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The Forum for America's Ideas

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REGARDING

REAL ID

BEFORE THE

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Mississippi House of Representatives

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Chairman McBride, Vice Chair Bell and honorable members of the Mississippi House Transportation Committee, thank you for the invitation to speak with you today about the REAL ID. I am Jeremy Meadows from the National Conference of State Legislatures (NCSL), the bipartisan organization that serves the legislators and staff of our nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on pressing issues, such as the REAL ID. NCSL is also an effective and respected advocate for the interests of state governments before Congress and federal agencies.

For NCSL to lobby an issue, state legislators from three-quarters of the states must agree on a position. You and your elected colleagues determine not just what NCSL's lobbying priorities should be, but what message you want us to deliver to Congress and the federal administration on your behalf. Since 2006, you have debated and set NCSL's policy on the REAL ID, and even the U.S. Department of Homeland Security (DHS) credits your engagement for dramatically altering the REAL ID final regulations.

In my testimony today, I would like to provide you with:

1. a brief history of the REAL ID Act;
2. a review of the REAL ID final regulations;
3. a summary of the REAL ID grant allocations;
4. a summary of state legislative activity on the REAL ID;
5. a snapshot of NCSL's work on REAL ID; and
6. a congressional update.



History of the REAL ID

When the 9/11 Commission issued its final report, it suggested that:

“Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists” (73 FR 5273).

Congress acted to realize the Commission’s recommendation and in December 2004, President George W. Bush signed into law the National Intelligence Reform Act of 2004 (*P.L. 108-458*). The law, among other things, required the U.S. Secretary of Transportation to establish a negotiated rulemaking process—to include state officials, privacy advocates, information technology experts, federal transportation and homeland security officials, and others—to devise minimum standards for state-issued driver's licenses (DL) and identification cards (ID). While the first meeting of the group had taken place, the collaborative process came to a screeching halt on May 11, 2005, when, without a hearing in either chamber, the REAL ID Act was enacted as part of a supplemental spending bill for tsunami relief and the war on terrorism.

In general, the act mandates states to issue REAL ID-compliant driver’s licenses and identification cards only to individuals lawfully present in the United States pursuant to federal standards, which were to be further defined by DHS. If states do not comply, the federal government will not accept their IDs for “official purposes.” “Official purpose” is defined under the act to include accessing federal facilities, boarding federally regulated commercial aircraft, and entering nuclear power plants, and any other purposes that the Secretary of Homeland Security determines.



On January 11, 2008, nearly three years after the enactment of the REAL ID and just 120 days before the statutory implementation date, DHS issued the final regulations to guide states' implementation of the act.

The Final Regulations

The good news is that the final regulations seem to offer much more flexibility for states than was originally proposed in the draft regulations. In particular, the final regulations:

- provide states additional time to reenroll existing driver's license and identification card holders;
- allow for an age-based progressive reenrollment process (a state-issued driver's license or identification card must meet the requirements of the REAL ID by December 1, 2014 for individuals born after December 1, 1964 and by December 1, 2017 for individuals born before December 1, 1964);
- provide flexibility on security features of driver's licenses and identification cards;
- allow states to determine which employees will be subject to background checks; and
- establish a flexible waiver and exceptions process.

The final regulations also limit the "official purpose" to those listed in the act.

Based on this added flexibility, DHS has re-estimated the 10-year costs to states at just under \$4 billion, down \$10 billion from the original \$14 billion estimate.



The bad news is that a number of issues remain unresolved including:

- the connectivity to and governance (including privacy protections) of the databases that states will need to access in order to electronically verify the validity of identity documents;
- the true cost of the REAL ID, including the user fees states will have to pay when accessing these databases; and
- the federal government's commitment to fund the REAL ID.

The Connectivity to and Governance of Electronic Databases

The REAL ID requires states to electronically verify the validity of identification documents presented by every individual applying for a REAL ID-compliant credential. This process will require states to have access to at least five national databases. However, not all of these databases exist and their availability and reliability on a national level have yet to be tested. In addition, for several of these systems, the method by which states will connect to these systems and the governance structure for information sharing has yet to be resolved, causing much consternation.

In order to effectively implement the REAL ID, these systems need to be made available and tested, not yesterday, not last week, but last year. However, in order to do that a governance structure, to which all 56 U.S. licensing jurisdictions can agree, has to be established. The lack of a governance structure makes it difficult for legislators, like yourselves, to respond to questions you receive from your constituents such as: Who will have access to my information? How will it be protected? Is this a national database?



The True Cost of the REAL ID

As mentioned earlier, DHS estimated in the final regulations that it will cost states \$3.9 billion to implement the REAL ID; however, NCSL fears those costs could be higher. The \$3.9 billion estimate assumes that only 75 percent of individuals currently holding a driver's license or identification card will apply for a REAL ID, excluding the majority of individuals with a U.S. Passport and those who do not fly commercially. For Passport holders to have this option, their state of residence must operate a two-tiered system, offering both a REAL ID-compliant and a non-compliant card. Does the \$3.9 billion figure take into account the cost states face if they choose to operate a two-tiered system? Further, does the \$3.9 billion number take into account the fees states may face in order to access the electronic databases to verify applicant information or the FBI databases required for employee background checks? This concern with the fees will become an even bigger issue in October of this year when the transaction fee on one of the existing systems—the Systematic Alien Verification Entitlement (SAVE) system—will increase from \$.05 to \$.50 for an initial query. Because of all of these unknown costs, it is difficult for states to project the true fiscal impact of implementing the REAL ID.

The Federal Government's Commitment to Fund the REAL ID

Whether the cost is \$3.9 billion or something higher the fact still remains, this is effectively an unfunded mandate. Congress has appropriated only \$90 million for state implementation of the REAL ID and the president's FY 2009 budget proposal zeroes out the grant program created by Congress in FY 2008. In its place, the president's budget proposes to create a new \$110 million National Security and Terrorism Prevention Grant program, of which implementation of the REAL ID is one of the eligible expenses. In addition, states have been authorized to use State



Homeland Security Grant Program (SHSGP) funds for REAL ID implementation, but this money is largely already spoken for by other homeland security priorities.

Grant Awards for Implementation of the Real ID

How is the \$90 million being spent?

- \$7 million was awarded to Kentucky for two pilot programs;
- \$2.5 million was used by DHS for grant management;
- \$400,000 was rescinded and paid to the U.S. Treasury; and
- \$79,875,000 will be distributed to the states through a competitive grant program.

On Friday, June 20, 2008, DHS announced the outcome of the competitive grant program and the state allocations of the \$79.9 million. All 48 U.S. licensing jurisdictions that submitted grant applications received some level of funding based on the number of driver's licenses and identification cards they issue and the "overall effectiveness of proposals based on the criteria identified in the REAL ID Demonstration Grant Program Application Kit," according to DHS. Details on the grant allocations are available at www.ncsl.org/realid; awards range from a low of \$300,000 to American Samoa, Guam, Puerto Rico, the U.S. Virgin Island and South Dakota to a high of \$17.5 million to Missouri. Note that \$17 million of Missouri's award is for the development of the verification hub. Mississippi's award is in the amount of \$718,424.

According to DHS officials, a state does not have to commit to implementing the REAL ID in order to accept the award as long as the funds are spent on activities consistent with implementing the 18 benchmarks. Many of the state officials on that call stated a need for that assurance to be put in writing and/or in the grant contracts.



State Activity

Since REAL ID's enactment, legislators in 48 states and the District of Columbia have proposed over 200 pieces of legislation related to REAL ID and, of those, at least 42 states have considered legislation that either asserted the state's opposition to REAL ID or urged Congress to amend or repeal the Act.

As of August 15, 2008, anti-REAL ID measures had passed in twenty-four states. Ten of those states—Alaska, Arizona, Idaho, Louisiana, Maine, Montana, New Hampshire, Oklahoma, South Carolina and Washington—passed bills that forbid state agencies from complying with REAL ID. Legislators in several states are currently considering similar proposals.

Not all responses to the REAL ID Act have been negative. Since 2005, legislators in at least 19 states have proposed measures that would bring their states closer to compliance with REAL ID. Lawmakers in at least five states—Indiana, Michigan, Nevada, Ohio and Wisconsin—have passed REAL ID compliance related laws.

Although the May 11, 2008 statutory deadline has passed and a number of state legislatures are still debating whether to implement the REAL ID, the final regulations provided states the opportunity to request an extension to December 31, 2009. All 56 U.S. licensing jurisdictions have received an extension.

What happens next? The final regulations include a list of 18 interim benchmarks that a state must meet in order to be considered “materially compliant.” If a state has met these 18 benchmarks by December 31, 2009 and still needs additional time in order to



come into full compliance with the REAL ID, the state can request a second extension until May 11, 2011.

While DHS originally indicated that requesting the first of the two possible deadline extensions would not commit states to implementing REAL ID, several articles published around the country in early March quoted DHS spokespeople as saying that states' requests for extensions are "good faith" indications of a state's intent to comply. It is this experience that has encouraged many state officials to request written assurances from DHS about use of the recent grant awards and expectations for compliance.

NCSL Policy and Congressional Activity

Given the amount of state legislative activity, it should not come as a surprise that the REAL ID has been the issue of many hours of discussion and debate at NCSL meetings over the past several years. Until the 2008 Annual Meeting in New Orleans this past July, NCSL's official position on REAL ID was a call for the repeal of the act and a return to the negotiated rulemaking of IRTPA. The action calendar resolution mandating that "repeal and replace" stance expired as of the 2008 Annual Meeting, and NCSL's position has reverted to the underlying standing policy, which calls for outright repeal of REAL ID. That standing policy on "Implementation of the REAL ID" is due to expire as of the 2009 Annual Meeting.

Given NCSL's position at the time, a letter was sent in April in support of S. 717—the *Identification Security Enhancement Act of 2007*—which repeals the REAL ID and reinstates the negotiated rulemaking process that preceded it. This legislation was first introduced at the end of the 109th Congress by United States Senators Akaka (Hawaii) and Sununu (New Hampshire). When the 110th Congress dawned in 2007,



Senators Akaka and Sununu were joined by Senators Leahy (Vermont) and Tester (Montana) to reintroduce their ‘repeal and replace’ legislation; Senators Alexander (Tennessee), Baucus (Montana), Kerry (Massachusetts), and McCaskill (Missouri) have also joined as co-sponsors. In April, during NCSL’s Spring Forum, NCSL and many state legislators from across the nation met with members of the Senate Judiciary Committee, to which S. 717 has been referred, and/or their staff, in order to encourage them to support and possibly co-sponsor the bill.

On the House side, Congressman Allen (Maine) has introduced similar legislation (H.R. 1117); that bill has 38 co-sponsors.

In addition, NCSL had requested that the Administration and Congress provide at least \$1 billion in FY 2008 for state implementation. These efforts failed.

As for other REAL ID-related congressional activity, several measures have been introduced to suggest more stringent means for encouraging states to comply with the REAL ID. There have also been several legislative attempts to expand the use of REAL IDs—some bills have called for states to use REAL IDs for voter registration purposes and one immigration bill item linked REAL ID to employment eligibility.

At the end of April, Senator Akaka invited NCSL to testify before his Senate Homeland Security and Governmental Affairs Subcommittee. NCSL President, Representative Donna Stone from Delaware, represented NCSL at the April 29, 2008 hearing. This is only the second congressional hearing on the REAL ID. The first was held in March 2007 in the same subcommittee.

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Finally, both the House and Senate Appropriations Committees have included \$50 million for state REAL ID costs in their respective FY 2009 Homeland Security spending bills, effectively continuing the FY2008 grant program that the President's budget zeroed out. Action on appropriations bills in either House is still pending and rumors of continuing resolutions abound.

NCSL's policy process will continue to determine NCSL's posture on REAL ID, and I encourage you to be involved in that process so that Mississippi's interests are factored into the debate. NCSL's Transportation Committee, which has jurisdiction for REAL ID policy, will next meet at NCSL's Fall Forum this December in Atlanta. NCSL will continue to monitor state activity on the REAL ID as well as developments on Capitol Hill or within DHS, and we look forward to remaining a resource to you as you consider Mississippi's best course of action. To access NCSL's policy positions, summary briefs, links to the referenced congressional legislation, as well as much more information on REAL ID, visit: www.ncsl.org/realid.

Thank you again for the opportunity to appear before you today, and I look forward to your questions.

Contains excerpts from the Testimony of Representative Donna Stone, Delaware General Assembly on Behalf of the National Conference of State Legislatures, Regarding the Impact of Implementation: A Review of the Real Act and the Western Hemisphere Travel Initiative, Before the Subcommittee on the Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Governmental Affairs, United States Senate, April 29, 2008.