



November 3, 2011

Office of Information and Regulatory Affairs
Office of Management and Budget.
By Electronic Mail: oir_submission@omb.eop.gov
By Fax: (202) 395-5806

Re: Agency Information Collection under the Real ID Act of 2005:
Minimum Standards for Driver's Licenses and Identification Cards
Acceptable by Federal Agencies for Official Purposes

Dear OMB Desk Officer, Department of Homeland Security:

The American Civil Liberties Union (ACLU) writes because we believe the collection of additional information pursuant to the Real ID Act is unnecessary and wasteful. 76 Fed. Reg. 61723, Agency Information Collection Activities: Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes. Implementation of the Real ID Act is completely stalled. Resistance to Real ID implementation in the states has guaranteed that the statute will never be implemented as it is currently drafted. The Office of Management and Budget (OMB) and the Department of Homeland Security (DHS) should recognize this fact, end all administrative measures aimed at compliance, and recommend repeal of the Real ID Act to Congress.

Real ID is a failed statute. Compliance with the Real ID Act is currently statutorily barred in 15 states and the statute has been rejected in at least 25 states. This state rebellion has led DHS to postpone implementation of the statute repeatedly. Nor does DHS have any effective tools for inducing state compliance in the future. Under Real ID, DHS's only remedy for addressing non-compliant states is to deny the citizens of those states the right to use their drivers' licenses to board airplanes or enter federal facilities. Because DHS has rightly recognized that it cannot possibly paralyze the air transportation system or deny tens of millions of Americans the right to fly, it has chosen to endlessly postpone implementation of the Act.

In light of these facts, new information collection provisions are unnecessary. The only solution is a repeal of the statute. Further pretense that Real ID can be implemented is a waste of time and resources which can be better spent on more effective and less invasive programs.

The ACLU is America's oldest and largest civil liberties organization. On behalf of its more than half a million members, countless additional supporters and activists, and 53 affiliates nationwide, we advocate

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against unnecessary government intrusion into the lives of Americans and undue burdens on their privacy rights.

Background

The Real ID Act of 2005 was passed as a rider to a bill funding military expenditures and tsunami relief. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Public Law 109-13, 119 Stat. 231, 302 (May 11, 2005) (codified at 49 U.S.C. 30301 note). The law gave states three years to bring their drivers' licenses into compliance with the Act's requirements including common licensing standards and a national database of drivers' license information.

Instead of compliance, Real ID faced widespread opposition. Groups from across the political spectrum opposed it. Supporters of fiscal conservatism and federalism decried it as an unfunded mandate that trampled on states' rights under the Tenth Amendment. Civil rights and civil liberties groups worried that the Act lacked sufficient protections and might increase racial discrimination. Defenders of religious freedom described its negative impact on the Amish and other religious denominations. Consumer groups feared it would result in an expansive and cumbersome new bureaucracy.

Others rejected Real ID as a national ID. Many groups including the ACLU believed it would facilitate tracking of data on individuals and bring government into the very center of every citizen's life. It would be a de facto government permission slip needed by everyone in order to travel. As happened with Social Security cards decades ago, use of such ID cards would then quickly spread and be used for other purposes – from work to voting to gun ownership.

Many states rejected Real ID because of its high cost – initially estimated by DHS at \$23 billion. States were concerned that the Act would force them to change their entire licensing issuance process to conform to a one-size-fits-all federal mandate. At the same time the states were also making great strides in improving drivers' license security and were rightly concerned that Real ID would interfere with or overturn many of these efforts.

State Statutes and DHS Extensions

Twenty five states, either through a statute or legislative resolution, rejected the Act or said they would not comply with Real ID.¹ Fifteen states have laws prohibiting compliance with Real ID. Many of these provisions are complete bars on any participation by the state in the program. Other states have funding and security requirements for participation that the federal government will almost certainly never meet.

The states are:

¹ The states are Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Louisiana, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia and Washington.

1. **Alaska** – ALASKA STAT. § 44.99.040 (2007-2008) (A state agency may not expend funds solely for the purpose of implementing or aiding in the implementation of the requirements of the federal Real ID Act of 2005 (P.L. 109-13, Division B)).
2. **Arizona** – ARIZ. REV. STAT. ANN. § 28-336 (2008) (This state shall not participate in the implementation of the REAL ID act of 2005 (P.L. 109-13, Division B; 119 Stat. 302). The department shall not implement the REAL ID act of 2005 and shall report to the governor and the legislature any attempt by agencies or agents of the United States DEPARTMENT of homeland security to secure the implementation of the REAL ID act of 2005 through the operations of the United States department of homeland security.)
3. **Georgia** – GA. CODE ANN. § 40-5-4.1 (2010) (The Governor of the State of Georgia, or his or her designee, is authorized to delay compliance with certain provisions of the federal Real ID Act, H.R. 1268, P.L. 109-13, enacted by Congress in 2005, until it is expressly guaranteed by the Department of Homeland Security, through adequately defined safeguards, that implementation of the Real ID Act will not compromise the economic privacy or biological sanctity of any citizen or resident of the State of Georgia.)
4. **Idaho** - IDAHO CODE ANN. § 40-322 (2008) (The legislature hereby declares that the state of Idaho shall not participate in the implementation of the REAL ID act of 2005. The Idaho transportation board and the Idaho transportation department, including the motor vehicles division of the Idaho transportation department are directed not to implement the provisions of the REAL ID act of 2005.)
5. **Louisiana** – LA. REV. STAT. ANN. § 402 NOTE (2008) (The Legislature of Louisiana does hereby direct the Department of Public Safety and Corrections, including the office of motor vehicles, not to implement the provisions of the REAL ID Act and to report to the governor any attempt by agencies or agents of the United States Department of Homeland Security to secure the implementation of the REAL ID Act through the operations of that division and department.)
6. **Maine** - ME. REV. STAT. ANN. tit. 29-A, § 1411 (2007) (The State may not participate in the federal REAL ID Act of 2005, enacted as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Public Law 109-13. The Secretary of State may not amend the procedures for applying for a driver's license or nondriver identification card under this chapter in a manner designed to conform to the federal REAL ID Act of 2005.)
7. **Minnesota** – 2009 MINN. LAWS CHAPT 92 (The commissioner of public safety is prohibited from taking any action to implement or to plan for the implementation by this state of those sections of Public Law 109-13 known as the Real ID Act.)
8. **Missouri** – MO. REV. STAT. § 302.183 (2009) (The Department of Revenue is prohibited from: (1) Amending any procedures for applying for a driver's license or identification card in order to comply with the standards of the federal Real ID Act of 2005; (2) Expanding motor vehicle records data it shares with other states, the federal government,

or other agencies or providing data to any additional states or state or federal agency unless authorized by statute; or (3) Collecting, obtaining, or retaining any data in connection with activities related to compliance with the act.)

9. **Montana** – MONT. CODE ANN. § 61.5.1 (2007) (The state of Montana will not participate in the implementation of the REAL ID Act of 2005. The department, including the motor vehicle division of the department, is directed not to implement the provisions of the REAL ID Act of 2005 and to report to the governor any attempt by agencies or agents of the U.S. department of homeland security to secure the implementation of the REAL ID Act of 2005 through the operations of that division and department.)
10. **New Hampshire** – ([T]he state of New Hampshire shall not participate in any driver's license program pursuant to the Real ID Act of 2005 or in any national identification card system that may follow therefrom. ... The department of safety shall not amend procedures for applying for a driver's license under RSA 263 or an identification card under RSA 260:21 in order to comply with the goals or standards set forth in the Real ID Act of 2005, or in any rules or regulations promulgated thereunder, or in any requirements adopted by the American Association of Motor Vehicle Administrators for such purposes. ... The department of safety shall not expand the motor vehicle records data it shares with other states, the federal government, or other agencies, or provide motor vehicle records data to any additional states or state or federal agencies unless authorized by statute.)
11. **Oklahoma** – OKLA. STAT. ANN, tit. 47, § 6-110.3 (2007) (The State of Oklahoma shall not participate in the implementation of the REAL ID Act of 2005. The Department of Public Safety is hereby directed not to implement the provisions of the REAL ID Act of 2005 and to report to the Governor and the Legislature any attempt by agencies or agents of the United States Department of Homeland Security to secure the implementation of the REAL ID Act of 2005 through the operations of that or any other state department. ... No department or agency of the state charged with motor vehicle registration or operation, the issuance or renewal of driver licenses, or the issuance or renewal of any identification cards shall collect, obtain, or retain any data in connection with activities related to complying with the REAL ID Act of 2005.)
12. **Oregon** – 2009 Or. Laws Chapt 432 (A state agency or program may not expend funds to implement the Real ID Act of 2005, P.L. 109-13, unless: (1) Federal funds are received by this state and allocated in amounts sufficient to cover the estimated costs to this state of implementing the Real ID Act of 2005; and...Sufficient measures to protect the privacy of individuals; and ... Sufficient safeguards against unauthorized disclosure or use of an individual's personal identifying information by department personnel or any contractor, agency or other person who may have access to the database, records facility or computer system.)
13. **South Carolina** – S.C. CODE ANN. § 56.1.85 (The State shall not participate in the implementation of the federal REAL ID Act.)

14. **Virginia** – VA CODE ANN. § 2.2-614.2 (2005) (Provides that, with the exception of identification cards issued to employees of the Department of State Police and certain other law enforcement officers, the Commonwealth will not comply with any provision of the federal REAL ID Act that it determines would compromise the economic privacy, biometric data, or biometric samples of any resident of the Commonwealth)
15. **Washington** WASH. REV. CODE § 43.41.390 (A state agency or program may not expend funds to implement or comply with the REAL ID Act of 2005, P.L. 109-13, unless ... federal funds are received by the state of Washington ... in amounts sufficient to cover the costs of the state implementing or complying with the REAL ID Act of 2005... the department of licensing shall certify that the driver's license, identicard, database, records facility, computer system, and the department's personnel screening and training procedures: (1) Include all reasonable security measures to protect the privacy of Washington state residents; (2) include all reasonable safeguards to protect against unauthorized disclosure of data; and (3) do not place unreasonable costs or recordkeeping burdens.)

As mandated by these fifteen statutes, these states will never comply with Real ID. It would be illegal for state officials to do so and has thereby created an impossible situation for DHS.

The only penalty for failure to comply with Real ID is that the citizens of non-compliant states cannot use their drivers' licenses to board airplanes or enter federal facilities. If DHS were to implement Real ID, it would mean denying the 64.7 million citizens of these 15 states, more than 20% of the total U.S. population, the right to use their drivers' license when boarding an airplane. U.S. Census Bureau. (2010, December 21) *Resident Population Data* (retrieved October 28, 2011). Because the state drivers' license is the main identification for most Americans this is functionally impossible. Either DHS would have to ignore the aviation identification requirement altogether or send millions of people to secondary screening or employ other, much slower, mechanisms for verifying identity. This would bring air travel to a halt and cause numerous security problems at other federal facilities.

The only alternative to this scenario is the one DHS has chosen: to continually postpone implementation. According to the original language of the Real ID Act its provisions were to be implemented within 3 years, by May 2008. In January 2008 DHS postponed that deadline, creating two new compliance deadlines. States were required to be compliant with one part of the act by December 31, 2009 and be fully compliant by May 11, 2011. 73 Fed. Reg. 5272. Those deadlines again proved impossible and further extensions were granted in December 2009 and January 2011. 74 Fed. Reg. 68477. The current nominal compliance deadline has been extended to January 2013. 76 Fed. Reg. 12269.

DHS itself acknowledges the moribund state of the law. According to recent Congressional testimony, the Department has only 4 full time employees working on Real ID, a tiny fraction of those necessary were the law ever to be implemented. *Oversight Hearing on the Department of Homeland Security: Hearing before the H. Judiciary Committee.*, 112th Cong. (Oct. 26, 2012).

Given these facts regarding Real ID implementation and the current impasse between the federal government and the states, any further regulatory efforts by DHS are futile. It is incumbent upon OMB to recognize that promulgating further regulations around a statute that will never be implemented is wasteful and unnecessary. OMB and DHS should halt any further Real ID regulations and formally recommend to Congress that it repeal the underlying Real ID statute.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The signature is written in a cursive, flowing style.

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink that reads "Christopher Calabrese". The signature is written in a cursive, flowing style.

Christopher Calabrese
Legislative Counsel