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MEMORANDUM FOR MEMBERS OF THE GOVERNMENT REFORM SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

FROM: Doug Ose 

SUBJECT: Briefing Memorandum for November 27, 2001 Hearing, "What Regulations are Needed to Ensure Air Security?"

On Tuesday, November 27, 2001, at 2:00 p.m., in Room 2154 Rayburn House Office Building, the Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs will hold a hearing on air security. The hearing is entitled, "What Regulations are Needed to Ensure Air Security?" Federal regulations govern the conduct of non-Federal parties (including private contractors); there are generally no Federal regulations governing the conduct of Federal employees.

Even before the Airline Deregulation Act of 1978, there were minimal Federal regulations governing air security. In 1978, Congress basically amended economic regulation of the airline industry (i.e., government-set fares and route control). The 1978 Act did not address air security issues. In 1981, the Department of Transportation's (DOT) Federal Aviation Administration (FAA) issued minimal regulations on airplane operator security, including less than one page on "Screening of passengers and property" (14 CFR §108.9). Since then, FAA issued amendments over 20 times to its regulations on airport security (14 CFR §107) and on airplane operator security (14 CFR §108). The latest amendments to both were published on July 17, 2001. Currently, the 1-page 14 CFR §108.201 (formerly §108.9) provides, "Except as provided in its security program, each aircraft operator shall use the procedures included, and the facilities and equipment described, in its security program for detecting explosives, incendiaries, and deadly or dangerous weapons."

Also, FAA has augmented its codified regulations with noncodified directives, some of which are not publicly available. For example, FAA issued a 1-page document entitled "Deadly or Dangerous Weapon Guidelines." Additionally, FAA has customized provisions in its

contracts with each of the airlines since airlines are currently responsible for air security, including screening passengers, carry-on baggage, and checked baggage.

In 1996, the Federal Aviation Reauthorization Act of 1996 required FAA "to certify companies providing security screening and to improve the training and testing of security screeners through development of uniform performance standards for providing security screening services" (Sec. 302, P.L. 104-264). In January 2000, FAA issued a proposed rule, Certification of Screening Companies, which would hold companies to minimum performance standards (65 FR 560). Since FAA had not yet issued a final rule responsive to the 1996 Act, on November 22, 2000, in the Airport Security Improvement Act of 2000, Congress directed FAA to issue a final rule on certification of screening companies by May 31, 2001 (Sec. 3, P.L. 106-528). FAA missed this statutory deadline. In the April 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Congress required FAA to submit a letter to Congress on February 1st and August 1st of each year regarding each missed statutory rulemaking deadline "including an explanation and a projected date" for issuance (Sec. 306, P.L. 106-181).

Since the 1988 Pan Am Flight 103 (from London's Heathrow Airport to New York) where a bomb exploded over Lockerbie, Scotland, there has been tighter security requirements for international flights originating in the United States. For example, each checked bag is x-rayed and matched with a boarding passenger. These requirements are not embodied in codified regulations; instead, FAA has included them in its contracts with each of the airlines. In October 1996, after the July 1996 TWA Flight 800 (from New York's John F. Kennedy International Airport to Paris) airplane crash shortly after takeoff, Congress passed the Federal Aviation Reauthorization Act of 1996, including the security screening provision cited above.

The April 2001 "U. S. Department of Transportation Performance Report Fiscal Year 2000 and Performance Plan Fiscal Year 2002" reveals that, in 2000, "DOT did not meet this year's performance target" for aviation security and "screener performance has not improved enough" (p. 125). As noted above, in January 2000, FAA issued a proposed rule with minimum performance standards. The April 2001 report says that "FAA is on schedule to publish a Final Rule ... by May 31, 2001" (p. 126). As noted above, FAA has not yet issued this final rule.

After the tragic terrorist events of September 11, 2001, both houses of Congress sought a legislative solution to beef up air security. On October 11th, the Senate passed the Aviation Security Act (S. 1447). On November 1st, the House passed the Airport Security Federalization Act of 2001 (H. 3150). On November 15th, both Houses passed the Aviation and Transportation Security Act (an amended S. 1447). On November 19th, the President signed this bill into law. The new law places primary responsibility for air security in the hands of DOT. Within one year, DOT is required to primarily use Federal employees for passenger and baggage screening. The bill also provides for a 2-year pilot program at five airports to test different screening approaches using private security firms instead of Federal employees, and, after a 3-year period,

an option for any airport to meet strict Federal standards for passenger and baggage screening by using private security firms instead of Federal employees.

The bill includes additional provisions on: hiring criteria for screeners, identifying airport employees, screening airport employees, employee training for baggage screening, other employee training, identifying passengers, identifying those seeking flight instruction, screening passengers, screening carry-on baggage, screening checked baggage (all by some means within 60 days and all with explosive detection equipment by 12/31/02), matching passengers and checked baggage, performance standards, and enforcement (including penalties). Throughout the bill, many areas are identified for regulatory coverage.

Section 101(l) establishes "emergency procedures" for DOT to issue interim final regulations without any public notice and comment. Since DOT has begun its initial consideration of the subject matter content and language for its regulations, it is prohibited by the Administrative Procedure Act (APA) from participating in a Congressional hearing. Therefore, the hearing is an opportunity to provide useful Congressional and public input into the regulatory decisionmaking process. The hearing will examine what Federal regulations are needed to ensure air security for various functions, such as screening passengers, carry-on baggage, and checked baggage. The hearing will question witnesses about a zero tolerance policy for mistakes. The Subcommittee will hear from an expert in air security and other witnesses representing the airlines, airports, pilots, flight attendants, and consumers.

The invited witnesses for the November 27, 2001 hearing are: Transportation and Infrastructure Subcommittee on Aviation Chairman John Mica; Isaac Yeffet, former Director of Security, El-Al Airlines; Edward A. Merlis, Senior Vice President, Legislative and International Affairs, Air Transport Association of America; Charles Barclay, President, American Association of Airport Executives; John O'Brien, Director of Engineering and Air Safety, Air Line Pilots Association, International; Patricia Friend, President, Association of Flight Attendants or a representative from the American Federation of Government Employees; and Paul Hudson, Executive Director, Aviation Consumer Action Project.