DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 107 and 108

[Docket No. 28859; Amendment No. 107–12, 108–17]

RIN 2120–AG32

Employment History, Verification and Criminal History Records Check

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA amends the regulations that require an access investigation, including a fingerprint-based criminal record check in certain cases, for unescorted access privileges to security areas at airports. This final rule extends the requirement for an access investigation (which is renamed ''employment history investigation'') to persons who perform checkpoint screening functions at airports and their supervisors. The final rule also requires airport operators and air carriers to audit employment history investigations. This final rule is in response to the Federal Aviation Reauthorization Act of 1996 and seeks to improve the security of the airport environment.

EFFECTIVE DATE: November 23, 1998.

FOR FURTHER INFORMATION CONTACT: Linda Valencia, Office of Civil Aviation Security Policy and Planning, Civil Aviation Security Division, ACP–100, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–3413.

SUPPLEMENTARY INFORMATION:

Availability of Final Rule

This document may be downloaded from the FAA regulations section of the FedWorld electronic bulletin board (telephone: 703–321–3339), the **Federal Register**'s electronic bulletin board (telephone: 202–512–1661), or the FAA's Aviation Rulemaking Advisory Committee Bulletin Board (telephone: 800–322–2722 or 202–267–5948).

Internet users may access the FAA's web page at http://www.faa.gov or the **Federal Register**'s web page at http://www/access.gpo.gov/su__docs to download recently published rulemaking documents.

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9677. Communications must reference the amendment number of this final rule.

Persons interested in being placed on the mailing list for future rules should request a copy of Advisory Circular (AC) No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires the FAA to report inquiries from small entities concerning information on, and advice about, compliance with statutes and regulations within the FAA's jurisdiction, including interpretation and application of the law to specific sets of facts supplied by a small entity.

The FAA's definitions of small entities may be accessed through the FAA's web page http://www.faa.gov/avr/arm/sbrefa.htm, by contacting a local FAA official, or by contacting the FAA's Small Entity Contact listed below.

If you are a small entity and have a question, contact your local FAA official. If you do not know how to contact your local FAA official, you may contact Charlene Brown, Program Analyst Staff, Office of Rulemaking, ARM–27, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591, 1–888–551–1594. Internet users can find additional information on SBREFA in the ''Quick Jump'' section of the FAA's web page at http://www.faa.gov and may send electronic inquiries to the following Internet address: 9–AWA–SBREFA@faa.dot.gov.

Background

History

Title 14 of the Code of Federal Regulations (CFR) part 107 prescribes security requirements of airport operators concerning access control, law enforcement support, and the submission of airport security programs for FAA approval. Title 14 CFR part 108 prescribes security rules for U.S. carriers who must adopt and carry out an FAA approved security program. As used in this document, the term ''air carrier'' refers to U.S. air carriers conducting passenger-carrying operations.

On October 3, 1995, the FAA issued a final rule on Unescorted Access Privilege (60 FR 51854). The FAA issued the rule primarily in response to the Aviation Security Improvement Act of 1990. The rule requires a 10-year employment history investigation for certain employees, including, if needed, a Federal Bureau of Investigation (FBI) fingerprint-based criminal records check. These employment checks must be performed for individuals who are granted unescorted access to a security identification display area (SIDA) and individuals who authorize others to have unescorted access. (See 14 CFR 107.25.) In the preamble to the Unescorted Access Privilege final rule the FAA stated that it would continue to evaluate the civil aviation security system to determine if further changes were warranted.

The bombings of the Federal Building in Oklahoma City and the World Trade Center Building in New York, along with information provided by the U.S. intelligence community after those incidents, has indicated the terrorist activities are no longer limited to areas outside of the United States. Intelligence information indicates that terrorists are in the United States, working alone, working in ad-hoc groups, or serving as members of established terrorist groups. In light of the increase in terrorism in this country, the White House Commission on Aviation Safety and Security (the Commission) identified a further need to enhance security at our nation's airports. In its final report, (''Final Report to President Clinton—White House Commission on Aviation Safety and Security,'' February 12, 1997), the Commission recommended that ''Given the risks associated with the potential introduction of explosives into these [airport] areas, * * * screeners and employees with access to secure areas [should] be subject to criminal background checks and FBI fingerprint checks.''

In section 304 of the Federal Aviation Reauthorization Act of 1996, Pub. L. 104–264 (the Act), the Congress directed the FAA to expand the use of both employment history investigations and fingerprint-based criminal records checks. Section 304 of the Act directs the Administrator to issue regulations requiring employment history investigations and, as needed, criminal record checks for individuals who screen passengers and property that will be carried in an aircraft cabin in air transportation or intrastate air transportation. The regulations would also apply to supervisors of screeners. The Act also provides that Administrator with the discretionary authority to apply these investigations to individuals who exercise security functions associated with cargo and baggage. In addition, section 306 of the Act directs the Administrator to provide for the periodic audit of the effectiveness of the criminal record checks. The FAA believes that the

measures mandated by Congress will help ensure the integrity of the airport environment.

In related security measures the FAA, on August 1, 1997, issued two NPRMs: Airport Security (62 FR 41760) and Aircraft Operator Security (62 FR 41730). These notices proposed to amend the existing Airport Security and Aircraft Operator Security rules in 14 CFR parts 107 and 108. In addition these amendments would revise certain applicability provisions, definitions and terms; reorganize these rules into subparts containing related requirements; and incorporate some requirements already implemented in airport and air carrier approved security programs. The comment period on both proposals was extended to June 26, 1998 (63 FR 19691, April 21, 1998). Neither of these proposals addresses employment history, verification, and criminal records checks. If these NPRMs become final rules then § 107.31 would be renumbered as § 107.207 and § 108.33 would be renumbered as § 108.221.

General Discussion of the Rule

On March 19, 1997, the FAA issued an NPRM proposing to revise the requirements for an Employment History, Verification and Criminal Records Check in §§ 107.31 and 108.33 (62 FR 13262). In the notice the FAA proposed to extend the requirement for employment history investigations to persons who perform checkpoint screening functions at airports and their supervisors. The addition of screeners only affects part 108. The FAA also proposed to require airport operators and air carriers to audit the employment history investigations that they perform under §§ 107.31 and 108.33, respectively.

A new term appears in this final rule. The NPRM used the term ''tenant.'' The FAA determined that the term ''tenant'' was not accurate for the purposes of proposed § 107.31. The FAA has defined the new term ''airport user'' for the purposes of § 107.31 only. ''Airport user'' means those employers, not subject to § 108.33, whose employees seek unescorted access privileges to the SIDA. An airport user may include those companies that do not have business offices at the airport, but require access to the airport's SIDA. Screeners are the responsibility of air carriers.

The FAA received 27 comments on the NPRM. A summary of those comments and an explanation of changes made in the final rule in response to those comments appear below under ''Discussion of Comments.'' Significant changes between the NPRM and the final rule include the following:

1. Section 107.31(p), Airport user responsibility, was added to the final rule to accommodate other changes related to comments received. Several comments to the NPRM stress the difficulty the airport operators would have in maintaining the investigative files for all individuals with unescorted access. In the final rule, § 107.31(p) allows airport users to maintain the employment history files after the airport operator has performed a preliminary review.

2. Section 108.33(m), Air carrier responsibility, was added to clarify for air carriers the designations of responsibility necessary for compliance with this rule. This section recognizes the extent of the air carriers' responsibilities with respect to their employees and security screeners.

3. The FAA has reorganized the employment history investigation by dividing the investigative process into Part 1 and Part 2. This clarification, which does not substantively change the requirements, was added to both §§ 107.31 and 108.33. Part 1 of the employment history investigation entails a review of the employment record of the individual for the past 10 years, and verification of the most recent 5 years of employment. This portion of the employment history investigation may be performed by an airport user, or in the case of air carriers by a screening company. Part 2 of the investigation is a fingerprint based criminal record check. If Part 1 reveals certain questionable items (triggers), such as an unexplained 12 month gap in employment, Part 2 must be performed. It is important to understand that Part 2 of the investigation only occurs if there is a triggering event discovered during Part 1 of the investigation and the employer and the individual agree to go forward with the fingerprint check. If the airport user chooses not to continue, or if the individual when requested chooses not to submit fingerprints, then the employment history investigation will stop and the individual will not be eligible for unescorted SIDA access or to perform or supervise screening functions.

Discussion of Comments

A total of 27 comments were received in response to the NPRM. Commenters include airport operators, air carriers and their respective associations, pilot associations, cargo companies, screening companies, and food service companies. While most commenters support the intent of the proposed rule to improve airport security, many commenters disagree with specific aspects of the proposal. Comments are discussed in detail below.

1. Scope (§§ 107.31(a) and 108.33(a))

The FAA proposed a clarifying amendment (§ 108.33(a)(2)) to ensure that an employment history investigation be completed for each individual issued an air carrier identification badge that is recognized as ''airport accepted'' media. By recognizing the air carrier badge the airport operator authorizes unescorted access privileges for that individual. Additionally, the FAA proposed (§ 108.33(a)(3)) expanding the applicability of the employment history investigation requirement to include (a) individuals performing screening functions associated with persons and property entering the aircraft cabin, and (b) individuals holding the two immediate supervisory positions above the screeners. This section continues to apply to those individuals who currently have unescorted access privilege.

Some comments address the issue of airline issued media. Two commenters state that if an individual has airline issued access media, that media should allow access to SIDAs regardless of whether it was issued at the individual's home airport. One commenter states that flight crewmembers should be able to use their company identification for access to the SIDA. Another commenter states that all air crews should be required to carry airline issued media and that the background checks and audit provisions should apply to such media.

One commenter suggests that the 10-year background check apply to issuing officers of airport tenants and contractors, including screening companies.

One commenter suggests that airport tenant service providers should be allowed to voluntarily obtain a certified standard security plan from the FAA in the same manner currently available to freight forwarders and cooperative shipper's associations. Such an approach would allow the security programs of tenants to be certified by the FAA in the same manner as an air carrier's, thereby streamlining the administrative process for airport contractors and their tenants.

FAA Response: It is the FAA's intent that the current practice of recognizing air carrier media by various airport operators as ''airport approved'' media be continued. The purpose of § 108.33(a)(2) is to maintain the current

practice and to ensure those air carrier employees who are extended such privileges have also undergone the same employment history investigation as others who have SIDA access.

The FAA does not require the creation of an ''issuing officer'' nor is there a clear understanding of what exactly the job duties are for a person holding such a position. Since the airport operator is the only approval authority for granting unescorted access the regulation covers those that might be granting such access on behalf of the airport. Several airport operators are requesting that airport users limit the number of persons who may sign a certification on behalf of that company. This makes sense from operational standpoint; however; it is FAA's view that this representation is only indicating the investigation has been conducted. The representative is not granting unescorted access on behalf of the airport operator. If in fact the airport user's representative is granting of authorizing unescorted access, the rule requires an employment history investigation for this person under § 107.31(a).

The NPRM was published to address employment history investigations and not for addressing the creation of tenant security programs; therefore the final rule does not address such programs. This issue was addressed in the Airport Security (62 FR 41760) and Aircraft Operator Security (62 FR 41730) NPRMs and will be further addressed in subsequent documents resulting from the NPRMs for Airport and Aircraft Operator Security.

The FAA will continue to evaluate all elements of the civil aviation security system to determine if further changes are warranted.

2. Grandfathering of Current Employees (§§ 108.33(a) (3) and (4))

The FAA proposed that all screeners hired after the effective date of the new regulations would be required to have an employment history investigation (§ 108.33(a)(3)). Retroactive background checks were proposed in § 108.33(a)(4) for individuals who were hired before the effective date of the rule and who remain employed for a year after the effective date.

A number of commenters, including National Air Transportation Association (NATA), Regional Airline Association (RAA), Air Transport Association of America (ATA), and Air Line Pilots Association (ALPA), say that requiring employment background checks on current screening personnel and supervisors is not justified because these employees have already undergone a 5-year verification check and on-the-job observation. According to these commenters, the proposed requirement would add unnecessary costs and paperwork without increasing aviation security. The commenters believe these individuals should be grandfathered into the final rule at its effective date.

Two commenters, Airports Council International and American Association of Airport Executives (ACI–NA and AAAE), state that airports which have proactively applied § 107.31 to security screeners should not have to reissue/revalidate access media nor do a second background investigation for these screeners.

ALPA states that the current rule applies only to those individuals seeking authorization for unescorted access privileges, and not to those who were employed before January 31, 1996.

One commenter requests clarification that § 108.33(a)(2) is not a retroactive requirement.

One commenter states that it should be made clear that § 108.33(a)(2), extending background investigation to each individual who is issued an air carrier identification badge that is accepted by an airport for unescorted access, applies only to flight crewmembers and other employees hired after the effective date. A retroactive application would impose very significant administrative burdens and costs on carriers.

Another commenter states that employees with access to the SIDA were grandfathered when the Access Investigation rule went into effect, therefore, the time frame for compliance with the proposed rule should be shortened.

FAA Response: The FAA has reconsidered its proposal to require currently employed screeners to undergo the employment history investigation. The FAA agrees with the commenters who state that requiring employment history investigations of current screening personnel and supervisors who have already undergone a 5-year verification check and on-the-job observation would add more costs and paperwork without providing a comparable increase in airport security. Further, because of the typically high turnover rates, much of the screener population will have been subjected to the expanded employment history investigation within a relatively short period. Therefore, the FAA concludes that air transportation security does not require the retroactive application of this rule to current screeners and their supervisors.

In response to the commenter requesting clarification about § 108.33(a)(2), the FAA confirms that it is not retroactive. This change was proposed in the NPRM and will become effective upon the effective date of this final rule.

In response to the commenter questioning whether the grandfathering provisions of the access investigation still apply, this rule does not change that grandfather provision. Those individuals having unescorted access prior to January 31, 1996, were grandfathered and this status will continue.

3. Employment History Investigation (§§ 107.31(b)(1) and 108.33(b)(1))

The FAA proposed replacing the term ''access investigation'' with ''employment history investigation,'' The 10-year employment history review and the 5-year verification requirements would remain unchanged, although the scope of application would be expanded to include screeners and supervisors regulated under § 108.33(a)(3).

While one commenter supports the terminology change, another recommends that the existing terminology, ''access investigation'' be retained because it is understood that the rule applies to those who may not have access to the SIDA. Also, this change would increase paperwork costs, as well as training costs.

This commenter further states that the workforce will experience stress and fatigue due to the delays from expanded background checks. This, in turn, will result in more safety problems, as well as the movement of potential workers away from this industry and towards comparable paying jobs with no such delays.

One commenter recommends that checkpoint screeners undergo the same employment background investigations as regular law enforcement officers including performance of a criminal record check both on National Crime Information Center (NCIC) and local records.

NATA says that the FAA must clarify which carrier would be responsible for conducting the required checks in cases where several carriers share a security checkpoint. The commenter also seeks clarification in cases where control of the checkpoint changes from one carrier to another.

FAA Response: In response to comments that the term ''access investigation'' not be changed due to the costs of changing application forms and retraining personnel on the terminology, the FAA did not and is not currently requiring a title be placed on any regulated parties application. The FAA purposely did not require the

development of any new forms with the Access Investigation, but indicated the required information could be added to the employers' current applications. This final rule adopts the language as proposed.

In response to the commenter who believes that the workforce would experience stress and fatigue due to delays from the expanded background checks, the FAA does not agree that these requirements will result in delays that might cause stress on the industry. The employment history investigations have not been expanded and the process remains the same as it was before. The new population being added to the 10-year investigation will soon find the process routine and will view it as another step to take prior to performing screener functions.

In response to the comment requesting that screeners undergo the same background check as law enforcement officers, the FAA does not equate screeners with law enforcement officers. Additionally, the FAA notes that regulated parties are free to determine, within the law, any standard pre-employment qualifications deemed necessary for their needs. After an individual has successfully met those requirements, then the individual would be subject to the FAA regulations that apply to the position.

In response to NATA's concern about several carriers having responsibility at one checkpoint, the FAA assures the commenter that these situations will be handled in the same manner they are currently being addressed for other regulatory issues. The FAA will rely on the air carriers, their principal security inspectors, and local FAA agents to continue to determine the best methods to address compliance with these regulations.

The FAA has clarified in the final rule the requirements in §§ 107.31(b)(1) and 108.33(b)(1) by explaining that this portion of the employment history investigations be referred to as Part 1. Part 1, which is the 10-year employment history and 5-year verification, must always be conducted. For reasons discussed in section 6 of the Discussion of comments, the National Crime Information Center (NCIC) is not available for implementing this rule.

Part 2 of the 10-year employment investigation is addressed in §§ 107.31(c)(5) and 108.33(c)(5). Part 2 consists of the criminal records check and is required only when a trigger has been met, but will not be conducted unless both the employer and the affected individual agree to proceed with the process.

4. Disqualifying Crimes (§§ 107.31(b)(2) and 108.33(b)(2)

The FAA did not propose any changes to the list of disqualifying crimes; however, some commenters requested changes to the list of disqualifying crimes.

Commenters recommend that the list of disqualifying crimes be expanded to include the manufacture, possession and use of controlled substances and crimes such as strong arm robbery, theft, auto theft, and burglary in order to more closely mirror the crimes listed in Part 1 of the Uniform Crime Reporting Act.

One commenter suggests that any felony conviction or arrest should preclude employment in security checkpoint positions.

FAA Response: The FAA did not propose and is not expanding the list of disqualifying crimes in this final rule. If regulated parties want to add anything to their pre-employment standards they may do so. The FAA is aware that several airport operators and air carriers regularly conduct local criminal record checks and it is under the authority of state or local law that such checks are conducted. The FAA encourages the recognition by all employing parties of the distinction between their pre-employment standards and qualifications, which are separate from FAA regulations.

5. Investigative Steps (§§ 107.31(c) and 108.33(c)

The FAA proposed no substantive changes to these sections, however, one commenter requests that the FAA clarify the language of proposed § 107.31(c)(4), which requires the airport operator to verify the information on the most recent 5 years of employment history. The commenter believes that the airport operator is required to have final responsibility for this function but is not required to verify every single background investigation done by employers.

Another commenter states that the current employment verification process is not effective because of the high turnover rate in the industry. It is difficult and time consuming to verify if an applicant's supervisor has left the company.

For these reasons and because the rule in intended to prevent individuals convicted of disqualifying crimes from obtaining access to the SIDA or from performing security functions, NATA recommends that verifications be used to ascertain that an individual was not incarcerated in each one-year period. This will allow affected companies to meet the intent of the regulations by determining if a disqualifying crime has been committed.

NATA adds that former employers will limit the employee information they provide out of fear of lawsuits from employees originating from the transfer of records, and that would be counterproductive to enhanced security.

Several commenters, including ACI–NA and AAAE, request that the FAA clarify the employment verification process and state what it considers to be acceptable verification. These commenters recommend that the employment verification process be standardized to ensure consistency among FAA regional security offices.

FAA Response: The proposed rule language has been modified in the final rule to refer to the first stage of the employment history investigation, paragraph (C)(1)–(4) as Part 1. Paragraph (c)(1) lists the information that the individual must provide on the application.

The final rule does require the airport operator to verify the information on the most recent 5 years of employment history. The airport operator is responsible for ensuring that the verification has been completed. The verification is a portion of the investigative process. The verification may be completed by the airport user, which the airport operator may accept through the certification.

There are many avenues that may be used in the verification process. The fact that the applicant's former supervisor is not available does not mean that the owner or other supervisors of the company could not vouch for the applicant. Persons other than the immediate supervisor presumably have access to company employment records.

It is unclear to the FAA why former employers are hesitant to provide past employment dates. It is not known to be a basis for a lawsuit to confirm employment dates. The FAA suspects that liability issues arise when there are more than just past employment dates that are being requested. To be in compliance with this regulation only the confirmation of employment dates is required. The employment history information required by this final rule from former employers is the same as required by the current rule.

This final rule was not intended to address the specifics of the verification process. Future FAA guidance may be provided in another forum in order to respond to the questions pertaining to the verification process and acceptable documentation.

6. Triggers/FBI Fingerprint Check (§§ 107.31(c)(5) and 108.33(c)(5))

The FAA proposed only an editorial change to the list of ''triggers.'' No additions to the current criteria were proposed.

NATA states that if the airport tenant who is hiring an individual, covered by the background check rule, does not receive any of the FBI information, how can that airport tenant employer be ''protected * * * from future liability?'' For example, if a potential employee has no disqualifying crimes, but has several convictions for theft, the business wanting to hire this person as a baggage handler would be unaware of this record.

One commenter advises the FAA that a criminal records check does not provide information on individuals who have resided outside the U.S.

Several commenters state that the 54-day estimate for the FBI fingerprint check is excessive and costly. One commenter says that the FAA should ensure that the fingerprint check is completed within 30 days. Another commenter adds that after 30 days it is no longer viable to keep a new hire on its payroll doing work that does not require unescorted SIDA access.

FAA Response: As stated, the proposal did not change the requirements other than extend them to screeners and screener supervisors.

In response to the commenter requesting access to FBI criminal records information for airport tenants, the FBI does not allow such access. The FBI criminal record information may be used only for the purposes of this rule as stated in § 107.31(i). The FAA does not have the statutory authority to provide access to FBI criminal records to anyone other than air carriers and airport operator.

In response to the commenter stating that a criminal records check does not provide information on individuals who have resided outside the U.S., the FAA agrees with respect to convictions in foreign countries. The criminal records check will provide information on individuals convicted in the U.S. of crimes regardless of where they currently reside. If an individual has been convicted of a crime outside the U.S., obtaining that criminal record is beyond the FAA's current statutory authority.

The FAA has received many telephone calls regarding the current §§ 107.31(c)(5) and 108.33(c)(5). Many believe the employer is directed or authorized to conduct a criminal records check of all employees/potential employees. The FAA cannot stress enough that the regulated parties are not to submit fingerprints for a criminal record unless such action has been triggered by one of the conditions listed in §§ 107.31(c)(5) and 108.33(c)(5). However, even with a triggering event the criminal record check may not occur if either the employer or the employee/potential employee chooses not to go forward with the process.

In order to assist those seeking to understand this regulation the final rule has been amended to reference the fingerprinting process of the employment history investigation as Part 2. If Part 2 of the employment history investigation occurs, only part 107 airport operators or part 108 air carriers are statutorily permitted to request a comparison of fingerprints against criminal files maintained by the FBI. Airport users or screening companies who wish to proceed with a criminal record check for employees or potential employees will make such a request of the FAA through the appropriate airport operator or the air carrier.

The FAA has changed the wording in these sections to acknowledge that not everyone has a criminal record. The final rule effects that the submission of fingerprints are once collected will be compared with the FBI's criminal files to see if a match exists and a criminal record is available.

The FAA agrees with commenters who indicate the turnaround time for receiving record information is too long. The FAA will continue in its attempts to ensure a speedy return for all fingerprint cards submitted. The FAA is confident that once an automated fingerprint processing system is fully implemented, the turnaround time will greatly improve. The FBI has indicated to the White House Commission on Aviation Safety and Security that the turnaround time will be at most seven days.

The FAA will keep the regulated parties abreast of any developments regarding the automated processing. Clearinghouse services may be sought by the FAA to assist those regulated parties who will be transitioning to automated fingerprint processing. The FBI determines the cost of processing fingerprints and will notify the FAA of any cost increases. The FAA will in turn notify the regulated parties of those costs. For further discussion of this issue, see the Regulatory Evaluation.

Regardless of the fingerprint processing utilized, either through electronic transmission or not, the requirements of §§ 107.31(c)(5) and 108.33(c)(5) remain the same.

Several commenters brought up the use of the NCIC. Title 49 U.S.C. § 44936 states that ''if the Administrator requires an identification and criminal record check, to be conducted by the Attorney General, as part of an investigation under this section, the Administrator shall designate an individual to obtain fingerprints and submit those fingerprints to the Attorney General.'' There was not and there still is not any intention of confirming criminal records by name alone. As previously noted by the FAA and the FBI, the use of NCIC is not a definitive means of identification and is not authorized to satisfy the requirements of this rule.

7. Individual Notification (§§ 107.31(d) and 108.33(d))

The FAA proposed requiring the regulated party to identify a point of contact when it notifies an individual that a criminal records check will need to be conducted.

One commenter recommends that this section specify how the affected individual should be notified prior to commencing the criminal records check, i.e., should notification be in writing and be acknowledged by the affected individual in writing and by signature.

FAA Response: The FAA believes that oral notification should be adequate, but understands that some regulated parties may choose to handle such a matter with written notification and acknowledgement by the affected individual. This business decision is not appropriate for and will not be addressed in this final rule.

8. Fingerprint Processing (§§ 107.31(e) and 108.33(e))

The FAA proposed changing paragraph (e)(1) (formerly paragraph (i)(1)) to clarify that only fingerprint cards approved by the FBI and issued by the FAA may be submitted. A change to paragraph (e)(5) was proposed to reflect the increase in the processing cost. The proposed paragraph did not state an actual dollar amount. The FAA also proposed that the applicable fee would be provided through the local FAA security offices.

ACI–NA and AAAE state that the first sentence of § 107.31(e) should read ''If finger-print based criminal history check is required pursuant to paragraph (c)(5), the airport operator * * * *'', to ensure that it is understood that fingerprints do not need to be taken until indicated by one of the triggers.

The same commenter states that obtaining fingerprints under the direct observation of the airport operator or law enforcement officer is inconvenient for those airports without on-site

facilities. It should be acceptable to utilize local police department personnel whose activities and expertise are acceptable by local, state and federal courts.

Two commenters, including ACI–NA and AAAE, express concern that FAA local offices might add charges to the rate of processing fingerprints. One of the commenters proposes that a flat rate be retained or that changes in the future be implemented only after a public hearing or formal consultation with air carriers.

One commenter states that the FAA and FBI should work together to expedite development of and direct access to the FBI's Integrated Automated Fingerprint Identification System (IAFIS) by law enforcement agencies supporting airports.

FAA Response: The lead-in sentence of §§ 107.31(e) and 108.33(e) has been changed in the final rule to clarify that the fingerprint processing requirements must be complied with ''if a fingerprint comparison is necessary'' under §§ 107.31(c)(5) and 108.33(c)(5). A fingerprint comparison, Part 2 of the employment history investigation, is required only if one of the triggering conditions occurs in Part 1 of the employment history investigation.

Local police departments are considered law enforcement officers and by current regulation may assist in the collection of fingerprints. This option has not been changed in the final rule.

As stated earlier the designated rate for processing each fingerprint card is determined by the FBI, conveyed to the FAA and will be passed on to the regulated parties. The FAA does not add any of its own administrative costs or user fees. When the FBI determines an increase is necessary it will formally notify the FAA. The FAA national headquarters will receive information on fees and forward it to the regulated parties via the local security field offices. The cost is determined by the FBI and is not negotiable.

The purpose of having the local FAA security offices advise the regulated parties of the fee is to prevent the need to go through the prolonged process of rulemaking to make such an announcement. Fees are periodically changed by the entities providing the services.

Regarding the comment on providing expedited access to law enforcement agencies supporting airports to the FBI's IAFIS, the FAA is aware such work is in progress. However, the law enforcement officer's access to IAFIS exists for law enforcement purposes only and is not accessible for employment history investigations.

9. Determination of Arrest Status (§§ 107.31(f) and 108.33(f))

The proposed rule made no changes to the current requirements in §§ 107.31(f) (formerly paragraph (j)) and 108.33(f). No comments were received on these requirements.

10. Corrective Action by Individuals (§§ 107.31(h) and 108.33(h))

The FAA proposed no substantive changes to §§ 107.31(h) (formerly § 107.31(k)) and 108.33(h) (formerly § 108.33(g)). No comments were received on these requirements.

11. Employment Status While Awaiting Criminal record Checks (§§ 107.31(j) and 108.33(j))

The FAA proposed for § 108.33(j) that those individuals applying for screening functions and screening supervisory positions would not make independent judgments until their employment history investigations are completed which includes a criminal record check if needed. Sections 107.31(j) and 108.33(j) simply restate the current requirement to escort those who are seeking, but have not yet been cleared for unescorted SIDA access.

Several commenters express concern that escorting newly hired workers who are awaiting clearance will put a burden on current employees, especially if staffing shortages occur.

One commenter says that the meaning of § 108.33(j)(2), ''* * * applicants * * * must not exercise any independent judgments regarding those functions'' is unclear and that it should be rewritten.

FAA Response: The FAA believes that some commenters have misunderstood the requirements for initiating a criminal record check. Only those persons who meet at least one of the triggers are required to submit fingerprints for a criminal record check (Part 2) in order to further pursue their considerations for performing screening functions. The FAA assumes this will not be the typical case. If the individual has no need for criminal record check, then the only waiting period is for the completion of the employment history verification portion (Part 1).

In response to the request for clarifying the language that screeners ''shall not exercise any independent judgments. * * *'', the FAA refers the commenter to that portion of the security program dealing with initial training of screeners for further clarification.

12. Recordkeeping (§§ 1.07.31(k) and 108.33(k))

The FAA proposed that only direct employees of airport operators and air carriers may carry out responsibilities related to requesting, processing, maintaining and destroying criminal records.

Several commenters, including ACI–NA and AAAE, disagree with the proposal requiring criminal record responsibilities to be carried out by direct airport operator employees, excluding contract personnel. One commenter states that this proposal will prevent airports from continuing to use law enforcement officers, which clearly does not compromise security.

The same commenters state that precluding the use of contractors will impinge upon the airport operator's authority to carry out a federal mandate in a confidential, efficient and economic manner.

One commenter petitions the FAA to request reconsideration by the FBI and to strike this limitation.

ACI–NA and AAAE request that the regulation contain an acceptable method of destruction of criminal and employment background investigation files.

NATA recommends that the FAA ''seek the same legislative solutions as found in the Pilot Records Act'' to protect past and prospective employers subject to liability that is associated with the sharing of sensitive information.

One commenter asks if the airport operator must obtain records for only those employees of tenants who have had the criminal record checks performed or for all employees of tenants with SIDA access.

Another commenter states that the NPRM should be more specific in defining ''where the air carrier's responsibility for file maintenance begins and the airport operator's ends.'' Also clarification is needed about whether the air carrier or airport operator will be responsible for maintaining the files of an air carriers' sub-contractors and sub-tenants.

FAA Response: In response to commenters' desire to use contractors the FAA has not changed the final rule concerning the handling of criminal records by direct employees only. The information contained in the criminal records is under the custody of the FBI and they determine how the information will be handled. The FAA has been in contact with the FBI to confirm this limitation regarding the handling by direct employees. The FBI restrictions are contained in FBI regulations and modifications to FBI interpretations are not currently being considered.

Furthermore, with respect to using contractors since the regulation requires a criminal record be processed through the FAA it remains unclear what

services a contractor is providing to the regulated parties that are necessary for compliance with this regulation.

In response to the comment about destruction of criminal records the FBI does not currently have a standard regarding the destruction of those records. With respect to destruction of employment history investigation files the FAA does not generally prescribe means of destroying records no longer necessary for regulatory compliance. Discussion with the local FAA offices might be beneficial to determine a means of appropriately destroying both types of records.

With respect to NATA's recommendation the FAA does not consider the information needed for this regulation to be sensitive. This rule only addresses the collection and confirmation of employment dates, which are generally not considered confidential information. The FAA does not agree that information required for this regulation necessitates legislation.

Additionally, the contents of the investigative files should contain only the information required for compliance with this regulation. No personnel related materials, such as insurance papers or training records need be included in the investigative file or other information which might be construed as sensitive. The airport user is strongly encouraged to redact information in the investigative files that is not related to the requirements of this regulation. The FAA believes that if only the information required for compliance with this regulation is contained in the investigative file, then any concerns about liability issues would be resolved. There is no requirement that the airport user provide original paperwork to the airport operator, however, the paperwork provided must be a truthful rendition of the record.

The comment requesting clarification on the maintenance of files for those contracted by the air carriers has been addressed in this final rule. The FAA specifically holds the air carrier responsible for the screening companies it hires to perform its screening functions. The air carrier may delegate the performance and maintenance of Part 1 of the employment history investigation files to screening companies but the air carriers remain responsible for compliance with this final rule. Only the air carrier's direct employees are to maintain Part 2 investigative files.

For clarification on the maintenance of files the FAA would like to point out for those airport operators who accept clarification from air carriers, for screeners requiring unescorted access, that Part 1 of the employment history investigation will be maintained by the air carriers. Additionally, air carriers are required to conduct self-audits and they are subject to regulatory audits performed by the FAA. These audits are intended to assist air carriers with compliance regarding this rule. Only air carriers, and not airport operators, have the regulatory responsibility to conduct employment history investigations on individuals seeking to perform screening functions under this rule.

In this final rule the airport operator must, at the time it accepts a certification, collect the completed investigative file and either maintain or delegate through the certification, the maintenance responsibility to the airport user. If the airport user maintains the investigative file the rule requires the airport operator to conduct a preliminary review of the file to ascertain that it is complete. The preliminary review would lead to the rejection and return of those files that appear to be incomplete. Any rejections due to incompleteness should in no way inhibit re-submissions by the airport user after the application has been completed. The preliminary review is different from the auditing process where the investigative file is assessed for accuracy and confirmation that the information was verified.

The airport operator may accept a certification from the air carrier, but need not receive the investigative file. The air carrier is separately responsible under § 108.33 for maintaining appropriate employment investigative files.

13. Continuing Responsibilities (§§ 107.31(l) and 108.33(l))

The FAA proposed that individuals who have been cleared for screening or supervisory functions or unescorted SIDA access will be obligated to report themselves to their employer if they are subsequently convicted of any disqualifying crime. The FAA also proposed that the tenant or contractor employer must report to the airport operator or the air carrier that an individual may have a possible conviction of a disqualifying crime. Additionally the FAA proposed that once the airport operator or air carrier receives this information it must determine the status of the conviction and take appropriate action if the conviction is confirmed.

One commenter states that this proposal is meaningless because it imposes no penalty on the individual for noncompliance. The employee has more incentive not to report since a loss of SIDA access would probably result in the loss of the employee's job.

The commenter also questions if the FAA is requiring that a fingerprint check be done on individuals to investigate felony convictions that may have occurred after the initial employment check.

FAA Response: The commenter is incorrect as there is potential for a civil penalty under 14 CFR part 13 on this section as well as on all sections of the security regulations.

The FAA understands that individuals who report themselves will lose their unescorted access privileges. The FAA also is aware of the potential for obtaining other positions at the airport that do not require unescorted access privileges, many times with the same employer. The same may not be true with those individuals seeking positions as screeners.

There is no regulatory authority to request nor is there a regulatory responsibility to obtain a fingerprint based criminal record check after the initial employment check has been completed. However, the airport operator and air carrier are obligated to comply with §§ 107.31(e)(2) and 108.33(e)(2) to determine if there is a conviction. The FAA would also point out that a conviction of a felony is not automatically disqualifying. Only a conviction of one of the crimes listed in §§ 107.31(b)(2) and 108.33(b)(2) is disqualifying.

In this final rule the FAA added § 107.31(p)(1) which also requires airport users to notify the airport operator if information becomes available to them regarding a possible conviction of a disqualifying crime of one of their employees.

14. Exceptions (§ 107.31(m))

The FAA proposed that the exception to the employment background investigation requirement for individuals who have undergone a U.S. Customs Service background investigation would no longer be recognized.

One commenter suggests that the proposal to remove the Customs exception should result in a coordinated effort between the Customs Service and the FAA to create one investigation process that would meet the requirements of both agencies.

NATA states that the removal of the exception will result in a redundant check for many employees requiring SIDA access that also operate in Customs areas. NATA adds that the FAA needs to provide further explanation why the Customs

background check no longer meets the requirements of the FAA regulations.

ACI–NA and AAAE agree with the removal of the Customs exception and states that the FAA should clarify that a new background check is not necessary for those individuals who were authorized through acceptance of the Customs Service background check before this rule takes effect.

FAA Response: Since publication of the unescorted access privilege rule the FAA has determined that the Customs Service background checks are not performed in a standard manner nationally. Customs regulations do allow for variation. The FAA has made the determination that due to the variation within the Customs Service the FAA will no longer recognize the background checks performed by the Customs Service.

Since the Customs Service and the FAA serve different functions having different missions and obligations it is unlikely that the two agencies could mesh their requirements for one background investigation.

Those individuals who were granted unescorted access based on the Customs background check prior to the effective date of this rule will be grandfathered as noted in § 107.31(m)(4).

15. Investigations by Air Carriers and Tenants (§ 107.31(n))

The FAA proposed that when the airport operator chooses to accept a tenant's certification the airport operator must collect and maintain the entire employment history investigation file.

Several commenters oppose the proposal that airport operators collect and maintain the entire history background investigation files because it would impose substantial administrative, filing, storage, and cost burdens on the airport operator, while offering minimal security justification.

ACI–NA and AAAE state that this requirement will make the airport operator liable for these records and their accuracy, which should be the responsibility of the air carriers and tenants.

A commenter states that the proposal would require the dissemination of confidential and personal information to more than one hundred airports, increasing the possibility of unauthorized disclosure.

RAA recommends that the employer maintain a copy of the background employment investigation files at a central location while making them available for FAA audit. This would meet the needs of the FAA and protect the privacy of individual employees. Other commenters suggest that airport tenants should maintain their employee background check records at a location in the airport where they will be available for random inspections by the airport operator or FAA.

Two commenters state that requiring the airport operator to maintain and control written records for air carriers and their contractors is redundant since air carriers are required under § 108.33(m)(1) to have such files available on-airport.

A commenter states that airport operators should not be responsible for foreign air carrier compliance and that the FAA should audit part 129 operators. In addition, the FAA should audit and hold accountable tenants with approved Tenant Agreements.

One commenter raises the issue of discrimination against foreign flags since under § 107.31(n) only foreign air carriers and tenants would be required to provide an entire employment background investigation file. The commenter asks whether this will be an automatic audit of all foreign air carrier submissions.

One commenter asks if the airport operator must obtain records for only those employees of tenants who have had the criminal records check performed or for all employees of tenants with SIDA access.

Another commenter states that the NPRM is confusing because § 107.31(k) appears to require airport operators to retain air carrier employment application and background investigation verification records, while § 107.31(n)(2) seems to require only completed tenant

RAA recommends that the employer maintain a copy of the background employment investigation files at a central location while making them available for FAA audit. This would meet the needs of the FAA and protect the privacy of individual employees. Other commenters suggest that airport tenants should maintain their employee background check records at a location in the airport where they will be available for random inspections by the airport operator or FAA.

Two commenters state that requiring the airport operator to maintain and control written records for air carriers and their contractors is redundant since air carriers are required under § 108.33(m)(1) to have such files avialable on-airport.

A commenter states that airport operators should not be responsible for foreign air carrier compliance and that the FAA should audit part 129 operators. In addition, the FAA should audit and hold accountable tenants with approved Tenant Agreements.

One commenter raises the issue of discrimination against foreign flags since under § 107.31(n) only foreign air carriers and tenants would be required to provide an entire employment background investigation file. The commenter asks whether this will be an automatic audit of all foreign air carrier submissions.

One commenter asks if the airport operator must obtain records for only those employees of tenants who have had the criminal records check performed or for all employees of tenants with SIDA access.

Another commenter states that the NPRM is confusing because § 107.31(k) appears to require airport operators to retain air carrier employment application and background investigation verification records, while § 107.31(n)(2) seems to require only completed tenant employment background investigation files to be obtained by the airport operator.

A commenter requests that the FAA clarify that if the file is incomplete and rejected, there is no liability for loss of employment caused by the airport operator's action.

A commenter asks whether the original background investigation file or merely a copy should be submitted to the airport operator and asks ''[i]f the original is submitted, will this then relieve the carrier of the audit by the FAA?''

Another commenter states that the rule should be modified to require airport operators to accept the air carrier's certification that a background check has been performed. This commenter adds that with the adoption of § 108.14 carriers are fully liable for falsification. Carriers should only have to conform to a single set of regulations rather than different requirements of different requirements at different airports.

FAA Response: In response to commenters who say they will suffer economic hardship if they are required to maintain the employment history files for all person granted unescorted access, the FAA has modified these requirements in the final rule. When an airport operator has accepted an airport user's certification, the airport operator then conducts a preliminary review of the investigative files of those individuals who are named in the certification. After the preliminary review of each employment history file the airport operator may return the file to the airport user to maintain as agreed to in the certification. Consistent with common business practices, airport users have the space, equipment, and the personnel to handle their normal

employment application paperwork. This rule requires certain information be collected for compliance with Part 1 of the investigative process. The FAA has viewed examples where the needed information is provided in 4 pages or less. Therefore the FAA is confident that the airport user will not experience any additional burden in maintaining the paperwork required. Providing the airport user with the opportunity to maintain Part 1 of the investigative file should alleviate anyone's concern about liability. Given the requirements of this regulation the required investigative file will lack confidential and personal information normally associated with employment applications.

It is true, however, that Part 2 of the employment history investigation, when required, will be conducted for the airport users entirely by the airport operator. So there may in fact be limited filing for the airport operator; however it would be far less than the NPRM had proposed.

Two commenters misunderstood the NPRM to state that the airport operators would maintain the files of part 108 air carriers. This is not the FAA's intent. The airport operator is not expected to handle any air carrier investigative files kept in compliance with this rule. The airport operator is only expected to keep the certification offered to them by the part 108 air carriers regarding unescorted access privileges. There is no expectation that the airport operator will conduct a preliminary review of the air carrier investigative files. The part 108 air carriers as regulated parties will be responsible for all investigative files pertaining to those individuals granted unescorted access.

The final rule also responds to comments concerning foreign air carriers. The FAA's policy does not discriminate against foreign air carriers. At the present time the FAA has no other means to reach the part 129 air carriers other than to view them as airport users and it is imperative that the security regulations apply to everyone who has access to an airport. Accordingly, the final rule allows more flexibility regarding the investigative files and offers relief to the part 129 air carriers. The final rule will allow the part 129 air carriers to maintain their own employees' files but keeps in place the airport's authority to ensure only those individuals who have been properly vetted will have access to the airport's SIDA. The final rule will eliminate the need for making copies of the individual's employment investigative file. The decision is up to the part 129 air carrier to offer a certification regarding the completion of an employment history investigation on an individual seeking unescorted access and at the discretion of the airport operator to accept it. The airport operator will conduct the procedures associated with Part 2 requirements for the part 129 air carriers, as it will do for other airport users.

In response to the comment that there is discrimination against foreign air carriers the FAA emphasizes that all investigative files are subject to audits by the FAA to ascertain compliance with the regulation.

Another commenter expressed concern about incomplete or rejected files. In such instances the airport operator should advise the airport user that the paperwork is incomplete so that the airport user and the affected individual would then have an opportunity to complete the paperwork. The air carriers are reminded that there is not obligation for the airport operators to accept certifications. The final rule states in § 107.31(n) that the operators are in compliance when they accept the certification.

Practical reasons dictate the employment history investigative files for screeners be located at the airport and not the air carriers' corporate offices. The main reason centers on logistics. The files need to be available to local FAA agents with regulatory responsibility to inspect records for compliance. Each location should therefore have an air carrier representative named to handle the sensitive issues that may arise relative to Part 2 of the employment history investigations.

16. Airport Operator/Air Carrier Responsibilities (§§ 107.31(o)(1) and (2) and 108.33(m)(1) and (2))

The FAA proposed no changes to the requirement that the airport operator designate the airport security coordinator (ASC) responsible for reviewing and controlling the results of the employment background investigations and for serving as the contact to receive notification from individuals of their intent to correct their criminal record. The FAA proposed changing §§ 107.31(g)(1) and (2) to §§ 107.31(o)(1) and (2).

The FAA proposed a new § 108.33(m). Proposed paragraph (m)(1) would require the air carrier to designate an individual at each airport to control and maintain the employment background investigation files for individuals for whom the air carrier has made a certification to the airport operator. Proposed paragraph (m)(2) would require the air carrier to designate an individual in its security program to control the employment background investigation files of individuals for whom the air carrier conducts investigations, including screeners and their supervisors.

Comments received on proposed §§ 107.31(o)(1) and (2) and 108.33(m) are as follows:

ACI–NA and AAAE states that the ASC should be permitted to designate other airport security staff or security contractor staff to fulfill the ASC role. The commenter states that it is not feasible at many airports for one or two individuals to accomplish these tasks and, therefore recommends that the words ''or designee'' be inserted after ''Airport Security Coordinator'' in § 107.31(o)(1) and (2).

The same commenter states that airport tenants should be regulated directly by the FAA rather than laying the entire security enforcement responsibility for them upon the airport operators.

The same commenter adds that the ''legal implications and liabilities associated with airport operating municipalities, states or other entities becoming involved in the employment practices of private companies should be fully explored.''

Another commenter recommends that part 107 require airlines to declare a sponsor for the contractor who would be responsible for the background investigations, audits and maintenance of its files.

Two commenters state that the proposed regulation does not clarify who is responsible for ensuring that the background investigations and audits are completed for contractors and screening companies who service several different airlines at the same airport. According to these comments, at many airports the responsibility of contracting with a contractor falls on an informal ''consortium'' of multiple carriers, or on individual airlines on a rotating basis. The comments suggest that the FAA treat screening companies in the same manner as other airport tenants by requiring each screening company to provide a certification directly to the airport operator.

A commenter suggests that the regulations include a provision permitting the air carriers to review, audit and exercise other oversight functions regarding the airport operator's handling of the screener background investigations. This would allow the air carriers to discharge their responsibility to maintain ultimate control of the screening function.

A commenter recommends that the FAA establish procedures for air carriers to notify the FAA of central locations

where records are maintained; designate the corporate offices which maintain the records; the required to make the records available for FAA inspection; and be required to audit the employment background investigations.

A commenter raised the issue of the threat of litigation against air carriers resulting from disclosure and states that the files must be kept in a secure location in the air carrier's human resources office.

A commenter states that storing the background investigation files should be the responsibility of the firm conducting the background check. Another commenter proposes that the employment background investigative records be kept on file by a FAA Central Records Office to alleviate complications when a security cleared person changes jobs.

Another commenter states that, if the FAA decides to establish a certification program for screening companies, those companies would be permitted to receive criminal history information from the FBI and could maintain their own background information files. The commenter states that requiring the air carrier to receive personal and confidential criminal history information dealing with the employee of another company is both unreasonable and unethical.

One commenter supports the proposal in § 108.33(m) that air carriers designate an individual at each airport to maintain and control employment background investigation files. Currently employment background audit attempts by Air Authority police indicate that records are usually maintained at each airline general office and are inaccessible or not available for a timely review.

One commenter states that the rule should be modified to require airport operators to accept the air carrier's certification that a background check has been performed. Furthermore, with the adoption of 14 CFR § 108.14 (sic), carriers are fully liable for falsification. Carriers should only have to conform to a single set of regulations rather than different requirements at different airports.

FAA Response: In response to the comment about permitting designees to fulfill the role of ASC the FAA has already developed a policy for the use of designees by ASCs. This policy remains in effect for this final rule.

The FAA is unsure why ACI–NAA and AAAE believe the airport would be liable for ''employment practices'' of private companies. The private company may, within certain limits, employ anyone it wishes. The federal regulations apply to those seeking to perform specific job functions. If the individual cannot fulfill a specific job's requirements, in compliance with the federal regulation, the company may still employ the individual in another capacity. Therefore the employability of the individual rests with the private company and not the airport operator.

In addressing the comment about sponsorship the FAA understands that some contractors may only seek unescorted access for one carrier and for a short duration of time. The FAA's only concern is that one of the regulated parties must be responsible for those individuals.

In response to the two comments regarding the issue of who is responsible for airport users the FAA reiterates that the airport operators are responsible for the security of the airport. The air carriers are responsible for their direct employees and those screening companies they hire to perform screening functions. Furthermore, it is the airport operators' responsibility to conduct the employment history investigations to perform the audits of any contractors other than screeners. This regulation allows the airport operator to consider contractors as airport users. This regulation likewise allows the airport operator to maintain the employment history files of those seeking unescorted access if the airport operator so chooses. The FAA leaves to the discretion of the airport operator whether or not the air carrier should take responsibility for certain contractors, other than screeners. The FAA encourages discussion between the airport operators and the air carriers regarding other air carrier contractors.

In response to which air carrier would be responsible for screening companies servicing multiple air carriers at one airport the FAA suggests that the air carriers use the same local procedures which are currently used for other security compliance issues. If there is reason to believe the same procedures cannot be used then it is recommended that all pertinent parties meet to develop a new procedure which is satisfactory to all, just as was done to create the current procedures.

It is the responsibility of the air carriers that hire screening companies to conduct, audit and exercise requisite oversight functions of the screening companies. The final rule states these responsibilities in § 108.33. Since the part 108 air carriers are charged with maintaining employment history investigation files the FAA will work closely with them regarding the exact location of the files. The FAA wishes to clarify that nothing in this final rule requires or authorizes the Airport Authority Police to audit screener employment history investigative files.

One commenter indicated the investigative files should be the responsibility of the firm that conducts the background check. The FAA will assume this comment concerns those private companies that perform pre-employment background checks for airport users. If those companies are also performing Part 1 of the employment history investigations for this rule they are doing so at the request of the airport users. If the airport operator has delegated the conduct of Part 1 of the employment history investigation to the airport user, then the user, under certification, will maintain the files on behalf of the airport operator. This rule does not address any further delegation for the maintenance of Part 1 files. If certifications are accepted by the airport operator certification requirements must be met. The responsibility to delegate or not delegate maintenance of the investigative files rests with the airport operator.

One commenter questioned why the FAA did not provide screening companies with the authority to receive criminal records. Screening companies are not authorized to have such access by 49 U.S.C. 44936. This commenter also believed it was ''unreasonable and unethical'' for a carrier to receive confidential criminal record information on another company's employee. The FAA does not agree with this comment. For a discussion of these issues see sections 6 and 12 of the Discussion of Comments.

It was not the intent of the FAA in the unescorted access rule, nor is it the intent of this rule, to require the airport operators to review the employment history investigative files of air carrier employees seeking unescorted access. The certification process was intended to handle the request and granting of unescorted access between air carriers and airport operators. However, the FAA will not remove the airport operators' prerogative to protect its property. The FAA audits and the air carrier's self-audits should supply sufficient assurances that compliance with this regulation is being met. The FAA encourages airport operators to rely on the air carriers' certification.

The FAA has expanded the air carrier's responsibilities listed in § 108.33(m). This paragraph lists the points of contact required for notifications and maintenance of Parts 1 and 2 of the employment history investigative files for both direct

employees and screening company employees.

17. Audits of Background Investigations (§§ 107.31(o)(4) and 108.33(m)(5))

Proposed § 107.31(o)(4) would require the airport operator to audit the employment background investigations performed in accordance with this section, except those employment background investigations of air carriers certifying to the airport operator compliance with § 108.33(b). Proposed § 108.33(m)(5) would require the air carrier to audit the employment background investigations. The audit process would be set forth in the air carrier approved security program.

Many comments were received on the audit requirements. Most of the comments expressed a concern that entities should be required to audit only those investigations concerning their own personnel.

ATA and ACI–NA and AAAE believe that the FAA should audit airport operators, air carriers, and screening companies, once they are FAA certificated, independently for compliance with the regulations. According to commenters, a FAA audit would ensure that audit procedures do not vary among regions and agents.

Some commenters state that requiring regular audits of all background investigations would be time consuming and costly with no corresponding increase in security.

FAA Response: The FAA's intent is to ensure a means of evaluating employment history investigations records and to confirm the validity and accuracy of the information they contain.

In addition to the self-audits, required by 49 U.S.C. § 44936(a)(3), the FAA will also be conducting audits of airport operators, and air carriers. Screening companies will be audited by the responsible air carriers. FAA audits when conducted on screening companies will be considered as part of an audit on the responsible air carrier.

The FAA has carefully considered all comments on the audit requirements. Most of these comments are specific and apply to the self-audit procedures that will be set forth in the air carrier and airport approved security programs. The FAA will provide an opportunity to comment on the specifics of the audit process in accordance with §§ 107.11 and 108.25.

Section 306 of the Act also directs the FAA to provide for the periodic audit of the effectiveness of the criminal records checks. The FAA in its oversight capacity has previously conducted audits and will continue to conduct audits on employment history investigations. The FAA views self-auditing as a valuable tool which can assist the regulated party in effective rule implementation. The final rule requires air carriers and airport operators to audit their employment history investigations. The self-audit requirements apply to both Part 1 and Part 2 of the employment history investigation.

This final rule provides, in general terms, information on audits to be conducted by regulated parties on employment history investigations. The audit functions pertaining to the employment history investigations have important security benefits; however, for security reasons, the exact auditing procedures cannot be described in a public document. Therefore the specific requirements regarding the audits will be proposed as amendments to the security programs.

18. General—Cargo and Baggage Operations

The FAA requested comments on whether to expand the employment history investigation requirement to include persons who perform security functions related to cargo and baggage outside of the SIDA. In general, commenters who responded to the FAA's question opposed such an expansion, and several stated that to include such a requirement in a final rule would violate the Administrative Procedures Act.

FAA Response: While Section 304 of the Act provides the Administrator with discretionary authority to require employment history investigations for other individuals who exercise security functions associated with baggage or cargo, the FAA did not propose to expand the requirement for such investigations beyond checkpoint screeners and their supervisors. As explained in the preamble to the proposed rule most air carrier baggage and cargo personnel currently have unescorted access to the SIDA and thus are currently subject to access investigations.

If the FAA had received comments supporting the inclusion of those who perform security functions outside the SIDA, related to cargo and baggage, the FAA would have addressed that concern in a separate NPRM. However, comments were insufficient to support the need for an additional proposal. Therefore, the FAA has decided not to expand the requirement.

19. Summary of Economic Comments

This section summaries the economic comments and the FAA's responses. A detailed discussion of these comments and responses is contained in the full regulatory evaluation in the docket for this final rule.

a. *Comments related to extending criminal background checks for screeners.* Two commenters state that the FAA's use of 54 days for the length of time to perform fingerprint checks was underestimated. These commenters believe that the actual length of time is longer, and should be reflected in the costs.

Two commenters also state that the assumption, based on the historical record, that only 0.4% of the applicants would need to be fingerprinted and a negligible amount would have a prior criminal conviction was inaccurate. These commenters believe, based on personal experience, that both estimates should be higher.

One commenter believes that the estimate of $55 for total staff time and supplies is too low, given all that is required.

Two commenters request that the FAA make clear who is paying the cost of fingerprint processing and that the local FAA offices are charging the correct rate.

One commenter, a catering company, does not believe that escorting a new hire for more than 30 days is viable. Another commenter, representing an airport, says that if the verbiage on criminal history background check document forms is changed, there would be increased costs due to paperwork changes.

FAA Response: The FAA cannot consider each airport's turnaround time individually, and will continue to use the national average for purposes of costing the rule. The FAA agrees that a 54 day processing time is too long, but has no means at its disposal to shorten it.

The rates used, of 0.4% and 0.0%, were based on a review of the data on the results of the first eight months of the current §§ 107.31 and 108.33, from February through September 1996. Neither commenter submitted any data or documentation showing rates different than these, so the FAA will continue to use these rates.

Much of what the commenter believes should be considered are not required; the economic analysis costed out those parts of the proposed rule that would add cost.

Regarding who pays what section of the cost of fingerprinting, the FAA is required by Executive Order to look at all costs to society and made clear, in its analysis, who would pay what. With regards to the cost of the criminal record checks, the FAA does not have control

over the cost of this process, so everyone needing fingerprinting would pay the same standard rate.

With regards to escorting employees, the FAA believes that conditions and requirements would be different for screeners than for caterer employees and that the ability for a screener to work supervised would be viable past 30 days. There are no document title requirements in the Regulations; hence, there would be no requirement to change any verbiage on the forms.

b. *Comments related to removing the exemption that substitutes a U.S. Customs Service (USCS) background check for a check based on the requirements.* A trade organization states that some airports report that up to 60% of air carrier employee SIDA access media, plus a much smaller percent of airport employees, were authorized through acceptance of the USCS background check. Accordingly, this change could be costly.

FAA Response: The FAA called for comments on the number of airport employees who currently were granted unescorted access due to a background check from the USCS. This was the only response, and is too vague to help project cost data. There will be no additional costs due to removing this exception.

c. *Comments related to the requirement that the airport operators and air carriers review the employee background documentation of their own employees as well as any appropriate contractors or, in the case of airports, airport users.* Four commenters state that the requirement for specific airport personnel to review the employment history check documentation would increase their paperwork requirements, and would require hiring of more employees and finding additional storage space.

There were several comments on the assumption (in the economic analyses) that 5% of all employment history investigations would be checked. These commenters believe that the FAA underestimated total costs, in part due to a belief that the actual amount checked would be greater than 5% as airports would want to check employees and avoid potential liability problems.

One commenter contends that the costs associated with collecting and filing records should be in the cost analysis, but are not.

FAA Response: The final rule will allow for the option that the airport user could hold the required paperwork for their employees; this would relieve the airport operator from having to maintain, collect, and process the entire employment background investigation file for each employee. Hence, airports will not need to hire additional personnel or find additional storage space to handle these files.

It is possible that the audit rate could be higher than 5% for some airports; the FAA used an estimated 5% as an average for all airports and calculated costs accordingly. This 5% applies to all persons with unescorted access who had been subject to an employment background check, and not all persons with unescorted access on file. There would be no potential liability responsibility should an incident occur since airport operators are not fully responsible for the compliance of the airport user.

The airport user or the airport would be filing these papers in their file cabinets anyway, so there would be no additional cost.

d. *Comments related to the FAA's NPRM economic analysis.* A trade organization claims that it is difficult to know for certain what variables were included in the economic analysis, particularly as they refer to the costs of the employment verification process for screeners. This same organization states that the assumed annual growth rate and salaries for screeners are far too low given the intent to add new explosive detection technologies at airports.

An airport commenter is concerned that the FAA's costs did not include the additional costs airports must incur to fulfill § 107.31 costs.

FAA Response: FAA's economic analysis makes it very clear what administrative costs are included, taking into account two hours of a paperwork/clerk specialist and one third of an hour of airport or air carrier supervisor designee. The FAA agrees that the advanced skills required for explosives detection technology will mean higher salaries and an increase in the overall demand for and career development growth rate of these screeners vis-a-vis other screeners. This information is included in the data used to calculate the costs of this rule.

All costs connected with § 107.31 were captured in the analysis of the final rule for Unescorted Access Privilege (60 FR 51854) that went into effect on January 31, 1996. This rule seeks to cover individuals not covered by § 107.31, and so the costs for this rule are separate.

Economic Summary

Proposed and final rule changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic effect of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. In conducting these analyses, the Federal Aviation Administration (FAA) has determined that the final rule would generate benefits that justify its costs and is not ''a significant regulatory action'' as defined in the Executive Order or Department of Transportation Regulatory Policies and Procedures. The rule will not have a significant impact on a substantial number of small entities and will not constitute a barrier to international trade. In addition, this rule does not contain any Federal intergovernmental mandates, but does contain a private sector mandate. However, because expenditures by the private sector will not exceed $100 million annually, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Cost of Compliance

The FAA has performed an analysis of the expected costs and benefits of this regulation. In this analysis, the FAA estimated costs for a 10-year period, from 1999 through 2008. As required by the Office of Management and Budget (OMB), the present value of this stream was calculated using a discount factor of 7 percent. All costs in this analysis are in 1997 dollars.

The FAA estimates that in 1999, there will be 15,600 screeners and screener supervisors affected by this rule, comprised of 1,400 checkpoint security supervisors (CSS), 100 shift supervisors, and 14,100 screeners. The analysis assumes loaded hourly wages (i.e., with fringe benefits) of $6.25 for screeners, $7.31 for CSS's, and $11.00 for shift supervisors. Industry sources report, on average, annual turnovers of 110% for all screeners, 85% for CSS's, and 20% for shift supervisors. This turnover rate, of course, will vary by airport and location. Given the difficulty of discerning the actual turnover rates at individual airports, the FAA has opted to use these turnover rates for the entire industry. In addition, the FAA assumes that the number of screeners will grow at an annual rate of 1.5%.

There are three cost components that need to be considered. These involve the fee for processing fingerprints; the time for a paperwork/clerk specialist to take the fingerprints, do the requisite paperwork, and mail the forms; and the need for this employee to be supervised.

Currently, a fingerprint check takes, on average, 54 days to be processed. During this time period, this particular employee, if hired, will need to be supervised. This employee's productivity will be low for he or she will not be able to exercise any independent judgment; all screened baggage will also need to be checked by this employee's supervisor, and this employee will not be able to do tasks such as using the metal detector or hand wand, or perform a physical search. On the other hand, at times, this employee might be doing tasks that do not need 100% attention from a supervisor. Accordingly, the FAA will use a 15% productivity rate in this analysis.

The alternative will be to delay hiring the employee until the results of the fingerprint check come back. Given the high turnover rate of screeners, there is a good likelihood at many locations that this person can then be hired based on another job opening.

The FAA examined the cost of both of these alternatives. The lower cost alternative will be to delay hiring this person until the fingerprint check results return; in such a situation, the only costs will be the costs of fingerprinting the employee. The higher cost alternative will be to hire this person, have this person supervised, and pay them even though their productivity will be low. Screeners will be supervised by another screener, at a total cost of about $1,925 per hire for the 54 day period. CSS's will be supervised by another CSS, at a total cost of about $2,250 per hire for the 54 day period.

The current processing fee for a fingerprint investigation is $28; the FAA has been paying the difference between that and the current published fee of $24. Under this final rule, employers and/or employees will pay the entire cost (with employees proscribed from handling the fingerprint cards), while the FAA will no longer pay the $4 difference. Hence these incremental changes cancel each other out.

Since January 31, 1996, all applicants for specific jobs requiring unescorted access have been subject to a criminal background history check; the FAA collected data on the results of the first eight months of these applicants. Of the applications that were processed, 0.4% of applicants needed to be fingerprinted. In addition, almost none had a prior criminal conviction which disqualified them. In the absence of other information, the FAA will use these percentages (0.4% and 0.0%, respectively) in estimating the costs of this final rule. Due to both the growth rate in screeners and the annual turnover rates, the FAA estimates that the ten-year costs for the criminal history background check portion of this final rule will range from $38,800 (net present value, $33,300) to $1.16 million (net present value, $804,100), again, the latter cost including the cost of supervision.

The FAA, in removing the USCS exemption in § 107.31(m), has made it clear that those individuals who were granted unescorted access based on the Customs background check prior to the effective date of this rule will be grandfathered. Hence, no employee who received unescorted access based on a background check from USCS will have to undergo a new check, and there will be no costs associated with the removal of this exception.

This amendment will add a new requirement that will require the airport operators and air carriers to review the employment background documentation of their own employees as well as any appropriate contractors or, in the case of airports, airport users. They will need to develop and carry out processes by which they will examine the accuracy and completeness of the employment background investigations being accomplished on all of all listed parties.

The actual percentage to be audited may vary by airport and air carrier and will be included in each's security program. The FAA assumes that, on average, 5 percent of all employment background investigations will be checked. The average check will involve a paperwork/clerk specialist going through the employee's application and checking to make sure that all items were accurate. The FAA estimates that the average investigation will cost approximately $58.

Based on the number of employees at airports with unescorted access privileges, specific employee growth rates, and annual attrition rates, the FAA calculates ten year costs for the airports to be $3.96 million (net present value, $2.72 million). Meanwhile, the air carriers will need to run checks on the screeners and screener supervisors that are hired during this time period. The ten-year costs for the air carriers sum to $524,700 (net present value, $365,500).

The ten-year cost of this rule will range from $4.53 million (net present value, $3.12 million) to $5.64 million (net present value, $3.89 million).

Analysis of Benefits

The purpose of this final rule is to enhance aviation security. The primary benefit of the rule will be increased protection to Americans and others traveling on U.S. domestic air carrier flights from acts of terrorism. The changes envisioned in this rule are an integral part of the total program needed by the airports, air carriers, and the FAA to prevent a criminal or terrorist incident in the future.

Since the mid-1980's, the major goals of aviation security have been to prevent bombing and sabotage incidents. Preventing an explosive or incendiary device from getting on board an airplane is one of the major lines of defense against an aviation-related criminal or terrorist act. The individuals covered by this final rule play a major role in preventing such occurrences. It is essential that potential employees that may have criminal records or questionable backgrounds be investigated, and, if certain conditions are met, denied the opportunity to conduct security-related activities. Such individuals could definitely be a threat to aviation security.

In 1996, both Congress and the White House Commission on Aviation Safety and Security recommended further specific actions to increase aviation security. The Commission stated that it believes that the threat against civil aviation is changing and growing, and recommended that the federal government commit greater resources to improving aviation security. President Clinton, in July 1996, declared that the threat of both foreign and domestic terrorism to aviation is a national threat. The U.S. Congress recognized this growing threat in the Federal Aviation Reauthorization Act of 1996 by: (1) authorizing money for the purchase of specific anti-terrorist equipment and the hiring of extra security personnel; and (2) requiring the FAA to promulgate additional security-related regulations including this current rulemaking action.

The cost of a catastrophic terrorist act can be estimated in terms of lives lost, property damage, decreased public utilization of air transportation, etc. The most deadly and expensive example of the type of event that aviation security is trying to prevent is the Pan Am 103 tragedy over Lockerbie, Scotland. Since the benefits of this rule will apply primarily to domestic flights, which are flown primarily by narrow-bodied airplanes, rather than international flights, which are flown primarily by wide-bodied airplanes, the FAA examined the costs associated with this catastrophe as they will apply to a domestic tragedy. A conservative estimate of these costs is $832.4 million. This high cost underscores the consequences of not taking prudent security-related steps.

Some benefits can be quantified—prevention of fatalities and injuries and

the loss of aircraft and other property. Other benefits are no less important, but are probably impossible to quantify—the perception of improved security on the part of the traveling public, and general gains for the U.S. attributable to the commitment to enhance aviation security.

Comparison of Costs and Benefits

The ten-year cost of this rule would range from $4.53 million (net present value, $3.12 million) to $5.64 million (net present value, $3.89 million). This cost needs to be compared to the possible tragedy that could occur if a bomb or some other incendiary device were to get onto an airplane and cause an explosion. Recent history not only points to Pan Am 103's explosion over Lockerbie, Scotland, but also the potential of up to twelve American airplanes being blown up in Asia in early 1995. While the specific points in this regulation may not, by themselves, have been factors in the occurrence of Pan Am 103 or the prevention of the culmination of the conspiracy in Asia, these potential devastating costs emphasize the consequences of not taking sensible security-related steps.

Congress has mandated that the FAA promulgate these regulations. Congress, which reflects the will of the American public, has determined that this regulation is in the best interest of the nation. Because this regulation reflects the will of the American people, and because its cost is low compared to the potential catastrophe of a single bomb explosion on an airplane, the FAA finds this rule cost-beneficial.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis (RFA) as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 act provides that the head of the agency may so certify and an RFA is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

Security Screening Companies

This rule will affect companies that perform security screening as well as specific airports. There are currently 58 companies that provide security screening services; 32 of these are small entities. To estimate the annual cost impact for each screening company, the FAA calculated what the maximum annual cost of the regulations will be per screener over the time period examined by this analysis, $11.66, and multiplied by the number of screeners that that company has. Based on these calculations, the FAA concludes that the costs are ''de minimus'' on all but four small entities; the highest cost for these four small entities is $5,000.

Airports

The airports covered by this rule are those that are regularly served by scheduled passenger aircraft operations having airplanes with a passenger seating configuration of greater than 60 seats, are subject to screening programs defined in the current § 108.5, and are required to have an Airport Security Program (ASP) under the current § 107.3(b). There are 74 such airports that have over 2 million people screened per year and 185 such airports that have less than 2 million people screened per year.

Part 107 affects airports classified under Standard Industrial Classification (SIC) 4582. The SBA's small entity size standards criterion define a small airport as one owned by a county, city, town or other jurisdiction having a population of 49,999 or less. If two or more towns, cities, or counties operate an airport jointly, the population size of each are totaled to determine whether that airport is small. In addition, all privately owned, public-use airports are considered small.

The most recent population data for cities, counties, and states is taken from the 1990 Census and this was used to determine the population of the appropriate jurisdiction. Thirty-seven of the 259 airports that meet the above definition are owned by jurisdictions with populations less than 50,000. Each of these has less than 2 million person screenings per year. As discussed above, an average of 554 employees have unescorted access privileges at each of these airports at the end of 1996. The average one year cost for any such airport is $215.

Conclusion

The FAA conducted the required review of this amendment and determined that it will not have a significant economic impact on a substantial number of small entities. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Federal Aviation Administration certifies that this rule will not have a significant impact on a substantial number of small entities.

International Trade Impact Statement

In accordance with the Office of Management and Budget memorandum dated March 1983, federal agencies engaged in rulemaking activities are required to assess the effects of regulatory changes on international trade. Since both domestic and international air carriers use screeners, this final rule change will have an equal effect on both. Unlike domestic air carriers that compete with foreign air carriers, domestic airports are not in competition with foreign airports. For this reason, a trade impact assessment is not be applicable for domestic airports.

Unfunded Mandates Determination

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. Section 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and tribal governments on a ''significant intergovernmental mandate.'' A ''significant intergovernmental mandate'' under the Act is any provision in a Federal agency regulation that will impose an enforceable duty upon State, local, and tribal governments, in the aggregate, of $100 million (adjusted annually for inflation) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that before establishing any regulatory

requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan that, among other things, provides for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity to provide input in the development of regulatory proposals.

This final rule does not contain any Federal intergovernmental mandates or private sector mandates.

Federalism Implications

These regulations do not have substantial direct effects on the states, or on the relationship, or distribution of power and responsibilities, between the Federal Government and the states. Thus, in accordance with the federalism principles and policymaking criteria of Executive Order 13083, this agency has determined that no federalism implications exist necessitating a Federalism Consultation.

International Civil Aviation Organization (ICAO) and Joint Aviation Regulations

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA finds no corresponding International Civil Aviation Organization regulations or Joint Aviation Regulations; therefore, no differences exist.

Paperwork Reduction Act

Under the requirements of the Paperwork Reduction Act of 1995, the Office of Management and Budget has approved the information collection burden for this rule and assigned it OMB Approval Number 2120–0628.

List of Subjects in 14 CFR Parts 107 and 108

Air carriers, Air transportation, Airlines, Airplane operator security, Aviation safety, Reporting and recordkeeping requirements, Security measures, Transportation, Weapons.

The Amendments

In consideration of the foregoing, the Federal Aviation Administration amends parts 107 and 108 of Title 14, Code of Federal Regulations (14 CFR parts 107 and 108) as follows:

PART 107—AIRPORT SECURITY

1. The authority citation for part 107 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 5103, 40113, 40119, 44701–44702, 44706, 44901–44905, 44907, 44913–44914, 44932, 44935–44936, 46105, Sec. 306, Pub. L. 104–264, 110 Stat. 3213.

2. Section 107.31 is revised to read as follows:

§ 107.31 Employment history, verification and criminal history records checks.

(a) *Scope.* On or after January 31, 1996, this section applies to all airport operators; airport users; individuals currently having unescorted access to a security identification display area (SIDA) that is identified by § 107.25; all individuals seeking authorization for, or seeking the authority to authorize others to have, unescorted access to the SIDA; and each airport user and air carrier making a certification to an airport operator pursuant to paragraph (n) of this section. An airport user, for the purposes of § 107.31 only, is any person making a certification under this section other than an air carrier subject to § 108.33.

(b) *Employment history investigations required.* Except as provided in paragraph (m) of this section, each airport operator must ensure that no individual is granted authorization for, or is granted authority to authorize others to have, unescorted access to the SIDA unless the following requirements are met:

(1) The individual has satisfactorily undergone Part 1 of an employment history investigation. Part 1 consists of a review of the previous 10 years of employment history and verification of the 5 employment years preceding the date the appropriate investigation is initiated as provided in paragraph (c) of this section; and

(2) If required by paragraph (c)(5) of this section, the individual has satisfied Part 2 of the employment history investigation. Part 2 is the process to determine if the individual has a criminal record. To satisfy Part 2 of the investigation the criminal record check must not disclose that the individual has been convicted or found not guilty by reason of insanity, in any jurisdiction, during the 10 years ending on the date of such investigation, of any of the crimes listed below:

(i) Forgery of certificates, false marking of aircraft, and other aircraft registration violation, 49 U.S.C. 46306;

(ii) Interference with air navigation, 49 U.S.C. 46308;

(iii) Improper transportation of a hazardous material, 49 U.S.C. 46312;

(iv) Aircraft piracy, 49 U.S.C. 46502;

(v) Interference with flightcrew members or flight attendants, 49 U.S.C. 46504;

(vi) Commission of certain crimes aboard aircraft in flight, 49 U.S.C. 46506;

(vii) Carrying a weapon or explosive aboard aircraft, 49 U.S.C. 46505;

(viii) Conveying false information and threats, 49 U.S.C. 46507;

(ix) Aircraft piracy outside the special aircraft jurisdiction of the United States, 49 U.S.C. 46502(b);

(x) Lighting violations involving transporting controlled substances, 49 U.S.C. 46315;

(xi) Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements, 49 U.S.C. 46314;

(xii) Destruction of an aircraft or aircraft facility, 18 U.S.C. 32;

(xiii) Murder;

(xiv) Assault with intent to murder;

(xv) Espionage;

(xvi) Sedition;

(xvii) Kidnapping or hostage taking;

(xviii) Treason;

(xix) Rape or aggravated sexual abuse;

(xx) Unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon;

(xxi) Extortion;

(xxii) Armed robbery;

(xxiii) Distribution of, or intent to distribute, a controlled substance;

(xxiv) Felony arson; or

(xxv) Conspiracy or attempt to commit any of the aforementioned criminal acts.

(c) *Investigative steps.* Part 1 of the employment history investigation must be competed on all persons listed in paragraph (a) of this section. If required by paragraph (c)(5) of this section, Part 2 of the employment history investigation must also be completed on all persons listed in paragraph (a) of this section.

(1) The individual must provide the following information on an application form:

(i) The individual's full name, including any aliases or nicknames.

(ii) The dates, names, phone numbers, and addresses of previous employers, with explanations for any gaps in employment of more than 12 consecutive months, during the previous 10-year period.

(iii) Any convictions during the previous 10-year period of the crimes listed in paragraph (b)(2) of this section.

(2) The airport operator or the airport user must include on the application form a notification that the individual will be subject to an employment history verification and possibly a criminal records check.

(3) The airport operator or the airport user must verify the identity of the individual through the presentation of two forms of identification, one of which must bear the individual's photograph.

(4) The airport operator or the airport user must verify the information on the most recent 5 years of employment history required under paragraph (c)(1)(ii) of this section. Information must be verified in writing, by documentation, by telephone, or in person.

(5) If one or more of the conditions (triggers) listed in § 107.31(c)(5)(i) through (iv) exist, the employment history investigation must not be considered complete unless Part 2 is accomplished. Only the airport operator may initiate Part 2 for airport users under this section. Part 2 consists of a comparison of the individual's fingerprints against the fingerprint files of known criminals maintained by the Federal Bureau of Investigation (FBI). The comparison of the individual's fingerprints must be processed through the FAA. The airport operator may request a check of the individual's fingerprint-based criminal record only if one or more of the following conditions exist:

(i) The individual does not satisfactorily account for a period of unemployment of 12 consecutive months or more during the previous 10-year period.

(ii) The individual is unable to support statements made on the application form.

(iii) There are significant inconsistencies in the information provided on the application.

(iv) Information becomes available to the airport operator or the airport user during the investigation indicating a possible conviction for one of the crimes listed in paragraph (b)(2) of this section.

(d) *Individual notification.* Prior to commencing the criminal records check, the airport operator must notify the affected individual and identify the Airport Security Coordinator as a contact for follow-up. An individual, who chooses not to submit fingerprints, after having met a requirement for Part 2 of the employment investigation, may not be granted unescorted access privilege.

(e) *Fingerprint processing.* If a fingerprint comparison is necessary under paragraph (c)(5) of this section to complete the employment history investigation the airport operator must collect and process fingerprints in the following manner:

(1) One set of legible and classifiable fingerprints must be recorded on fingerprint cards approved by the FBI, and distributed by the FAA for this purpose.

(2) The fingerprints must be obtained from the individual under direct observation by the airport operator or a law enforcement officer. Individuals submitting their fingerprints may not take possession of their fingerprint card after they have been fingerprinted.

(3) The identity of the individual must be verified at the time fingerprints are obtained. The individual must present two forms of identification, one of which must bear the individual's photograph.

(4) The fingerprint card must be forwarded to the FAA at the location specified by the Administrator.

(5) Fees for the processing of the criminal record checks are due upon application. Airport operators must submit payment through corporate check, cashier's check, or money order made payable to ''U.S. FAA,'' at the designated rate for each fingerprint card. Combined payment for multiple applications is acceptable. The designated rate for processing the fingerprint cards is available from the local FAA security office.

(f) *Determinaiton of arrest status.* In conducting the criminal record checks required by this section, the airport operator must not consider the employment history investigation complete unless it investigates arrest information for the crimes listed in paragraph (b)(2) of this section for which no disposition has been recorded and makes a determination that the arrest did not result in a disqualifying conviction.

(g) *Availability and correction of FBI records and notification of disqualification.* (1) At the time Part 2 is initiated and the fingerprints are collected, the airport operator must notify the individual that a copy of the criminal record received from the FBI will be made available to the individual if requested in writing. When requested in writing, the airport operator must make available to the individual a copy of any criminal record received from the FBI.

(2) Prior to making a final decision to deny authorization to an individual described in paragraph (a) of this section, the airport operator must advise the individual that the FBI criminal record discloses information that would disqualify him/her from receiving unescorted access and provide the individual with a copy of the FBI record if it has been requested.

(3) The airport operator must notify an individual that a final decision has been made to grant or deny authority for unescorted access.

(h) *Corrective action by the individual.* The individual may contact the local jurisdiction responsible for the information and the FBI to complete or correct the information contained in his/her record before any final decision is made, subject to the following conditions:

(1) Within 30 days after being advised that the criminal record received from the FBI discloses disqualifying information, the individual must notify the airport operator, in writing, of his/her intent to correct any information believed to be inaccurate.

(i) Upon notification by an individual that the record has been corrected, the airport operator must obtain a copy of the revised FBI record prior to making a final determination.

(2) If not notification is received within 30 days, the airport operator may make a final determination.

(i) *Limits on dissemination of results.* Criminal record information provided by the FBI must be used solely for the purposes of this section, and no person may disseminate the results of a criminal record check to anyone other than:

(1) The individual to whom the record pertains or that individual's authorized representative;

(2) Airport officials with a need to know; and

(3) Others designated by the Administrator.

(j) *Employment status while awaiting criminal record checks.* Individuals who have submitted their fingerprints and are awaiting FBI results may perform work within the SIDA when under escort by someone who has unescorted SIDA access privileges.

(k) *Recordkeeping.* (1) Except when the airport operator has received a certification under paragraph (n)(1) of this section, the airport operator must physically maintain and control the Part 1 employment history investigation file until 180 days after the termination of the individual's authority for unescorted access. The Part 1, employment history investigation file, must consist of the following:

(i) The application;

(ii) The employment verification information obtained by the employer;

(iii) The names of those from whom the employment verification information was obtained;

(iv) The date and the method of how the contact was made; and

(v) Any other information as required by the Administrator.

(2) The airport operator must physically maintain, control and when appropriate destroy Part 2, the criminal record, for each individual for whom a fingerprint comparison has been completed. Part 2 must be maintained for 180 days after the termination of the individual's authority for unescorted access. Only direct airport operator

employees may carry out this criminal record file responsibility. The Part 2 criminal record file must consist of the following:

(i) The criminal record received from the FBI as a result of an individual's fingerprint comparison; or

(ii) Information that the check was completed and no record exists.

(3) The files required by this section must be maintained in a manner that is acceptable to the Administrator and in a manner that protects the confidentiality of the individual.

(l) *Continuing responsibilities.* (1) Any individual authorized to have unescorted access privileges or who may authorize others to have unescorted access, who is subsequently convicted of any of the crimes listed in paragraph (b)(2) of this section must, within 24 hours, report the conviction to the airport operator and surrender the SIDA access medium to the issuer.

(2) If information becomes available to the airport operator or the airport user indicating that an individual with unescorted access has a possible conviction for one of the disqualifying crimes in paragraph (b)(2) of this section, the airport operator must determine the status of the conviction. If a disqualifying conviction is confirmed the airport operator must withdraw any authority granted under this section.

(m) *Exceptions.* Notwithstanding the requirements of this section, an airport operator may authorize the following individuals to have unescorted access, or to authorize others to have unescorted access to the SIDA:

(1) An employee of the Federal government or a state or local government (including a law enforcement officer) who, as a condition of employment, has been subjected to an employment investigation which includes a criminal record check.

(2) A crewmember of a foreign air carrier covered by an alternate security arrangement in the foreign air carrier's approved security program.

(3) An individual who has been continuously employed in a position requiring unescorted access by another airport operator, airport user or air carrier.

(4) Those persons who have received access to a U.S. Customs secured area prior to November 23, 1998.

(n) *Investigations by air carriers and airport users.* An airport operator is in compliance with its obligation under paragraph (b) of this section, as applicable, when the airport operator accepts for each individual seeking unescorted access one of the following:

(1) Certification from an air carrier subject to § 108.33 of this chapter indicating it has complied with §§ 108.33 of this chapter for the air carrier's employees and contractors seeking unescorted access; or

(2) Certification from an airport user indicating it has complied with and will continue to comply with the provisions listed in paragraph (p) of this section. The certification must include the name of each individual for whom the airport user has conducted an employment history investigation.

(o) *Airport operator responsibility.* The airport operator must:

(1) Prior to the acceptance of a certification from the airport user, the airport operator must conduct a preliminary review of the file for each individual listed on the certification to determine that Part 1 has been completed.

(2) Designate the airport security coordinator (ASC), in the security program, to be responsible for reviewing the results of the airport employees' and airport users' employment history investigations and for destroying the criminal record files when their maintenance is no longer required by paragraph (k)(2) of this section;

(3) Designate the ASC, in the security program, to serve as the contact to receive notification from individuals applying for unescorted access of their intent to seek correction of their FBI criminal record; and

(4) Audit the employment history investigations performed by the airport operator in accordance with this section and those investigations conducted by the airport users made by certification under paragraph (n)(2). The audit program must be set forth in the airport security program.

(p) *Airport user responsibility.*

(1) The airport user is responsible for reporting to the airport operator information, as it becomes available, which indicates an individual with unescorted access may have a conviction for one of the disqualifying crimes in paragraph (b)(2) of this section; and

(2) If the airport user offers certification to the airport operator under paragraph (n)(2) of this section, the airport user must for each individual for whom a certification is made:

(i) Conduct the employment history investigation, Part 1, in compliance with paragraph (c) of this section. The airport user must report to the airport operator if one of the conditions in paragraph (C)(5) of this section exist;

(ii) Maintain and control Part 1 of the employment history investigation file in compliance with paragraph (k) of this section, unless the airport operator decides to maintain and control Part 1 of the employment history investigation file;

(iii) Provide the airport operator and the FAA with access to each completed Part 1 employee history investigative file of those individuals listed on the certification; and

(iv) Provide either the name or title of the individual acting as custodian of the files, and the address of the location and the phone number at the location where the investigative files are maintained.

PART 108—AIRPLANE OPERATOR SECURITY

3. The authority citation for part 108 continues to read as follows:

Authority: 49 U.S.C. 106(g), 5103, 40113, 40119, 44701–44702, 44705, 44901–44905, 44907, 44913–44914, 44932, 44935–44936, 46105.

4. Section 108.33 is revised to read as follows:

§ 108.33 Employment history, verification and criminal history records checks.

(a) *Scope.* The following persons are within the scope of this section:

(1) Each employee or contractor employee covered under a certification made to an airport operator, pursuant to § 107.31(n) of this chapter, made on or after November 23, 1998.

(2) Each individual issued air carrier identification media that one or more airports accepts as airport approved media for unescorted access within a security identification display area (SIDA) as described in § 107.25 of this chapter.

(3) Each individual assigned, after November 23, 1998, to perform the following functions:

(i) Screen passengers or property that will be carried in a cabin of an aircraft of an air carrier required to screen passengers under this part.

(ii) Serve as an immediate supervisor (checkpoint security supervisor (CSS)), or the next supervisory level (shift or site supervisor), to those individuals described in paragraph (a)(3)(i) of this section.

(b) *Employment history investigations required.* Each air carrier must ensure that, for each individual described in paragraph (a) of this section, the following requirements are met:

(1) The individual has satisfactorily undergone Part 1 of an employment history investigation. Part 1 consists of a review of the previous 10 years of employment history and verifications of the 5 employment years preceding the date the employment history investigation is initiated as provided in paragraph (c) of this section; and

(2) If required by paragraph (c)(5) of this section, the individual has satisfied Part 2 of the employment history investigation. Part 2 is the process to determine if the individual has a criminal record. To satisfy Part 2 of the investigation the criminal records check must not disclose that the individual has been convicted or found not guilty by reason of insanity, in any jurisdiction, during the 10 years ending on the date of such investigation, of any of the crimes listed below:

(i) Forgery of certificates, false marking of aircraft, and other aircraft registration violation, 49 U.S.C. 46306;

(ii) Interference with air navigation, 49 U.S.C. 46308;

(iii) Improper transportation of a hazardous material, 49 U.S.C. 46312;

(iv) Aircraft piracy, 49 U.S.C. 46502;

(v) Interference with flightcrew members or flight attendants, 49 U.S.C. 46504;

(vi) Commission of certain crimes aboard aircraft in flight, 49 U.S.C. 46506;

(vii) Carrying a weapon or explosive aboard aircraft, 49 U.S.C. 46505;

(viii) Conveying false information and threats, 49 U.S.C. 46507;

(ix) Aircraft piracy outside the special aircraft jurisdiction of the United States, 49 U.S.C. 46502(b);

(x) Lighting violations involving transporting controlled substances, 49 U.S.C. 46315;

(xi) Unlawful entry into an aircraft or airport area that serves air carriers or foreign air carriers contrary to established security requirements, 49 U.S.C. 46314;

(xii) Destruction of an aircraft or aircraft facility, 18 U.S.C. 32;

(xiii) Murder;

(xiv) Assault with intent to murder;

(xv) Espionage;

(xvi) Sedition;

(xvii) Kidnapping or hostage taking;

(xviii) Treason;

(xix) Rape or aggravated sexual abuse;

(xx) Unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon;

(xxi) Extortion;

(xxii) Armed robbery;

(xxiii) Distribution of, or intent to distribute, a controlled substance;

(xxiv) Felony arson; or

(xxv) Conspiracy or attempt to commit any of the aforementioned criminal acts.

(c) *Investigative steps.* Part 1 of the employment history investigations must be completed on all persons described in paragraph (a) of this section. If required by paragraph (c)(5) of this section, Part 2 of the employment history investigation must also be completed on all persons listed in paragraph (a) of this section.

(1) The individual must provide the following information on an application:

(i) The individual's full name, including any aliases or nicknames;

(ii) The dates, names, phone numbers, and addresses of previous employers, with explanations for any gaps in employment of more than 12 consecutive months, during the previous 10-year period;

(iii) Any convictions during the previous 10-year period of the crimes listed in paragraph (b)(2) of this section.

(2) The air carrier must include on the application form a notification that the individual will be subject to an employment history verification and possibly a criminal records check.

(3) The air carrier must verify the identity of the individual through the presentation of two forms of identification, one of which must bear the individual's photograph.

(4) The air carrier must verify the information on the most recent 5 years of employment history required under paragraph (c)(1)(ii) of this section. Information must be verified in writing, by documentation, by telephone, or in person.

(5) If one or more of the conditions (triggers) listed in § 108.33(c)(5) (i) through (iv) exist, the employment history investigation must not be considered complete unless Part 2 is accomplished. Only the air carrier may initiate Part 2. Part 2 consists of a comparison of the individual's fingerprints against the fingerprint files of known criminals maintained by the Federal Bureau of Investigation (FBI). The comparison of the individual's fingerprints must be processed through the FAA. The air carrier may request a check of the individual's fingerprint-based criminal record only if one or more of the following conditions exist:

(i) The individual does not satisfactorily account for a period of unemployment of 12 consecutive months or more during the previous 10-year period.

(ii) The individual is unable to support statements made on the application form.

(iii) There are significant inconsistencies in the information provided on the application.

(iv) Information becomes available to the air carrier during the investigation indicating a possible conviction for one of the crimes listed in paragraph (b)(2) of this section.

(d) *Individual notification.* Prior to commencing the criminal records check, the air carrier must notify the affected individuals and identify a point of contact for follow-up. An individual who chooses not to submit fingerprints may not be granted unescorted access privilege and may not be allowed to hold screener or screener supervisory positions.

(e) *Fingerprint processing.* If a fingerprint comparison is necessary under paragraph (c)(5) of this section to complete the employment history investigation the air carrier must collect and process fingerprints in the following manner:

(1) One set of legible and classifiable fingerprints must be recorded on fingerprint cards approved by the FBI and distributed by the FAA for this purpose.

(2) The fingerprints must be obtained from the individual under direct observation by the air carrier or a law enforcement officer. Individuals submitting their fingerprints must not take possession of their fingerprint card after they have been fingerprinted.

(3) The identify of the individual must be verified at the time fingerprints are obtained. The individual must present two forms of identification, one of which must bear the individual's photograph.

(4) The fingerprint card must be forwarded to FAA at the location specified by the Administrator.

(5) Fees for the processing of the criminal records checks are due upon application. Air carriers must submit payment through corporate check, cashier's check, or money order made payable to ''U.S. FAA,'' at the designated rate for each fingerprint card. Combined payment for multiple applications is acceptable. The designated rate for processing the fingerprint cards is available from the local FAA security office.

(f) *Determination of arrest status.* In conducting the criminal record checks required by this section, the air carrier must not consider the employment history investigation complete unless it investigates arrest information for the crimes listed in paragraph (b)(2) of this section for which no disposition has been recorded and makes a determination that the arrest did not result in a disqualifying conviction.

(g) *Availability and correction of FBI records and notification of disqualification.* (1) At the time Part 2 is initiated and the fingerprints are collected, the air carrier must notify the individual that a copy of the criminal record received from the FBI will be made available to the individual if requested in writing. When requested in writing, the air carrier must make

available to the individual a copy of any criminal record received from the FBI.

(2) Prior to making a final decision to deny authorization to an individual described in paragraph (a) of this section, the air carrier must advise the individual that the FBI criminal record discloses information that would disqualify him/her from positions covered under this rule and provide him/her with a copy of their FBI record if requested.

(3) The air carrier must notify an individual that a final decision has been made to forward or not forward a letter of certification for unescorted access to the airport operator, or to grant or deny the individual authority to perform screening functions listed under paragraph (a)(3) of this section.

(h) *Corrective action by the individual.* The individual may contact the local jurisdiction responsible for the information and the FBI to complete or correct the information contained in his/her record before the air carrier makes any decision to withhold his/her name from a certification, or not grant authorization to perform screening functions subject to the following conditions:

(1) Within 30 days after being advised that the criminal record received from the FBI discloses disqualifying information, the individual must notify the air carrier, in writing, of his/her intent to correct any information believed to be inaccurate.

(2) Upon notification by an individual that the record has been corrected, the air carrier must obtain a copy of the revised FBI record prior to making a final determination.

(3) If no notification is received within 30 days, the air carrier may make a final determination.

(i) *Limits on dissemination of results.* Criminal record information provided by the FBI must be used solely for the purposes of this section, and no person may disseminate the results of a criminal record check to anyone other than:

(1) The individual to whom the record pertains or that individual's authorized representative;

(2) Air carrier officials with a need to know; and

(3) Others designated by the Administrator.

(j) *Employment status while awaiting criminal record checks.* Individuals who have submitted their fingerprints and are awaiting FBI results may perform work details under the following conditions:

(1) Those seeking unescorted access to the SIDA must be escorted by someone who has unescorted SIDA access privileges;

(2) Those applicants seeking positions covered under paragraphs (a)(3) and (d)(4) of this section, may not exercise any independent judgments regarding those functions.

(k) *Recordkeeping.* (1) The air carrier must physically maintain and control Part 1 employment history investigation file until 180 days after the termination of the individual's authority for unescorted access or termination from positions covered under paragraph (a)(3) of this section. Part 1 of the employment history investigation, completed on screening personnel must be maintained at the airport where they perform screening functions. Part 1 of the employment history investigation file must consist of the following:

(i) The application;

(ii) The employment verification information obtained by the employer;

(iii) the names of those from whom the employment verification information was obtained;

(iv) The date and the method of how the contact was made; and

(v) Any other information as required by the Administrator.

(2) The air carrier must physically maintain, control and when appropriate destroy Part 2, the criminal record file, for each individual for whom a fingerprint comparison has been made. Part 2 must be maintained for 180 days after the termination of the individual's authority for unescorted access or after the individual ceases to perform screening functions. Only direct air carrier employees may carry out Part 2 responsibilities. Part 2 must consist of the following:

(i) The results of the record check; or

(ii) Certification from the air carrier that the check was completed and did not uncover a disqualifying conviction.

(3) The files required by this paragraph must be maintained in a manner that is acceptable to the Administrator and in a manner that protects the confidentiality of the individual.

(l) *Continuing responsibilities.* (1) Any individual authorized to have unescorted access privilege to the SIDA or who performs functions covered under paragraph (a)(3) of this section, who is subsequently convicted of any of the crimes listed in paragraph (b)(2) of this section must, within 24 hours, report the conviction to the air carrier and surrender the SIDA access medium or any employment related identification medium to the issuer.

(2) If information becomes available to the air carrier indicating that an individual has a possible conviction for one of the disqualifying crimes in paragraph (b)(2) of this section, the air carrier must determine the status of the conviction and, if the conviction is confirmed:

(i) Immediately revoke access authorization for unescorted access to the SIDA; or

(ii) Immediately remove the individual from screening functions covered under paragraph (a)(3) of this section.

(m) *Air carrier responsibility.* The air carrier must:

(1) Designate an individual(s), in the security program, to be responsible for maintaining and controlling the employment history investigation for those whom the air carrier has made a certification to an airport operator under § 107.31(n)(1) of this chapter and for destroying the criminal record files when their maintenance is no longer required by paragraph (k)(2) of this section.

(2) Designate individual(s), in the security program, to maintain and control Part 1 of the employment history investigations of screeners whose files must be maintained at the location or station where the screener is performing his or her duties.

(3) Designate individual(s), in the security program, to serve as the contact to receive notification from an individual applying for either unescorted access or those seeking to perform screening functions of his or her intent to seek correction of his or her criminal record with the FBI.

(4) Designate an individual(s), in the security program, to maintain and control Part 2 of the employment history investigation file for all employees, contractors, or others who undergo a fingerprint comparison at the request of the air carrier.

(5) Audit the employment history investigations performed in accordance with this section. The audit process must be set forth in the air carrier approved security program.

Issued in Washington, DC on September 16, 1998.

Jane F. Garvey,

Administrator.

[FR Doc. 98–25210 Filed 9–23–98; 8:45 am]

BILLING CODE 4910–13–M