The Department of Homeland Security Proposes an Advance Passenger Information Requirement for Private Aircraft: Paranoia or Reasonable Security

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THE DEPARTMENT OF HOMELAND SECURITY PROPOSES AN ADVANCE PASSENGER INFORMATION REQUIREMENT FOR PRIVATE AIRCRAFT: PARANOIA OR REASONABLE SECURITY?

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I. INTRODUCTION

Since the creation of the Department of Homeland Security ("DHS") in direct response to the need for coordinated vigilance against domestic threats such as terrorism, many questions have been raised about the breadth of its authority and the implications of its exercise of power to fundamental liberties. Created by President George W. Bush in the wake of the September 11th terrorist attacks, the DHS is charged with the responsibility of protecting the American homeland as its primary mission, and endeavors to achieve this goal by consolidating various information gathering activities and communications to best respond to future domestic crises.\(^1\) While the DHS has been established with noteworthy goals to strengthen the country's ability to prevent, defend, and respond to domestic attacks and disasters,\(^2\) numerous concerns have been raised


\(^2\) Id.
questioning the consequences of its far-reaching authority on privacy and other individual liberties.\cite{talanian2003}

Recently, in another attempt to strengthen security, the DHS proposed that all private aircraft entering or leaving the United States be required to submit notice of arrival information to the Bureau of Customs and Border Protection ("CBP") by approved, electronic means at least one hour before departure.\cite{uscbp2007-0064} In addition, the proposal would require considerably more data elements pertaining to the aircraft, pilot, and passengers.\cite{uscbp2007-0064} Further, pilots would be obligated to verify passenger manifest data for each passenger against their respective travel documents.\cite{uscbp2007-0064} The CBP reasons that the proposed rule will further equip all pertinent security agencies with the ability to perform passenger checks against law enforcement and terrorist databases.\cite{uscbp2007-0064} Additionally, the CBP theorizes that such advance risk assessment of international private flights will improve border security by creating yet another mechanism to thwart future terrorist attacks within the United States.\cite{uscbp2007-0064} While rules similar to those proposed have been implemented for commercial aircraft, concerned interest groups argue that the proposed rule would not only be unreasonably burdensome for operators of private aircraft, but also inhibit travel to remote areas lacking the necessary transmission means to satisfy the proposed rule's electronic, advance arrival/departure notification requirements.\cite{bajabushpilotsfightborderproposal}

This comment explores the nature of the government's proposal, similar approaches by other countries, the concerns raised by the proposal, and plausible solutions for achieving CBP security objectives.


\footnote{Id. at 53,398.}

\footnote{Id. at 53,396.}

\footnote{Id.}

without suppressing the concerns of the private flying community.

II. BACKGROUND

A. SOURCE OF RULEMAKING AUTHORITY

Under 19 U.S.C. §§ 1433(c)-(e), the DHS may regulate arriving and departing aircraft entering or leaving the United States, and demand that certain travel documents be supplied by or on behalf of aircraft passengers. In particular, pilots of all United States bound aircraft, regardless of whether commercial or private, must “comply with such advance notification, arrival reporting, and landing requirements” as outlined by the Department. Similarly, all outbound aircraft must also satisfy certain regulations prior to departure from the United States. In addition, the Customs Service can demand the presentation or transmission of certain travel “information, data, documents, papers, or manifests,” as prescribed by the Department. While 19 U.S.C. § 1433 addresses any aircraft entering or leaving the United States, the incident proposal affects only private aircraft, leaving the regulations for commercial aircraft unchanged.

B. EXISTING COMMERCIAL AIRCRAFT REGULATIONS

Presently, any aircraft intending to enter the United States is required to provide advance notification of arrival, as noted above. Arrival and departure passenger manifests are provided by commercial airliners to the CPB through the Advance Passenger Information System (“APIS”), which is the electronic data interchange system approved by the CBP for such transmissions. Under Section 122.49a of the regulation, commercial airliners departing from a location outside the United States bound for the United States are required to transmit an electronic passenger arrival manifest to the CBP no later than thirty minutes prior to the securing of the aircraft for departure in the case of batch transmissions as specified by Section

11 19 U.S.C. § 1433(c).
12 Id. § 1433(e).
13 Id. § 1433(d).
14 See generally USCBP-2007-0064, supra note 4, at 53,394.
15 19 U.S.C. § 1433(c).
16 See Customs Duties, 19 C.F.R. §§ 122.49a(b)(1)(i), 122.75a(b)(1)(i) (2008). This requirement became effective on February 19, 2008. Id.
122.49a(b)(1)(ii)(A) or (B), or no later than the securing of the aircraft in the case of interactive non-batch transmissions of individual passenger information as specified in Section 122.49a(b)(1)(ii)(C). Similarly, under Section 122.75a, commercial airliners departing from the United States bound for a location outside the United States are required to transmit an electronic passenger departure manifest to the CBP no later than thirty minutes prior to the securing of the aircraft for departure in the case of batch transmissions as specified by Section 122.75a(b)(1)(ii)(A) or (B), or no later than the securing of the aircraft in the case of interactive non-batch transmissions of individual passenger information as specified in Section 122.75a(b)(1)(ii)(C). In both cases, "securing the aircraft" is defined as "the moment the aircraft's doors are closed and secured for flight." 

Electronic passenger manifests for all checked-in passengers for international flights arriving in the United States or departing the United States en route to a foreign destination must be transmitted through the APIS, which is an electronic data interchange system approved for such purposes by the CBP. One form of the approved system, dubbed eAPIS (electronic Advance Passenger Information System), operates via the internet. The CBP invites commercial aircraft carriers or their designees to visit the application on the web to provide the statutorily required passenger information within the required timeframe. In addition, the website provides a tutorial for the eAPIS Online Transmission System which the CBP "highly" encourages commercial air carriers to complete prior to employing the system for their statutory compliance efforts. It is also

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17 Id. §§122.49a(b)(2)(i)-(b)(2)(ii).
18 Id. §§122.75a(b)(2)(i)-(b)(2)(ii).
19 Id. §§122.49a(a), 122.75a(a).
20 See id. §§122.49a(b)(1)(i), 122.75a(b)(1)(i).
22 Id.
23 Id.

[The] CBP "highly" encourages that any commercial air carrier and/or air APIS transmitter who wishes to use the "eAPIS Online Transmission System" for their APIS compliance efforts to "first" complete the full eAPIS Online Tutorial courses to ensure they are fully competent and aware of the process, as well as fully understand all the valuable benefits which the eAPIS Online Transmission System provides the commercial air carrier industry users.
important to note that the pilot or his authorized agent is fully responsible for ensuring that the passenger data transmitted is complete and accurate, and reaches the CBP within the allotted timeframe.\textsuperscript{24}

The passenger manifests consist of self-identifying information for each passenger, including full name, date of birth, gender, citizenship, country of residence, status on board the aircraft, travel document type, passport details, alien registration number (if applicable), passenger name record locator, and relevant origin and destination port codes.\textsuperscript{25} As discussed below, this requirement of surrendering self-identifying passenger information is currently unique to commercial aircraft entering or leaving the United States.

In addition to passenger manifests, commercial air carriers are required to provide both crew member lists and non-crew member lists, and also provide air cargo manifests covering any onboard cargo. Commercial aircrafts arriving in, departing from, continuing within, or overflying the United States are required to provide a master crew member list and a master non-crew member list electronically and two days in advance of the flight.\textsuperscript{26} Non-crew members are air carrier employees, their families, and individuals who are traveling for the safety of the aircraft.\textsuperscript{27} Crew members, on the other hand, are air carrier personnel on board the aircraft whom are responsible for flying the aircraft and providing cabin services, including the pilot, copilot, flight engineer, airline management personnel, cabin crew, and relief crew.\textsuperscript{28} Like the passenger manifests, master crew member lists and master non-crew member lists include self-identifying information on each crew and non-crew member.\textsuperscript{29} The two-day period allows the Transportation Security

\textit{Id.}

\textsuperscript{24} 19 C.F.R. §§ 122.49a(b)(1)(i), 122.75a(b)(1)(i). "Appropriate official" means the master or commanding officer, or authorized agent, owner, or consignee, of a commercial aircraft; this term and the term 'carrier' are sometimes used interchangeably. \textit{Id.} §§ 122.49a(a), 122.75a(a).

\textsuperscript{25} \textit{Id.} §§ 122.49a(b)(3), 122.75a(b)(3).

\textsuperscript{26} \textit{Id.} § 122.49c.

\textsuperscript{27} \textit{Id.} § 122.49b(a). The provided example of a non-crew member is an animal handler who ensures the safety of any animals onboard a commercial aircraft. \textit{Id.} The definition of "non-crew member" only arises in the context of all-cargo flights. \textit{Id.}

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} For a full list of data components required in the master crew member and non-crew member lists, see 19 C.F.R. § 122.49c(c).
Administration to check the credentials of the crew and non-crew members and relay any necessary changes to the list.\textsuperscript{30} Later, sixty minutes prior to departure of the aircraft, a separate electronic manifest must be transmitted to the CBP covering any actual crew members and non-crew-members on board.\textsuperscript{31} By way of this second layer of security checks, this electronic manifest is compared against the corresponding master lists to ensure that each crew member or non-crew member is cleared to fly on board the aircraft.\textsuperscript{32} In the event of any mismatches, the aircraft may be denied clearance to depart, diverted from arriving in the United States, or denied clearance to enter the territorial airspace of the United States.\textsuperscript{33}

Further, commercial carriers carrying export cargo leaving the United States are required to file an air cargo manifest\textsuperscript{34} by completing a specific customs form.\textsuperscript{35} In the event that there is no export cargo to be declared by an air cargo manifest, the aircraft must still notify the port director of the absence of air cargo by telephone and sufficiently in advance to allow Customs to perform any necessary examinations prior to departure.\textsuperscript{36}

C. Existing Private Aircraft Regulations

1. Advance Notice of Arrival Requirements

In contrast to the requirements for commercial aircraft, compliance with the current regulations for private aircraft is arguably easier. Except for flights following a published schedule, certain private aircrafts arriving from foreign locations, other than those from south of the United States as described by 19 C.F.R. § 122.23(b), are required to provide an advance notice of arrival.\textsuperscript{37} Unlike commercial aircraft, such private aircraft's advance notice of arrival may be provided by radio, telephone, other methods, or through the Federal Aviation Administration’s flight notification procedure to the port director in the place of first landing in the United States.\textsuperscript{38} This notice of arrival must contain the type of aircraft and registration number,

\textsuperscript{30} See id. § 122.49c(a).
\textsuperscript{31} See id. §§ 122.49b(b)(2)(i), 122.75b(b)(2)(i).
\textsuperscript{32} Id. §§ 122.49b(b)(2)(ii), 122.75b(b)(2)(ii).
\textsuperscript{33} Id.
\textsuperscript{34} Id. § 122.72.
\textsuperscript{35} Id. § 122.73(a).
\textsuperscript{36} Id. §§ 122.71(a)-(b).
\textsuperscript{37} Id. §§ 122.31(a)-(b).
\textsuperscript{38} Id. § 122.31(c).
name of pilot, place of last foreign departure, location of intended landing, number of alien passengers, number of citizen passengers, and estimated time of arrival. Notably, the current regulations do not require the pilot to provide a tabulation of individual passenger information beyond mere numbers of alien and citizen passengers, and consequently pose no significant privacy concern or unreasonable burdens on the commander of the aircraft. Further, the regulations require that the notice of arrival be furnished sufficiently far enough in advance of the aircraft's arrival to allow inspecting officers to reach the intended place of first landing. Once such notice of arrival is delivered to the port director, who is, in turn, required to inform any relevant federal agencies.

2. Certain Private Aircraft Arriving from Areas South of the United States

Similarly, certain private aircrafts arriving in the United States from a foreign location that is both south of the United States and in the Western Hemisphere must also provide advance notice of arrival. Interestingly, not all private aircraft originating from locations both south of the United States and in the Western Hemisphere must provide the advance notice of arrival. Instead, the rules apply to only a subset of all private aircraft, as defined in the regulations.

Unlike private aircrafts entering the United States from other foreign locations, the specified private aircrafts originating from both south of the United States and in the Western Hemisphere are subject to special advance arrival notification requirements. In particular, they must "furnish a notice of intended arrival to Customs at the nearest designated airport to [the] point of crossing," as listed in Section 122.24(b). Further, the timeframe generally allowed for other private aircraft to submit

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59 Id. § 122.31(d).
60 See id.
61 Id. § 122.31(e).
62 Id. § 122.31(f).
63 Id. § 122.23(b). Although not discussed, certain unscheduled commercial flights arriving from both the south of the United States and in the Western Hemisphere are also required to comply with special arrival notification and landing requirements. See id.
64 Id.
65 Id. § 122.23(a). Notice that 19 C.F.R. § 122.23(a) explicitly modifies the definition of private aircraft for the purposes of the section. Id.
66 Id. § 122.23(b).
notices—a time period which adequately permits government officials to reach the place of first landing for inspections—does not apply to these private aircrafts.\(^{47}\) Instead, the advance notification of arrival "must be furnished at least 1 hour before crossing the U.S. coastline or border."\(^{48}\)

In addition to the aircraft registration number, the name of the pilot, place of last departure, intended U.S. airport of first landing, number of alien passengers, number of U.S. citizen passengers, and estimated time of arrival—as are required of other United States bound private aircraft—the pilots of these private aircrafts must also provide the estimated time and location of crossing the U.S. border or coastline.\(^{49}\) However, apart from these data elements, no further tabulation of individual passenger information is required as part of the notice of arrival.\(^{50}\) As an additional restriction, these private aircrafts are generally required to land at airports specifically designated in the regulations.\(^{51}\) Thus, in effect, this special advance notification procedure provides U.S. officials with information pertaining not only to the intended first place of landing, but also to the first penetration of U.S. airspace by aircrafts originating from locations lying to the south of the United States as described in 19 CFR § 122.23.\(^{52}\)

3. Certain Aircraft Arriving from Cuba

All private aircraft, except for those designated as public aircraft, entering the United States from Cuba\(^{53}\) are also required to give advance notice of arrival at least one hour before crossing the United States border.\(^{54}\) However, unlike other private aircraft or specified private aircraft arriving generally from the south of the United States, the notice of arrival must be submitted through the Federal Aviation Administration flight notification procedure, or directly to the Customs officer in charge at specifically designated airports.\(^{55}\) Additionally, aircraft arrivals

\(^{47}\) Compare id. § 122.31(e) with id. § 122.23(b).
\(^{48}\) Id. § 122.23(b).
\(^{49}\) Id. § 122.23(c).
\(^{50}\) See id.
\(^{51}\) See id. § 122.24(b).
\(^{52}\) Compare id. § 122.31(b) with id. § 122.23(b).
\(^{53}\) The definition of Cuba "does not include the Guantanamo Bay Naval Station." Id. § 122.151(b).
\(^{54}\) Id. § 122.154(b).
\(^{55}\) Id. Direct submission to a CBP officer in charge can be made at one of these applicable airports: Miami International Airport, Miami, Florida; John F. Ken-
from Cuba must typically obtain clearance to land at the Miami International Airport, the John F. Kennedy International Airport, or the Los Angeles International Airport.\textsuperscript{56}

Even excluding the complex requirements embodied in the advance notification of arrival of certain private international flights originating south of the border, significant differences in the regulations between commercial and private aircraft that may not be readily apparent still remain. And, more interestingly, currently there are no formal requirements demanding an advance departure notification for private aircraft leaving the United States, regardless of whether the foreign destination is to the south of the United States. Also, the regulations do not provide a clear procedure to request landing rights to land at landing rights airports.\textsuperscript{57}

D. Advance Landing Regulations

In addition to advance notification, an aircraft wishing to land in the United States must obtain permission to do so in the form of landing rights, designed mainly to ensure that necessary customs inspections are performed.\textsuperscript{58} An aircraft that seeks to land in the United States may land at one of three types of airports: an international airport, a user fee airport, or a landing rights airport.\textsuperscript{59} An international airport is any airport designated as such by each of the Secretary of the Treasury or the Commissioner of Customs, the Attorney General, and the Secretary of Health and Human Services.\textsuperscript{60} International airports are typically publicly owned\textsuperscript{61} and are deemed to have the proper facilities to conduct customs inspections.\textsuperscript{62} No formal landing rights are required for international airports since they are designated as a port of entry for aircraft arriving in the United States from a

\textsuperscript{56} Id. § 122.153.
\textsuperscript{57} See USCBP-2007-0064, supra note 4, at 53,403.
\textsuperscript{58} See 19 C.F.R. §§ 122.11-15, 122.24-25.
\textsuperscript{59} Id. §§ 122.11-15.
\textsuperscript{60} Id. § 122.1(e).
\textsuperscript{61} Id. § 122.11(a).
\textsuperscript{62} See id. §§ 122.11(b)-(c), 122.12.
foreign location. On the other hand, both user fee airports and landing rights airports generally require the pilot of the aircraft to obtain landing rights prior to grounding the aircraft. User fee airports are distinguished from landing rights airports in that they are specifically designated as such by the CBP and provided in an informational listing under 19 C.F.R. § 122.15. In both cases, unless there is an emergency or forced landing, permission to land is granted at the discretion of the director of the nearest port of entry or station. In the event that landing rights are granted, the director, in turn, is obligated to notify the relevant federal agencies, including, but not limited to, the Public Health Service, the Immigration and Naturalization Service, and the Animal and Plant Health Inspection Service. The CBP is particularly concerned that the procedures currently in place to obtain permission to land at landing rights airports may be inadequate.

**E. HISTORY AND RATIONALE FOR PASSENGER MANIFISTS**

A comparison of the regulations in place for commercial air carriers and private aircraft readily reveals that private aircraft do not require the same level of self-identifying passenger information to be electronically transmitted to the proper authorities. The passenger manifest requirement for commercial aircraft was first enacted under the Aviation and Transportation Security Act ("ATSA") in 2001. It required that air carriers electronically transmit individual passenger, crew, and non-crew manifests to the Customs Service. Despite the formation of the DHS, which consolidated various disparate agencies into one unified government entity under the Homeland Security

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63 Id. § 122.1(e). Note, however, that under 19 C.F.R. § 122.24(b), private aircraft arriving from both south of the United States and in the Western Hemisphere are required to land "at the nearest designated airport to the border or coastline" following entry into U.S. airspace.

64 Id. §§ 122.14(a), 122.15(a).

65 Compare id. § 122.1(m) with id. § 122.1(f).

66 Id. §§ 122.14(a)(4), 122.15(a).

67 Id. §§ 122.14(a)(1)-(3), 122.15(a).

68 Id. §§ 122.14(b), 122.15(a).

69 See USCBP-2007-0064, supra note 4, at 53,403.


71 Id.
Act, manifests are still required by the CBP, as discussed above.\textsuperscript{72} Notably, the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA") required that the DHS implement screening of passenger and crew members of commercial aircraft entering or leaving the United States, prior to departure.\textsuperscript{73} Before the enactment of the IRTPA, en route electronic transmission was the norm for the delivery of passenger/crew manifests.\textsuperscript{74} Although the relevant regulations have been modified from their original form by amendment, the APIS system now in place is employed to satisfy the IRTPA requirements for electronic transmission of passenger, crew, and non-crew manifests.\textsuperscript{75} At the time, the government reasoned that such predeparture screening would enable relevant authorities to intervene as necessary to prevent high-risk individuals from even boarding an aircraft bound for the United States or leaving the United States for a foreign location.\textsuperscript{76} The rule was implemented both in light of the September 11th terrorist attacks and the need to protect the airline industry—a vital constituent of the U.S. economy—from instability.\textsuperscript{77}

III. AIRCRAFT REGULATIONS IN FOREIGN COUNTRIES

A. United Kingdom

In sharp contrast to the existing regulations for commercial and private aircraft passenger manifests in the United States, the analogous rules in the United Kingdom appear much less complex.\textsuperscript{78} The captain of the aircraft arriving in the United Kingdom must ensure that passengers do not disembark prior to


\textsuperscript{74} CBP Proposes Predeparture Passenger and Crew Manifests, 83 No. 28 Interpreter Releases 1568 (July 24, 2006) [hereinafter CBP Proposes Predeparture Manifests].

\textsuperscript{75} See 19 C.F.R. §§ 122.49a(b)(1)(i), 122.75a(b)(1)(i) (2008).

\textsuperscript{76} See CBP Proposes Predeparture Manifests, supra note 74, at 1569.

\textsuperscript{77} See Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft, 70 Fed. Reg. at 17,837. "The . . . amendments of this final rule are published today in the interest of national security and to protect and safeguard the international traveling public and the commercial vessel and aviation industries during a time of considerable terrorist risk to those important interests." Id.

receiving approval from an immigration officer, and must take
necessary steps to make sure passengers are presented for exa-
mination in an orderly manner. Additionally, aircraft entering
or leaving the United Kingdom (or expecting to do so) must
provide a passenger list and crew particulars to the designated
immigration officer. The passenger lists must contain the
names and citizenships of each passenger onboard the aircraft.
The person responsible for submitting such lists may either be
the owner, agent, or captain. Although the timeframe within
which such passenger and crew lists are to be provided is not
prescribed by the statute, the statute does give the Secretary of
State the authority to designate an appropriate time, form, and
manner. The form and manner have since been designated by
statutory instrument—requiring passenger lists and particulars
of crew members to be provided in an electronic form to be
used by the recipient. The recipients include the immigration
authorities and the police, both requiring data on the passen-
gers, crew members, and the flight service. The various data
elements required vary depending on the category of the data
(passenger, crew, or service information) and the intended re-
cipient (immigration authorities or police). Surprisingly, the
statutes and regulations concerning passenger and crew mem-
ber particulars make no distinction between commercial or pri-
ivate aircraft—focusing rather on the fact that the aircraft is
engaged in international travel originating from or terminating
in the United Kingdom.

B. CANADA

Departing from the approaches of the United States and the
United Kingdom, Canada requires passenger lists (referred to as

79 See Immigration Act, 1971, c. 77, §§ 27(1)(a)–(b), sched. 2 (U.K.).
80 See Immigration, Asylum and Nationality Act, 2006, c. 13, §§ 31(2)–(3)
81 See id.
82 See id. § 31(4).
83 See id. §§ 31(2), (5).
84 The Immigration and Police (Passenger, Crew and Service Information) Or-
/www.opsi.gov.uk/si/si2008/uksi_20080005_en_1#pt2-l1g3 [hereinafter U.K. Im-
migration and Police Order 2008].
85 Id. pts. 2–4. Note that the Immigration Act of 1971, as amended, requires
flight service information to be provided only upon request by an immigration
officer. See Immigration, Asylum and Nationality Act, § 31.
"advance passenger information") to be provided to its officials upon request to the commercial air carrier. Once requested, the advance passenger information must be provided in writing by the commercial air carrier upon departure or prior to arriving in Canada. It shall contain the surname, first name, middle initial(s), date of birth, gender, passport number, passport country of origin, and reservation record locator of each passenger. On the other hand, persons in charge of a private or corporate aircraft must provide advance notification of persons onboard who intend to present themselves at a Canadian public airport, duly designated as a customs office. This advance notification must be provided to an officer at such location by telephone at least two hours before the aircraft is expected to arrive. But, such advance notification may not be made more than forty-eight hours prior to arrival in Canada. Upon request, persons in charge of the private/corporate aircraft may be required to provide any further information regarding passengers aboard the aircraft and/or notification of arrival in Canada.

C. OTHER COUNTRIES

A number of other countries also have instituted some form of an advance passenger information requirement for international flights. Spain was the first country in Europe to require advance passenger information, demanding that information commonly found on the photograph page of a passport, including name, date of issue, place of birth, and passport number, be provided to Spanish law enforcement officials prior to departure to Spain. Effective January 4, 2005, Japan joined the group of countries that have decided to implement an advance passenger

87 Immigration and Refugee Protection Regulations (Immigration and Refugee Protection Act) SOR/2002-227, s. 269 (June 11, 2002) (Can.).
88 Id.
89 Id.
91 Id.
92 Id.
93 Id. s. 15(2).
information system. Japan requires commercial air carriers to provide passenger data electronically at the time of boarding. The data then will be checked against the database of the National Police Agency, Ministry of Justice, and Ministry of Finance with the intent to locate wanted criminals, thwart organized crime and terrorism, and further secure the country’s borders. Although developed nations were among the first to implement laws and dedicate resources to facilitate the transfer of advance passenger information, a number of developing nations have also followed suit.

IV. PROPOSED REGULATIONS FOR PRIVATE AIRCRAFT

When compared to the U.S. regulations covering commercial aircraft engaged in international air travel, the regulations covering similarly situated private aircraft are simply not as demanding. Unlike commercial aircraft operators, private aircraft operators are not similarly required to transmit a notice of arrival in advance of departure. Further, regulations and procedures for private aircraft do not insist that self-identifying information for each passenger on board be provided before commencing an international flight destined for or leaving from the United States. Although the regulations go to great lengths to distinguish the nature of arrival notifications if the

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96 Id. at 2.
97 Id.
98 See, e.g., B.V. GOPINATH, INTRODUCTION OF ADVANCE PASSENGER INFORMATION SYSTEM (APIS)—SURVEY FORM (2005), http://mha.nic.in/pdfs/Surveyforms.pdf. As amended on July 3, 2005, India’s Foreigners Order, 1948 states in part: The master of a vessel or a pilot of the aircraft, as the case may be, arriving or landing in India, shall provide . . . information about the passengers on board within fifteen minutes of leaving or taking off of the vessel or aircraft from the port of embarkation outside India, to the immigration authority on the port of arrival or landing in India through electronic measure.
99 See supra notes 15–36 and accompanying text.
100 Recall that under the current regulations, only the headcounts of passengers that are U.S. citizens or aliens are provided in an advance notice of arrival for private aircraft. See supra notes 49–50 and accompanying text.
private flight originates from both south of the United States and in the Western Hemisphere, the regulations are surprisingly silent as to a departure notification requirement for international flights initiated by private aircraft within the United States.\(^{101}\) There is also a concern that the regulations do not satisfactorily proscribe the procedures a private aircraft should undertake in order to obtain permission to land at a designated landing rights airport.\(^{102}\)

In an effort to harmonize the differences between commercial and private aircraft regulations, the CBP has proposed a number of changes to the existing law as outlined in a recent notice of proposed rulemaking ("NPRM"), designated as USCBP-2007-0064.\(^ {103}\) The CBP hopes that closing the gap between these two sets of regulations will provide the CBP with information from which it can timely assess potential threats to the homeland.\(^ {104}\) As one of the hallmarks of the proposal, the CBP suggests requiring that self-identifying passenger manifests be included in the electronic advance notice of arrival for private aircraft engaged in international travel to or from the United States.\(^ {105}\) In addition, the proposal suggests expanding the private aircraft regulations to include more precise notice of arrival and departure requirements, and provide well-defined procedures for obtaining a landing clearance.\(^ {106}\) The CBP contends that this proposal, if implemented, would enhance national security by allowing advance pre-screening of international passengers, thereby providing relevant domestic and foreign authorities with the ability to respond timely to potential threats before they materialize.\(^ {107}\)

A. PROPOSED NOTICE OF ARRIVAL AND ARRIVAL MANIFEST REQUIREMENTS

The CBP proposes that pilots of private aircraft arriving in the United States from a foreign location be required to simultaneously submit notice of arrival of the aircraft and manifest data pertaining to each individual on board.\(^ {108}\) Further, the notice of

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\(^ {101}\) See supra notes 37–57 and accompanying text.  
\(^ {102}\) USCBP-2007-0064, supra note 4, at 53,396.  
\(^ {103}\) Id.  
\(^ {104}\) Id.  
\(^ {105}\) Id.  
\(^ {106}\) Id. at 53,404.  
\(^ {107}\) Id.  
\(^ {108}\) Id. (proposing a revised 19 C.F.R. § 122.22(b)(1)).
arrival and manifest data are to be transmitted through an electronic data interchange system approved by the CBP.\textsuperscript{109} The information must be submitted to the CBP "[n]o later than 60 minutes prior to departure of the aircraft," except that flights that are diverted to the United States on account of an emergency are required to submit such information "no later than 30 minutes prior to arrival."\textsuperscript{110} In cases of non-compliance during an emergency, the CBP will take into consideration the lack of proper equipment to make the required transmission.\textsuperscript{111} The "departure" of the aircraft is defined as "the point at which the aircraft is airborne and the aircraft is en route directly to its destination."\textsuperscript{112} In light of the convenience and accessibility of the internet, the CBP is predicting that most private aircraft will use the web-based eAPIS system, currently used by commercial aircraft, as their preferred transmission medium.\textsuperscript{113} As an alternative electronic means, the CBP permits private aircraft pilots to use the electronic EDIFACT (Electronic Data Interchange For Administration, Commerce, and Transport) transmission scheme, which is approved by the United Nations.\textsuperscript{114} The CBP envisions that pilots of business aircraft with large numbers of travelers would use an electronic EDIFACT transmission or other CBP-approved system, as opposed to eAPIS.\textsuperscript{115}

Surprisingly, the proposed regulations even demand that private aircraft pilots land their aircraft in another foreign location before arriving in the United States if a reliable means do not exist in their country of flight origin to satisfy these proposed statutory requirements.\textsuperscript{116} So, private aircraft pilots originating their United States-bound flights from foreign locations lacking sufficient electronic means to transmit the required notice of arrival and manifest data through a CBP-approved electronic

\textsuperscript{109} Id.

\textsuperscript{110} Id. (proposing a revised 19 C.F.R. § 122.22(b)(2)).

\textsuperscript{111} Id.

\textsuperscript{112} Id. (proposing a revised 19 C.F.R. § 122.22(a)).

\textsuperscript{113} Id. at 53,400.


\textsuperscript{115} USCBP-2007-0064, supra note 4, at 53,397 n.12.

\textsuperscript{116} Id. at 53,405 (proposing a revised 19 C.F.R. § 122.22(b)(5)). "When reliable means for giving notice are not available (for example, when departure is from a remote place) a landing must be made at a foreign place where notice can be sent prior to coming into the United States." Id.
data interchange system would not typically be excused from these data requirements.\textsuperscript{117} Instead, such pilots would have a duty to land at another foreign location, situated either in another part of the same foreign country of flight origin or another foreign country altogether, possessing the capabilities to transmit notice of arrival and manifest data as required by a CBP-approved electronic data interchange system.\textsuperscript{118} Although the CBP claims that a transitional period will be instituted during which the current manual process will be replaced by the automated electronic procedure,\textsuperscript{119} the electronic transmission requirements are still likely to be particularly burdensome for private aircraft pilots.\textsuperscript{120}

1. Data Requirements

The proposal also expands the notice of arrival data requirements and now requires the aircraft registration number, type of aircraft, call sign, decal number, place of last departure, date of aircraft arrival, estimated time of arrival, estimated time and location of crossing the U.S. border/coastline, name of intended U.S. airport of first landing, owner/lessee name, owner/lessee address, pilot name, pilot license number, pilot street address, pilot license country of issuance, operator name, operator street address, transponder code, color, complete itinerary, and twenty-four-hour point of contact name and phone number.\textsuperscript{121} Making no distinction between requirements for passengers and crew members, the manifest data requirements demand the full name, date of birth, citizenship, country of residence, status on board the aircraft (passenger or crew member), travel document type, passport number, passport/travel document country of issuance, passport expiration date, alien registration number (if applicable), address while in the United States, and redress number (if available) of each individual onboard the private aircraft.\textsuperscript{122} Significantly, unlike the current permitted modes of transmission of telephone, radio, or other method to comply

\begin{itemize}
\item \textsuperscript{117} Compare id. at 53,404 (proposing a revised 19 C.F.R. § 122.22(b)(1)) with id. at 53,405 (proposing a revised 19 C.F.R. § 122.22(b)(5)).
\item \textsuperscript{118} See id. at 53,405 (proposing a revised 19 C.F.R. § 122.22(b)(5)).
\item \textsuperscript{119} Id. at 53,397.
\item \textsuperscript{120} See, e.g., AOPA Online, Regulatory Brief, U.S. Customs and Border Protection Proposed Rule (Jan. 18, 2008), http://www.aopa.org/whatsnew/regulatory/customs.html.
\item \textsuperscript{121} See USCBP-2007-0064, supra note 4, at 53,404 (proposing a revised 19 C.F.R. § 122.22(b)(4)).
\item \textsuperscript{122} Id. (proposing a revised 19 C.F.R. § 122.22(b)(3)).
\end{itemize}
with notice of arrival requirements, both the proposed notice of arrival and manifest data are to be submitted electronically.\(^{123}\) Also, private aircraft pilots are responsible for ensuring the accuracy of the manifest information by verifying that the travel documents of each traveler on board the aircraft are DHS-approved travel documents, that they are sufficient for entry into the United States, and that they have been issued to the particular traveler in question.\(^{124}\)

2. *Departure Clearance*

The NPRM also proposes that the private aircraft pilot receive a departure clearance from the DHS prior to departure, permitting it to leave for the United States.\(^{125}\) In addition, if the DHS provides any instructions during the clearance process, the pilot would be required to follow those instructions prior to departure.\(^{126}\) This allows the DHS to pre-screen travelers and address any additional concerns by inquiring or instructing the private aircraft pilot as necessary before the private aircraft leaves for the United States. Also under consideration by the DHS is whether private aircraft pilots should be informed of passengers or crew members who have caused the denial or restriction on landing rights for the United States.\(^{127}\) If such notification is approved by the CBP over any privacy or security concerns, a notified private aircraft pilot would be able to exclude such individuals (for example, those designated as selectee or no-fly), thereby limiting any further flight delays.\(^{128}\)

3. *Amendments to the Arrival Manifest*

Any modifications to the arrival manifest after initial transmission to CBP must also be approved prior to departure.\(^{129}\) If amendments are forwarded to the CBP no later than sixty minutes prior to departure, then the normal procedures for submitting the notice of arrival and manifest data, and obtaining departure clearance apply.\(^{130}\) However, if the amended manifest is submitted less than sixty minutes prior to departure, a

\(^{123}\) *Id.* (proposing a revised 19 C.F.R. § 122.22(b)(1)).

\(^{124}\) *Id.* at 53,397.

\(^{125}\) *Id.* at 53,405 (proposing a revised 19 C.F.R. § 122.22(b)(6)).

\(^{126}\) *Id.*

\(^{127}\) *Id.* at 53,397.

\(^{128}\) *Id.*

\(^{129}\) *Id.* at 53,405 (proposing a revised 19 C.F.R. § 122.22(b)(7)).

\(^{130}\) *Id.*
revised manifest must be submitted and approved by the CBP before the aircraft is permitted to depart for the United States. In the event that an amendment to the traveler manifest data becomes necessary after the private aircraft is airborne, the flight may be diverted from arriving in the United States or denied clearance to land within the United States. As can be expected, any departure clearances previously granted on the basis of incorrect or incomplete traveler manifest data are invalidated upon transmission of a revised traveler manifest by the private aircraft pilot.

As envisioned by the CBP, this proposal would afford the DHS and the CBP an opportunity to pre-screen travelers, assess any potential risks posed by passengers or crew members aboard the private aircraft, and respond with further inquiries or instructions to address any threats, all before the private aircraft is airborne and en route to the United States. As such, this predeparture vetting procedure allows the DHS to address any concerns it may have in regard to a private aircraft entering U.S. airspace before it leaves the foreign country. Therefore, this would eliminate any potential need for drastic security response measures by the Department or other defense authorities, especially in light of the September 11th and other terrorist attacks around the world.

4. Requirements for Certain Aircraft Arriving from South of the United States

The proposed regulations also intend to change the rules for aircraft arriving in the Continental United States from areas both south of the United States and in the Western Hemisphere. They require that private aircraft pilots submit an advance notice of arrival and manifest data under the procedures discussed above and outlined in proposed rule 19 C.F.R. § 122.22. Thus, regardless of foreign place of origin, private aircrafts must provide an advance notice of arrival and manifest data sixty minutes prior to their United States bound departure by an approved electronic data interchange system. However, certain private aircraft, as set forth in proposed rule 19 C.F.R.

131 Id.
132 See id.
133 See id.
134 Id. at 53,397.
135 Id. at 53,405–06 (proposing a revised 19 C.F.R. §§ 122.23(a)-(b)).
136 Id. (proposing a revised 19 C.F.R. § 122.23(b)); see also id. at 53,397.
§ 122.23(a), are still required to provide CBP with advance notice of arrival at least one hour before crossing the U.S. coastline by telephone, radio, or other Federal Aviation Administration approved means. The proposed regulation lists the specific types of aircraft that are subject to this rule, as opposed to modifying the definition of "private aircraft" as do the current regulations. This eliminates any ambiguity as to which aircrafts must comply with 19 C.F.R. § 122.23.

5. Requirements for Certain Aircraft Arriving from Cuba

In addition, all aircraft arriving in the United States from Cuba, regardless of whether it is private or commercial, must also provide advance notice of arrival unless it is approved by the Office of Foreign Assets Control ("OFAC") and is a scheduled, commercial aircraft of a scheduled airline. In the context of private aircraft originating from Cuba, this would mean that they, too, would be required to submit notice of arrival and traveler manifest data in tandem, via an electronic data interchange system approved by the CBP, like all other private aircrafts. However, unchanged by the new proposal is the requirement that the notice of arrival information be submitted through the FAA flight notification procedure or directly to the Customs officer in charge at one of the specified airports: Miami International Airport, Miami Florida; John F. Kennedy International Airport, Jamaica, New York; or Los Angeles International Airport, Los Angeles, California.

B. Proposed Notice of Departure and Departure Manifest Requirements

The recent CBP proposal would also institute regulations on private aircraft departing from the United States and destined for a location outside of the United States. In an effort to mirror the notice of arrival, arrival manifest, and landing clearance requirements for private aircraft arriving in the United States from foreign locations, the CBP proposal would require a notice of departure, a departure manifest, and advance clearance re-

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137 Id. (proposing a revised 19 C.F.R. § 122.23(b)).
138 See id.
139 19 C.F.R. § 122.23(a) (2008).
140 USCBP-2007-0064, supra note 4, at 53,406 (proposing a revised 19 C.F.R. § 122.154(a)).
141 See id. at 53,404–05 (proposing a revised 19 C.F.R. § 122.22(b)(1)).
142 19 C.F.R. § 122.23(b).
quirement for all private aircraft leaving the United States bound for a foreign location. Like the arrival manifest, the departure manifest must contain data pertaining to all individuals traveling on the private aircraft. In addition, the departure manifest is to be simultaneously submitted with the notice of departure. Furthermore, submissions of both the notice of departure and departure manifests must be made through an electronic data interchange system approved by the CBP.

At all times and despite delegation of duties, the private aircraft pilot is deemed to be responsible for these submissions, and to ensure that they are complete, accurate, and fully compliant with the regulations. The private aircraft pilot (or his designated agent) is required to make the electronic notice of departure and departure manifests submissions no later than sixty minutes prior to departure from the United States. As with arrivals into the United States, a private aircraft pilot departing the United States can log on to the CBP-approved eAPIS system and comply with these requirements over the internet.

1. Data Requirements

As part of the notice of departure, private aircraft departing from the United States would be required to provide the aircraft registration number, type of aircraft, call sign (if available), decal number, place of last departure, date of aircraft departure, estimated time of departure, estimated time and location of crossing U.S. border/coastline, name of intended foreign airport of first landing, name of owner or lessee of the aircraft, address of owner or lessee, private aircraft pilot name, pilot license number, pilot’s address, pilot license country of issuance, operator’s name, operator’s address, a twenty-four-hour point of contact, transponder code, color, and complete itinerary.

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143 See USCBP-2007-0064, supra note 4, at 53,405 (proposing a revised 19 C.F.R. § 122.22(c)).
144 Id. (proposing a revised 19 C.F.R. § 122.22(c)(1)).
145 Id.
146 Id.
147 Id.
148 Recall that the “departure” of the aircraft is defined as “the point at which the aircraft is airborne and the aircraft is en route directly to its destination.” Id. at 53,404 (proposing a revised 19 C.F.R. § 122.22(a)).
149 Id. at 53,405 (proposing a revised 19 C.F.R. § 122.22(c)(2)).
150 See generally eAPIS Online Transmission System, supra note 21.
151 USCBP-2007-0064, supra note 4, at 53,405 (proposing a revised 19 C.F.R. § 122.22(c)(4)).
Like the regulations outlining the arrival manifest requirements, the regulations for private aircrafts leaving the United States do not make any distinctions between crew members and passengers as far as data requirements are concerned. As proposed, the pilot of a private aircraft intending to leave the United States for a foreign destination must provide in the departure manifest the full name, date of birth, gender, citizenship, country of residence, status onboard the aircraft, travel document type, passport number (if required), travel document issuing country, travel document expiration date, alien registration number (if applicable), address while in the United States, and redress number (if available) for each traveler aboard the private aircraft. Under the proposal, this information may not be submitted by the transmission means currently permitted for notice of arrival submissions, which include radio, telephone, or other similar communication methods. Assuming that most airports within the United States would have access to the internet or some other CBP-approved electronic means, meeting the proposal’s requirements for private aircraft departing from the United States would not be as problematic as complying with the proposal’s requirements for private aircraft prior to arriving in the United States.

2. Departure Clearance

Upon submission of the notice of departure and departure manifest data, the private aircraft must standby until permission to depart is issued by the DHS. A message from the DHS may either clear the private aircraft for departure or provide further instructions that must be followed prior to departure. As with advance notification of arrival and arrival manifest information, this screening procedure enables the DHS to assess any risks posed by the private aircraft or its travelers in advance of the aircraft becoming airborne.

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152 See id.
153 Id. (proposing a revised 19 C.F.R. § 122.22(c)(3)). Recall that the private aircraft pilot is responsible for collecting this information and verifying that it represents the passenger or crew member traveling onboard the aircraft. Id. (proposing a revised 19 C.F.R. § 122.22(c)(1)).
154 Id. (proposing a revised 19 C.F.R. § 122.22(c)(1)); see also 19 CFR § 122.31(c) (2008).
155 See supra note 9 and accompanying text.
156 USCBP-2007-0064, supra note 4, at 53,405 (proposing a revised 19 C.F.R. § 122.22(c)(5)).
157 Id.
3. Amendments to the Departure Manifest

As with arrival manifests, private aircraft pilots are required to make amendments to the manifest if changes are deemed necessary. Once an amended manifest is submitted, any prior departure clearances granted by the CBP as a result of earlier manifests are invalidated. The normal departure notification and information submission procedures apply if more than sixty minutes remain before departure. However, if an amended manifest is submitted less than sixty minutes prior to departure, the CBP may grant a departure clearance (or deny one) as it sees appropriate. This procedure ensures that screening is performed against the most accurate and complete data representing all travelers aboard the private aircraft.

V. CONCERNS RAISED BY THE CBP PROPOSAL

During the comment period for the CBP proposal, a number of organizations promoting aviation by private aircraft voiced their concern with the CBP proposal for advance information on private aircraft arriving and departing the United States. The primary concern of most of these organizations has been the demanding requirement that the information be provided by electronic transmission means. Although the CBP is seeking to institute these rules in an effort to conform more closely to the current requirements placed on commercial aircraft, general aviation pilots have made it clear that they do not share the government's notion that "one size fits all" regulations are the most rational means to ensure border safety and promote international travel and tourism by private aircraft.

A. Electronic Transmission Means

As explained above, a recent proposal from the CBP seeks to institute electronic reporting procedures for the submission of notice of arrival, notice of departure, and manifest information. Also, as noted, the CBP anticipates that most general aviation

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158 Id. (proposing a revised 19 C.F.R. § 122.22(c) (6)).
159 Id.
160 Id.
161 Recall that the regulations demand that those private aircraft pilots entering the United States from foreign locations lacking the infrastructure to provide the required advance information via electronic means to seek out, fly to, and submit the requested information from secondary locations having the CBP-approved electronic submission means. See supra note 116 and accompanying text.
pilots will make use of the eAPIS system over the internet to comply with these requirements.\textsuperscript{162} Many organizations have expressed concern that this would limit private air travel to remote places, such as parts of Mexico and Central America, due to the lack of proper facilities to make such an electronic submission.\textsuperscript{163}

1. \textit{Baja Bush Pilots}

While the CBP envisions employing the internet as the preferred means for complying with this proposal, many argue that such internet capabilities are simply not available in various locations. In particular, the President of Baja Bush Pilots, a 4,000-member organization that promotes private aircraft travel to Mexico and Central America, has stated that requiring advance notice over the internet would be particularly problematic.\textsuperscript{164} In his opinion, a number of destinations south of the border would not have the infrastructure to support internet or email delivery of notice of arrival or arrival manifest information, or be capable of awaiting the delivery of an electronic message from the CBP clearing a private aircraft for entry into the United States.\textsuperscript{165} Given the large number of private aircrafts entering the United States and assuming that internet access is available in the foreign country, the Baja Bush Pilots feel that there will be a substantial backlog of travelers awaiting permission over the internet to re-enter the United States.\textsuperscript{166} The organization strongly feels that the DHS, in putting forth this NPRM, has overlooked or misunderstood the state of the communications infrastructure in various parts of Canada, Mexico, and the Caribbean.\textsuperscript{167} It also points out that finding a working telephone can be challenging in Mexico and that internet connections are not typically available at its international airports.\textsuperscript{168} Furthermore, it predicts that the proposed rule, if instituted, would have a devastating effect on tourism to countries like Mexico and parts of Central America via private aircraft.

\textsuperscript{162} See supra note 113 and accompanying text.
\textsuperscript{163} See, e.g., \textit{Baja Bush Pilots Fight Border Proposal}, supra note 9.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
2. Aircraft Owners and Pilots Association

Another prominent organization, the Aircraft Owners and Pilots Association ("AOPA"), has also voiced its concerns and has encouraged its members to provide comments on the suggested proposal directly to the DHS.\textsuperscript{169} Echoing the concerns by the Baja Bush Pilots, the organization feels that the lack of universal accessibility to the internet in areas lying south of the United States, Canada, and even in certain parts of the United States, make it especially challenging to meet the proposal's electronic submission requirements.\textsuperscript{170} Moreover, requiring private aircraft pilots to seek out other locations having an approved electronic data interchange system (such as eAPIS over the internet), in its opinion, would be unnecessarily burdensome.\textsuperscript{171} In addition, AOPA highlights various operational differences between general and commercial aviation. Specifically, the organization claims that general aviation aircraft are more likely to change flight plans into the United States due to things such as weather, or other operational or personal considerations.\textsuperscript{172} On account of this increased susceptibility for change, the organization does not share the opinion that an electronic transmission means like the internet is the best way to relay amendments to flight plans to the relevant U.S. authorities.\textsuperscript{173} Furthermore, a number of comments from concerned pilots who are also members of AOPA indicate that the CBP's attempt to create a uniform, advance notification reporting procedure for all international flights may not be the most sensible way of protecting U.S. borders and the American people.\textsuperscript{174}

3. Canadian Owners and Pilots Association

The Canadian Owners and Pilots Association ("COPA"), the largest aviation association in Canada, is also concerned about

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\textsuperscript{170} Id.

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} See generally, AOPA Online, U.S. Customs and Border Protection Member Action Center, What Other Pilots are Saying, http://www.aopa.org/advocacy/customs/comments.html (last visited Jan. 10, 2008). One AOPA member-pilot comments: "Simply finding an operational telephone . . ., much less one that can be utilized for international calls, is frequently impossible. And the idea that Internet access will be available is a pipe dream." AOPA Online, supra note 169.
the implications of the NPRM for Canadian private pilots interested in traveling to the United States.\footnote{175}{Kevin Psutka, New Requirement for Private Aircraft Arriving, Departing U.S.—Update, http://www.copanational.org/non-members/new_requirement_for_private_airCONTINUED.htm (last visited Jan. 9, 2008).} Like the other aviation organizations, COPA opposes the CBP stance that electronic submissions are the sole means of complying with the advance notification and manifest requirements.\footnote{176}{Id.} The organization claims that making electronic submissions would be impractical considering the lack of internet access in a number of locations and the inability to be certain of internet availability at other airports in the area.\footnote{177}{Id.} In a formal comment letter to the CBP, COPA states that such remote locations exist in both Canada and the United States.\footnote{178}{Letter from Kevin Psutka, President and CEO, COPA, to NPRM Comments Office, U.S. Customs and Border Protection (Nov. 30, 2007), http://www.copanational.org/non-members/new_requirement_for_private_airCONTINUED.htm [hereinafter COPA NPRM Letter].} Thus, regardless of whether the private aircraft is seeking to depart from or arrive in the United States, this would pose significant practical difficulties in complying with the proposed advance notification requirements. Further, the organization claims that even if internet access is readily present at a particular departure site, private aircraft pilots cannot be certain that they will be permitted access on-demand.\footnote{179}{Id.} In addition, COPA contends that, due to weather or other operational considerations, electronic submissions over the internet would not be the best mode of forwarding last-minute changes to flight plans, arrival/departure times, or intended destinations as they arise.\footnote{180}{Id.}

Thus, a number of general aviation organizations firmly oppose the electronic submission requirements suggested by the CBP proposal. Although uniformity and electronic technology may arguably streamline the security efforts on the CBP end, the regulations, as drafted, pose significant challenges for the general aviation community. These organizations unanimously call for the elimination of electronic submission as the sole means for complying with the CBP regulations. In light of this united concern, the CBP should review its proposed regulations and weigh possible alternatives.
B. RIGHT TO TRAVEL

As enunciated in a decades old case, U.S. jurisprudence recognizes the right to travel as an individual liberty.\textsuperscript{181} Specifically, the Supreme Court has stated that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."\textsuperscript{182} Whether considered necessary for pleasure, shaping ideas, or to maintain a livelihood, the right to travel is consistent with an individual's pursuit of happiness, which our forefathers had deemed an inalienable right.\textsuperscript{183} However, in direct contrast to the right to interstate travel, which is virtually unqualified, the right to travel may be restricted to protect the country's foreign policy and national security interests.\textsuperscript{184} Thus, an intricate balance exists between the fundamental right to travel and government regulations. As protected by the Due Process clause of the Fifth Amendment, government regulations concerning foreign travel must survive a reasonableness test to ensure that they do not unnecessarily infringe on the constitutionally recognized right to travel.\textsuperscript{185}

The current proposal, as drafted, may pose a significant threat to the right to travel. With its expansion of data elements for arrival notification, its introduction of new departure notification requirements, and its information demands for each traveler on board the private aircraft in the form of a traveler manifest, the NPRM presents significant barriers to foreign travel. Additionally, the CBP's insistence that notification, manifests, and timely amendments be provided solely by elec-

\textsuperscript{181} See Kent v. Dulles, 357 U.S. 116, 125 (1958).
\textsuperscript{182} Id.
\textsuperscript{183} See id. at 126. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

For the same reasons, when there is a substantial likelihood of "serious damage" to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States.

\textsuperscript{185} Id. at 309.

\textsuperscript{185} Id. at 306-07 ("the freedom to travel abroad . . . in the form of a passport issued by the sovereign . . . is subject to reasonable governmental regulation" (emphasis added)).
tronic means creates yet another layer of difficulty for general aviation operators.

Although recent events since September 11th involving private aircraft have raised concerns as to whether the regulations concerning non-commercial aircraft are sufficient, the proposed regulations are probably overzealous in their attempt to curb an uncertain and likely insignificant threat.\(^\text{186}\) Moreover, the proposal fails to address the necessity of these substantial changes to the current notification system. Similarly, the CBP has been silent on any foreign policy or national security interests that these new regulations promote or otherwise address. Collectively, the substantive demands of the NPRM arguably infringe on a U.S. resident's right to engage in foreign travel. In the absence of any further rationale for erecting additional barriers to international travel other than the DHS's conclusory goals of securing the country's borders or protecting the American people,\(^\text{187}\) the agency is likely to have unreasonably infringed on the right to travel without due process of the law.

C. PRIVACY CONCERNS

Numerous privacy concerns were raised when the United States instituted regulations in 2003 demanding that all international air carriers provide U.S. security agencies with electronic access to airline passenger data.\(^\text{188}\) Many of the same issues can be raised with regard to the current proposal, which seeks to extend this requirement to private aircraft. At the time electronic passenger data was required of international commercial carriers, the U.S. data requirements were in direct conflict with the European Data Protection Law, which sought to safeguard

\(^{186}\) See, e.g., Kevin Anderson, Private Aviation Security Criticised, BBC News, Jan. 7, 2002, http://news.bbc.co.uk/2/hi/americas/1748153.stm. In the wake of a teenager's suicidal flight over MacDill Air Force base, and renewed concerns over the security threats posed by non-commercial aircraft, private aircraft pilots have "warn[ed] against overreaction, saying that small aircraft make poor tools in the hands of terrorists and that simple steps could provide greatly increased security at the nation's smaller airports." Id.


the privacy of European Union citizens. Specifically, the European law permitted security authorities to access passenger data only upon particularized suspicion. Further, it prohibited the use of this passenger data for any other purpose other than those directly raised by particularized suspicion. European airlines were concerned that compliance with the newly imposed passenger data requirements by the United States would simultaneously mean violation of the European Union privacy directives. Despite an initial agreement, a privacy official has recently expressed his concern that it fails to address "grave concern[s]" with the U.S. passenger data requirements, including the duration over which passenger information is retained (up to fifteen years), lack of limitation on what purposes and which U.S. agencies may use the data, and the absence of an adequate means for legal redress by individual EU citizens. However, after much back and forth debate, the United States and the European Union recently signed a bilateral agreement resolving privacy issues associated with the new passenger data requirement by the United States for commercial airlines.

The Electronic Privacy Information Center ("EPIC"), a public interest research center committed to bringing public attention to civil liberties, privacy, and other constitutional values, also opposed the U.S. requirement that commercial air carriers provide passenger data on international flights to U.S. security agencies. In a comment to the United States Immigration and Naturalization Service ("INS"), EPIC formally challenged the passenger data demands under both U.S. privacy laws and

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189 Id.
190 Id.
191 Id.
192 Id.
the Constitution. First, EPIC notes the INS's failure to provide a full disclosure of its statutory authority to collect information, whether it is compulsory or voluntary, the intended purpose and routine uses of the data collected, and the consequences of refusal. Second, it claims that collection of international travel information of U.S. residents would be in substantial violation of the Privacy Act, which prohibits the collection of data describing how an individual exercises his First Amendment rights in the absence of express statutory authority, permission from the individual, or law enforcement authority. Next, EPIC challenged the constitutionality of the regulations, claiming that the fundamental rights to travel and associate anonymously had been infringed. Specifically, it pointed out that collecting information on the international traveling habits of U.S. residents without further justification would be equivalent to unconstitutional government surveillance.

In light of the issues raised by the European Union and EPIC, privacy concerns with respect to this NPRM can also be anticipated. Privacy officials can be expected to demand further disclosure from the DHS regarding the necessity for the data requested, the duration for which the personal data will be retained, circumscribed purposes for which the personal data will be used, and the full extent of security provisions to prevent inadvertent disclosure. Likewise, privacy protection groups, such as EPIC, can be expected to raise challenges to the practice of collecting inordinate amounts of information on the flying community without a further substantiated basis. Maintaining secure borders is essential, but so is protecting the privacy of the American public.

Blanket monitoring of individuals absent particularized suspicion would be one step in the wrong direction, and would amount to creating a police state which trivializes individual liberties. The DHS and the CBP should strive to be clearer in their objectives in collecting information on Americans who choose to engage in foreign travel by private aircraft. With further cooperation from government security agencies, these privacy concerns can be properly addressed without compromising the security of the country.

197 Id. at 2.
199 EPIC Comments, supra note 196, at 3; see also 5 U.S.C. § 552a(e)(7).
200 EPIC Comments, supra note 196, at 3–4.
201 Id. at 4.
VI. POSSIBLE SOLUTIONS

Despite the legitimate constitutional challenges and privacy concerns raised by the proposed private aircraft regulations, the single most contentious issue is the CBP requirement that the advance notifications and manifest data be submitted exclusively by electronic means. As discussed above, demanding that electronic submission be the sole means by which private aircraft pilots may comply with the proposed rule poses significant challenges to the general aviation community. Although brokering a compromise between special interest groups and the CBP may be challenging, some of the following solutions may lead the way to achieving a workable solution.

A. LEGACY COMMUNICATIONS SYSTEMS

Although initial resistance can be anticipated from the DHS, one viable option is making no changes to the existing regulations. With many organizations claiming that the proposal lacks a proper motivating force, sticking to the current regulations is perhaps the best solution for now. As an old adage teaches us in very plain language, changes to the current status quo should bear an underlying rationale basis. For example, the President of Baja Bush Pilots, speaking from personal experiences and the experiences of his members, suggests that the current situation is, in fact, not broken. He contends that the current procedure whereby a Customs official, on behalf of the agency, inspects the private aircraft upon arrival when it is in the “circle” is adequate to address any potential security concerns. He also claims that private aircrafts pose little or no terrorist threat, adding further that the proposed amendments are extraordinary, especially given the trifling regulations placed upon international ground transportation. Thus, absent stronger and more legitimate reasons to modify the current regulations for general aviation, the present CBP proposal as drafted would merely act as a barrier to travel.

202 See supra notes 161–80 and accompanying text.
203 Id.
204 See supra notes 164–80 and accompanying text.
205 “If it’s not broken, don’t fix it.”
206 See Jack McCormick Interview, supra note 164.
207 Id.
208 Id.
Another alternative would be to achieve a compromise by permitting the CBP to demand the data elements it seeks under the proposal on each international arrival or departure while at the same time asking that it relax its requirement that electronic submission be the only acceptable means of compliance. Notably, COPA has indicated that it would favor such a compromise.\(^{209}\) Flying from one location to another in search of internet facilities or other approved electronic infrastructures, especially when in a foreign country, may be futile, costly, or both. Permitting the use of existing communications systems like the telephone and radio may be the most reasonable way to ensure that general aviation pilots fully comply with the requirements. Additionally, employing these legacy communications systems provides the best safety to international travelers and the most robust security for the American people since those systems are naturally adapted to facilitate timely amendments to be made to the notice of arrival/departure, and manifest data either directly from the aircraft or within reasonable proximity to it. In sharp contrast to commercial aircraft, this flexibility is critical because private aircraft are much more susceptible to change course, timing, or other flight plans based on operational considerations, such as inclement weather.\(^{210}\) In the event that maintaining the status quo is not an option that the CBP is willing to consider, this alternative, which is not a drastic departure from the current regulations, may well be an amicable solution. Both sides should weigh the pros and cons of this modified status quo approach to evaluate whether security concerns, on one hand, and ease of travel concerns, on the other, are properly addressed.

B. SMALL AIRCRAFT EXEMPTION

Yet another possible solution is instituting the regulations as drafted in full force, but including an exemption for certain small aircraft. As suggested by a number of general aviation groups, an exemption for general aviation aircrafts weighing 12,500 pounds or less would protect the interests of the private flying community. Specifically, COPA points out the efficacy of such discrimination between private aircraft weighing 12,500 pounds or less.

\(^{209}\) Psutka, supra note 175 ("COPA opposes electronic filing as sole means of compliance.").

\(^{210}\) Id. ("Use of the [Flight Service Station] system is especially important for last-minute changes to arrival/departure times or locations due to weather or other operational considerations.").
pounds or less and other larger private aircraft, namely that upon comparison, the smaller aircraft pose a significantly lower security threat. Accordingly, the proposed exemption merely requests that the CBP implement security measures commensurate with the corresponding risk posed by a particular type of private aircraft. Founded on sound reasoning, this recommendation arguably addresses the concerns of all stakeholders, and therefore security officials and concerned pilots should fully consider this proposal as an evenhanded solution to the issues raised.

C. INFORMATION RELAY STATION

A different solution would embody the idea of an information relay station. By amending the currently proposed NPRM, a number of carefully positioned centers throughout the United States can be designated as information relay stations. The locations may be determined based on proximity to popular foreign destinations or may even be located on-site at international airports. First, such locations would accept notice of arrival/departure information and manifest data as demanded by the current proposal by telephone, radio, or another approved legacy communications system. Second, operators at those locations would proceed to communicate with the DHS/CBP via an approved electronic data interchange system as envisioned by the current proposal. In fact, the Department's preferred means of information delivery, namely eAPIS over the internet, can be employed for the purpose. Next, the information relay stations can respond with additional instructions to the private aircraft pilots, and forward DHS's approval or denial of landing/departure rights, as appropriate. In this fashion, all parties can figuratively have their cake and eat it, too.

Of course, the cost of such a system would need to be assessed. If feasible, the costs of such a system could be shared by the government and the private aircraft owners/passengers. After a cost-value analysis is performed, this may be deemed a necessary system, at least in the interim. The CBP may also contend that this relay system would be a duplication of efforts; however, as suggested this system can be imposed merely as a temporary solution. Without stifling the concerns presented by the flying community, the CBP can periodically assess the need for such information relay stations with feedback from the general avia-

See COPA NPRM Letter, supra note 178.
tion industry. As technologies evolve and make their way in to private aircraft, the necessity for relay stations will likely dwindle. Internet and other electronic delivery mechanisms can be expected to become increasingly cost effective and be readily adapted for widespread deployment by the general aviation industry aboard private aircraft. As noted, the principal problem is that the day is not here yet.

The use of information relay stations may provide a temporary solution while more appealing technologies are given time to ripen. It will allow the proposed regulation to be enacted without any substantial changes, and give private aircraft pilots a practical means of compliance. Thus, like the other suggested alternatives, this solution should also be given fair consideration.

VII. CONCLUSION

While the current proposal advanced by the CBP has lofty goals of enhancing its ability to identify risks so that the DHS may effectively address potential domestic threats, the ability of the proposal to satisfy these goals remains uncertain. In particular, a number of significant privacy and constitutional arguments can be advanced with regard to the personal information collected, retained, and utilized by the CBP. However, concerned interest groups and the general aviation community oppose the regulation chiefly because of its strict electronic submission requirements. Although the CBP promotes the proposal with a laudable goal of augmenting existing border security, the necessity of such an unwavering requirement is debatable. Questions still remain as to the underlying weaknesses of the current notification system that motivate the proposed changes, especially since the present rules seem, at least on the surface, to be practical, efficient, and effective. The CBP should take into consideration the various issues raised by aviation groups, privacy groups, and individual pilots to achieve the best long-term security solution for private aircraft engaging in international travel from or to the United States. With unified cooperation, there is no doubt that one of the solutions suggested here, or other more suitable alternatives, will be found to be agreeable by all interested parties.