



Department of Homeland Security REAL ID Final Regulations NCTE Analysis and Review

(Washington, DC; March 14, 2008) The Department of Homeland Security (DHS) issued the final regulations for implementation of the REAL ID Act on January 11, 2008. After a thorough review, NCTE continues to have grave concerns about REAL ID, but we are pleased to see that the collective work that we and our allies have done has made a positive impact on these final rules.

Background

The REAL ID Act of 2005 establishes standards and procedures that states must follow in issuing driver licenses and identity cards, and creates a *de facto* national ID. REAL ID was passed by Congress with almost no discussion. So far, seven states have refused to comply with REAL ID, an additional 10 states have passed legislation opposing REAL ID, and several others have pending legislation.

The REAL ID Act specifies that in order for driver licenses and ID cards to be accepted for federal “official purposes” (defined specifically as commercial air travel, entry into federal facilities, entry into nuclear power plants, and other uses to be determined by DHS), those cards must meet certain standards.

The REAL ID Act requires driver license and state-issued ID card holders to prove their identity, date of birth, Social Security number, address, and citizenship or lawful presence in the United States. Even long-time driver license holders must re-establish their Department of Motor Vehicle (DMV) record.

State DMVs are required to verify the issuance, validity, and completeness of every document that each person uses to provide this proof. DMVs are also required to store a digital image of each document presented and a digital photo of the license applicant. The verification process requires sharing DMV records state-to-state and with the federal government, effectively creating a national database with questionable privacy protections.

The Good News

NCTE and our allies found a number of problems in the draft regulations that DHS released in March 2007. We worked on those issues and our influence is evident in changes to the final version. The most notable success is that:

“DHS will leave the determination of gender up to the States since different States have different requirements concerning when, and under what circumstances, a transgendered [sic] individual should be identified as another gender.”

Other important changes from the draft regulations to the final version:

- Name and gender history will not be contained in the barcode on the back of the cards.
- RFID (Radio Frequency Identity) chips¹ will not be used to store data on the card (which could have made it possible for a great deal of personal information to be read by anyone with a RFID reader up to 30 feet away). A two-dimensional barcode will be used instead and is only required to contain the same information as on the front of the driver license or ID card.
- States can keep name and gender history confidential, if state policy allows. States can cite “for reasons of public safety” or similar statements in DMV records, as a generic way to keep information private and not share it with other states.

¹ Radio Frequency Identity (RFID) chips use radio waves to transmit information and can be embedded in things, animals, or people.

- States can create “exceptions processes.” This gives states flexibility in accommodating atypical circumstances, such as when transgender people have one gender marker on driver licenses and another in Social Security records.
- A provision has been added that “allows States to record information from birth certificates in lieu of retaining an image or copy if state law permits and if requested by the applicant.” This would help transgender people and other people protect medical and other personal information not relevant to REAL ID.

Timelines in the Final Rules

States are required to begin issuing REAL ID-compliant driver licenses and IDs before May 11, 2011. And by December 1, 2014, everyone under 50 must have a REAL ID for federal official purposes. Those 50 and over on that date have until December 1, 2017.

While the Act technically requires states to fully comply by May 11, 2008, DHS rules provide for a series of extensions that would lead to the May 2011 date. This is significant because, as of the date of this publication, Montana, Maine, New Hampshire, and South Carolina (four of the seven who said they will not comply) have said they will not apply for an extension.² According to DHS, driver licenses and IDs from these and other states that do not apply for an extension will not be accepted for commercial air travel (and other uses outlined above) beginning May 11, 2008. If DHS enforces their threat (which is still very much an open question), residents of those non-compliant states will need to show passports or submit to secondary security screening³ at airports.

Failures in the Final DHS REAL ID Rules

Though the final regulations are improved from the draft version, they still have significant flaws. The final DHS rules still invade personal privacy, create a bureaucratic nightmare, and will cost Americans billions of dollars. The rules fail to provide adequate privacy protections (including protections against data capture by third parties), fail to offer recourse for individuals caught in bureaucratic breakdowns, fail to provide funding, fail to provide systems as required by the REAL ID Act, and fail to provide any protections against terrorism, the supposed purpose of REAL ID. These failures illustrate fundamental problems not just with the final rules, but with the REAL ID Act itself.

Furthermore, no state can meet the May 11, 2008, compliance deadline in the REAL ID Act, even if attempted, since DHS has failed to establish the systems necessary for compliance. With deadlines pushed forward into as many as three Presidential administrations, DHS appears to abdicate on its responsibilities to create a workable system for implementing the REAL ID Act, and instead leaves it as a problem for future administrations to solve.

“Official Purposes” Mission Creep

Besides commercial air travel and entry into federal facilities and nuclear power plants, DHS has the unfettered power to require a REAL ID-compliant license or ID for “any other purposes that the [DHS] Secretary shall determine.” Already DHS has suggested that REAL IDs could be required for purchasing some over-the-counter medications.

What Can Be Done?

NCTE encourages not just transgender people, but *all* Americans to work against the REAL ID Act. Contact your Representatives and Senators at *both* the state and federal levels, and tell them you support repeal of REAL ID.

On the federal level, ask your U.S. Senators and Representatives to co-sponsor S. 717 and H.R. 1117, respectively. On the local level, urge your state legislators and governor to reject compliance with REAL ID. For updated REAL ID developments and a breakdown on each state’s position, see the ACLU’s www.realnightmare.org.

² Georgia, Oklahoma, and Washington have also said they will not comply with REAL ID, but have applied for the first extension.

³ The government has kept secret exactly what occurs during secondary screening, but it is generally understood to be a more invasive search than going through the standard screening airport screening line. Transgender people may be uncomfortable with the extra scrutiny that secondary screening entails and may prefer to show ID over submitting to inspection of this detail.