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Visa Waiver Program

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Summary

The terrorist attacks in Paris in November 2015 and in Belgium in March 2016, which were perpetrated mainly by French and Belgian citizens, have increased focus on the potential security risks posed by the visa waiver program (VWP). The VWP allows nationals from certain countries, many of which are in Europe, to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa from a U.S. consulate abroad. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) officers at a consular post abroad before coming to the United States.

Concerns have been raised about the ability of terrorists to enter the United States under the VWP, because those entering under the VWP undergo a biographic rather than a biometric (i.e., fingerprint) security screening, and do not need to interview with a U.S. government official before embarking to the United States. Nonetheless, it can be argued that the VWP strengthens national security because it sets standards for travel documents, requires information sharing between the member countries and the United States on criminal and security concerns, and mandates reporting of lost and stolen travel documents. In addition, VWP travelers have to present e-passports (i.e., passports with a data chip containing biometric information), which tend to be more difficult to alter than other types of passports.

Furthermore, there is interest in the VWP as a mechanism to promote tourism and commerce. The inclusion of countries in the VWP may help foster positive relations between the United States and those countries, and ease consular office workloads abroad. As of July 2016, there were 38 countries participating in the VWP.

In FY2014, more than 21 million visitors entered the United States under this program, constituting 31% of all overseas visitors. To qualify for the VWP, statute specifies that a country must offer reciprocal privileges to U.S. citizens; have had a nonimmigrant refusal rate of less than 3% for the previous year; issue their nationals machine-readable passports that incorporate biometric identifiers; certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry; report the loss and theft of passports; share specified information regarding nationals of the country who represent a threat to U.S. security; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if an emergency occurs that threatens the United States' security or immigration interests.

All aliens entering under the VWP must present passports that contain electronic data chips (e-passports). Under DHS regulations, travelers who seek to enter the United States through the VWP are subject to the biometric requirements of the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. In addition, aliens entering under the VWP must get an approval from the Electronic System for Travel Authorization (ESTA), a web-based system that checks the alien's information against relevant law enforcement and security databases, before they can board a plane to the United States. ESTA became operational for all VWP countries on January 12, 2009.

Under statute, the Secretary of the Department of Homeland Security (DHS) has the authority to waive the nonimmigrant refusal rate requirement, provided certain conditions are met. The waiver became available in October 2008. In 2008, eight countries were added to the VWP who needed the nonimmigrant refusal rate waiver to be part of the program. However, the waiver authority was suspended on July 1, 2009, because DHS had not implemented an air-exit system that

incorporates biometric identifiers. The waiver will not be available until such a system is implemented, and it is unknown when and if a biometric exit system will be implemented. There are countries (e.g., Israel, Poland, Romania) that have expressed interest in being a part of the VWP who would need a waiver of the nonimmigrant refusal rate.

On December 8, 2015, the House passed H.R. 158, the Visa Waiver Program Improvement and Terrorist Travel Prevention Act. The bill was enacted as part of the FY2016 Consolidated Appropriations Act (P.L. 114-113), which was signed into law on December 18, 2015. The act makes numerous changes to the VWP, including, with some exceptions, prohibiting those who have traveled to Syria, Iraq, and certain other countries since March 2011 from entering the United States under the VWP. In addition, under the act, dual nationals of VWP countries and Syria, Iraq, and certain other countries, with possible exceptions, are also prohibited from traveling to the United States under the VWP. Moreover, P.L. 114-113 changes the information-sharing requirements for countries to participate in the VWP program. Some of the changes to the VWP made by P.L. 114-113 have raised concerns about discrimination based on national origin or family heritage. Two bills introduced after the passage of P.L. 114-113, H.R. 4380 and S. 2449, would remove the new prohibitions on certain dual nationals traveling under the VWP.

Other legislation has been introduced in the 114th Congress that would reinstate the nonimmigrant refusal rate waiver authority and make other changes to the VWP, such as allowing DHS to use overstay rates to determine program eligibility (H.R. 1401/H.R. 2686/S. 1507/S. 2091). There are also introduced bills that would change some of the program requirements to augment the security features of the program (e.g., H.R. 4122 and S. 2337). Another proposal (H.R. 2116) would create a new visa waiver program for the U.S. Virgin Islands, and allow Poland to be added to the VWP without meeting the program's requirements.

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Recent Developments

On December 8, 2015, the House passed H.R. 158, the Visa Waiver Program Improvement Act of 2015, by a vote of 407 to 19. H.R. 158, as passed by the House, was included in the FY2016 Consolidated Appropriations Act (P.L. 114-113), which was signed into law on December 18, 2015. Among other things, the act changed who can travel under the VWP. The VWP provisions of the act are discussed in detail in "Legislation in the 114th Congress."

Previously, on November 30, 2015, the Obama Administration announced several new enhancements to the VWP meant to increase the security of the program. The changes included modifying the Electronic System for Travel Authorization (ESTA) to capture information regarding past travel to countries "constituting a terrorist safe haven," as well as requiring reports from the Departments of Homeland Security and Justice to the President on topics ranging from information sharing with VWP countries, to identification of VWP countries who are "deficient in key areas of cooperation," to the delineation of possible pilot programs to collect and use biometric data on VWP travelers. In addition, the Administration will offer assistance to countries to facilitate information sharing and countering terrorist travel. (For a full discussion of the November 30 press release, see "Administration Initiated VWP Security Enhancements.")

Introduction

The Visa Waiver Program allows nationals from certain countries, many of which are in Europe, to enter the United States as temporary visitors for business or pleasure without first obtaining a visa from a U.S. consulate abroad. Temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) officers at a consular post abroad before coming to the United States.

The terrorist attacks in France and Belgium, and the possible threats posed by VWP-country citizens who have radicalized,[1] have increased congressional focus on the program.[2] While there tends to be agreement that the VWP benefits the U.S. economy by facilitating legitimate travel, there is disagreement on the VWP's impact on national security.[3] Proponents of the program say the VWP strengthens U.S. national security because it sets standards for travel documents, requires information sharing between the member countries and the United States on criminal and security concerns, and mandates reporting of lost and stolen travel documents.[4] Critics of the program argue the VWP could create a security loophole because VWP travelers do not undergo the screening traditionally required to receive a visa.[5]

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[1] For information on the Islamic State and foreign fighters, see CRS Report R43612, *The Islamic State and U.S. Policy*, by Christopher M. Blanchard and Carla E. Humud; and CRS Insight IN10209, *European Security and Islamist Terrorism*, by Kristin Archick and Paul Belkin.

[2] For example, see U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *One Flight Away: An Examination of the Threat Posed by ISIS Terrorists with Western Passports*, 113th Cong., 2nd sess., September 10, 2014; and Jerry Markon, "Visa Waivers Under Scrutiny on Hill," *The Washington Post*, January 28, 2015, p. A2.

[3] CRS Insight IN10246, *Balancing Tourism Against Terrorism: The Visa Waiver Program*, by Michaela D. Platzer and Alison Siskin, available to congressional clients upon request.

[4] For an example of this argument, see David Inserra and Riley Walters, *The Visa Waiver Program: Enhancing Security, Promoting Prosperity*, The Heritage Foundation, Issue Brief #4273, Washington, DC, September 16, 2014, http://www.heritage.org/research/reports/2014/09/the-visa-waiver-program-enhancing-security-promoting-prosperity.

[5] For an example of this argument, see Amanda Vicinanzo, *Visa Waiver Program Faces Scrutiny After Paris Terrorist*

Current Policy

In general, temporary foreign visitors for business or pleasure from most countries must obtain a "B" nonimmigrant visa[6] from DOS officers at a consular post abroad before coming to the United States.[7] Personal interviews are generally required, and consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. In addition to indicating the outcome of any prior visa application of the alien in the CCD, the system links with other databases to flag problems that may make the alien ineligible for a visa under the "grounds for inadmissibility" of the Immigration and Nationality Act (INA), which include criminal, terrorist, and public health grounds for exclusion. Consular officers are required to check the background of all aliens in the "lookout" databases, including the Consular Lookout and Support System (CLASS) and TIPOFF databases.[8]

Under the VWP, the Secretary of Homeland Security,[9] in consultation with the Secretary of State, may waive the "B" nonimmigrant visa requirement for most aliens traveling from certain countries as temporary visitors for business or pleasure (tourists). Eligible nationals from participating countries must use the web-based Electronic System for Travel Authorization (ESTA)[10] to get an approved electronic travel authorization before embarking to the United States, and are admitted into the United States for up to 90 days. The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa. As of May 2016, there were 38 countries participating in the VWP.[11]

Prior to enactment in December 2015 of the Visa Waiver Improvement and Terrorist Travel Prevention Act (P.L. 114-113),[12] all nationals from a VWP country were eligible to travel under the program—provided they received an ESTA approval. P.L. 114-113 changed eligibility for the VWP by prohibiting people who were present in certain countries since March 1, 2011, with limited exceptions, from traveling under the VWP. The specified countries include

- Iraq and Syria,

Attacks, Homeland Security Today, Washington, DC, January 16, 2015, http://www.hstoday.us/briefings/daily-news-analysis/single-article/visa-waiver-program-faces-scrutiny-after-paris-terrorist-attacks/701acf36132277d82b9a3898586baba6.html.

[6] "B" visa refers to the subparagraph in the Immigration and Nationalization Act (INA §101(a)(15)(B)).

[7] To obtain a nonimmigrant visa, individuals submit written applications and undergo interviews and background checks. For more information on temporary admissions, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[8] For more information on visa issuances, see CRS Report RL31512, *Visa Issuances: Policy, Issues, and Legislation*, by Ruth Ellen Wasem.

[9] The Secretary of Homeland Security administers the VWP program. Section 402 of the Homeland Security Act of 2002 (HSA; P.L. 107-296), signed into law on November 25, 2002, states: "The Secretary [of Homeland Security], acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: ... (4) Establishing and administering rules, ... governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States."

[10] ESTA became operational for all VWP countries on January 12, 2009.

[11] Chile was designated a VWP country on February 28, 2014.

[12] P.L. 114-113 was signed into law on December 18, 2015.

- any country designated by the Secretary of State as having repeatedly provided support for acts of international terrorism under any provision of law,[13] or
- any other country or area of concern deemed appropriate by the Secretary of DHS.[14]

Currently, the prohibition affects those who were present in any of the following countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The statutory exceptions from this restriction apply to foreign nationals who were in one of the specified countries in order to perform military service in the armed forces of a VWP country, or to perform official duties as an employee of the VWP country. In addition, the Administration has stated that waivers are to be granted on a case-by-case basis, but that the following are general categories of travelers to these countries who may be eligible for a waiver: (1) individuals who traveled on behalf of international organizations, regional organizations, and sub-national governments on official duty; (2) individuals who traveled on behalf of a humanitarian non-governmental organization (NGO) on official duty; (3) individuals who traveled as journalists for reporting purposes; (4) individuals who traveled to Iran for legitimate business-related purposes following the conclusion of the Joint Comprehensive Plan of Action (July 14, 2015);[15] and (5) individuals who have travel to Iraq for legitimate business-related purposes.[16]

In addition, anyone who is a dual national of a VWP country and one of these specified countries is ineligible to travel under the VWP. As with the prohibition against using the VWP for those who were present in certain countries, the Secretary of DHS has the authority to waive the prohibition on travel under the VWP by certain dual nationals if the Secretary of DHS determines that the waiver would be in the law enforcement or national security interests of the United States. As of the date of this report, DHS has not released any guidance on waivers for dual nationals.[17]

[13] Examples of acts that use the term "repeatedly provided support for acts of international terrorism," include §6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405), §40 of the Arms Export Control Act (22 U.S.C. 2780), and §620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371). Currently, these countries are Iran, Sudan, and Syria.

[14] The criteria to make the determination would include whether the presence of a foreign national in that area or country increases the likelihood that the foreign national is a credible threat to U.S. national security, whether a foreign terrorist organization has a significant presence in the area or country, and whether the country or area is a safe haven for terrorists. DHS has designated Libya, Somalia, and Yemen as "countries or areas of concern."

[15] On July 14, 2015, Iran and the six powers that have negotiated with Iran about its nuclear program since 2006 (the United States, the United Kingdom, France, Russia, China, and Germany) finalized a Joint Comprehensive Plan of Action (JCPOA). The JCPOA is intended to ensure that Iran's nuclear program can be used for purely peaceful purposes, in exchange for a broad lifting of U.S., European Union (EU), and United Nations (U.N.) sanctions on Iran. For more on the JCPOA, see CRS Report R43333, *Iran Nuclear Agreement*, by Kenneth Katzman and Paul K. Kerr.

[16] There is no separate application for a waiver. A foreign national's eligibility for a waiver is determined during the ESTA application process. U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions*, https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq, accessed July 20, 2016.

[17] For a discussion of some of the issues surrounding implementing the dual national provision, see Nahal Toosi, "Obama Aides Vexed by Visa Crackdown," *Politico*, April 12, 2016, Europe Edition, http://www.politico.eu/article/obama-aides-vexed-by-visa-crackdown/.

Visa Waiver Program Countries (as of July 2016)

Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Malta, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, and the United Kingdom.

Although the VWP eases the documentary requirements for certain nationals from participating countries, it has important restrictions. Aliens entering with a B visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status.[18] Aliens entering through the VWP are not permitted to extend their stays except for emergency reasons and then for only 30 days.[19] Additionally, with some limited exceptions, aliens entering through VWP are not permitted to adjust their immigration status. An alien entering through the VWP who violates the terms of admission becomes deportable without any judicial recourse or review (except in asylum cases).[20]

VWP Qualifying Criteria

Currently, to qualify for the VWP a country must

- offer reciprocal privileges to United States citizens;
- have had a nonimmigrant refusal rate of less than 3% for the previous year or an average of no more than 2% over the past two fiscal years with neither year going above 2.5%;
- certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier (on April 1, 2016, all passports presented by aliens entering under the VWP were required to be machine-readable and contain a biometric identifier [i.e., e-passports]);[21]
- certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry;

[18] Noncitizens entering on B visas may be admitted for six months, and may apply to extend their stay for another six months.

[19] This provision was amended by P.L. 106-406 to provide extended voluntary departure to nonimmigrants who enter under the VWP and require medical treatment.

[20] Foreign nationals seeking asylum must demonstrate a well-founded fear that if returned home they will be persecuted based on one of five characteristics: race, religion, nationality, membership in a particular social group, or political opinion. For more on asylum, see CRS Report R41753, *Asylum and "Credible Fear" Issues in U.S. Immigration Policy*, by Ruth Ellen Wasem.

[21] Prior to the enactment of P.L. 114-113 only passports issued after October 26, 2006, that were presented by aliens entering under the VWP had to be machine-readable and contain a biometric identifier. In August 2015, the Secretary of Homeland Security announced that to increase security of the VWP all travelers under the program would have to use an e-passport, but the requirement had not been put into effect before the enactment of P.L. 114-113. Department of Homeland Security, "Statement by Secretary Jeh C. Johnson on Intention to Implement Security Enhancements to the Visa Waiver Program," press release, August 6, 2015, https://www.dhs.gov/news/2015/08/06/statement-secretary-jeh-c-johnson-intention-implement-security-enhancements-visa; and telephone conversation with DHS Office of Legislative Affairs, November 3, 2015.

- no later than October 1, 2016, certify that it has in place mechanisms to validate machine-readable passports and e-passports at each port of entry;[22]
- enter into an agreement with the United States to report or make available through the International Criminal Police Organization (INTERPOL)[23] information about the theft or loss of passports no later than 24 hours after a theft or loss is reported to the VWP country;[24]
- certify, to the maximum extent allowed under the laws of the country, that it is screening each foreign national who is admitted to or departs from that country, using relevant INTERPOL databases and notices, or other means designated by the Secretary of DHS (this requirement goes into effect 270 days after December 18, 2015, and only applies to countries that have an international airport);[25]
- accept the repatriation of any citizen, former citizen, or national against whom a final order of removal is issued no later than three weeks after the order is issued;
- enter into and *fully implement*[26] an agreement with the United States to share information regarding whether a national of that country traveling to the United States represents a threat to U.S. security or welfare; and
- be determined, by the Secretary of Homeland Security, in consultation with the Secretary of State, not to compromise the law enforcement or security interests of the United States by its inclusion in the program.

The Secretary of DHS, in consultation with the Secretary of State, can suspend a program country based on a determination that the country presents a "high risk" to U.S. national security.[27] In addition, countries can be immediately terminated from the VWP if an emergency occurs in the country that the Secretary of Homeland Security in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.[28] For example,

[22] This requirement was added by P.L. 114-113, and does not apply to travel between countries within the Schengen Area. The Schengen Area enables citizens of the European Union (EU), as well as many non-EU nationals, to cross select international borders in Europe without being subject to border checks. See European Commission, *Migration and Home Affairs: Schengen Area*, November 13, 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm.

[23] Although statute discusses sharing information on lost and stolen passports, the INTERPOL database includes other types of travel documents such as identity documents and visas. INTERPOL is the world's largest international police organization, with 188 member countries. For more information on INTERPOL see, http://www.interpol.int/public/icpo/default.asp.

[24] P.L. 114-113 added the requirement that the reporting occur within 24 hours of the country being notified about the lost/stolen passport.

[25] This screening requirement was added by P.L. 114-113, and does not apply to those traveling between countries within the Schengen Area.

[26] The requirement to implement the agreement was added by the Visa Waiver Improvement and Terrorist Travel Prevention Act of 2015 (P.L. 114-113), enacted on December 18, 2015.

[27] The criteria to determine whether a country poses a "high risk" to national security include the number of nationals determined to be ineligible to travel to the United States under the VWP during the previous year; the number of nationals who were identified in U.S. government terrorism databases during the previous year, the estimated number of nationals who traveled to Iraq or Syria since March 1, 2011, to engage in terrorism; the country's capacity to combat passport fraud; the level of cooperation with U.S. counter-terrorism efforts; the adequacy of the country's border and immigration controls; and any other criteria determined by the Secretary of DHS.

[28] An emergency is defined as (1) the overthrow of a democratically elected government; (2) war; (3) a severe breakdown in law and order in the country; (4) a severe economic collapse; and (5) any other extraordinary event in the program country where that country's participation could threaten the law enforcement or security interests of the United States. INA §217(c)(5)(B).

because of Argentina's economic collapse in December 2001,[29] and the increase in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission,[30] that country was removed from the VWP in February 2002.[31] Similarly, on April 15, 2003, Uruguay was terminated from the VWP because Uruguay's participation in the VWP was determined to be inconsistent with the U.S. interest in enforcing immigration laws.[32] No country has been removed from the VWP since 2003.

Additionally, there is a probationary status for VWP countries that do not maintain a low disqualification rate. Countries on probation are determined by a formula based on a disqualification rate of 2% to 3.5%.[33] Probationary countries with a disqualification rate less than 2% over a period not to exceed three years may remain VWP countries.[34] Countries may also be placed on probation if more time is necessary to determine whether the continued participation of the country in the VWP is in the security interest of the United States. For example, in April 2003, Belgium was placed on provisional status because of concerns about the integrity of non-machine-readable Belgian passports and the reporting of lost or stolen passports.[35] DHS completed another country review of Belgium in 2005, and removed the country from probationary status. Belgium was the last country that was placed on probation.

Nonimmigrant Refusal Rate Waiver

Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53)[36] allows the Secretary of DHS, in consultation with the Secretary of DOS, to waive the nonimmigrant refusal rate requirement for admission to the VWP after the Secretary of DHS certifies to Congress that

[29] Beginning in December 2001, Argentina experienced a serious economic crisis, including defaulting on loans by foreign creditors, devaluation of its currency, and increased levels of unemployment and poverty. For more information on the financial collapse in Argentina see CRS Report RS21072, *The Financial Crisis in Argentina*, by J. F. Hornbeck.

[30] In addition, many Argentine nationals were trying to use the VWP to obtain entry to the United States solely for the purpose of proceeding to the Canadian border and pursuing an asylum claim in Canada. According to Citizenship and Immigration Canada, between 1999 and 2001, more than 2,500 Argentines filed refugee claims in Canada after transiting the United States under the VWP. *Federal Register*, February 21, 2002, vol. 67, no. 35, p. 7944.

[31] While the number of Argentine nonimmigrant travelers to the United States declined between 1998 and 2000, the number of Argentines denied admission at the border and the number of interior apprehensions increased. The Department of Justice (DOJ) in consultation with DOS determined that Argentina's participation in the VWP was inconsistent with the United States' interest in enforcing its immigration laws. (The Department of Homeland Security did not exist in February 2002, and authority for the VWP resided with the Attorney General in the DOJ.) *Federal Register*, February 21, 2002, vol. 67, no. 35, pp. 7943-7945.

[32] Between 2000 and 2003, Uruguay experienced a recession causing its citizens to enter under the VWP to live and work illegally in the United States. In 2002, Uruguayan nationals were two to three times more likely than all nonimmigrants on average to have been denied admission at the border. Uruguayan air arrivals had an apparent overstay rate more than twice the rate of the average apparent overstay rate for all air arrival nonimmigrants. *Federal Register*, March 7, 2003, vol. 68, no. 45, pp. 10954-10957.

[33] "Disqualification rate" is defined as the percentage of nationals from a country who applied for admission as a nonimmigrant who either violated the terms of the nonimmigrant visa, who were excluded from admission or who withdrew their application for admission as a nonimmigrant.

[34] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

[35] *Federal Register*, March 7, 2003, vol. 68, no. 45, pp. 10954-10957.

[36] P.L. 110-53 (H.R. 1), signed into law on August 3, 2007. For more details on the changes to the VWP in this act, see **Appendix**, "Legislative History."

- an air exit system is in place that can verify the departure of not less than 97% of foreign nationals that exit through U.S. airports,[37] and
- the electronic travel authorization system (ESTA discussed below) is operational.[38]

The waiver became available in October 2008, and was suspended on July 1, 2009. Under statute, the Secretary of DHS's authority to waive the nonimmigrant refusal rate is suspended until the air exit system is able to match an alien's biometric information with relevant watchlists and manifest information. It is unclear when DHS will implement an exit system with the specified biometric capacity.[39]

To participate in the program, a country that receives a refusal rate waiver also has to

- meet all the security requirements of the program;
- be determined by the Secretary of DHS to have a totality of security risk mitigation measures that provide assurances that the country's participation in the program would not compromise U.S. law enforcement and security interests, or the enforcement of U.S. immigration laws;
- have had a sustained reduction in visa refusal rates, and have existing conditions for the rates to continue to decline;
- have cooperated with the United States on counterterrorism initiatives and information sharing before the date of its designation, and be expected to continue such cooperation; and
- have had, during the previous fiscal year, a nonimmigrant visas refusal rate of less than 10%, or an overstay rate that did not exceed the maximum overstay rate established by the Secretaries of DHS and DOS for countries receiving waivers of the nonimmigrant refusal rate to participate in the program.

P.L. 110-53 also specified that in determining whether to waive the nonimmigrant refusal rate requirement, the Secretary of DHS, in consultation with the Secretary of DOS, may take into consideration other factors affecting U.S. security, such as the country's airport security and passport standards, whether the country has an effective air marshal program, and the estimated overstay rate for nationals from the country.

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[37] There was disagreement between some critics and DHS regarding exactly what needed to be verified. Some contend that Congressional intent was to have a functional entry-exit system that would be able to match arrival and departure records and know which aliens failed to depart from the United States rather than just matching the entry records with the records of those who were known to have departed from the United States. For example, see S. 203 introduced in the 111th Congress, which attempted to clarify the language in this provision. U.S. Congress, Senate Committee on Judiciary, Subcommittee on Terrorism, Technology and Homeland Security, *The Visa Waiver Program: Mitigating Risks to Ensure Safety to All Americans*, 110th Cong., 2nd sess., September 24, 2008.

[38] DHS determined that the law permitted it to utilize the waiver when ESTA was functional but before it was mandatory for all VWP travelers. Critics did not agree with this interpretation and thought that ESTA should have been mandatory for all VWP travelers before new countries were admitted to the program. When the new countries entered the program, their citizens were required to use ESTA before travelling to the United States. U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, GAO-08-967, September 2008. *(Hereafter GAO, Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks.)*

[39] See for example, Roy Beck, "Why is the Biometric Exit Tracking System Still Not in Place?," *The Hill* , January 20, 2016; and Bipartisan Policy Center, *Entry-Exit System: Progress, Challenges, and Outlook*, Staff Report, Washington , DC, May 6, 2014.

Electronic System for Travel Authorization (ESTA)

As previously mentioned, P.L. 110-53 mandated that the Secretary of DHS, in consultation with the Secretary of DOS, develop and implement an electronic travel authorization system through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the alien is eligible to travel to the United States and enter under the VWP. The system as implemented is known as the Electronic System for Travel Authorization (ESTA), and became fully operational for all VWP visitors traveling to the United States by airplane or cruise ship on January 12, 2009.[40] There is a $14 fee for travelers who use ESTA.[41]

In advance of departing for the United States by airplane or cruise ship,[42] aliens traveling under the VWP are required to use ESTA to electronically provide biographical information to make the eligibility determinations.[43] ESTA alerts the alien that he or she has been approved to travel, and if not approved the alien needs to obtain a visa prior to coming to the United States.[44] The information required by ESTA includes

- **biographical information** including name, birth date, country of citizenship, other citizenships (i.e., dual citizenship), previous citizenships, country of residence, telephone number, other names/aliases, parents' names, national identification number (if applicable), employment information (if applicable), city of birth;[45]
- **passport information** including number, issuing country, issuance date, and expiration date; and
- **travel information** including departure city, flight number, U.S. contact information, and address while in the United States.[46]

[40] Entrants under the VWP from VWP countries that receive a waiver of the nonimmigrant refusal rate (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, and South Korea) had to use the system starting on the date of their formal admission to the program. For all the countries except Malta, that date was November 17, 2008. Malta was formally admitted to the VWP on December 30, 2008. Department of Homeland Security, "Electronic System for Travel Authorization (ESTA) Advisory Statement," November 6, 2008. Department of Homeland Security, "Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program," 73 *Federal Register* 67354, November 13, 2008.

[41] The fee was instituted on September 8, 2010. The $14 fee includes $4 to cover the costs of administering ESTA and $10 for the travel promotion fee established by Congress in the Travel Promotion Act of 2009 (§9 of P.L. 111-145), and extended by Title VI of P.L. 113-235. The travel promotion fee is set to sunset on September 30, 2020. Department of Homeland Security, Customs and Border Protection, "DHS, CBP Announce Interim Final Rule For ESTA Fee," press release, August 6, 2010.

[42] Prior to the implementation of ESTA, the first time a foreign national traveling to the United States under the VWP was screened was at the airport after the foreign national checked in for the flight.

[43] A person is not required to apply for their own travel authorization under ESTA. Friends, relatives, personnel in the travel industry, and other third parties may apply for the traveler.

[44] In most cases, the approval process is almost instantaneous. Under statute, ESTA determinations are not reviewable by the courts.

[45] In November 2014, DHS added new questions to ESTA in response to security concerns. Department of Homeland Security, Customs and Border Protection, *ESTA - New questions to the ESTA application*, CBP INFO Center, Washington, DC, November 3, 2014, https://help.cbp.gov/app/answers/detail/a_id/1756/~/esta—new-questions-to-the-esta-application. Although the administration was already asking the questions, P.L. 114-113 statutorily added the requirement that nationals be queried about multiple and previous citizenships.

[46] Much of the information is the same that was required on the I-94W form. According to DHS, when developing ESTA, the department had to balance the need for biographic information with the requirement that the participating countries did not view applying for an approval under ESTA as equivalent to applying for a visa. If countries had interpreted applying for an authorization under ESTA as having the same burden as applying for a visa, these countries

ESTA also screens applicant responses to the same VWP eligibility questions that were collected on the Form I-94W, which aliens arriving in the United States under the VWP were required to complete to be admitted.[47] The I-94W form became automated in 2013 and is no longer used.[48]

Eligibility to travel, which is determined by ESTA, is valid for two years or until the person's passport expires.[49] However, the Secretary of DHS has the authority to shorten the validity period of any ESTA determination, or revoke the determination at any time.[50] An ESTA approval is valid for multiple entries, and can be revoked or have the validity period shortened at any time for any reason. Notably, a determination under ESTA that an alien is eligible to travel to the United States does not constitute a determination that the alien is admissible. Admissibility determinations are made by Customs and Border Protection (CBP) inspectors at the ports of entry.

In addition, P.L. 114-113 requires the Secretary of DHS to research developments to incorporate into ESTA technology to detect and prevent fraud or deception.

Arrival and Departure Inspections

Unlike other nonimmigrants, those entering under the VWP do not have to get a visa and thus, have no contact with U.S. governmental officials until they arrive at a port of entry and are inspected by CBP officers. Nonetheless, in addition to getting authorization through ESTA, prior to the alien's arrival, an electronic passenger manifest is sent from the airline or commercial vessel to CBP officials at the port of entry which is checked against security databases.

Since October 1, 2002, passenger arrival and departure information on individuals entering and leaving the United States under the VWP has been electronically collected from airlines and cruise lines, through CBP's Advanced Passenger Information System (APIS) system. If the carrier fails to submit the information, an alien may not enter under the VWP. APIS sends the data to the DHS's Immigration and Customs Enforcement's (ICE's) Arrival and Departure Information System (ADIS) for matching arrivals and departures and reporting purposes. APIS collects carrier information such as flight number, airport of departure, and other data.

At ports of entry, CBP officers observe and question applicants, examine passports, and conduct checks against a computerized system to determine whether the applicant is admissible to the United States.[51] Primary inspection consists of a brief interview with a CBP officer, a cursory check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS),[52] and entry of the traveler into the United States Visitor and Immigrant Status Indicator

might have required that U.S. citizens traveling to their countries obtain a visa.

[47] These eligibility questions pertain to whether the alien would be inadmissible on health, criminal, or terrorist grounds, or because the alien had previously violated immigration law (e.g., been deported). Other eligibility questions include whether the alien has: (1) violated a child custody agreement with a U.S. citizen; (2) previously been denied a visa to travel to the United States; and (3) asserted immunity from prosecution.

[48] It was the intention that ESTA would eventually replace the paper I-94W form. Department of Homeland Security, "Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program," *Federal Register*, June 9, 2008, vol. 73, no. 11, pp. 32440-32453. Department of Homeland Security, Customs and Boarder Protection, "Definition of Form I-94 to Include Electronic Format," 78 *Federal Register* 18457, March 27, 2013.

[49] Under statute, the maximum period of time is set in regulation by the Secretary of DHS, but cannot exceed three years.

[50] The provision giving the Secretary the authority to issue a shorten ESTA validity period was enacted as part of P.L. 114-113.

[51] All VWP applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

[52] ADIS feeds information to the Interagency Border Inspection System (IBIS). IBIS is a database of suspect

Technology (US-VISIT) system. The US-VISIT system uses biographical (e.g., passport information) and biometric identification (finger scans and digital photographs) to check identity.[53] Officers at the border collect the following information on aliens entering under the VWP: name, date of birth, nationality, gender, passport number, country of issuance, a digital photograph, and prints for both index finders. Primary inspections are quick (usually lasting no longer than a minute); however, if the CBP officer is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. Those travelers sent to secondary inspections are questioned extensively, travel documents are further examined, and additional databases are queried.[54]

Additionally, the Implementing Recommendations of the 9/11 Commission Act (P.L. 110-53) required that the Secretary of DHS, no later than one year after enactment (i.e., by August 3, 2008), establish an exit system that records the departure of every alien who entered under the VWP and left the United States by air. The exit system is required to match the alien's biometric information against relevant watch lists and immigration information, and compare such biographical information against manifest information collected by airlines to confirm that the alien left the United States.

In April 2008, DHS published a Notice of Proposed Rulemaking in the *Federal Register* that would have created biometric exit procedures at airports and seaports for international visitors.[55] DHS was expected to publish the final rule for this system by October 15, 2008.[56] However, in legislation that became law on September 30, 2008,[57] Congress required DHS to complete and report on at least two pilots testing biometric exit procedures at airports.[58] DHS completed the pilot programs, but according to the Government Accountability Office (GAO), "DHS cannot reliably commit to when and how the work will be accomplished to deliver a comprehensive exit solution to its almost 300 ports of entry."[59] In what some view as the first step in implementing an exit system, in December 2011 DHS announced an agreement with Canada to share entry records so that an entry into Canada along the land border would be counted as an exit in U.S. records.[60]

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individuals, businesses, vehicles, aircraft, and vessels that is used during inspections at the border. IBIS interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAILS), Non-immigrant Information System (NIIS), CLASS and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as whether an alien is admissible, an alien's criminal information, and whether an alien is wanted by law enforcement. Department of Homeland Security, Customs and Border Protection, *IBIS- General Information*, Washington, DC, July, 31, 2013; https://help.cbp.gov/app/answers/detail/a_id/151/kw/ibis%20fact%20sheet/session/L3RpbWUvMTM5MTAyMTM4NC9zaWQvci04amVDTGw%3D/suggested/1.

[53] For more information on US-VISIT, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*, by Lisa Seghetti.

[54] For more information on the screening process, see CRS Report R43589, *Immigration: Visa Security Policies*, by Ruth Ellen Wasem.

[55] Department of Homeland Security, "Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure," 73 *Federal Register* 22065, April 24, 2008.

[56] Personal conversation with Department of Homeland Security Congressional Affairs, September 22, 2008.

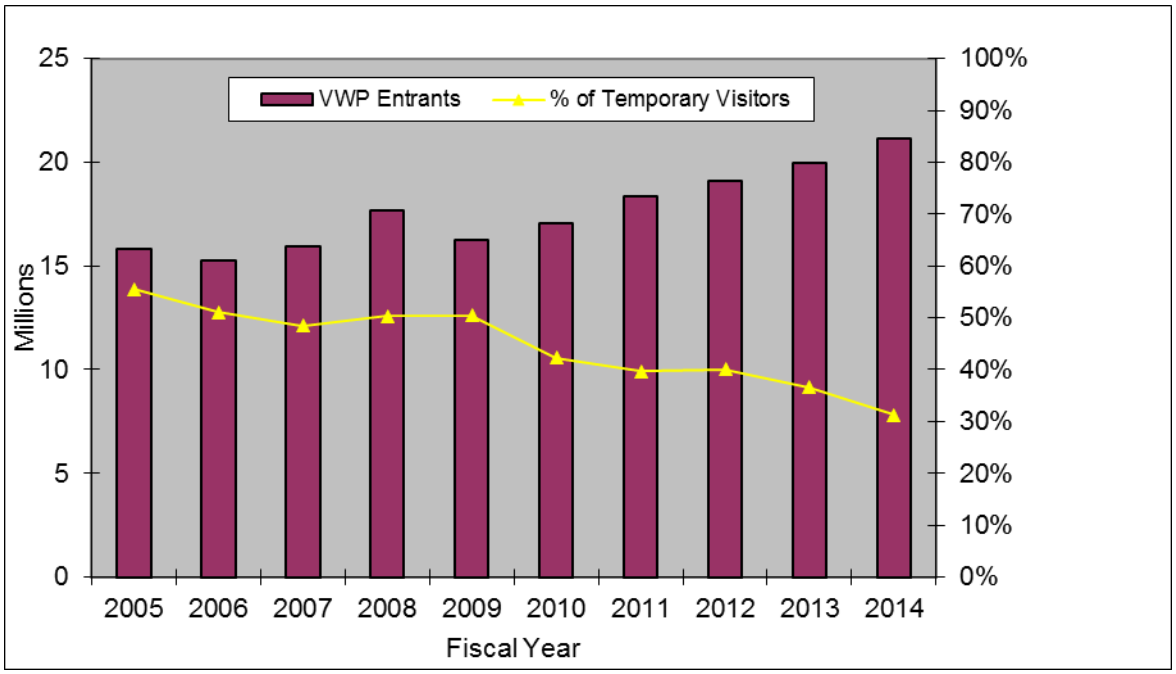
[57] P.L. 110-329.

[58] One pilot tested DHS's recommended solution that carriers collect biometrics from passengers; the other pilot tested CBP officers collecting passenger biometrics at the boarding gate.

[59] U.S. Government Accountability Office, *Homeland Security: Key US-VISIT Components at Varying Stages of Completion, but Integrated and Reliable Schedule Needed*, GAO-10-13, November 19, 2009, p. 1.

[60] Testimony of David F. Heyman, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Next Steps for the Visa Waiver Program*, 112th Cong., 1st sess., December 7, 2011. For more on this agreement, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*, by Lisa Seghetti.

Figure 1. Number of Entrants under the VWP for FY2005-FY2014, and Percentage of Visitor Entrants Who Entered under the VWP



Source: CRS analysis of data from Department of Homeland Security, *Yearbook of Immigration Statistics, FY2014*; Table 25.

Note: Number of countries participating in the VWP at the end of the fiscal year: FY2001, 29; FY2002, 28; FY2003-FY2008, 27; FY2009, 35; FY2010-FY2012, 36; FY2013, 37; FY2014, 38. Visitor entrants are temporary visitors and include aliens who entered with B visas, those who entered under the Guam Visa Waiver Program, and those who entered under the VWP.

Trends in Use of the VWP

Figure 1 shows the number of entrants under the VWP, and VWP entrants as a percentage of all temporary visitors.[61] Since FY2009, the number of entrants under the VWP has steadily increased. In FY2014, over 21 million people entered under the VWP, the largest number of people ever to enter under the program. However, since FY2009, the proportion of total visitors represented by VWP entrants has continuously declined. In FY2014, visitors entering under the VWP constituted 31% of all temporary visitors, the smallest percentage in more than 20 years.[62]

Policy Issues

The terrorist attacks in Europe in 2015 and 2016, and the possible threats posed by VWP country citizens who have radicalized and may have returned from fighting in the Middle East for terrorist

[61] Temporary visitors include aliens who entered with B visas, those who entered under the Guam Visa Waiver Program, and those who entered under the VWP.

[62] In FY2014, there were 67.5 million people who entered as temporary visitors, more than tripled the number since 1995. Department of Homeland Security, Office of Immigration Statistics, *Yearbook of Immigration Statistics*, multiple years.

groups such as the Islamic State,[63] have increased congressional focus on the benefits of and risks posed by the visa waiver program.[64] The VWP is supported by the U.S. travel and tourism industry, the business community, and DOS. The travel and tourism industry views the VWP as a tool to facilitate and encourage foreign visitors for business and pleasure, which results in increased economic growth generated by foreign tourism and commerce for the United States.[65] DOS argues that by waiving the visa requirement for high-volume/low-risk countries, consular workloads are significantly reduced, allowing for streamlined operations, cost savings, and concentration of resources on greater-risk nations in the visa process.[66] Additionally, it is unclear that DOS has the resources to issue B visas to all the visitors from VWP countries.[67]

While there tends to be agreement that the VWP benefits the U.S. economy by facilitating legitimate travel, there is disagreement on the VWP's impact on national security, with some arguing that the VWP presents a significant security risk. In addition, since terrorism does not have national boundaries, critics of the program contend that the VWP should not be based on particular countries, but should allow visa-free travel for low-risk individuals (e.g., a trusted traveler program).[68] Furthermore, while the program has reduced the consular workload in program countries since the officers do not have to issue as many B visas, it has increased the workload of immigration inspectors at ports of entry by shifting the noncitizen's first encounter with a U.S. official to ports of entry.

Security

There is significant debate about whether the VWP increases or decreases national security. As discussed, travelers under the VWP do not undergo the screening traditionally required to receive a B nonimmigrant visa. While the ESTA system has increased the security of the VWP, it is a name-based system and cannot be used to run checks against databases that use biometrics such as DHS's Automated Biometric Identification System (IDENT) and FBI's Integrated Automated Fingerprint Identification System (IAFIS).[69] (Travelers are checked against these systems through

[63] For information on the Islamic State and foreign fighters, see CRS Report R43612, *The Islamic State and U.S. Policy*, by Christopher M. Blanchard and Carla E. Humud; and CRS Insight IN10209, *European Security and Islamist Terrorism*, by Kristin Archick and Paul Belkin.

[64] For example, see U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *One Flight Away: An Examination of the Threat Posed by ISIS Terrorists with Western Passports*, 113th Cong., 2nd sess., September 10, 2014; and Jerry Markon, "Visa Waivers Under Scrutiny on Hill," *The Washington Post*, January 28, 2015, p. A2.

[65] The example of Argentina was frequently used to illustrate this relationship; during the first year Argentina was in the VWP, tourism from that country to the United States grew by 11.5%.

[66] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *The Visa Waiver Program: Implications for U.S. National Security*, Testimony of Edward J Ramotowski, Deputy Assistant Secretary for Visa Services, U.S. Department of State, 114th Cong., 1st sess., March 12, 2015.

[67] For example, in his testimony before the House Immigration and Claims Subcommittee on February 28, 2002, William S. Norman, President and Chief Executive Officer of the Travel Industry Association of America, stated that it would take hundreds of new consular staff and tens of millions of dollars to issue visas to visitors currently entering under the VWP. Since Mr. Norman testified, the number of people entering under the VWP has increased by more than 5 million entrants per year. (See **Figure 1**.)

[68] U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Visa Waiver Program Oversight: Risks and Benefits of the Program*, 112th Cong., 1st sess., December 7, 2011.

[69] IAFIS is a national fingerprint and criminal history system. IDENT is a DHS-wide system for the storage and processing of biometric and limited biographic information. IDENT is the primary DHS-wide system for the biometric identification and verification of individuals encountered in DHS mission-related processes. For more information on IAFIS, see Federal Bureau of Investigation, "The Integrated Automated Fingerprint Identification System (IAFIS),"

US-VISIT when they enter the United States.)[70] In addition, some contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease border security.[71]

Nonetheless, others argue that the VWP enhances security by setting standards for travel documents and information sharing, and that the program promotes economic growth and cultural ties.[72] For example, all travelers entering under the VWP must present e-passports, which tend to be more difficult to alter than other types of passports.[73] Furthermore, many B visas are valid for 10 years,[74] and it is possible that a person's circumstances or allegiances could change during that time. In other words, a person from a non-VWP country could become radicalized and the visa may still be valid.

Another concern about the security of the program centers on DHS's ability to conduct reviews of the current VWP countries. In 2002, Congress mandated that DHS evaluate each VWP country every two years to make sure that their continued participation was in the security, law enforcement, and immigration interests of the United States.[75] In a review of the Visa Waiver Program Office's (VWPO's) administration of the VWP, the DHS's Office of the Inspector General found that as of July 2012, there were 11 (out of 36) reports that exceeded the congressionally mandated two-year reporting cycle.[76] A GAO report found that as of October 31, 2015, approximately 25% of the most recent reports were submitted or remained outstanding at least five months past the statutory deadline.[77]

Administration Initiated VWP Security Enhancements

In August and November 2015, the Administration announced a series of changes to the VWP to enhance program security. Some of the Administration's changes were codified by the Visa Waiver Program Improvement and Terrorist Travel Prevention Act (P.L. 114-113). See "Visa

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press release, http://www.fbi.gov/hq/cjisd/iafis.htm. For more information on IDENT, see Department of Homeland Security, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)*, Washington, DC, July 31, 2006, p. 2, http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf.

[70] CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*, by Lisa Seghetti.

[71] For an example of this argument, see "Congressman Claims Allowing Poland Visa-Free Travel to the US Would Pose Security Threat," workpermit.com, June 20, 2012, http://www.workpermit.com/news/2012-06-20/us/congressman-claims-allowing-poland-visa-free-travel-to-us-would-pose-security-threat.htm.

[72] For an example of this argument, see Heritage Foundation, *The Visa Waiver Program: A Security Partnership*, Fact Sheet #66, Washington, DC, June 25, 2010.

[73] There is not a specific requirement to present an e-passport when entering under the VWP. Any passports issued after October 26, 2006, and used by VWP travelers to enter the United States are required to have integrated chips with information from the data page (e-passports). Most passports are valid for 10 years, and thus, it is likely that by October 2016, all VWP entrants will have e-passports.

[74] The length of validity of a visa is mostly dependent on reciprocity with the United States (i.e., that visas from that country for U.S. citizens are valid for the same period of time). For a full list of reciprocity schedules, see Department of State, Reciprocity Schedules, at http://travel.state.gov/visa/fees/fees_3272.html.

[75] P.L. 107-53, §711.

[76] VWPO cited a number of reasons for the reporting delays, including inadequate staffing of the office to manage the workload, and not receiving intelligence assessments in a timely manner. However, VWPO officials stated that "these delays have not posed any undue risks or threats to U.S. security interests, since any issues within a VWP country that might affect its continued compliance with VWP requirements are continuously monitored." Department of Homeland Security, Office of the Inspector General, *The Visa Waiver Program*, OIG-13-07, Washington, DC, November 2, 2012, p. 12, http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-07_Nov12.pdf.

[77] U.S. Government Accountability Office, *Visa Waiver Program: DHS Should Take Steps to Ensure Timeliness of Information Needed to Protect U.S. National Security*, GAO-16-498, May 2016.

Waiver Program Improvement and Terrorist Travel Prevention Act (H.R. 158/Miller and S. 2362/Johnson) and Defend America Act (S. 2435/Kirk)" for a full discussion of the legislation.

In August 2015, the Secretary of the Department of Homeland Security, Jeh C. Johnson, announced an intention to implement new security measures in the VWP.[78] Most significant among them were

- requiring e-passports of all VWP travelers coming to the United States,
- requiring VWP countries to use the INTERPOL Stolen and Lost Travel Document (SLTD) database to screen travelers crossing a VWP country's borders, and
- negotiating for the expanded use of U.S. federal air marshals on international flights from VWP countries to the United States.

Additionally, on November 30 the Administration announced more changes to the VWP meant to enhance security. These changes included

- modifying ESTA to capture information regarding any past travel to countries constituting a terrorist safe haven;
- accelerating the review process for VWP countries;
- requiring, within 60 days, that DHS report to the President on possible pilot programs designed to assess the collection and use of biometrics (fingerprints and/or photographs), and on any countries that are deficient in key areas of cooperation, along with recommended options to engender compliance;
- requiring, within 60 days, that the Federal Bureau of Investigation (FBI) provide an evaluation to the President on the terrorism information sharing that occurs between the United States and VWP countries, and identifying options to mitigate any deficiencies;
- offering assistance to countries to better facilitate terrorism information sharing, specifically to include the use of biometrics,[79] and deploying "Foreign Fighter Surge Teams" to work with countries to counter terrorist travel;[80] and
- expanding and promoting the use of the Global Entry program (a trusted traveler program),[81] which includes biometric checks within VWP countries.

[78] Department of Homeland Security, "Statement by Secretary Jeh C. Johnson on Intention to Implement Security Enhancements to the Visa Waiver Program," press release, August 6, 2015, https://www.dhs.gov/news/2015/08/06/statement-secretary-jeh-c-johnson-intention-implement-security-enhancements-visa.

[79] One proposed example of this assistance includes having DHS and the FBI's Terrorist Screening Center (TSC) assist interested VWP countries in screening refugees or asylum seekers, utilizing the terrorism information already provided to VWP countries, and by piloting programs to conduct "near real time" biometric checks. The TSC maintains the U.S. government's consolidated Terrorist Screening Database often referred to as the Terrorist Watchlist. Federal Bureau of Investigation, *About the Terrorist Screening Center*, https://www.fbi.gov/about-us/nsb/tsc/about-the-terrorist-screening-center.

[80] According to the press release, the Departments of Homeland Security and State, the FBI, and the U.S. intelligence community will deploy foreign fighter surge teams to work with countries to counter terrorist travel.

[81] As of December 3, 2015, the Global Entry program is available to citizens of Germany, Mexico, the Netherlands, Panama, South Korea, and the United Kingdom. For a discussion of the Global Entry program, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*, by Lisa Seghetti.

Debate over Biometric Exit Capacity

As discussed, the Secretary of DHS's authority to waive the nonimmigrant refusal rate has been suspended until the air exit system is able to match an alien's *biometric* information with relevant watch lists and manifest information. Some contend that the current biographic system provides suitable data for most security and immigration enforcement activities, and that the cost of implementing a biometric exit system would not justify the small increase in additional security.[82] In addition, in December 2011, DHS announced an agreement with Canada to share entry records so that an entry into Canada along the land border would be counted as an exit in U.S. records.[83] It is not clear whether the shared entry records will be a biographic system or contain biometric identifiers. However, others express concerns about the general security of the program and argue that until more security measures are in place, such as a biometric exit capacity, more countries should not be admitted to the program.[84]

Information Sharing

Currently, all VWP countries provide data on lost and stolen passports (LASP) to the United States.[85] However, concerns have been raised about information sharing on LASP, specifically whether countries are reporting data in a timely manner.[86] The mechanisms to secure data on LASP have differed over time (e.g., reporting to the U.S. Embassy, access to a common database) and by country (e.g., MOUs, Diplomatic Notes). While DHS receives a few countries' LASP data via direct links to those countries' databases, most data on LASP come from the International Criminal Police Organization's (INTERPOL's) Stolen and Lost Travel Documents (SLTD) database[87]—DHS's preferred method of data sharing.[88] Notably, ESTA screens passport information using the INTERPOL database. CBP also accesses LASP data via INTERPOL, but it is unclear if this information is checked during primary inspection.[89] P.L. 114-113 amended the

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[82] Testimony of James Jay Carafano, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Next Steps for the Visa Waiver Program*, 112th Cong., 1st sess., December 7, 2011.

[83] Testimony of David F. Heyman, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Next Steps for the Visa Waiver Program*, 112th Cong., 1st sess., December 7, 2011. For more on this agreement, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*, by Lisa Seghetti.

[84] Statement of Chairman Elton Gallegly, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Next Steps for the Visa Waiver Program*, 112th Cong., 1st sess., December 7, 2011.

[85] GAO, *Visa Waiver Program: Additional Actions Needed to Address Risks and Strengthen Overstay Enforcement*.

[86] The issue of LASP has been ongoing. VWP passports are supposedly highly valued since the bearer does not need a visa to enter the United States. For example, see GAO, *Visa Waiver Program: Additional Actions Needed to Address Risks and Strengthen Overstay Enforcement*, 2011. See also, Giulia Paravicini, "EU's Passport Fraud 'Epidemic'," *Politico*, January 28, 2016, Europe Edition, http://www.politico.eu/article/europes-fake-forged-stolen-passport-epidemic-visa-free-travel-rights/.

[87] The United States began providing information on LASP to the U.S. National Central Bureau of the International Criminal Police Organization (INTERPOL) in May 2004. The INTERPOL Stolen and Lost Travel Document (SLTD) database is available to law enforcement and immigration authorities worldwide. *Ibid*, and INTERPOL, *Border Management: Stolen and Lost Travel Documents database*, 2015, http://www.interpol.int/INTERPOL-expertise/Border-management/SLTD-Database.

[88] In the past, before access to and the content of the INTERPOL database was reliable, DHS required countries to submit LASP data to the U.S. Embassies in those countries.

[89] GAO, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, p.5.

provision mandating that the reporting of lost or stolen passports be done no later than 24 hours after a theft or loss was reported to the VWP country.

As discussed, all VWP countries are also required to enter into information-sharing agreements with the United States on whether the citizens or nationals of that country travelling to the United States represent a security or criminal threat to the United States. All VWP countries have entered into the required arrangements for the sharing of information on known and suspected terrorists pursuant to Homeland Security Presidential Directive 6 (HSPD-6),[90] and have also signed Preventing and Combating Serious Crime (PCSC) Agreements or equivalent agreements with the United States for the sharing of information on potential serious criminals and terrorists. DHS and the Departments of Justice and State are working with VWP countries to fully implement HSPD-6 arrangements and PCSC Agreements.[91] P.L. 114-113 changed the criteria to participate in the VWP, requiring that the HSPD-6 arrangements and PCSC Agreements not only be signed but be fully implemented before a country can be designated. A GAO report released in May 2016 found that more than a third of VWP countries have not shared terrorist identity information through the HSPD-6 agreements, and more than a third of VWP countries have not shared criminal history information through the PCSC agreements.[92]

Foreign Fighters, Syrian Refugees, and the VWP

Much of the recent attention on the VWP comes from concerns that terrorists, especially those who are aligned with the Islamic State, could enter the United States under the VWP. One focus has been on refugees fleeing from Syria, especially given press reports that one of the terrorists involved in the attacks in Paris may have entered Greece with a fake or stolen Syrian passport as part of the refugee flows before making his way to Paris.[93] As discussed, for a foreign national to travel under the VWP he or she must possess a passport from a VWP country. Thus, unless the Syrian refugees who are resettled in VWP countries receive citizenship or nationality[94] from those countries and are issued passports from the VWP country, they are ineligible to travel to the United States under the VWP.[95] European Union officials have cautioned against linking refugees with terrorism.[96]

Nonetheless, one of the more immediate concerns with the VWP is citizens of VWP countries who have become radicalized. It has been reported that several of the perpetrators of the

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[90] U.S. President (George W. Bush), "Homeland Security Presidential Directive/HSPD–6—Directive on Integration and Use of Screening Information To Protect Against Terrorism," *Weekly Compilation of Presidential Documents*, September 16, 2003, p. 1174. For a discussion of HSPD-6, see CRS Report R42336, *Terrorist Watch List Screening and Background Checks for Firearms*, by William J. Krouse.

[91] E-mail from Department of Homeland Security, Office of Legislative Affairs, November 16, 2015.

[92] U.S. Government Accountability Office, *Visa Waiver Program: DHS Should Take Steps to Ensure Timeliness of Information Needed to Protect U.S. National Security*, GAO-16-498, May 2016.

[93] Alison Smale and Kimberly Bradley, "Refugees Across Europe Fear Repercussions From Paris Attacks," *New York Times*, November 18, 2015, http://www.nytimes.com/2015/11/19/world/europe/refugees-paris-attacks.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=b-lede-package-region&region=top-news&WT.nav=top-news; and "Syrian Passport by Stadium Stolen or Fake, A.F.P. Reports," *New York Times*, November 17, 2015, http://www.nytimes.com/live/paris-attacks-live-updates/syrian-passport-reportedly-was-stolen-or-fake/#.

[94] A national is a citizen or subject of a particular nation, and is someone who would be eligible for a passport from that nation.

[95] INA §217(a)(2). The situation regarding the position of many countries in regards to acceptance of Syrian refugees is fluid and, as such, it is unclear whether any of these refugees will ever be eligible for citizenship in these countries.

[96] Esxter Zalan, "Juncker: Don't Mix Up Terrorists and Refugees," *EU Observer*, November 15, 2015, https://euobserver.com/political/131114.

November 13, 2015, attacks in Paris were citizens of France.[97] In addition, the alleged mastermind, Abdelhamid Abaaoud, reportedly was a national of Belgium.[98] As such, these terrorists may have been able to travel to the United States under the VWP if there was no derogatory information about them in U.S. biographic databases. Once citizens of VWP countries arrive in the United States, a Customs and Border Protection (CBP) officer decides on their admissibility. Without having specific classified information, it is unknown whether or not these individuals would have been eligible to travel under the VWP.

In addition, if the assumption is made that these terrorists would have been eligible to travel under the VWP, it is unknown whether or not the requirement to get a visa would have changed their eligibility to travel to the United States. As discussed, individuals who are not eligible to travel under the VWP (either individuals from non-VWP countries or those who do not receive an ESTA authorization) must get a visa before traveling to the United States. Unlike those traveling under the VWP, those who apply for a visa undergo an interview with a consular officer, and provide fingerprints to be used to run checks against databases that use biometrics (e.g., IDENT, IAFIS).

Adding Countries to the VWP

While some view the VWP as a security risk, others contend that the inclusion of countries in the VWP actually increases U.S. security by setting standards for travel documents and information sharing.[99] In addition, they argue that increasing membership in the VWP could be used as an incentive to get other countries to share intelligence information with the United States.[100] Since 2008, DHS has admitted 10 new countries into the program, but there are other countries that have expressed a desire to be included in the VWP.[101] These countries want to be in the VWP because of the possible economic benefits (e.g., increasing commerce and tourism), making it easier and cheaper for their populace to travel to the United States (i.e., since their citizens do not have to get a visa before traveling temporarily to the United States), and because membership in the program is often perceived as evidence of close ties with the United States.[102]

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[97] CBS/AP "Paris Attacks: Identifications and Arrests Start Piling Up," *CBS News*, November 15, 2015, http://www.cbsnews.com/news/paris-attacks-identifications-and-arrests-start-piling-up/.

[98] Lonnie Shekhtman, "Abdelhamid Abaaoud: Mastermind of the Paris attacks?," *Christian Science Monitor*, November 16, 2015, http://www.csmonitor.com/World/Europe/2015/1116/Abdelhamid-Abaaoud-Mastermind-of-the-Paris-attacks-video.

[99] For an example of this argument, see Heritage Foundation, *The Visa Waiver Program: A Security Partnership*, Fact Sheet #66, Washington, DC, June 25, 2010.

[100] For examples of this argument, see James Jay Carafano, *With a Little Help from Our Friends: Enhancing Security by Expanding the Visa Waiver Program*, Heritage Foundation, Executive Memorandum no. 991, February 3, 2006; and Jena Baker McNeill, *Time to Decouple Visa Waiver Program from Biometric Exit*, Heritage Foundation, Web Memorandum no. 2867, April 15, 2010.

[101] In 2008, DHS admitted 8 new countries into the program. These eight countries (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, and South Korea) received a waiver of the nonimmigrant refusal rate. Greece was admitted in 2010, and Taiwan was admitted in 2012. As the nonimmigrant refusal rate waiver has not been in effect since 2009, both countries had nonimmigrant refusal rates under 3%.

[102] In 2005, the George W. Bush administration began providing countries interested in joining the VWP with "road maps" to aid the countries in meeting the program's criteria. Some of the countries complained that since the "road maps" do not contain milestones or time tables, it was difficult to measure the amount of progress made towards fulfilling the criteria for VWP membership. There were 13 "road map" countries. They were Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, South Korea, Latvia, Lithuania, Malta, Poland, Romania, and Slovakia. Eight of these countries have been admitted to the VWP. The issues surrounding the "road maps," were the focus of an event held by the Heritage Foundation on February 8, 2006. The event was entitled, "*Fighting a More Effective War on*

Poland has been one of the most outspoken countries in regards to expressing frustration over their lack of inclusion in the VWP.[103] Reportedly, President Obama said in December 2010 that he was going to make it a priority to get Poland into the VWP.[104] Nonetheless, Poland's FY2014 nonimmigrant visa refusal rate was above 3%, and thus, Congress would have to amend the INA to allow Poland into the program.[105]

EU and Reciprocity

Of the European Union's 28 member states, only 5 are not VWP countries (Bulgaria, Croatia, Cyprus, Poland, and Romania). A visa is required for citizens from non-VWP EU countries wishing to travel to the United States, whereas under EU law these countries do not require visas of U.S. citizens for stays up to 90 days.[106]

In January 2014, a revised EU visa reciprocity mechanism entered into force, aimed at injecting greater momentum into EU efforts to achieve full visa reciprocity with countries, such as the United States, whose citizens can travel to the EU for short-term business or tourism without a visa.[107] Under the new EU rules, the European Commission may suspend visa-free travel for a third country's citizens in the absence of full visa reciprocity, subject to the approval of the EU member states and the European Parliament. Thus far, the European Commission has not moved to suspend any visa-free travel under the new reciprocity mechanism. In April 2016, the European Commission invited the European Parliament and the EU member states (acting as the Council of the EU) to assert their positions on the most appropriate way forward by July 2016.[108] With no formal responses from either the European Parliament or the Council, on July 13 the Commission essentially further delayed a decision on suspending visa-free travel for U.S. citizens.[109]

Overstays

Some maintain that the nonimmigrant visa refusal rate is an unobjective and arbitrary standard, because it is based on decisions made by consular officers rather than the actual behavior of

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Terrorism: Expanding the Visa Waiver Program" The featured speakers were Ambassadors Petr Kolar of the Czech Republic, John Bruton of the EU, Janusz Reiter of Poland, and András Simonyi of Hungary. A recording of the event is available at http://www.heritage.org/Press/Events/ev020806a.cfm.

[103] For examples, see "Polish President to Remind Obama of Visa Promise," Polskie Radio, September 9, 2012, http://www.thenews.pl/1/10/Artykul/113122,Polish-president-to-remind-Obama-of-visa-promise; and Nowy Dziennik Wuem, translated by Aleksangra Slabisz from Polish, "Polish Students Appeal to White House on Visa Waiver," *Voices of NY,* October 10, 2012.

[104] Josh Rogin, "Obama: Poland will be admitted to the visa waiver program," http://thecable.foreignpolicy.com, December 8, 2010, http://thecable.foreignpolicy.com/posts/2010/12/08/ obama_poland_will_be_admitted_to_the_visa_waiver_program.

[105] Poland's FY2014 adjusted B-visa refusal rate was 6.4%. Thus, Poland would not meet the refusal rate requirement if the nonimmigrant refusal rate waiver was reinstated. Department of State, *Adjusted Refusal Rate- B-Visas Only by Nationality: Fiscal Year 2014,* http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/ RefusalRates/FY14.pdf.

[106] For a discussion of EU visa policy, see European Commission, "Visa Policy," updated June 6, 2016, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm.

[107] This paragraph was adapted from CRS Report RS22030, *U.S.-EU Cooperation Against Terrorism,* by Kristin Archick. For more on the EU position on the VWP, see that report.

[108] Gabriela Baczynska, "EU Commission buys time to decide on visas for U.S., Canada," *Reuters,* April 12, 2016, http://www.reuters.com/article/us-eu-usa-visas-idUSKCN0X922M.

[109] European Commission, "Visa reciprocity with US and Canada: Commission takes stock of latest developments," press release, July 13, 2016, http://europa.eu/rapid/press-release_IP-16-2432_en.htm.

nonimmigrants.[110] When the program was conceived, it was expected that the number of nonimmigrants who overstay the terms of their entry under this program would be a better standard for future program participation. Using biographic departure information from passenger manifests, DHS has calculated overstay rates for all VWP countries (as well as other countries). Nonetheless, this system has limitations because persons entering by air or sea but exiting at a land port of entry may be mischaracterized as overstays.[111]

In January 2016, DHS released its first ever report on overstay rates.[112] All the current VWP countries have overstay rates of less than 3%. In addition, the worldwide overstay rate for non-VWP countries is less than 2%.

Importantly, although the refusal rate was seen as a proxy for the overstay rate when the program was conceived, people are denied visas for reasons other than being unable to prove that they will not remain illegally in the United States (i.e., they are "intending immigrants").[113] During the visa application process, consular officers[114] must confirm that an alien is not ineligible for a visa under any of the so-called "grounds for inadmissibility" of the INA, such as having a criminal history, engaging in terrorist activity, or having previously violated U.S. immigration law.[115] Although most B visa denials are because the alien cannot prove that they are not an "intending immigrant," there are other reasons a person could be denied a visa that are captured as part of a country's visa refusal rate.

Legislation in the 114th Congress

The Visa Waiver Program Improvement and Terrorist Travel Prevention Act (H.R. 158) was passed by the House on December 8, 2015, and enacted as part of the Consolidated Appropriations Act of 2016 (P.L. 114-113) on December 18, 2015. Nonetheless, some provisions of P.L. 114-113 are controversial and there have been bills introduced subsequently to amend the newly enacted legislation.

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[110] Until FY2012, refusal rates were calculated by application, not by person, so if a person applied for the same visa multiple times and was refused, all the refusals were calculated in the refusal rate. For example, if a person submitted five visa applications in a year and all were denied, they were all counted toward the refusal rate. However, if such a person submitted five applications that were denied and then a sixth application that was approved, none of the previous applications were counted as refusals in the calculation of the adjusted refusal rate that is used in the determination of VWP eligibility. Department of State, Multi-Year B Visa Adjusted Refusal Rates by Nationality, FY2012, http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf.

[111] As mentioned above, in December 2011 DHS announced an agreement with Canada to share biographic entry data as a method to enhance both country's exit records. For more on the limitations of the exit data, see CRS Report RS22446, *Nonimmigrant Overstays: Brief Synthesis of the Issue*, by Ruth Ellen Wasem.

[112] See, Department of Homeland Security, *Entry/Exit Overstay Report, Fiscal Year 2015*, Washington, DC, January 19, 2016, http://www.dhs.gov/publication/entryexit-overstay-report. An annual report on overstays was originally mandated by Congress in 1998 (P.L. 105-173, codified at 8 U.S.C. §1376) and Congress required the report again in P.L. 114-113

[113] §214(b) of the INA generally presumes that all aliens seeking admission to the United States are coming to live permanently; as a result, aliens seeking to qualify for a B visa (and most other nonimmigrant visas) must demonstrate that they are not coming to reside permanently in the United States. CRS Report R41104, *Immigration Visa Issuances and Grounds for Exclusion: Policy and Trends*, by Ruth Ellen Wasem.

[114] Determinations of inadmissibility are also made by CBP officers at ports of entry.

[115] The so-called grounds of inadmissibility under INA §212(a) include health-related grounds; criminal history; security and terrorist concerns; public charge (e.g., indigence); seeking to work without proper labor certification; illegal entrants and immigration law violations; ineligibility for citizenship; and aliens who are illegally present or have previously been removed.

In addition, there are several other bills that have been introduced in the 114th Congress that would change some of the VWP requirements to try to augment the security features of the program. While some of these bills contain provisions similar to ones enacted in P.L. 114-113, the bills also contain provisions that were not included in the act. Furthermore, bills have also been introduced that propose broad changes to the VWP by, among other things, reinstating the nonimmigrant refusal rate waiver authority, and by allowing DHS to use overstay rates to determine program eligibility. Another legislative proposal would create a new visa waiver program for the U.S. Virgin Islands, and allow the Secretary of DHS to add Poland to the VWP.[116] Three bills, H.R. 158, H.R. 5253, and S. 1619 have received action.

Visa Waiver Program Improvement and Terrorist Travel Prevention Act (H.R. 158/Miller and S. 2362/Johnson) and Defend America Act (S. 2435/Kirk)

H.R. 158, as passed by House on December 8, 2015, was enacted as part of the Consolidated Appropriations Act of 2016 (P.L. 114-113). The provisions related to the VWP in P.L. 114-113 are similar to those in S. 2362,[117] and S. 2435.

P.L. 114-113 requires as of April 1, 2016, that all foreign nationals traveling under the VWP present an electronic passport (e-passport) that is fraud resistant, and incorporates biographic and biometric information (as determined by the Secretary of DHS). No later than October 1, 2016, each VWP country has to certify that it has in place mechanisms to validate machine-readable passports and e-passports at each port of entry. This requirement does not apply to travel between countries within the Schengen Area.[118]

The act also prohibits people who were present in certain countries since March 1, 2011, from traveling under the VWP. The specified countries include

- Iraq and Syria;
- any country designated by the Secretary of State as having repeatedly provided support for acts of international terrorism under any provision of law,[119] or
- any other country or area of concern[120] deemed appropriate by the Secretary of DHS.

[116] There are two bills, H.R. 4135 and S. 2323, related to the ability of those who enter under the VWP to purchase firearms that are beyond the scope of the report. For more information on this issue, see CRS Legal Sidebar WSLG1467, *Firearms Eligibility for Foreign Nationals in the United States*, by Vivian S. Chu et al.

[117] S. 2362 contains two provisions that were not included in P.L. 114-113. Only S. 2362 would require that foreign nationals applying for an ESTA approval answer a series of questions, to be determined by the Secretary of DHS, that include queries about the foreign national's physical and mental health, criminal history, recent international travel, former employment in the United States, former visits to the United States, and any other information that the Secretary of DHS deems necessary.

[118] The Schengen Area enables citizens of the European Union (EU), as well as many non-EU nationals, to cross select international borders in Europe without being subject to border checks. See European Commission, *Migration and Home Affairs: Schengen Area*, November 13, 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm.

[119] Examples of acts that use the term "repeatedly provided support for acts of international terrorism," include §6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405), §40 of the Arms Export Control Act (22 U.S.C. 2780), and §620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371). Currently, these countries are Iran, Sudan, and Syria.

[120] The Secretary of DHS, in consultation with the Director of National Intelligence, is required to make this determination within 60 days of enactment. The criteria to make the determination would include whether the presence

In addition, anyone who is a dual national of a VWP country and one of these specified countries is ineligible to travel under the VWP. However, if the Secretary of DHS determines that the foreign national was in one of the specified countries in order to perform military service in the armed forces of a VWP country, or to perform official duties as an employee of the VWP country, the prohibition on traveling under the VWP does not apply. Similarly, P.L. 114-113 gives the Secretary of DHS the authority to waive the prohibition on travel under the VWP if the Secretary of DHS determines that the waiver would be in law enforcement or national security interests of the United States. The Secretary of DHS is required to submit an annual report to Congress on each instance where the waiver authority was exercised.

Likewise, P.L. 114-113 amended the requirement that countries report lost or stolen passports so that the reporting must be occur no later than 24 hours after a theft or loss is reported to the VWP country. The act also requires, no later than September 13, 2016,[121] that each program country with an international airport certify, to the maximum extend allowed under the laws of the country, that it is screening each foreign national who is admitted to or departs from that country, using relevant INTERPOL databases and notices, or other means designated by the Secretary of DHS. Consequently, a country that fails to screen foreign nationals arriving in or departing from that country will be terminated from the VWP. This screening requirement does not apply to those traveling between countries within the Schengen Area.

P.L. 114-113 also specifies that the HSPD-6 arrangements and PCSC Agreements (discussed in the section "Information Sharing") not only have to be signed before a country can be designed as a VWP country but have to be fully implemented. If the Secretary of DHS and the Secretary of State jointly determine that the VWP country is not sharing information regarding whether a citizen of that country traveling to the United States represents a threat to the security or welfare of the United States or U.S. citizens, the country will be terminated from the program. The country will be redesignated as a program country as soon as it fulfills the information-sharing requirements.

The act also requires that DHS report biennially to Congress on the national security threat posed by each program country.[122] The Secretary of DHS, in consultation with the Director of National Intelligence and the Secretary of State, are also required to annually evaluate program countries based on specified criteria[123] and to identify any country for which nationals of that country present a "high risk" to U.S. national security.[124] The Secretary of DHS, in consultation with the Secretary of State, can suspend a program country based on a determination that the country presents a high risk to U.S. national security.

Moreover, P.L. 114-113 allows the Secretary of DHS to shorten the validity period of any ESTA determination, in addition to revoking the determination. The Secretary of DHS is required to

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of a foreign national in that area or country increases the likelihood that the foreign national is a credible threat to U.S. national security, whether a foreign terrorist organization has a significant presence in the area or country, and whether the country or area is a safe haven for terrorists.

[121] This is 270 days after the enactment of P.L. 114-113.

[122] The first of such reports would be due 90 days after the bill is enacted.

[123] The criteria include the number of nationals determined to be ineligible to travel to the United States under the VWP during the previous year; the number of nationals who were identified in U.S. government terrorism databases during the previous year, the estimated number of nationals who traveled to Iraq or Syria since March 1, 2011, to engage in terrorism; the country's capacity to combat passport fraud; the level of cooperation with U.S. counter-terrorism efforts; the adequacy of the country's border and immigration controls; and any other criteria determined by the Secretary of DHS.

[124] The first report would be due 60 days after enactment.

collect information, through ESTA, on an applicant's previous or multiple citizenships, and to research opportunities to incorporate into ESTA technology to detect and prevent fraud or deception.

The act also requires DHS to report annually on the number of individuals (identified by citizenship) who were denied eligibility to travel under ESTA or whose eligibility to travel was revoked because they were determined to represent a security threat to the United States.[125] Additionally, DHS is required to report within 30 days from December 18, 2015, on ways to strengthen the ability of ESTA to prevent terrorists and instruments of terrorism from entering the United States.

Moreover, the act requires DHS, in consultation with the Department of State, to provide assistance, in a risk-based manner, to non-VWP countries to assist the countries in submitting information on lost or stolen travel documents to INTERPOL, and issuing and validating e-passports at ports of entry. The act also contains a sense of Congress that the International Civil Aviation Organization (ICAO)[126] should establish standards for e-passports and obligate the 191 member countries to utilize e-passports as soon as possible.

There are a few provisions in S. 2362 that were not included in P.L. 114-113. S. 2362 would require the Secretary of DHS to regularly evaluate the questions being asked under ESTA and to report to Congress after the evaluations. S. 2362 would also require the Commissioner of CBP, in consultation with the Secretary of DOS, to constantly assess the data collected through ESTA to verify the accuracy of such data. In addition, S. 2362 would require that CBP submit a report to Congress identifying (1) the five airports in Europe that most closely adhere to the requirements for commencing preclearance operations; and (2) the airports that would provide significant national security benefits if CBP officers were deployed at the airports. In addition, under S. 2362 (and S. 2337 discussed in the next section) countries would be required to enter into and comply with an agreement to assist in the "operation of an effective Air Marshal Program."

U.S. Citizens with Dual Citizenship and P.L. 114-113

The newly enacted provision prohibiting dual nationals of VWP countries and certain other countries, including Iran, Iraq, Sudan, and Syria, from utilizing the VWP has raised some questions and concerns about the impact on U.S. citizens with dual nationality with one of the specified countries.[127] Some dual nationals of the United States and one of these countries have expressed concerns that they will now need to get a visa to come to the United States (e.g., dual U.S.-Iranian citizens).[128] The VWP applies to foreign nationals coming to the United States; it

[125] The first report would be due 30 days after enactment.

[126] The International Civil Aviation Organization (ICAO) is a United Nations specialized agency established to manage the administration and governance of the Convention on International Civil Aviation. The ICAO works with Convention Member States and industry groups to reach consensus on international civil aviation standards and practices. International Civil Aviation Organization, *About ICAO*, http://www.icao.int/about-icao/Pages/default.aspx.

[127] In addition, some have expressed concerns that this provision is discriminatory. See, Letter from Representative John Conyers, Representative Dan Kildee, and Representative Brenda Lawrence, et al. to Majority Leader Mitch McConnell and Minority Leader Harry Reid, December 11, 2015, http://www.huffingtonpost.com/entry/house-democrats-visa-waiver-program_566b0094e4b009377b24be7c; American Civil Liberties Union, "75 Organizations Express Concerns with Various Visa Waiver Program Bills Included As Part of Omnibus Spending Bill," press release, December 11, 2015, https://www.aclu.org/letter/75-organizations-express-concerns-various-visa-waiver-program-bills-included-part-omnibus?redirect=letter/76-organizations-express-concerns-various-visa-waiver-program-bills-included-part-omnibus; and Nahal Toosi, "White House Stands by Visa Bill Critics Call Discriminatory," *Politico*, December 11, 2015, http://www.politico.com/story/2015/12/dual-nationals-visa-waivers-216700.

[128] For example, see NIAC Action, *UPDATE: Frequently Asked Questions on the Visa Waiver Reform Bill (*H.R. 158/S.

does not impact U.S. citizens, even those with dual nationality. In other words, dual U.S.-Iranian, U.S.-Iraqi, U.S.-Sudanese, or U.S.-Syrian citizens still *do not* need a visa to travel to the United States.

However, the provision may impact the ability of such dual nationals to travel visa-free to VWP countries, especially countries that are part of the European Union (EU). As discussed, the VWP is predicated on the idea of reciprocity. While the act does not affect U.S. citizens, VWP countries may enact similar provisions prohibiting visa-free travel of certain dual national U.S. citizens (e.g., U.S.-Iranian; U.S.-Syrian citizens) to those countries.[129]

Equal Protection in Travel Act (H.R. 4380/Amash and S. 2449/Flake)

Concerns have been raised that the provisions enacted in P.L. 114-113 prohibiting dual nationals of VWP countries and specified other countries (e.g., Iraq, Syria) from traveling under the VWP are discriminatory and ineffective.[130] The Equal Protection in Travel Act would reinstate the ability of dual nationals from VWP and any other country to travel under the VWP.

S. 2458/Cardin

S. 2458 would amend P.L. 114-113 to allow the Secretary of State, in addition to the Secretary of DHS, to designate a country as an area of concern for the purpose of making those who are dual nationals of that country and a VWP country, or have recently traveled to the designated country, ineligible to be admitted to the United States under the VWP. The bill would also add an exemption to the prohibition on using the VWP for those who were present in a country to perform official duties as an employee of an international organization. The bill would delay implementation of the prohibition for certain dual nationals and those who traveled to specified countries for 180 days after enactment, and would allow the Secretary of DHS and the Secretary of State to waive the prohibition for an additional 90 days if it would be in U.S. national security interest. In addition, on December 18, 2020, S. 2458 would sunset the prohibition on certain dual nationals traveling under the VWP.

Visa Waiver Program Security Enhancement Act (S. 2337/Feinstein and S. 2377/Reid)

Only S. 2337 would prohibit people who traveled to Iraq or Syria during the past five years from traveling under the VWP. The bill would also allow the Secretary of DHS to prohibit a foreign national from traveling under the VWP if during the past five years the foreign national has

2362*)*, December 14, 2014, http://www.niacaction.org/tag/dual-nationals/.

[129] The EU Ambassador and the Ambassadors of the 28 EU-VWP countries contend that these changes "could trigger legally-mandated reciprocal measures." See Ambassador David O'Sullivan, Ambassador Hans Peter Manz, and Ambassador Johan Vebeke, et al., "What the Visa Waiver Program means to Europe: By European Union's Ambassador to the United States David O'Sullivan and the Ambassadors to the U.S. of the 28 EU Member States," *The Hill*, December 14, 2015; http://thehill.com/blogs/congress-blog/foreign-policy/262999-what-the-visa-waiver-program-means-to-europe.

[130] For example, see Nahal Toosi, "Obama Aides Vexed by Visa Crackdown," *Politico*, April 12, 2016, Europe Edition, http://www.politico.eu/article/obama-aides-vexed-by-visa-crackdown/; Jamal Abdi, "Is Congress Accusing Dual Nationals of Holding Dual Loyalties?," *The World Post*, February 19, 2016, http://www.huffingtonpost.com/jamal-abdi/is-congress-accusing-dual_b_9273998.html; and Letter from American Civil Liberties Union to Honorable Ron Johnson, Chairman, and Honorable Thomas Carper, Ranking Member, U.S. Senate Committee on Homeland Security and Governmental Affairs, March 15, 2016, https://www.aclu.org/sites/default/files/field_document/16_3_15_aclu_statement_for_senate_hsgac_hearing_on_the_security_of_us_visa_programs_final.pdf.

traveled to a country in which a designated foreign terrorist organization has a significant presence and such prohibition is in the U.S. national security interest. Ninety days after enactment both bills would require that those traveling under the VWP present a machine-readable passport that incorporates biometric and document authentication identifiers that comply with the applicable standards established by the ICAO.

In addition, S. 2337 and S. 2377 would add certain requirements for countries to participate in the program. The bills would specify that the HSPD-6 arrangements and PCSC Agreements (discussed in the section "Information Sharing") would not only have to be signed before a country could be designated as a VWP country but would also have to be fully implemented within a time frame determined by the Secretary of DHS. In addition, the bills would amend the requirement that countries report lost or stolen passports so that the reporting would have to be done "frequently and promptly." Under the bills, a country that failed to fully comply with the agreements would be terminated from the VWP. In addition, countries would be required to enter into and comply with an agreement to assist in the "operation of an effective Air Marshal Program." The governments of VWP countries would also be required to comply with U.S. aviation and airport security standards, as determined by the Secretary of DHS.

Furthermore, the bills would specify considerations that should be used in determining whether a country should become or remain a VWP country. These considerations include whether the government

- collects, analyzes, and shares with the United States information on passengers traveling by air pertaining to flights not bound for the United States to identify potentially dangerous individuals who may attempt to travel to the United States;
- regularly screens the passports of air travelers against INTERPOL's Stolen and Lost Documents database before allowing such travelers to board a flight arriving in or departing from that country;
- regularly and promptly shares information on lost or stolen travel documents with INTERPOL;
- collects and analyzes biometric and other information about individuals other than U.S. nationals who are applying for asylum, refugee, or other forms of protections from persecution, and shares such information with the United States; and
- collects and shares intelligence on foreign fighters with the United States and multilateral organizations, such as INTERPOL and EUROPOL.[131]

In addition, S. 2337 would require foreign nationals traveling under the VWP to submit biometric information, including photographs and fingerprints, before boarding a conveyance to the United States. The implementation of this requirement would be prioritized for VWP countries that have a significant number of nationals who have traveled to fight with or assist the Islamic State of Iraq and the Levant (ISIL). The requirement to submit biometric data would take effect no later than one year after enactment, but the Secretary of DHS would have the authority to delay implementation for a total of two more years for countries where an extension of the deadline would not present a significant risk to national security. Under the bill, the Secretary of DHS could determine that a VWP country has met this requirement if the country signs and implements an agreement to

[131] EUROPOL is the European Union's agency that handles criminal intelligence. For more on EUROPOL, see CRS Report RS22030, *U.S.-EU Cooperation Against Terrorism*, by Kristin Archick.

- collect and share biometric information for individuals seeking to travel to the United States through the VWP;
- compare the collected biometric information against the information in the traveler's passport before the traveler boards a conveyance to the United States; and
- share the results of the comparison and any other information indicating that the traveler may pose a threat with DHS before the traveler boards a conveyance bound for the United States.

S. 2377 would require the Secretary of DHS to initiate a demonstration program to conduct the advance verification of biometric data from a random sample of foreign nationals entering under the VWP. The program would be required to be completed within 15 months of enactment. Both bills would mandate that the ESTA fees cover the cost of administering ESTA, as well as the security enhancements under the bill.

H.R. 4122/Sinema

H.R. 4122 would prohibit people who traveled to certain countries during the past five years from traveling under the VWP. The specified countries include

- Afghanistan, Egypt, Iraq, Yemen, Somalia, and Nigeria;
- any country designated by the Secretary of State as having repeatedly provided support for acts of international terrorism under any provision of law;[132] or
- any other country deemed appropriate by the Secretary of State, in consultation with the Secretaries of DHS and Treasury, and the Director of National Intelligence.

H.R. 4173/Boyle

H.R. 4173 would prohibit those who traveled to Iraq or Syria in the previous five years from entering the United States under the VWP. The Secretary of DHS, in consultation with the Secretary of State, would have the authority to waive the prohibition if appropriate.

Strong Visa Integrity Secures America Act (H.R. 5253/Hurd)

H.R. 5253 was ordered reported by the House Committee on Homeland Security on June 8, 2016. In relation to the VWP, the bill would require that no later than one year after enactment, the Commissioner of CBP screen electronic passports at airports by reading the passports' embedded chip, and to the greatest extent practicable, utilize facial recognition technology or other biometric technology, as determined by the Commissioner, to screen travelers. The bill would also require CBP to, in a risk-based manner, continuously screen individuals issued any visa and individuals who are present or will soon be arriving in the United States against the appropriate criminal, national security, and terrorism databases.

[132] Examples of acts that use the term "repeatedly provided support for acts of international terrorism," include §6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405), §40 of the Arms Export Control Act (22 U.S.C. 2780), and §620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

Jobs Originated through Launching Travel (JOLT) Act (H.R. 1401/Heck, S. 2091/Schumer) and the Visa Wavier Enhanced Security and Reform Act (H.R. 2686/Quigley, S. 1507/Mikulski)

H.R. 1401 (§3), S. 2091 (§3), H.R. 2686, and S. 1507 contain almost identical provisions regarding the VWP. The bills would authorize the Secretary of DHS, in consultation with the Secretary of State, to designate a country as a VWP country if the country's overstay rate and/or refusal rate was less than 3% in the previous fiscal year.[133] The bills would also allow the Secretary of DHS to waive the refusal rate requirement if certain conditions were met. These conditions are similar to those in current law regarding the nonimmigrant refusal rate waiver. The bills would revise the current probationary period and procedures for terminating a country's participation in the VWP if that country failed to comply with any of the program's requirements. Not later than 180 days after enactment, the bills would require that the Government Accountability Office (GAO) conduct a review of the methods used by DHS to track aliens entering and exiting the United States, and to detect aliens who overstay their authorized period of admission. The bills also would require DHS to submit to Congress an evaluation of the security risks of aliens who enter the United States without an approved Electronic System for Travel Authorization (ESTA) verification and description of improvements. This report would be due no later than 90 days after the date of enactment. The bills would also express a sense of Congress that DHS should prioritize reviews of countries where circumstances indicate that review is necessary or desirable.

The Department of Homeland Security Appropriations Act, 2016 (S. 1619/Hoeven)

S. 1619, as reported by the Senate Appropriations Committee, included a provision (§567) that would have allowed the Secretary of DHS to designate Poland as a VWP country regardless of the statutory requirements for participation.

Virgin Islands Visa Waiver Program (H.R. 2116/Plaskett)

H.R. 2116 would create a visa waiver program for nationals from Caribbean Community (CARICOM) nations entering the U.S. Virgin Islands for a maximum of 30 days. Countries that are members or associate members of the Caribbean Community (CARICOM)[134] would be eligible if their inclusion in the Virgin Islands Visa Waiver Program (VIVWP) would not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths. The bill would allow the Governor of the U.S. Virgin Islands to request that the Secretaries of the Interior and DHS add a particular country to the VIVWP. In determining whether to allow a nation to participate in the VIVWP, the Secretary of DHS, in consultation with the Secretaries of the Interior and DOS, would have to consider all relevant factors, including electronic travel authorizations, procedures for reporting lost and stolen passports, repatriation of

[133] It is not clear whether the requirement would be that both the overstay and refusal rates must be less than 3% or if only one of the rates must be less than 3%. In addition, according to a recent DHS report, many countries, including Israel, Poland, and Romania, have overstay rates of less than 3%.

[134] CARICOM member and associate members include Anguilla, Antigua and Barbuda, The Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Turks and Caicos Islands.

aliens, rates of refusal for nonimmigrant visitor visas, overstays, exit systems, and information exchange.

Appendix. Legislative History Prior to P.L. 114-113

Visa Waiver Pilot Program

The Visa Waiver Program was established as a temporary program (Visa Waiver Pilot Program) by the Immigration Reform and Control Act of 1986 (P.L. 99-603). To become a program country under the pilot program, a country must have offered reciprocal privileges to U.S. citizens, and have had an average non-immigrant refusal rate of 2% for the previous two years with neither year's refusal rate exceeding 2.5%. Participation in the pilot program was originally limited to eight countries. Congress periodically passed legislation to extend the program's authorization, expand the number of countries allowed to participate in the program, and modify the qualifying criteria. Between 1986 and 1997, Congress passed the following five laws that made changes to the Visa Waiver Pilot Program:

- the Immigration Technical Corrections Act of 1988 (P.L. 100-525);
- the Immigration Act of 1990 (P.L. 101-649), which inserted further requirements for the program and removed the limit on the number of countries that could participate in the program;
- the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (P.L. 102-232);
- the Immigration and Nationality Technical Corrections Act of 1994 (P.L. 103-416), which created a probationary status to allow countries whose nonimmigrant visa refusal rates were higher than 2% but less than 3.5% to enter the program on a probationary basis; and
- the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), which created a new type of probationary status for countries in the program that failed to meet certain criteria, and removed the probationary status that had allowed countries with nonimmigrant visa refusal rates higher than 2% but less than 3.5% to enter the program.

The pilot program was scheduled to expire on September 30, 1997, but temporary extensions were included in the Continuing Resolutions passed in the 105th Congress.[135] The Commerce, Justice, State, and Judiciary (CJS) FY1998 Appropriations Act (P.L. 105-119) also contained an extension through April 30, 1998. In 1998, Congress passed legislation (P.L. 105-173) that not only extended the program through April 30, 2000, but made other changes to the standard by which countries are selected (designated) to participate in the VWP.[136] By 1999, program participation had grown to include 29 countries.[137]

[135] An extension of the pilot program was included in the first Continuing Resolution (P.L. 105-56 §117) for FY1998. The five subsequent Continuing Resolutions—P.L. 105-64, P.L. 105-68, P.L. 105-69, P.L. 105-71, and P.L. 105-84—simply extended the expiration date of the provisions in the first Continuing Resolution for FY1998 (P.L. 105-56).

[136] Originally, to qualify for the Visa Waiver Pilot Program countries needed to have had an average nonimmigrant refusal rate of no more than 2% over the past two fiscal years with neither year going above 2.5%. P.L. 105-173 added the criteria that a country could have a nonimmigrant refusal rate of less than 3% for the previous year and qualify for the program.

[137] The 29 countries were: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay. Argentina was removed from the VWP in February 2002, and Uruguay was removed in April 2003. From April 2003 until

Visa Waiver Permanent Program Act

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law (P.L. 106-396). The statutory authority for the Visa Waiver Pilot Program had expired on April 30, 2000, but in the interim, the Commissioner of the former Immigration and Naturalization Service (INS)[138] exercised the Attorney General's parole authority to extend the program temporarily.[139] Besides making this program's authorization permanent, the Visa Waiver Permanent Program Act included provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that

- mandated that by October 1, 2007, all entrants under the VWP must have machine-readable passports;
- required that all visa waiver program applicants be checked against lookout systems;
- required ongoing evaluations of participating countries (not less than once every five years);
- required the collection of visa waiver program arrival/departure data at air and sea ports of entry; and
- required that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.[140]

At the time, many maintained that P.L. 106-396 balanced the competing concerns of facilitating travel and tightening immigration controls.

USA Patriot Act of 2001

The USA Patriot Act (P.L. 107-56), signed into law on October 26, 2001, advanced the deadline for all entrants under the VWP to have machine-readable passports to October 1, 2003, but allowed the Secretary of State to waive this requirement until October 1, 2007, if the VWP country could show that it was making progress toward issuing machine-readable passports. In addition, the USA Patriot Act directed the Secretary of State each year until 2007 to ascertain that designated VWP countries had established programs to develop tamper-resistant passports.

On September 24, 2003, the Secretary of State extended the deadline for visitors from 21 VWP countries to present a machine-readable passport at the ports of entry until October 26, 2004.[141] At

November 2008, the VWP included 27 countries. As of March 2014, there are 38 countries participating in the VWP.

[138] The Homeland Security Act of 2002 (P.L. 107-296) abolished the Immigration and Naturalization Service (INS) and effective March 1, 2003, transferred most of its functions to three bureaus in the new Department of Homeland Security (DHS): Citizenship and Immigration Services (USCIS); Bureau of Immigration and Customs Enforcement (ICE); and, Bureau of Customs and Border Protection (CBP).

[139] Parole is a temporary authorization to enter the United States and is normally granted when the alien's entry is determined to be in the public interest (INA §212(d)(5)(A)).

[140] Many of these requirements were included to address shortcomings in the program, as identified by the Inspectors General of both the Departments of Justice and State.

[141] The 21 countries granted a postponement were: Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom. On November 11, 2003, Luxembourg was granted an extension of the deadline.

this time, an entrant under the VWP with a passport which is not machine-readable must obtain a visa to travel to the United States.

Enhanced Border Security and Visa Entry Reform Act of 2002

The Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act),[142] signed into law on May 14, 2002, required all VWP countries to certify that they report in a timely manner the theft of blank passports, and required, prior to admission in the United States, that all aliens who enter under the VWP are checked against a lookout system. The Border Security Act also mandated that by October 26, 2004, the government of each VWP country needed to certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier.[143] The Border Security Act specified that any person applying for admission to the United States under the VWP must have a tamper-resistant, machine-readable passport with a biometric identifier unless the passport was issued prior to October 26, 2004. The USA Patriot Act established the deadline for all foreign nationals entering under the VWP to have machine-readable, tamper-resistant passports, and the new requirement of biometrics in the passports did not change the deadline in the USA Patriot Act for the presentation of machine-readable, tamper-resistant passports. The biometric passport requirement deadline was extended to October 27, 2005, by P.L. 108-299.[144] Thus, as of October 27, 2005 (the day after the new deadline), all entrants under the VWP were required to present machine-readable, tamper-resistant passports (as required by the USA Patriot Act, and P.L. 108-299), but only passports issued after October 26, 2005, were required to have a biometric identifier.

Although Congress extended the deadline for VWP countries to certify that they had a program to issue machine-readable passports with biometric identifiers, most VWP countries would have been unable to meet the new, October 26, 2005, deadline, especially if the biometric requirement could only have been fulfilled by countries who had electronic data chips in their passports (e-passports). In addition, there was resistance in Congress to grant another extension of the biometric deadline.[145] As a result, the U.S. government clarified that a digitized photograph printed on a data page in the passport would count as a biometric for the October 26, 2005, requirement. Thus, only France and Italy were unable to meet the new deadline, but have since come into compliance. In addition, any passports used by VWP travelers issued after October 26, 2006, requires integrated chips with information from the data page (e-passports).

The Intelligence Reform and Terrorism Prevention Act of 2004

P.L. 108-458,[146] the Intelligence Reform and Terrorism Prevention Act of 2004, added the requirement that by October 26, 2006, as a condition of being in the VWP, each VWP country must certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry.

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[142] P.L. 107-173. The original bill, H.R. 3525, was sponsored by Representative F. James Sensenbrenner.

[143] The act tasked the International Civil Aviation Organization (ICAO) with developing the biometric standard.

[144] Signed into law on August 9, 2004.

[145] For example, see letter from Rep. F. James Sensenbrenner, Jr., to Luc Frieden, President of the European Counsel of Ministers, and Franco Frattini, Vice-President of the European Commission, April 7, 2005.

[146] The original bill, H.R. 2845, was sponsored by Senator Susan M. Collins and signed into law on December 17, 2004.

Implementing the 9/11 Commission Recommendations Act of 2007

Signed into law on August 3, 2007, Section 711 of P.L. 110-53 (H.R. 1) allowed the Secretary of DHS, in consultation with the Secretary of DOS, to waive the nonimmigrant refusal rate requirement for admission to the VWP on the date on which the Secretary of DHS certified to Congress that an air exit system is in place that can verify the departure of not less than 97% of foreign nationals that exit through U.S. airports. In addition, the Secretary of DHS also had to certify to Congress that the electronic travel authorization system (discussed below) is operational, prior to being able to waive the nonimmigrant refusal rate requirement. Until June 30, 2009, the air exit system did not need to incorporate biometric identifiers; however, after that date, if the air exit system is unable to match an alien's biometric information with relevant watch lists and manifest information, the Secretary of DHS's authority to waive the nonimmigrant refusal rate is suspended until the air exit system has the specified biometric capacity.

For admission to the VWP, a country who receives a refusal rate waiver also has to

- meet all the security requirements of the program;
- be determined by the Secretary of DHS to have a totality of security risk mitigation measures which provide assurances that the country's participation in the program would not compromise U.S. law enforcement and security interests, or the enforcement of U.S. immigration laws;
- have had a sustained reduction in visa refusal rates, and have existing conditions for the rates to continue to decline;
- have cooperated with the United States on counterterrorism initiatives and information sharing before the date of its designation, and be expected to continue such cooperation; and
- have, during the previous fiscal year, a nonimmigrant visas refusal rate of not more than 10%, or an overstay rate that did not exceed the maximum overstay rate established by the Secretaries of DHS and DOS for countries receiving waivers of the nonimmigrant refusal rate to participate in the VWP the program.

P.L. 110-53 also specified that in determining whether to waive the nonimmigrant refusal rate requirement, the Secretary of DHS, in consultation with the Secretary of DOS, may take into consideration other factors affecting U.S. security, such as the country's airport security and passport standards, whether the country has an effective air marshal program, and the estimated overstay rate for nationals from the country.

In addition, P.L. 110-53 made several changes to the criteria to qualify as a VWP country, which were intended to enhance the security of the program. As previously mentioned, the act mandated that the Secretary of DHS, in consultation with the Secretary of State, develop and implement an electronic travel authorization system (the system),[147] through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the alien is eligible to travel to the United States and enter under the VWP. Aliens using the system are charged a fee that is required to be set at a level so that the cost of creating and administering the system is covered by the fees.

P.L. 110-53 also required the Secretary of DHS, no later than one year after enactment, to establish an exit system that records the departure of every alien who entered under the VWP and left the United States by air. The exit system is required to match the alien's biometric

[147] The system as implemented is known as the Electronic System for Travel Authorization (ESTA).

information against relevant watch lists and immigration information, and compare such biographical information against manifest information collected by airlines to confirm that the alien left the United States.[148]

Furthermore, under P.L. 110-53, to participate in the VWP, countries are required to enter into an agreement with the United States to report or make available through INTERPOL information about the theft or loss of passports. The agreements have to specify strict time limits for the reporting of this information. In addition, to be part of the VWP, countries have to accept the repatriation of any citizen, former citizen, or national against whom a final order of removal is issued no later than three weeks after the order is issued. Also, the countries are required to enter into an agreement with the United States to share information regarding whether a national of that country traveling to the United States represents a threat to U.S. security or welfare. The act requires the Secretary of DHS to provide technical assistance to VWP countries to assist the countries in fulfilling the requirements of the program.

In addition, P.L. 110-53 requires the Director of National Intelligence to conduct intelligence assessments of countries. For new VWP countries, the reviews must occur prior to their admittance into the VWP. For existing VWP countries, the reviews should be done in conjunction with the biannual country reviews.

The act also requires the Director of National Intelligence to immediately inform the Secretary of DHS of any current and credible threat of imminent danger to the United States or its citizens that originates from a VWP country. Upon receiving such notification, the Secretary of DHS, in consultation with the Secretary of DHS, may suspend a country from the VWP without any prior notice. Once the country's participation in the VWP no longer poses a security threat, the Secretary of DHS shall reinstate the country in the VWP.

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[148] This exit system is not necessarily the same as the exit system required for the nonimmigrant refusal rate waiver authority. DHS appears to have incorporated this requirement as part of the exit portion of automated entry and exit data system known as US-VISIT.