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

Re: Docket number: USCBP-2010-0025
Electronic System for Travel Authorization ("ESTA"):
Travel Promotion Fee and Fee for Use of the System

Dear Sir or Madam,

The American Immigration Lawyers Association ("AILA") submits these comments on the Interim Final Rule (IFR) published by the Department of Homeland Security ("DHS") establishing a fee for travel promotion and for utilizing the Electronic System for Travel Authorization ("ESTA") program by alien visitors under the Visa Waiver Program ("VWP").

1. Background About AILA

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 believe that our members' collective expertise provides experience that makes us particularly well-qualified to offer views that 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.

AILA supports the enhancement of our national security through the efficient and effective control of the cross-border flow of goods and people with appropriate allocation of resources. AILA submits these comments to the IFR establishing a fee to be paid by VWP visitors for travel promotion and for utilizing the ESTA system.

2. Description of the Interim Final Rule

The Department of Homeland Security ("DHS") has published an Interim Final Rule amending its regulations by authorizing Customs and Border Protection ("CBP") to collect a fee for VWP visitors utilizing the ESTA system for travel to the United States (U.S.) and for travel promotion. The ESTA program gathers data previously requested on Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form. This data is evaluated by CBP to determine the eligibility of citizens and eligible nationals of VWP countries to travel to the U.S. and whether such travel poses a law enforcement or security risk. This determination is made by CBP when a VWP visitor submits an ESTA

request before traveling to the U.S. A travel determination made under ESTA remains, with certain exceptions, valid for two years and may be used for multiple applications for admission.

CBP introduced the ESTA system in order to comply with section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007. The goal of ESTA is to provide greater efficiencies in the screening of international travelers by allowing CBP to identify subjects of potential interest before they travel to the U.S. CBP believes the introduction of ESTA increases security and reduces traveler delays upon arrival at U.S. ports of entry.

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. Aliens refused a travel authorization under ESTA are not eligible to travel to the U.S. under the VWP. Such aliens 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 is not required to obtain an ESTA determination.

The Travel Promotion Act ("TPA") of 2009 was enacted on March 4, 2010, mandating that DHS implement a user fee for the ESTA system in accordance with section 217(h)(3)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1187(h)(3)(B). The TPA also requires a travel promotion fee of $10.00 per travel authorization. In addition, the TPA requires an unspecified operational fee to cover the cost of establishing and administering the ESTA system. DHS determined the cost of establishing and administering the ESTA to be approximately $4.00 per application and established an initial operational fee of that amount. Accordingly, the combined ESTA fee required by the Interim Final Rule will be $14.00.

3. AILA Comments on the Proposed Regulation

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

A. Effective Date Discrepancy

Pursuant to the notice published in the *Federal Register*, the ESTA fee will become effective on September 8, 2010. The stated effective date appears to conflict with the requirements of the TPA and the regulation Supplementary Information provided by DHS in the *Federal Register*. The TPA mandates that DHS implement a fee for utilizing the ESTA system no later than six (6) months after its enactment. Citing a TPA enactment date of March 4, 2010, DHS identifies the date by which it must begin collecting the ESTA operational fee as September 4, 2010. The discrepancy between the September 4 date and the published effective date of September 8, 2010, for the Interim Final Rule should be clarified immediately to avoid confusion.

B. An Error Correction Mechanism is Needed

The proposed regulation fails to provide a mechanism for a traveler to request a correction of DHS records pertaining to that individual. It may be contemplated that, inevitably, 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.

Using the data provided by DHS in the *Federal Register*, if there is an error rate in ESTA determinations of only one half of one percent, over 100,000 travelers each year could be affected based on an average of 21,000,000 annual applicants over the next ten years. While persons affected by such errors would have the option of applying for a visitor visa, they should not be forced to incur the added cost and time solely due to a factual error.

AILA encourages CBP to create an effective mechanism for aliens refused a travel authorization under ESTA to request a review and, where appropriate, correction of records.

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

The economic impact analysis provided by DHS in its supplementary information mentions only briefly the possibility that foreign governments will impose travel authorization pre-clearance requirements and corresponding fees 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 CBP to consider this response from foreign governments and provide a factually-based analysis when weighing the economic impact of the ESTA proposal.

D. Only the Operational Fee Should Be Charged for a New ESTA Within the Two Year Period

An ESTA determination will be valid for up to two years. A new travel authorization is required, however, pursuant to 8 CFR § 217.5(e) if a VWP visitor obtains a new passport, changes his or her name, gender, or country of citizenship. In addition, if there are any changes that would require a VWP visitor to change a response to any of the ESTA application admissibility questions, it is necessary to submit a new ESTA request. It will be necessary to pay the full ESTA fee of $14.00 when making such changes.

The ESTA website allows VWP visitors to update information that may change each time an alien visitor travels to the U.S., such as the city where he will board an aircraft or vessel, carrier code, flight number, etc. The Supplementary Information to the Interim Final Rule explains that, when making such updates to travel data, payment of a new fee will not be required. AILA recommends that this information contained in the Supplementary Information be stated explicitly in the Final Rule.

AILA recommends that VWP visitors be charged only the $4.00 operational fee if, within the two (2) year period following issuance of a travel authorization, they are requesting a new ESTA due to changes that occur. Limiting the fee to $4.00 in such circumstances would be consistent with the TPA objectives. The $4.00 fee covers operational expenses. Collecting the $4.00 fee is consistent with the objective of recovering the DHS' estimated costs for evaluating whether a change impacts the security or law enforcement risks associated with an individual. Charging the additional $10.00 fee, used to fund

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a program to promote travel to the U.S., each time a VWP visitor has a change in his or her life is not consistent with issuance of an ESTA that is valid for two years.

E. Add Plain Language Instructions Identifying Changed Circumstances that Require a New ESTA

AILA recommends adding instructions on the website, as well as in the Final Rule, which clearly indicate what specific events require filing a new ESTA. As noted above, an ESTA determination will be valid for up to two years. A new travel authorization is required, pursuant to 8 CFR § 217.5(e), if a VWP visitor obtains a new passport, changes his or her name, gender, or country of citizenship. In addition, if there are any changes that would require a VWP visitor to change a response to any of the ESTA application admissibility questions, it is necessary to submit a new ESTA request.

The requirement that an applicant request a new ESTA when changed circumstances may affect admissibility should be clarified in the final rule. The rule should identify specific circumstances that require filing a new ESTA. To avoid confusion and to insure that travelers clearly know when a new ESTA is required, the rule should specify exactly what events require the filing of a new ESTA. It is unreasonable and contrary to the goals of the ESTA program to expect a traveler to know as a matter of law or by reference to a type of question rather than its substance when a new ESTA is required. The consequences to the traveler of failing to complete a new ESTA can be dire, including being barred permanently from the United States, as discussed below.

F. Add Plain Language Instructions Concerning Eligibility for Admission

Certain questions on the ESTA application relating to eligibility for admission are ambiguous. Some are counter-intuitive and even contradictory. For example, an alien applying for a visa at a U.S. consulate may be issued a letter under INA section 221(g) if there is a delay for any reason in the issuance of a visa. The U.S. Department of State refers to such procedures as a visa refusal. In many such 221(g) situations, the visa subsequently is issued. It is reasonable to assume that a member of the traveling public would be shocked to learn that, although he has a valid visa in his passport issued by a U.S. Consular Officer, he has been denied a visa under the interpretation used by CBP. It is equally reasonable to assume that such a traveler would innocently tick the electronic box on his ESTA application indicating that he had never been denied a visa. If he does so, CBP could permanently bar him from admission to the U.S. as an alien who has made a misrepresentation to gain an immigration benefit. It is reasonable to make such assumptions because, anecdotally, this has already occurred.

To avoid such harsh consequences for applicants acting in good faith, AILA recommends that CBP provide narrative explanations to each of the ESTA questions relating to eligibility for admission. This could be done easily through hyperlinks or “drop-down” boxes on the website. The explanations should explain immigration terms of art in common language that avoid use of jargon and complex legal terminology. In particular, the instructions should include an explanation that a 221(g) visa “refusal” is considered to be a visa “denial” for purposes of completing an ESTA application.

G. 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.

H. Security Concerns: "Phishing" and False E-mails

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

In computing, the term "phishing" refers to 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] Phishing is conducted in the following manner.

> Communications purporting to be from popular social websites, auction sites, online payment processors, or IT administrators are commonly used to lure the unsuspecting public. Phishing is typically carried out by e-mail[2] or instant messaging[3], and it often directs users to enter details at a fake website whose look and feel[4] are almost identical to the legitimate one. Even when using server authentication[5], it may require tremendous skill to detect that the website is fake. Phishing is an example of social engineering[6] techniques used to fool users. Additionally, it also exploits the poor usability of current web security technologies. Attempts to deal with the growing number of reported phishing incidents include legislation[7], user training, public awareness, and technical security measures. (Citations omitted).[8]

The Interim Final 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 VWP to visit the U.S. Similarly, e-mails purportedly from the State Department regarding the "Diversity Visa (DV) Lottery" frequently appear.[9] In fact, the Department of State (DOS) website warns potential applicants of companies that create "fraudulent websites [and pose] as U.S. Government sites."[10] Additionally, the DOS reminds the public that they inform "successful Diversity Visa applicant by letter, and NOT by e-mail," since they are aware of the problems with fraudulent e-mails and websites.[11]

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[1] http://en.wikipedia.org/wiki/Phishing
[2] http://en.wikipedia.org/wiki/E-mail
[3] http://en.wikipedia.org/wiki/Instant_messaging
[4] http://en.wikipedia.org/wiki/Look_and_feel
[5] http://en.wikipedia.org/wiki/Transport_Layer_Security
[6] http://en.wikipedia.org/wiki/Social_engineering_(computer_security)
[7] http://en.wikipedia.org/wiki/Legislation
[8] http://en.wikipedia.org/wiki/Phishing
[9] http://travel.state.gov/visa/immigrants/types/types_1749.html
[10] http://travel.state.gov/visa/immigrants/types/types_1322.html#3
[11] *Id.*

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The Interim Final Rule also makes no reference as to how DHS will address the issue of fraudulent e-mails posing as communication from the DHS to innocent foreign national travelers intending to use the VWP to visit the U.S. E-mails claiming to be from the IRS have surfaced attempting to deceive persons into tendering personal information such as bank accounts, social security numbers, and credit card information.

4. 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 are not merely the illusion of safety through increased efforts and expenditure of resources. Moreover, we must maintain those principles of fairness and process upon which this country was founded while ensuring the orderly flow of all travelers in and out of the United States. The establishment of a fee for users of the ESTA program severely impacts travel to the U.S. in terms of visiting for business and pleasure. Alarmingly absent from those regulations are procedures to manage emergency situations, innocent human errors, and technical errors, on the parts of both the nonimmigrant alien and the government.

Although we applaud efforts to apprehend terrorists and criminals before they can harm our people, businesses, institutions, and infrastructure, AILA believes that the imposition of a fee for use of the ESTA system as outlined in the Interim Final Rule should be applied in a balanced and fair manner. Individuals making changes to existing ESTA data should be charged only the $4.00 fee corresponding with the cost of administering the ESTA program. In addition, the Final Rule should clearly identify and explain when changed circumstances require filing a new ESTA application. In addition, implementation of the fee requires a far more detailed assessment of the costs of implementation and ongoing administration (including the potentially adverse impact on the free flow of international travel and trade) in light of the benefits to be derived from more careful monitoring of admissions to the United States.

Sincerely,

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