

November 2, 2007

The Honorable Kip Hawley
Assistant Secretary of Homeland Security
for the Transportation Security Administration
601 South 12th Street
Arlington, VA 22202-4220

U.S. Department of Transportation
Docket Operations
M-30
West Building
Ground Floor
Room W12-140
1200 New Jersey Avenue, SE
Washington, DC 20590
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Re: Docket Number TSA-2007-28572 Secure Flight Program

Dear Administrator Hawley:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment to the Department of Homeland Security, Transportation Security Administration's (TSA) proposed rulemaking on the Secure Flight Program. The Office of Advocacy believes that TSA has not analyzed properly the full economic impact of the proposal on small entities as required by the Regulatory Flexibility Act (RFA). Advocacy recommends that TSA prepare a revised initial regulatory flexibility analysis (IRFA) to address the concerns presented below.

Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views

expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the Act, as amended by the Small Business Regulatory Enforcement Fairness Act.¹

On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to implement policies protecting small entities when writing new rules and regulations. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

The Proposed Rule

On August 23, 2007, TSA published a proposed rule entitled *Secure Flight Program*.² Currently, aircraft operators perform passenger watch list matching using the Federal No Fly and Selectee Lists, as required under security directives issued by TSA following the terrorist attacks of September 11, 2001. Under the Secure Flight program, aircraft carriers will be required to request certain information from passengers and transmit the information to TSA. TSA would receive passenger and certain non-traveler information, conduct watch list matching against the No Fly and Selectee portions of the federal government's consolidated terrorist watch list, and transmit boarding pass printing instructions back to aircraft operators.

Requirements of the RFA

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the agency is required to

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² 72 Federal Register 48356.

prepare an initial regulatory flexibility analysis (IRFA) to assess the economic impact of a proposed action on small entities. Under Section 601(3) of the RFA "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable. The RFA requires the agency to publish the IRFA or a summary of the IRFA in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.³

Pursuant to section 605(a), an agency may prepare a certification in lieu of an IRFA if the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. A certification must be supported by a factual basis.

TSA's Compliance with the RFA

TSA prepared an IRFA for the proposed rule and solicited comments from the public regarding the information in the IRFA. Advocacy, however, is concerned that the IRFA indicates some confusion about the RFA and may not comply with the RFA. In the RFA section, TSA states:

³ 5 USC § 603.

“...we provide the IRFA to the public but withhold the final formal certification of determination as required by the RFA until after we receive public comments and publish the Final Regulatory Flexibility Analysis (FRFA).”⁴

Advocacy appreciates the fact that TSA is seeking comment on the RFA analysis. However, Advocacy is concerned that the document that was prepared by TSA appears to be confusing a certification under the RFA and the process of producing an IRFA and a subsequent FRFA. The language “withhold certification” implies that TSA has already predetermined that the rule does not have a significant economic impact rather than making a reasonable effort to explore all the effects of the rule, including the effects on small entities. As described in our *Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, there is a two-step process. First, the agency should determine whether it has a factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Then, if it cannot so certify, it must prepare an IRFA with all of the required elements.⁵ The RFA requires an agency to analyze the data to provide the public with information about the impact. It should focus on identifying the scope of the problem, the impact of the solution on the affected entities, and less costly alternatives before moving forward with a regulatory proposal.

Economic Impact

TSA May Have Underestimated the Impact of the Rule on Aircraft Operators

An IRFA describes the impact of the proposal on small entities. The IRFA identifies aircraft operators as small businesses that are affected by the proposal and travel agents as small businesses that are indirectly affected by the proposal. Advocacy believes that the impact on the travel agents is direct, and that TSA may have underestimated the economic impact of the rule on both industries.

⁴ Id at 48377.

⁵ See, page 4 of *Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, located at <http://www.sba.gov/advo/regulatory.html>.

Advocacy believes that TSA may not have fully considered the economic impact on aircraft operators as required by the RFA. TSA calculated the initial reprogramming costs. However, there may be other costs as well. For example, the Regional Airline Association (RAA) is concerned about the potential the impact the rule may have on their schedules (on-time departures). The proposal requires the air carrier to wait for a TSA security analysis of each passenger before the passenger can get a boarding pass. The airlines now control the process themselves. By turning it over to TSA, there may be delays that are beyond the control of the airlines. Not only are such delays an economic cost, they could lead to low customer satisfaction and result in a loss of future business. An airline may incur additional expenses by requiring additional customer relations staff at the airport to assist disgruntled passengers. Advocacy encourages TSA to consider the impact that the proposal may have on customer satisfaction and find a means for addressing those concerns.

TSA May Have Underestimated the Impact of the Rule on Travel Agents

Even though TSA asserted that the impact was indirect, it prepared an IRFA that addressed the impact on travel.⁶ Advocacy commends TSA for its efforts. However, TSA may have significantly underestimated the economic impact. In the IRFA, TSA stated that the impact would have to exceed \$942 to be significant. It then concluded that a travel agency would have to book 5,690 airline reservations to incur a significant economic impact.⁷ This estimated impact would result from the increased time to collect additional passenger information.⁸

According to American Society of Travel Agents (ASTA), the economic impact is underestimated. ASTA has informed Advocacy that the time to collect the additional information will require a 50 percent increase in reservation time, which will result in an 11.4 percent increase in costs or \$19 million in the first year. In addition to requiring additional time collecting information, ASTA asserts that travel agencies will need to

⁶ 72 Federal Register 48384.

⁷ 72 Federal Register 48384-48385.

⁸ From the information provided, Advocacy assumes that TSA is stating that the economic impact is less than \$942 per agency.

reprogram their computers and provide training on the new requirements. ASTA estimates that the average firm will incur \$3,000 in costs for training or \$30,543,000 industry-wide. In addition, firms that exceed \$2 million in sales will also incur approximately \$9,000 in costs to reprogram their computers. Since the small business size standard for travel agents is \$3.5 million, some small firms will incur that additional \$9,000 in costs. These are the costs that were not considered by TSA in performing its IRFA. Moreover, since the proposed rule specifically requires aircraft operators to ensure third party compliance with the rule, Advocacy believes that the impact on travel agents is direct. Advocacy encourages TSA to prepare a supplemental IRFA to fully analyze the direct impact of the proposal on travel agencies.

Alternatives

As noted above, the RFA requires agencies to consider less burdensome alternatives that still meet the statutory objectives. Both ASTA and RAA have informed Advocacy that the 60-day implementation period is too short. ASTA asserts that it will take at least 6 to 12 months to make the adjustments to the computers and train the agents on the new procedure. RAA estimates that it may take at least a year to make the necessary changes. Advocacy encourages TSA to consider expanding the implementation period of the proposal to at least a year. In addition to providing the industry with additional time to comply with the new regulations, a one-year implementation period will provide TSA additional time to educate the public about the new requirements. Advocacy further encourages TSA to fully consider other alternatives suggested by the respective industries.

Conclusion

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule, to provide the information on those impacts to the public for comment, and to consider less burdensome alternatives. Advocacy encourages TSA to prepare and publish for public comment a revised IRFA to determine the full economic impact on

small entities and consider significant alternatives to meet its objective while minimizing the impact on small entities before going forward with the final rule.

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. Advocacy is available to assist TSA in its RFA compliance. If you have any questions regarding these comments or if Advocacy can be of any assistance, please do not hesitate to contact Jennifer Smith at (202) 205-6943.

Sincerely,

Thomas M. Sullivan
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Jennifer A. Smith
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Cc: The Honorable Susan E. Dudley, Administrator
Office of Information and Regulatory Affairs, OMB