



December 4, 2007

Border Security Regulations Branch
Office of International Trade
U.S. Customs and Border Protection
1300 Pennsylvania Ave., NW (Mint Annex)
Washington, DC 20229

RE: Docket No. USCBP-2007-0064

To whom it may concern:

The Experimental Aircraft Association (EAA), the world leader in recreational aviation, represents a diverse international membership of more than 170,000 pilots, aircraft owners and aviation enthusiasts who are dedicated to the continued growth of aviation, the preservation of its history and the advancement of aviation's future. EAA programs, activities and events are known throughout the world for supporting aviation safety and promoting personal enjoyment and responsibility. These efforts are made possible through massive volunteer involvement in support of the organization, EAA's special interest divisions, a global network of nearly 1,000 local chapters, and the affiliated National Association of Flight Instructors (NAFI).

EAA members build, own, maintain, and operate tens of thousands of aircraft spanning the full spectrum of aeronautical vehicles including ultralights, amateur-built aircraft, restored historic military aircraft, antique, classic and vintage aircraft, traditional general aviation aircraft manufactured in large volume and corporate business class turboprops and jets. These aircraft, of every description and performance capability, are operated almost exclusively for recreation, and personal business use. A large number of EAA members travel abroad in their aircraft with great regularity most frequently to Canada, Mexico, the Bahamas and other island nations in the Caribbean.

General Comments

EAA understands the desire and operational necessity for Customs and Border Protection and, more broadly, the Department of Homeland Security to obtain complete and accurate information regarding the disposition, contents, and passenger manifest of private aircraft entering the territorial United States. We also understand that this regulatory initiative is in direct response to a mandate from the U.S. Congress. As such EAA does not outright oppose the spirit and intent of this rulemaking proposal.

However, we feel that the procedures for private aircraft and their pilots, as outlined in this proposal, do not in any way take into account in a realistic manner the operational environment encountered when personal aircraft are used for the conduct of international flights. *This is particularly true when these flights operate into and out of undeveloped or underdeveloped airports and/or unimproved landing facilities in foreign countries, as is very often the case.*

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EAA concerns center on six primary areas:

- 1) The requirement for **electronic submission** of arrival and departure notifications and manifests **ignores the practical reality of international flight in general aviation aircraft**. More often than not in the areas light aircraft frequent during the course of international travel there is no landline telephone capable of international calling; no cellular phone coverage; and no Internet access. The idea that submissions must be made and approvals returned via electronic data means is completely out of the question.
- 2) The potential **operational conflict between FAA communication** and flight planning requirements **and the newly proposed DHS notification** and manifest approval requirements **will likely result in operational delays, significant inconvenience, safety risks, and costs that have not been addressed in the regulatory analysis**. Some of the requirements such as advance notice of transponder codes are impossible given that codes are not issued until flight plan clearances are issued by the FAA or the appropriate international Civil Aviation Authority (CAA).
- 3) The **lack of flexibility** inherent in the proposed procedures in terms of method of communication, **inability to modify plans** in flight due to weather or other safety concerns, **and the rigidity of having to file and adhere to a 24-hour itinerary presents a significant safety threat** that can neither be justified nor has been addressed in the proposal.
- 4) The proposal does not adequately address what a pilot is supposed to do when either their arrival or departure notification or manifest has been denied. As the rule is written today, **there is no means for adjudicating and resolving any entry or departure denial, no advice or counsel to the pilot** on what they are to do if one of their passengers is denied entry (provided they are even told who it is), **and no means for resolving the fact that they and their passengers are potentially stranded in a foreign country** (perhaps exceeding their visa duration) on the basis of nothing but a nameless and faceless electronic denial on a computer screen.
- 5) The **proposal holds the pilot legally responsible for the timely and accurate submission** of all notification and manifest data, **but does not indicate what civil or criminal liability the pilot may incur should any of the data provided by the passengers to the pilot prove to be incorrect**.

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- 6) EAA members are **strongly opposed to the requirement for departure notifications and manifests when taking off domestically for travel abroad** and fail to see the justification for such a requirement. These departures are viewed as being no different than any other domestic departure in terms of security and the sensitivity of who or what is on board the aircraft. It seems that this proposal has the potential to be a prelude for a required process of notification and manifest approval for domestic flights, an invasion of privacy and impingement on the freedom of movement within this country that is entirely unacceptable for any means of private personal use transportation.

Communications

The primary benefit of flying personal aircraft on international flights is the flexibility to operate to and from a diverse number of departure and arrival locations not served by commercial aviation or even perhaps any other mode of transportation. More often than not, general aviation flights involve arrival and departure from foreign landing facilities that do not have improved landing strips or manned facilities, let alone international telephone, internet and cell phone coverage. This operational reality has long been acknowledged by the Federal Aviation Administration (FAA), which consequently maintains and staffs a variety of communications methods to accommodate the diverse operational and geographic needs of general aviation for the purposes of communicating U.S. Customs entry and flight planning procedures for international flights.

Historically, the FAA has been a single source of contact for both flight plans and entry notifications and this sole link has been vital to the success of general aviation international operations. Yet even with the efforts made by the FAA to address the operational constraints of general aviation in remote areas by accommodating telephonic and radio notifications and ongoing communications, it is still at times very difficult to establish contact in order to comply with the flight plan and Customs notification requirements as they exist today. Indeed, even with the flexibility offered by the FAA for methods and timing of communication and approval, pilots operating from remote locations often have to go to extreme lengths just to establish two-way communication due to lack of radio coverage, the unavailability of landline telephones from which an international call could be placed, or cell phone coverage.

EAA members report that it is very common when traveling from remote locations that the only means of filing a flight plan and providing the one-hour customs notification is to climb to extremely high altitudes (for these light aircraft) outside the territorial border of the U.S. in order to establish two-way radio communication (the only method available), file the necessary flight plan and Customs notification, then circle aimlessly outside the country while burning off an hour of flight time before crossing the border. Given this reality, we can see no way that the

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proposed notification, manifest and approval process could possibly work via electronic data means and in the timeframe desired. **The idea that somehow Internet access would be available in these remote locations (including grass landing strip, lakes, and remote unimproved landing sites) is entirely unrealistic.**

In discussion between EAA and DHS/USCBP management and personnel, one proposed alternative to this problem proposed by DHS would be to require personal use aircraft to transit through portal airports where internet access would be available for the transmission and approval of arrival/departure notices and manifests. EAA is patently opposed to this concept in that it entirely eliminates the flexibility, utility, and benefit of operating personal aircraft on international flights. If pilots and passengers of general aviation aircraft must transit the border via large portal international and domestic airports, they might as well travel via the commercial air carriers that already serve those airports. Further, this proposal does not address the fact that several countries and their Civil Aviation Authorities prohibit/restrict general aviation aircraft from operating at large portal international airports, so using these airports as an alternative method for finding internet access is, in many instances, not a viable option.

Under this scenario, the very benefit of being able to operate in and out of small and unimproved landing facilities in diverse locations and the flexibility of an open travel itinerary is entirely lost. Of course under this proposal light general aviation aircraft would be free to move from the portal airports to other outlying facilities once clearance (and possible landing rights) has been obtained; however, the amount of time and distance required to comply with such a requirement would be entirely unreasonable. Most piston general aviation aircraft fly 100 and 150 knots meaning that many hours and possibly days of flight time and travel could be added to an international itinerary (particularly if there is any weather to be avoided) flying long distances off of the planned route to land at an airport with internet access prior to departure from the U.S. or a foreign country. This is an expense and safety risk that in no way was accounted for in the regulatory analysis for the proposal. It would present an unacceptable burden in terms of direct operating costs, additional travel expenses, substantial addition of distance and time in the air, much of it over remote or uninhabited areas or water, and the consequent added safety risk presented by extending the duration of such operations.

EAA maintains that DHS and FAA need to collaborate in developing a system of notification and approval that involves a single point of contact for the submission of flight plans, arrival and departure notifications and passenger manifests. Further, EAA urges in the strongest terms that compliance with these requirements be permitted by any available means of communication including telephone, fax, internet and two-way radio in-flight communication.

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With fully 40% of all general aviation international arrivals occurring at 233 of the smallest entry airports in the country it should be clear to DHS how widespread and remote GA operations can be. The proposal does not make any attempt to determine from where outside the country the 138,559 international GA flights originated in 2006 but one can imagine that if their arrivals are spreads over 250 airports in the U.S., their points of origin outside the country are virtually limitless. Any system of arrival notification, manifests, flight planning and approval/clearance needs to involve a single point of contact that is available through flexible and varied methods of communication. Further, all government requirements must be compatible in terms of scheduling and timing and be flexible enough to accommodate real time changes necessitated by operational conditions, the FAA, or DHS.

Operational Conflict

The FAA currently requires pilots transiting into the United States to file a VFR or IFR flight plan. In addition, U.S. Customs requires notification of the inbound flight, a transaction that is most often handled by radio in flight via the FAA's air traffic and flight service personnel. This is a fairly smooth process in that it involves a single point of contact via a variety of available communications methods. Equally important is the fact that operationally required changes to the flight itinerary are easily accommodated by communicating with a single point of contact and with no fear of running afoul of security requirements. For example, it is not uncommon for flight plans to be altered in-flight to accommodate weather en-route or at the destination airport.

Similarly, flight plans can be changed for a whole host of reasons from airworthiness and maintenance concerns to operational restrictions such as airport closures (so common in the age of roaming temporary flight restrictions) or inoperative navigational aids or instrument approaches.

Delays in departure from a foreign landing facility or having to land at an intermediate en-route facility to avoid or wait out weather are commonplace. Today the system can handle these realities of light aircraft operation, but under the proposal this process would be dramatically complicated and in fact safety may well be compromised because of pilots being forced to make poor safety decisions in order to comply with security and border crossing requirements.

For example, a pilot might be granted an immediate clearance to depart a foreign or domestic airport to avoid incoming weather yet the pilot would be compelled to wait for an hour for the required security approval forcing him or her into a dangerous weather situation. Or a pilot might need to divert to a different destination while en-route due to weather or other operational concern only to feel trapped into having to continue on to the destination reported to USCBP in the departure or arrival notification. Similarly, the rigidity in the manifest requirements necessitating resubmission and approval for any last minute change (or even incorrect data) sets

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up a scenario for conflict with a flight plan that has already been filed or dangerous conflict with weather while waiting another hour or so seeking a new security approval for entry, departure and/or landing.

Today such scenarios and many others like them are easily accommodated by calling or radioing FAA flight service, announcing the change, and continuing on with the safest and most prudent course of action as is required of all pilots. The USCBP proposal sets up a situation where pilots would be forced to make a choice between the prudent operational and safety decision and running afoul of the nation's security apparatus and the consequent legal and bureaucratic nightmare that typically follows such an event.

Another conflict between FAA procedures and the proposed DHS procedures arises from the requirement to submit the aircraft's transponder code with the arrival/departure notification and manifest. This is impossible because transponder codes are not issued by the FAA or the controlling international CAA until the flight plan clearance is given either just prior to departure or en-route in the air. There is code available to submit to USCBP prior to takeoff and thus no code that can be submitted hours before takeoff. This is a glaring example of how incompatible the proposed entry procedures are with existing flight planning and operational procedures.

- Within the NPRM there is no indication that the DHS/USCBP has started or completed the necessary coordination with the International Civil Aviation Organization (ICAO) or individual foreign country Civil Aviation Authorities (CAA) for them to deviate from their normal standard operating policies/procedures in order to issue transponder codes to U.S. bound general aviation aircraft one-hour prior to takeoff.
- Nor have procedures been established for international CAA's to issue transponder codes by phone or internet to general aviation pilots operating from remote sites that do not have access to air traffic control or flight service communications links/facilities.

EAA maintains that no new departure, arrival or manifest procedures such as outlined in this proposal should be implemented until such time as the FAA and DHS can work out a seamless and transparent procedure whereby flight plans, entry approvals, manifest notification and approval, and subsequent operational changes can be accommodated with a single point of contact through the FAA by the most readily available means to the pilot wherever he or she might be. Implementing a set of USCBP requirements with their own time tables, restrictions, and communications methods independent of, and at times incompatible with, existing FAA requirements and methods is a recipe for significant safety conflict and at a minimum represents a financial and time burden that is in no way addressed or quantified in the proposal's regulatory analysis.

Lack of Itinerary Flexibility

For many of the same reasons outlined above, the requirement for the submission and adherence to a predetermined itinerary for the 24-hour period after crossing the border (arriving or departing) is entirely unrealistic both from an operational flexibility and safety standpoint. It is entirely unreasonable and undesirable to require pilots to rigidly adhere to an itinerary and such a requirement greatly diminishes the utility of general aviation travel. If pilots arrive at a foreign or domestic destination and decide to fly on to another locale later that day or the next, they should not be prohibited from doing so regardless of whether such activity is on a border crossing itinerary. Such activity is very normal and should not be a source of suspicion. It is hard to imagine that a pilot would be precluded from making another flight in their aircraft the same day or day after returning from a foreign trip if they had not anticipated it in advance and placed it on their arrival itinerary, but that seems to be the intent of the proposed requirement. EAA is patently opposed to any such requirement that would unnecessarily restrict the utility or freedom of movement of our members in their personal aircraft.

Similarly, the requirement for a 24-hour itinerary once again locks the pilot into potentially making dangerous decisions such as pressing on in the face of bad weather or maintenance issues in order to adhere to the reported itinerary. This is bad government policy on many levels and EAA strongly opposes any such requirement, particularly when the methods of communicating any change to such an itinerary are so strictly limited to a specific technology that is not universally available.

Pilot Procedures for Denial of Notification or Manifest

The proposal sets forth a number of requirements holding the pilot legally responsible for the completeness, accuracy, and timeliness of all data submitted for entry or departure approval. However, the proposal is entirely silent on what a pilot would be required to do should their proposed electronic manifest and notification be denied or “lost” within the USCBP/DHS system. The proposal does not contemplate a point of contact for conflict resolution nor even provide the pilot with sufficient information to decide what to do next. Indeed, it would appear that a pilot having dutifully submitted an electronic notification and manifest would be stranded for all intents and purposes upon receipt of an electronic denial. How does the pilot resolve the problem? Whom do they contact? How much information will they be provided with in order to resolve the difficulty? How can they ensure that some mistake in identity has not been made? This is simply not acceptable.

Based solely on the information provided in the notice of proposed rulemaking, it would seem that a pilot faced with a nameless and faceless computer-based denial would have no recourse but to remain stranded in the foreign country and contact the U.S. embassy for some form of

assistance - a process that could take days or weeks. The proposal does not address the role played by the U.S. Department of State (i.e., U.S. Embassies) in pilot/passenger vs. USCBP/DHS conflict resolution. The proposed procedures within this NPRM are not acceptable unless these conflict resolution protocols are established and published.

Before any notification, manifest and approval procedures are put in place, pilots need to fully understand what their responsibilities are from a security standpoint and what procedures they can follow to resolve any misunderstandings, so as not to be needlessly delayed or outright stranded abroad. EAA maintains that there needs to be a direct 24-hour point of contact for conflict and denial resolution and that the methods of communication need to be varied and readily available, including two-way radio contact when necessary.

Pilot Liability

The proposal holds the pilot of an international general aviation flight fully responsible for both the timeliness and accuracy of all the information provided for the notifications and manifest. Nowhere does the proposal address what the pilot's liability might be in the event that a deadline is missed or the data is somehow either incomplete or erroneous, even if by no fault of the pilot.

EAA questions what process exists for adjudication of any such issues of noncompliance or error:

- Who is responsible for making the determination of fault and culpability?
- What penalties - either civil, criminal or certificate action - might the pilot be liable for in the event of such an error or omission?
- What process exists to relieve the pilot and passengers of liability in the very possible case of USCBP/DHS error or omission of data that was correctly and accurately submitted?

The proposal is entirely silent on this matter and EAA maintains that everyone involved needs to fully understand the ramifications of any errors or omissions and that there needs to be a fair and equitable means of reviewing such infractions and appealing any decisions made at the agency level should it come to that.

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Departure Notification Requirement

Since publication of the proposal, one comment has been nearly unanimous from EAA members and other pilots and aircraft operators: there is no justification for requiring full notification and manifests for international departures from U.S. soil. Pilots and aircraft owners can well understand why we as a country would want to know who is entering the country via aircraft from overseas from a security standpoint. However, in the mind of nearly every U.S. pilot is the belief that, from a security standpoint, a domestic departure is a domestic departure whether the flight is going to conclude within the U.S. or outside the nation's borders. There is also a strong belief that such a requirement for notification and passenger manifests for a domestic departure heading overseas is but a prelude to a national program to require manifests for all domestic departures within the nation's borders. This is an invasion of privacy and a restriction on the freedom of movement of private citizens using personal transportation that the American public will not stand for any more than they would accept the Federal Government monitoring who is in each passenger car, van, truck, boat, or other personal conveyance and where they are going.

EAA and the general aviation community at large are patently opposed to requirements for departure notification and approval and submission of passenger manifests for any domestic departures regardless of final destination be it domestic or international. No justification has been presented by DHS or the USCBP for such an invasion of privacy or restriction on the free movement of U.S. citizens. We urge the DHS to reconsider this proposal and remove it entirely from any program designed to enhance the security of flights entering the United States.

Conclusion

EAA appreciates the fact that the Department of Homeland Security has given the public the opportunity to review and comment on this proposal prior to implementation and we particularly appreciate the ongoing opportunity to discuss these matters in person with DHS, USCBP and TSA personnel. However, we feel there are significant safety, operational, procedural and legal issues that need to be address before any such program can be implemented. Most notably, we urge in the strongest terms the DHS, FAA, and ICAO to work collaboratively in order to develop a system of notification and approval that works seamlessly with international flight planning and in-flight operational procedures already required of pilots operating to and from the U.S. National Airspace System.

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We stand ready to assist the Department and its various agencies in their quest to improve the security and situational awareness of incoming general aviation flights to the U.S. If there are any questions or concerns, please feel free to contact our Washington, D.C. office at 410-226-5526 and we will be more than happy to work with you and your staff.

Respectfully,

/original signed/

Douglas C. Macnair
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Experimental Aircraft Association (EAA)