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July 3, 2014

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

The Honorable Bill Shuster
Chairman
The Honorable Nick J. Rahall II
Ranking Member
Committee on Transportation and Infrastructure
House of Representatives

Subject: *Department of Homeland Security, Transportation Security Administration: Adjustment of Passenger Civil Aviation Security Service Fee*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Homeland Security, Transportation Security Administration (TSA) entitled "Adjustment of Passenger Civil Aviation Security Service Fee" (RIN: 1652-AA68). We received the rule on June 18, 2014. It was published in the *Federal Register* as an interim final rule; request for comments on June 20, 2014. 79 Fed. Reg. 35,462.

The interim final rule implements amendments to 49 U.S.C. § 44940, which authorizes TSA to impose fees to defray the government's costs for providing civil aviation security services, such as those related to screening personnel, screening equipment, and other specified security services. As required by the amendments to 49 U.S.C. § 44940(c), the interim final rule increases the security service fee to \$5.60 per one-way trip.

This final rule is effective on July 21, 2014. The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and public procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. §§ 553(d)(3), 808(2). In addition, section 601(d) of the Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165 (Dec. 26, 2013), provides for implementation of the fee increase by July 1, 2014, through publication of notice of the fee in the *Federal Register*, "notwithstanding ... the procedural requirements of [5 U.S.C. 553]." In order to afford industry the opportunity to make the necessary changes to reservations systems to collect the restructured fee, TSA set an

effective date of July 21, 2014. TSA found that there is good cause under 5 U.S.C. §§ 553(b)(B) and (d)(3) to dispense with the opportunity for advance notice and opportunity for public comment and good cause to publish this rule with an effective date of July 21, 2014.

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

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

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Susan Prosnitz
Acting Deputy Chief Counsel
Regulations and Security Standards
Transportation Security Administration
Department of Homeland Security

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
ENTITLED
"ADJUSTMENT OF PASSENGER CIVIL AVIATION
SECURITY SERVICE FEE"
(RIN: 1652-AA68)

(i) Cost-benefit analysis

TSA has prepared an analysis of its estimated costs and benefits of the interim final rule, under which direct air carriers and foreign air carriers will be required to impose a security service fee of \$5.60 per one-way trip. TSA stated that the qualitative benefit of the rule will be to allow TSA to continue providing security functions made possible by the collection of fees. TSA stated that there would be un-quantified costs to direct air carriers and foreign air carriers who are expected to update their computer and ticket sales systems to reflect the new fee structure. TSA estimated that the annualized monetized transfers from air passengers to the government would be approximately \$1.63 billion, using a 7 percent discount rate, or approximately \$1.67 billion, using a 3 percent discount rate.

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

The Regulatory Flexibility Act requires agencies to consider the impact of their regulatory proposals on small entities, to analyze effective alternatives that minimize small entity impacts, and to make their analyses available for public comment. However, when no notice of proposed rulemaking has first been published, no such assessment is required. Because TSA found good cause to waive notice of proposed rulemaking under 5 U.S.C. 553(b), this interim final rule is exempt from the requirements of the Regulatory Flexibility Act.

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

The requirements of the Unfunded Mandates Reform Act (UMRA) do not apply when rulemaking actions are taken without the issuance of a notice of proposed rulemaking. As discussed in the Administrative Procedure Act section, no notice of proposed rulemaking was required for this interim final rule. Accordingly, TSA did not prepare a written statement.

TSA stated, however, that it had analyzed the UMRA requirements as if the requirement applied and determined that the interim final rule does not contain a federal mandate that may reach the threshold of expenditures for state, local, and tribal governments in the aggregate. According to TSA, to the extent the increased fee affects the overall economy, resulting in an unfunded mandate on the private sector, this is a result of the Budget Act's revisions to 49 U.S.C. 44940, not a result of the interim final rule. Finally, TSA did not consider any alternatives as the purpose of the interim final rule is to implement the statutorily mandated fee change from \$2.50 per enplanement to \$5.60 per one-way trip.

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

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

TSA published the interim final rule without providing prior public notice and comment. Section 601(d) of the Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165 (Dec. 26, 2013), provides for implementation of the fee increase by July 1, 2014, through publication of notice of the fee in the *Federal Register*, “notwithstanding ... the procedural requirements of [5 U.S.C. 553].” Thus, the procedural rulemaking requirements of 5 U.S.C. 553 do not apply to the interim final rule. In addition to the statutory exemption, TSA determined that it would be impracticable and contrary to the public interest, in light of the deadline and potential budgetary impacts, to provide for notice and comment before issuing the interim final rule. Section 553(b) of the Administrative Procedure Act authorizes agencies to issue final rules without affording the public a prior opportunity to comment if it is “impracticable, unnecessary, or contrary to the public interest.”

While the statute exempts TSA from notice and comment requirements, TSA has chosen to issue this rulemaking as an interim final rule to provide an opportunity for comments before the rule is finalized. TSA will accept comments on the interim final rule until August 19, 2014. TSA will address the comments received on the interim final rule in a final rule.

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

Information collection requirements associated with the interim final rule have been approved by the Office of Management and Budget (OMB) through August 31, 2015, and assigned OMB Control Number 1652-0001. TSA has made technical changes to its PRA documents as necessary based on the Budget Act's restructuring of the fee. The primary change is to eliminate outdated references to a per-enplanement fee. The changes will be effective beginning August 1, 2014. The current PRA approval covers the requirements for air carriers to submit quarterly reports to TSA that provide an accounting of the fees imposed, collected, refunded to passengers, and remitted to TSA, and to retain the source information. The interim final rule does not modify these requirements, which continue to be in force.

Statutory authorization for the rule

The interim final rule is authorized by 49 U.S.C. § 4490, as amended by section 601 of the Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165 (Dec. 26, 2013).

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

The interim final rule is an “economically significant regulatory action,” under section 3(f)(1) of Executive Order 12,866. As further required by the Executive Order, OMB has reviewed the interim final rule and TSA prepared an analysis of its estimated costs and benefits.

Executive Order No. 13,132 (Federalism)

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