

Aviation Security – Cargo versus Passenger: Can Separate Ever Be Equal? Yes.

Erik M. Dullea*

TABLE OF CONTENTS

I. Introduction.....	186
II. Executive Summary	186
III. Background	189
A. Terms and Definitions.....	189
B. Scope of Air Cargo Industry	190
C. Preliminary Policies and Procedures	190
IV. Procedural Developments and Compliance Deadlines	191
V. Specific Provisions of the Final Rule	193
A. Categories of Regulated Entities	193
B. Adoption and Implementation of Standard Security Programs.....	195
C. Expansion of Security Identification Display Areas....	196
D. Security Threat Assessments	197
E. Accepting and Screening Cargo	199
F. Known Shipper Program	199
G. Indirect Air Carriers Specific Requirements.....	200
VI. Criticisms of Previous and Current Air Cargo Security Requirements	201

* J.D. Candidate, May 2007, University of Denver Sturm College of Law. The author gratefully acknowledges Mr. Philip A. Bangert with Patton Boggs, LLP for his suggestions and advice regarding this topic.

VII. Unique Nature of Cargo Carriers versus Passenger Carriers	203
A. Nature of the Persons or Cargo Being Transported	203
B. Predictability of Schedules	204
C. Number of Entry Points	205
VIII. Differences Between Full and Full "All Cargo" Programs .	206
IX. Adequacy of the Air Cargo Security Requirements	208
X. Conclusion	210

I. INTRODUCTION

On May 26, 2006, the Transportation Security Administration (TSA) published the Air Cargo Security Regulations, which are the first substantive change to air cargo regulations since 1999. The major provisions of the new regulations apply to airports, aircraft operators (domestic and foreign), and freight forwarders/indirect air carriers (IACs). The regulations are organized into discrete sections based on the type of regulated entity (e.g. airports, domestic aircraft operators, foreign air carriers, and IACs), but in most cases the specific provisions for each of the regulated entities are functionally equivalent. For the sake of clarity, this comment is organized by the type of regulation (e.g. background checks) and the application of the regulation to all regulated entities. Where the provision has unique or disparate application to one or more entities, those differences are also described.

II. EXECUTIVE SUMMARY

The changes to 40 CFR Part 1520, and Parts 1540–1548 are the first substantive regulatory changes for air cargo since 1999.¹ Although interim rules and programs were implemented in the aftermath of September 11, 2001 (some of which are incorporated into the final regulations), it took nearly five years and additional pressure from Congress on the Department of Homeland Security (DHS) and TSA to issue the final regulations called for in the Aviation and Transportation Security Act (ATSA) of 2001.²

Due to sheer size and the diversity of stakeholders in the air cargo industry, TSA's task of developing a set of comprehensive rules could be described as Herculean.³ In addition, there is an underlying tension be-

1. Suburban Emergency Management Project, *Aviation Security: Securing Cargo*, SEMP Biot #374, http://www.semp.us/biots/biot_374.html (last visited July 17, 2006) [hereinafter *Aviation Security: Securing Cargo*].

2. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,478-79 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

3. *Aviation Security: Transportation Security Administration has Made Progress in Managing a Federal Security Workforce and Ensuring Security at U.S. Airports, but Challenges Remain:*

tween the implementation of effective security procedures and the facilitation of unimpeded commerce, which is essential to the success of a market-based economy.⁴ The Final Rule includes significant changes to airport operations, creates a new category of aircraft carriers – the “Full All Cargo” category, requires TSA to consolidate and maintain a central database of Known Shippers, and places a greater burden on IACs regarding aviation security.⁵ However, the Final Rule did not require 100% inspection of all air cargo, or even 100% inspection of all air cargo loaded onto passenger aircraft.⁶

While there are occasional differences in the rules for passenger aircraft, all-cargo carriers, and the small “on-demand” air cargo carriers, the precise rationale for these differences can only be inferred, because the TSA does not disclose to the public the specific elements of its security procedures.⁷ In addition, TSA does not publicly disclose threat assessments or the intelligence data from which those assessments are made. However, based on the preamble and supplemental information for the Final Rule, when differences between entities do exist, it appears that those differences are intended to address the specific threats that each regulated entity is more likely to encounter.⁸

The ongoing differences between the security requirements for passenger carriers and air cargo carriers created a perception that the security procedures for cargo airlines were less stringent than the procedures

Testimony before Subcomm. on Federal Workforce and Agency Organization of the H. Comm. on Gov. Reform, 7 (Apr. 4, 2006) (statement of Cathleen A. Berrick, Dir. Homeland Sec. and Justice Issues) [hereinafter *Statement of Cathleen Berrick*] (Roughly 23 billion pounds of air cargo were transported within the United States in 2004. TSA is responsible for inspecting over 285 air carriers, with 2800 facilities nationwide, along with 3800 Indirect Air Carriers (IAC) with approximately 10,000 domestic locations.)

4. Aaron Lukas, *Protection without Protectionism: Reconciling Trade and Homeland Security*, CATO Institute, Trade Policy Analysis No. 27, 4 (Apr. 8, 2004), at <http://www.freetrade.org/pubs/pas/tpa-027.pdf> [hereinafter LUKAS] (acknowledging that an optimal balance between security and open trade is difficult to find even in the best of times).

5. See *Aviation Security: Securing Cargo*, *supra* note 1 (describing major new initiatives in the Air Cargo Final Rule including “[c]onsolidating approximately 4,000 private industry Known Shipper lists into one central database managed by TSA”).

6. Testimony before the Senate Comm. on Commerce, Science and Transp., 8 (Jan. 17, 2007) (see statement of Asst. Sec. Edmund “Kip” Hawley, TSA) available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1807 (The agency wants to screen as much cargo placed on passenger flights as possible. However, a mandate similar to what the House endorsed—forcing the agency to scan and inspect all cargo—might provide only a small incremental benefit of security while taking away resources for other efforts. “[A]ny mandate to physically inspect 100 percent of air cargo within three years is not feasible without impeding the legitimate flow of commerce and imposing an unreasonable cost on the government.”)

7. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,496 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

8. *Id.* at 30,479.

used by passenger airlines.⁹ Moreover, the absence of a 100% inspection requirement for all cargo transported in the belly of passenger jets is often viewed as a significant gap in combatting terrorism.¹⁰ In response, industry stakeholders and the TSA have articulated legitimate reasons why TSA did not require the inspection of 100% of air cargo.¹¹ The perception that the security standards for air cargo carriers are weaker than the standards for passenger carriers simply because the security standards are different is erroneous. Instead of applying a one-size-fits-all program, TSA applied a risk management program that was recommended by other governmental organizations.¹²

The 100% inspection issue boils down to an acceptable risk question on which reasonable people can reach different opinions.¹³ Regardless of what may be construed as an acceptable level of risk for air cargo security, the new regulation has an additional area that is cause for concern. All of the new requirements for airports, aircraft operators, and IACs are predicated on self-imposed compliance under the threat of TSA inspections.¹⁴ If the inspections are frequent, thorough, and generate severe

9. See John Patterson, *Overlooked Underbellies*, DAILY HERALD, Dec. 12, 2005, <http://www.dailyherald.com/special/homelandsecurity/aircargo.asp> (last visited July 27, 2006) [hereinafter PATTERSON]. See also Christy Gutkowski, *Exactly How Safe is the Cargo that is Being Shipped on our Planes?*, DAILY HERALD, Dec. 12, 2005, <http://www.dailyherald.com/special/homelandsecurity/aircargo.asp> (last visited July 27, 2006).

10. Press Release, Senator Charles Schumer, *Schumer Finds Fed's Proposed New Cargo Screening Rules Still Leave Gaping Hole in NY's Air Security* (Nov. 28, 2004) http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/2004/PR0390.CargoSecurity112804.pf.html (last visited July 26, 2006) [hereinafter SCHUMER].

11. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,493 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548) (stating in Section II.H that TSA considered 100 percent inspection but determined it was not feasible and would have a significant burden on the U.S. economy).

12. *Id.* at 30,479 (citing the recommendations by the DOT Office of Inspector General, the GAO 2002 Report "Vulnerabilities and Potential Improvements for the Air Cargo System," the Aviation Security Advisory Committee's October 1, 2003 recommendations as well as the DHS Air Cargo Strategic Plan). See also Patrick Burnson, *U.S. Passes Air Cargo Security Bill*, AIR CARGO NEWS, Jan. 1, 2007, at <http://www.aircargonews.com/070110/ussecuritybill.html> (last visited March 23, 2007).

13. See generally Letter from Air Transport Association Coalition to Sen. Inouye (Feb. 9, 2007) at <http://www.airlines.org/NR/rdonlyres/7F55C1C3-797D-49C6-B9CF-B5BDA3700795/0/CoalitionSenateBillLetterInouye.pdf> [hereinafter *Letter to Sen. Inouye*] (discussing S.B. 509; a coalition representing a broad range of air cargo supply-chain participants, including producers and shippers of goods, air freight forwarders, passenger and cargo airlines, airports and retailers who rely upon express delivery to serve their customers sent a letter to Sen. Inouye asking Congress to focus on realistic solutions based on a framework that identifies and prioritizes risks, works methodically to apply effective and proven security measures, and that optimizes federal and industry resources).

14. See generally 49 C.F.R. §§ 1542.5, 1544.3, 1546.3 and 1548.3 (May 26, 2006) (granting TSA the authority to enter and inspect premises and records of regulated airports, aircraft operators and indirect air carriers).

penalties for non-compliance, operators will have ample incentive to comply with the rules. However, if the industry believes that corners can be cut without being sanctioned, the air cargo system will be perceived as being just as vulnerable as it was under the former regulations.¹⁵ In addition, the General Accounting Office (GAO) has raised concerns about the validity of TSA's statistical data relating to security violations. In 2005, the GAO reported that the current data collection process used by TSA was unable to highlight weak areas in the cargo security system or provide sufficient data for TSA to fulfill its oversight responsibilities.¹⁶

III. BACKGROUND

On May 26, 2006, TSA published the "Air Cargo Security Requirements; Final Rule."¹⁷ This rule implements the security requirements mandated under the Aviation and Transportation Security Act (ATSA) of 2001 and the Department of Homeland Security Appropriations Act of 2005.¹⁸ The rule also takes into account the findings of the Department of Transportation (DOT) 2002 audit report, the Aviation Security Advisory Committee recommendations of 2003, and the Air Cargo Strategic Plan (ACSP) approved by DHS in 2004.¹⁹

A. TERMS AND DEFINITIONS

The following terms are defined in Subchapter B of 49 CFR Part 1520 *et seq.* and 1540.5 and are used throughout this article.

Indirect Air Carrier (IAC): a person or entity within the United States not in possession of an FAA air carrier operating certificate that undertakes to engage indirectly in air transportation of property and uses for all or any part of such transportation the services of a passenger air carrier. (Note: An IAC may also be described as a freight forwarder or a cargo/freight agent.)²⁰

Security Program: a plan, program, or strategy, along with all prior and subsequent amendments, which includes comments, instructions, or guidance for the security of an airport, aircraft or cargo operation.²¹

Security Identification Display Area (SIDA): a portion of an airport specified

15. See Greg Fulton, *An Airport Screener's Complaint*, TIME, Aug. 17, 2006, <http://www.time.com/time/printout/0.8816.1228247.00.html> (noting that after 9/11 Congress mandated government security screeners for passenger airlines in part due to a lack of confidence in private contractors hired by airlines to perform passenger screening before 9/11).

16. *Statement of Cathleen Berrick*, *supra* note 3, at 3.

17. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,478 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

18. *Id.* at 30,478-79.

19. *Id.*

20. *Aviation Security: Securing Cargo*, *supra* note 1. See also *Cargo and Freight Agents*, Occupational Outlook Handbook, U.S. Dep't of Labor, <http://www.bls.gov/oco/ocos281.htm> (last visited July 27, 2006) [hereinafter *Cargo and Freight Agents*].

21. 49 CFR Part 1520.3 (2006).

in the airport security program, in which security measures are carried out, which may include limiting access and verifying individuals' identification.²² *Sensitive Security Information* (SSI): that information obtained or developed in the conduct of security activities where TSA has determined that the disclosure of such information would be an unwarranted invasion of privacy, reveal trade secrets or company-confidential information, or be detrimental to the security of transportation.²³

B. SCOPE OF AIR CARGO INDUSTRY

As of August 2005, the TSA reported that 65 passenger carriers transport 1.8 million passengers per day on 30,000 flights from approximately 450 airports.²⁴ The cargo industry also operates from approximately 450 airports, but is composed of more than 280 air carriers and transports roughly 50,000 tons (one hundred million pounds) of cargo per day.²⁵

Passenger and all-cargo airlines have approximately 2800 cargo facilities nationwide; there are also approximately 3800 IACs accepting cargo at over 10,000 delivery sites.²⁶ These IACs are hired by approximately 1.5 million customers who are registered and listed as Known Shippers on over 4,000 databases maintained by private industry.²⁷

C. PRELIMINARY POLICIES AND PROCEDURES

TSA presented the ACSP in November of 2003 as an interim step towards the creation of "a comprehensive approach that will significantly enhance air cargo security."²⁸ The ACSP was the first change to air cargo regulations since 1999.²⁹ The goal of ACSP was to reduce the risk to air travel without constraining the nation's supply chain that supports a myriad number of industries through high-value, just-in-time inventory man-

22. 49 CFR Part 1540.5 (2006).

23. 49 CFR Part 1520.5 (2006).

24. U.S. Dep't of Justice, Office of the Inspector Gen., Audit Report 05-34, Ch. 1, Aug. 2005, available at <http://www.usdoj.gov/oig/reports/FBI/a0534/chapter1.htm> (last visited July 18, 2006) [hereinafter *Audit Report 05-34*].

25. See *Aviation Security: Securing Cargo*, *supra* note 1.

26. *Id.* See also John Beckius, *TSA Air Cargo Security Update*, Mar. 13, 2006, http://www.aemca.org/2006_conference/Beckius_Presentation.pdf (last visited July 17, 2006) [hereinafter BECKIUS].

27. *Id.*

28. *Keeping the Skies Friendly*, LOGISTICS TODAY, Apr. 2004, <http://www.logisticstoday.com/sNO/6376/iID/20878/LT/displaystory.asp> (last visited July 17, 2006) [hereinafter *Keeping the Skies Friendly*].

29. *TSA Issues New Regulations to Substantially Strengthen Air Cargo Security*, KANSAS CITY INFOZINE, May 17, 2006, <http://www.infozine.com/news/stories/op/storiesView/sid/15123/> (last visited July 17, 2006) [hereinafter *TSA Issues New Regulations*].

agement.³⁰ To achieve this goal, the ACSP adopted a multi-layered approach based on a threat-based, risk management algorithm that reached across the entire air cargo supply chain.³¹

Even before the ACSP was released, TSA had already determined that physically inspecting 100% of air-cargo was not technologically feasible and that security procedures were needed to screen or filter air cargo shipments and separate the wheat from the chaff.³² The purpose of these screening processes would be to ensure that all cargo which posed an elevated risk would be set aside for inspection.³³ The basic components of the air cargo security plan followed the procedures that were utilized for the maritime cargo industry.³⁴ As is true for many DHS programs, there is great emphasis on the need to scrutinize cargo from unknown shippers.³⁵

Although ACSP included substantive steps to improve the security procedures relating to air cargo shipments entering the United States, TSA encountered concern and skepticism from Congress and aviation security experts regarding the ACSP provisions. Congressman Edward Markey succeeded in passing an amendment to the DHS Appropriations Act, 2004 (HR 2555) which would have required *all* packages placed onto passenger airlines be screened.³⁶ At the time, packages weighing less than sixteen ounces were not screened.³⁷ Section VI below discusses in greater detail Congressman Markey's use of the term "screened" as opposed to the term "inspected." FedEx and United Parcel Service were strongly opposed to Congressman Markey's amendment.³⁸ The Senate's version of HR 2555 did not contain the Markey provision and the provision was not incorporated into the final version of the bill.³⁹

IV. PROCEDURAL DEVELOPMENTS AND COMPLIANCE DEADLINES

The Notice of Proposed Rule Making (NPRM) for Air Cargo Secur-

30. *Aviation Security: Securing Cargo*, *supra* note 1.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Keeping the Skies Friendly*, *supra* note 28.

35. *Id.* (advocating that shippers join C-TPAT because registered shippers will be more familiar and recognizable to security inspectors).

36. *TSA Receives Air Cargo Security Recommendations*, TDCTRADE.COM (2003), <http://www.tdctrade.com/alert/us0320d.htm> [hereinafter *TSA Receives Air Cargo Security Recommendations*].

37. *Id.* *Congress Again Gets in on the Act*, TDCTRADE.COM (2003), <http://www.tdctrade.com/alert/us0317.htm>.

38. *Id.*

39. *Id.*

ity Regulations was published on November 10, 2004.⁴⁰ The NPRM incorporated the ACSP threat-based risk management program and suggested a multi-layered interagency approach to implementing cargo security regulations,⁴¹ primarily because TSA had already concluded that inspecting 100% of cargo carried on passenger aircraft was not economically or technologically feasible.⁴²

In addition to electing not to require physical inspection of all air cargo, which some critics view as a fatal flaw of the rule,⁴³ TSA also failed to meet the legislative deadline for issuing the final regulations. Under the 2004 Intelligence Reform Act, TSA was required to finalize air cargo screening regulations by August 15, 2005,⁴⁴ but the final rule was not published until May 26, 2006.

The Air Cargo Security Requirements in the final rule were scheduled to go into effect on October 23, 2006, and specified two compliance dates for the regulated community. First, 49 CFR Part 1548.11 requires that all employees of IACs who accept, handle, transport, or deliver cargo were to complete security training by November 22, 2006.⁴⁵ Second, by December 1, 2006, all IACs, aircraft operators, and foreign air carriers were to submit Security Threat Assessment paperwork (as described in 49 CFR Part 1540 Subpart C) for all employees who have unescorted access to air cargo and have not previously undergone a background check.⁴⁶ IACs which do not presently operate under a TSA security program must establish and operate under a TSA security program if the IAC intends to continue offering cargo to operators of a Full All Cargo Program or a comparable foreign air carrier.⁴⁷

In the seven months following the Final Rule's publication, TSA has extended the compliance deadlines twice.⁴⁸ The extensions were made because the regulated community was not able to meet the original deadlines for submitting employee background checks, and technological

40. Air Cargo Security Requirements; 69 Fed. Reg. 65,258 (proposed Nov. 10, 2004) (to be codified at 49 C.F.R. pt. 1540-1548).

41. *Id.* at 65,260.

42. Robert W. Moorman, *Fire in the Belly*, HOMELAND SECURITY, Sept. 2004, at 44, 46 [hereinafter MOORMAN].

43. *TSA Receives Air Cargo Security Recommendations*, *supra* note 36.

44. Govexec.com, TSA Misses Deadline for Rule on Air Cargo Screening (2005), <http://www.govexec.com/dailyfed/0805/082205c1.htm>.

45. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,478, 13,515 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

46. *Id.* at 30,478.

47. *Id.*

48. Air Cargo Security Requirements; Compliance Dates; Amendment, 71 Fed. Reg. 62,546 (Oct. 25, 2006); Air Cargo Security Requirements; Compliance Dates; Amendment, 72 Fed. Reg. 13,023 (Mar. 20, 2007).

problems TSA encountered while processing these background checks.⁴⁹

The recent deadline extensions may not be the final activity in this area. In 2007 despite TSA's previous conclusions that 100% inspection of air cargo is not technologically feasible, the newly elected Democratic party-controlled Congress is considering legislation that will require 100% inspection of air cargo loaded onto passenger aircraft within three years.⁵⁰

V. SPECIFIC PROVISIONS OF THE FINAL RULE

The Final Rule is organized based on categories of regulated entities (airports, aircraft operators, IACs) and steps through the security rules for each category. Thus, certain sections of the rule repeat requirements that apply to more than one category of regulated entities (e.g. aircraft operators and IACs). Because many of the rule's requirements are applicable to multiple categories, this article describes the significant new requirements individually and points out the occasional differences amongst regulated entities where they occur.

A. CATEGORIES OF REGULATED ENTITIES

The Final Rule regulations are applicable to airports, aircraft operators, and Indirect Air Carriers. Within these generic groups, TSA segregates each entity based upon the type of Security Program the entity uses.

TSA requires airports to comply with either a "Complete Program" or a "Partial Program."⁵¹ Aircraft operators, on the other hand can receive approval to operate under one of six security programs based on the type of air service they provide, and the weight of the aircraft used by the operator.⁵² Aircraft operator programs are described in general terms within 49 CFR Part 1544.101.⁵³ Conversely, all IACs (freight forwarders) are subject to the same regulation regardless of the size of the business or corporation.

While the two *airport* security program categories remain unchanged, TSA added a requirement that all airports, which load or un-

49. Air Cargo Security Requirements; Compliance Dates; Amendment, 71 Fed. Reg. 62,546 (Oct. 25, 2006); Air Cargo Security Requirements; Compliance Dates; Amendment, 72 Fed. Reg. 13,024 (Mar. 20, 2007).

50. Aviation Security Improvement Act, S. Res. 509, 110th Cong. §3(g) (2007); *see also* Calvin Bieseller, Senate Bill Would Mandate Air Cargo Screening on Passenger Aircraft, DEFENSE DAILY, Feb. 27, 2007, <http://www.airportbusiness.com/online/article.jsp?id=10644&siteSection5>.

51. Airport Security, 49 C.F.R. § 1542.103 (2005).

52. Aircraft Operator Security: Air Carriers and Commercial Operators, 49 C.F.R. § 1544.101 (2006).

53. *Id.*

Entity & Regulation	Security Program	Comment
Airports		
49 CFR 1542.103(a)	Complete	Airport hosts passenger aircraft approved to operate under a Full Program
49 CFR 1542.103(a)	Partial	Airport hosts passenger & cargo aircraft approved to operate under the "Twelve-Five" program
49 CFR 1542.205	SIDA Amendment	All loading/unloading of cargo from aircraft approved under Full Program or Full "All Cargo" Program must occur in a SIDA
Aircraft Operator		
49 CFR 1544.101(a)	Full	Passenger airline (no change)
49 CFR 1544.101(h)	Full "All Cargo"	New category in the Final Rule
49 CFR 1544.101(b)	Partial	(no change)
49 CFR 1544.101(d)	Twelve-Five	Modified by the Final Rule
49 CFR 1544.101(f)	Private Charter	(no change)
49 CFR 1544.101(g)	Limited	(no change)
Indirect Air Carrier		
49 CFR 1548.5	IAC	All IACs are contained in a single category

load cargo from aircraft operators that are operating under an approved Full Program or Full All Cargo Program, must create a SIDA for these cargo operations.⁵⁴ This provision is discussed in greater detail below in subsection C. TSA also created an additional security program category for *aircraft* operators. Before this Final Rule went into effect, aircraft operator programs were classified as Full, Partial, Twelve-Five, Private Charter, or Limited.⁵⁵

All *aircraft operators* providing *scheduled passenger service* are required to operate under a Full Program.⁵⁶ The new security program, titled the Full All Cargo Program contains similar requirements to those found in the full programs adopted by passenger airlines.⁵⁷ The Full All Cargo Program is mandatory for each operation that uses aircraft with a maximum takeoff weight over 45,500 kg and *carries cargo but not passengers*.⁵⁸ The Final Rule also modified the original Twelve-Five Program.⁵⁹ Originally, the Twelve-Five program was available to any operator that

54. 49 C.F.R. § 1542.103(a); Airport Security, 49 C.F.R. § 1542.205 (2006).

55. Aircraft Operator Security: Air Carriers and Commercial Operators, 49 C.F.R. § 1544.101 (2002) (the 2006 version of the regulation includes descriptions of operations that are subject to the Full All-Cargo program and the revised Twelve-Five program).

56. Aircraft Operator Security: Air Carriers and Commercial Operators, 49 C.F.R. §1544.101(a).

57. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,478, 30,510 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

58. *Id.* at 30,510.

59. *Id.* (providing the revisions and new language for 40 CFR Part 1544.101).

provided *charter or scheduled cargo service* in aircraft with a maximum certified takeoff weight greater than 12,500 pounds. Under the new regulation, the Twelve-Five Program is now limited to only those operators that use aircraft with a maximum takeoff weight over 12,500 pounds and are *not* required to participate in a Full Program or a Full “All Cargo” Program.⁶⁰

To put the 45,500 kg and 12,500 pound weights into perspective, a Boeing 737 has a maximum certified takeoff weight of 66,000 kg.⁶¹ The entire Gulfstream business jet family has maximum certified takeoff weights ranging from 26,100 pounds to 41,277 kg, and the majority of the Cessna Citation business jet models have maximum certified takeoff weights between 12,500 and 36,000 pounds (which equals 16,329 kg).⁶² Thus, all cargo operations that utilize traditional passenger-jet sized aircraft must operate under the Full “All Cargo” program, while aircraft operators that use regional/business-jet sized aircraft will be able to operate under the Twelve-Five program.

B. ADOPTION AND IMPLEMENTATION OF STANDARD SECURITY PROGRAMS

In order to conduct operations within the United States, U.S. airports, all air carriers, and all IACs located within the United States must possess and operate in accordance with a security program approved by TSA. The Federal Aviation Administration has required aviation security programs for more than twenty years.⁶³ Security programs contain the specific guidance required to implement these regulatory changes. In the Final Rule, TSA is creating two additional security programs for Full “All Cargo” operators and all indirect air carriers.⁶⁴

All security programs are categorized as SSI and therefore are not authorized for public disclosure; in addition, regulated entities can petition for operating exceptions from SSP requirements.⁶⁵ Due to the lack

60. *Id.*

61. See 737-600 Technical Characteristics, http://www.boeing.com/commercial/737family/pf_pf_600tech.html (last visited April 13, 2007).

62. Gulfstream Specifications, <http://www.gulfstream.com> (last visited April 13, 2007); Cessna Citation Brochure, p. 14, http://cessna.com/pdf_brochures/citation_allmodel.pdf (last visited April 13, 2007).

63. *Proactive Management of FAA’s Security Program Needed, Hearing Before the President’s Commission on Aviation Security and Terrorism*, 101st Cong. 1-2 (1989) (statement of Kenneth M. Mead, Director, Transp. Issues Resources, Community, and Economic Develop. Div.), available at <http://archive.gao.gov/d38t12/140213.pdf>.

64. Air Cargo Security Requirements: Final Rule, 71 Fed. Reg. 30,489-90 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548); BECKIUS, *supra* note 26, at 8 (describing these regulations as the foundation for the roll-out of seven revised security programs).

65. See, e.g., Airport Security, 49 C.F.R. § 1542, Subpart B (2005).

of public information and the potential for regulated entities to receive variances from SSP requirements, this article does not address individual airport or aircraft operators' security programs. However, the titles and descriptions of security programs along with the general provisions of the Final Rule allow comparisons to be made amongst the various categories of regulated entities. For example, Full All Cargo operators are not authorized to transport passengers or checked baggage.⁶⁶ As a result, there is no reason to require these carriers to comply with security provisions dealing with those subjects. Accordingly, the SSP for aircraft operators exempts Full All Cargo operators from complying with the security provisions involving screening checked baggage, transporting passengers, and using explosive detection systems on checked bags.⁶⁷ Aside from these logical differences, the only disparity between the security provisions for the Full Program and the Full All Cargo Program involve the Known Shipper requirement which is discussed below in Section F. Otherwise, the security requirements for a passenger operation and a Full All Cargo operation are virtually identical.⁶⁸

C. EXPANSION OF SECURITY IDENTIFICATION DISPLAY AREAS

Each airport that currently operates under a Complete Program (per 49 CFR 1542) is required to have an "expansion of security identification area" (SIDA).⁶⁹ Previous TSA regulations required airports approved under a Complete Program to conduct all passenger boarding and baggage screening within a SIDA.⁷⁰ The Final Rule broadens the SIDA requirements to encompass the following:

airport premises which are regularly used to load or unload cargo from aircraft that operate under a Full Program or a Full All Cargo Program; and those areas in which air cargo is accepted by an aircraft operator, foreign air carrier, or indirect air carrier.⁷¹

During the notice and comment period, the expansion of SIDA re-

66. Certification: Air Carriers and Commercial Operators, 14 C.F.R. § 119.3 (2007) (defining all-cargo operations).

67. Aircraft Operator Security: Air Carriers and Commercial Operators, 49 C.F.R. § 1544.101 (2005); Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,510 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

68. *Id.*

69. Civil Aviation Security: General Rules, 49 C.F.R. § 1540.5 (2005) (defining both a SIDA and a Secured Area).

70. See 49 CFR §1542.205 (2002) (requiring that airport operators working under a Complete Program per 49 CFR 1542.103(a) must have at least one SIDA; Complete Programs are used to service aircraft operators who perform scheduled service and/or public charters on aircraft with more than 60 seats).

71. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,509 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

ceived vocal opposition from airport authorities, small aircraft operators, and private aircraft owners, based on the cost, practicality and ineffectiveness of expanding SIDA to increase security.⁷² Despite the opposition, TSA concluded that preventing unauthorized persons from accessing cargo operations is necessary to prevent tampering with cargo and to remove potential access points for hostile stowaways.⁷³ The cargo facilities provide ample opportunity for a terrorist to tamper with cargo prior to it being loaded onto an aircraft because the cargo can sit in these facilities while being sorted, staged, or consolidated.⁷⁴ By including these cargo facilities within a SIDA, unauthorized access to cargo shipments should be reduced, thereby providing increased security to one part of the supply chain.

D. SECURITY THREAT ASSESSMENTS

TSA requires that certain aircraft operator, foreign carrier, and IAC employees undergo security threat assessments (STA). The burden is on the employer, not the applicant, to verify the applicant's identity and submit the required data to TSA for review.⁷⁵ TSA will search domestic and international databases to verify that the employee or agent's unescorted access to air cargo anywhere along the delivery process will not be a threat to national security or transportation security.⁷⁶

There are only two categories of aircraft operators whose employees are subject to the STA requirement – Full Program operators and Full All Cargo operators. An aircraft operator in one of these categories must submit an STA application for each employee and agent that will have unescorted access to air cargo. The timeframe during which unescorted access might occur is from acceptance of the cargo by the carrier to the point at which the cargo arrives in a SIDA, is transferred to another carrier, or is removed at the destination airport.⁷⁷

Foreign carriers must also submit STAs for employees and agents that will have unescorted access to air cargo, but only for those individuals located within the United States.⁷⁸ The International Civil Aviation

72. *Id.* at 30,485-86 (describing comments submitted by American Associates of Airport Executives, Aircraft Owners and Pilots Association, Cargo Airline Association, UPS, DHL and FedEx).

73. *Id.* at 30,486.

74. *Id.* at 30,486; see generally *Cargo and Freight Agents*, *supra* note 20 (describing the handling, consolidation and loading of cargo).

75. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,507-08 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

76. *Id.* at 30,508.

77. *Id.* at 30,507, 30,511.

78. *Id.* at 30,483 (stating that TSA does not require STA's for unescorted access to cargo at foreign locations because appropriate background checks are already required under Interna-

Organization already requires background checks for access to restricted airport areas, and therefore, TSA will not require STAs for individuals with unescorted access at foreign locations.⁷⁹

IACs on the other hand, are required to submit STAs on a wider range of individuals. In addition to employees and agents who will have unescorted access to air cargo, IACs must submit STAs for proprietors, partners, officers, directors, and owners.⁸⁰ The final rule and the preamble do not provide an express reason for this additional requirement but in the *Security Threat Assessment Population* section of the preamble, TSA stated that most IACs were small businesses with less than fifteen employees.⁸¹ In a separate part of the preamble, TSA also stated that if the IAC can demonstrate that a proprietor *et al.* is unable to influence the business practices of the IAC, an unfavorable STA determination relating to that individual will not necessarily preclude the approval of the IAC's security program.⁸² The inference from these comments is that STAs are required for persons who own or control the operation of an IAC because these persons will have significant influence over the IAC's probability of complying with the regulations.

As far as what data must be submitted for an STA application, TSA will accept previous Criminal History Records Checks (CHRC) or other TSA-approved STAs for individuals in all regulated entity categories.⁸³ TSA believes that accepting results from previous STAs and CHRCs will lessen the burden on aircraft operators, foreign air carriers, and IACs.⁸⁴ This claim is obviously true for aircraft operators because pilots, mechanics, and ground personnel have already undergone an STA review to obtain authorization to enter the SIDA.⁸⁵ However, the benefit also carries over to the air cargo operators. According to TSA, most cargo screeners and their immediate supervisors at Full "All Cargo" operations have already undergone a CHRC to obtain authorization to enter a SIDA and therefore do not require an STA.⁸⁶

tional Civil Aviation Organization Standards); *see also* 71 Fed. Reg. at 30,483, *supra* note 2 (stating that foreign air carrier employees and agents within the United States are subject to the same requirements off-airport as the corresponding U.S. carrier's employees and agents).

79. *Id.* at 30,480.

80. Indirect Air Carrier Security, 49 C.F.R. § 1548.16.

81. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,480 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

82. *Id.* at 30,496.

83. *Id.* at 30,480-81.

84. *Id.*

85. *Id.*

86. *Id.*

E. ACCEPTING AND SCREENING CARGO

The new rule expressly states that IACs, foreign air carriers, and aircraft operators utilizing Full, Twelve-Five, and Full “All Cargo” Programs are responsible for preventing or deterring the carriage of unauthorized persons or unauthorized explosives, incendiaries, and destructive substances in cargo onboard an aircraft.⁸⁷ The Final Rule added “unauthorized persons” to the previous version in order to address the critical risks of stowaways and bombs on the aircraft.⁸⁸ This obligation can be addressed by screening passengers, baggage, and cargo, inspecting these items, and accepting cargo only from Known Shippers. In addition, all regulated entities are required to refuse transportation of cargo if the shipper refuses to grant consent for the screening or inspection of the cargo.⁸⁹ These regulatory provisions went into effect despite opposing comments from the industry alleging that sensitive cargo could be damaged if the shipper was forced to consent to the inspection.⁹⁰ TSA’s response was unsympathetic. The requirement for aircraft operators utilizing a Full Program, Full All Cargo Program, or Twelve-Five Program to screen and inspect cargo is “necessary to prevent and deter the introduction of stowaway hijackers, explosive devices, or other threats.”⁹¹ The inference from the Final Rule and the TSA comments is that TSA is classifying the screening and inspecting of cargo as a duty for all participants in the air cargo industry.

F. KNOWN SHIPPER PROGRAM

One of the more significant changes in the cargo security rule pertains to the Known Shipper Program. The Known Shipper concept has been used in air cargo security for thirty years.⁹² There are approximately 4,000 separate Known Shipper lists containing records for roughly 1.5 million manufacturers, small businesses, and individuals.⁹³ TSA will consolidate these lists into one centralized database, which will be accessible by all regulated entities in order to verify each shipper’s status. While TSA will maintain the database, it will be up to the regulated enti-

87. *Id.* at 30,484, 30,510.

88. *Id.* at 30,498.

89. *Id.* at 30,484.

90. *Id.* (carrying high cash value cargo such as jewelry and other sensitive or fragile cargo is shipped in sealed containers that may result in damage if opened). *See also* Jeff Berman, *Air Cargo Security on Congress’ Radar Screen Again*, LOGISTICS MANAGEMENT, Mar. 1, 2007, <http://www.logisticsmgmt.com/article/CA6424069.html> (last visited March 29, 2007) [hereafter BERMAN].

91. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,484, 30,498 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

92. *Id.* at 65,272.

93. *TSA Issues New Regulations*, *supra* note 29; BECKIUS, *supra* note 26.

ties to submit shipper data for inclusion in the database.⁹⁴ Although specific criteria are not included in the final rule, one aviation journalist claims that a carrier must demonstrate two years of shipments for a given freight forwarder and must have made at least twenty-four shipments on behalf of that forwarder in order for the freight forwarder to be considered for status as a Known Shipper.⁹⁵

Several parties have suggested that cargo from unknown shippers could be allowed on passenger aircraft after proper screening, but TSA has declined to adopt this suggestion. TSA explained that the industry lacks the technology to rapidly and accurately inspect the wide range of cargo and packaging, and for the time being only those shippers which are recognized as Known Shippers can have their cargo transported on passenger aircraft.⁹⁶

G. INDIRECT AIR CARRIERS SPECIFIC REQUIREMENTS

The specific provisions of the IAC security programs are broader in scope and impose additional duties on the IAC to “provide for the security of persons and property traveling in air transportation against acts of criminal violence and air piracy and against the introduction of any unauthorized person [or] unauthorized explosive [device].”⁹⁷ Any IAC not operating under an approved security program is forbidden from offering cargo to an air carrier operating under a Full Program, Full “All Cargo” Program, or a foreign air carrier conducting passenger operations.⁹⁸

The final rule also imposes training and accountability requirements on the IAC.⁹⁹ Employees and agents of an IAC who perform security related duties are now required to attend security training on an annual basis.¹⁰⁰ Any employee or agent who has not attended training as of November 22, 2006 was to be prohibited from performing security related duties on behalf of the IAC, but this deadline was extended to June 15, 2007.¹⁰¹ IACs are required to designate Indirect Air Carrier Security

94. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,487 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

95. Robert Moorman, *Cargo Security is Not Elementary*, AIR TRANSPORT WORLD 40, (Mar., 2006) available at <http://www.atwonline.com/magazine/article.html?articleID=1549> (last visited July 26, 2006) [hereinafter *Cargo Security is Not Elementary*] (Mr. Moorman states that the NPRM requires 2 years of shipping history and a minimum of 24 shipments to qualify as a Known Shipper.).

96. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,494 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

97. *Id.* at 30,500.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 30,501; Air Cargo Security Requirements; Compliance Dates; Amendment, 71 Fed. Reg. 62,548 (Oct. 25, 2006) (to be codified at 49 C.F.R. pt. 1540-1548).

Coordinators (IACSC) similar to the security coordinator positions required of airports and aircraft operators.¹⁰² The IACSC is a corporate level position, and this person shall be the IAC's primary contact regarding security related issues.¹⁰³

VI. CRITICISMS OF PREVIOUS AND CURRENT AIR CARGO SECURITY REQUIREMENTS

Predictably, industry stakeholders have argued that the interim and final rules have been too lax or too restrictive in combatting terrorism. Rafi Ron, a former head of the Israeli Airport Authority, argued that it is ridiculous to have different security standards for items taken into the passenger cabin and items loaded in the cargo bay.¹⁰⁴ Mr. Ron believes that TSA should not differentiate between two items that are being loaded on the same aircraft.¹⁰⁵ However, the amount of passenger and cargo traffic within the United States is *200 times larger* than the amount of traffic moving through Israel.¹⁰⁶ Coast Guard Admiral James Loy, a former head of TSA, personally observed the security procedures used at Israel's airports.¹⁰⁷ The admiral doubted that the high levels of readiness seen at two Israeli airports could be extrapolated out to over 500 U.S. airports.¹⁰⁸

The Air Line Pilots Association believes that the STA is an inadequate review process and that a CHRC should be performed for each employee or agent who has unescorted access to cargo.¹⁰⁹ Conversely, the Aircraft Owners and Pilots Association (AOPA) and the National Air

102. *Id.*

103. *Id.*

104. MOORMAN, *supra* note 42, at 45-46 (Mr. Rafi Ron is the president of New Age Security Solutions and formerly in charge of security for the Israel Airport Authority.). In fairness to Mr. Ron, his comments were made before the liquid bomb plot was thwarted in London, England in August 2006. Since then, TSA has drastically limited the type and quantity of liquids and gels that passengers are allowed to have in their carry-on luggage, while permitting those liquids and gels to be in the cargo hold of the same aircraft. The basis for this disparity is to prevent liquid ingredients from being combined in flight to create an explosive device.

105. *Id.* at 46.

106. Peter Robinson, *Israeli-Style Air Security, Costly and Intrusive, May Head West*, BLOOMBERG (Aug. 25, 2006), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFyfhM1e3G4> [hereinafter ROBINSON] (noting that Israel had 1.3 million air passengers during 2005 compared to 737 million air passengers in the United States, and whereas the U.S. commercial aircraft fleet has 6800 aircraft, El Al has 35 aircraft); see also CIA World Factbook, Israel: Transportation, available at <https://www.cia.gov/cia/publications/factbook/geos/is.html#Trans> (noting that there are only commercial 6 airports in Israel that have paved runways greater than 8,000 feet in length, which is the baseline length for jet aircraft operations).

107. ROBINSON, *supra* note 106.

108. *Id.*

109. Kerry Lynch, *TSA Draws Praise for Keeping 12-5 Program For Part 135 Cargo Operators*, AVIATION WEEK, May 30, 2006, http://www.aviationnow.com/avnow/news/channel_busav_

Transportation Association (NATA) believe that the NPRM went too far with the expansions of SIDA and STA requirements.¹¹⁰

Several stakeholders submitted comments in opposition to inspections for 100% of air cargo stating that the requirement would be impractical in light of existing technology and industry needs.¹¹¹ NATA endorsed TSA's decision to preserve the Twelve-Five program, as recognition of the differences between scheduled cargo carriers and on-demand carriers.¹¹² NATA stressed that a one-size-fits-all standard would not be an appropriate means of solving air cargo security and that the final rule merely codifies existing requirements but does not impose additional burdens on operators.¹¹³

In stark contrast to NATA's endorsement, a November 2004 press release by Senator Schumer condemned the proposed rule, charging that it left significant gaps in the cargo security system.¹¹⁴ Specifically, the Senator opposed TSA's decision not to *screen* 100% of cargo on passenger aircraft and argued that all cargo, especially foreign cargo, should be *inspected* before being loaded onto a passenger aircraft.¹¹⁵

The statements by Senator Schumer and Congressman Markey's amendment described earlier appear to use screening and inspecting interchangeably, which indicates a misunderstanding of the rule's provisions. According to TSA, inspections are one component of a larger screening system or network.¹¹⁶ TSA defines screening as a "systematic evaluation of a person or property to assess whether either poses a threat to security."¹¹⁷ A cargo shipment that has been flagged or highlighted during a screening process can be inspected to determine whether it is a security threat. Additionally, random inspections of cargo, regardless of a perceived threat, are another facet of a screening system.¹¹⁸ Random inspections and surge events with sustained periods of increased vigilance serve as deterrents against terrorists by reducing or eliminating predictable behavioral patterns for security personnel.¹¹⁹

These divergent opinions illustrate the underlying tension between

story.jsp?id=news/tsa05296.xml [hereinafter LYNCH]; Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,481 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

110. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,481 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

111. *Id.* at 30,493.

112. LYNCH, *supra* note 109.

113. *Id.*

114. SCHUMER, *supra* note 10.

115. *Id.*

116. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,481 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

117. *Id.*

118. MOORMAN, *supra* note 42, at 44-45.

119. See generally TRANSPORTATION SECURITY ADMINISTRATION, OUR SECURITY STRAT-

perfect security, the unimpeded flow of commerce, and the law of diminishing returns. In December 2005, TSA adopted a risk-based strategy towards security threats and acknowledged that it cannot eliminate each and every threat to transportation security.¹²⁰ Accordingly, TSA now strives to focus its vast (albeit finite) resources on countering threats that are either more probable to occur or have more severe consequences.¹²¹ This mindset accounts for the differences in security requirements for passenger aircraft and all-cargo aircraft.¹²²

VII. UNIQUE NATURE OF CARGO CARRIERS VERSUS PASSENGER CARRIERS

Within certain segments of the transportation industry, there is the belief or perception that the security requirements for airlines engaged in the shipping of cargo are less stringent than the security requirements for passenger airlines because the security requirements are not exactly the same.¹²³ However, cargo security requirements need to be different from passenger airline requirements for at least three reasons that pertain to the (1) nature of the persons/cargo being transported, (2) the predictable schedules that are widely available to the public, (3) and the number of entry points into the air carrier system.¹²⁴

A. NATURE OF THE PERSONS OR CARGO BEING TRANSPORTED

One of the main differences between passenger and cargo carriers is that the payload for passenger airlines is more uniform than the payload found on cargo airlines.¹²⁵ Passenger airlines can screen their passengers and checked bags in minimal time because the human body and passenger luggage are relatively uniform in both size and composition for the general passenger population.¹²⁶ Also, the transport of people and luggage constitutes the majority of the revenue stream for passenger airlines.

EGY, SYSTEMS-BASED RISK MANAGEMENT, <http://www.tsa.gov/approach/risk/index.shtm> (last visited July 26, 2006) [hereinafter *Our Security Strategy*].

120. *Id.*

121. *Id.*

122. *Id.*

123. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,489 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

124. Brandon Fried, *Forwarders Urge USA Lawmakers to Better Security*, AIR CARGO NEWS, Apr. 10, 2007, <http://www.aircargonews.com/070210.fried020907.html> [hereinafter FRIED]; Jonty Bloom, *Air Cargo Security Gaps Exposed*, BBC NEWS, Oct. 18, 2006, <http://www.news.bbc.co.uk/2/hi/americas/6059742.stm> [hereinafter BLOOM].

125. FRIED, *supra* note 124.

126. Daniel Gadow, Midwest Reg'l Operations Manager, Air Fr. Cargo-Chi., Presentation to the International Trade Association of Greater Chicago: Air Cargo Security: An Overview, available at <http://www.itagc.org/ppt/2005-Global-Supply-Chain-Security/Air-Cargo-Security.ppt> (last visited Mar. 1, 2007); see also MOORMAN, *supra* note 42, at 45.

For example, transporting cargo at United Airlines generates only five percent of the airline's revenue and approximately eighty percent of that cargo revenue is derived from shipping small packages.¹²⁷ Hence, passenger airlines do not rely on transporting the large, unwieldy shipments that are handled by dedicated cargo operations. Conversely, bulk cargo constitutes the main revenue source for cargo airlines, the contents of which come in various sizes, shapes, and materials.¹²⁸ There is no single technology that can handle the wide variety of cargo containers used today.¹²⁹ The equipment that is available to inspect those shipments is large, expensive, and slow.¹³⁰ It can take more than one hour for some devices to screen a cargo container.¹³¹

B. PREDICTABILITY OF SCHEDULES

Another difference between passenger and cargo carriers is that passenger carriers offer scheduled service and provide passengers with an advance itinerary of departure times and connecting cities, while cargo carriers do not publish pre-determined timetables. The timetables allow the general public to determine in advance which flights will arrive and depart from particular cities on specific dates (e.g. Dallas, TX to Cheyenne, WY with a connection through Denver, CO).¹³² Whereas the passenger airline's business plan is to provide scheduled service between cities, the business plan of a cargo carrier does not need to provide scheduled service.¹³³ Instead, a cargo airline provides shippers with just-in-time delivery service, which has become a fundamental element of the business strategy for many U.S. manufacturing and distribution industries.¹³⁴ In most cases, the shipper is only concerned with the cargo's arrival time, not the route or mode of transportation.¹³⁵ Therefore, the cargo carrier or its agent is free to use whichever transportation mode is

127. MOORMAN, *supra* note 42, at 44.

128. FRIED, *supra* note 124.

129. Air Cargo Security Requirements; 69 Fed. Reg. 65,267 (proposed Nov. 10, 2004) (to be codified at 49 C.F.R. pt. 1540-1548).

130. MOORMAN, *supra* note 42, at 46.

131. PATTERSON, *supra* note 9.

132. See generally United Airlines, Timetables, <http://www.united.com> (last visited Apr. 11, 2007); cf. UPS, Shipping, <http://www.ups.com> (last visited Apr. 11, 2007); FedEx, Ship, <http://www.fedex.com> (last visited Apr. 11, 2007). See also *Statement of Cathleen Berrick, supra* note 3, at 6-7.

133. See generally Air Carriers and Operators for Compensation or Hire: Certification and Operations, 14 C.F.R. § 119.3 (2007) (definitions include: all-cargo operations; passenger-carrying operations; schedules operations; and passenger airlines which are typically common carriers that publish in advance the departure location, departure time, and arrival location for potential customers).

134. LUKAS, *supra* note 4, at 4.

135. *Letter to Sen. Inouye, supra* note 13; see also BERMAN, *supra* note 90.

available while ensuring that the cargo arrives by the promised delivery date.¹³⁶

The just-in-time delivery system does not operate based on a set schedule and therefore becomes a less attractive target for terrorists because it is harder to predict when and where an explosive package will be at any point in time.¹³⁷ Proponents of 100% inspection for air cargo disagree and point to online tracking programs offered by carriers such as UPS and FedEx to allow customers to track the progress of their packages online.¹³⁸ However, while these tracking applications show where a package has been, they do not show where the package is going. Furthermore, these online tools do not provide prospective flight itineraries, flight numbers, or departure times.¹³⁹ Hence, while it may be possible for a would-be terrorist to deduce when a package could be in an aircraft, the terrorist would not be able to determine which aircraft or the aircraft's location. Moreover, TSA acknowledged that there is a historical link between passenger aircraft and terrorist operations.¹⁴⁰ It is beyond the scope of this comment to examine the mindset of terrorist organizations when choosing potential targets.

C. NUMBER OF ENTRY POINTS

A third difference between passenger carriers and cargo carriers is that the respective entry and exit points for cargo shipments to enter the transportation network are more diverse than those found in the passenger airline system. Airline passengers arrive at the airport, some passengers may check luggage, and all passengers go through a security screening process along with their carry-on items. As mentioned earlier, passenger airlines operate from approximately 450 airports.¹⁴¹ Although 450 airports appears to be a large number, the long lines at the check-in counters and security checkpoints demonstrate the number of access

136. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,493-94 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548); see also *Cargo and Freight Agents*, *supra* note 20; Commentary, *Regulation of Air Freight Pickup and Delivery*, 76 YALE L.J. 405, 405-06 (1966).

137. BLOOM, *supra* note 124.

138. *Id.*

139. See generally UPS, Tracking, <http://www.ups.com> (last visited Apr. 11, 2007); FedEx, Track, <http://www.fedex.com> (last visited Apr. 11, 2007) (online demonstrations of each corporation's tracking software informs the user the date when a package has departed or arrived at a particular city, but does not indicate the mode of travel or the time when the package departed or arrived).

140. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,489 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

141. See *Audit Report 05-34*, *supra* note 24, at 3 (citing Statement of Justin P. Oberman, Assistant Administrator, Transportation Security Administration, Secure Flight/Registered Traveler, to the Subcomm. on Economic Security, Infrastructure Protect, and Cybersecurity, Comm. on Homeland Security, U.S. H.R. (Jun. 29, 2005)).

points is limited compared to the number of passengers entering the system.¹⁴²

Unlike people who board passenger airlines, air cargo can enter the cargo system through entry points far away from the airport. Cargo and packages can enter system through remote drop off sites (e.g. FedEx Drop Boxes), retail stores (e.g. Mailboxes Etc.), or through freight agents that pick up the cargo at the shipper's location.¹⁴³ The large number of delivery sites, IACs, and cargo facilities create a much larger number of entry points for the air cargo system than what is found for passenger airlines.

In addition, air cargo may be received by a shipper and then transferred to an IAC who places the package on a truck. The truck driver delivers the package to the airport and hands it over to the air carrier, which places the package in a warehouse. Eventually the package is moved from the warehouse and loaded onto an aircraft. The package is at risk of being tampered with at any of these points on its journey from the shipper to the aircraft.¹⁴⁴

If a 100% inspection requirement were imposed on the air cargo system, not only would TSA need to decide "how to inspect" air cargo, but TSA would also have to decide "when to inspect" it.¹⁴⁵ Regardless of how and when the cargo is inspected, using existing technology, a 100% inspection requirement of air cargo system would significantly degrade the speed and efficiency of commerce.¹⁴⁶

VIII. DIFFERENCES BETWEEN FULL AND FULL "ALL CARGO" PROGRAMS

Although cargo was banned from passenger aircraft in the immediate aftermath of 9/11, that ban was partially rescinded by 2002. As of 2004, passenger aircraft were only able to transport cargo that originated with a participant in a Known Shipper program.¹⁴⁷ Although ATSA required 100% *screening* of all cargo loaded onto passenger aircraft, the statute expressly provided that the Known Shipper program was a form

142. Brad Wong, *Bolstered Security Means Long Waits, Missed Flights at Sea-Tac*, SEATTLE POST INTELLIGENCER, Aug. 10, 2006, http://seattlepi.nwsourc.com/local/280767_seatac10ww.html (last visited Mar. 1, 2007) [hereinafter WONG].

143. See generally *Cargo and Freight Agents*, *supra* note 20.

144. LUKAS, *supra* note 4, at 15.

145. BECKIUS, *supra* note 26 (describing the number of people who touch the cargo before it arrives at an aircraft to include: seller, shipper, freight forwarder, air carrier personnel).

146. WONG, *supra* note 142 (describing the cumulative effect of an extra 10 seconds spent on each of the 50,000 departing passenger at Seattle-Tacoma airport each day resulted in an additional 139 man-hours of work).

147. Air Cargo Security Requirements; 69 Fed. Reg. 65,259 (proposed Nov. 10, 2004) (to be codified at 49 C.F.R. pt. 1540-1548).

of screening.¹⁴⁸ Accordingly, TSA determined that the decision not to *inspect* 100% of the cargo on passenger aircraft did not contravene Congressional direction because the cargo from Known Shippers was *screened*.¹⁴⁹ Despite the express language in ATSA, in response to the DOT Inspector General's 2002 audit and the Government Accountability Office 2002 report, Congress directed TSA to triple the inspection rate for cargo loaded onto passenger airliners.¹⁵⁰ Many passenger airlines had already increased the inspection rates for belly cargo in anticipation of the regulatory requirements.¹⁵¹ TSA received 134 letters commenting on the NPRM from a wide range of industry stakeholders including aircraft operators, foreign air carriers, airports, indirect air carriers, and state and local governments.¹⁵² The agency acknowledged that the DOT audit, GAO report, and recommendations from the aviation industry all played a role in the development of the final regulation.¹⁵³

TSA views explosives as the greatest threat to the United States transportation infrastructure.¹⁵⁴ The continued prohibition of cargo from unknown shippers on passenger aircraft, the long-standing practice of positive bag matching, and the use of trace explosive detection equipment at passenger security gates are strong indicators that deterring and detecting explosive devices smuggled onboard passenger aircraft is still a TSA priority.¹⁵⁵ Passenger aircraft appear to be lucrative and easy targets in the eyes of a terrorist.¹⁵⁶ The predictable schedules and the number of lives involved may account for terrorists's historical preference for targeting passenger aircraft, as seen with Pan Am Flight 103 and the Russian flights on August 24, 2004.¹⁵⁷ Detection of explosives on a passenger aircraft may therefore be a higher-priority task for security personnel at passenger carriers than at cargo carriers.

However, it would appear that TSA views a hostile takeover of a cargo jet as a more likely risk than an onboard explosive. The Final Rule

148. *Id.*

149. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,484 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548) (responding to whether "inspect" and "screen" are interchangeable terms, TSA answered in the negative, and TSA interprets inspection as a subset of screening).

150. *Id.* at 30,484; *see* Department of Homeland Security Appropriations Act of 2005, Pub. L. No. 108-334, § 513, 118 Stat. 1298.

151. MOORMAN, *supra* note 42, at 44.

152. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,479 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

153. *Id.* at 30,478.

154. *Id.*

155. *See generally* Statement of Cathleen Berrick, *supra* note 3, at 6.

156. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,489 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548).

157. *Id.*

makes numerous references to stowaway hijackers and their use of aircraft as a weapon of mass destruction.¹⁵⁸ The potential for stowaways in air cargo was demonstrated when Mr. Charles McKinley shipped himself from New Jersey to Texas in a wooden crate aboard a Kitty Hawk Cargo aircraft.¹⁵⁹ In the post-9/11 environment, a hijacker of a passenger airline will most likely have to subdue the passengers as well as the flight crew in order to commandeer an aircraft. A stowaway on a cargo plane will only have to subdue the two to four pilots onboard in order to use a jet aircraft as a weapon of mass destruction.¹⁶⁰ The unique characteristics of passenger and cargo airline operations justify the different areas of emphasis for countering the more probable threats to passenger and cargo aircraft.

IX. ADEQUACY OF THE AIR CARGO SECURITY REQUIREMENTS

Senator Schumer and Congressman Markey have both supported 100% inspection for cargo that is shipped on aircraft.¹⁶¹ Although a 100% inspection rate is an ideal standard, the existing explosive detection technology cannot meet that goal without generating a significant number of false positive results.¹⁶² In addition, TSA views fluctuating inspection rates as a form of deterrence.¹⁶³ If a credible 100% inspection rate cannot be achieved, continuously operating at maximum effort leaves TSA with no means to increase security during heightened threat periods.¹⁶⁴ Also, by adding an element of unpredictability, would-be attackers have a more difficult time exploiting security procedures.¹⁶⁵

Irrespective of the ideal inspection rate, one of the primary areas of concern with the final rule will be accountability. The entire air cargo security system is predicated on the compliance of regulated entities.¹⁶⁶

158. *Id.* at 30,480, 30,498.

159. Preston Mendenhall, *Alert Highlights Air Cargo Risks*, CNN.COM, Nov. 9, 2003, <http://www.msnbc.msn.com/id/3403777/>; *Human Cargo*, CNN.COM AMERICAN MORNING, Sept. 10, 2003, <http://transcripts.cnn.com/TRANSCRIPTS/030910/ltm.06.html>.

160. Andrew Ward, *FedEx Halts Staff Flights Perk*, FINANCIAL TIMES (London, England), Oct. 2, 2005, at 21, reprinted in FEDEX WATCH, Oct. 2, 2005, http://www.teamster.org/fedex/news/news_051011_4.htm (describing a 1994 incident where an employee attempted to murder the crew, and crash the aircraft into corporate headquarters) (last visited March 1, 2007).

161. SCHUMER, *supra* note 10; *Air Cargo Security Measures Take Stage, Congress Again Gets in on the Act*, TDCTRADE.COM, Sept. 4, 2003, <http://www.tdctrade.com/alert/us0317.htm> (last visited July 26, 2006).

162. *Cargo Security is Not Elementary*, *supra* note 95.

163. BECKIUS, *supra* note 26, at 9, 11 (describing focused inspections of known weak areas along with concentrated week-long inspections of IACs at airports with high cargo volume).

164. Telephone interview with Security Coordinator at a major U.S. airline (July 19, 2006) (discussing the benefit of tailoring security procedures based on probable threats and existing capabilities).

165. *See Our Security Strategy*, *supra* note 119.

166. *Statement of Cathleen Berrick*, *supra* note 3, at 22 (stating that TSA has increased the

While the Aviation and Transportation Security Act required Transportation Security Officers (TSO) to conduct the screening of all passengers and checked baggage at passenger airports, the Act did not require TSOs to conduct the screening of air cargo.¹⁶⁷ Instead, TSA is responsible for the security of air cargo by establishing security rules and regulations (which it has done) and overseeing the implementation of these regulations through compliance inspections.¹⁶⁸ These inspections may consist of reviewing documentation, interviewing personnel, observing air cargo operations, or conducting compliance tests.¹⁶⁹

Because privately owned air cargo companies are in business to earn a profit and the increased costs of complying with TSA security regulations will affect profits, the success of the security system will depend to a large extent on the diligence of aircraft operators and the indirect air carriers. The assumption is that by publishing rules and regulations, the regulated entities will comply with them, but as was the case with the ValuJet crash in 1996, a willful or inadvertent failure to comply can cause an aviation disaster.¹⁷⁰

Air carriers are *not* required to verify that an IAC is in compliance with STA requirements as part of the acceptance process for air cargo.¹⁷¹ The compliance burden will be on TSA inspectors to verify that regulated entities are complying with the regulations. To meet this additional burden, TSA is hiring an additional 300 air cargo inspectors to supplement the existing cadre of inspectors, which will be stationed at 102 airports from which ninety-five per cent of domestic cargo originates.¹⁷² Although the hiring of additional inspectors will help, as of April 2006, TSA had not developed performance measures by which the agency could determine to what extent air carriers and IACs were complying with the air cargo security requirements.¹⁷³ Even though TSA has been able to determine that IACs have more violations than air carriers, TSA has not developed a baseline of acceptable performance. Accordingly, TSA cannot

number of inspectors used to assess whether air carriers and IACs are complying with security requirements).

167. *Id.* at 4-7.

168. *Id.* at 6.

169. *Id.* at 7.

170. *Aviation Security: Securing Cargo*, *supra* note 1 (describing NTSB findings that FAA oversights contributed to the loading of hazardous materials onto the aircraft, and that these hazardous materials caused the fire which lead to the crash).

171. Air Cargo Security Requirements; Final Rule, 71 Fed. Reg. 30,483 (May 26, 2006) (to be codified at 49 C.F.R. pts. 1520, 1540-1548)

172. *TSA Issues New Regulations*, *supra* note 29.

173. *Statement of Cathleen Berrick*, *supra* note 3, at 22-23 (indicating that TSA performed over 36,500 inspections between 2003 and 2004 and found 4,343 violations, but had not determined what constituted an acceptable level of performance).

compare an air carrier's or IAC's performance against this baseline.¹⁷⁴

X. CONCLUSION

The Air Cargo Security Requirements represent a substantial improvement over the previous security structure. The agency's transition to a threat-based risk management approach as a means of properly allocating its resources and protecting a diverse and porous supply chain appears to be reasonable on its face. The critical element of the Rule will be the frequency and depth of scrutiny utilized by TSA inspectors against aircraft operators and IACs and the ripple effect of those inspections within the industry in order to maintain a high degree of awareness and vigilance for transporting cargo.

174. *Id.* at 23-25.