



441 G St. N.W.  
Washington, DC 20548

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June 2, 2017

The Honorable Chuck Grassley  
Chairman  
The Honorable Dianne Feinstein  
Ranking Member  
Committee on the Judiciary  
United States Senate

The Honorable Bob Goodlatte  
Chairman  
The Honorable John Conyers  
Ranking Member  
Committee on the Judiciary  
House of Representatives

Subject: *Department of Homeland Security: Definition of Form I-94 To Include Electronic Format*

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) entitled “Definition of Form I-94 To Include Electronic Format” (RIN: 1651-AA96). We received the rule on May 22, 2017. It was published in the *Federal Register* as a final rule on December 19, 2016. 81 Fed. Reg. 91,646.

The final rule adopted, without change, interim amendments to DHS regulations which were published in the *Federal Register* on March 27, 2013, as CBP Dec. No. 13-06. The amendments enabled DHS to transition the issuance of the Form I-94 (Arrival/Departure Record) to an automated process. In the automated process, DHS created a Form I-94 in an electronic format based on passenger, passport, and visa information DHS obtains electronically from air and sea carriers and the Department of State as well as through the inspection process. The final rule addresses the comments received in response to the interim rule and discusses some operational modifications to the Form I-94 process that were implemented after publication of the interim rule.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This final rule was published in the *Federal Register* on December 19, 2016. 81 Fed. Reg. 91,646. It was received by the House of Representatives on December 14, 2016 (162 Cong. Rec. H7635), by the Senate on December 15, 2016 (162 Cong. Rec. S56), and by GAO on May 22, 2017. It has a stated effective date of January 18, 2017. Therefore, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of DHS’s 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, with the exception of the 60-day delay in its effective date.

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  
U.S. Customs and Border Protection  
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  
ENTITLED  
“DEFINITION OF FORM I-94 TO INCLUDE ELECTRONIC FORMAT”  
(RIN: 1651-AA96)

(i) Cost-benefit analysis

The Department of Homeland Security (DHS) performed a cost benefit analysis of the final rule. According to DHS, this rule amends the definition of the Form I-94, Arrival/Departure Record, to include an electronic format. This revision enables DHS to transition to an automated process for air and sea ports of entry whereby DHS creates a Form I-94 in an electronic format based on passenger, passport, and visa information DHS obtains electronically from air and sea carriers and the Department of State as well as through the inspection process. This rule also is consistent with the Customs and Border Patrol's (CBP) transition to accepting I-94 submissions online for use at the land border. DHS states that the rule results in substantial cost savings (benefits) for travelers, carriers, and CBP. CBP estimates the total net benefits to both domestic and foreign entities in 2013 ranged from \$57.9 million to \$82.7 million. Separately, CBP estimated a net benefit in 2013 of between \$41.1 million and \$65.9 million for foreign travelers, \$1.3 million for carriers, and \$15.5 million for CBP. Net benefits to U.S. entities (carriers and CBP) in 2013 totaled \$16.8 million. Costs and benefits to CBP, carriers, and travelers from Form I-94 automation using a 6-year period of analysis beginning in year 2012 were included in the final rule for all affected parties considering Automation at the Air and Sea Ports of Entry and Electronic Implementation at the Land Border, and the estimates incorporate costs and benefits on a pro-rated basis because the interim final rule (IFR) went into effect later than expected.

DHS stated that the costs to CBP of automation at the air and sea ports of entry were estimated by CBP's Office of Information Technology which estimated the cost to link data systems and to fully automate the Form I-94 was about \$1 million in calendar year 2012. In addition, it estimated the cost to develop the secure Web site was about \$321,000 in 2012. CBP anticipates spending \$92,000 per year in operations and maintenance costs for these systems. In total, CBP incurred costs of \$1,321,000 in 2012 and will incur costs of \$92,000 in following years. CBP's Office of Information Technology estimated that the costs of electronic implementation at the land border would be approximately \$540,000 in 2016 to develop the Web site and create the online payment capabilities. CBP will not bear any additional costs to process travelers as a result of this process. Travelers will not face new costs or time burdens under the new optional process at the land border. Under this process, travelers will have the option to use a new CBP Web site to answer the Form I-94 questions and to pay the \$6 fee in advance of travel. DHS provided estimates and tables summarizing costs borne by travelers to the United States from automation at air and sea ports of entry.

DHS states that aliens may also choose to present a Form I-94 to establish employment eligibility and identity, or eligibility for certain public benefits. To accommodate this need for the Form I-94, CBP has made an electronic Form I-94 available to aliens on the secure I-94 Web site and discussed those costs to travelers in unique circumstances in detail. DHS estimated that annualized costs to all entities affected by the final rule to range from \$21.0 million to

\$23.5 million. Monetized benefits of the final rule range from \$101.9 million to \$104.1 million to all entities. Non-quantified benefits of this rule include the reduced processing time that could result because of the automation of the Form I-94. In total, DHS estimates that net benefits to all parties ranged from \$5757.9 million to \$8282.7 million in 2013. Net benefits to U.S. entities (carriers and CBP) totaled \$16.8 million in 2013.

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

DHS states that since a notice of proposed rulemaking was not necessary, a regulatory flexibility analysis was not required, but that nonetheless, DHS considered the impact of the rule on small entities. The final rule primarily regulates individuals and individuals are not considered small entities. In addition, individual travelers may obtain a paper Form I-94 upon request, which would eliminate the impacts of the final rule for those travelers. Employers who have internet access may choose to allow their employees to use their internet connection to access the employee's electronic Form I-94, but they are not required to do so and are therefore not directly regulated by this rule. To the extent an employer chooses to assist an employee with accessing the internet and printing a Form I-94, this impact would not rise to being an economically significant impact under the Regulatory Flexibility Act. DHS further explains that the final rule also regulates air and sea carriers by eliminating the need for them to provide the paper Form I-94 to their passengers. DHS states that the final rule would impact all small carriers that transport passengers to the United States, thus DHS concluded that this rule has an impact on a substantial number of small entities. DHS's economic impact analysis estimated that carriers spend \$1.3 million a year printing and storing forms for their passengers, based on 2011 passenger volumes. In 2011, 16,586,753 Forms I-94 provided by carriers were filed at airports and seaports. Dividing these figures, DHS estimated that carriers spent 8 cents per form on printing and storage costs. Under this rule, carriers would no longer need to print and store the Forms I-94, thus eliminating these costs. DHS states that according to a 2013 study by the Department of Commerce's Office of Travel and Tourism Industries, the average airline ticket price for an international traveler traveling to the United States is \$1,588. The cost to the carrier of printing a Form I-94 is less than one hundredth of 1 percent of the revenue a carrier receives from the average passenger. DHS therefore states that it does not believe that this rule has a significant economic impact on small entities and noted that any impact to small carriers would be purely beneficial.

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

DHS did not directly discuss actions relevant under the Unfunded Mandates Reform Act, but did perform a cost and benefit analysis and discussed three regulatory alternatives, two of which were considered in the IFR: eliminating the paper Form I-94 in the air and sea environments entirely and providing the paper Form I-94 to all travelers who are not B-1/B-2 travelers. As a result of public comments on the interim final rule, DHS added a third alternative to its analysis: providing kiosks at major ports of entry where travelers have the option to print their electronic Form I-94 prior to leaving the airport. In total, DHS estimated that net benefits to all parties ranged from \$5757.9 million to \$8282.7 million in 2013. Net benefits to U.S. entities (carriers and CBP) totaled \$16.8 million in 2013.

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

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

On March 27, 2013, DHS published an IFR in the *Federal Register* (78 Fed. Reg. 18,457). DHS received 18 submissions in response to the IFR. According to DHS, most of these submissions contained comments providing support, voicing concerns, highlighting issues, or offering suggestions for modifications to the automation process. After review of the comments, DHS finalized the interim final rule without change. However, DHS has made some operational changes, primarily to the I-94 Web site, in response to the comments. The IFR enabled DHS to transition to an automated process whereby DHS creates a Form I-94 in an electronic format. DHS has not changed the substantive regulations relating to the Form I-94, but only the operational means by which DHS issues the form. Thus, according to DHS, the rule is a procedural rule exempt from prior notice-and-comment requirements under APA.

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

The collection of information regarding the CBP Form I-94 (Arrival/Departure Record) was previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the requirements of PRA under OMB Control Number 1651-0111. This OMB Control Number also includes the Electronic System for Travel Authorization (ESTA), ESTA fee, and Form I-94W, all of which are unaffected by this rule. In addition, information for the electronic Form I-94 is comprised of information already collected for the Advance Passenger Information Systems under approval 1651-0088. The burden hours associated with the collections of information contained in the final rule were previously reviewed and approved by OMB. The automation of the paper Form I-94 for commercial aircraft and vessel passengers in accordance with the final rule results in a reduction of 1,278,456 annual burden hours under OMB control number 1651-0111. Also in accordance with this final rule, the electronic Form I-94 is available to aliens on a secure Web site. Passengers may log into the Web site using seven pieces of basic identifying information that is either known to the traveler (their first name, last name, and date of birth) or readily available on their passport (passport number, country of issuance, date of entry, and class of admission). The estimated annual burden associated with this Web site, is 254,680 hours under OMB control number 1651-0111. The automation of the paper Form I-94 for commercial aircraft and vessel passengers in accordance with the final rule results in an estimated reduction of 10,918 Forms I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, filed, and an estimated reduction of 4,541.89 burden hours under OMB control number 1615-0079.

DHS included an exhibit that summarized the difference in the burden for the previous process and the process under the final rule. As OMB Control Number 1651-0111 includes ESTA and Form I-94W, DHS included those burden hours for informational purposes but noted that those burden hours were unaffected by the final rule.

Statutory authorization for the rule

DHS promulgated this rule under the Immigration and Nationality Act (INA) specifically, 8 U.S.C. § 1101; 8 U.S.C. § 1103; 8 U.S.C. § 1201; 8 U.S.C. §§ 1303-1305; 5 U.S.C. § 301; Pub. L. 107-296, 116 Stat. 2135; 6 U.S.C. § 1 et seq.

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

According to DHS, the rule is an economically significant regulatory action under section 3(f)(1) of Executive Order 12,866. The rule has been reviewed by OMB.

Executive Order No. 13,132 (Federalism)

DHS did not address federalism in its final rule.