

The Identity Project

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Legal Affairs Division
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LADRegulations@dmv.ca.gov

Re: OAL File Number 2017-0822-06
(Notice of Proposed Action: "Driver's Licenses and Identification Cards: Real ID")

Dear Deputy Director Soublet:

The Identity Project ("PapersPlease.org") welcomes the opportunity to submit these comments to the California Department of Motor Vehicles (DMV) concerning the Notice of Proposed Action for amendments to the California Code of Regulations related to drivers licenses and identification cards, OAL File Number 2017-0822-06.

The Notice of Proposed Action is, on its face, self-contradictory as to what is or is not "required" by Federal statutes or regulations. In fact, the actions proposed by the DMV in the notice are not required. Neither the REAL-ID Act of 2005, the implementing regulations for that Act, nor any other current or proposed Federal law or regulations requires or will require airline passengers to to have or to show any ID. That Federal act does not, and cannot, require California or any state to take any action whatsoever. And no California statute requires the DMV or the state to comply with the REAL-ID Act.

On the other hand, if California were to choose to comply with the REAL-ID Act, compliance would require uploading personal information concerning each holder of a state issued driver's license or ID card (including each holder of a "noncompliant" card) to a national ID database accessible to all other U.S. states and territories. Participation in the national ID database would entail additional expenses, adverse effects on the rights of California residents, and adverse economic impacts on individuals and on businesses including small businesses, which are omitted from the DMV's analysis of its proposal.

The actions by the DMV which would be necessary in order for the state of California to comply with the REAL-ID Act, including participation in the national ID database ("SPEXS"), would violate provisions of the Constitution of the State of California with respect to both the right to privacy and the use of driver's license fees.

The real issue is *not* that the state of California or the DMV are "required" to comply with the REAL-ID Act. They are not. The real issue is that the Federal government has threatened to interfere unlawfully with the rights of California residents to freedom of movement, assembly, and travel by common carrier.

Although these threats have no basis in current Federal law or regulations, and although it would violate the U.S. Constitution and human rights treaties ratified by the U.S. for the Federal government to carry out these threats, the DMV has failed to consider any alternative to capitulation to those threats. In particular, the DMV has failed to consider, much less to prepare for, litigation by the state of California to defend the rights of California residents against this threatened unlawful Federal interference.

The DMV should withdraw this unlawful proposal, and the DMV and the Attorney General of the state of California should redirect their efforts to preparing to defend the rights of any California residents whose rights to freedom of movement, assembly, or travel by common carrier are infringed by Federal agents or contractors.

1. About the Identity Project

The Identity Project (IDP) 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.

2. No current or proposed Federal law or regulation requires air travelers to show any ID.

According to the DMV's Initial Statement of Reasons for its proposed amendments to state regulations, "Federally-compliant cards are currently anticipated to be required to board commercial aircraft.... If the department does not adopt an issuance process in order to provide the opportunity for Californians to obtain a REAL ID compliant card, Californians would face difficulty boarding planes."¹

1 "Initial Statement of Reasons: Title 13, Division 1, Chapter 1, Article 2.0 – Driver's Licenses and Identification Cards" (undated), <https://www.dmv.ca.gov/portal/wcm/connect/2e00c6ef-6551-40f5-beaf-84a628d90697/Initial_Statement_of_Reasons.pdf>

The DMV cites no authority for this "anticipated" requirement, nor for its unequivocal claim that Californians "would" face such difficulties.

The consistent position of the TSA in litigation has been that no Federal law or regulation requires air travelers to have or show any ID. "People fly without ID every day. We have a procedure for that," the TSA's lead witness said under oath in the most recent such case.²

According to detailed daily TSA reports on how many people fly without ID which we have obtained under the Freedom Of Information Act, on average, 77,000 people each year — more than 200 a day — pass through TSA checkpoints to board airline flights in the U.S. without carrying or showing any ID at all, or with ID that TSA checkpoint staff consider "unacceptable". Ninety-eight percent of the would-be travelers who show up at TSA checkpoints without ID are allowed to board their flights.³

A Federal lawsuit brought by John Gilmore, founder of the Identity Project, was dismissed after lawyers for the TSA claimed and provided evidence *in camera* and under seal to the 9th Circuit Court of Appeals, which has jurisdiction over California, that neither any Federal law or regulation nor the TSA's secret Security Directives require air travelers to show ID to fly.⁴ There is **no** current or proposed Federal law or regulation that would require travelers to show any ID to fly. Any such law or regulation would be of dubious Constitutionality, and subject to legal challenge.⁵

The DMV's Notice of Proposed Action states that, "The [REAL ID] Act limits access to federal facilities, including airport boarding areas, to only those individuals with specified identification, such as a passport, or a driver's license or identification card issued by a State that adopts more restrictive identity requirements for issuing a card than traditionally used in legacy license and identification cards in many States."⁶

2 *State of New Mexico v. Philip Mocek*, Criminal Case 2573709, Bernalillo County Metropolitan Court. No transcript of the trial was prepared. Audio recordings made by the Identity Project with the permission of the court are available at <<https://papersplease.org/wp/2011/01/24/audio-state-of-new-mexico-v-phillip-mocek/>>.

3 Analysis and links to source documents: "Yes, you can fly without ID" (The Identity Project, April 13, 2017), <<https://papersplease.org/wp/2017/04/13/yes-you-can-fly-without-id/>>

4 *Gilmore v. Gonzales*, 435 F. 3d 1125, <<https://papersplease.org/gilmore/>>

5 Comments of the Identity Project and the Cyber Privacy Project, "Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)", January 9, 2017, <<https://papersplease.org/wp/wp-content/uploads/2017/01/IDP-form-415-9JAN2017.pdf>>

6 "Notice of Proposed Action: Driver's Licenses and Identification Cards" (undated), <<https://www.dmv.ca.gov/portal/wcm/connect/71a1030f-ab34-438e-9e2f->

This statement in the Notice of Proposed Action is clearly erroneous. Nothing in the REAL-ID Act imposes any limits on access to airports or other facilities or services. The REAL-ID Act pertains only to *which* ID cards are deemed acceptable in circumstances in which ID is required by some other Federal law or regulation. But there is no Federal law or regulation which limits access to airport boarding areas or transportation by common carrier to individuals in possession of, or displaying, ID cards.

TSA and DHS press releases, websites, and signs at airports do not have the force of law. TSA and DHS threats of future interference with air travel by individuals without ID credentials are unfounded, or at least not founded in law or regulations. These threats provide no basis in law for the DMV's claims in its Initial Statement of Reasons that the proposed regulations are "necessary" to avert this threatened (unlawful) interference.

3. No state or Federal law requires the DMV to comply with the REAL-ID Act.

The DMV's Notice of Proposed Action is flatly self-contradictory, stating both that, "Full compliance [with the REAL ID Act] is required for all states by October 2020" and that, "These regulations are not mandated by federal law or regulations."

The correct statement is the latter: Neither now nor in 2020 will California or any other state be required to take any action as a result of the REAL-ID Act.

As California has correctly and successfully argued with respect to use of state resources to enforce Federal immigration laws, the Federal government has no Constitutional authority to commandeer state resources, including state funds and state agencies such as the DMV, to carry out Federal policies.

The TSA, DHS, and other Federal authorities – knowing that Federal law does not (and cannot) mandate that states enact laws or regulations, spend state funds, or direct state employees to carry out Federal wishes – have instead resorted to threats to interfere with the rights of residents of states that don't "voluntarily" comply with Federal desires.

Those threats are unlawful, both because they have no basis in substantive Federal law or regulations and because they would violate the Constitutional rights of state residents. Disagreement by Federal officials with state policy choices is not a lawful basis for selective interference by Federal officials with the rights of residents of those states.

Any Federal attempt to interfere with California residents' exercise of our rights, including our rights to freedom of assembly, freedom of intrastate and interstate movement, and travel by common carrier, should be vigorously contested by the state of California, just as the state contested interference with Californians' rights of assembly, movement, and travel in the form of President Trump's "Muslim Ban" Executive Orders.

[7e145f82112f/Notice_of_Proposed_Action.pdf](#)>

4. In order for California to comply with the REAL-ID Act, the DMV would have to upload information about all California drivers licenses and state ID cards to a nationally accessible database ("SPEXS").

The REAL-ID Act requires compliant states to take certain actions with respect to (a) physical attributes of ID cards and drivers licenses and (b) ID card and license issuance procedures. These criteria of compliance are discussed in the DMV's proposal.

But there's also a third element of compliance in the Federal law: "To meet the requirements of this section, a State shall ... Provide electronic access to all other States to information contained in the motor vehicle database of the State."⁷

It would be prohibitively expensive for any state to try to build its own network of connections to each other state. In practice, the only way a state can comply with this requirement of the REAL-ID Act is to upload "pointers" for all drivers licenses or ID cards issued by the state (including "noncompliant" IDs and licenses) to a new national ID database, SPEXS. Full details about any of those IDs and licenses are sent to any other state on request through the national "hub" which connects all participating states to the S2S network as well as to other state, Federal, foreign, and private entities, as shown in the diagram from the official SPEXS specifications on the next page.⁸

If SPEXS were operated by the Federal government, it would be subject to the Federal Privacy Act⁹. The responsible Federal agency would have to publish a notice, before the system went into operation, describing the categories and sources of information in the database, how it is indexed and retrieved, how it is used, and to whom it is disclosed, and designating a point of contact and procedures for correction of records. Individuals about whom records are maintained would have the right to obtain copies of the records about themselves and an accounting of disclosures of those records to third parties, and to have inaccurate or irrelevant information corrected or deleted.

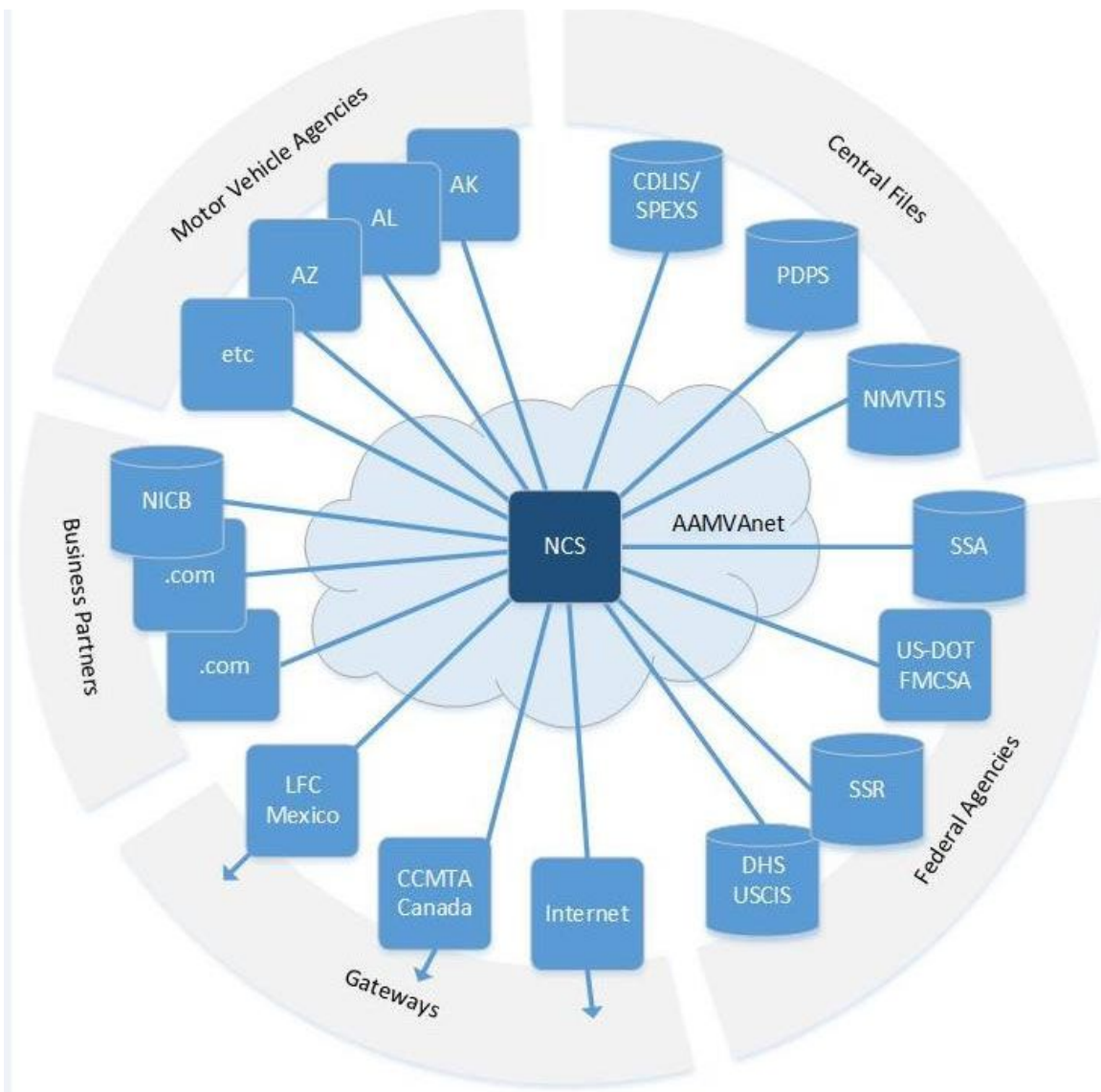
If SPEXS were a Federal government database, SPEXS policies, specifications, and governance records would also be accessible to the public through the Freedom Of Information Act¹⁰.

7 REAL-ID Act of 2005, P.L. 109-13, Title II, Section 202(d)(12).

8 The Identity Project, "How the REAL-ID Act is creating a national ID database", February 11, 2016, <<https://papersplease.org/wp/2016/02/11/how-the-real-id-act-is-creating-a-national-id-database/>>. Immediately after the Identity Project published this report on SPEXS, AAMVA removed the SPEXS specifications and other SPEXS and S2S documentation from its public website. Mirror copies of these documents are still available on the Identity Project website.

9 Privacy Act of 1974, 5 U.S.C. § 552a

10 Freedom of Information Act (FOIA), 5 U.S.C. § 552



"Diagram 1: AAMVAnet Usage", in "AAMVA State Pointer Exchange Services (SPEXS) Master Specification (AMIE), r6.0.8", page 5, available at <https://papersplease.org/_dl/SPEXS%20Master%20Specification%20%28AMIE%29%20r6.0.8.pdf>.

If SPEXS were operated by a California state or local government agency, these would be subject to the California Public Records Act¹¹ and the meetings of its governing body would be subject to the Brown Act¹² and the Bagley-Keene Open Meeting Act.¹³

However, development and operation of S2S and the SPEXS database has been outsourced to the American Association of Motor Vehicle Administrators (AAMVA), a nominally private non-governmental organization, and a private contractor in the Washington, DC, area, Clerus Solutions. Neither AAMVA nor Clerus Solutions are subject to the Privacy Act, FOIA, or any state open meeting or public records law.

Neither AAMVA nor Clerus Solutions are required to disclose their policies, procedures, or decisions; to tell individuals what information about them is included in SPEXS or the other central files, how it is used, or to whom it is disclosed; or to provide any mechanism for correction or deletion of inaccurate, out-of-date, or irrelevant data.

Last year, we asked AAMVA and Clerus Solutions whether there was any way to find out what information about oneself is included in SPEXS, or to correct any errors in SPEXS records. It took more than six months to get the answer: to find out what information about oneself is contained in SPEXS, an individual has to make a separate request to the agency in each state that participates in SPEXS. If there is an error in the SPEXS records about you, you can only get it corrected by first identifying which agency (if any) in which state supplied the erroneous data, and then getting that agency to get AAMVA to correct or delete the record (or to have Clerus Solutions correct it).¹⁴

There's no procedure for correcting an error by AAMVA or its subcontractors. "AAMVA does not have the unilateral authority to change pointer index data. It can do so only at the direction of the state that posted the pointer."¹⁵ So if an error by AAMVA results in a SPEXS record that doesn't correspond to data supplied by any state, neither AAMVA nor any state has the authority to correct or delete it. Catch 22!

If a pointer record in SPEXS suggests that you still have a driver's license or ID in any other state, the California DMV will not be allowed to issue you a new license or ID.

11 Government Code §§ 6250 *et seq.*

12 Government Code §§ 54950 *et seq.*

13 Government Code §§ 11120 *et seq.*

14 The Identity Project, "National REAL-ID database replicates problems with FBI rap sheets", June 30, 2016, <<https://papersplease.org/wp/2016/06/30/real-id-national-id-database-replicates-problems-with-fbi-rap-sheets/>>, and email message to Edward Hasbrouck of the Identity Project from Pierre Y. Boyer, Chief Information Security Officer, AAMVA, September 8, 2016.

15 Email message to Edward Hasbrouck of the Identity Project from Nancy Carlson, Senior Business Analyst, Clerus Solutions, June 20, 2016

Someone who moves from one state to another won't find out that the SPEXS pointer to their old license hasn't been deleted until they try to get a license in their new state of residence, and are turned down. The best case is that a California resident will have to work through the driver's license agency in some other state they formerly resided in to get an error in SPEXS corrected, before they can obtain a California license or ID. The worst case is an error by AAMVA or one of its contractors that nobody has the authority to correct, and that prevents you from getting a new ID in any compliant state.

Records in the SPEXS national ID database currently contain only a subset of the data in state drivers license records. The last version of the SPEXS specifications we were able to retrieve from the public AAMVA website (more recent versions have only been made available only to AAMVA members on a password-protected area of the site) included the following fields from each state license or ID in the national ID database:¹⁶

SPEXS Master Specification (AMIE), r6.0.8

AAMVA - Official Use Only

6.2 CD20 MASTER POINTER

Description

The CD20 Master Pointer identifies (points to) the jurisdiction in which: (i) for CDLIS purposes, the person's CDL record resides; and (ii) for non-CDLIS purposes, the person's credential record resides.

Content

The CD20 Master Pointer consists of the following data attributes:

ID	Clear Name and Identifier	Required (R)
CD20.C1	Master Pointer ID (DCDPID)	R
CD20.C2	Jurisdiction Code - Licensing (DDLJUR)	R
CD20.C3	Driver License Number (DDLNUM)	R
CD20.C4	Person Name Group (BPENGP)	R
CD20.C5	Driver Social Security Number (DDVSSN)	R (only until all Jurisdictions have implemented 5.1 or greater).
CD20.C6	Person SSN Last 5 Digits (BPSSD)	R
CD20.C7	Driver SSN Type (DDVSSI)	R
CD20.C8	Driver Date of Birth (DDVDOB)	R
CD20.C9	Driver Sex (DDVSEX)	R (only until all Jurisdictions have implemented 5.1 or greater).
CD20.C10	State Document Type (BJDTYP)	R
CD20.C11	State Document REAL ID Conformant (BJDRIC)	R
CD20.C12	CDLIS Pointer Indicator (DCDCPI)	R
CD20.C13	Message SOR Change in Progress Indicator (GMSSCH)	R
CD20.C14	Record Creation Date Time Stamp (GRCCDS)	R
CD20.C15	Record Last Update Date Time Stamp (GRCUDS)	R

¹⁶ "AAMVAState Pointer Exchange Services (SPEXS) Master Specification (AMIE), r6.0.8", <https://papersplease.org/_dl/SPEXS%20Master%20Specification%20%28AMIE%29%20r6.0.8.pdf>.

Unfortunately, the "limited" character of this pointer data is illusory, because (1) a compliant state must provide its entire license and/or ID record about any individual, not just the pointer, to any other participating state on request, and (2) AAMVA could change the SPEXS specifications at any time (and may already have done so, since they are no longer public) to require that additional data be included in pointer uploads or to impose additional conditions on states that want to participate or remain participants in S2S.

The purpose of the SPEXS pointers is to index and identify state license and ID records, so that they can be searched and matched with other records that might pertain to the same individual. It's easy to imagine that AAMVA might decide to index and search SPEXS records by photograph as well as by name, and start requiring uploads of license and ID photos in addition to the current pointer data fields.

But there is no way, other than through participation in S2S and uploading of whatever data AAMVA decides to require for SPEXS pointers (and complying with whatever other conditions AAMVA decides to impose on SPEXS and S2S participants) for a state to comply with the national database access requirement in the REAL-ID Act.

So a state that has complied with the REAL-ID Act through participation in S2S cannot withdraw from S2S or refuse to upload whatever additional data or comply with whatever new conditions AAMVA decides to impose on S2S participation without immediately becoming noncompliant with the REAL-ID Act.

Californians need to understand, and the DMV needs to acknowledge, that if California agrees to comply with the REAL-ID Act, the state will in effect be agreeing in advance to comply with whatever AAMVA later demands, including possible demands to upload additional data about all state residents to the national ID database. The DMV will be handing over control over California residents' license and ID data to private outside entities not subject to any of the transparency or accountability of government agencies.

Strictly speaking, participation in SPEXS is not required for REAL-ID Act compliance. But in practice, no other mechanism for compliance with the data-sharing provision of the REAL-ID Act is available or likely to become available.

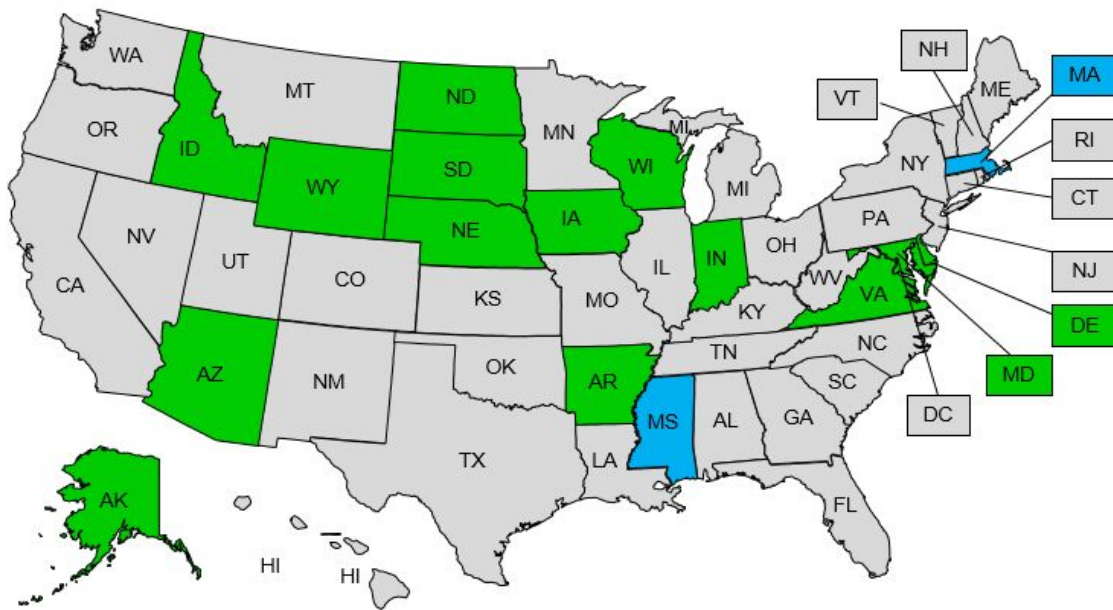
According to AAMVA (see the diagram on the next page), California is not a participant in S2S or SPEXS, and is not a signatory to a letter of intent to do so.

DHS grants of "extensions" of time to comply with the REAL-ID Act are not dispositive of what is required for compliance. Many states have been granted extensions of time to comply despite not being compliant with the database access provisions of the REAL-ID Act. DHS extensions of time to comply with the REAL-ID Act need not be based on any specific criteria and are not limited by any statutory deadline.

According to the REAL-ID Act regulations, "Subsequent extensions, if any, will be at the discretion of the Secretary" of Homeland Security.¹⁷

California is far from alone in not having complied with the REAL-ID Act. No state that is not participating in S2S and SPEXS is currently complying with the REAL-ID Act, regardless of whether it has received a discretionary extension from DHS.

Jurisdictions' S2S Testing & Implementation Current Status



Project Phase	Status	
Operational at 6.0	14	28%
Structured Testing Completed & Ready for Go Live	0	0%
Structured Testing in Progress	0	0%
Signed Letter of Intent	2	4%

AAMVA "S2S Participation Map - 08082017", at "State to State (S2S) Verification Services: Participation", <<http://www.aamva.org/State-to-State/>>

¹⁷ Department of Homeland Security, "Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Final Rule", 73 *Federal Register* 5272 at 5339 (January 29, 2008).

SPEXS is still relatively new and operating on a relatively small scale. The first states populated the national database in 2015, ten years after the REAL-ID Act was enacted and development of the SPEXS system began. As above, only 14 states, not including any of the most populous states, have uploaded their state data to SPEXS.

The total population of states participating in S2S and SPEXS is less than 15% of the U.S. population.¹⁸ To put it another way, more than 85% of the U.S. population resides in states – at least 36 of them, including California, Oregon, Washington, Texas, New York, Florida, Illinois, etc. – that are not in compliance with the database access requirements of the REAL-ID Act and have not indicated any intent to comply.

Unless the REAL-ID Act is repealed, each noncompliant states eventually will have to make the same decision as California: Whether to capitulate to Federal threats or challenge Federal interference with residents' rights. That is the real issue for our state.

According to the DMV's Notice of Proposed Action, "Under the proposed rulemaking, Californians will be able to apply for and receive a driver's license or identification card that is compliant with the REAL ID Act."

This claim is clearly and unquestionably false.

California does not make the contents of its driver's license database available to all other U.S. states and territories. The proposed amendments to DMV regulations would not change this or bring the state into compliance with the REAL-ID Act.

The DMV has neither requested not received funding or authorization to upload information about all holders of California driver's licenses or state ID cards to SPEXS, as would be required for compliance with the REAL-ID Act.

The DMV and the state of California should not embark on a course of regulatory or other administrative action, the stated purpose of which is for the state to comply with the REAL-ID Act, without first considering all of the elements of "compliance".

The DMV has completely failed to recognize, or to assess the implications of, the ID database-sharing requirement if the state is to comply with the REAL-ID Act.

5. Compliance by the DMV with the data sharing provisions of the REAL-ID Act would violate the Constitution of the State of California.

Article 1, Section 1, of the California constitution recognizes that, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty .. and pursuing and obtaining ... privacy."

¹⁸ Estimated resident populations of the 14 S2S participant states listed by AAMVA at <<http://www.aamva.org/State-to-State/>> and of the US, July 1, 2016, "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico (NST-EST2016-01)".

As a result of the DMV's failure to recognize that compliance with the REAL-ID Act – the stated intent of the proposed amendments to DMV regulations – would require participating and uploading data about all California drivers and ID cardholders to a nationally-accessible outsourced “private” ID database, the DMV has failed to assess the compatibility of that data sharing with the California Constitution or other state laws.

The DMV should publish, and provide a new opportunity for comment on, a new rulemaking proposal which includes this data sharing and assesses its economic and civil liberties impact and its compatibility with the state Constitution and other state laws.

We reserve the right to submit more detailed comments on these issues once the DMV articulates exactly how it proposes to make information about all state driver's licenses and ID cards available to all other U.S. jurisdictions. We believe that this can only be achieved by uploading this data to SPEXS and surrendering control of it to AAMVA and AAMVA's contractors. But that has been neither authorized nor funded.

As an initial matter, however, we note that Federal agencies could obtain SPEXS data from AAMVA and/or Clerus Solutions, while ordering those private companies not to disclose to the California DMV that they have obtained this data. The DMV and the state of California would thus be unable to control access to this data about California residents, or to know to what other third parties it had been disclosed.

We also note that the REAL-ID Act requires that to be compliant, a state must provide nationwide access to information about all driver's licenses and ID cards it has issued, including “noncompliant” licenses and ID cards.

A “noncompliant” driver's license or ID card issued by a compliant state isn't what it appears to be. Someone who chooses a “noncompliant” card probably thinks they have opted out of participating in the national ID database. But a compliant state can't let anyone opt out of nationwide sharing of all the state's data about them: The REAL-ID Act requires a compliant state to make its records about all driver's licenses or ID it issues – including “noncompliant” cards and licenses – available on request to all other states. Nobody who has a license or ID card issued by a compliant state can really opt out of the national database. A “noncompliant” license or ID card is a misleading sham.

This means that data about all California residents will be exported to a private contractor outside the control of the state, for the convenience (but not necessity) of a subset of Californians who hope that this action by the state will influence Federal agencies not to carry out their threats to interfere unlawfully with Californians' rights.

We do not believe that the convenience of some justifies sacrificing the privacy of all, or that this is consistent with the right to privacy recognized by our state Constitution.

The proper response by the state to these Federal threats is to prepare to challenge them, not for the state to become an accomplice to Federal infringement of our rights.

In addition, Article 19 of our state Constitution restricts the expenditure of motor vehicle and driver's license fees to, "The state administration and enforcement of laws regulating the use, operation, or registration of vehicles used upon the public streets and highways of this State."

The stated purpose of the proposed action (and of the data sharing which would entail additional costs and which would be required for compliance with the REAL-ID Act) is for the convenience of air travelers and visitors to Federal facilities. These are not within the purposes for which Article 19 of our state Constitution allows expenditures of these reserved funds.

6. The proposed amendments to state regulations would have adverse economic impacts on private persons and on businesses including small businesses.

The DMV states that., "The department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action."

This suggests that the department has failed to think through what will actually be required in order for California residents to obtain the documents proposed to be required for issuance or renewal of a California driver's license or ID card.

Many Californians don't have a certified copy of their birth certificate or other required paperwork, and have never before (or not for many years) been required to present documents to the government to prove who they are. Many people don't have, and can't readily obtain, the necessary documents for a compliant state ID card.

As an organization providing resources about the REAL-ID Act to individuals throughout the U.S., we hear regularly from people in this situation in other states that have implemented compliant state license and ID issuance and document requirements.

The burden of REAL-ID Act compliance falls disproportionately on the elderly, those with limited mobility, those who reside in a distant state from their place of birth, those who were born at home and whose birth was not recorded by a hospital (which is more common in some communities), and on those who were born in other countries and for whom it may be theoretically possible but practically impossible to obtain records from their country of birth.

A common Catch-22 is for an elderly or disabled person who doesn't have a certified copy of their birth certificate or other required paperwork to find it difficult or impossible to obtain the necessary documents without traveling to the state where they were born, but to be unable to travel there without the ID for which they need the documents.

In some countries and jurisdictions certified copies of birth certificates and other documents can only be obtained in person. As a result, obtaining these documents, even if it is possible, can entail expenses and time for out-of-state or international travel.

The DMV states that in its belief, “This regulation will not have an economic or fiscal impact on small business because the propose action only impacts the driver’s license issuance process.”

But this overlooks the fact that many California residents are engaged in small businesses as sole proprietors, freelancers, or independent contractors. Like it or not, motor vehicles are the primary means of transportation in our state, for small businesses as well as large ones. The inability to obtain a driver’s license is likely to have a profound effect, in many cases, on the ability of an individual to carry on a small business.

7. The DMV has failed to consider alternative responses to Federal threats to interfere with Californians’ rights, including litigation to defend those rights.

According to the DMV’s Initial Statement of Reasons for its proposals, “No reasonable alternatives would be less burdensome and equally effective in achieving the purpose of the statute, so none were considered.”

There are multiple errors in this statement.

First, it’s not clear what is meant by “the purpose of the statute”. No California statute mandates the proposed actions or compliance with the Federal REAL-ID Act. And it is a policy choice which the state of California is entitled to make in its own judgment – and which our state legislature has not yet made – as to whether the state wishes to expend state resources to carry out the purposes of this Federal statute.

Second, it is impossible to determine whether alternatives would be less burdensome and equally effective in achieving a particular purpose unless and until those alternatives have been considered. The point of “considering” alternatives is to develop the evidence needed to make that comparative determination. The DMV cannot exclude consideration of alternatives on the basis of their not (yet) having been found to be less burdensome or more effective, as it seems to suggest that it has done in this case.

Third, the DMV appears to have entirely ignored the obvious alternative of litigation by the state in opposition to the threatened Federal interference with state residents’ rights of assembly, movement, and travel by common carrier.

Once it is recognized that the stated purpose of the proposed actions is to reduce the likelihood of, and/or mitigate the damage from, threatened interference by Federal agencies with California residents’ rights, it should be obvious that litigation to challenge that interference, should it occur or be imminent, is an alternative course of action.

At a minimum, an assessment of the possibility of such litigation should be carried out by the office of the Attorney General of California, and considered by the DMV, before the DMV or the state of California gives up on the possibility of resistance and capitulates to Federal threats to interfere with California residents' rights.

Both the substantive arguments regarding freedom of movement and Federal commandeering of state resources, and the arguments for state standing to defend state residents' rights, are similar to those that the state of California, California municipalities, and allied states have successfully raised in other recent and ongoing litigation.¹⁹

In defending "Sanctuary City" policies against threatened Federal retaliation, California cities and counties have successfully asserted both their right not be commandeered to carry out Federal immigration policy, and their standing to seek injunctive relief against prospective retaliatory Federal denial of equal access to Federal programs.²⁰ Similar arguments are likely to be made in defense of California's new "Sanctuary State" law. These are exactly the issues that would arise in state litigation to enjoin prospective Federal retaliation against state governments for failing to implement Federal ID policies by restricting residents' access to Federally-licensed common carriers.

In challenging President Trump's "Muslim Ban" Executive Orders, states including California have successfully asserted both substantive claims for injunctive relief based on state residents' rights of freedom of movement and assembly, and state standing to raise and litigate these claims on behalf of state residents.²¹

We believe that, as it has on others of the issues discussed above, California would be likely to find allies among other states that would join us in such litigation.

8. Recommended alternative actions

We urge the DMV to withdraw the proposed amendments to the California Code of Regulations, or at a minimum to conduct and provide a new opportunity for comment on an assessment of the implications of the proposal, and the alternative actions, which were omitted from the Notice of Proposed Action and Initial Statement of Reasons.

19 See additional analysis and citations at, "Executive Orders, lawsuits, and the right to travel" (The Identity Project, February 16, 2017), <<https://papersplease.org/wp/2017/02/16/executive-orders-lawsuits-and-the-right-to-travel/>>

20 See e.g. *City and County of San Francisco v. Trump*, No. 17-cv-00485-WHO, U.S. District Court for the Northern District of CA; complaint filed January 31, 2017; temporary injunction issued April 25, 2017; reconsideration denied July 20, 2017.

21 See e.g. *State of Washington and State of Minnesota v. Trump*, No. 17-35105, 9th Circuit Court of Appeals, Per Curiam Order, February 9, 2017. The state of California intervened as an *amicus curiae* in support of the state plaintiffs in this case.

And we urge the DMV and the Attorney General of the state of California to begin preparing to go to court, as soon as such a case is ripe, to defend the rights of California residents to freedom of assembly, movement, and travel by common carrier against any threatened Federal interference.

Thank you in advance for your consideration of these comments, which will be summarized in our oral testimony at the hearing concerning this proposed regulatory action in Sacramento on October 16, 2017.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project