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TSA Issues Interim Security Rule in Advance of 100% Cargo Screening Deadline

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OVERVIEW

The U.S. Transportation Security Administration (“TSA”) has adopted an interim final rule (“IFR”) to achieve statutorily mandated cargo screening requirements under the Implementing Recommendations of the 9/11 Commission Act (the “Act”). The IFR includes a requirement that certain U.S. aircraft operators and foreign air carriers (collectively “covered carriers”), by August 3, 2010, ensure that 100 percent of cargo loaded inside the United States aboard passenger aircraft is screened. The IFR was published in the Federal Register on September 16, 2009 (74 Fed. Reg. 47672). Comments are due by November 16, 2009, when the IFR becomes effective.

Under the IFR, covered air carriers that must screen 100 percent of air cargo by the August 2010 deadline are: (a) U.S. aircraft operators with full security programs under subsection 1544.101(a) of TSA’s Regulations and (b) foreign air carriers with security programs under subsections 1546.101(a) or (b). This includes scheduled and public charter operations with aircraft of more than 60 passenger seats. It also includes operations with smaller aircraft when passengers are enplaned or deplaned from a sterile area.

The rule applies only to cargo loaded inside the United States. It does not apply to covered carriers when they load cargo outside of the United States onto passenger aircraft that will operate to the United States. It also does not apply to all-cargo or general aviation operations.

INTERIM RULE HIGHLIGHTS

In order to meet the statutory deadline for 100% air cargo screening, the rule implements a number of important changes, including, but not limited to:

- requiring TSA certified cargo screening facility (“CCSF”) approval for facilities that screen air cargo “off an airport” prior to tendering it to covered carriers for transport aboard passenger aircraft. If TSA approves an application for CCSF, the CCSF must: (1) implement a certified cargo screening standard security program; (2) appoint a security coordinator; (3) ensure that certain individuals undergo a TSA Security Threat Assessment (STA); (4) follow strict physical and access control measures for storage, handling, and screening of cargo; (5) screen cargo using TSA-approved methods; (6) implement chain of custody requirements; and (7) apply for recertification every 36 months;

- limiting who may conduct screening for cargo to be loaded aboard passenger aircraft, restricting such functions to covered air carriers that will screen cargo “on an airport” under their TSA approved security programs, a certificated CCSF “off an airport,” or the TSA (Where U.S. or foreign air carriers screen their own cargo “off an airport,” each off-site screening facility must be CCSF certificated.);
- mandating that carriers accept cargo for loading in the United States aboard passenger aircraft only from the shipper, a TSA-approved CCSF, or a U.S. aircraft operator, foreign air carrier, or indirect air carrier with TSA approved security programs (the known shipper rules continue to apply);
- requiring U.S. aircraft operators and foreign air carriers to “verify that the chain of custody measures for the screened cargo are intact prior to loading such cargo on aircraft;”
- establishing acceptable methods of screening, including physical examination or “non-intrusive methods” such as x-ray systems, explosive detection systems, explosives trace detection, and canine teams;
- requiring that CCSF facilities undergo initial and periodic examinations by TSA-approved validators; and
- establishing procedures for applying for TSA approval and setting forth additional requirements applicable to all CCSF facilities, including those operated by air carriers.

OTHER CONSIDERATIONS

Importantly, the IFR does not limit the types of entities that may apply for CCSF certification for a facility. By way of example, manufacturers, logistics companies, warehouses, distribution centers, and similar businesses may apply for certification as CCSFs. However, certifications will be limited to specific facilities, i.e., certifications will not apply company-wide, given that “security measures and the level of security will vary from one facility to another.”

It should be noted that the IFR was issued without prior notice and public comment, as authorized under the Act. Nevertheless, the Act requires TSA to issue a final rule no later than one year after the effective date of the IFR, namely on or before November 16, 2010.

Transportation operators, logistics companies, shippers, and other businesses should evaluate their cargo screening and acceptance procedures carefully to determine what changes, if any, may be necessary before the IFR and the 100 percent screening requirement take effect. For further information, please contact Lonnie Anne Pera via e-mail at lapera@zsrlaw.com, or Jonathon H. Foglia via e-mail at jhfoglia@zsrlaw.com or by phone at (202) 298-8660.