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**THE AVIATION  
AND TRANSPORTATION SECURITY ACT**

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Responding to the horrific events of September 11, Congress in November 2001 created an entirely new security agency within the Department of Transportation (“DOT”), the Transportation Security Administration (“TSA”), to begin revamping the nation’s transportation security regime so that the hijackings of September 11 could never be repeated. In enacting the Aviation and Transportation Security Act of 2001, Public Law 107-71 (the “Security Act”), Congress not only passed the most significant federal aviation legislation since the Airline Deregulation Act of 1978, but also created the largest law enforcement agency in the history of the United States.

Thus, in addition to the safety regulation that remains the province of the Federal Aviation Administration (“FAA”), the aviation industry will now have an additional layer of regulation premised on security and enforced by the nascent TSA. Under the Security Act, however, the TSA is responsible for much more than aviation security, as it is charged with ensuring security for every mode of transportation that the DOT oversees: port and maritime, rail, motor carrier, and even pipeline.<sup>2</sup> This would be a daunting task for an established agency, but, in the words of new TSA chief John Magaw, for an entirely new agency such as the TSA, “it

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<sup>1</sup> The authors would like to thank their colleagues Frank J. Costello, Shannon M. Moyer, and Adam F. Hulbig for assistance in researching and preparing this article.

<sup>2</sup> 49 U.S.C. § 114(d).

is a monumental challenge.”<sup>3</sup> Remarks by John W. Magaw, Under Secretary of Transportation for Security (Feb. 16, 2002).

This article provides an overview of the TSA’s implementation of the Security Act six months after the agency’s birth, and assesses the significant legislative and regulatory developments that are likely to occur in the remainder of 2002. Because the Security Act and the deadlines it established have been primarily aviation-related, the TSA’s implementation of the Security Act has been largely concerned with that mode. This article follows that emphasis, highlighting the major developments that have taken place since the Security Act’s enactment on November 19, 2001.

### ***Congressional Action After September 11***

In the wake of September 11, Congress took up several different bills concerning transportation security.<sup>4</sup> On September 21, a bill addressing specific security issues was introduced in the Senate. Competing Senate and House bills, with the Senate bill creating a federal work force to screen passengers, baggage, and cargo, and the House bill relying on private contractors under strict federal control, went to Conference on November 15. The Conference language, which adhered more closely to the Senate than the House plan, passed on November 16 and was signed into law by the President on November 19. Even though Congress was criticized for acting too slowly, in less than two months it had created a new federal agency that will ultimately be larger than any other DOT component. As the Conference Report noted, the result is “a fundamental change in the way [the U.S.] approaches the task of ensuring the safety and security of the civil air transportation system.”<sup>5</sup>

The debate in Congress focused on the issue of federalization versus private contracting, though in retrospect the distinction between the two may have been more cosmetic than real. As

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<sup>3</sup> The TSA has two Deputy Under Secretaries: Stephen J. McHale and former Coast Guard Commandant James M. Loy, who will also serve as TSA Chief Operating Officer. Mr. Loy’s appointment is perhaps evidence that the TSA is preparing significant action with respect to modes other than aviation. See TSA Press Release, “U.S. Transportation Secretary Mineta Announces Appointment Of Admiral Loy as Deputy Under Secretary for Transportation Security” (May 30, 2002).

<sup>4</sup> Before the Security Act was passed, Congress had already acted to address the financial crisis that loomed over commercial air carriers by enacting the Air Transportation Safety and System Stabilization Act on September 22. Public Law 107-42 (Sept. 22, 2001). The Stabilization Act authorized up to \$5 billion in immediate payments to commercial air carriers based on their demonstrated losses traceable to the post-September 11 ground stop and depression in demand for passenger and cargo air service. *Id.* § 101(a)(2). It also authorized a new, multi-agency Stabilization Board to approve up to \$10 billion in loan guarantees to carriers. *Id.* § 101(a)(1).

<sup>5</sup> H.R. Report 107-296, at 53 (Nov. 16, 2001).

several commentators noted, when dealing with airport screeners, who employs screeners has been less important than the pay, benefits, and training that the screeners receive. The primary consequence of leaving passenger screening in the hands of the air carriers, subject to FAA oversight and federal standards, was that security contracts were let to the lowest competent bidders. The private contractors, in turn, drew on a labor pool that was paid starting salaries at or near the minimum wage, less than the starting wages at airport fast food restaurants.<sup>6</sup> High turnover rates<sup>7</sup> and poor performance were inevitable in that workforce. At the time, the FAA's model security program required only 20 hours of private-sector training for new hires. Though the carriers received much criticism for airport security, their handling of this function was consistent with the industry's traditional response to FAA mandates: to comply with the applicable Federal Aviation Regulations at the lowest possible cost. That the U.S. was one of only three nations in the world using this approach speaks to its utility.<sup>8</sup>

The Security Act took the responsibility for passenger and baggage screening out of the hands of the carriers and placed it with the government, a model found in most other nations. That major step was somewhat lost in the political debate.

### ***A New Federal Agency: The Transportation Security Administration***

#### **An Overview Of The Agency**

The Security Act created a new federal agency within the DOT: the TSA, headed by the newly created position of Under Secretary of Transportation for Security.<sup>9</sup> The DOT formally constituted the TSA, effective December 28, 2001. 66 Fed. Reg. 67117 (Dec. 28, 2001). The TSA nominally has the same status as the modal administrations within the DOT, including the FAA, but its practical scope is very broad. The TSA is responsible for security over all modes of transportation regulated by the DOT, not just aviation.<sup>10</sup> The Administration's FY 2003 Budget

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<sup>6</sup> Testimony of Gerald L. Dillingham, Director Physical Infrastructure Issues, GAO, Before the Subcommittee on Aviation, House Committee on Transportation and Infrastructure, at 6 (Sept. 21, 2001) ("GAO Report").

<sup>7</sup> For the twelve months ended April 30, 1999, there was an average turnover rate of 126% at the 19 largest U.S. airports. GAO Report, at 6.

<sup>8</sup> The General Accounting Office found that of 103 nations with international airports, only the U.S., Canada, and Bermuda made passenger screening the responsibility of the air carriers. GAO Report, at 11.

<sup>9</sup> 49 U.S.C. § 114. As noted above, the first Under Secretary of Transportation for Security is John W. Magaw, whom President Bush appointed on January 7, 2002.

<sup>10</sup> The DOT has to sort out conflicting legislative directives in that regard. On the one hand, the TSA has plenary security responsibility over all modes. On the other hand, the Under Secretary's authority "shall not supersede the authority of any other department or agency of the Federal Government . . . with respect to transportation or transportation-related matters, whether or not during a national emergency." 49 U.S.C. § 114(g)(2). TSA officials have stated that, for (continued...)

requested \$4.8 billion in total funding for the TSA and assumed that the TSA would eventually have 41,000 employees, making it the largest federal law enforcement agency by a wide margin. TSA officials, however, have publicly stated that the actual headcount will be closer to 70,000 employees.<sup>11</sup>

The TSA can follow the FAA's personnel and procurement procedures or – and this is significant – “make such modifications . . . as the Under Secretary considers appropriate.” Security Act § 101(a), codified at 49 U.S.C. §§ 114(n) and (o). That flexibility continues in the TSA's rulemaking authority. Provided that the Secretary makes a finding that immediate issuance of a regulation or directive is required “to protect aviation security,” the TSA can act without providing notice or an opportunity for comment and without prior approval by the Secretary or by the federal Office of Management and Budget. Security Act § 101(a), to be codified at 49 U.S.C. § 114(l)(2)(A). All contrary provisions of law or Executive Order, including the Administrative Procedure Act and Executive Orders requiring cost-benefit analysis, are inapplicable. There is a review procedure for such regulations and directives, but it is internal and non-transparent. The TSA cannot take a security action if the FAA notifies the Under Secretary that such action “could adversely affect the airworthiness of an aircraft,” subject to the caveat that the Secretary of Transportation can overrule the FAA. Security Act § 101(a), to be codified at 49 U.S.C. § 114(l)(4). The TSA also is required “to give great weight to the timely views” of the National Transportation Safety Board (“NTSB”), although to what end and in what manner is not specified. Security Act § 101(a), to be codified at 49 U.S.C. § 114(i).

Though the agency is far from well-defined, the TSA's general organization is now in place. Below the Under Secretary and Deputy Under Secretaries of Transportation for Security, the TSA has eight directorates. Two of these directorates concern specific modes of transport: (1) aviation and (2) maritime and land security. The other six directorates are: security regulation and policy; intelligence; information technology; training and quality performance; inspection; and finance and administration. As noted above, the TSA has no "operational responsibility" in any mode of transportation except aviation. In what manner and to what extent the other directorates will direct security policy remains largely unanswered.

In addition to these directorates, the Security Act also creates a Transportation Security Oversight Board (the “TSOB”). The TSOB may review an “emergency” regulation or directive (which term the Act does not define) although the TSOB's role is limited to ratifying or disapproving a regulation or directive within 30 days of its issuance. Security Act § 102, codified at 49 U.S.C. §§ 114(l)(2)(B) and 115. The TSOB is comprised of one official each from the Departments of Transportation, Justice, Defense, and the Treasury; and the Central Intelligence Agency, the National Security Council, and the Office of Homeland Security. The

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(...continued)

the present, the agency has no "operational responsibility" in any mode of transportation except aviation.

<sup>11</sup> In the supplemental appropriations bill now before it, Congress specifies that the additional FY 2002 funds appropriated to TSA may not be used to lift TSA's total workforce above 45,000 full-time permanent positions. H.R. 4775 (discussed more fully below).

DOT representative chairs this Board. Security Act § 102(a), codified at 49 U.S.C. § 115(b). Apart from its limited regulatory review authority, the Board is directed to facilitate the sharing of intelligence and law enforcement activities among appropriate agencies and with “carriers and other transportation providers,” explore the technical feasibility of developing a database of persons who threaten transportation security, and make recommendations to the TSA. Security Act § 102(a), codified at 49 U.S.C. § 115(c)(2-6). The Board is required to meet at least quarterly. Security Act § 102(a), codified at 49 U.S.C. § 115(d). The TSOB has been meeting regularly, but its deliberations are closed, and it has issued no publicly-available documents describing what, if any, policies or actions have been agreed upon.

On February 22, 2002, the civil aviation security rules were transferred from the FAA (in 14 C.F.R. §§ 107, 108 and 109) to the TSA (in 49 C.F.R. §§ 1500 *et seq.*). 67 Fed. Reg. 8340. Apart from renumbering and updating existing rules, the new rules deal with the sensitive issue of transparency. The TSA has identified extensive information and records that constitute “sensitive security information” or “SSI.” SSI is not subject to Freedom of Information Act (“FOIA”) requests. Further, all persons in the possession of SSI must restrict disclosure and access. 49 C.F.R. §§ 1520.1 through 1520.7.

## **TSA Procurement**

As discussed above, the TSA is allowed to follow the FAA’s procurement policy (known as the Acquisition Management System (“AMS”)) or depart from it, as the Under Secretary considers appropriate. Security Act § 101(a), codified at 49 U.S.C. §§ 114(n) and (o). Further, the TSA is authorized to acquire whatever property, equipment, and services the Under Secretary considers necessary. Security Act § 101(a), codified at 49 U.S.C. § 114(j). As of this writing, TSA has not issued any modifications to the existing AMS.

The AMS is a policy statement that governs FAA contract selection, protests, management, and disputes. It was created in 1996 as a less onerous and cost-efficient alternative to the Federal Acquisition Regulations (“FAR”). Transportation Appropriations Act of 1996, Pub. L. 104-50, § 348 (1995). At its core, the AMS aims to create flexible partnerships with product developers and end-users. This is accomplished through the use of “integrated product teams,” whose members are given a budget and other resources to effectively conduct a procurement on behalf of the agency. AMS § 1.11. After the acquisition, the product team remains responsible for managing the contract; maintaining and updating the product; and determining when the product should be replaced. AMS § 3.10. The Office of Disputes Resolution for Acquisition (“ODRA”), within FAA’s Office of the Chief Counsel, handles all bid protests and contract disputes – and presumably will do so on behalf of the TSA. AMS § 3.9; 14 C.F.R. Parts 14-17. Thus, AMS protesters cannot appeal to the General Accounting Office for bid protests and have no access to DOT’s Board of Contract Appeals for contract disputes. For procurements of less than \$1 million and disputes involving less than \$1 million, the ODRA Director issues final decisions. *Id.* In all other cases, the FAA Administrator reviews ODRA findings and recommendations and issues final decisions.

To date, TSA has issued solicitations concerning the development and implementation of a training program for security screeners; the creation of a staffing and placement system to

provide ongoing human resources services; the coordination of explosive detection system (“EDS”) deployment; uniforms for TSA screeners and law enforcement officers; and the “rollout” of the federal takeover of airport security screening (described more fully below). TSA has made awards with respect to all or part of each of these solicitations.

## **The Proposed Department Of Homeland Security**

The Administration on June 6, 2002 proposed creating a new Department of Homeland Security (“DHS”) that would include the TSA in its entirety. The President has outlined the new Department’s composition and functions and submitted proposed legislation to Congress. *The Department of Homeland Security*, President George W. Bush, Briefing Paper, at 1-7 (June 2002) (“DHS Briefing Paper”). The DHS would assume responsibility for, *inter alia*, border and transportation security.<sup>12</sup> In order to meet this objective, the new Department would also include the Customs Service, the Immigration & Naturalization Service, the Border Patrol, and the Animal Plant Health Inspection Service of the Department of Agriculture, in addition to the TSA. *Id.* at 9; DHS bill submitted to Congress by the President, § 402 (“DHS Bill”). The border and transportation security component of the new agency would be headed by an Under Secretary. DHS Bill § 401. The DHS as proposed would be a massive department, employing an estimated 169,000 workers and having an annual budget of over \$37 billion, and the border and transportation security component would account for 156,000 employees and \$24 billion of those totals. The DHS would be funded in FY 2003 using monies already requested by the Administration. DHS Briefing Paper at 7. The DHS Bill also transfers to the new department control over the issuance and denial of visas to enter the U.S., while preserving the State Department’s traditional authority to deny visas to aliens. DHS Bill § 403.

Although the DHS Bill as submitted to Congress does not change the Security Act, as the legislation for the new Department moves through Congress, both houses will have the opportunity to modify features of the TSA that legislators have found wanting. The Security Act’s essentials, however, are likely to remain in place, and at least in the short term the TSA will continue its implementation of the Act.

## ***Passenger, Baggage & Cargo Screening***

### **The Federal Takeover Of Screening**

The immediate and most visible task of the TSA has been to take over passenger screening at the 429 airports (and their 740 screening checkpoints) in the U.S. receiving scheduled passenger service from certificated air carriers or foreign air carriers with aircraft having more than 30 seats, i.e., to establish direct federal control over screening contractors. This was accomplished on February 17, 2002, the deadline under the Security Act. The complete

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<sup>12</sup> The other three principal components would be emergency preparedness and response; chemical, biological, radiological, and nuclear countermeasures; and information analysis and infrastructure protection. *Id.* at 8.

federalization of this function will take place over a 12-month transition period (through November 19, 2002), with the TSA first assuming the carriers' existing contracts with the private screening companies, then replacing those companies with federal employees. As of this writing, the TSA has put its own screeners in place at Baltimore-Washington International, Louisville, and Mobile. "Transportation Security Administration Announces Successful Implementation Of Federal Passenger Screeners At BSI's Piers A And B Security Check Points," TSA Press Release (Apr. 30, 2002); "TSA To Place Federal Screeners in Two Airports (Louisville and Mobile)," TSA Press Release (June 7, 2002). The TSA also may accept, at no cost, asset transfers from the carriers necessary to support these functions. Security Act §§ 101(g) and 110(b), codified at 49 U.S.C. § 44901(a).<sup>13</sup> The federalization extends to passenger compliance in that it is now a federal felony to assault a federal, airport or air carrier employee who has security duties at an airport if it interferes with that person's security duties. Security Act § 114(a), codified at 49 U.S.C. § 46503.<sup>14</sup>

The current transition period raises difficult issues, particularly since it requires reliance on a privately-employed screening workforce that is in the process of being replaced by a better compensated, better trained federal workforce. Many of the privately employed screeners will be unable to meet the new federal minimum requirements, particularly U.S. citizenship.<sup>15</sup>

When the transition is completed in November, the TSA will have a federal security force in place at all 429 U.S. certificated airports. There will be three types of federal personnel. Initially, the 81 largest airports each will have a Federal Security Director ("FSD"). Security Act § 103, codified at 49 U.S.C. § 44933. The TSA as of June 20, 2002 had appointed FSDs at 30 large and medium-sized airports and is recruiting to fill all 81 positions. FSD salaries will range from \$44,400 to \$138,200, though at major airports FSDs will be paid at the upper end of this scale. This is indicative of the importance of the FSD at each airport. Testimony of John Magaw, Under Secretary of Transportation for Security before the Subcommittee on Transportation Committee on Appropriations, U.S. House of Representative (June 20, 2002). The FSDs, particularly at hub airports, are already playing a major regulatory role vis-à-vis the airlines. Until an FSD is hired at an airport, former FAA special agents act as security coordinators and liaisons to the airport operator and local law enforcement agencies.

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<sup>13</sup> Air carriers remain responsible for Computer Assisted Passenger Prescreening System or "CAPPS" screening, known shipper programs and positive bag-match programs. *Id.*

<sup>14</sup> The new TSA regulations also make it clear that no person may interfere with, assault, threaten or intimidate screening personnel in the performance of their duties. 49 C.F.R. §§ 1540.109. Violations of this rule, which would include "abusive, distracting behavior," would be subject to civil penalties. 67 Fed. Reg. at 8344.

<sup>15</sup> The TSA has upgraded the standards for screeners hired by private contractors after February 17, 2002 and through the transition to a federal workforce. These enhanced standards include a U.S. citizenship requirement and training under the TSA-mandated curricula. 49 C.F.R. §§ 1544.405-1544.411.

Each airport also will have federal law enforcement officers (“LEOs”) employed by the TSA at each screening location and elsewhere on the airport property. Security Act § 110(b), codified at 49 U.S.C. § 44901(g). LEOs will carry firearms and will have the authority to make arrests and to seek and execute warrants. Security Act §§ 101(a), codified at 49 U.S.C. § 114(q), and Security Act § 110(b). TSA officials have publicly stated that LEOs will supplement rather than replace existing state and local law enforcement personnel at these airports.<sup>16</sup>

The largest part of the workforce, however, will consist of an estimated 57,500 passenger and baggage screeners. *Deployment of Screening Systems: Report to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Transportation and Infrastructure*, at 5-6 (May 18, 2002) (“TSA Screening Report”).

### **Qualifications For The Federal Security Screener Workforce**

The Security Act imposes a number of minimum requirements, including:

- Each screener must be a “citizen of the United States.” Anecdotal evidence suggests that a substantial minority of today’s screener workforce, and perhaps a majority in many major metropolitan areas, are not U.S. citizens.<sup>17</sup>
- Each screener must have a high school or general equivalency diploma or a level of experience to be determined by the TSA.
- Each screener must pass a selection examination to be developed by the TSA. Each applicant must demonstrate sufficient basic aptitudes and physical abilities, as well the ability to read, speak, and write English well enough to perform all of the duties of the position.
- Each screener will be subject to a full background investigation, including a criminal history record check. The TSA also has authority to establish procedures, “in addition to a background check, to ensure that no individual who presents a threat to national security is employed as a security screener.”

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<sup>16</sup> The TSA’s recently issued regulations contemplate that the TSA may authorize an airport operator to use, on a reimbursable basis, TSA or other federal law enforcement personnel to meet its security obligations. 49 C.F.R. § 1542.219. The Preamble to this regulation assumes that TSA law enforcement personnel will have the primary responsibility but that the airport operator will continue to have a law enforcement presence “including covering screening before TSA law enforcement assumes this duty.” 67 Fed. Reg. at 8344.

<sup>17</sup> This requirement was subject to some initial criticism, although most federal jobs require U.S. citizenship. For example, for over 60 years, annual appropriations have carried language prohibiting the use of appropriated funds in the continental U.S. to pay federal employees unless they are U.S. citizens or meet one of several limited exceptions. *See, e.g.*, Public Law 106-58, § 605 (1999).

*Id.* § 111(a), codified at 49 U.S.C. § 44935(e-f).

### **Training The Federal Security Screener Workforce**

Screener training is far more substantial than it was under prior law. Each screener will be required to complete a minimum of 40 hours of classroom instruction and 60 hours of on-the-job training, pursuant to training procedures and curricula to be developed by the TSA. Recurrent and specialized training and annual proficiency reviews also are required. Security Act § 111(a), codified at 49 U.S.C. § 44935(g-h).<sup>18</sup> The TSA has established a training academy at Oklahoma City to conduct the classroom training. *See* “300 New Passenger Screener-Trainers Report for Training,” TSA Press Release (Mar. 26, 2002).

The objective of the increased training and compensation is to create a career path rather than temporary employment. Anecdotal evidence suggests that the TSA has drawn heavily upon current and former law enforcement employees. Indeed, the Security Act itself includes a veteran’s preference, though it is limited to veterans eligible for retired, retirement, or retainer pay.<sup>19</sup> The TSA has broad authority to fix the compensation of screeners and has used that authority to more than double the average salary for that position, as well as providing full federal benefit packages.<sup>20</sup> At the same time, these personnel will not have the same degree of job security enjoyed by the rest of the federal work force under the civil service laws, *e.g.*, the TSA may “employ, appoint, discipline and terminate” screeners and determine their work rules in such manner as the TSA deems appropriate. Security Act § 111(a), codified at 49 U.S.C. § 44935(i). The agency recently announced that TSA Screeners, who are not covered by the Whistleblower Protection Act, 5 U.S.C. § 1201 *et seq.*, will have protection from retaliation for whistleblowing, and the Department of Justice’s Office of Special Counsel will receive and investigate whistleblower retaliation complaints asserted by TSA screeners. “TSA Screeners To Have Whistleblower Protection Complaint Process, U.S. Office of Special Counsel and TSA Sign Memorandum of Understanding,” TSA Press Release (June 3, 2002).

### **Baggage Screening**

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<sup>18</sup> The TSA also is equipping all baggage x-ray screening devices with Threat Image Projection (“TIPS”) technology. TIPS technology randomly projects images of weapons and explosive devices in the bags being screened, both to maintain the attention of the screeners and to test their readiness.

<sup>19</sup> Security Act § 111(a), codified at 49 U.S.C. § 44935(f)(2).

<sup>20</sup> The TSA has stated that screeners will make \$23,000-40,000 annually. This compares to a pre-federalization average of less than \$15,000 per year.

While carry-on baggage is addressed through passenger screening procedures,<sup>21</sup> checked baggage is another matter. The problem with the screening of checked baggage is a logistical one, as an estimated one billion bags are checked at U.S. airports each year.

The Security Act required the TSA to have in operation a “system to screen all checked baggage at all airports in the United States” by no later than January 17, 2002. Security Act § 110(b), codified at 49 U.S.C. § 44901(c). Where the congressionally-preferred method of screening checked baggage – an explosive detection system (“EDS”)<sup>22</sup> – was not available, the Security Act allowed alternative methods to be used, including (but not limited to) a positive bag-match program, explosive trace detection (“ETD”), manual search and explosive detection dogs. The DOT allowed air carriers (which on January 17 remained responsible for baggage screening) to meet this deadline largely by using one or more of these alternatives to EDS screening.<sup>23</sup>

Despite the production problems associated with EDSs, the TSA also is required to ensure that all airports have EDSs in place by December 31, 2002, although even this requirement need not be met “if explosive detection equipment at an airport is unavailable,” in which case the TSA may continue to use the above alternative means. *Id.* § 110(b), codified at 49 U.S.C. § 44932(d)(1). Responding to the near-impossibility of meeting the December 31, 2002 EDS deadline using only EDS machines, TSA officials have acknowledged that they interpret the Security Act’s December 31, 2002 deadline to be met using about 1,100 EDSs and at least 4,800 ETD devices. *See* TSA Screening Report at 6, 22, 24; “DOT Awards the EDS/ETD General Contractor Contract to the Boeing Service Company,” TSA Press Release (June 7, 2002). Still, the TSA’s public insistence that the agency will meet the December 31 deadline has begun to draw public criticism on the grounds that many airports cannot accommodate the EDSs and that adhering to the deadline will unnecessarily burden passengers. *See, e.g.*, Letter of the Airport Alliance to the Honorable Norman Y. Mineta (May 29, 2002)

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<sup>21</sup> The Security Act reflects the sense of Congress that the FAA should maintain its current restriction of one carry-on bag and one personal item per passenger. *Id.* § 122(3). It also reflects the sense of the House (but not the Congress as a whole) that the TSA should develop procedures to permit musical instruments to be carried on board and require carriers to transport any animal that the Postal Service allows to be transported through the mail. *Id.* § 135.

<sup>22</sup> The FAA was required to certify by 1992 that EDS devices “can detect under realistic air carrier operating conditions the amounts, configurations, and types of explosive material that would likely be used to cause catastrophic damage to commercial aircraft,” 49 U.S.C. § 44913. The only type of EDS certified by the FAA is a large, expensive machine that uses CT-scan technology and computerized profiles to identify possible explosive materials. The original Congressional timetable for deployment of EDSs took it out to 2014. At this writing, there are less than 200 EDS machines deployed at U.S. airports. Screening Report at 22.

<sup>23</sup> The TSA has been criticized for requiring positive bag matching at originating airports but not at connecting airports. The TSA has announced plans to test positive bag matching for connections. The problem, again, is one of logistics, i.e., requiring all connecting bags to be matched with passengers could substantially interfere with airline hub operations.

(seeking “some form of legislative relief from the impending deadline”) (available at [www.airportnet.org](http://www.airportnet.org)).

In a related matter, the Security Act permits the Secretary of Transportation, if he chooses, to require airports to maximize the use of technology and equipment “designed to detect or neutralize potential chemical or biological weapons.” Security Act § 120, codified at 49 U.S.C. § 44903(c)(2)(C).

### **Cargo Screening**

The TSA is directed to develop a screening system for all-cargo operations “as soon as practicable,” but without a deadline. Security Act § 110(b), codified at 49 U.S.C. § 44901(f). The TSA has not issued any rules concerning this directive to date, but “is now closely examining the cargo industry and determining what additional security measures may be advisable.” 67 Fed. Reg. at 8346. In the meantime, the agency has issued a final rule establishing, pursuant to Section 132(a) of the Security Act, specific requirements security programs for both passenger and all-cargo operations using aircraft with a maximum certificated takeoff weight (“mtow”) of at least 12,500 pounds. 67 Fed. Reg 8205 (Feb. 22, 2002), codified in new 49 C.F.R. Part 1544. This rule concerns mostly criminal history record checks (discussed more fully below) and access to the flight deck by non-pilots.

### **Private Screening Options**

The congressional debate over whether to federalize passenger and baggage screening was resolved in favor of federalization, but the Security Act does create two limited options for the use of private screening companies.

The first option is a pilot program, starting on November 20, 2002. Security Act § 108, to be codified at 49 U.S.C. § 44919. Acting on the application of the airport operators, the TSA may select not more than five airports for this program, with not more than one from each of the airport security risk categories. The TSA, not the airport or the carriers, will contract with a private company for screening services at the selected airport(s). The FSD and federal law enforcement personnel will remain in place, and only the screeners will be under contract. The screeners must meet the same hiring and retention requirements as their federal counterparts and must be compensated at a comparable level. The private contractor must itself be “owned and controlled by a citizen of the United States . . . if there are private screening companies owned and controlled by such citizens.”<sup>24</sup> The government can terminate a contract for cause at any time, and all contracts terminate after three years unless extended by the government.

The second option is an opt-out program. This essentially is identical to the pilot program (including a requirement for TSA approval), but it does not begin until two years after

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<sup>24</sup> The statutory definition of “citizen of the United States” in the Transportation Code, when applied to a corporation, requires, *inter alia*, that at least 75% of the voting stock be owned *or* controlled by individual U.S. citizens. 49 U.S.C. § 40102(a)(15). The Security Act appears to favor a standard that raises an even higher barrier to foreign direct investment.

the TSA certifies to Congress that the federalization process has been completed at a given airport (and it has until November 19, 2002 to do so). Because the TSA has not made this certification and cannot be expected to do so much before the November 19 deadline, the opt-out program will probably not begin at any airport until November 2004. Security Act § 108, codified at 49 U.S.C. § 44920.

## *Paying For The New Aviation Security Regime*

### **User Fees**

The Security Act created two new user fees to pay for federalized security services: a mandatory passenger security fee and an air carrier security infrastructure fee meant to finance the security services not paid for by the passenger fee. Security Act § 118(a), codified at 49 U.S.C. § 44940(a)(1). These fees were created to pay the costs of providing salary and benefits for federal screening and law enforcement personnel; training screening personnel; maintaining screening equipment; financing the Federal Air Marshals (“FAMs”) program; completing background investigations of federal and airport personnel; and conducting research related to aviation security. *Id.* § 118(a), codified at 49 U.S.C. § 44940(a)(1-2).

### **Passenger Security Fee**

The TSA published an interim final rule with respect to passenger security fees at 49 C.F.R. § 1510. 66 Fed. Reg. 67698 (Dec. 31, 2001). The passenger security fee is assessed against passengers whose travel originates within the U.S. on direct U.S. air carriers and foreign air carriers for all transportation sold on or after February 1, 2002. Passengers are charged \$2.50 per enplanement, but only for two enplanements for a one-way trip and only for four enplanements for a round trip, for a maximum possible fee of \$10.00 for a single round trip.<sup>25</sup> Recent Congressional legislation to double this fee to \$5.00 per enplanement in order to fund the TSA for the rest of FY 2002 was rejected by the House.

This fee is restricted in its application in several ways. First, the fee applies only to flight segments originating within the United States. Second, for transportation that includes travel on two or more covered carriers, the carrier *selling* the air transportation is responsible for remitting the passenger security fee, regardless of whether the selling or operating carrier actually collects the fee from the passenger. Third, because it is intended to recoup security costs from those passengers who benefit from security screening, the fee applies only to such passengers, namely, only to passengers who enplane on the following domestic or foreign air carrier flights:

- (1) a scheduled passenger or public charter passenger operation on an aircraft having a passenger seating configuration of more than 60 seats; or

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<sup>25</sup> The TSA considers a roundtrip to be an air itinerary beginning and ending at the same airport or at co-terminal airports, *e.g.*, LaGuardia and JFK airports in New York City. Letter from DOT General Counsel to James L. Casey, Air Transport Association (Jan. 25, 2002) (available on the DOT web site).

- (2) a scheduled passenger or public charter passenger operation with an aircraft having a passenger seating configuration of less than 61 seats when passengers are enplaned from or deplaned into a sterile area.<sup>26</sup>

49 C.F.R. § 1510.9(a)(1-2). Finally, although the passenger security fee applies to passengers using frequent flyer awards for air transportation, it does not apply to non-revenue passengers, such as dependents of air carrier employees flying standby, or off-duty crewmembers sitting in passenger seats. Freedman Letter, at 2.

Carriers must identify the passenger security fee as the “September 11th Security Fee” in all of their advertisements and solicitations for air transportation. The TSA has taken the position that while carriers must collect the passenger security fee imposed by the TSA and may collect security fees imposed or required by other governments, carriers may *not* separately state other security charges in advertisements or tariffs. Freedman Letter, at 2.

Carriers must remit to the TSA all passenger security fees collected for a given month by the last calendar day of the following month. Accordingly, fees collected during February 2002 must be remitted on or before March 31, 2002. Carriers hold all fees collected from passengers pursuant to the Security Act in trust for the beneficial interest of the U.S. government.<sup>27</sup> Air carriers may retain any interest that accrues on the principal amounts collected between the date of collection and remittance to the TSA.

Carriers must establish an accounting system to “properly track the amount[s]” of the passenger security fee “imposed, collected, refunded and remitted,” as well as the airports at which the passengers enplaned, and then must submit quarterly reports to the TSA to provide an accounting of the fee using the same categories (but not including the airport-specific information). Like the fee itself, the quarterly reports are due to the TSA on the last day of the month following the quarter in which the fee was imposed. Any air carrier that collects a fee from more than 50,000 passengers in a calendar year must ensure that an independent certified public accountant conducts an audit of the carrier’s passenger security fee for that year, and each such audit must contain the auditor’s conclusions on (i) whether the procedures for collecting, holding, and remitting the fee are fair and reasonable, and (ii) whether the reports fairly represent the net transactions in passenger security fee accounts. Finally, carriers must permit

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<sup>26</sup> The TSA presently is considering whether to extend the passenger security fee to single-entity charter operations, i.e., to “private charters.” However, the fee does apply to charters operated for the U.S. government if security at the departure airport is provided by the TSA. Letter from DOT General Counsel to Pat Freedman, Air Transport Association, dated January 25, 2002 and available on the DOT’s web site. (“Freedman Letter”).

<sup>27</sup> For public charters, transportation will be considered sold on the earlier of the date on which the carrier or its agent is paid in full for the flight or the date on which the flight is operated. Freedman Letter, at 2. Since most public charter flight amounts are paid into a 14 C.F.R. Part 380 escrow account that is not released until the flight is completed, most of this transportation will be considered sold at the time of departure.

representatives of the TSA, the DOT Inspector General, the DOT generally, and the Comptroller General to audit or review any of its financial records related to the passenger security fee.

### **Air Carrier Security Infrastructure Fee**

The TSA also has imposed an air carrier security infrastructure fee on both U.S. and foreign air carriers to help recover costs incurred in the federalization of airport screening and related security functions. The objective is to transfer to the Federal government the amounts the carriers otherwise would have paid to private security companies in the U.S., based on what they did pay in 2000. This air carrier fee is in addition to the \$2.50-per-enplanement September 11th Security Fee, which is imposed on passengers and collected by the carriers, and it applies to passenger and combination operations. The fee does not apply to freighter operations.

On February 20, 2002, the TSA published its procedures for assessing and collecting this fee. 67 Fed. Reg. 7926, codified at 49 C.F.R. Part 1511. The initial payments were due May 31, based upon costs accounting that the carriers submitted on May 18. Subsequent payments are also due on the last day of each month. Unlike the September 11th Security Fee, this is not a flat fee and is not imposed on a per-passenger or per-enplanement basis. Rather, the annual amount of fees that an individual carrier must pay is based on – and cannot exceed – the amount that such carrier paid for passenger and property screening services during calendar year 2000. ("Property" includes belly cargo, mail, checked baggage and carry-on items, but does not include items transported under the "Known Shipper Program.") In addition, the total fees collected by the TSA from all carriers cannot exceed the total amount paid by all carriers during 2000. Beginning in FY 2004, the TSA will no longer rely on the costs submitted by air carriers but instead will calculate the fee based on the costs that the agency itself is expending to perform the security functions the fee is intended to cover and the carrier's market share at a particular airport. *Id.*, 67 Fed. Reg. at 7930, codified at 49 C.F.R. § 1511.5(g).

### **Appropriations For Civil Aviation Security**

The dramatic expansion of the TSA payroll and the major procurements it is now conducting have driven TSA funding requirements well beyond what they were estimated to be just months earlier.

In Congressional testimony on February 13, 2002, the DOT Inspector General stated that "there are tremendous budgetary challenges facing TSA for this year and next, and it is increasingly clear that the cost of good security will be substantially greater than most had anticipated . . . Key drivers are the sheer numbers of Federal screeners, Federal law enforcement officers, Federal security managers and Federal air marshals that will be needed, as well as the pace and type of EDS installation." Statement of the Honorable Kenneth M. Mead, Inspector General, U.S. Department of Transportation, Before the Subcommittee on Transportation and Related Agencies, House Appropriations Committee, at 5 (Feb. 13, 2002).

For the balance of FY 2002 (i.e., through September 30, 2002), the DOT's Inspector General estimates that the operating costs of the TSA will be between \$1.6 to \$1.8 billion. Added to that will be capital costs, primarily from acquiring and installing EDSs, in the range of

\$4.2 to \$4.8 billion, for a total TSA FY 2002 funding requirement of \$5.8 to \$6.2 billion. The projected revenue base for the TSA in this period, from the user fees and the FY 2002 appropriation, is only \$2-2.4 billion. The Congress is expected to make up for this shortfall through a supplemental appropriations bill, H.R. 4775, which if enacted would appropriate \$3.8 billion to the TSA. This bill also would appropriate \$200 million to airports for costs associated with new, additional, or revised security requirements imposed on airport operators on or after September 11, 2001, such as making structural changes in order to accommodate EDSs. While waiting for H.R. 4775 to be enacted, TSA has operated using a \$760 million transfer from the Federal Emergency Management Agency.

As for FY 2003, the Administration has requested \$4.8 billion for the TSA budget, with user fees expected to account for \$2.2-2.35 billion of that total. DOT FY 2003 Budget in Brief, at 15 (Feb. 4, 2002); DHS Briefing Paper, at 7. Many believe that this request may also be understated. There also are concerns that funding deficits may be addressed through even higher user fees, further raising the cost of air transportation to consumers.

The Security Act recognizes the substantial financial burden placed on airport operators by the enhanced security requirements and attempts to ease that burden. First, it authorized (but did not appropriate) a total of \$1.5 billion to reimburse airports for added security costs in Fiscal Years 2002 and 2003. (On December 21, 2001, the FAA published proposed procedures for processing reimbursement requests. 66 Fed. Reg. 66238. The public comment period ended on January 22, 2002.) Second, during FY 2002, airports have the flexibility to use funds from federal Airport Improvement Project monies (without a local match) and passenger facility charges to pay for security-related expenses and debt service (with DOT approval). Third, in FY 2002, an application for an AIP grant or a PFC does not require a competition plan if the funds are to be used to improve security. Security Act §§ 119 and 123, codified at 49 U.S.C. §§ 47102(3) and 47106(f). Finally, AIP funds are made available in FY 2002 to non-primary airports located in enhanced Class B airspace. These funds can cover operational costs at smaller airports that have been substantially restricted because of their proximity to major cities, i.e., Boston, New York and Washington. Security Act §119, codified at 49 U.S.C. § 47102(3)(K).

The Security Act also authorizes \$500 million for FY 2002 grants to air carriers for onboard security, *e.g.*, for fortified cockpit doors, video monitors, and non-interruptible transponders. *Id.* § 116(c), codified at 49 U.S.C. § 48301(b).

### ***Other Aviation Security Requirements***

#### **Criminal History Background Checks**

The Security Act dramatically expands the background check requirement to cover nearly every person who works at or on an airport, an estimated 750,000 people nationwide. Prior law required background checks for: (i) air carrier employees and others with *unescorted* access to the aircraft of a U.S. or foreign carrier or secured areas of airports; and (ii) passenger and baggage screeners, their supervisors, and such other individuals who exercise security functions associated with baggage or cargo, as determined by the FAA. *See* former 49 U.S.C. § 44936(a)(1)(A-B). The Security Act expands this to require background checks for persons who

previously did not require any background check or needed only an employment investigation – among them those who regularly have *escorted* access to aircraft of a U.S. or foreign carrier or a secured area of an airport. Security Act § 138(a)(6), to be codified at 49 U.S.C. § 44936(a)(1)(B)(iii).

On December 6, 2001, the FAA issued a final rule implementing Section 138 of the Security Act. 66 Fed. Reg. 63474-63486. The rule implements Section 138 by imposing separate new requirements on airport operators and U.S. and foreign air carriers. TSA has emphasized, however, that the pre-existing enhanced background check requirements remain in effect with respect to airports and aircraft operators foreign and domestic, since the transfer will take place airport by airport and aircraft operators will continue to conduct some screening at foreign locations. 67 Fed. Reg. at 8341.<sup>28</sup>

Airport operators must ensure that no one who currently has “unescorted access authority” to the security identification display area (“SIDA”) of an airport (and those with authority to approve unescorted access to the SIDA) may continue to have that authority without completing a fingerprint-based criminal history records check (“CHRC”) that demonstrates he or she has not committed any of the disqualifying criminal offenses listed in the rule.<sup>29</sup> CHRCs must be completed for all appropriate individuals by December 6, 2002. If an individual underwent only an employment history verification under the former 14 C.F.R. Part 107, then that individual must now be fingerprinted and undergo a CHRC. If, however, an individual was subject to a fingerprint-based CHRC in the past, he or she need not undergo another CHRC (nor does the rule apply to government employees and crewmembers of foreign air carriers). Disqualifying criminal offenses include specified crimes committed either in the ten years before the date of the CHRC or while the individual had unescorted access authority. The rule requires airport operators to determine that the arrest of an individual seeking unescorted access authority did not result in a conviction, and it also requires the operator to suspend the access of an individual who has been arrested – in both cases to determine the ultimate disposition of the arrest. 49 C.F.R. § 1542.209(a-f). Individuals who have already been subject to a CHRC may move to another employer at an airport or another airport without needing another CHRC, provided they have been continuously employed. 49 C.F.R. § 1542.209(m)(3).

The Security Act imposes similar new requirements on aircraft operators and their employees and contract employees – including those who have unescorted access authority.

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<sup>28</sup> The FAA’s rule (now incorporated into TSA regulations) does not mention the Security Act’s requirement of criminal history record checks (“CHRCs”) for persons with escorted access authority. TSA, however, expects to address this aspect of the new statute through a future rule. In any event, because the Security Act requires the same background scrutiny for both unescorted and escorted personnel, airports operators and air carriers may have little incentive to preserve the category of unescorted access authority for new hires.

<sup>29</sup> The list of disqualifying crimes includes most violent felonies and felonies against individuals and property, as well as drug-related felonies. The FAA may supplement the list of disqualifying crimes to cover crimes that involve aviation smuggling. 49 U.S.C. § 44936(b)(1)(B)(xiv)(IX).

Aircraft operators must ensure that on and after December 6, 2002, no covered individual retains unescorted access authority or has the authority to perform screening functions, unless the individual has been subjected to a fingerprint-based CHRC. As with the rule applied to airport operators, an individual subject to a fingerprint-based CHRC in the past need not undergo another CHRC to remain on the job. The same ten-year rule described above also applies with respect to aircraft operators' employees. 49 C.F.R. § 1544.229(a-e).<sup>30</sup>

To facilitate the completion of the required CHRCs, the FAA and the American Association of Airport Executives ("AAAE") created an aviation security clearinghouse in order to speed processing of results and ensure accurate record-tracking throughout the process. AAAE is serving as the single point of contact for payment and record submittal and is forwarding the fingerprint record to the FBI for processing against their automated fingerprint identification system. Criminal records will then be posted on a secure FAA website, which has not yet been created, where employers can determine whether their employees or applicants have committed any disqualifying criminal offenses. In addition, the AAAE clearinghouse will accommodate future biometric and security information requirements by storing a copy of electronically submitted records for employers. This will avoid having to reprint employees again as new biometric-based regulations and access control technologies emerge.

### **The Airmen Registry**

Under prior law, the FAA was directed to use its airmen registry (the official list of certificated pilots) to prevent airman certificate applicants from falsifying their identities or otherwise defrauding the Government in order to participate in illegal drug trafficking. The Security Act authorizes the FAA to modify the airmen registry in order to combat acts of terrorism as well. Security Act § 129, to be codified at 49 U.S.C. § 44703(g)(1). Further, the Security Act directs the FAA to work with other federal agencies and state and local authorities to assist in the identification of persons applying for or holding airmen certificates. *Id.*, codified at 49 U.S.C. § 44703(g)(4).

### **Flight School Security**

The Security Act allows aliens (or any other person specified by the TSA) to attend flight training schools *only* after the school notifies the Department of Justice that the individual has requested pilot training and the Department of Justice has not objected within a 45-day waiting period. Security Act § 113(a), codified at 49 U.S.C. § 44939(a)(1-2). The Department of Justice may terminate a student's studies even after those studies begin if the Department finds that the student presents a risk to aviation or national security. *Id.* § 113(a), codified at 49 U.S.C. § 44939(b). This provision applies to all applications for training received after November 19, 2001, and it covers all facets of flight training, including simulator training and any other form or aspect of training. *Id.* § 113(a), codified at 49 U.S.C. § 44939(c). It does not, however, cover

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<sup>30</sup> The rule subsequently was amended to make it clear that it extends to all flight crewmembers of all aircraft operators subject to security program requirements. 67 Fed. Reg. 8205 (Feb. 22, 2002), codified at 49 C.F.R. § 1544.230.

training for aircraft with a maximum takeoff weight of less than 12,500 pounds. *Id.* § 113(a), codified at 49 U.S.C. § 44939(a). With the TSA's guidance, flight schools must conduct security awareness training programs for their employees. Security Act § 113(a), codified at 49 U.S.C. § 44939(d).

The Department of Justice has issued two related rules implementing Section 113. These rules establish a two-track process for assessing aliens wishing to receive training.

The first track is an expedited processing procedure for three categories of aliens believed to pose a minimal security risk:

- Foreign nationals who are current and qualified as pilots or flight engineers with certificates recognized by the U.S., or who are employed as pilots by U.S. carriers, all with respect to operating aircraft with an mtow of at least 12,500 pounds;
- Commercial, governmental, corporate, or military pilots of aircraft with an mtow of at least 12,500 pounds who must receive familiarization training on a particular aircraft in order to transport it to the purchaser or recipient; and
- Military or law enforcement personnel who must receive training on a specific aircraft given by the U.S. to a foreign government pursuant to a draw-down authorized by the president under the Foreign Assistance Act of 1961, 22 U.S.C. § 2318(a)(2).

The latter two categories of aliens may only receive familiarization training, i.e., the training may not include initial qualification or type rating. 67 Fed. Reg. 41140, 41146 (June 14, 2002), codified at 28 C.F.R. § 105.12(a)(1-3). Aliens in these three categories cannot begin their training until the Department of Justice completes a security risk assessment and grants permission to the flight school to begin, or the 45-day period established by the Security Act elapses. 67 Fed. Reg. at 41145, codified at 28 C.F.R. § 105.10(b)(1).

The second track concerns aliens who do not fall into any of these three categories (and, as noted above, any *person* whom the TSA identifies as posing a security risk). Such persons may still receive training, but only after they complete a flight training candidate check form and submit to the FBI fingerprints taken under the direct supervision of a federal, state, or local law enforcement official. The same 45-day period governs the Department's security risk assessments of these non-expedited aliens, although the Department may interrupt any person's flight training after that period if the person is found to pose a security risk. 67 Fed. Reg. at 41146, 41151-41152, codified at 28 C.F.R. §§ 105.12(c), 105.13-105.14.

## **Crew Training**

All air carrier flight and cabin crew must be trained for "potential threat conditions." The FAA, in consultation with the TSA and other appropriate agencies, has developed guidelines for the training. Those guidelines include live situational training and training in the use of

protective devices. Domestic air carriers have 60 days from the date of receipt of the guidelines to submit their training programs to the FAA for review. Once a training program is approved (within 30 days of submission), the carrier must complete the training of all flight and cabin crews within 180 days. Security Act § 107(a), codified at 49 U.S.C. § 44918.

## **Airport Security**

The Security Act allows an airport operator to consult with state and local law enforcement authorities to conduct a threat assessment of the airport, in order to determine whether any rule restricting the parking of passenger vehicles near the terminal (typically within 300 feet of the terminal) should not apply to that airport. Security Act § 106(b)(2)(A). If the airport operator determines that sufficient safeguards are in place and so certifies in writing to the TSA, then the passenger vehicle parking restriction is eliminated at that airport. The TSA, however, may block the elimination of such a rule by objecting within 15 days of the airport operator's certification for a nonhub airport; within 30 days for a small hub airport; within 60 days for a medium hub airport (as all those terms are defined at 49 U.S.C. § 41714(h)); and within 120 days for an airport that had one percent or more of annual U.S. enplanements for the most recent calendar year.<sup>31</sup>

The Security Act adds wide-ranging measures to the airport *perimeter* security regime as well. The Act gives the TSA plenary power to deploy those federal personnel needed to counter threats to national security and air carrier operations at the airport and authorizes federal law enforcement agencies, such as the Department of Justice, to detail their employees to the TSA for such airport duty. The TSA – using the federalized screener workforce – must ensure the "screening or inspection of all individuals, goods, property, vehicles, and other equipment before entry into a secured area" of any airport with service by a certificated carrier. Security Act § 106(a), codified at 49 U.S.C. § 44903(h)(4)(A). Further, the TSA is required to establish procedures to ensure the safety and integrity of air carrier employees, ground-handling companies, fixed-base operators (or FBOs), caterers, and the like. All persons having direct access to the aircraft or the airfield, including vendors, must develop security programs. Both airports and carriers must develop "security awareness programs" for employees and independent contractors such as skycaps at airports. The goal is to assure that airports have "at least the same level of protection as will result from screening of passengers and their baggage." *Id.*, codified at 49 U.S.C. §44903(h)(4)(B).

## **Identification Cards**

One of the most contentious issues with respect to security is the use of identification cards. While the use of versions of these cards by consumers remains a subject of debate, the federal government is proceeding to develop a uniform identification card for all transportation

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<sup>31</sup> It is not entirely clear that large hub airports as defined above are even allowed to seek the elimination of a passenger vehicle parking restriction. Section 106(b)(2) applies only to airports "described in paragraph (1)," and Section 106(b)(1) refers only to airports with less than one percent of annual U.S. enplanements.

workers. Immediately after September 11, the Secretary of Transportation established the National Infrastructure Security Committee. The Committee has a number of Direct Action groups, including one focused on uniform national standards for credentialing transportation workers – the Credentialing Direct Access Group (“CDAG”). CDAG is considering a single ID card for all modes that would have biometric identifiers, would be linked to CHRCs and would rank cardholders for different levels of security. One of the objectives is to make the card system flexible enough to eventually include transportation users as well as workers. *See generally* Testimony of Rear Admiral James Underwood, Before the House Transportation and Infrastructure Committee, Subcommittee on Coast Guard and Maritime Transportation (Feb. 13, 2002).

Applying this concept to a single mode is difficult. Applying it to all modes is doubly so, particularly since it begins to cross over into state licensing requirements. The logic of such a system is obvious, however.

### **Charter And General Aviation Operations**

The Security Act takes a measured approach with respect to operations by charter aircraft and general aviation aircraft. First, access to Class B airspace by general aviation gradually was restored. Three small general aviation airports adjacent to the District of Columbia were opened, albeit under quite restrictive conditions,<sup>32</sup> and finally Washington’s Reagan National Airport was opened to general aviation. Second, on February 22, 2002 (and as discussed briefly above), the TSA established security rules applicable to scheduled and charter operators with smaller aircraft, i.e., aircraft with a maximum certificated takeoff weight of 12,500 pounds or more but with fewer than 30 seats (aircraft with more than 30 seats are otherwise required to have security programs). 67 Fed. Reg. 8205 (Feb. 22, 2002). This security program allows scheduled and charter operators with smaller aircraft to adopt a “twelve-five” security program, similar to the preexisting partial security program but without the requirement that the aircraft operator participate in airport-sponsored exercises of airport contingency plans. 49 C.F.R. § 1544.101(d). Passenger aircraft in commercial service can ship belly cargo received from the freighters of twelve-five carriers. The TSA, however, has refused to extend the twelve-five program to foreign all-cargo carriers in the form of an analogous rule in the new 49 C.F.R. Part 1546.

### ***Security During Flight***

The TSA has also emphasized improving the security of commercial aircraft while they are in flight, as distinguished from defeating and deterring threats before departure.

### **Flightdeck Security**

The Security Act gives the FAA responsibility for regulating flight deck security. The Act directed the FAA to issue an order “[a]s soon as possible” requiring U.S. and foreign carriers

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<sup>32</sup> The conditions include criminal history record checks of any pilots wishing to utilize the airports and preclearance of all flights. 67 Fed. Reg. 7538 (Feb. 19, 2002).

(when operating to and from the U.S.) to: (1) limit access to the cockpit to authorized persons on all domestic and foreign flights; (2) reinforce all flight deck doors and locks (on aircraft that have "rigid doors" in the bulkhead separating cockpit from cabin)<sup>33</sup>; and (3) keep the door to the cockpit locked during flight except when necessary to permit authorized persons to move in and out of the cockpit.<sup>34</sup> The FAA also is directed to develop technology allowing the installation of video monitors to alert pilots to incidents in the cabin, to ensure that hijackers cannot disable the transponder, and to investigate whether switches should be installed in the cabin to allow cabin crew to alert pilots of a security breach in the cabin. Security Act § 104. Acting on these directives, the FAA has issued several new design standards with respect to cockpit and related requirements, including a final rule requiring foreign carriers to add deck door locking devices to aircraft serving the U.S. and, eventually, to reinforce the flightdeck doors of those aircraft in the same manner that U.S. carriers have reinforced their flightdeck doors. *See* 67 Fed. Reg. 42450 (June 21, 2002); 67 Fed. Reg. 2112 and 2118 (Jan. 15, 2001); and 66 Fed. Reg. 58650 (Nov. 21, 2001).

### **Firearms, Less-than-Lethal Weapons, And In-flight Emergency Services**

The Security Act also includes discretionary provisions that, had the TSA chosen to implement them, would have significantly changed the way that flight crews defend themselves and their aircraft while in flight. First, and perhaps most controversially, Section 128 of the statute authorizes pilots of U.S. air carriers who volunteer to carry firearms if four conditions are met: (i) the TSA approves; (ii) the carrier approves; (iii) the TSA has approved the specific firearm to be carried; and (iv) the pilot has been trained according to regulations issued by the TSA. The TSA has decided not to allow pilots to have firearms on the flight deck. Matthew L. Wald, "Transportation Security Chief Says He Opposes Pilots' Carrying Guns Aboard Planes," *New York Times* (May 22, 2002). Legislation has been introduced, however, that would compel the agency to allow qualified and willing pilots to have firearms while in the cockpit. *See* The Arming Pilots Against Terrorism Act, S. 2456 and H.R. 4635.

Second, Section 126 addresses the provision of less-than-lethal weapons (such as stun guns, mace, or pepper spray) to flightdeck crewmembers. Under a specific directive in Section 126, the Department of Justice's National Institute of Justice ("NIJ") conducted a study (confidential except to air carrier security officials) assessing the "less-than-lethal" weapons available with a view to determining whether such weaponry would be effective in helping the cabin crew stop hijackers. According to the TSA, the NIJ recommended that "substantial systematic testing" be performed to determine any effects such weaponry, including electrical

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<sup>33</sup> The Act directs the FAA to investigate what can be done to similarly safeguard the cockpit in aircraft (such as turboprop commuter aircraft) that lack such a "rigid door." Security Act § 104(c).

<sup>34</sup> In the wake of the September 11 attacks, carriers quickly accomplished a temporary reinforcement of cockpit doors. The FAA also has issued a security directive that addresses cockpit access in significant detail. For instance, the directive prohibits pilots from other airlines from riding in the jump seat unless they are employed by the operating carrier's code-share partners.

shock devices, may cause on aircraft avionics or other critical systems. Other weapons including chemical devices, impact projectiles, and light and acoustic weapons, “pose either safety or effectiveness issues that should be further tested in multiple aircraft settings before any deployment.” Letter from David W. Tiedge, TSA Director of International Operations (May 23, 2002). Accordingly, the TSA on May 23 deferred action on this directive, informing both U.S. and foreign carriers that the “carriage of lethal or less-than-lethal weapons is not authorized by the Transportation Security Administration on your aircraft to or from the United States.” *Id.*

If the Departments of Justice, Transportation, and State were to agree that these weapons would be effective, the Secretary of Transportation may authorize cabin crew for U.S. or foreign carriers to carry such weapons. To do this, however, the Secretary would first have to prescribe (1) rules requiring that any flight deck crew member intending to carry such a weapon be trained in the proper use of the weapon; and (2) guidelines setting forth the circumstances under which such weapons may be used. Security Act § 126, codified at 49 U.S.C. § 44903(h)(1) & (2)(A-B).<sup>35</sup>

Third, in a related provision, Section 131 directs the TSA to carry out a program to permit qualified law enforcement officers, firefighters, and emergency medical technicians to provide emergency services on commercial air flights during emergencies. Security Act § 131(a), codified at 49 U.S.C. § 44944(a)(1). Those who volunteer for this program, once they complete a training program to be designed and implemented by the TSA, will place their names on a registry of emergency services personnel that the TSA will share with carriers for use during in-flight emergencies. In order to encourage individuals to volunteer for this program, the Security Act exempts them from civil damages in any federal or state court in any action “that arises from an act or omission of the individual in providing or attempting to provide assistance” during an in-flight emergency. Security Act § 131(a), codified at 49 U.S.C. § 44944(b). This exemption does not apply where a person exhibits gross negligence or wilful misconduct in responding to an emergency. *Id.* § 131(a), codified at 49 U.S.C. § 44944(c).

Finally, the Security Act establishes some legal protection for those who intervene to stop hijackings. Section 144 of the Act provides that an individual who attempts to thwart an “act of criminal violence or piracy” on an aircraft cannot be held civilly liable in a federal or state court for attempting to thwart such an act, if the individual “reasonably believed that such an act of criminal violence or piracy was occurring or was about to occur.” Codified at 49 U.S.C. § 44903(h).

### **Federal Air Marshals Program**

The number of Federal Air Marshals has been significantly increased, although the staffing projections are confidential. The Security Act directs the TSA to deploy Marshals on as many interstate and intrastate flights as possible, starting with nonstop, long distance flights such as those targeted on September 11. The TSA may use other federal law enforcement personnel

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<sup>35</sup> The FAA did issue a request for comments on both Sections 126 and 128. 66 Fed. Reg. 67620 (Dec. 31, 2001).

as Air Marshals on an interim basis. The TSA also may enter into agreements with Federal, state or local law enforcement agencies that permit their law enforcement personnel to carry firearms onboard when traveling by air and to be prepared to assist the Federal Air Marshals, if necessary. Several measures are directed at attracting qualified candidates, including: waiving the previous maximum age requirement (under 40) for retired law enforcement officers, retired members of the Armed Forces, and air carrier crewmembers who have been furloughed in the one-year period beginning September 11, 2001; and making Federal Air Marshals eligible for the availability pay (up to a 25% bonus in lieu of overtime) now given to federal criminal investigators. Security Act § 105(a), codified at 49 U.S.C. § 44917.

The Security Act gives the FAA responsibility for regulating flight deck security. The Act directed the FAA to issue an order “[a]s soon as possible” requiring U.S. and foreign carriers (when operating to and from the U.S.) to: (1) limit access to the cockpit to authorized persons on all domestic and foreign flights; (2) reinforce all flight deck doors and locks (on aircraft that have "rigid doors" in the bulkhead separating cockpit from cabin)<sup>36</sup>; and (3) keep the door to the cockpit locked during flight except when necessary to permit authorized persons to move in and out of the cockpit.<sup>37</sup> The FAA also is directed to develop technology allowing the installation of video monitors to alert pilots to incidents in the cabin, to ensure that hijackers cannot disable the transponder, and to investigate whether switches should be installed in the cabin to allow cabin crew to alert pilots of a security breach in the cabin. Security Act §104. Acting on these directives, the FAA has issued several new design standards with respect to cockpit and related requirements. *See* 67 Fed. Reg. 2112 and 2118 (Jan. 15, 2001) and 66 Fed. Reg. 58650 (Nov. 21, 2001).

### **Passenger and Crew Manifests**

Under the Customs Service implementation of this provision, the advance manifest requirement governs every passenger flight in foreign air transportation to the U.S., whether operated by a domestic or foreign carrier, and regardless of whether the passengers and crew have already been pre-inspected or pre-cleared at the foreign location for admission to the U.S. 66 Fed. Reg. 67482-67485, codified at 19 C.F.R. § 122.49a(a). The Security Act does not require a ticketing carrier that is not operating the flight in question to provide passenger manifest information, although as a practical matter code-share and alliance partners generate much of the information ultimately reported to the Customs Service.) This requirement applies to all passengers and crewmembers traveling to the U.S., even if they are transiting through the U.S. to another nation. 19 C.F.R. § 122.49a(c)(1). For each flight covered, a carrier must submit

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<sup>36</sup> The Act directs the FAA to investigate what can be done to similarly safeguard the cockpit in aircraft (such as turboprop commuter aircraft) that lack such a "rigid door." Security Act § 104(c).

<sup>37</sup> In the wake of the September 11 attacks, carriers quickly accomplished a temporary reinforcement of cockpit doors. The FAA also has issued a security directive that addresses cockpit access in significant detail. For instance, the directive prohibits pilots from other airlines from riding in the jump seat unless they are employed by the operating carrier's code-share partners.

to the Customs Service a separate passenger and crew manifest. The crew manifest must be received *in advance* of departure from the “last foreign port or place,” and the passenger manifest must be received no later than 15 minutes after the flight has departed from the last foreign port or place. “Departure” is defined as the moment when the wheels are up on the aircraft and the aircraft is en route directly to the U.S. 19 C.F.R. § 122.49a(b). The Customs Service is not requesting crew or passenger manifest information for all-cargo flights.

APIS is the only electronic database that carriers may use to submit the requisite information. (On an interim basis, however, a carrier instead may opt to provide a copy of a commonly used travel document (such as a passport) that contains some or all of this identifying information.) As directed by Section 115 of the Security Act, the Customs Service is now requiring domestic and foreign carriers to provide Customs with electronic access to requested passenger name record information whenever Customs requests it. 67 Fed. Reg. 42170 (June 25, 2002), codified at 19 C.F.R. §§ 122.49a-122.49b. 66 Fed. Reg. at 67483.<sup>38</sup>

### ***Optional And Long-Term Security Directives***

#### **Research & Development**

The TSA is directed to establish a pilot security program at no fewer than 20 airports to test and evaluate new technology – including biometric technology that identifies individuals by personal characteristics – to improve access control for closed or secure areas. Security Act § 106(d), codified at 49 U.S.C. § 44903(c)(3).<sup>39</sup> The TSA will provide technical support to small and medium-sized airports, those having less than one percent of annual U.S. enplanements in the most recent calendar year, and the TSA will also provide financial assistance to all small and medium-sized airports, i.e., all but the large hub airports.

On the other hand, the TSA also is directed to encourage the use of off-the-shelf technology. Under Section 136 of the Security Act, the TSA must recommend to airport operators commercially available measures or procedures to prevent access to secure airport areas by unauthorized personnel, including a 12-month deployment strategy for currently available technology at the largest airports.

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<sup>38</sup> Congress has added further detail with respect to aircraft manifests. The Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-73 (May 14, 2002), requires both aircraft and commercial vessels to provide information such as date of birth, citizenship, and country of residence for each passenger and crew member departing from, or arriving in, the U.S. Border Security Act § 402(a), to be codified at 8 U.S.C. § 231(a-c). Aircraft and vessel operators must provide this information electronically, rather than manually, beginning January 1, 2003. *Id.* § 402(a), to be codified at 8 U.S.C. § 231(e).

<sup>39</sup> This is one of a number of provisions of the Security Act that uses the term “Administrator” (i.e., the FAA) when the context suggests that it is to be the responsibility of the “Under Secretary” (i.e., the TSA).

## Optional Security Measures

The Security Act provides the TSA with a long list of “optional” security measures that the agency may or may not require. However, it also requires the TSA to report back to Congress with respect to each of these measures. Security Act § 109, codified at 49 U.S.C. § 114 note. The agency recently issued its report on these measures. *See* Report to Congress on Enhanced Security Measures (May 19, 2002) (“Enhanced Security Report”). The Enhanced Security Report contains the following significant conclusions on the Security Act’s Section 109 issues:

- The TSA declined to require a 911 emergency telephone call number for passenger aircraft and passenger trains. *Id.* at 3.
- Working with some state officials, the TSA is exploring how state and local law enforcement officers traveling armed might be employed to assist with aircraft security, including the use of a biometric-based ID card (the transportation workers identification card, or “TWIC”) to issue to such officers. *Id.* at 4.
- The TSA is working to evaluate a trusted traveler or registered passenger program that would allow “trusted” passengers to effectively be pre-screened. *Id.* at 4. This is different from the current practice of giving preferential treatment, i.e., separate screening checkpoints for frequent fliers, a practice that the TSA largely has rejected
- The agency is developing CAPPS II, a second generation of the CAPPS technology. *Id.* at 6.
- The FAA is working toward incorporating the TWIC into the pilot certification process, including (perhaps) a photograph of the holder and “appropriate biometric imprints.” Security Act § 109(a)(6); Enhanced Security Report at 7.
- Similarly, the TSA is examining the use of voice stress analysis, biometric, and other technologies in the screening process. Enhanced Security Report at 7.
- Both the TSA and the FAA are pursuing technological improvement in existing equipment to permit enhanced instant communications between in-flight passenger aircraft and ground facilities, *e.g.*, ensuring continuous transponder communication with air traffic following a hijacking. *Id.* at 8.

## *Liability*

Title II of the Security Act is devoted entirely to extending and amending the liability limitations included in the Air Transportation Safety and System Stabilization Act, Public Law 107-42. Section 201 of the Security Act extends the liability limitations of the Stabilization Act to aircraft manufacturers, state port authorities (i.e., the Port Authority of New York and New Jersey), owners and operators of airports, and persons with property interests in the World Trade

Center. The Security Act, in language that generally tracks § 408 of the Stabilization Act, limits the liability of any of these entities to the maximum level of its insurance coverage, in civil actions arising from the September 11 terrorist attacks. Security Act § 201(b), amending § 408(a)(1) of the Stabilization Act. Any person with a property interest in the World Trade Center, however, is required to satisfy all contractual obligations to rebuild or assist in the rebuilding of the World Trade Center, in order to receive liability protection under the Security Act. *Id.*, amending § 408(a)(2) of the Stabilization Act. Moreover, this liability limitation does not apply to aviation security companies. Security Act § 201(b)(3), adding § 408(c) to the Stabilization Act. Finally, the Security Act limits the civil liability of the City of New York arising from the September 11 attacks to the greater of the city's insurance coverage or \$350 million. Security Act § 201(b)(2), amending § 408(a)(3) of the Stabilization Act.

### ***Implementation Schedule***

The Security Act imposes a large number of deadlines for administrative action and implementation. To date, the DOT, FAA, and TSA have met all deadlines. The significant remaining deadlines are identified below:

By November 19, 2002	TSA certifies to Congress that federalization of screening process has been completed. (§ 110(b)).  TSA reports to Congress on screening requirements for scheduled passenger service on aircraft with 60 seats or less. (§ 110(d)).  Federal security screeners, managers, personnel and law enforcement officers must be deployed at all 429 certificated U.S. airports. (§ 110(g)).
November 20, 2002	Private screening pilot program begins at not more than five airports. (§ 108).
December 6, 2002	Airport operators and air carriers must ensure that all personnel with unescorted access to the secure area of an airport have satisfactorily completed fingerprint-based criminal history records checks.
By December 31, 2002	All checked baggage must be subject to EDS screening. (§ 110(b)).
By May 2003	TSA updates its report to Congress on enhanced security measures. (§ 109(b)).
Approximately November 19, 2004	Opt-out private screening program begins. (§ 108).

### ***Conclusion***

Whatever additional legislation is enacted,<sup>40</sup> and however the nation's transportation security regime continues to change, the Act must be regarded as a pivotal point in aviation – the

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<sup>40</sup> The Senate on December 20, 2001 passed the Port and Maritime Security Act of 2001, S. 1214, and sent it to the House of Representatives for consideration. The House also has before it (continued...)

point at which the nation turned away from the old model of regulation and began devoting more significant scrutiny and resources to transportation security. The TSA's challenge for the next several years is to meet the remaining aviation security deadlines specified by the Security Act, move forward with respect to security in other modes, and respond to additional legislation when enacted, all while filling tens of thousands of positions and all while the nation is at war. Criticisms of the agency, though warranted in certain circumstances, must be viewed in light of this daunting challenge.

*[Note: As this article was published in hard-copy form, TSA under secretary John W. Magaw resigned. Magaw was replaced by Admiral James M. Loy, who recently retired as commandant of the Coast Guard and who, as noted above, was serving as deputy under secretary for transportation security and chief operating officer of the TSA. As of November 1, 2002 Admiral Loy continues as acting under secretary but has not been confirmed by the Senate.]*

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(...continued)

a companion bill of an act bearing the same name, H.R. 3437. The Senate bill would, *inter alia*: authorize \$363 million for improvements in port and vessel security, including funds for hiring additional Customs Service agents and grants to port authorities for security improvements; create a National Maritime Security Advisory Committee to advise the DOT; direct the DOT to issue regulations for each port to develop and issue its own maritime facility security program and to conduct seaport security vulnerability assessments of those plans; create an international seaport assessment program under which the DOT would assess the effectiveness of the security measures maintained at foreign ports served by U.S. vessels or from which foreign vessels serve the U.S.; and create a sea marshals program similar to the FAMs program. Both of these bills are notable in that they give the TSA little additional authority and instead rely upon the Coast Guard.