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Visa Waiver Program

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Visa Waiver Program

The Visa Waiver Program (VWP), originally established in 1986 as a trial program and made permanent in 2000 (P.L. 106-396), allows nationals from 39 countries, many of which are in Europe, to enter the United States as temporary visitors (nonimmigrants) for business or pleasure without first obtaining a visa. Generally, temporary visitors for business or pleasure from non-VWP countries must obtain a visa from Department of State (DOS) officers at a consular post abroad before traveling to the United States.

Some observers argue that the VWP strengthens national security because it sets standards for travel documents, requires information sharing between the member countries and the United States on criminal and security concerns, and mandates reporting of lost and stolen travel documents. VWP travelers have to present e-passports (i.e., passports with a data chip containing biometric information), which tend to be more difficult to alter than other types of passports. Nevertheless, some observers of the program have raised concerns about the possibility that terrorists will enter the United States under the VWP because those entering under the VWP undergo a biographic, rather than a biometric (i.e., fingerprint and digital photograph), security screening and do not need to interview in person with a U.S. consular official before embarking for the United States.

There is also interest in the VWP as a mechanism to promote tourism and commerce. In FY2018, there were more than 22.8 million admissions to the United States under this program, constituting nearly a third of all visitor admissions. The inclusion of countries in the VWP indicates a shared approach to national security and eases consular workloads abroad.

To qualify for the VWP, a country must offer reciprocal travel privileges to U.S. citizens; have had a nonimmigrant visa refusal rate of less than 3% for the previous year; issue their nationals machine-readable passports that incorporate biometric identifiers; issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry; report the loss and theft of passports; share specified information regarding nationals of the country who represent a threat to U.S. security; and not compromise the law enforcement or security interests of the United States by its inclusion in the program. Countries can be terminated from the VWP if they fail to meet any of these conditions or otherwise threaten the United States' security or immigration interests.

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

Under statute, the Secretary of Homeland Security has the authority to waive the nonimmigrant visa refusal rate requirement, provided certain conditions are met. However, the waiver authority was suspended on July 1, 2009, because DHS had not fully implemented an air-exit system that incorporates biometric identifiers. The waiver will not be available until such a system is implemented, and it is unknown when and if a biometric exit system will be fully implemented.

Activity in the 116th Congress related to the VWP seeks to expand the number of countries by changing the criteria or by designating specific countries. Other bills would rename the VWP to "Secure Travel Partnership" to reflect one of the program's main goals of securing travel to the United States. Legislation in the 116th Congress would also address the ESTA fee paid by VWP applicants. In December 2019, Congress authorized the continued use of the ESTA fee to partially fund Brand USA, a national tourism promotion program, through September 30, 2027. Congress also raised the ESTA fee from \$14 to \$21 (Division I, Title 8 of P.L. 116-94). The effective date of the new ESTA fee has not yet been announced.

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Introduction

The Visa Waiver Program (VWP) allows nationals from certain countries to enter the United States as temporary visitors for business or pleasure without first obtaining a visa from a U.S. consulate abroad. Temporary visitors for business or pleasure from non-VWP countries¹ must obtain a visa from Department of State (DOS) officers at a consular post abroad before coming to the United States.

Two main goals of the VWP are increasing tourism and strengthening national security. While there tends to be agreement that the VWP benefits the U.S. economy by facilitating legitimate travel, there is disagreement on the VWP's impact on national security.² Proponents of the program say the VWP strengthens U.S. national security because it sets standards for travel documents, requires information sharing between member countries and the United States on criminal and security concerns, and mandates reporting of lost and stolen travel documents.³ Critics of the program argue the VWP creates a security loophole because VWP travelers do not undergo the in-person screening generally required to receive a visa.⁴

Current Policy

In general, temporary foreign visitors for business or pleasure from most countries must obtain a B nonimmigrant visa⁵ from DOS officers at a consular post abroad before coming to the United States.⁶ Personal interviews are generally required, and consular officers use the Consular Consolidated Database (CCD) to screen visa applicants. The CCD indicates the outcome of any prior visa application of the alien and facilitates the flagging of issues that may make the alien ineligible for a visa under the *grounds of inadmissibility* of the Immigration and Nationality Act (INA), which include criminal, terrorist, and public health grounds. Consular officers are required to check the background of all aliens in the “lookout” databases, including the Consular Lookout and Support System (CLASS) and TIPOFF databases.

¹ The two exceptions are Canada and Bermuda; they do not participate in the VWP, but their citizens do not need to obtain a nonimmigrant visa except in specified circumstances. For more information, see U.S. State Department, Bureau of Consular Affairs, *Citizens of Canada and Bermuda*, at <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/citizens-of-canada-and-bermuda.html>.

² See CRS Report R46300, *Adding Countries to the Visa Waiver Program: Effects on National Security and Tourism*.

³ For an example of this argument, see Riley Walter, *The Visa Waiver Program Is Still Great For America*, The Heritage Foundation, Issue Brief #4273, March 14, 2017, at <https://www.heritage.org/sites/default/files/2017-03/IB4664.pdf>.

⁴ For an example of this argument, see Federation for American Immigration Reform (FAIR), *The Visa Waiver Program: Suspend It or Eliminate It*, December 2015, at <https://www.fairus.org/issue/legal-immigration/visa-waiver-program-suspend-it-or-eliminate-it>.

⁵ *Nonimmigrants* are foreign nationals lawfully admitted to the United States for a specific purpose and limited period of time. Nonimmigrants are often referred to by the letter that denotes their subparagraph in the Immigration and Nationality Act (INA §101(a)(15)), such as H-2A agricultural workers, F-1 foreign students, or J-1 cultural exchange visitors. B nonimmigrant visas are issued to short-term visitors for business or pleasure. For more information, see CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*.

⁶ To obtain a nonimmigrant visa, a foreign national must submit an application and undergo a background check and usually an interview. For more information on temporary admissions, see CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*.

Eligible nationals from participating VWP countries must use the web-based Electronic System for Travel Authorization (ESTA)⁷ to get an approved electronic travel authorization before embarking to the United States. ESTA authorization is generally valid for two years. VWP travelers are admitted into the United States for stays up to 90 days. The VWP constitutes one of a few exceptions under the Immigration and Nationality Act (INA) in which foreign nationals are admitted into the United States without a valid visa. As of June 2020, there were 39 countries participating in the VWP.⁸

The large-scale terrorist attacks in Paris in November 2015 and in Belgium in March 2016, which were perpetrated mainly by French and Belgian citizens, increased the focus on potential security risks posed by the VWP. Prior to the December 2015 enactment of the Visa Waiver Improvement and Terrorist Travel Prevention Act (P.L. 114-113), all nationals from a VWP country were eligible to travel under the program—provided they received an ESTA approval. P.L. 114-113⁹ changed eligibility for the VWP by prohibiting people who were present in certain countries since March 1, 2011, with limited exceptions, from traveling under the VWP. The specified countries include

- Iraq and Syria,
- any country designated by the Secretary of State as having repeatedly provided support for acts of international terrorism under any provision of law,¹⁰ or
- any other country or area of concern¹¹ deemed appropriate by the Secretary of Homeland Security.¹²

Currently, the prohibition affects those who were present in any of the following countries: Democratic People’s Republic of Korea, Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. The statutory exceptions from this restriction apply to foreign nationals who were in one of the specified countries in order to perform military service in the armed forces of a VWP country, or to perform official duties as an employee of the VWP country. In addition, DHS can grant waivers on a case-by-case basis.¹³ The following are general categories of travelers to these countries who may be eligible for a waiver: (1) individuals who traveled on behalf of

⁷ ESTA became operational for all VWP countries on January 12, 2009; for more information, see “Electronic System for Travel Authorization,” below.

⁸ Poland was designated a VWP country on November 8, 2019. See Department of Homeland Security, “Designation of Poland for the Visa Waiver Program,” 84 *Federal Register* 60316, November 8, 2019.

⁹ For more details about P.L. 114-113, see **Appendix**.

¹⁰ Examples of acts that use the term “repeatedly provided support for acts of international terrorism,” include §6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405), §40 of the Arms Export Control Act (22 U.S.C. 2780), and §620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371). Currently, these countries are Iran, Sudan, and Syria.

¹¹ The criteria to make the determination would include whether the presence of a foreign national in that area or country increases the likelihood that the foreign national is a credible threat to U.S. national security, whether a foreign terrorist organization has a significant presence in the area or country, and whether the country or area is a safe haven for terrorists. DHS has designated the Democratic People’s Republic of Korea, Libya, Somalia, and Yemen as “countries or areas of concern.”

¹² The Secretary of Homeland Security administers the VWP program. Section 402 of the Homeland Security Act of 2002 (HSA; P.L. 107-296), signed into law on November 25, 2002, states:

The Secretary [of Homeland Security], acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: ... (4) Establishing and administering rules, ... governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not a citizen or an alien [sic] lawfully admitted for permanent residence in the United States.

¹³ 8 U.S.C. §1187(a)(12)(C).

international organizations, regional organizations, and sub-national governments on official duty; (2) individuals who traveled on behalf of a humanitarian non-governmental organization (NGO) on official duty; (3) individuals who traveled as journalists for reporting purposes; (4) individuals who traveled to Iran for legitimate business-related purposes following the conclusion of the Joint Comprehensive Plan of Action (July 14, 2015);¹⁴ and (5) individuals who have travel to Iraq for legitimate business-related purposes.¹⁵

In addition, anyone who is a dual national of a VWP country and the Democratic People's Republic of Korea, Iran, Iraq, Sudan, or Syria is ineligible to travel under the VWP. As with the prohibition against those who were present in certain countries, the Secretary of Homeland Security has the authority to waive the prohibition on certain dual nationals if the Secretary determines that the waiver would be in the law enforcement or national security interests of the United States. As of the date of this report, DHS has not released any guidance on waivers for dual nationals.¹⁶ DHS reports on these waivers to Congress annually, but these reports are not available to the public.

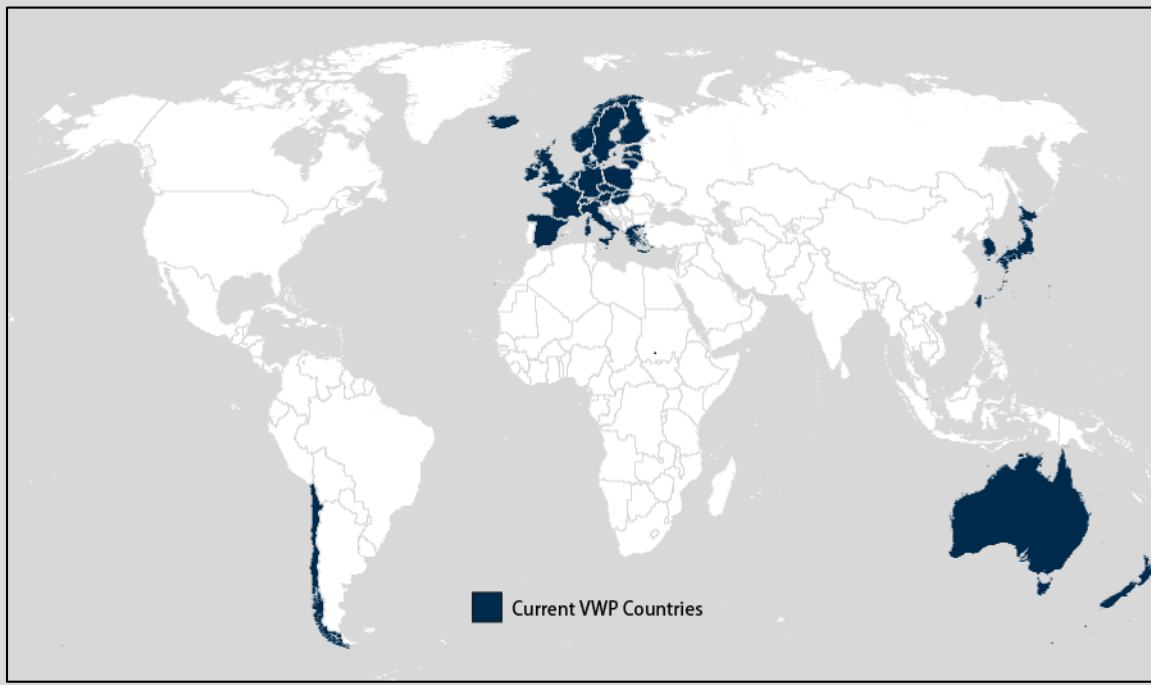
¹⁴ On July 14, 2015, Iran and the six powers that have negotiated with Iran about its nuclear program since 2006 (the United States, the United Kingdom, France, Russia, China, and Germany) finalized a Joint Comprehensive Plan of Action (JCPOA). The JCPOA is intended to ensure that Iran's nuclear program can be used for purely peaceful purposes, in exchange for a broad lifting of U.S., European Union (EU), and United Nations (U.N.) sanctions on Iran. On May 8, 2018, President Trump announced that the United States would no longer participate in the JCPOA. On January 5, 2020, Iran declared it would no longer abide by the limitations of the deal. For more on the JCPOA, see CRS Report R43333, *Iran Nuclear Agreement and U.S. Exit*.

¹⁵ There is no separate application for a waiver. A foreign national's eligibility for a waiver is determined during the ESTA application process. U.S. Customs and Border Protection, *Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions*, at <https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>, accessed November 13, 2019.

¹⁶ For a discussion of some of the issues surrounding implementing the dual national provision, see Nahal Toosi, "Obama Aides Vexed by Visa Crackdown," *Politico*, April 12, 2016, Europe Edition, at <http://www.politico.eu/article/obama-aides-vexed-by-visa-crackdown/>.

Visa Waiver Program Countries (as of June 2020)

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



Although the VWP allows certain nationals from participating countries to enter the United States without a visa, it has important restrictions. Aliens entering with a B visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status.¹⁷ Aliens entering through the VWP are not permitted to extend their stays except for emergency reasons and then for only 30 days.¹⁸ Additionally, with some limited exceptions, aliens entering through the VWP are not permitted to adjust their immigration status. An alien entering through the VWP who violates the terms of admission becomes deportable without any judicial recourse or review (except in asylum cases).¹⁹

¹⁷ Noncitizens entering on B visas may be admitted for six months, and may apply to extend their stay for another six months.

¹⁸ This provision was amended by P.L. 106-406 to provide exceptions for nonimmigrants who enter under the VWP and require medical treatment.

¹⁹ To receive asylum, a foreign national must demonstrate a well-founded fear of persecution in his or her home country based on one of five grounds—race, religion, nationality, membership in a particular social group, or political opinion—and meet other requirements. For more on asylum, see CRS Report R45539, *Immigration: U.S. Asylum Policy*.

VWP Qualifying Criteria

To qualify for the VWP, a country must

- offer reciprocal privileges to United States citizens;
- have had a nonimmigrant visa refusal rate²⁰ of less than 3% for the previous year or a lower average percentage over the previous two fiscal years;
- issue electronic, machine-readable passports that contain a biometric identifier (i.e., e-passports);²¹
- issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers, which are verifiable at the country's port of entry;
- certify that it has in place mechanisms to validate machine-readable passports and e-passports at each port of entry;²²
- enter into an agreement with the United States to report or make available through the International Criminal Police Organization (INTERPOL)²³ information about the theft or loss of passports no later than 24 hours after a theft or loss is reported to the VWP country;²⁴
- certify, to the maximum extent allowed under the laws of the country, that it is screening each foreign national who is admitted to or departs from that country, using relevant INTERPOL databases and notices, or other means designated by the Secretary of Homeland Security (this requirement applies only to countries that have an international airport);²⁵
- accept the repatriation of any citizen, former citizen, or national against whom a final order of removal from the United States is issued no later than three weeks after the order is issued;

²⁰ This rate represents the proportion of individuals whose applications for tourist or business visas have been rejected by U.S. consular officials in their home countries.

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

²² This requirement was added by P.L. 114-113, and does not apply to travel between countries within the Schengen Area, which comprises 22 European Union (EU) member states, plus 4 non-EU countries. Within the Schengen Area, internal border controls have been largely eliminated, and individuals may travel without passport checks among participating countries. See European Commission, *Migration and Home Affairs: Schengen Area*, at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm.

²³ Although statute discusses sharing information on lost and stolen passports, the INTERPOL database includes other types of travel documents such as identity documents and visas. INTERPOL is the world's largest international police organization, with 194 member countries. For more information on INTERPOL see, <https://www.interpol.int/Who-we-are/What-is-INTERPOL>.

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

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

- enter into and fully implement²⁶ an agreement with the United States to share information regarding whether a national of that country traveling to the United States represents a threat to U.S. security or welfare; and
- be determined, by the Secretary of Homeland Security, in consultation with the Secretary of State, not to compromise the law enforcement or security interests of the United States by its inclusion in the program.

The Secretary of Homeland Security, in consultation with the Secretary of State, can suspend a country's participation in the program based on a determination that the country presents a high risk to U.S. national security.²⁷ In addition, countries can be immediately terminated from the VWP if an emergency occurs in the country that the Secretary of Homeland Security in consultation with the Secretary of State determines threatens the law enforcement or security interest of the United States.²⁸ For example, because of Argentina's economic collapse in December 2001,²⁹ and the increase in the number of Argentine nationals attempting to use the VWP to enter the United States and remain illegally past the 90-day period of admission,³⁰ Argentina was removed from the VWP in February 2002.³¹ Likewise, Uruguay joined in 1999, but it was removed from the program in April 2003 because a recession led to an increasing number of Uruguayan citizens entering the United States under the VWP to live and work illegally.³² No country has been removed from the VWP since 2003.

Additionally, there is a probationary status for VWP countries that do not maintain a low disqualification rate.³³ VWP countries are placed on probation when they have a disqualification

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

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

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

²⁹ Beginning in December 2001, Argentina experienced a serious economic crisis, including defaulting on loans by foreign creditors, devaluation of its currency, and increased levels of unemployment and poverty.

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

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

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

³³ *Disqualification rate* is defined as the percentage of nationals from a country who either violated the terms of the nonimmigrant visa, who were excluded from admission to the United States at a port of entry, or who withdrew their

rate of 2% to 3.5%. Probationary countries with a disqualification rate less than 2% over a period prescribed in regulations (but not to exceed three years)³⁴ are removed from probationary status and may remain VWP countries.³⁵ Countries may also be placed on probation if an issue arises and more time is necessary to determine whether the continued participation of the country in the VWP is in the security interest of the United States. For example, in April 2003, Belgium was placed on provisional status because of concerns about the integrity of nonmachine-readable Belgian passports and the reporting of lost or stolen passports.³⁶ DHS completed another country review of Belgium in 2005 and removed the country from probationary status. Belgium was the last country to have been placed on probation.

Nonimmigrant Visa Refusal Rate Waiver

Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53)³⁷ allows the Secretary of Homeland Security, in consultation with the Secretary of State, to waive the nonimmigrant visa refusal rate requirement for admission to the VWP after the Secretary of Homeland Security certifies to Congress that

- an air exit system is in place that can verify the departure of not less than 97% of foreign nationals who exit through U.S. airports,³⁸ and
- the electronic travel authorization system is operational.³⁹

To participate in the program, a country that receives a visa refusal rate waiver also must

- meet all the other requirements of the program;
- be determined by the Secretary of Homeland Security to have a totality of security risk mitigation measures that provide assurances that the country's participation in the program would not compromise U.S. law enforcement and security interests, or the enforcement of U.S. immigration laws;

application for admission at a U.S. port of entry (8 U.S.C. §1187(f)(4)).

³⁴ 8 U.S.C. §1187(h)(3)(C).

³⁵ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208).

³⁶ Department of Justice, Immigration and Naturalization Service, "Attorney General's Evaluations of the Designations of Belgium, Italy, Portugal, and Uruguay as Participants Under the Visa Waiver Program," 68 *Federal Register*, 10954-10957, March 7, 2003, at <https://www.govinfo.gov/content/pkg/FR-2003-03-07/pdf/03-5244.pdf>.

³⁷ P.L. 110-53 (H.R. 1), signed into law on August 3, 2007. For more details on the changes to the VWP in this act, see **Appendix**, "Legislative History."

³⁸ There was disagreement between some critics and DHS regarding what needed to be verified. Some contended that congressional intent was to have a functional entry-exit system that would be able to match arrival and departure records and know which aliens failed to depart from the United States rather than just matching the entry records with the records of those who were known to have departed from the United States. For example, see S. 203 introduced in the 111th Congress, which attempted to clarify the language in this provision. U.S. Congress, Senate Committee on Judiciary, Subcommittee on Terrorism, Technology and Homeland Security, *The Visa Waiver Program: Mitigating Risks to Ensure Safety to All Americans*, 110th Cong., 2nd sess., September 24, 2008.

³⁹ DHS determined that the law permitted it to utilize the waiver when ESTA was functional but before it was mandatory for all VWP travelers. Critics did not agree with this interpretation and thought that ESTA should have been mandatory for all VWP travelers before new countries were designated into the program. When the new countries entered the program, their citizens were required to use ESTA before travelling to the United States. U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, GAO-08-967, September 2008.

- have had a sustained reduction in visa refusal rates, and have existing conditions for the rates to continue to decline;
- have cooperated with the United States on counterterrorism initiatives and information sharing before the date of its designation, and be expected to continue such cooperation; and
- have had, during the previous fiscal year, a nonimmigrant visa refusal rate of less than 10%, or an overstay rate that did not exceed the maximum overstay rate established by the Secretaries of DHS and DOS for countries receiving waivers of the nonimmigrant visa refusal rate to participate in the program.

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

The nonimmigrant visa refusal rate waiver became available in October 2008 and was suspended on July 1, 2009. Under P.L. 110-53, the Secretary of Homeland Security's authority to waive the nonimmigrant visa refusal rate was suspended on July 1, 2009, and is to remain suspended until the air exit system is able to match an alien's biometric information with relevant watch lists and manifest information.⁴⁰ U.S. Customs and Border Protection (CBP) is implementing biometric air exit systems across the country; their goal is to deploy biometric exit at 20 airports by 2022, which would capture 97% of all commercial air travelers departing the United States.⁴¹

Electronic System for Travel Authorization

P.L. 110-53 mandated that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement an electronic travel authorization system through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the alien is eligible to travel to the United States and enter under the VWP. The system as implemented is known as the Electronic System for Travel Authorization (ESTA) and became fully operational for all VWP visitors traveling to the United States on January 12,

⁴⁰ Section 110 IIRIRA, as amended, requires DHS to implement an automatic, biometric entry -exit system that covers all noncitizen travelers into and out of the United States and that identifies visa overstayers. For more information, see "Debate over Biometric Exit Capacity," below.

⁴¹ Department of Homeland Security, *Transportation Security Administration and U.S. Customs and Border Protection: Deployment of Biometric Technologies*, Report to Congress, August 30, 2019, p. 5, at <https://www.tsa.gov/sites/default/files/biometricsreport.pdf>.

2009.⁴² There is a \$14 fee for travelers who use ESTA.⁴³ In 2019, Congress approved raising the ESTA fee from \$14 to \$21, but the effective date of the new fee has not yet been announced.⁴⁴

ESTA screens applicants' biographical information against a number of security databases, including the Terrorist Screening Database, TECS (not an acronym, but a system used by CBP officers to screen arriving travelers to the United States),⁴⁵ the Automated Targeting System, and INTERPOL's Lost and Stolen Passport database. ESTA alerts the alien whether he or she has been approved to travel;⁴⁶ if not approved, the alien may still travel to the US but must obtain the relevant visa. The information required by ESTA includes

- **biographical information** including name, birth date, country of citizenship, other citizenships (i.e., dual citizenship), previous citizenships, country of residence, telephone number, other names/aliases, parents' names, national identification number (if applicable), employment information (if applicable), city of birth;⁴⁷
- **passport information** including number, issuing country, issuance date, and expiration date; and
- **travel information** including departure city, flight number, U.S. contact information, and address while in the United States.⁴⁸

Eligibility to travel, which is determined by ESTA, is valid for two years or until the person's passport expires (whichever comes first)⁴⁹ and multiple entries. Throughout this period, the ESTA system continually vets approved individuals' information against the aforementioned databases.

⁴² Entrants under the VWP from countries that receive a waiver of the nonimmigrant visa refusal rate (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, and South Korea) had to use the system starting on the date of their formal admission to the program. For all the countries except Malta, that date was November 17, 2008. Malta was formally designated into the VWP on December 30, 2008. Department of Homeland Security, "Electronic System for Travel Authorization (ESTA) Advisory Statement," November 6, 2008. Department of Homeland Security, "Electronic System for Travel Authorization: Mandatory Compliance Required for Travel Under the Visa Waiver Program," 73 *Federal Register* 67354, November 13, 2008.

⁴³ The fee was instituted on September 8, 2010. The \$14 fee includes \$4 to cover the costs of administering ESTA and \$10 for the travel promotion fee established by Congress in the Travel Promotion Act of 2009 (§9 of P.L. 111-145) and extended until September 30, 2020, by Title VI of P.L. 113-235. (Department of Homeland Security, Customs and Border Protection, "DHS, CBP Announce Interim Final Rule For ESTA Fee," press release, August 6, 2010).

⁴⁴ P.L. 116-94, Division I, Title VIII reduces the amount available for travel promotion to \$7 per traveler. Of the remainder, \$4 will continue to go to CBP to cover the costs of administering ESTA, and \$10 will be directed to the U.S. Treasury for the general fund. Title VIII of P.L. 116-94 further extended it until September 30, 2027.

⁴⁵ TECS, managed by DHS, is an updated version of the Treasury Enforcement Communications System.

⁴⁶ In most cases, the determination process is almost instantaneous. Under statute, ESTA determinations are not reviewable by the courts.

⁴⁷ In November 2014, DHS added new questions to ESTA in response to security concerns. Department of Homeland Security, Customs and Border Protection, *ESTA - New questions to the ESTA application*, CBP INFO Center, Washington, DC, November 3, 2014, at https://help.cbp.gov/app/answers/detail/a_id/1756/~/esta—new-questions-to-the-esta-application. Although the administration was already asking the questions, P.L. 114-113 statutorily added the requirement that nationals be queried about multiple and previous citizenships.

⁴⁸ Much of the information is the same that is required on the nonimmigrant visa waiver arrival/departure form (Form I-94W). According to DHS, when developing ESTA, the department had to balance the need for biographic information with the requirement that the participating countries did not view applying for an approval under ESTA as equivalent to applying for a visa. If countries had interpreted applying for an authorization under ESTA as having the same burden as applying for a visa, these countries might have required that U.S. citizens traveling to their countries obtain a visa.

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

The Secretary of Homeland Security has the authority to shorten or revoke the determination of eligibility at any time.⁵⁰ Notably, a determination under ESTA that an alien is eligible to travel to the United States does not constitute a determination that the alien is admissible. Admissibility determinations are made by CBP inspectors at the ports of entry (the same is true for all visa holders).

Arrival and Departure Inspections

Unlike other nonimmigrants, those entering under the VWP do not have to get a visa and thus, are not inspected by U.S. governmental officials until they arrive at a U.S. port of entry. Nonetheless, in addition to getting authorization through ESTA, prior to the alien's arrival, an electronic passenger manifest is sent from the airline or commercial vessel to CBP officials, as is done for all airline and commercial vessels departing from a foreign country destined for a U.S. port of entry. This manifest is checked against security databases.

Since October 1, 2002, passenger arrival and departure information on individuals entering and leaving the United States under the VWP has been electronically collected from airlines and cruise lines, through CBP's Advanced Passenger Information System (APIS) system.⁵¹ APIS collects carrier information (e.g., flight number, airport of departure, and other information), as well as travelers' personal information, including complete name, date of birth, passport number, country of citizenship, and country of residence.⁵² APIS sends the data to the DHS's Arrival and Departure Information System (ADIS) for matching arrivals and departures and reporting purposes. If the carrier fails to submit the information, an alien may not enter under the VWP.

At U.S. ports of entry, CBP officers observe and question foreign nationals, examine passports, and conduct checks against a computerized system to determine whether the applicant is admissible to the United States. Primary inspection consists of a brief interview with a CBP officer, a check of the traveler's documents, and a query of the Interagency Border Inspection System (IBIS)⁵³ and entry of certain biographic and biometric the information on the travelers into the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) system. The US-VISIT system uses biographical (e.g., passport information) and biometric identification (finger scans and digital photographs) to check identity.⁵⁴ Officers at the border collect the

⁵⁰ The provision giving the Secretary of Homeland Security the authority to shorten an EST A validity period was enacted as part of P.L. 114-113.

⁵¹ APIS is required pre-departure (i.e., before securing the doors) for all air carrier flights to and from the United States. For inbound cruise ships the data must be received 96 hours before arrival at a U.S. port, and for cruise ships leaving the United States, the data must be transmitted 60 minutes before departure. For private aircraft, a passenger and crew manifest listing all persons traveling on the aircraft must be sent electronically using the online eAPIS system at least one hour prior to departure for an inbound or outbound international flight.

⁵² The transmission, retention policies, data security, and redress procedures pertaining to APIS data (and other Passenger Name Record data) received by CBP is to comport with the US/EU Passenger Name Record Agreement. For more information, see CRS Report RS22030, *U.S.-EU Cooperation Against Terrorism*.

⁵³ ADIS feeds information to the Interagency Border Inspection System (IBIS). IBIS is a database of suspect individuals, businesses, vehicles, aircraft, and vessels that is used during inspections at the border. IBIS interfaces with the FBI's National Crime Information Center (NCIC), the Treasury Enforcement and Communications System (TECS II), National Automated Immigration Lookout System (NAILS), Non-immigrant Information System (NIIS), CLASS and TIPOFF terrorist databases. Because of the numerous systems and databases that interface with IBIS, the system is able to obtain such information as an alien's criminal history and whether an alien is wanted by law enforcement. Department of Homeland Security, Customs and Border Protection, *IBIS- General Information*, Washington, DC, July, 31, 2013.

⁵⁴ For more information on US-VISIT, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of*

following information on aliens entering under the VWP: name, date of birth, nationality, gender, passport number, country of issuance, a digital photograph, and prints for both index fingers. Primary inspections are typically quick; however, if the CBP officer is suspicious that the traveler may be inadmissible under the INA or in violation of other U.S. laws, the traveler is referred to a secondary inspection. Those travelers sent to secondary inspections are questioned extensively, travel documents are further examined, and additional databases are queried.⁵⁵

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

In April 2008, DHS published a Notice of Proposed Rulemaking in the *Federal Register* that would have created biometric exit procedures at airports and seaports for international visitors.⁵⁶ DHS was expected to publish the final rule for this system by October 15, 2008.⁵⁷ However, in legislation that became law on September 30, 2008,⁵⁸ Congress required DHS to complete and report on at least two studies testing biometric exit procedures at airports.⁵⁹ After piloting various biometric programs, CBP, in partnership with the Transportation Security Administration (TSA), is currently deploying the Traveler Verification Service (TVS). TVS is a private-public partnership⁶⁰ that uses facial recognition technology to verify travelers' identities. DHS in January 2020 reported TVS capturing roughly 60%⁶¹ of in-scope travelers.⁶² CBP's goal is to deploy TVS at 20 airports by 2022, which would capture 97%⁶³ of all commercial air travelers departing the United States.⁶⁴

Another step in implementing an exit system occurred in December 2011, when DHS announced an agreement with Canada to share entry records so that an entry into Canada along the land

Entry.

⁵⁵ For more information on the screening process, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*.

⁵⁶ Department of Homeland Security, "Collection of Alien Biometric Data Upon Exit From the United States at Air and Sea Ports of Departure," 73 *Federal Register* 22065, April 24, 2008.

⁵⁷ CRS analyst conversation with Department of Homeland Security Congressional Affairs, September 22, 2008.

⁵⁸ P.L. 110-329.

⁵⁹ One pilot tested DHS's recommended solution that carriers collect biometrics from passengers; the other pilot tested CBP officers collecting passenger biometrics at the boarding gate.

⁶⁰ Private partners include airports and airlines.

⁶¹ Based on CRS discussion with CBP officials on January 30, 2020.

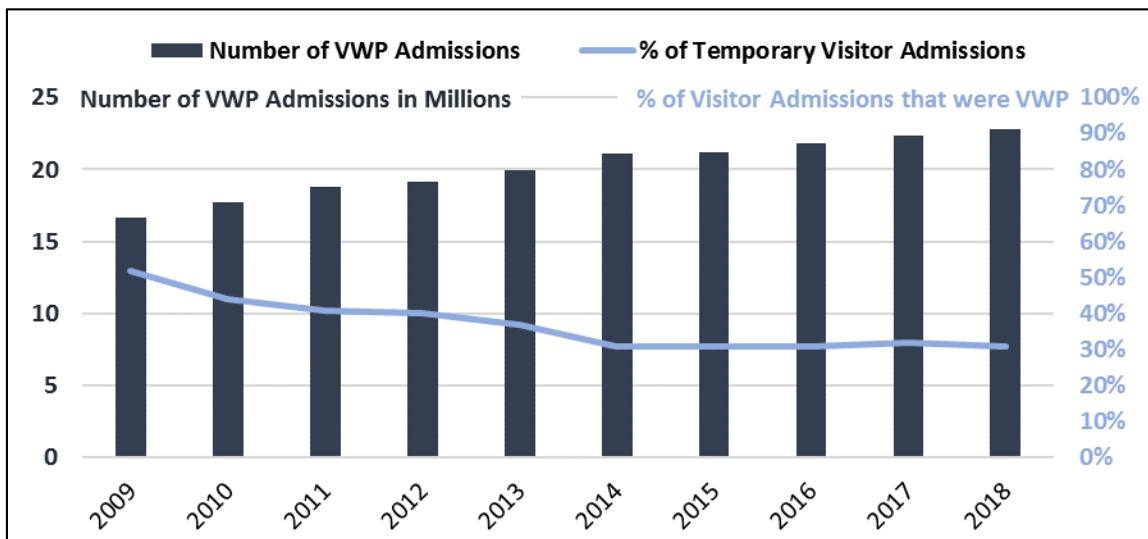
⁶² In-scope travelers include non-U.S. citizens aged 14-79.

⁶³ This would fulfill the final requirement needed to reinstate the nonimmigrant visa refusal rate waiver.

⁶⁴ Department of Homeland Security, *Transportation Security Administration and U.S. Customs and Border Protection: Deployment of Biometric Technologies*, Report to Congress, August 30, 2019, p. 5, at <https://www.tsa.gov/sites/default/files/biometricsreport.pdf>.

border would be counted as an exit in U.S. records.⁶⁵ This is part of the joint *Beyond the Border* initiative,⁶⁶ which is currently in Phase III of implementation.⁶⁷

Figure I. Number of Visa Waiver Program (VWP) Admissions, FY2009-FY2018, and Percentage of Visitor Admissions That Were VWP



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

Note: Number of countries participating in the VWP at the end of the fiscal year: FY2009, 35; FY2010-FY2012, 36; FY2013, 37; FY2014-FY2018, 38. Visitor admissions count those who entered with B visas, those who entered under the Guam Visa Waiver Program, and those who entered under the VWP.

Trends in Use of the VWP

Arrivals of international visitors to the United States have generally increased in most years over the past decade. International visitors to the United States increased from 32.9 million in 2007 to 73.8 million in 2018.⁶⁸ The growth during this time has mostly been consistent except for a decrease in 2009 caused by the Great Recession. Visitor admissions will likely fall sharply in 2020 due to the decline in international travel associated with the Coronavirus Disease 2019 (COVID-19) pandemic.

⁶⁵ Testimony of David F. Heyman, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Next Steps for the Visa Waiver Program*, 112th Cong., 1st sess., December 7, 2011. For more on this agreement, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*.

⁶⁶ The White House, “Declaration by President Obama and Prime Minister Harper of Canada - Beyond the Border,” press release, February 4, 2011, at <https://obamawhitehouse.archives.gov/the-press-office/2011/02/04/declaration-president-obama-and-prime-minister-harper-canada-beyond-bord>.

⁶⁷ For more information, see Department of Homeland Security, “U.S. and Canada Continue Commitment to Securing our Borders, Begin Phase III of the Entry/Exit Project Under the Beyond the Border Initiative,” press release, July 11, 2019, at <https://www.dhs.gov/news/2019/07/11/us-and-canada-continue-commitment-securing-our-borders-begin-phase-iii-entryexit>.

⁶⁸ Department of Homeland Security, *Yearbook of Immigration Statistics*, multiple years; Table 25.

Figure 1 shows the number of admissions under the VWP and VWP admissions as a percentage of all temporary visitor admissions.⁶⁹ Since FY2009, the number of admissions under the VWP has steadily increased. In FY2018, there were 22.8 million admissions under the VWP, the largest number ever under the program. However, from FY2009 to FY2016, the proportion of total visitor admissions represented by VWP admissions declined.⁷⁰ In FY2018, VWP admissions constituted 31% of all temporary visitor admissions to the United States, the smallest percentage in more than 20 years.

Policy Issues

The VWP is supported by the U.S. travel and tourism industry and the business community. The travel and tourism industry views the VWP as a tool to facilitate and encourage foreign visitors for business and pleasure, which results in increased economic growth generated by foreign tourism and commerce for the United States.⁷¹

The Department of State also supports the VWP. DOS argues that by waiving the visa requirement for high-volume/low-risk countries, consular workloads are significantly reduced, allowing for streamlined operations, cost savings, and concentration of resources on greater-risk nations in the visa process.⁷² The travel industry argues that DOS would have to hire many more consular officers to meet the demand for B visas from VWP countries absent the program.⁷³

While there tends to be agreement that the VWP benefits the U.S. economy by facilitating legitimate travel, there is disagreement on the VWP's impact on national security, with some arguing that the VWP presents a significant security risk and others arguing that it enhances national security.

Security

There has been significant debate about whether the VWP increases or decreases national security. As discussed, travelers under the VWP do not undergo the in-person screening generally required to receive a B nonimmigrant visa. Moreover, ESTA is a biographical system and cannot be used to run checks against databases that use biometrics as identifiers, such as DHS's Automated Biometric Identification System (IDENT) and FBI's Next Generation Identification

⁶⁹ Temporary visitors include aliens who entered with B visas, those who entered under the Guam Visa Waiver Program, and those who entered under the VWP.

⁷⁰ Visitor admissions from large, non-VWP countries have increased during this period, thereby reducing the proportion of VWP visitor admissions to the United States. For example, in 2018, Brazil, China, and India were among the top 10 overseas countries by visitor volume and accounted for 6.5 million visitors to the United States that year. (NTTO, *Non-Resident Arrivals to the United States: Overseas, Canada, Mexico, and International, Trend Line Data—Country of Residence*, November 2019, at <https://travel.trade.gov/view/m-2017-I-001/index.asp>).

⁷¹ For more information, see CRS Report R46300, *Adding Countries to the Visa Waiver Program: Effects on National Security and Tourism*.

⁷² U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *The Visa Waiver Program: Implications for U.S. National Security*, Testimony of Edward J Ramotowski, Deputy Assistant Secretary for Visa Services, U.S. Department of State, 114th Cong., 1st sess., March 12, 2015.

⁷³ For example, in his testimony before the House Immigration and Claims Subcommittee on February 28, 2002, William S. Norman, President and Chief Executive Officer of the Travel Industry Association of America, stated that it would take hundreds of new consular staff and tens of millions of dollars to issue visas to visitors currently entering under the VWP. Since Mr. Norman testified, the number of people entering under the VWP has increased by more than 5 million entrants per year.

(NGI).⁷⁴ While VWP travelers are not checked against these systems before boarding a plane or ship, they are checked against these systems through US-VISIT when they are at a U.S. port of entry.⁷⁵ In addition, some contend that the relaxed documentary requirements of the VWP increase immigration fraud and decrease security.⁷⁶

Others argue that the VWP enhances security by setting standards for travel documents and information sharing.⁷⁷ For example, all travelers entering under the VWP must present e-passports, which tend to be more difficult to alter than other types of passports.⁷⁸ Unlike ESTA authorization, many B visas are valid for 10 years⁷⁹ and are not continuously vetted.⁸⁰

Another concern about the national security implications of the program centers on DHS's ability to conduct reviews of the current VWP countries. In 2002, Congress mandated that DHS evaluate each VWP country every two years to make sure that their continued participation was in the security, law enforcement, and immigration interests of the United States.⁸¹ In a review of the Visa Waiver Program Office's (VWPO's) administration of the VWP, the DHS's Office of the Inspector General found that as of July 2012, there were 11 (out of 36) reports that exceeded the congressionally mandated two-year reporting cycle.⁸² A Government Accountability Office (GAO) report found that as of October 31, 2015, approximately 25% of the most recent reports were submitted or remained outstanding at least five months past the statutory deadline. Since then, DHS has made progress in meeting the mandated two-year reporting cycle, but some gaps remain.⁸³

⁷⁴ IDENT is the primary DHS-wide system for the biometric identification and verification of individuals encountered in DHS mission-related processes. NGI is a DHS-wide system for the storage and processing of biometric and limited biographic information. For more information on IDENT, see Department of Homeland Security, *Privacy Impact Assessment for the Automated Biometric Identification System (IDENT)*, July 31, 2006, p. 2, at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf. For more information on NGI, see Federal Bureau of Investigation, *Next Generation Identification (NGI)*, at <https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi>.

⁷⁵ CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*.

⁷⁶ For an example of this argument, see "Congressman Claims Allowing Poland Visa-Free Travel to the US Would Pose Security Threat," workpermit.com, June 20, 2012, at <http://www.workpermit.com/news/2012-06-20/us-congressman-claims-allowing-poland-visa-free-travel-to-us-would-pose-security-threat.htm>.

⁷⁷ For an example of this argument, see Heritage Foundation, *The Visa Waiver Program: A Security Partnership*, Fact Sheet #66, Washington, DC, June 25, 2010.

⁷⁸ There is not a specific requirement to present an e-passport when entering under the VWP. Any passports issued after October 26, 2006, and used by VWP travelers to enter the United States are required to have integrated chips with information from the data page (i.e., e-passports). Most passports are valid for 10 years, and thus, it is likely that by October 2016, all VWP entrants had e-passports.

⁷⁹ The length of validity of a visa is mostly dependent on reciprocity with the United States (i.e., that visas from that country for U.S. citizens are valid for the same period of time). For a full list of reciprocity schedules, see Department of State, *U.S. Visa: Reciprocity and Civil Documents by Country*, at <https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html>.

⁸⁰ CBP screens travelers on nonimmigrant visitor visas at ports of entry each time they enter the United States.

⁸¹ P.L. 107-53, §711.

⁸² VWPO cited a number of reasons for the reporting delays, including inadequate staffing of the office to manage the workload, and not receiving intelligence assessments in a timely manner. However, VWPO officials stated that "these delays have not posed any undue risks or threats to U.S. security interests, since any issues within a VWP country that might affect its continued compliance with VWP requirements are continuously monitored." Department of Homeland Security, Office of the Inspector General, *The Visa Waiver Program*, OIG-13-07, Washington, DC, November 2, 2012, p. 12, http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-07_Nov12.pdf.

⁸³ According to GAO,

In 2018, DHS completed a strategic review of the reporting process to better distribute the

Debate over Biometric Exit Capacity

As discussed, the Secretary of Homeland Security’s authority to waive the nonimmigrant visa refusal rate has been suspended until the air exit system is able to match an alien’s biometric information with relevant watch lists and manifest information.⁸⁴ Some contend that the current biographic system provides suitable data for most security and immigration enforcement activities, and that the cost of implementing a biometric exit system would not justify the small increase in additional security.⁸⁵ However, others express concerns about the general security of the program and argue that until more security measures are in place, such as a biometric exit capacity, more countries should not be designated into the program.⁸⁶

Information Sharing

According to GAO, all VWP countries provide data on lost and stolen passports (LASP) to the United States.⁸⁷ However, concerns have been raised about information sharing on LASP, specifically whether countries are reporting data in a timely manner.⁸⁸ The mechanisms to obtain data on LASP have differed over time (e.g., reporting to the U.S. Embassy, access to a common database) and by country (e.g., MOUs, Diplomatic Notes).⁸⁹ While DHS receives a few countries’ LASP data via direct links to those countries’ databases, most data on LASP come from the International Criminal Police Organization’s (INTERPOL’s) Stolen and Lost Travel Documents (SLTD) database⁹⁰—DHS’s preferred method of data sharing. Notably, ESTA screens passport

workload and adding staff in the Visa Waiver Program Office. As of October 2019, DHS reported taking several steps that should address prior delays in meeting the report deadlines, such as refining their request for information and modifying the report clearance process. To fully address this recommendation, DHS needs to demonstrate these steps have addressed the delays by issuing a report to Congress on each VWP country within the last two years. GAO will continue to monitor DHS efforts.

U.S. Government Accountability Office (GAO), “Recommendations for Executive Action.” in *Visa Waiver Program: DHS Should Take Steps to Ensure Timeliness of Information Needed to Protect U.S. National Security*, GAO-16-498, for the May 5, 2016, at <https://www.gao.gov/products/GAO-16-498>.

⁸⁴ The suspension can be lifted once the biometric exit system captures 97% of in-scope travelers (P.L. 110-53; Section 110 IIRIRA, as amended). Currently, the system captures 60% of in-scope travelers. (Based on CRS discussion with CBP officials on January 30, 2020.)

⁸⁵ Testimony of James Jay Carafano, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Next Steps for the Visa Waiver Program*, 112th Cong., 1st sess., December 7, 2011.

⁸⁶ Statement of Chairman Elton Gallegly, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Next Steps for the Visa Waiver Program*, 112th Cong., 1st sess., December 7, 2011.

⁸⁷ U.S. Government Accountability Office, *Visa Waiver Program: Additional Actions Needed to Address Risks and Strengthen Overstay Enforcement*, GAO-12-287T, December 7, 2011; U.S. Government Accountability Office, *Visa Waiver Program: DHS Should Take Steps to Ensure Timeliness of Information Needed to Protect U.S. National Security*, GAO-16-498, May 2016, p. 11.

⁸⁸ VWP passports are supposedly highly valued since the bearer does not need a visa to enter the United States. For example, see U.S. Government Accountability Office, *Visa Waiver Program: Additional Actions Needed to Address Risks and Strengthen Overstay Enforcement*, GAO-12-287T, December 7, 2011. See also, Giulia Paravicini, “EU’s Passport Fraud ‘Epidemic’,” *Politico*, January 28, 2016, Europe Edition, at <http://www.politico.eu/article/europes-fake-forged-stolen-passport-epidemic-visa-free-travel-rights/>.

⁸⁹ In the past, before access to and the content of the INTERPOL database were reliable, DHS required countries to submit LASP data to the U.S. embassies in those countries.

⁹⁰ The United States began providing information on LASP to the U.S. National Central Bureau of the International Criminal Police Organization (INTERPOL) in May 2004. The INTERPOL Stolen and Lost Travel Document (SLTD) database is available to law enforcement and immigration authorities worldwide. INTERPOL, *Border Management*, at

information using the INTERPOL database. CBP also accesses LASP data via INTERPOL, but it is unclear if this information is checked during primary inspection.⁹¹ P.L. 114-113 amended the provision mandating that the reporting of lost or stolen passports be done no later than 24 hours after a theft or loss was reported to the VWP country.

As discussed, all VWP countries are also required to enter into information-sharing agreements with the United States on whether the citizens or nationals of that country travelling to the United States represent a security or criminal threat to the United States. All VWP countries have entered into the required arrangements for the sharing of information on known and suspected terrorists pursuant to Homeland Security Presidential Directive 6 (HSPD-6),⁹² and have also signed Preventing and Combating Serious Crime (PCSC) Agreements or equivalent agreements with the United States for the sharing of information on potential serious criminals and terrorists. DHS, DOJ, and DOS worked with VWP countries to fully implement HSPD-6 arrangements and PCSC Agreements.⁹³ P.L. 114-113 requires that the HSPD-6 arrangements and PCSC Agreements not only be signed but be fully implemented before a country can be designated into the VWP. A GAO report released in May 2016 found that, as of that date, more than one third of VWP countries had not shared terrorist identity information through the HSPD-6 agreements, and a similar percentage of VWP countries had not shared criminal history information through the PCSC agreements.⁹⁴ No countries were removed from the program, but

DHS has reported progress towards implementing the required agreements and, in cases where agreements are not fully implemented, time frames and steps for bringing VWP countries into compliance with the information-sharing requirements. As a result, information sharing under the required agreements has improved.⁹⁵

Terrorism, Foreign Fighters, and the VWP

Since 9/11, significant national security concerns about the VWP came from fears that terrorists could enter the United States under the VWP. In recent years, U.S. concerns have focused on citizens from VWP countries who are aligned with the Islamic State terrorist group (also known as ISIS or ISIL). Many perpetrators of recent terrorist attacks were European citizens who trained and/or fought with the Islamic State in the Syria-Iraq region.⁹⁶

For example, several of the perpetrators of the November 2015 attacks in Paris were citizens of France.⁹⁷ In addition, the alleged mastermind, Abdelhamid Abaaoud, was a national of Belgium.⁹⁸

<https://www.interpol.int/How-we-work/Border-management>.

⁹¹ U.S. Government Accountability Office, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risks*, GAO-08-1142T, September 24, 2008, p.5.

⁹² U.S. President (George W. Bush), “Homeland Security Presidential Directive/HSPD-6—Directive on Integration and Use of Screening Information To Protect Against Terrorism,” *Weekly Compilation of Presidential Documents*, September 16, 2003, p. 1174. For a discussion of HSPD-6, see CRS Report R42336, *Terrorist Watch List Screening and Background Checks for Firearms*.

⁹³ E-mail from Department of Homeland Security, Office of Legislative Affairs, November 16, 2015.

⁹⁴ U.S. Government Accountability Office, *Visa Waiver Program: DHS Should Take Steps to Ensure Timeliness of Information Needed to Protect U.S. National Security*, GAO-16-498, May 2016.

⁹⁵ U.S. Government Accountability Office, “Recommendations for Executive Action,” in *Visa Waiver Program: DHS Should Take Steps to Ensure Timeliness of Information Needed to Protect U.S. National Security*, GAO-16-498, May 5, 2016, at <https://www.gao.gov/products/GAO-16-498>.

⁹⁶ For more information, see CRS In Focus IF10561, *Terrorism in Europe*.

⁹⁷ BBC News, “Paris attacks: Who were the attackers?,” April 27, 2016, at [ews/world-europe-34832512](http://www.bbc.com/news/world-europe-34832512).

⁹⁸ Lonnie Shekhtman, “Abdelhamid Abaaoud: Mastermind of the Paris attacks?,” *Christian Science Monitor*,

Most of the perpetrators of these attacks had trained and/or fought with the Islamic State in Syria and/or Iraq.⁹⁹ These terrorists may have been able to travel to the United States under the VWP, if ESTA did not find any derogatory information about them in U.S. biographic databases. Once citizens of VWP countries arrive in the United States, a CBP officer is to decide on their admissibility and check their information in biometric and biographic databases. Without having specific classified information, it is unknown whether or not these individuals would have been eligible to travel under the VWP and/or been admitted into the U.S. at a port of entry.

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

Authorities also remain concerned that terrorists could exploit refugee and migrant flows into Europe, especially given press reports that two of the terrorists involved in the November 2015 attacks in Paris may have entered Greece by posing as refugees with fake or stolen Syrian passports before making their way to Paris.¹⁰⁰ For a foreign national to travel under the VWP he or she must possess a passport from a VWP country. Thus, unless refugees or migrants who settle in VWP countries receive citizenship or nationality¹⁰¹ from those countries and are issued passports from the VWP country, they are ineligible to travel to the United States under the VWP.¹⁰²

Adding Countries to the VWP

While some view the VWP as a security risk, others contend that the inclusion of countries in the VWP increases U.S. national security by setting standards for travel documents and information sharing.¹⁰³ In addition, supporters of the VWP argue that increasing membership in the VWP could be used as an incentive to get additional countries to share intelligence information with the

November 16, 2015, at <http://www.csmonitor.com/World/Europe/2015/1116/Abdelhamid-Abaaoud-Mastermind-of-the-Paris-attacks-video>.

⁹⁹ For more information, see CRS In Focus IF10561, *Terrorism in Europe*.

¹⁰⁰ Alison Smale and Kimberly Bradley, “Refugees Across Europe Fear Repercussions From Paris Attacks,” *New York Times*, November 18, 2015, at <http://www.nytimes.com/2015/11/19/world/europe/refugees-paris-attacks.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=b-lede-package-region®ion=top-news&WT.nav=top-news>; and “At least two Paris attackers ‘traveled through Greece,’” *France 24*, November 21, 2015, at <https://www.france24.com/en/20151121-least-two-paris-attackers-travelled-through-greece-refugees-syria-migrants>.

¹⁰¹ A national is a citizen or subject of a particular nation and is someone who would be eligible for a passport from that nation.

¹⁰² INA §217(a)(2). The situation regarding the position of many countries in regard to acceptance of Syrian refugees is fluid and, as such, it is unclear whether any of these refugees would ever be eligible for citizenship in these countries.

¹⁰³ For an example of this argument, see Testimony of Hillary Batjer Johnson, Deputy Coordinator for Homeland Security, Screening, and Designations Bureau of Counterterrorism, in U.S. Department of State, U.S. Congress, House Committee on Oversight and Government Reform, Subcommittees on National Security and Government Operations, *The President’s Waiver of Restrictions on the Visa Waiver Program*, hearings, 114th Cong., 2nd sess., February 10, 2016, H.Hrg. 114-104 (Washington, DC: GPO, 2017).

United States.¹⁰⁴ Since 2010, DHS has designated four new countries—Chile, Greece, Poland, and Taiwan—into the program.

Most recently, on November 8, 2019, DHS designated Poland into the VWP.¹⁰⁵ Poland had been working with DHS for more than a decade to meet the VWP criteria.¹⁰⁶ Prior to Poland’s inclusion in the VWP, the Polish government had been outspoken in expressing frustration over the failure to include the country in the VWP.¹⁰⁷ Reportedly, President Barack Obama said in 2010 that he was going to make it a priority to get Poland into the VWP.¹⁰⁸ President Donald Trump, in public remarks before a September 2018 meeting with Poland’s President Andrezej Duda, said in reference to Poland’s designation into the VWP that his administration was “looking at that very strongly.”¹⁰⁹

In FY2019, Poland met the requirement of having a nonimmigrant visitor visa refusal rate below 3%.¹¹⁰ On October 4, 2019, President Trump announced that DOS had formally nominated Poland for the VWP,¹¹¹ and the following month, DHS announced Poland’s designation into the program.¹¹² As of November 11, 2019, Polish nationals, like other visitors from VWP countries, are able to apply online for ESTA, which authorizes travel to the United States without a visa. According to DHS, from November 11, 2019, through January 2020, approximately 40,000 Polish ESTA applications were approved.¹¹³

Other countries have expressed a desire to be included in the VWP because of the possible economic benefits (e.g., increasing commerce and tourism), the benefits to their populace of easier and cheaper travel to the United States (i.e., since their citizens do not have to apply for

¹⁰⁴ For examples of this argument, see James Jay Carafano, *With a Little Help from Our Friends: Enhancing Security by Expanding the Visa Waiver Program*, Heritage Foundation, Executive Memorandum no. 991, February 3, 2006; and Jena Baker McNeill, *Time to Decouple Visa Waiver Program from Biometric Exit*, Heritage Foundation, Web Memorandum no. 2867, April 15, 2010.

¹⁰⁵ Department of Homeland Security, “Designation of Poland for the Visa Waiver Program,” 84 *Federal Register* 60316, November 8, 2019.

¹⁰⁶ For more information, see CRS Report R45784, *Poland: Background and U.S. Relations*.

¹⁰⁷ For examples, see “Polish President to Remind Obama of Visa Promise,” *Polskie Radio*, September 9, 2012, at <http://www.thenews.pl/1/10/Artykul/113122,Polish-president-to-remind-Obama-of-visa-promise>; and Nowy Dziennik Wujem, translated by Aleksandra Slabisz from Polish, “Polish Students Appeal to White House on Visa Waiver,” *Voices of NY*, October 10, 2012.

¹⁰⁸ For examples, see “Polish President to Remind Obama of Visa Promise,” *Polskie Radio*, September 9, 2012, at <http://www.thenews.pl/1/10/Artykul/113122,Polish-president-to-remind-Obama-of-visa-promise>; and Nowy Dziennik Wujem, translated by Aleksandra Slabisz from Polish, “Polish Students Appeal to White House on Visa Waiver,” *Voices of NY*, October 10, 2012.

¹⁰⁹ The White House, “Remarks by President Trump and President Duda of the Republic of Poland Before Bilateral Meeting,” September 18, 2018, at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-president-duda-republic-poland-bilateral-meeting/>.

¹¹⁰ Department of State, “Adjusted Refusal Rate—B-Visas Only by Nationality Fiscal Year 2019,” at <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/RefusalRates/FY19.pdf>; also, see full list of criteria in the section, “VWP Qualifying Criteria.”

¹¹¹ The White House, “Statement from the Press Secretary Regarding the Nomination of Poland for Entry into the Visa Waiver Program,” press release, October 4, 2019, at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-nomination-poland-entry-visa-waiver-program/>.

¹¹² Department of Homeland Security, “Acting Secretary McAleenan Announces Designation of Poland into the Visa Waiver Program,” press release, November 6, 2019, at <https://www.dhs.gov/news/2019/11/06/acting-secretary-mcaleenan-announces-designation-poland-visa-waiver-program>.

¹¹³ Based on CRS discussion with DHS representatives about the VWP, January 30, 2020.

and pay for a visa), and because membership in the program is often perceived as evidence of close ties with the United States.¹¹⁴

EU and Reciprocity

Of the European Union's 27 member states, 4 are not VWP countries (Bulgaria, Croatia, Cyprus, and Romania). A visa is required for citizens from non-VWP EU countries wishing to travel to the United States, whereas, under EU law, no EU country requires visas of U.S. citizens for stays up to 90 days.¹¹⁵ The EU contends that "visa reciprocity is a fundamental principle of the European Union's common visa policy" and has long urged the United States to admit all EU member states to the VWP.¹¹⁶ The lack of short-term, visa-free privileges for all EU member states has been a point of contention between the United States and the EU for many years.

In January 2014, a revised EU visa reciprocity mechanism entered into force, aimed at injecting greater momentum into EU efforts to achieve full visa reciprocity with countries, such as the United States, whose citizens can travel to the EU for short-term business or tourism without a visa. The EU considered suspending its visa waiver for U.S. nationals in 2017 but decided not to do so.¹¹⁷ The United States remains the only country on the EU's visa-free list that does not fully reciprocate.¹¹⁸

Overstays

Some maintain that the nonimmigrant visa refusal rate is "not sufficiently probative" of a country's eligibility because it is based on decisions made by consular officers rather than on the behavior of nonimmigrants.¹¹⁹ When the program was conceived, planners expected that the number of nonimmigrants who overstay the terms of their entry under this program would be a better standard for future program participation, but it was not used at the time because of the lack of reliable data on overstays. Using biographic departure information from passenger manifests,

¹¹⁴ In 2005, the George W. Bush Administration began providing countries interested in joining the VWP with "road maps" to aid the countries in meeting the program's criteria. Some of the countries complained that since the "road maps" did not contain milestones or time tables, it was difficult to measure the amount of progress made toward fulfilling the criteria for VWP membership. There were 13 "road map" countries: Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, South Korea, Latvia, Lithuania, Malta, Poland, Romania, and Slovakia. Eight of these countries have been admitted to the VWP. For a discussion of the current "road map," or "aspiring" VWP countries, see CRS Report R46300, *Adding Countries to the Visa Waiver Program: Effects on National Security and Tourism*.

¹¹⁵ For a discussion of EU visa policy, see European Commission, *Visa Policy*, at https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en.

¹¹⁶ European Commission, "Visa non-reciprocity: Commission takes stock of progress and developments," press release, December 18, 2018, at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6821.

¹¹⁷ European Commission, "Visa Reciprocity: Commission responds to Parliament," press release, May 1, 2017, at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1148. However, in 2018, the European Union (EU) announced that before travel, visitors to the Schengen Area from all visa-free countries would need to complete an online application similar to the U.S. ESTA system, and they will be required to pay a fee of €7 to use the European Travel Information and Authorization System (ETIAS). ETIAS will apply to people traveling to all 26 countries currently in the Schengen Area (the majority of which are EU member states) and EU countries Croatia, Cyprus, Bulgaria, and Romania, which are expected to join the Schengen Area in the future. ETIAS is expected to be operational in early 2021. An approved ETIAS will be valid for three years or the date of passport expiration (whichever happens first), and it can be used for stays for up to 90 days.

¹¹⁸ For more background, see CRS Report RS22030, *U.S.-EU Cooperation Against Terrorism*.

¹¹⁹ U.S. Congress, House Committee on the Judiciary, *Visa Waiver Permanent Program Act*, report together with additional views to accompany H.R. 3767, 106th Cong., 2nd sess., H.Rept. 106-564 (Washington, DC: GPO, 2000), p. 32.

DHS has calculated overstay rates for all VWP countries (as well as other countries). Nonetheless, this method of measuring overstays has limitations because persons entering by air or sea but exiting at a land port of entry may be mischaracterized as overstays.¹²⁰

In January 2016, DHS released its first report on overstay rates.¹²¹ In a subsequent report on FY2018 overstays, all the VWP countries had overstay rates of less than 0.5%. In contrast, the worldwide overstay rate for non-VWP countries in FY2018 was 2%.¹²²

Although the refusal rate was seen as an alternative to the overstay rate when the program was conceived, people are denied visas for reasons other than being unable to prove that they will not remain illegally in the United States (i.e., they are *intending immigrants*).¹²³ During the visa application process, consular officers¹²⁴ must confirm that an alien is not ineligible for a visa under any of the *grounds of inadmissibility* of the INA, such as having a criminal history, engaging in terrorist activity, or having previously violated U.S. immigration law.¹²⁵ Although most B visa denials are because the alien cannot prove that he or she is not an intending immigrant, there are other reasons a person could be denied a visa that are captured as part of a country's visa refusal rate.

Legislation in the 116th Congress

The Further Consolidated Appropriations Act of 2020 (P.L. 116-94) extended the authority for Brand USA, a public-private travel promotion entity, to receive fees from the VWP through the end of September 2027 and raises the ESTA fee, as described above in “Electronic System for Travel Authorization (ESTA).” The private sector still must provide at least \$100 million per year in in-kind contributions and cash to the Brand USA program in order for it to receive these federal funds. The effective date of the new ESTA fee has not yet been announced.

Multiple proposals introduced in the 116th Congress aim to give DHS greater flexibility to designate countries that do not meet the criteria discussed above into the VWP. Representative Mike Quigley introduced the Jobs Originated through Launching Travel (JOLT) Act (H.R. 2187), which would reinstate DHS's authority to grant a waiver for the nonimmigrant visitor visa refusal rate. The bill would also change the name of the VWP to “Secure Travel Partnership.”¹²⁶ H.R.

¹²⁰ For example, a 2019 GAO report says there are “existing limitations in collecting departure data in the land environment.” See GAO, *Department of Homeland Security: Review of the Fiscal Year 2017 Entry/Exit Overstay Report*, GAO-19-298R, February 22, 2019, p. 3, at <https://www.gao.gov/products/GAO-19-298R>.

¹²¹ See, Department of Homeland Security, *Entry/Exit Overstay Report, Fiscal Year 2015*, January 19, 2016, at <http://www.dhs.gov/publication/entryexit-overstay-report>. An annual report on overstays was originally mandated by Congress in 1998 (P.L. 105-173, codified at 8 U.S.C. §1376), and Congress required the report again in P.L. 114-113.

¹²² Department of Homeland Security, *Fiscal Year 2018 Entry/Exit Overstay Report*, at https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf.

¹²³ INA §214(b) generally presumes that all aliens seeking admission to the United States are coming to live permanently; as a result, aliens seeking to qualify for a B visa (and most other nonimmigrant visas) must demonstrate that they are not coming to reside permanently in the United States. CRS Report R45040, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*.

¹²⁴ Determinations of inadmissibility are also made by CBP officers at ports of entry.

¹²⁵ The so-called grounds of inadmissibility under INA §212(a) include health-related grounds; criminal history; security and terrorist concerns; public charge (e.g., indigence); seeking to work without proper labor certification; illegal entrants and immigration law violations; ineligibility for citizenship; and aliens who are illegally present or have previously been removed.

¹²⁶ Unrelated to the VWP, H.R. 2187 would also allow Canadians over age 50 entering on tourist visas who own or have rented property in the United States to be admitted for up to 240 days. Currently, the maximum duration of stay

1996, also introduced by Representative Quigley, would solely rename the VWP to “Secure Travel Partnership.” Representative Dan Lipinski introduced the Allied Nations Travel Modernization Act (H.R. 2946), which would allow countries to be designated into the VWP if, instead of a low nonimmigrant visitor visa refusal rate, they have a low visa overstay rate and agree to spend 2% of their gross domestic product on defense;¹²⁷ according to Representative Lipinski, the bill was drafted “to create an alternative pathway into the program for NATO nations like Poland.”¹²⁸ As noted above, Poland was designated into the VWP on November 6, 2019. Both bills were referred to the Subcommittee on Immigration and Citizenship.

One proposal in the 116th Congress seeks to deter VWP overstays. Senator John Cornyn introduced the Humanitarian Upgrades to Manage and Assist our Nation’s Enforcement (HUMANE) Act of 2019 (S. 1303). Among other provisions, the bill endeavors to reduce VWP overstays by amending the INA’s terms and conditions of admission for VWP travelers, the VWP waiver of rights, and the detention and repatriation of visa waiver violators. This bill was referred to the Committee on the Judiciary.

Another proposal would address the spending of funds generated from ESTA fees. Senator Mike Enzi introduced the Responsibly Enhancing America’s Landscapes Act (S. 2783), which would establish the National Park Service Legacy Restoration Fund to help with the backlog of maintenance projects in national parks. This fund would be paid for by a \$16 ESTA fee along with a \$25 nonimmigrant visitor visa fee and a \$5 park entrance fee. This bill was referred to the Committee on the Judiciary.

on a tourist visa is 180 days. Additionally, H.R. 2187 includes sections related to visa processing, such as developing a secure remote videoconferencing program for visa interviews.

¹²⁷ For more information, see North Atlantic Treaty Organization, “Wales Summit Declaration,” press release, September 5, 2014, at https://www.nato.int/cps/en/natohq/official_texts_112964.htm?selectedLocale=en.

¹²⁸ Congressman Dan Lipinski, “Lipinski Praises Step Forward Towards Admitting Poland to the Visa Waiver Program as Polish President Visits U.S.,” press release, June 13, 2019, at <https://lipinski.house.gov/press-releases/lipinski-praises-step-forward-towards-admitting-poland-to-the-visa-waiver-program-as-polish-president-visits-us/>.

Appendix. Legislative History and Selected Administrative Action

Visa Waiver Pilot Program

The Visa Waiver Program was established initially as a temporary program (Visa Waiver Pilot Program) by the Immigration Reform and Control Act of 1986 (P.L. 99-603). To become a program country under the pilot program, a country must have offered reciprocal privileges to U.S. citizens and have had an average nonimmigrant visa refusal rate of 2% or less for the previous two years with neither year's refusal rate exceeding 2.5%. Participation in the pilot program was originally limited to up to eight countries.¹²⁹ Since the establishment of the pilot program, Congress has periodically passed legislation to extend the program's authorization, expand the number of countries allowed to participate in the program, and modify the qualifying criteria. Between 1986 and 1997, Congress passed five bills that were subsequently signed into law that made changes to the Visa Waiver Pilot Program:

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

The pilot visa waiver program was scheduled to expire on September 30, 1997, but short-term extensions were included in the Continuing Resolutions passed in the 105th Congress.¹³⁰ The Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998 (P.L. 105-119) contained an extension of the program through April 30, 1998. In 1998, Congress passed legislation (P.L. 105-173) that not only extended the program through April 30,

¹²⁹ 8 U.S.C. §1187, amendments.

¹³⁰ An extension of the pilot program was included in the first Continuing Resolution (P.L. 105-56 §117) for FY1998. The five subsequent Continuing Resolutions—P.L. 105-64, P.L. 105-68, P.L. 105-69, P.L. 105-71, and P.L. 105-84—simply extended the expiration date of the provisions in the first Continuing Resolution for FY1998 (P.L. 105-56).

2000, but made other changes to the standard by which countries are selected (designated) to participate in the VWP.¹³¹ By 1999, program participation had grown to include 29 countries.¹³²

Visa Waiver Permanent Program Act

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law (P.L. 106-396). The statutory authority for the Visa Waiver Pilot Program had expired on April 30, 2000, but in the interim, the Commissioner of the former Immigration and Naturalization Service (INS)¹³³ exercised the Attorney General’s parole authority to extend the program temporarily.¹³⁴ Besides making this program’s authorization permanent, the Visa Waiver Permanent Program Act included provisions designed to strengthen documentary and reporting requirements. P.L. 106-396 included provisions that

- mandated that by October 1, 2007, all entrants under the VWP must have machine-readable passports;
- required that all VWP applicants be checked against lookout systems;
- required ongoing evaluations of participating countries (not less than once every five years);
- required the collection of VWP arrival/departure data at air and sea ports of entry; and
- required that the calculation of visa refusal rates for determining country eligibility shall not include any refusals based on race, sex, or disability.¹³⁵

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

USA PATRIOT Act of 2001

The USA PATRIOT Act (P.L. 107-56), signed into law on October 26, 2001, shortened the time frame for all entrants under the VWP to have machine-readable passports to October 1, 2003, but allowed the Secretary of State to waive this requirement until October 1, 2007, if the VWP country could show that it was making progress toward issuing machine-readable passports. In

¹³¹ Originally, to qualify for the Visa Waiver Pilot Program countries needed to have had an average nonimmigrant visa refusal rate of no more than 2% over the past two fiscal years with neither year going above 2.5%. P.L. 105-173 added the criteria that a country could have a nonimmigrant visa refusal rate of less than 3% for the previous year and qualify for the program.

¹³² The 29 countries were: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay. Argentina was removed from the VWP in February 2002, and Uruguay was removed in April 2003. From April 2003 until November 2008, the VWP included 27 countries. As of March 2020, there are 39 countries participating in the VWP.

¹³³ The Homeland Security Act of 2002 (P.L. 107-296) abolished the Immigration and Naturalization Service (INS) and effective March 1, 2003, transferred most of its functions to three bureaus in the new Department of Homeland Security (DHS): Citizenship and Immigration Services (USCIS); Immigration and Customs Enforcement (ICE); and, Customs and Border Protection (CBP).

¹³⁴ Parole is a temporary authorization to enter the United States and is normally granted when the alien’s entry is determined to be in the public interest (INA §212(d)(5)(A)).

¹³⁵ Many of these requirements were included to address shortcomings in the program, as identified by the Inspectors General of both the Departments of Justice and State.

addition, the USA PATRIOT Act directed the Secretary of State to ascertain, each year until 2007, that VWP countries had established programs to develop tamper-resistant passports.

On September 24, 2003, the Secretary of State extended the deadline for visitors from 21 VWP countries to present a machine-readable passport at the ports of entry until October 26, 2004.¹³⁶

Enhanced Border Security and Visa Entry Reform Act of 2002

The Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act),¹³⁷ signed into law on May 14, 2002, required all VWP countries to certify that they report in a timely manner the theft of blank passports, and required, prior to admission to the United States, that all aliens, including those who enter under the VWP, are checked against a lookout system. The act also mandated that by October 26, 2004, the government of each VWP country needed to certify that it has established a program to issue to its nationals machine-readable passports that are tamper-resistant and incorporate a biometric identifier.¹³⁸ The act specified that any person applying for admission to the United States under the VWP must have a tamper-resistant, machine-readable passport with a biometric identifier unless the passport was issued prior to October 26, 2004. The USA PATRIOT Act established the deadline for all foreign nationals entering under the VWP to have machine-readable, tamper-resistant passports, and the new requirement of biometrics in the passports did not change the deadline in the USA PATRIOT Act for the presentation of machine-readable, tamper-resistant passports. The biometric passport requirement deadline was extended to October 26, 2005, by P.L. 108-299.¹³⁹ Thus, as of October 27, 2005 (the day after the new deadline), all entrants under the VWP were required to present machine-readable, tamper-resistant passports (as required by the USA PATRIOT Act, and P.L. 108-299), but only passports issued after October 26, 2005, were required to have a biometric identifier.

Although Congress extended the deadline for VWP countries to certify that they had a program to issue machine-readable passports with biometric identifiers, most VWP countries would have been unable to meet the new, October 26, 2005, deadline, especially if the biometric requirement could only have been fulfilled by countries who had electronic data chips in their passports (e-passports). In addition, there was resistance in Congress to grant another extension of the biometric deadline.¹⁴⁰ As a result, the U.S. government clarified that a digitized photograph printed on a data page in the passport would count as a biometric for the October 26, 2005, requirement. Only France and Italy were unable to meet the new deadline, but have since come

¹³⁶ The 21 countries granted a postponement were: Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom. On November 11, 2003, Luxembourg was granted an extension of the deadline. Five VWP countries (Andorra, Brunei, Liechtenstein, Luxembourg, and Slovenia) were eligible to receive and extension but did not request one because “all of their citizens already have machine-readable passports.” Belgium was not eligible to receive an extension, as DOJ had already required their citizens to present machine-readable passports as of May 15, 2003 (see footnote 36). U.S. Department of State, “Machine-Readable Passports for Visa Waiver Program Travel Postponed,” press release, September 23, 2003, at <https://2001-2009.state.gov/r/pa/prs/ps/2003/24407.htm>.

¹³⁷ P.L. 107-173. The original bill, H.R. 3525, was sponsored by Representative F. James Sensenbrenner.

¹³⁸ The act tasked the International Civil Aviation Organization (ICAO) with developing the biometric standard.

¹³⁹ Signed into law on August 9, 2004.

¹⁴⁰ For example, see letter from Rep. F. James Sensenbrenner, Jr., to Luc Frieden, President of the European Council of Ministers, and Franco Frattini, Vice-President of the European Commission, April 7, 2005.

into compliance. In addition, any passports used by VWP travelers issued after October 26, 2006, requires integrated chips with information from the data page (e-passports).

The Intelligence Reform and Terrorism Prevention Act of 2004

P.L. 108-458,¹⁴¹ the Intelligence Reform and Terrorism Prevention Act of 2004, added the requirement that by October 26, 2006, as a condition of being in the VWP, each VWP country must certify that it is developing a program to issue tamper-resistant, machine-readable visa documents that incorporate biometric identifiers which are verifiable at the country's port of entry.

Implementing the 9/11 Commission Recommendations Act of 2007

Signed into law on August 3, 2007, Section 711 of P.L. 110-53 (H.R. 1) required the Secretary of Homeland Security, no later than one year after enactment, to establish an exit system that records the departure of every alien who entered under the VWP and left the United States by air. The exit system is required to match the alien's biometric information against relevant watch lists and immigration information, and compare such biographical information against manifest information collected by airlines to confirm that the alien left the United States.¹⁴²

P.L. 110-53 also allows the Secretary of Homeland Security, in consultation with the Secretary of State, to waive the nonimmigrant visa refusal rate requirement for admission to the VWP on the date on which the Secretary of Homeland Security certifies to Congress that an air exit system is in place that can verify the departure of not less than 97% of foreign nationals who exit through U.S. airports. In addition, the Secretary of Homeland Security also had to certify to Congress that the electronic travel authorization system (discussed below) was operational, prior to being able to waive the nonimmigrant visa refusal rate requirement.

When P.L. 110-53 took effect, the Secretary of Homeland Security could waive the nonimmigrant refusal rate even if the air exit system did not yet incorporate biometric identifiers. However, if after June 30, 2009, the air exit system was unable to match an alien's biometric information with relevant watch lists and manifest information, the Secretary of Homeland Security's authority to waive the nonimmigrant visa refusal rate would be suspended until the air exit system had the specified biometric capacity.

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

- meet all the security requirements of the program;
- be determined by the Secretary of Homeland Security to have a totality of security risk mitigation measures that provide assurances that the country's participation in the program would not compromise U.S. law enforcement and security interests, or the enforcement of U.S. immigration laws;
- have had a sustained reduction in visa refusal rates and have existing conditions for the rates to continue to decline;

¹⁴¹ The original bill, H.R. 2845, was sponsored by Senator Susan M. Collins and signed into law on December 17, 2004.

¹⁴² This exit system is not necessarily the same as the exit system required for the nonimmigrant visa refusal rate waiver authority. DHS appears to have incorporated this requirement as part of the exit portion of automated entry and exit data system known as US-VISIT.

- have cooperated with the United States on counterterrorism initiatives and information sharing before the date of its designation and be expected to continue such cooperation; and
- have, during the previous fiscal year, a nonimmigrant visa refusal rate of not more than 10%, or an overstay rate that did not exceed the maximum overstay rate established by the Secretaries of Homeland Security and State for countries receiving waivers of the nonimmigrant visa refusal rate to participate in the VWP the program.

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

In addition, P.L. 110-53 made several changes to the criteria to qualify as a VWP country, which were intended to enhance the security of the program. As previously mentioned, the act mandated that the Secretary of Homeland Security, in consultation with the Secretary of State, develop and implement an electronic travel authorization system,¹⁴³ through which each alien electronically provides, in advance of travel, the biographical information necessary to determine whether the alien is eligible to travel to the United States and enter under the VWP. Aliens using the system are charged a fee that is required to be set at a level so that the cost of creating and administering the system is covered by those fees.

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

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

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

¹⁴³ The system as implemented is known as the Electronic System for Travel Authorization (ESTA).

Obama Administration Initiated VWP Security Enhancements

In August and November 2015, the Obama Administration announced a series of changes to the VWP to enhance security. Some of the Administration’s changes were codified by the Visa Waiver Program Improvement and Terrorist Travel Prevention Act (P.L. 114-113). See below for a full discussion of the legislation.

In August 2015, the then-Secretary of Homeland Security Jeh C. Johnson announced an intention to implement new security measures in the VWP.¹⁴⁴ Most significant among them were

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

In November 2015, the Obama Administration announced more changes to the VWP meant to enhance national security. These changes included

- modifying ESTA to capture information regarding any past travel to countries constituting a terrorist safe haven;
- accelerating the review process for VWP countries;
- requiring, within 60 days, that DHS report to the President on possible pilot programs designed to assess the collection and use of biometrics (fingerprints, photographs, or both) and on any countries that are deficient in key areas of cooperation, along with recommended options to engender compliance;
- requiring, within 60 days, that the Federal Bureau of Investigation (FBI) provide an evaluation to the President on the terrorism information sharing that occurs between the United States and VWP countries and identify options to mitigate any deficiencies;
- offering assistance to countries to better facilitate terrorism information sharing, specifically to include the use of biometrics¹⁴⁵ and deploying “Foreign Fighter Surge Teams” to work with countries to counter terrorist travel; and
- expanding and promoting the use of the Global Entry program (a trusted traveler program),¹⁴⁶ which includes biometric checks within VWP countries.

¹⁴⁴ Department of Homeland Security, “Statement by Secretary Jeh C. Johnson on Intention to Implement Security Enhancements to the Visa Waiver Program,” press release, August 6, 2015, <https://www.dhs.gov/news/2015/08/06/statement-secretary-jeh-c-johnson-intention-implement-security-enhancements-visa>.

¹⁴⁵ One proposed example of this assistance includes having DHS and the FBI’s Terrorist Screening Center (TSC) assist interested VWP countries in screening refugees or asylum seekers, utilizing the terrorism information already provided to VWP countries, and by piloting programs to conduct “near real time” biometric checks. The TSC maintains the U.S. government’s consolidated Terrorist Screening Database often referred to as the Terrorist Watchlist. Federal Bureau of Investigation, *About the Terrorist Screening Center*, <https://www.fbi.gov/about-us/nsb/tsc/about-the-terrorist-screening-center>.

¹⁴⁶ As of July 11, 2019, the Global Entry program is available to citizens of Argentina, Australia, Canada, Colombia, Germany, India, Mexico, New Zealand, Panama, Republic of Korea (South Korea), Singapore, Switzerland, and Taiwan (see CBP, *Global Entry: International Arrangements*, at <https://www.cbp.gov/travel/trusted-traveler-programs/global-entry/international-arrangements>). For a discussion of the Global Entry program, see CRS Report R43356,

The Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015

The Visa Waiver Program Improvement and Terrorist Travel Prevention Act (H.R. 158) was passed by the House on December 8, 2015, and enacted as part of the Consolidated Appropriations Act of 2016 (P.L. 114-113) on December 18, 2015.

P.L. 114-113 requires, as of April 1, 2016, that all foreign nationals traveling under the VWP present an electronic passport (e-passport) that is fraud resistant and incorporates biographic and biometric information (as determined by the Secretary of Homeland Security). No later than October 1, 2016, each VWP country had to certify that it had in place mechanisms to validate machine-readable passports and e-passports at each port of entry. This requirement does not apply to travel between countries within the Schengen Area.¹⁴⁷

The act also prohibited people who were present in certain countries on or after March 1, 2011, from traveling under the VWP. The specified countries include

- Iraq and Syria;
- any country designated by the Secretary of State as having repeatedly provided support for acts of international terrorism under any provision of law,¹⁴⁸ or
- any other country or area of concern¹⁴⁹ deemed appropriate by the Secretary of Homeland Security.

In addition, anyone who is a dual national of a VWP country and one of these specified countries is ineligible to travel under the VWP. Importantly, the VWP only applies to foreign nationals coming to the United States; it does not impact U.S. citizens, even those with dual nationality. In other words, dual U.S.-Iranian, U.S.-Iraqi, U.S.-Sudanese, or U.S.-Syrian citizens still do not need a visa to travel to the United States. If the Secretary of Homeland Security determines that the foreign national was in one of the specified countries in order to perform military service in the armed forces of a VWP country or to perform official duties as an employee of the VWP country, the prohibition on traveling under the VWP does not apply. Similarly, P.L. 114-113 gives the Secretary of Homeland Security the authority to waive the prohibition on travel under the VWP if the Secretary determines that the waiver would be in the law enforcement or national security interests of the United States. The Secretary of Homeland Security is required to submit an annual report to Congress on each instance where the waiver authority was exercised.

Likewise, P.L. 114-113 amended the lost or stolen passports reporting requirement to require countries to report lost or stolen passports to the United States or make the information available

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¹⁴⁷ The Schengen Area enables citizens of the European Union (EU), as well as many non-EU nationals, to cross select international borders in Europe without being subject to border checks. See European Commission, *Migration and Home Affairs: Schengen Area*, November 13, 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm.

¹⁴⁸ Examples of acts that use the term “repeatedly provided support for acts of international terrorism,” include §6(j) of the Export Administration Act of 1979 (50 U.S.C. 2405), §40 of the Arms Export Control Act (22 U.S.C. 2780), and §620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371). Currently, these countries are Iran, Sudan, and Syria.

¹⁴⁹ The Secretary of Homeland Security, in consultation with the Director of National Intelligence, is required to make this determination within 60 days of enactment. The criteria to make the determination would include whether the presence of a foreign national in that area or country increases the likelihood that the foreign national is a credible threat to U.S. national security, whether a foreign terrorist organization has a significant presence in the area or country, and whether the country or area is a safe haven for terrorists.

through INTERPOL no later than 24 hours after a theft or loss is reported to the VWP country. The act also required, no later than September 13, 2016,¹⁵⁰ that each program country with an international airport certify, to the maximum extent allowed under the laws of the country, that it is screening each foreign national who is admitted to or departs from that country, using relevant INTERPOL databases and notices or other means designated by the Secretary of Homeland Security. Consequently, a country that fails to screen foreign nationals arriving in or departing from that country will be terminated from the VWP. This screening requirement does not apply to those traveling between countries within the Schengen Area.

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

The act also requires that DHS report biennially to Congress on the national security threat posed by each program country.¹⁵¹ The Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Secretary of State, is also required to annually evaluate program countries based on specified criteria¹⁵² and to identify any country for which nationals of that country present a “high risk” to U.S. national security.¹⁵³ The Secretary of Homeland Security, in consultation with the Secretary of State, can suspend a program country based on a determination that the country presents a high risk to U.S. national security.

P.L. 114-113 allows the Secretary of Homeland Security to shorten the validity period of any ESTA determination, in addition to revoking the determination. The Secretary of Homeland Security is also required to collect information, through ESTA, on an applicant’s previous or multiple citizenships and to research opportunities to incorporate into ESTA technology to detect and prevent fraud or deception.

The act also requires DHS to report annually on the number of individuals (identified by citizenship) who were denied eligibility to travel under ESTA or whose eligibility to travel was revoked because they were determined to represent a security threat to the United States.¹⁵⁴ Additionally, DHS was required to report within 30 days from December 18, 2015, on ways to strengthen the ability of ESTA to prevent terrorists and instruments of terrorism from entering the United States.

The act requires DHS, in consultation with the Department of State, to provide assistance, in a risk-based manner, to non-VWP countries to assist the countries in submitting information on lost

¹⁵⁰ This is 270 days after the enactment of P.L. 114-113.

¹⁵¹ The first of such reports would be due 90 days after the bill is enacted.

¹⁵² The criteria include the number of nationals determined to be ineligible to travel to the United States under the VWP during the previous year; the number of nationals who were identified in U.S. government terrorism databases during the previous year; the estimated number of nationals who traveled to Iraq or Syria since March 1, 2011, to engage in terrorism; the country’s capacity to combat passport fraud; the level of cooperation with U.S. counter-terrorism efforts; the adequacy of the country’s border and immigration controls; and any other criteria determined by the Secretary of Homeland Security.

¹⁵³ The first report would be due 60 days after enactment.

¹⁵⁴ The first report would be due 30 days after enactment.

or stolen travel documents to INTERPOL and issuing and validating e-passports at ports of entry. The act also contained Sense of Congress language that the International Civil Aviation Organization (ICAO)¹⁵⁵ is expected to establish standards for e-passports and obligate the 191 member countries to utilize e-passports as soon as possible.

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¹⁵⁵ The International Civil Aviation Organization (ICAO) is a United Nations specialized agency established to manage the administration and governance of the Convention on International Civil Aviation. The ICAO works with Convention Member States and industry groups to reach consensus on international civil aviation standards and practices. International Civil Aviation Organization, *About ICAO*, at <https://www.icao.int/about-icao/Pages/default.aspx>.