

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Parts 107 and 108**

[Docket No. FAA-2001-10999; Amdt. Nos. 107-14 and 108-19]

RIN 2120-AH53

Criminal History Records Checks

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This rule requires each airport operator and aircraft operator that has adopted a security program under part 107 or part 108, respectively, to conduct fingerprint-based criminal history record checks (CHRC's) for individuals if they have not already undergone CHRC's. The rule applies to those who either have, or apply for: Unescorted access authority to the Security Identification Display Area (SIDA) of an airport; authority to authorize others to have unescorted access; and screening functions. The rule is needed because the FAA has determined that the current employment investigation method is not adequate. The rule will ensure that individuals in these positions do not have disqualifying criminal offenses.

DATES: This rule is effective December 6, 2001. Submit comments by January 7, 2002.

ADDRESSES: Address your comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW, Washington, DC 20590. You must identify the docket number FAA-2001-10999 at the beginning of your comments, and you should submit two copies of your comments. If you wish to receive confirmation that the FAA received your comments, include a self-addressed, stamped postcard. You may also submit comments through the Internet to <http://dms.dot.gov>.

You may review the public docket containing comments to these proposed regulations in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at <http://dms.dot.gov>.

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 Ave., SW, Washington, DC 20591; telephone 202-267-3413.

SUPPLEMENTARY INFORMATION:**Comments Invited**

This final rule is being adopted without prior notice and prior public comment. The Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; Feb. 26, 1979), however provides that, to the maximum extent possible, operating administrations for the DOT should provide an opportunity for public comment on regulations issued without prior notice. Accordingly, interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments. Comments relating to environmental, energy, federalism, or international trade impacts that might result from this amendment also are invited. Comments must include the regulatory docket or amendment number and must be submitted in duplicate to the address above. All comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, will be filed in the public docket. The docket is available for public inspection before and after the comment closing date.

The FAA will consider all comments received on or before the closing date for comments. Late-filed comments will be considered to the extent practicable. This final rule may be amended in light of the comments received.

See **ADDRESSES** above for information on how to submit comments.

Availability of Final Rule

You can get an electronic copy using the Internet by taking the following steps:

- (1) Go to search function of the Department of Transportation's electronic Docket Management System (DMS) Web page (<http://dms.dot.gov/search>).
- (2) On the search page type in the last four digits of the Docket number shown at the beginning of this notice. Click on "search."
- (3) On the next page, which contains the Docket summary information for the Docket you selected, click on the final rule.

You can also get an electronic copy using the Internet through FAA's web page at <http://www.faa.gov/avr/armhome.htm> or the Office of the Federal Register's web page at http://www.access.gpo.gov/su_docs/aces/aces140html.

You can also get a copy 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) 267-9680. Make sure to identify the amendment number or docket number of this final rule.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information advice about compliance with statutes and regulations within the FAA's jurisdiction. Therefore, any small entity that has a question regarding this document may contact its local FAA official. Internet users can find additional information on SBREFA on the FAA's web page at <http://www.faa.gov/avr/arm/sbrefa.htm> and send electronic inquiries to the following Internet address: 9-AWA-SBREFA@faa.gov.

Abbreviations And Terms Used In This Document

AIR-21—Wendell H. Ford Aviation Investment and Reform Act for the 21st Century
 ASIA 1990—Aviation Security Improvement Act of 1990
 ASIA 2000—Airport Security Improvement Act of 2000
 ATSA—Aviation and Transportation Security Act
 CHRC—Criminal history records check
 Reauthorization Act—Federal Aviation Reauthorization Act of 1996
 SIDA—Security Identification Display Area

Background

In the wake of the September 11, 2001, terrorist attacks against four U.S. commercial aircraft resulting in the tragic loss of human life at the World Trade Center, the Pentagon, and southwest Pennsylvania, the potential for additional terrorist attacks exists. Those responsible for the attacks are believed to be affiliated with an organization possessing a near-global terrorist network. The leaders of the groups constituting this organization have publicly stated they will attack the United States for incarcerating their members and are vehemently opposed to U.S. foreign policy and presence in the Middle East. They retain a capability and willingness to conduct airline bombings, hijackings, and suicide attacks against U.S. targets. These attacks also indicate that the terrorists are willing to use aircraft as weapons to inflict significant damage on persons and property in the United States. Given the resources and reach of the organization, it is likely that it has sought or will seek to place members in

positions at airports to facilitate future attacks, or that it will attempt to co-opt individuals already in such positions. It should be underscored that, although other potential threats to U.S. civil aviation may be overshadowed at present, they have not disappeared. The uncertain course of the Middle East peace process involving Israel and the Palestinians, negative reactions to the U.S.-led military campaign in Afghanistan, and Iraqi opportunism in response to continued United Nations sanctions are among the developments that could give rise to attacks by groups or individuals not linked to the September 11 atrocities.

Since 1996, the FAA has required airport operators and aircraft operators to conduct checks on certain individuals to prevent individuals from working in those positions if they have a history of certain criminal convictions. See 14 CFR 107.31 and 108.33 (1997). Most of these checks include a 10-year employment investigation. If the employment investigation reveals one of four triggers listed in the rules, such as a 12-month gap in employment that is not satisfactorily explained, the investigation must include a Federal Bureau of Investigation (FBI) criminal history records check (CHRC) that is based on fingerprints of the individual. If the employment investigation or CHRC reveals a conviction in the 10 years before the investigation for one or more of the crimes listed in the regulations, the individual may not serve in the specified positions.

As discussed below, the Administrator has determined that the current employment investigation method is not adequate. This rule requires that all employees in the specified positions undergo a CHRC based on their fingerprints.

Title 14 of the Code of Federal Regulations (CFR) part 107 prescribes security requirements for airport operators that must adopt and carry out an FAA-approved security program. The airport operators' responsibilities include the security of the Security Identification Display Area (SIDA). The SIDA is an area of an airport in which individuals who have unescorted access authority must display approved identification media (ID). It includes the areas near the terminal where aircraft taxi, and other areas as necessary for security. See 14 CFR 107.3. The approved ID usually is issued by the airport operator, but in some cases is issued by the aircraft operator. In this preamble, the term "airport operator" refers to airport operators that hold security programs under part 107.

Title 14 CFR part 108 prescribes security rules for U.S. aircraft operators that must adopt and carry out an FAA-approved security program. Aircraft operators are responsible for screening passengers and property that are carried on their aircraft. They also have responsibilities for the security of the SIDA. As used in this document, the term "aircraft operator" refers to U.S. aircraft operators conducting operations under security programs under part 108.

History

Section 105 of the Aviation Security Improvement Act of 1990 (ASIA 1990), Pub. L. 101-604, added a new provision that is now codified at 49 U.S.C. 44936. It directed the FAA to "issue regulations to require individuals employed in, and individuals applying for, [certain positions] to be subjected to such employment investigations, including criminal history records check, as the Administrator determines necessary to ensure air transportation security." The positions covered were those in which the individual has unescorted access authority to aircraft operator or foreign air carrier aircraft, or to secured areas of airports serving aircraft operators or foreign air carriers.

The FAA issued rules to carry out ASIA 1990. See 60 FR 51854 (October 3, 1995). The rules, §§ 107.31 and 108.33 (1997), require each airport operator and aircraft operator to conduct a 10-year employment history investigation for each individual applying for certain positions on or after the effective date, January 31, 1996. These employment checks must be performed for individuals who are granted unescorted access authority to a SIDA and individuals who authorize others to have unescorted access authority (together referred to in this preamble as individuals with "unescorted access authority"). If the employment investigation reveals one of four conditions (triggers) listed in the rules the investigation must include a CHRC. The rule lists crimes that disqualify the individual from a position with unescorted access authority if the conviction occurred during the 10 years ending on the date of the investigation. Individuals who had unescorted access authority before the effective date were not subject to the rule. In the preamble to the rule the FAA stated that it would continue to evaluate the civil aviation security system to determine if further changes were warranted.

Effective November 14, 2001, § 107.31 was renumbered as § 107.209, and § 108.33 was renumbered as § 108.229, in connection with comprehensive

revisions of those parts, Amendments 107-13 and 108-18. See 66 FR 37274 and 37330 (July 17, 2001).

Section 304 of the Federal Aviation Reauthorization Act of 1996, Pub. L. 104-264, directs the FAA to expand the checks to individuals who screen passengers and property that will be carried in an aircraft cabin in air transportation or intrastate air transportation and to supervisors of individuals with authority to perform screening functions (together referred to in this preamble as "individuals with authority to perform screening functions"). The act specifically requires that an employment investigation be performed for each individual hired to be a screener, and that a CHRC be done where the employment investigation reveals one of the four triggers.

The FAA amended § 108.33 to carry out the Reauthorization Act. See 63 FR 18076 (September 24, 1998). The amendment requires each aircraft operator to conduct a 10-year employment history investigation for individuals applying for positions as individuals with authority to perform screening functions on or after the effective date, November 23, 1998. It applies the same scheme as that for individuals with unescorted access authority, that is, a 10-year employment history investigation, with a CHRC if one of the four triggers exists.

Section 508 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. 106-181, gave the Administrator additional authority as to checks on individuals with authority to perform screening functions. In addition to the four triggers that provide a basis for a CHRC, it provided that a CHRC shall be done in any case in which "the Administrator decides it is necessary to ensure air transportation security with respect to passenger, baggage, or property screening at airports." See 49 U.S.C. 44936(a)(1)(C)(v).

Section 2 of the Airport Security Improvement Act of 2000 (ASIA 2000), Pub. L. 106-528, expands the use of CHRC's. It requires that, as of the effective dates, each individual applying for a position with unescorted access authority, or applying for a position as a screener, must undergo a CHRC. This is sometimes referred to as "100% fingerprinting of applicants." The effective date is December 23, 2000, for individuals at airports defined as a Category X airport by the FAA. The effective date is November 23, 2003, for individuals at other airports. These requirements are self-executing. That means that the FAA did not need to

issue a rule to make 100% fingerprinting of applicants effective on December 23, 2000, at Category X airports, and does not need to issue a rule to make 100% fingerprinting of applicants effective on November 23, 2003, at non-Category X airports.

ASIA 2000 also added crimes that disqualify an individual from a position with unescorted access authority or as a screener. This provision is self-executing and became effective on December 23, 2000, for individuals at all airports.

In sum, there are some individuals who have had neither an employment investigation nor a CHRC, some individuals who have had employment investigations only, and some individuals who have had CHRC's, as follows:

Individuals with unescorted access authority—

- At all airports, individuals who were in positions before January 31, 1996, did not undergo an employment investigation or a CHRC.
- At Category X airports, individuals applying for positions on or after January 31, 1996, and before December 23, 2000, underwent an employment investigation, and only underwent a CHRC if one of the four triggers existed.
- At Category X airports, all individuals applying for positions on or after December 23, 2000, through the present, undergo a CHRC.
- At other airports, individuals applying for positions on or after January 31, 1996, through the present, undergo an employment investigation, and a CHRC only if one of the four triggers exists.

Individuals with authority to perform screening functions—

- At all airports, individuals who were in positions before November 23, 1998, did not undergo an employment investigation or a CHRC.
- At Category X airports, individuals applying for positions on or after November 23, 1998, and before December 23, 2000, underwent an employment investigation, and only underwent a CHRC if one of the four triggers existed.
- At Category X airports, all individuals applying for positions on or after December 23, 2000, through the present, undergo a CHRC.
- At other airports, individuals applying for positions on or after January 31, 1996, through the present, undergo an employment investigation, and a CHRC only if one of the four triggers exists.

While the FAA has not before required CHRC's for all covered individuals, the statute provides

authority to do so. Further, section 138 of the Aviation Transportation Security Act (ATSA) provides that a new background check, including a criminal history record check, shall be required for individuals with unescorted access authority and individuals with authority to perform screening functions. This rulemaking accomplishes that requirement.

There may be some individuals who now are in the covered positions who will be disqualified under these new checks. For instance, there may be individuals who underwent an employment history investigation only before December 23, 2000, and did not have a history of a crime that was disqualifying at the time. If that individual has a disqualifying criminal offense for one of the crimes added in ASIA 2000, he or she will be disqualified. The legislative history for ASIA 2000 recognizes that this provision "may cause a few individuals to be removed from their jobs or prevent others from being hired. However, the number of people affected (convicted felons) will be few, and such actions will be taken to increase air travel security." S. Rep. No. 106-388, 106th Cong., 2nd Sess. 3 (2000), reprinted in 2000 U.S.C.C.A.N. 2252, 2254.

Note that individuals subject to §§ 107.209 and 108.229 have been required to report if they were convicted of a disqualifying crime after the initial investigation. See §§ 107.31 (l) and 108.33 (h) of the 1996 rule, and §§ 107.31 (l)(1) and 108.33 (l)(1) of the 1998 rule. The CHRC's conducted under this rule may reveal some individuals who did not report convictions that occurred after their original investigation. These individuals will no longer be able to have unescorted access authority or to perform screening functions.

ATSA also requires that additional background checks be done on both current employees and applicants for covered positions to the extent practicable. The additional checks include such things as a review of records of other governmental and international agencies. This rulemaking, which was written before ATSA was enacted, does not cover the additional background checks. They will be developed and adopted in the future.

Inadequacy of the Current Rules

In the past year the FAA has conducted nationwide assessments of aircraft operator and airport operator compliance with the regulatory requirements for employment history investigations. While the FAA has found numerous properly completed

employment history investigations, it has also discovered serious problems with the use of employment history investigations as a means for determining when a CHRC must be accomplished.

Under current regulations, the applicant provides a 10-year employment history. The airport operator, aircraft operator, or designee verifies the most recent 5 years of that history, for example, by calling prior employers to verify employment. An airport operator or aircraft operator may only request a CHRC if one of four triggers exists, such as an unexplained gap of 12 months or more in the 10-year employment history. The determination of whether a trigger exists depends almost entirely on information provided by the applicant. This process has proven to be insufficiently reliable and subject to abuse.

In its review of hundreds of employment history investigations, the FAA has found many instances where gaps in employment greater than 12 months were accounted for by a friend or family member, or by third party firm in the United States that claimed to know the whereabouts of an applicant while he or she was living in a foreign country. While the FAA regards such information as unsatisfactory to account for a period of unemployment, screening companies, on behalf of aircraft operators, routinely accept this information as sufficient under the regulations. Accordingly, applications that the FAA considers to reveal a trigger, and therefore require a CHRC, have not been regarded as such by an aircraft operator.

Furthermore the FAA has found several cases where it appears that an applicant has provided false information of employment and another person to provide a false reference for time periods greater than 12 months. In these cases, the screening company may be duped when verifying the information, because the false reference is a co-conspirator in the applicant's falsification of his or her employment history. In other cases, the screening company may have been unable to contact the reference, therefore may have been unable to verify prior employment, but nonetheless did not request a CHRC. In either instance, the applicant has successfully avoided undergoing a CHRC.

Even when an employment history is complete and an investigation of that history is properly conducted, the FAA is concerned that the four triggers do not always identify applicants with disqualifying criminal histories. For instance, during an October 2001 audit,

the FAA and the Department of Transportation found that some current employees had disqualifying criminal convictions. For at least one such employee, the employment history investigation appears to have been properly completed, but it revealed no triggers that would have required a CHRC.

Accordingly, the Administrator has determined that the employment history and verification procedure in the current rule is inadequate to determine whether the individual has a history of a disqualifying crime.

In addition to the changes in this rulemaking, the FAA continues to review pertinent information and determine whether additional requirements are needed to enhance the background checks for individuals in various positions that affect security.

Section-by-Section Analysis

These amendments reflect the new requirements in ASIA 2000, which provides additional disqualifying crimes and 100% fingerprinting of applicants at Category X airports. These amendments also require 100% fingerprinting of all applicants at Category I through IV airports, and 100% fingerprinting of all current employees with unescorted access authority and all current employees with authority to perform screening functions who have not been subject to a CHRC under current rules.

In this preamble, references to "current" rules mean §§ 107.209 and 108.229 as they became effective on November 14, 2001, 66 FR 37274 and 37330 (July 17, 2001). References to "new" rules mean amendments made in this rulemaking.

Section 107.209 Fingerprint-Based Criminal History Records Checks (CHRC)

This section amends § 107.209, Employment history, verification, and criminal history records checks. It applies to airport operators and others.

Paragraph (a), Scope, sets out the scope of the section. It is essentially unchanged, except that the section now covers individuals not only applying for unescorted access authority, but also those who currently have unescorted access authority. This section does not apply to individuals with authority to perform screening functions because airport operators are not responsible for screening.

Paragraph (b), Individuals seeking unescorted access authority, states the basic requirement for CHRC's for individuals seeking unescorted access authority. This paragraph provides that the airport operator must ensure that no

individual is granted unescorted access authority unless the individual has undergone a fingerprint-based CHRC that does not disclose that he or she has a disqualifying criminal offense. There are exceptions to this paragraph in paragraph (m).

Paragraph (c), Individuals who have not had a CHRC, states the requirements for individuals who currently have unescorted access authority. The airport operator must ensure that after December 6, 2002, no individual retains unescorted access authority unless the airport operator has obtained and submitted a fingerprint under part 107. This means that if the individual who currently has unescorted access authority was subject to a fingerprint-based CHRC under part 107 in the past, the individual does not need to undergo another CHRC. If the individual underwent only an employment history verification under part 107, or no check, the individual must now be fingerprinted and undergo a CHRC. There are exceptions to this paragraph in paragraph (m).

Paragraph (c)(2) provides that when a CHRC discloses a disqualifying criminal offense for which the conviction or finding of not guilty by reason of insanity was in the 10 years before December 6, 2001, the airport operator must immediately suspend that individual's authority. This is similar to current § 107.209 (l)(2), which in part provides that if the airport operator confirms that the individual has a disqualifying conviction the airport operator must withdraw any authority granted to that individual. An individual who believes that the CHRC is incorrect may seek to correct the record in accordance with paragraph (h).

Paragraph (d), Disqualifying criminal offenses, states what a disqualifying criminal offense is under the rule. A criminal offense is disqualifying if it meets several conditions: The individual must have been either convicted or found not guilty by reason of insanity; the crime must be listed in this section; and the conviction or finding must have occurred either during the 10 years before the date of the CHRC or while the individual has unescorted access authority. The disqualifying crimes are the crimes listed in current § 107.209 (b)(2), plus the crimes added in ASIA 2000. Further, 18 U.S.C. 37, Violence at international airports, is added.

The statute provides that the Administrator may make any other felony a disqualifying crime if she determines that the crime indicates a propensity for placing contraband

aboard an aircraft in return for money. See 49 U.S.C. 44936(b)(1)(B)(xiv)(IX). If the Administrator determines that an additional crime should be disqualifying, these rules will be amended to so provide.

Paragraph (e), Fingerprint application and processing, describes how the airport operator obtains and processes the fingerprint. Paragraph (e)(1) describes the application. The application must contain only the items in this paragraph, for reasons discussed for paragraph (e)(1)(iii). The application must have the disqualifying criminal offenses described in paragraph (d). This will give the individual the opportunity to determine whether he or she is not qualified and to stop the application process at that point. The application must have a statement that the individual signing the form does not have a disqualifying criminal offense. The application must contain a statement informing the individual that he or she must advise the airport operator within 24 hours if he or she is convicted of any disqualifying criminal offense that occurs while the individual has unescorted access authority. This is a notification to the individual of his or her responsibility under paragraph (l)(2).

Under paragraph (e)(1)(iii) the application also must have a statement that the individual signing the application may be subject to prosecution under title 18 of the United States Code if he or she knowingly and willfully provides false information on the application. This will inform the individual of the serious nature of the application and the need to be truthful. This statement applies to information that the government determines is material for governmental purposes. Other information that the airport operator may want to have to make employment decisions, such as the individual's wages and duties in prior employment, is not material to the government for this purpose and cannot be subject to the warning regarding title 18 of the United States Code. For this reason the application may contain only the information in this paragraph.

The application must have a line for the printed name of the individual. Finally, the application must have a line for the individual's signature and date of signature.

Paragraph (e)(2) provides that the individual must complete and sign the application prior to submitting his or her fingerprints.

Before the fingerprints are taken the airport operator must verify the identity of the individual with two forms of identification (ID). At least one ID must

have been issued by a government authority and at least one must include a photograph of the individual. One ID may satisfy the two latter requirements, together with one other ID. For instance, an individual may present one state driver's license with a photograph (which is both a government ID and an ID with a photograph) plus one other ID that is not issued by the government and does not have a photograph. This is a small expansion of the current rule. Current § 107.209 (e)(3) requires two forms of ID, at least one of which has a photo. The requirement for a government ID means that at least one of the ID's is from an official source.

Paragraph (e)(4) requires the airport operator to advise the individual that a copy of the criminal record received from the FBI will be provided to the individual if requested in writing. This is in current § 107.209 (g)(1). This paragraph also requires the airport operator to advise the individual that the Airport Security Coordinator is the point of contact for questions, as in current § 107.209 (d).

Under paragraph (e)(5) the airport operator must collect, control, and process one set of legible and classifiable fingerprints under direct observation by the airport operator or a law enforcement officer. These are essentially in current § 107.209 (e)(1) and (e)(2).

Paragraph (e)(6) makes clear that fingerprints may be either obtained and processed electronically, or on fingerprint cards approved by the FBI and distributed by the FAA for that purpose. Current § 107.209 (e)(1) provides only for obtaining fingerprints on cards. However, there now are electronic means of collecting fingerprints in use at a number of airports.

Paragraph (e)(7) provides that the fingerprints must be submitted in a manner specified by the Administrator, similar to current § 107.209 (e)(4).

Under paragraph (f), Fingerprint fees, the airport operator must pay for all fingerprints in a form and manner approved by the FAA. Current § 107.209 (e)(5) provides only for payment by corporate check, cash, or money order, due upon application. However, electronic fund transfers now are accepted, and credit cards and escrow accounts will be accepted in the future. This paragraph ensures that there is flexibility to develop new payment procedures for the efficiency of both the industry and the government. The rule specifically provides that individual personal checks are not acceptable. The FAA simply cannot handle checks from

each individual who submits fingerprints.

Paragraph (g), Determination of arrest status, states that the airport operator must investigate arrests recorded in the CHRC for individuals seeking unescorted access authority and for individuals with unescorted access authority. This is essentially the same as current § 107.209 (f), except that this paragraph also expressly states that—

- The airport operator must determine that the arrest of an individual seeking unescorted access authority did not result in a disqualifying offense before granting the individual that authority.
- When a CHRC on an individual with unescorted access authority discloses an arrest for a disqualifying criminal offense without indicating a disposition, the airport operator must suspend the individual's authority within 45 days of obtaining the CHRC, unless the arrest did not result in a disqualifying criminal offense. This rule does not require immediate suspension of the individual's unescorted access authority. The CHRC may not be complete. For instance, the charges might have been withdrawn or there could have been a conviction for a crime that is not disqualifying. The 45-day period provides an opportunity to obtain current information on disposition of the arrest.

- The airport operator only makes this determination for individuals for whom it is issuing or has issued unescorted access authority, and who are not covered by a certification from the aircraft operator under paragraph (n). The airport operator may not make this determination for individuals described in § 108.229 (a).

Paragraph (h), Correction of FBI records and notification of disqualification, states the airport operator's duty to advise the individual about a disqualifying criminal offense in the CHRC received from the FBI, provide a copy of the record, and notify the individual of a final decision. This paragraph is essentially the same as current § 107.209 (g)(2) and (3), except that the new section also covers individuals who already have unescorted access authority, as well as those seeking authority.

Paragraph (i), Corrective action by the individual, describes how the individual may correct his or her record. Paragraph (i)(1) describes the action the individual may take to correct an inaccurate CHRC. It is similar to current § 107.209 (h) with some additions. The current rule provides that the FBI record must be revised, but this may take undue time. New paragraph (i)(1)(i)

permits the airport operator to accept a certified true copy of the record from the appropriate court. For example, if the FBI record indicates that the individual was convicted, but does not also show that the conviction was reversed on appeal, the individual may obtain a certified true copy of the court record of that ruling. Certified true copies of court records may be obtained from the clerk of the court. This paragraph makes clear that the airport operator may either obtain the copy of the record itself, or accept a copy from the individual.

Paragraph (i)(2) provides a similar procedure for individuals who have unescorted access authority on December 6, 2001. If the individual corrects the information on the CHRC or provides a certified true copy of the information from the appropriate court, the individual's authority may be reinstated.

Paragraph (j), Limitations on dissemination of results, describes the limitations on disseminating the CHRC results. It is largely the same as current § 107.209 (i). This paragraph now expressly states that the CHRC may only be used to determine the appropriateness of granting unescorted access authority under this section. It also expressly states that the CHRC may be given to other airport operators who are determining whether to grant unescorted access to the individual under this part. It also states the information may be given to aircraft operators who are determining whether to grant unescorted access to the individual or authorize the individual to perform screening functions under part 108. If an individual has a need for unescorted access at two airports, for instance, one airport may conduct the CHRC and share the results with the second airport, so the individual only is fingerprinted once.

Paragraph (k), Recordkeeping, states the airport operator's duties to maintain records, and is essentially the same as current § 107.209 (k).

Paragraph (l), Continuing responsibilities, describes the continuing responsibilities of individuals, airport operators, and airport users regarding disqualifying criminal offenses occurring after the initial investigation. Paragraph (l)(1) addresses all individuals who currently have unescorted access authority. It requires them to report any disqualifying criminal offenses that have occurred in the 10 years before December 6, 2001. This applies to those who never underwent a background check under part 107 because they had unescorted access authority before the

1996 rule, to those who underwent an employment verification only under the 1996 rule, and to those who underwent a CHRC under the 1996 rule. This ensures that individuals who currently hold unescorted access authority are required to report offenses that are now listed in (d) and that disqualify them from continuing to serve in such a position.

Paragraphs (l)(2) and (l)(3) essentially repeat the current provisions of § 107.209 (l)(1) and (l)(2).

Paragraph (m), Exceptions, states the exceptions to this rule. Government employees, crewmembers of foreign air carriers and individuals who were previously employed in a position requiring a CHRC need not be fingerprinted under this rule, as described in this section. These exceptions are the same as in current § 107.209 (m). There are two changes to current paragraph (m). First, new paragraph (m) does not contain the exemption for certain individuals who were given access authority to U.S. Customs' secured areas before November 23, 1998. Section 138 of ATSA removes the exemption for the individuals with access to U.S. Customs' secured areas. Second, new paragraph (m) permits individuals who have unescorted access authority or authority to perform screening functions and who already have been subject to an FAA fingerprint-based CHRC to move to another employer or airport without being subject to another CHRC, provided that they have been continuously employed.

Paragraph (n), Certification by aircraft operators, states when the airport operator may accept a certification from an aircraft operator. Paragraph (n) permits the airport operator to accept a certification from an aircraft operator that it has complied with the requirements of the aircraft operator's rule, similar to current § 107.209 (n). This paragraph clarifies that if the airport operator accepts a certification from the aircraft operator, the airport operator may not also require a copy of the CHRC. If the airport operator is accepting a certification, it does not have a need for the CHRC.

Paragraph (o), Airport operator responsibilities, describes airport operator responsibilities, corresponding to current § 107.209 (o).

Paragraph (p), Airport user responsibility, states the airport user's responsibilities, similar to current § 107.209 (p).

Section 108.229 Fingerprint-Based Criminal History Records Checks (CHRC)

This section amends § 108.229, Employment history, verification, and criminal history records checks. It applies to aircraft operators and others.

Paragraph (a), Scope, sets out the scope of this section. Paragraph (a)(1) covers individuals applying for unescorted access or to have authority to perform screening functions on and after the December 6, 2001. Paragraph (a)(1)(i) covers each employee or contract employee covered under a certification made to an airport operator, pursuant to new § 107.209 (n), on and after December 6, 2001. These are employees who receive their unescorted access authority from the airport operator, based on the CHRC conducted by the aircraft operator. Paragraph (a)(ii) covers each individual, on and after December 6, 2001, issued aircraft operator identification media that one or more airports accepts as airport-approved media for unescorted access within a SIDA. Finally, paragraph (a)(1)(iii) covers each individual, on and after December 6, 2001, granted authority to perform certain screening functions within the United States. These functions are screening passengers or property that will be carried in a cabin of an aircraft, and serving as an immediate supervisor (checkpoint security supervisor (CSS)), or the next supervisory level (shift or site supervisor), to those individuals (referred to as individuals authorized to perform screening functions).

Paragraph (a)(2) covers individuals who were employed before the December 6, 2001. Paragraph (a)(2)(i) covers each employee or contract employee covered under a certification made to an airport operator pursuant to § 107.31 (n) as it existed before November 14, 2001, or pursuant to § 107.209 (n) before December 6, 2001. Paragraph (a)(2)(ii) covers individuals with unescorted access authority based on an aircraft operator identification media, and paragraph (a)(2)(iii) covers individuals authorized to perform screening functions.

Paragraph (b), Individuals seeking unescorted access authority or authority to perform screening functions, states the basic requirement for CHRC's for individuals identified in paragraph (a)(1). This paragraph provides that the aircraft operator must ensure that each individual has undergone a fingerprint-based CHRC that does not disclose that he or she has a disqualifying criminal offense before making a certification to an airport operator regarding that

individual, issuing an aircraft operator identification media to that individual, or authorizing that individual to perform a screening function.

Paragraph (c), Individuals who have not had a CHRC, states the requirements for individuals who currently have unescorted access authority or who perform screening functions. Under paragraph (c), such individuals may not retain their unescorted access authority, and may not perform screening functions, after one year after the December 6, 2001, unless a CHRC has been conducted. Paragraph (c)(2) is essentially the same as current § 107.209 (c)(2).

Paragraph (d), Disqualifying criminal offenses, states what a disqualifying criminal offense is under the rule. It is essentially the same as new § 107.209 (d), discussed above, and corresponds to current § 108.229 (d).

Paragraph (e), Fingerprint application and processing, describes how the aircraft operator obtains and processes the fingerprints. It is essentially the same as new § 107.209 (f).

Paragraph (f), Fingerprint fees, describes the fees for fingerprinting, essentially the same as new § 107.209 (g). It corresponds to current § 108.29 (e)(5).

Paragraph (g), Determination of arrest status, requires the aircraft operator to investigate arrests recorded in the CHRC. It is essentially the same as new § 107.209 (g), and corresponds to current § 108.229 (f). The paragraph states that—

- When a CHRC on an individual described in paragraph (a)(1) discloses an arrest for a disqualifying criminal offense and does not indicate a disposition, an aircraft operator may not grant that individual unescorted access authority, either by making a certification to an airport operator or issuing identification media that is accepted by airport operators for unescorted access, or authority to perform screening functions.

- When a CHRC on an individual described in paragraph (a)(2) discloses an arrest for a disqualifying criminal offense and does not indicate a disposition, an aircraft operator must suspend the individual's unescorted access authority or authority to perform screening functions within 45 days after obtaining the CHRC unless the aircraft operator determines, after investigation, that the arrest did not result in a disqualifying criminal offense.

- An aircraft operator may only make this determination for individuals described in paragraph (a).

Paragraph (h), Correction of FBI records and notification of

disqualification, states the aircraft operator's duty to advise the individual about a disqualifying criminal offense in the CHRC, provide a copy of the record, and notify the individual of a final decision. It is essentially the same as new § 107.209 (h) and current § 108.229 (g).

Paragraph (i), Corrective action by the individual, describes the action the individual may take to correct an inaccurate CHRC. It is essentially the same as new § 107.209 (i) and current § 108.229(h).

Paragraph (j), Limits on dissemination of results, describes the limitations on disseminating the CHRC results. It is essentially the same as new § 107.209 (j) and current § 108.229(i). Paragraph (j)(2) clarifies that an aircraft operator may not provide CHRC results to an airport operator if the aircraft operator is providing a certification under part 107. In such a case, the airport operator does not have a need to see the CHRC under these rules. This is consistent with new § 107.209 (n).

Paragraph (k), Recordkeeping, states the airport operator's duties to maintain records, and is essentially the same as new § 107.209 (k) and current § 108.229 (k).

Paragraph (l), Continuing responsibilities, states the continuing responsibilities of the aircraft operator, each person with unescorted access authority, and each person performing screening functions, corresponding to new § 107.209 (l) and current § 108.229 (l).

Paragraph (m), Aircraft operator responsibility, states the aircraft operator responsibility corresponding to new § 107.209 (o) and current § 108.229 (m).

Compliance Dates

This rule becomes effective on December 6, 2001. On that date each airport operator and each aircraft operator may begin submitting fingerprints to complete the CHRC's required under this rule.

The compliance date for individuals seeking unescorted access authority, and for individuals seeking authority to perform screening functions, at non-Category X airports is December 6, 2001. On and after that date each individual seeking such authority must undergo a CHRC as provided in this rulemaking.

Under § 107.209 (c) and § 108.229 (c) the compliance date for submitting fingerprints for individuals who now have unescorted access authority and individuals who now have authority to perform screening functions is one year after the December 6, 2001. By that date, each airport operator and each aircraft

operator must have submitted fingerprints for all such individuals.

The FAA considers it critical to promptly address the deficiencies in the current employment investigations described above. Based on discussions with the industry, the FAA believes that these dates can be met. Indeed, a number of airport operators agree that all covered individuals should be fingerprinted and are ready to undertake that task as soon as possible, and expect to complete it much sooner than one year.

Good Cause for Immediate Adoption

This action is necessary to prevent a possible imminent hazard to aircraft and persons and property within the United States. Because the circumstances described herein warrant immediate action, the Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and contrary to the public interest. Further, the Administrator finds that good cause exists under 5 U.S.C. 553(d) for making this rule effective less than 30 days after publication in the **Federal Register**.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to this rule.

Paperwork Reduction Act

This emergency rule contains information collection activities subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). In accordance with section 3507 (j)(1)(B) of that statute, the FAA requested the Office of Management and Budget to grant an immediate emergency clearance on the paperwork package that was submitted. As protection provided by the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The collection of information was approved and assigned OMB Control Number 2120-0673. Following is a summary of the information collection activity.

Need: This rule requires information to be collected on individuals who perform, or seek to perform, security-related functions at domestic airports. The rule covers individuals at all categories of airports who were not

subject to a fingerprint-based CHRC before December 6, 2001. Under current FAA rules and statutes, fingerprint-based criminal history record checks are conducted on applicants at Category X airports for employment as screeners and for positions with access to secured areas of the airport. At non-Category X airports criminal history record checks are done only in limited circumstances, that is, when a verification of their prior employment reveals certain triggers, such as an unexplained gap in employment of 12 months. No individual with access to secured areas had a background check before 1996, and no screener had a background check before 1998. Only limited numbers of individuals hired since 1996 and 1998 respectively have been subjected criminal history checks. The new rules will require that all individuals with access to secured areas and all screeners be fingerprinted and a criminal history check conducted if it has not been done in the past. The rules are an essential part of the response to the current threat of terrorist activity.

Description of Respondents: All new and existing personnel who have unescorted access authority to the security identification display area of an airport, individuals who authorize others to have unescorted access authority, individuals who screen passengers and property that will be carried in an aircraft cabin in air transportation or intrastate air transportation, and supervisors of screeners. The FAA estimates that there will be 1.06 million respondents during the first year.

Estimated Burden: This rule will constitute a recordkeeping burden for certificate holders operating under parts 107 and 108. All personnel will need to be fingerprinted. In the first year of this rule, 1.06 million employees will need to be processed; in subsequent years, it will average about 275,000 employees. The total ten-year burden for the estimated 3.52 million employees is 1,234,711 hours at a cost of \$27,833,525. The annual burden sums to 123,471.1 hours at a cost of \$2,783,352.50.

Economic Analyses

This rulemaking action is taken under an emergency situation within the meaning of Section 6(a)(3)(D) of Executive Order 12866, Regulatory Planning and Review. It also is considered an emergency regulation under Paragraph 11g of the Department of Transportation (DOT) Regulatory Policies and Procedures. In addition, it is a significant rule within the meaning of the Executive Order and DOT's policies and procedures. No regulatory

analysis or evaluation accompanies this rule. The FAA has not assessed of whether this rule will have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act of 1980. When no notice of proposed rulemaking has first been published, no such assessment is required for a final rule. The FAA recognizes that this rule will impose significant costs on airport operators and aircraft operators. The current security threat requires, however, that operators take all necessary measures to ensure the safety and security of their operations.

Executive Order 13132, Federalism

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we have determined that this final rule does not have federalism implications.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104-4 on March 22, 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

Based on the FAA's rough initial estimates the FAA does not believe that the rule will result in such a mandate. The requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply when no notice of proposed rulemaking has first been published, however. Accordingly, the FAA has not prepared a statement under the Act.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j) this

rulemaking action qualifies for a categorical exclusion.

Energy Impact

The energy impact of this rule has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Pub. L. 94-163, as amended (42 U.S.C. 6362) and FAA Order 1053.1. It has been determined that this rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects

14 CFR Part 107

Airports, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

14 CFR Part 108

Air carriers, Aircraft, Airports, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

The Amendments

For the reasons stated in the preamble, the Federal Aviation Administration amends 14 CFR chapter I as set forth below:

PART 107—AIRPORT SECURITY

1. The authority citation for part 107 continues 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.

2. Revise § 107.209 to read as follows:

§ 107.209 Fingerprint-based criminal history records checks (CHRC).

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

(1) Each airport operator and airport user.

(2) Each individual currently having unescorted access to a SIDA, and each individual with authority to authorize others to have unescorted access to a SIDA (referred to as unescorted access authority).

(3) Each individual seeking unescorted access authority.

(4) Each airport user and aircraft operator making a certification to an airport operator pursuant to paragraph (n) of this section, or § 107.31 (n) as it existed before November 14, 2001 (see 14 CFR parts 60 to 139 revised as of January 1, 2001). An airport user, for the purposes of this section only, is any person other than an aircraft operator subject to § 108.229 of this chapter making a certification under this section.

(b) *Individuals seeking unescorted access authority.* Except as provided in

paragraph (m) of this section, each airport operator must ensure that no individual is granted unescorted access authority unless the individual has undergone a fingerprint-based CHRC that does not disclose that he or she has a disqualifying criminal offense, as described in paragraph (d) of this section.

(c) *Individuals who have not had a CHRC.* (1) Except as provided in paragraph (m) of this section, each airport operator must ensure that after December 6, 2002, no individual retains unescorted access authority, unless the airport operator has obtained and submitted a fingerprint under this part.

(2) When a CHRC discloses a disqualifying criminal offense for which the conviction or finding of not guilty by reason of insanity was on or after December 6, 1991, the airport operator must immediately suspend that individual's authority.

(d) *Disqualifying criminal offenses.* An individual has a disqualifying criminal offense if the individual has been convicted, or found not guilty of by reason of insanity, of any of the disqualifying crimes listed in this paragraph in any jurisdiction during the 10 years before the date of the individual's application for unescorted access authority, or while the individual has unescorted access authority. The disqualifying criminal offenses are as follows—

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

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

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

(4) Aircraft piracy; 49 U.S.C. 46502.

(5) Interference with flight crew members or flight attendants; 49 U.S.C. 46504.

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

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

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

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

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

(11) 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.

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

(13) Murder.

(14) Assault with intent to murder.

- (15) Espionage.
- (16) Sedition.
- (17) Kidnapping or hostage taking.
- (18) Treason.
- (19) Rape or aggravated sexual abuse.
- (20) Unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon.
- (21) Extortion.
- (22) Armed or felony unarmed robbery.
- (23) Distribution of, or intent to distribute, a controlled substance.
- (24) Felony arson.
- (25) Felony involving a threat.
- (26) Felony involving—
 - (i) Willful destruction of property;
 - (ii) Importation or manufacture of a controlled substance;
 - (iii) Burglary;
 - (iv) Theft;
 - (v) Dishonesty, fraud, or misrepresentation;
 - (vi) Possession or distribution of stolen property;
 - (vii) Aggravated assault;
 - (viii) Bribery; or
 - (ix) Illegal possession of a controlled substance punishable by a maximum term of imprisonment of more than 1 year.
- (27) Violence at international airports; 18 U.S.C. 37.
- (28) Conspiracy or attempt to commit any of the criminal acts listed in this paragraph.

(e) *Fingerprint application and processing.* (1) At the time of fingerprinting, the airport operator must provide the individual to be fingerprinted a fingerprint application that includes only the following—

- (i) The disqualifying criminal offenses described in paragraph (d) of this section.
- (ii) A statement that the individual signing the application does not have a disqualifying criminal offense.
- (iii) A statement informing the individual that Federal regulations under 14 CFR 107.209 (l) impose a continuing obligation to disclose to the airport operator within 24 hours if he or she is convicted of any disqualifying criminal offense that occurs while he or she has unescorted access authority.
- (iv) A statement reading, “The information I have provided on this application is true, complete, and correct to the best of my knowledge and belief and is provided in good faith. I understand that a knowing and willful false statement on this application can be punished by fine or imprisonment or both. (See section 1001 of Title 18 United States Code.)”
- (v) A line for the printed name of the individual.
- (vi) A line for the individual’s signature and date of signature.

(2) Each individual must complete and sign the application prior to submitting his or her fingerprints.

(3) The airport operator must verify the identity of the individual through two forms of identification prior to fingerprinting, and ensure that the printed name on the fingerprint application is legible. At least one of the two forms of identification must have been issued by a government authority, and at least one must include a photo.

(4) The airport operator must advise the individual that:

- (i) A copy of the criminal record received from the FBI will be provided to the individual, if requested by the individual in writing; and
- (ii) The ASC is the individual’s point of contact if he or she has questions about the results of the CHRC.

(5) The airport operator must collect, control, and process one set of legible and classifiable fingerprints under direct observation of the airport operator or a law enforcement officer.

(6) Fingerprints may be obtained and processed electronically, or recorded on fingerprint cards approved by the FBI and distributed by the FAA for that purpose.

(7) The fingerprint submission must be forwarded to the FAA in the manner specified by the Administrator.

(f) *Fingerprinting fees.* Airport operators must pay for all fingerprints in a form and manner approved by the FAA. The payment must be made at the designated rate (available from the local FAA security office) for each set of fingerprints submitted. Information about payment options is available through the designated FAA headquarters point of contact. Individual personal checks are not acceptable.

(g) *Determination of arrest status.* (1) When a CHRC on an individual seeking unescorted access authority discloses an arrest for any disqualifying criminal offense listed in paragraph (d) of this section without indicating a disposition, the airport operator must determine, after investigation, that the arrest did not result in a disqualifying offense before granting that authority.

(2) When a CHRC on an individual with unescorted access authority discloses an arrest for any disqualifying criminal offense without indicating a disposition, the airport operator must suspend the individual’s unescorted access authority not later than 45 days after obtaining the CHRC unless the airport operator determines, after investigation, that the arrest did not result in a disqualifying criminal offense.

(3) The airport operator may only make the determinations required in paragraphs (g)(1) and (g)(2) of this section for individuals for whom it is issuing, or has issued, unescorted access authority, and who are not covered by a certification from an aircraft operator under paragraph (n) of this section. The airport operator may not make determinations for individuals described in § 108.229 of this chapter.

(h) *Correction of FBI records and notification of disqualification.* (1) Before making a final decision to deny unescorted access authority to an individual described in paragraph (b) of this section, the airport operator must advise him or her that the FBI criminal record discloses information that would disqualify him or her from receiving or retaining unescorted access authority and provide the individual with a copy of the FBI record if he or she requests it.

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

(3) Immediately following the suspension of unescorted access authority of an individual, the airport operator must advise him or her that the FBI criminal record discloses information that disqualifies him or her from retaining unescorted access authority and provide the individual with a copy of the FBI record if he or she requests it.

(i) *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 or her record, subject to the following conditions—

(1) For an individual seeking unescorted access authority on or after December 6, 2001, the following applies:

(i) Within 30 days after being advised that the criminal record received from the FBI discloses a disqualifying criminal offense, the individual must notify the airport operator in writing of his or her intent to correct any information he or she believes to be inaccurate. The airport operator must obtain a copy, or accept a copy from the individual, of the revised FBI record, or a certified true copy of the information from the appropriate court, prior to granting unescorted access authority.

(ii) If no notification, as described in paragraph (h)(1) of this section, is received within 30 days, the airport operator may make a final determination to deny unescorted access authority.

(2) For an individual with unescorted access authority before December 6, 2001, the following applies: Within 30 days after being advised of suspension because the criminal record received from the FBI discloses a disqualifying criminal offense, the individual must notify the airport operator in writing of his or her intent to correct any information he or she believes to be inaccurate. The airport operator must obtain a copy, or accept a copy from the individual, of the revised FBI record, or a certified true copy of the information from the appropriate court, prior to reinstating unescorted access authority.

(j) *Limits on dissemination of results.* Criminal record information provided by the FBI may be used only to carry out this section and § 108.229 of this chapter. No person may disseminate the results of a CHRC to anyone other than:

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

(2) Officials of other airport operators who are determining whether to grant unescorted access to the individual under this part.

(3) Aircraft operators who are determining whether to grant unescorted access to the individual or authorize the individual to perform screening functions under part 108 of this chapter.

(4) Others designated by the Administrator.

(k) *Recordkeeping.* The airport operator must maintain the following information.

(1) *Investigations conducted before December 6, 2001.* The airport operator must maintain and control the access or employment history investigation files, including the criminal history records results portion, or the appropriate certifications, for investigations conducted before December 6, 2001.

(2) *Fingerprint application process on or after December 6, 2001.* Except when the airport operator has received a certification under paragraph (n) of this section, the airport operator must physically maintain, control, and, as appropriate, destroy the fingerprint application and the criminal record. Only direct airport operator employees may carry out the responsibility for maintaining, controlling, and destroying criminal records.

(3) *Certification on or after December 6, 2001.* The airport operator must maintain the certifications provided under paragraph (n) of this section.

(4) *Protection of records—all investigations.* The records 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.

(5) *Duration—all investigations.* The records identified in this section with regard to an individual must be maintained until 180 days after the termination of the individual's unescorted access authority. When files are no longer maintained, the criminal record must be destroyed.

(1) *Continuing responsibilities.* (1) Each individual with unescorted access authority on December 6, 2001, who had a disqualifying criminal offense in paragraph (d) of this section on or after December 6, 1991, must, by January 7, 2002, report the conviction to the airport operator and surrender the SIDA access medium to the issuer.

(2) Each individual with unescorted access authority who has a disqualifying criminal offense must report the offense to the airport operator and surrender the SIDA access medium to the issuer within 24 hours of the conviction or the finding of not guilty by reason of insanity.

(3) If information becomes available to the airport operator or the airport user indicating that an individual with unescorted access authority has a disqualifying criminal offense, the airport operator must determine the status of the conviction. If a disqualifying offense is confirmed the airport operator must immediately revoke any unescorted access authority.

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

(1) An employee of the Federal, state, or local government (including a law enforcement officer (LEO)) who, as a condition of employment, has been subjected to an employment investigation which includes a criminal records 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 authority by another airport operator, airport user, or aircraft operator, provided the grant for his or her unescorted access authority was based upon a fingerprint-based CHRC through the FAA.

(4) An individual who has been continuously employed by an aircraft operator, in a position with authority to perform screening functions, provided the grant for his or her authority to perform screening functions was based upon a fingerprint-based CHRC through the FAA.

(n) *Certifications by aircraft operators.* An airport operator is in compliance with its obligation under paragraph (b) or (c) of this section when the airport operator accepts, for each individual seeking unescorted access authority, certification from an aircraft operator subject to part 108 of this chapter indicating it has complied with § 108.229 of this chapter for the aircraft operator's employees and contractors seeking unescorted access authority. If the airport operator accepts a certification from the aircraft operator, the airport operator may not require the aircraft operator to provide a copy of the CHRC.

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

(1) Designate the ASC, in the security program, or a direct employee if the ASC is not a direct employee, to be responsible for maintaining, controlling, and destroying the criminal record files when their maintenance is no longer required by paragraph (k) of this section.

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

(3) Audit the employment history investigations performed by the airport operator in accordance with this section and § 107.31 as it existed before November 14, 2001 (see 14 CFR parts 60 to 139 revised as of January 1, 2001), and those investigations conducted by the airport users who provided certification to the airport operator. The audit program must be set forth in the airport security program.

(p) *Airport user responsibility.* (1) The airport user must report to the airport operator information, as it becomes available, that indicates an individual with unescorted access authority may have a disqualifying criminal offense.

(2) The airport user must maintain and control, in compliance with paragraph (k) of this section, the employment history investigation files for investigations conducted before December 6, 2001, unless the airport operator decides to maintain and control the employment history investigation file.

(3) The airport user must provide the airport operator with either the name or title of the individual acting as custodian of the files described in this paragraph, the address of the location where the files are maintained, and the phone number of that location. The airport user must provide the airport operator and the FAA with access to these files.

PART 108—AIRCRAFT OPERATOR SECURITY

3. The authority 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. Revise § 108.229 to read as follows:

§ 108.229 Fingerprint-based criminal history records checks (CHRC).

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

(1)(i) Each employee or contract employee covered under a certification made to an airport operator on or after December 6, 2001, pursuant to § 107.209(n) of this chapter.

(ii) Each individual issued on or after December 6, 2001, aircraft operator identification media that one or more airports accepts as airport-approved media for unescorted access authority within a security identification display area (SIDA), as described in § 107.205 of this chapter (referred to as unescorted access authority).

(iii) Each individual, on or after December 6, 2001, granted authority to perform the following screening functions at locations within the United States (referred to as authority to perform screening functions)—

(A) Screening passengers or property that will be carried in a cabin of an aircraft of an aircraft operator required to screen passengers under this part.

(B) Serving as an immediate supervisor (checkpoint security supervisor (CSS)), and the next supervisory level (shift or site supervisor), to those individuals described in paragraph (a)(1)(iii)(A) of this section.

(2)(i) Each employee or contract employee covered under a certification made to an airport operator pursuant to § 107.31(n) as it existed before November 14, 2001 (see 14 CFR parts 60 to 139 revised as of January 1, 2001), or pursuant to § 107.209(n) of this chapter before December 6, 2001.

(ii) Each individual who holds on December 6, 2001, an aircraft operator identification media that one or more airports accepts as airport-approved media for unescorted access authority within a security identification display area (SIDA), as described in § 107.205 of this chapter.

(iii) Each individual who is performing on December 6, 2001, a screening function identified in paragraph (a)(1)(iii) of this section.

(b) *Individuals seeking unescorted access authority or authority to perform*

screening functions. Each aircraft operator must ensure that each individual identified in (a)(1) of this section has undergone a fingerprint-based CHRC that does not disclose that he or she has a disqualifying criminal offense, as described in paragraph (d) of this section, before—

(1) Making a certification to an airport operator regarding that individual;

(2) Issuing an aircraft operator identification medium to that individual; or

(3) Authorizing that individual authority to perform screening functions.

(c) *Individuals who have not had a CHRC.* (1) Each aircraft operator must ensure that, on and after December 6, 2002:

(i) No individual retains unescorted access authority, whether obtained as a result of a certification to an airport operator under § 107.31(n) as it existed before November 14, 2001 (see 14 CFR parts 60 to 139 revised as of January 1, 2001), or under § 107.209(n) of this chapter before December 6, 2001, or obtained as a result of the issuance of an aircraft operator's identification media, unless the individual has been subject to a fingerprint-based CHRC for unescorted access authority under this part.

(ii) No individual continues to have authority to perform screening functions described in paragraph (a)(1)(iii) of this section, unless the individual has been subject to a fingerprint-based CHRC under this part.

(2) When a CHRC discloses a disqualifying criminal offense for which the conviction or finding was on or after December 6, 1991, the aircraft operator must immediately suspend that individual's unescorted access authority or authority to perform screening functions.

(d) *Disqualifying criminal offenses.* An individual has a disqualifying criminal offense if the individual has been convicted, or found not guilty by reason of insanity, of any of the disqualifying crimes listed in this paragraph in any jurisdiction during the 10 years before the date of the individual's application for unescorted access authority or authority to perform screening functions, or while the individual has unescorted access authority or authority to perform screening functions. The disqualifying criminal offenses are as follows—

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

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

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

(4) Aircraft piracy; 49 U.S.C. 46502.

(5) Interference with flight crew members or flight attendants; 49 U.S.C. 46504.

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

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

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

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

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

(11) 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.

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

(13) Murder.

(14) Assault with intent to murder.

(15) Espionage.

(16) Sedition.

(17) Kidnapping or hostage taking.

(18) Treason.

(19) Rape or aggravated sexual abuse.

(20) Unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon.

(21) Extortion.

(22) Armed or felony unarmed robbery.

(23) Distribution of, or intent to distribute, a controlled substance.

(24) Felony arson.

(25) Felony involving a threat.

(26) Felony involving—

(i) Willful destruction of property;

(ii) Importation or manufacture of a controlled substance;

(iii) Burglary;

(iv) Theft;

(v) Dishonesty, fraud, or misrepresentation;

(vi) Possession or distribution of stolen property;

(vii) Aggravated assault;

(viii) Bribery; or

(ix) Illegal possession of a controlled substance punishable by a maximum term of imprisonment of more than 1 year.

(27) Violence at international airports; 18 U.S.C. 37.

(28) Conspiracy or attempt to commit any of the criminal acts listed in this paragraph.

(e) *Fingerprint application and processing.* (1) At the time of fingerprinting, the aircraft operator must provide the individual to be fingerprinted a fingerprint application that includes only the following—

(i) The disqualifying criminal offenses described in paragraph (d) of this section.

(ii) A statement that the individual signing the application does not have a disqualifying criminal offense.

(iii) A statement informing the individual that Federal regulations under 14 CFR 108.229 impose a continuing obligation to disclose to the aircraft operator within 24 hours if he or she is convicted of any disqualifying criminal offense that occurs while he or she has unescorted access authority.

(iv) A statement reading, "The information I have provided on this application is true, complete, and correct to the best of my knowledge and belief and is provided in good faith. I understand that a knowing and willful false statement on this application can be punished by fine or imprisonment or both. (See section 1001 of Title 18 United States Code.)"

(v) A line for the printed name of the individual.

(vi) A line for the individual's signature and date of signature.

(2) Each individual must complete and sign the application prior to submitting his or her fingerprints.

(3) The aircraft operator must verify the identity of the individual through two forms of identification prior to fingerprinting, and ensure that the printed name on the fingerprint application is legible. At least one of the two forms of identification must have been issued by a government authority, and at least one must include a photo.

(4) The aircraft operator must:

(i) Advise the individual that a copy of the criminal record received from the FBI will be provided to the individual, if requested by the individual in writing; and

(ii) Identify a point of contact if the individual has questions about the results of the CHRC.

(5) The aircraft operator must collect, control, and process one set of legible and classifiable fingerprints under direct observation by the aircraft operator or a law enforcement officer.

(6) Fingerprints may be obtained and processed electronically, or recorded on fingerprint cards approved by the FBI and distributed by the FAA for that purpose.

(7) The fingerprint submission must be forwarded to the FAA in the manner specified by the Administrator.

(f) *Fingerprinting fees.* Aircraft operators must pay for all fingerprints in a form and manner approved by the FAA. The payment must be made at the designated rate (available from the local FAA security office) for each set of fingerprints submitted. Information

about payment options is available through the designated FAA headquarters point of contact. Individual personal checks are not acceptable.

(g) *Determination of arrest status.* (1) When a CHRC on an individual described in paragraph (a)(1) of this section discloses an arrest for any disqualifying criminal offense listed in paragraph (d) of this section without indicating a disposition, the aircraft operator must determine, after investigation, that the arrest did not result in a disqualifying offense before granting unescorted access authority or authority to perform screening functions.

(2) When a CHRC on an individual described in paragraph (a)(2) of this section discloses an arrest for any disqualifying criminal offense without indicating a disposition, the aircraft operator must suspend the individual's unescorted access authority or authority to perform screening functions not later than 45 days after obtaining the CHRC unless the aircraft operator determines, after investigation, that the arrest did not result in a disqualifying criminal offense.

(3) The aircraft operator may only make the determinations required in paragraphs (g)(1) and (g)(2) of this section for individuals for whom it is issuing, or has issued, unescorted access authority; individuals for whom it is issuing, or has issued, authority to perform screening functions; and individuals who are covered by a certification from an aircraft operator under § 107.209 (n) of this chapter. The aircraft operator may not make determinations for individuals described in § 107.209 (a) of this chapter.

(h) *Correction of FBI records and notification of disqualification.* (1) Before making a final decision to deny authority to an individual described in paragraph (a)(1) of this section, the aircraft operator must advise him or her that the FBI criminal record discloses information that would disqualify him or her from receiving or retaining unescorted access authority or authority to perform screening functions and provide the individual with a copy of the FBI record if he or she requests it.

(2) The aircraft operator must notify an individual that a final decision has been made to grant or deny unescorted access authority or authority to perform screening functions.

(3) Immediately following the suspension of unescorted access authority or authority to perform screening functions, the aircraft operator must advise the individual that the FBI

criminal record discloses information that disqualifies him or her from retaining his or her authority, and provide the individual with a copy of the FBI record if he or she requests it.

(i) *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 or her record, subject to the following conditions—

(1) For an individual seeking unescorted access authority or authority to perform screening functions on or after December 6, 2001, the following applies:

(i) Within 30 days after being advised that the criminal record received from the FBI discloses a disqualifying criminal offense, the individual must notify the aircraft operator in writing of his or her intent to correct any information he or she believes to be inaccurate. The aircraft operator must obtain a copy, or accept a copy from the individual, of the revised FBI record or a certified true copy of the information from the appropriate court, prior to granting unescorted access authority or authority to perform screening functions.

(ii) If no notification, as described in paragraph (h)(1) of this section, is received within 30 days, the aircraft operator may make a final determination to deny unescorted access authority or authority to perform screening functions.

(2) For an individual with unescorted access authority or authority to perform screening functions before December 6, 2001, the following applies: Within 30 days after being advised of suspension because the criminal record received from the FBI discloses a disqualifying criminal offense, the individual must notify the aircraft operator in writing of his or her intent to correct any information he or she believes to be inaccurate. The aircraft operator must obtain a copy, or accept a copy from the individual, of the revised FBI record, or a certified true copy of the information from the appropriate court, prior to reinstating unescorted access authority or authority to perform screening functions.

(j) *Limits on dissemination of results.* Criminal record information provided by the FBI may be used only to carry out this section and § 107.209 of this chapter. No person may disseminate the results of a CHRC to anyone other than:

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

(2) Officials of airport operators who are determining whether to grant

unescorted access to the individual under part 107 of this chapter when the determination is not based on the aircraft operator's certification under § 107.209 (n) of this chapter.

(3) Other aircraft operators who are determining whether to grant unescorted access to the individual or authorize the individual to perform screening functions under this part.

(4) Others designated by the Administrator.

(k) *Recordkeeping.* The aircraft operator must maintain the following information.

(1) *Investigation conducted before December 6, 2001.* The aircraft operator must maintain and control the access or employment history investigation files, including the criminal history records results portion, for investigations conducted before December 6, 2001.

(2) *Fingerprint application process on or after December 6, 2001.* The aircraft operator must physically maintain, control, and, as appropriate, destroy the fingerprint application and the criminal record. Only direct aircraft operator employees may carry out the responsibility for maintaining, controlling, and destroying criminal records.

(3) *Protection of records—all investigations.* The records 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.

(4) *Duration—all investigations.* The records identified in this section with regard to an individual must be maintained until 180 days after the termination of the individual's

unescorted access authority or authority to perform screening functions. When files are no longer maintained, the criminal record must be destroyed.

(l) *Continuing responsibilities.* (1) Each individual with unescorted access authority or the authority to perform screening functions on December 6, 2001, who had a disqualifying criminal offense in paragraph (d) of this section on or after December 6, 1991, must, by January 7, 2002, report the conviction to the aircraft operator and surrender the SIDA access medium to the issuer and cease performing screening functions, as applicable.

(2) Each individual with unescorted access authority or authority to perform screening functions who has a disqualifying criminal offense must report the offense to the aircraft operator and surrender the SIDA access medium to the issuer within 24 hours of the conviction or the finding of not guilty by reason of insanity.

(3) If information becomes available to the aircraft operator indicating that an individual with unescorted access authority or authority to perform screening functions has a possible conviction for any disqualifying criminal offense in paragraph (d) of this section, the aircraft operator must determine the status of the conviction. If a disqualifying criminal offense is confirmed the aircraft operator must immediately revoke any unescorted access authority and authority to perform screening functions.

(m) *Aircraft operator responsibility.* The aircraft operator must—

(1) Designate an individual(s) to be responsible for maintaining and controlling the employment history

investigations for those whom the aircraft operator has made a certification to an airport operator under § 107.209 (n) of this chapter, and for those whom the aircraft operator has issued identification media that are airport-accepted. The aircraft operator must designate a direct employee to maintain, control, and, as appropriate, destroy criminal records.

(2) Designate an individual(s) to maintain the employment history investigations of individuals with authority to perform screening functions whose files must be maintained at the location or station where the screener is performing his or her duties.

(3) Designate an individual(s) at appropriate locations to serve as the contact to receive notification from individuals seeking unescorted access authority or authority to perform screening functions of their intent to seek correction of their FBI criminal record.

(4) Audit the employment history investigations performed in accordance with this section and § 108.33 as it existed before November 14, 2001 (see 14 CFR parts 60 to 139 revised as of January 1, 2001). The aircraft operator must set forth the audit procedures in its security program. Section 138 of ATSA removes the exemption for the individuals with access to U.S. Customs' secured areas.

Issued in Washington, DC on December 3, 2001.

Jane F. Garvey,
Administrator.

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