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The 9/11 Recommendations Implementation Act (H.R. 10) and the National Intelligence Reform Act of 2004 (S. 2845): National Standards for Drivers' Licenses, Social Security Cards and Birth Certificates

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Summary

In its comprehensive report to the nation, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) recommended that the federal government set national standards for the issuance of identification documents including drivers' licenses, social security cards and birth certificates. The Commission noted that identification fraud is no longer simply a matter of theft, but now complicates the government's ability to adequately ensure public safety at vulnerable facilities including airport terminals, train stations, bus stations, and other entry points. Both the House of Representatives and the Senate have included provisions intended to address this specific recommendation (H.R. 10, S. 2845). However, the approaches taken by the two chambers varies both in their respective scope as well as with respect to the methods used to bring the states into conformity with a new national standard. In general, the House of Representatives opted to detail specific statutory requirements, while the Senate has chosen to mandate regulation, but has given broad discretionary authority to the relevant federal agencies. This report will be updated as events warrant.

Introduction

The 9/11 Commission's final report recommended that "the federal government should set standards for the issuance of birth certificates, and sources of identification, such as drivers' licenses."¹ Specifically noting the rising problem of identification fraud, the Commission concluded that "sources of identification are the last opportunity to

¹ THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES, 390 (2004).

ensure that people are who they say they are and to check whether they are terrorists.”² Currently, the standards for drivers’ licenses and birth certificates are determined on a state-by-state basis with no national standards in place. While states are currently required to obtain social security numbers from drivers’ license applicants for child support collection purposes, it appears that most states do not currently require that the social security number be printed on a driver’s license. However, in those states that still use social security numbers on drivers’ licenses, it appears that an opt-out process is available. Both the House of Representatives³ and the Senate⁴ have adopted legislation designed to establish national standards, however, both chambers differ in their approaches. Generally, the House of Representatives has opted to legislate specific requirements, while the Senate has chosen to mandate regulation, but has provided the appropriate federal agencies broad discretionary authority to address the various concerns identified in the statutory language.

Drivers’ Licenses and Personal Identification Cards

H.R. 10. Section 3052 establishes the minimum document requirements, as well as verification and issuance standards for the acceptance of drivers’ licenses and personal identification cards by federal agencies.⁵ Specifically, each driver’s license or identification card, in order to be accepted for any official purpose by a federal agency, will be required to include the individual’s: (1) full legal name; (2) date of birth; (3) gender; (4) driver’s license or identification card number; (5) digital photograph; (6) address; and (7) signature. In addition, the cards must contain physical security features designed to prevent tampering, counterfeiting or duplication for fraudulent purposes as well as a common machine-readable technology with defined minimum elements.

Prior to issuing a document that conforms with these minimum standards a state would be required to verify with the issuing agency, the issuance, validity and completeness of: (1) a photo identification document or a non-photo document containing both the individual’s full legal name and date of birth; (2) date of birth; (3) proof of a social security number (SSN) or verification of the individual’s ineligibility for a SSN; and (4) name and address of the individual’s principal residence. States could not accept any foreign document, with the exception of an official passport.

Moreover, states would also be required to verify an individual’s legal presence in the United States. Not later than September 11, 2005, states would enter into a memorandum of understanding with the Secretary of Homeland Security to routinely utilize the “Systematic Alien Verification for Entitlements” to verify the legal presence status of a person, other than a U.S. citizen. If an individual falls into one of six

² *Id.*

³ See H.R. 10, 108th Cong. §§ 3051-3060 (2d Sess. 2004).

⁴ See S. 2845, 108th Cong. (2d Sess. 2004).

⁵ Whether this obviates federalism concerns under *Printz v. United States*, 521 U.S. 898 (1997) and subsequent cases, remains to be seen.

categories,⁶ a state may only issue a temporary driver's license or identification card with an expiration date equal to the period of time of the applicant's authorized stay in the United States. If there is an indefinite end to the period of authorized stay, the card's expiration date shall be one year. The temporary card shall clearly indicate that it is temporary and shall state the expiration date. Renewals of the temporary cards shall be done only upon presentation of valid documentary evidence that the status has been extended by the Secretary of Homeland Security.

In instances of renewal, duplication, or reissuance of a driver's license or identification card, a state shall presume that the initial card was issued in accordance with the law, if at the time of application, the driver's license or identification card has not expired or been canceled, suspended or revoked. This presumption would be inapplicable if the state is notified by a local, state or federal government agency that the individual seeking renewal, duplication or reissuance is neither a citizen of the United States nor legally in the United States.

Furthermore, the House bill requires states to adopt procedures and practices to: (1) employ technology to capture digital images of identity source documents; (2) retain paper copies of source documents for a minimum of seven years or images of source documents presented for a minimum of ten years; (3) subject each applicant to a mandatory facial image capture; (4) confirm or verify a renewing applicant's information; (5) confirm with the Social Security Administration a SSN presented by a person using the full social security account number;⁷ (6) refuse issuance of a driver's license or identification card to a person holding a driver's license issued by another state without confirmation that the person is terminating or has terminated the driver's license; (7) ensure the physical security of locations where cards are produced and the security of document materials and papers from which drivers' licenses and identification cards are produced; (8) subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements; (9) establish fraudulent document recognition training programs for appropriate employees engaged in the issuance of drivers' licenses and identification cards.

S. 2845. Like H.R. 10, the Senate bill attempts to establish national standards for federal agency acceptance of drivers' licenses and personal identification cards. However, unlike H.R. 10, the Senate vests the authority to set the minimum standards with the Secretary of Transportation, in consultation with the Secretary of Homeland Security.

⁶ A person would only be eligible for a temporary drivers' license or identification card if evidence is presented that they: (1) have a valid, unexpired non-immigrant visa or non-immigrant visa status for entry into the United States; (2) have a pending or approved application for asylum in the United States; (3) have entered into the United States in refugee status; (4) have a pending or approved application for temporary protected status in the United States; (5) have approved deferred action status; or (6) have a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

⁷ In the event that a SSN is already registered to or associated with another person to which any state has issued a driver's license or identification card, the state shall resolve the discrepancy and take appropriate action.

The Secretary is required, within 18 months of enactment, to establish minimum standards for drivers' licenses or personal identification cards issued by a State for use by federal agencies for identification purposes. The regulations shall include standards for documentation, verification and processing required for drivers' licenses and personal identification cards. In addition, the regulations are to contain security standards to ensure that drivers' licenses and personal identification cards are resistant to tampering, alteration, or counterfeiting, and capable of accommodating and ensuring the security of a digital photograph or other unique identifier. Also, the regulations are to require states to confiscate a driver's license or personal identification card if any component or security feature of the license or identification card is compromised. Finally, the regulations are to contain procedures designed to protect the privacy and civil rights of applicants for drivers' licenses and identification cards. To ensure compliance with these regulations, the Senate language requires the States to certify to the Secretary of Transportation, at intervals to be determined by regulation, that they conform to the legislation's requirements.

The Senate bill also places limitations on the Secretary's regulatory authority. Specifically, the regulations may not infringe on the state's power to set eligibility requirements or to fully enforce those requirements. In addition, the Secretary may not require a single national design for either drivers' licenses or personal identification cards.

In addition to the specific content requirements, the Senate bill mandates that the regulations be promulgated under the negotiated rule-making process of the Administrative Procedure Act.⁸ This process is designed to bring together agency representatives and concerned interest groups to negotiate the text of a proposed rule. In this case, the Senate bill requires that the negotiation group include representatives from the state offices charged with issuing such documents, state elected officials, the Department of Homeland Security, organizations with technological and operational expertise in document security, and organizations that represent applicant interests.

Social Security Numbers

H.R. 10. The House bill makes numerous changes to the Social Security Act⁹ designed to protect the integrity and privacy of social security numbers.¹⁰ The bill specifically prohibits the states or their political subdivisions from displaying, electronically or otherwise, a social security number, (or any derivative of such number) on any driver's license or motor vehicle registration, or on any other document issued by states to an individual for identification.

The House bill also requires the Commissioner of Social Security to promulgate a number of regulations with respect to the system for issuing social security numbers. First, regarding applications for social security numbers by individuals, other than for

⁸ See Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4970 (1990) (codified as amended at 5 U.S.C. § 581 *et seq.*).

⁹ Social Security Act of 1935, Title II, § 205, 49 Stat. 624 (codified as amended at 42 U.S.C. § 401 *et seq.*)

¹⁰ See H.R. 10, 108th Cong. §§ 3071-3076 (2d Sess. 2004).

purposes of enumeration at birth, the Commissioner shall require independent verification of any birth record provided by the applicant in support of the application, and may provide for reasonable exceptions in situations where the Commissioner determines there is minimal opportunity for fraud. Second, the Commissioner is directed to make improvements to the enumeration at birth program for the issuance of social security numbers to newborns. Such improvements shall be designed to prevent the assignment of social security numbers to unnamed children; the issuance of more than one social security number to the same child; and, other opportunities for fraudulently obtaining a social security number. Finally, the House bill requires the Commissioner issue regulations restricting the issuance of multiple replacement social security cards to any individual to 3 per year and to 10 for the life of the individual, except where the Commissioner determines there is a minimal opportunity for fraud.

In addition, the House bill contains a number of provisions requiring the submission to Congress of reports and recommendations including reports to Congress regarding the results of a study and legislative recommendations to test the feasibility and cost effectiveness of verifying all identification documents submitted by an applicant for a replacement social security card; the results of a study and legislative recommendations on the most efficient options for ensuring the integrity of the process for enumeration at birth and; the results of a study and legislative recommendations on the best method of requiring and obtaining photographic identification of applicants for old-age, survivors, and disability insurance benefits, for a social security number, or for a replacement social security card, including reasonable exceptions to any requirement for photographic identification of such applicants.

S. 2845. As was the case with respect to drivers' licenses, the Senate bill takes a different approach with respect to social security numbers. Like the House bill, the Senate bill requires the Commissioner of Social Security to issue regulations restricting the issuance of multiple replacement cards to minimize fraud and requiring independent verification of all records provided by applicants for social security numbers other than at enumeration at birth.

However, unlike the House bill, the Senate requires the Commissioner to add death, fraud, and work authorization indicators to the social security number verification system within 18 months of the legislation's enactment. In addition, the Senate bill provides for the establishment of an interagency task force to further improve the security of social security cards and numbers. Within one year the task force shall establish security requirements for safeguarding social security cards from counterfeiting, tampering, theft and alteration, verifying documents submitted for the issuance of replacement cards, and to increase enforcement against the fraudulent issuance or use of social security numbers and cards. The Senate bill does not appear to amend the Social Security Act, nor does it currently contain any of the study and recommendation provisions included within the House language.

Birth Certificates

H.R. 10. Similar to the driver's license provisions, the House bill establishes minimum document, issuance, and verification standards for federal recognition of birth certificates.¹¹ To meet the minimum document standards the House bill requires state and local governments to use safety paper, a custodian of records seal, and any other measures deemed necessary by the Secretary of Health and Human Services to prevent the tampering, counterfeiting, or unauthorized duplication of a birth certificate. The Secretary may not, however, require a single national design to which all states must conform.

Before issuing a duplicate certificate, a state, to comply with the minimum issuance standards, will be required to verify the name on the birth certificate, the date and location of birth, the mother's maiden name and substantial proof of the requestor's identity. In cases where the requestor is not named on the birth certificate, states will have to require the presentation and verification of legal authorization before issuing a birth certificate. In addition, the House language will require the Secretary to promulgate regulations establishing minimum standards for the issuing of birth certificates to authorized family members.

The House bill will also require states to establish minimum building security standards for both state and local vital records offices, implement other security and privacy protection measures, and establish a central database that can provide interoperative data exchange with other states and federal agencies. In addition, the House bill requires the Secretary to establish a common database and exchange protocol for electronic birth and death registration systems. This system will be required to employ fraud prevention technology, utilize a common electronic system for issuing birth certificates, employ a common format for certified copies, and establish uniform field requirements for state birth registries.

S. 2845. As with standards for drivers' licenses and social security cards, the Senate bill delegates regulatory authority – here, to the Secretary of Health and Human Services to establish minimum standards for birth certificates for use by federal agencies for official purposes. The regulations promulgated by the Secretary are to include certification by the state or local custodian of records, the use of safety paper, custodian's seal, and other features designed to prevent tampering, counterfeiting, or other unauthorized duplications for fraudulent purposes. In addition, the regulations are to establish requirements for both proof and verification of identity, as well as the processing of birth certificate applications to prevent fraud. Moreover, the Secretary is prohibited from requiring that a single national design be used, and is specifically required to accommodate the differences between the states with respect to the manner and form in which birth certificates are stored and produced.

¹¹ See *Printz v. United States*, 521 U.S. 898 (1997).