

The Identity Project, Consumer Travel Alliance, Center for Financial Privacy and Human Rights, and John Gilmore submit these comments in response to the Notice of Proposed Rulemaking (NPRM), “Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates,” published at 75 *Federal Register* 6321-6330 (February 9, 2010), docket number USDOS-2010-0035, RIN 1400-AC58.

Under this NPRM, the Bureau of Consular Affairs, Department of State (“the Department”), proposes to increase fees including the application fee (from \$55 to \$70) and the “security surcharge” (from \$20 to \$40) for issuance of a passport book, the fee for adding blank visa pages to a passport book (from free to \$82), and the application fee for a passport card (from \$20 to \$30).

The signers of these comments oppose the proposed fee increases for the reasons set forth below.

The fundamental defect in this rulemaking is that the Department has failed to evaluate the impact of the proposed fee increases on the ability of U.S. citizens to exercise rights protected by the First Amendment and international treaties. In addition, the proposed increase in the fee to add pages to a passport book would violate due process and the Administrative Procedure Act. The Department has failed to justify the differences in proposed fees, in relation to costs, for passports and passport cards. And the Department has failed to consider the impact of the proposed rules on individuals as “small economic entities,” pursuant to the Regulatory Flexibility Act.

The Department should stop including RFID chips in passports and passport cards, instead of increasing fees to cover the cost of RFID chips. This would be less costly, more secure for passport holders, and less restrictive of U.S. citizens’ right to travel, assemble, and enter and leave the country, as protected by the First Amendment and international human rights treaties.

I. ABOUT THE COMMENTERS

The Identity Project (IDP), <<http://www.PapersPlease.org>>, provides advice, assistance,

publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

The Consumer Travel Alliance (CTA), <<http://www.consumertravelalliance.org>>, is a nonprofit, nonpartisan organization that works to provide consumers an articulate and reasoned voice in decisions that affect travel consumers. CTA seeks to help improve consumer understanding of the travel environment, including aviation, rail, cruising, telecommunications, banking, Internet travel services, and insurance. CTA supports an individual consumer's freedom to travel whether for business or leisure, and protection of consumers during their travel activities. Through its efforts, the focus is put on how travel rules and regulations, national laws, and corporate policies affect the consumer. CTA is one of the member organizations of the Consumer Federation of America.

The Center for Financial Privacy and Human Rights (CFPHR), <<http://www.financialprivacy.org>>, was founded in 2005 to defend privacy, civil liberties and market economics. The Center is a non-profit human rights and civil liberties organization whose core mission recognizes traditional economic rights as a necessary foundation for a broad understanding of human rights. CFPHR is part of the Liberty and Privacy Network, a non-governmental advocacy and research 501(c)(3) organization.

II. THE DEPARTMENT SHOULD STOP INCLUDING RFID CHIPS IN PASSPORTS, INSTEAD OF INCREASING FEES TO COVER THE COSTS OF RFID CHIPS.

According to the NPRM, “The Department is increasing the passport book security surcharge from \$20-\$40 in order to cover the costs of increased border security which includes, but is not limited to, enhanced biometric features in the document itself.” Although the NPRM does not itemize these “biometric features,” the only substantial change in biometric or other features, production, or security

since the last adjustment of passport fees is the addition of an embedded Radio Frequency Identification (RFID) transponder chip laminated within each so-called “e-passport.”

As was noted in numerous comments to the Department when it first proposed adding RFID chips to passports, RFID chips in passports are a serious security vulnerability and threat to passport holders. RFID chips in identity credentials such as passports are a surveillance and control feature, not a security feature. They facilitate both government and third-party surveillance of passport holders, whether for commercial, criminal, or terrorist purposes, through the inclusion of a globally unique identification number. There are no legal restrictions whatsoever in the U.S. on private or commercial use of RFID readers to interrogate the RFID chips in e-passports or passport cards, nor on the use of data obtained in this way. RFID chips in passports also facilitate identity theft, passport cloning, and forgery of other types of identity credentials and documents through misuse of personal data intercepted from exchanges between e-passport chips and readers in use by government agencies at border crossings, airports, etc.

Discontinuing the inclusion of RFID chips in passports would enhance the security of passport holders, reduce passport production costs, and eliminate the need to increase the passport issuance fee or “security surcharge.” Rather than raising fees to cover the cost of adding a passport feature which poses a significant threat to the security of the passport holder, the Department should use this opportunity to reconsider and rescind its decision to include RFID chips in passports and passport cards.

III. THE DEPARTMENT HAS FAILED TO EVALUATE THE IMPACT OF THE PROPOSED FEE INCREASES ON THE ABILITY OF U.S. CITIZENS TO EXERCISE RIGHTS PROTECTED BY THE FIRST AMENDMENT AND INTERNATIONAL TREATIES.

When the current passport fees were established, it was still possible (although significantly encumbered) for U.S. citizens to enter or leave the U.S. without a passport or any other government issued identity credentials. Passport issuance laws and regulations were therefore evaluated, both by the

Department and by the courts, as pertaining to the issuance of credentials which were not essential for the exercise by U.S. citizens of their rights to cross U.S. borders.

That has changed, however, with the implementation of the “Western Hemisphere Travel Initiative” (WHTI), which requires a passport, passport card, other specified government issued identity credential, or a discretionary waiver of this requirement, as a prerequisite to crossing any U.S. border by any means by any U.S. citizen. See our previous objections to those requirements, “Comments of the Identity Project, Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere,” USCBP-2006-0097, September 25, 2006, available at <http://hasbrouck.org/IDP/IDP-WHTI-comments.pdf>), and “Comments of the Identity Project, Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere,” USCBP-2007-0061, August 27, 2007, available at <http://hasbrouck.org/IDP/IDP-WHTI-comments2.pdf>).

The right to assemble and the right to petition for redress of grievances are directly protected by the First Amendment. In the case of U.S. citizens born and/or residing abroad, or U.S. citizens wishing to assemble with U.S. citizens abroad, the exercise of those rights requires crossing U.S. borders. The right to freedom of movement, specifically including both the right to leave any country and the right to return to one's own country, is protected by Article 12 of the International Covenant on Civil and Political Rights (ICCPR), a treaty signed and ratified by, and binding on, the U.S. Executive Order 13107, “Implementation of Human Rights Treaties,” directs all executive departments and agencies to “maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully.”

Now that the U.S. government requires U.S. citizens to have passports for international travel, passport fees must be considered according to the higher standard of justification applicable to regulations which burden the exercise of rights protected by both the First Amendment and the ICCPR, including a

showing that the proposed rules are the least restrictive available means of accomplishing a permissible government purpose, and would in fact achieve that purpose.

As discussed in our previous comments to U.S. Customs and Border Protection on the WHTI document requirements in dockets USCBP-2006-0097 and USCBP-2007-0061, cited above, the Department of State has reiterated in its most recent report to the United Nations Human Rights Committee that, “As reported in the Initial Report, in the United States, the right to travel – both domestically and internationally – is constitutionally protected.” (*Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights*, Paragraph 203, 28 November 2005, CCPR/C/USA/3, available at <[http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/\\$FILE/G0545268.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf)>, referring to *Initial Report by the U.S. Concerning Its Compliance with the International Covenant on Civil and Political Rights*, July 1994, CCPR/C/81/Add.4 and HRI/CORE/1/Add.49, available at <http://dosfan.lib.uic.edu/erc/law/covenant94/Specific_Articles/12.html>).

Even before the promulgation of the WHTI regulations requiring U.S. citizens to obtain passports for travel with the Western Hemisphere, the Supreme Court had long recognized that passport issuance implicates the fundamental Constitutional freedom of travel. “The denial of a passport, given existing domestic and foreign laws, is a severe restriction upon, and, in effect, a prohibition against, world-wide foreign travel.” *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Strict scrutiny is required for regulations which, like those proposed by this NPRM, would burden passport issuance and thus the exercise of First Amendment rights. Strict scrutiny requires both a showing of actual effectiveness for a permissible government purpose, and that no less restrictive effective alternative is available: “[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

With respect to international treaties, Article 12, Section 4, of the International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. Senate on April 2, 1992 (138 *Congressional Record* S4782), provides that, “No one shall be arbitrarily deprived of the right to enter his own country.”

The meaning of this section of the ICCPR is interpreted in Paragraph 21 of U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, issued under Article 40(4) of the ICCPR, CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999, available at <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument)>:

In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.

Sections 2 and 3 of Article 12 of the ICCPR provide:

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

To be “necessary”, as is required by Section 3 of Article 12, requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes. “Necessity” requires a showing that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of “necessity” is supported by the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, which provides in Paragraph 14:

Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

Since there is no such showing of “necessity” in the NPRM, the proposed rules are flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn.

In addition, the proposed rules are inconsistent with Article 21 of the ICCPR, which imposes a similar standard of “necessity” on rules which burden the right of assembly:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The same analysis of the Department’s failure to make or support a showing of necessity applies with respect to this Article 21 as with respect to Sections 2 and 3 of Article 12, as discussed above. The proposed rules thus are inconsistent with Article 21 of the ICCPR as well, and must be withdrawn.

There are clearly less restrictive alternatives to the proposed passport and passport card fee increases: elimination of the RFID chips in the passports, eliminating the need for a fee increase, and/or elimination of the requirement for U.S. citizens to have a passport to enter or leave the U.S. But the Department has failed even to consider the heightened standard of justification required as a consequence of the imposition of the WHTI requirements for government issued identity credentials for U.S. citizens.

Before any fee increase is finalized, the Department must evaluate the proposal against the standard of justification applicable to rules that burden the exercise of rights protected by the First Amendment and the ICCPR, including consideration of these less restrictive alternatives.

IV. THE DEPARTMENT HAS FAILED TO JUSTIFY THE DIFFERENCES IN PROPOSED FEES, IN RELATION TO COSTS, FOR PASSPORTS AND PASSPORT CARDS.

In this NPRM, the Department proposes to raise the fee for a passport book to \$110 (\$70 application fee plus \$40 “security surcharge”), or 104% of the estimated cost of \$105.80. At the same time, it proposes to raise the fee for a passport card only to \$30, or 39% of its estimated cost of \$77.59.

The only explanation given in the NPR and is that “the card is intended to be a substantially less expensive document.” No explanation is given as to why, if in fact it has not fulfilled that intent, passport applicants and taxpayers in general should be required to subsidize passport card issuance.

The only plausible interpretation of the proposed new fee structure is that it is intended to create artificial financial incentives for citizens (A) to be more willing obtain a passport card and, (B) to be more likely to obtain a passport card rather than a passport book, than they would be if the fee for a passport card were proportionate to its actual cost.

This is an impermissible basis for distortions to an otherwise purportedly cost-based fee structure. There is no legitimate government purpose that justifies such a scheme to promote passport card acceptance at the expense of taxpayers and applicants for passport books.

Passport cards do not comply with International Civil Aviation Organization (ICAO) standards, and as a result are not globally interoperable or acceptable to other governments. ICAO Document 9303 provides for card-format travel documents, but requires that if an RFID chip is included in any travel document it must be a shorter-range “proximity” chip complying with ISO standard 14443, rather than a longer-range ISO 18000-6C “vicinity” RFID chip as used in U.S. passport cards. ICAO considered longer-range RFID chip types, but rejected them in order to protect the security of passport holders. ICAO travel document standards in Document 9303 do not require any RFID chips in passports or passport cards, and permit RFID chips only if they comply with the shorter-range ISO 14443 standard. Passport cards deliberately violate ICAO standards, at the expense of passport security, in order to facilitate longer-range reading of the RFID chips and surveillance of movement of passport card holders.

Potential applicants for a passport or passport card should not be given artificial financial incentives to accept a type of credential that violates international passport security standards, in order to make it easier for the government or any third party (commercial, criminal, or terrorist) to monitor and log their movements through the globally-unique identification number in their RFID chip.

Any passport card issued by the Department should be valid for travel worldwide, consistent with U.S. citizens' Constitutional and treaty right right to depart the U.S. regardless of their intended destination and to re-enter the U.S. from any other country. At a minimum, this would require the Department to replace the longer-range ISO 18000-6C "vicinity" RFID chip with a shorter-range ISO 14443 "proximity" chip. If the Department wants a cheaper passport card, it should make a cheaper passport card. The most obvious way to do so is to eliminate the RFID chip entirely. The Department cannot and should not overcharge passport-book users to subsidize undercharged passport-card users.

If the passport card has proven to be too expensive, even if the RFID chip and its costs were no longer included, the Department should consider the less restrictive, less costly alternative of rescinding or amending the WHTI regulations to eliminate the requirement for a passport, passport card, or other government issued credential for U.S. citizens to enter or leave the U.S.

V. THE PROPOSED INCREASE IN THE FEE TO ADD PAGES TO A PASSPORT BOOK WOULD VIOLATE DUE PROCESS AND THE ADMINISTRATIVE PROCEDURE ACT.

As noted in the NPRM, there has until now been no charge for the addition of blank pages to a full passport book. The Department proposes to impose a new fee of \$82 for this service.

Passport books have been issued in varying thicknesses, with anywhere from 24 to 96 blank visa pages, at the standardless, secret, discretion of the Department. There is no place on the passport application form to indicate a request for a thicker passport. Because additional blank pages could always be added later, at no charge, there was no adverse financial consequence to the applicant if, in its discretion, the Department declined to issue a thicker passport, and no due process rights were attached to that decision. No standards for the issuance of thicker passports and no procedures for administrative appeal or review of decisions as to what size passport to issue have ever been established.

For a variety of reasons (the lack of a designated place to indicate on the passport application a request for a thicker passport book; failure to notice such requests made, of necessity, in a nonstandard manner or on a cover letter or separate sheet attached or enclosed with the application; or simply the manner in which the Department has exercised its discretion – in the absence of published standards, due process, or review, it's impossible to be certain about the reasons), many applicants who have attempted to request a thicker passport have received only a standard passport with the minimum number of pages.

For example, John Gilmore, a member of the Identity Project and a co-signer of these comments, specifically asked the Department for a thicker passport when he most recently renewed his passport book. Despite his specific written request accompanying his passport application, he received a standard passport with the minimum number of pages. He received no notice of why his request for a thicker passport book was denied, who was responsible for the denial, whether the denial could be appealed, or if so, how. Numerous other individuals have reported similar experiences to the Identity Project.

The imposition of a fee to add pages to a passport book would, retroactively, attach significant financial consequences to past determinations by the Department of what size passport books to issue to which applicants – decisions which were, at the time, treated as purely discretionary and subject to no due process rights whatsoever, since additional pages could always be added later, at no charge.

It would be grossly unfair to citizens who requested a thicker passport when they first applied for it, who did not receive it, and who were unable to challenge that action or have it reviewed at the time because it was, at the time, without adverse financial consequences, now to require them to pay an additional fee to have the pages that they wanted and requested in the first place added to their passport.

Consistent with due process and the Administrative Procedure Act, those passport book holders should not be subject to any fee for the addition of pages to their current passport books.

Before imposing any fee for adding pages to any passport book, the Department should:

(A) Add a check-box or boxes to the passport application form for the applicant to indicate in a standardized manner, on the form itself, a request for a passport with more pages instead of the standard passport, up to the maximum possible number of pages;

(B) Either (1) begin issuing thicker passports, up to the maximum possible size, to all those who request them, rather than on a “discretionary” basis, or (2) promulgate regulations, after notice and comment, defining neutral standards for determining whether to issue a thicker passport, and mechanisms for due process and administrative appeal of adverse decisions not to issue a thicker passport; and

(C) Exempt from any fee for the addition of new pages those passports with less than the maximum number of pages issued prior to the effective date of the preceding changes in procedures.

VI. THE DEPARTMENT HAS FAILED TO CONSIDER THE IMPACT OF THE PROPOSED RULES ON INDIVIDUALS AS “SMALL ECONOMIC ENTITIES”

According to the NPRM, “the Department, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities as defined in 5 U.S.C. 606(6).”

The definition of “small entity” does not distinguish or exclude natural persons. All or almost all sole proprietors and self-employed individuals, and most freelancers, are small economic entities as that term is defined for purposes of the Regulatory Flexibility Act. It is self-evident that the principal effects of the proposed regulations on small entities will be its effects on those self-employed individuals as applicants for passports and passport cards and payers of fees for other services. As with any other agency whose regulations affect individuals, the Department should routinely make it a practice, in reviewing whether any rulemaking is subject to the requirement for an analysis of its impact on small economic entities, and in conducting such analyses, to consider its impact on self-employed individuals.

However, the purported analysis in the NPRM gives no indication that the Department has, in fact, conducted any review of the number of self-employed or other individual “small entities” on which it would have an impact, or the potential significance of that impact. The complete omission of individuals as small entities from the purported analysis in the NPRM strongly suggests that the Department has not, in fact, adequately conducted the required review, and must do so and publish the results for comments before finalizing any regulations under this rulemaking.

VII. CONCLUSIONS AND RECOMMENDATIONS

The proposed fee increases should be withdrawn. Instead, the Department should eliminate RFID chips from passport books and cards, and eliminate the requirement for U.S. citizens to have or display a passport or other government-issued credential as a prerequisite to the exercise of their Constitutional and international treaty rights to depart from, and return to, U.S. territory, by any means and to or from any other country or territory, or to or from international waters or airspace.

Before finalizing any fee increases under this rulemaking, the Department must evaluate the impact of the proposed rules on the ability of U.S. citizens to exercise rights protected by the First Amendment and international treaties; justify the differences in proposed fees, in relation to costs, for passports and passport cards; and conduct and publish for comment an evaluation of the impact of the proposed rules on individuals as “small economic entities”, pursuant to the Regulatory Flexibility Act.

Respectfully submitted,

The Identity Project (IDP)

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A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

_____/s/_____

Edward Hasbrouck,

Consultant to IDP on travel-related issues

Consumer Travel Alliance

7062 Solomon Seal Court

Springfield, VA 33152

<<http://www.consumertravelalliance.org>>

Center for Financial Privacy and Human Rights

J . Bradley Jansen, Director

PO Box 2658

Washington, DC 20013-2658

<<http://www.financialprivacy.org>>

John Gilmore

Post Office Box 170608

San Francisco, CA 94117

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