling or unable to meet the conditions of this final rule's process. The existing process, through the consular officer interview and DHS review, involves many similar requirements relating to the applicant's health and ability to cover expenses.

Regarding unanticipated medical expenses, the likelihood of such expenses is judged by the totality of circumstances in each applicant's case. Offers of support from individuals and organizations, as well as personal assets, will be given consideration.

DHS and DOS will make every effort to ensure that these regulations are applied consistently without regard to inappropriate consideration, such as an applicant's race.

G. Human Rights Concerns

Some commenters pointed out that the United States is one of only a few countries in the world that restricts travel for those who are HIV-positive. These commenters contended that this is a violation of basic human rights (to travel) and that DHS and HHS should remove HIV infection from the list of contagious diseases of public health significance.

As discussed in the proposed rule, historically, Congress clearly expressed its intent that HIV infection be listed as a communicable disease of public health significance in enacting a statute to that effect. Because Public Law 110-293 eliminated a mandatory listing from the INA, HHS has indicated that it is beginning the process of removing HIV from the list of communicable diseases of public health significance by rulemaking. However, while that process is developing, through rulemaking, DHS is providing a streamlined process for these aliens to be granted temporary admission into the United States as an immediate interim option, pending HHS's plan to remove HIV from the list of communicable diseases of public significance.

H. Public Health Reasons for the Rule

Several commenters contended that the proposed process, with its requirements and conditions, is not supported by medical science, *i.e.*, that the need for the limitations in admitting HIV-positive aliens is not based on sound public health reasons.

The final rule's process was developed in consultation with HHS's Centers for Disease Control and Prevention and National Institutes of Health. DHS relied on those knowledgeable agencies to provide input based on current science. HHS continues to list HIV as a communicable disease of public health significance and DHS must continue to apply the statutory provisions regarding inadmissibility and discretionary authority for temporary admission in a manner appropriate to safeguard the public from what is still recognized under the current statute and regulation as a disease of public health significance.

I. Disparate Treatment Applied to Contagious Diseases

A few commenters contended that the statutes and regulations pertaining to inadmissibility, discretionary authorization, and pro-

cess that limit admission to the United States treat HIV infection differently than other communicable diseases, including sexually transmitted diseases (STDs). These commenters questioned the rationale for this disparate treatment and contended that the statute discriminated against aliens who are HIV-positive.

When the statute treated HIV infection (whether or not it is considered a STD) as a communicable disease of public health significance that disqualifies a carrier of the disease from admission to the United States (subject to exception). DHS utilized a lengthy detailed process for determining whether to grant temporary admission. Accordingly, DHS proposed an alternative, streamlined process for HIV-positive aliens to be granted temporary admission into the United States pending completion of HHS rulemaking.

The HHS list does not cover all communicable diseases, but HHS is charged with the responsibility and has the expertise to make distinctions. Some diseases are on the list, including some STDs (HIV, gonorrhea), while others are not. That a given disease is placed on the list while others are not is not, by itself, evidence of discrimination, nor does it show that the disease is wrongfully on the list. Other non-STDs covered include leprosy (infectious) and tuberculosis (active). Other STDs covered include chancroid, granuloma inguinale, lymphogranuloma venereum, and syphilis (infectious stage). As HIV remains on the HHS list pending further action, publishing a final rule to put into place a streamlined process for temporary admission is appropriate.

J. The 30-day Temporary Admission Limit

A few commenters objected to the 30-day limit imposed by the rule for HIV-positive aliens entering the United States under the rule's categorical authorization process. These commenters contended that this period is needlessly short.

DHS has previously granted blanket authorizations under INA section 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A), for specific, limited purposes, such as to permit HIV-positive aliens to attend particular events, including the Salt Lake City Olympic games, the United Nations General Assembly Special Session on HIV/AIDS in 2001, various Universal Fellowship of Metropolitan Community Churches events, and the 2006 Gay Games in Chicago. Since 1990, aliens who are HIV-positive have rarely been given blanket authorizations for an admission of greater than 10 days. This new process will allow admissions for up to 30 days, which is in line with 30-day admissions often authorized under the individualized, case-by-case process.

The final rule describes a new (alternative) option for nonmigrant aliens with HIV who wish to enter the United States in B-1/B-2 status for periods of time that do not exceed 30 days (but a provision for authorization of satisfactory departure in exigent circumstances is included in this final rule). Moreover, the final rule

authorizes two applications for admission during the 12-month period of the visa validity. This reasonable condition of visa issuance and admission to the United States applies to the majority of nonimmigrants traveling to the United States (regardless of particular nonimmigrant status). For those who anticipate traveling in other nonimmigrant categories or for longer than 30 days, the processes described in 8 CFR 212.4(a) and (b) remain available.

Moreover, many of the admissions under the existing process for HIV-positive aliens have been more narrowly limited to periods corresponding to a particular event in the United States, such as a seminar or convention. Typically, these admissions have been for less than 30 days. Admission under the existing discretionary authorization process also has been more restrictive for nonimmigrant aliens seeking to enter the United States for general tourism purposes. In these respects, the final rule's process is more advantageous to HIV-positive aliens seeking to enter the United States.

However, DHS recognizes that emergencies do occur and, accordingly, has added to this final rule a provision for authorizing an additional period or periods of stay, as appropriate and as deemed necessary by appropriate DHS officials, where an alien admitted under the final rule's process experiences exigent circumstances that prevent his or her departure from the United States. This provision is modeled after the "satisfactory departure" provision under the Visa Waiver Program regulations. 8 CFR 217.3(a); *see* 8 CFR 212.4(f)(5) as adopted in this final rule.

K. Extension of the Comment Period

A few commenters requested additional time to file comments on the proposed rule.

The comment period was open for 30 days, and over 700 persons submitted comments. The comments submitted come from a wide variety of persons and appear to cover a wide breadth of relevant issues and objections. DHS concludes that there was adequate opportunity for public participation and does not see the need to extend the comment period.

L. Vagueness in Criteria and Medical Expertise of Consular Officers

One commenter stated that the criteria of the rule's categorical authorization process that must be met are vague and cannot be administered consistently because consular officers are not able to assess the medical conditions the proposal vaguely puts forward. Similarly, four commenters suggested that consular officers are not trained to handle medical issues.

DHS disagrees. DOS has extensive experience processing applications under the existing HIV authorization process. In order to ensure consistent application of the criteria, DOS has issued specific instructions to consular officers regarding how to evaluate applica-

tions for admission to the United States, including medical issues such as those in question. In addition, consular officers may consult with panel physicians to assist with medical issues when necessary.

M. Negative Impact on United States Citizens

One commenter stated that the proposal would have a negative effect on United States citizens.

DHS disagrees with this comment. This rule only affects nonimmigrant alien visitors to the United States and has no direct effect on United States citizens.

N. Focus on Illegal Aliens

One commenter suggested that DHS should focus its resources on the illegal alien population in the United States.

DHS is committed to enforcing the laws within its purview, including those laws that relate to illegal immigration and those laws that relate to public health concerns.

O. Aliens Who Are Unaware of their HIV Status

One commenter suggested that DHS should focus its resources on those aliens seeking admission to the United States who are not yet aware that they are HIV-positive. Another commenter suggested that DHS focus on education and the prevention of AIDS.

In order to determine whether undiagnosed nonimmigrant aliens are HIV-positive, a medical examination would be required for all nonimmigrant visa applicants. DHS is not proposing to require such an examination as part of this rulemaking. However, the U.S. government is committed to preventing the global spread of AIDS through education and other measures.

P. Appeal of Decision

One commenter objected because the proposed regulation does not specifically provide for appeal of a consular officer's decision. If an alien is denied a visa and temporary admission under the rule's process, he or she may seek admission under the existing process for a case-by-case determination of eligibility.

Q. Future Bar Due to Noncompliance

One commenter contended that an alien who fails to comply with a condition of admission under the final rule's process should not be barred from seeking authorization under the process in the future.

DHS disagrees and believes that this is a reasonable condition to ensure that nonimmigrant aliens comply with the conditions for admission under this rule's process. In addition, an alien who is ineligible for authorization under these regulations because he or she has previously failed to comply with a condition for admission, or for other reasons, can still seek authorization under the existing case-

by-case process. This is similar to the restriction of previous violators of the Visa Waiver Program (VWP) from being able to use the VWP program again for admission. *See* INA section 217(a)(7), 8 U.S.C. 1187(a)(7). In both of these situations, the violator may still apply for a visa; he or she is only barred from using the streamlined process of this regulation or VWP, respectively.

R. Effect on Naturalization and Aliens from Visa Waiver Countries

One commenter expressed concern regarding the effect of the proposed regulations on a permanent resident's ability to become a United States citizen. Several commenters expressed concern regarding the effect of the proposed regulations on travelers from visa waiver countries.

The rule's process does not affect the eligibility of a permanent resident to qualify for naturalization. In addition, these regulations do not change eligibility for aliens seeking admission to the United States under the Visa Waiver Program.

S. Returning Permanent Residents

One commenter objected that an HIV-positive alien with permanent resident status could never travel outside the United States because he would not be allowed to return.

An alien with status as a permanent resident of the United States who travels temporarily outside the United States and returns is not considered to be applying for admission for immigration purposes unless one of the six conditions delineated in INA section 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(c), apply. Therefore, absent any of one of the six conditions, a permanent resident alien who travels outside the United States will not be subject to any of the grounds of inadmissibility found at INA section 212(a), 8 U.S.C. 1182(a). If one of the six conditions applies, the permanent resident alien is subject to any applicable ground of inadmissibility.

IV. Statutory and Regulatory Reviews

A. Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. 553(d), generally requires that a final rule becomes effective no less than 30 days from the date of publication. Rules that grant or recognize an exception or relieve a restriction, however, can be made effective immediately upon publication. This rule does not add new requirements or restrictions; instead it codifies existing criteria for nonimmigrant aliens infected with HIV to obtain a short-term visa authorization. This final rule also removes certain procedural obstacles in the process and provides a more streamlined procedure for HIV-positive aliens to seek admission into the United States. DHS therefore believes that this rule relieves current restrictions on the admissibility

to the United States of HIV-positive nonimmigrant aliens. Accordingly, this final rule will become effective immediately upon publication in the **Federal Register**.

B. Regulatory Flexibility Act

DHS has reviewed the final rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. The individual non-immigrant aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Thus, the RFA does not apply.

C. Unfunded Mandates Reform Act of 1995

The final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 12866

This rule has been determined to be a significant regulatory action under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review. There are no new costs to the public associated with this rule. This rule does not create any new or additional requirements.

E. Executive Order 13132

The final 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.

F. Executive Order 12988

The final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all Departments are required to submit to OMB, for review and approval, any reporting and recordkeeping requirements inherent in a rule. This rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects*8 CFR Part 100*

Organization and functions (Government agencies).

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas.

Amendments to the Regulations

■ For the reasons stated in the preamble, parts 100 and 212 of chapter I of title 8 of the Code of Federal Regulations (8 CFR parts 100 and 212) are amended as follows:

PART 100—STATEMENT OF ORGANIZATION

■ 1. The general authority citation for part 100 continues to read as follows:

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

§ 100.7 [Amended]

■ 2. Section 100.7 is amended by removing the citation “212.4(g)” in the list of parts and sections and replacing it with the citation “212.4(h)”.

PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 3. The general authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458).

■ 4. Section 212.4 is amended by:

■ a. In paragraph (e), removing the citation “212(a)(1)” the first time it appears and replacing it with “212(a)(1)(A)(iii)”, and removing the citation “212(a)(1) of the Act” and replacing it with “212(a)(1)(A)(iii)(I) or (II) of the Act due to a mental disorder and associated threatening or harmful behavior”;

■ b. Redesignating paragraphs (f), (g), (h), and (i) as paragraphs (g), (h), (i), and (j) and adding new paragraph (f) to read as follows:

§ 212.4 Applications for the exercise of discretion under section 212(d)(1) and 212(d)(3).

* * * * *

(f) *Inadmissibility under section 212(a)(1) for aliens inadmissible due to HIV.*

(1) *General.* Pursuant to the authority in section 212(d)(3)(A)(i) of the Act, any alien who is inadmissible under section 212(a)(1)(A)(i) of the Act due to infection with the etiologic agent for acquired immune deficiency syndrome (HIV infection) may be issued a B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant visa by a consular officer or the Secretary of State, and be authorized for temporary admission into the United States for a period not to exceed 30 days, subject to authorization of an additional period or periods under paragraph (f)(5) of this section, provided that the authorization is granted in accordance with paragraphs (f)(2) through (f)(7) of this section. Application under this paragraph (f) may not be combined with any other waiver of inadmissibility.

(2) *Conditions.* An alien who is HIV-positive who applies for a nonimmigrant visa before a consular officer may be issued a B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant visa and admitted to the United States for a period not to exceed 30 days, provided that the applicant establishes that:

- (i) The applicant has tested positive for HIV;
- (ii) The applicant is not currently exhibiting symptoms indicative of an active contagious infection associated with acquired immune deficiency syndrome;
- (iii) The applicant is aware of, has been counseled on, and understands the nature, severity, and the communicability of his or her medical condition;
- (iv) The applicant's admission poses a minimal risk of danger to the public health in the United States and poses a minimal risk of danger of transmission of the infection to any other person in the United States;
- (v) The applicant will have in his or her possession, or will have access to, as medically appropriate, an adequate supply of antiretroviral drugs for the anticipated stay in the United States and possesses sufficient assets, such as insurance that is accepted in the United States, to cover the medical care that the applicant may require in the event of illness at any time while in the United States;
- (vi) The applicant's admission will not create any cost to the United States, or a state or local government, or any agency thereof, without the prior written consent of the agency;
- (vii) The applicant is seeking admission solely for activities that are consistent with the B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant classification;
- (viii) The applicant is aware that no single admission to the United States will be for a period that exceeds 30 days (subject to paragraph (f)(5) of this section);
- (ix) The applicant is otherwise admissible to the United States and no other ground of inadmissibility applies;

(x) The applicant is aware that he or she cannot be admitted under section 217 of the Act (Visa Waiver Program);

(xi) The applicant is aware that any failure to comply with any condition of admission set forth under this paragraph (f) will thereafter make him or her ineligible for authorization under this paragraph; and

(xii) The applicant, for the purpose of admission pursuant to authorization under this paragraph (f), waives any opportunity to apply for an extension of nonimmigrant stay (except as provided in paragraph (f)(5) of this section), a change of nonimmigrant status, or adjustment of status to that of permanent resident.

(A) Nothing in this paragraph (f) precludes an alien admitted under this paragraph (f) from applying for asylum pursuant to section 208 of the Act.

(B) Any alien admitted under this paragraph (f) who applies for adjustment of status under section 209 of the Act after being granted asylum must establish his or her eligibility to adjust status under all applicable provisions of the Act and 8 CFR part 209. Any applicable ground of inadmissibility must be waived by approval of an appropriate waiver(s) under section 209(c) of the Act and 8 CFR 209.2(b).

(C) Nothing within this paragraph (f) constitutes a waiver of inadmissibility under section 209 of the Act or 8 CFR part 209.

(3) *Nonimmigrant visa.* A nonimmigrant visa issued to the applicant for purposes of temporary admission under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may not be valid for more than 12 months or for more than two applications for admission during the 12-month period. The authorized period of stay will be for 30 calendar days calculated from the initial admission under this visa.

(4) *Application at U.S. port.* If otherwise admissible, a holder of the nonimmigrant visa issued under section 212(d)(3)(A)(i) of the Act and this paragraph (f) is authorized to apply for admission at a United States port of entry at any time during the period of validity of the visa in only the B-1 (business visitor) or B-2 (visitor for pleasure) nonimmigrant categories.

(5) *Admission limited; satisfactory departure.* Notwithstanding any other provision of this chapter, no single period of admission under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may be authorized for more than 30 days; if an emergency prevents a nonimmigrant alien admitted under this paragraph (f) from departing from the United States within his or her period of authorized stay, the director (or other appropriate official) having jurisdiction over the place of the alien's temporary stay may, in his or her discretion, grant an additional period (or periods) of satisfactory departure, each such period not to exceed 30 days. If departure is accomplished during that period, the alien is to be regarded as having

satisfactorily accomplished the visit without overstaying the allotted time.

(6) *Failure to comply.* No authorization under section 212(d)(3)(A)(i) of the Act and this paragraph (f) may be provided to any alien who has previously failed to comply with any condition of an admission authorized under this paragraph.

(7) *Additional limitations.* The Secretary of Homeland Security or the Secretary of State may require additional evidence or impose additional conditions on granting authorization for temporary admissions under this paragraph (f) as international (or other relevant) conditions may indicate.

(8) *Option for case-by-case determination.* If the applicant does not meet the criteria under this paragraph (f), or does not wish to agree to the conditions for the streamlined 30-day visa under this paragraph (f), the applicant may elect to utilize the process described in either paragraph (a) or (b) of this section, as applicable.

MICHAEL CHERTOFF,
Secretary.

[Published in the Federal Register, October 6, 2009 (73 FR 58023)]



General Notices

PROPOSED COLLECTION; COMMENT REQUEST

Complaint Management System

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Request for a new collection of information.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, U.S. Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Complaint Management System. This request for comment is being made pursuant to the Paperwork Reduction Act (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 5, 2008, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs and Border Protection, Information Services Group, Attn.: Tracey Denning,

1300 Pennsylvania Avenue, NW, Room 3.2.C, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to U.S. Customs and Border Protection, Attn.: Tracey Denning, 1300 Pennsylvania Avenue NW, Room 3.2C, Washington, D.C. 20229, Tel. (202) 344-1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Complaint Management System

Form Number: None

Abstract: CBP is creating the Complaint Management System (CMS) in order to allow anybody who has interacted with CBP, either as a result of importing or exporting goods, traveling to or from the U.S., seeking a job, or simply living in an area where CBP conducts operations such as border patrol checkpoints, to file a complaint or comment about their CBP experience through an on-line portal.

Current Actions: This submission is being made to establish a new information collection.

Type of Review: New collection of information

Affected Public: Individuals, Businesses

Estimated Number of Respondents: 3,000

Estimated Number of Responses: 3,000

Estimated Time Per Response: 23 minutes

Estimated Total Annual Burden Hours: 1,199

Dated: September 29, 2008

TRACEY DENNING,
*Agency Clearance Officer,
Information Services Branch.*

[Published in the Federal Register, October 6, 2008 (73 FR 58253)]

**RECEIPT OF AN APPLICATION FOR “LEVER-RULE”
PROTECTION**

AGENCY: Customs and Border Protection (CBP), Department of Homeland Security

ACTION: Notice of receipt of application for “Lever-Rule” protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from John Wiley & Sons, Inc. (hereinafter referred to as “Wiley”) seeking “Lever-Rule” protection.

FOR FURTHER INFORMATION CONTACT: Dean Cantalupo, Intellectual Property Rights and Restricted Merchandise Branch, Regulations & Rulings, (202) 572-0885.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that CBP has received an application from Wiley seeking “Lever-Rule” protection. Protection is sought against importations of an individual scientific and technical publication, published by John Wiley & Sons, Inc. (“Wiley”). The specific international editions are not authorized for sale in the United States. The product to be protected and authorized for sale in the United States, is the following scientific and technical text book: written by Erwin Kreyszig, entitled Advanced Engineering Mathematics, 9th Edition, 2006, ISBN 0-471-48885-2. Pursuant to 19 CFR 133.2(f), CBP will publish an additional notice in the Customs Bulletin indicating whether the specific edition will receive Lever-Rule protection in the event that CBP determines that the products are physically and materially different from the Wiley products authorized for sale in the United States.

Dated: September 22, 2008

GEORGE FREDERICK MCCRAY, ESQ.,
*Chief,
Intellectual Property Rights Branch,
Office of Regulations and Rulings.*

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.

Washington, DC, October 8, 2008

The following documents of U.S. Customs and Border Protection (“CBP”), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
*Executive Director,
Regulations and Rulings Office of Trade.*

**REVOCATION OF A RULING LETTER AND REVOCATION
OF TREATMENT RELATING TO THE TARIFF
CLASSIFICATION OF CERTAIN MILK CHOCOLATE CHIPS**

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of certain milk chocolate chips.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North America Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that CBP is revoking one ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of certain milk chocolate chips. CBP also is revoking any treatment previously accorded by it to substantially identical transactions.

Notice of the proposed revocation of NY N007481 was published on August 13, 2008, Vol. 42, No. 34, of the Customs Bulletin. One comment was received in response to the notice. As a result of the comment, we have reviewed past rulings on substantially similar merchandise, and have abandoned the position taken in proposed revocation of NY N007481 with respect to chocolate chips shipped in 25-pound cases.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 22, 2008.

FOR FURTHER INFORMATION CONTACT: Isaac D. Levy, Tariff Classification and Marking Branch: (202) 572-8794.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. § 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the *Customs Bulletin*, Vol. 42, No. 34, on August 13, 2008, proposing to revoke one ruling letter pertaining to the tariff classification of certain milk chocolate chips. One comment opposing the proposed revocation was received in response to that notice. As a result of the comment, we have reviewed past rulings on substantially similar merchandise, and as a result have decided not to pursue our proposal with respect to the classification of chocolate chips shipped in 25-pound cases under subheading 1806.90, HTSUS. We now believe that chocolate chips shipped in 25-pound cases are in "other bulk form" falling under the provisions of subheading 1806.20, HTSUS. Consequently, we have abandoned our proposed classification position for the chips shipped in 25-pound cases, as set forth in the notice. Moreover, it is our position that the chocolate chips shipped in 300-gram retail bags are classified in subheading 1806.90.1500, HTSUSA, if the quantitative limits of note 2 to chapter 18 have not been reached.

This revocation covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addi-

tion to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. § 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N007481, and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise according to the analysis contained in Headquarters Ruling Letter (HQ) H009857, set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: September 24, 2008

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H009857
September 24, 2008
CLA-2 OT:RR:CTF:TCM H009857 IDL
CATEGORY: Classification
TARIFF NO.: 1806.20.2600, 1806.90.1500/1806.90.1800

MR. BOB W. FORBES
COMPLIANCE MANAGER
ROE Logistics
660 Bridge Street
Montreal, Quebec H3K 3K9
Canada

Re: Milk Chocolate Chips ("Milk Chips 2"); Revocation of NY N007481

DEAR MR. FORBES:

This letter concerns New York Ruling Letter (NY) N007481, dated March 16, 2007, issued to you on behalf of your client, Barry Callebaut, Canada, by the National Commodity Specialist Division, U.S. Customs and Border Protection (CBP). At issue in NY N007481 was the correct classification of “Milk Chips 2” milk chocolate chips under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed NY N007481 and have found that it is incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation was published in the *Customs Bulletin*, Volume 42, No. 34, on August 13, 2008. One comment was received in response to the notice.

FACTS:

In NY N007481, the merchandise at issue was described as a milk chocolate chip product intended for use as “decoration on cakes/pastries, in home baking and ready-to-eat.” The product was to be shipped in two forms: packaged for retail sale in 300-gram retail bags and packaged in 25-pound cases to be repackaged after importation. The chocolate chips were further described as being composed of 47.21 percent sugar, 22 percent cocoa paste, 12.59 percent (non-fat) milk powder, 11.07 percent cocoa butter, 0.008 percent vanillin, and 7.10 percent milk fat. The total milk solids content of the chocolate was 19.69 percent, and the total milk fat content of the chocolate was 7.14 percent.

CBP classified the chocolate chips shipped in 25-pound cases under subheading 1806.20.3600, HTSUSA, which provides for: “Chocolate and other food preparations containing cocoa: Other preparations in blocks, slabs or bars, weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg: Preparations consisting wholly of ground cocoa beans, with or without added cocoa fat, flavoring or emulsifying agents, and containing not more than 32 percent by weight of butterfat or other milk solids and not more than 60 percent by weight of sugar: Other: Containing butterfat or other milk solids (excluding articles for consumption at retail as candy or confection): Other: Other: Containing less than 21 percent by weight of milk solids.”

CBP classified the chips shipped in 300-gram retail bags under subheading 1806.90.2800, HTSUSA, which provides for: “Chocolate and other food preparations containing cocoa: Other: Other: Other: Containing butterfat or other milk solids (excluding articles for consumption at retail as candy or confection): Other: Other: Containing less than 21 percent by weight of milk solids.”

CBP took the position in the proposed revocation, cited above, that the milk chocolate chips should be classified under subheading 1806.90.1800, HTSUSA. One commenter opposed the proposed revocation. As a result of the comment, we have reviewed past rulings on substantially similar merchandise, and have decided not to pursue the proposed classification of the chocolate chips in 25-pound cases as set forth in that notice. We now believe that chocolate chips in 25-pound cases are considered an “other bulk form” classifiable in subheading 1806.20, HTSUS. Further, it is CBP’s position

that the chocolate chips in 300-gram retail bags are classified in subheading 1806.90.1500, HTSUSA, if the quantitative limits of note 2 to Chapter 18 have not been reached.

ISSUE:

Whether the milk chocolate chips shipped in 25-pound cases are properly classified under subheading 1806.20.2600, HTSUSA, or subheading 1806.20.3600, HTSUSA?

Whether the milk chocolate chips shipped in 300-gram retail bags are classified in subheading 1806.90.1500, HTSUSA, subheading 1806.90.1800, HTSUSA or subheading 1806.90.2800, HTSUSA?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUSA in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUSA is such that most goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUSA provisions under consideration are as follows:

1806	Chocolate and other food preparations containing cocoa: * * *
1806.20	Other preparations in blocks, slabs or bars, weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg: Preparations consisting wholly of ground cocoa beans, with or without added cocoa fat, flavoring or emulsifying agents, and containing not more than 32 percent by weight of butterfat or other milk solids and not more than 60 percent by weight of sugar: * * * Other: Containing butterfat or other milk solids (excluding articles for consumption at retail as candy or confection): Other, containing over 5.5 percent by weight of butterfat: Other:

1806.20.2600 Containing less than 21 percent
by weight of milk solids 1¹

* * *

Other:

* * *

Other:

1806.20.3600 Containing less than 21 percent
by weight of milk solids 1²

* * *

1806.90 Other:

* * *

Other:

* * *

Other:

Containing butterfat or other milk solids (ex-
cluding articles for consumption at retail as
candy or confection):

Containing over 5.5 percent by weight of
butterfat:

1806.90.1500 Described in additional U.S. note 2 to
this chapter and entered pursuant to
its provisions

Other:

1806.90.1800 Containing less than 21 percent
by weight of milk solids 1³

* * *

Other:

* * *

Other:

1806.90.2800 Containing less than 21 percent
by weight of milk solids 1⁴

As stated above, the milk chocolate chips contain sugar, cocoa paste, cocoa

¹ Goods falling under this provision are subject to quota under chapter 99, HTSUS.

² Goods falling under this provision are subject to quota under chapter 99, HTSUS.

³ Goods falling under this provision are subject to quota under chapter 99, HTSUS.

⁴ Goods falling under this provision are subject to quota under chapter 99, HTSUS.

butter, and vanillin (flavoring). We find that the chips meet the requirements of heading 1806, HTSUS. As such, the milk chocolate chips are properly classified in heading 1806, HTSUS.

Subheading 1806.20, HTSUS, provides for food preparations containing cocoa in “bulk form . . . of a content exceeding 2 kg”. Chocolate chips are a bulk form similar to the exemplars listed therein and fall under the provisions of 1806.20, HTSUS. Further, the chocolate chips shipped in 25-pound cases, meet the minimum weight requirements of subheading 1806.20, HTSUS. Therefore, the chocolate chips shipped in bulk quantities are classified in subheading 1806.20, HTSUS. The chocolate chips shipped in 25-pound cases which contain over 5.5 percent by weight of butterfat and less than 21 percent by weight of milk solids meet the provisions of subheading 1806.20.2600, HTSUSA, and are classified therein.

The chocolate chips shipped in 300-gram retail bags are classifiable as “other” food preparations containing cocoa under subheading 1806.90, HTSUS inasmuch as they do not meet the minimum quantitative weight limit set forth in subheading 1806.20, HTSUS. The milk chocolate chips shipped in 300-gram retail bags which contain over 5.5 percent by weight of butterfat and less than 21 percent by weight of milk solids will be classified in subheading 1806.90.1500, HTSUSA, if imported in quantities that fall within the limits described in additional U.S. note 2 to chapter 18. If the quantitative limits of additional U.S. note 2 to chapter 18 have been reached, the chocolate chips in 300-gram bags are classified under subheading 1806.90.1800, HTSUSA. In addition, products classified in subheadings 1806.90.1800, HTSUSA, will be subject to additional duties based on their value as described in subheadings 9904.18.09 to 9904.18.14, HTSUS.

HOLDING:

By application of GRI 1, the milk chocolate chips shipped in 25-pound cases are classified in heading 1806, HTSUS, and are specifically provided for under subheading 1806.20.2600, HTSUSA, as: “Chocolate and other food preparations containing cocoa: Other preparations in blocks, slabs or bars, weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg: Preparations consisting wholly of ground cocoa beans, with or without added cocoa fat, flavoring or emulsifying agents, and containing not more than 32 percent by weight of butterfat or other milk solids and not more than 60 percent by weight of sugar: Other: Containing butterfat or other milk solids (excluding articles for consumption at retail as candy or confection): Other, containing over 5.5 percent by weight of butterfat: Other: Containing less than 21 percent by weight of milk solids.” The general, column one rate of duty is 37.2 cents/kg + 4.3% *ad valorem*.

The milk chocolate chips shipped in 300-gram retail bags are classified in heading 1806, HTSUS, and, provided that the quantitative limits in additional U.S. note 2 to chapter 18 have not been exceeded, are specifically provided for under subheading 1806.90.1500, HTSUSA, as “Chocolate and other food preparations containing cocoa: Other: Other: Other: Containing butterfat or other milk solids (excluding articles for consumption at retail as candy or confection): Other, containing over 5.5 percent by weight of butterfat: Described in additional U.S. note 2 to chapter 18 and entered pursuant to its provisions” with a general, column one rate of duty of 3.5 percent *ad valorem*. If the limits of the note have been exceeded, the milk chocolate chips shipped in 300-gram retail bags are classified in subheading

1806.90.1800, HTSUSA, as: “Chocolate and other food preparations containing cocoa: Other: Other: Other: Containing butterfat or other milk solids (excluding articles for consumption at retail a candy or confection): Containing over 5.5 percent by weight of butterfat: Other: Containing less than 21 percent by weight of milk solids” with a general, column one rate of duty of 37.2 cents/kg + 6% *ad valorem*. If classified in subheading 1806.90.1800, HTSUSA, the chocolate chips imported in 300-gram bags will be subject to additional duties based on their value as described in subheadings 9904.18.09 to 9904.18.14, HTSUS.

EFFECT ON OTHER RULINGS:

NY N007481, dated March 16, 2007, is hereby revoked. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

**PROPOSED REVOCATION OF A RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
CLASSIFICATION OF A MOTORCYCLE LOCK SET**

AGENCY: U.S. Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed modification of a classification ruling letter and revocation of treatment relating to the classification of a motorcycle Lock Set.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is proposing to revoke one ruling letter relating to the classification of a motorcycle Lock Set. CBP is also proposing to revoke any treatment previously accorded by it to substantially identical merchandise.

DATE: Comments must be received on or before November 22, 2008.

ADDRESS: Written comments are to be addressed to the U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at the offices of Customs and Border Protection, 799 9th Street, NW, Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Kelly Herman,
Tariff Classification and Marking Branch: (202) 572-8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the classification of a motorcycle Lock Set. Although in this notice, CBP is specifically referring to the revocation of New York Ruling Letter (NY) N007611, dated March 7, 2007 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may

raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In N007611, a motorcycle Lock Set consisting of a switch assembly, fuel filler cap and motorcycle seat lock, was separately classified in each of the components respective headings. The switch assembly was classified in heading 8536, Harmonized Tariff Schedule of the United States (HTSUS), as “Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V.” The fuel filler cap was classified in heading 8714, HTSUS, as “Parts and accessories of vehicles of headings 8711 to 8713” and the motorcycle seat lock was classified in heading 8301, which provides for “Padlocks and locks (key, combination or electrically operated), of base metal; clasps and frames with clasps, incorporating locks, of base metal; keys and parts of any of the foregoing articles, of base metal.” Since the issuance of that ruling, CBP has reviewed the classification of the motorcycle Lock Set and has determined that the cited ruling is in error.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is proposing to revoke N007611, dated March 7, 2007, and revoke or modify any other ruling not specifically identified, to reflect the classification of the motorcycle Lock Set according to the analysis contained in proposed Headquarters Ruling Letter (HQ) H009850, set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: October 6, 2008

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

ATTACHMENT A

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
NY N007611
March 7, 2007

DOCUMENT-NO: [*1] CLA-2-87:RR:NC:N1:101

CATEGORY: Classification

TARIFF-NO: 8536.50.9065; 8714.19.0060; 8301.20.0060

LAURIE PEACH, NATIONAL CUSTOMS MANAGER
AMERICAN HONDA MOTOR CO., INC.
1919 Torrance Blvd
Torrance, CA 90501-2746

REFERENCE: The tariff classification of motorcycle parts from Japan

DEAR MS. PEACH:

In your letter dated February 13, 2007 you requested a tariff classification ruling.

The items concerned are motorcycle parts packaged together in a box identified as part number 35010-MBW-A10. These parts are specifically designed for use with the Honda CBR 600F motorcycle. The box contains an unsealed clear plastic bag, which contains the following parts: a switch assembly, an alloy steel fuel filler cap with integrated lock and, lastly, a motorcycle seat lock. There is also a set of matched keys that operate all three pieces.

The first item is a switch assembly (an ignition cylinder attached to an ignition switch and contact base with wire harness). It measures approximately 4 inches long and 2 ¾ inches at its widest. It has approximately 16 inches of harnessing attached.

[SEE ILLUSTRATION IN ORIGINAL]

The purpose of the switch assembly is to control the flow of electrical current from the battery to the starter. [*2] The switch is operated by use of a key.

The next item is an alloy steel fuel filler cap with integrated lock. The fuel filler cap measures approximately 4 ½ inches in diameter and 1 ½ inches in height.

[SEE ILLUSTRATION IN ORIGINAL]

The purpose of the fuel filler cap is to maintain a liquid-tight seal on the fuel tank. It has an integrated locking mechanism that needs to be released in order to access the fuel tank.

The last item is a motorcycle seat lock. The seat lock measures approximately 1 inch in diameter and 2 inches high.

[SEE ILLUSTRATION IN ORIGINAL]

The purpose of the seat lock is to secure the storage compartment that is often found on motorcycles. The lock is operated by the inserting of a key.

In your Ruling Request, you propose classification of these parts, together, in Harmonized Tariff Schedule of the United States (HTSUS) subheading 8714.19.0060, as a “set” for classification purposes.

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings [*3] and the GRIs.

EN 3(b)(X)(b) states that, “. . . sets . . . shall be taken to mean goods which consist of . . . articles put together to meet a particular need . . .” The switch assembly is considered to be a keyed switch for classification purposes and therefore does not meet the need of securing any part of the motorcycle. The fuel filler cap secures the fill pipe by the use of a lock, the motorcycle seat lock secures the contents of the seat by way of a lock, the switch assembly does not secure the motorcycle, rather it uses the supplied key to open and close a circuit.

Classification of goods in the Harmonized Tariff Schedule of the United States (HTSUS) is governed by the General Rules of Interpretation (GRIs). GRI 1. states, “. . . classification shall be determined according to the terms of the headings . . .”.

General Note 3. (h) (vi) to the HTSUS states, “. . . a reference to ”headings“ encompasses subheadings indented thereunder.”

The applicable subheading for the replacement ignition cylinder and switch will be 8536.50.9065, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “. . . apparatus for switching . . . electrical circuits, or for making connections to or in [*4] electrical circuits (for example, switches . . .) . . . : Other switches: Other: Other.” The rate of duty will be 2.7%

The applicable subheading for the alloy steel fuel filler cap with integrated lock will be 8714.19.0060, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “Parts . . . of vehicles . . . : . . . motorcycles . . . : Other: . . . Other.” The rate of duty will be Free.

The applicable subheading for the motorcycle seat lock will be 8301.20.0060, Harmonized Tariff Schedule of the United States (HTSUS), which provides for “. . . locks (key . . . operated) . . . : . . . of a kind used on motor vehicles: Other.” The rate of duty will be 5.7%.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Richard Laman [*5] at 646-733-3017.

Legal Topics:

For related research and practice materials, see the following legal topics: International Trade Law Imports & Exports Classification of Merchandise Harmonized Tariff Schedule International Trade Law Imports & Exports Duties, Fees & Taxes General Overview

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

CUSTOMER SERVICE DISCLAIMER: Inclusion of Customs ruling in LEXIS does not constitute publication of the ruling under 19 CFR 177.10(b).

An established and uniform practice is created for Customs rulings only by full-text publication in the Customs Bulletin and only if the ruling concerns a rate of duty or change.

ATTACHMENT B

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H009850
CLA-2: OT:RR:CTF:TCM H009850 KSH
CATEGORY: Classification
TARIFF NO.: 8714.19.00

DONALD HARRISON ESQ.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, DC 20036

RE: Revocation of NY N007611, dated March 7, 2007; tariff classification of a motorcycle Lock Set

DEAR MR. HARRISON:

This is in reply to your letter dated April 13, 2007, in which you have requested reconsideration of New York Ruling Letter (NY) N007611, dated March 7, 2007, as it pertains to the classification of a Lock Set for the Honda CBR 600F motorcycle.

In accordance with your request for reconsideration of NY N007611, CBP has reviewed the classification of this item and has determined that the cited ruling is in error.

FACTS:

The merchandise at issue is a Lock Set, identified as part number 35010-MBW-A10, for use with the Honda CBR 600F motorcycle. It consists of a switch assembly, an alloy steel fuel filler cap with integrated lock and a motorcycle seat lock. A pair of matched keys to operate the three parts is included in the Lock Set. The Lock Set is packaged together in a box inside an unsealed clear plastic bag.

The switch assembly (an ignition cylinder attached to an ignition switch and contact base with wire harness) measures approximately 4 inches long and 2 ¾ inches at its widest. It has approximately 16 inches of harnessing attached.

The switch assembly controls the flow of electrical current from the battery to the starter and is operated by use of a key.

The alloy steel fuel filler cap with integrated lock measures approximately 4 ½ inches in diameter and 1 ½ inches in height. It maintains a liquid-tight seal on the fuel tank and has an integrated locking mechanism that needs to be released in order to access the fuel tank.

The motorcycle seat lock measures approximately 1 inch in diameter and 2 inches high. It secures the storage compartment that of the motorcycle. The lock is operated by the inserting of a key.

In NY N007611, we determined that the Lock Set was not classifiable as a set in accordance with General Rule of Interpretation (GRI) 3(b). Specifically we stated that the switch assembly was classified in heading 8536, Harmo-

nized Tariff Schedule of the United States (HTSUS), as “Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V.” The fuel filler cap was classified in heading 8714, HTSUS, as “Parts and accessories of vehicles of headings 8711 to 8713” and the motorcycle seat lock was classified in heading 8301, which provides for “Padlocks and locks (key, combination or electrically operated), of base metal; clasps and frames with clasps, incorporating locks, of base metal; keys and parts of any of the foregoing articles, of base metal.”

ISSUE:

Whether the Lock Set is classifiable as a set.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the GRI. GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The HTSUS provisions under consideration are as follows:

- 8301 Padlocks and locks (key, combination or electrically operated), of base metal; clasps and frames with clasps, incorporating locks, of base metal; keys and parts of any of the foregoing articles, of base metal:
- 8301.20.00 Locks of a kind used on motor vehicles
- * * * *
- 8536 Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V:
- 8536.50 Other switches:
- 8536.50.90 Other
- * * * *
- 8714 Parts and accessories of vehicles of headings 8711 to 8713:
- Of motorcycles (including mopeds):
- 8714.19.00 Other

Inasmuch as the Lock Set is composed of goods that are *prima facie* classifiable in more than one heading, classification cannot be resolved under GRI 1. GRI 2(b) directs that the “classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.”

GRI 3 provides that:

When by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings refer to only part of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to the goods, even if one of them gives a more complete or precise description of the good.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
- (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The headings at issue only refer to part of the items in the set put up for retail sale. As such, they are regarded as equally specific and resort must be made to GRI 3(b).

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the HTSUS. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. It is Customs and Border Protection (CBP) practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See*, T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN X to GRI 3(b) provides guidance as to whether the Lock Set constitutes “goods put up in sets for retail sale”:

For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings . . . ;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without re-packing (e.g., in boxes or cases or on boards).

As previously explained, the items comprising the Lock Set are *prima facie* classifiable under different headings of the HTSUS.

The Lock Set is intended for installation on a single motorcycle to meet the need of an owner to carry a single key that will operate multiple functions of the motorcycle, all of which require the use of a key. The switch assembly requires a key in order for the owner to activate the ignition. The filler cap requires a key in order for the owner to fill the motorcycle with gas. The seat lock requires a key in order for the owner to access a storage compartment underneath the seat. Requiring the use of a key to access the ignition, gas tank, and storage compartment provides the owner with security for the motorcycle. The use of one key for accessing all three of these functions also fulfills the owner’s need for convenience, as the owner is not

obligated to carry multiple keys for each function. Accordingly, the Lock Set is put up together to meet an owner's needs for convenience and security, through the use of a single key.

The goods are imported in a manner suitable for sale to users without re-packing. At importation, the Lock Set is packaged in a box labeled with a singular part number. American Honda Motor Co. sells these units to Honda motorcycle dealers in the same packaging. (See HQ 962339 dated June 29, 1999, noting that CBP has previously held that merchandise that is not sold directly to consumers can be "goods put up in sets for retail sales," where some other party acts as the ultimate purchaser.)

Because the three criteria under EN X to GRI 3(b) are satisfied, the three items are considered "goods put up in sets for retail sale" and will be "classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

Explanatory Note VIII to GRI 3(b) explains, "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods." In this case, the principal reason for purchasing the Lock Set is to obtain three items that utilize the same key. The essential character is the functionality that enables each item to be accessed with the same key. As each part requires a different functionality, no single item imparts the essential character to the set. Therefore, the set is not classifiable on the basis of its essential character by reference to GRI 3(b).

Thus classification must be determined in accordance with GRI 3(c). Heading 8714, HTSUS, is last in numerical order. Thus the Lock Set is classified in heading, 8714, HTSUS.

HOLDING:

By application of GRI 3(c), the Lock Set for the Honda CBR 600F motorcycle is classified in heading 8714, HTSUS. It is specifically provided for in subheading 8714.19.0060, HTSUS, which provides for: "Parts and accessories of vehicles of headings 8711 to 8713: Of motorcycles (including mopeds): Other: Other". The general, column one rate of duty is "Free."

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web, at <http://www.usitc.gov.tata/hts/>.

EFFECT ON OTHER RULINGS:

NY N007611, dated March 7, 2007, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

19 CFR PART 177**PROPOSED REVOCATION OF A RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE CLASSIFICATION OF HYPERFORM® HPN-68L**

AGENCY: U.S. Customs and Border Protection (“CBP”), Department of Homeland Security.

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to the classification of Hyperform® HPN-68L.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 STAT. 2057), this notice advises interested parties that CPB intends to revoke a ruling concerning the classification of Hyperform® HPN-68L, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CPB intends to revoke any treatment previously accorded by CPB to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before November 22, 2008.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of International Trade—Regulation and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at 799 9th St. N.W. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, Tariff Classification and Marking Branch (202) 572-8784.

SUPPLEMENTARY INFORMATION:**Background**

On December 8, 1993, Title VI (CBP Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter “Title VI”), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “informed compliance” and “shared responsibility.” These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accord-

ingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that CBP intends to revoke a ruling pertaining to the classification of Hyperform® HPN-68L. Although in this notice CBP is specifically referring to Headquarters Ruling Letter (HQ) 968189, dated June 6, 2006, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In HQ 968189 (Attachment "A"), CBP ruled that Hyperform® HPN-68L is classified in subheading 3824.90.91, HTSUS, which provides for: "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Other: Other." The referenced ruling is incorrect because the chemical substance at issue contains a separate chemically defined organic compound with an added stabilizer and is classified in subheading subheading 2917.20.00, HTSUS, which provides for: "Polycarboxylic acids, their

anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Cyclanic, cyclenic or cycloterpenic polycarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives.”

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke HQ 968189, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter HQ W968389. (Attachment “B”). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: October 6, 2008

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

ATTACHMENT A

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
HQ 968189
June 6, 2006
CLA—2 RR:CTF:TCM 968189 BtB
CATEGORY: Classification
TARIFF NO.: 3824.90.9190

MR. JOHN D. BRUHNKE
MILIKEN CHEMICAL
920 Miliken Road
M-209
Spartanburg, SC 29304

Re: Classification of Hyperform® HPN-68L; CAS Number 351870-33-2

DEAR MR. BRUHNKE:

This is in reply to your binding ruling request sent electronically by eRuling template to the National Commodity Specialist Division (“NCS”) of U.S. Customs and Border Protection (“CBP”) on January 17, 2006, requesting the classification under the Harmonized Tariff Schedule of the United States Annotated (“HTSUSA”) of a certain product that you identified as “Hyper form® HPN-68L.” You supplemented the ruling request with a letter dated March 31, 2006. These letters have been forwarded to this office for a reply.

FACTS:

Hyper form® HPN-68L (hereinafter “Hyperform® HPN-68L”) is a nucleating additive for polyolefin polymers. It is composed of Bicylco[2.2.1]

heptane-2,3-dicarboxylic acid, disodium salt, (1R, 2R, 3S, 4S)-rel-and a blend of amorphous silicon dioxide and (Z)-13-docosenamide.⁵

You identified the amorphous silicon dioxide and (Z)-13-docosenamide blend in Hyperform® HPN-68L as SYLOBLOC® 250, a product distributed by Grace Davison. You also provided us with a copy a Grace Davison webpage describing the product. *See generally* <http://www.gracedavison.com/products/plastics/property.htm> . SYLOBLOC® 250 is an amorphous silicon dioxide coated with 13-docosenamide in a 1:1 ratio. *See* <http://www.gracedavison.com/products/plastics/product.htm>. We note that 13-docosenamide is also recognized as Erucamide (CAS Number 112-84-5).

A leading website on specialty chemicals states the following about SYLOBLOC® 250:

[A] [b]blend of synthetic amorphous silica and erucamide. Used as an anti-blocking aid in plastic film applications such as polyethylene and polypropylene, as an adsorbent and a pigment dispersion aid and as a mold release agent for injection molded parts. Offers large internal surface area, high porosity, superior dispersibility, high efficiency and clarity. Provides plateout protection in PVC formulations. Gives slip performance, high homogeneity and compatibility with UV stabilizers, anti-oxidants, acid scavengers. *See* <http://www.specialchem4polymers.com> .

You stated in your ruling request SYLOBLOC® 250 constitutes 20% of Hyperform® HPN-68L. It is our understanding that Hyperform® HPN-68L is in powder form. In your ruling request, you identify the Hyperform® HPN-68L's CAS Number as 351870-33-2. You did not indicate the product's country of origin. You provided us with a sample of Hyperform® HPN-68L, which was tested by CBP's New York Laboratory.

Also, you propose that Hyperform® HPN-68L is classified as separate chemically defined compound in subheading 2917.20.0000, HTSUSA, which provides for: "Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Cyclanic, cyclenic or cycloterpenic polycarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives."

ISSUE:

What is the classification of Hyperform® HPN-68L?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally

⁵ See <http://www.hyperformnucleatingagents.com/chemical/chemdivp.nsf/KLWebKey/Hyperform%7E%7EFirst%20Page%7E%7E%7E%7E%7E%7E%7EHome?OpenDocument&SubSiteID=Hyperform>.

binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

A product's classification is determined by first looking to the headings and section or chapter notes. *See Orlando Food Corp. v. United States*, 140 F.3d 1437 (Fed. Cir. 1998). Only after determining that a product is classifiable under the heading should one look to the subheadings to find the correct classification for the merchandise. *Id.*

You have proposed that Hyperform® HPN–68L is classified in heading 2917, HTSUSA, which provides for: “Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives.” As a general rule, subject to the provisions of Note 1 to the Chapter, the headings of Chapter 29 are restricted to separate chemically defined organic compounds. *See* Note 1 to Chapter 29, HTSUSA, and General EN to Chapter 29. Pursuant to Note 1(f) of the Chapter, these separate chemically defined compounds may contain an added stabilizer (including an anticaking agent) necessary for their preservation or transport. The General EN (A) to Chapter 29, in pertinent part, state that:

A separate chemically defined compound is a substance which consists of one molecular species (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram

Separate chemically defined compounds containing other substances deliberately added during or after their manufacture (including purification) are excluded from this Chapter

The threshold question in this matter is whether Hyperform® HPN–68L is a separate chemically defined compound containing only substances allowed under Note 1 to Chapter 29, HTSUSA. In this case, the SYLOBLOC® 250 in the Hyperform® HPN–68L that is of specific concern. If the SYLOBLOC® 250 can be regarded merely as an anticaking agent (permitted under Note 1(f) to Chapter 29, HTSUSA), the headings of Chapter 29 may be considered for classification of Hyperform® HPN–68L. If this blend cannot, the headings of Chapter 29 will not be applicable to Hyperform® HPN–68L.

Before this analysis can proceed further, it is necessary to set forth definitions relevant to this analysis. “Anti-caking agent” is defined in Hawley’s Condensed Chemical Dictionary (14th Edition) as:

An additive used primarily in certain finely divided food particles that tend to be hygroscopic to prevent or inhibit agglomeration and thus maintain a free-flowing condition.

Much different from anti-caking agents are anti-blocking agents and anti-slip agents. “Antiblocking agent” is defined as:

A substance (e.g., a finely divided solid of mineral nature) that is added to a plastic mix to prevent adhesion of the surfaces of films made from the plastic to each other or to other surfaces. They are of particular value in polyolefin and vinyl films. The hard, infusible particles tend to roughen the surface and so maintain a small air space between the adjacent layers of the film, thus preventing adhesion. Silicate minerals are widely used for this purpose. *Id.*

“Anti-slip agent” is defined as an additive that decreases the slip of surfaces used to eliminate the sliding of parallel film surfaces over each other or the sliding of film surfaces over substrates.⁶

Silicon dioxide/13-docosenamide blends are generally used in the polymer industry as antiblocking/anti-slip agents. As reflected on Grace Davison’s webpage, SYLOBLOC® products can be used for several purposes, specifically as antiblocking agents, plateout protection, mold releasers, pigment dispersers, and liquid carriers.⁷ SYLOBLOC® products can also be tailor-made for individual uses, and are manufactured in many grades and combinations with other components.

In your supplemental letter, you assert that although SYLOBLOC® 250 can be used as an antiblocking/anti-slip agent, that is not the additive’s intended purpose in the Hyperform® HPN-68L. You claim that the blend is added to Hyperform® HPN-68L “to prevent moisture from affecting the product, and to help prevent agglomeration, or clumps, which can cause the product to cake together and not flow into or out of a shipping container.”

Based on product information, your letters, and our lab testing of the additive⁸, we find that SYLOBLOC® 250 is purposely added to Hyperform® HPN-68L not only to absorb excess moisture and prevent agglomeration, but also to act as an antiblocking/anti-slip agent in the formation of polyolefins. This finding is consistent with how silicon dioxide/13-docosenamide blends of this nature are generally used in the polymer industry. The presence of SYLOBLOC® 250 in Hyperform® HPN-68L will result in end products made with Hyperform® HPN-68L having a micro-rough surface, resulting in less contact and less blocking and slip between surfaces. If the blend were not an intentional and functional addition to Hyperform® HPN-68L, this formulated, specialized additive could be replaced by a simple (and most likely less expensive) anticaking agent, which would absorb excess moisture and prevent agglomeration. The high content (20%) of SYLOBLOC® 250 in Hyperform® HPN-68L is also not consistent with a substance only functioning as an anticaking agent.

As a consequence of the above determination, we find that Hyperform® HPN-68L is not a separate chemically defined compound containing only substances allowed under Note 1 to Chapter 29, HTSUSA. The SYLOBLOC® 250 in the product cannot be regarded merely as an anticaking agent (permitted under Note 1(f) to Chapter 29, HTSUSA). Consequently, the headings of Chapter 29 may not be considered for classification of Hyperform® HPN-68L.

Heading 3824, HTSUSA, provides for: “Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included.” As Hyperform® HPN-68L is not elsewhere specified or included, it is classified in heading 3824, HTSUSA. The product is provided for by subheading 3824.90.9190, HTSUSA, the basket provision of heading 3824, HTSUSA.

⁶ See <http://www.specialchem4coatings.com/resources/glossary/>.

⁷ See <http://www.gracedavison.com/products/plastics/property.htm>.

⁸ CBP Lab Report NY20060082S, dated January 24, 2006, states: “The amide and silica might be added for safety purposes or for transport, but are also used as slip and block agents in polymer formulations.”

HOLDING: Hyperform® HPN-68L is classified in subheading 3824.90.9190, HTSUSA, which provides for: "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Other: Other: Other, Other." The applicable column one, general rate of duty under the 2006 HTSUSA is 5% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the world wide web at www.usitc.gov.

This merchandise may be subject to the requirements of the Toxic Substances Control Act ("TSCA") administered by the U.S. Environmental Protection Agency. You may contact them by mail at 402 M Street, SW, Washington, DC 20460, or by telephone at (202)-554-1404.

GAIL A. HAMILL,
Chief,

Tariff Classification and Marking Branch.

ATTACHMENT B

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ W968389
CLA-2 OT:RR:CTF:TCM W968389 ARM
CATEGORY: Classification
TARIFF NO.: 2917.20.00

BARRY E. COHEN, ESQ.
CROWELL MORING
1001 Pennsylvania Avenue, NW
Washington, D. C. 20004-2595

Re: Classification of Hyperform® HPN-68L; CAS Number 351870-33-2

DEAR MR. COHEN:

This is in reply to your letter, dated August 25, 2006, on behalf of your client, Milliken & Company, requesting reconsideration of Headquarters Ruling Letter (HQ) 968189, dated June 6, 2006, classifying Hyperform® HPN-68L in heading 3824, of the Harmonized Tariff Schedule of the United States ("HTSUS"), which provides for: "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included:" You request classification in heading 2917, HTSUS, which provides for: "Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives:"

In reaching our determination, we have also considered your supplemental submission of May 27, 2008, comments made in a telephone conference with Michael Mannion, Chemical Engineer of Milliken & Company, on August 11, 2008, and supplemental information from Mr. Mannion, received by electronic mail on August 12, 2008. We have decided HQ 968189 is in error.

FACTS:

Hyperform HPN-68L is a nucleating additive for polyolefin polymers.⁹ It is composed of 80 percent Bicyclo[2.2.1]heptane-2,3-dicarboxylic acid, disodium salt, (1R, 2R, 3S, 4S)-rel- and 20 percent anti-caking agent known as Sylobloc® 250, a blend of amorphous silicon dioxide and (Z)-13-docosamide. CBP Laboratory Report # 20061574 indicates that the amount of Sylobloc® 250 is too low to act as a slip and antiblock agent. The laboratory report also highlights the following language from U.S. Patent #6,946,507, filed October 3, 2003, on behalf of Milliken, which discusses the effect of Sylobloc® 250 in the merchandise as follows:

Another alternative method of utilizing such a combination of components involves the initial addition of from 0.1 to 5 percent by weight of the anticaking agent to the bicyclic nucleator formulation. It has been found that for storage purposes, this low amount of anticaking additive provides the desired effect of preventing agglomeration and ultimate cementation. Subsequently, then, a larger amount of anticaking agent in the range of from 10-20 percent by weight, for instance, may be added to a bicyclic nucleator formulation during introduction within a target molten thermoplastic. As noted above, the high amount of anticaking agent appears to contribute to the ability of the bicyclic nucleator to impart higher crystallization temperatures and simultaneous lower haze measurements to such target thermoplastics. Thus, instead of relying upon inclusion of large amounts of anticaking agents during initial bicyclic nucleator storage, it is thus possible to delay addition of such large amounts, thereby permitting an optimization of greater amounts of the nucleator compound to be stored at the highest available level of anticaking (anti-agglomeration, anticementation, etc.), without needing to include larger amounts of such agents that would not contribute any further reductions in cementation propensities during storage . . .

The CBP Laboratory Report concluded, "Based on the cited patent reference it appears Sylobloc® 250 was added at the 20% level to contribute to the ability of the nucleator to impart higher crystallization temps and lower haze."

ISSUE:

Whether HPN-68L, containing 20 percent Sylobloc® 250, is a separate chemically identifiable compound under Note 1 to chapter 29.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

⁹ A nucleating agent increases the crystallization rate and the overall percent crystallinity of a polymer. The faster crystallization rate allows for higher productivity in molding and extrusion processes . . . (CBP Laboratory Report # 20061574, dated November 6, 2006).

The HTSUS provisions under consideration are as follows:

- 2917 Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives.
- 2917.20.00 Cyclanic, cyclenic or cycloterpenic polycarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives
- * * * * *
- 3824 Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included:
- 3824.90 Other:
- Other:
- 3824.90.91 Other.

Note 1 to Chapter 29, HTSUS, states, in pertinent part, the following:

1. Except where the context otherwise requires, the headings of this chapter apply only to:
 - (a) Separate chemically defined organic compounds, whether or not containing impurities; . . .
 - * * * * *
 - (f) The products mentioned in (a), (b), (c), (d) or (e) above with an added stabilizer (including an anticaking agent) necessary for their preservation or transport; . . .
 - * * * * *

In HQ 968189, we stated that “[T]he threshold question in this matter is whether Hyperform® HPN-68L is a separate chemically defined compound containing only substances allowed under Note 1 to Chapter 29, HTSUSA If the SYLOBLOC® 250 can be regarded merely as an anticaking agent (permitted under Note 1(f) to Chapter 29, HTSUSA), the headings of Chapter 29 may be considered for classification of Hyperform® HPN-68L. If this blend cannot, the headings of Chapter 29 will not be applicable to Hyperform® HPN-68L.” We maintain that this is the essential issue in this classification determination. However, we believe our specific finding is in error. In HQ 968189, we specifically stated that “[B]ased on product information, your letters, and our lab testing of the additive (footnote omitted), we find that Sylobloc® 250 is purposely added to Hyperform® HPN-68L not only to absorb excess moisture and prevent agglomeration, but also to act as an antiblocking/anti-slip agent in the formation of polyolefins.” This finding is contradicted by the statement in CBP Laboratory Report # 20061574 that “. . . the amount of Sylobloc 250 is too low to act as a slip and antiblock agent” It is CBP’s practice not to disregard the reports of CBP laboratories. *See* Customs Directive 099-3820-002, issued May 4, 1992;

see also *Consolidated Cork Corp. v. United States*, 54 Cust. Ct. 83, C.D. 2512 (1965). Therefore, we are convinced that the Sylobloc® 250 does not perform as an antiblocking or anti-slip agent in the instant product.

However, the question remains whether the 20 percent Sylobloc® 250 content in the instant product is solely an anti-caking agent. In your submission dated May 27, 2008, you provided evidence reprinted from patent # 6,946,507, that the crystallization temperature and haze measurements are essentially the same for the jet milled product without Sylobloc® 250 and the product with the Sylobloc® 250 without milling. The patent language notwithstanding, the higher percentages of anticaking agent maintain the as-manufactured characteristics of the HPN-68L as a free-flowing, fine powder, which itself imparts higher crystallization temperatures and lower haze measurements during the processing of the final products it is used in.

We find that Sylobloc® 250 in HPN-68L is an anti-caking agent. It is therefore a permissible addition to a separate chemically defined organic compounds under note 1(f) to chapter 29. Our laboratory report concurs that the HPN-68L contains Bicyclo[2.2.1]heptane-2,3-dicarboxylic acid, disodium salt, (1R, 2R, 3S, 4S)-rel-, a cyclanic dicarboxylic acid derivative containing carboxylic acid and salt functional groups, and is classified in heading 2917, HTSUS, under GRI 1. Specifically, HPN-68L is classified in subheading 2917.20.00, HTSUS, which provides for: "Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Cyclanic, cyclenic or cycloterpenic polycarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives."

HOLDING:

Hyperform® HPN-68L is classified in heading 2917, HTSUS. It is provided for in subheading 2917.20.00, HTSUS, which provides for: "Polycarboxylic acids, their anhydrides, halides, peroxides and peroxyacids; their halogenated, sulfonated, nitrated or nitrosated derivatives: Cyclanic, cyclenic or cycloterpenic polycarboxylic acids, their anhydrides, halides, peroxides, peroxyacids and their derivatives." The applicable column one, general rate of duty under the 2008 HTSUS is 4.2 percent *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the world wide web at www.usitc.gov.

This merchandise may be subject to the requirements of the Toxic Substances Control Act ("TSCA") administered by the U.S. Environmental Protection Agency. You may contact them by mail at U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460-0001, or by telephone at (202) 564-2220.

EFFECT ON OTHER RULINGS:

HQ 968189, dated June 6, 2006, is revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

**PROPOSED MODIFICATION OF A RULING LETTER AND
REVOCATION OF TREATMENT RELATING TO THE
TARIFF CLASSIFICATION OF A HANDBAG AND TOTE
WITH COORDINATING POUCHES**

AGENCY: U.S. Customs and Border Protection; Department of Homeland Security.

ACTION: Proposed modification of a classification ruling letter and revocation of treatment relating to the classification of a handbag and tote with coordinating pouches.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is proposing to modify a ruling letter relating to the classification of a handbag and tote with coordinating pouches. CBP is also proposing to modify or revoke any treatment previously accorded by it to substantially identical merchandise.

DATE: Comments must be received on or before November 22, 2008.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of International Trade, Regulations & Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at the offices of Customs and Border Protection, 799 9th Street, NW, Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Tariff Classification and Marking Branch: (202) 572-8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the

trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP is proposing to modify a ruling letter pertaining to the classification of a handbag and tote with coordinating pouches. Although in this notice, CBP is specifically referring to the modification of New York Ruling Letter (NY) N025384, dated April 15, 2008 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is proposing to modify any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N025384, pouches imported with a coordinating tote and purse were separately classified from the coordinating purse and tote. Since the issuance of that ruling, CBP has reviewed the classification of the pouches and has determined that the cited ruling is in error.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is proposing to modify NY N025384 and is proposing to revoke or modify any other ruling not specifically identified, to reflect the classification of the pouches according to the analysis contained in proposed Headquarters Ruling Letter (HQ) H031400, set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: October 6, 2008

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

ATTACHMENT A

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
N025384
April 15, 2008
DOCUMENT-NO: CLA-2-42:OT:RR:NC:N3:341
CATEGORY: Classification
TARIFF-NO: 4202.22.8050, 4202.92.3031, 4202.92.9026

DIANE R. PASTOOR
V. ALEXANDER & CO., INC.
110 Mc Ghee Tyson Blvd.
Suite 202
Alcoa, TN 37701-4105

REFERENCE: The tariff classification of handbags, tote bag, toiletry bags and laptop case from China

DEAR MS. PASTOOR:

In your letter dated March 24, 2008 on behalf of Brand Science, LLC., you requested a classification ruling. The samples which you submitted are being returned as requested.

Style 7520 consists of a handbag and a toiletry bag. Both are constructed with an outer surface of 100% man-made textile material. The handbag is designed and sized to contain the small personal effects that would normally be carried on a daily basis. It has a main textile-lined zippered compartment with a zippered wall pocket. Both the front and back exterior have zippered pockets along the full width of the bag. It has an adjustable shoulder strap. The toiletry bag has a textile-lined interior compartment with a zipper closure. It is designed to provide storage, protection, and portability to cosmetics or toiletry items during travel. For classification purposes, the handbag and toiletry bag are not considered a set. Although sold together, the items are not designed to meet a particular need or carry out a specific activity. Consequently, each item is classifiable separately under its appropriate sub-heading. The handbag measures approximately 11.5" (W) x 8" (H) x 4.5" (D). The toiletry bag measures 7.25" (W) x 5.75" (H).

Style 7541 is a handbag constructed with an outer surface of 100% man-made textile material. The handbag is designed and sized to contain the small personal effects that would normally be carried on a daily basis. The interior is textile-lined with a zippered wall pocket and two open pockets. It has a zippered closure and two carrying handles. The front exterior of the bag has a zippered pocket along the full width of the bag, and two open

pockets. The back exterior of the bag also has a zippered pocket along the full width of the bag. It measures approximately 13" (W) × 9.25" (H) × 3.75" (D).

Style 7547 consists of a tote bag and a toiletry bag. Both are constructed with an outer surface of 100% man-made textile material. The tote bag is designed to contain personal effects and accessories during travel. The interior is textile-lined with a zippered wall pocket and an open pocket. It has a top zipper closure. At one end of the adjustable shoulder strap, there is a seat-belt like metal closure that secures to the bag. The toiletry bag has a textile-lined compartment with a zipper closure. It is designed to provide storage, protection, and portability to cosmetics or toiletry items during travel. For classification purposes, the tote bag and toiletry bag are not considered a set. Although sold together, the items are not designed to meet a particular need or carry out a specific activity. Consequently, each item is classifiable separately under its appropriate heading. The tote bag measures approximately 23" (W) × 12.5" (H) × 4.5" (D). The toiletry bag measures 8.5" (W) × 7" (H).

Style 7904 is a laptop carrying case that is constructed with an outer surface of 100% man-made textile material. The case has an interior storage compartment without any additional features. It is padded, and specially shaped and fitted to hold a laptop computer. It has a flap that secures with a hook and loop closure. It measures approximately 14" (W) × 11.5" (H) × 1.75" (D).

The applicable subheading for the handbags of styles 7520 and 7541 will be 4202.22.8050, Harmonized Tariff Schedule of the United States (HTSUS), which provides for travel, sports, and similar bags, with outer surface of textile materials, other, of man-made fibers, other. The rate of duty will be 17.6% ad valorem.

The applicable subheading for the tote bag of style 7547 will be 4202.92.3031, HTSUS, which provides for travel, sports, and similar bags, with outer surface of textile materials, other, of man-made fibers, other. The rate of duty will be 17.6% ad valorem.

The applicable subheading for the toiletry bags of styles 7520 and 7547 will be 4202.92.3031, HTSUS, which provides for travel, sports, and similar bags, with outer surface of textile materials, other, of man-made fibers, other. The rate of duty will be 17.6% ad valorem.

The applicable subheading for style 7904 will be 4202.92.9026, HTSUS, which provides in part, for other bags and containers, with outer surface of textile materials, other, other, other, of man-made fibers. The duty rate will be 17.6 percent ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

HTSUS 4202.22.8050, 4202.92.3031, and 4202.92.9026 fall within textile category 670. With the exception of certain products of China, quota/visa requirements are no longer applicable for merchandise which is the product of World Trade Organization (WTO) member countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas" which is available on our web site at www.cbp.gov. For cur-

rent information regarding possible textile safeguard actions on goods from China and related issues, we refer you to the web site of the Office of Textiles and Apparel of the Department of Commerce at otexa.ita.doc.gov.

Your inquiry does not provide enough information for us to give a classification ruling on any style that will be constructed from the 0.17mm polyvinyl chloride (PVC) coated polyester material. Your request for a classification ruling should include samples in the same condition as imported. When this information is available, you may wish to consider resubmission of your request. We are returning any related samples, exhibits, etc. If you decide to resubmit your request, please include all of the material that we have returned to you.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Vikki Lazaro at 646-733-3041.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

ATTACHMENT B

DEPARTMENT OF HOMELAND SECURITY.
U.S. CUSTOMS AND BORDER PROTECTION,
HQ H031400
CLA-2: OT:RR:CTF:TCM H031400 KSH
CATEGORY: Classification
TARIFF NO.: 4202.22.8050; 4202.92.3031

BRENDA JACOBS, ESQ.
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005

RE: Modification of NY N025384 dated April 15, 2008; Classification of handbag with pouch and tote bag with pouch

DEAR MS. JACOBS:

This is in reply to your letter dated June 18, 2008, in which you have requested reconsideration of New York Ruling Letter (NY) N025384, dated April 15, 2008. In NY N025384, a handbag with pouch and tote bag with pouch were individually classified rather than classified as sets.

In your request for reconsideration, you state that the aforementioned ruling is in conflict with NY N027768, dated June 3, 2008, in which a substantially similar handbag and pouch were classified as a set pursuant to GRI 3(b).

FACTS:

The merchandise at issue is a handbag and pouch, identified as Style 7520 and a tote bag and pouch, identified as Style 7547. Both the handbag with pouch and tote bag with pouch are imported and sold together at retail as a

single item. As presented at retail, the pouches are attached to the handbag or tote bag by a plastic “secure tak” fastener.

Style 7520 features a man-made fiber textile outer-surface. The handbag measures approximately 11.5” wide by 8” high by 4.5” deep. It has a zipper closure and a single textile lined interior compartment that includes a hanging zippered pocket. The front exterior of the handbag features a single zippered pocket covering the length of the bag. The back exterior of the handbag features a small zippered pocket and open pocket. The handbag has an adjustable webbed shoulder strap and is trimmed with the same webbing fabric.

The pouch measures approximately 7.2” by 5.75”. It features a single zippered closure across the top accented by a grosgrain ribbon imprinted with the trademark “Le Sportsac.” It is designed to carry or store the handbag when not in use and to organize and carry small articles of a kind normally carried in a handbag, such as cosmetics, a small comb or a mirror.

Style 7547 also exhibits a man-made fiber textile outer surface. The tote bag measures approximately 23” by 12.5” by 4.5”. It has a single top zipper closure accented by a grosgrain ribbon imprinted with the repeating trademark “Le Sportsac.” The interior is textile lined with an interior zippered pocket and a smaller open pocket. The tote has an adjustable webbed shoulder strap and is trimmed with the same webbing fabric.

The pouch measures approximately 8.5” by 7” and features a single zipper closure across the top accented by a grosgrain ribbon imprinted with the repeating trademark “Le Sportsac.” It is designed to carry or store the handbag when not in use and to organize and carry small articles of a kind normally carried in a handbag such as cosmetics, a small comb or a mirror.

ISSUE:

Whether the handbag or tote and accompanying pouch are classified as a set pursuant to GRI 3(b).

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation. GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. The ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. CBP believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The applicable HTSUS provisions at issue are as follows:

- 4202 Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:
- Handbags, whether or not with shoulder strap, including those without handle:
- 4202.22 With outer surface of sheeting of plastic or of textile materials:
- * * * *
- Articles of a kind normally carried in the pocket or in the handbag:
- 4202.32 With outer surface of sheeting of plastic or of textile materials:
- * * * *
- Other
- 4202.92 With outer surface of sheeting of plastic or of textile materials:

There is no dispute that the subject merchandise is classified in heading 4202, HTSUS. GRI 6 provides that the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

The subject merchandise contains two articles packaged together, which cannot be classified pursuant to a GRI 1 analysis because the articles are *prima facie*, classifiable in two different subheadings. If imported separately, the handbag would be classified in subheading 4202.22, HTSUS, which provides, in part, for “Handbags, whether or not with shoulder strap, including those without handle”, the tote would be classified in subheading 4202.92, HTSUS, which provides, in part, for “Other” bags and the handbag or totes pouch would be classified in subheading 4202.32, HTSUS, which provides, in part, for “Articles of a kind normally carried in the pocket or in the handbag.”

When goods are, *prima facie*, classifiable in two or more headings, they must be classified in accordance with GRI 3, which provides, in relevant part, as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

* * * * *

GRI 3 establishes a hierarchy of methods for classifying goods that fall under two or more headings. GRI 3(a) states that the heading providing the most specific description is to be preferred to a heading, which provides a more general description. However, GRI 3(a) indicates that when two or more headings each refer to part only of the materials or substances in a composite good or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description than the other. In this case, the subheadings 4202.22, 4202.32 and 4202.92, HTSUS, each refer to only part of the items in the set. Thus, pursuant to GRI 3(a), we must consider the headings equally specific in relation to the goods. Accordingly, the goods are classifiable pursuant to GRI 3(b).

In classifying the articles pursuant to a GRI 3(b) analysis, the goods are classified as if they consisted of the component that gives them their essential character and a determination must be made as to whether or not these are “goods put up in sets for retail sale”. In relevant part, the ENs to GRI 3(b) state:

- (VII) In all these cases the goods are to be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

* * * * *

- (X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:

- (a) consist of at least two different articles which are, prima facie, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without re-packing (e.g., in boxes or cases or on boards).

In accordance with GRI 3(b), we find that the subject component articles are properly classified as “sets” because they consist of goods put up in a set for retail sale. In this instance, the pouch is designed to coordinate with the handbag or tote bag in that it is constructed of the same fabric and is color coordinated to match the patterns of the handbag or tote. The pouch is also a typical accessory that one might expect to be sold with a hand bag or tote. The handbag, tote and pouch serve the singular purpose of helping the user to carry various items. Furthermore, the components in this set are, *prima facie*, classifiable in different subheadings and have been put up in retail packaging suitable for sale directly to users without repacking. See also NY G82760, dated October 10, 2000, and NY G87109, dated February 14, 2008.

There have been several court decisions on “essential character” for purposes of GRI 3(b). These cases have looked to the role of the constituent materials or components in relation to the use of the goods to determine essential character. See, Better Home Plastics Corp. v. United States, 916 F. Supp. 1265 (CIT 1996), *affirmed*, 119 F. 3d 969 (Fed. Cir. 1997); Mita Copystar America, Inc. v. United States, 966 F. Supp. 1245 (CIT 1997), *rehearing denied*, 994 F. Supp. 393 (CIT 1998), and Vista International Packaging Co., v. United States, 19 CIT 868, 890 F. Supp. 1095 (1995). See also, Pillowtex Corp. v. United States, 983 F. Supp. 188 (CIT 1997), *affirmed*, 171 F. 3d 1370 (Fed. Cir. 1999).

The handbag of style 7520 and the tote bag of style 7547 carries and keeps its pouch and enhances the usefulness of the pouch when used in combination with the handbag or tote bag. Moreover, the handbag or tote bag provide the bulk of the set and visual impact. In this instance, it is the handbag or tote bag that imparts the essential character to the set.

HOLDING:

Pursuant to GRI 1, Style 7520 and Style 7547 are classified in heading 4202. By application of GRI 6 and GRI 3(b), Style 7520 is classified in subheading 4202.22.8050, HTSUSA (Annotated), which provides for: “Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Handbags, whether or not with shoulder strap, including those without handle: With outer surface of sheeting of plastic or of textile materials: With outer surface of textile materials: Other: Other: Other, Of man-made fibers.” The column one, general rate of duty is 17.6% *ad valorem*. The textile category code is 670.

By application of GRI 6 and 3(b), Style 7547 is classified in subheading 4202.92.3031, HTSUSA, which provides for “Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vul-

canized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags: With outer surface of textile materials: Other, Other: Other.” The column one, general rate of duty is 17.6% *ad valorem*. The textile category code is 670.

With the exception of certain products of China, quota/visa requirements are no longer applicable for merchandise which is the product of World Trade Organization (WTO) member countries. The textile category number above applies to merchandise produced in non-WTO member-countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the “Textile Status Report for Absolute Quotas” which is available on our web site at www.cbp.gov. For current information regarding possible textile safeguard actions on goods from China and related issues, we refer to the web site of the Office of Textiles and Apparel of the Department of Commerce at www.otexa.ita.doc.gov.

EFFECT ON OTHER RULINGS:

NY N025384, dated April 15, 2008 is hereby modified.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.