



G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-318703

September 30, 2009

The Honorable John D. Rockefeller IV
Chairman
The Honorable Kay Bailey Hutchison
Ranking Minority Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Bennie G. Thompson
Chairman
The Honorable Peter T. King
Ranking Minority Member
Committee on Homeland Security
House of Representatives

Subject: *Department of Homeland Security, Transportation Security Administration:
Air Cargo Screening*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Homeland Security, Transportation Security Administration (TSA), entitled “Air Cargo Screening” (RIN: 1652-AA64). We received the rule on September 8, 2009. It was published in the *Federal Register* as an “interim final rule; request for comments” on September 16, 2009. 74 Fed. Reg. 47,672.

The interim final rule codifies a statutory requirement of the Implementing Recommendations of the 9/11 Commission Act that TSA establish a system to screen 100 percent of cargo transported on passenger aircraft by August 3, 2010. Pub. L. No. 110–53 § 1602, 121 Stat. 266, 478 (2007). TSA determined it could not achieve this mandate by relying solely on aircraft operators to conduct screening because there is insufficient space and capacity for aircraft operators to screen the approximately 12 million pounds of cargo transported on passenger aircraft in the United States. Because TSA cannot meet the screening requirements established in the 9/11 Act for cargo loaded in the U.S. without a system in place to screen cargo off-airport by parties other than aircraft operators, this interim final rule establishes a program under which TSA will certify cargo screening facilities located in the U.S. that volunteer to screen cargo prior to tendering it to aircraft operators for carriage on passenger aircraft. The interim final rule requires affected passenger aircraft

operators to ensure that either an aircraft operator or certified cargo screening facility that does so in accordance with TSA standards, or TSA itself, screens all cargo loaded on passenger aircraft.

The interim final rule has a stated effective date of November 16, 2009, and was issued without notice and public comment under its authority in 49 U.S.C. § 44901(g)(3)(A). In the interim final rule, however, TSA seeks prior public comment on a proposed fee to cover the cost of the TSA-conducted security threat assessment to certify cargo screening facilities and personnel. TSA also invites interested persons to participate in this rulemaking by submitting written comments to the interim final rule.

Enclosed is our assessment of TSA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that TSA complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Mardi Ruth Thompson
Deputy Chief Counsel
Regulations and Security Standards
Department of Homeland Security

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY ADMINISTRATION
ENTITLED
"AIR CARGO SCREENING"
(RIN: 1652-AA64)

(i) Cost-benefit analysis

TSA conducted a cost-benefit analysis of this interim final rule. Over the 10-year period of the analysis, TSA estimates that the aggregate costs of this rulemaking to total approximately \$2.8 billion, undiscounted. Discounted at 7 percent, the cost is \$1.9 billion, and discounted at 3 percent, the cost is \$2.4 billion. The cost of this rule would be borne by five relevant parties: certified cargo screening facilities (CCSFs), non-CCSF entities that receive screened cargo from CCSFs, validation firms, aircraft operators, and TSA. Additionally, industry will bear a cost for delayed shipment of cargo estimated at \$297.1 million over the 10-year analysis period (\$203.1 million discounted at 7 percent and \$250.4 million discounted at 3 percent). TSA anticipates bearing costs to administer the provisions of the rulemaking at \$384 million over the 10-year analysis period.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

The rule was published as an interim final rule, and therefore, a regulatory flexibility analysis was not required under the Act. Note, Congress explicitly authorized TSA to issue an interim final rule in the Implementing Recommendations of the 9/11 Commission Act.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

TSA concluded that this interim final rule will not result in the expenditure by state, local, or tribal governments, in the aggregate, of \$100 million or more in any one year (annually adjusted for inflation) because it does not require them to take any action. TSA concluded, however, that the impact on the overall economy does exceed the threshold, resulting in an unfunded mandate on the private sector. In the interim final rule, TSA documents the costs and alternatives associated with the regulatory action.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

TSA issued this rule as an interim final rule. Congress specifically authorized TSA to issue this rule as an interim final rule as a temporary regulation to implement requirements “without regard to the provisions of chapter 5 of title 5.” 49 U.S.C. 44901(g)(3)(A). Since TSA issued an interim final rule under the provision, TSA must follow it with a final rule as a permanent regulation implementing the section within 12 months of the effective date of the interim final rule. 49 U.S.C. 44901(g)(3)(B)(i).

TSA also concluded that issuing this rule as an interim final rule is fully consistent with sections 553(b) and (d) of the Administrative Procedure Act (APA) that allow agencies a “good cause” exception which authorizes them to issue final rules without affording the public a prior opportunity to comment. TSA determined it would be contrary to the public interest to delay this rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

This interim final rule contains new information collection requirements that have been submitted to the Office of Management and Budget (OMB) for review.

Statutory authorization for the rule

TSA states that this interim final rule is issued pursuant to the authority found in the Implementing Recommendations of the 9/11 Commission Act. Pub. L. No. 110–53 § 1602, 121 Stat. 266, 478 (2007).

Executive Order No. 12,866 (Regulatory Planning and Review)

TSA concluded that this interim final rule is a major rule within the definition of Executive Order 12,866, as annual costs or benefits to all parties exceed the \$100 million threshold in any year.

Executive Order No. 13,132 (Federalism)

TSA determined that this interim final rule will not have a substantial direct effect on the states, or the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.