



NATIONAL CONFERENCE
of STATE LEGISLATURES
The Forum for America's Ideas

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 ID
ACT AND THE WESTERN HEMISPHERE TRAVEL INITIATIVE**

BEFORE THE SUBCOMMITTEE ON 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



Good morning Chairman Akaka, Ranking Member Voinovich and distinguished members of the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. I am Representative Donna Stone, President of the National Conference of State Legislatures (NCSL) and a member of the Delaware House of Representatives. I appear before you today on behalf of NCSL, a bi-partisan organization representing the 50 state legislatures and the legislatures of our nation's commonwealths, territories, and the District of Columbia.

Mr. Chairman, I would like to thank you for the opportunity to testify today on the state impact of implementing the REAL ID and the Western Hemisphere Travel Initiative (WHTI). Legislators across the country share the goal of improving the integrity and security of state-issued identification, but they do have some concerns with the implementation of both of these programs. We hope to continue the dialogue with you and this committee as you and the implementing departments consider the path forward for both efforts.

REAL ID

As you know, the REAL ID Act of 2005 requires states to adopt federal standards for state-issued driver's licenses and identification cards by May 11, 2008. If they do not, the federal government will not accept the driver's licenses or identification cards for federal purposes—boarding commercial aircraft, entering a federal building or nuclear power plant, or other purposes as determined by the secretary of the Department of Homeland Security (DHS).

While NCSL had numerous concerns with the draft regulation to implement the Act, we commend the Department of Homeland Security (DHS) for its efforts in the final regulations to provide states much needed flexibility and to reduce, per DHS estimates, state 10-year costs from over \$14 billion down to \$4 billion.

In particular, the final regulations reduce the implementation burden on states in the following ways:

- Provide states additional time to reenroll existing driver's license and identification card holders;
- Allow for an age-based progressive enrollment;
- 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.

However, the road to successful implementation is long, up hill and in some places has rocky terrain due to a number of uncertainties that still exist, which include:

- the federal government's commitment to fund the REAL ID;
- the connectivity to and governance of the databases, including privacy protections, 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;
- privacy protections; and
- the department's recognition of state legislatures' critical role in implementation of the REAL ID.

Commitment to Fund the REAL ID

To date, Congress has appropriated only \$90 million to assist states with implementation of the REAL ID, and a portion of these funds are now targeted to fund what many state legislators considered a federal responsibility, the hub—how states will connect to the necessary databases.

It is critical to successful implementation that states see a commitment on the part of the federal government to pay for the state portion of this unfunded mandate. NCSL has requested that the Administration and Congress provide at least \$1 billion in fiscal year 2008 to states for start-up cost. To date, these requests have gone unanswered.

In fact, the President's budget proposal for FY 2009 zeroes out the grant program for states that Congress created for FY 2008 and instead makes REAL ID one of the eligible programs for a new \$110 million National Security and Terrorism Prevention Grant program, while at the same time slashing the SHSGP program by 78% (FY 2008 appropriations were \$890 million and the President requested \$200 million for FY 2009). REAL ID represents federal standards, and they deserve federal dollars.



Furthermore, the cost of unfunded federal mandates, like REAL ID, is now conservatively estimated to be \$31.9 billion for FY 2008—the highest level since the passage of the Unfunded Mandate Reform Act. The time is long past to cease cost-shifts to states and fund mandated standards like REAL ID.

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. While we recognize that some, but not all, of these databases do exist, 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, we needed these systems available and tested not yesterday, not last week, but last year. But in order to do that a governance structure which all 56 U.S. licensing jurisdictions can agree to has to be established. The lack of a governance structure makes it difficult for me as a state legislator to respond to questions I am receiving from my constituents such as: Who will have access to my information? How will it be protected? Is this a national database?

While we appreciate the department's recognition that states will have to establish most of these policies, again, these decisions cannot be made overnight and as a result will be a challenge to implementation.

The True Cost of the REAL ID

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 well 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; this excludes the majority of individuals with a U.S. Passport or 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 take into account the cost states face if they chose to operate a two-tiered system? Further, does the \$3.9 billion take into account the fees states may face in order to access the five electronic databases for verifying 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. State legislators are required to balance their budgets and must pay for a host of high priorities that compete for state attention and funds such as other homeland security priorities, critical infrastructure, transportation, education and health care/Medicaid. It is critical that we have the answers to these questions.

State Legislatures' Role in Implementing the REAL ID

State legislatures' traditional roles—lawmaking, oversight, the appropriation of funds, and information gathering—are critical in the implementation of the REAL ID. The state legislature:

- Exercises constitutional and statutory oversight to review and evaluate state programs in order to coordinate the state's activities.
- Appropriates state funds and ensures that all federal funds are appropriated according to state law. This becomes extremely critical to ensure the long term viability of new programs as future federal funding cannot be predicted and federal funds may require a maintenance-of-effort contribution from the state.
- Conducts hearings or other public information-gathering activities to determine what actions the state will take on a given issue.

I feel that the lack of understanding by DHS of the role of the state legislature in the REAL ID will continue to be a barrier to implementation unless something changes. For example, Secretary Chertoff recently established a task force to address concerns raised by governors relating to implementation of the REAL ID and in particular how the state grant funds were to be distributed.



Because state legislators play a key role in the future of the REAL ID, NCSL's leadership asked staff to contact the department's Office of Intergovernmental Programs to request that legislators be included in those discussions or that a similar activity be established for state legislators. Our request was denied even though it is state legislators, in their capacity as appropriators, who will have to find a way to pay for this mandate in the midst of competing state priorities; even though it is state legislators who will debate and make any necessary changes to state laws; and even though it is state legislators who will hold oversight hearings on the implementation of the program.

State legislatures are essential partners in the successful implementation of the REAL ID Act. While I commend the department for recognizing the need for improved and continued dialogue with state policymakers, there needs to be an equal exchange between the secretary and both the executive and legislative branches of state government in order to ensure successful implementation of the Act.

State Legislative Activity on the REAL ID

In their capacity as policymakers, legislators in 48 states and the District of Columbia have proposed approximately 207 pieces of legislation related to REAL ID and, of those, 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 April 17, 2008, anti-REAL ID measures had passed in twenty-one states. Seven of those states—Idaho, 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.

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

NCSL's Policy on the REAL ID



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, which has resulted in the following policy position:

NCSL calls on Congress to repeal the REAL ID Act and reinstitute the negotiated rulemaking process created under the Intelligence Reform and Terrorism Prevention Act [IRTPA] of 2004 (P.L. 108-458) and fully fund the requirements of the final rule promulgated under the negotiated rulemaking process;

NCSL's policy statements on REAL ID and a letter dated April 4th in support of S.717 are appended.

While NCSL recognizes the final regulations provide states additional time and flexibility to implement the REAL ID, the negotiated rulemaking could address the issues I have raised today and others, which NCSL raised last year before this committee, such as:

- Waiving the verification requirements for applicants who already have been through an identity verification process conducted by the federal government, such as individuals with military credentials, U.S. Passports, Transportation Worker Identification Credentials, or other federal identification cards.
- Prohibit federal agencies from charging states transaction fees for accessing the required electronic verification systems.
- Institute a legislative trigger that would automatically release states from complying with any REAL ID provision in any fiscal year in which the Congress fails to appropriate funds for these purposes.

In addition, a negotiated rulemaking process could result in an acceptable funding mechanism because the outcome would be the product of a true partnership. Further, it is possible that the negotiated rulemaking could result in new standards implemented more quickly than the current timetable set forth in the REAL ID final rules. In fact, we started with all the promises of a collaborative, negotiated rulemaking process following enactment of IRTPA of 2004; unfortunately, REAL ID substituted coercive federalism for collaborative federalism.



WESTERN HEMISPHERE TRAVEL INITIATIVE

State legislators have expressed concern about WHTI for several years. As with REAL ID, state legislators support the border security goals of WHTI but are concerned that some policy and implementation choices may unnecessarily and adversely affect travel, trade, and tourism, all of which are critical economic drivers for state economies throughout the nation. We are also concerned that WHTI and REAL ID are being conflated and confused as initiatives and identity credential programs.

The Departments of Homeland Security and State recently issued final regulations regarding the documents necessary for entering the United States at land and sea ports-of-entry. Since Congress legislatively stipulated that WHTI cannot be implemented at land and sea ports until June 1, 2009, having final regulations at this time seems to allow ample time for public education efforts and a smooth implementation; we hope that proves the case.

Nonetheless, many state legislators have expressed concerns about some implementation issues, particularly as they relate to technology; Passports, Passcards, and costs; and the state Enhanced Driver's License (EDL) option that the Department of Homeland Security is making available through Memoranda of Agreement with various states.

Last week, at NCSL's Spring Forum in Washington, NCSL considered two new policy statements on WHTI implementation. The first policy was adopted and, in general, opposes federal mandates to use RFID in WHTI-compliant state-issued documents and the prospect of RFID use in the REAL ID program. The second related to the cost of Passport alternative documents. It was discussed and tabled for further action at NCSL's Annual Meeting this July. NCSL's policy statements on WHTI are appended for your reference.

In particular, NCSL is now on record expressing concern about plans to use different kinds of RFID in Passcards or EDLs than are used in Passports. While measures to make Passports affordable is perhaps a congressional policy decision, use of RFID is an implementation choice being made by the Departments. The RFID found in traditional State Department-issued Passports is a short-range version that uses basic access control; however, the technology that DHS is



requiring states to use in EDLs is a stronger RFID and DHS is denying state consideration of encryption.

The second, tabled policy asserts that the new Passcard—which is intended to provide a lower cost, \$45 alternative to traditional Passports—is of limited and misleading use since it will only be valid for land and sea border crossing but not for air travel in the Western Hemisphere. The resolution suggests that Congress instead take action to cut the cost of traditional passports in lieu of the entirely new Passcard program and supports congressional establishment of a federal income tax credit to halve the cost of a Passport. At NCSL's Annual Meeting this summer, state legislators will examine other means of reducing costs of Passports as this policy is revisited.

DHS is using the economic impact of WHTI on border communities to pressure border states into acting on EDLs. DHS is not truly negotiating with states on EDLs and continues to ignore the importance and role of legislatures in setting credentialing and privacy policy, frameworks for state programs, and funding agency operations. Instead, it has been reported to NCSL that DHS is presenting states with a cookie cutter plan for EDLs, getting state administrator agreement, and then pushing “must pass” legislation through the legislature.

Don't mistake me, NCSL appreciates and supports the notion of working with states to create EDLs so that this state ID credential can continue to be used to cross borders as they have been for years. The State of Washington has recently concluded a Memorandum of Agreement with DHS and launched the first EDL program. However, the beauty of this EDL approach to WHTI is the opportunity it provides to adapt to a particular state's needs, licensing systems, and border-crossing patterns. Simply taking the Washington model and imposing it upon another state, which is the approach we understand DHS is now taking, is not acceptable and completely wastes this excellent opportunity to build a state-federal partnership to meet the goals of WHTI.

Finally, many state legislators have expressed concern about the way in which DHS seems to conflate REAL ID and WHTI, blurring lines between the two programs, and encouraging states who have legislatively opposed REAL ID to implement REAL ID by way of WHTI-compliant IDs.



This seems disingenuous, perhaps duplicitous, and certainly disrespects decisions taken by state legislatures.

Mr. Chairman, in closing I would like to reiterate that state legislatures are committed to working with federal policymakers to ensure the security and integrity of identity documents. However, we see the road to REAL ID as being closed for construction and S. 717 as the solution and the new direction for finalizing federal standards for state issued driver's licenses and identification cards. For WHTI, the road is bumpy at present, but if the federal government chooses the proper route, a smoother ride is still possible.

I thank you for this opportunity to testify and look forward to questions from members of the subcommittee.

Appendices

NCSL Policy on Policy on Implementation of the REAL ID

NCSL Urges Congress to Fix and Fund the REAL ID Action Calendar Resolution

NCSL Policy on the Western Hemisphere Travel Initiative

NCSL Opposes Federal Mandates to use RFID in State Documents Action Calendar Resolution

NCSL Letter of Support for S. 717 dated April 4, 2008

NATIONAL CONFERENCE *of* STATE LEGISLATURES*The Forum for America's Ideas***Standing Committee on Transportation****Policy on Implementation of the REAL ID**

On May 11, 2005, the REAL ID Act was enacted as part of supplemental spending bill (P.L. 109-13). Under the REAL ID Act, a state must implement new federal standards for the issuance of drivers licenses (DL) and identification cards (ID) by May 11, 2008 or the federal government will not recognize the state's DL/ID for federal purposes. The United States Department of Homeland Security is currently developing regulations to implement the Act. Congress is failing to provide adequate funds to implement the Act.

NCSL urges the federal government to:

- Maintain a definition of official purpose consistent with the underlying legislative intent. Establish an official process, which includes state legislatures, to consider future application.
- Provide states sufficient time for conversion of DLs/IDs issued after the underlying federal infrastructure is in place.
- Allow for states to self-certify as to their compliance with the requirements of the Act. DHS should involve states in the development of this process.
- Establish standards and do not set specific substrates for card security features.
- Allow for the display of an alternative address on the face of the license.
- Exempt documents related to verification of proof of principal residence from electronic verification, scanning and retention requirements.
- Make necessary improvements to the Systematic Alien Verification for Entitlements (SAVE) program and other federal systems necessary for the Act's implementation. These changes should be federally funded.
- Establish a state working group to ensure the appropriate functionality of the SAVE system for the purposes of the Act and to ensure that SAVE is to be used by any jurisdiction only for the purpose for which it is intended.
- Recognize that states issue other temporary licenses. Continue to allow states to use the same method of identifying those drivers.
- Require states to electronically verify identity documents only if the systems for verification are operational, reliable and federally funded.
- Provide states sufficient time to change record retention laws.
- Allow states to convert to front-end image capture as system contracts come up for renewal or upgrade.
- Allow for REAL-ID compliant DLs/IDs to be renewed through the mail or Internet, or other methods that states currently have available.
- Allow states to identify those staff that require security clearances as part of the self certification process, to include disqualifying factors. Allow new hires to be granted a provisional status.
- Access to state information, as it relates to an all-driver's system should be as a query and response and not wholesale penetration. Access must adhere to the Driver Privacy Protection Act (DPPA) as well as additional state requirements which may exist, and be limited to state issuance and law enforcement management.
- Provide federal funds for implementation and recognize the need for an annual appropriation to maintain the system. Federal appropriations must recognize and cover the costs of new requirements on states in support of federal security initiatives required by the Act.



- Repeal the REAL ID Act if Congress does not provide for full funding or the federal government does not provide for the points listed in this policy on or before December 31, 2007.

This policy replaces and supersedes the NCSL standing committee policy “Identity Security, Driver’s Licenses and State Identification Cards.”

July 2009



NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

STANDING COMMITTEE ON
TRANSPORTATION

Action Calendar Resolution

NCSL URGES CONGRESS TO FIX AND FUND THE REAL ID

WHEREAS, many states have been taking the necessary steps to modernize and improve the security of state-issued driver's licenses (DLs) and identification cards (IDs) since before September 11, 2001; and

WHEREAS, the 9/11 Commission recognized the importance of state issued driver's license and identification card security; and

WHEREAS, the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) authorized the U.S. Secretary of Transportation to convene a group of elected state, local and federal officials, driver's license experts, and other interested parties to negotiate minimum standards for driver's licenses and identification cards;

WHEREAS, the negotiated rulemaking process established under the Intelligence Reform and Terrorism Prevention Act of 2004 provided states with the flexibility to provide safety and security to our citizens in an efficient and cost effective manner; and

WHEREAS, on May 11, 2005, the REAL ID Act (act) was enacted as part of a supplemental spending bill (P.L. 109-13); and

WHEREAS, the act repealed the negotiated rulemaking process established under the Intelligence Reform and Terrorism Prevention Act of 2004; and

WHEREAS, under the act, a state must implement new federal standards for the issuance of drivers licenses and identification cards by May 11, 2008 or the federal government will not recognize the state's DL/ID for federal purposes; and

WHEREAS, under the act, states must have access to five national identity document verification systems, of which only one is operational; and

WHEREAS, a comprehensive analysis of the act conducted by the National Conference of State Legislatures (NCSL), National Governors Association and the American Association of Motor Vehicle Administrators determined the act would cost states more than \$11 billion over its first five years of implementation, which includes a one-time, up front cost of \$1 billion; and

WHEREAS, the U.S. Department of Homeland Security (DHS) issued a Notice of Proposed Rulemaking (NPRM) to implement the Real ID (6 CFR Part 37) on March 9, 2007; and



WHEREAS, the NPRM does not adopt the necessary changes to the Real ID as outlined in the September 2006 report—The Real ID Act: National Impact Analysis—issued by NCSL, the National Governors Association and the American Association of Motor Vehicle Administrators; and

WHEREAS, DHS estimated in the NPRM the cost of implementation of the Real ID at \$23.1 billion over 10 years, of which \$10 billion to \$14 billion are costs to states; and

WHEREAS, DHS was expected to publish final regulations to implement the Real ID in August or September of 2007; and

WHEREAS, the May 11, 2008 deadline for the implementation of the act is rapidly approaching; and

WHEREAS, Congress and the Administration have failed to address the fatal shortcomings of the Real ID, including in the area of securing personal identification and biological data; and

WHEREAS, Congress and the Administration have failed to provide adequate funds to implement the act; and

WHEREAS, several members of Congress want to expand the use of the Real ID;

THEREFORE, BE IT RESOLVED, NCSL urges Congress to adopt the necessary changes to the Real ID as outlined in the September 2006 report—The Real ID Act: National Impact Analysis—issued by NCSL, the National Governors Association and the American Association of Motor Vehicle Administrators;

BE IT FURTHER RESOLVED, that NCSL urges the President and Congress to fully fund the federal government's obligations under the act to develop various document verifications systems for states;

BE IT FURTHER RESOLVED, that NCSL urges the President and Congress to provide at least \$1 billion in federal FY 2008 for up front costs to states to implement the Real ID;

BE IT FURTHER RESOLVED, that NCSL urges the President and Congress to fully fund state implementation of the Real ID through a grant program, which provides each state with a minimum grant award;

BE IT FURTHER RESOLVED, that if, by December 31, 2007, Congress does not provide at least \$1 billion in federal FY 2008 for up front costs to states to implement the Real ID, including in the area of securing personal identification and biological data, and adopt the necessary changes to the Real ID as outlined in the September 2006 report—The Real ID Act: National Impact Analysis— then NCSL calls on Congress to repeal the Real ID Act and reinstitute the negotiated rulemaking process created under the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) and fully fund the requirements of the final rule promulgated under the negotiated rulemaking process; and

BE IT FURTHER RESOLVED, that NCSL urges Congress and the Administration to affirm their commitment of working with state legislatures to improve driver's license security standards; and

BE IT FURTHER RESOLVED, that a copy of this resolution be sent to the President of the United States and to all the members of Congress.

Expires in August 2008



NATIONAL CONFERENCE *of* STATE LEGISLATURES

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STANDING COMMITTEE ON
LABOR & ECONOMIC DEVELOPMENT

THE WESTERN HEMISPHERE TRAVEL INITIATIVE

The Western Hemisphere Travel Initiative (WHTI)

On April 5, 2005, the Departments of Homeland Security and State announced the Western Hemisphere Travel Initiative (WHTI) which would require all travelers to and from the United States to have a passport or other accepted document to enter or re-enter the United States. The federal government asserts that this initiative will increase the safety measures at the borders.

On September 1, 2005, the U.S. government published in the Federal Register an Advanced Notice of Proposed Rulemaking (ANPR) on the plan to implement the WHTI and opened a period of public comment on the plan.

The ANPR confirmed the U.S. Departments of Homeland Security and State have delayed and simplified the implementation of WHTI and now says that the rules will apply to all individuals traveling to the United States by air and by sea beginning December 31, 2006, and will apply to all individuals entering or re-entering the U.S. via its land border crossings as of December 31, 2007.

Impacts on Trade and Tourism

The WHTI as currently outlined will be a deterrent to travel and negatively impact the total number of border crossings, having significant implications for the economies of both Canada and the United States. The Canada–United States border relationship is a special one with more than 300,000 business people, tourists, and regular commuters traveling between Canada and the United States every day. On average \$1.1-billion in goods crosses the Canada-United States Border every day. It is estimated that fifty-six percent (56%) of same-day travelers from the United States, forty percent (40%) of same-day travelers from Canada, fifty percent (50%) of overnight travelers from the United States, and thirty percent (30%) of overnight travelers from Canada do not possess a passport.

A recent report prepared by Conference Board of Canada for the Canadian Tourism Commission estimates that this passport requirement would result in 3.5 million fewer trips into the United States from Canada by 2008 with a related



loss of \$785 million in potential tourism revenue. Likewise, the report estimates 7.7 million fewer trips by U.S. citizens into Canada and \$1.7 billion in lost revenues.

NCSL on Trade and Tourism

The National Conference of State Legislatures (NCSL) recognizes that tourism is a vital element of state economic development, diversification, and rural development programs as well as a leading services sector employer. As evidence of its importance to the U.S. economy, travel and tourism is the nation's largest export industry, ranks as the nation's third largest employer, and is the third largest retail sales industry. NCSL also acknowledges that free and open trade can bolster economies and increase standards of living and that measures that restrict the free flow of individuals and goods between the United States and Canada could negatively impact both economies.

Alternative Measures to the WHTI

NCSL applauds efforts by the U.S. Departments of Homeland Security and State to further secure America's borders and protect the well-being of U.S. residents and their property. However, NCSL strongly encourages the federal government to seek the least onerous measures possible where the U.S. Canada border is concerned in full recognition of the trade and tourism traffic that benefits the people and nations on both sides of that line. To this end, NCSL encourages the federal government to fully explore frequent border-crossing programs – such as NEXUS, FAST, and CANPASS – and the range of identity documentation or passport substitutes that could be employed. At the same time, NCSL implores the federal government – the U.S. Congress, the White House, and the U.S. Departments of Homeland Security and State – to fully and effectively consult with NCSL and state legislatures to ensure that state interests and concerns are factored into these border security plans. Further, NCSL supports a delay, if necessary, in the implementation of WHTI to ensure that federal action along America's northern border has a minimal effect on tourism, trade, citizens' way-of-life, and states' economies while achieving the goal of homeland security.

Effect on Southern Border Between United States and Mexico

NCSL acknowledges the importance of the cultural, economic and trade issues unique to the border between the United States and Mexico, and hereby expresses concern about the potential economic impact of the WHTI policy on the states which border Mexico. We urge that alternative measures to the WHTI be explored for the U.S.-Mexico border.

NCSL looks forward to working with the appropriate federal officials as they work to guarantee American security while sustaining American quality of life and commerce. To wit, NCSL's position shall be communicated, *inter alia*, to the Chairmen and Ranking members of the Senate Foreign Relations Committee, the Senate Homeland Security and Governmental Affairs Committee, the House Homeland Security Committee and the House International Relations Committee, as well as the President of the United States, the U.S. Secretary of State, and the U.S. Secretary of Homeland Security. NCSL also looks forward to working with the Prime Minister of Canada, the Deputy Prime Minister/Minister



of Public Safety and Emergency Preparedness and the Minister of Foreign Affairs in Canada, as well as to the Governors, Premiers and legislative leaders of the states and provinces that share these common borders.

Expires Annual Meeting 2009

NATIONAL CONFERENCE *of* STATE LEGISLATURES*The Forum for America's Ideas***NCSL Opposes Federal Mandates to use RFID in State Documents****Communications, Financial Services & Interstate Commerce**

Whereas, the federal government is taking a more active role in determining or influencing the technological standards for state issued identification documents. The federal government is attempting to mandate or influence the technological standards of sovereign state issued identification documents through the acts of Congress, the rule-making processes of the Departments of State and Homeland Security, or through both official or informal agreements with international organizations or initiatives such as the American Association of Motor Vehicle Administrators (AAMVA), the Security and Prosperity Partnership (SPP), or the United Nation's agency known as the International Civil Aviation Organization (ICAO).

Whereas, the initial version of the REAL ID Act, as introduced, would have required the states to enter into the AAMVA compact known as the Driver's License Agreement (DLA). This compact as drafted would put the international 501c3 AAMVA in charge of making technology decisions for state's sovereign driver's licenses. Such decisions would allow for AAMVA to determine such choices as to whether data could be encrypted, and whether Radio Frequency Identification Technology (RFID), or similar remote technology, would be required.

Whereas, in 2008, the final rules were published for both the Western Hemisphere Travel Initiative (WHTI) and REAL ID, which imposed technological standards onto states' driver's licenses for them to be acceptable for certain uses. While not specifically called for in the IRTP of 2004, the Department of Homeland Security is requiring states to embed RFID into a state's sovereign documents in order for them to be acceptable at ground border crossings under the WHTI. This places specific technological choices as having equal importance over the roles of identification and proof of citizenship, while leaving states with no flexibility or options in this area.

Whereas, the final rules for REAL ID, for now, both do not require encryption and do require the use of 2D bar code technology. The final rules for REAL ID, page 86, make clear however that "Moreover, in the future, DHS, in consultation with the States and DOT, and may consider technology alternatives to the PDF417 2D bar code that provide greater privacy protections after providing for public comment". REAL ID requiring the use of RFID in state documents in the future therefore remains an open possibility, and would require only non-binding consultation with States.

Whereas, the use of unencrypted, long range vicinity read RFID technology, in federal documents such as new "passport cards", NEXUS, and others, has been controversial for reasons of both security and privacy. The RFID chips in passports are also being assembled overseas in foreign countries such as Thailand, and have been found to be susceptible to a variety of technological security problems including hacking, cloning, and remote data interception. Whereas the use of RFID in federal passports has much to do with agreements between the United States and the ICAO, the States have entered into no such



agreements. Despite this fact, current federal policy is being crafted in a manner that penalizes the States if they do not adopt this or similar technology.

Therefore, let it be resolved, that the National Conference of State Legislatures will urge the President, Congress, and the Departments of State, Transportation, and Homeland Security to not pass law, allow for federal policy, to use international organizations, or to enter into international agreements that mandate or attempt to influence the use of RFID, the specific kinds of RFID, or similar remote technology, into state or local identity documents.

Unanimously adopted by NCSL Standing Committee on Communications, Financial Services and Interstate Commerce on April 25, 2008.

Unanimously adopted at Spring Forum Business Meeting on April 26, 2008.



NCSL Letter of Support for S. 717 dated April 4, 2008

Please insert attached PDF file.