



THE PASS ID ACT

H.R. 3471 / S. 1261 • August 2009

The REAL ID Act of 2005 established standards and procedures that states must follow in issuing driver's licenses and identity cards, and creates a de facto national ID. REAL ID was passed by Congress with almost no discussion. So far, 24 states have passed legislation rejecting compliance with REAL ID. NCTE has opposed REAL ID because of, among other things, the program's potential for outing transgender people in a variety of situations. Two bills currently before Congress would replace REAL ID with a system that addresses some of states' concerns. It remains to be seen, however, whether the result will look more like a repeal or a revival of REAL ID. For now, NCTE opposes the Senate bill introduced by Sen. Akaka (D-HI) but supports the House bill introduced by Rep. Cohen (D-TN).

BACKGROUND ON REAL ID

The REAL ID Act specifies that in order for driver's 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 national 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 would need to 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. Because of states' resistance, however, these standards have not yet been implemented.

Some, though not all, of NCTE's concerns were favorably addressed by regulations finalized by the DHS in early 2008. While the Act would still make gender a required field on driver's licenses, the regulations made clear that determination of gender will be left up to states; that name and gender history will not be recorded on driver's license barcodes; and that states can keep this information confidential. Regulations also ruled out the use of RFID (Radio Frequency Identity) chips – which could make personal information available to any person in the holder's vicinity with a RFID reader – in place of barcodes.

PASS ID ACT (IN SENATE, S. 1261)

On the Senate side, the Providing for Additional Security in States' Identification Act of 2009 (PASS ID) was introduced by Sen. Daniel Akaka, and is supported by Secretary Napolitano of DHS. While PASS ID would nominally repeal REAL ID, in reality it would revive and potentially exacerbate many of REAL ID's most troubling features.

PASS ID would still create a national ID card. Under PASS ID, all state driver's licenses and IDs would need to comply with federal standards to be used for air travel. This national ID card could potentially be required for a variety of other purposes in the future.

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PASS ID would require storage of documents that out people as transgender. States would be required to scan or store documents such as birth certificate that may show name or gender history, and retain copies for even longer periods than under REAL ID. States would also be required to maintain electronic databases designed to give agencies of other states real-time access to birth record data, which could include gender designations.

PASS ID would revive the possibility of using RFID chips. Unlike barcodes, identifying data on these chips can be read from a distance with the right equipment. While REAL ID regulations have ruled out their use, PASS ID would open the door for using RFID on driver's licenses.

PASS ID lacks adequate privacy protections. PASS ID explicitly allows the sharing of personal information for a variety of purposes including credit checks and law enforcement. The bill lacks privacy protections to ensure that this information is not used in a way that outs individuals, for example at routine traffic stops. The modest protections added to REAL ID by recent regulations would have to be revisited by DHS, with no guarantee they would be preserved. DHS could again have the power to define requirements for verification of gender.

Bill Status: PASS ID, S. 1261, was recently passed out of the Senate Homeland Security and Government Affairs Committee with amendments. It is expected to be debated on the floor of the Senate in the coming months.

REAL ID REPEAL AND IDENTIFICATION SECURITY ENHANCEMENT ACT (IN HOUSE):

On the House side, Rep. Steve Cohen has introduced the REAL ID Repeal and Identification Security Enhancement Act of 2009. This bill would repeal REAL ID and return to the negotiated rulemaking process that REAL ID replaced. NCTE is optimistic about the privacy protections and documentation requirements found in Rep. Cohen's bill.

Return to negotiated rulemaking. The House bill provides for national ID standards to be set by a negotiated rulemaking committee that would include federal and state officials along with civil liberties advocates and experts in fraud prevention, privacy protection, immigration and constitutional law. Direct inclusion of these groups into the rulemaking process would make it much more likely that national standards would protect the privacy and safety of transgender people.

Stronger privacy protections. The House bill includes a number of critical privacy provisions that neither REAL ID nor the Senate PASS ID bill contain. It requires encryption for all transmission of identifiable personal information. It guarantees procedures to challenge errors in license records. It also prohibits the collection, storage and dissemination of personal information in license records by private entities. Importantly, the bill also preserves privacy protections enacted by the states.

No document storage requirement. Unlike REAL ID or PASS ID, the House bill does not require state agencies to store copies of documents such as birth certificates. Whether and how such documents would be stored will be left up to the negotiated rulemaking process.

Bill Status: H.R. 3471 was introduced on July 31, 2009 and referred to the House Judiciary Committee and House Oversight and Government Reform Committee.

WHAT CAN BE DONE?

NCTE encourages not just transgender people, but all people to contact their Senators and Representatives and urge them to support a real repeal of REAL ID. NCTE is closely monitoring these bills, and will work with our allies to oppose PASS ID and to ensure that any repeal legislation ensures adequate privacy protections for transgender people.