

by religious and nonprofit organizations (as defined in section 501(c)(3) of the Internal Revenue Code of 1954) for the purpose of soliciting funds or distributing materials.

(b) In promulgating regulations under this section the Administrator shall consider requiring any individual or organization described in subsection (a) to submit an application for a permit to engage in the soliciting of funds or the distribution of materials. In considering such an application the Administrator may require that—

(1) a responsible individual representative of the applicant shall be designated to represent the organization;

(2) each individual participating in any solicitation or distribution will display a proper identification approved by the Administrator;

(3) the number of individuals engaged in any solicitation or distribution at any one time shall not exceed a reasonable number, in keeping with the need for free movement in and operation of the airports as provided for by the permit;

(4) the solicitation or distribution be confined to limited areas and times; and  
(5) no individual or organization which holds a permit under this section shall be permitted to—

(A) use sound amplification or display signs (other than signs approved by the Administrator);

(B) intentionally interfere with users of the airport;

(C) engage in the use of indecent or obscene remarks or conduct; or

(D) engage in the use of loud, threatening, or abusive language intended to coerce, intimidate or disturb the peace.

(c)(1) The Administrator shall consider requiring that a copy of a permit (if such is required) be conspicuously posted in the area in which any solicitation or distribution is permitted.

(2) The Administrator shall consider whether revocation of approval for any permit if required and approved under this section should occur for any violation of any rule or regulation promulgated hereunder.

(d) Regulations intended to be promulgated under this section shall be submitted to Congress within 90 days after the date of enactment of this Act.

In recent years it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities. Washington National and Dulles International Airports are no exception to this trend. The airports are owned by the United States Government and large portions of the airport buildings were designed for and are open to the general public. Last year more than 18 million passengers passed through the terminal buildings on their way to and from air transportation. There is a considerable amount of social and commercial interchange in the terminals and, in many respects, the terminals are like

any other public thoroughfare where there is no question that the Constitutional guarantees of freedom of speech, the exercise of religion and the right to peaceable assembly apply. These activities enjoy the protection of the First Amendment, and they may not be regulated by airport authorities in the same manner as commercial activity.

However, the absence of regulation has led to situations where those soliciting money or leafletting have caused or contributed to congestion in the terminals and obstruction of travelers. At National Airport, and at Dulles Airport during the peak hours of operation, the airport terminals, sidewalks and passageways are extremely congested. At National the design capacity of the terminal is greatly exceeded on a daily basis. When congestion occurs at or near points where the free flow of traffic is essential to the airport's operation, the congestion causes inconvenience to the traveling public and an interference with efficient airport operation.

Currently, there is no regulation that even limits the number of solicitors or leafletters at the ticket counters, baggage claim areas and other areas where travelers must attend to the business which brought them to the airport. Nor is there any prohibition on the places where soliciting or leafletting activity could occur, such as near the top of staircases or escalators, at restroom entrances, doorways and other areas where such activity causes unsafe conditions as well as inefficient airport operation. Furthermore, there is no regulation which prohibits solicitation or leafletting from travelers who are in line or otherwise conducting their business at the airport. Finally, there is no requirement that solicitors identify themselves to the airport officials and to the public or that he or she indicate that he/she has the authority to represent the cause for which money is sought.

Another disturbing aspect of soliciting funds in the terminals has become apparent to FAA. Numerous written complaints have been received by the FAA concerning incidents in which airport patrons or tenants have allegedly been subjected to fraud, harassment, verbal abuse, intimidation and embarrassment. People standing in line or otherwise waiting to conduct their business at the airport find this activity to be particularly objectionable because they cannot avoid the solicitor by choosing to forego their purpose for being at the airport. Therefore, they may constitute a captive audience to behavior they find objectionable. On the other hand, there have been complaints

*See corrections*

#### 14 CFR Part 159

[Docket No. 20200; Amdt. 159-16]

#### Solicitation and Leafletting Procedures at National and Dulles International Airports

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

**SUMMARY:** This amendment regulates solicitation of funds and distribution of literature by non-profit organizations at National and Dulles airports. The amendment promotes the efficient use of these facilities and the security of patrons using the terminals without infringing upon the rights of individuals who choose to use the airport for constitutionally protected activity. Title V of Public Law 96-193 enacted February 18, 1980 directed F.A.A. to promulgate regulations to control solicitation activity at Washington National and Dulles Airports.

**EFFECTIVE DATE:** July 28, 1980.

**FOR FURTHER INFORMATION CONTACT:** Edward S. Faggen, Legal Counsel, AMA-7, Washington National Airport, Hangar 9, Washington, D.C. 20001, telephone: (703) 557-8123.

#### SUPPLEMENTARY INFORMATION:

##### Discussion of the Final Rule

##### A. Background

By a recent legislative enactment, Congress has directed FAA to promulgate regulations to control solicitation activity at Washington National and Dulles Airports. Title V of Pub. L. 96-193 enacted February 18, 1980 provides:

Section 501(a) The Administrator of the Federal Aviation Administration (hereinafter referred to as the "Administrator") shall, within 90 days after the date of enactment of this Act, promulgate regulations for airports operated by the Administration to regulate access to public areas by individuals or

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to FAA by representatives of groups peaceably soliciting funds. They claim to have been harassed by employees or others using the airport. There have been several instances of assault or alleged assault and there have been complaints against alleged deceptive practices of solicitors who intentionally conceal their organization's identity or fail to make change to a contributor promptly or accurately.

As proprietor of the Airport, FAA has the authority to prescribe rules of conduct to protect airport patrons and efficient operations of the airport. The FAA's authority to operate National and Dulles Airports is broad. Congress has charged FAA with "the control over and the responsibility for, the care, operation, maintenance, improvement and protection of the airport," together with the powers to make and amend rules and regulations as are necessary to the proper exercise of this control and responsibility (54 Stat. 688; 64 Stat. 771). The FAA has, by regulation, exercised control over all commercial activity that occurs at the Metropolitan Washington Airports. No business is conducted, including advertising, or space leased except upon the terms and conditions prescribed by the Director of Metropolitan Washington Airports (14 CFR 159.91(a)). Usually, these terms and conditions are set forth in a contractual form that specifically describes the business to be allowed, its location and duration. The number of such concessions or other businesses and the nature of the business are controlled by the FAA, Director of Metropolitan Washington Airports, to meet the needs of the airports and the traveling public.

The FAA also has the statutory authority to police the airports to protect life and property (81 Stat. 94; 64 Stat. 772) Under this authority, FAA has enacted regulatory "rules of conduct" (14 CFR 159.71 to 159.111) and has deployed a police force and fire department. Its police powers are no less than that of a municipality if such municipality were the airport proprietor. While on the airport, the public looks only to the Federal Government, acting through the FAA, for protection of its health and welfare interests.

Although the FAA has possessed the authority, its regulations of "conduct" on the airport have not been addressed in any detail to the solicitation of funds or the distribution of literature on the airport by individuals or organizations acting in a noncommercial capacity. The number of solicitors on the airport, the locations within the terminals, and the manner in which they solicit money from the traveling public have not been

regulated by the FAA. The existing regulation, 14 CFR 159.91(b) merely proscribes the "solicitation of alms" without the permission of the Airport Manager. This is deemed inadequate to meet the standards of the First Amendment.

In view of the congestion and other operational problems, the repeated incidents in the terminals, the legislative expression of concern and the mandate to FAA to regulate the access to public areas by individuals or organizations for the purpose of soliciting funds or distributing literature, FAA has decided to establish this regulation. Under the regulation a reasonable limitation is placed on the time, place and manner of soliciting and leafletting in the National and Dulles Airport Terminals.

FAA recognizes that the soliciting of funds for religious purposes and the distribution of literature are protected under the First Amendment of the Constitution. In the area of First Amendment freedoms, including the constitutionally protected forms of solicitation, the touchstone of regulation must be precision. Regulations will not offend the Constitution if they regulate only the time, place and manner of expression, are narrowly drawn to protect only a compelling governmental interest, and are not subject to discretionary administration by officials. Any procedure which allows the airport officials wide, unbounded discretion in granting or denying permits is constitutionally questionable, because it would permit the airport to base its determination on the content of the ideas sought to be expressed.

FAA has no interest in regulating the ideas disseminated at the airport, and has no intention of regulating based on the content of the message or the cause that a solicitor supports. Also FAA has no intention of regulating in such a way as to relegate solicitors to a corner or to areas or to times of day that would deny them access to the great majority of airport users.

FAA is concerned, first, that the number of solicitors or distributors of literature not exceed a number which would aggravate existing congestion, and that such activity not be conducted at points in the terminal that are critical to airport efficiency and safety or within areas leased for the quiet enjoyment of an airport tenant. Second, FAA is concerned that those who solicit money or distribute literature in the terminal not do so for commercial purposes. It is essential to proper airport administration and operation that business activities be conducted on the airports only with the permission of the airport managers. Third, FAA expects

those who solicit money from the public for non-commercial purposes to identify themselves and their cause, not for approval by the FAA but rather to provide the public this minimal assurance that it will know who is soliciting and why. Fourth, as the entity responsible for public health and welfare on the airports, FAA expects solicitors not to engage in particularly offensive, deceptive, or otherwise egregious activity. These are the legitimate, compelling proprietary and governmental interests that FAA seeks to protect by regulation. The FAA intends to impose only the least restrictive regulations on constitutionally protected activities that is necessary to protect these interests.

With this as its objective, FAA has identified those points on the airport that are critical to efficient and safe operation. These are the ticket counters, baggage claim areas, departure check in counters, departure gate lounge, anti-hijack security screening points, restroom facilities, staircases, escalators, elevators, doorways or entrance ways, and points where motor vehicles load or unload occupants and baggage. This regulation prohibits solicitation and distribution of literature within ten feet of these precisely identifiable points and from the people waiting in line to conduct business at these points. Ten feet is a readily identifiable standard, and provides the maximum freedom of movement to leafletors and solicitors consistent with the rights of others using the airports. This regulation also prohibits leafletting and solicitation in premises leased for the exclusive use of a concessionaire.

This leaves large portions of the public lobbies and lounges, through which virtually all users of the airport pass, available to solicitors and leafletors. FAA commissioned a study of the pedestrian traffic flow in the terminals to identify those areas that are susceptible to congestion if soliciting and leafletting occur or occur in too great a magnitude. On the basis of this study FAA identified the areas in which a certain level of soliciting and leafletting will not cause unacceptable congestion or an unsafe condition, and the maximum number of persons conducting these activities that should be allowed in each of the identified areas. Establishment of area restrictions is well within the airport proprietor's rights if there is a demonstrable and substantial relationship between the restriction and the valid interest of promoting efficient and safe use of the facilities.

The study, which was conducted by an independent consultant, used as data the layout of the terminals and several traffic counts conducted in early March 1980, a period when air traffic was well below peak levels. The analysis of the data was accomplished in two stages. First, standard air terminal planning factors were applied to figures representing the size of terminal facilities (e.g., linear feet of ticket counter) and the mean traffic flow past each facility. The result is a distance in feet from each such facility required for minimally adequate public access to that facility. From these figures, a diagram of each major terminal area was developed, indicating areas in which solicitation could be conducted with the least disruption of public business and travel. Second, the effect of introducing various numbers of solicitors into these open areas was calculated. This analysis identified the number of solicitors who could be accommodated in each area without an unacceptable level of obstruction to the flow of terminal traffic.

The study referred to *Pedestrian Planning and Design*, by John J. Fruin, a standard reference for public walkway planning. Fruin divides pedestrian flow into six categories or levels of service, A through F. Using this scale during peak hours the level of service at National is C (15-25 square feet per person), and at Dulles is D (10-15 square feet per person). This means that there is a high probability of conflict in moving requiring frequent adjustment of speed and direction to avoid contact (C level of Service). The D level severely restricts movement and there is multiple conflicting movements. FAA will allow the highest number of solicitors without lowering the level of service to D and E.

The consultant's recommendations concerning the areas in which soliciting and leafletting should be permitted, and the number of permits to be issued for those activities, are incorporated in the proposed regulation, with one exception. The study results indicated that no solicitation should be permitted in the National Airport main terminal concourse. This is a heavily trafficked area and the area most frequently used by solicitors. In the interest of permitting some level of solicitation in this area, FAA has designated a maximum of two solicitors to be allowed in a certain portion of the area. The FAA will monitor this activity and should it present an unacceptable obstacle to traffic matters, FAA will propose to modify the regulation.

At Dulles Airport a limited number of permits (7) will be issued only between

4:00 p.m. and 8:00 p.m. each day, in view of the marked peaking characteristics of traffic at that terminal. Area and numerical restrictions are inapplicable at all other times, although the permit requirements described below will apply at all times.

Each person conducting leafletting and soliciting activity will be required to obtain and display a permit. The standards for issuing such permits shall be simple and objective. Airport officials will not have the discretion to deny a permit to those who are soliciting for non-commercial purposes or distributing literature of any non-commercial nature, except in precisely defined situations.

Permit systems that protect a legitimate governmental interest, and which are administered in accordance with narrowly drawn, precise and objective standards, are clearly allowable. The Supreme Court has stated that without doubt government "may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, the interest of public safety, peace, comfort or convenience." (*Cantwell v. Connecticut*, 310 U.S. 296, 306, 1940).

Under the proposal a permit will be issued by Airport Management immediately upon completion of the application provided that all available permits have not been distributed to other applicants. Permits will be issued on a first come/first serve basis. Permits will be good for two days to assure an adequate turnover in the permits while not limiting the holder to what may be an unduly brief authorization. Daily permits are administratively burdensome to the Airport personnel. Conversely, issuing permits with overly long duration may result in perpetuating certain groups or solicitors and unreasonably excluding others.

An application for a permit to distribute written or printed matter without charge or without otherwise soliciting funds, will require only the applicant's oral request for a leafletting permit.

An application for a permit to solicit contributions will require the applicant's identity, a statement that the applicant's activity is being conducted for non-commercial purposes, and certain other information intended to provide minimal public protection from fraudulent solicitation without infringing on protected activities. First, the application will require the

identification of the organization which the applicant represents, and a letter or other evidence that the applicant is authorized to represent that organization. An individual need not be a member of an organization to solicit on its behalf. Second, the application will require the name and title of the person in that organization who will bear the responsibility for the applicant's activity at the airport.

Finally, the solicitor will be required to submit a statement of the organization's status as a religious, political, or charitable or public interest organization. If the applicant claims that the organization is either religious or political in nature, a statement to that effect, and nothing more, will be required. Applicants to solicit on behalf of charitable, scientific, educational or other public interest organizations will be required to submit a statement that the Internal Revenue Service has determined the organization to be eligible for tax-exempt status under 26 U.S.C.A. Sections 501(c)(3), (c)(4) or (c)(5). Applicants for organizations which have an application for such status pending may, alternatively, submit a statement to that effect. Section 501(c)(3) addresses the tax-exempt status of religious, educational, charitable, scientific, testing for public safety, fostering of certain amateur sports competition, and prevention of cruelty to children or animals organizations. Section 501(c)(4) pertains to civic leagues, social welfare organizations, and local associations of employees. Section 501(c)(5) covers labor, agricultural, and horticultural organizations.

Regulation of charitable solicitation at the airports for the protection of the public is well within FAA's regulatory and police powers. The IRS determination of tax-exempt status is used only because it constitutes an objective determination of whether an organization is commercial or non-commercial, i.e. whether or not the organization primarily benefits a charitable or public interest which is different from that of the organization's owners and management. The determination is easy to obtain if the organization has not already done so, and is minimally restrictive. (More than 200,000 organizations qualified for Section 501(c)(3) status alone as of October 1978.) Additionally, the determination provides an objective criterion for issuance of a solicitation permit by airport officials on a ministerial, non-discretionary basis. Similar documentation is not required for religious or political organizations in

consideration of the special constitutional deference to such activities, particularly religious solicitation, and the absence of appropriate documentation for political organizations.

Alternatively, an applicant representing a charitable organization may submit a statement that the organization is registered with the Virginia Administrator of Consumer Affairs in accordance with Section 57-49, Virginia Annotated Code (1978 Cumulative Supplement), "Registration of Charitable Organizations".

### B. Comments Received

FAA received 15 comments on the NPRM (45 FR 20424). The proposal was favored by the individual air carriers who commented and by the Air Transport Association. While expressing support for the proposal, these commenters favored additional or more stringent requirements on solicitors and leafletters. It was suggested that non-commercial activity be prohibited within 15 feet, not 10 feet as proposed, from critical points at the airport and lines at these points, that the regulations clarify the rights of tenants to regulate access to those areas under their exclusive control, and that solicitors pay a space rental and clean up fees the same as any business on the airports. Individuals, presumably travelers who use the airports, commented in favor of the proposal expressing the views that solicitors are "a nuisance and an aggravation to travelers."

Comments were received from organizations who regularly solicit for money at airports and from organizations concerned about the preservation of civil liberties. Many of these comments focused on significant constitutional issues raised by the FAA's proposal. While their comments were critical of various aspects of the proposal, several commenters acknowledged that FAA drafted the NPRM with careful attention to the First Amendment rights of individuals. The comments received have been helpful and the legal issues raised by the comments have prompted further revisions to the proposal, as discussed below.

In the final rule the FAA has endeavored to be attentive to the First Amendment rights of individuals who use the airports as a forum for the expression of ideas and solicitation of funds as well as responsive to its duties as the airport proprietor.

### C. Specific Comments

*Noncommercial Activity.* The definition of non-commercial activity was criticized as vague and unprecise so as to cause individuals wishing to engage in such activity at the airports to guess whether their activity was lawful. The NPRM stated "commercial activity" means activity undertaken for profit including the sale, provision, advertisement or display of goods or services (Proposed Sec. 159.91(b)). FAA regulations have always provided that no commercial activity may take place on the airport without the approval of, and under terms and conditions prescribed by the airport manager. This is continued under the adopted rule.

As proposed in the NPRM § 159.93(b)(1) requires each person conducting "non-commercial activity" to hold a permit issued by the Airport Manager. Non-commercial activity was defined as "the following activity:

1. The distribution of printed matter to the general public, and
2. The solicitation of funds from the general public,

undertaken not for profit but for *philanthropic, religious, charitable, benevolent, humane, public interest or similar purposes.*"

No definition was provided for the *underscored* phrases. One commenter believes these phrases to be vague. FAA did not intend these phrases to be a limitation on who can conduct non-commercial activity on the airport. These phrases were used to better convey the difference between the commercial and non-commercial activity. For regulatory purposes the clearest definition of non-commercial activity, in view of the definition of commercial activity, is simply activity undertaken not for profit. This definition is adopted and the *underscored* phrases are not in the final regulation.

Another aspect of the proposed non-commercial activity definition that was criticized as constitutionally infirm is the provisions in § 159.93(a)(1):

*provided, that if written or printed matter is for sale on the airport by a commercial vendor, its sale by any person will be treated as a "commercial activity".*

This proposal was designed to protect vendors who pay for the privileges of selling printed matter at the airport from the competition by those who would sell the same printed matter, but have no overhead costs to the airport. Several commenters objected to protection of commercial facilities by imposing a restriction on the sale of religious non-commercial printed matter. Furthermore, the regulation creates a situation by

which airport concessionaires could legally prevent non-commercial distribution of printed matter merely by placing that same literature for sale in their concessions. Because of these concerns, on balance, there is not at present a sufficiently compelling interest to warrant the promulgation of this aspect of the regulation. Therefore the portion of § 159.93(a)(1) quoted above will not be adopted in the final regulation.

The portion of § 159.93(a)(1) that makes the distribution of items or material other than printed matter a commercial activity will be adopted as proposed. This is not adopted to protect concessionaires but to provide airport management with control over the sale of trinkets, candies, and other such items in the terminal. Such items have no inherent message value and their sale or distribution does present airport management with litter and space utilization problems. FAA believes that it has a legitimate and compelling proprietary interest in determining where and what kind of trafficking of goods occurs on the airport.

### Permit System

One commenter expressed as a general rule that no license or permits should be required at all for leafletting or solicitation of funds, and the mere fact that such activities may contribute to congestion of public areas is not a sufficient reason to justify such a requirement.

FAA respectfully disagrees. It has a statutory duty to maintain and operate the airports. Furthermore, FAA has the right to impose reasonable time, place and manner restrictions on the exercise of leafletting and soliciting activity in the airports if this would further a compelling governmental interest. The interests in this case, as stated in the NPRM, include a concern that the number of solicitors or distributors not exceed a number which would aggravate the already existing serious congestion at the airport. The purpose for which the terminal was built and maintained is to process and serve air travelers efficiently. FAA has studied the flow of traffic through the airport terminals. We employed traditional airport terminal planning factors, i.e., factors used to judge the efficiency of how terminal space serves the number of users. These planning factors have been used consistently for National and Dulles Airports and were not newly created for this study of passenger flow. The resulting study shows a clear need to limit the number of solicitors and leafletters to achieve minimally acceptable passenger traffic flow. FAA

knows of no better or less restrictive way to limit the number of leafletters and solicitors than by issuing permits. Additionally, the regulation was not intended for the comfort and convenience of travelers, but rather, it was needed to protect travelers against unacceptable obstruction and congestion.

Several significant concerns were raised about the process of applying for a permit. First, it was vigorously asserted that those who are distributing literature have a right to anonymity that would be violated by the application process. Indeed, the Supreme Court has recognized that right to anonymity in *Talley v. California*, 362 U.S. 60 (1960). The Court stated

"[I]dentification and fees of reprisal might deter perfectly peaceful discussions of public matters of importance particularly where door to door solicitation seeks discussions of sensitive and controversial ideas 367 U.S. at 825.

FAA believes that where no money is sought from the public, interests are served by merely requiring a permit so that the number of distributors and places of distribution may be regulated. There is, however, no compelling need for the leafletter to identify himself/herself. The permit will be marked as one for distribution, not sale, of non-commercial printed matter.

One commenter expressed concern that some applicants might freeze out other applicants for an entire week by applying for a permit to exclude others. Because the FAA was concerned about the burden on applicants to apply for a daily permit, the NPRM proposed the permit last for seven days. To prevent undue monopoly of the permits, the FAA accordingly changes the duration of the permit to two days. Because of the shorter duration, assuring a greater turnover rate, there will be protection against monopolizing permits. Furthermore, the twenty four hour waiting period to reapply is deleted, as it is no longer needed because of the greater turnover rate.

One commenter expressed disagreement with the "first come, first serve" procedure for issuing permits. The commenter stated that this procedure is too competitive. The FAA believes the "first come, first serve" rule is the fairest approach in issuing a permit. This procedure excludes any discretion on the part of FAA to pick and choose which groups or individuals will be issued a permit first.

In one important respect several commenters misunderstood the powers and remedies available to the FAA under the regulation to deny or revoke permits. A permit will be issued upon

completion of the application form. In deference to the rights protected by the constitution, there is no provision in the regulation for denial of a permit on the basis of suspected, false statements in the application. Nor is there any provision for revocation of a permit already issued, for any reason. For example, § 159.94(b), which makes it illegal to solicit under a permit issued in response to an intentionally false application, has no effect on the permit issuance process other than deterrence of false representations. In the event of a suspected violation of this provision, or of any other provision of § 159.94, the actions available to the FAA are, first, the prosecution of the individual for violation of airport regulations, violation of which is a misdemeanor or second, the seeking of a District Court injunction against further solicitations by the individual at the airports. Either alternative requires judicial review of the case initiated by the FAA, clearly assuring due process to the individual concerned.

#### *Solicitors*

Two commenters contend that FAA should not even require a solicitor who solicits on behalf of an organization to provide documentation to that effect. They believe that it would be less restrictive for the person simply to state the name of the group he or she claims to represent. We do not agree. FAA believes that organizations sending a representative to solicit on their behalf will willingly, and can reasonably be required to, document this representation with a simple letter. Such a minimal requirement is hardly burdensome. It would seem to be more, not less objectionable if FAA were to "investigate" and make its own determination of whether an individual represents an organization as claimed. FAA does not believe it is appropriate that it engage in this type of extended investigative activity.

The proposed regulation requires the name of the applicant's supervisor responsible for the applicant's activity at the airports. This is attacked as vague. FAA disagrees. The requirement simply and clearly calls for the name of someone in charge of the solicitor at the airport. However, in recognition that in some instances there may not be a supervisor, the regulation as proposed is amended to specify "if applicable". An applicant for a permit will not be denied a permit on the basis of the failure to provide this name.

#### *Charitable Causes*

Several commenters called attention to the recent Supreme Court decision in

*Village of Schaumburg v. Citizens for a Better Environment*, 48 LW 4162 (Feb. 20, 1980), in which the Supreme Court clearly recognizes that charitable solicitation is so closely intertwined with speech interests that it is within the protection of the First Amendment. This settles a question which FAA viewed as heretofore open. The statement in the preamble of the NPRM that "the solicitation of funds by individuals not associated with the free exercise of religion is not constitutionally protected" is no longer correct.

Given that charitable solicitation is afforded at least some degree of constitutional protection, FAA is presented with the question of how it may inquire into the legitimacy or non-commerciality, of an espoused charity, and whether it may require documentation that the organization is a charity before the individual is allowed to solicit funds on the airport.

In *Schaumburg*, the Supreme Court struck down a prohibition against soliciting for a charitable organization if more than 25% of the receipts of that organization are used on fund raising salaries and overhead. The Court found this standard unconstitutionally overbroad, in that it grouped legitimate charitable organizations engaged primarily in research, advocacy, or public education with those that are in fact using the charitable label as a cloak for profitmaking. The Court, however, did not foreclose any inquiry into whether an organization is a charity, and indeed noted the failure of the Village to employ more precise measures to separate one group from the other. The Court further implied that an organization's eligibility for tax exempt status under federal law could be determinative of its eligibility for preferred constitutional status in its fund raising efforts. Attainment of such tax exempt status is at least verifiable. This verification is what FAA sought to obtain in proposed 159.93(e)(E)(iii) which required a copy of an official Internal Revenue Service ruling or letter stating that the applicant's organization or its parent organization qualifies for tax exempt status under 26 U.S.C. 501(c)(3), (c)(4) or (c)(5).

FAA believes that if there is a reasonable means of verifying the representations made by a solicitor, those means should be used. Two commenters state that while a tax exempt status might be useful in determining who is a charitable group, this is a different question from whether applicants should be required to provide evidence of that status to airport officials. In view of this concern that

documentation is burdensome on the applicant, FAA has reconsidered the requirement. In lieu of documentation FAA will require only that the applicant state if his or her organization has received an IRS determination for exempt status under Section 501(c)(3), (c)(4), or (c)(5), or has an application for such status pending. No further evidence will be required. FAA may, if it chooses, make further inquiry with IRS as to the currency or accuracy of the applicant's statement.

FAA is also revising the final regulation to take into account recent legislation on the registration of charitable organizations in the State of Virginia, in which both airports are located. The State of Virginia requires that every charitable organization, except as exempted, which intends to solicit contributions within the Commonwealth, or have funds solicited on its behalf, shall, prior to any solicitation, file a registration statement with the Administrator of Consumer Affairs, VA. Code 57-49. Evidence that an organization is currently registered as a charity in Virginia will suffice as a means of verifying to FAA that the organization is a charity, for purposes of solicitation at the airports. Applicants may use either the Virginia registration or the IRS tax-exempt status at their choosing.

#### *Political Organizations*

Two commenters believe that the definition of a political organization in 159.93(c)(2)(E)(ii) is too restrictive, and would not include groups that advocate positions on matters of public concern but work for political causes unrelated to elections or legislation. FAA does not intend to be restrictive in this definition. Advocacy groups such as those protected by the *Village of Schaumburg* have been added to the definition in the final rule.

#### *Traffic Flow Study*

Several comments were critical of the traffic flow study done for the FAA by a planning consultant firm. Two commenters attacked as unconstitutional an assumption that solicitation would not be allowed in the public waiting areas or seating lounges based on a captive audience theory. FAA believes that the assumption is reasonable. Persons in the lounges of course can get up and move away to avoid a solicitor. However, FAA does not believe that there is any justification for disrupting the seating lounge by creating a situation where the air traveler has to move away from unwanted solicitation. The solicitors

have access to these persons as they enter or leave the seating lounges.

Furthermore, these seating areas are not areas where pedestrian traffic flows and therefore they are properly excluded from any calculation of the impact of non-commercial activity on such flow. Thus, even if solicitation were permitted in the seating area, that area would not have been added into the calculation of the total number of solicitors. That number was based on a level of service in the traffic flow area. Level of service is another way of describing the traffic flow in the terminal. The study applied the standard level of service descriptions used for planning public facilities, transportation facilities, shopping malls, etc. The levels of service were not arbitrarily applied to the airports as one commenter asserted. At both airports the level of service is restricted. For example, at National Airport, the study notes, the freedom to select individual walking speed and freely pass other pedestrians is restricted. Where pedestrian cross movements and reverse flows exist, there is a high probability of conflict requiring frequent adjustment. At Dulles Airport during the peak hours of the afternoon the majority of persons would have their normal walking speeds restricted and reduced due to difficulties in bypassing slower moving pedestrians and avoiding conflicts.

Analysis was then performed to determine if the addition of a number of solicitors or leafletters would further reduce these existing levels. FAA will permit the highest number of solicitors that would not result in a reduction in the present service level. The FAA does not believe that either of the present service levels at National or Dulles should be lowered to the next lowest level by increasing the number of solicitors beyond the number in the Final Rule. Such an action would not be consistent with the proper exercise of the FAA's statutory responsibilities at the Airport.

#### *Prohibitions and Penalties*

Several commenters expressed concern that the prohibition against behavior which "embarrasses" or "ridicules" airport patrons is vague and overly broad. The FAA agrees, and therefore, has omitted the words "embarrass" and "ridicule" from the NPRM section on prohibited acts. (159.94.f)

The proposed penalty provision, § 159.191(c), which provided that any person wilfully violating the solicitation regulation shall be prohibited from engaging in non-commercial activity at the airport for not more than six months,

was criticized as being an unlawful prior restraint on protected First Amendment rights. This amendment merely intended to notify violators that such restriction may be imposed. It was not intended to arrogate this authority to the FAA or airport management. Violators of any airport regulations are guilty of a misdemeanor which is punishable by up to six months in prison. In lieu of a jail sentence, the courts already possess the authority to require a convicted person to not conduct such activity on the airports. The penalty, like others, can only be imposed by a court of law after due process to the accused. Because FAA recognizes that the court already has this authority, the final rule has been modified by deleting § 159.191(c).

#### *Comments Supporting Broader Regulation of Solicitors and Leafletters*

One commenting airline company supported the proposed rule, but contended that the main terminal concourse was not large enough to accommodate even two solicitors or leafletters as proposed. The terminal traffic study used by FAA in development of the regulation also indicated that any solicitors in the main terminal would cause unacceptable interference with traffic flow. However, FAA will continue to allow two solicitors in this area in the interest of accommodating First Amendment activities to the maximum extent consistent with the terminal's function. The FAA will monitor this activity and should it present an unacceptable obstacle to traffic patterns, FAA is prepared to modify the regulation.

Another commenting airline company recommended that only one solicitor be permitted in each terminal complex. FAA has, however, followed the recommendations of its passenger study on this point, and permitted more solicitors where indicated. The commenter further recommended that soliciting organizations be required to lease space, as a business would be required to do, and to publish income and expenditure statements. While FAA can appreciate the concern of airport businesses that solicitors can use the airports without cost for fund-raising purposes, FAA recognizes that it is the solicitor's right to do so. On the second point, any benefits which would be realized by a financial disclosure requirement are already obtained, to the extent necessary, by reference to the IRS determination and Virginia Consumer Affairs registration. Therefore no such disclosure requirement has been included in the final rule.

The Air Transport Association of America (ATA), of which 16 incumbent

carriers at the airports are members, generally supported the proposed regulations as directly related to the promotion of safety and the reduction of burdens for air travelers. ATA recommended several amendments to the proposed rule including, first, an increase in the minimum distance specified in Section 159.94(d) from 10 feet to 15 feet. However, maintaining a 10 foot distance from the critical points on the airport and persons in line at these points is sufficient to prevent the interference with the operation of these areas. The 10 foot distance is also not unduly restrictive on the solicitors and is retained in the final rule. ATA also recommended that applicants for leafletting permits be required to provide the same information as for solicitation permits. For reasons discussed above, however, FAA has deleted all information requirements for leafletters.

ATA further requested that § 159.94(d)(8) be amended to add "or other building tenants" to the prohibition on solicitation within 10 feet of "Premises leased for the exclusive use of a concessionaire". FAA is sensitive to the possible interference with normal airport business caused by solicitation. However, other restrictions set forth in the same section would appear to address this concern adequately, particularly the limitations on solicitation near ticket counters, baggage claims areas, departure gate check-in counters and lounges, and doorways. ATA expressed a related concern which FAA believes legitimate: the possibility that the regulations, which delineate rights to as well as limitations on solicitations, might be construed to affect the rights of existing airport lessees. FAA has therefore included in the final rule a provision which preserves the present rights of such lessees in areas under their exclusive control.

Two final ATA recommendations were not incorporated in the final rule. First, ATA proposed that permits for Dulles be limited continuously as at National, rather than at specific hours. FAA believes the lack of congestion at Dulles during off-peak hours precludes the necessity for limiting the number of solicitors at all times. Second, ATA recommends that FAA retain the authority to impose a total ban on solicitation during heavy traffic or emergency periods, such as Thanksgiving and Christmas holidays, or heavy snow condition. FAA does not believe that this action is necessary in light of the general constitutional protection of peak-hour solicitation,

when access to the public is most effective. In genuine emergency situations FAA is confident that its existing police powers are sufficient to take all actions reasonably necessary.

#### The Final Rule

The Federal Aviation Administration hereby amends Subpart D, "Rules of Conduct," of Part 159 of the Federal Aviation Regulations (14 CFR Part 159) as follows:

1. By amending § 159.91, "Business and Commercial Activity," by deleting the heading and the entire section consisting of paragraphs (a), (b) and (c) and substituting for them the following:

##### § 159.91 Commercial activity.

(a) No person may engage in any commercial activity on the Airport without the approval of, and under terms and conditions prescribed by, the Airport Manager.

(b) For the purpose of this section "commercial activity" means any activity undertaken for profit including the sale, provision, advertisement or display of goods or services."

2. By adding a new § 159.93 to read as follows:

##### § 159.93 Certain non-commercial activities.

(a) This section applies to the following activities undertaken not for profit but for non-commercial purpose (hereinafter referred to as "non-commercial" activities):

(1) The distribution of any written or printed matter to the general public including distribution for the conduct of surveys and petitions. The distribution of items or material other than printed material will be treated as a "commercial activity" under this Part.

(2) The solicitation of funds from the general public whether or not in connection with the distribution of written or printed matter.

(3) The sale of written or printed matter by persons who have identified themselves as religious solicitors pursuant to paragraph (c)(2)(e)(i) of this section. All other sales of any material, items, or services will be treated as a "commercial activity" under this Part.

(b) Each person conducting any non-commercial activity must hold a valid permit issued by the Airport Manager and conduct the activity in conformity with applicable laws, regulations and the terms of the permit. Each permit shall describe the activity authorized and the area in which it may be conducted.

(c) *Procedure:* Unless by prior application all available permits have

been granted, applications will be processed as follows:

(1) Each person who seeks to distribute written or printed matter without soliciting funds shall immediately be given a single permit for leafletting for non-commercial purposes upon his request.

(2) Each person who seeks to solicit contributions or sell or distribute printed matter, either in connection with religious expression or as representative of a non-commercial organization, shall immediately be given a single permit upon his submission of an application, signed by the applicant, containing the following:

(i) The applicant's name, address and telephone number;

(ii) If the applicant purports to represent an organization, the name, address and telephone number of the organization, and a letter or other documentation that the applicant has authority to represent that organization.

(iii) The name and title of the person in the organization who will have supervision of and responsibility for the activity at the airport, if applicable;

(iv) A statement that the sale of printed matter and/or the solicitation of funds is for non-commercial purposes; and

(v) One of the following:

(A) A Statement signed by the applicant that the applicant represents and will be soliciting funds for the sole benefit of a religion or religious group;

(B) A statement signed by the applicant that the applicant represents and will be soliciting funds for the sole benefit of a political organization the primary function of which is to influence the nomination, election, or appointment of one or more individuals to Federal, state or local public office; to influence Federal, state or local legislation; or to advocate issues or causes to the public.

(C) A statement signed by the applicant that the applicant's organization has received an official Internal Revenue Service (IRS) ruling or letter of determination stating that the organization or its parent organization qualifies for tax-exempt status under 26 U.S.C. Section 501(c)(3), (c)(4), or (c)(5).

(D) A statement signed by the applicant that the applicant's organization has applied to the IRS for a determination of tax-exempt status under 26 U.S.C. 501(c)(3), (c)(4), or (c)(5), and that the IRS has not yet issued a final administrative ruling or determination on such status; or

(E) A statement signed by the applicant that the applicant's organization has on file with the Virginia Administrator of Consumer Affairs a current registration statement.

in accordance with the Virginia Annotated Code, Section 57-49 (1978 Cumulative Supplement), "Registration of Charitable Organizations".

(d) Failure to submit the information required by subsection (c) shall result in denial of a solicitation permit. Upon request, for a leafletting permit, or upon submission of a completed signed application, for a solicitation permit, a permit shall be issued unless all available permits have been issued to prior applicants.

(e) Applications for permits must be submitted to the Operations Office of the airport concerned. Permits will be granted on a "first come, first served" basis. The area will be granted on a "first come, first choice" basis. The permits are not transferable except among individuals who have completed and submitted applications for the same permit.

(f) *Duration.* Each permit shall authorize the holder to conduct non-commercial activities for a period of 48 hours. Permits shall not be extended or renewed. After the expiration of the permit a new leafletting or solicitation permit may be issued to the former permit holder upon request or submission of a new application respectively. In such a case, applicants may be permitted to incorporate by reference any required documentation led with a previous application.

(g) *Areas.* Each permit shall specify the area in which the non-commercial activity may be conducted by the permit holder. Permits shall be issued for the following areas up to the maximum number indicated:

- (1) Washington National Airport:
- (i) The Northwest/Trans World Airlines lobby (2).
  - (ii) The American Airlines lobby (1).
  - (iii) The main concourse and balcony (2).
  - (iv) The north terminal (2).
  - (v) The sidewalk in front of the Piedmont Aviation Terminal (1).
- (2) Dulles International Airport between 4 p.m. and 8 p.m.
- (i) upper level main concourse south of ticketing area (4).
  - (ii) lower level south concourse (1).
  - (iii) lower level east (1).
  - (iv) lower level west (1).

The areas are on display on a floor plan at the Operations Office of each Airport.

(h) Nothing in this Part shall be construed as impairing or expanding any right which an airport lessee may otherwise have, by virtue of its leasehold interest in airport premises, to regulate access to those areas under its leasehold control.

3. By adding new § 159.94 to read as follows:

**§ 159.94 Prohibited conduct relating to non-commercial Activity.**

No person may conduct non-commercial activity:

(a) Without a permit or with a permit that has expired.

(b) With a permit issued in response to an intentionally false application.

(c) With a permit outside the area designated on the permit.

(d) Within 10 feet of the following: (1) A ticket counter, (2) A baggage claim facility, (3) A departure gate check-in counter, (4) A departure gate lounge, (5) An anti-hijack security screening point, (6) Premises leased for the exclusive use of a concessionaire, (7) Restroom facilities, (8) A stair, escalator or elevator, (9) A doorway or entrance way, (10) A motor vehicle with embarking or disembarking passengers, (11) A public service information counter, (12) Persons waiting in line at any of the above listed areas.

(e) If that person is selling written or printed matter or soliciting funds, without wearing or displaying, in a conspicuous manner, the name of the organization that the person represents.

(f) By use of threatening gestures, or by language directed at another person in a manner intended to harass that other person.

(g) By intentionally touching or making physical contact with another person unless that other person has consented to such physical contact.

(h) By repeatedly attempting to distribute written or printed matter to, or to solicit funds from, another person when that other person has indicated to the solicitor that he or she does not wish to accept any matter or to make a donation.

(i) By use of a loudspeaker, sound or voice amplifying apparatus without the permission of the Airport Manager.

(j) By setting up a table, counter or stand without the permission of the Airport Manager.

(Secs. 2 and 4 of the Act for the Administration of Washington National Airport, 54 Stat. 686 as amended by 61 Stat. 94; Secs. 4 and 10 of the Second Washington Airport Act, 64 Stat. 770; sec. 313 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1359); sec. 6, Department of Transportation Act (29 U.S.C. 1655); Sec. 501 of Pub. L. 96-193, February 18, 1980)

*Note.*—The FAA has determined that this document involves a regulation which is not significant under Executive Order 12044, as implemented by DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). The economic impact of the proposal is judged to be minimal and a detailed evaluation is not required.

Issued in Washington, D.C., on May 20, 1980.

Quentin S. Taylor,  
Deputy Administrator.

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July 7, 1980

**14 CFR Part 159****[Docket No. 20200; Amdt. 159-18]****Solicitation and Leafletting  
Procedures at National and Dulles  
International Airports***Correction*

In FR Doc. 80-15968 appearing at page 35314, in the issue of Tuesday, May 27, 1980, on page 35320 in the second column in the fourth line in § 159.93(a)(3) "paragraph (c)(2)(e)(i)" should read "paragraph (c)(2)(v)(A)".

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