

Federal Register

Thursday
July 8, 1993

Part VI

Department of
Transportation

Federal Aviation Administration

14 CFR Part 108
Security Directives and Information
Circulars; Disposition of Comments to
Final Rule

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 108**

[Docket No. 25953; Amdt. No. 108-6]

RIN 2120-AD14

Security Directives and Information Circulars

AGENCY: Federal Aviation Administration, DOT.

ACTION: Disposition of comments to final rule.

SUMMARY: On July 6, 1989, the Federal Administration (FAA) issued a final rule providing for the issuance of Security Directives and Information Circulars as means of disseminating information concerning threats against civil aviation (54 FR 28982; July 10, 1989). The final rule was effective on July 10, 1989; however, the FAA invited public comments on the final rule until August 9, 1989. Although the FAA has determined that there is no need for any amendment to the final rule as originally issued, this document responds to the comments submitted by the public.

ADDRESSES: The complete docket for the final rule on Security Directives and Information Circulars may be examined at the Federal Aviation Administration, Office of the Chief Counsel (AGC-10), Rules Docket, room 915-G, 800 Independence Avenue SW., Washington, DC 20591, weekdays (except Federal holidays) between 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Craig Stier, Office of Civil Aviation Security Policy and Planning (ACP-110), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3413.

SUPPLEMENTARY INFORMATION:**Background**

On April 3, 1989, the Department of Transportation announced civil aviation security initiatives designed to protect passengers and crewmembers traveling on U.S. air carriers. Among these initiatives was a commitment to establish a mandatory Security Directive system. The initiatives were necessary because of the dramatic increase in international terrorism since 1971, the year the FAA's Civil Aviation Security Program was established. In December of 1988, Pan American World Airways (Pan Am) Flight 103 was destroyed by a terrorist bomb over Lockerbie,

Scotland, illustrating the vulnerability of civil aviation to terrorist acts.

When the FAA learns, through its analysis of classified and unclassified information, of critical threats against civil aviation, it is crucial that the information and any appropriate countermeasures be disseminated as soon as possible to air carrier security personnel. For this reason, the FAA decided that a system that would significantly improve the capability to disseminate critical threat information quickly and, when necessary, establish mandatory security countermeasures, was needed.

On July 6, 1989, the FAA issued a final rule that established a system for the issuance of Security Directives and Information Circulars (54 FR 28982; July 10, 1989). Prior to the issuance of this rule, notification of threats against civil aviation was made through Security Bulletins that discussed both general security concerns and specific threats. Air carriers were not required to acknowledge receipt of Security Bulletins or to comply with the countermeasures recommended in them. The rule provides that Security Directives will be used to notify U.S. air carriers of specific credible threats against civil aviation and will set forth mandatory countermeasures to be implemented by the carriers. The rule requires air carriers to acknowledge receipt of Security Directives and to notify the FAA of how they have implemented the FAA-prescribed countermeasures. It is the FAA's policy to ensure that all specific, credible threats against any aircraft are completely resolved before that aircraft is permitted to take off. The rule provides that Information Circulars will be used to notify air carriers of general security concerns for which the FAA will not prescribe mandatory countermeasures. In addition, the rule prohibits the release of information contained in both Security Directives and Information Circulars without the prior written authorization of the Assistant Administrator for Civil Aviation Security.

(Since promulgation of the final rule, the Aviation Security Improvement Act of 1990, Public Law 101-604, November 18, 1990, (the Act) created the new position of Assistant Administrator for Civil Aviation Security reporting directly to the Administrator with responsibilities for all security functions within the FAA including implementation and enforcement of the Rule on Security Directives and Information Circulars. In a separate rulemaking action, the FAA intends to revise the nomenclature throughout 14

CFR part 108 to reflect this change. For the sake of clarity, this notice uses the title Assistant Administrator for Civil Aviation Security.)

In order to protect immediately passengers and crewmembers traveling in air transportation from a possible rapid increase in criminal acts against civil aviation, the FAA determined that good cause existed to adopt the final rule without prior notice and opportunity for public comment and to make the rule effective upon publication in the *Federal Register*. In accordance with the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979), the FAA invited the public to comment on the final rule after it was published in the *Federal Register*. Eight comments were received. No comments were received objecting to the concept of disseminating threat information; one comment approves of the rule as written and seven suggest modifications.

On August 4, 1989, shortly after the final rule was issued, the President's Commission on Aviation Security and Terrorism (the Commission) was established to "review and evaluate policy operations in connection with aviation security, with particular reference to the destruction * * * of Pan American World Airways Flight 103" (Executive Order 12686). The Commission released its report on May 15, 1990, and made recommendations pertaining to the gathering and dissemination of threat information. The recommendations are as follows:

- The intelligence and law enforcement communities, and those that receive information collected or analyzed by those communities, should review their procedures to reduce to the minimum the number of persons with access to information on civil aviation threats.
- The U.S. Government should, as a matter of course and policy, consciously consider the question of notification and carefully review the factors outlined. The Department of State, and Department of Justice, in close cooperation with the Department of Transportation, should establish a process and a mechanism by which clearly identifiable officials will consider when and how to provide notification to the traveling public.

With respect to the Commission's first recommendation, the FAA concludes that its final rule is consistent with the Commission's statement. The rule limits distribution of Security Directives and Information Circulars to prescribed personnel and those with an operational need to know. The rule also prohibits disclosure of any information contained

in Security Directives and Information Circulars without prior written authorization of the Assistant Administrator for Civil Aviation Security. The FAA supports the need to review procedures for disseminating threat information and to work closely with other entities who collect, receive, or analyze that information, to establish clear and consistent distribution policies that will further reduce the number of persons with access to it.

Regarding the Commission's second recommendation, the FAA's position remains that there should be no routine public notification of threats, and that threat information should be handled by aviation security professionals who have the ability to analyze the threat and either counter it or order the cancellation of the flight. Moreover, the Act establishes criteria, authority, and responsibility for notification of threats to civil aviation. The Department of Transportation and FAA will work closely with the Departments of State and Justice and the entire intelligence community to consider the advisability of public notification in specific circumstances. The issue of public notification, as raised by the public comments, is also addressed below under "Discussion of Comments."

In October 1989, after the issuance of the final rule and the close of the comment period, the FAA chartered the Aviation Security Advisory Committee (ASAC), to be chaired by the FAA's Assistant Administrator for Aviation Security and to serve as an advisory body and develop recommendations on methods, equipment, and procedures to improve civil aviation security. The FAA will consider any recommendations involving threat analysis and dissemination that may result from the work of the ASAC and will consider further rulemaking action if appropriate. The FAA has already received for consideration the ASAC's recommendations addressing the security response to bomb threats. The recommendations addressed standardized criteria for evaluating threats, dissemination and analysis of information, air carrier and airport security training programs, and demarcating areas of responsibilities and authority.

Discussion of Comments

Airport Operators, Ground Security Coordinators, and In-Flight Security Coordinators Should Be Given Copies of Security Directives and Information Circulars

Two commenters believe that it is essential that Security Directives and

Information Circulars be distributed to airport operators as well as air carriers. The Airports Commission for the City and County of San Francisco (Airports Commission) states that, pursuant to FAR Part 107—Airport Security, airport operators are responsible for overall airport security and, therefore, must receive timely, accurate security warnings to ensure effective, coordinated responses to threats against civil aviation. The City of Houston's Aviation Department says that there are three primary parties involved with the safety of the flying public—airlines, airport operators, and the FAA—and that as a part of that triumvirate, airport operators must be included in the information link.

Security Directives and Information Circulars should be disseminated on a need-to-know basis, and the FAA agrees that it is important to include airport operators in the dissemination of threat information when threats are made that affect airport operations. It is the FAA's policy to ensure that Security Directives and Information Circulars are distributed to airport operators when appropriate for effective, coordinated responses. The final rule, however, was directed at U.S. air carriers because the threat to domestic airports is relatively low, and in most instances, the threats addressed by Security Directives or Information Circulars will not affect U.S. airports. The FAA is currently reviewing and updating FAR Part 107—Airport Security, and will evaluate further the need for a special system for security alerts to airports in the context of that rulemaking.

The Air Line Pilots Association (ALPA) states that, at a minimum, the ground security coordinator and the in-flight security coordinator (pilot-in-command) should be notified of every Security Directive and Information Circular. ALPA states that this would help pilots and crewmembers to be especially vigilant for the duration of the threat. Flight Engineers' International Association (FEIA) expresses a similar opinion by stating that the flightcrew has a definite operational need to know and must be advised as soon as possible of the issuance of a Security Directive.

Again, as noted in the response to airport operators, the FAA concludes that all persons with an operational need to know (including crewmembers) should be notified in circumstances in which they are directly and immediately affected by a particular threat. The final rule requires that each Security Directive be distributed to personnel specified in the Security Directive and to other personnel that an

air carrier determines have an operational need to know. This is essential to ensure that all personnel with an operational involvement in security-related situations are informed of current threat information. The final rule does not preclude airport operators, in-flight security coordinators, or ground security coordinators from being informed of the issuance of Security Directives. The FAA's analysis of the disseminations of past Security Directives (and their predecessor, Security Bulletins) suggests that in almost all instances at those airports assessed as potentially affected by a security threat, personnel likely to have an operational need to know and who would be provided with Security Directives information under the rule include: airport operators, in-flight security coordinators, and ground security coordinators. Indeed, some of these categories of personnel have been listed in Security Directives issued since the final rule was promulgated in 1989. Because the final rule was designed to cover many contingencies, the FAA determined that it was not feasible to list every category of personnel for which dissemination would be appropriate in every possible threat situation. Instead, the final rule requires certificate holders to distribute Security Directives to those persons that are specified by the FAA and to those persons determined by the carrier to have an operational need to know the information.

The FAA Should Allow Public Access to Threat Information

Senator Alfonse D'Amato comments that although Security Directives will contain some sensitive information that should be protected, he does not agree that specific credible threats should be withheld from the public. Senator D'Amato adds that members of the public deserve to be put in a position where they can protect themselves. The FAA is acutely sensitive to the importance of this issue and has implemented procedures to effect the public notification requirements of Section 109 of the Act. The adopted procedures provide for consideration of several factors prior to issuing a threat notification: specificity of the threat, credibility of intelligence, ability to counter the threat, protection of intelligence sources, impact of cancellation of flight vs. public notification, and ability of passengers and crew to reduce their risks as a result of notification.

The Reporters Committee for Freedom of the Press (Reporters Committee) urges the FAA to amend the final rule to

provide for routine FAA dissemination of specific threat information and does not believe that the Freedom of Information Act (FOIA) or section 316(d)(2) of the Federal Aviation Act of 1958, as amended, provides for the blanket withholding of threat information from the public. The Reporters Committee also states that, even though it recognizes that security systems depend in part on the ability of officials to keep specific surveillance techniques secret, it does not believe that disclosure of threats would compromise passenger safety in any way, and that refusal to disclose threats precludes public oversight of airline and airport security and impairs journalistic comment on government activities. Furthermore, the Reporters Committee believes the FAA should amend the rule to require that air carriers disclose immediately any information that does not directly threaten security.

The FAA realizes that public dissemination of threats to aviation security is a sensitive and controversial issue. Consistent with the adopted rule on Security Directives and Information Circulars and with the adopted rule governing flight and cabin crew notification guidelines (56 FR 27866, June 17, 1991), the current system of evaluating and responding to threats to civil aviation is founded on the principle that it is best for intelligence experts to evaluate threat information before dissemination to personnel directly responsible for dealing with those threats. The air carrier's security experts, generally in consultation with the FAA and other government entities, evaluate threat information against specific FAA-established criteria to determine "specificity" and "credibility." (The terms "specific" and "credible" are not interdependent and are commonly applied by intelligence experts to threat information involving a well defined target and which has been authenticated.)

Excluding those threats which are judged to be groundless or not requiring the application of specific countermeasures is a practical approach, given the hundreds of bogus threats received annually. Eliminating bogus threats is also critical to ensure that real threats are perceived as serious, not diluted in impact by a multiplicity of false alarms. The FAA's view is this limited distribution of threat information helps ensure that genuine threats are handled as thoroughly and expeditiously as possible.

Based on its expertise and experience in aviation security matters and on consultations with the Office of the Secretary of Transportation and other

government agencies, the FAA has determined that protecting the confidential sources of threat information, and thereby ensuring the free flow of this critical information to the agency, ultimately increases the security of crewmembers and the traveling public. The decision whether to disclose any threat information contained in a Security Directive or Information Circular is properly part of the FAA's overall aviation security responsibility. Toward that end the FAA is continuing existing control procedures, consistent with Section 109 of the Act, to minimize the number of agency personnel having access to intelligence information on threats to civil aviation.

Under appropriate circumstances, the Department of Transportation issues information on specific domestic threats to the public. The State Department issues travel advisories to American citizens. These advisories are issued for a variety of reasons, including general information on the level of the threat of terrorism; however, the State Department's policy is that the general public is advised of particular threats only when they are specific, credible, and cannot be countered. Because existing mechanisms within the U.S. government and procedures of other agencies provide for disclosure of threat information in appropriate circumstances, the FAA has not revised the rule. The FAA's action in this regard is consistent with the notification guidance in section 109 of the Act and the requirement to review working agreements between the intelligence community and the FAA in section 111 of the Act.

The Reporters Committee urges the FAA to revise its FOIA procedures regarding disclosure of Security Directives and Information Circulars and suggests that the FAA revise its FOIA procedures so that the Assistant Administrator for Civil Aviation Security is not the final arbiter regarding the release of a Security Directive or Information Circular. The Reporters Committee suggests that the FAA create a "FOIA unit" that would make such decisions, presumably only for Security Directives and Information Circulars, but not for other FAA documents subject to FOIA.

The final rule contemplates that air carriers and the FAA will receive requests for threat information contained in Security Directives and Information Circulars. The rule quite properly leaves any decision to release threat information under established procedures in the hands of those best equipped to assess the impact of

releasing such information. The FAA does not agree with the Reporters Committee's suggestion that there be a "FOIA unit." Even if the FAA had such a unit, its members would not necessarily be aware of related sensitive aviation security information needed to make a properly informed decision on the release of a particular document. The Assistant Administrator for Civil Aviation Security is best equipped to make these decisions. In addition, the Assistant Administrator for Civil Aviation Security is charged by statute with determining what information, if any, can be released based on an informed assessment that disclosure of such information would not be detrimental to the safety of persons traveling in air transportation.

The decision of the Assistant Administrator for Civil Aviation Security is subject to the concurrence of the Office of the Chief Counsel, and may be appealed to the Assistant Administrator for Public Affairs. A decision to uphold the denial of the Assistant Administrator for Civil Aviation Security is subject to the additional concurrence of the General Counsel, Office of the Secretary, Department of Transportation. These procedures fully comply with the FAA's obligations under the Freedom of Information Act and ensure the protection of sensitive information that might endanger aviation security. Thus, the FAA has not revised the final rule to provide for routine disclosure of threat information by the FAA or to provide amended FOIA procedures specific to Security Directives and Information Circulars.

The FAA Should Consult With Air Carriers Before Issuing Security Directives and There Should Be Some Post-Issuance Mechanism To Review Appropriateness of Countermeasures

The Air Transport Association of America (ATA) states that consultations with air carriers before the issuance of Security Directives is necessary in order for the FAA to develop the most effective and efficient mandatory countermeasures. It is the policy of the FAA to consult with air carriers when time allows; however, this policy will be carried out on a case-by-case basis. The rule allows the FAA flexibility to address the adequacy of U.S. air carriers' responses to the countermeasures prescribed in Security Directives. The rule states that carriers shall notify the FAA of how they have implemented the countermeasures, and that carriers unable to implement the countermeasures shall submit proposed alternative measures to the Assistant

Administrator for Civil Aviation Security for approval.

The ATA further states that the FAA and the air carriers need to be able to review the countermeasures after implementation in order to avoid future problems. The FAA understands that there will be occasions when it will be appropriate to assess situations in retrospect in order to make adjustments when responding to those types of situations in the future, and the FAA does not prohibit air carriers from contacting the FAA to discuss the appropriateness of countermeasures after threats have passed.

Security Directives Should Have Automatic Expiration Dates With Provisions for Extension, if Required

The ATA also states that threats typically are not of infinite duration and that Security Directives should carry automatic expiration dates. The ATA then states that if a threat were likely to persist beyond the expiration date of a Security Directive or an Information Circular, the FAA could extend its effectiveness.

The FAA does not agree that Security Directives should have automatic expiration dates in all cases because the nature of each threat determines the necessary duration. In many instances, however, it is appropriate to issue time-limited Security Directives. The FAA periodically evaluates all Security Directives, regardless of whether they

carry expiration dates, to determine if they should be rescinded or remain in effect. In the case of ongoing threats, the FAA may choose to amend an air carrier's approved security program.

The Rule Should State That the U.S. Government Shall Be Responsible for Coordinating Countermeasures With Foreign Governments

The ATA states that the U.S. government, not the air carriers, should be responsible for consultation and coordination with foreign governments with respect to countermeasures. The FAA agrees and the final rule does not burden air carriers with the responsibility of consulting with foreign governments regarding any threats or countermeasures. Since the rule was issued, the FAA has implemented section 104 of the Act, establishing a security liaison officer position for each airport outside the U.S. as determined by the Administrator. The Civil Aviation Security Liaison Officer (CASLO) is responsible for serving as the liaison between the Assistant Administrator for Civil Aviation Security and foreign authorities including foreign governments and airport authorities.

The FAA Should Establish and Publicize Its Enforcement Policy for Responding to Alleged Leaks of Security-Sensitive Information

The ATA states that the FAA should publicize its enforcement policy

regarding the unauthorized disclosure of security-sensitive information so that penalties for failure to comply with the regulation are clearly understood. Unauthorized disclosure of security information would significantly threaten the safety of crewmembers and the traveling public and could hamper the effectiveness of the aviation security program. Thus, the FAA regards unauthorized disclosure in violation of the regulation as a serious violation that would warrant enforcement action similar to other safety and security violations committed by individuals and air carriers.

Conclusion

The FAA has determined, after carefully considering the comments submitted in response to the final rule, that no further rulemaking action is necessary at this time. Amendment No. 108-6 remains in effect as prescribed by the July 6, 1989, final rule.

Issued in Washington, DC, on June 30, 1993.

Bruce R. Butterworth,
Director, Office of CAS Policy and Planning,
ACP-1.

[FR Doc. 93-16093 Filed 7-7-93; 8:45 am]

BILLING CODE 4910-13-M