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United States Government Accountability Office
Washington, DC 20548

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August 20, 2010

The Honorable Max Baucus
Chairman
The Honorable Charles E. Grassley
Ranking Member
Committee on Finance
United States Senate

The Honorable John Conyers, Jr.
Chairman
The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Homeland Security, U.S. Customs and Border Protection:
Electronic System for Travel Authorization (ESTA): Travel Promotion Fee
and Fee for Use of the System*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Homeland Security (DHS), U.S. Customs and Border Protection (Customs), entitled “Electronic System for Travel Authorization (ESTA): Travel Promotion Fee and Fee for Use of the System” (RIN: 1651-AA83). We received the rule on August 9, 2010. It was published in the *Federal Register* as an “interim final rule; solicitation of comments” on August 9, 2010. 75 Fed. Reg. 47,701.

Nonimmigrant aliens who wish to enter the United States under the Visa Waiver Program at air or sea ports of entry must obtain a travel authorization electronically through ESTA from Customs. The interim final rule requires ESTA applicants to pay a congressionally mandated fee of \$14.00. The fee is the sum of two amounts: a \$10.00 travel promotion fee set by statute and a \$4.00 operational fee for the use of ESTA as set by the Secretary of Homeland Security to ensure recovery of the full costs of providing and administering the ESTA system. 8 U.S.C. § 1187(h)(3)(B).

The interim final rule is effective on September 8, 2010. Comments must be received on or before October 8, 2010. The Congressional Review Act requires major rules to have a 60-day delay in their effective date, following publication in the *Federal*

Register or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, notwithstanding the 60-day requirement, any rule that an agency for good cause finds that the notice and public comment procedures are impractical, unnecessary, or contrary to the public interest, is to take effect when the promulgating agency so determines. 5 U.S.C. § 808(2). DHS determined that it had good cause to waive prior notice and comment procedures in this case. Therefore, the requirement to have a 60-day delay does not apply to this rule.

Enclosed is our assessment of DHS' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that DHS complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Lorrie Rodbart
Chief, Border Security Regulations Branch
Department of Homeland Security

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
ENTITLED
"ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION (ESTA):
TRAVEL PROMOTION FEE AND FEE FOR USE OF THE SYSTEM"
(RIN: 1651-AA83)

(i) Cost-benefit analysis

DHS conducted a cost-benefit analysis of this interim final rule. DHS concluded that the annualized cost to applicants, primarily in the form of transfers from foreign citizens to the U.S. government, is estimated between \$152 million and \$258 million. With respect to benefits, DHS states that this interim final rule allows DHS to comply with the Travel Promotion Act of 2009 (TPA), which was contained in section 9 of the United States Capitol Police Administrative Technical Corrections Act of 2009, Pub. L. No. 111-145, and enhances security.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

This rule is published as an interim final rule, and therefore, a regulatory flexibility analysis is not required under the Act. Nonetheless, DHS considered the impact of this interim final rule on small entities and certified that this rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

DHS determined that this interim final rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the U.S. private sector, of \$100 million (adjusted for inflation) or more in any one year, and it will not significantly or uniquely affect small governments.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

DHS issued this rule as an “interim final rule; solicitation of comments.” DHS determined that a notice of proposed rulemaking was not required because there was “good cause” to determine that such rulemaking was impracticable, unnecessary or contrary to the public interest. 5 U.S.C. § 553(b)(B). More specifically, providing

the public the opportunity to comment on this rule prior to implementation would hamper the ability of the agency to collect the necessary fees as required under the TPA by September 4, 2010. Nonetheless, DHS provided the public with the opportunity to comment prior to the issuance of a final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

This interim final rule imposes new information collection and recordkeeping requirements. DHS obtained temporary, emergency approval from the Office of Management and Budget (OMB), in accordance with the Act. DHS states that it will solicit public comments when it submits a request for permanent OMB approval.

Statutory authorization for the rule

In the interim final rule, DHS states that the TPA mandates that the Secretary of Homeland Security establish a fee for the use of the ESTA system and begin assessing and collecting that fee no later than 6 months after enactment of TPA, *i.e.*, September 4, 2010. See section 217(h)(3)(B) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1187(h)(3)(B).

Executive Order No. 12,866 (Regulatory Planning and Review)

DHS determined that this interim final rule is a “significant regulatory action” and submitted it to OMB for review.

Executive Order No. 13,132 (Federalism)

DHS determined that this interim final rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, and therefore, does not have federalism implications.