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TSA AND DOT PROPOSE MAJOR NEW RULES

FOR ALL-CARGO SECURITY AND FOR CARRIAGE OF DISABLED PASSENGERS

On November 4 and 10, 2004, DOT and TSA separately published major notices of proposed rulemaking that will affect most segments of the air transportation system.

TSA is proposing to extend significant additional security requirements to all-cargo operations. Comments on the TSA proposal are due on or before *January 10, 2005*.

DOT is proposing to revise Part 382 of its regulations to extend to non-U.S. airlines and airports the specific rules regarding nondiscrimination on the basis of disability. 69 Fed. Reg. 64364. This proposal also would change some of the existing rules applicable to U.S. airlines and airports as well as travel agents. Comments on the DOT proposal are due on or before *February 2, 2005*.

Some of the highlights of the proposed rules are discussed below. However, the reader should be aware that these are detailed proposals that require careful analysis beyond this brief summary.

All-Cargo Security

When Congress passed the Aviation and Transportation Security Act of 2001, it gave TSA immediate deadlines for implementation of security measures with respect to passenger-carrying aircraft. However, it gave TSA the discretion, and the time, to design and implement a program for the security of air freight. TSA has been doing that in measured steps, and the proposed rules represent the final step in that process – addressing the security of all-cargo operations. The proposals are as important for what they do not contain as for what is in them.

TSA states that it considered, among other measures, prohibiting cargo from being transported on passenger aircraft, requiring every piece of cargo shipped on a passenger aircraft to be physically inspected and full criminal history record checks for every person with unescorted access to air cargo. The fact that these proposals are *not* included in the notice reflects the work of the

Aviation Security Advisory Committee and its Air Cargo Security working groups and TSA coordination with other federal agencies. TSA continues to follow the aviation safety paradigm of a “layered” approach to security, *i.e.*, a system that takes measures at many different levels of the transportation chain.

The proposed rules codify a number of existing practices and security directives, but also include many new measures. The major new items include the following:

1. U.S. and non-U.S. airlines operating all-cargo aircraft with a maximum certificated takeoff weight of 45,500 kg (100,309.3 lbs.) or more, *and* air freight forwarders utilizing such aircraft, must have full security programs. Presently, these enhanced programs are limited to passenger operations. The details of such programs never are made public, but they require substantially more planning and implementation than the lesser security program requirements presently applicable to all-cargo flights.

Initial applications, and annual reapplications, by air freight forwarders for approval of security programs also will be subject to more careful vetting by the TSA.

2. The known shipper program will be strengthened. However, there is at least a partially open issue as to whether, and to what extent, airlines will be permitted to accept cargo submitted by unknown shippers for transportation on passenger aircraft. For example, should such cargo be accepted if it has been subjected to physical inspection before boarding? TSA emphasizes that it is not proposing this, but it is willing to listen to comments on the subject.

3. Any person with unescorted access to air cargo prior to boarding who has not previously been credentialed for entry into Security Identification Display Areas (SIDAs) -- and TSA estimates that there approximately 63,000 such individuals without SIDA credentials -- must be cleared by a Security Threat Assessment review. This review will be based on each person's identifying information and checks on existing intelligence-based records and databases. It stops well short of the fingerprint-based criminal history record check required to obtain a SIDA credential, and is another example of "layering."

4. Airports with existing SIDAs for passenger operations must also create SIDAs for any cargo operations. This requirement would *not* apply to cargo-only airports, although operators still would be required to take measures to prevent unauthorized access to their aircraft.

Part 382 Disability Rules

The Air Carrier Access Act of 1986 (ACAA), the law prohibiting discrimination against airline passengers on the basis of disability, initially did not apply to non-U.S. airlines. In 2000, Air 21 amended ACAA so that it applied to non-U.S. airlines. Part 382, the implementing regulation, was not amended, but DOT took the position that Part 382 provided "guidance" as to whether the practices of non-U.S. airlines violated ACAA.

The proposed rules would close the regulatory gap by applying Part 382 to non-U.S. airlines. Taking advantage of the docket opportunity, DOT also proposes some changes that will apply to U.S. airlines as well. Most of the proposed rules also would implicate airports, either directly or indirectly, and some of the changes would affect travel agents, particularly those who sell online. The significant portions of the proposal include the following:

1. For non-U.S. airlines, Part 382 would apply to all flights that begin or end in the U.S. as well as all flights that carry the same flight number to or from the U.S. For a code-share flight between non-U.S. points, however, only the service requirements of the rules would apply, *i.e.*, the detailed requirements with respect to the physical accessibility of ground facilities and the aircraft would not apply.

2. The physical accessibility requirements with respect to aircraft largely would be phased in for non-U.S. airlines. Certain service requirements also would be phased in for non-U.S. carriers. For example:

- Movable armrests on at least 50% of the aisle seats would be required only for aircraft ordered after the effective date of the rule or delivered two years or more after the effective date of the rule.
- Accessible lavatories would be subject to the same implementation schedule.
- The on-board wheelchair and wheelchair stowage requirements would apply to all aircraft but not until two years after the effective date of the rules.
- The seating assignment requirements would not apply until six months after the effective date of the rule.
- Telephone information or reservation services would require TTY capability no later than one year after the effective date.

3. There is a proposed waiver provision that would make Part 382 inapplicable to a non-U.S. airline to the extent that it directly conflicts with a provision of the flag nation's laws. A waiver request would be required to (i) identify the source of the conflict and (ii) identify alternative measures that the objective of the Part 382 requirement could be met.

4. There are a number of new requirements that would apply to just U.S. airlines or to all airlines, for example:

- The term "facility" would be expanded to

include anything at the airport that involves passengers and that is owned, leased or controlled by the airline.

- All websites selling air transportation within, to or from the U.S., including those of airlines and online travel agencies, must meet the ATBCB accessibility standards (the agency that determines general accessibility rules). This requirement would apply to all websites created after the effective date and to all previously existing websites within two years after the effective date.

5. Many of the proposed rules would affect airports, either directly or indirectly. For example, U.S. airports must meet specific DOJ and DOT requirements under the ADA. Non-U.S. airports must meet a general “readily use” standard for flights to or from the U.S., starting one year after the effective date. Specific requirements with respect to information for individuals with hearing or vision impairments also would be imposed.

These are just a few of the more important items in a complex rulemaking proposal. This *Aviation Advisor* is intended to alert readers to the pending rulemaking proceedings. The full text of the proposals is available on the DOT and TSA websites.

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For further information regarding any of the developments discussed in this issue, please contact a member of the firm’s Aviation Group:

Frank J. Costello
Ralph L. Kissick
William H. Callaway, Jr.
Rachel B. Trinder
Charles J. Simpson, Jr.
Richard D. Mathias
Malcolm L. Bengel
Lonnie A. Pera
Robert T. Francis
Jonathan Howe
Nathaniel Breed

Our address is:
888 17th Street, N.W.,
Washington, D.C. 20006.
Telephone: (202) 298-8660
Telecopiers: (202) 342-
0683/1316
Web site: www.zsrlaw.com

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