



May 15, 2014

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Dear Secretary Johnson,

The American Civil Liberties Union and the National Immigration Law Center urge the Department of Homeland Security (DHS) to accept California's proposed design of a license that may not be used for official federal purposes. The issuance of driver's licenses is a traditional and fundamental state activity. DHS should respect California's judgments to ensure that drivers are not deterred from obtaining licenses and are not discriminated against based on the kind of license they carry.

As you know, an increasing number of states are choosing to issue one or more categories of driver's licenses and/or identification cards that are not acceptable for official federal purposes. While we continue to oppose the Real ID Act and support the many states that have refused to implement its provisions, there is no question that no matter what a state's position is on Real ID generally, this type of license is a permissible option under the act.

Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, to set minimum requirements for state issuance of driver's licenses considered acceptable for certain federal "official purposes." One requirement is that states verify the citizenship or lawful presence of applicants for driver's licenses acceptable for official purposes. Under Sec 202 (d)(11) of REAL ID, states have the option of achieving overall compliance with REAL ID while also issuing driver's licenses that are not acceptable for federal purposes, provided that such a license:

- (A) clearly states on its face that it may not be accepted by any Federal agency for federal identification or any other official purpose; and
- (B) uses a unique design or color indicator to alert Federal agency and other law enforcement personnel that it may not be accepted for any such purpose.

The goal of the markings requirements is to allow federal officials to distinguish between licenses that are acceptable for official purposes and those that are not. AS DHS made clear in its discussion preceding the final REAL ID rule, states have flexibility in meeting the requirements: "DHS will leave the types of marking and unique coloring to the discretion of the individual States, subject to DHS approval as part of the Compliance Package to ensure that DHS officials,

such as TSA screeners, can adequately distinguish between REAL ID-compliant cards and those not intended for official purposes.” 73 FR 5272, 5276 (Jan. 29, 2008).

Consistent with the clear statutory language of the new law it enacted in 2013 (AB 60), California proposed in an April 21, 2014 letter to DHS to meet these requirements by placing a “DP” (for driving privilege) in place of the current “DL” the front of the California license; and stating on the back of the license that “This card is not acceptable for official federal purposes.”

Yet in a recent, letter replying to California’s Department of Motor Vehicles, DHS rejected this proposal by simply reiterating the two requirements under Sec 202 (d)(11) (above). DHS did nothing to specify why California’s proposal does not meet these requirements. However, federal officials have suggested in conversations that the proposal fails to meet the requirement of a clear statement on the “face” of the document, because DHS interprets “face” to mean “front.”

The term “face,” however, is subject to another equally valid meaning. In many contexts, “face” more commonly means the visible appearance of the surface of a document, regardless of whether on the front or the back. See West’s Encyclopedia of American Law (2d Ed. 2008) (defining face as “[t]he external appearance or surface of anything; that which is readily observable by a spectator” See also: Merriam-Webster (2014) (defining face as “outward appearance”; “the aspect of something that is perceptible or obvious upon superficial examination”).

DHS can and should permit California to interpret “face” in this context to mean the clearly visible surface of the document, particularly since this is what matters to federal officials who will screen the document for official purposes. Even if DHS interprets the term more strictly to refer only to the front of the document, California’s proposal to place a “DP” on the front satisfies this requirement, as well as the practical goal of enabling federal officials to recognize the difference.

DHS has taken a flexible and pragmatic approach to interpreting other REAL ID provisions. For example, states are not required under regulation to allow other states access to their motor vehicle databases in spite of the fact that Real ID clearly states that compliance with the act requires states to provide “electronic access to all other States to information contained in the motor vehicle database of the State.” Sec 202 (d)(12). Further, 6 CFR §37.11(h) sensibly allows states to establish an exceptions process for proving identity, date of birth and citizenship although the statute does not provide for this. DHS’ REAL ID FAQs for State Implementation also signal agency flexibility on satisfying the marking requirements:

How should states mark compliant and non-compliant licenses so that screeners can easily distinguish between acceptable and unacceptable state-issued driver's licenses or identification cards?

While DHS recommends that states adopt the general design marking (aka "gold star"), per the REAL ID Security Plan Guidance Handbook, states may submit for DHS review and approval alternative methods of marking documents to clearly differentiate a compliant card from a non-compliant card. Those methods could include differentiations in color, lettering, and/or format.
(<http://www.dhs.gov/real-id-faq-implementation>)

DHS can effectively train federal officers to distinguish AB 60 licenses from other California licenses. Federal officers could either look for the “DP” on the front, or for the statement “not acceptable for official federal purposes” on the back. In light of the pragmatism DHS has demonstrated in other areas of REAL ID implementation, and given the flexibility it evinces in its FAQs on this precise area, it is puzzling that DHS is taking such an inflexible approach to California’s proposed AB 60 design.

AB 60’s provisions were intended satisfy REAL ID’s requirements by allowing federal officials to distinguish between licenses that are acceptable for official purposes and those that are not, while at the same time protecting drivers’ from the risk of discrimination due to specially marked licenses. Since DHS has discretion to accept California’s proposed design, we urge you take a flexible approach and to work towards a prompt and favorable resolution of this matter.

Thank you.



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