

# Bureau of Customs and Border Protection

## *CBP Decision*

**8 CFR PARTS 217, 231 AND 251**

**19 CFR PARTS 4, 122 AND 178**

**(CBP Decision 05-12)**

**RIN 1651-AA37**

### **ELECTRONIC TRANSMISSION OF PASSENGER AND CREW MANIFESTS FOR VESSELS AND AIRCRAFT**

**AGENCY:** Bureau of Customs and Border Protection, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This document amends the Bureau of Customs and Border Protection regulations pertaining to the filing of commercial vessel and aircraft manifests for passengers and crew members. Collectively, the provisions of this final rule require the electronic transmission of manifest information for passengers and crew members onboard commercial vessels and aircraft, in advance of arrival in and departure from the United States, and for crew members and non-crew members onboard commercial aircraft that continue within (foreign air carriers only) and overfly the United States, in advance of the departure of those flights. Submission of this manifest information to the Bureau of Customs and Border Protection is a necessary component of the nation's continuing program of ensuring aviation and vessel safety and protecting national security. The required information also will assist in the efficient inspection and control of passengers and crew members and thus will facilitate the effective enforcement of the customs, immigration, and transportation security laws.

**EFFECTIVE DATE:** This final rule is effective on June 6, 2005.

**FOR FURTHER INFORMATION CONTACT:** Tricia Kennedy (202-344-1229) or Charles G. Perez (202-344-2605), Office of Field Operations, Bureau of Customs and Border Protection.

**SUPPLEMENTARY INFORMATION:****BACKGROUND***Statement of purpose*

The Bureau of Customs and Border Protection (CBP) emphasizes that the primary impetus for this rulemaking and the provisions set forth in the regulatory text below is the increased terrorist threat facing the United States and international trade and transportation industries, particularly the commercial air and vessel carrier industries, since the September 11, 2001 terrorist attacks. To prevent future terrorist attacks, the Department of Homeland Security and its agencies, including CBP and the Transportation Security Administration (TSA), as well as the air and vessel carrier industries, must take the necessary steps to alleviate, to the greatest extent possible, the risk to these vital industries posed by the threat of terrorism, including implementing regulations under the Aviation and Transportation Security Act of 2001 and the Enhanced Border Security and Visa Reform Act of 2002.

The urgency of these efforts is underscored by the recent cancellation of flights to the United States, the terrorist attacks in Spain, and the continued operations of Al Qaeda and its affiliates throughout the world. The threat is serious and ongoing. It is important to note that the threat is not just to the lives of the innocent, but also to the economic well-being of the commercial aircraft and vessel industries. Given the importance of these industries to the United States and other economies, a terrorist attack involving a commercial airliner or an ocean-going vessel could substantially disrupt the global economy. Therefore, it is incumbent upon the government and private sector to take steps to prevent such an attack.

The provisions of this final rule impose on commercial air and vessel carriers electronic manifest transmission requirements relative to passengers, crew members, and non-crew members in several circumstances – those situations involving arrival in, departure from, or overflying the United States, as well as those involving a foreign air carrier arriving at a U.S. port and then continuing domestically within the United States to a second U.S. port. The manifest information required in these circumstances varies to some extent but uniformly includes certain travel itinerary data, aircraft/flight or vessel/voyage data, and personal identification information, including name, gender, date of birth, citizenship, travel document data, and status onboard the vessel or aircraft. These and other requirements are imposed for the purpose of meeting the collective objectives of the Aviation and Transportation Security Act (49 U.S.C. 44909), the Enhanced Border Security and Enhanced Visa Entry Reform Act of 2002 (8 U.S.C. 1221), and applicable aviation security laws and regulations enforced by the Transportation Security Ad-

ministration (49 U.S.C. 114; 49 CFR parts 1544, 1546, and 1550): to secure the United States citizenry and economy, international travelers, and the international air and sea carrier industries from terrorist attack and from violations of various other laws, including other customs and immigration laws. The enforcement and administration of these requirements will provide that protection without unduly impacting upon international trade and travel.

#### *Clarification of agency names*

CBP notes that in this document (hereinafter, the final rule), references to U.S. Customs, the Customs Service, or Customs concern the former Customs Service or actions undertaken by the former Customs Service prior to its transfer to the Department of Homeland Security (DHS) under the Homeland Security Act (HS Act) and the Reorganization Plan Modification for DHS of January 30, 2003. References in this document to the Immigration & Naturalization Service (INS), the INS, or the Service concern the former INS or actions taken by the former INS prior to certain of its component functions being transferred to CBP under these authorities. (See section IV of this document, entitled "Government Reorganization Pursuant to the Homeland Security Act of 2002" for a more detailed presentation of this subject.)

Also, any references to the Secretary of the Treasury, the Commissioner of Customs, the Attorney General of the United States, or the Commissioner of the INS are retained in this document only when made in discussion of the governing statutes (which were amended in pertinent part prior to the creation of the DHS); these authorities are now vested in the Secretary of the Department of Homeland Security and his delegates.

#### *Organization*

This document is organized as follows:

- I. The Customs Interim Rule – Summary of rule published in the **Federal Register** on December 31, 2001, (hereinafter, the Customs Interim Rule);
- II. The INS NPRM – Summary of INS NPRM published on January 3, 2003 (hereinafter, the INS NPRM);
- III. TSA Requirements – Provisions incorporated into this final rule in order to assist TSA in carrying out its aviation security responsibilities with respect to crew members and non-crew members of commercial aircraft;
- IV. Governmental Reorganization Pursuant to the Homeland Security Act – Discussion of the new Department of Homeland Security and its effect in combining the border security

and inspectional functions of Customs and INS into one agency – CBP;

- V. Discussion of Comments – Discussion of comments received by CBP in response to the Customs Interim Rule and the INS NPRM;
- VI. Changes to the Interim and Proposed Regulatory Texts – Summary of changes made to the Customs Interim Rule and the INS NPRM in this final rule, including changes made to assist TSA;
- VII. Conclusion.

## **I – The Customs Interim Rule**

### *Statutory changes*

On November 19, 2001, the President signed into law the Aviation and Transportation Security Act (ATSA), Public Law 107–71, 115 Stat. 597. Section 115 of the ATSA, amending 49 U.S.C. 44909, provides that, not later than 60 days after the date of enactment of the ATSA, each domestic air carrier and foreign air carrier operating a passenger flight in foreign air transportation to the United States must electronically transmit to the Customs Service a passenger and crew manifest containing specific identifying data elements and any other information determined to be reasonably necessary to ensure aviation safety.

The specific passenger and crew identifying information required consists of the following: (a) the full name of each passenger and crew member; (b) the date of birth and citizenship of each passenger and crew member; (c) the gender of each passenger and crew member; (d) the passport number and country of issuance for each passenger and crew member if a passport is required for travel; and (e) the United States visa number or resident alien card number of each passenger and crew member, as applicable.

Section 115 of ATSA further provides that: (i) the carriers may use the advanced passenger information system established under section 431 of the Tariff Act of 1930, as amended (19 U.S.C. 1431), to provide the required information; (ii) the carriers must make passenger name record (PNR) information available to the Customs Service upon request; (iii) the required passenger and crew manifest must be transmitted in advance of the aircraft landing in the United States in such manner, time, and form as the Customs Service prescribes; and (iv) the required information may, upon request, be shared with other Federal agencies for the purpose of protecting national security.

*Interim regulatory amendments*

On December 31, 2001, Customs published in the **Federal Register** (66 FR 67482), as T.D. 02-01, an interim rule (with request for comments) entitled “Passenger and Crew Manifests Required for Passenger Flights in Foreign Air Transportation to the United States” (the Customs Interim Rule). The Customs Interim Rule amended the Customs regulations (now CBP regulations) by adding a new § 122.49a (19 CFR 122.49a) to implement the new passenger and crew manifest reporting requirement discussed above. The Customs Interim Rule addresses all of the provisions of section 115 of ATSA except for the PNR provision which has been addressed separately as indicated below.

Section 122.49a of the Customs Interim Rule sets forth the general requirement that each foreign and domestic air carrier operating a passenger flight in foreign air transportation to the United States must transmit electronically to Customs a passenger manifest and a crew manifest containing the information set forth in section 115 of ATSA. The transmission must be effected through an electronic data interchange system approved by Customs and must go to the U.S. Customs Data Center, Customs Headquarters. The system in operation at the time ATSA was enacted is the Advance Passenger Information System (APIS), which was a voluntary program. It remains in operation, and many carriers have or will have this capability to comply with the requirements set forth in this final rule. There are alternative means available for those carriers without this capability, as discussed in the “Discussion of Comments” section (section V). Section 122.49a further provides that the manifest reporting requirement applies to flights where the passengers and crew have already been pre-inspected or pre-cleared at the foreign location for admission to the United States.

Section 122.49a of the Customs Interim Rule also provides that the air carrier for each flight must transmit the passenger manifest and the crew manifest separately. Furthermore, the crew manifest must be received by Customs electronically anytime prior to departure from the last foreign port or place, and the passenger manifest must be received by Customs no later than 15 minutes after the flight has departed from the last foreign port or place. Departure occurs after the wheels are up on the aircraft and the aircraft is en route directly to the United States.

Section 122.49a of the Customs Interim Rule specifies the following categories of information and related requirements that apply to each passenger manifest and crew manifest:

1. The following airline and flight information must be included in the transmission: (a) the airline International Air Transport Association (IATA) code; (b) the flight number, followed by the alpha character “C” in the case of a crew manifest; (c) the departure location IATA code; (d) the U.S. arrival location(s) IATA code(s); (e) the date of

flight arrival in the United States; and (f) whether each passenger and crew member on the flight is destined for the United States or in transit through the United States.

2. The passenger and crew member identity data elements required in section 115 of ATSA must be included in the transmission.

3. Each air carrier must provide the passenger and crew member identity data elements specified in section 115 of ATSA by transmitting to Customs one, and only one, travel document per passenger or crew member, selected from the following list: U.S. Alien Registration Card; U.S. Border Crossing Card; U.S. non-immigrant visa; U.S. Refugee Travel Document or Re-entry Permit; U.S. Passport; or non-U.S. passport. Until notice is published in the **Federal Register** providing otherwise, timely receipt by Customs of the electronically transmitted preferred travel document will constitute full compliance with the informational requirements of section 115 of ATSA. (Transmission of the travel document means transmission of the information that is obtained from the travel document via the electronic document reader that scans the machine-readable zone of the travel document. In those instances where a travel document does not have a machine-readable zone, the data normally so obtained will be collected manually from the biographical page of the travel document.)

4. The Customs Interim Rule specifies that the following additional information must be included on each passenger and crew manifest: (a) the foreign airport where the passengers and crew members began their air transportation to the United States; (b) for passengers and crew members destined for the United States, the airport in the United States where the passenger will be processed through customs and immigration formalities; and (c) for passengers and crew members that are transiting through the United States and not clearing customs and immigration formalities, the foreign airport of ultimate destination.

5. The Customs Interim Rule indicates that by a date that would be announced in the **Federal Register**, air carriers would be required to transmit additional elements which are not contained in the transmitted travel documents (see section 4 above). Thus, as of the date announced in the Federal Register, air carriers would no longer be excused from satisfying all informational requirements set out in section 115 of ATSA and the "full compliance" provision described above would no longer apply as of that published date.

Section 122.49a of the Customs Interim Rule also provides that the carrier collecting the required information is responsible for comparing this information with the related travel document to ensure that the information is correct, that the document appears to be valid for travel to the United States, and that the passenger or crew member is the person to whom the travel document was issued.

Section 122.49a of the Customs Interim Rule also provides that the information contained in passenger and crew manifests that were the subject of the Customs Interim Rule may, upon request, be shared with other Federal agencies for the purpose of protecting national security.

The Customs Interim Rule also included a conforming amendment to § 178.2 of the Customs regulations (19 CFR 178.2) which sets forth a list of information collection control numbers assigned by the Office of Management and Budget pursuant to the Paperwork Reduction Act.

Finally, the Customs Interim Rule document provides that the requirement in section 115 of ATSA that the carriers make PNR information available to the Customs Service upon request would be the subject of a separate document. (PNR information is data the carrier has in its reservation system regarding passengers. PNR data or information is not to be confused with the “PNR locator number” (also referred to as the PNR locator or PNR number) which is only the number that is associated with the passenger record.)

On June 25, 2002, Customs published in the **Federal Register** (67 FR 42710) as T.D. 02-33 an interim rule document (a new § 122.49b) setting forth the regulatory standards by which Customs will have electronic access to PNR information maintained by air carriers (that is, information contained in a carrier’s automated reservation or departure control system). Although this § 122.49b is not the subject of, nor affected by (beyond being redesignated § 122.49d), this final rule, this interim rule also included a technical amendment to § 122.49a which reflects the passenger and crew information elements contained in section 115 of ATSA. The amendment involved the replacement of the words “and the United States visa number” with the words “and the United States visa travel document number (located in the machine-readable zone of the visa document).” This amendment was made in order to ensure that the requirement in the regulatory text is compatible with the existing reporting system that uses an electronic document reader to scan the travel document and transmit the information on it to Customs.

The Customs Interim Rule invited the submission of written public comments on new § 122.49a, and the public comment period closed on March 1, 2002. The submitted comments are summarized and responded to in section V (“Discussion of Comments”) set forth later in this document.

## **II - The INS NPRM**

### *Statutory changes*

On May 14, 2002, the President signed into law the Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSA), Public Law 107-173, 116 Stat. 543. Section 402 of the EBSA amended section 231 of the Immigration and Nationality Act (8 U.S.C. 1221). Section

402 of the EBSA provides that, for each commercial vessel or aircraft transporting any person to any seaport or airport of the United States from any place outside the United States, it shall be the duty of an appropriate official to provide to any United States border officer at that port manifest information concerning each passenger, crew member, and other occupant transported on such vessel or aircraft prior to arrival at that port.

Section 402 of the EBSA provides that, for each commercial vessel or aircraft taking passengers on board at any seaport or airport of the United States, who are destined to any place outside the United States, it shall be the duty of an appropriate official to provide to any United States border officer before departure from such port manifest information concerning each passenger, crew member, and other occupant to be transported.

Section 402 of the EBSA also provides that the information to be provided with respect to each person listed on a manifest covered by this section shall include the following information: (a) complete name; (b) date of birth; (c) citizenship; (d) gender; (e) passport number and country of issuance; (f) travel document type and date of expiration; (g) country of residence; (h) United States visa number, date, and place of issuance; (i) alien registration number; (j) United States address while in the United States; and (k) such other information the Attorney General, in consultation with the Secretary of State, and the Secretary of the Treasury determine as being necessary for the identification of the persons transported, the enforcement of the immigration laws, and the protection of safety and national security. (This authority is now vested in the Secretary of DHS.)

Section 402 of the EBSA also provides that an "appropriate official" is the master or commanding officer, or authorized agent, owner, or consignee, of the commercial vessel or aircraft concerned.

Section 402 of the EBSA provides that, not later than January 1, 2003, manifest information required under this section shall be transmitted electronically by the appropriate official to an immigration officer.

Section 402 of the EBSA provides that no operator of any private or public carrier that is under a duty to provide manifest information shall be granted clearance papers until the appropriate official has complied with the requirements of this subsection, except that, in the case of commercial vessels or aircraft that the Attorney General determines are making regular trips to the United States, the Attorney General may, when expedient, arrange for the provision of manifest information of persons departing the United States at a later date.

In addition to other penalties and sanctions available under Federal law, section 402 of the EBSA further provides that, if it appears to the satisfaction of the Attorney General that an appropriate offi-

cial, any public or private carrier, or the agent of any transportation line has refused or failed to provide required manifest information, or that the manifest information provided is not accurate and full based on information provided to the carrier, such official, carrier, or agent shall pay to the Commissioner of INS (now CBP) the sum of \$1,000 for each person for whom such accurate and full manifest information is not provided, or for whom the manifest information is not prepared as prescribed. No commercial vessel or aircraft shall be granted clearance pending determination of the question of the liability to the payment of such penalty, or while it remains unpaid, and no such penalty shall be remitted or refunded, except that clearance may be granted prior to the determination of such question upon the deposit with the Commissioner of a bond or undertaking approved by the Attorney General or a sum sufficient to cover such penalty.

Section 402 of the EBSA further provides that the Attorney General may waive the requirements for providing arrival or departure manifests upon such circumstances and conditions as the Attorney General may by regulation prescribe.

Finally, section 402 of the EBSA provides that the term “United States border officer” means, with respect to a particular port of entry into the United States, any United States official who is performing duties at that port of entry.

#### *Proposed regulatory amendments*

On January 3, 2003, the INS published in the **Federal Register** (68 FR 292), as INS No. 2182–01, a document entitled “Manifest Requirements Under Section 231 of the Act” (INS NPRM). This document set forth proposed amendments to the Immigration regulations in Title 8 of the Code of Federal Regulations to implement the statutory changes made by section 402 of the EBSA as described above. These proposed regulatory amendments involved the revision of § 217.7 (8 CFR 217.7), the revision of the heading for Part 231, the revision of § 231.1 (8 CFR 231.1), the revision of the heading for Part 251, the redesignation of § 251.5 as § 251.6 (8 CFR 251.6), the addition of a new § 251.5 (8 CFR 251.5), and the revision of newly redesignated § 251.6.

#### *Proposed revision of § 217.7*

The proposed revision of § 217.7 involved changes to conform the text to the terms of revised § 231.1 discussed below. These conforming changes involved a non-substantive rewording of the text and the insertion of a cross-reference to the requirements of § 231.1, and (2) replacement of text regarding procedures and specific data elements for the electronic transmission of passenger arrival and departure information, with text describing the potential consequences

for carriers that fail to submit electronic arrival and departure manifests.

*Proposed revision of § 231.1*

The changes made in the proposed revision of § 231.1 involved (1) a revision of the section heading, (2) the addition of provisions to implement the terms of section 402 of the EBSA, (3) elimination of the manifest submission exception for in-transit passengers, (4) redesignation of paragraphs, and (5) elimination of the provision regarding the completion and presentation of Form I-94. Thus, the proposed revision of § 231.1 was intended to implement all of the principal operational requirements reflected in the statutory changes made by section 402(a) of the EBSA. The proposed terms of revised § 231.1 are discussed in detail below.

Paragraph (a) of revised § 231.1 is headed “definitions” and defines the following terms: “appropriate official”; “commercial aircraft”; “commercial vessel”; “crew member”; “ferry”; “passenger”; and “United States.”

Paragraph (b) of revised § 231.1 is headed “electronic arrival manifest” and provides that (i) an appropriate official of every commercial vessel or aircraft arriving in the United States from any place outside of the United States shall transmit electronically to the Service a passenger arrival manifest and a crew member arrival manifest, and (ii) the electronic arrival manifest must contain the required data elements for each passenger and crew member.

Paragraph (b) also sets forth rules regarding the timing for transmission of aircraft arrival manifests. In the case of passenger arrival manifests, the appropriate official must transmit the manifest no later than 15 minutes after the flight has departed from the last foreign port or place. For crew member arrival manifests, the manifest must be transmitted in advance of departure from the last foreign port or place. Further, paragraph (b) sets forth rules regarding the timing for transmission of vessel arrival manifests. For passenger and crew member manifests, one of the following three alternative rules will be applied, depending on the length of the voyage: (i) at least 96 hours before entering the port or place of destination, for voyages of 96 hours or more; (ii) at least 24 hours before entering the port or place of destination, for voyages of less than 96 hours but not less than 24 hours; or (iii) prior to departing the port or place of departure, for voyages of less than 24 hours.

Paragraph (c) of revised § 231.1 is headed “electronic departure manifest” and provides that an appropriate official of every commercial vessel or aircraft departing from the United States to any place outside of the United States shall transmit electronically to the Service a passenger departure manifest and a crew member departure manifest. The electronic departure manifest must contain the required data elements for each passenger and crew member.

Paragraph (c) also provides that the appropriate official must transmit both the passenger departure manifest and the crew member departure manifest no later than 15 minutes before the flight or vessel departs from the United States. Further, paragraph (c) sets forth a special rule regarding the timing for transmission of vessel and aircraft departure manifests when passengers or crew members board or disembark after the original manifest has been submitted. In this case, the appropriate official must submit amended or updated passenger and crew member information electronically to the Service no later than 15 minutes after the flight or vessel has departed from the United States. The appropriate official must also notify the Service electronically if a flight or voyage has been cancelled after submission of a departure manifest.

Paragraph (d) of revised § 231.1 is headed “electronic format” and sets forth standards for the electronic transmission of the arrival and departure manifests for passengers and crew members. Manifests “must be transmitted electronically to the Service via the USCS [U.S. Customs Service], by means of an electronic data interchange system that is approved by the Service.” Passenger arrival and departure manifests must be transmitted separately from the crew member arrival and departure manifests and, to distinguish the two manifests transmitted for a given flight or vessel, the crew member arrival and departure manifests must have the alpha character “C” included in the transmission to denote that the manifest information pertains to the crew members for the flight or vessel.

Paragraph (e) of revised § 231.1 is headed “contents of arrival and departure manifests” and provides that each electronic arrival or departure manifest must contain certain information for all passengers or crew members of air and vessel carriers. Air carriers must provide the following information: (a) complete name; (b) date of birth; (c) citizenship (country of document issuance); (d) gender; (e) passport number and country of issuance, if a passport is required; (f) country of residence; (g) United States visa number, date, and place of issuance (arrivals only); (h) alien registration number; (i) United States address while in the United States; (j) International Air Transport Association (IATA) arrival port code; (k) IATA departure port code; (l) flight number, date of flight arrival, date of flight departure; (m) airline carrier code; (n) document type (*e.g.*, passport; visa; alien registration); (o) date of document expiration; and (p) a unique passenger identifier, or reservation number or Passenger Name Record (PNR) locator number.

Sea carriers must provide the following information: (a) complete name; (b) date of birth; (c) citizenship (country of document issuance); (d) gender; (e) passport number and country of issuance, if a passport is required; (f) country of residence; (g) United States visa number, date, and place of issuance (arrivals only); (h) alien registration number; (i) United States address while in the United States; (j)

arrival port code; (k) departure port code; (l) voyage number; (m) date of vessel arrival; (n) date of vessel departure; (o) country of registry/flag; (p) document type (e.g., passport; visa; alien registration); (q) date of document expiration; (r) a unique passenger identifier, or reservation number or Passenger Name Record (PNR) locator; (s) vessel name; and (t) International Maritime Organization (IMO) number or the official number of the vessel.

Paragraph (f) of revised § 231.1 is headed “ferries” and provides that requirements relating to the transmission of electronic arrival and departure manifests “shall not apply to a ferry (if the passengers are subject to a land-border inspection by the Service upon arrival in the United States).”

Finally, paragraph (g) of revised § 231.1 is headed “progressive clearance” and provides that the inspection of arriving passengers may be deferred at the request of the carrier to an onward port of debarkation, that authorization for this progressive clearance may be granted by the Regional Commissioner of the INS when both the initial port of entry and the onward port are within the same regional jurisdiction, and that, when the initial port of entry and onward port are located within different regions, requests for progressive clearance must be authorized by the Assistant Commissioner for Inspections. Paragraph (g) further provides that, when progressive clearance is requested, the carrier shall present Form I-92 in duplicate at the initial port of entry and that the original Form I-92 will be processed at the initial port of entry and the duplicate noted and returned to the carrier for presentation at the onward port of debarkation.

*Proposed revision of § 251.5*

Proposed new § 251.5 is headed “electronic arrival and departure manifest for crew member” and provides that, in addition to submitting arrival and departure manifests in a paper format in accordance with §§ 251.1, 251.3, and 251.4, the master or commanding officer, or authorized agent, owner, or consignee of any aircraft or vessel transporting passengers to any airport or seaport of the United States from any place outside of the United States or from any airport or seaport of the United States to any place outside of the United States must submit electronic arrival and departure manifests for all crew members on board in accordance with 8 CFR 231.1.

*Proposed revision of § 251.6*

The proposed revision of § 251.6 involved minor wording changes.

The INS NPRM invited the submission of written public comments on the 8 CFR changes, and the public comment period closed on February 3, 2003. The submitted comments are summarized and responded to in section V (“Discussion of Comments”) set forth later in this document.

### **III – TSA Requirements**

#### *TSA Security Directives and Emergency Amendments*

This final rule contains several provisions that, in addition to implementing the authority of CBP, will assist TSA in carrying out its aviation security mission. TSA issues and administers Transportation Security regulations (TSRs) which are codified in Title 49 of the Code of Federal Regulations (49 CFR), Chapter XII, parts 1500 through 1699. The TSRs establish security requirements for, among others, certain U.S. aircraft operators (49 CFR part 1544) and foreign air carriers (49 CFR parts 1546 and 1550) that conduct passenger and all-cargo operations to, from, within, and overflying the United States. In addition to these public regulations published in the CFR, TSA issues non-public regulations in the form of security programs, Security Directives (SDs), and Emergency Amendments (EAs) that establish additional detailed security requirements for these regulated parties. (See 49 CFR 1544.305, 1546.105, 1550.5.)

As part of its security mission, TSA is responsible for assessing intelligence and other information in order to identify individuals who pose, or are suspected of posing, a threat to transportation or national security and to coordinate countermeasures with other Federal agencies to address such threats. (See 49 U.S.C. 114(f)(1)–(4).) Under this authority, which is held concurrently by the Under Secretary of Border and Transportation Security (BTS) of DHS, TSA may require aircraft operators and foreign air carriers conducting passenger or all-cargo flight operations to and from the United States, as well as certain air carriers conducting flights within (limited to foreign air carrier flights from the U.S. port of their arrival to a second U.S. port) and overflying the United States, to provide TSA, prior to departure, manifest information for those persons (other than passengers) onboard a flight. Under certain SDs and EAs now in effect, TSA requires the advance submission of certain manifest information for certain flights operating to, from, within, or overflying the United States. TSA uses this information, in coordination with CBP, to conduct security threat assessments for crew and non-crew members.

Because these requirements, which are already effective under security programs, EAs, and SDs issued to the air carriers by TSA, are similar to the provisions of the Customs Interim Rule and the INS NPRM in substance, effect, and purpose, the Under Secretary of BTS has determined to incorporate them into this final rule. As a result, the public now has access to all manifest requirements in a single source. In addition, these requirements (except for those affecting overflights) are also authorized under 49 U.S.C. 44909(c)(2)(F) and 8 U.S.C. 1221(c)(10), both of which provide that CBP may require that crew manifests include such information that

CBP and TSA determine is reasonably necessary to ensure aviation safety.

#### **IV - Governmental Reorganization Pursuant to the Homeland Security Act**

On November 25, 2002, the President signed into law the Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135 (HS Act), which involved, among other things, the creation of a new cabinet-level department, the Department of Homeland Security (DHS), the transfer to DHS of a number of Executive Branch agencies and offices, and the reorganization of a number of Executive Branch agencies and offices within existing cabinet-level departments. This legislation had a profound impact on the organization and operation of both the Customs Service and INS, with consequential implications (discussed below) for the Customs Interim Rule and the INS NPRM.

Section 401 of the HS Act established in DHS a Directorate of Border and Transportation Security (BTS) headed by an Under Secretary for BTS. Section 402 of the HS Act provides that the Secretary of DHS, acting through the Under Secretary for BTS, shall be responsible for, among other things, the following: (1) securing the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States, including managing and coordinating those functions transferred to DHS at ports of entry; (2) carrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of INS (or any officer, employee, or component of the INS) immediately before the date on which the transfer of functions specified under section 441 of the HS Act takes effect; (3) establishing and administering rules, in accordance with section 428 of the HS Act, 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; (4) establishing national immigration enforcement policies and priorities; and (5) with some exceptions, administering the customs laws of the United States.

With regard to the Customs Service, section 403(1) of the HS Act transferred the functions, personnel, assets, and liabilities of the Customs Service, including the functions of the Secretary of the Treasury relating to the Customs Service, to the Secretary of DHS. Section 411 of the HS Act established, in DHS, the United States Customs Service, under the authority of the Under Secretary for BTS, and provided for a Commissioner of Customs as its head.

Pursuant to section 1502 of the HS Act, the President submitted to Congress on November 25, 2002, a reorganization plan and, on January 30, 2003, a modification of that reorganization plan (collectively, The Reorganization Plan). The Reorganization Plan, among

other things, renamed the “Customs Service” as the “Bureau of Customs and Border Protection” (CBP). The Reorganization Plan also provided (1) that CBP will inherit and have responsibility for, among other things, the resources and missions of the Customs Service and the INS (including the Border Patrol and the inspections program) relating to borders and ports of entry and (2) that the Commissioner of CBP will, among other things, establish and oversee the administration of the policies for performing the Border Patrol and inspection program functions that are transferred to the Under Secretary for BTS by section 441 of the HS Act (discussed below) and delegated to the Commissioner by the Under Secretary.

With regard to the INS, section 471(a) of the HS Act provided for the abolishment of the INS of the Department of Justice upon completion of all transfers from the INS as provided for by the HS Act. The transfers referred to in section 471(a) that affect DHS are as follows:

1. Section 441 of the HS Act transferred, from the Commissioner of INS to the Under Secretary for BTS, all functions performed under, and all personnel, assets, and liabilities pertaining to, the following programs: The Border Patrol ; detention and removal ; intelligence; investigations; and inspections .

2. Section 442 of the HS Act established in DHS a bureau to be known as the “Bureau of Border Security” and headed by an Assistant Secretary who reports directly to the Under Secretary for BTS. The functions of the Assistant Secretary include, among other things, the establishment of policies for performing functions transferred to the Under Secretary by section 441 of the HS Act and delegated to the Assistant Secretary by the Under Secretary. The Reorganization Plan renamed the “Bureau of Border Security” as the “Bureau of Immigration and Customs Enforcement” (ICE). It also provided that ICE would have responsibility for, among other things, the INS interior enforcement functions (including the detention and removal program, the intelligence program, and the investigations program) and the interior enforcement resources and mission of the Customs Service and thus would be responsible for the enforcement of the full range of immigration and customs laws within the interior of the United States. Subsequently, by Delegation Order 7030, the border search authority vested in the Under Secretary of BTS under section 402 was delegated to the Assistant Secretary of ICE; thus, ICE’s responsibilities include a border enforcement component, as well.

3. Section 451 of the HS Act established in DHS a bureau to be known as the “Bureau of Citizenship and Immigration Services” (CIS) and headed by a Director who reports directly to the Deputy Secretary of Homeland Security. The Director’s functions include, among other things, establishing and overseeing the administration of policies for performing functions transferred by section 451 from

the Commissioner of INS to the Director. The functions (including all supporting personnel, infrastructure, and funding) transferred by section 451 consist of (1) adjudications of immigrant visa petitions, naturalization petitions, and asylum and refugee applications, (2) adjudications performed at service centers, and (3) all other adjudications performed by the INS immediately before the date on which the transfer of functions specified in section 441 of the HS Act takes effect.

Under section 1502 of the HS Act and the Reorganization Plan, the statutory transfers and Presidential agency redesignations and allocations of functions described above took effect on March 1, 2003. Accordingly, as of that date, the INS ceased to exist as a separate agency and the border inspection functions formerly performed by INS under the immigration laws were merged with the border functions historically performed by the Customs Service under the customs and related laws in one agency, CBP.

The statutory amendment made by the ATSA (which enabled publication of the Customs Interim Rule) and the statutory amendments made by the EBSA (which enabled publication of the INS NPRM) respectively involve only customs border arrival functions and immigration border arrival and departure inspection functions, all of which are now the exclusive responsibility of CBP. It is further noted that the Customs Interim Rule and the INS NPRM affect one or both of the same industry sectors (that is, the air carrier industry and the sea carrier industry) and that each of those statutory and regulatory regimes imposes separate but in some cases identical or similar information reporting requirements for the same carrier transaction. Finally, it is noted that the Customs Interim Rule and INS NPRM changes in question were published prior to the March 1, 2003, governmental reorganization under the HS Act and therefore reflected the agency organization and regulatory perspective that existed prior to that date, with the Customs Interim Rule amendments set forth in Title 19 of the CFR and the INS NPRM changes slated for inclusion in Title 8 of the CFR.

Based on the considerations set forth above, and in light of the similar provisions added to this final rule to assist TSA in its aviation security mission, the Secretary has determined that it would be preferable to consider the Customs Interim Rule and the INS NPRM as one regulatory initiative and to address the TSA requirements at the same time. Accordingly, the Secretary, after consultation with the Commissioner of CBP and the Assistant Secretary for TSA, and pursuant to the authority vested in him by law, including but not limited to 49 U.S.C. 44909, 8 U.S.C. 1221, 49 U.S.C. 114, and section 402 of the HS Act, has determined to incorporate the three above initiatives into this final rule amending 19 CFR in order to avoid a duplication of reporting requirements, improve the organization and transparency of the regulatory texts, and facilitate administration of

these important provisions that concern national security and the safety of commercial vessel transportation to and from the United States and commercial air transportation to, from, within, and over the United States.

## **V - Discussion of Comments**

The comments submitted in response to the Customs Interim Rule and the INS NPRM are summarized and responded to below. Where a comment directed to a provision of the Customs Interim Rule or the INS NPRM raises an issue that is also relevant to the other rule or to a provision included in this final rule to assist TSA, all aspects of the comment will be addressed at that time; the full response to the comment will appear only once in the text of the final rule.

### *Comments on the Customs Interim Rule*

Twelve commenters responded to the solicitation of comments on the Customs Interim Rule setting forth new § 122.49a to require the electronic transmission of passenger and crew manifests for flights in foreign air transportation to the United States.

#### *Comment:*

One commenter contended that the § 122.49a requirements should not apply to a passenger flight in foreign air transportation that is not initially destined for the United States but rather is diverted in flight to a U.S. airport due to an emergency (for example, a mechanical problem, bad weather, a sick passenger).

#### *Response*

Initially, CBP notes that, due to a reorganization of the regulation based on the incorporation of TSA requirements into this final rule, § 122.49a of this final rule covers only passengers while crew members are covered in § 122.49b (whereas § 122.49a of the Customs Interim Rule covered both passengers and crew members on arriving commercial aircraft).

CBP does not agree that flights diverted to a U.S. port due to an emergency should be excepted from the passenger and crew manifest transmission requirement; however, CBP recognizes that the regulation should address emergency flight scenarios. Thus, an appropriate provision has been added to the regulatory texts in this final rule for emergency aircraft arrivals (§§ 122.49a(b)(2)(ii) (passenger manifests) and 122.49b(b)(2)(i)(B) (crew member manifests)).

CBP recognizes that an aircraft diverted to a U.S. port due to an emergency may not be able to transmit manifests in compliance with the time requirement of the regulation. CBP also recognizes that not all such aircraft will be equipped for making a transmission of manifest information through the APIS, whether by electronic US or UN EDIFACT transmission or by an approved alternative transmission

medium. For these reasons, the regulation now provides an alternative manifest filing time requirement for these flights and an accommodation for non-equipped air carriers who fail to meet the requirements.

As the above discussion is also applicable to arriving vessels, this final rule also contains an emergency provision for these vessels (§ 4.7b(b)(2)(D)).

*Comment:*

This comment discussion (regarding alternative means of electronic transmission) includes comments on both the Customs Interim Rule and the INS NPRM.

One commenter argued that § 122.49a should expressly provide for a separate electronic system by which small carriers could transmit passenger and crew manifest data to Customs. It was explained that Customs had allowed small carriers to transmit manifest data through an electronic mail (email) system, and it was recommended that this system for transmitting the data be changed to a computer web-based medium, coupled with a telephonic or facsimile back-up system. Another commenter requested information on the alternative methods of submission such as email and the web-based application. The commenter also requested that the effective date of the final rule be delayed until the web-based application is piloted.

*Response:*

CBP does not believe that every electronic setup, along with its technological details and operational features, that is authorized for effecting the mandatory transmission of manifest data to CBP needs to be prescribed in the regulations. Consistent with the terms of 49 U.S.C. 44909(c)(1) and (c)(4), CBP believes that it is sufficient to use a general statement in the regulatory texts that the electronic transmission of manifest information to CBP must be effected through an electronic data interchange system that is approved by CBP. Also, as the statute requires electronic submission of data, and telephonic and facsimile reporting are not considered electronic, transmissions in this manner would not be in compliance with the requirements.

It is also noted that, in an effort to be more responsive to the needs of the affected industries, CBP has developed a computer web-based medium (eAPIS) to allow carriers to access the CBP web site and thus transmit manifests directly to the data center via the Internet. This medium became operational at the end of January 2005. More information on eAPIS is available at [www.cbp.gov](http://www.cbp.gov) (related links). All information on alternative methods for transmitting electronic manifest data for air and sea carriers, including email and web-based applications, can be found at [www.cbp.gov](http://www.cbp.gov) (related links).

Regarding a delayed effective date, CBP does not believe that the availability of the web-based application should be related to the

implementation date of the manifesting requirements. As noted above, eAPIS is now operational, so this concern is moot (and there are other alternative methods of transmission currently available).

*Comment:*

Two commenters cited an inability to install automated equipment that would enable them to transmit electronically the necessary manifest data for passenger flights from Cuba in accordance with § 122.49a. These commenters requested that Customs develop alternative procedures to deal with this situation.

*Response:*

Since the publication of the Customs Interim Rule, carriers arriving from Cuba have demonstrated ability to comply with electronic manifest requirements. As such, we believe this concern is no longer an issue. It is clear under the express language of 49 U.S.C. 44909(c)(1) that CBP may require the transmission itself be by electronic means. Additionally, as noted previously, the manifest may be transmitted through the CBP web site once operational.

*Comment:*

Two commenters requested that Customs use account managers for the purpose of administering § 122.49a, as was originally done to administer the APIS system, which was then a voluntary program under which air carriers electronically transmitted passenger and crew manifest data to Customs.

*Response:*

CBP believes the practice of using account managers is beneficial to the industry and therefore will continue to provide those services. Further information on APIS account managers (not necessary for this rule) is available at [www.cbp.gov](http://www.cbp.gov) (related links).

*Comment:*

Six commenters were concerned about the degree to which carriers would need to comply with the provisions of § 122.49a. These commenters referred to a Customs press release of March 1, 2002 (<http://www.cbp.gov/xp/cgov/> (click on links to newsroom/press releases) indicating that penalties could be assessed if carriers failed to reach stated minimum levels of compliance by certain target dates in transmitting to Customs error-free manifest data under § 122.49a. The commenters concluded that these target dates did not afford enough time for many carriers not yet online to achieve the stated levels of compliance. Also, it was asserted that a penalty of \$5,000 for noncompliance with the requirements of § 122.49a was too harsh.

*Response:*

Full compliance with the provisions of § 122.49a (§§ 122.49a for passengers and 122.49b for crew members in this final rule) was, of course, compulsory as of its effective date (December 31, 2001). However, the use of CBP penalty guidelines for determining the parameters under which CBP may assess a penalty for noncompliance with § 122.49a falls outside the scope of this rulemaking. Penalty guidelines are set forth in Part 171 of CBP's regulations and any changes will be published on the website and in the **Federal Register**. Furthermore, it is noted that a civil penalty of \$5,000 is authorized by statute and regulation for each violation of § 122.49a (or § 122.49b for arriving crew members in this final rule) (see 19 U.S.C. 1644a(b)(1)(D) and (b)(2); 19 CFR 122.161; and 19 U.S.C. 1436).

*Comment:*

This comment discussion (regarding the timing of manifest information submission) includes comments on both the Customs Interim Rule and the INS NPRM. These comments have been broken down into four subparts.

(1) Eleven commenters were of the opinion that the requirement regarding transmission of passenger manifest information to Customs no later than 15 minutes after the departure of the aircraft was difficult to meet and should be relaxed. It was instead suggested that the time period for transmitting the passenger manifest to Customs should be a flexible one and that it should be tied to the duration of the related flight.

(2) It was further suggested in this context that the crew manifest should be sent to Customs at the same time as the passenger manifest, rather than in advance of departure, in order to accommodate last minute crew changes.

(3) One commenter requested that any updates to the departure manifest be limited to only those records that need to be updated, not a complete transmission.

(4) Finally, one commenter asked for clarification of "departure time."

*Response:*

(1) After careful review of the matter, including consideration of recent events involving the continuing threat of terrorism, CBP has determined that changing the time requirements in the manner recommended by the commenters for arriving and departing aircraft is not in the best interest of the international traveling public, the carrier industries, or national security. Such a change would be inimical to the security enhancing intent of the requirements as it would result in the completion of security checks later rather than sooner and leave less time for the taking of appropriate action. Thus, permitting variable submission times based on flight duration would be

unacceptable. CBP continues to evaluate whether the transmission of APIS data for aircraft passengers and for passengers and crew onboard departing vessels, in accordance with the provisions of this final rule, allows CBP sufficient time to respond to identified threats.

However, as discussed previously, this final rule includes provisions designed to assist TSA in its aviation security mission. These provisions are set forth in security programs, EAs, and SDs already issued by TSA to the air carriers and address electronic manifest transmission requirements for crew members (on passenger and all-cargo flights) and non-crew members (all-cargo flights only) traveling onboard commercial aircraft arriving in, departing from, continuing within (foreign air carriers only), and overflying the United States. These provisions are authorized under TSA law and regulations (49 U.S.C. 114 and 49 CFR part 1500), and, with the exception of overflights, also fall within the authority of 49 U.S.C. 44909, as amended by the ATSA, and 8 U.S.C. 1221, as amended by the EBSA. These provisions require the advance transmission of crew manifest information no later than 60 minutes prior to departure of the aircraft and have been adopted for incorporation into this final rule in §§ 122.49b and 122.75b, pertaining respectively to crew and non-crew members on flights to, continuing within, and overflying the United States and to the same persons on flights departing from the United States. In this final rule, the 60-minute requirement is limited to crew and non-crew in these scenarios.

(2) With this final rule, as set forth in (1) above, crew member and non-crew member manifests are now required no later than 60 minutes prior to departure. Last minute crew changes (updating manifests within 60 minutes of departure) will be accommodated only upon approval by TSA. Failure to obtain timely approval may result in possible denial of flight clearance or diversion of the flight to another port, as appropriate. CBP notes that the updating manifest requirement in this final rule applies only to crew members and non-crew members. There is no manifest updating provision for passengers.

(3) CBP agrees with the commenter's preference regarding updating (amending) manifests. As such, where submission of updated information is provided for in this final rule, it is only the updated information that is required, although a complete manifest may be transmitted through APIS with updated information if the carrier desires. Further, while the INS NPRM provided for amendment of the departure manifests to reflect the disembarkation of passengers or crew members, the text of this final rule reflects that the amendment provisions apply only to additions to crew member and non-crew member manifests. The APIS system is not capable of deleting manifest information already transmitted, so reporting disembarka-

tions is not required in the manifest amendment provisions of this final rule.

(4) Regarding the meaning of “departure time,” for aircraft, departure time is the moment at which the aircraft’s wheels are up and off the runway and the aircraft is en route to its destination. The “wheels up” concept is the same for other scenarios covered in this final rule, such as flights continuing within and overflying the United States.

*Comment:*

Two commenters stated that, while § 122.49a(b) required that Customs timely receive the electronic transmission of the passenger manifest and the crew manifest for a covered flight, air carriers could not guarantee receipt of the information by Customs, only its transmission by the carrier.

*Response:*

Section 122.49a(b) regarding arriving passengers and § 122.49b(b) in this final rule regarding arriving crew members require both the transmission and the receipt of the requisite manifest information because transmission without receipt defeats the purpose behind the statutory requirement that the carrier “provide” the manifest by electronic transmission. The APIS application will provide an automatic confirmation procedure for notifying a registered sender that the transmitted manifest data was received by CBP.

*Comment:*

This comment discussion (regarding the issue of privacy) includes comments on both the Customs Interim Rule and the INS NPRM.

Seven commenters remarked that requiring the disclosure to Customs of passenger manifest data might conflict with the requirements of foreign privacy laws. These commenters opined that the U.S. Government should engage in a dialogue with applicable foreign governments to resolve this issue. Also, a large majority of the 328 commenters to the INS NPRM expressed concern with respect to the right to privacy of travelers and the protection of data by the agency.

*Response:*

CBP has fully complied with, and will continue to ensure compliance with, all requirements of the Privacy Act of 1974, 5 U.S.C. § 552a. APIS data is used primarily for law enforcement purposes and in accordance with all applicable laws of the United States. Those U.S. laws, and the measures taken by CBP to implement such laws, protect against misuse of, or unauthorized access to, the information in the system.

APIS data largely consists of information that appears on the biographical data page of travel documents, including passports issued by governments worldwide. The collection of this information is generally consistent with the recommended document standards and practices of the International Civil Aviation Organization (ICAO) set forth in ICAO Document 9303, "A Passport with Machine Readable Capability." APIS data elements have been collected routinely over the years by governments of countries into which a traveler seeks entry (that is, by requiring the traveler to present a government-issued travel document). Moreover, CBP has the statutory authority to require presentation of the information by travelers upon their arrival at the U.S. border. Through APIS, CBP can efficiently and effectively conduct its necessary risk assessment of travelers, while substantially facilitating bona fide travel and avoiding substantial delays in the processing of travelers. Accordingly, CBP does not believe that APIS will give rise to any new or increased threats to personal privacy interests.

More detailed information regarding the collection and safeguarding of APIS data is available in the APIS Privacy Impact Assessment (PIA) published in conjunction with this final rule.

*Comment:*

This comment discussion (regarding the right to travel) addresses comments made in response to both the Customs Interim Rule and the INS NPRM. Several commenters remarked that collection of information through APIS would infringe on the right to travel as recognized by the Supreme Court in *Kent v. Dulles*, 357 U.S. 116 (1958).

*Response:*

CBP recognizes, as the Supreme Court has stated, that the right to travel is an important and long-cherished liberty. Although a passenger's refusal to supply the information required by the regulatory text will result in denying that person access to international travel on commercial vessels and aircraft, the new provisions will not violate a constitutional right to travel. The Supreme Court has recognized that the right to travel abroad is not an absolute right, and the Court has recognized that no government interest is more compelling than the security of the nation. *Haig v. Agee*, 453 U.S. 280, 307 (1981). The government may place reasonable restrictions on the right to travel in order to protect this compelling interest. *Id.*; see also *Eunique v. Powell*, 302 F. 3d 971, 974 (9th Cir. 2002); *Hutchins v. District of Columbia*, 188 F. 3d 531, 537 (D.C. Cir. 1999).

The restrictions this final rule places on certain modes of travel (here, by effectively denying access to certain international travel if a passenger or crew member refuses to provide the information required) are reasonable and narrowly drawn to ensure accurate identification of individuals. Moreover, the restrictions imposed through

the required submission of information are far more likely to promote the ability to travel than to restrict it. In fact, as recent events have shown, the ability to travel can be severely restricted by terrorist threats to our means of transportation. *See* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT 29 (NORTON 2004) (noting FAA's September 11, 2001, instruction to all aircraft to land at the nearest airport). Congress, through legislation discussed throughout this document, has required certain safeguards involving the collection of information to protect our national security. The new regulatory text published today is designed to enhance the ability to travel, not to restrict it for law-abiding U.S. citizens, lawful permanent residents (LPRs), or foreign visitors. Some commenters argued that the proposed rule should not apply to U.S. citizens and LPRs. While requiring information from U.S. citizens and LPRs is a valid concern, the applicable statutes, 49 U.S.C. 44909(c) and 8 U.S.C. 1221, do not exempt these persons from their requirements. Nevertheless, CBP recognizes that certain U.S. citizens and LPRs could pose a risk to the transportation industry and the national security of the United States. CBP must have the ability to properly assess the level of risk of all persons and to respond accordingly.

*Comment:*

Several commenters requested additional clarification as to the meaning of the terms "full name" and "country of issuance of the passport" as used in § 122.49a(c)(2). Also, it was asked why both the citizenship and the country of issuance of the passport for each passenger and crew member on a covered flight were required to be electronically transmitted to Customs as this information would, in almost all cases, be the same.

*Response:*

The regulatory texts contained in this final rule (§ 122.49a(b)(3) for arriving passengers and § 122.49b(b)(3) for arriving crew members) specify the data element "full name" as meaning the first name, last name, and, if available, middle name. However, CBP will accept as the full name the name that appears in the machine-readable zone of the travel document. Carriers have the responsibility to ensure that the information in the machine-readable zone, including full name, is accurately transmitted to CBP.

Regarding the data element "country of issuance of the passport," CBP defines this as the country that issued the passport, as opposed to the country where the document is issued (i.e., if a passport is issued to a U.S. citizen by the U.S. embassy in Costa Rica, the country of passport issuance is the United States). In most instances, country of passport issuance will be the same as "citizenship," and CBP, for the time being, will accept for both data element fields the coun-

try of passport issuance as obtained from the machine-readable zone of the passport. However, as CBP is interested in those instances when these data elements are not the same, in the longer term, under the UN EDIFACT transmission format for aircraft (required for aircraft manifest transmissions in place of US EDIFACT 180 days after publication of this document) and under the U.S. Coast Guard's (USCG) electronic Notice of Arrival/Departure (eNOA/D) transmission method or Extensible Markup Language (XML) transmission method for vessels (required 30 days after publication for cargo vessels; 180 days after publication for passenger vessels; explained more fully below), CBP will require the carrier to provide the appropriate data for each of these fields in all cases. As explained further below in the comment discussion, vessel carriers must use the eNOA/D or XML transmission methods to transmit required manifest information.

Finally, citizenship data is required even if a travel document is not required (under both US and UN EDIFACT and under either eNOA/D or XML).

*Comment:*

Concerning § 122.49a(c)(3), which obliges carriers to use a preferred travel document to obtain the information that identifies the passengers and crew on a covered flight, eight commenters argued that Customs should only require the submission of information from the preferred travel document, usually a passport, that is capable of being scanned through the use of an electronic document reader (in other words, only the electronic transmission of information that is contained in the machine-readable zone of the travel document should be required). For example, it was stated that the U.S. visa number that is required in § 122.49a(c)(2) for a U.S.-issued non-immigrant visa travel document was not located in the machine-readable zone of that document, and thus the visa number of this travel document as described in § 122.49a(c)(3) could not be electronically transmitted to Customs through the use of a machine reader.

*Response:*

CBP disagrees that the electronic transmission of manifest data (in §§ 122.49a(b)(3) and 122.49b(b)(3) in this final rule) should be limited only to the information contained in the machine-readable zone of a preferred travel document. Even though the preamble of the Customs Interim Rule stated that the electronic transmission of the preferred travel document information for the time being would be considered as constituting full compliance with the requirements of 49 U.S.C. 44909(c)(2)(A)–(E), in the longer term, application of that more limited standard would result in the collection of less information than CBP believes is necessary for law enforcement and

national security purposes. For example, neither the traveler's U.S. destination address nor his/her travel itinerary is obtainable from the machine-readable zone of the travel document. It was for this reason that the Customs Interim Rule stated that air carriers would be required to transmit any informational elements required by the statute and regulation that are not contained in transmitted travel documents by a date that would be announced in a future **Federal Register** document. That date is 180 days after publication of this document, as specified in the regulatory text of this final rule.

With regard specifically to submission of the U.S. visa number, CBP has determined that it will be able to electronically obtain this data from another source. Therefore, this data need not be transmitted by the carrier. The regulatory text of this final rule has been modified accordingly. This modification will reduce the manual data collection burden on carriers while ensuring that CBP receives the required data.

*Comment:*

With reference to § 122.49a(c)(1) and (c)(4), which provide that certain travel itinerary information for each passenger and crew member must be electronically transmitted to Customs, several commenters observed that information on a passenger's travel itinerary is not always available through the air carrier's PNR (reservation) information system. These commenters suggested that Customs limit the requirement for submitting details on a passenger's travel itinerary to those cases where the carrier possesses this information in its PNR reservation system.

*Response:*

The submission of information on the travel itinerary of each passenger and crew member, as provided in § 122.49a(c)(1) and (c)(4) (in §§ 122.49a(b)(3) and 122.49b(b)(3) in this final rule), has been determined to be important to the effort to ensure national safety and, therefore, such information should be submitted to the maximum extent possible. However, carriers will be expected to report a passenger's itinerary only to the extent that the carrier can determine the itinerary electronically. The statutory authority for requiring the submission of this information is 49 U.S.C. 44909(c)(2)(F) and 8 U.S.C. 1221(c)(10).

*Comment:*

A number of commenters sought further clarification of the following words or phrases used in § 122.49a(c)(4): "transiting"; "destined for the United States"; and "the foreign airport where they [each passenger and crew member] began their air transportation to the United States."

*Response:*

CBP believes that these words in § 122.49a(c)(4) (§§ 122.49a(b)(3) and 122.49b(b)(3) in this final rule) do not require special definitions regarding their meaning. They are not intended as terms of art and therefore should be accorded their generally accepted, ordinary meanings. Yet, clarification of the words pertaining to the airport where a passenger's or crew member's air transportation to the United States began is warranted. These words require identification of the airport where the passenger or crew member first boarded an aircraft on his/her journey to the United States; however, as mentioned above, the information required to be transmitted will depend on the responsible, transmitting carrier's knowledge of the traveler's itinerary. Thus, where, for example, the traveler first boards at Athens for travel to New York via Rome and London, and the responsible, transmitting carrier knows this itinerary, Athens will be the port/place where the traveler's journey to the United States began, regardless of any aircraft changes, air carrier changes, or overnight layovers along the way. However, if the responsible, transmitting carrier only knows of the traveler's itinerary beginning in Rome, because, e.g., the traveler changed airlines there and the carrier is unaware that the traveler's journey began in Athens, then the carrier's identification of Rome as the port/place where the journey began will be acceptable. Setting forth all possible scenarios in this document is not feasible. The carrier is responsible for transmitting the required information based on its knowledge, obtained through reasonable effort, of the traveler's itinerary.

*Comments on the INS NPRM*

A total of 328 commenters responded to the solicitation of comments on the INS NPRM setting forth amendments to the immigration regulations in Title 8 of the CFR to require the electronic transmission of passenger and crew manifests for air and sea carriers in foreign transportation into and out of the United States. The submitted comments are summarized and responded to below. Again, similar comments received on both the Customs Interim Rule and the INS NPRM were addressed in the comment-response section for the Customs interim rule and will not be repeated in this section.

*Comment:*

Ten commenters expressed their support for the proposed regulatory requirements. The commenters noted in particular that the requirements would increase the security of air travelers and the United States.

*Response:*

CBP agrees and appreciates the support for this regulatory action.

*Comment:*

Eleven commenters expressed concern over the requirement that the carriers submit the traveler's address while in the United States. The various concerns involve the following:

- (1) the address requires manual input;
  - (2) the requirement applies to in-transit passengers who, by definition, are not entering the United States;
  - (3) the requirement applies to departure manifests;
  - (4) whether a telephone number should be sufficient for passengers who cannot supply a specific address;
  - (5) whether the carriers should be liable for the accuracy of the data;
  - (6) the requirement is not limited to visitors;
  - (7) that carriers should be allowed to send crew addresses via fax;
- and
- (8) the requirement should not be applied to crew members of sea carriers.

*Response:*

After serious consideration of the various concerns of the industry regarding the requirement to submit the U.S. destination address (primarily, additional processing time for manual entry of this data), CBP has significantly modified this requirement to decrease the burden on the industry. Although CBP has determined that the submission of the U.S. destination address for certain persons is necessary for transportation and national security, CBP has modified the scope to focus more accurately the requirement on a subset of the traveling public. The following are the responses to the eight concerns summarized above:

(1) CBP recognizes that the manual entry of data will result in an additional burden on the carriers that collect and provide the information. As mentioned above, CBP has carefully weighed the importance of any information that requires manual entry to ensure that the burden is imposed only when the receipt of the information is necessary for transportation and national security purposes.

(2) CBP agrees that a U.S. address should not be required for in-transit passengers since they are only transiting through and are not destined to remain in the United States. Thus, CBP is waiving this requirement. The relevant regulatory texts set forth in this final rule document have been modified accordingly.

(3) CBP agrees that the U.S. address should not be included as part of the passenger departure manifest for either commercial vessels or aircraft. This information relative to non-immigrant travelers can be obtained from information collected upon arrival (as U.S. address is required for arriving non-immigrant passengers). Thus, CBP is waiving this data element requirement in the above scenarios.

The regulatory texts set forth in this final rule document have been modified accordingly.

(4) Some travelers (as to whom the information is required) may indicate that they are not able to provide a specific U.S. address; however, CBP cannot accept a telephone number in lieu of the address. The U.S. destination address is required under the EBSA (8 U.S.C. 1221) and must be provided unless waived under the statute. The statute does not provide for transmission of a telephone number or anything else as an alternative. If the information is not submitted with the manifest, the carrier may be penalized for submitting an incomplete manifest, and CBP will be forced to elicit this information from the traveler upon arrival, which could impact CBP processing times.

(5) CBP agrees that the carriers should not be held liable for the accuracy of the U.S. address information provided by the traveler. However, a carrier may be held liable for a failure to provide the information or for providing information it knows or should have known was incorrect. An example of the latter kind of failure is not catching and correcting an address lacking credibility, such as one naming the White House or using a post office box which carriers should be made aware is unacceptable. CBP expects that carriers will make a reasonable effort to ensure that the address provided appears to be a valid address.

(6) CBP agrees that the U.S. address requirement should apply to arriving non-immigrant visitors and not to U.S. citizens or lawful permanent residents (LPRs). As this information, with respect to U.S. citizens and LPRs, can be obtained by other means, CBP is waiving this data requirement for these groups. The regulatory texts set forth in this final rule document have been appropriately modified to reflect this view.

(7) CBP does not agree that transmission of the U.S. address, where required, can be made via fax. This means of transmission is not in compliance with the ATSA and EBSA requirements for the electronic submission of manifest data.

(8) In preparing this final rule, CBP has decided to waive the requirement for U.S. address for crew members arriving in or departing from the United States onboard commercial vessels or aircraft. This information can be obtained from the carrier if necessary. The regulatory texts of this final rule have been modified accordingly. However, the data element "address of permanent residence" (which may be a U.S. address in some instances) has been added to the regulatory texts of this final rule for crew members and non-crew members onboard arriving and departing commercial aircraft. This data element (as well as two additional scenarios to which it applies for crew members and non-crew members: certain flights continuing within and overflying the United States) has been added to incorporate current TSA provisions into this rulemaking. Requiring this

data element for arriving and departing aircraft is also authorized under the EBSA amendments to 8 U.S.C. 1221 (8 U.S.C. 1221(c)(10)) and, additionally for aircraft arrivals, under the ATSA amendments to 49 U.S.C. 44909 (49 U.S.C. 44909(c)(2)(F)). The regulatory texts of this final rule have been modified accordingly. Thus, where the crew member's or non-crew member's permanent residence is in the United States, that address will be required (and, per item (7) above, cannot be transmitted to CBP by fax) to meet this data element requirement.

Under ATSA, CBP may require additional information that it determines is reasonably necessary to ensure aviation safety, such as the address requirement for certain crew and non-crew members discussed above. Thus, for this reason, requiring the U.S. address as outlined above is authorized under the statute for aircraft arrivals; not requiring it in some circumstances is not contrary to the statute.

Under 8 U.S.C. 1221, as amended by EBSA, pertaining to manifests for aircraft and vessel arrivals and departures, the U.S. address is required (in paragraph (c)(9)). However, paragraph (h) of 8 U.S.C. 1221, as amended, provides CBP the authority to waive the requirements of paragraphs (a) and (b) of the statute relating to submission of arrival and departure manifest information. As CBP has the authority to waive submission of the manifest information altogether (such as for active duty U.S. military personnel on certain Department of Defense aircraft), its authority to waive submission of one or more data elements is reasonably implied. Thus, a manifest data element provided for under paragraph (c) of the statute may be excluded from the regulation (visa number) or limited in the regulation (U.S. address) under the waiver provision, provided that to do so does not present a security risk to vessel and air travel or shipments and is grounded in a reasonable need. Accordingly, the waiver of 8 U.S.C. 1221(h) provides the basis for not requiring, under this final rule, the U.S. destination address for U.S. citizens, LPRs, in-transit passengers, crew members, and all departing travelers in both the commercial vessel and air travel environments. CBP again notes, however, that it can obtain the U.S. address by other means with respect to these groups (except in-transits). And CBP reiterates that, despite the foregoing waiver, the data element "address of permanent residence" (which may be a U.S. address in some instances) is required in this final rule for crew members and non-crew members on flights to, from, continuing within (foreign air carriers only), and overflying the United States.

*Comment:*

Eight commenters commented on the conversion to the United Nations Electronic Data Interchange for Administration, Commerce, and Trade (UN EDIFACT). The comments involved the following specific issues:

- (1) estimates of the time required to convert to UN EDIFACT;
- (2) concern over the cost of conversion to UN EDIFACT;
- (3) concern over the availability of other methods of transmission for small carriers (email and web-based applications);
- (4) confusion over the statement in the preamble of the INS NPRM that conversion to UN EDIFACT is not required;
- (5) concern over the timeliness of the final publication of the UN EDIFACT Implementation Guide; and
- (6) concern that the increased transmission of data in blocks will increase the possibility of lost data.

*Response:*

Although the carriers have specific concerns regarding UN EDIFACT, the use of this format for APIS transmissions serves several useful purposes for the air carrier industry. UN EDIFACT was approved as the global standard for APIS messaging by the World Customs Organization in March 2003. Therefore, although the air carriers must reprogram their systems to comply with this new format, they will not have to continue to reprogram to meet other governments' individual APIS requirements, other than possible minor programming changes. Also, UN EDIFACT is much more flexible than US EDIFACT and will allow the carriers to comply with the new data element requirements and make minor adjustments to accommodate modifications without major reprogramming.

The following are the specific responses to the six issues raised by the commenters:

(1) CBP considered all submitted estimates of time required to convert to UN EDIFACT. Industry estimates indicated that most air carriers would be able to convert by the end of December 2003 if the regulatory requirements were finalized by April 2003. CBP has modified the regulatory texts contained in this final rule document to set the requirement for transmission of all data in UN EDIFACT format at approximately 180 days from the date of publication of this final rule. In view of the ample period of time during which the industry has been aware of these impending requirements and has had access to the draft implementation guide to UN EDIFACT, CBP believes that this 180-day delay affords sufficient time for the carriers to complete the necessary programming. Prior to the publication of this final rule, five major carriers and two communication providers have completed programming for UN EDIFACT and 60 others are currently testing with CBP.

For the sea travel environment, CBP has decided to adopt the use of the USCG's eNOA/D transmission format or the XML transmission format for vessel carrier transmissions. The eNOA/D is a web-based application that has been developed by the USCG in cooperation with CBP. It became available to the vessel carrier industry at the end of January 2005. The XML format allows transmission of re-

quired information by attachment to an email message. CBP is adopting these methods in large part due to the comments received by the industry calling for USCG and CBP to consolidate duplicative manifesting requirements and provide the industry a "single-window" for manifest transmissions. USCG and CBP conducted an evaluation of their respective systems to determine the optimum way to consolidate their transmission requirements and be more responsive to the industry. It was determined that the eNOA/D and XML methods (not UN EDIFACT) are the most compatible and easy to implement methods for this purpose.

For cargo vessel carriers, using eNOA/D or XML will constitute transmission to CBP through an electronic data interchange system approved by CBP, as required under 8 U.S.C. 1221, as amended by EBSA. Cargo vessel carriers must make transmissions through one of these media 30 days after the date of publication of this document. Passenger vessel carriers must make transmissions through one of these media by a date that is 180 days after the date of publication of this document. Cargo vessel carriers are required to comply earlier than passenger vessels since they do not currently submit data and have not previously implemented the US EDIFACT transmission format. Passenger vessel carriers have been required to submit manifest data on Visa Waiver passengers in US EDIFACT since October 10, 2002, and therefore will require a period of time to convert to XML. This change has been made in cooperation with the USCG to facilitate transmission in the sea environment for the vessel carriers and is expected to be easily achieved.

(2) CBP recognizes that the conversion to UN EDIFACT will impose initial and subsequent operating expenses on the carriers. In fact, CBP itself has incurred considerable expense in programming its automated system to accept UN EDIFACT. See the economic impact analysis set forth in the "Regulatory Assessment Under Executive Order (E.O.) 12866" section of this document which concludes that this final rule constitutes a significant regulatory action because it requires the expenditure of over \$100 million in any one year. However, CBP notes that UN EDIFACT was approved as the standard for transmission of Advance Passenger Information (API) data by the World Customs Organization in March 2003, and, thus, many air carriers would likely need to convert to UN EDIFACT (as many already have) to comply with the requirements of other countries, even if CBP APIS, and the requirements of this final rule, did not exist. Also, this final rule provides certain benefits to the carriers that are discussed in the E.O. 12866 analysis.

(3) In the air travel environment, although CBP will continue to accept email transmissions for the foreseeable future, CBP may eventually phase out this method of transmission since it is generally considered to be less reliable. In the meantime, CBP will require the transmissions sent via email to be in UN EDIFACT format once

UN EDIFACT becomes the operative format under the regulatory texts adopted in this final rule. Again, CBP has developed “eAPIS” (the web-based application located on the CBP web site) which became available to the carrier industry at the end of January 2005. Additional information on UN EDIFACT and points of contact for assistance can be accessed on the Internet at [www.cbp.gov](http://www.cbp.gov) (related links).

Concerning the sea travel environment, the industry can access eNOA/D through the USCG’s National Movement Vessel Center web site ([www.nvmc.uscg.gov](http://www.nvmc.uscg.gov)). The eNOA/D contains all information required to satisfy the USCG’s Notice of Arrival (NOA) report requirements and CBP’s electronic manifest requirements. Finally, for vessel carriers who do not have access to the Internet or do not wish to incur the On-line costs, they can either download the XML form provided on the USCG web site or design their own XML form and email it to the address provided on the USCG web site above.

(4) Some of the commenters were confused with the statement in the preamble of the INS NPRM regarding conversion to UN EDIFACT not being required. To clarify, in order to comply with the statutory and regulatory requirements, conversion to UN EDIFACT will be necessary for air carriers. As already noted, UN EDIFACT is the API messaging format endorsed by the World Customs Organization, and, therefore, most air carriers would likely have to convert to UN EDIFACT to satisfy other government requirements regardless of this final rule.

(5) CBP published a draft UN EDIFACT Implementation Guide in March 2003 which was updated in March 2004. CBP will publish a final UN EDIFACT Implementation Guide at [www.cbp.gov](http://www.cbp.gov) (related links) as soon as practicable following publication of this final rule document.

(6) CBP assures the industry that it will work to ensure that the increased transmissions will not increase the risk of lost data. CBP has implemented specific programming to address the initial loss of data experienced after the publication of the Customs Interim Rule.

*Comment:*

Three commenters asked for clarification on whether the electronic manifest requirement applies to carriers that transport crew only.

*Response:*

For the national and aviation security reasons set forth in the governing statutes, as amended, CBP will require carriers (vessel and air) transporting only crew members to transmit arrival and departure manifests in accordance with the regulatory texts of this final rule. The provisions incorporated into this final rule to assist the TSA aviation security mission, which serve the same purposes, also

require crew member and non-crew member manifest transmissions for cargo-only flights arriving in or departing from the United States (as well as for cargo-only flights continuing within (foreign air carriers only) and overflying the United States).

*Comment:*

One commenter requested that the government match APIS manifest data through the passport number at the time of arrival only and thus not require the alien registration number, country of residence, or the U.S. address on the outbound manifest. Five commenters argued that the alien registration number requirement should be omitted from the final rule altogether (for inbound and outbound) since it can be retrieved by (legacy) INS systems. One commenter also alleged that it is difficult for an airline to know if a traveler has an alien registration card.

*Response:*

Regarding the alien registration number, which must be submitted “where applicable” under 8 U.S.C. 1221(c)(9), as amended, and “as appropriate” under 49 U.S.C. 44909(c)(2)(E), as amended, CBP has determined that providing this information with respect to any LPR to whom an alien registration card has been issued, whether or not the card is required for travel, is an “applicable” and “appropriate” requirement. In other words, where a traveler is an LPR to whom an alien registration card has been issued, it is appropriate in, and applicable to, the situation at issue (international travel – arrival in and departure from the United States) to require that information, particularly given the national security, aviation security, and law enforcement purposes upon which the amendments to the laws predicated this regulatory action are based. Thus, under the circumstances, waiving this data element is not warranted.

Regarding the commenters’ suggestion that the requirement to submit the alien registration card number can be removed from the regulation because this information can be obtained elsewhere, after looking into the possibility of automated retrieval of the alien registration number from other sources, CBP has concluded that the electronic manifest transmission systems required to comply with the amendments of this document currently lack this capability. Accordingly, the alien registration number requirement must be retained.

*Comment:*

Five commenters expressed concern that the visa number, issuance country, and date of issuance data elements require manual input and thus will significantly delay processing times. The commenters also asserted that, with the transmission of the passport number, the visa information could be retrieved from the State Department database.

*Response:*

CBP concurs. Regarding the U.S. visa number and date and place of visa issuance, CBP has determined that submission of this information under 8 U.S.C. 1221(c)(7) by the carrier is subject to the waiver of paragraph (h) of the statute. Because CBP will be able to obtain this information electronically from another source and does not wish to delay processing times unnecessarily, these elements have not been included in the regulatory texts set forth in this final rule document. The waiver of this requirement reduces the burden on carriers supplying information under these regulations, since these data elements would have required manual entry by carrier representatives.

*Comment:*

Two commenters referred to the proposed requirement that the crew manifest be transmitted separately with an indicator “C” after the flight number to distinguish it as a crew manifest. These commenters noted that the new UN EDIFACT will require each traveler’s status to be indicated, thus making the “C” designation requirement unnecessary.

*Response:*

The proposed use of the indicator “C” (in the INS NPRM) was for manifest transmissions in US EDIFACT format only, to distinguish passenger manifests from crew manifests. This final rule does not require a “C” indicator under the UN EDIFACT format; however, TSA may require certain air carriers to add specific suffixes to the flight number to distinguish crew manifests. TSA will advise the affected air carriers accordingly.

*Comment:*

One commenter sought clarification on the requirement for the transmission of a passenger’s citizenship vis-a-vis the country of document issuance.

*Response:*

As stated in a previous response to a comment relative to the regulatory text of the Customs Interim Rule that concerned the country of issuance of the passport, CBP will accept the country of travel document issuance data, contained in the machine-readable zone of the travel document, as the citizenship data. However, after commencement of transmission of aircraft manifest information in UN EDIFACT format, both data elements will be required separately. It should also be noted that citizenship data is required even if a travel document is not.

*Comment:*

Four commenters requested omission of the country of residence requirement from the final rule since it requires manual entry and can only be determined through interview of the passenger.

*Response:*

Notwithstanding the fact that this requirement will add to processing times, CBP believes that the requirement should be retained for arrivals. CBP routinely collects this data upon entry into the United States and all foreign nationals are required to provide this data on the I-94 form. Electronic submission of the country of residence, in advance, assists CBP in facilitating travelers' entry and evaluating risk assessments. However, CBP has determined that this data element need not be required for outbound passenger or crew manifests since this information is captured on the inbound manifests (subject to the caveat noted previously for crew and non-crew members who must provide the address of permanent residence).

*Comment:*

One commenter asked that the Passenger Name Record (PNR) locator number requirement not be effective until December 15, 2003, so that the capability to satisfy this requirement can be developed. Eight commenters stated that a PNR locator number may not always be available and may, at times, be different for inbound and outbound manifests. Three commenters requested that the final regulation not require the creation of a unique identifier.

*Response:*

This final rule does not require carriers to provide CBP access to a passenger's reservation data. The regulatory requirements for access to PNR information was published under a separate interim regulation, under 19 CFR 122.49b, which has been redesignated 19 CFR 122.49d in this final rule. This rule only requires submission of the PNR locator number. The locator number will be used by CBP to locate a passenger's passenger name record (PNR; reservation data) when available. A carrier will be responsible for transmission of the PNR locator only when UN EDIFACT becomes the required transmission format – 180 days after publication of this final rule, well after the December 15, 2003 date mentioned by the commenter. With regard to the second comment, CBP recognizes that a PNR locator number may not always be available and may be different for inbound and outbound manifests. Therefore, CBP has determined that, for the time being, if the carrier's system does not contain PNR locator numbers, the carrier may leave this data element blank. The regulatory texts set forth in this final rule document have been

modified to require the PNR locator only “if available.” Also, CBP will not require the transmission of a unique identifier number.

*Comment:*

One commenter requested that sea carriers be allowed to transmit “traveling manifests” via APIS and be exempted from submitting the paper I-418, thus permitting full replacement of the paper I-418 by the APIS transmission. Two commenters similarly asked for elimination of the Form I-94.

*Response:*

CBP’s APIS system cannot currently accommodate the filing of traveling manifests. CBP believes that this capacity is beyond the scope and intent of the APIS system. With regard to the I-418 and I-94 forms, CBP intends to study whether, and if so to what extent, the transmission of APIS data can replace the submission of these paper forms. Preliminary analysis indicates that these documents can be significantly reduced, if not eliminated. However, this evaluation will not be completed by the effective date of this final rule and, therefore, the I-418 and I-94 will continue to be required. If CBP ultimately determines that these two paper forms can be eliminated entirely or in some circumstances, an appropriate regulatory change document will be published in the **Federal Register** for public comment at a future date.

*Comment:*

One commenter requested that CBP work with the USCG to consolidate requirements and thus allow the data submitted to CBP to satisfy the passenger and crew manifesting requirements of the USCG.

*Response:*

CBP and USCG have consolidated requirements to every extent possible. For instance, the INS NPRM’s provision for submitting a vessel arrival manifest, in certain circumstances, less than 24 hours in advance of entry at a U.S. port (in proposed § 231.1(b)(2)(iii)) was removed from the regulatory text in this final rule and replaced with a submission time requirement acceptable to USCG. This modification was done to maintain consistency with USCG requirements. However, it is noted that the USCG has other manifesting requirements that cannot be addressed in an APIS regulatory context.

As mentioned in a previous comment response, CBP has adopted the use of the eNOA/D and XML in order to eliminate the duplicate reporting requirements and provide a “single window” for filing manifest information. For this purpose, commercial vessel carriers will utilize either of these methods to satisfy both USCG’s and CBP’s passenger and crew manifest submission requirements.

*Comment:*

Five commenters expressed concern that the “date of document expiration” requires manual input for some travel documents. They suggested for this reason that this data requirement should be omitted from the regulation.

*Response:*

CBP has determined that the “date of document expiration” data element is necessary for advance risk assessment. However, the date of expiration is also contained in the machine-readable zone of the passport. Therefore, manual input of this data element should be minimal.

*Comment:*

One commenter asked for clarification as to whether the carrier will be liable if a traveler, due to dual citizenship, presents different travel documents when traveling into or out of the United States.

*Response:*

CBP will not hold the carrier liable if the traveler, due to dual citizenship, presents different valid travel documents while traveling into or out of the United States. The carrier’s responsibility, and liability for failure to meet it, relates to the proper transmission of travel document information provided by the traveler and a reasonable effort to obtain correct information.

*Comment:*

Three commenters requested that Visa Waiver Program passengers not be refused entry due to inaccurate APIS transmissions.

*Response:*

Upon arrival of a VWP passenger, the passport will be scanned and the inspector will be alerted to discrepant information. When resolved by the inspector as an incorrect transmission, the VWP passenger will be admitted. CBP does not intend to deny entry of a Visa Waiver Program passenger based solely on an incorrect APIS transmission.

*Comment:*

Four commenters expressed concern regarding the penalties for non-compliance with the APIS regulatory requirements. The concerns were as follows:

(1) whether the carriers will be penalized for the accuracy of those data elements that rely solely on the verbal declaration of the passengers (country of residence and U.S. destination address);

(2) whether compliance with data element requirements under the regulations will affect a carrier's APIS compliance rate (previously calculated by the Customs Service);

(3) whether notices of potential penalties should be emailed or faxed rather than mailed;

(4) whether penalties should be waived if the carrier's compliance rate exceeds a certain level over a 1-year period; and

(5) whether carriers will be penalized for discrepancies between the I-94 and the APIS transmission.

*Response:*

(1) As addressed in a previous comment response, carriers must make a reasonable effort to ensure the information on the manifest appears valid.

(2) An APIS compliance rate will still be calculated and may encompass all elements of this regulation.

(3) Notices of penalties will be emailed or faxed when practicable. All carriers should ensure that local APIS port coordinators have current email addresses and fax numbers.

(4) Compliance with the provisions of this rule is necessary in order for CBP to facilitate the processing of travelers and properly conduct advance risk assessments. Therefore, CBP will not waive enforcement of these provisions simply because a carrier has demonstrated compliance for one year.

(5) CBP does not intend to penalize carriers for discrepancies between the I-94 and the APIS transmission. Passenger information is submitted to the carrier at check in. If it is apparently valid, carriers cannot be held accountable if a passenger later puts different information on the I-94 that is submitted at the time of arrival.

*Comment:*

One commenter asked that air carriers be exempt from transmitting APIS manifest information from flights departing pre-inspection locations.

*Response:*

APIS manifest information must be transmitted for pre-inspection location departures in order to perform law enforcement and national security checks that are not completed during the pre-inspection process. Also, the APIS transmissions are necessary to satisfy United States Visitor and Immigrant Status Indicator Technology (US VISIT) requirements that were the subject of a rulemaking document published in the **Federal Register** (69 FR 468) on January 5, 2004.

*Comment:*

One commenter asked for clarification of the process by which a carrier should cancel APIS manifests for a flight that was canceled after transmission.

*Response:*

There is currently no method for a carrier to cancel a manifest after transmission. Accordingly, all references to reports of cancelled voyages or flights have been removed from the regulatory texts set forth in this final rule. Carriers should continue to follow current practices of notifying CBP of cancellations as soon as practicable.

**VI – Changes to the Interim and Proposed Regulatory Texts**

This final rule incorporates a few organizational changes and a number of textual changes from what was set forth in the regulatory texts of the Customs Interim Rule and the INS NPRM, including changes to assist TSA in its aviation security mission. All substantive changes are addressed below.

*Organizational changes*

The principal organizational change involves a transfer of the operative manifest provisions contained in the INS NPRM (that is, the substance of the proposed revision of 8 CFR 231.1, which set forth the new passenger and crew manifest requirements for arriving and departing vessels and aircraft) to 19 CFR parts 4 and 122. This change is based on the following considerations: (1) As pointed out earlier in this document, the new manifest requirements will now be administered by one government agency, CBP; (2) the existing CBP regulations in Chapter I of Title 19 of the CFR already contain detailed requirements regarding the arrival and clearance for departure of commercial vessels and aircraft, including manifest reporting requirements covering incoming and outgoing cargo and electronic manifest requirements for passengers and crew members on arriving aircraft; and (3) use of the regulations by the affected industry sectors will be facilitated if the various provisions that apply to the same arrival or departure transaction are found in one place within the CFR.

Thus, with this transfer of the manifest provisions from 8 CFR to 19 CFR, the requirements for submitting manifest information relative to passengers and crew members arriving in and departing from the United States on board commercial vessels and aircraft will not be found in 8 CFR 231.1, as proposed in the NPRM. Instead, vessel manifest requirements will be found in 19 CFR 4.7b (arrivals) and 4.64 (departures), and aircraft manifest requirements will be found

in 19 CFR 122.49a (passenger arrivals), 122.49b (crew member and non-crew member arrivals), 122.75a (passenger departures), and 122.75b (crew and non-crew departures), as set forth in the regulatory texts below.

Other organizational changes, made to accommodate the incorporation into this final rule of certain provisions to assist TSA in carrying out its aviation security responsibilities, include limiting the manifest requirement of 19 CFR 122.49a to arriving passengers (aircraft) and placing this requirement for arriving crew members in a new 19 CFR 122.49b. Manifest requirements for crew members and non-crew members on foreign flights continuing within and overflying the United States also have been placed in the new 19 CFR 122.49b. This change regarding new 19 CFR 122.49b necessitated redesignating former 19 CFR 122.49b pertaining to PNR information as 19 CFR 122.49d. New 19 CFR 122.49c pertaining to master crew member and non-crew member lists has been added. Manifest transmission requirements for departing passengers have been added in new 19 CFR 122.75a and, for departing crew members, new 19 CFR 122.75b.

*Textual changes to the provisions of the Customs Interim Rule and the INS NPRM*

(1) Conforming Amendments:

- (a) Appropriate conforming changes have been made to proposed 8 CFR 217.7 regarding the Visa Waiver Program (VWP). In this final rule, this section now references 19 CFR 4.7b and 122.49a for electronic manifest requirements for aliens arriving in the United States as applicants under the VWP and 19 CFR 4.64 and 122.75a for electronic manifest requirements for aliens admitted under the VWP who are departing from the United States.
- (b) The INS NPRM did not contain a proposed amendment to 8 CFR 231.2. In this final rule, appropriate conforming changes have been made to 8 CFR 231.2 to reflect that the electronic departure manifest requirements for passengers and crew are now found in 19 CFR 4.64, 122.75a, and 122.75b. Language regarding the I-94 has been retained in 8 CFR 231.2.

(2) Definitions: The definitions of proposed 8 CFR 231.1(a) of the INS NPRM have been removed from that section. These definitions, some of which have been revised, have been placed, as appropriate, in 19 CFR 4.7b(a), 4.64(a), 122.49a(a), 122.49b(a), 122.75a(a), and 122.75b(a) of this final rule. In addition, definitions for the following terms have been added, as appropriate, to these 19 CFR sections:

“carrier”; “departure” relative to aircraft (this term is defined for vessels in 19 CFR 4.0(g)); “emergency”; “flight continuing within the United States”; “flight overflying the United States”; “non-crew member”; and “territorial airspace of the United States.” Some of these definitions have been added due to the incorporation in this final rule of provisions that assist TSA in meeting its aviation security responsibilities. CBP notes that, for purposes of consistency (given that the electronic manifest filing provisions subject of this rulemaking are now contained in 19 CFR), the INS NPRM definition of “ferry” (now contained in 19 CFR 4.7b(a)) has been modified to be consistent with the definition of “ferry” found in 19 CFR 24.22(a)(4). The definition of “crew member” has been revised to encompass certain elements of 8 U.S.C. 1101(a)(10) and (a)(15)(D) (under which sections the term “crewman” is used) to reflect more accurately factors established by case law (alien crew members must further meet all additional requirements for such persons set forth in subparagraph (a)(15)(D)). In some instances, due to incorporation in this final rule of provisions related to the TSA aviation security mission, the definition includes “relief crew” (also known as “deadheading crew”) and airline management personnel authorized to travel in the cockpit. However, CBP notes that, for all other purposes of immigration law and documentary evidence required under the Immigration and Nationality Act (8 U.S.C. 1101, *et seq.*), the term “crew member” (or “crewman”) does not include relief crew or airline management personnel authorized to travel in the cockpit unless such persons otherwise fall within the definition of “crewman” as set forth in 8 U.S.C. 1101(a)(10) and (a)(15)(D), as applicable. CBP further notes that the definitions of “crew member” found in the amended texts of 19 CFR set forth in this document should not be applied in the context of other customs laws, to the extent these definitions differ from the meaning of “crew member” contemplated in such other customs laws.

(3) I-94 Form: Requirements concerning submission of the Form I-94 (Arrival/Departure Record), removal of which from 8 CFR 231.1 was proposed in the INS NPRM, have been retained in this final rule. CBP has determined that, until further study of the matter is concluded, the I-94 requirement must be retained.

(4) Air Ambulances: Based on concerns from the industry, CBP has determined that an accommodation is warranted for flights by air ambulances, i.e., aircraft operating for the purpose of servicing a medical emergency. (An air ambulance, or aircraft in service of a medical emergency, is not an aircraft experiencing a medical emergency on board; it is one that has been put in service for the specific purpose of attending to a medical emergency situation.) Therefore, the regulatory texts of this final rule, for arrivals and departures, re-

flect a relaxation of the passenger and crew manifest transmission requirement for such aircraft by providing that these carriers have up to 30 minutes prior to arrival to transmit arrival manifests and up to 30 minutes after departure to transmit departure manifests. In the departure context, this “30 minutes after departure” requirement does not comport with the “before departure” requirement of the statute, 8 U.S.C. 1221(b), as amended by the EBSA. However, in these narrow circumstances, the statutory requirement can be relaxed under the waiver of paragraph (h) of the statute.

(5) Emergencies: Based on comments received, CBP has determined that an accommodation is necessary for commercial aircraft and vessels diverted to a U.S. port due to an emergency. In cases of non-compliance, CBP will take into consideration that the carrier was not equipped to make the transmission and the circumstances of the emergency situation.

Thus, for flights not originally destined to the U.S., but diverted to a U.S. port due to an emergency, manifests are required to be submitted no later than 30 minutes prior to arrival. In the case of a vessel that was not destined to the United States but was diverted to a U.S. port due to an emergency, manifests are required to be submitted before the vessel enters the U.S. port or place to which diverted.

(6) Vessel manifest filing times: Based on comments received, the manifest filing (transmission) requirement for arriving vessels (found in proposed 8 CFR 231.1(b)(2) of the INS NPRM but placed in 19 CFR 4.7b(b)(2) in this final rule) has been changed in this final rule to provide that (i) for voyages of 96 hours or more, the manifest must be transmitted to CBP at least 96 hours before the vessel’s entry at the first U.S. port or place of destination; (ii) for voyages of 24 hours but less than 96 hours, the manifest must be transmitted to CBP prior to the vessel’s departure and (iii) for voyages of less than 24 hours, the transmission must be made 24 hours prior to the vessel’s entry at the first U.S. port or place of destination. This requirement was modified to be consistent with USCG requirements.

(7) Departure port code: The departure port code data element contained in the Customs Interim Rule for arriving aircraft and in the INS NPRM for arriving vessels and aircraft has not been carried over into this final rule, as the APIS system can accommodate the transmission of only three location identifiers. The departure port code would be the fourth location identifier for passengers on arriving vessels and aircraft, and CBP has decided to remove it from the regulation. This data element is still required for vessel and aircraft departures.

(8) Passenger updates: While the INS NPRM provided for updates to departure passenger manifests, CBP has taken into consideration the aviation, transportation, and national security purposes this rule serves and has decided that passenger updates for departure manifests will not be included in the regulation.

(9) **Timing of crew updates:** Based on comments received, crew manifest updates relative to vessel arrivals (not provided for in the INS NPRM) must be transmitted at least 12 hours, and up to 24 hours, before the vessel enters a U.S. port. For vessel departures, manifest updates will be accepted up to 12 hours after departure from the U.S. port. Crew manifest updates relative to aircraft arrivals and departures require TSA approval if sought to be made within 60 minutes of departure. (See item (17) below regarding the content of crew and non-crew manifest updates which are required under the regulation.)

(10) **DOD Exception:** Based on specific concerns expressed by the Department of Defense (DOD), an exception to the electronic passenger manifest filing requirement for arrivals and departures has been added in this final rule document (in paragraph (c) of 19 CFR 4.7b, 4.64, 122.49a, and 122.75a) to apply to active duty U.S. military personnel traveling as passengers on board DOD vessels and aircraft. Neither the INS NPRM nor the Customs Interim Rule provided this exception. This exception applies to DOD aircraft and vessels as well as DOD controlled commercial chartered aircraft and vessels. Appropriate manifests will be required for crew members, non-active duty U.S. military personnel, and non-military personnel.

(11) **Pre-inspected flights:** The language found in 19 CFR 122.49a(a) of the Customs Interim Rule that refers to arriving flights with pre-inspected or pre-cleared passengers and crew being subject to the electronic manifest transmission requirement has not been carried over to the regulatory text of this final rule. (CBP notes that arriving crew members are covered in 19 CFR 122.49b of this final rule.) Although the transmission requirement still applies to flights with pre-inspected or pre-cleared passengers and crew, it is not necessary to explicitly state so in the regulation, which is sufficiently clear and unambiguous without it.

(12) **U.S. Visa:** Based on comments received, CBP will no longer require commercial air and vessel carriers to submit visa number, date, and place of visa issuance. This information will be obtained through other means.

(13) **U.S. destination address:** Based on comments received, the following exceptions have been made to the requirement to supply the U.S. destination address for passengers and crew members on commercial sea and air carriers:

- (a) For arriving carriers, U.S. citizens, LPRs, crew members, and in-transit passengers are not required to provide a U.S. destination address (but note address of permanent residence requirement for crew and non-crew members in item (26) of this listing).
- (b) For departing carriers, no passengers or crew members are required to provide a U.S. destination address (again, see item (26)).

(14) Conversion date to UN EDIFACT: Based on comments received, CBP has designated a conversion date of 180 days from publication of this final rule.

(15) eNOA/D and XML: Based on comments received, CBP adopted the use of USCG's eNOA/D and XML in order to eliminate duplicative manifest reporting requirements and provide the industry with a single window for electronic transmission of manifests.

(16) Country of residence: Based on comments received, CBP waived the requirement for country of residence for departing passenger and crew manifests (but note address of permanent residence requirement for crew and non-crew members in item (26) of this listing).

(17) Content of crew and non-crew manifest updates: Based on comments received, CBP will allow crew and non-crew manifest updates to contain only those records that require amendments in lieu of submission of the entire manifest. However, CBP will still accept resubmission of the full manifest to comply with the updating requirements, should a carrier choose to do so.

(18) PNR locator number: Based on comments received, CBP will only require the PNR locator number if PNR information is available in the carrier's reservation or departure control system. CBP will not require the submission of a unique identifier.

(19) Accuracy of travel documents: Paragraph (d) of the Customs Interim Rule's 19 CFR 122.49a — requiring the air carrier to ensure (i) the accuracy of the travel document information transmitted to CBP, (ii) that the travel document appears valid, and (iii) that the passenger or crew member is the person to whom the travel document was issued — has been included as paragraph (d) in 19 CFR 4.7b, 4.64, 122.49b, 122.75a, and 122.75b in this final rule. Travel document information (consisting primarily of personal and document data) is the information the carrier obtains from the travel document and transmits to CBP (usually using machine-reading technology).

(20) Sharing of information: Paragraph (e) of 19 CFR 122.49a — providing for sharing of information with other Federal agencies upon request — has been included as paragraph (e) in 19 CFR 4.7b, 4.64, 122.49b, 122.75a, and 122.75b. Sharing of information is further permitted as otherwise authorized by law.

(21) The chart of 19 CFR 178.2, which was amended under the Customs Interim Rule to reflect an Office of Management and Budget (OMB) information collection control number relative to passenger and crew manifest information for arriving aircraft, is further amended in this final rule to reflect a new OMB control number relative to the new CBP (of the new DHS) for such manifest information and for manifest information for vessels and aircraft. The listing can now be found (in 19 CFR 178.2) in the appropriate column under 19 CFR 4.7b rather than under 19 CFR 122.49a where it was placed per

the Customs Interim Rule (see "Paperwork Reduction Act" section). The complete listing is for 19 CFR 4.7b, 4.64, 122.49a, 122.49b, 122.49c, 122.75a, and 122.75b.

The following provisions will assist TSA in carrying out its aviation security responsibilities. CBP notes that these additional requirements (except those pertaining to overflights) are jointly authorized under 49 U.S.C. 44909, as amended by the ATSA, and 8 U.S.C. 1221, as amended by the EBSA, in the proper exercise of authority under these statutes by the Commissioner of CBP to ensure aviation safety, enforce the immigration laws, and enhance national security and the safety of the public. Some of these additions to this final rule are found in 19 CFR 122.49b (aircraft arrivals and flights continuing within and overflying the U.S.) and 19 CFR 122.75b (aircraft departures) as follows:

(22) Air carriers are subject to the electronic manifest transmission requirement for crew members (passenger and all-cargo flights), and non-crew members (all-cargo flights only) on flights to, from, continuing within (foreign air carriers only), and overflying the United States. These manifests must be transmitted through an electronic data interchange system approved by CBP.

(23) These crew and non-crew manifests must be transmitted to CBP no later than 60 minutes prior to departure of the aircraft.

(24) The carrier is obligated to report changes to the crew and non-crew manifest after transmission of the manifest to CBP. To make an effective change within 60 minutes of departure, TSA must approve the change. Without TSA approval, the flight may be denied clearance, diverted from arrival at a U.S. port, or denied clearance to enter the territorial airspace of the United States, as appropriate.

(25) With transmission of manifest data for each crew member and non-crew member onboard the flight, the carrier certifies that each crew member and non-crew member is listed on a master crew list and a master non-crew list separately transmitted to CBP, with updates as required. Where a crew member or non-crew member onboard is not on the appropriate list, or has not been on that list for the requisite period of time, the flight may be denied clearance, diverted from arrival in the United States, or denied clearance to overfly the United States.

(26) The following data elements, in addition to those already required for arriving or departing crew members under the Customs Interim Rule and the INS NPRM, as modified in this document, must be included in a crew member manifest: place of birth; address of permanent residence; and pilot certificate number and country of issuance, if applicable. This data submission requirement applicable to crew members onboard arriving and departing aircraft also applies to crew members and, for all-cargo flights only, non-crew members, onboard flights continuing within (foreign air carriers only)

and overflying the United States. As set forth below, there are two exceptions to the crew and non-crew manifest requirements for FAA inspectors and DOD personnel.

(27) The crew member and non-crew member manifest requirement does not apply to properly credentialed and authorized Air Safety Inspectors of the Federal Aviation Administration (FAA); however, these FAA inspectors are considered passengers on arriving and departing flights subject to the passenger manifest requirements for arriving and departing aircraft (19 CFR 122.49a and 122.75a).

(28) The non-crew member manifest requirement, applicable only to all-cargo flights, does not apply to flights chartered by the U.S. DOD. (However, such persons are considered passengers under 19 CFR 122.75a pertaining to departing flights and would be subject to that electronic manifest requirement.)

In 19 CFR 122.49c of this final rule, TSA requirements relative to the master crew list and the master non-crew list are found. These requirements include the following:

(29) Each carrier operating flights to, from, continuing within (foreign air carriers only), or overflying the United States is obligated to transmit a master crew list and a master non-crew list to CBP through an electronic data interchange system approved by CBP. Initial transmission of these lists must occur at least 2 days in advance of any covered flight that any person on the list will operate, serve on, or be transported on. TSA will advise the carrier if any person on the list must be removed from the list. Only those persons approved by TSA will be permitted to operate, serve on, or be transported on the carrier's flights. The carrier is obligated to keep the list updated. Any updates to the list must be made at least 24 hours in advance of any flight the person who was added to the list, or who was subject of the update, will operate, serve on, or be transported on. Failure to comply with these requirements may result in denial of flight clearance, diversion of the flight, or denial of clearance to overfly the United States.

(30) The data required on the master lists is as follows: full name; gender; address of permanent residence (street, city, state, if applicable, country); date of birth; place of birth; passport number and country of issuance; pilot certificate number, if applicable, and country of issuance; and status onboard the aircraft.

(31) Master crew lists are not required for aircraft chartered by the U.S. DOD. Properly credentialed and authorized FAA Aviation Safety Inspectors are not subject to the master list requirement.

## **VII - Conclusion**

After careful consideration of the comments received in response to the Customs Interim Rule and the INS NPRM, and further review

of the matter subject of those rulemakings, CBP has concluded that the proposed amendments of the INS NPRM to parts 217, 231, and 251, Immigration and Naturalization Regulations (8 CFR parts 217, 231, and 251), that were published in the **Federal Register** (68 FR 292) on January 3, 2003, and the interim amendments of the Customs Interim Rule to parts 122 and 178, Customs Regulations (19 CFR parts 122 and 178) that were published in the **Federal Register** (66 FR 67482) on December 31, 2001, should be incorporated into this final rule, with the modifications discussed above in the “Comments” and “Changes” sections, as set forth in the regulatory texts below. Also, provisions have been added to this rule to assist TSA in its aviation security mission. These provisions relate to the electronic transmission of manifest information covering crew members and non-crew members traveling onboard commercial flights to, from, continuing within (foreign air carriers only), and overflying the United States.

The above 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.

#### **SIGNING AUTHORITY**

This amendment to the regulations is being issued in accordance with § 0.2(a) of the CBP regulations (19 CFR 0.2(a)) pertaining to the authority of the Secretary of the Department of Homeland Security (or his/her delegate) to prescribe regulations not related to customs revenue functions.

#### **REGULATORY ASSESSMENT UNDER EXECUTIVE ORDER 12866**

The final rule, which implements the amendments of section 115 of the ATSA and section 402 of the EBSA and includes provisions authorized under 49 U.S.C 114, is considered an economically significant regulatory action under Executive Order 12866 because it requires the expenditure of over \$100 million in any one year. The Office of Management and Budget (OMB) has reviewed it under that order.

As discussed previously in the preamble of this rule, the primary impetus for this rule is the increased threat facing the United States and international trade and transportation industries, particularly the commercial air and vessel carrier industries, since the terrorist

attacks of September 11, 2001. The Department of Homeland Security and its agencies, including CBP, TSA, and the U.S. Coast Guard, along with the air and vessel carrier industries, are called upon to take the necessary steps to alleviate, to the greatest extent possible, the risk to these vital industries posed by the threat of terrorism, including implementing regulations under the ATSA and the EBSA.

These regulations are being finalized to meet the objectives of the new laws: to secure the United States, international travelers, and the international air and sea industries from terrorist attacks. The enforcement and administration of these requirements will provide protection without unduly affecting international trade and travel.

### *Summary*

We estimate that the cost of this final rule will be approximately \$1 billion over a 10-year period (7 percent discount rate). In the first year this rule is in effect, we estimate the cost will be \$166 million (undiscounted) as companies reprogram existing systems and purchase necessary equipment. Once reprogramming is complete and equipment is in place, we estimate an average annual cost of \$135 million (undiscounted) as users submit information electronically. The annual cost is driven primarily by passenger counts and crew loads in air and cruise ship travel. The average annual cost reflects an average passenger count over the 10-year period of analysis based on a 2-percent annual increase in passenger loads for air carriers and a 6.4-percent annual increase in passenger loads for cruise ships.

### *Population Affected*

This rule will affect commercial passenger and cargo air carriers and commercial passenger and cargo vessels. These entities will be required to submit electronic passenger and crewmember manifests for inbound and outbound flights and voyages. According to CBP databases, there are an estimated 1,280 foreign and domestic air carriers that will be affected by the final rule. Of these, 92 are large air carriers (11 U.S. carriers and 81 foreign carriers) and 1,188 are small air carriers (773 U.S. carriers and 415 foreign carriers). According to U.S. Coast Guard and CBP databases, there are 16 cruise-ship companies that own approximately 150 vessels. There are also 12,835 foreign and domestic cargo vessel carriers. An estimated 585 are U.S.-flag vessels certified to operate internationally, while approximately 12,250 are foreign-flag vessels that make ports of call in the United States.

Annual costs are driven by passenger and crew loads in the air and cruise ship industries. Based on CBP data, we estimate that 2004 passenger/crew loads in the air and cruise industries will be

approximately 72 million and 16 million persons, respectively. We also predict a 2-percent annual increase in passenger loads for air carriers and a 6.4-percent annual increase in passenger loads for cruise ships for the 10-year period of analysis (percentages based on trend analysis of passenger and crew data starting with data from 1999). Thus, by 2013, predicted passenger/crew loads for the air and cruise industries are approximately 86 million and 28 million, respectively. Additionally, we assume that 95 percent of the total passenger/crew loads travel on large air carriers and 47 percent of these travel on U.S. carriers. Of the 5 percent of passenger/crew on small air carriers, and estimated 65 percent travel on U.S.-owned carriers. Complete detail is presented in Table 1.

Table 1  
Predicted Passenger/Crew Counts for Air Carriers and  
Cruise Ships over the 10-Year Period of Analysis

Year	Large U.S. Air Carriers	Large Foreign Air Carriers	Small U.S. Air Carriers	Small Foreign Air Carriers	Total for Air Carriers	Cruise Ships
1	32,084,327	36,180,199	2,335,365	1,257,504	71,857,396	16,095,618
2	32,726,014	36,903,803	2,382,073	1,282,655	73,294,544	17,125,737
3	33,380,534	37,641,879	2,429,714	1,308,308	74,760,435	18,221,784
4	34,048,145	38,394,716	2,478,308	1,334,474	76,255,643	19,387,978
5	34,729,108	39,162,611	2,527,875	1,361,163	77,780,756	20,628,809
6	35,423,690	39,945,863	2,578,432	1,388,387	79,336,371	21,949,053
7	36,132,164	40,744,780	2,630,001	1,416,154	80,923,099	23,353,792
8	36,854,807	41,559,676	2,682,601	1,444,477	82,541,561	24,848,435
9	37,591,903	42,390,869	2,736,253	1,473,367	84,192,392	26,438,735
10	38,343,741	43,238,687	2,790,978	1,502,834	85,876,240	28,130,814

There are an estimated 585 U.S.-flag vessels that are certified to operate internationally. Based on a Coast Guard analysis for vessel security requirements (USCG-2003-14792), most of these vessels are freight ships, tank ships, and small passenger vessels. Complete detail of the vessel population and the typical number of crewmembers onboard are presented in Table 2.

Table 2  
U.S.-Flag Vessels and Average Crew Counts

	Number of Vessels	Average Crew Count	Total Crewmembers
Freight ships	241	15	3,615
Tank ships	114	15	1,710
Small passenger vessels	109	10	1,090
Offshore Supply Vessels	75	4	300
Industrial vessels	20	5	100
Towboats	14	4	56
Research vessels	8	5	40
Mobile Offshore Drilling Units	2	10	20
Fishing	1	5	5
Oil recovery	1	3	3
Total	585		6,939

According to CBP and the Coast Guard, there are approximately 12,250 foreign-flag cargo vessels that make ports of call in the United States annually, not including cruise ships, whose passengers and crew have already been accounted for in Table 1. The vast majority of these vessels are freight ships and tank ships. We assume that these foreign-flag vessels will each have a crew of 15, for a total of 183,750 crewmembers. Also according to CBP and the Coast Guard, there are approximately 55,000 annual arrivals into U.S. ports from foreign ports of call. With approximately 12,800 vessels in the affected population, this results in an average of 4 arrivals per vessel per year.

#### *Regulatory Baseline*

Much of the information that must be submitted under this final rule is already submitted electronically to CBP by large carriers, both air and sea. Most of the large air carriers were voluntarily submitting electronic passenger and crew member manifests to CBP as early as 1989, when a voluntary program was implemented. These carriers submitted APIS in the US EDIFACT format to the former Customs Service. Carriers voluntarily submitted these manifests in electronic format in exchange for expedited processing, with a maximum processing time per flight. Also, existing immigration regulations (those effective until the effective date of this final rule) have required that air and vessel carriers submit arrival and departure manifests electronically for passengers traveling pursuant to the

Visa Waiver Program (VWP). In connection with this rulemaking, carriers informed CBP that it is more efficient for them to transmit electronic manifest information for all passengers, not just VWP passengers. Overall, a substantial majority of the carriers, over 80 percent, already submit arrival and departure manifests electronically for all passengers, including much of the information this rule requires. Moreover, many carriers would likely be investing in the implementation of UN EDIFACT transmission capability in the absence of this final rule because UN EDIFACT was selected as the transmission standard by the World Customs Organization in March 2003. Also, some carriers have, in fact, already converted to UN EDIFACT. While we calculate the costs of this rule as if the industry has not acted to meet the provisions of the rule, much of the industry is already compliant. We have estimated the full costs in order not to understate costs or assume that voluntary programs were more inclusive than they actually are.

For the most part, small air carriers and vessel carriers were not participating in the voluntary program. Thus, the compliance of small air carriers began either in anticipation of a final rule following publication of the interim rule in December 2001 or as the result of TSA Emergency Amendments and Security Directives mandating manifests via APIS. Cargo vessels will begin submitting electronic manifests upon publication of this rule. However, it should be noted that all of the above were required to submit these manifests in paper form prior to finalization of this rule.

### *Cost Analysis*

#### *Unit costs*

The source of the estimates provided in the following tables is the U.S. Department of Homeland Security, the Bureau of Customs and Border Protection, or the Transportation Security Administration, September 2004. All costs are presented in 2004 dollars.

For this analysis, we estimate the one-time start-up costs that will be incurred in the first year the final rule is in effect as carriers modify their existing systems and purchase necessary equipment. Following the first year, carriers will experience annual operating costs for submitting their information electronically and maintenance for their computer systems. The following is a summary of estimated unit costs for the various components of the affected population.

*Large air carriers*—the 92 large air carriers will incur computer programming costs associated with conversion from US EDIFACT to UN EDIFACT. According to the International Air Transport Association (IATA), the average cost for the conversion is \$400,000 per carrier. Large air carriers will also have to modify their existing systems to submit master crew lists and update these lists as necessary. Since we published this estimate in the NPRM, we have received

new information from seven carriers who have made the conversion to UN EDIFACT in anticipation of this rule and compliance with transmission standards of the World Customs Organization. The costs for conversion ranged from \$331,000 to \$500,000. Thus, we assume the cost to convert to UN EDIFACT plus the cost of system modifications to include the master crew list will be \$500,000 in the first year the rule is in effect and \$25,000 (5 percent of initial costs) in subsequent years as carriers make small programming changes.

Following conversion to UN EDIFACT, carriers will assume a transaction cost per passenger/crew member. These transaction costs will be incurred each year over the period of analysis. We estimate that the cost to submit the required passenger/crew information would be \$1 for inbound traveler and \$0.25 for outbound traveler. Using wage data from the Bureau of Labor Statistics, we estimate that, as a national average, counter and rental clerks, travel agents, and flight attendants earn \$18.57 per hour without fringe benefits or about \$25 per hour once the rate is "loaded" to include benefits. Assuming one to two minutes of added time, the additional cost would be between \$0.42 and \$0.84 per transaction. Because some additional training would be required to become proficient with the new system, CBP assumes that the added cost could be as high as \$1 per transaction. Because only machine-readable zone data are collected on outbound trips, we assume a cost of \$0.25 per transaction.

Additionally, we estimate the cost of transmitting overflight data and crew manifest data to comply with requirements from TSA Emergency Amendments and Security Directives. There are an estimated 16,800 overflights in 2004, and they are estimated to increase at a 4.9 percent rate over the 10-year period of analysis. TSA estimates the transmission cost for submitting overflight and crew information is \$2.50 per submission, assuming the submission will require 10 minutes of time at a cost of \$15.00 per hour. Because we cannot discern which overflights are made by large carriers versus small carriers, we include overflight costs in the "large foreign air carrier" component. We estimate that overflight information will cost carriers \$42,000 in year 1 and \$64,599 in year 10, with the increase in overflights over the period of analysis.

Finally, TSA estimates that large air carriers will submit modifications to their master crew lists an average of once per week, or 52 times per year. Again, TSA estimates this will cost \$2.50 per submission, for a per-carrier cost of \$130 annually.

Based on CBP data, we estimate that 95 percent of the passenger/crew loads are onboard large air carriers. Operational costs are expected to increase over the period of analysis as passenger loads increase from 68 million in year 1 to 82 million in year 10 (2 percent increase in passenger loads annually). The calculation of first-year

and annual costs (undiscounted) for large air carriers, U.S. and foreign, is shown in Tables 3 and 4.

**Table 3**  
**Total Costs for Large U.S. Air Carriers (11 carriers)**

Year	UN EDIFACT Conversion	Passenger/crew information*	Master crew list modifications**	Total costs
1	\$5,500,000	\$40,105,409	\$1,430	\$45,606,839
2	275,000	40,907,517	1,430	41,183,947
3	275,000	41,725,668	1,430	42,002,098
4	275,000	42,560,181	1,430	42,836,611
5	275,000	43,411,385	1,430	43,687,815
6	275,000	44,279,612	1,430	44,556,042
7	275,000	45,165,205	1,430	45,441,635
8	275,000	46,068,509	1,430	46,344,939
9	275,000	46,989,879	1,430	47,266,309
10	275,000	47,929,676	1,430	48,206,106
<b>Total</b>				<b>\$447,132,341</b>

\*Passenger/crew loads from Table 1 × \$1.25

\*\*11 carriers × 52 modifications per year × \$2.50 transaction cost

**Table 4**  
**Total Costs for Large Foreign Air Carriers (81 carriers)**

Year	UN EDIFACT Conversion	Passenger/crew information*	Master crew list modifications**	Overflight information***	Total costs
1	\$40,500,000	\$45,225,249	\$10,530	\$42,000	\$85,777,779
2	2,025,000	46,129,754	10,530	44,058	48,209,342
3	2,025,000	47,052,349	10,530	46,217	49,134,095
4	2,025,000	47,993,396	10,530	48,481	50,077,407
5	2,025,000	48,953,264	10,530	50,857	51,039,651
6	2,025,000	49,932,329	10,530	53,349	52,021,208
7	2,025,000	50,930,975	10,530	55,963	53,022,469
8	2,025,000	51,949,595	10,530	58,705	54,043,830
9	2,025,000	52,988,587	10,530	61,582	55,085,699
10	2,025,000	54,048,359	10,530	64,599	56,148,488
<b>Total</b>					<b>\$554,559,967</b>

\*Passenger/crew loads from Table 1 × \$1.25

\*\*81 carriers × 52 modifications per year × \$2.50 transaction cost

\*\*\*Annual overflights × \$2.50 transaction cost per overflight (16,800 overflights in 2004, 25,840 overflights in 2013 assuming a 4.9 percent annual increase)

*Small air carriers*—the 1,188 small air carriers, rather than converting to UN EDIFACT, will be able to use eAPIS, an internet-based submission system developed by CBP that complies with UN EDIFACT standards. These carriers may also continue to email manifests. To access eAPIS or transmit manifests via email, these carriers will need to have access to a desktop computer with compatible software and Internet access (for eAPIS only). Most, if not all, small air carriers already have desktop computers with the software necessary to access eAPIS or transmit email. In order not to underestimate the costs of this final rule to small carriers, however, we attribute a \$500 cost for a computer system to each carrier. This cost will be incurred in year 1, when the final rule becomes effective, and in year 5, assuming that a computer will last for 5 years and will then need to be replaced.

We should note that large air carriers may also use eAPIS and other alternative transmission methods, though their large inbound and outbound passenger volumes make widespread use impractical. Historically, some large carriers have employed the email alternative to transmit manifests for primarily small crews. For this analysis, we assume that the 92 large carriers will undergo conversion to UN EDIFACT, as estimated above.

We estimate annual maintenance for the computer to be 10 percent of the initial cost of the computer, or \$50 annually. This cost will be incurred each year of the period of analysis. As noted previously, we estimate that 5 percent of air passengers and crew are aboard small carriers and will cost \$1.25 per person to submit their information through eAPIS. This cost may overstate per-person transmission costs because the eAPIS system will allow small carriers to save manifest data for reuse on subsequent flights and will allow users to select previous crew or passenger records for automatic input into the manifest. Small carrier personnel will also not require extensive training to use eAPIS.

Finally, TSA estimates that small air carriers will submit modifications to their master crew lists an average of once per month, or 12 times per year. Again, TSA estimates this will cost \$2.50 per submission, for a per-carrier cost of \$30 annually. The costs for submitting overflight information have already been captured above in the “large air carrier” component. The calculation of first-year and annual costs (undiscounted) for small air carriers, U.S. and foreign, is shown in Tables 5 and 6.

**Table 5**  
**Total Costs for Small U.S. Air Carriers (773 carriers)**

Year	Desktop computer costs	Passenger/crew information*	Master crew list modifications**	Total costs
1	\$386,500	\$2,919,207	\$23,190	\$3,328,897
2	38,650	2,977,591	23,190	3,039,431
3	38,650	3,037,143	23,190	3,098,983
4	38,650	3,097,886	23,190	3,159,726
5	38,650	3,159,843	23,190	3,221,683
6	425,150	3,223,040	23,190	3,671,380
7	38,650	3,287,501	23,190	3,349,341
8	38,650	3,353,251	23,190	3,415,091
9	38,650	3,420,316	23,190	3,482,156
10	38,650	3,488,722	23,190	3,550,562
Total				\$33,317,249

\*Passenger/crew loads from Table 1 × \$1.25

\*\*773 carriers × 12 modifications per year × \$2.50 transaction cost

**Table 6**  
**Total Costs for Small Foreign Air Carriers (415 carriers)**

Year	Desktop computer costs	Passenger/crew information*	Master crew list modifications**	Total costs
1	\$207,500	\$1,571,881	\$12,450	\$1,791,831
2	20,750	1,603,318	12,450	1,636,518
3	20,750	1,635,385	12,450	1,668,585
4	20,750	1,668,092	12,450	1,701,292
5	20,750	1,701,454	12,450	1,734,654
6	228,250	1,735,483	12,450	1,976,183
7	20,750	1,770,193	12,450	1,803,393
8	20,750	1,805,597	12,450	1,838,797
9	20,750	1,841,709	12,450	1,874,909
10	20,750	1,878,543	12,450	1,911,743
Total	\$17,937,903			

\*Passenger/crew loads from Table 1 × \$1.25

\*\*415 carriers × 12 modifications per year × \$2.50 transaction cost

*Cruise ship companies*—there are 16 cruise ship companies that will convert to an XML format to comply with the electronic submis-

sion requirements of this final rule. These 16 carriers dominate the industry. Few, if any, small cruise companies make voyages to the United States, and we do not include any in this analysis. Based on data received from the International Council of Cruise Lines (ICCL), average conversion costs will be \$125,000 per company. This figure is the estimate for conversion to UN EDIFACT, and the conversion to XML should be no higher than this figure. This cost will be incurred the first year the rule is in effect. As with large air carriers, we estimate a 5 percent annual programming cost once the initial major conversion is complete in the first year.

CBP estimates a 6.4 percent annual increase in passenger loads for the cruise line industry, with an estimated 16 million passengers in year 1 and 28 million passengers in year 10; thus annual operational costs will increase with passenger loads. We assume a \$1.25 transaction cost per passenger and crew member on cruise ships. The calculation of first-year and annual costs (undiscounted) for cruise ship companies is shown in Table 7.

Table 7  
Total Costs for Cruise Ship Companies (16 companies)

Year	XML format conversion	Passenger/crew information*	Total costs
1	\$2,000,000	\$20,119,522	\$22,119,522
2	100,000	21,407,171	21,507,171
3	100,000	22,777,230	22,877,230
4	100,000	24,234,973	24,334,973
5	100,000	25,786,011	25,886,011
6	100,000	27,436,316	27,536,316
7	100,000	29,192,240	29,292,240
8	100,000	31,060,544	31,160,544
9	100,000	33,048,419	33,148,419
10	100,000	35,163,517	35,263,517
Total			\$273,125,944

\*Passenger/crew loads from Table 1  $\times$  \$1.25

*U.S.-flag cargo vessels*—there are 585 U.S.-flag vessels that will use “eNOA/D,” a low-cost web-based system, to comply with the requirements of the final rule. While a Coast Guard system, eNOA/D will automatically transmit the necessary data to CBP, thus eliminating duplicate submissions to both agencies. As with small air carriers, the cost to these vessels will be a desktop computer with minimal software requirements and Internet access. Again, in order not

to underestimate the costs to U.S.-flag cargo vessels, we assign a \$500 computer cost to each vessel. This cost will be incurred in year 1, when the final rule becomes effective, and in year 5, assuming that a computer will last for 5 years and will then need to be replaced. We estimate that maintenance will be \$50 annually.

Average crew size for different types of vessels was presented in Table 2, and we estimate the crew population for U.S. vessels to be 6,939. Crew information will need to be submitted via eNOA/D each time the vessel enters a U.S. port after departing a foreign port. As calculated above, we estimate that vessels will have an average of approximately 4 foreign arrivals annually (55,000 annual arrivals ÷ 12,835 total cargo vessels). While this estimate is probably low for some vessel services (such as offshore supply vessels), it is probably high for other services (container ships or vessels in tramp service). We assume that crew counts per vessel will remain constant over the period of analysis, and we do not assume a growth rate for the U.S. fleet. The calculation of first-year and annual costs (undiscounted) for U.S.-flag cargo vessels is shown in Table 8.

Table 8

## Total Costs for U.S-Flag Cargo Vessels (585 vessels)

Year	Desktop computer costs	Crew information*	Total costs
1	\$292,500	\$34,695	\$327,195
2	29,250	34,695	63,945
3	29,250	34,695	63,945
4	29,250	34,695	63,945
5	29,250	34,695	63,945
6	321,750	34,695	356,445
7	29,250	34,695	63,945
8	29,250	34,695	63,945
9	29,250	34,695	63,945
10	29,250	34,695	63,945
Total			\$1,195,200

\*6,939 crewmembers × \$1.25 × 4 arrivals

*Foreign-flag cargo vessels*—there are approximately 12,250 foreign-flag cargo vessels (not including cruise ships described previously) that will also use eNOA/D to comply with the requirements of the final rule. We again assign a \$500 computer cost to each vessel. This cost will be incurred in year 1, when the final rule becomes effective, and in year 5, assuming that a computer will last for 5 years and will then need to be replaced.

We estimate annual maintenance for the computer to be 10 percent of the initial cost of the computer, or \$50 annually, and the cost will be incurred each year of the period of analysis. The overwhelming majority of foreign-flag vessels arriving here from foreign ports are freighters and tankers, with an average crew size of 15 people, for a total of 183,750 crewmembers. As calculated above for U.S.-flag vessels, we estimate that vessels will have an average of 4 foreign arrivals annually. We assume that crew counts per vessel will remain constant over the period of analysis, and we do not assume a growth rate for the foreign fleet trading with the United States. The calculation of first-year and annual costs (undiscounted) for foreign-flag cargo vessels is shown in Table 9.

Table 9  
Total Costs for Foreign-Flag Cargo Vessels (12,250 vessels)

Year	Desktop computer costs	Crew information*	Total costs
1	\$6,125,000	\$918,750	\$7,043,750
2	612,500	918,750	1,531,250
3	612,500	918,750	1,531,250
4	612,500	918,750	1,531,250
5	612,500	918,750	1,531,250
6	6,737,500	918,750	7,656,250
7	612,500	918,750	1,531,250
8	612,500	918,750	1,531,250
9	612,500	918,750	1,531,250
10	612,500	918,750	1,531,250
Total			\$26,950,000

\*183,750 crewmembers  $\times$  \$1.25  $\times$  4 arrivals

#### *Total costs*

Total costs for the above components are presented in the following tables. Costs to U.S. carriers are presented in Table 10 and foreign carriers in Table 11. Total final cost estimates are discounted to their present value at a 7-percent rate and shown in Table 12. As shown, the present value cost of the final rule is approximately \$1 billion. Because passenger/crew loads are the primary cost drivers, large carriers comprise almost 75 percent of the costs of this rule. As stated previously, CBP estimates that 80 percent of the large air carriers already submit the information required under the final rule under the voluntary APIS program. These carriers would have converted to UN EDIFACT even in the absence of this final rule, and

many carriers have started their conversion in anticipation of the new requirements. Thus, these costs likely overstate the impacts to industry but provide a good estimate of the magnitude of costs that are associated with the APIS program, TSA security directives, and other requirements that have not been accounted for in previous regulatory assessments.

Table 10

## Total Costs of the Final Rule to U.S. Entities, Undiscounted

Year	Large U.S. Air Carriers	Small U.S. Air Carriers	U.S.-Flag Cargo Vessels	Total Costs
1	\$45,606,839	\$3,328,897	\$327,195	\$49,262,931
2	41,183,947	3,039,431	63,945	44,287,323
3	42,002,098	3,098,983	63,945	45,165,025
4	42,836,611	3,159,726	63,945	46,060,282
5	43,687,815	3,221,683	63,945	46,973,443
6	44,556,042	3,671,380	356,445	48,583,867
7	45,441,635	3,349,341	63,945	48,854,920
8	46,344,939	3,415,091	63,945	49,823,975
9	47,266,309	3,482,156	63,945	50,812,410
10	48,206,106	3,550,562	63,945	51,820,614
Total	\$447,132,341	\$33,317,249	\$1,195,200	\$481,644,790

Table 11

## Total Costs of the Final Rule to Foreign Entities, Undiscounted

Year	Large Foreign Air Carriers	Small Foreign Air Carriers	Cruise Ship Companies	Foreign-Flag Cargo Vessels	Total Costs
1	\$85,777,779	\$1,791,831	\$22,119,522	\$7,043,750	\$116,732,881
2	48,209,342	1,636,518	21,507,171	1,531,250	72,884,281
3	49,134,095	1,668,585	22,877,230	1,531,250	75,211,160
4	50,077,407	1,701,292	24,334,973	1,531,250	77,644,922
5	51,039,651	1,734,654	25,886,011	1,531,250	80,191,566
6	52,021,208	1,976,183	27,536,316	7,656,250	89,189,957
7	53,022,469	1,803,393	29,292,240	1,531,250	85,649,352
8	54,043,830	1,838,797	31,160,544	1,531,250	88,574,421
9	55,085,699	1,874,909	33,148,419	1,531,250	91,640,276
10	56,148,488	1,911,743	35,263,517	1,531,250	94,854,998
Total	\$554,559,967	\$17,937,903	\$273,125,944	\$26,950,000	\$872,573,814

**Table 12**  
**Total Costs of the Final Rule**

Year	Undiscounted			Discounted (7 percent discount rate)		
	U.S. Entities	Foreign Entities	Total	U.S. Entities	Foreign Entities	Total
1	\$49,262,931	\$116,732,881	165,995,812	49,262,931	116,732,881	165,995,812
2	44,287,323	72,884,281	117,171,604	41,390,022	68,116,151	109,506,172
3	45,165,025	75,211,160	120,376,186	39,448,882	65,692,340	105,141,223
4	46,060,282	77,644,922	123,705,204	37,598,910	63,381,385	100,980,295
5	46,973,443	80,191,566	127,165,009	35,835,815	61,177,762	97,013,576
6	48,583,867	89,189,957	137,773,825	34,639,626	63,591,207	98,230,833
7	48,854,920	85,649,352	134,504,272	32,554,096	57,071,779	89,625,876
8	49,823,975	88,574,421	138,398,395	31,027,867	55,159,698	86,187,565
9	50,812,410	91,640,276	142,452,686	29,573,285	53,335,475	82,908,760
10	51,820,614	94,854,998	146,675,612	28,186,980	51,594,834	79,781,814
Total	\$481,644,790	\$872,573,814	\$1,354,218,604	\$359,518,415	\$655,853,512	\$1,015,371,927

### *Regulatory Alternatives*

The requirements of this final rule are mandated by the ATSA and the EBSA. Exploration of regulatory alternatives, therefore, was limited during the rulemaking process, as these legislative acts were explicit in the types of systems to be installed and the type of information to be submitted. CBP has, however, developed alternative submission methods for small air carriers, while the Coast Guard has developed alternative methods for vessels. These alternative methods should help small businesses comply with the final rule in the most cost-effective manner. The three alternatives considered in this assessment are presented below.

#### *No Action Alternative*

The “no action” alternative is not a feasible alternative because it does not meet legislative mandates.

#### *The Final Rule*

As presented above, the final rule is expected to cost \$166 million in the first year, an average of \$135 million annually, and \$1.015 billion over the period of analysis (discounted at 7 percent).

#### *The Final Rule Without Low-Cost Alternatives for Small Air Carriers*

In response to public comment and in order to provide better service to our customers, CBP developed eAPIS to allow small air carriers to submit their information electronically without a full conversion to UN EDIFACT. These carriers may also submit their information in email and XML formats. If CBP did not allow these submission exceptions, the cost would be an estimated \$7,000 to \$9,000 per carrier to develop software. Additionally, the Coast Guard has developed eNOA/D similarly to accept electronic submissions simply and cheaply. If small air carriers and vessels had to spend an average of \$8,000 in the first year to develop the necessary systems (and assuming large air carriers and cruise ships used the same submission methods as described in the final rule), this alternative would result in a first-year cost of \$271 million, average annual costs of \$150 million, and 10-year costs of \$1.148 billion (discounted at 7 percent). Over 10 years, this alternative would cost small air carriers and vessels \$133 million more than with low-cost alternative submission methods (\$1.148 billion without the low-cost alternative minus \$1.015 billion for the final rule).

#### *Benefit Analysis*

Under the provisions of this final rule, CBP will conduct advance record checks of persons traveling on flights to and from the United States for the purpose of detecting inadmissible or removable aliens, dangerous criminals, known or potential terrorists, and others that

pose risks of committing violations of our nation's laws. CBP will prescreen the names of passengers and crew against lists of these persons and a list of "no-fly" designees. CBP will also conduct advance record checks and prescreening of passengers and crewmembers onboard arriving and departing vessels. CBP will also be able to analyze the patterns and associations of alien smugglers.

The advance prescreening of passengers arriving in the United States prior to arrival enables CBP to process low-risk travelers expeditiously while focusing on high-risk travelers who may pose a threat to national security, international transportation, and other travelers. However, CBP continues to evaluate whether the transmission of manifest data for aircraft passengers and for passengers and crew onboard departing vessels, in accordance with the provisions of this final rule, allows CBP sufficient time to respond to identified threats.

Because CBP has been receiving similar data from the commercial air carriers on a voluntary basis for over a decade, CBP can report positive results from access to this data. For example, in the CBP "Performance and Annual Report FY 2002 and FY 2003," it is reported that CBP targeting efficiency was 29.1 (FY 02) and 29.7 (FY 03) times better than random compliance exams.

The information obtained through this final rule enhances safety and security as the applicable flights may present a risk to the safety of international travelers, the international transportation industry, and to national security. Having pertinent and timely information relative to crewmembers and non-crewmembers can mitigate this threat.

Use of UN EDIFACT will improve transmission of required electronic manifest data for aircraft, since under US EDIFACT, the carriers cannot submit all the data elements required by law, and, therefore, CBP cannot conduct risk assessments with the level of detail desired. If the US EDIFACT format were retained, it would cause delays in passenger processing due to CBP inspectors having to ask passengers additional immigration-related questions that will be automatically collected under UN EDIFACT and would result in passengers missing connecting flights, at additional expense to the carrier and affected passengers.

As discussed previously, UN EDIFACT was adopted as the global technical standard for transmission of electronic passenger and crewmember manifests. Other countries, including Canada, Mexico, United Kingdom, and Costa Rica, are implementing or have indicated that they intend to implement UN EDIFACT to transmit manifests. Several other countries are awaiting legislation and conducting feasibility studies.

APIS is recognized by the international community as a facilitative tool for passenger processing. Airline industry organizations have also traditionally supported APIS as a means of mitigating pro-

cessing times as passenger counts increase. Submission of APIS by air carriers results in an average of 45 minutes per flight passenger processing times. Also, according to the World Customs Organization UN EDIFACT PAXLIST guidelines, additional passenger data captured at booking or check-in could, in some instances, enhance airline security and ensure that all passengers carry valid travel documents required for admission to the destination country. Carriers complying with APIS may also achieve the additional benefit of reduced penalties for inaccurate and/or incomplete manifest submissions. According to the Cost Management Information System, the average cost of processing an improperly documented passenger is \$1,507 per person.

This rule requires each carrier to provide the advance passenger manifest information in advance of the aircraft's arrival or departure. When a carrier transmits less than 100 percent of the required information, a CBP officer must manually enter the APIS information and wait for query results. Passengers awaiting CBP clearance would be subsequently delayed. This could result in costly inspections and flight delay. Each hour of delay costs \$3,372 per flight. (For this cost figure, see: Massachusetts Institute of Technology, Lincoln Laboratory, Delay Causality and Reduction at the New York City Airports Using Terminal Weather Information Systems. Project Report ATC-291, by S.S. Allan, S.G. Gaddy, and J.E. Evans, February 16, 2001.) Additionally, airlines could incur costs for rerouting individuals unable to make original connections.

As discussed previously, CBP developed eAPIS, a web based application, for small air carriers to submit their manifests in UN EDIFACT format. The Coast Guard developed eNOA/D for vessels. Additionally, this rule adopts the use of XML for cruise ship companies. This change eliminates duplicative reporting requirements for CBP and the Coast Guard. If CBP had required that cruise companies convert to UN EDIFACT, the carriers would have had to convert their system to accommodate two different manifest submission systems. Finally, vessels will now submit their requirements electronically, which should save time, particularly as recurrent data is stored and automatically retrieved.

Taken in their entirety, the benefits include safer and more secure air and vessel transits; reduced delay from incomplete information; more user-friendly submission methods than paper submissions; and low-cost alternatives to full conversion to UN EDIFACT.

#### *Accounting statement*

As required by OMB Circular A-4 (available at <http://www.whitehouse.gov/omb/circ>), in Table 13, CBP has prepared an accounting statement showing the classification of the expenditures associated with Electronic Transmission of Passenger and Crew Manifests for Vessels and Aircraft. The table provides our best esti-

mate of the dollar amount of these costs and benefits, expressed in 2004 dollars, at three percent and seven percent discount rates. We estimate that the cost of this final rule will be approximately \$135 million annualized (7 percent discount rate) and approximately \$135 million annualized (3 percent discount rate). The non-quantified benefits are enhanced security.

Table 13

Accounting Statement: Classification of Expenditures,  
2005 through 2014 (2004 Dollars)

Three Percent Annual Discount Rate

-----  
BENEFITS  
-----

Annualized monetized benefits  
-----

(Un-quantified) benefits	enhanced security
--------------------------	-------------------

-----  
COSTS  
-----

Annualized monetized costs	\$135 million
----------------------------	---------------

-----  
Annualized quantified, but un-monetized costs  
-----

-----  
Qualitative (un-quantified) costs  
-----

Seven Percent Annual Discount Rate

-----  
BENEFITS  
-----

Annualized monetized benefits  
-----

(Un-quantified) benefits	enhanced security
--------------------------	-------------------

-----  
COSTS  
-----

Annualized monetized costs	\$135 million
----------------------------	---------------

-----  
Annualized quantified, but un-monetized costs  
-----

-----  
Qualitative (un-quantified) costs  
-----

In accordance with the provisions of E.O. 12866, this regulation was reviewed by the Office of Management and Budget.

### **REGULATORY FLEXIBILITY ACT**

We have prepared this Final Regulatory Flexibility Act Analysis (FRFA) to examine the impacts of the final rule on small entities as required by the Regulatory Flexibility Act. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

In preparing this final rule, CBP has taken into consideration the importance of minimizing its impact on small businesses. CBP has consulted with a number of the affected entities, including the National Business Aviation Association (NBAA), National Air Carrier Association (NACA), Air Transport Association (ATA), International Air Transport Association (IATA), World Shipping Council, National Association of Maritime Organizations and other appropriate associations. Also, CBP has considered the views of interested persons commenting on the amendments of the Customs Interim Rule and the INS NPRM. In addition, CBP has been working with TSA to incorporate provisions of interest to TSA relating to aviation security. These provisions are consistent with the authority of CBP and, to a large extent, the provisions of the Customs Interim Rule and the INS NPRM regarding submission of manifest information for arriving and departing aircraft. Also included in the TSA related provisions of this final rule are provisions for flights continuing within (foreign air carriers only) and overflying the United States and provisions relative to submission of master lists for crew members and non-crew members.

This FRFA addresses the following.

- The reason the agency is considering this action
- The objectives of and legal basis for the rule
- The number and types of small entities to which the rule will apply
- Projected reporting, recordkeeping, and other compliance requirements of the rule, including the classes of small entities that will be subject to the requirements and the type of professional skills necessary for the preparation of the reports and records
- Other relevant Federal rules that may duplicate, overlap, or conflict with the rule
- Significant alternatives to the component under consideration that accomplish the stated objectives of applicable statutes and may minimize any significant economic impact of the rule on small entities
- Significant issues that have been assessed

*Reason for Agency Action*

This rule finalizes the Customs Interim Rule issued on December 31, 2001, and the NPRM issued on January 3, 2003, which, together (one rule's provisions being effective, the other's being proposed), required the electronic submission of passenger and crewmember manifests for inbound and outbound flights and voyages. This rule also incorporates crew manifesting requirements published under the TSA EAs and SDs.

*Objective and Legal Basis for Rule*

This final rule implements the amendments of section 115 of the Aviation and Transportation Security Act (ATSA) and section 402 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSA) and includes provisions authorized under 49 U.S.C. 114. As fully discussed in the preamble and the Executive Order sections, this rule will serve to assist CBP and DHS in securing the United States, international travelers, and the international air and sea industries from terrorist attack and from violations of various customs and other applicable laws.

*Number of Small Entities Affected*

A "small entity" is defined under the RFA to be the same as a "small business concern" as defined under the Small Business Act (SBA; 15 U.S.C. 632). Thus, a small entity (also referred to as a small business or small carrier) for RFA purposes is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria set forth under the SBA. In accordance with provisions of the U.S. Small Business Administration (the USSBA), air carriers that employ fewer than 1,500 employees and sea carriers that employ fewer than 500 employees are small carriers.

As discussed in the Regulatory Assessment section of this preamble, a CBP database identifies, as of August 2004, 773 U.S.-based small air passenger and cargo carriers. Also, Coast Guard data for international cargo vessel entries revealed 88 additional U.S. companies owning 585 U.S.-flag vessels. For this analysis, we compared the estimated cost of the rule in the first year (when equipment is purchased) and in subsequent years to annual revenue data for the small businesses affected. To determine annual company revenue data, we used the *Reference USA* database available online.

*Small Air Carriers*

Small air carriers will not incur substantial programming or equipment costs because, unlike the large air carriers, small carriers do not currently have reservation systems that need to be reprogrammed. Instead, these carriers may use free programs available online. As we showed in the Regulatory Assessment above, small air

carriers will, in the worst case, incur the costs of a new computer with Internet access. They will also incur a per-passenger/crew cost of \$1.25 and the costs associated with a master crew list. Based on CBP databases, we assume that each small carrier will carry 300 passengers and crew annually. First-year costs per small carrier, assuming that a computer must be purchased, are \$905 [\$500 computer cost + \$30 for the master crew list and modifications + ( $\$1.25 \times 300$  passengers)]. Following the first year, annual costs per small carrier are \$455 [\$50 computer maintenance + \$30 for the master crew list and modifications + ( $\$1.25 \times 300$  passengers)]. If the carrier already has a computer with internet access, both first-year and annual costs will be \$405 per year.

Of the 755 small air carriers, we found revenue data for 258 of them (34 percent). Most of these carriers have average annual revenues of approximately \$2.5 million. Only 30 of the 258 carriers have revenues in excess of \$10 million. For all of the small air carriers, we found that the initial and annual costs of this final rule will not exceed 0.5 percent of annual revenue, and this represents the worst case where a computer will need to be purchased.

#### *Small Sea Carriers*

Like small air carriers, vessels owned by small companies will not incur substantial programming or equipment costs. Small vessel companies will, in the worst case, incur the costs of a new computer with Internet access. They will also incur a per-crew cost of \$1.25. Based on Coast Guard and CBP information, we assume that each vessel will carry an average of 10 crew and make four arrivals from foreign ports of call annually. First-year costs per vessel, assuming that a computer must be purchased, are \$550 [\$500 computer cost + ( $\$1.25 \times 10$  crew  $\times 4$  arrivals)]. Following the first year, annual costs per vessel are \$100 [\$50 computer maintenance + ( $\$1.25 \times 10$  crew  $\times 4$  arrivals)]. Most small vessel companies own one or two vessels. If the vessel already has a computer with internet access, both first-year and annual costs will be \$50 per year.

Of the 88 small vessel companies, we found revenue data for 33 of them (40 percent). These 33 companies own 74 vessels. Most of these carriers have average annual revenues of approximately \$1.2 million. Only 8 of the 33 carriers have revenues in excess of \$10 million. For all but three of the small vessel companies, we found that the initial costs of this final rule will not exceed 0.5 percent of annual revenue. Following the first year, no companies will incur costs exceeding 0.5 percent of annual revenue. Again, this represents the worst case where a computer will need to be purchased.

#### *Reporting and Recordkeeping*

All small carriers that transport passengers or crew members to or from any seaport or airport of the United States, as well as those

small carriers that transport crew and non-crew on flights continuing within (foreign air carriers only) and overflying the United States, will be required to comply with the electronic manifest filing requirements set forth in this final rule. This final rule implements an ongoing reporting requirement for carriers.

CBP estimates that this rule will require each of the 773 small air carriers to submit a master crew list, update the list monthly, and submit individual manifests estimated at one inbound and one outbound manifest per week (104) per year. This estimate is an average of 117 APIS transmissions per year per carrier. CBP also estimates that this rule will require vessels to submit an average of four manifests a year.

Both the eAPIS and eNOA/D applications will allow for auto-population of many data elements and the auto-population of previously submitted passenger and crewmembers names. The eNOA/D application will allow the entire manifest to be saved and be resubmitted with minor modifications, such as the addition or deletion of crewmembers. This application will decrease the amount of data that must be entered in subsequent manifest submissions.

These submissions will be completed using online applications accessed via the Internet. There are no unique professional skills required other than typing and web navigation. CBP does not anticipate the need for specialized training for small entities in order to comply with the rule.

#### *Other Federal Rules*

This final rule does not duplicate, overlap, or conflict with other Federal regulations. The rule was prepared after consultation with the TSA and Coast Guard and was designed to work in coordination with their regulations. As discussed throughout this document, CBP and Coast Guard coordinated their efforts to develop an electronic arrival and departure manifest system that meets the requirements of both agencies.

#### *Regulatory Alternatives*

The requirements of this final rule are mandated by the ATSA and the EBSA. Exploration of regulatory alternatives, therefore, was limited during the rulemaking process, as these legislative acts were explicit in the types of systems to be installed and the types of information that must be submitted. The three regulatory alternatives considered were discussed in detail in the E.O. 12866 section of this preamble.

CBP has developed alternative submission methods for small air carriers (primarily eAPIS), while the Coast Guard has developed alternative methods for vessels (eNOA/D). These alternative methods should help small businesses comply with the final rule in the most cost-effective manner. Over 10 years, we estimate that without these

low-cost alternatives, this rule would impose additional costs on small entities totaling \$113 million.

*Significant Issues That Have Been Assessed*

Several issues arose during the comment period for the Customs Interim Rule published on December 31, 2001, and the INS NPRM published on January 3, 2003. A complete summary of all the comments we received and our responses can be found above. A summary of issues specific to small entities follows.

The industry expressed a desire for a separate electronic system by which small carriers could transmit passenger and crewmember manifests. A specific recommendation was made that a web-based medium be developed coupled with a telephonic or facsimile backup. As discussed in this section, CBP developed a web-based application for the air carriers and has adopted the use of Coast Guard's web application for the sea carriers. The telephonic and facsimile methods could not be implemented since they would not meet the statutory requirement for electronic submission.

The industry expressed concern over the requirement that they submit manifests in UN EDIFACT format. Since the small carriers do not have sophisticated reservation systems, this requirement would require most small carriers to purchase software from private sources and would no longer allow them to submit manifests through email. CBP developed eAPIS to be compliant with the UN EDIFACT format. Therefore, all carriers that submit manifest via eAPIS will comply with this requirement without purchasing specific UN EDIFACT software. Also, CBP adopted the use of the eNOA/D system and therefore does not require vessel manifests to be submitted in UN EDIFACT. The vessel manifests must be submitted via eNOA/D or an XML worksheet. The industry can use the XML worksheet provided by the Coast Guard at no cost.

The industry expressed concern about the cost of creating a unique identifier in lieu of a PNR Locator. CBP has exempted this requirement. There is no requirement for carriers that do not have PNR locator numbers to create a unique identifier.

**CIVIL LIBERTIES COSTS AND BENEFITS**

This rule contains a number of non-quantified costs and benefits related to civil liberties. The primary non-quantified costs imposed by the rule result from putting certain travelers (those law-abiding travelers who would prefer not to disclose information to the agency) to the choice of providing personal information or foregoing international travel. Many travelers who prefer not to provide personal information will do so anyway because they value the ability to travel more than the ability to resist providing information to the agency. These travelers will incur the non-quantified costs of providing the personal information. CBP expects that a smaller number of travel-

ers may feel more strongly about providing personal information to the agency, and may therefore forego the travel in which they would otherwise engage. The costs of foregoing travel can be significant. These costs, which are the result of information being collected as mandated by statute, are non-quantified, but CBP recognizes that in particular cases they may be significant.

The rule also provides non-quantified benefits, however, and CBP considers those benefits to far outweigh the non-quantified costs. This rule will aid in both deterring and detecting terrorist threats to commercial vessels and aircraft. As our past has shown, these threats unchecked can lead to loss of life and severe restrictions on travel for scores of individuals. Considering the latter, the cost of shutting down a transportation system for a large but unknown number of individuals (and thereby restricting the ability to travel) is not quantifiable, but the benefit of preventing such an event is substantial. This rule will likely have another non-quantified benefit: Some persons wary of traveling out of fear of terrorist attacks will correctly perceive that the rule will make safer those transportation systems affected by this rule. This perception will likely have the effect of removing barriers to international travel that an unknown number of persons previously experienced, thereby expanding the opportunities for individuals to travel. This perception, therefore, is a civil liberties benefit.

#### **UNFUNDED MANDATES REFORM ACT OF 1995**

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Pub. L. 104-4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the UMRA, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a "significant intergovernmental mandate." A "significant intergovernmental mandate" under the UMRA is any provision in a Federal agency regulation that will impose an enforceable duty upon state, local, and tribal governments, in the aggregate, of \$100 million (adjusted annually for inflation) in any one year. Section 203 of the UMRA, 2 U.S.C. 1533, which supplements section 204(a), provides that, before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for meaningful and timely opportunity to provide input in the development of regulatory proposals.

This final rule will not impose any cost on small governments or significantly or uniquely affect small governments. However, as stated in the "E.O. 12866" section of this document, which concluded that the final rule constitutes a significant regulatory action, the rule will result in the expenditure by the private sector of \$166 million in the first year and \$135 million per year over a 10-year period. Therefore, the provisions of this final rule constitute a private sector mandate under the UMRA. CBP's analysis of the cost impact on affected businesses in the "E.O. 12866" section of this document is incorporated here by reference as the assessment required under Title II of the UMRA.

#### **EXECUTIVE ORDER 13132**

This final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **EXECUTIVE ORDER 12988 CIVIL JUSTICE REFORM**

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **NATIONAL ENVIRONMENTAL POLICY ACT**

CBP has evaluated this final rule for purposes of the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*). CBP has determined that an environmental statement is not required, since this action is non-invasive and there is no potential impact of any kind. Record of this determination has been placed in the rulemaking docket.

#### **PAPERWORK REDUCTION ACT**

This final rule requires that carriers electronically provide manifest information to CBP relative to passengers and crew members on board commercial vessels arriving in and departing from the United States and crew members and non-crew members onboard commercial aircraft operating, serving on, and traveling on flights to, from, continuing within (foreign air carriers only), and overflying the United States. This requirement is considered an information collection requirement under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*).

The collection of information in this final rule, with respect to commercial vessels and aircraft arriving in and departing from the United States, had in part already been reviewed by the Office of

Management and Budget (OMB) and assigned OMB Control Numbers 1651-0088 (Electronic manifest information required for passengers and crew on board commercial aircraft arriving in the United States) and 1651-0104 (Electronic manifest information required for passengers and crew on board commercial vessels and aircraft arriving in and departing from the United States). In connection with this final rule, the public burden hours reported for OMB 1651-0088 have been increased to reflect appropriate addition to the estimates made under OMB 1651-0104 and to reflect a more accurate estimate of the number of respondents than were reflected in the previous estimates. These changes were submitted to OMB on March 17, 2004 (on an adjustment sheet) in connection with this rulemaking; however, a new submission for OMB has been prepared for submission to reflect further adjustments. The combined information collection will be recorded under OMB No. 1651-0088.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. This final rule's collection of information is contained in 19 CFR §§ 4.7b, 4.64, 122.49a, 122.49b, 122.49c, 122.75a, and 122.75b (some of which are referenced in 8 CFR §§ 217.7, 231.1 and 231.2). This information is necessary to ensure national security and the security of commercial vessel travel to and from the United States and commercial air travel to, from, continuing within (foreign air carriers only), and overflying the United States. It will also enhance enforcement of the immigration and customs laws relative to passengers and crew members traveling to and from the United States on board commercial vessels and aircraft. The likely respondents and recordkeepers are commercial passenger and cargo sea and air carriers. Part 178, Customs Regulations (19 CFR part 178), containing the list of approved information collections, is appropriately revised.

#### **ADMINISTRATIVE PROCEDURE ACT**

This final rule contains several provisions that, in addition to implementing authority of CBP, will assist TSA in carrying out its aviation security mission under TSA law and regulations. These provisions pertain to the electronic transmission of manifest information relative to crew and non-crew members onboard flights of commercial aircraft to, from, continuing within (after a foreign air carrier flight's arrival at a U.S. port), and overflying the United States. TSA first established these requirements in response to specific intelligence information received in December of 2003 regarding possible terrorist threats to international flights. TSA determined that the new requirements are necessary to protect air passengers and others who could be harmed by a terrorist using a commercial aircraft to perpetrate a terrorist attack. These requirements were designed to facilitate TSA's performance of security threat assess-

ments of individuals with access to the flight deck (crew members) on these international flights. (In the case of all-cargo flights, these individuals include non-crew members.) TSA thus has issued non-public Emergency Amendments (EAs) and Security Directives (SDs) to the air carriers to implement these requirements. Over the course of the past eight months, TSA has worked with the affected air carriers to address the technological and operational issues that have arisen as the carriers have implemented the manifest reporting requirements of the SDs and EAs. In response to comments from the carriers, TSA has approved alternative procedures, as appropriate, to address operational issues.

Because the manifest reporting requirements for crew and non-crew members now being issued publicly in this final rule already are in place with respect to the carriers (under the privately issued SDs and EAs) and initially were put in place by TSA to address a possible terrorist threat to aviation safety, a threat that still exists, good cause exists for dispensing with the notice and public comment procedures of the Administrative Procedure Act (5 U.S.C. 553) as it would be unnecessary and contrary to the public interest to delay publication of these requirements in this final rule until after a public comment period. (See 5 U.S.C. 553 (b)(B).)

## LIST OF SUBJECTS

### *8 CFR Part 217*

Air carriers, Aliens, Maritime carriers, Passports and visas.

### *8 CFR Part 231*

Air carriers, Aliens, Maritime carriers, Reporting and recordkeeping requirements.

### *8 CFR Part 251*

Alien crew members, Maritime carriers, Reporting and recordkeeping requirements, Vessels.

### *19 CFR Part 4*

Aliens, Customs duties and inspection, Immigration, Maritime carriers, Passenger vessels, Reporting and recordkeeping requirements, Vessels.

### *19 CFR Part 122*

Air carriers, Aircraft, Airports, Air transportation, Commercial aircraft, Customs duties and inspection, Entry procedure, Reporting and recordkeeping requirements, Security measures.

*19 CFR Part 178*

Administrative practice and procedure, Collections of information, Paperwork requirements, Reporting and recordkeeping requirements.

**8 CFR CHAPTER I****AMENDMENTS TO THE REGULATIONS**

For the reasons set out in the preamble, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

**PART 217 – VISA WAIVER PROGRAM**

1. The heading for part 217 is revised to read as set forth above.
2. The authority citation for part 217 continues to read as follows:

**AUTHORITY:** 8 U.S.C. 1103, 1187; 8 CFR part 2.

3. Section 217.7 is revised to read as follows:

**§ 217.7 Electronic data transmission requirement.**

(a) An alien who applies for admission under the provisions of section 217 of the Act after arriving via sea or air at a port of entry will not be admitted under the Visa Waiver Program unless an appropriate official of the carrier transporting the alien electronically transmitted to Customs and Border Protection (CBP) passenger arrival manifest data relative to that alien passenger in accordance with 19 CFR 4.7b or 19 CFR 122.49a. Upon departure from the United States by sea or air of an alien admitted under the Visa Waiver Program, an appropriate official of the transporting carrier must electronically transmit to CBP departure manifest data relative to that alien passenger in accordance with 19 CFR 4.64 and 19 CFR 122.75a.

(b) If a carrier fails to submit the required electronic arrival or departure manifests specified in paragraph (a) of this section, CBP will evaluate the carrier's compliance with immigration requirements as a whole. CBP will inform the carrier of any noncompliance and then may revoke any contract agreements between CBP and the carrier. The carrier may also be subject to fines for failure to comply with manifest requirements or other statutory provisions. CBP will also review each Visa Waiver Program applicant who applies for admission and, on a case-by-case basis, may authorize a waiver under current CBP policy and guidelines or deny the applicant admission into the United States.

**PART 231 – ARRIVAL AND DEPARTURE MANIFESTS**

4. The heading for part 231 is revised to read as set forth above.
5. The authority citation for part 231 is revised to read as follows:

**AUTHORITY:** 8 U.S.C. 1101, 1103, 1182, 1221, 1228, 1229; 8 CFR part 2.

6. Section 231.1 is revised to read as follows:

**§ 231.1 Electronic manifest and I-94 requirement for passengers and crew onboard arriving vessels and aircraft.**

(a) *Electronic submission of manifests.* Provisions setting forth requirements applicable to commercial carriers regarding the electronic transmission of arrival manifests covering passengers and crew members under section 231 of the Act are set forth in 19 CFR 4.7b (passengers and crew members onboard vessels) and in 19 CFR 122.49a (passengers onboard aircraft) and 122.49b (crew members onboard aircraft).

(b) *Submission of Form I-94.* (1) *General requirement.* In addition to the electronic manifest transmission requirement specified in paragraph (a) of this section, and subject to the exception of paragraph (2) of this paragraph (b), the master or commanding officer, or authorized agent, owner or consignee, of each commercial vessel or aircraft arriving in the United States from any place outside the United States must present to a Customs and Border Protection (CBP) officer at the port of entry a properly completed Arrival/Departure Record, Form I-94, for each arriving passenger.

(2) *Exceptions.* The Form I-94 requirement of paragraph (1) of this paragraph (b) does not apply to United States citizens, lawful permanent residents of the United States, immigrants to the United States, or passengers in transit through the United States; nor does it apply to vessels or aircraft arriving directly from Canada on a trip originating in that country or arriving in the Virgin Islands of the United States directly from a trip originating in the British Virgin Islands.

(c) *Progressive clearance.* Inspection of arriving passengers may be deferred at the request of the carrier to an onward port of debarkation. However, verification of transmission of the electronic manifest referred to in paragraph (a) of this section must occur at the first port of arrival. Authorization for this progressive clearance may be granted by the Director, Field Operations, at the first port of arrival. When progressive clearance is requested, the carrier must present the Form I-92 referred to in paragraph (d) of this section in duplicate at the initial port of entry. The original Form I-92 will be processed at the initial port of entry, and the duplicate will be noted and returned to the carrier for presentation at the onward port of debarkation.

(d) *Aircraft/Vessel Report*. A properly completed Aircraft/Vessel Report, Form I-92, must be completed for each arriving aircraft and vessel that is transporting passengers. Submission of the Form I-92 to the CBP officer must be accomplished on the day of arrival.

7. Section 231.2 is revised to read as follows.

**§ 231.2 Electronic manifest and I-94 requirement for passengers and crew onboard departing vessels and aircraft.**

(a) *Electronic submission of manifests*. Provisions setting forth requirements applicable to commercial carriers regarding the electronic transmission of departure manifests covering passengers and crew members under section 231 of the Act are set forth in 19 CFR 4.64 (passengers and crew members onboard vessels) and in 19 CFR 122.75a (passengers onboard aircraft) and 122.75b (crew members onboard aircraft).

(b) *Submission of Form I-94*. (1) *General requirement*. In addition to the electronic manifest transmission requirement specified in paragraph (a) of this section, and subject to the exception of paragraph (2) of this paragraph (b), the master or commanding officer, or authorized agent, owner, or consignee, of each commercial vessel or aircraft departing from the United States to any place outside the United States must present a properly completed departure portion of an Arrival/Departure Record, Form I-94, to the Customs and Border Protection (CBP) officer at the port of departure for each person on board. Whenever possible, the departure Form I-94 presented must be the same form given to the alien at the time of arrival in the United States. The carrier must endorse the I-94 with the departure information on the reverse of the form. Submission of the I-94 to the CBP officer must be accomplished within 48 hours of the departure, exclusive of Saturdays, Sundays, and legal holidays. Failure to submit the departure I-94 within this period may be regarded as a failure to comply with section 231(g) of the Act, unless prior authorization for delayed delivery is obtained from CBP. A non-immigrant alien departing on an aircraft proceeding directly to Canada on a flight terminating in that country must surrender any Form I-94 in his/her possession to the airline agent at the port of departure.

(2) *Exceptions*. The form I-94 requirement of paragraph (1) of this paragraph (b) does not apply to United States citizens, lawful permanent residents of the United States, or passengers in transit through the United States; nor does it apply to a vessel or aircraft departing on a trip directly for and terminating in Canada or departing from the United States Virgin Islands directly to the British Virgin Islands on a trip terminating there.

(c) *Aircraft/Vessel Report*. A properly completed Aircraft/Vessel Report, Form I-92, must be completed for each departing aircraft and vessel that is transporting passengers. Submission of the Form

I-92 to the CBP officer must be accomplished on the day of departure.

**PART 251 - ARRIVAL AND DEPARTURE MANIFESTS AND LISTS: SUPPORTING DOCUMENTS**

- 8. The heading for part 251 is revised to read as set forth above.
- 9. The authority citation for part 251 continues to read as follows:

**AUTHORITY:** 8 U.S.C. 1103, 1182, 1221, 1281, 1282; 8 CFR part 2.

10. Section 251.5 is redesignated as § 251.6, which is revised to read as follows:

**§ 251.6 Exemptions for private vessels and aircraft.**

The provisions of this part relating to the presentation of arrival and departure manifests do not apply to a private vessel or private aircraft not engaged directly or indirectly in the carrying of persons or cargo for hire.

- 11. New § 251.5 is added to read as follows:

**§ 251.5 Paper arrival and departure manifests for crew.**

In addition to the electronic manifest transmission requirement applicable to crew members specified in §§ 231.1 and 231.2 of this chapter, the master or commanding officer, or authorized agent, owner, or consignee, of a commercial vessel or commercial aircraft arriving in or departing from the United States must submit arrival and departure manifests in a paper format in accordance with §§ 251.1, 251.3, and 251.4.

**19 CFR CHAPTER I**

**AMENDMENTS TO THE REGULATIONS**

For the reasons set out in the preamble, chapter I of title 19 of the Code of Federal Regulations is amended as follows:

**PART 4 - VESSELS IN FOREIGN AND DOMESTIC TRADES**

- 1. The general authority citation for part 4 continues to read and new specific authority citations for §§ 4.7b and 4.64 are added to read, as follows:

**AUTHORITY:** 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 2071 note; 46 U.S.C. App. 3, 91.

\* \* \* \* \*

Section 4.7b also issued under 8 U.S.C. 1221;

\* \* \* \* \*

Section 4.64 also issued under 8 U.S.C. 1221;

\* \* \* \* \*

2. New § 4.7b is added to read as follows:

**§ 4.7b Electronic passenger and crew arrival manifests.**

(a) *Definitions.* The following definitions apply for purposes of this section:

*Appropriate official.* “Appropriate official” means the master or commanding officer, or authorized agent, owner, or consignee, of a commercial vessel; this term and the term “carrier” are sometimes used interchangeably.

*Carrier.* See “Appropriate official.”

*Commercial vessel.* “Commercial vessel” means any civilian vessel being used to transport persons or property for compensation or hire.

*Crew member.* “Crew member” means a person serving on board a vessel in good faith in any capacity required for normal operation and service of the voyage. In addition, the definition of “crew member” applicable to this section should not be applied in the context of other customs laws, to the extent this definition differs from the meaning of “crew member” contemplated in such other customs laws.

*Emergency.* “Emergency” means, with respect to a vessel arriving at a U.S. port due to an emergency, an urgent situation due to a mechanical, medical, or security problem affecting the voyage, or to an urgent situation affecting the non-U.S. port of destination that necessitates a detour to a U.S. port.

*Ferry.* “Ferry” means any vessel which is being used to provide transportation only between places that are no more than 300 miles apart and which is being used to transport only passengers and/or vehicles, or railroad cars, which are being used, or have been used, in transporting passengers or goods.

*Passenger.* “Passenger” means any person being transported on a commercial vessel who is not a crew member.

*United States.* “United States” means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

(b) *Electronic arrival manifest—(1) General requirement.* Except as provided in paragraph (c) of this section, an appropriate official of each commercial vessel arriving in the United States from any place outside the United States must transmit to Customs and Border Protection (CBP) an electronic passenger arrival manifest and an electronic crew member arrival manifest. Each electronic arrival manifest:

(i) Must be transmitted to CPB at the place and time specified in paragraph (b)(2) of this section by means of an electronic data interchange system approved by CBP. If the transmission is in US

EDIFACT format, the passenger manifest and the crew member manifest must be transmitted separately; and

(ii) Must set forth the information specified in paragraph (b)(3) of this section.

(2) *Place and time for submission*—(i) *General requirement.* The appropriate official must transmit each electronic arrival manifest required under paragraph (b)(1) of this section to the CBP Data Center, CBP Headquarters:

(A) In the case of a voyage of 96 hours or more, at least 96 hours before entering the first United States port or place of destination;

(B) In the case of a voyage of less than 96 hours but at least 24 hours, prior to departure of the vessel;

(C) In the case of a voyage of less than 24 hours, at least 24 hours before entering the first U.S. port or place of destination; and

(D) In the case of a vessel that was not destined to the United States but was diverted to a U.S. port due to an emergency, before the vessel enters the U.S. port or place to which diverted; in cases of non-compliance, CBP will take into consideration that the carrier was not equipped to make the transmission and the circumstances of the emergency situation.

(ii) *Amendment of crew member manifests.* In any instance where a crew member boards the vessel after initial submission of the manifest under paragraph (b)(2)(i) of this section, the appropriate official must transmit amended manifest information to CBP reflecting the data required under paragraph (b)(3) of this section for the additional crew member. The amended manifest information must be transmitted to the CBP data Center, CBP Headquarters:

(A) If the remaining voyage time after initial submission of the manifest is 24 hours or more, at least 24 hours before entering the first U.S. port or place of destination; or

(B) In any other case, at least 12 hours before the vessel enters the first U.S. port or place of destination.

(3) *Information required.* Each electronic arrival manifest required under paragraph (b)(1) of this section must contain the following information for all passengers and crew members, except that for commercial passenger vessels, the information specified in paragraphs (b)(3)(iv), (v), (x), (xii), (xiii), (xiv), (xvi), (xviii), and (xix) of this section must be included on the manifest only on or after [insert date 180 days from date of publication in the **Federal Register**]:

(i) Full name (last, first, and, if available, middle);

(ii) Date of birth;

(iii) Gender (F = female; M = male);

(iv) Citizenship;

(v) Country of residence;

(vi) Status on board the vessel;

(vii) Travel document type (e.g., P = passport, A = alien registration);

- (viii) Passport number, if a passport is required;
- (ix) Passport country of issuance, if a passport is required;
- (x) Passport expiration date, if a passport is required;
- (xi) Alien registration number, where applicable;
- (xii) Address while in the United States (number and street, city, state, and zip code), except that this information is not required for U.S. citizens, lawful permanent residents, crew members, or persons who are in transit to a location outside the United States;
- (xiii) Passenger Name Record locator, if available;
- (xiv) Foreign port/place where transportation to the United States began (foreign port code);
- (xv) Port/place of first arrival (CBP port code);
- (xvi) Final foreign port/place of destination for in-transit passenger and crew member (foreign port code);
- (xvii) Vessel name;
- (xviii) Vessel country of registry/flag;
- (xix) International Maritime Organization number or other official number of the vessel;
- (xx) Voyage number (applicable only for multiple arrivals on the same calendar day); and
- (xxi) Date of vessel arrival.

(c) *Exceptions.* The electronic arrival manifest requirement specified in paragraph (b) of this section is subject to the following conditions:

- (1) No passenger or crew member manifest is required if the arriving commercial vessel is operating as a ferry;
- (2) If the arriving commercial vessel is not transporting passengers, only a crew member manifest is required; and
- (3) No passenger manifest is required for active duty U.S. military personnel onboard an arriving Department of Defense commercial chartered vessel.

(d) *Carrier responsibility for comparing information collected with travel document.* The carrier collecting the information described in paragraph (b)(3) of this section is responsible for comparing the travel document presented by the passenger or crew member with the travel document information it is transmitting to CBP in accordance with this section in order to ensure that the information transmitted is correct, the document appears to be valid for travel to the United States, and the passenger or crew member is the person to whom the travel document was issued.

(e) *Sharing of manifest information.* Information contained in passenger and crew member manifests that is received by CBP electronically may, upon request, be shared with other Federal agencies for the purpose of protecting national security. CBP may also share such information as otherwise authorized by law.

3. New § 4.64 is added to read as follows:

#### § 4.64 Electronic passenger and crew member departure manifests.

(a) *Definitions.* The definitions contained in § 4.7b(a) also apply for purposes of this section.

(b) *Electronic departure manifest—(1) General requirement.* Except as provided in paragraph (c) of this section, an appropriate official of each commercial vessel departing from the United States to any port or place outside the United States must transmit to Customs and Border Protection (CBP) an electronic passenger departure manifest and an electronic crew member departure manifest. Each electronic departure manifest:

(i) Must be transmitted to CPB at the place and time specified in paragraph (b)(2) of this section by means of an electronic data interchange system approved by CBP. If the transmission is in US EDIFACT format, the passenger manifest and the crew member manifest must be transmitted separately; and

(ii) Must set forth the information specified in paragraph (b)(3) of this section.

(2) *Place and time for submission—(i) General requirement.* The appropriate official must transmit each electronic departure manifest required under paragraph (b)(1) of this section to the CBP Data Center, CBP Headquarters, no later than 15 minutes before the vessel departs from the United States.

(ii) *Amended crew member manifests.* If a crew member boards the vessel after submission of the manifest under paragraph (b)(2)(i) of this section, the appropriate official must transmit amended manifest information to CBP reflecting the data required under paragraph (b)(3) of this section for the additional crew member. The amended manifest information must be transmitted to the CBP Data Center, CBP Headquarters, no later than 12 hours after the vessel has departed from the United States.

(3) *Information required.* Each electronic departure manifest required under paragraph (b)(1) of this section must contain the following information for all passengers and crew members, except that the information specified in paragraphs (b)(3)(iv), (ix), (xi), (xv), and (xvi), of this section must be included on the manifest only on or after [insert date 180 days from date of publication in the **Federal Register**]:

- (i) Full name (last, first, and, if available, middle);
- (ii) Date of birth;
- (iii) Gender (F = female; M = male);
- (iv) Citizenship;
- (v) Status on board the vessel;
- (vi) Travel document type (e.g., P = passport; A = alien registration card);
- (vii) Passport number, if a passport is required;
- (viii) Passport country of issuance, if a passport is required;

- (ix) Passport expiration date, if a passport is required;
- (x) Alien registration number, where applicable;
- (xi) Passenger Name Record locator, if available;
- (xii) Departure port code (CBP port code);
- (xiii) Port/place of final arrival (foreign port code);
- (xiv) Vessel name;
- (xv) Vessel country of registry/flag;
- (xvi) International Maritime Organization number or other official number of the vessel;
- (xvii) Voyage number (applicable only for multiple departures on the same calendar day); and
- (xviii) Date of vessel departure.

(c) *Exceptions.* The electronic departure manifest requirement specified in paragraph (b) of this section is subject to the following conditions:

- (1) No passenger or crew member departure manifest is required if the departing commercial vessel is operating as a ferry;
- (2) If the departing commercial vessel is not transporting passengers, only a crew member departure manifest is required;
- (3) No passenger departure manifest is required for active duty U.S. military personnel on board a departing Department of Defense commercial chartered vessel.

(d) *Carrier responsibility for comparing information collected with travel document.* The carrier collecting the information described in paragraph (b)(3) of this section is responsible for comparing the travel document presented by the passenger or crew member with the travel document information it is transmitting to CBP in accordance with this section in order to ensure that the information is correct, the document appears to be valid for travel purposes, and the passenger or crew member is the person to whom the travel document was issued.

(e) *Sharing of manifest information.* Information contained in passenger and crew member manifests that is received by CBP electronically may, upon request, be shared with other Federal agencies for the purpose of protecting national security. CBP may also share such information as otherwise authorized by law.

## PART 122 – AIR COMMERCE REGULATIONS

4. The general authority citation for part 122 continues to read, the specific authority citations for §§ 122.49a and 122.49b are revised to read, and new specific authority citations for §§ 122.49c, 122.49d, 122.75a, and 122.75b are added to read, as follows:

**AUTHORITY:** 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

Section 122.49a also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 44909.

Section 122.49b also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114, 44909.

Section 122.49c also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114, 44909.

Section 122.49d also issued under 49 U.S.C. 44909(c)(3).

\* \* \* \* \*

Section 122.75a also issued under 8 U.S.C. 1221, 19 U.S.C. 1431.  
Section 122.75b also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 114.

5. The heading for Subpart E of Part 122 is revised to read as follows: **Subpart E – Aircraft Entry and Entry Documents; Electronic Manifest Requirements for Passengers, Crew Members, and Non-Crew Members Onboard Commercial Aircraft Arriving In, Continuing Within, and Overflying the United States**

6. Section 122.49a is revised to read as follows:

**§ 122.49a Electronic manifest requirement for passengers onboard commercial aircraft arriving in the United States.**

(a) *Definitions.* The following definitions apply for purposes of this section:

*Appropriate official.* “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.

*Carrier.* See “Appropriate official.”

*Commercial aircraft.* “Commercial aircraft” has the meaning provided in § 122.1(d) and includes aircraft engaged in passenger flight operations, all-cargo flight operations, and dual flight operations involving the transport of both cargo and passengers.

*Crew Member.* “Crew member” means a person serving on board an aircraft in good faith in any capacity required for normal operation and service of the flight. In addition, the definition of “crew member” applicable to this section should not be applied in the context of other customs laws, to the extent this definition differs from the meaning of “crew member” contemplated in such other customs laws.

*Departure.* “Departure” means the point at which the wheels are up on the aircraft and the aircraft is en route directly to its destination.

*Emergency.* “Emergency” means, with respect to an aircraft arriving at a U.S. port due to an emergency, an urgent situation due to a mechanical, medical, or security problem affecting the flight, or to an urgent situation affecting the non-U.S. port of destination that necessitates a detour to a U.S. port.

*Passenger.* “Passenger” means any person, including a Federal Aviation Administration (FAA) Aviation Security Inspector with valid credentials and authorization, being transported on a commercial aircraft who is not a crew member.

*United States.* “United States” means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

(b) *Electronic arrival manifest.* (1) *General requirement.* Except as provided in paragraph (c) of this section, an appropriate official of each commercial aircraft arriving in the United States from any place outside the United States must transmit to Customs and Border Protection (CBP) an electronic passenger arrival manifest covering any passengers on board the aircraft. Each manifest must be transmitted to CPB at the place and time specified in paragraph (b)(2) of this section by means of an electronic data interchange system approved by CBP and must set forth the information specified in paragraph (b)(3) of this section. A passenger manifest must be transmitted separately from a crew member manifest required under § 122.49b if transmission is in US EDIFACT format.

(2) *Place and time for submission.* The appropriate official specified in paragraph (b)(1) of this section must transmit the electronic passenger arrival manifest required under paragraph (b)(1) of this section to the CBP Data Center, CBP Headquarters:

(i) No later than 15 minutes after departure of the aircraft;

(ii) For flights not originally destined to the United States but diverted to a U.S. port due to an emergency, no later than 30 minutes prior to arrival; in cases of non-compliance, CBP will take into consideration that the carrier was not equipped to make the transmission and the circumstances of the emergency situation; and

(iii) For an aircraft operating as an air ambulance in service of a medical emergency, no later than 30 minutes prior to arrival.

(3) *Information required.* Except as provided in paragraph (c) of this section, the electronic passenger arrival manifest required under paragraph (b)(1) of this section must contain the following information for all passengers, except that the information specified in paragraphs (b)(iv), (v), (x), (xii), (xiii), and (xiv) of this section must be included on the manifest only on or after [insert date 180 days from date of publication in the **Federal Register**]:

(i) Full name (last, first, and, if available, middle);

(ii) Date of birth;

(iii) Gender (F = female; M = male);

(iv) Citizenship;

(v) Country of residence;

(vi) Status on board the aircraft;

(vii) Travel document type (e.g., P = passport; A = alien registration card);

(viii) Passport number, if a passport is required;

- (ix) Passport country of issuance, if a passport is required;
- (x) Passport expiration date, if a passport is required;
- (xi) Alien registration number, where applicable;
- (xii) Address while in the United States (number and street, city, state, and zip code), except that this information is not required for U.S. citizens, lawful permanent residents, or persons who are in transit to a location outside the United States;
- (xiii) Passenger Name Record locator, if available;
- (xiv) International Air Transport Association (IATA) code of foreign port/place where transportation to the United States began (foreign port code);
- (xv) IATA code of port/place of first arrival (arrival port code);
- (xvi) IATA code of final foreign port/place of destination for in-transit passengers (foreign port code);
- (xvii) Airline carrier code;
- (xviii) Flight number; and
- (xix) Date of aircraft arrival.

(c) *Exception.* The electronic passenger arrival manifest specified in paragraph (b)(1) of this section is not required for active duty U.S. military personnel being transported as passengers on arriving Department of Defense commercial chartered aircraft.

(d) *Carrier responsibility for comparing information collected with travel document.* The carrier collecting the information described in paragraph (b)(3) of this section is responsible for comparing the travel document presented by the passenger with the travel document information it is transmitting to CBP in accordance with this section in order to ensure that the information is correct, the document appears to be valid for travel to the United States, and the passenger is the person to whom the travel document was issued.

(e) *Sharing of manifest information.* Information contained in the passenger manifests required by this section that is received by CBP electronically may, upon request, be shared with other Federal agencies for the purpose of protecting national security. CBP may also share such information as otherwise authorized by law.

7. Section 122.49b is redesignated as § 122.49d.

8. New § 122.49b is added to read as follows:

**§ 122.49b Electronic manifest requirement for crew members and non-crew members onboard commercial aircraft arriving in, continuing within, and overflying the United States.**

(a) *Definitions.* The definitions set forth below apply for purposes of this section. The definitions set forth in § 122.49a(a), other than those for the terms set forth below, also apply for purposes of this section:

*All-cargo flight.* “All-cargo flight” means a flight in operation for the purpose of transporting cargo which has onboard only “crew

members” and “non-crew members” as defined in this paragraph.

*Carrier.* In addition to the meaning set forth in § 122.49a(a), “carrier” includes each entity that is an “aircraft operator” or “foreign air carrier” with a security program under 49 CFR part 1544, 1546, or 1550 of the Transportation Security Administration regulations.

*Crew member.* “Crew member” means a pilot, copilot, flight engineer, airline management personnel authorized to travel in the cockpit, cabin crew, and relief crew (also known as “deadheading crew”). However, for all other purposes of immigration law and documentary evidence required under the Immigration and Nationality Act (8 U.S.C. 1101, *et seq.*), “crew member” (or “crewman”) means a person serving onboard an aircraft in good faith in any capacity required for the normal operation and service of the flight (8 U.S.C. 1101(a)(10) and (a)(15)(D), as applicable). In addition, the definition of “crew member” applicable to this section should not be applied in the context of other customs laws, to the extent this definition differs from the meaning of “crew member” contemplated in such other customs laws.

*Flight continuing within the United States.* “Flight continuing within the United States” refers to the domestic leg of a flight operated by a foreign air carrier that originates at a foreign port or place, arrives at a U.S. port, and then continues to a second U.S. port.

*Flight overflying the United States.* “Flight overflying the United States” refers to a flight departing from a foreign port or place that enters the territorial airspace of the U.S. en route to another foreign port or place.

*Non-crew member.* “Non-crew member” means air carrier employees and their family members and persons traveling onboard a commercial aircraft for the safety of the flight (such as an animal handler when animals are onboard). The definition of “non-crew member” is limited to all-cargo flights. (On a passenger or dual flight (passengers and cargo), air carrier employees, their family members, and persons onboard for the safety of the flight are considered passengers.)

*Territorial airspace of the United States.* “Territorial airspace of the United States” means the airspace over the United States, its territories, and possessions, and the airspace over the territorial waters between the United States coast and 12 nautical miles from the coast.

(b) *Electronic arrival manifest.* (1) *General requirement.* Except as provided in paragraph (c) of this section, an appropriate official of each commercial aircraft operating a flight arriving in or overflying the United States, from a foreign port or place, or continuing within the United States after arriving at a U.S. port from a foreign port or place, must transmit to Customs and Border Protection (CBP) an electronic crew member manifest and, for all-cargo flights only, an electronic non-crew member manifest covering any crew members

and non-crew members onboard. Each manifest must be transmitted to CBP at the place and time specified in paragraph (b)(2) of this section by means of an electronic data interchange system approved by CBP and must set forth the information specified in paragraph (b)(3) of this section. Where both a crew member manifest and a non-crew member manifest are required with respect to an all-cargo flight, they must be combined in one manifest covering both crew members and non-crew members. Where a passenger arrival manifest under § 122.49a and a crew member arrival manifest under this section are required, they must be transmitted separately if the transmission is in US EDIFACT format.

(2) *Place and time for submission; certification; changes to manifest.* (i) *Place and time for submission.* The appropriate official specified in paragraph (b)(1) of this section must transmit the electronic manifest required under paragraph (b)(1) of this section to the CBP Data Center, CBP Headquarters:

(A) With respect to aircraft arriving in and overflying the United States, no later than 60 minutes prior to departure of the aircraft from the foreign port or place of departure, and with respect to aircraft continuing within the United States, no later than 60 minutes prior to departure from the U.S. port of arrival;

(B) For a flight not originally destined to arrive in the United States but diverted to a U.S. port due to an emergency, no later than 30 minutes prior to arrival; in cases of noncompliance, CBP will take into consideration that the carrier was not equipped to make the transmission and the circumstances of the emergency situation; and

(C) For an aircraft operating as an air ambulance in service of a medical emergency, no later than 30 minutes prior to arrival;

(ii) *Certification.* Except as provided in paragraph (c) of this section, the appropriate official, by transmitting the manifest as required under paragraph (b)(1) of this section, certifies that the flight's crew members and non-crew members are included, respectively, on the master crew member list or master non-crew member list previously submitted to CBP in accordance with § 122.49c. If a crew member or non-crew member on the manifest is not also included on the appropriate master list, the flight may be, as appropriate, denied clearance to depart, diverted from arriving in the United States, or denied clearance to enter the territorial airspace of the United States.

(iii) *Changes to manifest.* The appropriate official is obligated to make necessary changes to the crew member or non-crew member manifest after transmission of the manifest to CBP. Necessary changes include adding a name, with other required information, to the manifest or amending previously submitted information. If changes are submitted less than 60 minutes before scheduled flight departure, the air carrier must receive approval from TSA before allowing the flight to depart or the flight may be, as appropriate, de-

nied clearance to depart, diverted from arriving in the United States, or denied clearance to enter the territorial airspace of the United States.

(3) *Information required.* The electronic crew member and non-crew member manifests required under paragraph (b)(1) of this section must contain the following information for all crew members and non-crew members, except that the information specified in paragraphs (b)(iii), (v), (vi), (vii), (xiii), (xv), and (xvi) of this section must be included on the manifest only on or after [insert date 180 days from date of publication in the **Federal Register**]:

- (i) Full name (last, first, and, if available, middle);
- (ii) Date of birth;
- (iii) Place of birth (city, state – if applicable, country);
- (iv) Gender (F = female; M = male);
- (v) Citizenship;
- (vi) Country of residence;
- (vii) Address of permanent residence;
- (viii) Status on board the aircraft;
- (ix) Pilot certificate number and country of issuance (if applicable);
- (x) Travel document type (e.g., P = passport; A = alien registration card);
- (xi) Passport number, if a passport is required;
- (xii) Passport country of issuance, if a passport is required;
- (xiii) Passport expiration date, if a passport is required;
- (xiv) Alien registration number, where applicable;
- (xv) Passenger Name Record locator, if available;
- (xvi) International Air Transport Association (IATA) code of foreign port/place where transportation to the United States began or where the transportation destined to the territorial airspace of the United States began (foreign port code);
- (xvii) IATA code of port/place of first arrival (arrival port code);
- (xviii) IATA code of final foreign port/place of destination for (foreign port code);
- (xix) Airline carrier code;
- (xx) Flight number; and
- (xxi) Date of aircraft arrival.

(c) *Exceptions.* The electronic crew member or non-crew member manifest requirement specified in paragraph (b)(1) of this section is subject to the following conditions:

(1) Federal Aviation Administration (FAA) Aviation Safety Inspectors with valid credentials and authorization are not subject to the requirement, but the manifest requirement of § 122.49a of this part applies to these inspectors on flights arriving in the United States, as they are considered passengers on arriving flights;

(2) For crew members traveling onboard an aircraft chartered by the U.S. Department of Defense that is arriving in the United

States, the provisions of this section apply regarding electronic transmission of the manifest, except that:

(i) The manifest certification provision of paragraph (b)(2)(ii) of this section is inapplicable; and

(ii) The TSA manifest change approval requirement of paragraph (b)(2)(iii) of this section is inapplicable;

(3) For crew members traveling onboard an aircraft chartered by the U.S. Department of Defense that is continuing a flight within the United States or overflying the United States, the manifest is not required;

(4) For non-crew members traveling onboard an all-cargo flight chartered by the U.S. Department of Defense that is arriving in the United States, the manifest is not required, but the manifest requirement of § 122.49a applies to these persons, as, in this instance, they are considered passengers on arriving flights; and

(5) For non-crew members traveling onboard an all-cargo flight chartered by the U.S. Department of Defense that is continuing a flight within the United States or overflying the United States, the manifest is not required.

(d) *Carrier responsibility for comparing information collected with travel document.* The carrier collecting the information described in paragraph (b)(3) of this section is responsible for comparing the travel document presented by the crew member or non-crew member with the travel document information it is transmitting to CBP in accordance with this section in order to ensure that the information is correct, the document appears to be valid for travel to the United States, and the crew member or non-crew member is the person to whom the travel document was issued.

(e) *Sharing of manifest information.* Information contained in the crew member and non-crew member manifests required by this section that is received by CBP electronically may, upon request, be shared with other Federal agencies for the purpose of protecting national security. CBP may also share such information as otherwise authorized by law.

(f) *Superseding amendments issued by TSA.* One or more of the requirements of this section may be superseded by specific provisions of, amendments to, or alternative procedures authorized by TSA for compliance with an aviation security program, emergency amendment, or security directive issued by the TSA to an air carrier subject to 49 CFR part 1544, 1546, or 1550. The provisions or amendments will have superseding effect only for the air carrier to which issued and only for the period of time specified in the provision or amendment.

9. New § 122.49c is added to read as follows:

**§ 122.49c Master crew member list and master non-crew member list requirement for commercial aircraft arriving in, departing from, continuing within, and overflying the United States.**

(a) *General requirement.* Air carriers subject to the provisions of § 122.49b and § 122.75b, with respect to the flights covered in those sections, must electronically transmit to Customs and Border Protection (CBP), by means of an electronic data interchange system approved by CBP, a master crew member list and a master non-crew member list containing the information set forth in paragraph (c) of this section covering, respectively, all crew members and non-crew members operating and servicing its flights. The initial transmission of a list must be made at least two days in advance of any flight a crew member or non-crew member on the list will be operating, serving on, or traveling on and must contain the information set forth in paragraph (c) of this section. After review of the master crew list and the master non-crew list by TSA, TSA will advise the carrier of any crew members or non-crew members that must be removed from the list. Only those persons on the TSA-approved master crew and master non-crew lists will be permitted to operate, serve on, or travel on flights covered by this section. Until a carrier becomes a participant in the CBP-approved electronic interchange system, it must submit the required information in a format provided by TSA.

(b) *Changes to master lists.* After the initial transmission of the master crew member and non-crew member lists to CBP, the carrier is obligated to update the lists as necessary. To add a name to either list, along with the required information set forth in paragraph (c) of this section, or to add or change information relative to a name already submitted, the carrier must transmit the information to CBP at least 24 hours in advance of any flight the added or subject crew member or non-crew member will be operating, serving on, or traveling on. A carrier must submit deletions from the lists as expeditiously as possible.

(c) *Master list information.* The electronic master crew lists required under paragraph (a) of this section must contain the following information with respect to each crew member or non-crew member that operates, serves on, or travels on a carrier's flights that are covered by this section except that the information specified in paragraphs (c)(4), (5), (6), (7), and (10) of this section must be included on the manifest only on or after [insert date 180 days from date of publication in the **Federal Register**]:

- (1) Full name (last, first, and, if available, middle);
- (2) Gender;
- (3) Date of birth;
- (4) Place of birth (city, state – if applicable, and country);
- (5) Citizenship;
- (6) Country of residence;

- (7) Address of permanent residence;
- (8) Passport number, if passport required;
- (9) Passport country of issuance, if passport required;
- (10) Passport expiration date, if passport required;
- (11) Pilot certificate number and country of issuance, if applicable;
- (12) Status onboard the aircraft.

(d) *Exception.* The master crew member and non-crew member list requirements of this section do not apply to aircraft chartered by the U.S. Department of Defense.

(e) *Superseding amendments issued by TSA.* One or more of the requirements of this section may be superseded by specific provisions of, amendments to, or alternative procedures authorized by TSA for compliance with an aviation security program, emergency amendment, or security directive issued by the TSA to an air carrier subject to the provisions of 49 CFR part 1544, 1546, or 1550. The amendments will have superseding effect only for the air carrier to which issued and only for the period of time specified in the amendment.

10. The heading for subpart H of part 122 is revised to read as follows: **Subpart H - Documents Required for Clearance and Permission to Depart; Electronic Manifest Requirements for Passengers, Crew Members, and Non-Crew Members Onboard Commercial Aircraft Departing From the United States**

11. New § 122.75a is added to read as follows:

**§ 122.75a Electronic manifest requirement for passengers onboard commercial aircraft departing from the United States.**

(a) *Definitions.* The definitions set forth in § 122.49a(a) also apply for purposes of this section.

(b) *Electronic departure manifest.* (1) *General requirement.* Except as provided in paragraph (c) of this section, an appropriate official of each commercial aircraft departing from the United States to any port or place outside the United States must transmit to Customs and Border Protection (CBP) an electronic passenger departure manifest covering any passengers onboard. The manifest must be transmitted to CPB at the place and time specified in paragraph (b)(2) of this section by means of an electronic data interchange system approved by CBP and must set forth the information specified in paragraph (b)(3) of this section.

(2) *Place and time for submission.* The appropriate official specified in paragraph (b)(1) of this section must transmit the electronic passenger departure manifest required under paragraph (b)(1) of this section to the CBP Data Center, CBP Headquarters, no later than 15 minutes prior to departure of the aircraft from the United

States, except that for an air ambulance in service of a medical emergency, the manifest must be transmitted to CBP no later than 30 minutes after departure.

(3) *Information required.* The electronic passenger departure manifest required under paragraph (b)(1) of this section must contain the following information for all passengers, except that the information specified in paragraphs (b)(3)(iv), (ix), and (xi) of this section must be included on the manifest only on or after [insert date 180 days from date of publication in the **Federal Register**]:

- (i) Full name (last, first, and, if available, middle);
- (ii) Date of birth;
- (iii) Gender (F = female; M = male);
- (iv) Citizenship;
- (v) Status on board the aircraft;
- (vi) Travel document type (e.g., P = passport; A = alien registration card);
- (vii) Passport number, if a passport is required;
- (viii) Passport country of issuance, if a passport is required;
- (ix) Passport expiration date, if a passport is required;
- (x) Alien registration number, where applicable;
- (xi) Passenger Name Record locator, if available;
- (xii) International Air Transport Association (IATA) departure port code;
- (xiii) IATA code of port/place of final arrival (foreign port code);
- (xiv) Airline carrier code;
- (xv) Flight number; and
- (xvi) Date of aircraft departure.

(c) *Exception.* The electronic passenger departure manifest specified in paragraph (b)(1) of this section is not required for active duty military personnel traveling as passengers on board a departing Department of Defense commercial chartered aircraft.

(d) *Carrier responsibility for comparing information collected with travel document.* The carrier collecting the information described in paragraph (b)(3) of this section is responsible for comparing the travel document presented by the passenger with the travel document information it is transmitting to CBP in accordance with this section in order to ensure that the information is correct, the document appears to be valid for travel purposes, and the passenger is the person to whom the travel document was issued.

(e) *Sharing of manifest information.* Information contained in the passenger manifest required under this section that is received by CBP electronically may, upon request, be shared with other Federal agencies for the purpose of protecting national security. CBP may also share such information as otherwise authorized by law.

12. New § 122.75b is added to read as follows:

**§ 122.75b Electronic manifest requirement for crew members and non-crew members onboard commercial aircraft departing from the United States.**

(a) *Definitions.* The definitions set forth in § 122.49a(a) also apply for purposes of this section, except that the definitions of “all-cargo flight,” “carrier,” “crew member,” and “non-crew member” applicable to this section are found in § 122.49b(a).

(b) *Electronic departure manifest.* (1) *General requirement.* Except as provided in paragraph (c) of this section, an appropriate official of each commercial aircraft departing from the United States to any port or place outside the United States must transmit to Customs and Border Protection (CBP) an electronic crew member departure manifest and, for all-cargo flights only, an electronic non-crew member departure manifest covering any crew members and non-crew members onboard. Each manifest must be transmitted to CBP at the place and time specified in paragraph (b)(2) of this section by means of an electronic data interchange system approved by CBP and must set forth the information specified in paragraph (b)(3) of this section. Where both a crew member departure manifest and a non-crew member departure manifest are required for an all-cargo flight, they must be combined in one departure manifest covering both crew members and non-crew members. Where a passenger departure manifest under § 122.75a and a crew member departure manifest under this section are required, they must be transmitted separately if the transmission is in US EDIFACT format.

(2) *Place and time for submission; certification; change to manifest.* (i) *Place and time for submission.* The appropriate official specified in paragraph (b)(1) of this section must transmit the electronic departure manifest required under paragraph (b)(1) of this section to the CBP Data Center, CBP Headquarters, no later than 60 minutes prior to departure of the aircraft, except that for an air ambulance in service of a medical emergency, the manifest must be transmitted to CBP no later than 30 minutes after departure.

(ii) *Certification.* Except as provided in paragraph (c) of this section, the appropriate official, by transmitting the manifest as required under paragraph (b)(1) of this section, certifies that the flight’s crew members and non-crew members are included, respectively, on the master crew member list or master non-crew member list previously submitted to CBP in accordance with § 122.49c. If a crew member or non-crew member on the manifest is not also included on the appropriate master list, the flight may be denied clearance to depart.

(iii) *Changes to manifest.* The appropriate official is obligated to make necessary changes to the crew member or non-crew member departure manifest after transmission of the manifest to CBP. Necessary changes include adding a name, with other required information, to the manifest or amending previously submitted information.

If changes are submitted less than 60 minutes before scheduled flight departure, the air carrier must receive approval from TSA before allowing the flight to depart or the flight may be denied clearance to depart.

(3) *Information required.* The electronic crew member and non-crew member departure manifests required under paragraph (b)(1) of this section must contain the following information for all crew members and non-crew members, except that the information specified in paragraphs (b)(iii), (v), (vi), (xii), and (xiv) of this section must be included on the manifest only on or after [insert date 180 days from date of publication in the **Federal Register**]:

- (i) Full name (last, first, and, if available, middle);
- (ii) Date of birth;
- (iii) Place of birth (city, state – if applicable, country);
- (iv) Gender (F = female; M = male);
- (v) Citizenship;
- (vi) Address of permanent residence;
- (vii) Status on board the aircraft;
- (viii) Pilot certificate number and country of issuance (if applicable);
- (ix) Travel document type (e.g., P = passport; A = alien registration card);
- (x) Passport number, if a passport is required;
- (xi) Passport country of issuance, if a passport is required;
- (xii) Passport expiration date, if a passport is required;
- (xiii) Alien registration number, where applicable;
- (xiv) Passenger Name Record locator, if available;
- (xv) International Air Transport Association (IATA) departure port code;
- (xvi) IATA code of port/place of final arrival (foreign port code);
- (xvii) Airline carrier code;
- (xviii) Flight number; and
- (xix) Date of aircraft departure.

(c) *Exceptions.* The electronic departure manifest requirement specified in paragraph (b)(1) of this section is subject to the following conditions:

(1) Federal Aviation Administration (FAA) Aviation Safety Inspectors with valid credentials and authorization are not subject to the requirement, but the manifest requirement of § 122.75a applies to these inspectors, as they are considered passengers on departing flights;

(2) For crew members traveling onboard departing aircraft chartered by the U.S. Department of Defense, the provisions of this section apply regarding electronic transmission of the manifest, except that:

- (i) The manifest certification provision of paragraph (b)(2)(ii) of this section is inapplicable; and

(ii) The TSA manifest change approval requirement of paragraph (b)(2)(iii) of this section is inapplicable; and

(3) For non-crew members traveling onboard a departing all-cargo flight chartered by the U.S. Department of Defense, the manifest is not required, but the manifest requirement of § 122.75a applies to these persons, as, in this instance, they are considered passengers on departing flights.

(d) *Carrier responsibility for comparing information collected with travel document.* The carrier collecting the information described in paragraph (b)(3) of this section is responsible for comparing the travel document presented by the crew member or non-crew member with the travel document information it is transmitting to CBP in accordance with this section in order to ensure that the information is correct, the document appears to be valid for travel, and the crew member or non-crew member is the person to whom the travel document was issued.

(e) *Sharing of manifest information.* Information contained in the crew member and non-crew member manifests required under this section that is received by CBP electronically may, upon request, be shared with other Federal agencies for the purpose of protecting national security. CBP may also share such information as otherwise authorized by law.

(f) *Master crew member and non-crew member lists.* Air carriers subject to the requirements of this section must also comply with the requirements of § 122.49c pertaining to the electronic transmission of a master crew member list and a master non-crew member list as applied to flights departing from the United States.

(g) *Superseding amendments issued by TSA.* One or more of the requirements of this section may be superseded by provisions of, amendments to, or alternative procedures authorized by TSA for compliance with an aviation security program, emergency amendment, or security directive issued by the TSA to an air carrier subject to the provisions of 49 CFR part 1544, 1546, or 1550. The amendments will have superseding effect only for the airline to which issued and only for the period of time they remain in effect.

#### **PART 178 – APPROVAL OF INFORMATION COLLECTION REQUIREMENTS**

13. The authority citation for part 178 continues to read as follows:

**AUTHORITY:** 5 U.S.C. 301; 19 U.S.C. 1624, 44 U.S.C. 3501 et seq.

14. Section 178.2 is amended by removing from the chart the entry for § 122.49a and adding to the chart the following in appropriate numerical sequence according to the section number under the columns indicated:

**§ 178.2 Listing of OMB control numbers.**

19 CFR Section	Description	OMB control no.
§§ 4.7b, 4.64, 122.49a, 122.49b, 122.49c, 122.75a, 122.75b	Electronic manifest requirements for carriers transporting passen- gers and crew onboard vessels and aircraft.	1651-0088

\* \* \* \* \*

ROBERT C. BONNER,  
*Commissioner,*  
*Customs and Border Protection.*

Approved: March 25, 2005

MICHAEL CHERTOFF,  
*Secretary.*

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