

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Parts 107 and 108**

[Docket No. 26763; Notice No. 92-3C]

RIN 2120-AE14

Unescorted Access Privilege**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: The FAA proposes to establish regulations requiring airport operators and air carriers to conduct an employment investigation and disqualify individuals convicted of certain enumerated crimes from having, or being able to authorize others to have, unescorted access privileges to a security identification display area (SIDA) of a U.S. airport. This notice is proposed in lieu of the FAA's original Notice of Proposed Rulemaking (NPRM), as a means to implement Section 105 of the Aviation Security Improvement Act of 1990, and resulted from consideration of the comments received on that NPRM. The major changes from the NPRM are: individuals currently holding unescorted access authority are exempted; and an FBI criminal history records check would be required only when the employment investigation triggers a need for one. The proposed regulations are intended to enhance the effectiveness of the U.S. civil aviation security system by ensuring that individuals applying for unescorted access privilege do not constitute an unreasonable risk to the security of the aviation system.

DATES: Comments must be received on or before December 17, 1992. However, late filed comments will be considered to the extent practicable.

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. 26763, 800 Independence Avenue SW., Washington, DC 20591. All comments must be marked: "Docket No. 26763." Comments may be examined in Room 915G on weekdays except on Federal holidays between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Andrew V. Cebula, Office of Civil Aviation Security Policy and Planning, Policy and Standards Division, (ACP-110), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, telephone (202) 267-8293.

SUPPLEMENTARY INFORMATION:**Comments Invited**

Because the proposals in this SNPRM differ in many respects from the NPRM (Notice No. 92-3), the FAA encourages interested persons to file comments in response to this Notice even if they have already commented on the NPRM. The SNPRM is intended to supersede the NPRM. In instances where the proposed rule has been changed based on comments to the NPRM, comments filed in response to the SNPRM will be the primary focus of attention in developing the final rule. However, comments filed in response to the NPRM will be considered to the extent they provide information relevant to the development of the final rule.

Interested persons are invited to comment on the proposed rule by submitting such written data, views, or arguments as they may desire. 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 by cost estimates. Comments should identify the regulatory docket or notice number and be submitted in triplicate to the Rules Docket at the address specified above. All comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

All comments received on or before the closing date 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.

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. 26763." When the comment is received, the postcard will be dated, time stamped and mailed to the commenter.

Availability of SNPRM

Any person may obtain a copy of this SNPRM 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 or docket number 92-3C.

Persons interested in being placed on a mailing list for future proposed rules 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.

While the FAA has not scheduled public meetings on this notice, if significant issues arise during the comment period, the FAA will schedule one or more meetings in a future notice.

History

Section 105(a) of the Aviation Security Improvement Act of 1990, Public Law 101-604 (the Aviation Security Improvement Act or the Act) amends section 316 of the Federal Aviation Act of 1958 (FA Act) by adding a new subsection "(g)," captioned "Air Carrier and Airport Security Personnel." This subsection directs the FAA Administrator to promulgate regulations that subject individuals with unescorted access to U.S. or foreign air carrier aircraft, or to secured areas of U.S. airports served by air carriers, to employment investigations, including a criminal history records check as the Administrator determines necessary to ensure air transportation security.

On February 13, 1992, the FAA published a notice of proposed rulemaking (Notice No. 92-3, 57 FR 5352) to require a criminal history records check using the Federal Bureau of Investigation's (FBI) fingerprint-based national criminal history record filing system for all individuals with unescorted access to the SIDA at U.S. airports. In that proposal, the FAA used the broad authority delegated to the FAA Administrator in the Act to require an employment investigation, including a criminal history records check. The proposal was consistent with the previous efforts of the FAA to obtain the legislative authority to require a criminal history records check, as well as recommendations made by the President's Commission on Aviation Security and Terrorism in May 1990. It also incorporated many of the recommendations made by the aviation industry through the Aviation Security Advisory Committee (ASAC) in March 1991.

Responding to requests from airport operators and air carriers, the FAA extended the comment period for that proposal from March 18 until May 15, 1992 (57 FR 8834), and announced that one or more public meetings would be scheduled. The notice outlining the details of the public meetings was

published on April 9, 1992 (57 FR 12396). Public meetings were held in Los Angeles, California, on April 28; Ft. Worth, Texas, on April 30; and Washington, DC on May 12, 1992. The FAA received over 270 written comments to the docket and 66 commenters made oral presentations at the public meetings.

The overwhelming majority of commenters opposed FAA's proposal to require a criminal history records check for all individuals having unescorted access to the SIDA, and the proposal to require escorts for anyone inside the SIDA who did not have such a records check. Specifically, commenters argued that individuals with existing unescorted access privileges should be excluded from the criminal history records check requirement, and that the proposed escorting requirements were neither practical nor cost-effective. Some commenters questioned whether any benefit would result from requiring a criminal history check. Because of these concerns, commenters strongly recommended that the FAA exercise more flexibility in implementing the employment investigation requirements required by the Act. We have determined that the Act does provide flexibility in requiring a criminal history records check. The Senate Transportation Appropriation Committee's report on the Department of Transportation Fiscal Year 1993 Appropriations legislation also addressed this issue by adding the following language to its proposal: "While continuing to believe that the authority to require criminal background checks is important, the Committee does believe that FAA could exercise greater discretion in the use of that authority."

Based on the comments, the FAA has re-evaluated Notice No. 92-3 and is proposing a revised approach. The FAA again proposes that airport operators and air carriers conduct an employment investigation of individuals applying for unescorted access privilege. The revised proposal incorporates an investigation which would consist of an enhanced employment history verification and, only where appropriate, a criminal history records check. Under this approach, a criminal history records check would only be required when an air carrier or airport operator wants to hire an individual for a position requiring unescorted access if one or more of the criteria proposed for the employment investigation in the SNPRM is met. The proposed fingerprint-based criminal history records check process is similar to that proposed in the NPRM, Notice No.

92-3 and takes into account comments made by the FBI.

The FAA proposes to amend 14 CFR parts 107 and 108 (Parts 107 and 108 of the Federal Aviation Regulations (FAR)). The proposed rule would codify into regulatory requirement the pre-existing airport and air carrier security program requirements for an investigation into the background of individuals with unescorted access to the SIDA of U.S. airports. The SIDA is defined as "any area identified in the airport security program as requiring each person to continuously display on their outermost garment, an airport-approved identification medium unless under airport-approved escort" [14 CFR 107.25(a)].

Discussion of Proposed Rule

General

14 CFR part 107 (Part 107 of the FAR) contains security requirements for airport operators. Part 107 addresses access control, law enforcement support, and submission of airport security programs for FAA approval. Part 108 prescribes security rules for U.S. air carriers.

The purpose of the FAA's security requirements is to protect persons and property in air transportation against acts of criminal violence, air piracy and terrorism. These acts are neither simple nor uniform, and are certainly not limited to sophisticated acts of international terrorists with political motives or the acts of deranged individuals. The FAA is also concerned about individuals deliberately committing or assisting in the commission of criminal acts against aviation for financial gain. A trust is placed on individuals authorized to have unescorted access and it is presumed that they will not present a security risk to civil aviation. Because many of the crimes listed in the Act relate to acts of criminal violence, there is a logical link between the future actions the FAA is attempting to prevent and the past convictions for the disqualifying crimes. Also, the Act affirmatively prohibits individuals convicted of disqualifying crimes during the previous 10 years from having unescorted access privileges.

The FAA is therefore proposing a regulatory requirement that would screen the background of individuals applying for unescorted access to identify those who might knowingly be involved in an act against civil aviation or participate in criminal activity that affects the airport operating environment. While not specifically prohibiting the employment of disqualified individuals, the Act does

prohibit individuals who have been convicted of certain enumerated crimes in the past 10 years from having unescorted access to secured areas of a U.S. airport or to U.S. and foreign air carrier aircraft. The Act directs the Administrator to issue regulations requiring employment investigations for individuals with unescorted access.

Employment investigations are one of the three core requirements of that part of the civil aviation domestic security program designed to control access at airports and ensure the security of aircraft used in scheduled or public chartered transportation. Consequently, in 1985, the requirement for an employment history verification was implemented to include, at a minimum, references and prior employment histories to the extent necessary to verify representations made by the individual for the preceding 5 years. The access controls required by 14 CFR 107.13 and 107.14, along with the identification display, training, and challenge requirements of § 107.25, are the other core elements.

Since the existing 5-year employment history verification was first required by FAA in 1985 through amendments to airport and air carrier security programs, the aviation industry has implemented procedures to meet that requirement. However, in many cases these procedures have been open to interpretation because the FAA has not issued specific guidelines on what constitutes an acceptable employment history verification. While this often entails checking references and prior employment histories to the extent necessary to verify representations made by the individual, the FAA has left it to the employer's discretion to determine the method for reviewing the background of prospective employees.

The FAA recognizes the need for a regulatory requirement for employment history verifications of individuals applying for unescorted access privileges to provide a minimum standard and specify triggers for a criminal history records check. Accordingly, the FAA proposes to amend parts 107 and 108 to supersede the current security program language for individuals with SIDA access privileges. However, for individuals applying for positions that do not require unescorted access privileges to the SIDA (and thus are not covered by the Act or this rulemaking), e.g., security screening personnel and individuals with access to areas of the air operations area outside of the SIDA, the existing airport and air carrier security program language requiring the 5-year

employment history verification would continue to apply.

This SNPRM proposes to: (1) Establish minimum requirements for information that would be included on the employment application; (2) specify the information that must be verified; (3) establish the criteria that would "trigger" the requirement for a criminal history records check; and (4) prohibit unescorted access privileges for individuals convicted of the enumerated disqualifying crimes. The proposal would also specify the process for performing the records check.

The first three requirements would be used to determine whether an individual may have unescorted access to the SIDA. In accordance with section 105 of the Act, this proposal would also apply to individuals directly responsible for authorizing unescorted access, including individuals performing the required investigations and those issuing the credentials for unescorted access privilege.

In Notice No. 92-3, the FAA proposed to apply the criminal history records check requirement comprehensively to all individuals with unescorted SIDA access. However, as stated above, commenters to the NPRM argued that requiring the check comprehensively was not necessary in order to identify individuals who might pose a threat to aviation security. Instead, commenters recommended enhancing the existing 5-year employment history verification requirement.

The FAA considered increasing the employment history verification portion of the investigation process from 5 years to 10, but determined that to do so would increase the costs and time spent on the verification without appreciably enhancing aviation security. Consultation with entities that perform background investigations indicated that a 5-year employment history verification is usually sufficient to expose a questionable background and that an additional 5 years would not be cost effective. Furthermore, the great majority of commenters at the public meetings on the NPRM were satisfied with the current 5-year requirement, and did not suggest that a 10-year check was necessary.

If the employment history verification were to cover 10 years, employers could find it difficult to verify the less recent part of an individual's employment history. This is because former employers may no longer be in business, or, if they are still in business, supervisors familiar with the individual may have left the company, or records destroyed as part of normal business practice. Unnecessary criminal checks

could be triggered simply because less recent information would be harder to verify.

The FAA has structured the SNPRM to cover the 10-year period stated in the Act in a number of ways. The application form for employment would require the applicant to list convictions for any disqualifying crime in the last 10 years. The form would also put the applicant on notice that he or she may be subject to an FBI criminal history records check, which should discourage applicants from attempting to conceal a disqualifying conviction from the prospective employer. Finally, if a criminal history records check is triggered during the employment investigation, the criminal record would be obtained from the FBI and the individual would be disqualified if his or her record discloses a conviction for any of the disqualifying crimes in the previous 10-years.

The FAA seeks comment on whether the information obtained through the 5-year employment history verification is sufficient or whether it is advisable to expand the employment history verification portion of the proposal to 10 years. Commenters should provide cost information, and explain what benefits they would expect from the extended verification period. Of course, employers could expand the scope of the employment history verification to a longer period if they so choose.

The FAA proposes that the airport operator have the overall responsibility for ensuring that employment investigations are performed for all individuals applying to have, or to authorize others to have, unescorted SIDA access. This does not mean that the airport operator must perform the investigations in all cases. Flexibility has been provided to avoid duplicative cost and administrative burden.

In lieu of performing such investigations, § 107.31(f) of the proposed rule would permit the airport operator to accept a certification from an air carrier that it has performed the required employment history verification and criminal history records check, where appropriate, for air carrier employees. Similar to the process currently used for employment history verifications, the airport operator would be required to have a certification on file indicating that the air carrier has performed the investigation. The FAA would consider the airport operator's acceptance of this certification as compliance with its regulatory obligation. The air carrier could be subject to FAA enforcement action if it falsely certifies that it has performed the employment investigation.

There are two situations where an air carrier would certify to an airport operator that it has performed the relevant employment investigations. In the first case, the carrier must perform the investigation for employees (such as flight crewmembers) to whom it issues air carrier identification that have been approved by the airport operator as acceptable for SIDA access. The air carrier would certify to each airport operator that accepts the identification that the employment investigation had been performed as a part of its program for issuing such identification. One certification would cover the entire program and would not have to include individual names.

In the second case, for individual air carrier employees issued identification by an airport operator, the air carrier would certify to the airport operator that the employment investigation had been performed for named individuals. Those individuals could then receive airport-issued identification authorizing SIDA access at that airport. However, the proposed rule would permit the air carrier and the airport operator to determine which of them would perform the employment investigations for air carrier employees needing airport identification. The entity that performs the employment investigation would be responsible for ensuring that it is done in accordance with the proposed rule.

The proposal would not alter the process allowing an airport operator to accept certification from non-air carrier airport tenants that the employment history verification component of the employment investigation had been performed. However, in instances where a criminal history records check would be required, the airport operator would have to perform the check of the FBI's criminal history record index. The authority to request the FBI check is limited by the Act to airport operators and air carriers.

Individuals With Current Access Authority

Many of the commenters to Notice No. 92-3 argued that individuals with existing unescorted access authority could be exempted from the employment investigation without compromising the security of the U.S. civil aviation system. As required by the FAA, individuals authorized to have unescorted access privilege since November 28, 1985 have been subjected to the 5-year employment history verification. Since hiring these individuals, employers have had the opportunity to observe their conduct. The benefits, if any, of subjecting current employees to the

proposed employment investigation would not justify the disruption and cost that such a requirement would place on the air carriers and airport operators. Further, because of the turnover rates for employees, all but the most long term individuals will be subjected to the proposed employment investigation within a short period of time.

Thus, numerous commenters believed the FAA should instead follow the ASAC recommendation to exempt all individuals with current unescorted access authority from the proposed employment investigation. The FAA is proposing to adopt this recommendation by exempting from the employment investigation all individuals with current unescorted access authority on the effective date of the final rule.

Although the FAA is excluding these individuals from the proposed employment investigation requirement, additional rulemaking could be initiated if the FAA determines that there is a security need to review further the background of individuals exempted under the proposal.

Escorting

A number of commenters to Notice No. 92-3 objected to the requirement to escort an individual while the criminal history records check, which could take from 30 to 90 days, is being performed. The FAA is proposing to use the employment history verification as the primary means of determining an individual's eligibility for unescorted access. Most individuals would not need to be escorted because the applicants would not be employed in a position requiring unescorted access until the employment history verification is completed. In statements made at the public meetings to Notice No. 92-3, commenters indicated that the current 5-year employment history verification is completed in 5-10 days.

An individual would have to be escorted only when a criminal history records check is required or "triggered" by the employment history verification. The FAA's proposed "triggers" for the criminal history records check are based on information supplied by the aviation industry on the criteria used by some air carriers to screen job applicants. The use of these triggers will significantly reduce the number of criminal history records checks required, in comparison to that proposed in Notice No. 92-3. Considering the additional requirements associated with performing a criminal history records check, it is likely that airport operators and air carriers will decide to subject only a limited number of individuals to a criminal history records check. This will drastically

reduce the number of individuals requiring escorting. While the actual number of criminal checks performed may be few, the deterrent aspect of potentially being subjected to the check is an important component of the proposal. In that regard, the FAA proposes to require that all applicants for covered positions be notified in advance of the possibility that they may be subject to a criminal history records check.

Section-by-Section Analysis

Section 107.1 Applicability and Definitions

The FAA proposes to add a definition of the term "escort" to this section of the regulation. Under the proposal, escort would have to be conducted by an individual who is authorized by the airport operator to have access to areas controlled for security purposes. This person is required to take action, in accordance with local airport procedures, if the individual under escort engages in activities other than those for which the escorted access is granted.

Section 107.31 Unescorted Access Privilege

107.31(a)—Applicability

The FAA is proposing that after the effective date of the rule, any individual applying for the authority to have, or to authorize others to have, unescorted access to the SIDA be subject to the employment investigation process. The FAA invites comments on the length of time between the date a final rule is published in the *Federal Register* and the date it would become effective. During that time period, the industry would prepare the administrative processes necessary to comply with the requirements of the rule. The FAA is planning that 90 days after the final rule is published it would become effective.

For airports that are not required to define a SIDA, the investigation requirement would apply to areas identified in the airport security program that are controlled for security purposes. Prior to the effective date of this proposal, the existing 5-year employment history verification would remain in effect and all individuals authorized for unescorted access prior to the effective date of the final rule would not be subjected to the rule being proposed.

In Notice No. 92-3, the FAA proposed using the term "SIDA," an area which the airport operator is required to define in its security program. The SIDA includes the secured area of an airport as defined under § 107.14 and the

portions of an airport where U.S. and foreign air carrier aircraft operate as specified by the Act. The essential requirement under § 107.25 for unescorted access to the SIDA is the continuous display of airport approved identification and specified training.

Notice No. 92-3 also requested comments on the use of the SIDA as the appropriate area to be covered by the employment investigation process. The majority of commenters addressing this issue expressed concern about the areas and activities that are included in the SIDA by airport operators, rather than the appropriateness of using SIDA access authority. The FAA has subsequently issued policy guidance to the FAA field offices and to airport operators clarifying the application of SIDAs at airports. While not issued as a result of Notice No. 92-3, these actions have further defined the areas and types of operations that should be included within the SIDA and specifically address the concerns of commenters in this proceeding regarding the application of SIDA to general aviation areas. During this rulemaking, FAA will continue to evaluate industry's concerns about the areas and activities to be included in the SIDA by airport operators.

Currently, the 5-year employment history verification is required for the issuance of an identification credential or badge to determine an individual's suitability for unescorted access authority. The employment investigation requirements of this proposal would supersede the 5-year employment history verification in the security program for individuals subject to the final rule. The issuance or denial of an identification credential required for SIDA access would serve as the vehicle for the implementation of the requirement from a practical and enforcement standpoint.

Section 107.31(b)—Types of Employment Investigation Required

Under this section and the Act, if the results of the employment investigation disclose that an individual was convicted of a disqualifying crime in the previous 10 years from the date the verification is initiated, the individual may not be granted unescorted access authority. The Act does now allow the FAA to consider the rehabilitation of an individual, but places a blanket prohibition on unescorted access for individuals with a statutorily disqualifying conviction.

The FAA is proposing that arson be added to the mandatory disqualifying convictions listed in the Act. The Act

does not permit the FAA to exclude any of the crimes listed. The disqualifying crimes identified in the Act include specific violations of section 902 of the FA Act, 49 U.S.C. App. 1472 (not state law equivalents, as suggested by some of the commenters) to include: Forgery of certificates, false marking of aircraft, and other aircraft registration violations; interference with air navigation; improper shipment of a hazardous material; aircraft piracy; interference with flight crewmembers or flight attendants; commission of certain crimes aboard aircraft in flight; carrying weapons or explosives aboard aircraft; conveying false information and threats; aircraft piracy outside the special aircraft jurisdiction of the United States; lighting violations in connection with transportation of controlled substances; unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements; and destruction of an aircraft or aircraft facility.

Other crimes enumerated in the Act and in this proposal are: Murder; assault with intent to murder; espionage; sedition; kidnapping; treason; rape; unlawful possession, sale, distribution, or manufacture of an explosive or weapon; extortion; armed robbery; distribution of, or intent to distribute, a controlled substance; and conspiracy to commit any of these criminal acts.

In Notice No. 92-3, the FAA sought comments on whether additional crimes should be listed. The comments on expanding the list of disqualifying crimes ranged from suggestions that all felony convictions be considered disqualifying to not adding any crimes to the list. However, arson was a specific crime that many of the commenters believed should be added to the list of disqualifying convictions, due to the deliberate nature of the offense and the safety and the practical considerations of fueling aircraft. The FAA proposes to add arson to the list and again invites comments on the possible expansion of the list of disqualifying crimes in the Act that may be relevant in authorizing unescorted access privilege. Additionally, the FAA again seeks comments on whether a person found not guilty by reason of insanity for any of the disqualifying crimes should be disqualified from unescorted SIDA access.

Section 107.31(c)—Employment Investigation Requirements

The proposal would establish the standards for the employment investigation. The standards would specify information required on the application, require proof of the

individual's identity, and verification of representations made by the individual. The investigation includes a 5-year employment history verification that would confirm the statements made by an individual regarding their previous employment. Where appropriate, a criminal history records check would be required.

The airport operator would be required to have the individual complete an application form that includes: (1) The individual's full name, as well as any aliases or nicknames; (2) the dates, names, phone numbers and addresses of the individual's previous employers for the last 5 years, with explanations for any gaps in employment of more than 12 months; (3) the notice that the individual will be subject to an employment history verification and possibly a criminal history records check; and (4) the question asking if the individual has been convicted of any of the disqualifying crimes during the previous 10 years. The purpose of requiring this information is to help the airport operator identify any applicants who may have disqualifying convictions. For example, an unexplainable gap in employment may have occurred due to incarceration for a conviction of a disqualifying crime.

The FAA anticipates that the additional application information can be gathered at little additional cost to the employer or applicant. For example, an existing application form could be supplemented with the notice (3 above) and the list of disqualifying crimes (4 above) along with a question on the use of aliases and any additional information needed on the 5-year employment history that does not already appear on the employer's existing employment application.

The airport operator would verify the information required on the employment application to the extent necessary to validate representations made regarding the previous 5-year period. This process would be similar to that used for the existing 5-year employment verification and could be conducted by telephone calls, in writing or in a personal visit. In cases where a previous employer has gone out of business, a reasonable attempt to verify the period of prior employment should be made. As defined in § 107.31(n), documentation to record the method and the results obtained would be required. The FAA would also specify that records must be maintained of information provided, persons providing the information and the dates the contact was made. The FAA solicits comments on additional means of verifying an individual's employment

that should be acceptable in the verification process. This could include accepting documentation in lieu of an employer making the verification by telephone calls, in writing, or in a personal visit.

The FAA proposal establishes a baseline requirement for the employment history verification. The airport operator may want to expand the scope of the employment history verification to cover areas not required by the proposal.

Under the proposal, if one or more of the following "triggers" established for the employment history verification is activated, the employment investigation would have to include a fingerprint-based check of the criminal records maintained by the Federal Bureau of Investigation (FBI) should the employer choose to proceed with the hiring process for that applicant.

First, an individual who is not able to adequately account for any period of unemployment of 12 months or more over the past 5 years in a manner that substantiates that he or she was not incarcerated for a disqualifying crime would be subject to a check. Unemployment for a 12-month period or more would not automatically trigger a criminal history records check. Rather, the criminal check would be required when the period of unemployment cannot be verified through the checking of appropriate documentation or references. For example, a gap could be satisfactorily explained by receipts for unemployment compensation, travel records or other information that would sufficiently provide evidence of an individual's whereabouts. In instances where an individual was self-employed, tax records, billing records, work orders, or other means could be used to support the claims made on the application.

Second, a criminal history records check would be triggered if there is an inability to substantiate statements made, or if there are significant inconsistencies between information required by the proposal that is provided by the applicant and that which is obtained during the employment verification. This has been intentionally defined using broad terms to allow the judgment of the airport operator and employers to determine what is acceptable. However, if an individual's employment cannot be verified, this would be considered as an inability to substantiate statements made.

Third, if information becomes available to the airport operator during the course of the investigation indicating a possible conviction for one of the

disqualifying crimes, a criminal records check would be required.

The 10-year criminal history records check is authorized by the Act. Individuals whose record shows a conviction during the previous 10 years for a crime listed in the proposed regulations would not be permitted to have, or authorize others to have, unescorted access to the SIDA. The 10-year period covered by the criminal history records check would be measured from the date the employment investigation process was initiated, i.e., the date the employment history verification began. As contemplated in section 105 of the Act, the FAA's proposal would limit the criminal history records check to the FBI's national criminal history record filing system.

As indicated in Notice No. 92-3, the FAA does not propose to require that the criminal history records received from the FBI be screened to delete information other than convictions for the enumerated crimes. Several of the commenters to the Notice No. 92-3 indicated that they already receive criminal history records from state or local sources for their prospective employees. Thus, the FAA's proposed rule would not limit the ability of airport operators and air carriers to review an individual's complete FBI criminal history record. However, any decision to deny unescorted access may be attributed to this rule only if it is based on the individual's conviction within the previous 10 years of an enumerated crime. Any other adverse information contained in the criminal record would not result in disqualification under the proposed rule.

Section 107.31(d)—Escorted Access

The proposal would require individuals who have not been authorized to have unescorted access authority to be under escort while in the SIDA. The FAA proposes to define "escort" in § 107.1(b)(3).

While escort requirements arise for a variety of reasons, the proposed rule is not expected to have a significant impact on the number of persons currently needing to be escorted. As mentioned earlier, the proposed screening of persons would result in very few individuals needing to be escorted pending completion of their criminal history records check. Escorting would be discretionary because the airport operator has the option of completing the check prior to hiring an employee to perform a duty requiring unescorted access privilege.

Section 107.31(e)—Exceptions to the Investigation Requirements

Government Employees

The FAA proposes that no additional employment investigation be required for Federal, state, and local government employees who have been subject to an employment investigation. Typically, the government employer subjects applicants to an employment investigation that is at least equivalent to that proposed in this notice. For example, Federal applicants are required on Standard Form 171 to disclose convictions, and the Office of Personnel Management, where appropriate, conducts a criminal history records check.

However, the FAA is sensitive to airport operator concerns over any exclusions to the employment investigation requirements. The FAA proposes to include state and local governments in this exception and invites comments on whether their hiring practices are comparable to that of the Federal Government.

Foreign Air Carrier Employees

The FAA is proposing to treat foreign air carrier employees similarly to that proposed in Notice No. 92-3. Many of the commenters to Notice No. 92-3 felt the threat to security exists primarily at foreign airports. Other commenters raised the complexity associated with trying to unilaterally apply U.S. laws in other countries. This could result in retribution by foreign countries who could require similar investigations for U.S. air carrier personnel. The Act, and hence this proposal implementing the Act, apply only at U.S. airports. Under this proposed rule, foreign nationals and U.S. citizens working in the United States for a foreign air carrier would be subject to an employment investigation prior to receiving airport-issued identification for SIDA unescorted access. While the airport operator would be responsible for the investigation, the foreign air carrier could perform the employment history verification, as it currently does at most airports.

The FAA proposes to implement an alternate security arrangement for foreign air carrier flight crewmembers (i.e., captain, second-in-command, flight engineer, or company check pilot) who are not based in the United States and are not otherwise issued airport identification. Alternate security arrangements are permitted by section 105 of the Act. The proposed alternate system for foreign flight crewmembers requires operational limitations to ensure an equivalent level of security. In

addition, there is a very low probability of detecting disqualifying convictions for a foreign national based outside the United States through an investigation of FBI records, because those records normally include only arrests and convictions entered in the United States.

Under an alternate system, foreign air carrier flight crewmembers would be excluded from the employment investigation requirements of the proposed rule, provided that their access is restricted under an approved airport security program. An acceptable alternate system under an approved airport security program could be to permit a foreign air carrier flight crewmember to have unescorted access limited to the footprint of their aircraft (i.e., the aircraft and the immediate surrounding ramp area). To access any other aircraft or areas of the airport, the foreign air carrier flight crewmember would require an escort.

Transfer of Privilege

Under this proposal, an individual who has unescorted access privilege may transfer that privilege to another airport. This can be accomplished by the airport operator obtaining certification from the previous airport operator that the employment history verification has been completed. The individual must have been continuously employed in a position requiring unescorted access since being authorized for unescorted SIDA access. This addresses flight crewmembers or other employees of airport tenants with unescorted access privilege who change their duty station and may transfer their unescorted access privilege.

Individuals Subject To Investigation By Customs

The FAA proposes to accept the background check performed by the U.S. Customs Service (Customs) for access to the Customs security area of a U.S. airport as a substitute for the proposed employment investigation. Since 1985, Customs has required a background investigation of individuals with access to the Customs security areas of U.S. airports [19 CFR 122.181-188]. This investigation includes an FBI criminal history records check and further background investigation by Customs to determine whether the individual should be issued a seal allowing access to the Customs security area. Customs denies access authority to any individual convicted of a felony or convicted of a misdemeanor involving theft, smuggling or any theft-related crime, or evidence of a pending or past investigation which establishes criminal or dishonest

conduct, or a verified record of such conduct. In addition, when the Customs District Director believes an individual would endanger the revenue or security of the Customs security area, the individual will be denied access authority.

Accepting the background investigation by Customs for the purposes of this proposal would avoid a redundant check, while providing an equivalent level of security for individuals with unescorted access. Failure to obtain access authority to the Customs area would not preclude an individual from obtaining unescorted access to the SIDA under this proposed rule, but would require the individual to be subjected to an employment investigation.

Section 107.31(f)—Investigations by Air Carriers and Airport Tenants

The FAA is proposing that an airport operator may accept written certification from an air carrier that the employment investigation was performed for its employees. Receipt of certification would satisfy the airport operator's obligation under the proposed rule. The airport operator may accept a general certification that the employment history verification and, where appropriate, the criminal history records check were performed as part of the process of an air carrier issuing identification credentials to its employees. When a specific air carrier employee or its contractor employee is subject to an employment investigation by the carrier for receipt of an airport-issued identification credential, the airport operator must receive certification for each employee prior to issuing an identification credential.

The proposal also includes a provision permitting an airport operator to accept written certification from airport tenants that the 5-year employment history verification has been performed. In many cases, these airport tenants currently perform the 5-year employment history verification for their employees. The FAA proposes that tenants would be permitted to perform the 5-year employment history verification. However, the criminal history records check would be the responsibility of the airport operator for all airport tenants other than U.S. air carriers. (Tenants other than U.S. air carriers may include airline food service companies, fixed base operators, and foreign air carriers whose employees receive airport identification.)

Section 107.31(g)—Appointing Contact

The proposal would require the airport operator to appoint a person

responsible for reviewing the results of the employment investigation and determining an individual's eligibility for unescorted access privilege. The designated person would also serve as the liaison in situations where the individual disputes the results of the criminal history records check that revealed information that would disqualify the person from unescorted access. The FAA seeks comments on whether the rule should specifically assign this responsibility to the Airport Security Coordinator (ASC) required under § 107.29. If this responsibility were assigned to the ASC, the ASC could delegate the duties while continuing to serve as the FAA's point of contact with the airport for purposes of monitoring compliance with this section.

Section 107.31(h)—Designating an Entity and Individual Notification

The FAA proposes to allow the airport operator to designate an outside entity to process the criminal history records check required by the rule. In Notice No. 92-3, three methods for processing the criminal history records check requests were discussed. The options for processing include: (1) Fully centralized processing, (2) partially centralized processing, and (3) decentralized processing.

An entity providing full central processing would receive requests from airports and air carriers for background checks. The entity would verify the quality of the fingerprints and batch those requests, and route the fingerprint cards to the FBI. After the FBI completed the search of its index system, the results would be returned to the entity providing the central processing, which, in turn, would forward the results to the airport operator or air carrier. Under a fully-centralized system, an entity providing the service may also follow-up on arrests for disqualifying convictions for which there is no disposition, and possibly screen the results. This is generally the type of system used by the nuclear industry for determining unescorted access to nuclear powerplants.

Under a partially-centralized system, one or more entities could provide partially-centralized processing and would verify the quality of the fingerprints and batch the requests for FBI criminal history record checks. The FBI would send the results of the record check to the airport operator or air carrier. The banking industry utilizes a similar method for processing records checks for individuals in that industry.

In a decentralized system, each airport operator and air carrier would

mail requests directly to the FBI and the FBI would send the results of the criminal history record check to the airport operator or air carrier.

As noted in Notice No. 92-3B, after the enactment of the Act, but prior to issuance of the NPRM, several organizations indicated a willingness to channel record requests to the FBI. The FBI, in discussions with the FAA, has indicated its preference that the number of entities be limited in order to facilitate FBI processing procedures. The FAA would again like to know if any organizations have an interest in channeling the records to the FBI. Prior to issuing a final rule, the FAA will resolve the issue of acceptable procedures for requesting and receiving the criminal history records check information, in consultation with the FBI. Although the method for requesting the records checks and receiving them from the FBI has not been established, the basic process outlined in the proposal would not be affected by the outcome of that issue.

This proposed section would require that individuals covered by the proposed rule be notified of the need for a criminal history records check prior to commencing the check.

Section 107.31(i)—Fingerprint Processing

Similar to Notice No. 92-3, this proposal includes procedures for collecting fingerprints and requires that one set of legible fingerprints be taken on a card acceptable to the FBI. The airport operator or its designee could choose to have the airport law enforcement officers take the fingerprints or have another entity perform the function. The FAA also proposed to require that the identity of the individual be verified at the time the fingerprints are taken. The individual would be required to present two forms of identification, one of which must bear the photograph of the individual. A current driver's license, military identification, or passport are examples of acceptable identification. The FAA also proposes that the fingerprint cards be handled and shipped in a manner that would protect the privacy of the individual.

Section 107.31(j)—Making the Access Determination

The FBI has indicated that 60 percent of records in its system show an arrest for which there has been no disposition (e.g., the case is pending). The FAA is proposing that the airport operator or its designee, investigate arrests for any of the enumerated offenses when no

disposition has been recorded in the FBI's records. This investigation would be conducted with the affected individual and the jurisdiction where the arrest took place in order to determine whether a disposition has been recorded in that jurisdiction but not forwarded to the FBI.

In determining whether to grant unescorted access to an individual with an arrest for one of the disqualifying crimes but no disposition, the airport operator should weigh all relevant information available on the individual, including the results of the employment investigation. However, the proposal requires that unescorted access be denied only for convictions of the disqualifying crimes.

Section 107.31(k)—Availability and Correction of FBI Records and Notification of Disqualification

Similar to the process proposed in Notice No. 92-3, this proposal requires the airport operator or its designee to notify an individual at the time the fingerprints are taken that he or she would be provided, upon written request, a copy of his or her results from the FBI criminal history records check, prior to rendering the access decision. All individuals subject to an unescorted access determination have the option of receiving a copy of the results from the criminal history records check.

In instances where an individual's criminal history records check reveals information that would disqualify him or her from unescorted access, the FAA is proposing that the airport operator or its designee be required to advise the affected individual of disqualifying information. The airport operator or its designee would also be required to provide the individual with a copy of the criminal history records check results.

The individual would have the right to challenge the accuracy of the record. Because the FBI maintains the records and has established procedures to address possible inaccuracies, it would be appropriate to forward a copy of any requests for correction to the FBI. However, the actual request would be made by the individual directly to the agency (i.e., state or local jurisdiction) which contributed the questioned information contained in the criminal history record to the FBI.

The proposed rule would require the individual to notify the airport operator or its designee within 30 days of receipt of the record of his or her intent to correct any information believed to be inaccurate. If the airport operator or its designee is not notified by the individual within the 30-day period, the airport operator may make the final access

decision. The airport operator is under no obligation to hire the individual and provide an escort before the correction (if any) is made, nor is there an obligation to hire the applicant after the record is corrected. However, if the airport operator wanted to hire an individual after being informed that the disqualifying information has been corrected, the airport operator would have to obtain a copy of the revised record from the FBI.

If an individual is disqualified for unescorted access privilege based on the findings of the criminal history records check, the FAA is proposing that the individual be notified that such a determination has been made.

Section 107.31(l)—Individual Accountability

The FAA solicited comments on the need, utility, and expense associated with a recurrent employment investigation requirement. While the FAA received mixed comments on this proposal, the majority argued a recurrent employment investigation was not necessary. The FAA now proposes to require that each affected individual report to the issuer of the identification credential convictions for any disqualifying crimes that may occur after the completion of the employment investigation and surrender the identification media. Many commenters pointed out that even if an employee fails to report a conviction for one or more of the disqualifying crimes, such a conviction would become known to the employer due to lapses in employment or through other means.

The proposal would also subject any individual failing to report a disqualifying conviction or to surrender his/her SIDA identification credential under this section to possible FAA enforcement action, including civil penalty liability.

Section 107.31(m)—Limits on Dissemination of Results

Consistent with the Act, the criminal history records check could only be used to determine whether to grant unescorted access privilege to the SIDA, not whether or not to hire an individual for non-SIDA access positions. As required by the Act, the proposed rule also includes limits on the dissemination of the criminal history information. The FAA proposes to limit distribution of such information to: (1) The individual to whom the record pertains or someone authorized by that person; (2) the airport operator or entity designated by the airport operator; and (3) the individuals designated by the Administrator (e.g., FAA special agents).

Section 107.31(n)—Recordkeeping

Two types of recordkeeping requirements are being proposed: (1) A record indicating that the 5-year employment history verification was performed, and (2) for those subject to a criminal history records check, a copy of the results of the record check received from the FBI.

The airport operator would be required to maintain a written record for all individuals permitted unescorted access. The FAA proposes that this record would be retained for 180 days after termination of that individual's authority. The purpose of this record is to illustrate that an individual was subject to an employment history verification, either by the airport operator, air carrier, or airport tenant. The record must include a record of calls made, plus a record of correspondence or any other documents received. (However, the documents themselves need not be retained.) In the case of air carrier employees, the record can be a certification from the carrier that the employment investigation was performed.

For individuals subject to a criminal history records check, the FAA is proposing that the record received from the FBI be maintained in a manner that prevents the unauthorized dissemination of the content of the results. While Notice No. 92-3 proposed to require the airport operator to destroy the criminal history records check after the determination has been made, many of the commenters expressed concerns over destruction of a record that was used to make the unescorted access determination and its future availability.

Section 108.33 Unescorted Access Privilege (Air Carrier Employees)

The FAA is proposing that air carriers be authorized to perform the background investigations for their employees and contractors as required of airport operators under proposed 107.31. The air carrier may provide a general certification to an airport operator under proposed § 107.31(f) that the employment investigations were performed as part of issuing identification credentials to its employees. When an individual air carrier employee or its contractor employee is investigated by the carrier for receipt of airport-issued identification media, the air carrier must provide the airport operator with certification for each employee. For identification issued to an air carrier or its contractor employee by the airport operator, the investigation may be

performed by either the air carrier or airport operator.

The proposed requirements for an air carrier performing the employment investigations are identical to those required of an airport operator.

Initial Regulatory Evaluation Summary

This section summarizes the regulatory evaluation prepared by the FAA. The regulatory evaluation provides more detailed information on estimates of the potential economic consequences of this proposal. This summary and the evaluation quantify, to the extent practicable, estimated costs of the rule to the private sector, consumers, and Federal, State, and local governments, and also the 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 effect on the economy of \$100 million or more, a major increase in consumer costs, or a significant adverse affect on competition.

The FAA has determined that this proposal 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 the proposal, has not been prepared. Instead, the agency has prepared a more concise document termed a "regulatory evaluation," which 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 (Public Law 96-354) and an international trade impact assessment. If the reader desires more detailed economic information than this summary contains, then he or she should consult the regulatory evaluation contained in the docket.

Costs of the Proposed Amendment

Airport operators, air carriers, and other airport tenants with employees who require unescorted SIDA access would incur some costs under the proposed rule. These costs consist of two components: (1) The cost of enhancing the employment history verification process; and (2) the cost of

conducting a criminal history records check on applicants whose employment verification reveals information that would trigger such a check. Employers may avoid the latter cost by simply choosing to terminate the employment process for the individual.

The proposed rule establishes standards and a regulatory requirement for an employment history verification. Currently, the broad requirement for an employment reference verification exists in airport and air carrier security programs. The FAA estimates that non-air carrier airport tenants would incur most of the cost because their current employment history verification processes differ from the industry standard used by the air carriers and that proposed in the notice. The FAA estimates that this proposal would add to the employment process about 15 to 30 minutes of staff time per applicant for non-air carrier airport tenants. One hour of a personnel specialist's time (including benefits) is approximated at \$21.62. Hence, the additional per applicant cost to airport tenants other than air carriers, such as caterers and fixed based operators with personnel requiring unescorted SIDA access, would range from \$5.41 to \$10.81. The FAA estimates that these employees make up approximately one-third of all individuals with SIDA access.

The costs associated with changes in application forms as a result of the proposal are considered negligible and have not been factored into the cost estimates. The cost estimates for the proposal also exclude the costs related to the time spent by former employers of an individual applying for unescorted access privilege who are requested to verify an individual's previous employment. The proposed rule would not affect the latter cost, because previous employers are already consulted under the current program requirements. The FAA solicits comments on whether these two cost items should be included in the analysis. Commenters should provide any supporting data.

Other costs that would be imposed by the proposal are associated with carrying out an FBI criminal records check for some candidates. The FAA estimates that about 1 out of every 100 applicants will meet the criteria established in the proposal that would trigger the requirement for a criminal history records check. The cost of a criminal history records check includes the FBI record search, the airport or air carrier administrative costs, and the cost of escorting the individual pending completion of the FBI records check. The latter cost may be avoided if the

employer waits for the completion of the FBI criminal history records check before hiring an individual for a position requiring unescorted access. The FAA estimates the total cost for processing a criminal record check at \$51 and the escorting costs to be \$953 per individual escorted.

The FAA estimates that in 1991, the 443 part 107 airports employed 475,000 individuals having unescorted SIDA access. This evaluation assumes a 4 percent growth rate in employees receiving unescorted access (reflecting the forecasted growth in passengers) and an annual turnover rate of those with unescorted access to the SIDA of 35 percent. In the first year of implementation of the proposal, 1993, the FAA estimates the number of individuals with SIDA access will be 514,000. Based on these estimates, the FAA calculates the number of individuals receiving new authority for SIDA unescorted access in 1993 as 180,000. In 10 years, the annual turnover rate for individuals with SIDA unescorted access is expected to be 256,000. Over the decade, the average annual number of individuals receiving new authority for SIDA access that will be subjected to the employment investigation proposed in the SNPRM will therefore be 216,000.

The FAA estimated a range of costs for the proposal. The lower estimate assumes that a 5-year employment history verification for airport tenants other than air carriers would require an additional 15 minutes to complete and require no additional time for airport operators and air carriers. The lower estimate also assumes that airports, air carriers, and other airport tenants would choose to terminate the employment process for at least 75 percent of those applicants whose employment history verification triggers the requirement for a criminal history records check (only 1 percent of total applicants are expected to meet the requirement for such a check). Under the lower estimate, 20 percent of the remaining 25 percent whose employment verification indicated a need for a criminal history records check would be escorted during the period while the FBI criminal history records check was being performed (companies would not hire for an unescorted access position the other 80 percent until completion of the FBI records check).

The higher cost estimate assumes that the 5-year employment history verification for airport tenants other than air carriers would require an additional 30 minutes to complete and no additional time for airport operators

and air carriers. The higher estimate also assumes that airports, air carriers, and other airport tenants would choose to terminate the employment process for at least 50 percent of those applicants whose employment history verification triggers the requirement for a criminal history records check (only 1 percent of total applicants are expected to meet the requirement for such a check). Under the higher estimate, 50 percent of the remaining 50 percent whose employment verification indicated a need for a criminal history records check would be escorted during the period while the FBI criminal history records check was being performed (companies would not hire for an unescorted access position the other 50 percent until the FBI records check is completed).

Based on these estimates, first year costs for the industry would range from \$0.4 to \$1.1 million. These costs would be incurred by airports, air carriers and other airport tenants. In 1993, the FAA estimates that 180,000 employees will apply for unescorted SIDA access privilege. The cost of the proposal is associated with the added time to complete 60,000 employment history verifications by non-air carrier airport tenants, and the cost for performing between 100 and 500 criminal history records checks by airport operators and air carriers. Between 1993 and 2002, \$5.1 to \$13.6 million. The present value of these costs ranges from \$3.1 to \$8.5 million.

Benefits of the Proposed Amendment

The proposed rule augments other recent FAA security regulations by establishing regulatory requirements for employment investigation of individuals applying for unescorted access to airport SIDAs. Each enhancement of the U.S. civil aviation security system reduces the possibility of a criminal or terrorist acts against civil aviation.

The FAA estimates that about one out of every 5,000 applications would be excluded from unescorted access as a result of a conviction for one of the enumerated disqualifying crimes. This estimate suggests that 40 to 50 applicants for SIDA access privilege would be turned away each year over the next ten years. Preventing such persons from having access to airport SIDAs would be an important benefit under the proposed rule and provide an enhancement of airport security.

United States registered air carrier operators have experienced 235 terrorist or other criminal events over the past 30 years, resulting in a loss of 403 lives. The potential value of avoiding a loss from a terrorist act is measured by the

value of avoided fatalities and aircraft replacement costs. The FAA currently uses a value of \$1.5 million to represent statistically a human fatality avoided. This procedure and value is used in accordance with guidelines issued by The Office of the Secretary of Transportation, June, 1990. The benefits of preventing one terrorist accident over the next decade range from \$92 million for the loss of a Boeing 727 aircraft to \$198 million for the loss of a DC-10 aircraft.

Comparison of Cost and Benefits

At the 443 airports in the U.S. aviation security network, nearly a half million persons have unescorted access to airport SIDAs. The proposal would require airports, air carriers, and other airport tenants to perform a consistent and standardized employment history verification for all applicants, and a criminal history records check for applicants who meet certain criteria. The total cost for ten years of requiring a consistent and standardized employment history verification process and a criminal history records check on certain applicants ranges from \$3.1 to \$8.5 million (discounted over the next decade). The benefits ascribed to these regulations are based on preventing the destruction by a terrorist or a criminal act of one air carrier aircraft. At a minimum economic value of \$1.5 million per fatality avoided, the cost of this proposal is easily covered by a small fraction of the value derived from preventing the destruction of a small air carrier aircraft (B-727).

International Trade Impact Assessment

The proposed rule would exempt foreign air carrier flight crewmembers from the employment investigation requirements provided they are covered by an alternate system. However, foreign nationals or U.S. citizens working for foreign air carriers that are issued U.S. airport identification would be subject to the proposed rule. Thus, the proposal could impose a slight trade disadvantage on domestic air carriers because they would have to incur the cost of the proposed rule for flight crewmembers, while foreign air carrier flight crewmembers would not be subject to the requirements if they are not issued identification credentials by an airport operator. The FAA contends that this extra cost is negligible. The additional cost would be less than two-one hundredth of a cent per enplanement. Hence, domestic firms would not incur a discernible competitive trade advantage or disadvantage in the sale of United States aviation products or services.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities (small businesses, nonprofit organizations, and small cities) are not overly burdened by Federal regulations. The RFA requires regulatory agencies to review rules which may have "a significant economic impact on a substantial number of small entities." A substantial number of small entities, as defined in FAA Order 2100.14A, Regulatory Flexibility Criteria and Guidance, is a number not less than 11 or more than one-third of the small entities subject to the proposed or existing rule. To determine if the proposed rule would impose a significant cost impact on these small entities, the annualized cost imposed on them must not exceed the annualized cost threshold established in FAA Order 2100.14A for each of these entity types.

In order to estimate the impact of the proposed rule on small entities, the FAA has determined that the average cost of an employee verification for non-air carrier airport tenants to be \$11.20. This estimate also incorporates the cost of a criminal history records check and a four percent growth rate in SIDA employment.

The small entities potentially affected by the proposed rule are small airports, air carriers, fixed-base operators, and catering companies. However, most of the requirements of the rule are already standard procedure for these entities; and the cost of a criminal history records check is minimal because so few employers are expected to utilize the criminal check.

Aircraft Repair Facilities: FAA Order 2100.14A defines small aircraft repair facilities as those with 200 employees or less. The FAA has estimated the cost threshold for small operators to be \$4,025 in 1991 dollars. To exceed this threshold, a facility would have to hire 360 employees (\$4,025/11.20) per year. This means that the facility would have to employ on a regular basis 1,028 people (assuming a 35 percent turnover rate: 360/.35). If a firm employed that many people, it would not be a small entity since it is over the size threshold of 200 employees.

Caterers: Small caterers are not defined in FAA Order 2100.14A. Thus, this evaluation will use the size and cost thresholds for small aircraft repair facilities to represent small catering businesses. These criteria are 200 employees or less for the size threshold and \$4,025 for the cost threshold. Because they have the small threshold

criteria, small catering firms would also have to employ on a regular basis 1,028 people, which is over the size threshold of 200 employees.

In conclusion, the proposed rule would not impose a significant impact on a substantial number of small entities.

Federalism Implications

The proposed rule would not have a substantial direct effect 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. Most airports covered by the NPRM are public entities (state and local governments). However, relatively few of the covered individuals are actually employed by the airport operator, and it is anticipated that most of the costs for the required investigations would be borne by the airport tenants and air carriers. Thus, the overall impact is not substantial within the meaning of Executive Order 12612. Therefore, in accordance with that Executive Order, it is determined that this proposal would not have sufficient Federal implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

The reporting and recordkeeping requirement associated with this rule is being submitted to the Office of Management and Budget for approval in accordance with 44 U.S.C. 35 under OMB NO: 2120-0564; Title: Unescorted Access Privilege; Need for Information: To record employment investigations as required by Public Law 101-604; Proposed Use of Information: To determine eligibility for unescorted access; Frequency: Recordkeeping; Burden Estimate: 36,720 hours annually; Respondents: Airport operators and air carriers; Form(s): None; Average Burden Hours per Respondent: 64—The annual hours per recordkeeper depends on the number of employees in each operation. The estimate is 10 minutes per employee; For Further Information Contact: The Information Requirements Division, M-34, Office of the Secretary of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-4735.

Comments on these information collection requirements should be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for FAA. Comments submitted to OMB should also be submitted to the FAA docket.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Initial 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, this proposal, if adopted, will not have a significant economic impact on a substantial number of small entities under the criteria of the Initial 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 this proposal, including a Regulatory Flexibility Determination and 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 Parts 107 and 108

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

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend parts 107 and 108 of the Federal Aviation Regulations (14 CFR parts 107 and 108) as follows:

PART 107—AIRPORT SECURITY

1. The authority citation for part 107 is revised to read as follows:

Authority: 49 U.S.C. App. 1354, 1356, 1357, 1358 and 1421; 49 U.S.C. 106(g).

2. In part 107, § 107.1 paragraphs (b)(3) through (b)(5) are redesignated as paragraphs (b)(4) through (b)(6), and new paragraph (b)(3) is added to read as follows:

§ 107.1 Applicability and definitions.

* * * * *

(b) * * *

(3) Escort means to accompany or supervise an individual who does not have access authority to areas restricted for security purposes as identified in the airport security program in a manner sufficient to take action should the individual engage in activities other than those for which the escorted access is granted.

* * * * *

3. Part 107 is amended by adding a new § 107.31 to read as follows:

§ 107.31 Unescorted access privilege.

(a) This section applies to all individuals seeking authorization for, or seeking authority to authorize others to have, unescorted access privilege to the following areas:

(1) The security identification display area (SIDA) that is identified in the airport security program as required by § 107.25; or

(2) At airports that are not required to identify a SIDA under § 107.25, that portion of the airport where access is controlled for security purposes in accordance with the airport security program.

(b) Except as provided in paragraph (e) of this section, each airport operator shall ensure that no individual is granted authorization for, or is granted authority to authorize others to have, unescorted access to the areas identified in paragraph (a) of this section unless:

(1) The individual has satisfactorily undergone a verification of employment history for the 5 years preceding the date the verification is initiated as provided in paragraph (c) of this section; and

(2) The results of the employment investigation do not disclose that the individual has been convicted in the 10 years ending on the date of such investigation of arson or any of the following crimes enumerated in section 316(g)(3)(A)(ii) of the Federal Aviation Act of 1958, 49 U.S.C. App. 1357(g)(3)(A)(ii):

- (i) Forgery of certificates, false marking of aircraft, and other aircraft registration violations;
- (ii) Interference with air navigation;
- (iii) Improper shipment of a hazardous material;
- (iv) Aircraft piracy;
- (v) Interference with flight crew members or flight attendants;
- (vi) Commission of certain crimes aboard aircraft in flight;
- (vii) Carrying weapons or explosives aboard aircraft;
- (viii) Conveying false information and threats;
- (ix) Aircraft piracy outside the special aircraft jurisdiction of the United States;
- (x) Lighting violations in connection with transportation of controlled substances;
- (xi) Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements;
- (xii) Destruction of an aircraft or aircraft facility;
- (xiii) Murder;
- (xiv) Assault with intent to murder;
- (xv) Espionage;
- (xvi) Sedition;

(xvii) Kidnapping;
 (xviii) Treason;
 (xix) Rape;
 (xx) Unlawful possession, sale, distribution, or manufacture of an explosive or weapon;
 (xxi) Extortion;
 (xxii) Armed robbery;
 (xxiii) Distribution of, or intent to distribute, a controlled substance; or
 (xxiv) Conspiracy to commit any of the aforementioned criminal acts.

(c) The employment history verification shall include the following steps:

(1) The individual must complete an application form that includes:

(i) The individual's full name, including any aliases or nicknames;
 (ii) The dates, names, phone numbers and addresses of previous employers, with explanations for any gaps in employment of more than 12 months, during the previous 5-year period;

(iii) Notification that the individual will be subject to an employment history verification and possibly a criminal history records check; and

(iv) Any convictions during the previous 10-year period of the crimes listed in paragraph (b)(2) of this section.

(2) The identity of the individual must be verified through the presentation of two forms of identification, one of which must bear the individual's photograph.

(3) The information on the employment application required under paragraph (c)(1)(ii) of this section must be verified in writing, by telephone, or in person.

(4) If one or more of the following conditions exists, the employment investigation shall not be considered complete unless it includes a check of the individual's fingerprint based criminal history record maintained by the Federal Bureau of Investigation (FBI):

(i) The individual cannot satisfactorily account for a period of unemployment of 12 months or more;

(ii) The individual is unable to support statements made or there are significant inconsistencies between information provided on the application in response to questions required by paragraph (c)(1)(ii) of this section and that which is obtained through the verification process; or

(iii) Information becomes available to the airport operator during the employment history verification indicating a possible conviction for one of the disqualifying crimes.

(d) An airport operator may permit an individual to be under escort as defined in § 107.1 in accordance with the airport security program to the areas identified in paragraph (a) of this section.

(e) Notwithstanding the requirements of this section, an airport operator may authorize the following individuals to have unescorted access to the areas identified in paragraph (a) of this section:

(1) Employees of the Federal government or a State or local government (including law enforcement officers) who, as a condition of employment, have been subject to an employment investigation;

(2) Flight crewmembers of foreign air carriers covered by an alternate security arrangement in the approved airport operator security program;

(3) An individual who has been continuously employed in a position requiring unescorted access by another airport operator, airport tenant or air carrier; or

(4) An individual who has been authorized for access authority to the U.S. Customs Service security area of a U.S. airport.

(f) An airport operator will be deemed to be in compliance with its obligations under paragraphs (b)(1) and (b)(2) of this section, as applicable, when it accepts certification from:

(1) An air carrier subject to § 108.33 of this chapter that the air carrier has complied with paragraphs 108.33(a)(1) and (a)(2) for its employees and contractors; and

(2) An airport tenant other than a U.S. air carrier that the tenant has complied with paragraph (b)(1) of this section for its employees.

(g) The airport operator shall designate an individual to:

(1) Review the results of the employment investigation; and

(2) Serve as the contact to receive notification from an individual applying for unescorted access of his or her intent to seek correction of his or her criminal history record with the FBI.

(h) The airport operator may designate an entity to process the records check required by paragraph (c)(4) of this section. Prior to commencing the records check, the airport operator or its designee shall notify the affected individuals.

(i) The airport operator or its designee shall collect and process fingerprints in the following manner:

(1) One set of legible and classifiable fingerprints shall be recorded on fingerprint cards approved by the FBI;

(2) The fingerprints shall be obtained from the individual under direct observation by the airport operator or its designee;

(3) The identity of the individual must be verified at the time fingerprints are obtained. The individual must present two forms of identification media, one of

which must bear his or her photograph; and

(4) The fingerprint cards shall be forwarded to the Identification Division of the FBI in a manner that protects the confidentiality of the individual's record.

(j) In conducting the criminal history records check required by this section, the airport operator or its designee shall investigate arrest information for the crimes listed in paragraph (b)(2) of this section for which no disposition has been recorded to make a determination of the outcome of the arrest.

(k) The airport operator or its designee shall:

(1) At the time the fingerprints are taken, notify the individual that a copy of the criminal history record received from the FBI will be made available if requested in writing.

(2) Prior to making a final decision to deny authorization for unescorted access, advise the individual that the criminal history record received from the FBI discloses information that would disqualify him or her from unescorted access authorization and provide each affected individual with a copy of his or her record received from the FBI. The individual may contact the FBI to complete or correct the information contained in the record before any final access decision is made, subject to the following conditions:

(i) Within 30 days after being advised that the criminal history record received from the FBI discloses disqualifying information, the individual must notify the airport operator or its designee, in writing, of his or her intent to correct any information believed to be inaccurate. If no notification is received within 30 days, the airport operator may make a final access decision.

(ii) Upon notification by the individual that the record has been corrected, the airport operator or its designee must obtain a copy of the revised record from the FBI prior to making a final access decision.

(3) Notify an individual that a final decision has been made to deny authorization for unescorted access.

(1) Any individual authorized to have unescorted access privilege to the areas identified in paragraph (a) of this section who is subsequently convicted of any of the crimes listed in paragraph (b)(2) of this section shall report the conviction and surrender the SIDA identification medium within 24 hours to the issuer.

(m) Criminal history record information provided by the FBI shall be used solely for the purposes of this section, and no person shall disseminate the results of a criminal history records check to anyone other than:

(1) The individual to whom the record pertains or that individual's authorized representative;

(2) The airport operator or its authorized representative; or

(3) Others designated by the Administrator.

(n) The airport shall maintain a written record for the individual until 180 days after the termination of the individual's authority for unescorted access. For individuals subject to:

(1) The employment history verification required by paragraph (b) of this section, the record shall include information provided, persons providing the information, the dates the contact was made, and any other information as required by the Assistant Administrator for Civil Aviation Security, and

(2) An investigation required under paragraph (c)(4) of this section, the record shall include the results of the FBI criminal history records check information in a manner protecting the confidentiality of the individual acceptable to the Assistant Administrator for Civil Aviation Security.

PART 108—[AMENDED]

4. 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).

5. Part 108 is amended by adding a new § 108.33 to read as follows:

§ 108.33 Unescorted access privilege.

(a) For each employee or contractor employee covered under a certification made to an airport operator pursuant to § 107.31(f) of this chapter, the certificate holder shall ensure that:

(1) The individual has satisfactorily undergone a verification of employment history for the 5 years preceding the date the verification is initiated as provided in paragraph (b) of this section; and

(2) The results of the employment investigation do not disclose that the individual has been convicted in the 10 years ending on the date of such investigation of arson or any of the following crimes enumerated in section 316(g)(3)(A)(ii) of the Federal Aviation Act of 1958, 49 U.S.C. App. 1357(g)(3)(A)(ii):

- (i) Forgery of certificates, false marking of aircraft, and other aircraft registration violations;
- (ii) Interference with air navigation;
- (iii) Improper shipment of a hazardous material;
- (iv) Aircraft piracy;
- (v) Interference with flight crew members or flight attendants;

(vi) Commission of certain crimes aboard aircraft in flight;

(vii) Carrying weapons or explosives aboard aircraft;

(viii) Conveying false information and threats;

(ix) Aircraft piracy outside the special aircraft jurisdiction of the United States;

(x) Lighting violations in connection with transportation of controlled substances;

(xi) Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements;

(xii) Destruction of an aircraft or aircraft facility;

(xiii) Murder;

(xiv) Assault with intent to murder;

(xv) Espionage;

(xvi) Sedition;

(xvii) Kidnaping;

(xviii) Treason;

(xix) Rape;

(xx) Unlawful possession, sale, distribution, or manufacture of an explosive or weapon;

(xxi) Extortion;

(xxii) Armed robbery;

(xxiii) Distribution of, or intent to distribute, a controlled substance; or

(xxiv) Conspiracy to commit any of the aforementioned criminal acts.

(b) The employment history verification shall include the following steps:

(1) The individual must complete an application form that includes:

(i) The individual's full name, including any aliases or nicknames;

(ii) The dates, names, phone numbers and addresses of previous employers, with explanations for any gaps in employment of more than 12 months, during the previous 5-year period;

(iii) Notification that the individual will be subject to an employment history verification and possibly a criminal history records check; and

(iv) Any convictions during the previous 10-year period of the crimes listed in paragraph (a)(2) of this section.

(2) The identity of the individual must be verified through the presentation of two forms of identification, one of which must bear the individual's photograph.

(3) The information on the employment application required under paragraph (b)(1)(ii) of this section must be verified in writing, by telephone, or in person.

(4) If one or more of the following conditions exists, the employment investigation shall not be considered complete unless it includes a check of the individual's fingerprint based criminal history record maintained by the Federal Bureau of Investigation (FBI):

(i) The individual cannot satisfactorily account for a period of unemployment of 12 months or more;

(ii) The individual is unable to support statements made or there are significant inconsistencies between information provided on the application in response to questions required by paragraph (b)(1)(ii) of this section and that which is obtained through the verification process; or

(iii) Information becomes available to the certificate holder during the employment history verification indicating a possible conviction for one of the disqualifying crimes.

(c) The certificate holder shall designate an individual to:

(1) Review the results of the employment investigation; and

(2) Serve as the contact to receive notification from an individual applying for unescorted access of his or her intent to seek correction of his or her criminal history record with the FBI.

(d) The certificate holder may designate an entity to process the records check required by paragraph (b)(4) of this section. Prior to commencing the records check, the certificate holder or its designee shall notify the affected individuals.

(e) The certificate holder or its designee shall collect and process fingerprints in the following manner:

(1) One set of legible and classifiable fingerprints shall be recorded on fingerprint cards approved by the FBI;

(2) The fingerprints shall be obtained from the individual under direct observation by the certificate holder or its designee;

(3) The identity of the individual must be verified at the time fingerprints are obtained. The individual must present two forms of identification media, one of which must bear his or her photograph; and

(4) The fingerprint cards shall be forwarded to the Identification Division of the FBI in a manner that protects the confidentiality of the individual's record.

(f) In conducting the criminal history records check required by this section, the certificate holder or its designee shall investigate arrest information for the crimes listed in paragraph (a)(2) of this section for which no disposition has been recorded to make a determination of the outcome of the arrest.

(g) The certificate holder or its designee shall:

(1) At the time the fingerprints are taken, notify the individual that a copy of the criminal history record received from the FBI will be made available if requested in writing.

(2) Prior to making a final decision to deny authorization for unescorted access, advise the individual that the criminal history record received from the FBI discloses information that would disqualify him or her from unescorted access authorization and provide each affected individual with a copy of his or her record received from the FBI. The individual may contact the FBI to complete or correct the information contained in the record before any final access decision is made, subject to the following conditions:

(i) Within 30 days after being advised that the criminal history record received from the FBI discloses disqualifying information, the individual must notify the certificate holder or its designee, in writing, of his or her intent to correct any information believed to be inaccurate. If no notification is received within 30 days, the certificate holder may make a final access decision.

(ii) Upon notification by the individual that the record has been corrected, the certificate holder or its designee must obtain a copy of the revised record from

the FBI prior to making a final access decision.

(3) Notify an individual that a final decision has been made to deny authority for unescorted access.

(h) Any individual authorized to have unescorted access privilege as identified in paragraph (a) of this section, who is subsequently convicted of any of the crimes listed in paragraph (a)(2) of this section, shall report the conviction and surrender the SIDA identification medium within 24 hours to the issuer.

(i) Criminal history record information provided by the FBI shall be used solely for the purposes of this section, and no person shall disseminate the results of a criminal history records check to anyone other than:

(1) The individual to whom the record pertains or that individual's authorized representative;

(2) The certificate holder or its authorized representative; or

(3) Others designated by the Administrator.

(j) The certificate holder shall maintain a written record that the investigation was conducted for the

individual until 180 days after the termination of the individual's authority for unescorted access. For individuals subject to:

(1) The employment history verification required by paragraph (a)(1) of this section, the record shall include information provided, persons providing the information, the dates the contact was made, and any other information as required by the Assistant Administrator for Civil Aviation Security, and

(2) An investigation required under paragraph (c)(4) of this section, the record shall include the results of the FBI criminal history records check information in a manner protecting the confidentiality of the individual acceptable to the Assistant Administrator for Civil Aviation Security.

Issued in Washington, DC on September 14, 1992.

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