

LexisNexis® Emerging Issues Analysis

Jason Klitenic on

Establishment of a Permanent Global Entry Program: Expedited Clearance for Trusted Air Travelers

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Introduction. A chief mission and continuing challenge for the U.S. Department of Homeland Security (DHS) is to prevent dangerous people and things from entering our country without stifling the free flow of travel and commerce. Consistent with these efforts, DHS on November 19, 2009, published a new proposed rule that would establish a permanent Global Entry program designed to expedite the international arrival process for trusted air travelers at U.S. airports.¹

Global Entry, which is currently implemented as a pilot program at twenty U.S. international airports, relies upon biometric identification² to authenticate the identity of enrolled travelers. This voluntary U.S. Customs and Border Protection (CBP) program is important because it enables DHS to pre-clear the vast majority of air travelers who are benign, while pragmatically shifting security resources to assessing higher-risk individuals who warrant tighter scrutiny.

Under the program, prescreened members arriving at U.S. airports may use kiosk fingerprint authentication to bypass the traditional CBP passport-control line. As discussed below, while the Global Entry program provides practical convenience to those who gain admission to it, the largely straightforward enrollment process can nonetheless present some notable challenges for applicant and practitioner alike.

Genesis of the Global Entry Program. The preamble of the Global Entry proposed rule cites § 7208(k) of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),³ which mandated that the Secretary of Homeland Security create an international registered traveler program designed to expedite the clearance of prescreened travelers into the United States. In so directing the Secretary, Congress expressly relied

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1. [74 Fed. Reg. 59932](#) (proposed Nov. 19, 2009).
 2. For more on biometrics generally, see Sean O'Connor, Biometrics and Identification After 9/11, 7 Bender's Immigration Bulletin 159 (Feb. 15, 2002); Sean O'Connor, *Collected, Tagged, and Archived: Legal Issues in the Burgeoning Use of Biometrics for Personal Identification*, 3 Bender's Immigration Bulletin 1245 (Dec. 15, 1998).
 3. Pub. L. No. 108-458, 118 Stat. 3638, 3822 (2004), amended by Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. E, § 565, 121 Stat. 2091 (2007), codified at [8 U.S.C. § 1365b](#). See the Global Entry proposed rule at [74 Fed. Reg. 59932](#) for discussion of IRTPA and trusted-traveler programs.

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upon the report of the National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) and found that

- (A) Expediting the travel of previously screened and known travelers across the borders of the United States should be a high priority.
- (B) The process of expediting known travelers across the borders of the United States can permit inspectors to better focus on identifying terrorists attempting to enter the United States.⁴

In response to IRTPA, CBP initiated Global Entry as a pilot program at three airports in June 2008 and ultimately expanded the pilot to twenty U.S. major international airports in August 2009.⁵ The proposed Global Entry rule would transform Global Entry from a pilot program to a permanent one, while also allowing CBP to institute Global Entry at U.S. international airports beyond the twenty that currently provide it.

Program Benefits. Under the program, prescreened members arriving in the United States may use automated kiosks to facilitate their entry into the country. Rather than waiting in a traditional CBP passport-control line, a participant uses a Global Entry touch-screen kiosk to present a machine-readable U.S. passport (or lawful permanent resident card, also known as a "green card"), submit fingerprints for electronic identification, and make a customs declaration.⁶ The fingerprints are compared with the member's fingerprint biometrics on file with CBP to confirm that the individual is a program participant. The participant also looks into a camera that takes a digital photograph. After the member successfully completes these steps, the kiosk generates a transaction receipt that the participant presents, along with his passport, to a CBP Officer for examination and entry.⁷

DHS estimates that the Global Entry program has grown to 27,000 members and that CBP has processed approximately 100,000 entries. According to DHS, the Global Entry program has reduced average airport international entry wait times by more than 70%

4. [8 U.S.C. §1365b\(k\)\(1\)](#).

5. [74 Fed. Reg. 39965](#) (notice Aug. 10, 2009).

6. [74 Fed. Reg. 59932, 59936](#) (proposed Nov. 19, 2009).

7. *Id.*

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and more than 75% of travelers using Global Entry were processed in fewer than five minutes.⁸

Eligibility and Enrollment Process. To be eligible for admission to the Global Entry program, an applicant must be at least fourteen years old and a U.S. citizen, U.S. national, or U.S. lawful permanent resident. Citizens of other countries could later become eligible for the program if CBP enters into reciprocal trusted-traveler agreements with foreign governments.⁹ Based on risk factors, an applicant may be ineligible if he:

- provides false or incomplete information;
- has any prior arrests or is the subject of an investigation;
- has been found to be in violation of any customs, immigration, or agriculture laws of any country;
- is inadmissible under U.S. immigration law;
- is on a government watch list; or
- is otherwise not a low-risk traveler.¹⁰

Those who seek admission to the Global Entry program must apply through the Global On-line Enrollment System (GOES) and pay a \$100 fee.¹¹ The on-line questionnaire seeks personal identifier information that enables the government to check through various databases the background of the applicant to determine, among other things, whether any of the above risk factors are present. Applicants who successfully complete the on-line application process are later interviewed in person by a CBP Officer

8. See DHS Press Release, Secretary Napolitano Announces Rule Proposing Permanent Global Entry Program (Nov. 19, 2009), available at http://www.dhs.gov/ynews/releases/pr_1258657984894.shtm.

9. For example, under the Global Entry pilot program CBP executed a trusted-traveler agreement with the Netherlands so that Netherlands citizens who are members of that country's Privium expedited-travel program could be eligible for Global Entry. 74 Fed. Reg. at 59934.

10. 74 Fed. Reg. at 59934.

11. GOES may be accessed at <http://www.globalentry.gov>.

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who confirms whether the candidate is eligible to become a member of the Global Entry program.

Subsequent to the interview, CBP notifies the applicant whether he has been accepted. CBP provides denied applicants with instructions regarding how to seek additional information and redress.¹²

Redress and Practice Pointers. The Global Entry program has certain specific redress procedures. In short, an individual whose application has been denied may

- send a letter to the CBP enrollment center where the interview was conducted, setting forth the basis for the challenge of the denial;
- contact the DHS Travelers Redress Inquiry Program (DHS TRIP); and
- contact the CBP Trusted Traveler Ombudsman.¹³

As a practical matter, the burden of proof is on the applicant to establish that he is eligible for admission to the program. Accordingly, it is important to submit accurate and complete information in the first instance; otherwise the applicant subjects himself to approval delay, application denial, or worse. Although this admonition certainly applies anytime information is provided to a law enforcement agency such as DHS, it is important to bear in mind that the government may possess more information regarding the applicant's suitability than the applicant himself has, or information that the applicant might not readily recall during the application process. Therefore, it is important to view the application process as a serious, thorough, and necessary exercise.

Problems can nonetheless arise even where the applicant views himself to have been completely forthcoming. For example, an applicant might receive a letter from CBP simply indicating that his application was denied because of a "violation of customs law," a violation that the applicant does not recall. In this possible scenario, the denial notice might not identify the particular law deemed to have been violated or when or even where the violation occurred.

12. 74 Fed. Reg. at 59934.

13. *Id.*

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In this example, one viable option would be to work collaboratively with CBP — including submitting a Freedom of Information Act (FOIA) request — to ascertain the basis of the denial and provide additional supporting documentation demonstrating suitability. The FOIA documents might reveal that the applicant was erroneously flagged in a database because of mistaken identity.

Unfortunately, the government's own records might shed no additional information on the alleged violation, including the particular law allegedly violated, whether any arrest or detention ensued, and where or even when the violation occurred. In instances where there is no information anywhere regarding a flag in the system (e.g., no evidence of charging documents, arrest warrant, or other legal action) it might be possible to work with CBP to establish the applicant's suitability by providing information sufficient to demonstrate that, notwithstanding the instant unexplained record notation, the applicant has had no brushes with law and presents none of the risk factors articulated in the Global Entry rule.

Because securing U.S. borders is CBP's first priority, and we are a safer nation for it, CBP does not lightly overturn denied applications to Global Entry program. Experience has shown, however, that CBP has taken a rational approach to operating its Global Entry trusted-traveler program. CBP largely affords applicants sufficient opportunity to address government concerns and present information demonstrating suitability.

In Closing. The Global Entry program proposed rule evidences DHS's continued focus and priority on security while recognizing the important interests of travel and commerce that are vital to our country.¹⁴ The program provides substantial benefits to international air travelers, and those who apply for admission should do so in a considered and thorough fashion.

Related information is at [8 C.F.R. § 235.1\(4\)](#); [22 C.F.R. § 53.2\(4\)](#).

About the Author. Jason Klitenic (<http://www.klitenicrobertson.com/>) is a founding member of Klitenic Robertson PLLC and KR Security LLC. He is Vice Chair of the American Bar Association's Committee on Homeland Security and

14. Even more recent statements of the need for the balance are in the Declaration of Principles DHS released December 7, 2009, after a meeting between Secretary Napolitano and Mexico's Secretary of Finance and Public Credit, available at http://www.dhs.gov/xlibrary/assets/us-mexico_declaration_of_principles.pdf (last visited Dec. 8, 2009). There are countless other examples.

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National Defense. From 2003 to 2005 Mr. Klitenic served as the Deputy General Counsel of the United States Department of Homeland Security. In 2005 he was appointed DHS acting General Counsel and served as the chief legal officer of the 180,000-employee agency. From 2002 to 2003 Mr. Klitenic served as Deputy Associate Attorney General of the United States Department of Justice. In addition to his public service, Mr. Klitenic has been a partner at two national law firms. He also is a contributor to the Homeland Security Deskbook published by LexisNexis Matthew Bender. Mr. Klitenic received his J.D. from the University of Baltimore and B.A. from Johns Hopkins University. He is admitted to practice in the District of Columbia and Georgia.

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