DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 108

[Notice No. 91-2; Docket No. 26459]

RIN2120-AD92

Flight and Cabin Crew Notification Guidelines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to amend the Federal Aviation Regulations to implement a statutory requirement for the notification of flight and cabin crewmembers of threats to the security of their flight. The Aviation Security Improvement Act of 1990 amended title III of the Federal Aviation Act of 1958 and directs the Administrator of the FAA to implement guidelines for such notification. The proposed rule is needed to clarify an air carrier's responsibility to disseminate threat information to inflight security coordinators and to establish new requirements to disseminate this information to flight and cabin crewmembers. Air carriers would also be required to provide any evaluation of the threat information and countermeasures to be applied. This action is intended to enhance civil aviation security.

DATES: Comments must be received on or before March 6, 1991.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 26459, 800 Independence Avenue SW., Washington, DC 20591. Comments delivered must be marked: Docket No. 26459. Comments may be examined in room 915G on weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Frederick P. Falcone, Office of Civil Aviation Security Policy and Plans, Policy and Standards Division (ACP-110), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, telephone (202) 267-7296.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire on all matters raised in this proposed rulemaking. Comments relating to the environmental, energy, federalism, or international trade impacts that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied with cost estimates. Comments should identify the regulatory docket or notice number and be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments will be considered by the Administrator before taking action on this proposed rulemaking. Late-filed comments will be considered to the extent practicable. The proposals contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date of comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include with their comments a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 26459." The postcard will be date stamped and mailed to the commenter.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-200, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM.

Persons interested in being placed on a mailing list for future NPRMs should request from the above office a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

Legislative Mandate

The Aviation Security Improvement Act of 1990 (the Act), Public Law 101-604, signed into law on November 16, 1990, includes section 109, entitled "Threats to Civil Aviation; Public Notification." Section 109 amends title III of the Federal Aviation Act of 1958 (the FA Act) (49 U.S.C. App. 1341-1358) by adding a new section 321, "Reporting of Threats to Civil Aviation", which includes, in part, the following under subsection (c), "Notification Guidelines—":

> (2) FLIGHT AND CABIN CREW NOTIFICATION GUIDELINES. Not later than 180 days after the date of the enactment of this section, the Administrator shall develop guidelines for ensuring notification of the flight and cabin crews of an air carrier flight of threats to the security of such flight in appropriate cases.

This rulemaking is in response to this legislative mandate and takes into consideration public comments by flight and cabin crew representatives at hearings that have been held on the topic.

History

The Act was passed largely in response to the recommendations of the President's Commission on Aviation Security and Terrorism which was established following the destruction of Pan American World Airways Flight 103 (Pan Am 103) over Lockerbie, Scotland, on December 21, 1988. Soon after the investigation into the probable cause of this mid-air disaster began, aviation experts concluded that Pan Am 103 was downed as a result of sabotage. At once the FAA and the international civil aviation community took steps to reduce the public's risk of exposure to such acts in the future.

The FAA initiated several rulemaking proceedings to strengthen the security of all U.S. carriers. For example, on July 6, 1989, the FAA issued a regulation (14 CFR 108.18) (54 FR 28982; July 10, 1989) to provide for the issuance of Security Directives and Information Circulars to enable air carriers and the security community to coordinate more effectively responses to threats against civil aviation. This action simplified and expedited the procedures for disseminating threat information, and helps to ensure that appropriate officials take specific measures to counter terrorism directed at civil aviation. The FAA uses Security Directives to notify U.S. air carriers of specific credible threats. The directives generally contain mandatory countermeasures, and the rule requires air carriers within a specified time to acknowledge receipt of Security Directives and to notify the FAA of how they implemented the countermeasures prescribed by the FAA. Information Circulars, in contrast, are used to notify U.S. air carriers of general situations for which the agency does not prescribe mandatory countermeasures.

Because of the sensitive nature of the information contained in these

documents, both Security Directives and Information Circulars are restricted in their distribution. The FAA has authority to specify the personnel to whom Security Directive information should be distributed; the air carrier retains discretion to determine which additional personnel have an operational need-to-know. Air carriers which receive Security Directives or Information Circulars are specifically forbidden by 14 CFR 108.18(d) to release such information to persons other than those with an operational need-to-know without the prior written consent of the FAA's Director of Civil Aviation Security (now the Assistant Administrator for Civil Aviation Security).

In 1989 the FAA identified and implemented several other initiatives that were especially designed to strengthen security measures at high-risk airports in Europe and the Middle East. Some of these initiatives included the deployment of additional FAA security specialists in the Europe, Africa, and Middle East region; improved procedures for intelligence assessment and dissemination; and issuance of procedures for the detailed examination of selected electronic devices.

Part 108 of the Federal Aviation Regulations (FAR) (title 14 CFR part 108) was promulgated in 1981 (46 FR 3782; January 15, 1981) and requires certain U.S. air carriers to adopt and use FAA-approved security programs to screen passengers and property, control access to airplanes and facilities, and prevent criminal acts against civil aviation. On September 5, 1989, the FAA issued a final rule to amend part 108 of the FAR to require certain U.S. air carriers to use explosives detection systems (EDS's) to screen checked baggage for international flights in accordance with their respective approved security programs (54 FR 36938; September 5, 1989). The notice of proposed rulemaking in that action was issued on July 6, 1989 (54 FR 28985; July 10, 1989).

Against the background of these initiatives, on August 4, 1989, President Bush signed Executive Order 12686 establishing the President's Commission on Aviation Security and Terrorism as part of the continuing investigation of the downing of Pan Am 103. The Commission was chartered "* * * to review and evaluate policy options in connection with aviation security, with particular reference to the destruction on December 21, 1988 of Pan American World Airways Flight 103." In a report issued May 15, 1990, the Commission presented a series of recommendations intended to improve the aviation security system. Some of the Commission's recommendations directed to the FAA had been adopted by the agency before the Report was issued. Other recommendations have been adopted since then and many were adopted by Congress in the Act.

At about the time the President's Commission was formed, the Secretary of Transportation determined that the formation of a broad-based advisory committee would be in the public interest in connection with the duties imposed upon the FAA by law. Therefore, the Aviation Security Advisory Committee (ASAC), sponsored by the Federal Aviation Administration, was established in September, 1989 (54 FR 39493; September 26, 1989). The committee is composed of representatives from government, the airline industry and the general public, and is responsible for examining all areas of civil aviation security. On a continuing basis, the committee provides the FAA Administrator with recommendations for the improvement of methods, equipment, and procedures that will ensure a high degree of safety to the traveling public.

In October, 1990 ASAC forwarded to the Administrator recommendations addressing credible bomb threats made against U.S. air carriers, foreign air carriers, and airports. ASAC recommended that such threats made against air carriers and airports should be made known to ground security coordinators. ASAC also recommended that in-flight security coordinators should be advised of bomb threats related to their flight assignments and should, in turn, inform other crewmembers of pertinent information. The rule proposed herein would implement these ASAC recommendations.

Security Concerns Related to Threat Dissemination

The current system for evaluating and responding to threats to civil aviation is founded on the principle that it is best to filter threat information before providing it to aviation security personnel directly responsible for dealing with those threats. There is no regulatory requirement that air carriers share all information involving the range of threats with inflight or ground security coordinators. Nor is there a requirement to provide all threat information to flight and cabin crewmembers, and as a matter of policy and practice, most air carriers do not routinely do so.

Instead, the air carrier's security experts, generally in consultation with the FAA and other government entities, evaluate threat information against specific FAA-established criteria to determine "specificity" and "credibility." (The terms "specific" and "credible" are not interdependent and are commonly applied by intelligence experts to threat information involving a well defined target and which has been authenticated.) This evaluation process is also used by the FAA in determining when to issue a security directive.

Filtering out those threats which are judged to be groundless or not requiring the application of specific countermeasures is a practical approach, given the hundreds of bogus threats received annually. Filtering out bogus threats is also critical to ensure that real threats are perceived as serious, not diluted in impact by a multiplicity of false alarms. Those threats considered specific and credible in the judgment of the air carrier, using the FAA's criteria, are presented to ground security coordinators, in-flight security coordinators, and others with an operational need-to-know. (As noted above, when the FAA issues a security directive, the agency has authority to specify the personnel to whom the information should be directed.) This limited distribution of threat information helps ensure that obviously bogus threats are filtered out, so that genuine threats can be handled as thoroughly and expeditiously as possible.

The President's Commission, on page 91 of its Report, acknowledged this principle within the context of public notification:

> There are few credible threats. Of the 600–700 anonymous aircraft threats received on average annually for the past decade, none resulted in an explosion or the discovery of a bomb. For this reason alone, there is no serious suggestion that travelers should be notified of all threats * * *. A flood of warnings * * * would leave the public unable to distinguish among threats and to identify those that should be taken seriously. Over time, the public would begin to ignore all warnings.

Congress apparently shared this concern since section 109 of the Act requires notification of flight and cabin crews (as well as the public) "in appropriate cases," but not in all cases. In the FAA's view, it is not appropriate to provide notification to flight and cabin crews unless the threat information has been judged by security professionals to be specific and credible. Also on page 91 of its report, the Commission recognized the validity of this principle:

> If the proposition is accepted that a threat should be "credible" before notification is considered, the question then becomes how

to determine when a threat is deemed "credible." The Commission believes that this answer must rest with the professionals who analyze threat information—the intelligence and law enforcement communities.

The FAA recognizes that flight crewmembers may desire more information about threats against their particular flight than is deemed specific and credible. It is appropriate, however, that the credibility of threat information should continue to be determined by the security professionals who currently have such responsibility. Once the information is determined to be credible, the FAA's proposed rule would ensure that it is promptly transmitted to crewmembers.

Discussion of the Proposed Rule

The FAA has found limited reference to the issue of flight and cabin crew notification in the legislative history of the Act published in the Congressional Record, and in the Commission's Report. The primary focus of Congress, and of the President's Commission, was on public notification, not notification of flight and cabin crews. For example, section 109(a) of the Act adds a new Section 321 to the FA Act, "Reporting Threats to Civil Aviation;" subsections 321(c)(1), (d), (e), and (f) all concern Congress' direction to the President to develop guidelines for ensuring notification to the public of threats to civil aviation in appropriate cases.

The flight and cabin crew notification subsection of section 109 appears to be responsive to a statement submitted during Congressional Hearings on the Act by the Air Line Pilots Association (ALPA). ALPA expressed concern about what it believes to be "the lack of timely and adequate threat information that reaches the cockpit crew."

The FAA recognizes that crewmembers play an important role as the air carrier's "eyes and ears" and that they are subject to Federal requirements to receive training in security procedures. In order to assist them in their responsibilities, including preventive security and emergency response, the FAA believes that carriers should be required to provide crewmembers with all threat information that is determined to be specific and credible. Such threat information could be obtained from FAA-issued Security Directives, or from information obtained directly by the carrier. The proposed rule would ensure that all crewmembers receive all useful information, while limiting the possibility that they will be flooded with bogus threats.

The FAA is proposing, in its new § 108.19(a), to require that upon receipt of a specific and credible threat to the security of a flight, the air carrier shall immediately notify the ground and in-flight security coordinators of the threat, any evaluation thereof, and any countermeasures to be applied. Further, the air carrier would be required to ensure that the in-flight security coordinator then notifies the flight and cabin crew. (Under the provisions of 14 CFR 108.10, the pilot in command is the in-flight security coordinator.)

Pursuant to their approved security programs, air carriers are now required to communicate to the in-flight security coordinator, through the ground security coordinator, all pertinent security information for the specific flight. The proposed rule goes further than the current requirements in that the carrier would be required to provide ground and in-flight security coordinators with any evaluation of the threat information and any countermeasures to be applied. The FAA intends carriers to include not only the carrier's internal assessment of the threat, but also any evaluation received from any source, including government intelligence agencies. Thus the pilot in command will be fully informed of all evaluations of the threat. In a second major change from existing requirements, the proposed rule would obligate the air carrier to ensure that the in-flight security coordinator notifies the flight and cabin crewmembers of the same threat information. Currently, pursuant to the air carriers' security programs, the in-flight security coordinator is required to brief the crew on any significant occurrences that may affect the security of the flight. There is a concern, however, that in-flight security coordinators may not routinely pass on all such information. This proposed rule would eliminate any discretion on this issue, and require the carrier to ensure that the in-flight security coordinator provides the flight and cabin crew with threat information along with any evaluation and the countermeasures to be applied. This measure will help ensure that crews are thoroughly informed, so that they can focus their attention on possible security problems and perform their security-related functions with a heightened level of care and awareness.

The FAA believes that expanding and clarifying the notification requirements for the pilot in command, and expanding the information network to include all members of the flight and cabin crews, will help ensure the effective use of crew resources.

Regulatory Evaluation Summary

This section summarizes the full regulatory evaluation prepared by the FAA that provides more detailed estimates of the economic consequences of this proposed regulatory action. This summary and the full evaluation quantify, to the extent practicable, estimated costs to the private sector, consumers, Federal, State and local governments, as well as anticipated benefits.

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. This determination is normally made on the basis of a regulatory evaluation. In this case, however, the Congress has already determined that this proposed rule is in the public interest; that is, its collective public benefits outweigh its costs to the public, because Congress has required the proposed rule be promulgated (The Aviation Security Improvement Act of 1990: Pub. L. 101–604). Nevertheless, the FAA has prepared this conventional regulatory evaluation of the proposed rule. The purpose of this evaluation is not to justify taking this proposed rulemaking action (which has already been done through Congressional action), but to estimate potential costs and benefits (either qualitatively or quantitatively) to promote a better understanding of the impact of the proposed rule. The order also requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly defined exigencies. A "major" rule is one that is likely to result in an annual effect on the economy of $100 million or more, a major increase in consumer costs, a significant adverse effect on competition, or is highly controversial.

The FAA has determined that this proposal is not "major" as defined in the executive order, therefore a full regulatory analysis, including the identification and evaluation of cost-reducing alternatives to the proposal, has not been prepared. Instead, the agency has prepared a more concise document termed a regulatory evaluation that analyzes only this proposal without identifying alternatives. In addition to a summary of the regulatory evaluation, this section also contains an initial regulatory flexibility determination required by the 1980 Regulatory Flexibility Act (Pub. L. 96–354) and an international trade impact assessment. If more detailed economic information is desired than is contained in this summary, the reader is

referred to the full regulatory evaluation contained in the docket.

Costs

The proposed rule is expected to impose a negligible incremental cost of compliance on U.S. air carriers. In addition, the proposed rule is not expected to impose any monetary costs on the flying public. This assessment is based on the rationales contained in the following paragraphs.

The FAA expects the costs of the proposed rule to be negligible based on two assumptions. First, the proposed rule is assumed not to substantially increase the costs associated with the current flow of specific and credible security threat information between air carrier management and ground and in-flight security coordinators. This is because air carriers are already providing most of the security information that would be required by the proposed rule to ground and in-flight security coordinators on a routine basis.

The second assumption of this evaluation is that the major additional requirement the proposed rule would impose on air carriers beyond current industry practice would be to ensure that in-flight security coordinators notify flight and cabin crewmembers of *all* specific and credible security threats and to require air carriers to provide any evaluation of the threat information and countermeasures to be applied. Disclosure of this information to flight and cabin crewmembers would impose only a negligible cost of compliance on air carrier operators because they already compile specific and credible security threat information on a routine basis.

Although the FAA contends that the proposed rule would impose a negligible cost of compliance for the notification process, it recognizes that the potential for significant costs does exist in some cases. The magnitude of this potential would depend on the extent to which flight and cabin crews expand the field of information available to security experts, who could then decide to take additional countermeasures based upon all security information available. These measures could include delaying scheduled flights from departing or requesting airborne flights to land for the purpose of conducting additional security checks or applying countermeasures.

The average time required to conduct a security check for narrow and wide-body aircraft on the ground ranges between three and five hours. If an aircraft is airborne and forced to land for a security check, there would be an additional cost for landing fees and delay time. Another cost factor (qualitative) associated with this potential situation would be the inconvenience imposed on passengers in the form of delays. According to one air carrier, the cost of an aircraft delay as the result of conducting additional security countermeasures could range between $200,000 to over $1 million (in 1990 dollars) per security check from a worst case standpoint. The reader is cautioned that this range of aircraft delay cost estimate is rough and incorporates a number of general assumptions. Some of the assumptions include: the delayed aircraft is the only one connected to departures from other areas, additional flight crew may be needed due to time and duty limitations, lawsuits may be filed by some business passengers, cost may be incurred for another slot at the gate, plus a multitude of other factors. Over the past 10 years, on average, air carriers have received between 650 and 750 security threats annually. An estimated 600 to 700 of these represented anonymous threats that were not determined to be specific and credible. None of these bogus threats resulted in an explosion or the discovery of a bomb. During the same period, there were about 50 credible aircraft security threats annually, 30 of which were also deemed specific. To date, there is no evidence of an explosion or discovery of bomb relating to specific and credible security threats. The FAA solicits comments from the aviation community on delay cost estimates as the result of the application of security countermeasures.

Benefits

The proposed rule would generate benefits by ensuring that the current high level of aviation safety remains intact. Under the proposal, air carriers would be required to provide *all* credible and specific security threats, as well as any evaluation thereof and countermeasures to be applied, to the ground and in-flight security coordinators. In turn, the in-flight security coordinator would notify the flight and cabin crewmembers. The flight and cabin crewmembers would benefit directly from the proposal. As the "eye and ears" of an air carrier, flight and cabin crewmembers are trained to be alert to possible security threats and to apply security procedures when a threat is suspected. The proposal would better enable flight and cabin crewmembers to conduct their security responsibilities by enhancing their alertness to indications that a threat may be actually carried out. The enhanced awareness of the flight and cabin crews would subsequently benefit the in-flight security coordinator by enhancing the information he or she has as the pilot in command. The proposal could benefit the traveling public by reducing the possibility that security threats to a U.S. air carrier not disclosed to flight and cabin crewmembers would result in casualty losses (namely, aviation fatalities and property damage).

Conclusions

The proposed rule would impose only negligible incremental costs on air carriers and could result in benefits to the aviation community and flying public in the form of ensuring that the current high level of aviation safety remains intact. Therefore, the FAA concludes that the proposed rule is cost-beneficial.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. The RFA requires agencies to review rules that may have "a significant economic impact on a substantial number of small entities." The small entities that could be potentially affected by the implementation of this proposed rule are scheduled air carrier operators for hire that own but do not necessarily operate nine or fewer aircraft. A significant economic impact for these small entities would be an annualized cost that exceeds $105,000 (in 1990 dollars). Since the incremental cost of compliance is expected to be negligible (less than $105,000 annually for each air carrier operator), the FAA has determined that the proposed rule would not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The proposed rule would neither have an effect on the sale of foreign aviation products or services in the United States, nor would it have an effect on the sale of U.S. products or services in foreign countries. This is because the proposed rule would be expected to impose only negligible costs on U.S. air carrier operators. This proposed action would not result in a competitive disadvantage to U.S. air carrier operators.

Federalism Implications

The proposed rule would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the

distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this proposed regulation is not major under Executive Order 12291. In addition, it is certified that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This proposal is considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). An initial regulatory evaluation of the proposal, including a Regulatory Flexibility Determination and International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under "**FOR FURTHER INFORMATION CONTACT.**"

List of Subjects in 14 CFR Part 108

Airplane operator security, Aviation safety, Air transportation, Air carriers, Airlines, Security measures, Transportation, Weapons.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend part 108 of the Federal Aviation Regulations (14 CFR part 108) as follows:

1. The authority citation for part 108 is revised to read as follows:

Authority: 49 U.S.C. 1354, 1356, 1357, 1421, 1424, and 1511; 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983); 49 U.S.C. App. 1341-1358 revised Pub. L. 101-604, November 16, 1990).

2. Section 108.19 is amended by redesignating paragraphs (a) and (b) as (b) and (c) respectively; by adding a new paragraph (a); and by revising the section heading to read as follows:

§ 108.19 Security threats and procedures.

(a) Upon receipt of a specific and credible threat to the security of a flight, the certificate holder shall—

(1) Immediately notify the ground and in-flight security coordinators of the threat, any evaluation thereof, and any countermeasures to be applied; and

(2) Ensure that the in-flight security coordinator notifies the flight and cabin crewmembers of the threat, any evaluation thereof, and any countermeasures to be applied.

* * * * *

Issued in Washington, DC on January 28, 1991.

Lynne A. Osmus,

Acting Director, Office of Civil Aviation Security Policy and Planning.

[FR Doc. 91-2471 Filed 1-29-91; 4:22 pm]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

14 CFR Part 129

[Docket No. 26460; Notice No. 91-3]

RIN 2120-AD94

Foreign Air Carrier Security Programs

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to amend the Federal Aviation Regulations to require foreign air carriers that land or take off in the United States to provide passengers a level of protection similar to the level of protection provided by U.S. air carriers at the same airports. To ensure that foreign air carrier security programs provide a similar level of protection, the Administrator could amend those programs according to the procedures proposed in this notice. This action is needed to ensure that appropriate security measures are implemented by foreign air carriers operating into and out of the United States and to comply with legislation enacted on November 16, 1990. The intended effect of this proposed rule is to increase the safety and security of passengers aboard foreign air carriers on flights to and from the United States by reducing the risk of fatalities and property damage attributable to criminal acts against civil aviation.

DATES: Comments must be submitted on or before March 6, 1991.

ADDRESSES: Comments on this proposed rulemaking should be mailed or delivered, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, attention: Rules Docket (AGC-10), room 915-G, Docket No. 26460, 800 Independence Ave. SW., Washington, DC 20591. Comments may be examined in room 915-G between 8:30 a.m. and 5 p.m. weekdays except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Max D. Payne, Civil Aviation Security Policy and Standards Division (ACP-110), Federal Aviation Administration, 800 Independence Ave, SW., Washington, DC 20591; telephone (202) 267-7839.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in this rulemaking by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this document are also invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket as specified above. All comments received on or before the closing date for comments specified will be considered by the Federal Aviation Administration before taking action on this proposed rulemaking. The proposals contained in this document may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with Federal Aviation Administration (FAA) personnel concerned with this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 26460." The postcard will be date-stamped and mailed to the commenter.

Availability of NPRM's

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-430, 800 Independence Ave., SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM.

Persons interested in being placed on the mailing list for future NPRM's should request from the above office a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

Statement of the Problem

Attacks against civil aviation have increased in sophistication over the past decade. As a result, security has become an even greater concern of the flying public. Over 1,000 passengers on civil aircraft from 14 different member States of the International Civil Aviation Organization (ICAO) have died as the result of criminal acts against civil aviation in the last 10 years. Sabotage and hijacking of civil aircraft are worldwide problems requiring a unified, global solution.

History

The Federal Aviation Administration's (FAA) present Civil Aviation Security Program was initiated in 1973. The pertinent provisions in Part 129 of the Federal Aviation Regulations (FAR), which govern the operations of foreign air carriers that hold a permit issued by the Department of Transportation (DOT) under section 402 of the Federal Aviation Act or that hold another appropriate economic or exemption authority issued by DOT, were initially promulgated in 1976 (41 FR 30106, July 22, 1976).

The FAA issued an amendment to FAR § 129.25(e) in 1989 (54 FR 11116, March 16, 1989) that requires foreign air carriers flying to or from the U.S. to submit their security programs to the FAA for acceptance by the Administrator. The submitted programs must describe the procedures, facilities, and equipment that foreign air carriers will use to ensure the safety of persons and property traveling in air transportation. The rule applies to foreign air carrier operations at U.S. airports and at foreign airports that are a last point of departure prior to landing in the United States.

With respect to that portion of a security program dealing with identified airports that are a last point of departure to the United States, a Notice of Implementation Policy (54 FR 25551, June 15, 1989) set forth a policy that allows a foreign air carrier to refer the FAA to the appropriate foreign government authorities that implement those procedures. Currently, 136 foreign air carriers are required to submit security programs and all have done so.

On November 29, 1976, the FAA promulgated a new 14 CFR part 191 (41 FR 53777, December 9, 1976) establishing the requirements for withholding security information from disclosure under the Air Transportation Security Act of 1976. Security programs are documents detailing how U.S. air carriers and foreign air carriers will comply with the requirements contained in the FAR. They contain sensitive security procedures and are not available to the public.

Related Activities

It is vitally important to recognize the global nature of terrorism and other criminal acts against civil aviation. Illicit access to the air transportation system may be attempted through airports in countries far from the terrorist's intended target where the perceived threat to that nation's interests is not high and the security measures accordingly less stringent. It is therefore essential to raise the standard of aviation security worldwide to prevent terrorist acts.

The security Standards and Recommended Practices (SARPs) developed by the International Civil Aviation Organization (ICAO) and incorporated into Annex 17 of the Convention on International Civil Aviation (Chicago Convention) are continually reviewed and updated. At the next meeting of the ICAO Aviation Security Panel in June 1991, a complete review of the current SARPs will be conducted. The Panel will recommend to the ICAO Council those changes to the SARPs it determines are necessary to counter the global threat to civil aviation security.

It is not always possible or appropriate to unilaterally impose identical security procedures for U.S. air carriers and foreign air carriers, because the perceived—and often the actual—threat directed at the air carriers of various nations differs widely. An attempt to require all air carriers, foreign and domestic, to follow identical procedures could precipitate major economic and political confrontations with little or no increase in passenger security. Bilateral negotiations will be used, when necessary, to preclude such confrontations and increase the level of aviation security. The Secretaries of State and Transportation are committed to both multilateral and bilateral actions to improve and strengthen security standards.

Congressional Activity

On November 16, 1990, the President signed the Aviation Security Improvement Act of 1990 (Pub. L. 101–604). This legislation provides that the Administrator of the FAA may accept a foreign air carrier security program only if the Administrator determines that the security program provides passengers with a similar level of protection as such passengers would receive under the security programs of U.S. air carriers serving the same airports.

Current Requirements

Currently, Part 129 requires each foreign air carrier landing or taking off in the United States to adopt and use a security program acceptable to the Administrator. The security program must describe the procedures, facilities, and equipment used by the foreign air carrier to ensure the safety of persons and property traveling in air transportation. The standard for acceptance by the Administrator initially was adherence to part 129 and the ICAO Standards in Annex 17.

The FAA is revising the standard for acceptance of a foeign air security program. The proposed revision was issued to foreign air carriers for comment on October 24, 1990. Under this proposed revision, foreign air carriers would be required to detect test objects (simulated weapons and explosive devices) during FAA tests of the security screening checkpoints at U.S. airports. The new standard would also require foreign air carriers to adopt the same standards for X-ray imaging, metal detector calibrations, and training for screening personnel that are required of U.S. air carriers at the same airports in the United States. Further, the revision would require a positive passenger/baggage match for all flights to and from the United States in accordance with current ICAO Standards.

Discussion of the Proposals

The FAA is proposing to amend part 129 to ensure that all foreign air carriers that land or take off in the United States adopt and use a security program that provides passengers a level of protection similar to the level of protection provided by U.S. air carriers serving the same airports. The security measures needed to provide a similar level of protection will vary with the risk.

Risk is a combination of the threat and the effectiveness of the security measures performed to counter the threat. Certain flights from certain locations are at greater risk, but the threat at any location may change at any time. Ineffective security measures increase the risk even though the prevailing threat may not be directed toward that airport or carrier. Persons intent upon sabotaging or hijacking civil aircraft are likely to gravitate to those airports where it is easiest to circumvent security procedures and enter the air transportation system.

The FAA is proposing to amend part 129 to authorize the Administrator to amend foreign air carrier security programs in the interest of safety in air transportation or in air commerce and in the public interest. The procedures proposed for the amendment of foreign air carrier security programs by the Administrator closely parallel the procedures in part 108 for the amendment of U.S. air carrier security programs. In most cases, proposed amendments would be issued to the foreign air carrier for comment prior to adoption. A specified period of time is set aside for submission of comments and implementation of any amendment adopted. In an emergency, when a comment period would be impractical or contrary to the public interest, the Administrator would be authorized to amend a security program effective on the date it is received by the foreign air carrier.

To ensure effective security measures, the FAA could amend foreign air carrier security programs to include standby enhanced security procedures. The enhanced procedures could be performed at airports where the FAA has identified an increased risk to passengers and the Administrator determines that such procedures are necessary to provide passengers a similar level of protection. The FAA will consult the foreign government authority whenever enhanced security procedures are deemed necessary at a foreign airport.

Regulatory Evaluation Summary

Introduction

This section summarizes the full regulatory evaluation prepared by the FAA that provides more detailed estimates of the economic consequences of this regulatory action. This summary and the full evaluation quantify, to the extent practicable, estimated costs to the private sector, consumers, Federal, State and local governments, as well as anticipated benefits.

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. The order also requires the preparation of a Regulatory Impact Analysis of all "major" rules except those responding to emergency situations or other narrowly defined exigencies. A "major" rule is one that is likely to result in an annual increase in consumer costs, a significant adverse effect on the economy of $100 million or more, a major increase in consumer costs, or a significant adverse effect on competition.

The FAA has determined that this proposed rule is not "major" as defined in the executive order; therefore, a full Regulatory Impact Analysis, which includes the identification and evaluation of cost-reducing alternatives to this proposed rule, has not been prepared. Instead, the agency has prepared a more concise document termed a regulatory evaluation that analyzes only this proposed rule without identifying alternatives. In addition to a summary of the regulatory evaluation, this section also contains the Regulatory Flexibility Determination required by the Regulatory Flexibility Act and an International Trade Impact assessment. If more detailed economic information is desired, the reader may refer to the full

regulatory evaluation contained in the docket.

Cost/Benefit

Under the authority of the proposed amendment, existing foreign air carrier security programs could be amended by adding a standby set of enhanced security procedures for flights departing to the United States. The enhanced procedures would be activated when and where the FAA identifies an increased risk and the Administrator determines that such procedures are necessary to provide passengers a similar level of protection as that provided by U.S. air carriers serving the same airports.

Since the extent to which these enhanced procedures would be activated is dependent on unknown future risk conditions, a definitive estimate of the total costs attributable to the proposal is not possible. Accordingly, this evaluation includes estimates of the unit costs that would be incurred to employ the enhanced procedures for a range of application levels.

Work-load estimates for the twelve individual enhanced security procedures were developed by the FAA. The unit costs for each procedure were multiplied by the appropriate operations data to determine the expected cost per departure and the average annual costs per station, per foreign air carrier, and for all foreign air carriers that would be subject to the provisions of the rule.

On average, the FAA estimates that the enhanced security procedures would increase costs by $349 per airport departure during the first year at those stations where the procedures are applied. The average annual costs for larger aggregations are estimated at $238,000 per station, $510,000 per foreign air carrier, and a maximum potential of $49.5 million if the enhanced procedures were activated for all foreign carrier flights into the U.S. for 1 year. The worldwide risk conditions that would be necessary to activate these procedures for all flights by all foreign air carriers would be unprecedented.

Based on previous experience, the FAA estimates that not more than 10 percent of foreign carrier stations are likely to operate under the enhanced security procedures at any given time. Applying this assumption, the most likely cost of the proposed amendment would not exceed $4.9 million per year.

For comparison purposes, it is estimated that the economic valuation of a terrorist explosion incident would range on average between $94 and $104 million, not counting injuries or secondary effects. These data support the position that the proposed rule would be cost-beneficial if one average terrorist explosion incident were averted: (1) Over a 20-year period at the expected level of costs, or (2) over a 2-year period at the maximum estimated potential cost where the enhanced security procedures would be implemented by all affected foreign air carriers for all flights to the United States. The determination that the proposal would be cost-beneficial is further supported by the fact that the enhanced security procedures would be applied in those cases where the FAA has identified an increased risk to passengers and the Administrator has determined that they are necessary.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily or disproportionately burdened by Government regulations. The RFA required a Regulatory Flexibility Analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small business entities. FAA Order 2100.14A, Regulatory Flexibility Criteria and Guidance, establishes threshold cost values and small entity size standards for complying with RFA review requirements in FAA rulemaking actions.

The FAA has determined that this proposed rule would not directly affect U.S. enterprises and, therefore, it would not have an economic impact on small domestic entities. This evaluation has not considered the impact on small foreign entities on the basis that they are external to the scope of the RFA.

International Trade Impact Analysis

The provisions of this proposed rule could affect the existing access to U.S. markets by foreign interests. It would require that the security programs of foreign air carriers provide passengers a level of protection similar to the level of protection provided by U.S. air carriers serving the same airports. The most likely cost of the proposed amendment would not exceed $4.9 million per year—an average of $51,000 per year per foreign air carrier providing service to the United States from airports that are also served by U.S. air carriers. United States air carriers are already subject to the enhanced security procedures associated with this proposal.

Federalism Implications

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism statement.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this proposed regulation is not major under Executive Order 12291. In addition, the FAA certifies that this proposal, if adopted, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. This proposal is not considered significant under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). An initial regulatory evaluation of the proposal, including a Regulatory Flexibility Determination and International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under "FOR FUTHER INFORMATION CONTACT."

List of Subjects in 14 CFR Part 129

Aircraft, Air carriers, Airports, Aviation safety, Weapons.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend part 129 of the Federal Aviation Regulations (14 CFR part 129) as follows:

PART 129—OPERATIONS: FOREIGN AIR CARRIERS AND FOREIGN OPERATORS OF U.S.-REGISTERED AIRCRAFT ENGAGED IN COMMON CARRIAGE

1. The authority citation for part 129 is revised to read as follows:

Authority: 49 U.S.C. 1346, 1354(a), 1356, 1357, 1421, 1502, and 1511; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983).

2. Section 129.25(e) is revised to read as follows:

§ 129.25 Airplane Security.

* * * * *

(e) Each foreign air carrier required to adopt and use a security program pursuant to paragraph (b) of this section shall have a security program acceptable to the Administrator. A foreign air carrier's security program is

accepted only if the Administrator finds that the security program provides passengers a level of protection similar to the level of protection provided by U.S. air carriers serving the same airports. Foreign air carriers shall employ procedures equivalent to those required of U.S. air carriers serving the same airports if the Administrator determines that such procedures are necessary to provide passengers a similar level of protection. The following procedures apply for acceptance of a security program by the Administrator:

(1) Unless otherwise authorized by the Administrator, each foreign air carrier required to have a security program by paragraph (b) of this section shall submit its program to the Administrator at least 90 days before the intended date of passenger operations. The proposed security program must be in English unless the Administrator requests that the proposed program be submitted in the official language of the foreign air carrier's country. The Administrator will notify the foreign air carrier of the security program's acceptability, or the need to modify the proposed security program for it to be acceptable under this part, within 30 days after receiving the proposed security program. The foreign air carrier may petition the Administrator to reconsider the notice to modify the security program within 30 days after receiving a notice to modify.

(2) In the case of a security program previously found to be acceptable pursuant to this section, the Administrator may subsequently amend the security program in the interest of safety in air transportation or in air commerce and in the public interest within a specified period of time. In making such an amendment, the following procedures apply:

(i) The Administrator notifies the foreign air carrier, in writing, of a proposed amendment, fixing a period of not less than 45 days within which the foreign air carrier may submit written information, views, and arguments on the proposed amendment.

(ii) At the end of the comment period, after considering all relevant material, the Administrator notifies the foreign air carrier of any amendment to be adopted and the effective date, or rescinds the notice of proposed amendment. The foreign air carrier may petition the Administrator to reconsider the amendment, in which case the effective date of the amendment is stayed until the Administrator reconsiders the matter.

(3) If the Administrator finds that there is an emergency requiring immediate action with respect to safety in air transportation or in air commerce that makes the procedures in paragraph (e)(2) of this section impractical or contrary to the public interest, the Administrator may issue an amendment to the foreign air carrier security program, effective without stay on the date the foreign air carrier receives notice of it. In such a case, the Administrator incorporates in the notice of amendment the finding and a brief statement of the reasons for the amendment.

(4) A foreign air carrier may submit a request to the Administrator to amend its security program. The requested amendment must be filed with the Administrator at least 45 days before the date the foreign carrier proposes that the amendment would become effective, unless a shorter period is allowed by the Administrator. Within 30 days after receiving the requested amendment, the Administrator will notify the foreign air carrier whether the amendment is acceptable. The foreign air carrier may petition the Administrator to reconsider a notice of unacceptability of the requested amendment within 45 days after receiving notice of unacceptability.

(5) Each foreign air carrier required to use a security program by paragraph (b) of this section shall, upon request of the Administrator and in accordance with the applicable law, provide information regarding the implementation and operation of its security program.

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Issued in Washington, DC, on January 29, 1991.

Kenneth M. Lauterstein,

Acting Director, Office of Civil Aviation Security Policy and Planning.

[FR Doc. 91-2470 Filed 1-29-91; 4:22 pm]

BILLING CODE 4910-13-M