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Final Rule

*Irvin Varkonyi reviews
the US TSA's Final
Rule on Air Cargo
Security*

On 23 October 2006, the **US Transportation Security Administration's (TSA) Final Rule on Air Cargo Security** became effective under Code of Federal Regulations (CFR) Parts 1520, 1540, 1542, 1544, 1546, and 1548. Of course, the tragedy of 9/11 played a vital role in highlighting the need for tighter security. However, the air carrier industry, its regulators and its commercial users realised well before this event that there were great vulnerabilities not just in the movement of travellers, but also in the shipment of cargo.

The goal

The TSA is tasked with protecting physical and human assets which interact with the daily movement of more than 50,000 metric tonnes (mt) of cargo transported on passenger and all-cargo aircraft within the US, as well as between the US and nations around the world. Can these assets be better protected from intentional or accidental events which would do harm against assets within the industry, its customers and with the surrounding infrastructure?

The TSA was designed to make the entire air industry safer by the Aviation and Transportation Security Act of 19 November 2001, specifically by 'the screening of all passengers, and property, including US mail, cargo, carry-on and checked baggage and other articles'. It took two years for the TSA to develop its Air Cargo Security Strategic Plan, which was released on 17 November 2003. It decided to take a multi-layered approach and use a threat-based, risk-managed methodology to reach throughout the air cargo supply chain. Pre-screening of cargo based on risk assessments was adopted in favour of 100% physical screening.

Having made enormous investments in protecting travelers, in the immediate aftermath of 9/11, the TSA delayed the cargo portion of its primary goal until it issued a Notice of Proposed Final Rule-Making (NPRM) in November 2004. This marked the first substantial change to air cargo regulations since 1999. Among the events precipitating the 1999 changes had been the **Pan Am** flight 103

crash over Lockerbie, Scotland, caused by an explosive in a suitcase which was not screened; and the 1996 **ValuJet** crash near Miami, Florida, caused by improper handling of hazardous material.

Before 1999, there were less extensive changes, such as the implementation of Known Shipper Rules (KSR). These were a reaction to concerns over the possible use of cargo to damage aircraft that were prompted by the original World Trade Center bombing in 1994. Despite the Pan Am and ValuJet incidents, however, enforcement of KSR had become very lax.

Final Rule aims

There were a number of critical targets in the Final Rule:

- address the critical risks of a hostile takeover of an all-cargo aircraft and the use of cargo to introduce an explosive device aboard a passenger aircraft
- create a new mandatory security regime for aircraft operators and foreign air carriers in all cargo operations for larger aircraft above certified take off weight of 45,500 kilogrammes (kg)
- require Security Threat Assessments (STAs) for individuals and unescorted access to cargo
- enhance existing requirements for indirect air carriers (IACs)
- expand Security Identification Display Area (SIDA) requirements where cargo is loaded and unloaded.

IACs are the intermediaries in the air cargo business, who consolidate air cargo from multiple shippers and deliver the cargo to air carriers. Very often, IACs control closed loop cargo systems, not limited to connecting to carriers but using their own aircraft to transport cargo. **FedEx**, **UPS** and **DHL** are IACs – as would be a local freight forwarder at Schiphol Airport, for example. The operations of IACs outside the US are not directly impacted by the TSA regulations, except when they interface with US assets.

Who is affected by STAs? In addition to many current industry personnel subject to criminal history records and name-based background checks, the TSA now seeks to cover significant additional personnel who

Irvin Varkonyi is the Manager for Programme Instruction with the Association for Operations Management (APICS), and a past consultant in supply chain security preparedness and air cargo executive with KLM Royal Dutch Airlines, Martinair Holland and Emery Worldwide. He is also an adjunct professor at George Mason University in Arlington, Virginia and the American Public University System, where he teaches transportation security, global logistics and logistics engineering.

Contact:
Irvin Varkonyi
Email: ivarkonyi@apics.org

have unescorted access to SIDAs. These include personnel with all-cargo aircraft, officers and directors of IACs.

Carrying out the STA is not to be a responsibility of those parties regulated by the TSA but rather by the TSA itself. The IAC will be charged a fee of \$28 for each STA. The TSA is committed to completing STAs within ten working days. The STA is to be transferable and will accompany the employee should he move to other organisations.

Costs of the Final Rule

There is no free lunch in security, or anything else for that matter. Thus the industry has been concerned that regulations imposed on them will cost more than they can absorb or more than consumers are willing to pay. As often occurs, the answer on this is blurry. While the TSA estimates that the industry will be paying about \$2 billion over a ten-year period for implementation of programmes to reduce risk, about 75% are associated with regulations other than the Final Rule. These may include **Federal Aviation Administration (FAA)** safety regulations. Importantly, note that the FAA is separate and apart from the TSA, with the former housed in the **US Department of Transportation (DOT)**, and the later having been born in DOT but then transferred to the **Department of Homeland Security (DHS)**.

At the request of Congress, the **Government Accountability Office (GAO)** issued an opinion in June 2006, finding that the Final Rule would, in fact, have an economically significant impact on the industry. Furthermore, it estimated an additional nearly 60,000 hours annual burden imposed on industry for the collection of required data.

Final Rule implementation

The awesome task of making this disparate and fragmented industry more secure has been taken on by the TSA. It will consolidate security oversight in an industry where there had been insufficient oversight, according to reports by government authorities and demonstrated by the Pan Am and ValuJet incidents.

Although the KSR had been in place for a decade, it was deemed insufficient to fulfil its mission. Among other factors, each carrier had its own database to deal with its thousands of known shippers.

Instead, the TSA will consolidate information in a centralised database on an estimated 4,000 private industry KSR lists. This is claimed to enhance the TSA's visibility into the activities of these companies. The TSA estimates it will secure background checks on an additional 51,000 off-airport freight forwarder employees and another 50,000 cargo aircraft operator employees, who were not previously covered. Of course, after the initial screening, the TSA will continue the process as new personnel come into the industry. The reality of designing compatibility between the TSA's centralised database and the IAC's databases is yet to be determined.

The details of how to implement the new regulatory changes have been spelled out in draft security programme templates provided by the TSA to these IACs. Enhancements and enforcement are being implemented in phased stages, which began in November 2006.

Comments from the industry

So many comments were received from industry when the NPRM was issued in November 2004 that the TSA was forced to delay implementation by more than a year in order to respond and modify the programme. Besides individual comments from more than 130 affected parties, the **Aviation Security Advisory Committee (ASAC)**, a private/public sector group consisting of airlines, IACs and various other aviation related groups, offered considerable comments on the NPRM, many of which made it into the Final Rule.

FedEx expressed concern about the requirements imposed on it to maintain records of cleared personnel, especially those who were contract carriers, and not direct employees.

In the *Federal Register* on 26 May 2006, the TSA stated that FedEx is responsible for ensuring personnel who work in SIDAs meet the requirements of the

Final Rules: 'If a regulated entity uses a third party agent to meet its security programme requirements, which regulated entity is responsible for ensuring that the third party has an STA, just as they are responsible for other security duties their agents carry out.'

Many IACs objected to having to pay a third party, the TSA, for background checks since they already utilised such processes. But the TSA did not accept the standards of these background checks, commenting: 'Private companies do not have access to all of the intelligence databases that the TSA will use to conduct STAs. Further, the TSA must make judgments as to the information received from the databases, which it has the expertise to apply.'

These two were among the literally hundreds of issues about which the industry expressed concern, arguing that the changes would constrain business, raise costs and be questionable in increasing the level of security effectiveness. The TSA, under political pressure to act, sought to accommodate the IACs as much as possible, in an attempt to keep even more difficult restrictions from making it into law. This would include proposed legislation by Democratic Representative Ed Markey of Massachusetts which would mandate 100% physical inspection of all air cargo, a process that is acknowledged would greatly reduce the efficiency of this industry, with current technology, systems and dated facilities (see *Cargo Security International*, December/January, page 42).

The future?

The Final Rule is in place – but will the industry be able to implement the required changes? Will the TSA be able to complete the STAs, and the centralised KSR database? Will there be action from the US Congress, now under the control of the Democratic Party, to go back into the DHS organisation and its many bureaucracies and re-define goals? Will Markey have a better chance to implement the 100% physical inspection rule as his party now controls the Congress?

Sorry, but the best the author can state at this point is 'TBA (to be announced)'.