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B-327877

March 17, 2016

The Honorable Ron Johnson  
Chairman  
The Honorable Thomas R. Carper  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Michael McCaul  
Chairman  
The Honorable Bennie G. Thompson  
Ranking Member  
Committee on Homeland Security  
House of Representatives

Subject: *Department of Homeland Security, Transportation Security Administration:  
Passenger Screening Using Advanced Imaging Technology*

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 “Passenger Screening Using Advanced Imaging Technology” (RIN: 1652-AA67). We received the rule on February 24, 2016. It was published in the *Federal Register* as a final rule on March 3, 2016. 81 Fed. Reg. 11,364.

The final rule amends TSA’s civil aviation security regulations to specify that TSA may use advanced imaging technology (AIT) to screen individuals at security screening checkpoints. The final rule was issued to comply with a decision of the U.S. Court of Appeals for the District of Columbia Circuit, *Electronic Privacy Information Center (EPIC) v. United States Department of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011), which ordered TSA to engage in notice-and-comment rulemaking on the use of AIT for passenger screening.

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 M. Pronsnitz  
Deputy Chief Counsel for 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  
“PASSENGER SCREENING USING  
ADVANCED IMAGING TECHNOLOGY”  
(RIN: 1652-AA67)

(i) Cost-benefit analysis

The Transportation Security Administration (TSA) performed a cost benefit analysis on the final rule. According to TSA, when estimating the cost of a rulemaking, agencies typically estimate future expected costs imposed by a regulation over a period of analysis. As the advanced imaging technology (AIT) unit life cycle is 10 years from deployment to disposal, the period of analysis for estimating the cost of the rule is 10 years. TSA states that it has revised the Notice of Proposed Rulemaking (NPRM) Regulatory Impact Analysis (RIA) assumption of an 8-year life cycle for AIT units to 10 years based on a recent life cycle cost estimate report. AIT deployment began in 2008 and TSA, therefore, included costs that have already been borne by TSA, the traveling public, the screening systems industry, and airports. Consequently, the RIA took into account costs that have already occurred—in years 2008–2014—in addition to the projected costs in years 2015–2017. By reporting the costs that have already occurred and estimating future costs in this manner, TSA states that it accounted for the full life cycle of AIT machines. TSA estimated the total cost of the rule from 2008–2017 to be \$2,146.31 million (undiscounted). TSA incurred over 98 percent of all costs.

According to TSA, AIT generates benefits by reducing security risks because it is capable of detecting both metallic and non-metallic weapons and explosives; terrorists continue to test our security measures in an attempt to find and exploit vulnerabilities; and the threat to aviation security has evolved to include the use of non-metallic explosives. TSA states in the rule that, since it began using AIT, it has been able to detect many kinds of non-metallic items, small items, and items concealed on parts of the body that would not have been detected using the Walk Through Metal Detector. TSA stated that it also considered the added benefit of deterrence—the effect of would-be attackers becoming discouraged because of increased security measures—from the use of AIT. TSA also states that given the demonstrated ability of AIT to detect concealed metallic and non-metallic objects, it is reasonable to assume that AIT acts as a deterrent to attacks involving the smuggling of a metallic or non-metallic weapon or explosive on board a commercial airplane. Moreover, as an essential component in TSA's comprehensive security system because it can detect both non-metallic and metallic threats concealed under a person's clothing, AIT plays a vital role in decreasing the vulnerability of civil aviation to a terrorist attack. To describe further the security benefits from AIT, TSA performed a break-even analysis to compare the potential direct costs of an averted terrorist attack to the net cost of AIT. TSA states that agencies use a break-even analysis when quantification of benefits is not possible. Based upon the results from the break-even analysis, TSA estimates that AIT will need to prevent an attack between once every 5.25 years to once every 23.5 years—depending on the size of the aircraft—for the direct cost of an averted attack to equal the annualized cost of AIT. The break-even analysis does not include the difficult to quantify indirect costs of an attack or the macroeconomic impacts that could occur due to a major attack.

TSA included summary tables in the final rule. One table reports the total costs from 2008–2014 to be \$1,439.32 million (undiscounted), another reports total costs for projected years 2015–2017 to be \$706.99 million (undiscounted), \$666.47 million discounted at 3 percent, and \$618.18 million discounted at 7 percent. Another table reports total costs for years 2008–2017 to be \$2,146.31 million (undiscounted). TSA explained that during 2008–2017, TSA estimates that personnel and equipment life cycle costs are the largest categories of expenditures. Another table measures the frequency of attacks averted to break-even costs in millions of dollars. In two other tables, TSA presents annualized cost estimates and quantitative benefits of AIT deployment and operation. Finally, TSA included a table of advantages and disadvantages of regulatory alternatives.

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

TSA performed a Final Regulatory Flexibility Analysis and stated that the analysis suggested that the rule would not have a significant economic impact on a substantial number of small entities under section 605(b) of RFA.

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

TSA stated that UMRA is intended, among other things, to curb the practice of imposing unfunded federal mandates on state, local, and tribal governments. Title II of UMRA requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” TSA stated that the final rule does not contain such a mandate, and that therefore, the requirements of title II of UMRA do not apply, nor did TSA prepare a statement.

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

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

On March 26, 2013, TSA published a notice of proposed rulemaking (NPRM) to obtain public comment on its proposal to revise civil aviation security regulations to codify that TSA may use AIT for passenger screening. 78 Fed. Reg. 18,287. This was adopted to comply with a ruling of the United States Court of Appeals for the District of Columbia Circuit. In *Electronic Privacy Information Center (EPIC) v. U.S. Department of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011), the court directed TSA to conduct notice-and-comment rulemaking on the use of AIT to screen passengers. TSA received comments from private citizens, industry associations, advocacy groups, and non-profit organizations which are in docket TSA 2013–0004 and which were addressed in the final rule.

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

TSA stated that it did not receive any comments regarding PRA. TSA also determined that there are no current or new information collection requirements associated with the rule. TSA concluded that its use of AIT to screen passengers does not constitute activity that would result in the collection of information as defined in PRA. As protection provided by PRA, as amended,

an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

#### Statutory authorization for the rule

TSA promulgated the final rule under the authority of the Aviation and Transportation Security Act (Pub. L. No. 107-71 (115 Stat. 597, Nov. 19, 2001)); the FAA Modernization and Reform Act of 2012 (Pub. L. No. 112-95 (126 Stat. 11, Feb. 14, 2012)); and sections 114(d) and (f), 44901(a) and (l), 44902(a), 44903(b), 44904(a) and (e), 44925(a) and (b) of title 49 of the United States Code.

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

TSA determined that the rule is a significant regulatory action that is economically significant under section 3(f)(1) of E.O. 12,866. Accordingly, OMB has reviewed the final rule.

#### Executive Order No. 13,132 (Federalism)

TSA analyzed the final rule under the principles and criteria of E.O. 13,132, Federalism. TSA determined that this action will not have a substantial direct effect on the states, or the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.