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**TRANSPORTATION SECURITY ADMINISTRATION  
PUBLIC MEETING ON  
PROPOSED LARGE AIRCRAFT SECURITY PROGRAM  
DOCKET NO. TSA-2008-0021**

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STATEMENT OF KIRK K. VAN TINE  
ON BEHALF OF THE  
AIRCRAFT OWNERS AND PILOTS ASSOCIATION

On behalf of the Aircraft Owners and Pilots Association (“AOPA”), I want to thank TSA for providing an opportunity for public discussion of the proposed rules establishing the Large Aircraft Security Program. AOPA is the largest general aviation organization in the world, with more than 414,000 members, including nearly three-quarters of all the pilots in the United States. AOPA has worked closely with TSA on a number of important aviation security issues in the past, and believes that all parties benefit from improved communications to and from TSA. In this instance, while AOPA recognizes the importance of TSA’s mission, AOPA does not support the proposed Large Aircraft Security rules as written, and will be submitting detailed written comments outlining its concerns. In the time available today, I want to focus on a few of the main substantive issues, and also suggest how we think TSA should proceed from here.

First, by way of introduction, I was the General Counsel of the U.S. Department of Transportation between 2001 and 2003, when the TSA was created as a part of DOT. I was part of the group that helped to get the TSA up and running, and worked closely with the TSA Administrator, the Chief Counsel and the TSA legal staff to address a number of difficult legal issues regarding transportation security. I was also part of the team that coordinated the

transfer of TSA to the newly-created Department of Homeland Security in 2003. Subsequently, I became the Deputy Secretary of the Department of Transportation, and I worked closely with DHS and other agencies to address a wide variety of homeland security policy issues. As a result of those experiences, I have a first-hand appreciation for the difficulty of TSA's mission, and also of the legal and practical difficulties of finding workable solutions to complex, real-world security problems. In general, AOPA understands the problems that TSA is trying to address in the Large Aircraft Security rules, but believes that TSA needs to do substantially more work on all of the major issues to arrive at an acceptable balance between its legitimate security interests and the legitimate privacy and property interests of the wide range of private individuals and businesses that will be affected.

I would like to comment briefly on a few key issues that we see in the NPRM, and then offer some suggestions about how we think you should proceed from here.

#### **I. The Proposed Rules Should Be Tailored To Meet The Actual Security Threat**

The first concern that I want to discuss is both a legal and a policy concern. At a high level, I think it is important to recognize the fact that fundamental goal of the NPRM is to subject privately owned and operated aircraft to security measures that are essentially the same as those that are currently applicable to commercial aircraft that operate on a common carriage basis. That is an important departure from previous security measures, in a number of respects.

In the past, TSA has focused primarily on common carrier transportation providers, such as airlines, railroads, and transit systems. In the context of regulating the operations of common carriers, legal concerns regarding privacy issues and restrictions on private travel are often subordinated to the security goals that TSA seeks to achieve. In contrast, in

considering whether new security costs and obligations should be imposed on privately owned and operated aircraft, the new requirements are subject to heightened legal scrutiny, and the costs and benefits need to be carefully analyzed. In regulating purely private activity, such restrictions should be imposed only when they are clearly necessary and clearly justified.

In the NPRM, TSA's starting point is the observation that privately-owned aircraft could cause the same damage as commercial aircraft of a similar size. Starting with that assumption, and without discussing any analysis of the actual security threat posed by privately operated aircraft, TSA concludes that the same security measures applicable to commercial aircraft should be applied to private aircraft. However, applying that same reasoning process, one might conclude that privately owned and operated recreational vehicles, many of which have gross weights and cargo carrying capacities that far exceed the 12,500 pound threshold for large aircraft, should also be subject to the same security measures, because they also could be used to cause the same type and degree of damage as large aircraft.

In the NPRM, TSA has ignored the fact that there are significant differences between private operations and commercial operations that may significantly reduce the security risks posed by private aircraft. Those kinds of differences would have been identified and considered if TSA had performed a security threat assessment prior to issuing the NPRM. Apparently, it did not perform such an assessment.

Before proceeding with the NPRM, TSA should perform a security assessment of the threat posed by private operation of large aircraft, and at a minimum, TSA should tailor the proposed rules to the actual operating profile of the privately operated aircraft it proposes to

regulate. AOPA believes that, if it performed a formal security threat assessment, TSA would conclude that it could satisfy its security objectives with substantially less burdensome, costly and intrusive security regulations.

## **II. TSA's Lack Of Critical Information Render The Economic Impact Analysis Totally Speculative.**

The NPRM acknowledges that there are major gaps in TSA's factual knowledge regarding the proposed rules, and as a result of those gaps, the legally mandated cost benefit analysis accompanying the rules is a purely speculative exercise. One of the issues on which the NPRM acknowledges uncertainty is the fundamental issue of how many individuals, businesses and airports might be economically affected. In discussing that basic fact, which has to be the starting point for any cost benefit analysis, the NPRM states that the number of affected parties falls in a range of "between zero and 9,061," and essentially admits that, due to lack of data, even that range is pure speculation.

The NPRM also says the estimated ten-year cost burden is between \$850 million and \$1.9 billion. That is a "margin of error" of over a billion dollars, more than 100% of the base estimate. That huge uncertainty about costs is simply a reflection of the huge holes in the factual support for the proposed rules.

Finally, the Notice establishing these public hearings requests comment on no less than 16 major issues, which TSA "must explore to complete its review." Those 16 issues are good examples of the many instances in the NPRM and the accompanying required analyses in which TSA admits that substantially more factual information is needed before the proposed rules can be finalized. In AOPA's view, the costs and impacts of the proposed regulations are drastically understated, and the benefits of the regulations are significantly overstated.

AOPA believes that TSA should first complete its homework by gathering the necessary data, then perform a meaningful review of costs, benefits and impacts, and only when that work is finished, determine whether the proposed security measures are really justified and necessary.

### **III. The Proposals To Outsource Security Program Audits And Watch List Checks Should Be Reconsidered.**

The NPRM would require that private operators of large aircraft establish security plans, and that their implementation of, and compliance with, those plans be audited every two years. In addition, the NPRM proposes that all passengers on privately operated large aircraft would undergo watch list checks, just like passengers flying on commercial aircraft. Unlike commercial aircraft, however, the NPRM would require private aircraft operators to pay third party auditors and third party watch list checkers to ensure compliance with these new requirements. While those two “outsourcing” proposals would certainly serve the goal of putting people to work by creating new private sector employment opportunities, they would do little to enhance security, and would impose significant potential burdens.

First, the obligation to ensure transportation security is an inherently governmental function, and the requirements for monitoring implementation of security programs and watch list checking clearly are governmental responsibilities. AOPA believes that those functions should be performed by government employees, and the costs of those unfunded mandates should be borne by the government, not private aircraft operators.

Further, with regard to the proposed third party audits, the NPRM suggests no system for training and maintaining accountability over the auditors, or for ensuring that the same standards and requirements are applied in all compliance reviews. All of those issues may be difficult to address in the context of a widely-dispersed and fragmented system of small

auditing firms all over the United States. The NPRM also fails to address the issue of how private aircraft operators will be able to challenge errors in the audits, what criteria will be used to determine whether the operator “passes” the audit, and whether penalties will be imposed for failure to maintain perfect compliance. Finally, the use of third-party auditors, who may come and go depending on the economics of their business, raises the issue of how those third party auditors will be chosen and qualified by TSA, and whether their access to sensitive information poses an additional unforeseen security risk if those auditors later leave the business voluntarily, or are removed for cause from the approved list of auditors.

The outsourcing of watch list checks for private aircraft operators raises similar issues. Unlike commercial aircraft, private aircraft operators often do not know their exact operating schedules and passenger manifests until shortly before flight time. The NPRM does not recognize this fundamental operational difference, and does not establish the time frame in which names must be submitted to, and cleared by, watch list service providers, or how GA operators will communicate passenger manifests and receive fly/no fly decisions. One of the main functions of privately operated aircraft is to provide transportation on short notice, to accommodate business or personal scheduling demands. If the watch list screening function cannot be performed very quickly by the outsourcing operators, that reason for private operations will be defeated.

In addition, in the normal course of private aircraft operations, many of the passengers on board will be repeat passengers, and will be well-known to the operator, as either employees or guests. Those facts should eliminate or decrease the need to check every passenger name on every flight.

Finally, there appears to be no reason to outsource the watch list screening function. With the issuance of TSA's Final Regulations instituting the Secure Flight program, the TSA is consolidating, and will soon perform, all other watch list screening tasks. The NPRM does not explain why the watch list screening program for privately operated aircraft should not be incorporated now into TSA's existing Secure Flight program, rather than setting up an entirely separate infrastructure and then dismantling it at some time in the future, as the NPRM currently proposes. The additional burden to the government of assuming responsibility for a newly-created private aircraft watch list mandate should be minimal when compared to the overall cost of the Secure Flight program.

**IV. The NPRM Should Be Re-Issued As An ANPRM And Conducted As A "Negotiated" Rulemaking Proceeding.**

The final area that I want to comment on is procedural. As I mentioned previously, I was the General Counsel of the Department of Transportation between 2001 and 2003. In that job, I worked on all the substantial rules that the Department issued before they went out, and there were a lot of them. I do not recall ever seeing a rule that reached the NPRM stage with as many important factual gaps as this one. In a case like this one, where the potential costs and impact on the economy could be major, it is important to get the facts right before the rule goes final. And this one clearly is not ready for "prime time."

As a former General Counsel, my suggestion would be to drop back a step -- the issues identified in the NPRM would typically be explored in an Advance Notice of Proposed Rulemaking, before the NPRM stage. That extra procedural step allows the agency to develop a proposed rule based on solid facts, rather than speculation. That is what should happen here -- we think TSA should withdraw the NPRM, and reissue it as an ANPRM, to provide a more meaningful opportunity to comment on the substance of the proposed rules.

I have one more procedural suggestion. Because this proposed rule would affect a wide and very diverse range of individuals and businesses, all of whom may have different interests and objectives, the Large Aircraft Security Program would be an ideal subject for what is called a “negotiated” rulemaking proceeding. In a “negotiated” rulemaking, representatives of the major affected groups are invited to participate in scheduled meetings to discuss the key facts, the costs and benefits, and the pros and cons of the proposed rules. Those meetings are real “working sessions,” providing an opportunity for questions and answers and a “real-time” exchange of views, rather than just prepared statements or written comments. Sometimes, those sessions are led by a professional facilitator who tries to make sure that all issues are discussed and all views are considered. In my experience at DOT, we used the “negotiated” rulemaking process successfully on a number of occasions very similar to this one, and I believe it would work well here, not only to gather data, but to help TSA arrive at workable solutions to the problems posed by the NPRM. That kind of a “negotiated” process might take a little longer to work through, but would produce a much better result in the end. AOPA would be pleased to work with TSA in a negotiated rulemaking to try to arrive at a reasonable, well-thought-out regulatory proposal that will meet TSA’s objectives, without unduly burdening the affected parties.

On behalf of AOPA, I want to thank you again for the opportunity to appear before you today.