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**COMMENTS OF EDWARD HASBROUCK RE: DOCKET NUMBER TSA-2004-19160,
REPORT AND COMPLAINT OF INTENDED COMMISSION OF A CRIME, AND
REQUEST FOR CRIME PREVENTION AND CRIMINAL LAW ENFORCEMENT ACTION**

**"Secure Flight Test Phase" (OMB Emergency Clearance Request) and
"Secure Flight Test Records" (System of Records DHS/TSA 017)
69 *Federal Register* 57342-57348, 24 September 2004**

To: Office of Information and Regulatory Affairs
Office of Management and Budget
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COMMENTS OF EDWARD HASBROUCK RE: DOCKET NUMBER TSA-2004-19160,
REPORT AND COMPLAINT OF INTENDED COMMISSION OF A CRIME, AND
REQUEST FOR CRIME PREVENTION AND CRIMINAL LAW ENFORCEMENT ACTION
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These comments are in response to the publication by the Transportation Security Administration (TSA) in the *Federal Register* on 24 September 2004 of the following:

(1) "Notice to Establish a System of Records" (SORN) and "Request For Comments" pursuant to the Privacy Act for System of Records DHS/TSA 017, "Secure Flight Test Records" (docket TSA-2004-19160-3, 69 *Federal Register* 57345-57348); and

(2) "Notice of Emergency Clearance Request" and solicitation of comments to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act for a proposed "Secure Flight Test Phase Information Collection Request" (ICR), (docket TSA-2004-19160-2, 69 *Federal Register* 57342-57345).

Abstract: (1) The proposed system of records and the information collection request described in these Notices: are contrary to the recommendations in the final report of the 9/11 Commission; (2) would unconstitutionally burden and chill the exercise of the right to assemble guaranteed by the First Amendment; (3) are barred by multiple provisions of the Privacy Act of 1974 and the Airline Deregulation Act of 1978; and (4) are not authorized by any of the statutes claimed in the Notices as their authority. (5) The Notices are inaccurate, incomplete, and fail to provide several of the notices required by the Privacy Act. (6) Maintenance of the proposed system of records would constitute a criminal violation of the Privacy Act on the part of each officer or employee of any agency maintaining the system of records. (7) The TSA has failed to conduct the assessments required by the Airline Deregulation Act of 1978, the Aviation and Transportation Security Act of 2001, the Regulatory Flexibility Act of 1980, and the Unfunded Mandates Reform Act of 1995. (8) The TSA has failed to conduct the assessments, or satisfy the criteria for emergency clearance by the OMB, required by the Paperwork Reduction Act. (9) In order to comply with the proposed orders, airlines and the Computerized Reservation Systems (CRS's) that host their PNR databases would have to cease operating flights to or from, or accepting reservations from, the European Union, at a cost of billions of dollars a year.

COMMENTS OF EDWARD HASBROUCK RE: DOCKET NUMBER TSA-2004-19160,
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1. Both of these Notices contain identical false claims
that:

"The Secure Flight program is fully consistent with the
recommendations in the final report of the 9/11 Commission."

The Secure Flight testing proposals in the Notices are, in
fact, directly contrary to the 9/11 Commission's recommendations,
particularly final, overall recommendation in the report:

"Recommendation: The burden of proof for retaining a
particular governmental power should be on the executive, to
explain (a) that the power actually materially enhances
security and (b) that there is adequate supervision of the
executive's use of the powers to ensure protection of civil
liberties. If the power is granted, there must be adequate
guidelines and oversight to properly confine its use."

Even with respect to the proposed "Secure Flight" testing,
much less subsequent phases of "Secure Flight", the TSA has
neither attempted nor succeeded, in the Notices or anywhere else
on the public record, to satisfy the burden of proof defined in
clause (a) of this recommendation. And the proposal in the
Notice for exemption of the Secure Flight system of records from
the administration remedies normally available under the Privacy
Act is directly contrary to clause (b) of this recommendation.

Even if the proposed system of records were not exempted
from the Privacy Act, discretionary review by officials within
the agency itself does not constitute "oversight", which implies
independent authority, and is not "sufficient to ensure
protection of civil liberties" or "to properly confine its use",
as recommended by the final report of the 9/11 Commission.

2. The system of records, and the order directing airlines
to provide PNR data to the TSA, would burden the exercise of the
right of the people peaceable to assemble, as guaranteed by the
First Amendment to the U.S. Constitution, without satisfying the
requirements for a permissible government-imposed burden on such
a protected activity, and are thus unconstitutional.

The First Amendment to the U.S. Constitution provides in relevant part that, "Congress shall make no law ... abridging ... the right of the people peaceably to assemble."

Few activities implicate the assembly clause of the First Amendment as directly as travel.

Travel is, of course, an activity often engaged in for purposes protected under other clauses of the First Amendment, such as travel to petition the government for a redress of grievances, or travel for purposes protected as freedom of speech or of the press.

More directly and importantly, in most instances travel is, *in and of itself*, an act of assembly. As such, travel is an activity *directly* protected under the assembly clause of the First Amendment. When people travel for business or organization meetings or conventions, or to meet friends and relatives, their travel is an act of assembly.

Statutory or regulatory measures potentially abridging the right of the people peaceably to travel must therefore be evaluated in accordance with the standards applicable to measures infringing on directly-protected First Amendment activity.

In a country as large and discontinuous as the USA, air travel is particularly essential to the exercise of the First Amendment right of the people to assemble. Even within some states, such as between islands of Hawai'i and between many parts of Alaska, there is no meaningful or affordable alternative to air transportation. In the USA today, no national assembly of people, for any purpose, is feasible without air transportation.

Thus a law or regulation imposing a burden on the exercise of the right to travel, including air travel by common carrier, or potentially having a chilling effect on the exercise of the right to travel, is clearly a "law ... abridging ... the right of the people peaceably to assemble", and must be evaluated under the strict standards applicable to regulation of an activity – to wit, assembly – directly protected by the First Amendment.

A long line of Supreme Court decisions has applied the strictest scrutiny to government demands for disclosure of records of protected acts of assembly. Most of the categories of data at issue in those cases, compulsory disclosure of which has

been held to be forbidden by the First Amendment as potentially chilling the exercise of protected rights of assembly, are also included in the Passenger Name Record (PNR) data demanded under the Notices. One PNR can contain reservations for an entire group of people travelling and assembling together. Multiple PNR's for people travelling and assembling together can be cross-referenced to indicate their association, even when they are travelling from different places. And PNR's for travel by members of organizations frequently identify their organizational affiliations through discount eligibility codes, particularly through unique meeting codes that identify a specific assembly.

There is a reasonable and foreseeable likelihood that some people will be chilled in the exercise of their First Amendment right to assemble if they know that airline common carriers could be compelled to turn over to the government, after the fact, detailed records of their acts of assembly: with whom they assembled, when (and for how long) they assembled, where (and from where) they assembled, how they assembled, and other assembly details contained in PNR's.

The fact that the demand for data under these Notices for "Secure Flight" testing would apply only to past flights (completed acts of assembly) would only enhance the chilling effect of the proposals on citizens' willingness to engage in future acts of assembly by air common carrier, since they would not be able to know which of those acts of assembly might, after the fact, be reported to the government without their consent. If the proposed order were to be upheld, citizens would be forced to assume that all travel details might subsequently be subject to compelled disclosure to the government, maximizing the chilling effect on the exercise of the right to assemble.

At a minimum, demands for records of protected First Amendment activities, such as PNR's logging citizens' acts of assembly by air common carrier, require strict scrutiny and a showing that there is no alternative way to fulfill a valid government purpose that would be less burdensome or potentially chilling to the exercise of protected First Amendment rights.

The TSA has failed to subject these proposals to such strict scrutiny, and these Notices fail to satisfy the requirements for regulations potentially burdening and chilling the exercise of the right to assemble, as guaranteed by the First Amendment. The proposed actions are therefor barred by the First Amendment.

3. The proposed system of records, and the proposed order directing airlines to provide PNR data to the TSA, are contrary to the express requirements of Federal statutes:

A. The proposals are contrary to 5 U.S.C. 552a(e)(7), the Privacy Act of 1974, which provides that:

"Each agency that maintains a system of records shall --... maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

As discussed immediately above, PNR's and the proposed "Secure Flight Test Records" system (DHS/TSA 017) are and would be records describing, in detail, how individuals exercise rights of assembly protected by the First Amendment. It is, in fact, difficult to imagine any type or category of records that would more directly implicate this section of the Privacy Act in relation to the assembly clause of the First Amendment.

None of the three exceptions in the statute applies in this case. First, any claimed statutory authorization for the maintenance of such a system of records is, at most, implied, not express. Second, the maintenance of these records would not be authorized by the individuals about whom the records are maintained. Indeed, by demanding cancelled PNR's and PNR's for past travel, the TSA has so structured its proposals as to ensure that it will not be possible for anyone to "opt out" or prevent the inclusion of records about them in the system, even by canceling their reservations and/or deciding not to travel. Third, there is no mention of any law enforcement activity in the intended routine uses of the system of records.

Accordingly, maintenance of any of the records proposed to be included in this system, and demanded from airlines under the proposed order, is expressly barred by the Privacy Act.

B. The proposals are contrary to 5 U.S.C. 552a(e)(2), the Privacy Act of 1974, which requires that:

"Each agency that maintains a system of records shall --... collect information to the maximum extent practicable directly from the subject individual when the information

may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs."

As discussed above, the right to assemble is a right protected under the First Amendment. And, as discussed further below, the right of transit through the navigable airspace (including by air common carrier) and the right of carriage by common carrier (for all persons complying with the published tariff of fares and conditions of carriage), are rights guaranteed under the Federal programs for regulation of air common carriers pursuant to the Airline Deregulation Act of 1978.

Although the TSA has disclosed few details, it appears clear from the reference in both Notices to "expanded TSA No-Fly ... lists" that the intended use of the information is to develop systems which would be used as the basis for "No-Fly" determinations, which would be determinations about individuals' rights under those Federal air carrier regulatory programs.

Accordingly, the proposal is subject to the statutory mandate under 5 U.S.C. 552a(e)(2) that information be collected "to the maximum extent practicable directly from the subject individual". The proposal fails to satisfy that requirement.

As is acknowledged in the Notices, the TSA is required to conduct "screening" of all airline passengers. Each passenger must interact directly with one or more TSA employees or agents, prior to boarding, at a security screening checkpoint. To satisfy this statute, the TSA would have to show that it would not be practicable for TSA staff or their agents to collect any necessary information about passengers directly from those passengers. The TSA has not attempted to make any such showing, and the proposed indirect information collection is therefore barred by statute.

C. The Airline Deregulation Act of 1978, 49 U.S.C. 40102 (a)(5), 49 U.S.C. 40102 (a)(23), 49 U.S.C. 40102 (a)(25), and 49 U.S.C. 40102 (a)(27), requires that intrastate, interstate, and international airlines all be licensed only as "common carriers". By definition, a "common carrier" is required to transport all passengers complying with their published tariff of fares and conditions of carriage. As licensed common carriers, airlines are thereby forbidding by statute from refusing to transport an otherwise-qualified passenger, except on the basis of a binding order from a court of competent

jurisdiction. A "No-Fly list" not based on such court orders could not lawfully be used the basis for "No-Fly" decisions by airlines, consistent with their obligations as common carriers. And testing of mechanisms for use of such a list has no statutorily valid purpose. But the Notices claim that the purpose of the proposed system of records and information collection is the testing of such an "expanded No-Fly list". To the extent that the Notices correctly represent the purpose of the proposals as being related to testing of a "No-Fly list" not based on court orders barring travel by air common carrier, the proposals are contrary to, and barred by, the "common carrier" provisions of the Airline Deregulation Act.

4. The proposed system of records, and the proposed order directing airlines to provide PNR data to the TSA, are not authorized by any of the statutes cited as authority for the maintenance of the systems: 49 U.S.C. 114, 44901, and 44903.

A. The statute cites as authority for the proposals, 49 U.S.C. 114 (h)(3) authorizes the Department of Transportation (now the TSA) to, "in consultation with other appropriate Federal agencies and air carriers, establish policies and procedures requiring air carriers ... to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security." That is not the process contemplated by these Notices, or the system they are intended to be used to test.

Under the statute, the source of the data is to be government lists, and the identification of passengers matching those lists is to be done by airlines. If, instead, the source of data is to be airline reservation data (PNR's), and the identification is to be done by the government -- as is clearly contemplated by the Notices -- that change will require a change in the statute, and cannot be accomplished by a regulation or administrative Notice.

B. The TSA has failed to make the showing of "necessity" required by 49 U.S.C. 114(1)(1) and independently by 5 U.S.C. 552a(e)(1), which would require showing that no less burdensome alternative could serve the purpose of the proposed regulations (if there is any such statutorily valid purpose).

5. The "Secure Flight Test Records" system of records notice is inaccurate and incomplete, and fails to provide the notices

required by 5 U.S.C. 552a(e)(3) and 5 U.S.C. 552a(e)(4), the Privacy Act of 1974.

A. 5 U.S.C. 552a(e)(3)(A) and 5 U.S.C. 552a(e)(3)(D), the Privacy Act of 1974, require that, "Each agency that maintains a system of records shall ... inform each individual whom it asks to supply information ... whether disclosure of such information is mandatory or voluntary ... and the effects on him of not providing all or any part of the requested information". The TSA has provided no such notice, without which the proposed information collection cannot lawfully be conducted.

B. 5 U.S.C. 552a(e)(4)(B), the Privacy Act of 1974, requires that the notice published in the *Federal Register* include "the categories of individuals on whom records are maintained in the system". But the Notice published by the TSA omits large categories of individuals about whom the system, as described in the Notice, would contain personally identifiable information.

The Notice discloses that the system of records will cover "Individuals traveling within the United States by passenger air transportation". In fact, the system as described would include information about non-passengers and about passengers on flights within and between countries other than the USA.

Among those categories of individuals about whom PNR's, and thus the system as described in the Notice, would contain information, but which are not mentioned in the Notice, are the following:

(1) Individuals in whose names reservations for air travel are made, but who do not actually travel and/or whose reservations are cancelled, or who "no show" and do not travel without their reservations being cancelled (in many cases because they are unaware that reservations have been made in their names). The proposed order specifically includes "(19) Any PNR reflecting itineraries that were cancelled in whole or in part", so the TSA is clearly aware that the system of records will include information about any individuals named in cancelled PNR's. Given the explicit inclusion of cancelled PNR's in the proposed order, it is difficult to interpret the

omission of individuals named in cancelled PNR's from the Notice as a sign of anything other than gross incompetence, ignorance of the contents of PNR's, or a deliberate intent to mislead readers of the Notice.

(2) Travel arrangers, personal assistants and administrative staff, travel managers, group coordinators, event organizers, and family members and friends assisting with travel arrangements, as identified by the "received from" field in the PNR that records the person who requested the creation of the reservation or the most recent change to it. The proposed order excludes the PNR history, which includes this information for each entry or change made to the PNR. But the most recent "received from" entry is generally included in the "live" PNR.

(3) People who pay for tickets for others, or who hold joint credit or debit cards with people who purchase travel for themselves or others – again, whether or not they travel themselves – as identified from the "form of payment" fields in ticketing records in PNR's.

(4) Travel industry personnel, including travel agents and airline reservation, check-in, and ticketing staff, as identified by the unique "agent sine" or log-in ID in the PNR and by the city or "pseudo-city" (airline office or travel agency branch or location) and the LNIATA or "set address" of the terminal or data connection on which the entry was made (the CRS or airline hosting system counterpart of an Internet IP address). Again, the proposed order excludes the PNR history, which includes this information for each entry or change made to the PNR. But the first agent sine and pseudo-city used when the PNR was created is generally included in the "live" PNR.

(5) Clients, customers, and employers of travellers, even if they aren't travelling, as identified by billing and accounting codes for

travel by others undertaken on their behalf or at their expense. Corporate travel agencies routinely include codes in PNR's to indicate to the traveller (or the traveller's employer), to which department, project, or client the cost of the trip is to be billed. In the case of a law firm, these entries routinely identify the specific client, case, or matter on whose behalf or at whose expense the travel was undertaken. Thus clients of law firms, consultants, financial advisors, and other professionals are routinely the subject of data in PNR's, and thus could be the subject of data in the proposed system.

(6) Friends, family members, hosts, housemates, domestic partners, and business associates of travellers, as identified from the "local contact" and "document delivery" information in PNR's (which may include phone numbers, descriptions of the relationship of the contact to the traveller, and in some cases addresses).

There is no indication in the Notices as to what utility, much less "necessity", exists for the demand for cancelled PNR's or for data about any of these categories of individuals other than passengers. But since the TSA proposes to require this data, it must be assumed that the TSA claims to have some use for it, which the TSA could have only have if data from cancelled PNR's and data concerning these other categories of individuals is to be retrieved from the system by name or other identifying particular. If the TSA has no necessity for data concerning these other categories of individuals, and will not be retrieving it, then the TSA has no basis for the demand for this data.

6. The Privacy Act of 1974, 5 U.S.C. 552a(I)(2), provides that:

"Any officer or employee of an agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor."

As discussed immediately above, the system of records notice does not meet the notice requirements of 5 U.S.C. 552a(e)(4) with respect to the categories of individuals on whom records are to

be maintained in the system. As a result, willful maintenance of the proposed "Secure Flight Test Records" system, DHS/TSA 017, containing data from PNR's concerning any categories of individuals other than individuals actually travelling, would be a criminal violation of the Privacy Act of 1974, 5 U.S.C. 552a(I)(2), on the part of each officer or employee of any agency willfully participating in such maintenance.

It is ironic that, in the guise of an effort to prevent possible future crimes, the TSA has declared through a notice in the *Federal Register* its intent to commit a Federal crime. It is more ironic that this notice of intent to commit a criminal violation of the Privacy Act was issued and published over the signature of an agency employee whose title is "Privacy Officer".

It is a clear test of the sincerity of the commitment to privacy of the TSA and Department of Homeland Security (DHS), especially with respect to this and the predecessor proposals, whether they will take action to prevent this crime, and/or to enforce the Privacy Act against violators within their agencies.

By these comments, I call to the attention of the manager of the proposed system of records as identified in the Notice (Justin Oberman, Director, Office of National Risk Assessment, Transportation Security Administration) that the willful maintenance of the proposed system of records would constitute a criminal violation of the Privacy Act of 1974, 5 U.S.C. 552a(I)(2), on the part of each officer or employee of any agency willfully participating in such maintenance.

By these comments, I hereby report my knowledge and belief that a criminal violation of the Privacy Act of 1974, 5 U.S.C. 552a(I)(2), is about to be committed by Justin Oberman, in his official capacity as Director of the Office of National Risk Assessment (ONRA), Transportation Security Administration, and by other officers and employees of the ONRA, TSA, and DHS. And I hereby request that any competent law enforcement officer to which this report of intended criminal activity becomes known take action to prevent this imminent crime, and initiate a criminal complaint against anyone committing such a crime.

I call to the attention of the Privacy Officer of the TSA (Lisa S. Dean, signer of the Notice) and the Privacy Officer of the DHS (Nuala O'Connor Kelly), that the Notice as published in the *Federal Register* constitutes a notice of intent by officers

and employees of their respective agencies to commit, on or about 25 October 2004, a criminal violation of the Privacy Act.

I specifically request that the Privacy Officers of the TSA and DHS (1) take immediate action to prevent this crime, (2) initiate an investigation of this intended crime, and (3) notify officers and employees of their agencies who might be party to this crime of their obligation under the Privacy Act not to participate in the maintenance of systems of records for which the notice required by the Privacy Act has not been given.

Should the Privacy Officers not consider it to be within their authority to initiate actions to prevent criminal violations of the Privacy Act, and/or to initiate investigations of criminal violations of the Privacy Act, I specifically request that they (1) notify me that they do not consider themselves to have such authority, (2) forward this report and complaint of imminent commission of a crime and request for crime prevention and criminal law enforcement to the law enforcement officer authorized to take such crime prevention and enforcement action, and (3) notify me to whom they have forwarded this report and complaint of imminent commission of a crime and request for crime prevention and criminal law enforcement action.

7. The TSA has failed to conduct the assessments required in a rulemaking such as this one by the Airline Deregulation Act of 1978, the Aviation and Transportation Security Act of 2001, the Regulatory Flexibility Act of 1980 and the Unfunded Mandates Reform Act of 1995, as follows:

A. The Airline Deregulation Act of 1978, 49 U.S.C. 40101(c)(2), requires that:

"...the Administrator of the Federal Aviation Administration shall consider the following matters:... (2) the public right of freedom of transit through the navigable airspace."

To the extent that the authority of the Administrator of the TSA is derived from that of the Administrator of the FAA under this section, it is subject to the same statutory limitations and requirements. No such consideration is included in the Notices.

B. The Aviation and Transportation Security Act of 2001 (cited as purported authority for the Notices), requires that all of the following be considered by the agency in any rulemaking:

(1) “whether the costs of the regulation are excessive in relation to the enhancement of security the regulation will provide”, 49 U.S.C. 114(1)(3), which should include consideration of the costs to airlines, CRS’s, travel agencies (which are primarily small businesses), tour operators, hotels and motels (which are mostly owned by small independent franchisees) and other travel companies, including the costs resulting from the incompatibility of the proposals with other countries' legal requirements for operating in, or accepting personal data from, those countries, especially in the European Union.

(2) “whether [the] proposed regulation is consistent with ... protecting passengers”, 49 U.S.C. 44903(b)(2)(A), which should include consideration of protection of passengers against identity theft, stalking, and privacy invasion.

(3) “whether [the] proposed regulation is consistent with ... the public interest in promoting air transportation”, 49 U.S.C. 44903(b)(2)(B), which should include the possible consequences of cessation of air services and CRS connectivity between the USA and countries with whose data protection laws the proposal is incompatible, including the European Union.

(4) “the extent to which [the] proposed regulation will carry out this section”, 49 U.S.C. 44903(b)(2)(B), i.e. the extent, if any, to which the proposed regulation will actually be effective to “protect passengers and property”.

There is no evidence in the Notices that the TSA has considered any of these factors, as required by statute.

B. The Regulatory Flexibility Act of 1980 (P. L. 96-354), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (PL. 104-121), provides at 5 U.S.C. 603 that in any rulemaking with a significant impact on a substantial number of small businesses:

“... the agency shall prepare and make available for public

comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the *Federal Register* at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration."

As discussed further below, the incompatibility of the proposed Information Collection request with the European Union Code of Conduct for Computerized Reservation Systems (CRS's) and the EU Data Protection Directive will require CRS's to choose to do business in, accept reservations from, and transmit reservations to, either the USA, or the EU, but not both.

The resulting loss of trans-Atlantic CRS connectivity, messaging, and reservations capability will have a significant effect on a substantial number of small travel businesses in the USA. Among these will be tens of thousands of small travel agencies that will no longer be able to use the CRS's to which they subscribe make reservations for their clients for flights on airlines in the EU, or with railroads, hotels, car rental companies, tour operators, cruise lines, or other travel services providers in the EU. Also among the affected small businesses will be the owners of hotels and motels (including small independent franchisees) who will be unable to accept reservations from EU customers through the CRS's.

Before it can issue the proposed order, the TSA must conduct, publish, and accept comments on, an analysis of the impact of the proposed order on small entities.

C. The Unfunded Mandates Reform Act of 1995 (PL. 104-4) requires in Section 202 that:

"...before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure ... by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement containing - ... (2) a qualitative and quantitative assessment of the anticipated

costs and benefits of the Federal mandate, including the costs and benefits to State, local, and tribal governments or the private sector."

And Section 205(a) further requires that:

"...before promulgating any rule for which a written statement is required under section 202, the agency shall identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule, for – ...(2) the private sector, in the case of a rule containing a Federal private sector mandate."

The TSA has published no such statement, has conducted no public consideration of alternatives, and has made no apparent effort to select the least costly, most effective, or least burdensome alternative.

The applicability of these provisions to these Notices depends on whether the proposed order "includes any Federal mandate that may result in the expenditure ... by the private sector, of \$100,000,000 or more ... in any 1 year."

As discussed previously, and as discussed in further detail below, the proposed order to USA-based airlines to turn over to PNR data for past flights, without the possibility of providing notice to data subjects (including passengers, travel agents, airline staff, persons making reservations or paying for tickets for others, and other categories of individuals identified in PNR's) prior to the collection of the data already in PNR's, or withholding from disclosure data concerning persons not giving their consent, is forbidden by the European Union Data Protection Directive and, to the extent such data is stored in CRS's, by the EU Code of Conduct for CRS's.

Airlines and CRS's that comply with the proposed order will be required to cease doing business, operating flights, providing airlines with PNR database hosting services, providing travel agencies with CRS reservation connectivity, and accepting reservations from or transmitting reservations to, either the USA or the EU. They will not be able to continue to operate in both jurisdictions, since the proposed order is incompatible with existing EU laws and regulatory mandates.

The cost to the private sector in the USA of the discontinuation of USA-EU airline service, which is mandated implicitly by the proposed order, would clearly exceed US\$100 million per year. It would most likely be measured in billions of dollars per year, but might exceed US\$10 billion per year.

The proposals are therefor subject to the requirements of Sections 202 and 205 of the Unfunded Mandates Reform Act of 1995, and the TSA must conduct and publish the analysis required by those sections before the proposed order can lawfully be issued.

8. Before issuing the proposed order, the TSA must, under the Paperwork Reduction Act, either conduct an evaluation of the proposed Information Collection Request in accordance with 44 U.S.C. 3506 (which the TSA has not done), or obtain the certification of the Director of the Office of Management and Budget (OMB) that the proposed order satisfies the criteria for emergency clearance under 44 U.S.C. 3507(j)(1). The TSA has requested such a certification and emergency clearance.

The statutory criteria for an emergency information collection request and clearance are as follows:

"(j)(1) The agency head may request the Director to authorize a collection of information, if an agency head determines that--

(A) a collection of information--

(i) is needed prior to the expiration of time periods established under this subchapter; and

(ii) is essential to the mission of the agency; and

(B) the agency cannot reasonably comply with the provisions of this subchapter because--

(i) public harm is reasonably likely to result if normal clearance procedures are followed;

(ii) an unanticipated event has occurred; or

(iii) the use of normal clearance procedures is reasonably likely to prevent or disrupt the

collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed."

The TSA has failed even to assert any of the three requisite criteria -- (A)(i), A(ii), and at least one of the alternative criteria (B)(i), (B)(ii), or (B)(iii). For that reason alone, the emergency clearance request should be denied by the Director of the OMB for failure to state a valid basis for the request.

With respect to section (A)(i), there is no basis for a belief that the next round of testing of a program that has been under development for more than three years, and the Notices for which were not published until almost exactly a year after the completion of the last round of public comment on the predecessor "CAPPS-II" proposal on 30 September 2003, could be "needed prior to the expiration of time periods" for normal policy review.

Section (A)(ii) requires a showing that the information collection is not merely relevant or useful (both of which are in considerable doubt, given that, since there were no acts of air terrorism on flights in the USA in June 2004, the PNR's at issue contain no data on people who would have, if allowed to fly, committed acts of air terrorism), but that it is "essential", a very high threshold for which there is no evidence whatsoever.

Section (B)(ii) is clearly inapplicable, since there have been no unforeseen events related to these Notices. So is section (B)(iii), since the data has already been collected by the airlines and CRS's, is in no danger of being destroyed, and can with equal ease be ordered turned over at a later date.

That leaves Section (B)(i) as the only possible basis for the emergency clearance request. But the TSA itself claims that it will use the data only for testing, not for actual "Fly/No-Fly" decisions. So it is difficult to see how the TSA would claim that "public harm is reasonably likely to if normal clearance procedures are followed" (not, as already noted, that the TSA has even tried to make such a claim).

For all these reasons, the emergency information collection clearance request should be denied by the Director of the OMB.

9. In order to comply with the proposed orders, airlines and the Computerized Reservation Systems (CRS's) that host their PNR

databases would have to cease operating flights to or from, doing business in, providing PNR hosting services or travel agency connectivity services to, or accepting reservations from, the European Union (or, if based in the European Union, would have to cease providing such services to, or sending personal data to, the USA) at a cost of billions of dollars a year.

Almost all major airlines outsource hosting of their PNR databases to one of the four major Computerized Reservation Systems (CRS's). The collaboration of these CRS's would be required in order for airlines to comply with the proposed order.

As mentioned previously, the European Union Code of Conduct for CRS's, Council Regulation (EEC) No 2299/89 of 24 July 1989 [Official Journal L 220 of 29.07.1989], as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 [Official Journal L 278 of 11.11.1993] and Council Regulation (EC) No 323/1999 of 8 February 1999 [Official Journal L 40 of 13.02.1999], requires in Article 6 (d) that:

"personal information concerning a consumer and generated by a travel agent shall be made available to others not involved in the transaction only with the consent of the consumer."

There is no exception to this consent requirement for data made available to government agencies or for "screening" purposes. Data can be made available to government agencies and for these purposes, but only with the consent of the consumer.

The Notices and the proposed Information Collection Request by the TSA are carefully structured to preclude any possibility of consent: the data concerns flights that have already been completed (or that were scheduled to have been completed) in June of 2004. Since PNR's can typically be created as much as 11-12 months prior to the scheduled flight date (and in some cases more than a year in advance, such as when additional flights further in the future are added to a PNR that was created many months earlier), the issue for the European Commission and for the CRS's, in enforcing and in attempting to comply with the Code of Conduct for CRS's, is whether people making reservations from the EU as early as in *June 2003* (or perhaps earlier) for itineraries including flights within the USA in June 2004, consented to the disclosure of their PNR data to the TSA. Clearly, they did not.

As a result, it will be impossible for CRS's based in the USA to comply with the proposed order and continue to do business in or accept reservations from the EU.

Amadeus, the one major CRS based in the EU, could not legally comply with the proposed order, or provide its airline hosting customers (including, among others, Continental Airlines in the USA) with the data they would need to comply. If the proposed order is issued, Amadeus would be required by the law in its home jurisdiction to stop providing data to Continental, and Continental would have to find a new PNR hosting provider.

The other three major CRS's (Sabre, Worldspan, and Galileo) are based in the USA, and could be forced (if the proposed order is deemed valid) to provide archival data to airlines even if the CRS's know that it will be turned over to the TSA without the data subjects' consent. But if they do so, those CRS's would have to stop doing business in the EU, including ceasing to provide PNR hosting services to EU airlines, or reservation connectivity to travel agencies in the EU.

The result would be billions of dollars in lost airline business and disruption to airlines' and travel agencies' business. Since CRS's are the primary infrastructure of travel industry communications -- used, for example, by travel agents in the USA make reservations for hotels in the EU, and vice versa -- the effects would be felt throughout the travel industry.

The proposed order would also impose mandates on airlines and travel agencies contrary to their obligations under the EU Data Protection Directive and EU national data protection laws. The USA negotiated an agreement with the European Commission (currently under challenge by the European Parliament in the European Court of Justice) to permit use of data about passengers for testing of CAPPS-II, but it doesn't extend to Secure Flight (the TSA has expressly claimed that "Secure flight" is not the same as CAPPS-II) or to data subjects other than passengers.

The USA-EU agreement and the DHS undertakings apply exclusively to data (1) concerning international flights and (2) concerning passengers. Data collected in the EU for reservations on domestic flights within the USA, data on flights within the EU, or data on flights elsewhere in the world are included only through a clause in the undertakings permitting their use for testing (not deployment) of CAPPS-II . There is nor mention

whatsoever of any other similar, related, or successor program(s) to CAPPs-II. Data in PNR's concerning categories of individuals other than passengers, as detailed earlier in these comments, is clearly protected by EU data protection law against nonconsensual disclosure. And, as also detailed earlier, the order is so structured as to preclude any possibility of consent (especially as of June 2003, when the PNR's at issue began to be created).

Unless a new USA-EU agreement is concluded before the effective date of the proposed order, airlines in the USA that comply with the order will be unable legally to operate in, or accept reservations from, the EU. That consequence -- cessation of USA-EU flights by USA-based airlines -- would increase the cost burden of the proposed information collection requirement into the tens of billions of dollars.

The proposed order would not be limited to PNR data concerning flights within the USA: it would also include data on domestic flights within other countries (including EU members) and international flights between other countries (including flights between EU members, and flights between EU members and non-members other than the USA).

The proposed order would require under paragraph 18 that:

"The aircraft operator must exclude the following from the set of PNR's submitted... (B) Any flight segment from a PNR that represents one or more flight segments to or from the United States."

But bizarrely, the proposed order -- while excluding data concerning flights *to or from* the USA -- would still include flight entirely outside the USA, either between or within other countries! I can imagine no legitimate rationale for structuring the proposed order in this fashion. I take this as an indication that the order was drafted negligently, by people who (1) are so USA-centric that they never thought about flights entirely outside the USA, (2) have no familiarity with airline reservation procedures and PNR data content, and/or (3) are more interested in surveillance and data aggregation than in orders narrowly crafted to serve legitimate safety purposes.

Consider, for example, someone who travelled from Lyon, France, to Rochester, New York (typically by way of Paris and New York City, in the absence of direct flights); travelled by

surface transport from Rochester to Toronto, and returned to Lyon from Toronto (by way of Montréal and Paris).

Rather than obtaining only PNR data related to the one domestic flight within the USA (New York City to Rochester), the proposed order would require the airline(s) to turn over all PNR data pertaining to the domestic flights within France (Lyon-Paris and Paris-Lyon), the domestic flight within Canada (Toronto-Montréal), and the international flight between Canada and France (Montréal-Paris).

I work as a travel agent at Airtreks.com, the leading travel agency in the USA specializing in around-the-world and other multi-stop tickets. A typical PNR we create for a client's trip around the world, originating and terminating in the USA, might contain ten to twenty flights: one or two within the USA to get to or from international gateways at the beginning or end of the trip, one international flight from the USA and one back to the USA, and the remaining majority of the flights within and between other countries outside the USA. Under the proposed order, the TSA would obtain the data on all those flights outside the USA, if the PNR included a flight within the USA in June 2004.

If the TSA does not think it needs data concerning international flights to or from the USA, it has no conceivable legitimate need for data concerning flights within and between other countries. This is perhaps the single clearest indication in the proposed order and Notices of the TSA's failure to minimize the burden of information collection.

Even if the proposed order were narrowed to demand only information concerning domestic flights within the USA, it would still include information originally collected by airlines, travel agents, and tour operators in the EU, and subject to EU data protection laws. It is impossible to determine, from any internal evidence in an existing PNR, whether it contains information originally collected in the EU. And the order does not permit the exclusion of data collected and protected in the EU, even if that were technically possible. So the data turned over under the proposal inevitably will include information about EU citizens (passengers, travel agents, airline staff, etc.), originally collected in the EU, which it is forbidden by EU law to turn over without notice to, and consent of, the data subjects. Transfer of such data pursuant to the proposed order could result in sanctions for the airlines including a

prohibition on continued operations in the EU – a consequence which must be considered in evaluating these proposals.

Conclusions: For all of the reasons stated in the comments above, I request (1) that the proposed system of records not be created, and the system of records notice be formally withdrawn by the TSA or DHS, (2) that the proposed information collection order not be issued, and the notice of emergency clearance request be formally withdrawn by the TSA or DHS, (3) that the request for an emergency certification and clearance be denied by the OMB, and (4) that, unless the proposals are immediately and publicly withdrawn, immediate action be taken to prevent the proposed criminal violations of the Privacy Act.

Respectfully submitted,

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San Francisco, CA, USA
25 October 2004

This document is also available on the Web at:
<http://hasbrouck.org/articles/Hasbrouck_TSA_OMB_comments-25OCT2004.pdf>

Comments on prior versions of these proposals and notices:

<http://hasbrouck.org/articles/Hasbrouck_DHS_comments-30SEP2003.pdf>

<http://hasbrouck.org/articles/Hasbrouck_TSA_comments-01AUG2003.html>

<http://hasbrouck.org/articles/Hasbrouck_DOT_comments-23FEB2003.pdf>

Additional background information and references:

<<http://hasbrouck.org/articles/travelprivacy.html>>

<<http://hasbrouck.org/articles/CAPPS-II.html>>

<<http://hasbrouck.org/articles/PNR.html>>

<<http://hasbrouck.org/cfp2003>>

<http://hasbrouck.org/blog/archives/cat_privacy_and_travel.html>

About the Author:

I am a travel expert and consultant, investigative travel journalist and consumer advocate for travellers, author of two books of consumer advice for travellers on issues including privacy and travel data, author and maintainer since 1991 of the Usenet FAQ on international airfares, author/publisher of a Web site of consumer advice and information for travellers, staff employee of an Internet travel agency specializing exclusively in international air travel, and the leading privacy advocate in the USA on travel issues, particularly those related to PNR data.

About these Comments:

These comments are submitted strictly on my own behalf, and as an independent investigative travel journalist and a consumer and privacy advocate for travellers. They do not necessarily represent the opinions or beliefs of my publisher, my employers, or any of my consulting clients.