



The Identity Project (IDP) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) “Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Phased Approach for Card-Based Enforcement”, Docket No. TSA–2023–0003, RIN 1652–AA77, FR Doc. 2024–20616, 88 *Federal Register* 74137-74161 (September 12, 2024).

By this NPRM, the Transportation Security Administration (TSA) proposes to grant to itself and to delegate to other agencies – including other components of the Department of Homeland Security (DHS), other departments, and components of other departments – authority to establish rules (“phased enforcement plans”) governing who is, and who is not, under what conditions, allowed to access Federal facilities or exercise Federally-recognized rights including the right to travel by air by common carrier. These rules could be adopted by the TSA and other agencies without notice, public comment, publication in the *Federal Register*, or codification in the Code of Federal Regulations (CFR). Instead of standards for the acceptance of IDs, the TSA is proposing to delegate authority to itself and other agencies for decentralized and nonstandard acceptance or rejection of noncompliant IDs. Congress has given the TSA no such authority.

This NPRM is premised on erroneous explicit and implicit legal and factual findings, including claims that some or all states and territories have complied with the requirements of the REAL-ID Act of 2005 and that airline passengers are required to have, carry, and/or show ID. These findings are arbitrary, capricious, contrary to law, and not entitled to deference.

Compliance with the REAL-ID Act requires a state to electronically share information concerning all driver’s licenses and state-issued IDs with *all* other states, but not all states do so.



has published investigative reports concerning the REAL-ID Act and the associated “SPEXS” national ID database, and has testified before state legislatures regarding the REAL-ID Act.

## **2. The proposed rules exceed the statutory authority of the DHS and TSA.**

The REAL-ID Act authorizes the DHS to issue regulations to implement that Act by establishing standards for issuance by states and territories of ID credentials acceptable for Federal purposes in circumstances in which ID is required by other laws.

But nothing in the REAL-ID Act authorizes the DHS or any of its components, including the TSA, to (A) delegate its regulatory authority to other departments or agencies or (B) impose, by regulation, ID requirements where such requirements are not imposed by other statutes.

The proposed rules would do both, thereby exceeding the authority of the TSA and DHS.

The “phased enforcement plans” contemplated by the proposed rules would establish who is, and who is not, permitted to enter Federal facilities or exercise other Federally-recognized rights. In establishing with finality the relationship between individuals and Federal agencies, and who is and who is not permitted by Federal agencies to engage in specific activities, these “phased enforcement plans” would constitute Federal regulations. For the purposes of the APA, a regulation by any other name is still a regulation. But these plans would be issued by other departments and agencies, not the DHS. They would vary from agency to agency, rather than being “standards” applicable to all agencies as contemplated by Congress.

In enacting the REAL-ID Act, Congress chose to delegate to the DHS the authority to implement that Act by promulgating regulations to establish standards for acceptable ID. But





Travel by common carrier is a right, and the TSA has not authority to promulgate regulations conditioning the exercise of this right on a waiver of other rights.

The Airline Deregulation Act, 49 U.S. Code § 40101(c)(2), recognizes and requires the Federal Aviation Administration to consider “the public right of freedom of transit through the navigable airspace.” This provision was made applicable to the DHS and TSA by the Aviation and Transportation Security Act of 2001 and the Homeland Security Act of 2002. In addition, numerous bilateral and multilateral aviation treaties to which the US is a party recognize airlines as common carriers and commit the U.S. to require them to operate as common carriers.

The new ID requirement for airline passengers imposed by, or implicit in, the proposed rule exceeds the authority of the TSA pursuant to the REAL-ID Act, and is contrary to law.

### **3. The proposed rules would violate the APA.**

In accordance with the general requirement for due process of law, the APA imposes procedural and transparency requirements for the promulgation of regulations by Federal agencies. These include, *inter alia*, notice of the proposed rule in the *Federal Register*, an opportunity for public comment on the proposed rule, publication of the final rule in the *Federal Register*, and codification of the final rule in the Code of Federal Regulations (CFR).

As discussed above, the “phased enforcement plans” contemplated by the proposed rules would constitute and function as *de facto* regulations. As such, they are subject to the APA, regardless of whether they are called regulations, plans, policies, or some other name.

By these proposed rules, the TSA would purport to authorize each department or agency to promulgate its individual “phased enforcement plan” without complying with any of the





information contained in the motor vehicle database of the State.” This section of the law unambiguously requires electronic data sharing with *all* other states for REAL-ID compliance.

In practice, the only available way for a state to comply with this part of the REAL-ID Act is to participate in the “State-to-State” (S2S) data sharing system and the State Pointer Exchange System” (SPEXS) national ID database operated by the Association of American Motor Vehicle Administrators (AAMVA). AAMVA says that, “For those states ... choosing to comply with REAL ID... the Department of Homeland Security has indicated that participation in S2S will be required for the state to be REAL ID compliant. This is because... the law and regulations governing REAL ID include requirements for state licensing agencies to connect their databases.” (AAMVA, “S2S Frequently Asked Questions”, <<https://www.aamva.org/technology/systems/driver-licensing-systems/s2s-frequently-asked-questions>>.)

Not all states participate in S2S or have uploaded data about all of the driver’s licenses and IDs they have issued (including noncompliant licenses and IDs) to SPEXS. (AAMVA, “IT Systems Participation Map”, <<https://www.aamva.org/it-systems-participation-map?id=576>>.) Many states, including California and Illinois, do not participate in these systems.

Unless and until *all* states and territories participate in S2S and SPEXS, no state or territory complies, or will be able to comply, with the REAL-ID Act requirement to provide electronic access to *all* other states and territories to its license and ID database.

All of the certifications by the DHS that states and territories comply with the REAL-ID Act, when no state or territory actually provides electronic access to *all* other states to records of all its driver’s licenses and state-issued IDs, are plainly erroneous. These certifications of state compliance are arbitrary, capricious, contrary to law, and not entitled to deference.

Since no state or territory complies with the REAL-ID Act, (A) it is impossible for any individual to obtain a state-issued driver's license or ID that complies with the REAL-ID Act, and (B) any enforcement measures directed at individuals with driver's licenses or IDs issued by noncompliant states must be directed equally at all holders of all state-issued license or IDs.

Rules, such as these proposed rules, predicated on the plainly erroneous finding that some states have complied with the REAL-ID Act and are able to issue licenses and IDs comply with that Act are arbitrary, capricious, contrary to law, and not entitled to deference.

For all of the foregoing reasons the proposed rules must be withdrawn in their entirety.

Respectfully submitted,

**The Identity Project (IDP)**

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