# THE NEW FACE OF AVIATION SECURITY: IMPLEMENTING THE AVIATION AND TRANSPORTATION SECURITY ACT

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The Aviation and Transportation Security Act of 2001, Public Law 107-71 (the "Security Act") was enacted on November 19, 2001 and is reproduced in the Appendix to this article. The Security Act, together with the Air Transportation Safety and System Stabilization Act of 2001, Public Law 107-42 (the "Stabilization Act"), constitutes the most significant federal aviation legislation since the Airline Deregulation Act of 1978. At the start of a new millennium, the face of aviation has been changed in ways that no one fairly could have anticipated.

Economic regulation of the aviation industry was greatly reduced (but not eliminated) in the last two decades. Safety regulation, by most measures, was intensified during that period. With the passage of the Security Act, the industry has a new layer of regulation premised on security and enforced by the nascent Transportation Security Administration, an institution that soon will become the largest federal law enforcement agency – ever. This article provides an overview of the Security Act approximately three months into its implementation.

## Before September 11

Aviation security has been a significant issue in the U.S. since May 1, 1961, when a National Airlines flight from Miami to Key West was hijacked.[1] The response to this and to incidents later that year was the Air Piracy Act, making aircraft hijacking a federal offense carrying, in some circumstances, the death penalty. 49 U.S.C. § 46502. When the incidence of hijackings increased in the early 1970s, the FAA responded by creating the Sky Marshal program (formally reconstituted in 1985 as the Federal Air Marshal program).

It was the only successful aircraft hijacking in history -- successful on the presumption that the perpetrator escaped -- that prompted greater airport security. D. B. Cooper parachuted

[1] In the mid-1950s, a DC-6 was destroyed in-flight by dynamite placed in a suitcase by a relative of a passenger hoping to collect on an insurance policy. It was viewed as an isolated criminal incident.

from a Northwest 727 on November 24, 1971, somewhere over the Cascade Mountains, after demanding and receiving a large cash ransom. He never was found. But Mr. Cooper's escapade was the final straw, prompting the FAA to require universal prescreening of passengers and their carry-on baggage.

That system went into effect on January 5, 1973, and, with various modifications and additions, it was the system in place on September 11, 2001. The decision was made to place the responsibility for the prescreening functions with the air carriers. In an era of regulated fares, it was a cost that simply was passed through to passengers. However, while security remained stationary, the risks greatly increased. Political terrorism became the watchword. Aircraft hijacking became an end, rather than just a means. Terrorists added aircraft sabotage to the risks. The world became a much more dangerous place.

The U.S. did not stand still. In the years following the sabotage of Pan Am flight 103 in 1988, two Presidential Commissions made specific security recommendations, and at least two major pieces of federal legislation were directed at the subject. The changes and improvements, however, were on the margin.

## After September 11

Everything changed on the morning of September 11, 2001, events so terrible that they made the incidents of the past 40 years seem almost benign. The tragedies prompted Congress to act, and to act quickly.

Congress first tackled the resulting financial crisis in the airline industry with the Stabilization Act, signed into law on September 22. 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 security work force 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 by the President on November 19. Although Congress was criticized for acting too slowly, in less than two months it had created a new federal agency that will soon be larger than the FAA – and will be the largest federal law enforcement agency in the nation's history. 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."[2]

The debate in Congress focused on the issue of federalization versus private contracting. The distinction between the two may have been more cosmetic than real. As several commentators noted, when dealing with airport screeners, it is not the name on the top of the check that matters, "it is the amount that counts." The primary consequence of leaving passenger screening in the hands of the air carriers, subject to 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

[2] H.R. Report 107-296, at 53 (November 16, 2001).

wages at the airport fast food restaurants.[3] High turnover rates,[4] poor training skills and poor communication skills were inevitable in that workforce. It was no fault of the carriers. In a deregulated environment, they had no alternative but to attempt to comply with the FAA requirements at the lowest possible cost. That the U.S. is one of only three nations in the world that used this approach speaks to its utility.[5]

Whatever else the Security Act does, and it does much more, it takes the responsibility for passenger screening out of the hands of the carriers and places it with the government, a pattern found in most other nations. That is a major step, somewhat lost in the political debate. This is accomplished in legislation that has a large number of rough edges. Numerous implementing regulations and agency directives are polishing those edges. This article reviews in detail the initial implementation of the Security Act.

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

The Security Act creates a new federal agency within the DOT: the Transportation Security Administration ("TSA"), headed by the newly created position of Under Secretary of Transportation for Security. Security Act §101(a), to be codified at 49 U.S.C. §114.[6] The DOT formally constituted the TSA, effective December 28, 2001. 66 Fed. Reg. 67117 (December 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.[7] The Administration's Fiscal Year 2003 Budget requests $4.8 billion in total funding for the TSA and assumes that the TSA will have 41,000 employees, making it the largest federal law enforcement agency by a wide margin. Most observers believe that these numbers are on the low side of the TSA's actual requirements.

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[3] Testimony of Gerald L. Dillingham, Director Physical Infrastructure Issues, GAO, Before the Subcommittee on Aviation, House Committee on Transportation and Infrastructure, at 6 (September 21, 2001) ("GAO Report").

[4] For the twelve months ended April 30, 1999, there was an average turnover rate of 126% at the nineteen largest U.S. airports. GAO Report, at 6.

[5] 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.

[6] The new Under Secretary of Transportation is John Magaw, appointed by President Bush on January 7, 2002. Security Act § 101(a), to be codified at 49 U.S.C. § 114.

[7] 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." Security Act §101(a), to be codified at 49 U.S.C. §114(g)(2).

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), to be 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 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). Finally, an "emergency" regulation or directive is subject to review by the Transportation Security Oversight Board (the "TSOB"), although the TSOB's role is limited to ratifying or disapproving a regulation or directive within 30 days of its issuance. Security Act §102, to be 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 DOT representative chairs this Board. Security Act § 102(a), to be 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. *Id.* § 102(a), to be codified at 49 U.S.C. § 115(c)(2-6). The Board is required to meet at least quarterly *Id.* § 102(a), to be codified at 49 U.S.C. § 115(d).

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. The new TSA rules are reproduced in the Appendix to this article. Apart from renumbering and updating existing rules, the new rules deal with the sensitive issue of transparency. One of the more remarkable facets of the debate on aviation security has been the extent to which it has been public. The TSA has identified extensive information and records that constitute "sensitive security information" or "SSI." SSI is not subject to FOIA requests. Further, all persons in the possession of SSI must restrict disclosure and access. 49 C.F.R. §§ 1520.1 through 1520.7.

## Passenger Screening

### How The Federal Takeover Of Screening Will Work

The immediate and most visible task of the TSA has been to take over passenger screening at the 429 airports in the U.S. receiving scheduled passenger service from certificated air carriers or foreign air carriers, 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 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. 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), the latter to be codified at 49 U.S.C. §44901(a).[8] The federalization extends to passenger compliance, i.e., it now is 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), to be codified at 49 U.S.C. § 46503.[9]

The 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, including U.S. citizenship.[10]

When the transition is completed, the TSA will have a federal security force in place at the 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, to be codified at 49 U.S.C. § 44933. The TSA presently is recruiting for those positions, positions that will be at or near the top of the federal pay scale ($105,000 to $150,000 per year). This is indicative of the importance of the FSD at each airport. The FSDs, particularly at hub airports, will play a major regulatory role vis-à-vis the airlines.

Each airport also will have federal law enforcement officers employed by the TSA at each screening location and elsewhere on the airport property. Security Act § 110(b), to be codified at 49 U.S.C. § 44901(g). These officers will carry firearms and will have the authority

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8 The carriers will remain responsible for CAPPS screening, known shipper programs and positive bag-match programs. *Id.*

9 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.

10 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 curriculua. 49 C.F.R. §§ 1544.405 - 1544.411.

to make arrests and to seek and execute warrants. Security Act §§ 101(a), to be codified at 49 U.S.C. § 114(q), and Security Act § 110(b). One of the issues to be resolved is the extent to which the federal officers will supplement rather than replace existing state and local law enforcement personnel at these airports.[11]

But the largest part of the workforce, by far, will consist of at least 30,000 screeners.

**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.[12]

- 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."

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

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[11] 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.

[12] This requirement was subject to some initial criticism, although most federal jobs require U.S. citizenship. For example, for over sixty 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).

**Training The Federal Security Screener Workforce**

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), to be codified at 49 U.S.C. § 44935(g-h).

In many respects, screeners will be regulated by the TSA in a manner similar to individual certificate holders regulated by the FAA. They will not hold certificates because they will be federal employees. Indeed, an obvious pool of qualified (and pre-cleared) talent rests in the retired federal work force.[13] The objective is to create a career path rather than temporary employment. The TSA has broad authority to fix the compensation of screeners and is expected to use that authority to more than double the average salary for that position.[14] At the same time, these personnel will not have the relative 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), to be codified at 49 U.S.C. § 44935(i).

**Baggage Screening**

While carry-on baggage is addressed through passenger screening procedures,[15] checked baggage is another matter. The problem with the screening of checked baggage is a logistical one. It is estimated that at least 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), to be codified at 49 U.S.C. § 44901(c). Where the congressionally-preferred method of

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[13] There is a veteran's preference, but it is limited to veterans eligible for retired, retirement or retainer pay. Security Act § 111(a), to be codified at 49 U.S.C. § 44935(f)(2).

[14] The Congressional Budget Office assumed that screeners would receive an average base salary at the Federal Grade 7 level, approximately $35,000 per year, as compared to a current average of less than $15,000 per year. It also was assumed that supervisors would be at the Grade 11 level, about $53,000 per year. Congressional Budget Office, Cost Estimate for S.1447, Aviation Security Act, at 5 (October 26, 2001). The TSA has not yet released its proposed pay schedules for these positions.

[15] 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, truly in a lesser "sense," the sense of the House 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.

screening checked baggage – an explosive detection system ("EDS")[16] – was not available, the Security Act allowed alternative methods to be used, including (but not limited to) a positive bag-match program, 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.[17] 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), to be codified at 49 U.S.C. § 44932(d)(1).

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, to be 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), to be 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.

**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

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[16] An EDS certificated by the FAA is a large, expensive device that uses CAT scan technology and computerized profiles to identify possible explosive materials.

[17] The DOT received some criticism for requiring positive bag matching at originating airports but not at connecting airports. The DOT 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.

and controlled by such citizens."[18] 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 the TSA certifies to Congress that the federalization process has been completed at a given airport (and it has until November 20, 2002 to do so). Accordingly, the opt-out program cannot begin at any airport until November 19, 2004 at the earliest. Security Act § 108, to be codified at 49 U.S.C. § 44920.

The open question, of course, is why an airport would seek inclusion in either program once the federalization process has been completed. But time will tell, and the compromise preserves the option.

## Paying For The New Security Regime

### User Fees

The Security Act created two new user fees to pay for federalized security services: a mandatory passenger security fee and a carrier security fee meant to finance the security services not paid for by the passenger fee. Security Act § 118(a), to be 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 and maintaining the equipment they use; maintaining the Federal Air Marshals program; completing background investigations of federal and airport personnel; and conducting research related to aviation security. *Id.* § 118(a), to be 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).[19] 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

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[18] 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, if that is possible.

[19] Although the rule became effective immediately upon issuance, the DOT will consider comments received by March 1, 2002 concerning the rule.

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.[20]

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

(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.[21]

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.[22] Air

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[20] 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, dated January 25, 2002 and available on the DOT's web site.

[21] The TSA presently is considering whether to extend the passenger security fee to single-entity charter operations, i.e., to "private charters." However, the fees 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").

[22] 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.
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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 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 Fee**

The TSA is authorized to impose a security fee on U.S. and foreign air carriers in order 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.

On February 20, 2002, the TSA published its procedures for assessing and collecting the new air carrier fee, called the "Aviation Security Infrastructure Fee." 67 Fed. Reg. 7926, to be codified at 49 C.F.R. § 1511. The fee is effective February 18, 2002 (although the initial payments are not due until May 31) and applies to passenger and combination operations. The fee does not apply to freighter operations. 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.

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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.

Although the fee has been imposed, the TSA requests comments on the fee and the related procedures. Such comments are due by March 18, 2002.

**Appropriations For Civil Aviation Security**

One of the most intriguing aspects of the new security regime is that no one has a clear idea of what it will cost. 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 (February 13, 2002).

For the balance of FY 2002 (i.e., through August 31, 2001), 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 between $2 to $2.4 billion. In other words, there is at least a $3 to $4 billion shortfall over just the next six months.

The Administration has requested $4.8 billion for TSA in its FY 2003 budget, with $2.2 billion of that amount projected to come from user fees. DOT FY 2003 Budget in Brief, at 15 (February 4, 2002). Many believe that this requirement 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, a total of $1.5 billion is authorized (but not appropriated) 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 AIP (without a local match) and PFC funds 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, to be 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, to be codified at 49 U.S.C. §47102(3)(K).

The Security Act 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), to be codified at 49 U.S.C. § 48301(b).

**Criminal Background Checks**

The Security Act dramatically expands the background check requirement to cover 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 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. This rule became effective immediately, although the FAA is accepting comments on the rule until March 11, 2002. *See* 67 Fed. Reg. 3810 (Jan. 25, 2002). 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.

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.[23] This 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. §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.

[23] 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).

§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).

Second, the Security Act imposes similar new requirements on aircraft operators and their employees and contract employees – including those who have unescorted access authority. 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).[24]

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 will serve as the single point of contact for payment and record submittal and will forward 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 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 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.*, to be 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 Justice Department that the individual has requested pilot training and the Justice Department has not objected within a 45-day waiting period. Security Act § 113(a), to be codified at 49 U.S.C. § 44939(a)(1-2). The Justice

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[24] The rule subsequently was amended to make it clear that it extends to all flightcrew members of all aircraft operators subject to security program requirements. 67 Fed. Reg. 8205 (February 22, 2002), 49 C.F.R. § 1544.230.

Department 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), to be 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), to be codified at 49 U.S.C. § 44939(c). It does not, however, cover training for aircraft with a maximum takeoff weight of less than 12,500 pounds. *Id.* § 113(a), to be 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), to be codified at 49 U.S.C. § 44939(d).

Section 113 was effective immediately, and, pending implementation of the Justice Department's notification process, flight schools (and U.S. carriers providing flight training) were forced to suspend the training of aliens. This restriction imposed a substantial economic burden on training providers. Accordingly, until it promulgates implementing regulations, the Justice Department has granted "provisional advance consent" for the training of four different categories of aliens, based on a determination that they do not pose a risk to aviation or national security:

(1) Foreign nationals who are current and qualified as a pilot or flight engineer with certificates and ratings recognized by the U.S., for aircraft with an mtow of at least 12,500 pounds;

(2) Military pilots or other crewmembers who are to receive training by the Defense Department or the U.S. Coast Guard, or the agencies' contractors;

(3) Military pilots or other crewmembers who are to receive training pursuant to a Department of State export authorization issued prior to February 1, 2002 and scheduled to commence prior to April 1, 2002 (i.e., aliens already scheduled for training); and

(4) Commercial, governmental, and military pilots of aircraft with an mtow of at least 12,500 pounds who must receive familiarization of training on a particular aircraft in order to transport it to the recipient, provided that the training is limited to familiarization and not basic flight instruction.

67 Fed. Reg. 6051-6052 (Feb. 8, 2002). After the flight school reasonably determines that a prospective alien trainee falls within one of these four categories, the flight school may proceed with training the alien immediately and does not have to submit any identifying information to the Department. The Justice Department, however, will bring civil and/or criminal sanctions against flight schools and other training providers who knowingly or negligently provide training to aliens not covered by the Department's advance consent. The Justice Department plans to publish implementation procedures shortly to provide a means by which training providers may notify the Department of aliens outside of that consent who are seeking instruction. Until that time, only pilots covered by the above categories are able to receive flight school training in the U.S.

## 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), to be 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.[25]

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), to be 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, 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.*, to be codified at 49 U.S.C. §44903(h)(4)(B).

[25] 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.

## 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. With the opening of three small general aviation airports adjacent to the District of Columbia, albeit under quite restrictive conditions,[26] the only airport still closed to general aviation is Washington's Reagan National Airport. Second, on February 22, 2002, 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). The rule 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).

## Security During Flight

The Security Act also emphasizes 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 (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)[27]; 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.[28] 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. The FAA has issued

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[26] The conditions include criminal history record checks of any pilots wishing to utilize the airports and preclearance of all flights. 67 Fed. Reg. 7538 (February 19, 2002).

[27] 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).

[28] 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.

several new design standards with respect to cockpit and related requirements. 67 Fed. Reg. 2112 and 2118 (January 15, 2001) and 66 Fed. Reg. 58650 (November 21, 2001).

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

The Security Act also makes dramatic changes to the way that flight crew may defend themselves and their aircraft. First, Section 128 of the statute authorizes pilots of U.S. air carriers to carry firearms if, and only 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.

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 Justice Department's National Institute of Justice ("NIJ") conducted a study (confidential, at least for now) assessing the "less-than-lethal" weapons available with a view to determining whether such weaponry would be effective in helping cabin crew stop hijackers. If the Departments of Justice, Transportation, and State agree that particular 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 first must 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, to be codified at 49 U.S.C. § 44903(h)(1) & (2)(A-B).

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), to be 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), to be 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), to be codified at 49 U.S.C. § 44944(c)

The Secretary has not yet promulgated rules concerning any of these three sections, but, acting in the TSA's stead, the FAA issued a request for comments on all three. 66 Fed. Reg. 67620 (Dec. 31, 2001). Comments were due February 14, 2002. The FAA is specifically concerned with issues such as whether and how weapons that are carried on board should be stored on the aircraft; the types and numbers of firearms and ammunition that qualified pilots should be permitted to carry; and what types of aircraft modifications (such as changes to avionics and ventilation systems) should be required when aircraft are equipped with firearms or less-than-lethal weapons. *Id.* at 67621.

Finally, 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." Security Act §144, to be codified at 49 U.S.C. § 44903(h).

**Federal Air Marshals Program**

The number of Federal Air Marshals is being 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 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), to be codified at 49 U.S.C. § 44917.

**Passenger And Crew Manifests**

The Advanced Passenger Information System ("APIS") was a voluntary program administered by the U.S. Customs Service with respect to operations from airports overseas to airports within the U.S. Under APIS, a participating air carrier (and approximately 94 participated prior to September 11) electronically transmits the passenger manifest information for a flight departing to the U.S. at the time of departure. The Security Act, in effect, made this mandatory for all air carrier and foreign air carrier flights operated to the U.S., starting no later than January 19, 2002. Security Act §117, to be codified at 49 U.S.C. §44909(c).[29] The same provision also allows Customs to request passenger name record information (the basic booking information for a reservation).

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 air 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, to be codified at 19 C.F.R. § 122.49a(a).[30] (The Security Act does not require a ticketing carrier that is not operating the flight in question to provide passenger

[29] Section 101(a) of the Security Act, to be codified at 49 U.S.C. §114(h)(4), also directs the TSA to "consider requiring passenger air carriers to share passenger lists with appropriate Federal agencies," a domestic version of the APIS program.

[30] The Customs Service will consider comments submitted by March 1, 2001 regarding the rule.

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 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.) The rule does not address making passenger name record information available to the Customs Service, but this will be addressed in a future proceeding. 66 Fed. Reg. at 67483.

## 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), to be codified at 49 U.S.C. § 44903(c)(3).[31] 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.

### 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. The measures include:

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[31] This is one of a number of provisions of the Security Act that uses the term "Administrator" when the context suggests that it is to be the responsibility of the TSA, i.e., the "Under Secretary."

- requiring a 911 emergency telephone call number for passenger aircraft and passenger trains;

- establishing uniform ID cards for all law enforcement personnel to be used to allow access to secured airport areas or the carriage of firearms aboard aircraft;

- establishing requirements for trusted passenger programs that would allow such passengers, in effect, to be pre-screened;[32]

- requiring all pilot licenses to include a photograph of the holder and "appropriate biometric imprints"; and

- using voice stress analysis, biometric or other technologies in the screening process.

## 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 No. 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.

[32] 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.

## Implementation Schedule

The Security Act contains an unusually large number of deadlines for administrative action and implementation. To date, the DOT, FAA and TSA have met all deadlines, albeit some with an explanation. The more significant remaining deadlines are identified below:

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|---|---|
| By May 18, 2002 | TSA may establish performance goals and objectives. (§ 130).<br><br>TSA must report to Congress on progress of § 109 measures and any legislative recommendations for enhancing security.<br><br>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. (§ 136). |
| By November 19, 2002 | TSA certifies to Congress that federalization of screening process has been completed. (§ 110(b)).<br><br>TSA reports to Congress on screening requirements for scheduled passenger service on aircraft with 60 seats or less. (§ 110(d)).<br><br>Federal security screeners, managers, personnel and law enforcement officers must be deployed at all U.S. airports. (§ 110(g)). |
| November 20, 2002 | Private screening pilot program begins at not more than five airports. (§ 108). |
| By December 31, 2002 | All checked baggage must be subject to EDS screening. (§ 110(b)). |
| November 20, 2004 | Opt-out private screening program begins. (§ 108). |

## Conclusion

Whatever additional legislation is enacted, and whatever the new system's precise shape once fully implemented, the Security Act must be regarded as a pivotal point in aviation – the point at which the nation turned away from the old model of regulation and began devoting more significant scrutiny and resources to security.

The new face of aviation security is stern and uncompromising. Its success will be measured on two fronts – the extent to which it deters future terrorist acts, and the extent to which it restores passenger confidence in our air transportation system. The inevitable criticisms and complaints always must be viewed against those standards. Security must be fair and objective, but it also must be effective. The challenge for the Transportation Security Administration, and for the aviation community, is considerable.