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DHS Publishes Final Rule On Deadline For State Compliance On REAL ID Act

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Rules and Regulations

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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 37

[Docket No. DHS-2006-0030]
RIN 1601-AA63

Minimum Standards for Driver's Licenses and Identification Cards
Acceptable by Federal Agencies for Official Purposes

AGENCY: Office of the Secretary, DHS.

ACTION: Final rule; full compliance date.

SUMMARY: Pursuant to the Department of Homeland Security's REAL ID regulations, States must be in full compliance with the REAL ID Act of 2005 by May 11, 2011. This final rule changes that date to January 15, 2013. This change will give States the time necessary to ensure that driver's licenses and identification cards issued by States meet the security requirements of the REAL ID Act.

DATES: Effective on March 7, 2011.

FOR FURTHER INFORMATION CONTACT: Steve Kozar, Office of State-Issued Identification Support, Screening Coordination Office, Department of Homeland Security, Washington, DC 20528 (202) 447-3368.

SUPPLEMENTARY INFORMATION:

I. Background

The REAL ID Act of 2005 (the Act) \1\ prohibits Federal agencies, effective May 11, 2008, from accepting a driver's license or personal identification card issued by a U.S. State for any official purpose unless the license or card has been issued by a State that meets the requirements set forth in the Act. Section 205(b) of the Act authorizes the Secretary of Homeland Security to grant States extensions of time to meet the requirements of the Act if the State provides adequate justification for noncompliance.

\1\ The Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Public Law 109-13, 119 Stat. 231, 302 (May 11, 2005) (codified at 49 U.S.C. 30301 note).

On January 29, 2008, DHS promulgated a final rule implementing the requirements of the Act. See 73 FR 5272, also 6 CFR part 37. The final rule extended the full compliance date from May 11, 2008 to May 11, 2011. See 6 CFR 37.51(a). To be in full compliance with the Act, States must meet the standards of 6 CFR Part 37, Subparts A through D, or have a REAL ID program that DHS has determined to be comparable to the standards of Subparts A through D. Id. States must be fully compliant on or before May 11, 2011. Id.

At the time DHS promulgated the REAL ID final rule, DHS recognized

that many States were having trouble meeting the statutory requirements of the Act. In an attempt to balance DHS's responsibility to ensure that driver's licenses and identification cards intended to be used for official Federal purposes met certain statutory and regulatory requirements with the operational needs of the States, DHS bifurcated the requirements for compliance with the Act. See 75 FR 5272 at 5399. DHS required States to demonstrate material compliance with certain elements of the regulation by January 1, 2010, and to be fully compliant with subparts A through D of the regulation on or before May 11, 2011. See 6 CFR 37.51(a) and (b).

As the REAL ID program has developed further, States have continued to experience trouble meeting the statutory requirements of the Act. As a result of these difficulties, in December 2009, DHS stayed until further notice the date by which states are required to demonstrate material compliance. See 74 FR 68477.

II. Change of the Full Compliance Date From May 11, 2011 to January 15, 2013

Since promulgation of the REAL ID final rule, DHS has worked very closely with the States to assist with implementation and has awarded large amounts of grant funds. These efforts have assisted States in making significant progress toward meeting most of the REAL ID requirements. Since 2008, DHS has awarded States 150 separate grants that collectively total approximately \$175,000,000.

Of the grant money expended by the States, the majority has been spent on the following items:

(1) Facility infrastructure upgrades, including security cameras at DMV locations, modification of facilities to limit public access to sensitive equipment and card production materials storage locations, and the addition of or upgrades to security alarms, doors, or other electronic detection equipment;

(2) Upgrades of IT infrastructure or systems overhaul (including modernization of IT systems to ensure all in-State DMVs are interoperable), software upgrades to improve the ability to protect personal identity information, upgrades of network communication, and ensuring the ability to use the DHS Systematic Alien Verification for Entitlements System (SAVE), DHS's electronic immigration verification system;

(3) Document security enhancement, including the development of more tamper-resistant documents with enhanced security features, and the use of facial recognition software to detect a person with multiple identity documents or social security numbers;

(4) Equipment upgrades, including document scanners, high-resolution digital scanners, and high-speed printers; and

(5) Reengineering of business practices, including converting from an over-the-counter issuance to a more secure central issuance process, minimizing the potential for insider fraud.

These enhancements have allowed States to make significant progress toward achieving compliance with many parts of the REAL ID regulation,

including several provisions of Subpart B (minimum documentation, verification, and card issuance requirements), Subpart C (source document retention and DMV databases), and Subpart D (security at DMVs and driver's license and identification card production facilities). There are, however, still significant portions of the regulation, mostly involving document verification and markings, that most States will be unable to meet by May 11, 2011.

The inability of States to fully comply with the requirements of REAL ID by

May 11, 2011 is the result of a number of factors, including diminished State budgets caused by the economic downturn and the uncertainty throughout much of the 111th Congress about Congressional action on the PASS ID Act, which would have modified some of the requirements of REAL ID. Implementation of REAL ID involves a significant financial investment, and, despite the receipt of substantial Federal grant funds, a number of States are struggling to come up with the resources necessary to meet the full compliance deadline in these times of budget austerity. Additionally, some States delayed investing in new technology and process changes because of uncertainty associated with Congressional action on the PASS ID Act. PASS ID, which was supported by the Administration as well as State associations, including the National Governor's Association and the American Association of Motor Vehicle Administrators, would have modified certain requirements of REAL ID to facilitate State compliance. States delayed making investments to implement REAL ID to ensure they were not making expenditures to comply with requirements that would have been undone had PASS ID been enacted into law. Now that PASS ID seems unlikely to be enacted, DHS anticipates States will refocus on achieving compliance with the REAL ID requirements.

As a result of these factors, and because of the significant progress many States are making towards achieving full compliance, DHS believes that a change of the full compliance deadline from May 11, 2011 to January 15, 2013 is warranted. This change will give States more time to ensure that the documents they issue meet the security requirements of the REAL ID Act.

Without this change, as of the full compliance date, licenses and identification cards issued by States will not be accepted for official purposes. "Official purpose" as defined in both the Act and the regulation includes, but is not limited to, accessing Federal facilities and boarding Federally regulated commercial aircraft. Individuals possessing licenses and identification documents issued by non-compliant States would either have to undergo additional screening or provide alternative documents to pass through security at airports and to access Federal facilities. DHS estimates that over 90 percent of the documents shown for identity purposes for boarding Federally regulated commercial aircraft and for accessing Federal facilities are driver's licenses or other State-issued identity documents. Requiring individuals to obtain alternative or additional identity documents or to undergo additional screening would result in significant disruptions

to commercial airline travel and to the ability of the public to conduct business with the Federal government.

III. Regulatory Analyses

A. Administrative Procedure Act

The Administrative Procedure Act (APA) provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for "good cause," finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. 553(b)(B).

As discussed above, throughout the development and implementation of the REAL ID program, DHS has engaged in extensive, ongoing discussions with the States regarding their ability to comply with the REAL ID Act and the DHS regulations. Based on those communications, DHS has learned that the States, despite their good-faith efforts, will not be able to meet the May 11, 2011 deadline. If States are unable to meet the May 11, 2011 full compliance deadline, and the deadline is not changed, as of that date, Federal agencies, including the Transportation Security Administration (TSA), cannot accept State-issued driver's licenses or identification cards for use in boarding commercial aircraft. This would severely disrupt commercial aviation, as travelers would either have to obtain and use alternative TSA approved documents or submit to additional screening to pass through security at airports. Thus, it would be contrary to the public interest to inflict a significant and substantial burden on the traveling public and the travel industry. Furthermore, to seek public comment prior to changing the full compliance date would be impracticable, given that such comments could not be received and acted upon prior to the full compliance date.

Based on the above, DHS finds that notice and comment rulemaking, in this instance, would be impracticable, unnecessary, and contrary to the public interest. For the same reason, DHS finds good cause to make this rule effective immediately upon publication in the Federal Register. See 5 U.S.C. 553(d)(3). In addition, because this final rule relieves a restriction, and because the States will now have more time to ensure that the documents they issue meet the security requirements of the REAL ID Act, there is good cause to make this rule effective immediately upon publication in the Federal Register.

B. Executive Order 13563 and Executive Order 12866

This rule constitutes a "significant regulatory action" under Executive Order 12866, as supplemented by Executive Order 13563, and therefore has been reviewed by the Office of Management and Budget (OMB). Executive Order 12866 defines "significant regulatory action" as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State,

local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. This final rule, however, makes changes for which notice and comment are not necessary. Accordingly, DHS is not required to prepare a regulatory flexibility analysis. 5 U.S.C. 603, 604.

D. Paperwork Reduction Act

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

E. Executive Order 12132 (Federalism)

A rule has implications for federalism under Executive Order 13132, "Federalism," if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have these implications for federalism.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Unfunded Mandates Reform Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$100 million (adjusted for inflation) or more in any one year. This final rule will not result in such an expenditure.

G. Executive Order 13175 (Tribal Consultation)

This rule does not have Tribal Implications under Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

H. Executive Order 13175 (Energy Impact Analysis)

DHS has analyzed this rule under Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." DHS has determined that it is not a "significant energy action" under that Order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

List of Subjects in 6 CFR Part 37

Document security, Driver's licenses, Identification cards, Motor vehicle administrations, Physical security.

The Amendments

For the reasons set forth above, the Department of Homeland Security amends 6 CFR part 37 as follows:

PART 37--REAL ID DRIVER'S LICENSES AND IDENTIFICATION CARDS

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1. The authority citation for part 37 continues to read as follows:

Authority: 49 U.S.C. 30301 note 6 U.S.C. 111, 112.

Sec. 37.51 [Amended]

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2. Amend Sec. 37.51(a) by removing the date "May 11, 2011" and adding in its place the date "January 15, 2013."

Janet Napolitano,
Secretary.

[FR Doc. 2011-5002 Filed 3-4-11; 8:45 am]
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