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Border Security Regulations Branch
Office of International Trade
Customs and Border Protection
1300 Pennsylvania Avenue, NW (Mint Annex)
Washington, DC 20229

Re: Docket number: USCBP-2008-0003
Changes to the Visa Waiver Program to Implement Electronic System
for Travel Authorization (“ESTA”) Program.

Dear Customs and Border Protection Official:

The American Immigration Lawyers Association (“AILA”) submits these comments on the interim final rule published by the Department of Homeland Security (“DHS”) concerning Changes to the Visa Waiver Program to Implement Electronic System for Travel Authorization (“ESTA”) Program or “Proposed Rule.”

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. We appreciate the opportunity to comment on the interim final rule and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals in seeking immigration benefits, including lawful admission to the United States, and in complying with U.S. immigration laws and regulations.

I. Description of the Proposed Rule

In the Proposed Rule, the Department of Homeland Security (“DHS”) proposes amendment of its regulations to authorize Customs and Border Protection (“CBP”) to introduce an Electronic System for Travel

Authorization (“ESTA”) for aliens wishing to visit the United States using the Visa Waiver Program (“VWP”). According to the DHS, the ESTA program will gather data currently requested on the Form I-94W Arrival/Departure Record for aliens seeking admission to the United States under the VWP. This data will be evaluated by CBP to determine the eligibility of citizens and eligible nationals of VWP countries to travel to the United States and whether such travel poses a law enforcement or security risk. This determination will be made by CBP before such persons travel to the U.S. A travel determination made under ESTA will remain, with certain exceptions, valid for two years and may be used for multiple applications for admission.

DHS states it is introducing this measure in order to comply with section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007. The goal of the ESTA is to provide for greater efficiencies in the screening of international travelers by allowing CBP to identify subjects of potential interest before they travel to the U.S. DHS believes the introduction of ESTA will increase security and reduce traveler delays upon arrival at U.S. ports of entry.

DHS notes that a travel authorization issued under ESTA is not a determination of admissibility to the U.S., nor is it a determination of eligibility to receive a visa. Under the Proposed Rule, aliens refused a travel authorization under ESTA will not be eligible to travel to the U.S. under the VWP. Such aliens will remain eligible, however, to apply for a visa at a U.S. Consulate. An alien planning to travel to the U.S. with a visa will not be required to obtain an ESTA determination.

DHS plans to publish a notice in the *Federal Register* in November 2008, announcing implementation of ESTA. The ESTA program will become effective on or before January 12, 2009, 60 days after publication of the notice in the *Federal Register*.

II. AILA Comments on the Proposed Regulation

The DHS proposal to enhance security and facilitate international travel is to be commended. Certain features of the interim final rule, however, present as yet unanswered questions. Among them are the following:

A. Introduce ESTA Through a Phased System

AILA encourages DHS to introduce ESTA through a phased system. CBP introduced the ESTA website on August 1, 2008, and travelers may obtain a voluntary ESTA determination before use of the program becomes mandatory on January 12, 2009. Rather than imposing a universal effective date, ESTA should initially be voluntary, becoming mandatory over a period of time. By doing so, several problematic issues can be addressed and many advantages gained.

First, a phased introduction would allow DHS to test, refine, and “de-bug” the ESTA system. Identifying and eliminating problems on an initially small scale should be vastly easier than under the pressure of a system-wide, mandatory program. Second, by introducing the ESTA program gradually, DHS could allay the fears, whether real or unfounded, of the traveling VWP public about what its actual impact would be. By demonstrating ESTA’s effectiveness and efficiency, DHS could create a positive message that may dispel resistance to the program.

The first phase of ESTA should be one in which traveler participation is entirely voluntary. The “reward” for participating in ESTA would be the ability to use a dedicated, faster line at the port of entry. Those VWP travelers who fail to obtain an ESTA determination in the introductory phase would be required to use other inspection lanes that may be presumed to take longer due to the need for added inspection scrutiny. The favorable publicity generated by ESTA users should garner public cooperation and support for the system.

The second phase of ESTA implementation could permit those VWP travelers without ESTA determinations to be given a one-time permission to embark on a carrier to the U.S., where the travelers would be inspected as currently is done, while receiving instructions to use the ESTA system for any future VWP travel.

A phased introduction of ESTA could also be divided by countries of embarkation, or by intended port of entry. Either of these options would allow DHS to begin small, and to then scale-up the system, rather than start all at once. Once a track record of success is established DHS could scale up the system for higher volumes. If the system works as intended, then it will be embraced as a more efficient and cost effective means of obtaining travel authorization for the U.S. than applying for a B-1/B-2 nonimmigrant visa. If it does not work so well at the inception, then DHS will have the opportunity to identify the bugs and address them before international travelers are delayed through no fault of their own.

B. Systems and Procedures Clarification is Required

The proposed regulation will require aliens intending to travel to the U.S. under the VWP to provide data to the CBP in order to obtain an ESTA determination prior to embarkation on a carrier for travel to the U.S. The manner of providing data, however, is not specified in the proposed regulation. The accompanying supplementary information explains that DHS intends aliens to provide the required data by accessing a CBP web site. The site became available to receive voluntary applications for ESTA determinations beginning August 1, 2008. The DHS estimates that 17,000,000 travelers will take, on average, 15 minutes to complete the on-line ESTA process.

The supplementary information does not discuss what steps CBP plans to take to ensure that the ESTA web site will be able to accommodate the traffic that it will receive. It may be expected that over 1.4 million applications for an ESTA determination will be made each month (i.e. 1/12th of the total expected annual demand). In the early days of the ESTA program it may be expected that there will be many travelers who remain unaware of the new requirements. This may place even greater burdens on the ESTA system due to last minute authorization requests.

If the on-line system becomes unavailable due to technical or capacity limitations, international travel to the U.S. could experience considerable delays. The economic impact of missed flights, resulting lost tourism and commercial opportunities is not discussed in the supplementary information.

To avoid system capacity and capability issues at its launch, AILA encourages CBP to introduce ESTA through a phased system.

C. Data Update Requirements Need to Be Clarified

AILA recommends adding instructions on the web site as well as in the regulation which clearly indicate which updates are mandatory and which are optional. An ESTA determination will be valid for up to two years. The ESTA web site includes a page for travelers to update information concerning the city where they will board an aircraft or vessel, carrier code, flight number, etc. Such data is likely to change each and every time an alien visitor travels to the U.S. If travelers are expected to obtain a new ESTA determination if such data changes, this appears to be inconsistent with the stated expectation that an ESTA determination will be valid for up to two years. If it is not necessary to update ESTA data each time carrier and flight numbers change, instructions to travelers should clearly indicate that it is not necessary to do so.

D. Timeframe for Adjudication and Emergency Request Mechanism are Needed

AILA encourages including a timeframe for ESTA determinations to be completed. AILA also encourages the establishment of a mechanism for requesting a follow up on a delayed request. Finally, AILA also encourages the establishment of a mechanism for requesting an emergency ESTA determination.

CBP admonishes travelers in its supplementary information to request an ESTA clearance when reserving or purchasing a ticket or at least 72 hours before departure to the U.S. The supplementary information describes an intention to provide ESTA determinations to travelers by email. While most responses are expected to be nearly

instantaneous, the CBP acknowledges that there may be delays in some undetermined number of cases. When such delays occur, the ESTA web site currently advises travelers to wait 72 hours before checking back to receive a determination. There are no follow up steps outlined for a traveler to take in the event that an authorization remains pending after 72 hours have elapsed.

While the need for emergency travel appears to have been contemplated, there is no mechanism in the proposed regulation for requesting an ESTA determination on an expedited basis. Though DHS information indicates that a response may be provided in “real time,” DHS also admonishes travelers to apply for a determination at least 72 hours before flight time. The absence of a specific timeframe for receiving an ESTA determination may result in travelers waiting until immediately before travel to inquire about a delayed or missing reply from CBP. This could further exacerbate the demand for emergency ESTA determinations.

E. An Error Correction Mechanism is Needed

AILA encourages CBP to create a mechanism for aliens refused a travel authorization under ESTA to request a review and, where appropriate, correction of records. Additionally, system administrators should give ESTA enrollees a Receipt and allow for error correction and allow leeway during the program’s infancy.

The proposed regulation fails to provide a mechanism for a traveler to request a correction of DHS records pertaining to that individual. It is not unreasonable to contemplate that errors of identity may occur in the databases accessed by CBP. It further may be contemplated that an individual who has previously obtained an ESTA determination may, without changes in any material facts, be erroneously refused a new one following a subsequent application. Situations such as these may result in significant travel disruption for individuals affected by such errors.

If there is an error rate of only one half of one percent, approximately 85,000 travelers could be affected each year based on the CBP’s estimate of 17,000,000 annual applicants. While persons affected by such errors would have the option of applying for a visitor visa, the added cost and time should be unnecessary if necessitated solely due to a factual error.

Finally, a grace period for ESTA compliance and alternative methods by which visa holders may comply with exit control without penalty are necessary to ensure that innocent travelers are not unfairly penalized during implementation. Without giving ESTA enrollees physical proof of their pre-clearance, enrollees will have no way to rebut technical system errors or to identify operator data entry mistakes. Enrollees undoubtedly will face much uncertainty regarding their responsibilities under this program.

F. An ESTA Determination Should Be Valid Longer Than Two Years

AILA recommends that an ESTA determination be valid for a period of five years. DHS proposes to make an ESTA determination last for a period of two years or through the validity date of the traveler's passport. If certain changes occur, the alien will need to apply for a new ESTA determination even if the two year period of authorization has not elapsed.

Currently, alien visitors from VWP countries are authorized to apply for a B-1/B-2 visitor visa valid for a period of ten years. Many frequent travelers, otherwise eligible to participate in the VWP, may calculate that a one-time application for a ten-year visitor visa is a better choice than having to apply for an ESTA determination five times in a decade. If this attitude prevails it would shift the burden of receiving and adjudicating visa applications to U.S. Department of State consulates abroad. In addition to the higher cost to the U.S. and increased security concerns associated with greater traffic to consulates, the intended security benefit would be frustrated. Alien visitors with a ten-year visitor visa would complete a pre-boarding security screen only once each decade. If an ESTA clearance were valid for a longer period of five years, then alien visitors may decide that obtaining it would be preferable to the more costly and time-consuming task of applying for a visitor visa. In addition, the government's security objective would be advanced because ESTA participants still would be pre-screened twice as often as those obtaining visitor visas.

G. Economic Impact of Reciprocal Requirements Imposed on U.S. Citizens by Foreign Governments

The economic impact analysis provided by DHS in its supplementary information fails to contemplate the possibility that foreign governments will impose travel authorization pre-clearance requirements for U.S. citizens on a reciprocal basis. The imposition of such a requirement could disadvantage U.S. commercial interests by creating additional burdens for companies providing services abroad. AILA encourages DHS to consider this response from foreign governments when weighing the economic impact of the ESTA proposal.

H. Visa Application Alternative

Anecdotally, there already is a growing sentiment in visa waiver countries that ESTA reflects a significant rollback of the U.S. immigration system. For example, while the U.S. Department of Commerce pushes initiatives such as “Invest in America” to attract foreign investors, further tightening of the admission practices and policies send the opposite message. There appears to be a perception among foreign business communities that an ESTA determination does not add value. Since the application for an ESTA determination asks essentially the same questions that currently appear on the Form I-94W and having the preclearance does not dispense with the requirement for inspection upon application for admission, there is an appearance of adding process without augmenting security.

In addition, there are anecdotal concerns among European business communities over privacy rights and reluctance to disclose personal data to a U.S. government web site that will be required by ESTA. Many travelers, otherwise eligible to participate in the VWP, may choose to apply for a visa rather than provide their personal data for an ESTA clearance. Few seem to recognize that they would need to disclose virtually the same data in the context of a visitor visa application.

Should these viewpoints persist and grow, it is likely that many visa waiver country citizens will apply for 10-year multiple entry B visas. This, in turn, may lead to lengthy waits for a visa appointment and lost economic opportunities in the U.S.

I. Instructions for Transit Aliens Should be Included

The proposed regulation should address ESTA requirements for aliens who will transit the U.S. onward to other destinations. Regulations should clearly indicate whether VWP aliens transiting the U.S. are required to comply with ESTA requirements even though they will not enter the U.S.

J. Security Concerns

There are some security concerns with respect to the collection of information and the implementation of the ESTA program.

1. “Phishing”

In computing, the term “phishing” refers to the is the criminally fraudulent process of attempting to acquire sensitive information such as usernames, passwords and credit card details, by masquerading as a trustworthy entity in an electronic communication.¹

The Proposed Rule makes no reference as to how DHS will address the issue of fraudulent websites, possibly implemented by terrorists, to gather information on innocent foreign national travelers intending to use the Visa Waiver Program to visit the U.S.

2. System Integration Does Not Exist.

The Rule discussing ESTA does not describe how it will address the lack of system database integration. ESTA presumably will rely on government databases similar to IDENT/IAFIS used in conjunction with USVISIT in making pre-determinations regarding whether the databases accessed by ESTA and used by CBP will be properly integrated. AILA has strong concerns regarding the integration between government databases in order to secure U.S. borders. The IDENT/IAFIS integration provides an example. Before September 11, 2001, in Fiscal Year (“FY”) 1999, Congress mandated the integration of the legacy INS IDENT database with the FBI IAFIS database. In FY 2005, DHS was tasked to lead the future development of IDENT/IAFIS integration. In 2005, CBP officials indicated that integrated workstations allowing field agents to take a single set of prints and simultaneously query both IDENT and IAFIS would be in place later that same year. Due to the delays in this integration, systems such as US-VISIT still fail to fully query IAFIS at time of enrollment and watch-list checks upon admission at ports of entry. If ESTA relies on similar databases it will also suffer from the same lack of database integration. Thus, AILA recommends that prior to implementation of the ESTA requirements the agency address first the issue of database integration.

K. DHS Must Increase its Outreach to the Public

DHS must inform ESTA enrollees of the program’s requirements, and information must be widely disseminated and presented in a timely manner. Without adequate public

¹ Phishing is conducted in the following manner:

Communications purporting to be from PayPal, eBay, Youtube or online banks are commonly used to lure the unsuspecting. Phishing is typically carried out by e-mail or instant messaging, and it often directs users to enter details at a website. Phishing is an example of social engineering techniques used to fool users. Attempts to deal with the growing number of reported phishing incidents include legislation, user training, public awareness, and technical security measures.¹

<http://en.wikipedia.org/wiki/Phishing>

notice on how to comply with these new ESTA requirements, the program will not operate properly and will impede the flow of people who are essential to the country's future economic growth and vitality.

IV. Conclusion

While we continue to seek and employ methods to improve our ability to protect our country, we must first be sure that such measures will actually work and do not merely provide an illusion of safety through increased efforts and expenditure of resources. Moreover, we must continue to balance the principles of fairness and process upon which this country was founded with the need to ensure an orderly flow of travelers in and out of the United States. The ESTA program as proposed would severely impact travel to the U.S. because the final rule does not provide for procedures to manage either emergency situations or mistakes that are the result of human and or technical error.

Although we applaud efforts to apprehend terrorists and criminals before they can harm our people, businesses, institutions, and infrastructure, AILA believes that the strategy suggested in the interim final rule is premature. Prior to its implementation the program requires a more detailed cost benefit analysis together with an assessment of the adverse environmental effects and the program's impact on the free flow of international travel and trade.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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