



Testimony of Mr. Douglas E. Lavin

Regional Vice President, North America
International Air Transport Association

July 16, 2008

Before the US House of Representatives
Committee on Homeland Security
Subcommittee on Border, Maritime and Global Counterterrorism

**“Implementing the 9/11 Act Mandates for Enhancing the Visa
Waiver Program”**



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Madame Chairwoman, distinguished Members of the Subcommittee.

My name is Douglas Lavin. I am the Regional Vice President for North America for the International Air Transport Association (IATA).

IATA represents 228 carriers engaged in scheduled international transportation of passengers, mail and cargo by air. Seventy-eight of those airlines fly into and out of the United States on a scheduled basis. All of the major US network carriers are members of IATA.

IATA appreciates the opportunity to brief the Subcommittee on IATA's position relating to the proposal by the US Department of Homeland Security (DHS) to require commercial air carriers to collect biometric data from certain foreign citizens upon exit from the United States at airports of departure (US Exit). IATA and its member airlines are directly impacted by this DHS proposal.

IATA and its member airlines are strongly opposed to an industry-implemented and funded US Exit program for the following reasons:

1. Border protection and immigration are core US Government responsibilities that cannot be outsourced to private industry
2. DHS does not have the legal authority to require airlines to fund this program
3. Before introducing a new biometric collection program, DHS should harmonize its five separate and duplicative passenger data collection procedures
4. The centralized collection by DHS of biometric data at a single point in the passenger flow is more efficient, secure and cost effective than making significant amendments to every point of airline/passenger contact
5. DHS has significantly underestimated the cost associated with airlines designing, implementing, running and maintaining a biometric collection process
6. Airlines are not in a financial position to fund this program

Introduction

Since 1996, Congress has on numerous occasions mandated that the Federal Government develop an entry and exit control system to collect the records of arrivals and departures of non-US citizens leaving the US. DHS' Notice of Proposed Rulemaking on US Exit ("NPRM")¹ lists seven different laws since 1996 that call for the creation of an entry/exit program. In January 2004, DHS implemented US-VISIT as a government owned and operated system and has fingerprinted over 100 million visitors entering the United States. From 2004 to 2007, US-VISIT also fingerprinted over 6.5 million visitors exiting the US as part of the US Exit Pilot Program. Between 2003 and 2006, DHS reports allocating \$250 million for US Exit related efforts.

Rather than implementing this government program on its own, DHS published an NPRM on April 24, 2008 calling for airlines to design, implement, manage and maintain a process to collect fingerprints from most foreign citizens leaving the United States by air or sea. The NPRM asked the public to provide extensive comments on the feasibility of the proposed airline collection process, a detailed review of the cost assumptions reached by DHS for this program, and any alternatives to the DHS proposed system. DHS denied more than 16 requests for a reasonable extension of time to complete these comments, offering instead the opportunity for interested parties to testify for 2-3 minutes in front of a panel of lower-level DHS technical experts.

Despite having worked on this program since 1996, the NPRM said that Congressional deadlines make it imperative that DHS "establish" an Exit system by July 25, 2008 and have it up and running by July 1, 2009.² As discussed below, there is no Congressional mandate that the airline industry meet these Congressional deadlines. Indeed, it is ludicrous for DHS to now insist that the airline industry establish an Exit system 90 days after the publication of the NPRM when DHS and its predecessor agencies have failed to do so over the past 12 years. Equally troubling is the fact that US Exit will be only one of five uncoordinated DHS passenger data collection processes that has either been implemented or proposed by DHS since 9/11.

As we demonstrate below, there are insurmountable physical, technological and financial challenges that make it impossible for the airlines to meet these unreasonable DHS demands. We therefore urge this Committee and the Congress in general to step in and to prevent DHS from continuing to pursue this program as envisioned.

¹ Collection of Alien Biometric Data Upon Exit from the United States at Air and Sea Ports of Departure; United States Visitor and Immigrant Status Indicator Technology Program ("US-VISIT"), 73 Fed Reg 22065.

² According to the DHS NPRM, Section 711 of the 9/11 Recommendations Act directs DHS to establish an exit system within one year of enactment (July 25, 2007). It also notes that the DHS Secretary loses the ability to waive restrictions on the Visa Waiver Program (VWP) if it does not have the US Exit system operational by July 1, 2009. 73 Fed Reg 22068.

1. Border and Immigration Controls are Core US Government Functions

DHS has argued consistently that a US Exit program is an essential tool in determining whether an alien has overstayed the terms of his or her visa. Indeed, in the NPRM, DHS suggests that several of the 9/11 hijackers would not have been able to carry out the attacks in the United States if a US Exit system were in place.³ Given this statement, it is not surprising that DHS has dedicated significant resources to develop and implement the US-VISIT program and, additionally, has initiated a three-year trial of a US Government-developed and implemented US Exit program. We find it illogical for DHS to now propose that US Exit, which according to DHS is a critical immigration control tool, be developed and implemented not by the Federal Government, but by untrained, ill-equipped and underfinanced airlines and their personnel. This outsourcing of core immigration and border control functions to the airline industry makes no sense and should be abandoned.

The NPRM and senior DHS officials have suggested that the collection of fingerprints by airlines is part of the cost of operating an airline in the United States and merely an extension of already existing data gathering responsibilities under the Advanced Passenger Information System, or APIS program. However, US Exit, as proposed in the Rule, would place new and unprecedented, onerous operational and legal obligations on carriers. Airlines and their employees cannot and should not be expected to accept these new responsibilities. Airline staff are not trained government agents capable of undertaking law enforcement duties and Airlines do not have the systems in place to meet the transmission, security and storage requirements set forth in the DHS proposal. DHS' own Regulatory Impact Analysis (RIA) demonstrates that US Government-led and financed alternatives enjoy a better cost-benefit outcome than the carrier-led proposals outlined in the NPRM.⁴ These government-led alternatives also optimize data privacy and IT security and, depending on the alternative, minimize disruption to the passenger and the carrier. Simply passing off a bad proposal as a "cost of doing business" is not acceptable, particularly given DHS' own regulatory impact analysis.

2. DHS Does Not Have the Authority to Outsource this Program

There is no law, regulation, report language or Congressional suggestion that US Exit should be designed, implemented, managed and funded by the airline industry. Instead, the language of the laws cited by DHS as justification for their effort to outsource this core government function makes it clear that the US Congress intended DHS to be responsible for all aspects of the Exit program.

³ 73 Fed Reg 22066

⁴ Air/Sea Biometric Exit Project Regulatory Impact Analysis, April 17, 2008, at 80.

For example, the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), states that “completing a biometric entry and exit data system as expeditiously as possible [was] an essential investment in efforts to protect the United States by preventing the entry of terrorists.”⁵ It seems logical to assume that had the Congress decided that the private sector should bear the cost and responsibility for this “essential investment,” it would have drafted the law in such a way that would expressly and unequivocally reflect that intention. In fact, the same law states that “the [DHS] shall operate the biometric entry and exit system”⁶ The IRTPA does not include any language providing for a delegation of this statutory obligation in favor of third parties, which would be required before any such delegation takes place.

DHS argues that its authority to require airlines to fund US Exit stems from Congress’ requirement that airlines collect and provide DHS specific passenger manifest data under Section 231 of the Immigration and Naturalization Act.⁷ However, DHS offers no legislative language or history to suggest that when Congress authorized DHS to require airlines to collect APIS information that it also authorized the collection of fingerprints from outgoing passengers. To the contrary, Congress passed separate legislation directing DHS (and no one else) to establish a US-VISIT program, distinct from the APIS program. IATA strongly believes that the inherent differences between the airlines’ collection of biographical APIS information and the collection and transfer of fingerprints are significant enough that specific Congressional authorization is required before moving forward with this program. Unlike APIS information, which is flight-specific, biometric information would be stored for up to 75 years and could potentially be used to impose sanctions during “subsequent encounters” with US Government officials.⁸ From a technical, operational and privacy perspective, this proposal envisions a totally new collection process that cannot be reasonably justified as simply another data element to be collected by the airlines.

In addition to a lack of any US law authorizing outsourcing of this core government function, DHS’ proposal also raises significant implications in terms of US bilateral and multilateral obligations. From a bilateral perspective, IATA believes that the transfer of responsibility outlined in US Exit is contrary to the spirit of most US air services agreements as it would, in effect, compel air carriers operating in this country to provide additional services and facilities, such as border control, that are an inherent government responsibility. This would have the same effect as imposing unreasonable user charges on air carriers, something not allowed under our bilateral air agreements. On the multilateral level, ICAO has developed standards and recommended practices in the field of facilitation (Annex 9) that are binding upon all Contracting States to the Chicago Convention. Those internationally agreed provisions stipulate that facilities used

⁵ Public Law 108-458, 3827 (December 17, 2004)

⁶ Id at 3821

⁷ 8 USC. 1221(c)(10)

⁸ 73 Fed Reg 22067, 22071

for clearance controls should be provided at public expense.⁹ In contrast, under the DHS proposal, carriers would have to procure the space and facilities at their own expense to carry out border control duties. Finally, one cannot discount the possibility that the DHS program as envisioned would violate a number of jurisdictions' data privacy laws, including EU Directive 95/46/EC which provides significant protections for passengers from this type of intrusive data collection. Further, airlines are not in the position to accept the liability associated with the collection and storage of this most highly private, personal data. Additionally DHS does not address the issue of refusal by a passenger – because of data privacy concerns – to give their biometric to an individual airline employee rather than to a government agent.

3. Harmonize the Five Passenger Screening Programs

Since September 11, 2001, five separate passenger data exchange programs have been either initiated or announced by various DHS agencies. From PNR Access and APIS to the fast-approaching APIS Quick Query, TSA's Secure Flight and, most recently, the Electronic System for Travel Authority (ESTA) – carriers are being forced to send essentially the same data about passengers to various DHS agencies at different times and using non-aligned transmission formats.

In reality, each of these programs has essentially the same goal – enabling DHS to know more about passengers arriving in and departing from the United States. Unfortunately, as each program has been developed independently and has been designed to respond to a very narrow objective, little attention has been paid to ensuring that data being submitted under one regulation can or is used to satisfy requirements imposed under another.

We believe that it is time for DHS to reevaluate and rationalize its regulatory structure relating to passenger data exchange program requirements. The potential for up to five wholly separate programs designed to collect essentially the same data concerning the same passengers simply cannot be justified in today's environment of linked systems and instant communication. For the air transport industry, the costs - in terms of program development and operational impact – can no longer be borne at a time when both US and foreign-flagged carriers are struggling for economic survival.

It is now time for a change in approach. We implore DHS to join with the industry to optimize and consolidate existing passenger data exchange systems and to ensure the most efficient use of carrier provided data, instead of continuing to introduce entirely independent niche programs. Biometric identification should only be discussed in the context of developing such a comprehensive passenger-screening rule.

⁹ Annex 9, Facilitation, Chapter 6, Section 6.58

4. Centralized Collection by DHS at a Single Point in Passenger Flow

Despite the fact the DHS RIA favors a government biometric collection system, DHS proposes to require airlines to include this collection as part of the passenger check-in and/or boarding process. DHS justifies this conclusion in part by indicating they found it difficult to collect biometrics effectively during their three year US Exit Pilot program. However, even a cursory review of the impact an Airline-implemented US Exit program would have on airline passenger processing demonstrates that the introduction of biometric collection during the existing passenger check-in and boarding process would have significant negative impact on international air travel:

- **Airline check-in desk:** IATA estimates it will take at least 1-2 minutes to collect a set of fingerprints, increasing processing time by up to 50% for those affected by the requirement and thereby lengthening line wait times for all passengers, regardless of nationality. Additionally, this delay raises airport capacity concerns and could result in increased security threats to passengers in the non-secure area of the airport.
- **Boarding gate:** Airport boarding gates are not designed for the collection of additional passenger information. Adding any additional processes, such as biometric collection, would result in unacceptable delays.
- **Kiosk check-in:** IATA and its member airlines have spent millions of dollars in recent years to automate the check-in process. Self-service check-in kiosks are increasingly the norm at US airports, including for use by international passengers, and do not require the need for intervention by airline staff. Introduction of a biometric collection process here would disrupt the efficiency gains resulting from this self-service process.
- **Remote check-in:** Today, as a result of airline technology investments and Web access, a growing percentage of passengers (domestic and international) check-in online, check their baggage via a common airport collection site, and interact directly with airline personnel only when presenting themselves for boarding at a gate. Requiring airlines to collect biometric information as part of this process will negate the positive impact self service check-in has on the airport environment, the passenger experience, the efficiency of international aviation and US competitiveness in that system.

DHS should implement a system, under government control, that allows for the collection of biometrics at a single point in the passenger flow. A government-run biometric data collection process should utilize the existing infrastructure already in place at the 119 US Airports where US-VISIT arrival processing occurs. We believe there are two alternative approaches that DHS can consider in this regard. In each of the following scenarios, additional benefits ensue once DHS consolidates its internal data systems to provide for real-time response.

Central Kiosks:

As tested over a three year period, centrally located US Exit registration kiosks in each of the 119 airports where US-VISIT is active today would provide for fairly widely-disbursed collection of biometric data, and would respond effectively to concerns that biometrics should be collected only at the airport from which US departure occurs. In addition to fixed kiosk installations, this method could also be supplemented by mobile registration facilities that could be located immediately adjacent to international departing flights. A centralized collection is efficient in many ways - the number of collection points is vastly reduced, thus providing a secure, cost-effective mode of data collection.

TSA Security Screening Points:

Another option would be to incorporate biometric data collection as part of the TSA Security Screening Point activity. There are several benefits to this approach:

- TSA Infrastructure is already in place at all airports
- All persons entering the aviation system at a US airport could be checked
- Collection at TSA Security Screening locations at all domestic and international airports, or at least in the 119 US airports where US-VISIT is currently operating, would spread the impact of data collection across more airport facilities
- Final APIS (or AQQ) manifests would confirm actual departure

IATA believes that either approach described above effectively responds to the Congressional mandate, which is to implement a biometrically-based entry and exit system that can identify those who have violated the terms of their visas.

5. DHS has significantly underestimated the cost of implementing this program

The US Exit NPRM estimates that carriers would incur costs ranging from \$3.5 billion to \$6.4 billion to fund the proposed US Exit program. Unfortunately, DHS does not offer any methodology or expense categories to fully justify their calculations.

IATA has worked with our member airlines, network service providers and hardware manufacturers to scope out the cost of both the NPRM and the additional requirements set forth in the associated RIA. IATA believes that the proposed rule could cost the airline industry as much as **\$12.3 billion over ten years**. This represents an increase of approximately \$5.9 billion above the highest 10 year cost estimate by DHS. A complete accounting of IATA's \$12.3 billion estimate is attached at the end of this testimony.

One of the critical erroneous assumptions contained in the NPRM is the apparent DHS belief that airline networks have the same data transmission capabilities as Internet-based networks. In fact, airlines maintain or lease highly specialized networks, which are optimized to transmit character-based data and are not capable of transmitting biometrics. Thus, DHS' assumption that you could simply upgrade existing airline networks to support fingerprint transmission is incorrect.

In addition to this fundamental misunderstanding of airline networks, we are particularly concerned about three critical costs omitted by DHS in the NPRM:

- **Data transmission:** Under this NPRM, Carriers would be required to transmit 350 to 800 times more data to the US Government per flight than is currently being transmitted to support the APIS program. IATA estimates that each year, impacted airlines would have to spend an additional \$750 million to transmit the additional data.
- **Dedicated secure networks:** The PIA indicates that DHS will require the airlines to operate secure and encrypted data transmission lines for the fingerprints. Airlines currently do not have this capability between airports and each airline's DCS and overseas data processing facilities. IATA estimates the installation and maintenance of these additional secure connections will exceed \$150 million over ten years.
- **Specialized secure data warehouses:** The PIA indicates that DHS will also require airlines to operate secure fingerprint storage data warehouses to hold the fingerprints prior to their being transmitted to the US Government. These facilities would need physical security and access controls, back-up capabilities and specialized data encryption hardware and software – costs for which that are not accounted by DHS in the NPRM. We estimate it will cost over \$1 billion over ten years to build, equip, connect and operate these warehouses.

The DHS regulatory impact analysis estimates that the gross ten-year benefits of US Exit would be approximately \$1.09 billion. Given DHS's own estimate of a \$3.5 billion cost over ten years, one must question how you could reasonably conclude that DHS has met the regulatory requirement for a sustainable cost benefit analysis. This analysis becomes even less sustainable when you consider the ten-year cost is likely closer to IATA's \$12.3 billion estimate.

6. Airlines Cannot Fund this Program

As noted above, IATA believes DHS has significantly underestimated the cost of the proposed US Exit program. However, while one can argue whether the cost of the program would be \$3.5, \$6.4 or \$12.3 billion over ten years, no one can reasonably argue that the airline industry can afford to fund any such US Government program.

The airline industry is today facing an unprecedented crisis with the advent of dramatically increasing fuel prices. IATA airlines are expected to face an

additional financial burden of \$99 billion over the next 12 months over our 2007 fuel bill. Furthermore, 24 airlines have ceased operations or filed for bankruptcy in the last five months, and many more are expected not to survive the year. Softening demand has also increased the impact of this crisis, and airlines have not been able to recoup oil costs in revenue. In the last four months, the 2008 financial forecast for the global industry has swung from a \$5 billion profit to a \$2.3 billion loss. IATA has called on governments around the world to refrain from imposing unnecessary and punitive costs on the industry. Any additional costs to the industry will only cause further, irreparable damage to cost management practices, to bottom lines and to the survivability of the industry.

In the best of times, airlines are limited in their ability to pass increased security costs on to their passengers. There is no business model one could envision that would allow airlines to pass between \$3.5 and \$12.3 billion onto their passengers to support fingerprint collection. Instead, if DHS is successful in outsourcing this government program, we can expect this cost to increase the likelihood of airline bankruptcy (Chapter 11 and Chapter 7) and a reduction in international service from the United States. Today, the international airline industry contributes \$3.5 trillion, or 7.5%, of global GDP and generates 32 million jobs. Is this the time to threaten this economic engine in order to alleviate DHS of its statutory mandate?

Conclusion

IATA appreciates the fact that DHS has been directed by the US Congress to implement a system to collect biometric information from passengers as they leave by air or sea. IATA also accepts that collection of this information could provide some benefit in terms of border control. However, IATA cannot accept a proposal that suggests that the airline industry should take on this core government function, particularly at a time when airlines are facing a financial crisis deeper than has been seen since before 9/11. We strongly urge DHS to withdraw this proposal and to work with Congress and industry to find a more reasonable solution to meet this border control data requirement.

First Year and Recurring Annual Costs of the DHS Proposed US Exit System

Composed by the International Air Transport Association

Expense Area	Description	First Year Costs	Recurring Annual Costs	Details
Data Transmission	Cost to transmit fingerprints from airline to US Government	\$750,420,000	\$750,420,000	Current 3rd party vendor cost per passenger to transmit APIS data = \$.036 Estimated cost per passenger to transmit fingerprints = \$22.74 (Basis: new transmission would be 350-800 times the size of data currently being transmitted) Estimate includes the cost of 3rd party vendor upgrading their networks
Hardware Acquisition	Purchase of fingerprint readers	\$57,816,000		Estimates 9636 readers required at \$6000/unit
Installation/Retro-Fit	Electrical rewiring and modification of counters/gates/kiosks	\$19,272,000		
Secure Transmission Lines	New networks from airports to DCS	\$75,000,000	\$7,500,000	Includes ownership, leasing and maintenance
Separate Secure Storage	Data warehouse for fingerprint storage	\$1,000,000,000	\$200,000	Not included in DHS NPRM but required by DHS privacy office Recurring annual cost of \$200,000 required for maintenance
Programming Enhancements	Cost to rewrite APIS systems to include biometrics	\$64,000,000		
Additional Infrastructure	Departure delays, increased staffing, staff training	\$300,000,000	\$300,000,000	
Separate Biometric Transmission System	Cost due to carriers' need to build standalone systems	\$500,000,000		Additional developmental and hardware costs if airline fingerprint data networks can not be integrated with APIS network system
	Total Costs per Annum	\$2,766,508,000	\$1,058,120,000	
	Total Cost Over 10 Years	x1	x9	Recurring annual costs are multiplied by 9 signifying the remaining nine years after the first year, thereby making 10 total years
		\$2,766,508,000	\$9,523,080,000	
		\$12,289,588,000		Equals first year costs plus recurring annual costs for nine years