Before

U.S. Customs and Border Protection
U.S. DEPARTMENT OF HOMELAND SECURITY

Washington, DC

Notice of Proposed Rulemaking, "Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States"; Docket Number USCBP-2020-0062, FR Doc. 2020-24707, RIN 1651-AB12	**COMMENTS OF THE IDENTITY PROJECT (IDP), RESTORE THE FOURTH, PRIVACY TIMES, AND NATIONAL WORKRIGHTS INSTITUTE**

The Identity Project (IDP)

<https://PapersPlease.org>

December 21, 2020

The undersigned civil liberties and human rights organizations – the Identity Project (IDP), Restore the Fourth, Privacy Times, and the National Workrights Institute – submit these comments in response to the purported "Notice of Proposed Rulemaking: Collection of Biometric Data from Aliens Upon Entry to and Departure from the United States," Docket Number USCBP-2020-0062, FR Doc. 2020-24707, RIN 1651-AB12, 85 *Federal Register* 74162-74193 (November 19, 2020).

By this Notice of Proposed Rulemaking (NPRM), U.S. Customs and Border Protection (CBP) proposes to require all non-U.S. citizens including lawful permanent residents of the U.S., and all U.S. citizens who do not "opt out," to submit to collection of facial images by airlines, cruise lines, ferry companies, airport or seaport operators, or CBP itself, with all these images transmitted to CBP, whenever individuals enter or leave the U.S. by land, sea, or air.

The purported NPRM was promulgated under purported authority delegated by an official purporting to exercise the duties of the Secretary of Homeland Security. That official was not appointed in accordance with the Vacancies Reform Act and therefore lacks authority to promulgate notices of proposed rules or final rules, or to delegate authority to do so which they do not themselves hold. The purported NPRM is therefore null and void *ab initio*, and cannot form the basis for issuance of a valid final rule. Before any final rule could be promulgated, a new NPRM would need to be promulgated by a properly appointed official.

The proposed rules and procedures would violate the Privacy Act, and must therefore be revised or withdrawn.

The proposed rules and procedures would violate the Paperwork Reduction Act (PRA), and must therefore be revised or withdrawn.

The impact assessment in the NPRM is incomplete, inaccurate, and grossly underestimates the costs which would be imposed on individual travelers by the proposed rule.

The NPRM fails to consider how many (more) individuals would opt out of collection of biometrics, if they were provided with the notices required by the PRA, or the cost to those travelers who are so delayed that they miss their flights. The impact assessment must be revised.

1. About the commenters

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.

Restore The Fourth is a nationwide, volunteer-run civil liberties organization dedicated to opposing unconstitutional government surveillance and protecting the liberties in the Fourth Amendment to the U.S. Constitution.

Privacy Times is a leading provider of expert witness and expert consulting services regarding all matters relating to the privacy of financial and other consumer information. From 1981-2013, Privacy Times published a specialized newsletter covering the Privacy Act, Freedom of Information Act, FCRA, and a wide variety of information privacy issues.

The **National Workrights Institute's** creation grew from the belief that the workplace is a critical front in the fight for human rights. The Institute's mission is to be the one human rights

organization which commits its entire effort to workplace issues. The Institute's goal is to improve the legal protection of human rights in the workplace.

2. The NPRM was not promulgated by an official with valid authority.

According to the NPRM, "The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the *Federal Register*."

However, Mr. Wolf is not, in fact or in law, the Acting Secretary of Homeland Security. To be valid, the appointment of an Acting Secretary of Homeland Security would have had to be made in accordance with the Vacancies Reform Act of 1998 (VRA), 5 U.S.C. §3345–3349.

The Government Accountability Office (GAO) and several courts have determined that Mr. Wolf has not been appointed as Acting Secretary of Homeland Security in accordance with the VRA. See GAO Decision B-331650, "In the Matter of Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security," August 14, 2020, <https://www.gao.gov/assets/710/708830.pdf> ("Messrs. Wolf and Cuccinelli were named to their respective positions of Acting Secretary and Senior Official Performing the Duties of Deputy Secretary by reference to an invalid order of succession"), and *Northwest Immigrant Rights Project v. U.S. Citizenship and Immigration Services*, No. 19-3283 (RDM), <https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv3283-85>, memorandum opinion

(D.D.C., October 9, 2020; collecting cases with respect to validity of appointment and authority to promulgate rules and granting preliminary injunction).

Since Mr. Wolf was not the Acting Secretary of Homeland Security, he had no authority to promulgate an NPRM or a final rule, or to delegate to others authority he himself lacked.

The NPRM is therefore null and void, and cannot serve as the basis for any final rule. Before any final rule could be promulgated by a subsequent duly appointed official, a valid NPRM would need to be promulgated by such an official, and comment accepted on that NPRM.

3. **The proposed rules and procedures would violate the Privacy Act.**

The NPRM proposes rules and describes procedures that would involve collection of records of how individuals exercise rights guaranteed by the First Amendment to the U.S. Constitution without satisfying the conditions in the Privacy Act for this collection of records.

The Privacy Act of 1974, 5 U.S.C. §552a(e)(7), requires that:

> "Each agency that maintains a system of records shall --... maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

As used in the Privacy Act, the term "individuals" includes both U.S. citizens and lawful permanent residents. The proposed rules would require lawful permanent residents of the U.S. to submit to collection of biometric information. And the NPRM describes procedures pursuant to which biometric information would be collected from U.S. citizens on an "opt out" basis.

Records pertaining to when and where we enter or leave the U.S. or cross U.S. borders, where we are coming from, or where we are going are records of how we exercise rights guaranteed by the First Amendment, including the right of the people peaceably to assemble.

The Privacy Act permits the maintenance by a Federal agency of records such as these of how U.S. persons exercise rights guaranteed by the First Amendment only if this is: (a) expressly authorized by statute, (b) expressly authorized by the individual about whom the record is maintained, or (c) pertinent to and within the scope of an authorized law enforcement activity.

The proposed maintenance of records pertaining to the collection of biometric data (for example, logs of the places and times when a facial image was captured by a CBP, airline, or airport camera) do not satisfy any of these three conditions.

First, there is no explicit authorization in any Federal statute for collection or maintenance of biometric data concerning travel of U.S. persons. It is irrelevant whether authorization might arguably be implicit in some general authority claimed by DHS. The Privacy Act requires express statutory authorization, and there is no such authorization for biometric-based monitoring of U.S. person's movements, including entries, exits and border crossings.

Second, the maintenance of these records with respect to U.S. persons would not be "expressly authorized by ... the individuals about whom these records are maintained."

With respect to lawful permanent residents of the U.S., the proposed rules would require submission to collection of facial images at border crossings and ports of entry and exit.

The proposed rules would purport to allow U.S. citizens to opt out of facial imaging or collection of other biometrics. But failure to opt out is, at most, "implied" authorization, not "express authorization." Implicit authorization by U.S. citizens does not satisfy the Privacy Act.

Third, the maintenance of these records of location and movement is not, "pertinent to and within the scope of an authorized law enforcement activity."

The NPRM does not explain why CBP believes that evidence about the lawful travel and border crossings of U.S. persons is pertinent to any authorized law enforcement activity.

Acts of travel, including border crossings and entries and exits to and from the U.S., are acts by which we exercise our right to assemble. The exercise of First Amendment rights, including the right to assemble, cannot Constitutionally be treated as *per se* suspicious.

With respect to whether this record-keeping is "pertinent to … an authorized law enforcement activity," whether any proposed use of this sort of information about acts of assembly is authorized by law or by the U.S. Constitution would be subject to strict scrutiny.

Even if CBP were to establish that some of this record-keeping is "pertinent to" some inferred authority for surveillance of our movements for general law enforcement purposes – which CBP has not done, and which we do not believe it can do – the Privacy Act would also require that it be "within the scope" of that authorized purpose.

The scope of the record-keeping described by the NPRM encompasses all border crossings, entries, and exits, regards of their legality or any basis for suspicion. Suspicionless surveillance of lawful activity is not a permissible or authorized law enforcement activity.

The NPRM thus proposes rules and describes practices that would involve the collection of information about how U.S. persons exercise rights of assembly protected by the First Amendment, without satisfying any of the three alternative conditions under which collection of this information would be permitted by the Privacy Act.

Even if this collection of biometric information by CBP – including from U.S. citizens and lawful permanent residents of the U.S. – were expressly authorized by stature or by the individuals to whom this biometric information pertains, the Privacy Act would require that it be collected directly by CBP directly from these individuals, "to the greatest extent practicable."

The Privacy Act of 1974, 5 U.S.C. §552a(e)(2), provides that:

> "Each agency that maintains a system of records shall --... collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs."

It would be feasible for CBP to collect facial images directly from travelers, and the NPRM describes how CBP did so in its pilot programs for "biometric exit" at airports. However, despite having proven that this approach of direct collection was practicable and despite the unambiguous and explicit mandate of the Privacy Act, CBP proposes in the NPRM that facial images be collected by airlines or airport operators, and then passed on to CBP.

According to the NPRM, "During the regulatory period, CBP will enter into partnerships with carriers…. Facial recognition will be integrated into the boarding process."

The NPRM does not mention the requirements of the Privacy Act or make any claim that it would not be "practicable" for CBP to collect facial images directly. On the contrary, the NPRM discusses the specific, and quite modest, costs to CBP of collecting facial images directly during some of its "pilot programs" at airports where CBP deployed its own staff.

The procedure proposed in the NPRM – and, in fact, already deployed by some airlines and airports – is plainly unlawful. It has been developed and deployed by CBP and CBP's "partners" apparently in complete disregard for the Privacy Act.

Mere additional cost does not render direct collection of information "impracticable", and CBP has proven in its pilot programs that it would, in fact, be "practicable."

There are good policy reasons for this provision of the Privacy Act. Indeed, the NPRM itself makes clear some of the reasons why it is important for CBP, like other Federal agencies, to collect biometrics or other information directly from individuals.

According to the NPRM:

> "The hardware cost in the regulatory period will be borne by the carriers and airports who partner with CBP. CBP will give carriers and airports access to its facial recognition system and the carriers and airports will choose (and pay for) the hardware that best fits their needs. While this partnership is voluntary, CBP expects that all commercial carriers and major airports will elect to participate within five years."

Why would all airlines – for-profit commercial entities – bear the cost of assisting CBP in biometric tracking of their customers, as the NPRM assumes? What's the *quid pro quo?*

CBP can be confident that airlines will all make the same commercial choice because the value to airlines of getting "free" use of the CBP facial-recognition "identification-as-a-service" Traveler Verification Service (TVS) for their own business purposes, including at other passenger "touchpoints," will exceed the capital and labor costs of collecting photos and passing them on to CBP. Airlines won't need to retain the photos themselves, or develop their own facial recognition systems, to obtain the commercial benefits of automated facial recognition conducted for them by CBP through TVS, on the basis of photos sourced in part from airlines and airports.

CBP is counting on being able to bribe airlines into deploying and operating biometric systems for CBP to track their customers, in exchange for giving those commercial entities "free" use of a CBP facial-recognition identification service, based on image galleries aggregated from government and commercial (airline) sources, for their commercial purposes.

The Privacy Act, for good reasons, does not permit such a scheme.

If CBP wants to collect biometric information about travelers, it can – and must – collect that information from them directly. The NPRM must be withdrawn or revised accordingly.

4. **The proposed rules and procedures would violate the Paperwork Reduction Act (PRA).**

The Paperwork Reduction Act of 1980, 44 U.S.C. §3501-3521, as amended, imposes requirements for any collection of information by a Federal agency including, *inter alia*, notice and comment, approval by the Office of Management and Budget (OMB), assignment of an OMB control number, and notice to individuals from whom information is collected. That notice must include the OMB control number, notice of the right not to respond to any collection of information by a Federal agency that does not display a valid OMB control number, and "whether responses to the collection of information are voluntary, required to obtain a benefit, or mandatory."

These requirements apply to any collection of information regardless of (a) whether information is to be collected from U.S. persons or non-U.S. persons, (b) whether the collection of information is mandatory or voluntary, (c) whether or if so for how long the information collected is maintained, or (d) whether the information is written, verbal, or biometric.

According to the NPRM, "The collections of information related to this NPRM, including biometric exit, are approved by OMB under collection 1651-0138."

However, none of the statutory authorities cited as the basis for information collection 1651-0138 in the current approval[1] or the request pending with OMB for renewal of that approval[2] mandate or authorize *any* collection of information from U.S. citizens. All of the statutes cited as authority pertain *exclusively* to entry and exit of "aliens."

In addition, despite repeated false claims in prior and current applications for OMB approval that CBP will display the OMB approval number in notices at places where this information, including biometric information, is collected, and despite the claim in the NPRM that "CBP strives to be transparent and provide notice to individuals regarding its collection, use, dissemination, and maintenance of personally identifiable information (PII)," CBP in fact:

(A) Has *never* displayed or required airlines or airport operators to display this OMB number or any of the notices required by the PRA at any departure gate or other airport location where facial images are collected by or on behalf of CBP;

(B) Does not currently display this OMB control number or any of the notices required by the PRA at any of the departure gates or other airport locations where facial images are being collected by or on behalf of CBP; and

(C) Has submitted no proposed PRA signage or notices for "biometric exit" to OMB and has, in fact, no plans to display or require display of any such notices.

CBP's standard signs for posting at locations where biometrics are collected are available on the CBP website at <https://biometrics.cbp.gov/resources>. None of these signs contain any OMB control number or any of the notices required by the PRA.

1. The current OMB approval for information collection 1651-0138 expires December 31, 2020.
2. https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201903-1651-001

For example, Figure 1 below shows the standard CBP biometric boarding signage for airports, available at <https://biometrics.cbp.gov/sites/default/files/docs/Air-Exit-Signage.pdf>. Figure 2 shows a typical current installation of one of these signs at a departure gate at Newark Liberty International Airport. Neither sign includes any OMB control number or PRA notices:

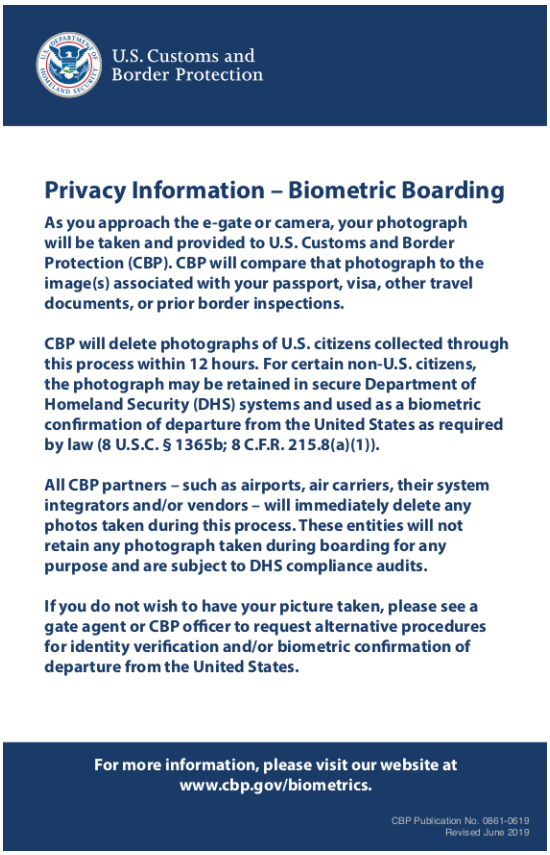

Figure 1: "Biometric Air Exit Signage" as shown on CBP website

Figure 2: CBP sign in use at departure gate at Newark Liberty International Airport, 2020

CBP signs, as above, refer travelers to the CBP website at <www.cbp.gov/biometrics> for more information. But there is no OMB number and no mention of the PRA on that website.

Both the current and proposed collection of biometric information are being, and would continue to be, conducted without proper approval and notices, in flagrant violation of the PRA. They must immediately be suspended, and must not be resumed unless and until proper notices compliant with the PRA are prepared, made available for public comment, and submitted to OMB; CBP and OMB have reviewed the public comments; OMB has approved the proposed notices; and the new notices have been posted at all locations where this information is collected.

The pervasive and persistent nationwide violations of the PRA in the deployment of facial recognition systems by CBP, and on behalf of CBP by its airline and airport "partners," are not mere technical violations. These deficiencies in notice affect individuals' ability to know their rights. And as discussed further below, they affect both the likelihood that individuals will assert their right to opt out of collection of facial images by or on behalf of CBP and the number of individuals who suffer (unlawful) adverse consequences as a result of opting out.

CBP signs tell individuals that they can "request alternative procedures" if they do not wish to have their photograph taken. But these signs do not tell individuals whether such requests will always, never, or sometimes (and if so, for whom or on what basis?) be granted, despite the explicit mandate of the PRA to inform individuals "whether responses to the collection of information are voluntary, required to obtain a benefit, or mandatory."

There is a fundamental difference between being allowed to make a "request" to opt out, as suggested by the CBP signs, and being entitled to assert a *right* to opt out.

Nor do the CBP signs tell individuals anything about what, if any, sanctions may be imposed on those who opt out of airport mug shots. Will those who "request alternative

procedures" be subjected to more intrusive search and/or questioning? Will more information about them be collected and recorded? Will they be delayed, or kept from boarding flights? The signs are silent, leaving passengers to speculate and forcing them to chose whether or not to submit to being photographed without knowing the consequences of the choice, or even whether they really have a choice (if, for example, "requests" to opt out are rarely or never granted).

As long as there is no OMB control number applicable to this collection of information, and valid PRA notices are not displayed at the locations where facial images are being collected, these collections of information are unlawful. All individuals, regardless of citizenship, have an absolute right, pursuant to the PRA, not to respond to these collections of information. The PRA provides an absolute defense against any sanctions – including denial of entry or exit, denial of passage across a land border, or delay or denial of boarding of a flight, cruise vessel, or ferry – imposed for failure or refusal to respond to these collections of information.

5. The impact assessment in the NPRM is incomplete and inaccurate.

The NPRM correctly notes that, "The Regulatory Flexibility Act requires agencies to consider the impacts of their rules on small entities."

However, the NPRM continues by incorrectly stating that, "This proposed rule would only directly regulate travelers. Travelers are individuals and are not considered to be small entities by the RFA…. CBP therefore certifies that this rule will not result in a significant economic impact on a substantial number of small entities."

This claim is false, and is entirely devoid of any support in the statutory definition. Nothing in the language of the Regulatory Flexibility Act (RFA) or the Small Business Act (SBA) excludes or permits the exclusion of individuals from the definition of "small entities" if they otherwise satisfy the criteria in the statutory definition. The RFA defines "small entity" at 5 U.S.C. §601(6) as including any "small business" as defined in 5 U.S.C. §601(3): "the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the *Federal Register*." No such definition(s) have been promulgated by CBP.

Section 3 of the Small Business Act (15 U.S.C. §632), provides that "a small-business concern ... shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation." Additional criteria are permitted by the Small Business Act only after public notice and comment, and none have been promulgated with respect to any category of individuals. Individuals are by definition "independently owned," and of course hardly any individuals are dominant in their fields of operation. Many individual travelers are, by this RFA and SBA definition, "small entities," including all self-employed individuals and sole proprietors.

We're not sure how the claim that "individuals are not small entities" came to be included in agency boilerplate for NPRMs and RFA assessments. Perhaps in 1980, when the RFA was enacted, a much smaller percentage of individuals were self-employed or sole

proprietors. But it's time for agencies to purge this language from their rulemaking templates, and for OMB to begin rejecting NPRMs or RFA assessments that exclude individuals from their consideration of impacts on "small entities."

CBP itself has conceded, in response to our comments on proposed rules, that individual travelers are in fact among "small entities" as that term is used in the RFA. For example, in a 2008 joint rulemaking by CBP and the Department of State concerning passport rules, the agencies said (73 *Federal Register* 18384 at 18403, April 3, 2008):

> Comment: One commenter [The Identity Project] noted several examples of individuals who would be considered small businesses, including sole proprietors, self-employed individuals, and freelancers.
>
> Response: CBP agrees that these "sole proprietors" would be considered small businesses and could be directly affected by the rule if their occupation requires travel.... The number of such sole proprietors is not available from the Small Business Administration or other available business databases, but we acknowledge that the number could be considered "substantial."

It's odd that the Small Business Administration (SBA) does not have data on numbers of sole proprietors, since the SBA itself says that, "A sole proprietorship is the ... most common structure chosen to start a business."[3] Where proposed rules affect individuals, as with this NPRM, it's likely that most of the affected "small entities" will be individuals, and that the RFA assessment will (or should) *primarily* concern impacts on these individuals.

We again urge the SBA advocacy office, as we have done before, to begin working with OMB to develop guidelines for agencies to use in estimating the numbers of individuals affected by proposed rules who are likely to constitute "small entities" as that term is used in the RFA.

3. SBA, "Sole Proprietorship", at <https://www.sba.gov/starting-business/choose-your-business-structure/sole-proprietorship%20>.

CBP's erroneous exclusion of individuals from its consideration of "small entities," its RFA analysis based on that error, and its impact assessment, are plain errors that require the withdrawal of the NPRM or the publication of, and a new opportunity for comment on, a valid RFA analysis which takes into consideration those individuals who fit the RFA definition of "small entities." If the proposed rule is not withdrawn, and no new RFA assessment including consideration of impacts on individuals is published for comment, OMB must reject the proposed rule as not being accompanied by a valid RFA analysis.

While we reserve the right to submit additional comments concerning the impact of the proposed rule on small entities once CBP publishes a new, valid NPRM, it is clear that CBP grossly underestimates the number of individuals – including those who are considered "small entities" for purposes of RFA and SBA analysis – who would opt out of CBP mug shots.

According to the NPRM:

> "We estimate the opt-out rate through reference to the Transportation Security Agency (TSA)'s biometrics pilot. TSA has recently begun testing facial recognition at some locations, comparing the photographs of travelers to CBP's gallery. During the test, TSA has made clear through signage that it was optional and the TSA agent asked travelers whether they wanted to opt out. TSA tracked the number of opt outs over two days in the summer of 2019 and found an opt-out rate of 0.18 percent across more than 13,000 travelers. We adopt this rate as our estimate for U.S. citizens who will opt out of biometric collection under this rule. We request comment on this assumption."

Our comment is that this assumption is in error, and too low, because the TSA, like CBP, has failed to provide the notices required by the PRA. We believe that if U.S. citizens were told explicitly, in writing, that they had the right to opt out and that no adverse consequences would be imposed on those who opt out, the percentage who opt out would be much higher.

Individuals who opt out of being photographed will be subjected to an "alternative inspection process." CBP says that "the alternative inspection process may be a slower process than the automated process, but every effort will be made to not delay or hinder travel."

Regardless of what "effort" is made, a slower process is likely to delay travel for a large percentage of those who opt out. Facial images are to be collected at departure gates as passengers are boarding, at which point the flight is about to depart as soon as the boarding process is complete. Any delay at this point is likely to result in missing the flight.

CBP says in the NPRM that "In the event that an individual does experience a delay or issue as an outcome of these processes, travelers may contact the CBP Info Center and/or DHS Traveler Redress Inquiry Program (TRIP)." But the ability to "contact" CBP or DHS does not amount to a right to, or a procedure for, compensation for direct or consequential damages for delay, particularly where delay results in missing an international flight.

Most international flights to and from the U.S. operate on daily schedules, so the typical consequence of being delayed long enough to miss such a flight will be a 24-hour delay. Typical direct and consequential damages will include the cost of food and lodging for a night at the departure airport and forfeited prepayments or cancellation penalties for a night's lodging at the destination. Business travelers – such as most of those travelers who are considered "small entities" – will likely suffer addition adverse consequences in disruption of business and missed attendance at meetings or events (including missed performances, speeches, sales presentations, etc.). Leisure travelers delayed for 24 hours may miss departures of cruises or tours.

Some airlines hold passengers responsible for cancellation or change fees if they miss flights as a consequence of government action. So some travelers will have injury added to insult by having to pay to change their reservations to the next day's flight after being delayed by CBP.

By way of comparison, the European Union fixes statutory damages for delay by an airline of a flight departing the EU or on an EU-based airline. For a delay of more than 4 hours of a flight of more than 3,500 km (approx. 2,175 miles), EU regulations require compensation of EUR600 (approx. US$725) in cash, plus reasonable costs of accommodations (food, lodging, and transfers) during the delay.[4] The average length of an international flight from the U.S. is more than 3,500 km[5], and the typical delay for a passenger who misses a typical daily international flight to or from the U.S. is 24 hours. Costs will thus typically be higher than the EU average.

Taking into consideration these EU provisions for statutory compensation, we believe that a minimum estimate of the average damage to a traveler who is delayed long enough to miss their international flight would be at least $1,000. In some cases, such as a speaker or performer who misses a paid engagement, a business person who loses a major sale, or a field service technician needed at their destination to repair critical equipment whose failure has shut down a factory or other industrial or commercial facility, the damages could be many times higher.

None of these or other costs to travelers, particularly those who miss their scheduled flights – as many undoubtedly will – are considered in the NPRM or regulatory assessment. We

4. "Legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air," Official Journal of the European Union C 93, March 24, 2017, p. 336, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2017.093.01.0336.01.ENG>.
5. For calendar year 2018, the average non-stop distance flown per departure on international flights ("flight stage length") to and from the U.S. was 2,418.3 miles. Bureau of Transportation Statistics, "2018 Traffic Data for U.S. Airlines and Foreign Airlines U.S. Flights," Release BTS 10-19, March 21, 2019, Table 9, <https://www.bts.dot.gov/newsroom/2018-traffic-data-us-airlines-and-foreign-airlines-us-flights>.

believe that this rulemaking – which as of now is a nullity – is fundamentally contrary to the right to travel, and should be abandoned. But if CBP, once it has an official validly appointed and with the authority to promulgate rules, chooses to promulgate a new SORN and initiate a valid rulemaking, we urge CBP to fully consider these costs in its regulatory assessment.

Respectfully submitted,

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