



## **DEPARTMENT OF HOMELAND SECURITY**

### **U.S. Customs and Border Protection**

#### **8 CFR Part 217**

#### **CBP Dec. 22-08**

#### **RIN 1651-AB40**

### **Electronic System for Travel Authorization (ESTA) Fee Increase**

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

**ACTION:** Final rule.

**SUMMARY:** This document amends Department of Homeland Security (DHS) regulations pertaining to the Electronic System for Travel Authorization (ESTA). ESTA is the online system through which nonimmigrant visitors intending to enter the United States under the Visa Waiver Program (VWP) at air or sea ports of entry must obtain an electronic travel authorization in advance of travel to the United States. Pursuant to updates in Congressional mandates, the ESTA travel promotion fee (also referred to as the “authorization charge”) was increased from \$10 to \$17 and extended to 2027. As a result of the increase in the travel promotion fee, the fee for an approved ESTA (which includes the travel promotion fee and a \$4 operational fee) is \$21. CBP will begin collecting the new fee following the effective date of this rule.

**DATES:** The final rule is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Sikina S. Hasham, Director, Electronic System for Travel Authorization (ESTA), Office of Field Operations, 202-325-8000, [sikina.hasham@cbp.dhs.gov](mailto:sikina.hasham@cbp.dhs.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

#### *A. The Visa Waiver Program*

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security, in consultation with the Secretary of State, may designate countries for participation in the Visa Waiver Program (VWP) if certain requirements are met. Eligible citizens and nationals of VWP countries<sup>1</sup> may apply for admission to the United States at a U.S. port of entry as nonimmigrant visitors for a period of ninety (90) days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. Other nonimmigrant visitors must obtain a visa from a U.S. embassy or consulate and generally must undergo an interview by consular officials overseas in advance of travel to the United States.

#### *B. The Electronic System for Travel Authorization (ESTA)*

On August 3, 2007, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Public Law 110-53. Section 711 of the 9/11 Act required the Secretary of Homeland Security, in consultation with the Secretary of State, to develop and implement a fully automated electronic travel authorization system to collect biographical and other information as the Secretary of Homeland Security determines necessary to evaluate, in advance of travel, the eligibility of the applicant to travel to the United States under the VWP, and whether such travel poses a law enforcement or security risk.<sup>2</sup>

On June 9, 2008, DHS published an interim final rule in the *Federal Register* (73 FR 32440) announcing the creation of the ESTA program for nonimmigrant visitors

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<sup>1</sup> The current list of designated VWP countries is set forth in 8 CFR 217.2(a).

<sup>2</sup> 8 U.S.C. 1187(h)(3)(A).

traveling to the United States by air or sea under the VWP, and regulations have since been codified in the Code of Federal Regulations (CFR), at 8 CFR 217.5. ESTA provided for an automated collection of the information required on the Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure paper form (Form I-94W), in advance of travel. ESTA is intended to fulfill the statutory requirements described in section 711 of the 9/11 Act.

On November 13, 2008, DHS published a notice in the *Federal Register* (73 FR 67354) announcing that the use of ESTA would be mandatory for all VWP travelers traveling to the United States seeking admission at air and sea ports of entry beginning January 12, 2009. Since that date, VWP travelers have been required to receive travel authorization through ESTA prior to boarding a conveyance destined for an air or sea port of entry in the United States. Travelers unable to receive authorization through ESTA to travel under the VWP may still apply for a visa to travel to the United States.<sup>3</sup>

### *C. The Fee for the Use of ESTA and the Travel Promotion Act Fee*

There have been several laws enacted that include provisions regarding ESTA fees, which have been incorporated into the DHS regulations. The relevant statutes and prior DHS rules are described below. However, some recent statutory changes have not yet been incorporated into the DHS regulations. This rule incorporates those changes.

On March 4, 2010, the United States Capitol Police Administrative Technical Corrections Act of 2009, Public Law 111-145, was enacted. Section 9 of this law, the Travel Promotion Act of 2009 (TPA), mandated that the Secretary of Homeland Security establish a fee for the use of ESTA and begin assessing and collecting the fee no later than six months after enactment.<sup>4</sup> The TPA provided that the initial fee consists of the sum of “\$10 per travel authorization” (travel promotion fee) to fund the newly authorized

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<sup>3</sup> 8 CFR 217.5(f)(2). More information can be found in the “Frequently Asked Questions” section of the Official ESTA Application Website, <https://esta.cbp.dhs.gov/> (last accessed Apr. 27, 2022).

<sup>4</sup> 8 U.S.C. 1187(h)(3)(B).

Corporation for Travel Promotion plus “an amount that will at least ensure recovery of the full costs of providing and administering the System, as determined by the Secretary” (known as the “operational fee” or the “processing charge”).<sup>5</sup> The TPA authorized collection of the \$10 travel promotion fee through September 30, 2014. On July 2, 2010, the Homebuyer Assistance and Improvement Act of 2010, Public Law 111-198 at § 5, amended the TPA by extending the sunset provision of the travel promotion fee and authorizing the Secretary to collect this fee through September 30, 2015.

On August 9, 2010, DHS published an interim final rule in the *Federal Register* (75 FR 47701) announcing that, beginning September 8, 2010, a \$4 operational fee would be charged to each ESTA applicant to ensure recovery of the full costs of providing and administering the system in addition to the \$10 travel promotion fee that would be charged to each applicant receiving a travel authorization through September 30, 2015. Accordingly, the regulations at 8 CFR 217.5(h) were amended to provide that until September 30, 2015, the fee for an approved ESTA was \$14, the sum of the \$10 travel promotion fee and the \$4 operational fee, and that beginning October 1, 2015, and after the sunset of the travel promotion fee, the fee for using ESTA would be just the operational fee of \$4.

On December 16, 2014, section 605 of the Travel Promotion, Enhancement, and Modernization Act of 2014, Public Law 113-235, further extended the sunset provision of the travel promotion fee through September 30, 2020. It did not make any changes to the operational fee and CBP continues to collect that fee. In contrast to the travel promotion fee, which is set by Congress, the operational fee does not include a sunset provision or a statutory amount. The Secretary of Homeland Security has discretion to determine the operational fee amount pursuant to the TPA. CBP will reassess the \$4 operational fee on

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<sup>5</sup> Public Law 111-145 at sec. 9.

a regular basis to ensure that it is set at a level to fully recover ESTA operating costs.

Any changes to this operational fee will be done through a subsequent rulemaking.

On June 8, 2015, DHS published a final rule in the *Federal Register* (80 FR 32267) finalizing the June 9, 2008 interim final rule regarding the ESTA program and the August 9, 2010 interim final rule regarding the ESTA fee for nonimmigrant visitors traveling to the United States by air or sea under the VWP. Due to oversight, 8 CFR 217.5(h)(1) was not appropriately amended to provide the sunset date of September 30, 2020. Nonetheless, in accordance with section 217(h)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1187(h)(3)(B), CBP continued to collect the \$10 travel promotion fee.

On February 9, 2018, section 30203(a) of the Bipartisan Budget Act of 2018, Public Law 115-123, extended the sunset provision of the travel promotion fee through September 30, 2027.

On December 20, 2019, section 806 of the Further Consolidated Appropriations Act of 2020, Public Law 116-94, increased the travel promotion fee from \$10 to \$17. As a result of this provision, the ESTA fee, which includes both the travel promotion fee and the \$4 operational fee, was increased to \$21. CBP will begin collecting the new fee following the effective date of this rule. Pursuant to the Bipartisan Budget Act of 2018, this is the ESTA fee through September 30, 2027. Beginning on October 1, 2027, the ESTA fee will be \$4. Pursuant to the TPA, the Secretary of Homeland Security has discretion to determine the operational fee amount. CBP will reassess the \$4 operational fee on a regular basis to ensure that it is set at a level to fully recover ESTA operating costs. Any changes to this operational fee will be done through a separate rulemaking.

## **II. Discussion of Regulatory Changes**

This rule updates the ESTA fee regulations to incorporate the most recent statutory provisions. To incorporate the new sunset provision for the travel promotion

fee contained in section 30203(a) of the Bipartisan Budget Act of 2018, Public Law 115-123, this document amends 8 CFR 217.5(h)(1) by replacing “September 30, 2015” with “September 30, 2027”. To reflect the fact that, after September 30, 2027, the only ESTA fee will be the operational fee, this document amends 8 CFR 217.5(h)(2) by replacing “October 1, 2020” with “October 1, 2027”.

To implement the new travel promotion fee amount as set forth in section 806 of the Further Consolidated Appropriations Act of 2020, Public Law 116-94, this document amends 8 CFR 217.5(h)(1) by replacing the amount “\$14.00” with “\$21” and replacing the amount “\$10” with “\$17”. Additionally, this document removes extraneous decimal points and zeros after the references to “\$4” throughout section 217.5(h).

### **III. Inapplicability of Notice and Delayed Effective Date**

The Administrative Procedure Act (APA) requirements in 5 U.S.C. 553 govern agency rulemaking procedures. Section 553(b) of the APA generally requires notice and public comment before issuance of a final rule. In addition, section 553(d) of the APA requires that a final rule have a 30-day delayed effective date. The APA, however, provides exceptions from the prior notice and public comment requirement and the delayed effective date requirements, when an agency for good cause finds that such procedures are “impracticable, unnecessary, or contrary to the public interest.” *See* 5 U.S.C. 553(b)(3)(B), (d)(3). Prior notice and comment is “unnecessary” when, “so far as the public is concerned,” the regulatory change is minor or merely technical.<sup>6</sup> Prior notice and comment has also been deemed “unnecessary” when there is no need to allow “affected parties an opportunity to participate in agency decision making early in the process, when the agency is more likely to consider alternative ideas,”<sup>7</sup> and where Congress requires an agency to perform a non-discretionary act, and where no extent of

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<sup>6</sup> *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987).

<sup>7</sup> *Id.*

notice or commentary could have altered the obligation of the agency.<sup>8</sup> Additionally, courts have held that when there is a Congressionally approved extension to a program, further delay in implementing that program contravenes the program's purpose.<sup>9</sup>

In this case, CBP finds that good cause exists for dispensing with prior notice and public procedure as unnecessary because the amendments to the regulations are simply conforming amendments to reflect statutory changes and a non-substantive administrative change regarding how the \$4 fee is referenced in the regulations. Specifically, the amendments in this document are necessary to reflect the changes to the sunset provision regarding the travel promotion fee in the Bipartisan Budget Act of 2018 and to reflect the change to the travel promotion fee amount in the Further Consolidated Appropriations Act of 2020. CBP has no discretion in raising the fee.

For the same reasons, CBP finds that good cause exists for dispensing with the requirement for a delayed effective date as provided in 5 U.S.C. 553(d)(3).

#### **IV. Statutory and Regulatory Requirements**

##### **A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)**

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” that is economically significant under section 3(f)(1) of

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<sup>8</sup> *McChesney v. Peterson*, 275 F. Supp. 3d 1123, 1136 (Neb. 2016).

<sup>9</sup> *Id.* (citing *Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n*, 795 F.3d 151, 154 (D.C. Cir. 2015)).

Executive Order 12866 as it results in transfers of over \$100 million in a given year.

Accordingly, OMB has reviewed this regulation.

The ESTA program pertains to nonimmigrant visitors traveling to the United States by air or sea under the Visa Waiver Program. ESTA provides for an automated collection of information from these travelers in advance of travel. Under the current regulations, the ESTA fee is \$14 for an approved ESTA and consists of both a \$10 travel promotion fee and a \$4 operational fee. The Bipartisan Budget Act of 2018 extended the sunset provision for the travel promotion fee to 2027, and the Further Consolidated Appropriations Act of 2020 increased the travel promotion fee from \$10 to \$17. As a result of these statutory changes, the total fee for an approved ESTA has increased from \$14 to \$21. This final rule makes conforming amendments to DHS regulations to reflect the increase and extension of the travel promotion fee. CBP will begin collecting the new fee following the effective date of this rule. In accordance with the statutory changes, CBP could collect the new \$17 fee even if this regulation were not promulgated. This rule is being promulgated for consistency between the statute and the regulations and to minimize the confusion any inconsistency would cause. Although the effects of the fee increase are not a result of this rule, but rather a result of the statutory changes, we analyze the effects here to inform the public of the effect of this fee increase.

The travel promotion fee is collected by CBP, but the fee revenue is not kept by CBP or DHS. Instead, up to \$100 million of fee revenue goes to the Travel Promotion Fund, which is made available to the Corporation for Travel Promotion (subject to a matching requirement) to carry out its functions. Any remaining fee revenue is retained by the general fund of the Treasury. As annual collections are already over \$100 million before the increase in the fee, all of the additional revenue generated by this fee increase will be retained by the general fund of the Treasury. As the \$7 fee increase is relatively



small compared to costs involved to travel to the United States, CBP anticipates that the fee increase will not adversely affect travel to the United States.

Table 1 shows the number of approved ESTA applications from fiscal year (FY) 2016 to 2021. Prior to the COVID pandemic, the average annual number of approved ESTA applications was approximately 15 million. After FY 2019, travel decreased substantially, and we expect that travel will remain lower through FY 2022, though forecasting travel coming out of a pandemic is difficult. For the purposes of this analysis, we project travel returning to normal in FY 2022. To the extent that it takes longer than that, the effects of the fee change will be lower.

Table 1: Total annual approved ESTA applications

Fiscal Year	Total approved ESTA applications
FY 2016	14,601,471
FY 2017	14,894,749
FY 2018	15,115,878
FY 2019	15,184,970
FY 2020	6,312,562
FY 2021	1,259,440
<b>Total</b>	<b>67,369,070</b>

In the absence of any publicly available forecast for post-pandemic travel, CBP uses an ordinary least squares (OLS) linear trend based on pre-pandemic data to forecast future approved ESTA applications once ESTA travel returns to pre-pandemic levels.

Table 2 shows the forecasted future approved applications until FY 2027.<sup>10</sup>

Table 2: Future approved ESTA applications (forecast)

Fiscal Year	Future approved ESTA applications (forecast)
FY 2022	15,442,174

<sup>10</sup> The linear trend (ESTA applications = 14,456,360 + 197,163\*(time), time = 1, 2, 3, 4 where year 1 is FY 2016, 2 is FY 2017, 3 is FY 2018, 4 is FY2019, 5 is FY 2022, 6 is FY 2023, etc.) was determined based on FY 2016 to 2019 data. Data from FY 2020 and 2021 were not used to generate the forecasted amounts since travel data from those years were severely affected by the COVID-19 pandemic, including the strict restrictions governments imposed on nonessential travel. Accordingly, CBP estimates the linear trend for the growth in applications for the forecasted period (FY 2022-2027) beginning from FY 2019 levels. Note that projected FY 2022 applications are what we expect FY 2020 would have been without the COVID-19 pandemic. ESTA is only used for leisure and business travel.

FY 2023	15,639,336
FY 2024	15,836,499
FY 2025	16,033,661
FY 2026	16,230,824
FY 2027	16,427,987

Using the forecast and applying the proposed \$7 increase would result in the following forecast of additional revenue from the travel promotion fee. As shown in Table 3, the corresponding revenue forecasted is \$108 million in FY 2022 to approximately \$115 million in FY 2027. As this fee is not tied to the costs of the services provided by ESTA, this effect is not a cost but rather a transfer<sup>11</sup> of funds from one party to another within society. In this case, it is a transfer from ESTA travelers to the U.S. Government.

Table 3: Anticipated additional fee revenue (forecast)

Fiscal Year	Future approved ESTA applications	Fee increase amount	Anticipated additional fee revenue
FY 2022	15,442,174	\$7	\$108,095,215
FY 2023	15,639,336	\$7	\$109,475,353
FY 2024	15,836,499	\$7	\$110,855,491
FY 2025	16,033,661	\$7	\$112,235,629
FY 2026	16,230,824	\$7	\$113,615,767
FY 2027	16,427,987	\$7	\$114,995,906

Table 4 presents the estimated discounted future revenue that would result from the fee increase of \$7. The estimated travel promotion fee revenue is discounted at both 3-percent and 7-percent. The total revenue generated from the fee increase over the six-year period of analysis from fiscal year 2022 to 2027 is expected to be \$603,619,432 after applying a 3-percent discount rate, and \$539,391,804 using a 7-percent discount rate.

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<sup>11</sup> See OMB Circular A-4. (This analysis is performed from a global perspective, and includes those individuals who travel to the United States. Please note that individuals paying the fee are not U.S. citizens or permanent residents.)

The annualized amount using a 3-percent discount rate is \$111,426,638, and \$111,273,973 using a 7-percent discount rate.

Table 4: Discounted additional travel promotion fee revenue (forecast)

Fiscal Year (Forecast)	Additional travel promotion fee revenue (Discounted at 3%)	Additional travel promotion fee revenue (Discounted at 7%)
2022	\$104,946,811	\$101,023,565
2023	\$103,191,020	\$95,620,013
2024	\$101,448,478	\$90,491,102
2025	\$99,719,903	\$85,624,024
2026	\$98,005,959	\$81,006,472
2027	\$96,307,261	\$76,626,628
<b>Total</b>	<b>\$603,619,432</b>	<b>\$530,391,804</b>
<b>Annualized</b>	<b>\$111,426,638</b>	<b>\$111,273,973</b>

Aside from the increase in fee revenue collection, the final rule is not expected to increase costs or benefits to the Government or any other entity.

#### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act. 5 U.S.C. 601 *et seq.*

#### **C. Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **D. Executive Order 13132**

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **E. Executive Order 12988 Civil Justice Reform**

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

#### **F. Paperwork Reduction Act**

Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. The collection of information in this final rule is approved in accordance with the requirements of the Paperwork Reduction Act under control number 1651-0111. There are no changes being made to the information collection as a result of this final rule.

#### **List of Subjects in 8 CFR Part 217**

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

#### **Amendments to the Regulations**

For the reasons set forth above, 8 CFR part 217 is amended as set forth below.

#### **PART 217 – VISA WAIVER PROGRAM**

1. The authority citation for part 217 continues to read as follows:

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

2. In § 217.5, revise paragraph (h) to read as follows:

#### **§ 217.5 Electronic System for Travel Authorization.**

\* \* \* \* \*

(h) *Fee.* (1) Through September 30, 2027, the fee for an approved ESTA is \$21, which is the sum of two amounts: a \$17 travel promotion fee to fund the Corporation for Travel Promotion and a \$4 operational fee to at least ensure recovery of the full costs of providing and administering the system. In the event the ESTA application is denied, the fee is \$4 to cover the operational costs.

(2) Beginning October 1, 2027, the fee for using ESTA is an operational fee of \$4 to at least ensure recovery of the full costs of providing and administering the system.

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Alejandro N. Mayorkas  
Secretary,  
U.S. Department of Homeland Security.

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