

VIA ELECTRONIC SUBMISSION

November 15, 2021

Office of Program Management and Operational Support (CA/PPT/S/PMO)  
Bureau of Consular Affairs, Passport Services  
U.S. Department of State

**Re: 60-Day Notice of Proposed Information Collection: Application for a U.S. Passport; Form DS-11; OMB Control No. 1405-0004; Docket No. DOS-2021-0020**

---

**Re: 60-Day Notice of Proposed Information Collection: U.S. Passport Renewal Application for Eligible Individuals; Form DS-0082; Docket No. DOS-2021-0021**

---

**Re: 60-Day Notice of Proposed Information Collection: Application for a U.S. Passport: Corrections, Name Change Within 1 Year of Passport Issuance, and Limited Passport Holders; Form DS-5504; Docket No. DOS-2021-0022**

The American Civil Liberties Union (ACLU), the National Center for Transgender Equality, interACT: Advocates for Intersex Youth, and the Council for Global Equality offer these comments on the three above-referenced proposed data collections, which revise application forms for US passports. We applaud the Department for its efforts to protect the dignity and safety of US passport holders and applicants and to eliminate unnecessary and inequitable burdens, including for transgender, non-binary, and intersex Americans. Removing burdensome medical documentation requirements, together with the addition of a neutral/unspecified gender designation, represent a significant step forward that will benefit hundreds of thousands of Americans and their families while simplifying the processing of applications, in accord with international standards.

We strongly support these policy and procedure changes, along with corresponding form changes. In these comments, we also offer recommendations for improving the clarity and simplicity of the proposed form language.

### **General comments on all forms: Benefits of gender marker reforms**

So long as federal identification and travel documents, including US passports, display gender information, they should permit the holder to self-select the most appropriate designation.

This approach is consistent with federal laws and guidance from the Office of Management and Budget (OMB) governing the use of personally identifiable information (PII). The Privacy Act of 1974, as amended, directs each federal agency to maintain only such information about an individual as is “relevant and necessary” to accomplish a purpose required by law; to ensure such records are sufficiently accurate and relevant to ensure fairness to the individual; and to permit individuals to request amendments of personal information.<sup>1</sup> The Paperwork Reduction Act requires OMB to determine whether any agency collection of information “is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”<sup>2</sup> The E-Government Act requires agencies to regularly obtain OMB approval that information collections comply with these principles.<sup>3</sup>

Similarly, the Fair Information Practice Principles (FIPPs) set forth in OMB Circular A-130 include the principles of Minimization (only collecting and using relevant and necessary data), Purpose Specification and Use Limitation (defining purposes of data collection and only using it for those purposes), and Individual Participation (involving individuals in the use of their own data and, wherever possible, using it only with their consent).<sup>4</sup> OMB Circular A-130 directs agencies to “evaluate the sensitivity of each individual data element that

<sup>1</sup> 5 U.S.C. § 552a.

<sup>2</sup> 44 U.S.C. § 3508.

<sup>3</sup> 44 U.S.C. § 3501 note.

<sup>4</sup> OMB Circular No. A-130, Managing Information as a Strategic Resource, App. II-3 (rev. Jul. 2016).

is PII, as well as all of the data elements together.”<sup>5</sup> OMB further explained this principle in Memorandum M-17-12, providing that “when assessing the nature and sensitivity of PII,” agencies must also consider factors including the potential for “revealing private information about an individual,” and the extent to which it “identifies or disproportionately impacts a particularly vulnerable population.”<sup>6</sup>

There can be no doubt that PII related to gender can be highly sensitive, and that its use can have important material effects on individuals. A growing body of research shows that having ID documents or records that misidentify one’s gender creates barriers to government services and harms individuals’ health, well-being, and opportunities.<sup>7</sup> Courts have consistently held that gender PII can be “excruciatingly private” to the extent that it may effectively disclose an individual’s transgender status.<sup>8</sup> One court stated that privacy concerns regarding gender PII “cut at the ‘very essence of personhood’ protected” by our Constitution.<sup>9</sup> Courts have therefore recognized that disclosure of gender PII by the government—including through ID documents or administrative records—is therefore subject to heightened constitutional protection under both Equal Protection and Due Process principles.<sup>10</sup> The same is true under federal civil rights statutes. For example, the Equal Employment Opportunity Commission (EEOC) has found that failure to update administrative records to reflect a name change can effectively be a disclosure of gender PII where typically gender-specific names are involved, and can violate Title VII of the Civil Rights Act.<sup>11</sup> Federal courts, as well as the Departments of Justice and Education, have taken a similar view under Title IX.<sup>12</sup>

Currently, transgender and intersex people must produce medical documentation to obtain accurate identification and different agencies have variations of what that documentation must look like. This intrusive and burdensome requirement may require out-of-pocket medical visits solely for this purpose, and force individuals to carry inaccurate identification for long periods of time. By requiring either an “F” or “M” designation, non-binary individuals are unable to obtain accurate identification. Moreover, they cannot obtain a passport at all without “willfully subscrib[ing] as true a[ ] material matter which [they] do[ ] not believe to be true,” in apparent violation of the federal perjury statute.<sup>13</sup>

This has recently led federal courts to declare such policies arbitrary and unconstitutional. In May 2020, a federal appeals court held that the Department’s requirement that US passport applicants select an “M” or “F” designation on their passport was arbitrary and capricious.<sup>14</sup> The Department recently issued the first US passport with the “X” designation to the plaintiff in that case.<sup>15</sup> And in November 2020, a federal court held that

<sup>5</sup> *Id.* at App. II-2.

<sup>6</sup> OMB Memorandum No. 17-12, Preparing for and Responding to a Breach of Personally Identifiable Information (Jan. 3, 2017).

<sup>7</sup> Seelman, K.L. et al., Predictors of healthcare mistreatment among transgender and gender diverse individuals: Are there different patterns by patient race and ethnicity? 60 SOC. WORK HEALTH CARE 411 (2021); Scheim, A. I., et al., Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study, 5 LANCET PUB. HEALTH e196 (2020); Lelutiu-Weinberger, C. et al. The Roles of Gender Affirmation and Discrimination in the Resilience of Transgender Individuals in the US, 46 BEHAV. MED. 175 (2020); Restar, A., et al., Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations, 11 SSM—POP. HEALTH 100595 (2020); JAMES, S. E., ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (Washington, DC: Nat’l Ctr. Transgender Equal. 2016); Bauer, G.R., et al., Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, 15 CANADA BMC PUB. HEALTH 525 (2015).

<sup>8</sup> *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

<sup>9</sup> *Love v. Johnson*, 146 F.Supp.3d 848, 855 (E.D. Mich. 2015).

<sup>10</sup> *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020); *Corbitt v. Taylor*, 513 F.Supp.3d 1309 (M.D. Ala. 2021), *app. filed*, No. 21-10486 (11th Cir. Feb. 12, 2021); *Ray v. McCloud*, 507 F.Supp.3d 925 (S.D. Ohio 2020); *Arroyo Gonzalez v. Rossello Nevares*, 305 F.Supp.3d 327 (D.P.R. 2018); *F.V. v. Barron*, 286 F. Supp.3d 1131 (2018); *Love v. Johnson*, 146 F.Supp.3d 848 (E.D. Mich. 2015). *See also Saba v. Cuomo*, No. 20-cv-5859, 2021 WL 1600496 (S.D.N.Y. Apr. 23, 2021) (holding claims challenging binary-only gender marker policy for driver’s licenses are justiciable).

<sup>11</sup> *Complainant v. Dep’t of Veterans Affairs*, EEOC App. No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014).

<sup>12</sup> *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020); US Dep’t of Educ. & Justice, Dear Colleague Letter on Transgender Students (May 13, 2016; rescinded).  
<sup>13</sup> 18 U.S.C. § 1621(2).

<sup>14</sup> *Zzyym v. Pompeo*, 958 F. 3d 1014 (10th Cir. 2020).

<sup>15</sup> Ned Price, US State Department Spokesperson, Issuance of the First U.S. Passport with an X Gender Marker (Oct. 27, 2021), <https://www.state.gov/issuance-of-the-first-u-s-passport-with-an-x-gender-marker/>.

requiring medical documentation to obtain a US passport with a correct gender marker violated the Constitution’s Equal Protection Clause.<sup>16</sup> Based in part on this growing body of case law, and in part on the recommendations of groups like the American Medical Association,<sup>17</sup> nearly twenty states have moved to ensure individuals can simply select an M, F, or X marker on IDs.

Self-attestation is the most effective, administrable, and equitable approach to gender designations, given the natural diversity in gender identity, sex characteristics, experiences of gender transition, and perceptions of other people’s gender. Given these realities, no policy can ensure complete consistency of gender designations across identification documents or administrative systems—nor ensure that a gender designation is consistent with how an official may perceive a person’s appearance.<sup>18</sup> Nor is this single-character data field, however assigned, of central value for identity verification. Unlike Social Security numbers, birth dates, the combination of facial features represented by a photograph, or even our names, “sex markers are not helpful in guarding against personal identity fraud because maleness and femaleness are characteristics that we share with many other people”—indeed, with nearly half the human race.<sup>19</sup> Following similar reasoning, the United States recently argued in federal court that requiring gender designations on driver’s licenses correspond either to certain aspects of the holder’s medical records or birth records does not serve any important state interest.<sup>20</sup>

For these reasons, the International Civil Aviation Organization (ICAO) does not prescribe how countries should determine a person’s sex for purposes of machine-readable travel documents.<sup>21</sup> Similarly, neither the REAL ID Act nor the Department of Homeland Security’s implementing rules prescribe how a states should determine gender.<sup>22</sup> Self-attestation of gender has been widely by states as well as foreign jurisdictions for many years—well over a decade in some jurisdictions.<sup>23</sup> Agencies have found that this approach is easily administrable, reduces administrative burdens, increases equitable access to identification, and does not affect the security or reliability of identification. For example, fourteen states and the District of Columbia recently explained in a federal court brief that, based on their experience, “the provision of driver’s licenses that accurately reflect [the holder’s] gender identity directly assists in advancing public safety and reducing the occurrence of discrimination.”<sup>24</sup>

### **“Gender Marker Information” section (all forms): Overall description of gender markers**

<sup>16</sup> *Morris v. Pompeo*, No. 19-cv-569, \_\_\_ F. Supp. 3d \_\_\_ (D. Nev. 2020).

<sup>17</sup> Am. Med. Ass’n, Policy H-65.967: Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients (updated 2021).

<sup>18</sup> See, e.g., Paisley Currah & Tara Mulqueen, *Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport*, 78 SOC. RES. 557, 572 (2011) (giving illustrative examples). See also Brief of Amici Curiae States of California, Connecticut, District of Columbia, Hawaii, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, *Corbitt v. Taylor*, No. 21-10486 (11th Cir., filed Aug. 16, 2021) (“States have similarly recognized interests in removing onerous, unnecessary requirements in light of financial barriers in accessing healthcare, the recognition that one’s gender identity exists regardless of medical interventions undertaken, and that there is no uniform set of procedures that transgender people require, and some do not need treatment at all.”)

<sup>19</sup> HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* 40 (2017). Agencies have sometimes claimed that gender data is useful in some marginal cases—not for verifying who someone is, but only for verifying that they are not someone on a watch list, and only if they happen to have exactly the same name but a different gender marker. Transportation Security Administration, *Secure Flight Program: Final Rule*, 73 FR 64017, 64034 (Oct. 28, 2008). For this purpose, however, the basis of the gender designation appears immaterial to its value as simply one more data point.

<sup>20</sup> Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees and Urging Affirmance, *Corbitt v. Taylor*, No. 21-10486 (11th Cir., filed Aug. 2, 2021).

<sup>21</sup> ICAO, *Doc 9303, Machine Readable Travel Documents* (8th ed, 2021).

<sup>22</sup> REAL ID Act of 2005, § 202(b)(3), *codified at* 49 U.S.C. § 30301 note; Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Final Rule, 73 FR 5271, 5301 (Jan. 29, 2008).

<sup>23</sup> See, e.g., Transgender Europe, *Trans Rights Europe & Central Asia Index 2021* (2021), <https://transrightsmap.tgeu.org/>; ILGA World, *Trans Legal Mapping Report 2019: Recognition before the law* (2020), <https://ilga.org/trans-legal-mapping-report>; Movement Advancement Project, *Identity Document Laws and Policies*, [https://www.lgbtmap.org/equality-maps/identity\\_document\\_laws](https://www.lgbtmap.org/equality-maps/identity_document_laws) (accessed Nov. 3, 2021).

<sup>24</sup> Brief of Amici Curiae States of California, Connecticut, District of Columbia, Hawaii, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, *Corbitt v. Taylor*, No. 21-10486 (11th Cir., filed Aug. 16, 2021).

The proposed forms contain a new section entitled, “Gender Marker Information,” which begins:

*We print passport holders’ gender in the ‘Sex’ field of U.S passports.*

While we appreciate the effort to provide clear and helpful instructions for applicants, we believe this first sentence could potentially be more confusing than illuminating, and recommend removing this sentence. While we understand the intention of this statement, the terms “gender” and “sex” are often used interchangeably in many contexts,<sup>25</sup> and ordinary people as well as experts in various fields hold varying understanding of the scope of these terms and how they differ.<sup>26</sup> Moreover, we believe that the rest of the instructions adequately describe how applicants may fill out the form, and omitting this statement will make the instructions more concise and easier to understand.

#### **“Gender Marker Information” section (all forms): Definition of the X designation**

The proposed forms label the response options for “Gender” as simply “M,” “F,” and “X.” The section entitled “Gender Marker Information” describes these designations as “M (male), F (female) and X (non-binary, intersex, and/or gender non-conforming).” We appreciate the Department’s effort to clearly communicate to these populations that these may choose the “X” designation, and that it is intended to be inclusive. We believe this type of language is appropriate for informal resources and descriptions for applicants, such as those on the Travel.State.gov website. For example, we would recommend using statements in these materials such as: “Applicants should select the gender designation that best describes them. Non-binary, intersex, or gender non-conforming applicants may choose to select the X (undesigned) gender marker.”

However, we strongly recommend avoiding the use of these identity-specific terms to define the “X” designation on official forms, policies, or manuals. First, “unspecified” is the term used by ICAO, as well as several US jurisdictions to describe this designation, while “undesigned” is used by others.<sup>27</sup> These more neutral terms adequately describe this designation while avoiding these issues, and create greater consistency with international practice. Second, most intersex people, and many gender non-conforming and non-binary people, are male or female and will appropriately seek passports that reflect this fact. Defining the “X” designation in the manner proposed may create confusion for these applicants. Third, the usage of specific terminology regarding gender identity (or, in the case of *intersex*, variations in sex characteristics) tends to vary in individual and community usage and can evolve relatively quickly over time. Today, most applicants who are not male or female and who wish to select the “X” designation may recognize and use the terms included the proposed form, but some will not. People who are Two-Spirit, agender, or bigender, for example, may not feel the terms included in the proposed forms describe them. Currently accepted terms may one day be considered outdated or even offensive as language use evolves, requiring the Department to regularly re-assess this terminology.

<sup>25</sup> For example, federal courts have long used the two terms interchangeably in a variety of contexts. *See, e.g.*, *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 n. 24 (Tex. 2018); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 672 n. 15 (W.D. Pa. 2015). Academic literature across a variety of disciplines also frequently uses the terms interchangeably. *See, e.g.*, Haig, D. *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 ARCH SEX. BEHAV. 87 (2004).

<sup>26</sup> *Compare, e.g.*, World Health Organization, Q&A: Gender and health (May 21, 2021), <https://www.who.int/news-room/q-a-detail/gender-and-health> (defining “sex” as “a set of biological attributes” that “is mainly associated with physical and physiological features including chromosomes, gene expression, hormone level and function, and reproductive and sexual anatomy,” and “often categorized as,” but not limited to, male and female); NIH Office of Research on Women’s Health, “Sex & Gender” (accessed Nov. 3, 2021), <https://orwh.od.nih.gov/sex-gender> (defining “sex” as “biological differences between females and males including chromosomes, sex organs, and endogenous hormonal profiles”), and Arnegard, M. E., et al., *Sex as a Biological Variable: A 5-Year Progress Report and Call to Action*, 29 J. WOMEN’S HEALTH 858 (2020) (defining “sex” as “a biological variable defined genetically”). *See also* Friedman, A, *Unintended consequences of the feminist sex/gender distinction*, GENDERS (43) (2006), <https://link.gale.com/apps/doc/A179660938/AONE>.

<sup>27</sup> ICAO, *Doc 9303, Machine Readable Travel Documents* (8th ed, 2021) (“Where an issuing State or organization does not want to identify the sex, the filler character (<) shall be used in this field in the [machine readable zone] and an X in this field in the [visual inspection zone]”); Movement Advancement Project, *Identity Document Laws and Policies*, [https://www.lgbtmap.org/equality-maps/identity\\_document\\_laws](https://www.lgbtmap.org/equality-maps/identity_document_laws) (accessed Nov. 3, 2021) (collecting state forms and policies).

## **“Gender Marker Information” (all forms): Processing applications when sex is not marked**

The proposed forms state:

*If no gender marker is selected, we will print the gender as listed on your supporting evidence.*

While we appreciate the attempt to provide clarity, we believe that both the practice described and the explanation could be improved.

First, there may be a variety of reasons why a person does not select a box under the “Gender” field, including simple omission. While the Department should work to ensure applications are fully completed, applicants should not be forced to receive a passport with an inaccurate gender marker due to such mere inadvertence. Second, the proposed instruction does not explain what will happen if an applicant’s supporting evidence includes multiple documents with differing gender markers. In this scenario, the Department may have no basis on which to make a default selection; here especially, it may be necessary to contact the applicant for more information. **Instead, the Department should consider a default practice in such cases of sending a form letter explaining that a selection is required and explaining the applicant’s options.**

Regardless, to the extent that the Department reserves discretion to use an applicant’s supporting evidence to select the gender marker in the absence of a selection by the applicant, the forms should state that the Department “may” do so. Alternatively, to the extent that the Department cannot give a simple statement of how it will handle all cases in which a gender is not selected by the applicant, the Department could consider omitting this information on the application form itself, reserving it instead for other resources for applicants such as the “Selecting your Gender Marker” page on Travel.State.gov. (This would be consistent with other fields, where the form does not describe how omissions will be handled.)

## **“Gender Marker Information” (all forms): Caveats regarding possible non-recognition**

We appreciate the Department’s awareness that, while individuals have a right to and the government has an interest in accurate identification, the “X” designation is still not in wide use in many countries, and there exists the potential—even if unlikely for any given traveler—for administrative or other difficulties in traveling with this designation on the passport. We support the intention of flagging this possibility for travelers, but believe this statement could be simplified and clarified. The proposed forms state:

*Please Note: We cannot guarantee that other countries you visit or travel through will accept the gender marker on your passport. Research the laws of the countries you plan to visit or travel through to make sure you understand their entry requirements. Some countries and travel companies may not recognize the X gender marker.*

First, we believe the term “recognize” would be clearer than “accept” in this context. The term “accept” could be read in this context to suggest that there is a substantial risk that a traveler’s passport might not be accepted as a valid travel document and they might be refused entry as a result. However, passports with an “X” designation clearly meet ICAO’s global specifications for machine-readable passports, and we are not aware of any reason to believe that any nation would fail to accept it as a valid travel document and proof of citizenship. We believe the issues that could potentially arise would more likely be in the nature of additional security screening, harassment, or the application of discriminatory laws regarding gender. In addition, it has always been the case that countries (as well as US jurisdictions) may or may not consider any gender designation on a passport—whether F, M, or X—as determinative of a person’s gender for their own administrative purposes or application of their laws.<sup>28</sup> An accurate gender designation will tend to promote respectful and nondiscriminatory treatment of the passport holder, but cannot guarantee it. While it is worth flagging these potential issues for applicants, we

<sup>28</sup> See, e.g., Tamar-Mattis, A., What is a person’s ‘legal sex’?, ENDOCRINE TODAY (May 1, 2009), <https://www.healio.com/news/endocrinology/20120325/what-is-a-person-s-legal-sex>.



believe the word “recognize” better describes them, and may help prevent confusion about the passport’s reliability as a travel document.

We also recommend removing the second sentence above, which encourages applicants to research laws in other countries to understand their entry requirements. We are not aware of any countries that have clear, publicly available instructions on what gender markers they accept on passports of foreign visitors. Countries whose systems do not account for an X designation are unlikely to announce this fact, so this instruction may only serve to discourage applicants when they cannot find such information. And, as stated above, we are not aware of any country that would decline to accept a passport because of a feature that complies with ICAO standards. Without more context than this form can provide, this statement could create the unfounded impression that many countries will not permit entry because of an X designation.

Lastly, since the first sentence discusses the recognition of gender markers generally, the third sentence is repetitive and unnecessary. In order to provide helpful information without unduly frightening or discouraging applicants, we believe this statement should be as simple and concise as possible. If the Department wishes to be more specific about potential issues with private travel companies as well as foreign governments, it could consider language similar to that used by Immigration, Refugees and Citizenship Canada on its website, which explains that current systems used by some countries and travel companies may not recognize the X gender identifier, and travelers may still be asked to list or state their gender as either male or female when traveling.<sup>29</sup>

### **“Gender Marker Information” section (all forms): Recommended revised text**

For the reasons stated above, we recommend the following revisions to the “Gender Marker Information” section on the proposed forms:

~~We print passport holders’ gender in the ‘Sex’ field of U.S. passports. The gender markers we use are: M (male), F (female) and X (unspecified non-binary, intersex, and/or gender non-conforming). The gender marker that you check on this form will appear in your passport regardless of the gender marker(s) on your previous passport and/or your supporting evidence of citizenship and identity. If changing your gender marker select Yes in the "Gender" field on page 1. If no gender marker is selected, we may contact you for more information, or may will print the gender as listed on your supporting evidence. Please Note: We cannot guarantee that other countries you visit or travel through will recognize accept the gender marker on your passport. Some countries and travel companies may may still ask you to state or list either female or male on forms. Research the laws of the countries you plan to visit or travel through to make sure you understand their entry requirements. Some countries and travel companies may not recognize the X gender marker. Visit [travel.state.gov](http://travel.state.gov) for more information.~~

### **Form DS-11: Sex listed on birth certificates**

The proposed Form DS-11 states:

*An acceptable U.S. birth certificate must include your full name, date and place of birth, sex, date the birth record was filed, the seal or other certification of the official custodian of such records (state, county, or city/town office), and the full names of your parent(s).*

We recommend the Department remove “sex” from this sentence. No federal law or regulation or ICAO standard requires that a passport applicant’s birth certificate must list their sex.<sup>30</sup> Moreover, the American Medical Association now recommends “the removal of sex as a legal designation on the public portion of the birth certificate, recognizing that information on an individual’s sex designation at birth will still be submitted through

<sup>29</sup> Choose or update the gender identifier on your passport or travel document (updated Sept. 17, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html>.

<sup>30</sup> See 22 USC § 211-14 (Passports); 22 CFR Part 51, Subpart C (Evidence of U.S. Citizenship or Nationality); ICAO, *Doc 9303, Machine Readable Travel Documents* (8th ed, 2021).

the U.S. Standard Certificate of Live Birth for medical, public health and statistical use only.”<sup>31</sup> While displaying sex data on the public portion of the birth certificate is currently the norm for US jurisdictions, this is likely to change in light of the AMA’s recommendation. Moreover, under current policy there is no need to rely on supporting evidence for this information.

### **Form DS-5504: Limited-duration passports**

The proposed Form DS-5504 states:

*If your U.S. passport book was limited due to sex transition, please visit [travel.state.gov](https://travel.state.gov) for more information.*

The “Selecting Your Gender Marker” page on Travel.State.gov currently explains that individuals who were issued a limited-validity passport under the old gender marker policy may request a full validity passport, using either Form DS-5504 (if the current passport was issued in the last two years) or Form DS-11 (if not).<sup>32</sup> To the extent that the Department believes this information is important enough to mention on the application forms, it should consider providing this simple explanation rather than referring to the website. In making this determination, the Department may wish to consider the number of limited-validity passports issued under the prior gender marker policy that are still valid.

In any event, we recommend avoiding the term “sex transition,” which is less commonly used than “gender transition” or several other comparable terms.<sup>33</sup> In this context, another alternative would be language such as “*If your U.S. passport book was limited due to our prior gender marker policy.*”

### **Forms DS-5504 and DS-82: Information on name changes**

We understand that the proposed forms do not represent any change in the Department’s policies regarding name change. Currently, the Department accepts:

- a court order or decree (including but not limited to name change, adoption, divorce, or dissolution orders)
- a marriage, civil union, domestic partnership, or naturalization certificate;
- a British deed poll or UK statutory declaration;
- a family registry entry from certain countries;
- a name change from a civil registry or civil notary from certain countries;
- evidence of a common-law marriage from certain US and foreign jurisdictions;
- any other government-issued documentation of name change pursuant to state law; or
- evidence of customary usage over a long period of time (generally five years).<sup>34</sup>

Notably, states have other methods of officially documenting name change under their laws, including a certificate of name change issued by an administrative agency, and an amended birth certificate.<sup>35</sup> While not specifically mentioned, these documents would also qualify as acceptable evidence under the FAM.<sup>36</sup>

However, the three proposed forms (like their current versions) each contain different information regarding name changes. This information could be provided in a clearer and more consistent manner.

<sup>31</sup> Am. Med. Ass’n, Res. 005-I-19: Removing Sex Designation from the Public Portion of the Birth Certificate (June 2021).

<sup>32</sup> <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> (accessed November 2, 2021).

<sup>33</sup> Compare <https://www.google.com/search?q=%22gender+transition%22> (“About 1,010,000 results” on November 2, 2021), with <https://www.google.com/search?q=%22sex+transition%22> (“About 311,000 results” on November 2, 2021).

<sup>34</sup> 22 CFR § 51.25; 8 FAM 403.1-4, Material Discrepancies (Major Name Changes) (updated Aug. 7, 2018).

<sup>35</sup> See, e.g., Haw. Rev. Stat. §574-5; Or. Rev. Stat. 432.235; Social Security Administration, Program Operations Manual System: RM 10212.090 Evidence of a Name Change based on a US Issued Amended or Corrected Birth Certificate (updated Dec. 28, 2018), <https://secure.ssa.gov/poms.nsf/lnx/0110212090>;

<sup>36</sup> 8 FAM 403.1-4, Material Discrepancies (Major Name Changes) (updated Aug. 7, 2018).

Proposed Form DS-11 states:

*If you have changed your name, please see instructions on what to submit at [travel.state.gov/namechange](http://travel.state.gov/namechange).”*

Proposed Form DS-5504 states:

*You must submit a certified name change document such as a certified copy of your marriage certificate or a certified copy of a court order showing a seal and officiate/judge's signature. If you are unable to document your name change in this manner, you must apply on form DS-11, Application for a U.S. Passport.*

Proposed Form DS-82 states that applicants may use this form if:

*My name has not changed since my most recent U.S. passport book and/or card was issued.*

*--OR--*

*My name has changed by marriage or court order, and I can submit proper certified documentation to reflect my name change.*

We believe this information is incomplete and could confuse and create difficulties for applicants. First, the DS-82 language lists only two of many possible examples of acceptable evidence of name change. It is not clear whether the Department intends to limit the use of this form only to name changes based on certain forms of acceptable evidence and not others—a seemingly arbitrary distinction—or whether it has simply provided an inaccurate description of the types of evidence accepted. The Foreign Affairs Manual appears to indicate that all forms of name change evidence, with the sole exception of evidence of name change by customary usage, can be provided using Form DS-82.<sup>37</sup> Similarly, while the DS-11 language uses the qualifier “such as,” we believe the Department could easily make clear that a range of other forms of evidence are accepted. Finally, both forms refer only to “certified” documents, while the FAM specifies that “an original or certified copy” is acceptable.

We therefore recommend the following revised text:

For Form DS-5504:

*You must submit an official certified-name change document (such as a certified copy of a your marriage certificate or a certified copy of a court order) showing a seal and officiate/judge's signature. Please visit [travel.state.gov/namechange](http://travel.state.gov/namechange) for a complete description of accepted documents. If you are unable to document your name change in this manner, you must apply on form DS-11, Application for a U.S. Passport.*

Proposed Form DS-82 states that applicants may use this form if:

*My name has not changed since my most recent U.S. passport book and/or card was issued.*

*--OR--*

*My name has changed ~~by marriage or court order~~, and I can submit proper official certified documentation to reflect my name change (such as a certified copy of a marriage certificate or court order). (Please visit [travel.state.gov/namechange](http://travel.state.gov/namechange) for a complete description of accepted documents.)*

We recognize that court orders and marriage certificates are the most common forms of evidence available to, and provided by, applicants. However, as more states move to ease administrative and financial barriers to formal name changes, a growing number of individuals have changed their names by other means. To the extent the Department has concerns about the balance between completeness and simplicity, and between addressing the most common situations as well as less common ones, in these forms, we encourage the Department to conduct user testing that includes the name change-related portions of the forms.

<sup>37</sup> 8 FAM 403.1-4, Material Discrepancies (Major Name Changes) (updated Aug. 7, 2018).



## **Revising other forms and policies**

The Department should review and revise other forms and policies for identity documents, based on the principles outlined above. In particular, the Department should:

- At minimum, revise the Consular Report of Birth Abroad (CRBA) and related forms (Forms FS-240 and DS-2029) to provide for self-attestation and an X designation option, as the Department announced in June 2021.
- In light of the AMA's subsequent recommendation, consider removing the gender marker from the public portion of the CRBA.
- Implement similar reforms and form revisions for visa documents and Border Crossing Cards.
- Implement similar reforms and form revisions for DOS driver licenses for members of the foreign diplomatic community.
- Pursue dialogue within ICAO about providing states with flexibility to omit the sex field on passports.

## **Conclusion**

We appreciate the Department's efforts to ensure that all Americans can obtain accurate identification and can travel safely and with dignity. The above recommendations will help ensure that these forms revisions meet those goals. Please contact Arli Christian ([achristian@aclu.org](mailto:achristian@aclu.org)) with any questions regarding these comments and recommendations.

*Submitted by:*

American Civil Liberties Union (ACLU)  
Council for Global Equality  
interACT: Advocates for Intersex Youth  
National Center for Transgender Equality