Congress of the United States

House of Representatives

Washington, DC 20515

February 27, 2009

VIA E-MAIL

Mr. Erik Jensen
Chief, Policy, Plans & Stakeholder Affairs
Office of General Aviation
Transportation Security Administration
Department of Homeland Security
601 South 12th Street
Arlington, VA 22202-4220

RE: Large Aircraft Security Program, Other Aircraft Operator Security Program, and Airport Operator Security Program, Docket No. TSA-2008-0021, RIN 1652-AA53, 73 Fed. Reg. 64,790 (Oct. 30, 2008)

Dear Mr. Jensen:

On October 30, 2008, the Transportation Security Administration (TSA) published a proposed rule to amend its current aviation transportation security regulations by requiring any aircraft with a maximum takeoff weight of 12,500 pounds or more and any airport that is capable of serving such aircraft to meet security standards equivalent to those for commercial aviation. 73 Fed. Reg. 64,790 (hereinafter "NPRM" or "Proposed Rule"). Comments originally were due by December 29, 2008 but TSA granted an extension to February 27, 2009. TSA should be commended for granting the extension given the complex nature of the proposed rule and their impact on a wide variety of small businesses and other small entities that rely on general aviation.

TSA prepared a regulatory impact analysis as required by Executive Order 12,866 (E.O. 12,866).[1] TSA also prepared an initial regulatory flexibility analysis (IRFA), pursuant to § 603

[1] Executive Order 12,866 requires federal agencies to prepare an assessment, including a benefit-cost analysis, of any proposed or final major rule. Under the Executive Order, a major rule is one that, among other things, will have an effect on the economy of more than $100 million (either positively or negatively). TSA determined that the proposed rule will have an impact of more $100 million on the economy. 73 Fed. Reg. at

(continued...)

of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA) without ever identifying whether the proposed rule would have a significant economic impact on a substantial number of small entities[2] as required by that Act. Finally, TSA, as required by the Unfunded Mandates Reform Act, 2 U.S.C. §§ 1501-71, provided an estimate of any unfunded mandates arising out of the rule.[3] Despite these analytical efforts, TSA's rule is procedurally and substantively flawed. The proposed rule does not: a) contain adequate notice as required by § 553 of the Administrative Procedure Act (APA); b) comply with the requirements of the RFA; c) accurately assess costs and benefits under E.O. 12,866; and d) constitute rational rulemaking because it fails to address the statutory factors mandated by Congress or achieves the objectives sought by TSA.

Instead of rushing to judgment based on a flawed rulemaking procedure, TSA should properly assess the costs and benefits of the rule on all entities, including small businesses, small not-for-profit organizations, and small governmental jurisdictions. Once it has an accurate evaluation of the costs, the agency should reassess alternatives that will achieve increased security without imposing undue burdens on the various stakeholders affected by the rule. TSA then should issue a new proposed rule. In the alternative, TSA can utilize the data as part of a negotiated rulemaking established pursuant to the Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570a. This will enable TSA to work with all stakeholders through a negotiated rulemaking committee to find the appropriate means to ensure the security of general aviation without imposing undue and unnecessary restrictions on general aviation.

I. The Proposed Rule

The fundamental objective of the Proposed Rule is to strengthen the security of general aviation. TRANSPORTATION SECURITY ADMINISTRATION, REGULATORY EVALUATION FOR NOTICE OF PROPOSED RULEMAKING ON LARGE AIRCRAFT SECURITY PROGRAM 140 (July 2008) ("TSA RIA"). The agency achieves this result by creating a new Large Aircraft Standard Security Plan (LASP) to "replace the current security programs for partial program operators, twelve-five program operators, and private charter program operators." 73 Fed. Reg. at 64,795. The NPRM would apply to any aircraft with a maximum takeoff weight that exceeds 12,500 pounds. *Id.* at 64,790. In addition, the plan would apply to certain airports that serve aircraft exceeding the aforementioned weight limit. *Id.* at 64,803.

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[1](...continued)
64,820.

[2] Small entities, under the RFA, include small businesses, small not-for-profit organizations, and small governmental jurisdictions (those governmental entities whose populations have less than 50,000). 5 U.S.C. § 601(3)-(5). An airport authority whose total population is less than 50,000 or a local government that operates an airport authority would be considered a small governmental jurisdiction for purposes of the RFA.

[3] Pursuant to § 1532, agencies must provide an assessment on state, local, and tribal governments of any proposed rule that will impose regulatory costs on those governmental jurisdictions without an accompanying appropriation to fund compliance.

For aircraft, the basic elements of the LASP are: a) require flight crew background checks; b) utilize private watchlist service providers to validate passenger manifests against two security lists – the selectee checklist and the no-fly checklist; c) contract with TSA-approved audit firms to conduct audits of compliance with the LASP; d) designate Aircraft Operator, Ground, and In-flight security coordinators; e) complete threat assessments on flight crewmembers; f) ensure that weapons, explosives, and other dangerous materials are inaccessible to passengers; and g) allow law enforcement officials on board, including the possibility of having federal air marshals accompany flights. *Id.* at 64,795-803. For airport operators, the LASP NPRM requires the adoption of a partial security plan that requires: a) designation of an airport security coordinator; b) institution of a training program for law enforcement personnel; c) description of available law enforcement support; d) development of a system for maintaining records related to security; e) implementation of a system for dealing with sensitive security information; f) creation of procedures to post public advisories; and g) promulgation of incident management procedures. *Id.* at 64,803-805.

TSA recognized that adoption of the Proposed Rule would create economic consequences of more than $100 million dollars on the American economy. It also prepared an initial regulatory flexibility analysis (IRFA) because of the possible consequences that the rule would have on small businesses that dominate the general aviation industry. Before discussing the flaws in TSA's NPRM, it is necessary to provide a broader description of the general aviation industry and the entities that will be affected by implementation of the Proposed Rule.

II. The Structure Of The General Aviation Industry

A. The Industry Overall

As TSA notes in the NPRM, there is no statutory or regulatory definition of general aviation. 73 Fed. Reg. at 64,791 n.2. General aviation includes all flight operations of aircraft registered in the United States under a part of the Federal Aviation Administration (FAA) rules other than Part 121.[4] The FAA further parses general aviation into various use categories: personal (aircraft not used for any business purpose); instructional (aircraft operated under the supervision of a flight instructor); corporate (aircraft used by a business but flown by a professional pilot); business (aircraft used by a business but the pilot owns the business); air taxi and tours (aircraft used to ferry passengers or cargo if the payload of the plane is below a certain weight or passenger configuration); and other miscellaneous uses (such as highway traffic

[4] GENERAL ACCOUNTING OFFICE, GENERAL AVIATION: STATUS OF THE INDUSTRY, RELATED INFRASTRUCTURE, AND SAFETY ISSUES 10 n. 1 (Aug. 2001). In less technical language, general aviation includes all "aspects of the aviation industry except scheduled passenger and cargo airline operations and military flying." NATIONAL AIR TRANSPORTATION ASSOCIATION, GENERAL AVIATION IN THE UNITED STATES 1 (2007).

reporting, search and rescue, or pest control) that do not include carrying of passengers or cargo.[5] In addition, general aviation also includes ancillary services needed to support flight operations including flight schools, aircraft fuel suppliers and storage, aircraft maintenance, and airport operations.[6]

General aviation accounts for about 27 million flight hours and carries 166 million passengers to around 5,000 communities, many of which have no scheduled commercial air service operated under Part 121 of the FAA's rules. More than two-thirds of general aviation flights are for business purposes.[7] No estimate exists on the total number of small businesses involved in general aviation.[8] However, the Small Business Administration (SBA) estimates that approximately 94 percent of the firms (about 2,700) that provide air transportation services (cargo or passenger) have fewer than 500 employees and are considered small businesses under the SBA's size standard regulations.[9] *Compare* 13 C.F.R. 121.201 (subsector 481). There are approximately 3,000 firms[10] that provide aviation support services (NAICS subsector 48819); of those, about 92 percent are small businesses.[11]

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[5] GENERAL ACCOUNTING OFFICE, GENERAL AVIATION: STATUS OF THE INDUSTRY, RELATED INFRASTRUCTURE, AND SAFETY ISSUES 10-12 (Aug. 2001) (GAO 01-916), available at www.gao.gov .

[6] NATIONAL AIR TRANSPORTATION ASSOCIATION, GENERAL AVIATION IN THE UNITED STATES 1 (2007).

[7] *Id.*

[8] Data from the United States Small Business Administration (SBA) will underestimate the number of small businesses that are involved in general aviation because the SBA's data is collected on the primary business in which an enterprise is engaged. If a business owns a general aviation aircraft but its primary business is not in subsectors 481 or 488 of the North American Industrial Classification (NAICS) (the system by which the SBA and the Bureau of the Census categorize business data those agencies collect), they will not show up as involved in general aviation.

[9] Given the requirements needed to obtain certificates under Part 119 of the FAA's rules and the operational mandates in Part 121, it is reasonable to estimate that most of the approximately 2,700 firms in subsector 481 are probably involved in general aviation.

[10] The SBA data is derived from 2002 Bureau of the Census information; later data will not beavailable until some time later this year or early in 2010. The Census data probably undercounts the number of firms in general aviation support. Data from the National Air Transportation Association reveals, for example, that there are about 4,000 mainatenance/repair stations. NATIONAL AIR TRANSPORTATION ASSOCIATION, GENERAL AVIATION IN THE UNITED STATES 22 (2007). Despite these data differences, there is little dispute that the vast majority of aviation support businesses in the United States are small.

[11] The SBA obtains it data from the Bureau of the Census. That data are not sufficiently granular to ascertain the amount of revenue that a firm providing aviation support receives from general aviation as opposed to commercial aviation. Nevertheless, it is safe to assume that many of the firms in subsector 48819 provide service to general aviation.

In addition to the businesses at the operational end of the general aviation industry, there is another set of businesses involved in the development and manufacturing of general aviation aircraft. The SBA data reveal that there are about 1,200 firms involved in the manufacturing of aircraft and parts, of which 90 percent are small businesses.[12]

Overall, general aviation, both operations and manufacturing, employ about 1.2 million people and contribute approximately $150 billion to the overall gross domestic product.[13] And this statistic underestimates the total impact because it does not count many other businesses that rely on general aviation in some way, such as tourism associated with use of private planes.

B. The Small Entities Directly Affected By The Proposed Rule[14]

Only a segment of the general aviation will be affected by the proposed rule. TSA did a reasonable job in providing some estimates of the scope of businesses and other small entities affected by the proposed rule.

The agency calculated that there are 774 firms that provide air passenger or cargo service but are not required to comply with existing transportation security regimes. TSA RIA at 145-46. TSA then determined that all but 15 of those firms have fewer than 1,500 employees and would be considered small businesses under SBA regulations. *Id.* at 146. The agency correctly recognized that its estimate relied on 2003 data and requested comments on the accuracy of its estimate.

TSA noted that approximately 9,000 aircraft registered in the United States are not covered by current security regulations and would be subject to the strictures of the Proposed Rule. *Id.* at 147. The agency then stated it "could not identify the respective NAICS codes for these operators." *Id.* Since the SBA's size standard regulations are based on classification under the NAICS, TSA was unable to determine which, if any or all, of the entities operating the 9,000 aircraft were small businesses. *Id.* To the extent that these aircraft are operated by small businesses as part of their business operations, they will be affected by the NPRM. Furthermore,

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[12] Since the SBA calculates manufacturer size by the number of employees, there is almost no way to ascertain the percentage of the firms that supply general aviation without investigating the production lines of each manufacturer in sector 33641.

[13] GENERAL AVIATION MANUFACTURERS ASSOCIATION, GENERAL AVIATION STATISTICAL DATABOOK & INDUSTRY OUTLOOK ii (2008).

[14] Court cases are consistent in holding that an agency's obligation under the RFA only is to examine the impact on those entities directly regulated by a proposed or final rule. *E.g., Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 177 (D.C. Cir. 2007); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985). As a result, TSA only is obligated to look at those entities that will be subjected to the proposed new security plans. An aviation maintenance facility that loses repair income because of a reduction in general aviation utilization would not be affected directly by the proposed rule and TSA need not consider the impact of its proposal on such entities.

to the extent that owners of the aircraft utilize other businesses, many of which may be small, to supply flight and cabin crews, those small businesses also will be affected by changes in the security protocols mandated by the NPRM.

Even if TSA identified appropriate NAICS codes for these aircraft operators, not all of them would be small businesses. Some of them are small not-for-profit organizations that sponsor air shows of historic airplanes but would be covered by the rule. For example, the Experimental Air Association (EAA) is a small not-for-profit organization that sponsors one of the largest gatherings of historic aircraft in the world – the Oshkosh AirVenture Fly-In.[15] There are other not-for-profit organizations (almost all of which would be considered small) that also sponsor events that utilize historic aircraft subject to the Proposed Rule and would be affected by the imposition of new security requirements.

TSA also identifies that operators of airports will be affected by the proposed rules. Airports subject to the rule may be operated by private entities or public governmental jurisdictions. According to TSA, there are approximately 315 airports that would be subject to the proposed rule. *Id.* at 148. Of these, 46 are privately owned and 269 are publicly owned. *Id.* at 149-50. TSA concluded that almost all of the private firms were likely to be small businesses. *Id.* at 149. In estimating the number of public airport facilities that would be consider small, TSA utilized the definition of small governmental jurisdiction of populations less than 50,000. It determined that between 68 and 74 airports are operated by governmental jurisdictions with less than 50,000 people. *Id.* at 150.

C. Entities Indirectly Affected By The Proposed Rule

Although an agency only needs to examine the economic consequences on entities directly regulated by a proposed rule for compliance with the RFA, *see* note 14, *supra*, an agency's economic analysis under E.O. 12,866 is not limited to entities directly regulated by a proposed rule. The indirect consequences to changes in the availability of general aviation will affect thousands of small businesses, small not-for-profit organizations, and small governmental jurisdictions that in some way rely on general aviation. Some of these effects are obvious; others less so.

Lower utilization of aircraft covered by the NPRM will mean less of a need for aviation support services, such as fuel, cabin crews, and maintenance. These numerous small businesses may find it difficult, if not impossible, to find substitute revenue given the specialized nature of the industry. Reductions in the demand for general aviation aircraft also will reduce the output from manufacturers and their suppliers.

But the impacts go beyond firms which are primarily engaged in the aviation business. For example, the AirVenture Fly-In brings in about 500,000 visitors and 10,000 aircraft to the

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[15] EXPERIMENTAL AIR ASSOCIATION, ANNUAL AUDIT 10 (June 9, 2008).

Oshkosh, WI area.[16] To the extent that changes in security reduce the attractiveness of the event, the food and lodging businesses in the area will find it hard to replace the lost business.

But the situation in Oshkosh is only emblematic of a much more serious impact – the reliance that America's smaller communities place on general aviation as a key tool in their economic development arsenal. Without access to aviation services, rural America will be unable to compete with those areas that can provide easy access to aviation services.

As one example of the importance of air service as a component of economic development is the efforts of the Ithaca Tompkins Regional Airport in Ithaca, NY. Its annual report boasts of the benefits that it provides to businesses in Tompkins County, New York.[17] The report also mentioned the combined efforts of the airport and local institutions to increase air service to the airport. That included a revenue guarantee made possible, in no small part, by the presence of Cornell University and its multi-billion dollar endowment.[18] If Ithaca, NY with the presence of two universities needs significant effort, including revenue guarantees, to attract air service, imagine the difficulty facing smaller communities that have no scheduled air service and rely entirely on general aviation for their air transportation needs. Given the importance of aviation for economic development, the entire business communities of towns and counties that rely on general aviation for air transportation services will be affected by the Proposed Rule.

III. The NPRM Does Not Contain An Adequate Notice For Purposes Of Conducting Rulemaking Under The APA

TSA is conducting this rulemaking pursuant to the notice and comment provisions of the APA. Section 553(b) provides, in relevant part:

> General notice of the proposed rule making shall be published in the Federal Register.... The notice shall include:
> ....
> (2) reference to the legal authority under which the rule is proposed; and
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b)(2)-(3).

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[16] EXPERIMENTAL AIR ASSOCIATION, FACT SHEET 2(2008), *reprinted at* http://www.airventure.org/media/EAA_Facts.pdf .

[17] ITHACA TOMPKINS REGIONAL AIRPORT, ANNUAL REPORT 16-25 (2007).

[18] *Id.* at 13.

These procedures exist to: a) educate the agency by exposing the rules to public comment; b) ensure fairness to affected parties by giving them notice of prospective changes; and c) enable an adequate record to be developed should the rule ultimately be challenged in court. *International Union, United Mine Workers of America v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1124 (4th Cir. 1985); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). Ultimately, the procedures ensure that a court can determine whether the agency considered all relevant statutory factors in developing a rule. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

TSA issued the NPRM pursuant to its authority under § 101 of the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (codified at 49 U.S.C. § 114) (ATSA). That section authorizes the Under Secretary of Transportation for Security[19] to "issue regulations as are necessary to carry out the functions of the Administration [TSA]." 49 U.S.C. § 114(*l*)(1). TSA's rulemaking power under ATSA is not unbridled. In issuing regulations, TSA must consider "whether the costs of the regulation are excessive in relation to the enhancement of security the regulation will provide." *Id.* at § 114(*l*)(3).[20]

In the context of the instant rulemaking, the notice must be sufficient for the public to educate TSA on whether the costs of the LASP are excessive in relation to the benefits gained from the additional security measures that will be required if the Proposed Rule is adopted. In this regard, the agency has failed to provide an adequate notice.

There has not been a terrorist incident involving general aviation under existing security protocols. Despite this, TSA simply asseverates that "the proposed rule would enhance security significantly." 73 Fed. Reg. at 64,792. TSA only could reach this conclusion if: a) the current security arrangements were inadequate; or b) the current arrangements are adequate but new threats exist for which current security arrangements are inadequate. The agency does not claim that the current security protocols are inadequate and could not, since no terrorist incident has occurred within general aviation. TSA only could conclude that evidence of new threats make existing protocols unsafe. If this is the basis upon which the agency proffered the NPRM, the notice requirements of the APA mandate that the agency provide this critical data for comment by the public. In fact, the courts, in interpreting the notice requirements of the APA, are consentient in ruling that notice is inadequate if critical data upon which an agency rests its rulemaking decisions are not revealed for public comment and scrutiny. *E.g.*, *Owner-Operator*

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[19] The rulemaking authority of the Under Secretary was transferred, without change, to the Department of Homeland Security pursuant to 6 U.S.C. § 203(2).

[20] TSA also cites the general authority to prescribe regulations pursuant to 49 U.S.C. §§ 40113 and 46105. It is a abecedarian principle of statutory construction that the specific overrules the general. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2348 (2007). In the circumstances of this rulemaking, the statutory considerations are those of the specific – the powers and circumscription of such powers as laid out in 49 U.S.C. § 114 – rather than the broader powers laid out elsewhere in the United States Code.

Independent Drivers Ass'n v. FMCSA, 494 F.3d 188, 199 (D.C. Cir.); *Citizens Awareness Network v. United States*, 391 F.3d 338, 353 (1st Cir. 2004); *Idaho Farm Bur. Fed'n v. Babbitt*, 58 F.3d 1392, 1402-03 (9th Cir. 1995); *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986); *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

The inability of the public to comment on TSA's determination is critical to meeting the statutory objective of ensuring that the enhancements to security will outweigh the costs. If TSA does not provide any data on the probability that an incident will occur, the public (and, more importantly, the courts in any challenge to the agency rulemaking) are unavailable to counter the assertions undergirding the choices the agency made in the NPRM. An example will place in stark relief the problem associated with TSA's failure to provide the critical data on that new data shows gaps in existing security protocols for aircraft with a maximum takeoff weight in excess of 12,500 pounds.

One of the scenarios developed by TSA to assess the benefits of the NPRM is a situation in which a large aircraft is used to deliver a nuclear device. TSA RIA at 42. The agency estimates that the costs of such an incident would be about one trillion dollars. *Id.* For TSA to meet its statutory mandate, it would have to demonstrate that the probability of delivery of a nuclear device is higher by an aircraft covered by the rule than by some other mode of delivery[21] and that these protocols would prevent the delivery of a nuclear device. Only then could TSA claim that its statutory mandate under § 101 of ATSA was met. Testing of that hypothesis requires that TSA show how it determined the probability of such an occurrence and how the new protocols would prevent that so the public could comment on the validity of the agency's data and assumptions. Otherwise, TSA could be imposing a requirement in which the costs are excessive to the enhancement of security (the avoidance of the catastrophe).[22]

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[21] Presumably the delivery and detonation of a nuclear device in the United States by any mode of transportation would be equally catastrophic. With respect to the delivery of nuclear devices, one might suggest that TSA focus on the protocols that the United States Air Force has with respect to the nuclear devices rather than general aviation. *See* Michael Hoffman, *5th Bomb Wing Flunks Nuclear Inspection*, AIR FORCE TIMES, June 2, 2008 available at http://www.airforcetimes.com/news/2008/05/airforce_minot_failure_053008w/ (discussing failure of Air Force security protocols with nuclear weapons).

[22] To demonstrate the fallacious reasoning, it is worth examining an even more unlikely event – the impact of a ten kilometer-diameter wide asteroid hitting the earth. According to the Los Alamos National Laboratory, such an event would have the impact of 300 million nuclear weapons. Maureen Oakes, *Modeling an Asteroid Impact*, LOS ALAMOS RESEARCH Q., Spring 2003, at 23. The likely outcome of such an event is the complete annihilation of life on earth as we know it. Yet, the probability of such an event (within the lifetime of the human population) is quite low – in fact it probably has not happened for at least 65 million years, *see id.* at 26). Thus, while the benefits of preventing such an event would be incalculable (even infinite), the cost of preventing such an occurrence (if possible) would not outweigh the slight probability that such an event will occur within the lifetime of the human race. Thus, any analysis needs to weigh not only the cost and methods of avoidance but the probability that the event will occur.

Given the failure of TSA to provide critical data in the NPRM, it is more than probable that a court will find that the agency failed to provide adequate notice as required by § 553(b)(3) of the APA. The likely outcome is that the agency would have the rule remanded to the agency for additional comment on the data that TSA did not reveal in the Proposed Rule. To the extent that any additional benefits would accrue from changes to the general aviation protocols, they would be delayed by the failure of the agency to comply with the important procedural strictures of the APA.

IV. TSA Did Not Comply With The RFA

The RFA requires federal agencies to assess the economic consequences of proposed rules, and if the proposed rule will have a significant economic impact on a substantial number of small entities, prepare an initial regulatory flexibility analysis (IRFA). 5 U.S.C. § 603.

The RFA delineates the contents of an IRFA: a) the need for and objectives of the rule; b) an estimate of the number of small entities affected; c) projected reporting, recordkeeping, and other compliance costs of the proposed rule; d) identification of duplicative, overlapping, or rules that conflict with the proposal; and e) development and evaluation of alternatives to the proposal that lessens the adverse consequences on small businesses. *Id.* at § 603(b)-(c). Compliance with the RFA is not based on same irreducible mathematical formula. Instead, agencies must make a good faith effort to examine the criteria specified in § 603. *See Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997).

Despite the voluminous information provided by the agency in the TSA RIA, it failed to make a good faith effort to examine the criteria specified in § 603. First, TSA failed even to state categorically whether the impact will be significant under the RFA. Even if TSA concluded that the NPRM would have a significant economic impact on a substantial number of small entities, it failed to provide an accurate estimate of the costs that would be incurred by small entities operating under the Proposed Rule. The agency also failed to assess the impact on a significant sector of the general aviation industry that would be affected by the Proposed Rule. Finally, the agency made a fundamental mistake by not considering a no action alternative, i.e., leaving the current security protocols for general aviation unchanged.

A. TSA Failed To Specify The Impact That The Rule Would Have On Small Entities

Section 605(b) of the RFA states, in relevant part, "sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." TSA adopted an odd procedure by preparing an IRFA but "made no determination whether the proposed rule would have a significant economic impact on a substantial number of small entities under section 605(b) of the RFA." 73 Fed. Reg. at 64,839. In essence, TSA created its own procedure in contravention of a direct statutory directive.

Agencies derive their power and operational constraints from Congress. *See Bowen v. Georgetown U. Hosp.*, 488 U.S. 204, 208 (1988). If Congress speaks clearly and explicitly on an issue, the agency "must give effect to the unambiguously expressed intent of Congress." *Chevron, USA, Inc. v. NRDC*, 463 U.S. 837, 842-43 (1984). In the case of the RFA, the intent of Congress could not have been expressed more clearly – an agency prepares an IRFA or must certify that the proposal will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b). An agency does not have the alternative of preparing an IRFA for a proposed rule and then certifying that said proposal will not have a significant economic impact on a substantial number of small entities. In other words, Congress did not give an agency the ability to hedge its bet on this call.[23] But that is exactly what TSA did – hedge its bet with respect to the conclusion. Agencies cannot make their own procedures when Congress specifically circumscribes an agency action. As a result, the determination by TSA failed to comply with § 605 of the RFA.

B. The Agency Failed To Examine The Cost Of The NPRM On Small Businesses That Operate Aircraft Subject To The Rule

TSA notes that approximately 9,000 aircraft will be subject to the NPRM. Since all of the aircraft are registered in the United States, TSA could have obtained the registration data from the FAA and cross-checked the information with existing business databases, such as Dun & Bradstreet,[24] the agency could have obtained sufficient granular information to ascertain which businesses that own aircraft that would be subject to the new security protocols are small businesses. Yet, the agency failed to take that simple step.

Had the agency undertaken the effort to determine which owners are small, the agency would have had a broader perspective on the types of businesses that rely on general aviation aircraft covered by the Proposed Rule. Once TSA understood the types of businesses that rely on the covered aircraft, it would have focused less on the operational costs to the owners of the new security protocols and more on the impact to a business's operation. This would have provided a more accurate assessment of the true costs of the NPRM than that provided in the IRFA.

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[23] Since one of the key aspects of the RFA is to alert affected small entities about proposals that might affect them, *see* 5 U.S.C. § 609(a), an IRFA accompanying a certification that the proposed rule will not have a significant economic impact on a substantial number of small entities sends potentially affected small entities a mixed message on the possible impact of a proposed rule. Given the fact that most small entities, particularly small business owners, do not have warren of lawyers and regulatory analysts at their beck and call to sift through the Federal Register and hundreds of pages of a regulatory impact analysis to ascertain whether an agency that prepared an IRFA was correct in certifying the proposal under § 605(b), Congress foreclosed the agency from doing so. This assures that a proper signal will be sent to the small entity community concerning the rule.

[24] Even the Small Business Administration utilizes databases provided by Dun & Bradstreet to obtain economic information on small firms.

Business aviation is deployed for a variety of strategic reasons. Some businesses use general aviation aircraft to enable employees to reach key clients in a time-effective manner.[25] In some instances, general aviation may be the only available air service to a particular client.[26] Given issues related to security on scheduled airlines, tools, equipment and goods may not be easily transported along with employees thereby necessitating either shipment via an air cargo carrier or use of general aviation to haul the goods by the employees.[27] In fact, the utilization of general aviation aircraft by businesses may well be a key component of a particular business's production function. Yet, TSA never recognizes this in its IRFA.

For example, a business that provides oil field services may need to haul equipment and engineers to a remote location in eastern New Mexico from its base in Houston, TX. If TSA has underestimated the costs of compliance with the new security protocols and that has made it too expensive for the business to use general aviation, then it must use scheduled air service. The opportunity cost is lost time for the business of key employees and possibly even lost business if the enterprise cannot get to the oil field in sufficient time to address the problem faced by the oil driller. Even if the security rules do not impose sufficient costs to prevent a business from owning and operating aircraft, new security rules about what may be transported may result in the same problem – the business may not be able to take necessary equipment on board the plane and need to ship it, but no service is available to reach the appropriate destination. In either instance, the opportunity costs to the oil services business then become much more significant – a result that TSA completely ignores in its IRFA.

The failure to recognize the true opportunity costs associated with implementation of a new LASP undermines the ability of the agency to meet the Congressional statutory mandate that TSA must consider whether the costs of regulation are excessive in relation to the enhancements in security. Certainly lost business opportunities as a result of decreased effectiveness of general aviation would have a significantly different cost-benefit breakeven assessment than one that simply focuses on the actual implementation costs of the new security regime. As a result of TSA's failure to recognize the vital business role played by general aviation, it underestimated the impact on small entities by a substantial factor. That constitutes a failure of the agency to consider the economic consequences on small businesses subject to the regulation. More importantly, it undermines the ability of TSA to accurately assess, as mandated in ATSA, whether the security protocols in the NPRM are worth the costs. As a result, the agency must revise its IRFA to incorporate a more robust assessment of the true costs faced by businesses owning general aviation aircraft in excess of 12,500 pounds.

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[25] ANDERSEN CONSULTING, BUSINESS AVIATION IN TODAY'S ECONOMY 8-11 (2001).

[26] For example, during a strike by Northwest Airline employees in 1998, scheduled air service to North Dakota was completely shut down. *See* Laurence Zuckerman, *States Bracing for Northwest Pilots' Strike*, N.Y. TIMES, Aug. 26, 1998, at D1 (citing statements of North Dakota officials noting that all jet service to state provided by Northwest).

[27] ANDERSEN CONSULTING, BUSINESS AVIATION IN TODAY'S ECONOMY 8-11 (2001).

C. *TSA Failed To Provide An Accurate Estimate Of The Small Entities Affected By The NPRM*

As has already been described, TSA identified a number of entities that would be affected by the NPRM, including aircraft operators and airports. However, there are at least two aspects of general aviation that would be significantly affected by the Proposed Rule that were not examined in the IRFA; the portion of the charter aviation business that supplies flight crews and cabin crews to owners of general aviation aircraft and not-for-profit organizations that sponsor airshows using aircraft that will be subject to the Proposed Rule.

TSA identified approximately 9,000 aircraft whose owners would fall within the new security protocols mandated by the NPRM. Not all of those aircraft owners maintain pilots and cabin crews as employees. They hire pilots and crews as necessary; yet these pilots and crews would be subject to the security strictures in the Proposed Rule. While TSA examined the impact on charter operators (the vast majority of which are small businesses), it examined the effect on their total operations rather than on their ability to supply existing aircraft owners just with flight and cabin crews. To the extent that the new protocols affect their capacity to provide in-flight services, these businesses revenues will be affected.[28]

There are approximately 325 to 350 air shows put on in the United States, according to the International Council of Airshows. The Council estimates that approximately 10 million people visit these air shows annually and generate annual revenue of about $110 million.[29] The vast majority of air shows are sponsored by not-for-profit groups to raise money for charity or generate interest in aviation. There is absolutely no mention of how these rules will affect air shows even though many of the historic aircraft on display and flown at these shows are aircraft in excess of 12,500 pounds.

In estimating and describing the number and type of entities affected by a proposed rule, TSA committed a cardinal error that undercuts its efforts at complying with § 603(b)(3). The Office of Advocacy, the agency in the federal government charged with monitoring agency compliance with the RFA, 5 U.S.C. § 612(a), has taken a longstanding position that federal

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[28] TSA cannot argue that pilots and flight crews leased by aircraft owners from charter operators are indirectly affected and thus not subject to assessment under the RFA. Pilots and flight crews will be subject to various security checks and will have to make decisions about flight operations prior to takeoff. If the pilots and cabin crews are affected, then the charter operators that employ them to staff business aircraft owned by other entities are directly affected by the regulation. In this regard, the rule is similar to the regulations concerning drug and alcohol testing promulgated by the FAA. In that instance, the D.C. Circuit found that the FAA violated the RFA by not performing a regulatory flexibility analysis for subcontractors of air carriers. *Aeronautical Repair Station Ass'n v. FAA*, 494 F.3d 161, 177 (D.C. Cir. 2007).

[29] The data was obtained from various parts of the International Council of Air Shows website which can be accessed at www.airshows.aero.

agencies, when describing the entities affected by the rule, should not aggregate economic effects to obtain an overall impact if identifiable subsectors of a particular industry are subjected to a greater impact than other parts of an industry.[30] The rationale for disaggregating economic effects applies with equal force to the division of small businesses into affected sectors for a description of the entities affected by the size standard rule. Absent disaggregation, it would be impossible for TSA to perform two critical aspects of an IRFA – determining the economic consequences of the proposal on small entities and developing appropriate alternatives to reduce impacts on various classes of small businesses.[31] TSA certainly cannot argue that not-for-profit entities that sponsor airshows are similar to charter services that will be subject to the rule. Therefore, absent a revision to the IRFA, a court may find that the final rule is flawed and prohibit implementation against adversely affected small entities, such as sponsors of airshows. *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 42-43 (D.C. Cir. 2005) (holding that remedy for failure to comply with RFA is prohibition on enforcing rule against small entities). The ultimate outcome then would be the possible diminution of general air security.

D. TSA Failed To Examine A Significant Alternative Of Taking No Action That Would Reduce Burdens On Small Businesses

The National Environmental Policy Act, 42 U.S.C. §§ 4321-47 (NEPA) requires federal agencies to examine the impact of their proposed actions on the environment and develop alternatives that minimize the impact of those actions. Pursuant to an Executive Order issued by President Carter,[32] the Council of Environmental Quality or CEQ (the organization delegated with the responsibility to monitor agency compliance with NEPA) developed regulations that all agencies must apply in developing environmental impact statements.[33] The regulations explicate

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[30] *Notice of Proposed Rulemaking on Valencia Oranges Grown in Arizona and Designated Parts of California; Proposed Weekly Levels of Volume Regulation for the 1989-90 Season*, Comments of the Chief Counsel for Advocacy at 4 (July 13, 1990) (noting that average masks structural differences in industry that benefit large handlers while harming small handlers). The Chief Counsel reaffirmed this conclusion in the guidance document issued pursuant to Executive Order 13,272. OFFICE OF ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT 15-16 (2003).

[31] *Notice of Proposed Rulemaking on Navel Oranges Grown in Arizona and Designated Parts of California; Proposed Weekly Levels of Volume Regulation for the 1990-91 Season*, Comments of the Chief Counsel for Advocacy at 4-5 (Oct. 25, 1990). In the proposed rule, the Department of Agriculture certified the proposed rule as not having a significant economic impact on a substantial number of small entities. The Chief Counsel responded by concurring in the Department's assertion that most of the businesses involved in handling navel oranges were small. However, the Chief Counsel noted that such conclusion is "akin to viewing a forest from a plane and saying the trees are green. Nothing specific about the makeup of the forest is gleaned form such a statement. Similarly, nothing about the handlers of navel oranges is obtained from the Department's conclusion." *Id.*

[32] E.O. 11,991 (May 24, 1977), *reprinted in* 42 Fed. Reg. 26,967 (1977).

[33] The regulations of the Council are granted substantial deference as authoritative interpretations of NEPA.

(continued...)

the scope of the alternatives that agencies are supposed to examine in their environmental impact statements. Specifically, the Council requires agencies to include the alternative of "no action." 40 C.F.R. § 1502.14(d).

The RFA, written ten years after NEPA, was designed to parallel that statute and be the equivalent of an economic impact statement on regulations. *See National Ass'n of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272, 1286 (D.C. Cir. 2005); *Associated Fisheries of Maine*, 127 F.3d at 114. If that is the case, then an equally valid parallel may be drawn between the regulations that CEQ adopted for compliance with NEPA with the obligations of agencies to examine the economic impact of their regulations on small entities.

Given the absence of any evidence that general aviation poses an increased risk of terrorism, one alternative would be for the agency to examine taking no action in its IRFA. Examination of this alternative also will assist TSA in complying with its statutory mandate to ensure that costs of security changes are not excessive relative to the enhancements for security. Such a review may reveal that the status quo provides sufficient protection and the marginal increase in protection resulting from the changes proffered in the Proposed Rule are excessively onerous on small entities thereby violating the statutory mandate of ATSA. Since small entities represent the majority of the industry that will be affected by the proposed security changes, the agency cannot comply with ATSA or the RFA unless it examines a no-action alternative.

E. Conclusion

Despite its efforts, TSA's compliance with the RFA is seriously flawed. The absence of analysis is more troubling because it undermines the ability of the agency to understand how the costs will affect small entities – those businesses, organizations, and governmental jurisdictions that will bear the brunt of these new security protocols. This failure is problematic, *see United States Telecom Ass'n*, 400 F.3d at 42-43, and may lead to a court challenge that will prohibit implementation of new security rules against small entities, ultimately undermining any possibility of achieving its statutory goal set forth in ATSA.

V. TSA Failed To Assess Properly Costs And Benefits As Required By E.O. 12,866

The RFA is not the only mandate that forces executive branch agencies, such as TSA, to examine economic impacts. For nearly 40 years, Presidents have used the Office of Management and Budget (OMB) as the point of centralized review of agency rulemaking.[34] Since September 30, 1993, executive branch agencies, such as TSA, have had to comply with the

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[33](...continued)
Robertson v. Methow Valley Citizens Ass'n, 490 U.S. 332, 356 (1990).

[34] GENERAL ACCOUNTING OFFICE, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 20 (Sept. 2003) (GAO-03-929), available at www.gao.gov .

analyticalrequirements of Executive Order 12,866.[35] 58 Fed. Reg. 51,735 (Oct. 4, 1993) (hereinafter referred to as E.O. 12,866 or "Order"). Section 6 of the Order requires agencies, for significant rules,[36] to assess the benefits anticipated from the rulemaking and the costs "anticipated from the regulatory action (such as, but not limited to, the direct cost ... to businesses)." Order, § 6(a)(3)(C)(i)-(ii), 58 Fed. Reg. at 51,741. Unlike the RFA, nothing in E.O. 12,866 circumscribes an agency's assessment of costs and benefits to only those directly regulated by a rule. Indirect economic effects can and should be examined under the Order, especially where as here, significant benefits and costs accrue to entities other than those that directly would be subject to the strictures of the NPRM. Nor is the order limited to examining the impacts only on small entities; instead, the effects are to be assessed irrespective of what type of entity is affected.

Had TSA examined some obvious indirect cost consequences of the NPRM, its cost data would look significantly different than the costs that are imposed directly on the owners of the large aircraft covered by the rule. In particular, it would have looked at potential economic impacts on those businesses that support general aviation, the potential risks associated with modifications to flights involving medical transport, and the costs to economic development in small communities that must rely on general aviation.

A. General Aviation Support Industries And Manufacturers

According to one study, general aviation contributes approximately $150 billion to the American economy, accounting for about 1.265 million jobs.[37] Most of that economic impact does not derive from flight operations but arises out of the innumerable businesses that exist to support general aviation planes.[38] These businesses are not directly affected by the NPRM. Nevertheless, businesses that support general aviation will feel the effects of the Proposed Rule in two ways. First, small businesses may face greater difficulty in operating as a result of the new security protocols. There is no need for further expatiation concerning the impact on small businesses of an increase in cost without a concomitant increase in revenue. Second, to the extent that the new security protocols will reduce utilization of large general aviation aircraft, the small businesses that provide aviation support will face reduced revenue. Even if these costs were not considered in its original regulatory impact analysis, TSA certainly should consider such costs in preparing any subsequent analyses. This is especially true when a rule may have a deleterious effect on employment during a time of severe economic distress, particularly when

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[35] The Order, issued by President Clinton, was not repealed by his successors, Presidents Bush or Obama and thus remains in full force and effect.

[36] TSA's determined that the NPRM met one of the standards of a significant rule under the Order – that it would have an effect on the economy of more than $100 million. 73 Fed. Reg. at 64,822.

[37] NATIONAL AIR TRANSPORTATION ASSOCIATION, GENERAL AVIATION IN THE UNITED STATES 1 (2007).

[38] *Id.* at 8-26.

the evidence of security enhancements revealed in the record of the proceeding are marginal at best.

In addition to the impact on those businesses that serve general aviation, the analysis under the E.O. also failed to examine the impact that reduced demand will have on manufacturers of general aviation aircraft and on their suppliers. As already noted, there are about 1,200 small firms involved in the manufacturing of planes or parts for general aviation aircraft. At a time when manufacturing continues to deteriorate and general aviation represents one of the best providers of export dollars to the United States,[39] it behooves TSA to assess the indirect impact that its new security protocols will have on small manufacturers in the general aviation because economic well-being is as vital to the country as aviation security.

B. Fixed-Wing Air Medical Services

There are approximately 230 privately-owned and 37 governmentally-owned providers of air medical transport. Of those, approximately 100 operate fixed-wing air transportation services,[40] utilizing about 150 dedicated fixed-wing aircraft,[41] some of which are not currently covered and others, that are covered, may have to alter their security operations.

They provide transport for longer flights (than can be carried out using helicopters). Air medical transport enables patients isolated from ground-based emergency medical services to receive basic or advanced life support services during transfer to a hospital or trauma center. They also provide services to carry donated organs for transplantation.[42] Services of air medical transport are particularly critical in rural and frontier areas because of travel time (absolutely vital in dealing with traumas or organ transplantation) and the capacity to provide almost hospital-level care while in transit.[43] In short, air medical services provide a vital cog in the provision of higher levels of medical care in the United States.

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[39] GENERAL AVIATION MANUFACTURERS'S ASS'N, GENERAL AVIATION STATISTICAL DATABOOK & INDUSTRY OUTLOOK 5 (2008) (noting that general aviation contributed 43.9 percent of value of manufactured airplanes exported from United States).

[40] Data from the Association of Air Medical Services available at http://www.aams.org/Content/NavigationMenu/AboutAAMS/OnlineMemberDirectories/FixedWingServices/default.htm. Some are small businesses, some are not-for-profit organizations and some are governmental entities.

[41] FOUNDATION FOR AIR MEDICAL RESEARCH & EDUCATION, AIR MEDICINE: ASSESSING THE FUTURE OF HEALTH CARE 2 (2006).

[42] *Id.* at 10.

[43] *Id.* at 8.

The NPRM would require additional security protocols applicable to air medical services. These additional protocols include securing dangerous cargo, such as knives, and checking passengers against watch lists. Of course, preventing trauma surgeons from carrying supplies like orthopedic saws and knives aboard a plane destined to pick up passengers in a trauma defeats the purpose of the flight in the first instance. Similarly, when an emergency occurs or a hospital is notified of the availability of an available organ, time may not be available to check a government match list (assuming that a private watch list contractor will be available to provide data to the air medical service) or find a substitute physician, if there are questions concerning the ability of a particular physician or nurse to travel on the aircraft. TSA analyzed both instances as an opportunity cost; having to transport goods by air cargo or a person must travel by scheduled commercial service. TSA RIA at 115-126. In the case of air medical services, there is clearly an additional opportunity cost – the loss of life as the result of a delay in the provision of medical care. TSA failed to examine this cost under E.O. 12,866. If TSA is imposing rules to prevent loss of life through increased security measures, it also should examine the loss of life that might result from additional security burdens on air medical services.

C. Impacts On Small Communities And Rural Economic Development

Changes in the American economy suggest that time and travel speed will be factors in motivating personal location decisions.[44] Just-in-time inventory management, outsourcing of information technology services, and expectations of overnight delivery of goods by consumers and businesses all rely on air transportation services.[45] As a result, poor access to air transportation can hinder economic development. Surveys show that lack of access to air transportation represents a significant barrier to businesses locating in rural areas.[46] As rural areas rely more heavily on tourism and non-resource extractive businesses, access to aviation services only will continue to exacerbate the economic development difficulties facing rural America.[47]

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[44] Scott Tarry & Brent Bowen, *Optimizing Airspace System Capacity through a Small Aircraft Transportation System: An Analysis of Economic and Operational Considerations*, 6 J. AIR TRANSP. WORLD WIDE 65, 69 (2001).

[45] Fred Gale & Dennis Brown, *How Important is Access for Rural Businesses?*, RURAL AMERICA, 16 (September 2000).

[46] *Id.* at 18. In fact, while it was the fifth most significant factor for rural businesses, it was only ninth on the list for businesses located in urban areas. *Id.* One might conclude that businesses located in suburban and urban areas take convenient airport access for granted.

[47] *Id.* at 23.

Congress recognized the value of air service to rural communities, both as a vital service and as critical element by creating the Essential Air Service program.[48] In fact, the program has become so important to rural America's economic development that, although originally created as temporary program, Congress made the program permanent in 1998.[49] Today, that program currently serves fewer than 150 communities, yet there are thousands of rural towns and counties that need air service. One group that has sought to fill the gaps not provided by the Essential Air Service program is general aviation, be it businesses owning aircraft, charter services, or air taxis. These providers of air transportation can help fill the void left by scheduled airline service to rural America.

Any proposal that might lessen the availability of air transportation services to rural America is highly problematic given the vital role that it plays in the American economy. When TSA considered the costs of the proposal, it took the crabbed approach of simply examining the costs of operations on those entities that operated covered aircraft. It failed to assess what those impacts will be on the broader economy, particularly in rural areas that might find a diminution of air transportation services. Whatever logic exists for commercial airlines to provide services in the hub and spoke model thereby dramatically reducing access to Americans living in rural areas, the profit-making commercial decisions should not then be compounded by government regulators that impose further barriers to rural communities seeking air transportation services. And if such decisions are made, they should only be made after due consideration of the impacts that such decisions will have on rural communities and their economies. Only then will TSA have sufficient data to assess properly the true value of its changes in security protocols.

VI. The Proposed Rule Demonstrates That TSA Is Not Conducting Rational Rulemaking

The polestar of APA rulemaking is rational rulemaking. While the focus typically revolves around an examination of whether the agency followed proper procedure, *see, e.g.*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 547 (1976); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985), the process must result in a substantively rational rule. For a rule to be substantively rational, an agency must address all relevant statutory factors, *see Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 416, examine *relevant* data, and articulate a satisfactory explanation for its course of action. *E.g.*, *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *California v. FCC*, 905 F.2d 1217, 1230-31 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). A decision by an agency that is so implausible that it cannot be ascribed to its expertise,

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[48] The essential air service program was created when the airlines were deregulated to ensure that communities that could not generate sufficient demand would still have air service. *Mesa Air Group, Inc. v. Department of Transportation*, 87 F.3d 498, 500 (D.C. Cir. 1996). GOVERNMENT ACCOUNTABILITY OFFICE, PROGRAMS AND OPTIONS FOR PROVIDING AIR SERVICE TO SMALL COMMUNITIES 5 (April 2007) (GAO 07-793T). The program has grown from serving 95 communities in 1997 to 145 in 2007. *Id.* at 3.

[49] GOVERNMENT ACCOUNTABILITY OFFICE, PROGRAMS AND OPTIONS FOR PROVIDING AIR SERVICE TO SMALL COMMUNITIES 5 (April 2007) (GAO 07-793T).

Motor Vehicle Manufacturers Ass'n, 463 U.S. at 43, or constitutes a clear error of judgment, will be considered arbitrary and capricious rulemaking in violation of the APA. *Arent v. Shalala*, 70 F.3d 610, 617 (D.C. Cir. 1995), *quoting Citizens to Preserve Overton Park* at 416. An agency that promulgates a regulation in which the rule is not rationally related to its statutory mandate or objectives also will be considered to have acted arbitrarily and capriciously in violation of the APA's mandate of rational rulemaking. *E.g.*, *Mourning v. Family Publications Serv. Inc.*, 411 U.S. 356, 369 (1973); *Sidell v. Commissioner*, 225 F.3d 103, 106 (1st Cir. 2000); *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 935 (5th Cir. 1998); *American Paper Inst. v. EPA*, 996 F.2d 346, 351 (D.C. Cir. 1993). When examined under these standards, TSA Proposed Rule fails the test of rational rulemaking mandated by the APA.

A. TSA's Inaccurate Economic Assessments Demonstrate That The Agency Failed To Properly Consider Relevant Statutory Factors

The economic analyses performed by an agency pursuant to the RFA and E.O. 12,866 provide a roadmap on how that agency assessed the cost of a proposed rule on small entities and the overall economy. Done well, these analyses will buttress an agency's rationale for the course of action it has chosen in the rulemaking process. Done poorly, it demonstrates that the agency has driven substantially off-course, calls into question the ability of the agency to conduct rulemaking under the strictures mandated by Congress in the APA, and undermines the rationality of any final rule that is the outcome of this irrational rulemaking process. *See Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) (noting that inaccurate economic assessments deprives rule of rational support).

TSA's economic assessments, as already shown, are lacking in both scope and accuracy. Without sound economic analyses revealing the true costs of TSA's proposed security changes, it requires some logical prestidigitation to determine how the agency will assess whether the security enhancements proffered in the NPRM are achievable without the imposition of excessive costs on those potentially subject to the strictures of the Proposed Rule. TSA compounds a situation of its own making by failing to provide any data or evaluation of the threat that the agency is trying to prevent. These considerations are not precatory; rather, it represents the fundamental circumscription of TSA's authority by Congress set forth in ATSA. An agency that is unable to show how it rationally considered all relevant statutory factors as required by *Citizens to Preserve Overton* represents the paradigmatic example of arbitrary and capricious rulemaking under the APA. No finer example of this flawed epitome can be found than in the instant rulemaking from TSA.

At bottom, the validity of TSA's rulemaking process rests on the unstated conclusion that the security enhancements will not impose excessive costs on those covered by the NPRM. However, TSA's failed economic analyses either contradict that conclusion or provide an insufficient case for that a fair review of the evidence would support the agency's conclusion. The agency's rulemaking, as a result of its poor economic analysis, does not demonstrate that it

articulated a satisfactory explanation for its course of action. *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43; *Thompson v. Clark*, 741 F.2d at 405.

B. The Proposed Rule Does Not Achieve The Objectives Sought By TSA

TSA asserts that it is proposing to mandate the new security strictures because general aviation with over 100,000 aircraft "may be vulnerable to exploitation by terrorists." 73 Fed. Reg. at 64,826. TSA then asserts that the Proposed Rule would mitigate this risk. *Id.*

Even though the use of aircraft as a missile was probably not within the ken of most security experts, terrorist targeting of scheduled commercial airliners goes back nearly forty years to the late 1960s and early 1970s when airliners were hijacked. Such actions continued on an intermittent basis until and after the events of September 11, 2001. Even after those events, the only recorded incidents concerning aviation involved scheduled commercial airliners, not general aviation.[50] No evidence exists that general aviation has been targeted or that any event concerning terrorists and general aviation has occurred. In fact, despite the claims in the NPRM, the Department of Homeland Security, in a 2008 unclassified threat assessment, found that terrorists are unlikely to target general aviation. This conclusion makes sense given the fact that owners of general aviation aircraft know who their passengers will be and have significantly greater control over who boards their planes than commercial airlines. Furthermore, general aviation airports are significantly smaller and the employees almost always have direct knowledge of the individuals that utilize such airports.

To achieve its statutory objective, TSA must show some evidence that general aviation, and in particular the sector that it has selected, is currently vulnerable to terrorist exploitation. An agency's use of data (in this case the purported threat to general aviation) is arbitrary if it "bears no rational relationship to the reality it purports to represent." *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1005 (D.C. Cir. 1997). In the instant rulemaking, the data does not bear any rational relationship to reality since, outside of suppositions, no record evidence exists to demonstrate that general aviation represents an increased risk of targeting by terrorists. Furthermore, an argument can be made that existing security protocols work since no incident involving general aviation has occurred in the United States, either before 9/11 or since. In essence, TSA's conclusions are based on an inaccurate representation of reality that is so implausible that it cannot be ascribed to agency expertise. A regulatory process demonstrating such an absence of agency expertise constitutes a violation of the rational rulemaking standards set forth in the APA. *Motor Vehicle Manufacturers Ass'n*, 463 U.S. at 43.

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[50] Some of those incidents included the shoe-bomber Richard Reid, *see* http://archives.cnn.com/2001/US/12/24/investigation.plane/, and the efforts to use liquid explosives to destroy commercial airliners. *See* http://blogs.abcnews.com/theblotter/2006/08/explosive_gel_t.html (discussing extent of plot to detonate explosives on commercial airlines flying from United Kingdom to United States).

VII. Conclusion

TSA is faced with stark choices in this rulemaking. It can continue down its current heading thereby incurring possible legal challenges or Congressional obstacles in implementing changes to general aviation security. Or TSA can heed the advice in these comments and select a flight path that will lead to a more reasoned decisionmaking process. To do so, the agency will have to delay any finalization of the rules proposed in the NPRM until it has properly assessed the costs of the new security rules on small entities and the economic consequences that new security arrangements will have on businesses and communities that rely on general aviation. The reevaluation also will entail the agency to assess properly the risks posed by the covered aircraft to the American public. As part of this reexamination, the agency must consider less burdensome alternatives, including the alternative of no modification to existing security protocols for aircraft in excess of 12,500 pounds. The ultimate outcome of this reconsideration may be the issuance of a new proposed rule. However, that may be the only avenue that TSA has to ensure that it has conducted rational rulemaking mandated by the APA.

In the alternative, the agency could initiate negotiated rulemaking pursuant to the Negotiated Rulemaking Act, 5 U.S.C. §§ 561-570a..[51] Negotiated rulemaking enables an agency to submit a draft of regulations prior to those groups likely to be significantly affected by a change in a regulatory regime and negotiate the form and substance of the regulations prior to the issuance of notice and comment pursuant to § 553 of the APA.[52] The expectation is that the outcome will result in a better final rule than had the agency developed the form of the proposed rule internally and then responded to comments during the notice and comment procedures of the APA.[53]

If the agency fails to revisit its current rulemaking, it may face more dire consequences from Congress – a resolution of disapproval of the final rule under the Congressional Review Act, 5 U.S.C. §§ 801-08. Passage of a resolution of disapproval not only prohibits the rule from taking effect but prevents an agency from reissuing the "rule in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued...." *Id.* at § 801(b)(2). Action under the Congressional Review Act then might unduly restrict the discretion of TSA; the better alternative is to avoid such action by a thorough reevaluation of the existing NPRM.

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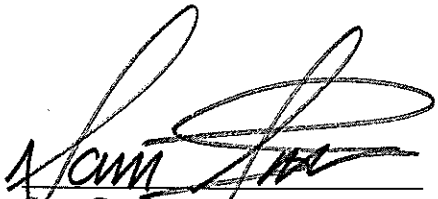
[51] Nothing in the ATSA or the Homeland Security Act of 2002 prohibits TSA from undertaking a negotiated rulemaking. Section 112(e) of the Homeland Security Act of 2002, 6 U.S.C. § 112(e), states that the "issuance of regulations by the Secretary shall be governed by the provisions of chapter 5, Title 5...." The Negotiated Rulemaking Act was added to chapter 5, Title 5 in 1990.

[52] *USA Group Loan Servs, Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).

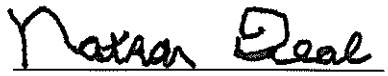
[53] *Id.*

Thank you for the opportunity to comment. Should TSA have any questions concerning these comments, please direct them to Barry Pineles, Chief Counsel, Republican Staff, Committee on Small Business, at 202-225-5821.

Sincerely,

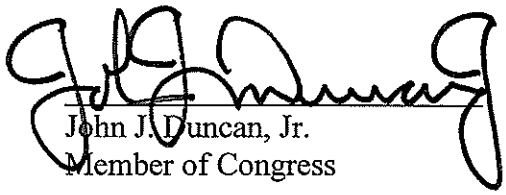


Sam Graves
Member of Congress



Nathan Deal
Member of Congress

Lynn A. Westmoreland
Member of Congress



John J. Duncan, Jr.
Member of Congress

Blaine Luetkemeyer
Member of Congress

W. Todd Akin
Member of Congress

Todd Tiahrt
Member of Congress