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An Aviation Law Update

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TSA Proposes to Require Businesses be Subject to TSA Security

On October 2, 2008, the Transportation Security Administration ("TSA") issued a 260-page notice of proposed rulemaking ("NPRM") entitled "Large Aircraft Security Program, Other Operator Security Program, and Airport Operator Security Program." This NPRM proposes to require all aircraft operations using aircraft with a maximum certificated takeoff weight of more than 12,500 pounds to adopt a TSA approved security plan. According to the TSA, if enacted, the amount of operators required to operate under a security program would increase from approximately 650 to approximately 10,000.

The TSA's proposal would require all general aviation operators who operate aircraft weighing more than 12,500 pounds to adopt a security program. This requirement has already been in place for commercial operators of the same sizes of aircraft since shortly after September 11, 2001.

More specifically, on November 16, 2001, the Aviation and Transportation Security Act ("ATSA") was enacted. The ATSA created the TSA and required the TSA to "implement a security program for charter air carriers with a maximum certificated takeoff weight of 12,500 pounds or more." The final rule requiring these commercial operators to implement and comply with a security program was issued on February 22, 2002, and remains in place today.

The proposed security program for general aviation operators, while similar to the security program currently required for commercial operators, is not identical. The proposed security program would require that applicable general aviation operators:

- Restrict over 80 items carried onboard the aircraft including sporting goods such as baseball bats and golf clubs, cigarette lighters and tools. This prohibited items list is the same list currently used by the TSA for airline passengers;

- Allow Federal Air Marshals ("FAMs") to fly on the operators aircraft when requested. The TSA would require all operators to provide a seat to any Federal Air Marshal requesting travel. This could involve bumping existing passengers in the event the aircraft is at full capacity;
- Provide for additional security of both aircraft and facilities. The TSA would require all operators to create and implement procedures for securing unattended aircraft and for securing all facilities that support the operator's aircraft. This would presumably include aircraft hangars and operator offices;
- Create and implement a contingency plan in response to security-related threats. This would require operators to develop a detailed plan for responding to specific security-related threats and other security-related issues;
- Comply with TSA security directives and information circulars when issued. Currently airlines have security departments who monitor for new and existing TSA Security Directives ("SDs") and information circulars. These departments review these procedures and are tasked with ensuring that the respective operator is in compliance with these TSA directives. The TSA is proposing that general aviation operators comply with these directives as well;
- Conduct criminal history records checks on all flight crew members. The proposal would require all pilots and flight attendants to undergo a fingerprint-based Criminal History Record Check ("CHRC") and a Security Threat Assessment ("STA"). The proposed cost for the required CHRC and STA would be \$74 per crew member. Any crew member who did not pass a CHRC and STA would be prohibited from flying. The TSA is proposing that STA's be conducted every 5 years;
- Electronically transmit Master Crew Lists ("MCL") changes, additions and deletions to the TSA. The TSA will require that the names of all pilots and flight attendants be submitted to them;
- Electronically transmit passenger manifest data to a TSA approved vendor. The TSA is proposing to require all operators to transmit passenger manifest data to a TSA approved vendor so that the vendor can then check each passenger's name against the TSA terrorist watch list. This list, a list that has been in place since the enactment of the ATSA, has two components: the "selectee" list and the "no fly" list. Currently, the "selectee" list is a list of passengers that must undergo additional security screening when traveling via commercial airline. The "no fly" list is a list of

passengers who are banned from all travel on commercial airlines. These lists are confidential and disseminated only on a need-to-know basis. Because the lists are confidential, and because the amount of operators under the TSAs proposal would increase dramatically, the TSA is proposing that a TSA approved vendor compare the operator's names to the TSAs watch list. Under the proposal, the TSA would allow operators to provide a list of common travelers that would then be amended by the operator as necessary. The operator would have the option to check passenger names for each flight or to create this regular passenger list. The TSA would prohibit passengers appearing on the "no fly" list from flying on board the aircraft. The TSA identifies other notification requirements for the operator to follow if a passenger's name appears on the "selectee" list;

- Contract with a third party auditor to audit the operator's compliance with their security program. Because of the significant increase of operators who will be required to have a security program, and because the TSA lacks the staffing to oversee these additional operators, the TSA has proposed that third party auditing companies be created and certified by the TSA. These companies would audit the new security programs and then audit them biennially thereafter for compliance. The audit company would submit a report to the TSA who would determine regulatory compliance;
- Employ security personnel. The operator would be required to employ and train an Aircraft Operator Security Coordinator, a Ground Security Coordinator and an In-Flight Security Coordinator. The Aircraft Operator Security Coordinator would be the primary contact for the TSA and would be required to be available at all times;
- Restrict transportation of weapons. All operators would be required to transport weapons either in a cargo area or in a lock box under the supervision of the Inflight Security Coordinator;
- Create and implement a security training program;
- Provide additional security-related training to its employees. The TSA would require that employees be trained on general compliance with the security program. The proposed rule specifically states that employees must be trained regarding procedures used to obtain law enforcement assistance in the event of a security need; and

- Restrict access to the flight deck.

Because of the large scope of the TSA's proposed requirements and because of the significant burden, both financially and otherwise, to operators of most business aircraft, the TSA is facing significant opposition to their proposal. For example, National Business Aviation Association ("NBAA") President and CEO Ed Bolen, in a TSA public hearing last week, stated that the plan would have "unintended and destructive consequences that threaten the well-being of businesses across the U.S. that rely on their airplanes for survival."

The TSA will continue to conduct public hearings this month around the country on the NPRM. Public comments may be submitted to the TSA on the NPRM on or before February 27, 2009. The NBAA has published a link on its [website](#) that will allow comment to the TSA as well.

While no date for a final rule has been announced, there is reason to believe that a final rule will be issued sometime in 2009 with a full implementation deadline coming sometime in 2010. Based on the significant opposition the TSA is facing regarding the NPRM, from both trade groups and operators alike, the final rule requirements will most likely be diluted to some extent.

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