

Before the
Transportation Security Administration
U.S. DEPARTMENT OF HOMELAND SECURITY
Washington, DC

Notice of Proposed Rulemaking,
“Minimum Standards for Driver’s
Licenses and Identification Cards
Acceptable by Federal Agencies for
Official Purposes; Waiver for Mobile
Driver’s Licenses”; Docket Number
TSA-2023-0002, FR Doc. 2023–
18582, RIN 1652-AA76

COMMENTS OF THE IDENTITY PROJECT

The Identity Project (IDP)

<<https://PapersPlease.org>>

October 16, 2023

The Identity Project (IDP) submits these comments in response to the Notice of Proposed Rulemaking, “Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Waiver for Mobile Driver’s Licenses”, Docket Number TSA-2023-0002, FR Doc. 2023–18582, RIN 1652-AA76, 88 *Federal Register* 60056-60104 (August 30, 2023).

By this Notice of Proposed Rulemaking (NPRM), the Transportation Security Administration (TSA) proposes to establish “standards” (which are not included in the NPRM and not available to the public) for a national digital ID to be used by Federal agencies in an unknown range of circumstances for unknown purposes (also not specified in the NPRM, and for which the notices and approvals required by law have not been provided or obtained).

The NPRM, which includes a proposal to incorporate by reference numerous documents which are not included in the NPRM and have not been made available to would-be commenters who have requested them, fails to provide adequate notice of the proposed rule or opportunity to comment on the undisclosed documents proposed to be incorporated by reference. It violates the regulatory requirements for incorporation by reference of unpublished material.

If the proposed rule is not withdrawn in its entirety, a new notice must be provided, the material proposed to be incorporated must be made available to the public, and an adequate opportunity for comment must be provided before any proposed rule is finalized.

Since despite diligent effort we have been denied the opportunity to review and comment on the proposed rule, including the material proposed to be incorporated by reference, these comments will be limited to the deficiencies in the NPRM and the failure of the TSA to provide

the required notices and obtain the required approvals for its ongoing unlawful collection of information through exchanges of digital data with “mobile ID” apps and mobile devices.

We reserve the right to submit comments on the entirety of the proposed rule, if it is not withdrawn, once proper notice is provided and we are able to review the material proposed to be incorporated by reference and the notices and requests for approval of information collections.

1. About the Identity Project

The Identity Project (IDP) is an independent not-for-profit civil liberties and human rights project, founded in 2006, which 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.

2. The NPRM fails to give adequate notice of the proposed rule.

Pursuant to 1 CFR § 51.7 “A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it— ... (3) Is reasonably available to... the class of persons affected.”

According to the NPRM (88 *Federal Register* 60062):

As discussed in Part III.B.8, below, this rulemaking proposes to amend § 37.4 by incorporating by reference into part 37 nineteen standards and guidelines. All proposed incorporation by reference material is available for inspection at DHS Headquarters in Washington DC, please email requesttoreviewstandards@hq.dhs.gov. The material may also be obtained from its publisher, as discussed below.

This statement is false, and the NPRM would be deficient even if it were true.

In a diligent effort to obtain the material proposed to be incorporated by reference, we sent email messages requesting access to this material to requesttoreviewstandards@hq.dhs.gov on September 8, September 20, September 29, and October 9, 2023.

We have to date received no response whatsoever to any of these messages.

The claim in the NPRM that, “All proposed incorporation by reference material is available for inspection at DHS Headquarters in Washington DC”, is unverifiable, vague, and unhelpful. It does not specify at which of the many DHS locations in Washington, DC, the material proposed for incorporation by reference might be available, during what hours, or through what procedures. Most DHS building are not open to the public, or are open only by appointment and on condition of showing ID deemed compliant with the REAL-ID Act of 2005.

Access procedures are especially critical with respect to this proposed rule because “the class of persons affected” – the relevant category pursuant to 1 CFR § 51.7(3), as quoted above – obviously includes individuals who do not have ID deemed compliant with the REAL-ID Act.

It is unclear what, if any, procedures have been established to enable individuals who do not have ID deemed compliant with the REAL-ID Act to obtain access to the relevant premises at “DHS Headquarters”, at whichever of the many possible locations that might be, to inspect the material proposed to be incorporated by reference into the proposed rule.

Individuals seeking to review this material can’t simply go the specified address, since no address is specified, even if they would be allowed in the door, which they probably wouldn’t. The only way members of the public are instructed to try to obtain this material or find out where or how to inspect it is to send an email message to requesttoreviewstandards@hq.dhs.gov. But, as we discovered, all of our messages to that address have gone unanswered.

An address where material is available is required by the Office of the Federal Register for approval by that Office of incorporation by reference into Federal regulations, according to the “Incorporation by Reference Handbook” (Office of the Federal Register, National Archives and Records Administration, June 2023 Ed., ed. Rev. 8/28/2023, p. 14, available at <https://www.archives.gov/files/federal-register/write/handbook/ibr.pdf>):

4. Include in the statements of availability:

- a. Agency’s street or internet address where the public can inspect the material;
- b. Agency’s phone number or email address for questions from the public regarding the material; and
- c. Publisher’s street address, and at least two of the following: phone number, email, and internet address.

The proposed rule would also implicitly incorporate the Master Specification for State Pointer Exchange Services (SPEXS) published by the American Association of Motor Vehicle Administrators (AAMVA), which is not included or mentioned in the NPRM or publicly available and which AAMVA has actively attempted to remove from public availability.

The REAL-ID Act, Pub. L. 109-13, § 202 (d)(12), requires that in order to be deemed compliant with the REAL-ID Act, each state that issues any compliant driver’s licenses or ID cards must, “Provide electronic access to all other States to information contained in the motor vehicle database of the State” including, “at a minimum — (A) all data fields printed on drivers’ licenses and identification cards issued by the State; and (B) motor vehicle drivers’ histories, including motor vehicle violations, suspensions, and points on licenses.”

No state currently complies with this provision, which requires providing electronic access to *all* other states. No state even arguably complies with the REAL-ID Act.

Some but not all states upload data about driver’s licenses and IDs they have issued to the aggregated SPEXS national ID database operated by AAMVA and AAMVA’s contractors.¹ But it will not be possible for *any* state to comply with this provision unless and until *all* states have interconnected their driver’s license and ID databases or added their data to an aggregated national ID database – of which SPEXS is the only one in use or publicly under development.

Participation in SPEXS is the *only* way in which it is currently foreseen by DHS or state ID and driver’s license issuing agencies that any state may ever be able to comply with this provision of the REAL-ID Act. Compliance with the SPEXS specifications developed by AAMVA is thus a *de facto* element of the possibility (if all other states also join and upload data about their residents to SPEXS) of compliance by any state with the REAL-ID Act.

As of 2016, a version of the SPEXS Master Specification, r6.0.8, was publicly available on AAMVA’s website. However, after we analyzed and reported on this document (in the same manner in which we might wish to comment on the current version in response to the NPRM), AAMVA removed it from its public website. Two years later, AAMVA demanded, under threat of a lawsuit for infringement of their copyright, that we remove from our website the version we had obtained from AAMVA’s public website and had included with our article about SPEXS.²

We do not know what changes – such as additions to the data elements for each driver’s license or ID uploaded to SPEXS – have been made in the SPEXS Master Specification since the last version made public by AAMVA in 2016, and we have been chilled by their threats from disseminating even that version to other members of the public to inform their comments.

1. 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/>.
2. The Identity Project, “What AAMVA doesn’t want you to know about the national REAL-ID database”, October 10, 2018, <https://papersplease.org/wp/2018/10/10/what-aamva-doesnt-want-you-to-know-about-the-national-real-id-database/>.

If the possibility of eventual compliance by any state with the REAL-ID Act is to remain dependent on participation in SPEXS, which requires compliance with the SPEXS specifications, the current version of the SPEXS Master Specification must be made available for comment.

3. The TSA has not given notice or obtained approval for the information collections already being carried out through “mobile ID” transactions.

The NPRM purports to include an analysis, pursuant to the Paperwork Reduction Act (PRA), of “the information collection burdens imposed on the public,” and claims to have requested approval for these information collection from the the Office of Management and Budget (OMB). But both the NPRM and the request for OMB approval omit any mention of the collection of information from individuals that occurs each time a “mobile ID” is “presented” and an app on a mobile device interacts with TSA or other Federal agency devices or servers.

“Presentment” of a mobile ID involves a data exchange between an individual’s device and Federal agency devices or servers that constitutes a collection of information as defined in the PRA. The TSA and possibly other DHS components and other Federal agencies are already engaged in these collections of information from individuals including airline travelers. “TSA began testing the acceptance of digital IDs, including mobile driver’s licenses (mDLs) from participating states, at select TSA PreCheck checkpoints in early 2022.”³ “Test” information collections are not exempt from PRA requirements for notice and prior OMB approval.

Regulations issued by OMB, 5 CFR § 1320.3 (h)(1), purport to create an exception to the notice and approval requirement in the PRA statute for “Affidavits, oaths, affirmations,

3. “When will the phased digital ID rollout start? Which airports/states will be first in line for this new technology?”, <https://www.tsa.gov/travel/frequently-asked-questions/when-will-phased-digital-id-rollout-start-which-airportsstates>. See also additional sites of mobile ID information collection listed at, “Biometric and Digital Identity Solutions For TSA PreCheck Members”, <https://www.tsa.gov/digital-id>.

certifications, receipts, changes of address, consents, or acknowledgments; provided that they entail no burden other than that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument.” The PRA, however, does not grant to OMB the authority to exempt collections of certain categories of information from the statutory requirements. We question the validity of this provision of the PRA regulations.

But even if the creation of this exception is within the authority of OMB, it does not apply to the information collected when a mobile ID is “presented”.

First, mobile IDs are not “Affidavits, oaths, affirmations, certifications, receipts, changes of address, consents, or acknowledgments”. Individuals are not, and cannot lawfully be, required to swear oaths or affirmations or attest to their identity under penalty of perjury in order to board airline flights or travel by common carrier. A traveler can be subjected to certain limited administrative searches in certain circumstances, but they are entitled to stand mute in response to questions. No court has upheld a requirement to respond to “administrative interrogation.”

Second, the information contained in, and collected by the TSA and other Federal agencies from, a mobile ID is not limited to “that necessary to identify the respondent, the date, the respondent's address, and the nature of the instrument,” as required by the regulations.

A drivers license or mobile ID typically includes additional information that is not necessary to identify the license holder, such as which class(es) of motor vehicles the holder is authorized to operate, the date of expiration of their permit to operate motor vehicles, requirements for corrective lenses when operating motor vehicles, and organ donations.

By comparison, a US passport – the canonical Federally-issued ID credential for a US citizen – includes none of this information. A passport doesn’t even include an address or any

contact information. A Federal agency may want an address or contact information in order to find, track, surveil, or arrest an individual, but does not need it to identify them. The only identifying information included on a passport is a name, photograph, and date of birth.⁴ A drivers license, state ID, or mobile ID includes much more non-identifying information.

Despite these unarguably applicable requirements, the TSA has neither sought nor obtained approval from OMB for any collection of mobile ID information from individuals.

The TSA has twice – in 2016 and again in 2020 – given notice of its *intent* to request approval from OMB for its collection of information of information on TSA Form 415 from travelers who *don't* present “satisfactory” ID credentials.⁵ But the TSA has not yet submitted a request for approval of Form 415 to OMB. Form 415 remains unlawfully in use, in violation of the PRA, without OMB approval. And the TSA has never sought or obtained approval from OMB for its collection of information from travelers who present physical or mobile IDs.

In the absence of OMB approval or PRA notices, all current collections of information from physical or mobile IDs by the TSA, other DHS components, or other Federal agencies are being carried out in violation of the PRA, and must be ended immediately.

Pursuant to the PRA, 44 USC § 3512, and implementing regulations at 5 CFR § 1320.6, individuals have the right to ignore these information collections and to go about their business without responding. And the PRA provides a complete bar to the imposition of any form of penalty or sanction, at any time, for not responding to such an information collection.

4. Some US passports include a gender indicator, but this is not necessary (and not necessarily useful) for identification and is no longer required on recently-issued passports. A US citizen who does not wish to be identified by gender may be issued on request with a US passport with an “X” in place of “male” or “female”.
5. See comments of the Identity Project, “Certification of Identity Form (TSA Form 415)”, TSA-2013-0001-0075 January 9, 2017, <https://papersplease.org/wp/wp-content/uploads/2017/01/IDP-form-415-9JAN2017.pdf>, and “Certification of Identity Form (TSA Form 415)”, TSA-2013-0001-0075, May 19, 2020, <https://papersplease.org/wp/wp-content/uploads/2020/05/IDP-form-415-19MAY2020.pdf>.

The NPRM also asks for comment on “costs incurred by mDL users.” But much of the information needed to assess the costs to individual users is the information contained in the unpublished standards proposed for incorporation by reference and/or which would need to be included in requests for OMB approval of collections of information from mobile IDs.

What data fields will be collected when a TSA or other Federal agency device interacts with a mobile ID app on an individual’s device? We don’t know. What code will an individual be required to allow to run on their device, and with what privileges? We don’t know, although this could be critical to the risks and potential costs to individuals if, for example, they are required to allow closed-source code to run on their devices with root privileges.

From which people, how many of them, in what circumstances, and for what purposes, will this information be collected? We don’t know, although all of this is required to be included in an application for OMB approval of a collection of information.

The simplest, most technologically agnostic, and least costly way to provide a digital analogue of a physical ID credential would be to provide the individual with a file digitally signed by the TSA or other government agency that includes only their identifying information (such as, as with a passport, their name, photograph, and date of birth). Such a file could be stored, carried, and presented on any storage device, such as an SD card, CD, or USB flash drive. Assuming the TSA has confidence in its public-key infrastructure, as the NPRM suggests it does, this would enable an individual to provide identification by sharing the file in any manner.

The fact that the TSA seeks to require the installation of a government app on a mobile device of a certain type suggests that the government has other purposes than mere

“identification”, such as the ability to track devices as well as people. But we don’t know, because we haven’t been able to inspect the source code for any of these apps.

What will individuals be told about whether these collections of information are required? We don’t know this either, although this is a required element of each PRA notice, because the TSA provides no PRA notices to any of those individuals from whom it collects information at its checkpoints, including information collected from mobile IDs.

As the TSA itself has argued in litigation, no Federal statute or regulation requires airline passengers to show ID.⁶ And hundreds of people pass through TSA checkpoints and board flights without showing ID every day.⁷ An accurate submission to OMB, and an accurate PRA notice (if approved by OMB), would inform all individuals passing through TSA checkpoints that ID is not required for passage. But instead of providing OMB-approved PRA notices at its checkpoints in airports, the TSA has posted or caused to be posted knowingly false signage claiming that all airline passengers are “required” to show government-issued ID credentials. Individuals incur substantial costs as a result of these false notices, particularly when individuals without ID forego valuable travel in reliance on deliberately misleading signs that ID is required.

The appropriate place and time to address these issues is through the PRA procedures for notice, comment, and approval by OMB of the TSA’s proposals for collection of information from individuals at checkpoints in airports, which must be completed before the start of any collection of information. The TSA should suspend its ongoing unapproved and unlawful collections of information from travelers at checkpoints in airports and at other locations, including from mobile IDs, and apply for approval for them before its seeks to expand them.

6. See discussion in our comments on the TSA notices of intent to request approval form OMB, note 5, *supra*.

7. The Identity Project, “How many people fly without REAL-ID?”, March 15, 2022, <https://papersplease.org/wp/2022/03/15/how-many-people-fly-without-real-id/>.

Any other DHS components or other Federal agencies intending to collect information from individuals by means of mobile IDs must similarly apply for, and obtain, OMB approval, and provide approved PRA notices, before commencing any such information collection.

The proposed rule, in its entirety, should be withdrawn. If the proposed rule is not withdrawn, proper notice – including actual availability of all material proposed to be incorporated by reference – and an opportunity for comment must be provided.

Respectfully submitted,

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