No. 15-____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE COMPETITIVE ENTERPRISE INSTITUTE, NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE RUTHERFORD INSTITUTE, LAWSON BADER, AND MARC SCRIBNER,

Petitioners.

15-1224

PETITION FOR A WRIT OF MANDAMUS TO ENFORCE THIS COURT'S MANDATE

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July 15, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for petitioners certifies as follows:

A. Parties

The Competitive Enterprise Institute (CEI), the National Center for Transgender Equality (NCTE), The Rutherford Institute, Lawson Bader, and Marc Scribner are the petitioners in this Court. The Secretary of Homeland Security, Jeh Johnson, is the respondent.

Pursuant to Circuit Rule 26.1, undersigned counsel certifies that Petitioner CEI is a District of Columbia corporation with no parent corporation. No publicly held company has a 10 percent or greater ownership interest in CEI. Petitioner NCTE is a District of Columbia corporation with no parent corporation. No publicly held company has a 10 percent or greater ownership interest in NCTE. The Rutherford Institute is a Virginia corporation with no parent corporation. No publicly held company has a 10 percent or greater ownership interest in The Rutherford Institute.

B. Rulings Under Review

Petitioners seek a writ of mandamus to compel the Secretary of Homeland Security to publish a rule regarding the Transportation Security Administration (TSA) screening passengers at U.S. airports primarily using Advanced Imaging Technology (AIT), pursuant to this Court's order in *Electronic Privacy Information Center v. DHS*, 653 F.3d 1, 11 (D.C. Cir. July 15,

2011) (*EPIC v. DHS*). The agency issued a notice of proposed rulemaking in March 2013. Passenger Screening Using Advanced Imaging Technology, *Notice of Proposed Rulemaking*, 78 Fed. Reg. 18,287 (Mar. 26, 2013) (to be codified at 49 C.F.R. § 1540.107(d)). The agency has yet to publish a final rule or take any other action to complete this rulemaking.

C. Related Cases

This petition for a writ of mandamus follows a petition for review filed in this Court by the Electronic Privacy Information Center (EPIC) in 2010. There, this Court held that the Transportation Security Administration's decision to use AIT, also known as Whole Body Imaging (WBI), for primary screening of airport passengers is a legislative rule within the meaning of the Administrative Procedure Act (APA). *EPIC*, 653 F.3d at 8. Because TSA had failed to conduct a notice-and-comment rulemaking as the APA requires, 5 U.S.C. § 553(b)–(c), this Court "instruct[ed] the agency promptly to proceed in a manner consistent with [its] opinion." *EPIC*, 653 F.3d at 11.

In 2012, a year after this Court's aforementioned order, EPIC sought a writ of mandamus to compel TSA to act, as it had yet to issue a notice of proposed rulemaking. This Court denied that petition "in light of the Government's representation" that the NPRM was "expected to be complete by or before the end of February 2013." *In re EPIC*, No. 12-1307 (D.C. Cir. Sept. 25, 2012) (per curiam) (internal quotations and citation omitted).

Accordingly, this Court stated that it "expect[ed] that the NPRM will be published before the end of March 2013." *Id.*

July 15, 2015

/s/ Hans Bader
HANS BADER
Counsel for Petitioners

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GLOSSARY

AIT	Advanced Imaging Technology
APA	Administrative Procedure Act
CEI	Competitive Enterprise Institute
DHS	Department of Homeland Security
EPIC	Electronic Privacy Information Center
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FERC	Federal Energy Regulatory Commission
GAO	Government Accountability Office
ICC	Interstate Commerce Commission
NCTE	National Center for Transgender Equality
NOAA	National Oceanic and Atmospheric Administration
NPRM	Notice of Proposed Rulemaking
OSHA	Occupational Safety and Health Administration
PMOI	People's Mojahedin Organization of Iran
TRAC	Telecommunications Research and Action Center
TSA	Transportation Security Administration
WBI	Whole Body Imaging

JURISDICTIONAL STATEMENT

This Court is empowered to issue writs of mandamus under 28 U.S.C. § 1651. This Court is authorized to review TSA's airport screening rule under 49 U.S.C. § 46110(a), which provides that "a person disclosing a substantial interest in an order issued by the Secretary . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit." Upon the filing of such a petition, this Court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings." 49 U.S.C. § 46110(c). And this Court "may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists." *Id.* In general, this Court may issue a writ of mandamus if an agency unreasonably fails to respond to this Court's remand. *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) (citing *In re Core Communications, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008)). Finally, the APA empowers this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

SUMMARY OF ARGUMENT

At issue in this case is TSA's multi-year failure to complete its notice-and-comment rulemaking on body scanners, despite two court rulings ordering it to do so. More than eight years ago, in early 2007, TSA began deploying

whole body imaging scanners in U.S. airports to screen airline passengers. Over 740 of these body scanning machines, also referred to as Advanced Imaging Technology (AIT), have since been installed in 160 airports nationwide.

In May 2009, the Electronic Privacy Information Center (EPIC), a non-profit research center, and thirty other organizations wrote a letter urging the Secretary of Homeland Security—who oversees TSA—to conduct notice-and-comment rulemaking with respect to the agency's use of whole body imaging in airports. The agency responded to the letter, but it did not commence a rulemaking. In April 2010, EPIC and a similar set of organizations filed a formal petition asking the Secretary to issue a rule governing TSA's use of AIT in airports. Again, TSA did not initiate a rulemaking.

Five years ago, in July 2010, EPIC filed a petition for review with this Court, arguing among other things that TSA's deployment and use of AIT were unlawful due to the agency's failure to conduct notice-and-comment rulemaking as required by the APA. In July 2011, this Court held TSA's AIT policy to be in violation of the APA, and remanded it to the agency with instructions to "promptly . . . proceed in a manner consistent with [this Court's] opinion."

A year later, TSA had yet to publish a notice of proposed rulemaking, a necessary prerequisite to issuing a final rule. Thus, in July 2012, EPIC petitioned this Court for a writ of mandamus to effectuate its earlier

decision. In September 2012, this Court denied EPIC's petition, but emphasized that it expected TSA's notice of proposed rulemaking would be "published before the end of March 2013." The agency fulfilled this deadline with only five days to spare.

Now, four years after this Court's July 15, 2011, mandate, and over two years since TSA published its NPRM, the agency has yet to issue a final rule, or take any other steps toward meeting the APA's requirements. For over eight years, therefore, TSA has subjected passengers flying through U.S. airports to its AIT regime—a policy the American people have not had any say in making, even though they are "substantively affect[ed]" by it, as this Court has held. *EPIC v. DHS*, 653 F.3d 1, 6 (D.C. Cir. July 15, 2011).

TSA has taken far too long to heed this Court's mandate by publishing a rule regarding AIT screening. Flouting the APA for eight years—despite repeated public requests to conduct notice-and-comment rulemaking and four years after this Court ordered the agency to do just that—is unreasonable and unlawful. TSA's chronic failure to timely comply with this Court's mandate evinces crippling bureaucratic inefficiency, especially for an agency with over 50,000 full-time equivalent employees.

Therefore, we respectfully ask this Court to issue a writ of mandamus to compel the Secretary of Homeland Security to publish a final rule regarding TSA's use of AIT for passenger screening within 90 days.

IDENTITY AND STANDING OF PETITIONERS

Petitioner Competitive Enterprise Institute (CEI) is a nonprofit 501(c)(3) public interest organization dedicated to advancing free-market solutions to regulatory issues. CEI was founded in 1984 and is headquartered in Washington, D.C. CEI has been involved in TSA airport screening issues for a number of years. In 2013, for instance, CEI filed comments with TSA in response to the agency's notice of proposed rulemaking.[1] CEI is participating in this petition on the basis of its longstanding interest in this issue and, more specifically, its organizational interest in the ability of its officers, directors, and employees to freely engage in interstate air travel to conduct CEI business, unfettered by regulatory impediments that are unsupported by substantial evidence or otherwise unlawful.

Petitioner National Center for Transgender Equality (NCTE) is a nonprofit organization dedicated to improving the lives of transgender people and their loved ones through education and advocacy. NCTE was founded in 2003 and is headquartered in Washington, D.C. NCTE has a special interest in this issue because transgender travelers commonly report experiencing additional scrutiny at airports based on their appearance,

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1. Comments of CEI and Robert L. Crandall, Passenger Screening Using Advanced Imaging Technology, *Notice of Proposed Rulemaking*, 78 Fed. Reg. 18,287 (rel. Mar. 26, 2013), *available at* https://cei.org/regulatory-comments-and-testimony/comments-tsa-regarding-deployment-ait.

identification, clothing, or physical features. In a 2008–09 national survey conducted by NCTE and the National Gay and Lesbian Task Force, 21% of transgender people reported experiencing harassment or other discrimination at an airport. NCTE has been involved in education and advocacy on the issue of passenger screening for many years, providing information to transgender members of the public, technical assistance and training to TSA personnel, and engaging members of the public to file nearly 1,000 comments on the agency's 2013 notice of proposed rulemaking.

Petitioner The Rutherford Institute, since its founding over thirty years ago, has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. The Rutherford Institute is a nonprofit, nonstock corporation made up of members from around the nation. The Institute has been involved in the TSA body scanner issue since 2009, based on its concern over the impact of the TSA's policy on the ability of both its staff and members to engage in air travel.

Petitioner Lawson Bader is a resident of Virginia and the President of CEI. He consistently flies over 100,000 miles annually on commercial flights for business and pleasure. He is a member of United Airlines' Mileage Plus program and holds Premier 1K status, the highest elite level the airline

affords its most frequent flyers. He is also a member of the airline's Million Miler program, which recognizes passengers who have flown over one million miles on United Airlines flights. Most of his flights originate at U.S. airports where body scanners are used for primary screening. Mr. Bader is frequently permitted to use TSA's streamlined airport screening process—known as "PreCheck"—where body scanners are not used for primary screening. However, TSA does not guarantee any passenger that he or she will be eligible for PreCheck screening on any particular flight. TSA officers sometimes direct Mr. Bader to ordinary security lanes, where body scanners are in use. Each time Mr. Bader flies out of a major U.S. airport, therefore, he runs the risk that TSA will require him to enter a body scanner.

Petitioner Marc Scribner is a resident of the District of Columbia and a research fellow at CEI. He flies about a dozen times a year on domestic flights originating at U.S. airports where body scanners are used for primary screening. Unlike Mr. Bader, Mr. Scribner is rarely invited to use PreCheck, so he must walk through a body scanner nearly every time he flies. Consequently, Mr. Scribner typically spends substantially more time waiting in line to enter an airport's sterile area compared to flyers who are eligible for PreCheck.

As described in the attached declarations (A1–A4), petitioners are adversely affected by TSA's current body scanner policy.

ARGUMENT

I. TSA'S BODY SCANNERS AFFECT MILLIONS OF AMERICANS DAILY, BUT DESPITE TWO RULINGS FROM THIS COURT, THE AGENCY CONTINUES TO SHIELD ITS POLICY FROM PUBLIC INPUT AND JUDICIAL REVIEW

On a typical day, over two million people board a scheduled passenger flight in the United States.[2] Each of these passengers must undergo security screening by TSA employees, 49 U.S.C. § 44901(a), or in a few airports, by a "qualified private screening company" that meets all the requirements applicable to TSA "personnel who perform screening services at airports," 49 U.S.C. § 44919(f). Both TSA and private screening companies are supervised by the Secretary of Homeland Security. 6 U.S.C. § 203.[3]

In early 2007, TSA began using Advancing Imaging Technology, also known as Whole Body Imaging. Thomas Frank, *TSA Looks Into Using More Airport Body Scans*, USA TODAY, Oct. 7, 2007. In 2009, TSA began using AIT "as a means of primary screening." *EPIC v. DHS*, 653 F.3d 1, 3 (D.C. Cir. 2011). Currently, about 740 body scanners are in use at about 160 airports

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2. Dep't of Transp., Bureau of Transp. Statistics, *March 2015 U.S. Airline Traffic Data* (June 12, 2015), *available at* http://www.rita.dot.gov/bts/press_releases/bts028_15.

3. Although this authority was initially vested in the Under Secretary of Transportation for Security, Congress transferred the responsibilities of that position to the Secretary of Homeland Security in 2002, Pub. L. No. 107-296, § 403, 116 Stat. 2135 (codified at 6 U.S.C. § 203).

nationwide.[4] Unlike the magnetometers—that is, metal detectors—traditionally used for airport passenger screening, AIT produces an "image of an unclothed person" so that the machine's operator can "detect a nonmetallic object, such as a liquid or powder." *EPIC*, 653 F.3d at 3.

Although TSA has taken some "precautions" to protect passenger privacy, this Court found that "an AIT scanner intrudes upon . . . personal privacy in a way a magnetometer does not." *Id.* at 6. Therefore, TSA's widespread use of AIT "substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Id.* (citing *Pickus v. Bd. of Parole*, 507 F.2d 1107, 1113–14 (D.C. Cir. 1974)).

TSA currently allows passengers to fly even if they do not wish to undergo AIT screening; instead, they may "opt for a patdown." *EPIC*, 653 F.3d at 7. But this "opt out" allowance is not guaranteed by TSA, nor can it be found in the Code of Federal Regulations—rather, as TSA conceded in this Court, it requires every passenger to submit to "whatever screening procedure" the agency is using upon his or her arrival at an airport. *Id.* When TSA introduced AIT as a means of primary screening and allowed passengers to opt for a patdown instead, the agency did not commence

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4. U.S. Gov't Accountability Office, GAO-14-357, Advanced Imaging Technology: TSA Needs Additional Information before Procuring Next Generation Systems 2 (2014), *available at* http://www.gao.gov/assets/670/662146.pdf.

notice-and-comment rulemaking or publish a rule in the Federal Register. *Id.* Thus, the agency could change its policy on a whim to make AIT screening mandatory for *all* passengers tomorrow.

Under the APA, however, an agency must generally engage in notice-and-comment rulemaking before it invokes its power to "bind[] the public to a strict and specific set of obligations." *Id*. Existing regulations provide that "[n]o individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person . . . in accordance with the procedures being applied to control access to that area." 49 C.F.R. § 1540.105(a). But although TSA's rules make clear that passengers must comply with the agency's screening and inspection policies, its rules do not explain what procedures are "being applied to control access" to sterile areas.

In 2009, when TSA began using AIT as a primary means of screening in certain airports—in lieu of magnetometers—this marked a "substantive regulatory change" to the agency's regulatory regime. *EPIC*, 653 F.3d at 6–7 (quoting *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34–40 (D.C. Cir. 2005)). As such, the APA required TSA to conduct notice-and-comment rulemaking before dramatically shifting its screening procedures. *See* 5 U.S.C. § 553(b)–(c). Because the agency failed to do so, on July 15, 2011, this Court instructed TSA to "promptly" conduct a rulemaking in accordance with the APA. *EPIC*, 653 F.3d at 11.

A year later, however, TSA had yet to publish a notice of proposed rulemaking, so EPIC petitioned this Court for a writ of mandamus to compel the agency to act. *In re EPIC*, No. 12-1307 (D.C. Cir. Sept. 25, 2012) (per curiam). Although this Court denied that petition "in light of the Government's representation" that the NPRM was "expected to be complete by or before the end of February 2013," this Court stated that it "expect[ed] that the NPRM will be published before the end of March 2013." *Id.* (internal quotations and citation omitted).

Four years after this Court's July 2011 mandate in *EPIC*, however, TSA has yet to issue a rule regarding its use of AIT for airport screening. Although the agency issued a notice of proposed rulemaking in March 2013, Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287 (Mar. 26, 2013) (to be codified at 49 C.F.R. § 1540.107(d)), TSA has since taken no further actions to complete this rulemaking. Meanwhile, however, the agency has continued to deploy AIT scanners, buying some 300 units two months *after* this Court's July 2011 order. Joint Majority Staff Report, 112th Cong., *A Decade Later: A Call for TSA Reform* 17 (Nov. 16, 2011).[5]

Because TSA has yet to issue its AIT screening rule, more than 5,000 public commenters who weighed in with the agency in 2013 have no way of knowing whether the agency has incorporated their input into its

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5. This report is available at http://oversight.house.gov/wp-content/uploads/2012/03/2011-11-16-TSA_Reform_Report.pdf.

decisionmaking, as the APA requires, 5 U.S.C. § 553(c).[6] This law reflects Congress' judgment that "notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). For an agency to "implement a rule first, and then seek comment later," as TSA has done here, "is antithetical to the structure and purpose of the APA." *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005).

II. TSA HAS UNREASONABLY DELAYED PUBLISHING ITS BODY SCANNER RULE, WARRANTING EXTRAORDINARY RELIEF FROM THIS COURT

The APA empowers this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In interpreting this statute, this Court has articulated the following six factors that bear on the reasonableness of an agency's delay, *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC v. FCC*):

(1) a "rule of reason" governs "the time limit to administrative proceedings," *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983);

(2) this rule of reason may be supplied when "Congress has provided a timetable or other indication of the speed with which it expects the

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6. The full rulemaking docket, including public comments, is available at http://www.regulations.gov/#!documentDetail;D=TSA-2013-0004-0001.

agency to proceed in the enabling statute," *Pub. Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984);

(3) "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake," *id.*;

(4) "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority," *see, e.g., id.*;

(5) the court should "take into account the nature and extent of the interests prejudiced by delay," *id.* at 35; and

(6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed,'" *id.*

Taking these six factors into consideration, TSA's continued failure to abide by this Court's mandate is unreasonable, and it warrants extraordinary relief.

Under the first *TRAC* factor, a "rule of reason" that governs administrative proceedings, 750 F.2d at 80, TSA has taken an unreasonably lengthy amount of time to complete its body scanner rulemaking in light of the circumstances. By way of comparison, on December 19, 2014, the President signed a law amending the limits on the "security service fee" charged to airline passengers by TSA. Pub. L. No. 113-294, § 1, 128 Stat. 4009 (2014) (amending 49 U.S.C. § 44940(c)). Less than six months later, on June 4, 2015, TSA issued an interim final rule and request for comments, incorporating the most recent statutory amendment. Adjustment of

Passenger Civil Aviation Security Service Fee, 80 Fed. Reg. 31,850 (2015) (to be codified at 49 C.F.R. § 1510). TSA has thus demonstrated that it can comply with the APA's requirements within a reasonable time, yet the agency has nevertheless allowed its body scanner proceeding to languish for over two years without showing any meaningful progress toward issuing a final rule.

The second *TRAC* factor turns on the speed with which Congress intended an agency to proceed with respect to a particular matter. *TRAC*, 750 F.2d at 80 (citing *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34–35 (D.C. Cir. 1984)). With respect to TSA's use of AIT scanners, Congress ordered the Secretary of Homeland Security to "give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals." 49 U.S.C. § 44925(a). In December 2004, Congress gave TSA a 90-day deadline to "submit to the appropriate congressional committees a strategic plan to promote the optimal utilization and deployment of explosive detection equipment at airports to screen individuals." Pub. L. No. 108-458, § 4013, 118 Stat. 3638 (2004). Although Congress never specifically addressed the timetable by which TSA should conduct APA rulemaking with respect to body scanners, it is evident from the legislative record that Congress viewed AIT as an important, time-sensitive priority. *See, e.g.*, H.R. REP. 107-296, at

58–59 (2001) (Conf. Rep.) ("Conferees want new, state-of-the-art security equipment installed at airports on an *expedited basis* . . . .") (emphasis added).

The third *TRAC* factor distinguishes between economic regulation and safety regulation, as "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." 750 F.2d at 80. Here, TSA has deployed hundreds of machines that employ electromagnetic radiation to produce unclothed images of airplane passengers for explosive detection. *EPIC*, 653 F.3d at 3. This is a quintessential health-related regulation, as its direct objective is preventing loss of life aboard commercial airliners. Body scanners implicate not only the privacy interests of airline passengers, see *id.* at 4, but also the public interest in deterring "attempts to carry aboard airplanes explosives in liquid or powder form," *id.* at 10. By following the APA's requirements and incorporating public input into its screening rules, TSA will be better-positioned to advance privacy *and* security interests.

As for the fourth *TRAC* factor, the risk that "expediting delayed action" might adversely affect TSA's activities "of a higher or competing priority," 750 F.2d at 80, the agency is hardly starved for resources. To the contrary, TSA has over 50,000 full-time equivalent employees, and spent nearly $7.4

billion in 2014.[7] As a Joint Congressional Committee report noted, if TSA were a standalone cabinet department, it "would rank as the 12th largest" in terms of employees—and it would be "larger than the Departments of Labor, Energy, Education, Housing and Urban Development, and State, combined." Joint Majority Staff Report, 112th Cong., *A Decade Later: A Call for TSA* Reform 6–7 (2011). And TSA's budget exceeds that of an entire branch of government: the Federal Judiciary, which requested $7.0 billion for fiscal year 2016. *See Hearing Before the S. Comm. on Appropriations*, 114th Cong. 1 (2015) (statement of the Hon. Julia S. Gibbons, Chair, Comm. on the Budget of the Judicial Conference of the U.S.). TSA's large staff includes over 1,000 full-time equivalent "support" employees tasked with "headquarters administration," while TSA's parent department, the Department of Homeland Security, oversees "more than 1,800 attorneys" throughout the Department."[8] And unlike many agencies, TSA's rulemaking capacity is far from inundated—the agency has issued just one final rule to date in 2015. *See* 80 Fed. Reg. 31,850 (2015).

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7. Dep't of Homeland Sec., *Budget-in-Brief: Fiscal Year 2016* 57 (2015), *available at* http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf (enacted FY 2014 budget of $7,361,308).
8. Dep't of Homeland Sec., *Congressional Budget Justification FY2016*, at 7; *Departmental Management & Ops.*, at 2 (Feb. 2, 2015), *available at* http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification_15_0325.pdf.

The fifth *TRAC* factor, the "nature and extent of the interests prejudiced by delay," 750 F.2d at 80, also counsels strongly in favor of extraordinary relief. TSA's airport screening procedures are uniquely pervasive as far as federal agency actions are concerned, given how many Americans undergo passenger screening at airports, while the agency has spent hundreds of millions of taxpayer dollars on AIT. Joint Majority Staff Report, 112th Cong., *A Decade Later: A Call for TSA* Reform 17 (2011). The agency's chronic failure to complete APA rulemaking as ordered by this Court has literally affected hundreds of millions of Americans.

As for the final *TRAC* factor, TSA has clearly demonstrated its intent to ignore the law with respect to its use of AIT as primary screening. The agency declined to act on two written requests from public interest organizations urging it to conduct APA rulemaking with respect to its use of AIT machines. *EPIC*, 653 F.3d at 4. Then, even after this Court's 2011 order remanding the rule to the agency to "promptly" complete APA rulemaking, the agency did not solicit public comment until this Court issued a subsequent order in 2012 noting that it expected the agency to begin the rulemaking process by March 2013. Finally, TSA published a notice of proposed rulemaking on March 26, 2013, just five days before this Court's deadline.

Moreover, TSA has repeatedly postponed its timetable for completing its body scanner rule. In Spring 2013, TSA projected that its final rule would be

complete by June 2014.[9] A year later, in Spring 2014, TSA projected its final rule would be complete by October 2014.[10] Finally, in Spring 2015, TSA projected it would complete its final rule in September 2015.[11] Given this series of failed projections, there is no reason to believe that the agency will actually manage to issue its final rule two months from now.

In light of this behavior, the best that can be said of TSA is that it suffers from unusually severe "bureaucratic inefficiency." *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 628–29 (D.C. Cir. 1987) ("bureaucratic inefficiency" may constitute "unreasonable delay" under 5 U.S.C. § 706). Similarly, it is unnecessary to "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984). At worst, the agency is deliberately avoiding compliance with this Court's mandate. In either case, this Court should compel TSA to finalize its rulemaking.

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9. *Spring 2013 Update to the Unified Agenda of Federal Regulatory and Deregulatory Actions*, RIN 1652-AA67, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1652-AA67.
10. *Spring 2014 Update to the Unified Agenda of Federal Regulatory and Deregulatory Actions*, RIN 1652-AA67, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=1652-AA67.
11. *Spring 2015 Update to the Unified Agenda of Federal Regulatory and Deregulatory Actions*, RIN 1652-AA67, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1652-AA67.

III. THIS COURT HAS EXERCISED ITS AUTHORITY TO COMPEL UNLAWFULLY WITHHELD AGENCY ACTION IN SIMILAR CIRCUMSTANCES

TSA's failure to promptly complete its body scanner rulemaking is comparable in severity to other agency delays that have led this Court to grant extraordinary relief. Four years is simply too long for an agency to take to issue a final rule, even if this were a complex rulemaking. Indeed, "[a] reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (citing *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987)). In numerous cases, this Court has set a specific deadline for compliance when an agency has taken far less than four years to complete a mandatory duty.

For instance, in 2010, this Court remanded to the Secretary of State a petition for review by the People's Mojahedin Organization of Iran (PMOI) regarding PMOI's designation as a "Foreign Terrorist Organization." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 613 F.3d 220, 231 (D.C. Cir. 2010). This Court instructed the Secretary to afford PMOI due process protections, such as affording PMOI an opportunity to review and rebut unclassified portions of the administrative record. *Id.* Less than two years later, after the Secretary had failed to take final action, this Court ordered the Secretary to act within "four months" on PMOI's petition. *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 838 (D.C. Cir. 2012).

This Court also issued a writ of mandamus directing the FCC to "immediately" repeal its "personal attack and political editorial rules" in 2000, after the agency had failed to act for ten months following this Court remanding the case to the agency so it could "provide an adequate justification" for its rules. *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 308 (D.C. Cir. 2000). And in 2004, six years after a coalition of environmental organizations petitioned FERC to formally consult NOAA regarding FERC's regulatory authority over hydropower operations affecting endangered anadromous fish, this Court granted a petition for a writ of mandamus and ordered FERC to "respond to the petition within 45 days." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 414 (D.C. Cir. 2004). Here, TSA's delay is similarly lengthy; the EPIC-led coalition formally petitioned the Secretary to conduct rulemaking with respect to body scanners in April 2010—well over five years ago.

Similarly, when OSHA failed to act for three years after announcing its "intent to regulate" workplace exposure to ethylene oxide, this Court ordered the agency to issue a notice of proposed rulemaking "within 30 days," with the expectation that the agency promulgate a "final rule within a year's time." *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157–59 (D.C. Cir. 1983). And when the FCC allowed telecommunications tariff revisions to remain in effect for nearly four years without exercising its statutory duty to determine whether the rates were "just and reasonable," this Court remanded the case to the agency with instructions to submit

within "30 days" "a feasible schedule for final determination of a just and reasonable . . . tariff in this proceeding." *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 324–25, 345–46 (D.C. Cir. 1980).

IV. GIVEN CONTINUED PUBLIC SKEPTICISM ABOUT BODY SCANNERS, TSA'S FAILURE TO COMPLY WITH THIS COURT'S MANDATE SERIOUSLY INJURES THE PUBLIC INTEREST

The gravity of public concerns about AIT scanners has been demonstrated by the widespread opposition they have provoked, especially in Congress. In 2009, when legislation reauthorizing TSA reached the floor of the House of Representatives, over 300 Members voted for an amendment by Rep. Jason Chaffetz to bar TSA from using "whole-body imaging technology" to screen passengers "unless another method of screening . . . demonstrates cause for preventing such passenger from boarding an aircraft." *See* H.R. REP. NO. 111-127, at 16–17 (2009); H. AMEND. 172 to H.R. 2200, 111th Cong. (2009).

In 2011, Rep. John Mica, a coauthor of TSA's enabling statute and then-Chairman of the House Transportation and Infrastructure Committee, noted that he "had the [AIT] equipment tested by GAO in December of this past year." He added that "every Member of Congress" should be "required" to "see the extensive failure rate" of the machines, predicting that if Congress "could reveal the failure rate, the American public would be outraged." *TSA Oversight Part I: Whole Body Imaging: Hearing Before the Subcomm. on Nat'l Sec.,*

Homeland Def. & Foreign Operations of the H. Comm. on Oversight & Gov't Reform, 112th Cong. (2011) (remarks of Rep. John Mica).[12]

More recently, as AIT scanners have proliferated in U.S. airports, questions about the machines' efficacy and reliability have persisted. In June 2015, the results of an audit of TSA's airport screening practices by the Department of Homeland Security's Office of Inspector General were leaked, revealing a 96 percent failure rate. Justin Fishel et al., *Undercover DHS Tests Find Security Failures at US Airports*, ABC NEWS, June 1, 2015. The same day this news broke, TSA's acting administrator was reassigned by the Secretary. Adam B. Lerner, *Director of Nation's Airport Security Reassigned*, POLITICO, June 1, 2015.

In response to the news, Sen. Ben Sasse, a member of the U.S. Senate Committee on Homeland Security & Governmental Affairs, stated that "TSA's recent 96% failure rate was not the result of sophisticated so-called 'Red Teams.' The administration has an obligation to responsibly declassify the inspector general's investigation and to publicly release everything else it knows about TSA's failures." Senator Ben Sasse, *Statement on False TSA "Red Team" Narrative* (June 9, 2015), *available at* http://www.sasse.senate.gov/public/index.cfm/2015/6/sasse-statement-on-false-tsa-red-team-narrative.

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12. The hearing transcript is available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg67371/html/CHRG-112hhrg67371.htm.

Regardless of the merits of these criticisms, the agency owes them careful consideration.

CONCLUSION

For the reasons set forth above, petitioners respectfully urge this Court to issue a writ of mandamus to compel the Secretary of Homeland Security to complete TSA's rulemaking in the matter of passenger screening using advanced imaging technology within 90 days.

July 15, 2015

Respectfully submitted,

/s/ Hans Bader

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface, 14-point Palatino Linotype, using Microsoft Word 2013. I further certify that the foregoing petition complies with the 30-page limit of Circuit Rule 21(d).

July 15, 2015

/s/ Hans Bader
HANS BADER
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of July 2015, I caused one copy each of the foregoing petition to be served by U.S. mail on counsel for respondent listed below. Pursuant to Circuit Rule 21(d), I will also file three paper copies of this document with the clerk of this Court.

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July 15, 2015

/s/ Hans Bader
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Counsel for Petitioners

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE COMPETITIVE ENTERPRISE INSTITUTE *et al.*,	)	
	)	No. 15-_____
Petitioners	)	

DECLARATION OF LAWSON BADER

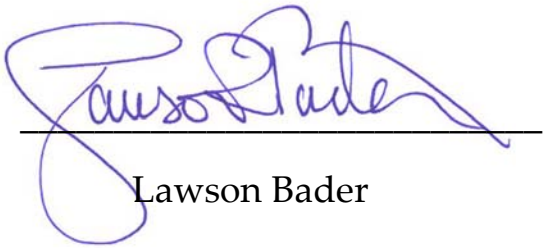
I, Lawson Bader, declare as follows:

1. I am a resident of the Commonwealth of Virginia, and the President of the Competitive Enterprise Institute (CEI), which studies transportation and other regulatory issues. CEI's officers, directors, and employees travel by air in conducting CEI business.
2. For example, I fly over 100,000 miles annually on commercial flights for business and pleasure. I am a member of United Airlines' Mileage Plus program and hold Premier 1K status, the highest elite level the airline affords its most frequent flyers. I am also a member of the airline's Million Miler program, which recognizes passengers who have flown over one million miles on United Airlines flights.
3. Most of my flights originate at U.S. airports where body scanners are used for primary screening.
4. I am often permitted to use TSA's streamlined airport screening process—known as 'PreCheck'—where body scanners are not used

for primary screening. But TSA does not guarantee any passenger that he or she will be eligible for PreCheck screening on any particular flight.

5. Thus, TSA officers sometimes direct me to ordinary security lanes, where body scanners are in use, and I accordingly have had to enter body scanners.
6. Each time I fly out of a major U.S. airport, I therefore run the risk that TSA will require me to enter a body scanner.
7. Entering a body scanner is an invasion of privacy that I find very unpleasant. I do not care for such other forms of airport security examinations as metal detectors and body pat-downs, but I view body scanners as being significantly more intrusive, given the newness of the technology and the nature of the data it records.
8. In the years ahead, I will continue traveling by air frequently for both business and personal reasons.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 14, 2015 in Washington, D.C.



Lawson Bader

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE COMPETITIVE ENTERPRISE INSTITUTE *et al.*,	)	
	)	No. 15-_____
Petitioners	)	

DECLARATION OF MARC SCRIBNER

I, Marc Scribner, declare as follows:

1. I am a research fellow at the Competitive Enterprise Institute and a resident of the District of Columbia.
2. Among the areas I study and write about is transportation safety and security.[1]
3. Each year, I take domestic flights originating at U.S. airports where body scanners are used for primary screening. I do so approximately a dozen times per year, and thus am required to enter a body scanner.

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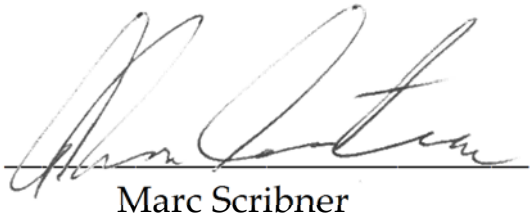
1. *See, e.g.*, Robert L. Crandall & Marc Scribner, *TSA Ignoring Court Ruling on Unsafe Scanners*, PRESS OF ATLANTIC CITY, August 8, 2012, at A11; Marc Scribner, *No Good Reason to Ban In-Flight Cellphone Use*, PACIFIC DAILY NEWS, Dec. 30, 2013; Marc Scribner, *Driverless Cars Are Coming*, WASH. POST, Nov. 4, 2012, at C4.

4. I am rarely invited to use PreCheck, so I must walk through a body scanner nearly every time I fly. As a result, I spend substantially more time waiting in line to enter an airport's sterile area compared to flyers who are eligible for PreCheck.
5. Being subjected to whole-body imaging is an unpleasant invasion of privacy. I find other airport screening procedures, such as pat-downs, to be unpleasant, but I view body scanners as being significantly more invasive.
6. In the years ahead, I plan to continue frequently traveling by air for both business and personal reasons.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 14, 2015 in Washington, D.C.



Marc Scribner

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 10, 2011 Decided July 15, 2011

No. 10-1157

ELECTRONIC PRIVACY INFORMATION CENTER, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
RESPONDENTS

On Petition for Review of an Order of
the U.S. Department of Homeland Security

Marc Rotenberg argued the cause for petitioners. With him on the briefs was *John Verdi*.

Beth S. Brinkmann, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for respondents. On the briefs were *Douglas N. Letter* and *John S. Koppel*, Attorneys.

Before: GINSBURG, HENDERSON and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: The Electronic Privacy Information Center (EPIC) and two individuals petition for review of a decision by the Transportation Security Administration to screen airline passengers by using advanced imaging technology instead of magnetometers. They argue this use of AIT violates various federal statutes and the Fourth Amendment to the Constitution of the United States and, in any event, should have been the subject of notice-and-comment rulemaking before being adopted. Although we are not persuaded by any of the statutory or constitutional arguments against the rule, we agree the TSA has not justified its failure to issue notice and solicit comments. We therefore grant the petition in part.

I. Background

By statute, anyone seeking to board a commercial airline flight must be screened by the TSA in order to ensure he is not "carrying unlawfully a dangerous weapon, explosive, or other destructive substance." 49 U.S.C. §§ 44901(a), 44902(a)(1). The Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public. In addition to the SOPs, the agency has promulgated a blanket regulation barring any person from entering the so-called "sterile area" of an airport, the area on the departure side of the security apparatus, "without complying with the systems, measures, or procedures being applied to control access to, or presence or movement in, such area[]." 49 C.F.R. § 1540.105(a)(2). The Congress did, however, in 2004, direct the TSA to "give a high priority to developing, testing, improving, and deploying" at airport screening checkpoints a new technology "that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms."

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 4013(a), 118 Stat. 3719 (codified at 49 U.S.C. § 44925(a)).

The TSA responded to this directive by contracting with private vendors to develop AIT for use at airports. The agency has procured two different types of AIT scanner, one that uses millimeter wave technology, which relies upon radio frequency energy, and another that uses backscatter technology, which employs low-intensity X-ray beams. Each technology is designed to produce a crude image of an unclothed person, who must stand in the scanner for several seconds while it generates the image. That image enables the operator of the machine to detect a nonmetallic object, such as a liquid or powder — which a magnetometer cannot detect — without touching the passengers coming through the checkpoint.

The TSA began to deploy AIT scanners in 2007 in order to provide additional or "secondary" screening of selected passengers who had already passed through a magnetometer. In 2009 the TSA initiated a field test in which it used AIT as a means of primary screening at a limited number of airports. Based upon the apparent success of the test, the TSA decided early in 2010 to use the scanners everywhere for primary screening. By the end of that year the TSA was operating 486 scanners at 78 airports; it plans to add 500 more scanners before the end of this year.

No passenger is ever required to submit to an AIT scan. Signs at the security checkpoint notify passengers they may opt instead for a patdown, which the TSA claims is the only effective alternative method of screening passengers. A passenger who does not want to pass through an AIT scanner may ask that the patdown be performed by an officer of the

same sex and in private. Many passengers nonetheless remain unaware of this right, and some who have exercised the right have complained that the resulting patdown was unnecessarily aggressive.

The TSA has also taken steps to mitigate the effect a scan using AIT might have upon passenger privacy: Each image produced by a scanner passes through a filter to obscure facial features and is viewable on a computer screen only by an officer sitting in a remote and secure room. As soon as the passenger has been cleared, moreover, the image is deleted; the officer cannot retain the image on his computer, nor is he permitted to bring a cell phone or camera into the secure room. In addition to these measures to protect privacy, the agency has commissioned two studies of the safety of the scanners that use backscatter technology, each of which has found the scanners emit levels of radiation well within acceptable limits. Millimeter wave scanners are also tested to ensure they meet accepted standards for safety.

The petitioners, for their part, have long been unsatisfied with the TSA's efforts to protect passengers' privacy and health from the risks associated with AIT. In May 2009 more than 30 organizations, including the petitioner EPIC, sent a letter to the Secretary of Homeland Security, in which they objected to the use of AIT as a primary means of screening passengers. They asked that the TSA cease using AIT in that capacity pending "a 90-day formal public rulemaking process." The TSA responded with a letter addressing the organizations' substantive concerns but ignoring their request for rulemaking.

Nearly a year later, in April 2010, the EPIC and a slightly different group of organizations sent the Secretary and her Chief Privacy Officer a second letter, denominated a "petition

for the issuance, amendment, or repeal of a rule" pursuant to 5 U.S.C. § 553(e). They argued the use of AIT for primary screening violates the Privacy Act; a provision of the Homeland Security Act requiring the Chief Privacy Officer upon the issuance of a new rule to prepare a privacy impact assessment; the Religious Freedom Restoration Act (RFRA); and the Fourth Amendment. In May the TSA again responded by letter, clarifying some factual matters, responding to the legal challenges, and taking the position it is not required to initiate a rulemaking each time it changes screening procedures. In July, the EPIC, joined by two members of its advisory board who travel frequently and have been subjected to AIT screening by the TSA, petitioned this court for review.

II. Analysis

The petitioners focus their opening brief upon their substantive challenges to the TSA's decision to use AIT for initial screening. They raise all the legal claims foreshadowed in their request for rulemaking, as well as a claim under the Video Voyeurism Prevention Act. As explained below, however, our attention is most drawn to their procedural argument that the TSA should have engaged in notice-and-comment rulemaking.

A. Notice and Comment

In their opening brief, the petitioners argue the TSA "refus[ed] to process" and "effectively ignored" their 2010 letter, which was "explicitly marked as a 'petition'" for rulemaking under § 553. The TSA responds that the petitioners did not petition "for the issuance, amendment, or repeal of a rule," as authorized by § 553(e), because "the relief actually sought [was] ... the immediate suspension of

the AIT program." A construction of § 553(e) that excludes any petition with a goal beyond mere process is dubious at best, and the agency offers no authority for it. The petitioners were clearly seeking "amendment[] or repeal of a rule"; that their aim was expressed in terms of the substance of the rule surely does not work against them. Indeed, we would be surprised to find many petitions for rulemaking that do not identify the substantive outcome the petitioner wants the agency to reach.[*]

Anticipating this conclusion, the TSA next argues it responded appropriately to the petition by denying it. We will set aside an agency's decision to deny a petition for rulemaking only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Moreover, "an agency's refusal to institute rulemaking proceedings is at the high end of the range of levels of deference we give to agency action under our arbitrary and capricious review." *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (internal quotation marks omitted). Here, however, the TSA denied the petition on the ground it "is not required to initiate APA rulemaking procedures each time the agency develops and implements improved passenger screening procedures." Because this position rests upon an interpretation of the Administrative Procedure Act, the crux of our review turns upon our analysis of that statute. *See Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (court may overturn decision to deny petition for rulemaking if based

[*] We have no need to reach petitioners' claim the TSA unreasonably delayed in responding to their 2009 letter; our remand to the agency of their 2010 petition for rulemaking gives them all the relief they would obtain in any event.

upon "plain errors of law" (internal quotation marks omitted)).

We turn, then, to §§ 553(b) and (c) of the APA, which generally require an agency to publish notice of a proposed rule in the Federal Register and to solicit and consider public comments upon its proposal. *See U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005) ("This court and many commentators have generally referred to the category of rules to which the notice-and-comment requirements do apply as 'legislative rules'"). As the TSA points out, however, the statute does provide certain exceptions to this standard procedure; in particular, as set forth in § 553(b)(3)(A), the notice and comment requirements do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." The TSA argues its decision to use AIT for primary screening comes within all three listed categories and therefore is not a "legislative rule" subject to notice and comment.

1. Procedural Rule

We consider first the TSA's argument it has announced a rule of "agency organization, procedure, or practice," which our cases refer to as a "procedural rule." In general, a procedural rule "does not itself 'alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.'" *Chamber of Commerce of U.S. v. DOL*, 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)). That is, the rule does "not impose new substantive burdens." *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 169 (D.C. Cir. 1997). As we have noted before, however, a rule with a "substantial impact" upon the persons subject to it is not necessarily a substantive

rule under § 553(b)(3)(A). *See Pub. Citizen v. Dep't of State*, 276 F.3d 634, 640–41 (2002). Further, the distinction between substantive and procedural rules is "one of degree" depending upon "whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983). Those policies, as we have elsewhere observed, are to serve "the need for public participation in agency decisionmaking," *Chamber of Commerce*, 174 F.3d at 211, and to ensure the agency has all pertinent information before it when making a decision, *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (1987). In order to further these policies, the exception for procedural rules "must be narrowly construed." *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989).

Of course, stated at a high enough level of generality, the new policy imposes no new substantive obligations upon airline passengers: The requirement that a passenger pass through a security checkpoint is hardly novel, the prohibition against boarding a plane with a weapon or an explosive device even less so. But this overly abstract account of the change in procedure at the checkpoint elides the privacy interests at the heart of the petitioners' concern with AIT. Despite the precautions taken by the TSA, it is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not. Therefore, regardless whether this is a "new substantive burden," *see Aulenback*, 103 F.3d at 169, the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking. *Cf. Pickus v. Bd. of Parole*, 507 F.2d 1107, 1113–14 (D.C. Cir. 1974) (rules governing parole hearings not procedural because they went "beyond formality and substantially affect[ed]" prisoners' liberty). Indeed, few

if any regulatory procedures impose directly and significantly upon so many members of the public. Not surprisingly, therefore, much public concern and media coverage have been focused upon issues of privacy, safety, and efficacy, each of which no doubt would have been the subject of many comments had the TSA seen fit to solicit comments upon a proposal to use AIT for primary screening. To confirm these issues were relevant to the TSA's deliberations about AIT, we need look no further than its assurances to that effect in its response to the petitioners' 2010 letter: "AIT screening has proven effective in addressing ever-changing security threats, and numerous independent studies have addressed health concerns. TSA has carefully considered the important ... privacy issues." For these reasons, the TSA's use of AIT for primary screening has the hallmark of a substantive rule and, therefore, unless the rule comes within some other exception, it should have been the subject of notice and comment.

2. Interpretive Rule

The TSA next tries to justify having proceeded without notice and comment on the ground that it announced only an "interpretative" rule advising the public of its current understanding of the statutory charge to develop and deploy new technologies for the detection of terrorist weapons. For their part, the petitioners argue the rule is legislative rather than interpretive because it "effectively amends a prior legislative rule," *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), to wit, the secondary use of AIT only to back-up primary screening performed with magnetometers. *See also Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) ("an amendment to a legislative rule must itself be legislative" (internal quotation marks omitted)).

The practical question inherent in the distinction between legislative and interpretive regulations is whether the new rule effects "a substantive regulatory change" to the statutory or regulatory regime. *U.S. Telecom Ass'n*, 400 F.3d at 34–40 (FCC effected substantive change when it required wireline telephone carriers to permit customers to transfer their telephone numbers to wireless carriers). For the reasons discussed in Part II.A.1, we conclude the TSA's policy substantially changes the experience of airline passengers and is therefore not merely "interpretative" either of the statute directing the TSA to detect weapons likely to be used by terrorists or of the general regulation requiring that passengers comply with all TSA screening procedures. Although the statute, 49 U.S.C. § 44925, does require the TSA to develop and test advanced screening technology, it does not specifically require the TSA to deploy AIT scanners let alone use them for primary screening. Concededly, there is some merit in the TSA's argument it has done no more than resolve an ambiguity inherent in its statutory and regulatory authority, but the purpose of the APA would be disserved if an agency with a broad statutory command (here, to detect weapons) could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation (here, requiring passengers to clear a checkpoint) and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations.

3. General Statement of Policy

Finally, the TSA argues notice and comment is not required because, rather than promulgating a legislative rule, the agency, in announcing it will use AIT for primary screening, made a "general statement[] of policy." The question raised by the policy exception "is whether a statement is ... of present binding effect"; if it is, then the

APA calls for notice and comment. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). Our cases "make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (internal citation omitted); *see also Chamber of Commerce*, 174 F.3d at 212–13. It is enough for the agency's statement to "purport to bind" those subject to it, that is, to be cast in "mandatory language" so "the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences." *Gen. Elec.*, 290 F.3d at 383–84 (internal quotation marks omitted).

The TSA seems to think it significant that there are no AIT scanners at some airports and the agency retains the discretion to stop using the scanners where they are in place. More clearly significant is that a passenger is bound to comply with whatever screening procedure the TSA is using on the date he is to fly at the airport from which his flight departs. 49 C.F.R. § 1540.105(a)(2) (no passenger may enter the "sterile area" of an airport "without complying with the systems, measures, or procedures being applied to control access to" that area). To be sure, he can opt for a patdown but, as the TSA conceded at oral argument, the agency has not argued that option makes its screening procedures nonbinding and we therefore do not consider the possibility. We are left, then, with the argument that a passenger is not bound to comply with the set of choices presented by the TSA when he arrives at the security checkpoint, which is absurd.[*]

[*] The TSA's argument it has not promulgated a "rule" also fails because the question at issue is again whether the agency's pronouncement is or purports to be binding. *Cf. Amoco Prod. Co. v. Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005).

In sum, the TSA has advanced no justification for having failed to conduct a notice-and-comment rulemaking. We therefore remand this matter to the agency for further proceedings. Because vacating the present rule would severely disrupt an essential security operation, however, and the rule is, as we explain below, otherwise lawful, we shall not vacate the rule, but we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation. *See Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

The agency asks us to "make clear that on remand, TSA is free to invoke the APA's 'good cause' exception" to notice-and-comment rulemaking, 5 U.S.C. § 553(b)(B) (exception "when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"). We have no occasion to express a view upon this possibility other than to note we do not reach it.

B. Substantive Claims

We turn next to the statutory and constitutional claims raised by the petitioners. None of their arguments, as we explain below, warrants granting relief.

1. Statutory Claims

The petitioners argue first that capturing images of passengers is unlawful under the Video Voyeurism Prevention Act, 18 U.S.C. § 1801, a claim the TSA urges should be dismissed because it was not raised before the agency. *See* 49 U.S.C. § 46110(d) ("court may consider an objection to an order ... only if the objection was made in the

proceeding conducted by the [agency] or if there was a reasonable ground for not making the objection in the proceeding"). As the petitioners argue, however, § 46110(d) presupposes there was an agency "proceeding" where the party could advance its argument in the first instance, the absence of which is the very matter at issue here. The TSA more helpfully reminds us the VVPA "does not [apply to] any lawful law enforcement, correctional, or intelligence activity." 18 U.S.C. § 1801(c). Because the only "unlawfulness" the petitioners claim in order to get around that exception is the alleged violation of the Fourth Amendment, which we reject below, and their argument the TSA does not engage in "law enforcement, correctional, or intelligence activity" borders upon the silly, we conclude the exception applies here.

The petitioners next argue the TSA's use of AIT violates the Privacy Act, 5 U.S.C. § 552a, a statute that applies only insofar as the Government maintains a "system of records" from which it can retrieve a record by using an individual's name or other identifying information, *see id.* § 552a(a)(5), (e)(4); *Maydak v. United States*, 363 F.3d 512, 515 (D.C. Cir. 2004). Here the TSA points out it does not maintain data from AIT scanners in a "system of records" linked to names or any other identifier. Even if, as the petitioners speculate, the TSA has the ability to combine various sources of information and then to link names to the images produced using AIT, their Privacy Act claim still fails because they offer no reason to believe the TSA has in fact done that. *See Henke v. Dep't of Commerce*, 83 F.3d 1453, 1460–61 (D.C. Cir. 1996) ("retrieval capability is not sufficient to create a system of records").

The petitioners also claim the Chief Privacy Officer of the DHS failed to discharge her statutory duties generally to "assur[e] that the use of technologies" does not "erode[]

privacy protections" and, more specifically, to make an assessment of the rule's impact upon privacy. *See* 6 U.S.C. § 142(a)(1), (4). The CPO has, however, prepared three privacy impact assessments of the AIT program. Although, as the petitioners point out, the CPO made those assessments before the agency decided to extend the use of AIT from primary screening at six airports and secondary screening at selected others to primary screening at every airport, she also explained she would update the assessments "as needed." Mary Ellen Callahan, *Privacy Impact Assessment Update for TSA Whole Body Imaging* 10 (July 23, 2009). We infer from the absence of any subsequent assessment a determination by the CPO that her prior efforts remain sufficient to cover the impact upon privacy of the expanded use of AIT, *see Lichoulas v. FERC*, 606 F.3d 769, 780 n.8 (D.C. Cir. 2010) (presumption of regularity attaches to actions by administrative officials); the petitioners have failed to show that determination is arbitrary or capricious, *see* 5 U.S.C. § 706(2)(A). As for the broad claim under § 142(a)(1) that the CPO has not done enough to safeguard privacy, the petitioners make no more specific objection that would enable us to disturb the CPO's conclusion that the privacy protections built into the AIT program are sufficiently "strong." Therefore this argument fails as well.

Last, the petitioners claim the use of AIT violates the RFRA, 42 U.S.C. § 2000bb *et seq.*, because revealing a person's naked body "offends the sincerely held beliefs of Muslims and other religious groups." The TSA argues that Nadhira Al-Khalili, the only person the petitioners assert has any religiously founded objection to AIT, is not a proper party because she is not named in the petition for review, *see* FED. R. APP. P. 15(a) (petition must "name each party seeking review"); indeed, she first appeared as a purported party in the petitioners' opening brief. The petitioners respond that their

opening brief should be treated as a complaint is treated in the district court, that is, as the appropriate document in which to list the complaining parties. They provide no reasoning to support this assertion and the case they cite actually says something quite different: "'A petition for review ... is analogous to a complaint[,] in which all parties must be named.'" *Elkins Carmen v. STB*, 170 F.3d 1144, 1145 (D.C. Cir. 1999) (quoting FED. R. APP. P. 15(a) advisory committee's note).

Next, the petitioners contend their claims and Al-Khalili's should be considered as one because she is legal counsel for an organization that was a party to their 2010 letter, the TSA's response to which is here under review. The case they cite for support, *Rampengan v. Gonzales*, 206 F. App'x 248, 252 (4th Cir. 2006), concerned a family of four who had jointly applied for asylum and, having been treated in an administrative proceeding as a single party under the husband's name, listed only his name in their petition for review of the administrative decision. Al-Khalili, in contrast, claims no familial or agency or other formal relationship with any other petitioner; her employer, despite having joined the letter to the TSA, did not petition for review. Accordingly, neither Al-Khalili nor her employer is before us and, there being no actual petitioner with standing to assert a religious injury cognizable under the RFRA, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (no standing absent an injury-in-fact fairly traceable to the challenged conduct and likely to be redressed by a favorable decision); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"), that claim must be dismissed.

2. Fourth Amendment Claim

Finally, the petitioners argue that using AIT for primary screening violates the Fourth Amendment because it is more invasive than is necessary to detect weapons or explosives. In view of the Supreme Court's "repeated[] refus[al] to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment," *City of Ontario v. Quon*, 130 S. Ct. 2619, 2632 (2010) (internal quotation marks omitted), and considering the measures taken by the TSA to safeguard personal privacy, we hold AIT screening does not violate the Fourth Amendment.

As other circuits have held, and as the Supreme Court has strongly suggested, screening passengers at an airport is an "administrative search" because the primary goal is not to determine whether any passenger has committed a crime but rather to protect the public from a terrorist attack. *See United States v. Aukai*, 497 F.3d 955, 958–63 (9th Cir. 2007) (en banc) (passenger search at airport checkpoint); *United States v. Hartwell*, 436 F.3d 174, 178–81 (3d Cir. 2006) (Alito, J.) (same); *United States v. Edwards*, 498 F.2d 496, 499–501 (2d Cir. 1974) (Friendly, J.) (carry-on baggage search at airport); *see also Illinois v. Lidster*, 540 U.S. 419 (2004) (police set up checkpoint to obtain information about earlier crash); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint). An administrative search does not require individualized suspicion. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 47–48 (2000) (individualized suspicion required when police checkpoint is "primarily [for] general crime control," that is, "to detect evidence of ordinary criminal wrongdoing" unlike "searches at places like airports ... where the need for such measures to ensure public safety can be particularly acute"). Instead, whether an administrative search is "unreasonable" within the

condemnation of the Fourth Amendment "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (internal quotation marks omitted).

That balance clearly favors the Government here. The need to search airline passengers "to ensure public safety can be particularly acute," *Edmond*, 531 U.S. at 47–48, and, crucially, an AIT scanner, unlike a magnetometer, is capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form. On the other side of the balance, we must acknowledge the steps the TSA has already taken to protect passenger privacy, in particular distorting the image created using AIT and deleting it as soon as the passenger has been cleared. More telling, any passenger may opt-out of AIT screening in favor of a patdown, which allows him to decide which of the two options for detecting a concealed, nonmetallic weapon or explosive is least invasive.

Contrary to the EPIC's argument, it is not determinative that AIT is not the last step in a potentially escalating series of search techniques. In *Hartwell*, from which the petitioners tease out this argument, the Third Circuit upheld an airport search that started with a walk-through magnetometer, thence to scanning with a hand-held magnetometer and, when the TSA officer encountered a bulge in the passenger's pocket, progressed (according to the passenger) to the officer's removing a package of crack cocaine from that pocket. 436 F.3d at 175–76. The court noted, however, that its opinion, while describing the search at issue there as "minimally intrusive," did "not purport to set the outer limits of intrusiveness in the airport context." *Id.* at 180 & n.10.

Nothing in *Hartwell*, that is, suggests the AIT scanners must be minimally intrusive to be consistent with the Fourth Amendment.

III. Conclusion

To sum up, first, we grant the petition for review insofar as it claims the TSA has not justified its failure to initiate notice-and-comment rulemaking before announcing it would use AIT scanners for primary screening. None of the exceptions urged by the TSA justifies its failure to give notice of and receive comment upon such a rule, which is legislative and not merely interpretive, procedural, or a general statement of policy. Second, we deny the petition with respect to the petitioners' statutory arguments and their claim under the Fourth Amendment, except their claim under the RFRA, which we dismiss for lack of standing. Finally, due to the obvious need for the TSA to continue its airport security operations without interruption, we remand the rule to the TSA but do not vacate it, and instruct the agency promptly to proceed in a manner consistent with this opinion.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1307 **September Term, 2012**

DHS-May28,2010Letter

Filed On: September 25, 2012

In re: Electronic Privacy Information Center,

Petitioner

BEFORE: Henderson and Tatel, Circuit Judges, and Ginsburg, Senior Circuit Judge

O R D E R

Upon consideration of petitioner's petition for writ of mandamus, the response thereto, and the reply, it is

ORDERED that the petition for writ of mandamus be denied in light of the Government's representation that "the process of finalizing the AIT Rulemaking documents so that the NPRM may be published is expected to be complete by or before the end of February 2013." See Declaration of John P. Sammon at 9, ¶ 23. Accordingly, we expect that the NPRM will be published before the end of March 2013.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

Executive Order 13132

NHTSA does not believe that there would be sufficient federalism implications to warrant the preparation of a federalism assessment.

Paperwork Reduction Act

The proposed rule does not contain any information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Unfunded Mandates Reform Act of 1995

NHTSA has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For more information on DOT's implementation of the Privacy Act, please visit: *http://www.dot.gov/privacy.*

List of Subjects in 49 CFR Part 553

Rulemaking Procedures.

For the reasons set forth in the preamble, the National Highway Traffic Safety Administration proposes to amend 49 CFR part 553 of the Code of Federal Regulations as follows:

PART 553—RULEMAKING PROCEDURES

■ 1. The authority citation is revised to read 49 U.S.C. 322, 1657, 30103, 30122, 30124, 30125, 30127, 30146, 30162, 32303, 32502, 32504, 32505, 32705, 32901, 32902, 33102, 33103, and 33107; delegation of authority at 49 CFR 1.95.

■ 2. Add § 553.14 to Subpart B to read as follows:

§ 553.14 Direct final rulemaking.

If the Administrator, for good cause, finds that notice is unnecessary, and incorporates that finding and a brief statement of the reasons for it in the rule, a direct final rule may be issued according to the following procedures.

(a) Rules that the Administrator judges to be non-controversial and unlikely to result in adverse public comment may be published as direct final rules. These may include rules that:

(1) Are non-substantive amendments, such as clarifications or corrections, to an existing rule;

(2) Update existing forms or rules, such as incorporations by reference of the latest technical standards;

(3) Affect NHTSA's internal procedures, such as filing requirements and rules governing inspection and copying of documents;

(4) Are minor substantive rules or changes to existing rules on which the agency does not expect adverse comment.

(b) The **Federal Register** document will state that any adverse comment or notice of intent to submit adverse comment must be received in writing by NHTSA within the specified time after the date of publication of the direct final rule and that, if no written adverse comment or written notice of intent to submit adverse comment is received in that period, the rule will become effective a specified number of days after the date of publication of the direct final rule.

(c) If no written adverse comment or written notice of intent to submit adverse comment is received by NHTSA within the specified time after the date of publication in the **Federal Register**, NHTSA will publish a notice in the **Federal Register** indicating that no adverse comment was received and confirming that the rule will become effective on the date that was indicated in the direct final rule.

(d) If NHTSA receives any written adverse comment or written notice of intent to submit adverse comment within the specified time after publication of the direct final rule in the **Federal Register**, the agency will publish a notice withdrawing the direct final rule, in whole or in part, in the final rule section of the **Federal Register**. If NHTSA decides to proceed with a provision on which adverse comment was received, the agency will publish a notice of proposed rulemaking in the proposed rule section of the **Federal Register** to provide another opportunity to comment.

(e) An ''adverse'' comment, for the purpose of this subpart, means any comment that NHTSA determines is critical of any provision of the rule, suggests that the rule should not be adopted, or suggests a change that should be made in the rule. A comment suggesting that the policy or requirements of the rule should or should not also be extended to other Departmental programs outside the scope of the rule is not adverse.

■ 3. In § 553.15, revise paragraphs (a), (b)(1) and (b)(3) to read as follows:

§ 553.15 Contents of notices of proposed rulemaking and direct final rules.

(a) Each notice of proposed rulemaking, and each direct final rule, is published in the **Federal Register**, unless all persons subject to it are named and are personally served with a copy of it.

(b) * * *

(1) A statement of the time, place, and nature of the rulemaking proceeding;

* * * * *

(3) A description of the subjects and issues involved or the substance and terms of the rule;

* * * * *

■ 4. Revise § 553.23 to read as follows:

§ 553.23, Consideration of comments received.

All timely comments are considered before final action is taken on a rulemaking proposal or direct final rule. Late filed comments will be considered to the extent practicable.

Issued in Washington, DC on March 19, 2013, under authority delegated in 49 CFR part 1.95.

Christopher J. Bonanti,

Associate Administrator for Rulemaking.

[FR Doc. 2013–06724 Filed 3–25–13; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Part 1540

[Docket No. TSA–2013–0004]

RIN 1652–AA67

Passenger Screening Using Advanced Imaging Technology

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Transportation Security Administration (TSA) is proposing to revise its civil aviation security regulations to clarify that TSA may use advanced imaging technology (AIT) to screen individuals at security screening checkpoints. This proposed rule is issued to comply with a decision of the U.S. Court of Appeals for the District of Columbia Circuit, which ordered TSA to engage in notice-and-comment rulemaking on the use of AIT for screening. The Court decided that TSA should provide notice and invite comments on the use of AIT technology for primary screening.

DATES: Submit comments by June 24, 2013.

ADDRESSES: You may submit comments, identified by the TSA docket number to this rulemaking, to the Federal Docket Management System (FDMS), a

government-wide, electronic docket management system, using any one of the following methods:

Electronically: You may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail, In Person, or Fax: Address, hand-deliver, or fax your written comments to the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; fax (202) 493–2251. The Department of Transportation (DOT), which maintains and processes TSA's official regulatory dockets, will scan the submission and post it to FDMS.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: Chawanna Carrington, Project Manager, Passenger Screening Program, Office of Security Capabilities, Transportation Security Administration, 701 South 12th Street, Arlington, VA 20598–6016; telephone: (571) 227–2958; facsimile: (571) 227–1931; email: *Chawanna.Carrington@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from this rulemaking action. See **ADDRESSES** above for information on where to submit comments.

With each comment, please identify the docket number at the beginning of your comments. TSA encourages commenters to provide their names and addresses. The most helpful comments reference a specific portion of the rulemaking, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you would like TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

TSA will file all comments to our docket address, as well as items sent to the address or email under **FOR FURTHER INFORMATION CONTACT**, in the public docket, except for comments containing confidential information and sensitive security information (SSI).[1] Should you wish your personally identifiable information redacted prior to filing in the docket, please so state. TSA will consider all comments that are in the docket on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments

Do not submit comments that include trade secrets, confidential commercial or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the rulemaking. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

TSA will not place comments containing SSI in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold documents containing SSI, confidential business information, or trade secrets in a separate file to which the public does not have access, and place a note in the public docket explaining that commenters have submitted such documents. TSA may include a redacted version of the comment in the public docket. If an individual requests to examine or copy information that is not in the public docket, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the FOIA regulations of the Department of Homeland Security (DHS) found in 6 CFR part 5.

Reviewing Comments in the Docket

Please be aware that anyone is able to search the electronic form of all comments in any of our dockets by the name of the individual who submitted the comment (or signed the comment, if an association, business, labor union, etc., submitted the comment). You may review the applicable Privacy Act System of Records Notice published in the **Federal Register** on April 11, 2000 (65 FR 19477) and modified on January 17, 2008 (73 FR 3316).

You may review TSA's electronic public docket on the Internet at *http://www.regulations.gov.* In addition, DOT's Docket Management Facility provides a physical facility, staff, equipment, and assistance to the public. To obtain assistance or to review comments in TSA's public docket, you may visit this facility between 9:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, or call (202) 366–9826. This docket operations facility is located in the West Building Ground Floor, Room W12–140 at 1200 New Jersey Avenue SE., Washington, DC 20590.

Availability of Rulemaking Document

You can get an electronic copy using the Internet by—

(1) Searching the electronic FDMS Web page at *http://www.regulations.gov;*

(2) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html;* or

(3) Visiting TSA's Web site at *http://www.tsa.gov* and accessing the link for ''Stakeholders'' at the top of the Web page, selecting the link for ''Research Center'' in the left column, and then the link for ''Security Regulations'' in the left column.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

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[1] ''Sensitive Security Information'' or ''SSI'' is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

I. Executive Summary

A. Purpose of the Regulation

TSA is proposing to amend its regulations to specify that screening and inspection of an individual conducted to control access to the sterile area of an airport or to an aircraft may include the use of advanced imaging technology (AIT), also referred to as whole body imaging, as a screening method. Terrorists have repeatedly attempted to cause harm with the aid of weapons and devices smuggled aboard aircraft. It is the primary mission of DHS to prevent terrorist attacks within the United States and to reduce the vulnerability of the United States to terrorism.[2] The use of AIT is an important tool in accomplishing that mission.

This NPRM is being issued to comply with the decision rendered by the U.S. Court of Appeals for the District of Columbia Circuit in *Electronic Privacy Information Center* v. *U.S. Department of Homeland Security*.[3] In that case, the U.S. Court of Appeals directed TSA to conduct notice-and-comment rulemaking on the use of AIT as a screening method for passengers. The Court did not require TSA to stop using AIT to screen passengers, explaining that ''vacating the present rule would severely disrupt an essential security operation,'' and that the rule is ''otherwise lawful.'' [4]

B. Summary of Major Provisions

The proposed rule codifies the use of AIT to screen individuals at aviation security screening checkpoints. This NPRM discusses the following points regarding the use of AIT:

- The threat to aviation security has evolved to include the use of non-metallic explosives, non-metallic explosive devices, and non-metallic weapons.
- AIT currently provides the best available opportunity to detect non-metallic anomalies [5] concealed under clothing without touching the passenger and is an essential component of TSA's security layers.
- Congress has authorized TSA to procure and deploy AIT for use at security checkpoints.
- TSA implemented stringent safeguards to protect the privacy of passengers undergoing AIT screening when AIT units were initially deployed and enhanced privacy even further by upgrading its millimeter wave AIT units with automatic target recognition (ATR) software. An AIT unit equipped with ATR creates a generic outline, not an image of a specific individual, and eliminates the need for operator interpretation of an image. TSA is removing all units that are not equipped with ATR from its checkpoints by May 31, 2013.[6]
- The safety of the two types of AIT equipment initially deployed was tested by TSA and independent entities and all results confirmed that both the backscatter and millimeter wave technologies are safe because the x-ray or radio waves emissions are well below applicable safety and health standards, and are so low as to present a negligible risk to passengers, airline crew members, airport employees, and TSA employees.[7]
- TSA has provided a detailed explanation of AIT procedures on its webWeb site at *www.tsa.gov/ait-how-it-works* (which allows opt out procedures for passengers) and posted signs at airport checkpoints to notify passengers about AIT and alternative screening procedures. The level of acceptance by passengers has been high; the vast majority of passengers do not object to AIT screening.
- TSA's experience in using AIT confirms that it is effective in detecting small, non-metallic items hidden underneath passenger clothing that could otherwise escape detection. When an item is detected, additional screening must be performed to determine whether the item is prohibited.

C. Costs and Benefits

When estimating the cost of a rulemaking, agencies typically estimate future expected costs imposed by a regulation over a period of analysis. As the AIT machine life cycle from deployment to disposal is eight years, the period of analysis for estimating the cost of AIT is eight years. However, as AIT deployment began in 2008, there are costs that have already been borne by TSA, the traveling public, and airport operators that were not due to this rule. Consequently, in the Initial Regulatory Impact Analysis for this rule, TSA is reporting the AIT-related costs that have already occurred (years 2008–2011), while considering the additional cost of this rulemaking to be years 2012–2015. By reporting the costs that have already happened and estimating future costs in this manner, TSA considers and discloses the full eight-year life cycle of AIT deployment.

TSA reports that the net cost of AIT deployment from 2008–2011 has been $841.2 million (undiscounted) and that TSA has borne over 99 percent of all costs related to AIT deployment. TSA projects that from 2012–2015 net AIT-related costs will be approximately $1.5 billion (undiscounted), $1.4 billion at a three percent discount rate, and $1.3 billion at a seven percent discount rate. During 2012–2015, TSA estimates it will also incur over 98 percent of AIT-related costs with equipment and personnel costs being the largest categories of expenditures. Table 1 below reports the costs that have already occurred (2008–2011) by cost category, while Table 2 shows the additional costs TSA is attributing to this rulemaking (2012–2015). Table 3 shows the total cost of AIT deployment from 2008 to 2015.

TABLE 1—NET COST [8] SUMMARY OF AIT DEPLOYMENT FROM 2008–2011 BY COST COMPONENT

[Costs already incurred in $ thousands—undiscounted]

Year	Passenger opt outs	Industry utilities	TSA costs				Total
			Personnel	Training	Equipment	Utilities	
2008	$7.0	$5.7	$14,689.1	$389.5	$37,425.2	$18.8	$52,535.3
2009	32.2	5.7	15,618.6	88.0	42,563.6	20.4	58328.5
2010	262.2	158.2	247,566.7	5,332.8	119,105.4	241.4	372,666.6

[2] 49 U.S.C. 114.

[3] 653 F.3d 1 (DC Cir. 2011).

[4] *Id.* at 8.

[5] An anomaly is any object that would not ordinarily be found on someone's person.

[6] The manufacturer of these units will bear the costs of removal and storage. TSA is following the Federal Management Regulation process to transfer and donate this equipment to other DHS components and then to other Federal, State, and local government agencies, if necessary. TSA will not hold any public auction or sale and will not donate or abandon any of the equipment to the public in the interests of security.

[7] See, *http://www.tsa.gov/ait-safety*.

TABLE 1—NET COST[8] SUMMARY OF AIT DEPLOYMENT FROM 2008–2011 BY COST COMPONENT—Continued

[Costs already incurred in $ thousands—undiscounted]

Year	Passenger opt outs	Industry utilities	TSA costs				Total
			Personnel	Training	Equipment	Utilities	
2011	1,384.2	186.7	284,938.7	15,354.4	55,567.2	269.1	357,700.2
Total	1,685.6	356.3	562,813.0	21,164.7	254,661.3	549.6	841,230.6

[8] TSA removed costs related to Walk Through Metal Detectors (WTMDs) that would have occurred regardless of AIT deployment to obtain an estimated net cost for AIT.

TABLE 2—COST SUMMARY (NET COST OF AIT DEPLOYMENT 2012–2015) BY COST COMPONENT

[AIT Costs in $ thousands]

Year	Passenger Opt Outs	Industry Utilities	TSA Costs				Rapiscan Removal	Total
			Personnel	Training	Equipment	Utilities		
2012	$2,716.5	$325.7	$375,886.9	$12,043.0	$116,499.3	$473	$0.0	$507,924.4
2013	3,991.7	329.3	280,844.3	4,277.5	51,588.8	324.4	1,809.6	343,165.7
2014	4,238.7	312.0	263,677.6	4,190.5	51,397.8	317.7	0.0	324,134.2
2015	5,611.8	300.3	278,580.2	4,144.2	68,052.6	365.7	0.0	357,054.9
Total	16,558.7	1,267.3	1,198,969.0	24,655.2	287,538.5	1,480.9	1,809.6	1,532,279.2
Discounted 3%	15,265.0	1,178.9	1,118,459.3	23,810.2	269,233.7	1,380.7	1,705.7	1,431,033.5
Discounted 7%	13,766.6	1,075.8	1,024,344.7	22,048.8	247,810.4	1,263.8	1,580.6	1,311,890.7

TABLE 3—COST SUMMARY (NET COST OF AIT DEPLOYMENT 2008–2015) BY COST COMPONENT

[AIT Costs in $ thousands—undiscounted]

Year	Passenger opt outs	Industry utilities	TSA costs				Rapiscan removal	Total
			Personnel	Training	Equipment	Utilities		
2008	$7.0	$5.7	$14,689.1	$389.5	$37,425.2	$18.8	$0.0	$52,535.3
2009	32.2	5.7	15,618.6	88.0	42,563.6	20.4	0.0	58,328.5
2010	262.2	158.2	247,566.7	5,332.8	119,105.4	241.4	0.0	372,666.6
2011	1,384.2	186.7	284,938.7	15,354.4	55,567.2	269.1	0.0	357,700.2
2012	2,716.5	325.7	375,866.9	12,043.0	116,499.3	473.0	0.0	507,924.4
2013	3,991.7	329.3	280,844.3	4,277.5	51,588.8	324.4	1,809.6	343,165.7
2014	4,238.7	312.0	263,677.6	4,190.5	51,397.8	317.7	0.0	324,134.2
2015	5,611.8	300.3	278,580.2	4,144.2	68,052.6	365.7	0.0	357,054.9
Total	18,944.4	1,623.6	1,761,782.0	45,819.9	542,199.9	2,030.4	1,809.6	2,373,509.9

The operations described in this proposed rule produce benefits by reducing security risks through the deployment of AIT that is capable of detecting both metallic and non-metallic weapons and explosives.[9] Terrorists continue to test our security measures in an attempt to find and exploit vulnerabilities. The threat to aviation security has evolved to include the use of non-metallic explosives. AIT is a proven technology based on laboratory testing and field experience and is an essential component of TSA's security screening because it provides the best opportunity to detect metallic and non-metallic anomalies concealed under clothing without the need to touch the passenger. Since it began using AIT, TSA has been able to detect many kinds of non-metallic items, small items, and items concealed on parts of the body that would not have been detected using the WTMD.

II. Background

A. The Evolving Threat to Aviation Security

The need for security screening at airports dates back to the 1960s when the most significant threat to aviation security was hijacking. To combat this threat, metal detectors were installed at airports and used by air carriers to detect firearms and other metallic weapons. In 1974, Congress passed the Air Transportation Security Act,[10] which directed the Federal Aviation Administration (FAA) to require all passengers to be screened by weapon-detecting devices, and conduct research to develop and evaluate systems, procedures, facilities, and devices to protect persons and property aboard aircraft. Since that time, technological and procedural improvements have been implemented to keep pace with evolving threats.

Following the events of September 11, 2001, it was clear that the security screening at airports was insufficient to protect the traveling public against the threat posed by Al Qaeda and other terrorists who sought to harm the United States by targeting civil aviation. In response to those events, TSA was created to ensure freedom of movement

[9] Metal detectors and AITs are both designed to detect metallic threats on passengers, but go about it in different ways. Metal detectors rely on the inductance that is generated by the metal, while AIT relies on the metal's reflectivity properties to indicate an anomaly. AIT capabilities exceed metal detectors because AIT can detect metallic/non-metallic weapons, non-metallic bulk explosives, and non-metallic liquid explosives.

[10] Public Law 93–366.

for people and commerce by preventing terrorist attacks, reducing the vulnerability of the United States to terrorism, and effectively securing all modes of transportation, including aviation.

Pursuant to law, TSA is required to ''provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft * * *.'' [11] Regulations restricting the carriage of weapons, explosives, and incendiaries on an individual's person or accessible property and requiring individuals to submit to the screening and inspection of their person and accessible property prior to entering a sterile area or boarding an aircraft were transferred from FAA to TSA in February 2002.[12] TSA took over operation of the screening checkpoints from the air carriers and began instituting additional protocols and new equipment to detect individuals and items that could pose a threat to aviation security.

The FAA had begun exploring AIT in the mid-1990s and started testing and evaluating AIT in 2000. Once TSA was established, the evaluation of AIT and other technology that could detect metallic and non-metallic threats continued. TSA began testing early AIT equipment and protocols to evaluate the size of the units, image quality, detection capabilities, safety, and other operational issues.

Since September 11, 2001, the nature of the threat to transportation security has evolved as terrorists continue to test our security measures in an attempt to find and exploit vulnerabilities. As the recent instances described below demonstrate, non-metallic explosives have become one of the greatest threats to aviation security. TSA has responded to the developing threats by deploying new screening protocols and increasing its use of technology to improve its ability to detect weapons, explosives, and incendiaries.

On December 22, 2001, on board an airplane bound for the United States, Richard Reid attempted to detonate a non-metallic bomb concealed in his shoe. Following this terrorist attempt, screening procedures were revised by enhancing the screening of footwear.

In 2004, terrorists mounted a successful attack on two domestic Russian passenger aircraft using explosives that were concealed on the torsos of female passengers. TSA responded to this demonstrated security vulnerability by implementing a variety of enhancements to its standard operating procedures. Revised pat-down protocols that increased the thoroughness of pat-downs on the female torso were among the enhancements implemented to improve the ability to detect explosives concealed on the body.

In 2006, terrorists in the United Kingdom plotted to bring on board aircraft liquid explosives that would be used to construct and detonate a bomb while in flight. Following this threat, TSA again adjusted its security procedures by limiting the amount of liquids that could be brought on board aircraft and enhancing the screening of liquids, aerosols, and gels. TSA also deployed technology to improve detection of liquid explosives.

On December 25, 2009, a bombing plot by Al Qaeda in the Arabian Peninsula (AQAP) culminated in Umar Farouk Abdulmutallab's attempt to blow up an American aircraft over the United States using a non-metallic explosive device hidden in his underwear. TSA's pat-down procedures then in effect may not have detected the device. TSA modified its screening procedures to improve its ability to detect explosives hidden in an area of the body that previously was not thoroughly searched and hastened to expand deployment of AIT to improve its ability to detect non-metallic explosives concealed on the body through the use of technology, rather than the pat-down.[13]

In October 2010, AQAP attempted to destroy two airplanes in flight using non-metallic explosives hidden in two printer cartridges. TSA immediately instituted new screening requirements for cargo bound for the United States.

In May 2012, AQAP developed another non-metallic explosive device that could be hidden in an individual's underwear and detonated while on board an aircraft. Fortunately, this device was obtained by an undercover operative and was not given to a potential suicide bomber. The device was provided to the Federal Bureau of Investigation for technical and forensic analysis and the results indicate that terrorists have modified certain characteristics of the bomb in comparison with the December 25, 2009 bomb in an attempt to avoid the 2009 bombing attempt's design failure.

As evidenced by the incidents described above, TSA operates in a high-threat environment. Terrorists look for security gaps or exceptions to exploit. The device used in the December 25, 2009 attempt is illustrative. It was cleverly constructed and intentionally hidden on a sensitive part of the body to avert detection. If this attack were successful as planned, the lives of the almost 300 passengers and crew and potentially people on the ground would have been in jeopardy.

As these examples of the real and ever-evolving threats to aviation security demonstrate, non-metallic explosives are now one of the foremost known threats to passenger aircraft. The best defense against these and other terrorist threats remains a risk-based, layered security approach that uses a range of screening measures, both seen and unseen. This includes the use of AIT, which is proven technology for identifying non-metallic explosives during passenger screening, such as the device Umar Farouk Abdulmutallab attempted to detonate on Christmas Day 2009. TSA requests comment on the threat to aviation security described above and the risk-based, layered security approach it has adopted.

B. Layers of Security

TSA deploys approximately 50,000 Transportation Security Officers (TSOs) at more than 446 domestic airports with over 700 security checkpoints to screen nearly 2 million passengers each day using various screening methods and technologies. Although the airport checkpoints are the most visible layer of security used by TSA, TSA also relies extensively on intelligence regarding potential and actual terrorist threats to inform and identify what security measures are necessary to meet the nature of those threats. Other security layers include checking passenger manifests against records from the Government known or suspected terrorist watch lists through TSA's Secure Flight program, examining identity and travel documents, using explosives detection systems, and conducting random security operations at the checkpoint and throughout the airport.

Because even the best intelligence does not identify in advance every individual who would seek to do harm to passengers, aviation security, and the United States, TSA must rely on the security expertise of its frontline personnel—TSOs, Federal Air Marshals, Transportation Security Specialists-Explosives, Behavior Detection Officers,

[11] 49 U.S.C. 44901.

[12] *See* 49 CFR 1540.107 and 1540.111.

[13] On January 7, 2010, the President issued a ''Presidential Memorandum Regarding 12/25/2009 Attempted Terrorist Attack,'' which charged TSA with aggressively pursuing enhanced screening technology in order to prevent further such attempts, while at the same time protecting passenger privacy. A copy of that memorandum is available in the docket for this rulemaking and can be found at *http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-12252009-attempted-terrorist-attack.*

and explosives detection canine teams, among others—to help prevent acts of terrorism.

Effective technology is an essential component of TSA's arsenal of tools to detect and deter threats against our nation's transportation systems. Since its creation, TSA has deployed an increasingly sophisticated range of next generation detection equipment—including bottled liquid scanners, advanced technology x-ray systems, explosives trace detection (ETD) units, and AIT—as the threats to aviation security change and become more sophisticated. As recent history illustrates, TSA changes its screening equipment and procedures as needed to respond to evolving threats based on experience and the latest intelligence. TSA's layered approach and its ability to deploy new security methods to respond to the latest threats are necessary to provide adequate security for the traveling public. Advanced Imaging Technology currently provides the best opportunity to detect metallic and non-metallic threats concealed on the body under clothing without physical contact.[14]

C. Congressional Direction To Pursue AIT

In 2004, Congress directed TSA to continue to explore the use of new technologies to improve its threat detection capabilities.[15] Specifically, the law provides:

> Deployment and use of detection equipment at airport screening checkpoints
> • Weapons and explosives.—The Secretary of Homeland Security shall give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms, on individuals and in their personal property * * * the types of weapons and explosives that terrorists would likely try to smuggle aboard an air carrier aircraft.
> • [The TSA Administrator shall submit] * * * a strategic plan to promote the optimal utilization and deployment of explosive detection equipment at airports to screen individuals and their personal property. Such equipment includes walk-through explosive detection portals, document scanners, shoe scanners, and backscatter x-ray scanners.

Additional references in congressional reports accompanying appropriations and authorizing legislation demonstrate Congress' continued direction to DHS and TSA to pursue enhanced screening technologies and imaging technology, including:

(1) Explanatory Statement, House Appropriations Committee Print for Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (FY09 DHS Appropriations) Pub. L. 110–329 at p. 640:

> The bill provides $250,000,000 for Checkpoint Support to deploy a number of emerging technologies to screen airline passengers and carry-on baggage for explosives, weapons, and other threat objects by the most advanced equipment currently under development. TSA is directed to spend funds on multiple whole body imaging technologies including backscatter and millimeter wave as directed in the Senate report.

(2) H. Rep. 110–862 at p. 64, FY09 DHS Appropriations:

> Over the past year, TSA has made some advances in testing, piloting, and deploying next-generation checkpoint technologies that will be used to screen airline passengers and carry-on baggage for explosives, weapons, and other threats. Even with this progress, however, additional funding is necessary to expedite pilot testing and deployment of advanced checkpoint explosive detection equipment and screening techniques to determine optimal deployment as well as preferred operational and equipment protocols for these new systems. Eligible systems may include, but are not limited to, advanced technology screening systems; whole body imagers; * * * The Committee expects TSA to give the highest priority to deploying next-generation technologies to designated Tier One threat airports.

(3) S. Rep. 110–396 at p. 60, FY09 DHS Appropriations:

> WHOLE BODY IMAGERS. The Committee is fully supportive of emerging technologies at passenger screening checkpoints, including the whole body imaging program currently underway at Category X airports. These technologies provide an increased level of screening for passengers by detecting explosives and other non-metal objects that current checkpoint technologies are not capable of detecting. The Committee directs that funds for whole body imaging continue to be spent by TSA on multiple imaging technologies, including backscatter and millimeter wave.

(4) H. Rep.110–259, at Web page 363, Conference Report to Implementing Recommendations of 9/11 Commission Act of 2007, Pub. L. 110–53, sec. 1601—Airport checkpoint screening fund:

> The National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) asserted that while more advanced screening technology is being developed, Congress should provide funding for, and TSA should move as expeditiously as possible to support, the installation of explosives detection trace portals or other applicable technologies at more of the nation's commercial airports. Advanced technologies, such as the use of non-intrusive imaging, have been evaluated by TSA over the last few years and have demonstrated that they can provide significant improvements in threat detection at airport passenger screening checkpoints for both carry-on baggage and the screening of passengers. The Conference urges TSA to deploy such technologies quickly and broadly to address security shortcomings at passenger screening checkpoints.[16]

D. U.S. Court of Appeals Decision in EPIC v. DHS

In July 2010, the EPIC petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of TSA's use of AIT as a primary screening device to screen airline passengers. EPIC argued that the use of AIT violated various federal statutes and the Fourth Amendment to the Constitution and should have been the subject of notice-and-comment rulemaking.

The Court of Appeals issued a decision on July 15, 2011, which rejected nearly all of EPIC's claims.[17] In ruling on EPIC's Fourth Amendment claim, the Court held that screening passengers at an airport is an administrative search that does not rely on individualized suspicion. ''Instead, whether an administrative search is 'unreasonable' within the condemnation of the Fourth Amendment 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests'.'' [18]

The Court found that the ''balance clearly favors the Government here.'' [19] The Court recognized the clear need for AIT screening, and the advantages the AIT provides over the WTMD. The Court stated that ''[t]he need to search

[14] In September 2012, TSA initiated a limited procurement for next generation AIT units for the purpose of testing such units in a laboratory environment. The outcome of the testing will determine if the units will proceed to testing in an airport environment. TSA anticipates that next generation AIT units will have enhanced detection capabilities, faster passenger throughput, and a smaller footprint.

[15] 49 U.S.C. 44925.

[16] *See also,* sec. 109 of the Aviation and Transportation Security Act (ATSA), Public Law 107–71 (2001), as amended by sec. 1403(b) of the Homeland Security Act of 2002, Public Law 107–296, ''(7) Provide for the use of voice stress analysis, biometric, or other technologies to prevent a person who might pose a danger to air safety or security from boarding the aircraft of an air carrier or foreign air carrier in air transportation or intrastate air transportation'' and Title IV of the American Recovery and Reinvestment Act of 2009, Public Law 111–5 ''* * * for procurement and installation of checked baggage explosives detection systems and checkpoint explosives detection equipment.''

[17] *Electronic Privacy Information Center* v. *U.S. Department of Homeland Security,* 653 F.3d 1 (D.C. Cir. 2011).

[18] *Id.* at 10 (quoting *United States* v. *Knights,* 534 U.S. 112, 118–119 (2001)).

[19] *Id.*

airline passengers 'to ensure public safety can be particularly acute' and, crucially, an AIT scanner, unlike a magnetometer, is capable of detecting, and therefore of deterring, attempts to carry aboard airplanes explosives in liquid or powder form.'' [20]

As explained in the decision, the AIT scanners then in use produce a ''crude image of an unclothed person * * *.''[21] In rejecting EPIC's privacy argument, the Court recognized that TSA has taken steps:

[T]o mitigate the effect a scan using AIT might have upon passenger privacy: Each image produced by a scanner passes through a filter to obscure facial features and is viewable on a computer screen only by an officer sitting in a remote and secure room. As soon as the passenger has been cleared, moreover, the image is deleted; the officer cannot retain the image on his computer, nor is he permitted to bring a cell phone or camera into the secure room.[22]

The Court also noted that three Privacy Impact Assessments (PIAs) of the AIT program had been completed and were sufficient. ''[T]he petitioners make no more specific objection that would enable us to disturb the [Chief Privacy Officer's] conclusion that the privacy protections built into the AIT program are sufficiently 'strong'.'' [23]

In its decision, the Court acknowledged that Congress authorized TSA to prescribe the details of the screening process. The Court noted that ''Congress did * * * in 2004, direct the TSA to 'give a high priority to developing, testing, improving, and deploying' at airport screening checkpoints a new technology 'that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms'.'' [24] The Court observed that TSA responded to this directive through the development and procurement of AIT scanners, which enable the operator of the machine to detect non-metallic objects, such as a liquid or powder, which a metal detector cannot detect, without touching the passengers coming through the checkpoint.[25]

TSA tested the use of AIT machines in 2009 for primary screening at a limited number of airports. The Court acknowledged that ''based on the apparent success of the test, the TSA decided early in 2010 to use the scanners everywhere for primary screening.'' [26] The Court also pointed out that passengers are not required to go through the AIT screening process. The Court stated ''no passenger is ever required to submit to an AIT scan * * * [and] signs at the security checkpoint notify passengers they may opt instead for a patdown.'' [27] The Court also rejected EPIC's claims that the AIT is unlawful under the Video Voyeurism Prevention Act and the Religious Freedom Restoration Act.

In ruling on EPIC's Administrative Procedure Act claim, the Court determined that TSA did not justify ''its failure to initiate notice-and-comment rulemaking before announcing it would use AIT scanners for primary screening.'' [28] Even though privacy precautions had been implemented, the Court stated ''it is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon * * * personal privacy in a way a magnetometer does not.'' [29] Thus, the Court found the use of the AIT in primary screening ''substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking.'' [30] The Court did not require TSA to stop using AIT. ''[D]ue to the obvious need for the TSA to continue its airport security operations without interruption, we remand the rule to the TSA but do not vacate it * * *.'' [31]

III. AIT Screening Protocols

A. Types of AIT Equipment

TSA engaged in extensive laboratory and operational testing before approving the two types of AIT equipment initially deployed. In February 2007, TSA initiated a pilot operation at an airport to test AIT detection capability in the secondary screening position for aviation passengers who set off the alarm of the WTMD. In January 2008, TSA published a PIA to cover AIT screening of all passengers at the security screening checkpoint. Throughout 2007 and 2008, additional AIT units were tested in the secondary screening position and TSA continued to evaluate different types of AIT equipment, including both general-use x-ray backscatter and millimeter wave. In 2009, TSA began to evaluate using AIT in the primary screening position as an alternative to WTMD.[32] Deploying AIT in the primary position to screen all passengers for both metallic and non-metallic threats allows TSA to use the technology to its full capability. In February 2010, TSA submitted a report to Congress on privacy protections and deployment of AIT.[33]

TSA has compared AIT to other transportation security equipment and manual processes, including ETD, WTMD, and pat-downs. Based on the testing results, TSA determined that AIT currently offers the best opportunity to detect both metallic and non-metallic threat items concealed underneath clothing, such as the explosives carried by Mr. Abdulmutallab, without physical contact.

One type of AIT equipment initially deployed by TSA, the Rapiscan Secure 1000, uses backscatter technology. Unlike a traditional x-ray machine, which relies on the transmission of x-rays through an object, general-use backscatter technology projects low level x-ray beams over the body surface at high speed. The reflection or ''backscatter'' of the beam is detected and digitized to create an image.[34]

The L–3 ProVision, another type of AIT equipment currently deployed by TSA, uses millimeter-length radio waves. Millimeter wave technology bounces electromagnetic waves off of the human body to detectors in the machine, which a computer then interprets in order to create a black and white image.[35]

Working with the DHS Science & Technology Directorate and private industry, TSA began testing ATR software in 2010. Automatic Target Recognition software generates a generic outline and not an individual image.[36]

[20] *Id.* (quoting *City of Indianapolis* v. *Edmond,* 531 U.S. 32, 47–48) (internal citation omitted).

[21] *Id.* at 3.

[22] *Id.* at 4.

[23] *Id.* at 9.

[24] *Id.* at 3 (quoting sec. 4013 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108–458, 118 Stat. 3719).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 6.

[30] *Id.*

[31] *Id.* at 8.

[32] In addition to the AIT equipment described below, TSA evaluated infrared (IR) technology, which scans for temperature differences on the body's surface or for temperature imbalances between the body, clothes, and any hidden objects.

[33] ''Advanced Imaging Technologies: Passenger Privacy Protections,'' Fiscal Year 2010 Report to Congress, February 25, 2010.

[34] An example of the image produced by the backscatter technology is posted on TSA's Web site at *http://www.tsa.gov/travelers-guide/ait-how-it-works.*

[35] See ''Safety of AIT'' for a discussion of the safety of the millimeter wave equipment. The Food and Drug Administration has found that millimeter wave is safe and states on its Web site that ''[m]illimeter wave security systems which comply with the limits set in the applicable national non-ionizing radiation safety standard * * * cause no known adverse health effects.'' *http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/SecuritySystems/ucm227201.htm#2.*

[36] Examples of the generic outline that the ATR software produces are available on TSA's Web site at *http://www.tsa.gov/travelers-guide/ait-how-it-works.*

In July 2011, TSA began installing ATR software on millimeter wave AIT units and completed installation on all millimeter wave units currently in use. This advancement significantly enhances privacy by eliminating the passenger-specific images referred to in the *EPIC* v. *DHS* decision.

As part of the Federal Aviation Administration Modernization and Reform Act of 2012, Congress mandated that all AIT units must be equipped with ATR by June 1, 2012.[37] As permitted by law, the deadline was extended to June 1, 2013. While all of the millimeter wave units have been equipped with the ATR software, Rapiscan was unable to develop ATR software that would work on the general-use backscatter units. As a result, TSA terminated its Rapiscan ATR delivery order and all Rapiscan general-use backscatter AIT units currently deployed at TSA checkpoints are being removed from operation by Rapiscan.[38] By June 1, 2013, only AIT equipped with ATR will be used at TSA checkpoints.

TSA will continue to evaluate current AIT systems and associated screening procedures, as well as any new technologies and procedures that may be considered for deployment, to ensure that they are safe and meet all relevant government and consensus industry standards, are effective against established and anticipated threats, and require the least disruption and intrusion on passenger privacy possible.

B. Privacy Safeguards for AIT

The use of ATR software enhances passenger privacy by eliminating images of individual passengers, as well as the need for a TSO to view the individual images to identify anomalies.[39] Automatic Target Recognition software auto-detects anomalies concealed on the body and displays these on a generic outline, which is viewable on a screen located on the AIT equipment. These anomalies are then resolved through additional screening. Automatic Target Recognition-enabled units deployed at airports are not capable of storing or printing the generic outline that will be visible to passengers. TSA has installed the software on all currently-deployed millimeter wave units. As noted above, AIT units without ATR software are being removed from operation and only ATR-equipped AIT units will be used at the checkpoint as of June 1, 2013.

Section 222 of the Homeland Security Act requires that the Privacy Office assure that the use of technologies sustain and do not erode privacy protections relating to the use, collection, and disclosure of personal information, and to conduct a privacy impact assessment (PIA) for proposed rules impacting the privacy of personal information (6 U.S.C. 142). Even before the development of the ATR software, TSA instituted rigorous safeguards to protect the privacy of individuals who are screened using AIT. In addition, as noted by the Court in *EPIC* v. *DHS,* the DHS Chief Privacy Officer has conducted several PIAs on the use of AIT equipment to ensure that the public's privacy concerns related to AIT screening are adequately addressed. These PIAs meet the requirements of section 222 for this NPRM and describe the strict measures TSA uses to protect privacy.[40] To the extent that TSA receives substantive comments on privacy issues related to the use of AIT, they will be addressed in the final rule and any resulting changes will be addressed appropriately in a revised PIA.

While graphic images purportedly from TSA's AIT machines have been circulated in the media, those images were not the type produced by TSA's AIT equipment. Neither of the AIT technologies that have been used by TSA produced photographs or images that would enable personal identification. As deployed by TSA, neither technology is able to store, print, or export any image.

When using the backscatter technology, TSA requirements dictated that a filter be applied to prevent a detailed image of an individual. In addition, the images were viewed by a trained TSO in a locked, remote location. The anonymity of the individual being screened was preserved, since the TSO assisting the individual at the AIT unit never saw the image, and the TSO viewing the image never saw the individual being screened. No TSA personnel were permitted to view both the image and the individual. The backscatter units did not store, print, or export any images. Storage capability was disabled prior to deployment, and TSA airport personnel were not able to activate the storage capability. In addition, the backscatter images were transmitted securely between the unit and the viewing room so they could not be lost, modified, or disclosed. The images produced by the backscatter units were encrypted during transmission. The images were deleted from the screen in the viewing room when the individual was cleared. TSOs in the viewing room were prohibited from bringing electronic devices such as cameras, cell phones, or other recording devices into the room. Violations of these procedures subjected the TSO to disciplinary action, which included termination.

To give further effect to the Fair Information Practice Principles that are the foundation for privacy policy and implementation at DHS, individuals may opt-out of the AIT in favor of physical screening. TSA provides notice of the use of AIT and the opt-out option at the checkpoint so that individuals may exercise an informed judgment on AIT. Signs are posted that explain the technology and state ''use of this technology is optional. If you choose not to be screened by this technology you will receive a thorough pat down.''[41] TSA requests comment on the privacy safeguards discussed above and on the ability of passengers to opt-out of AIT screening.

C. Safety of AIT

AIT equipment has been subject to extensive testing that has confirmed that it is safe for individuals being screened, equipment operators, and bystanders.[42] The exposure to ionizing x-ray beams emitted by the backscatter machines that are being removed pursuant to statute, as well as the non-ionizing electromagnetic waves from the millimeter wave machines is well within the limits allowed under relevant national health and safety standards. Prior to procuring and deploying both backscatter and millimeter wave AIT equipment, TSA tested the units to determine whether they would be safe for use in passenger screening. As explained further below, TSA determined that the general-use backscatter and millimeter wave technologies were safe for use in screening the public because the x-ray and radio waves emissions were so low as to present a negligible risk to passengers, airline crew members, airport employees, and TSA employees.

1. Millimeter Wave Units

The millimeter wave AIT systems that will be the only technology deployed at

[37] Public Law 112–95.

[38] *http://blog.tsa.gov/2013/01/rapiscan-backscatter-contract.html.*

[39] Before the installation of ATR software, TSA required that all millimeter wave machines blur the face of the passenger.

[40] The most recent update to the PIA is posted on the DHS Web site at *http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-tsa-ait.pdf* and is available in the docket for this rulemaking.

[41] See AIT Signs at *http://www.tsa.gov/ait-how-it-works.*

[42] See AIT: Safety at *http://www.tsa.gov/ait-safety.*

the checkpoint as of June 1, 2013 use non-ionizing radio frequency energy in the millimeter wave spectrum to generate a three-dimensional image based on the energy reflected from the body. Millimeter wave imaging technology meets all known national and international health and safety standards. In fact, the energy emitted by millimeter wave technology is 1,000 times less than the international limits and guidelines. The millimeter wave AIT systems that TSA uses must comply with the 2005 Institute of Electrical and Electronics Engineers, Inc. Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields (IEEE Std. C95.1™–2005) as well as the International Commission on Non-Ionizing Radiation Protection Guidelines for Limiting Exposure to Time-Varying Electric, Magnetic, and Electromagnetic Fields, Health Physics 74(4); 494–522, published April 1998. TSA's millimeter wave units are also consistent with Federal Communications Commission OET Bulletin 65, Health Canada Safety Code 6, and RSS–102 Issue 3 for Canada. The FDA has also confirmed that millimeter wave security systems that comply with the IEEE Std. C95.1™–2005 cause no known adverse health effects.[43]

2. Backscatter Units

As required by statute, TSA will remove all currently deployed Rapiscan backscatter units by May 31, 2013. When in use, TSA addressed potential health concerns regarding the ionizing radiation emitted by general-use backscatter technology. TSA's procurement specifications required that the backscatter units must conform to the consensus radiation safety standard of the American National Standards Institute (ANSI)[44] and Health Physics Society (HPS)[45] for the design and operation of security screening systems that use ionizing radiation. That standard is ANSI/HPS N43.17, which was first published in 2002 and revised in 2009.[46]

The annual dose limits in ANSI/HPS N43.17 are based on dose limit recommendations for the general public published by the National Council on Radiation Protection and Measurements[47] in Report 116, ''Limitations of Exposure to Ionizing Radiation.''[48] The dose limits were set with consideration given to individuals, such as pregnant women, children, and persons who receive radiation treatments, who may be more susceptible to radiation health effects. Further, the standard also takes into consideration the fact that individuals are continuously exposed to ionizing radiation from the environment. ANSI/HPS N43.17 sets the maximum permissible dose of ionizing radiation from a general-use system per security screening at 0.25 microsieverts.[49] The standard also requires that individuals should not receive 250 microsieverts or more from a general-use x-ray security screening system in a year.

The radiation dose (effective dose) a passenger receives from a general-use backscatter AIT screening has been independently evaluated by the Food and Drug Administration's (FDA's) Center for Devices and Radiological Health, the National Institute for Standards and Technology, and the Johns Hopkins University Applied Physics Laboratory. All results affirmed that the effective dose for individuals being screened, operators, and bystanders was well below the dose limits specified by ANSI/HPS N43.17.[50] These results were confirmed in a report issued by the DHS Office of Inspector General (OIG) in February 2012.[51] The OIG report found that the independent surveys show that backscatter radiation levels are below the established limits and that TSA complied with ANSI/HPS N43.17.

Typical doses from backscatter machines are no more than 0.05 microsieverts per screening, well below the ANSI/HPS N43.17 maximum dosage of 0.25 microsievert per screening. An individual would have to have been screened by the Rapiscan Secure 1000 more than 13 times daily for 365 consecutive days before exceeding the ANSI/HPS standard.

By comparison, a traveler would have to be screened via Rapiscan/backscatter AIT 2,000 times to equal the dosage received in a single chest x-ray, which delivers 100 microsieverts of ionizing radiation. A typical bite-wing dental x-ray of 5 microsieverts would be equivalent to 100 backscatter screenings, and a two-view mammogram that delivers 360 microsieverts would be equivalent to 7,200 backscatter screenings.[52] A passenger flying one-way from Washington, DC to Los Angeles is exposed to approximately 19.1 microsieverts of ionizing radiation over the course of the 4.7 hour flight.[53]

ANSI/HPS also reflects the standard for a negligible individual dose of radiation established by the National Council on Radiation Protection and Measurements at 10 microsieverts per year. Efforts to reduce radiation exposure below the negligible individual dose are not warranted because the risks associated with that level of exposure are so small as to be indistinguishable from the risks attendant to environmental radiation that individuals are exposed to every day.[54] The level of radiation issued by the Rapiscan Secure 1000 is so low that most passengers would not have exceeded even the negligible individual

[43] *http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/SecuritySystems/ucm227201.htm.*

[44] ANSI is a private, non-profit organization that administers and coordinates the U.S. voluntary standards and conformity assessment system. The Institute oversees the development and use of voluntary consensus standards by providing neutral, third-party accreditation of the procedures used by standards developing organizations, and approving their documents as American National Standards.

[45] HPS is a scientific organization of professionals who specialize in radiation safety. Its mission is to support its members and to promote excellence in the science and practice of radiation safety. As an independent nonprofit scientific organization, HPS is not affiliated with any government or industrial organization or private entity.

[46] American National Standard, ''Radiation Safety for Personnel Security Screening Systems Using X-Ray or Gamma Radiation,'' ANSI/HPS N43.17 (2009); Health Physics Society, McLean, VA. Copies can be ordered at: *http://webstore.ansi.org/faq.aspx#resellers.*

[47] The National Council on Radiation Protection and Measurements was founded in 1964 by Congress to cooperate with the International Commission on Radiological Protection, the Federal Radiation Council, the International Commission on Radiation Units and Measurements, and other national and international organizations, both governmental and private, concerned with radiation quantities, units, and measurements as well as radiation protection.

[48] Copies of the report can be ordered at: *http://www.ncrppublications.org/Reports/116.*

[49] The biological effect of radiation is measured in sieverts. One sievert equals 1,000 millisieverts and one millisievert equals 1,000 microsieverts.

[50] TSA's Web site at *http://www.tsa.gov/travelers-guide/ait-safety* contains many articles and studies that discuss AIT safety, including a description of the built-in safety features of the Rapiscan Secure 1000, an Archives of Internal Medicine report on the risks of imaging technology, the FDA evaluation of backscatter technology, and other independent safety assessments of AIT.

[51] Department of Homeland Security, Office of Inspector General, ''Transportation Security Administration's Use of Backscatter Units,'' OIG–12–38, February 2012.

[52] HPS Fact Sheet: Radiation Exposure from Medical Exams and Procedures, January 2010, *http://hps.org/documents/Medical_Exposures_Fact_Sheet.pdf.*

[53] Federal Aviation Administration, ''What Aircrews Should Know About Their Occupational Exposure to Ionizing Radiation,'' DOT–FAA–AM–03–1 (October 2003) at p. 9. Available at: *http://www.faa.gov/data_research/research/med_humanfacs/oamtechreports/2000s/media/0316.pdf.*

[54] The World Health Organization estimates that each person is exposed, on average, to 2.4 millisieverts (*i.e.,* 2400 microsieverts) of ionizing radiation each year from natural sources. *www.who.int/ionizing_radiation/about/what_is_ir/en/index2.html.*

dose. In fact, an individual would have to be screened more than 200 times a year by a Rapiscan Secure 1000 before he or she would exceed the negligible individual dose and, even then, the exposure would be below the ANSI/HPS N43.17 standard.

The European Commission released a report conducted by the Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) on the risks related to the use of security scanners for passenger screening that use ionizing radiation such as the general-use backscatter AIT machines.[55] The committee found no short term health effects that can result from the doses of radiation delivered by security scanners. In the long term, it found that the potential cancer risk cannot be estimated, but is likely to remain so low that it cannot be distinguished from the effects of other exposures including both ionizing radiation from other natural sources, and background risk due to other factors.

The ANSI/HPS N43.17 standard also requires that any general-use backscatter machine have safety interlocks to terminate emission of x-rays in the event of any system problem that could result in abnormal or unintended radiation emission. The Rapiscan Secure 1000 had three such features. First, the unit was designed to cease x-ray emission once the programmed scan motion ends. That feature could not be adjusted. Second, the unit was programmed to terminate emission once the requiWeb site number of lines of data necessary to create an image was received. Both of these automatic features reduced the possibility that emissions could continue if the unit malfunctions. Finally, the unit had an emergency stop button that would terminate x-ray emission.

Upon installation, a radiation emission survey was conducted on each Rapiscan Secure 1000 to ensure the unit operated properly. Preventive maintenance checks, including radiation safety surveys, were performed at least once every six months; after any maintenance that affected the radiation shielding, shutter mechanism, or x-ray production components; after any incident where damage was suspected; or after a unit was moved. The U.S. Army Public Health Command also conducted an independent radiation survey on deployed systems. The report confirmed that the general-use backscatter units tested were well within applicable national safety standards.[56]

The DHS Office of the Chief Procurement Officer is also requesting the National Academy of Sciences to review previous studies as well as the current processes used by DHS and equipment manufacturers to estimate radiation exposure resulting from general-use backscatter equipment and to provide a report on whether radiation exposures comply with applicable health and safety standards and whether system design operating procedures and maintenance procedures are appropriate.

D. AIT Procedures at the Checkpoint

TSA's regulations require that ''[i]ndividuals may not enter or be present within a secured area, air operations area, security identification display area, or sterile area without complying with the systems, measures, or procedures used to control access to such areas.'' [57] In addition, ''[i]ndividuals may not enter a sterile area or board an aircraft without submitting to the screening and inspection of their person and accessible property in accordance with the procedures being applied to control access to that area or the aircraft.'' [58] Federal law also requires that air carriers refuse to transport a passenger who does not consent to a search of his person or baggage,[59] and authorizes air carriers to refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.[60]

The specific security procedures, systems, or measures that TSA deploys are included in its Standard Operating Procedures (SOPs). The SOPs instruct the TSOs how to conduct the screening measures currently in use. Terrorists continue to seek ways to thwart aviation security measures and could use information on TSA procedures, such as the instructions on how to operate AIT equipment and the AIT equipment specifications, to plan and execute attacks. Therefore, the SOPs are SSI and are not made public as such disclosure would prove detrimental to transportation security.[61]

In response to the decision in *EPIC* v. *DHS,* TSA is proposing to add the following language to its current regulations at 49 CFR 1540.107, quoted above, to specifically address AIT screening:

> (d) The screening and inspection described in (a) may include the use of advanced imaging technology. For purposes of this section, advanced imaging technology is defined as screening technology used to detect concealed anomalies without requiring physical contact with the individual being screened.

In addition, TSA has posted information on its Web site on what individuals can expect when submitting to AIT screening. AIT screening is currently optional, but when opting out of AIT screening, a passenger will receive a pat-down. When TSA deploys AIT equipment at a screening lane, a sign is posted to inform the public that AIT may be used as part of the screening process prior to passengers entering the machine so that each passenger may exercise an informed decision on the use of AIT. The sign also indicates that a passenger who chooses not to be screened by AIT will receive a pat-down. However, TSA has found that since 2009, fewer than two percent of passengers opt for a pat-down in lieu of AIT screening.[62]

TSA's Web site [63] explains that AIT looks for any items, both metallic and non-metallic, that might be anywhere on the body. It recommends that individuals remove all items from pockets and their person and place them in carry-on baggage prior to entering the checkpoint. It notes that removal will lessen the chance that additional screening will be required. The Web site also explains that for AIT units not equipped with ATR, the TSO who views the image cannot see the individual; while for AIT equipped with ATR software, the screen with the generic outline is located on the scanner and is visible to the passenger and the TSO. The Web site states that AIT is optional.

After any items are removed, individuals are directed to enter the

[55] The SCENIHR is an independent committee that provides the European Commission with the scientific advice it needs when preparing policy and proposals relating to consumer safety, public health and the environment. The committee is made up of external experts. The report can be found at *http://ec.europa.eu/health/scientific_committees/emerging/docs/scenihr_o_036.pdf.*

[56] The report is available on TSA's Web site at *http://www.tsa.gov/travelers-guide/ait-safety.*

[57] 49 CFR 1540.105(a)(2).

[58] 49 CFR 1540.107(a).

[59] 49 U.S.C. 44902(a), 49 CFR 1544.201(c).

[60] 49 U.S.C. 44902(b).

[61] SSI is defined in footnote 1.

[62] TSA's Web site describes the results of independent polling on AIT acceptance showing strong public support for and understanding of the need for AIT. See *http://www.tsa.gov/ait-more-information.* In addition, passengers with joint replacements or other medical devices that would regularly set off the alarm on a metal detector often prefer AIT because it is quicker and less invasive than a pat-down. See *http://www.tsa.gov/traveler-information/advanced-imaging-technology-ait.* An internet campaign in 2010 failed in an attempt to disrupt checkpoint operations by urging passengers to request a pat-down in lieu of AIT screening during the Thanksgiving holiday travel period. See ''Opt Out Turns Into Opt In,'' The TSA Blog, November 24, 2010, *http://blog.tsa.gov/2010_11_24_archive.html.*

[63] *http://www.tsa.gov/travelers-guide/ait-how-it-works.*

AIT. Once inside, individuals are directed to stand with arms raised, and to remain still for several seconds while the image is created. When using AIT with ATR, the image is not an image of the individual passenger, rather a generic outline that indicates where the anomaly is detected. Individuals are directed to exit the opposite side of the portal. Once the image is reviewed and any anomalies are resolved, the image is deleted. This process usually takes less than a minute.

TSA has also refined its procedures to make sure that the screening process addresses the needs of families. TSA never separates a child from an accompanying adult and makes sure that the accompanying adult observes the entire screening process. Advanced Imaging Technology is safe for children, and children may undergo screening using AIT as long as they are able to stand with their hands above their head for the five to seven seconds needed to conduct the scan. However, TSA no longer requires children who are 12 years old or younger to be screened by AIT and will direct those passengers to the WTMD unless instructed otherwise by an accompanying adult.[64] TSA has also implemented procedures to accommodate those passengers with disabilities and medical conditions that make them ineligible for AIT screening because they cannot stand in the necessary pose.

IV. Deployment of AIT

As of February 22, 2013, TSA has deployed over 800 AIT machines at approximately 200 airports in the United States.[65] TSA is removing the 174 Rapiscan general-use backscatter units from its checkpoints and by June 1, 2013, only units equipped with ATR software will be used to conduct screening.

Since it began using AIT, TSA has been able to detect many kinds of non-metallic items, small items, and items concealed on parts of the body that would not have been detected using metal detectors. Once an anomaly is detected, additional screening is required to determine if the item is prohibited.

Since January 2010, this technology has helped TSA officers detect hundreds of prohibited, dangerous, or illegal items concealed on passengers.[66] TSA's procurement specifications require that any AIT system must meet certain thresholds with respect to the detection of anomalies concealed under an individual's clothing. While the detection requirements of AIT are classified, the procurement specifications require that any approved system be sensitive enough to detect smaller items, such as a Web pager, wallet, or small bottle of contact lens solution.

Experience has confirmed that AIT will detect metallic and non-metallic items, including material that could be in various forms concealed under an individual's clothing. For example, a non-metallic martial arts weapon called a ''Tactical Spike'' was discovered in the sock of a passenger in Pensacola, Florida after being screened by AIT.[67] Advanced Imaging Technology is also effective in detecting metallic items. In December, 2011, a loaded .38 caliber firearm in an ankle holster was discovered during AIT screening of a passenger at Detroit Metropolitan Airport.[68] The versatility of AIT in detecting both metallic and non-metallic concealed items without physical contact makes it more effective than metal detectors as a tool to protect transportation security.

Some of the items discovered concealed on passengers during AIT screening are small items, such as weapons made of composite, non-metallic materials, including a three inch pocket knife hidden on a passenger's back; little packets of powder, including a packet the size of a thumbprint; and a syringe full of liquid hidden in a passenger's underwear.[69] A plastic dagger hidden in the hemline of a passenger's shirt was detected using AIT [70] and a plastic dagger concealed inside a comb was detected in a passenger's pocket.[71] Advanced Imaging Technology's capability to identify these small items is important because in addition to weapons and explosive materials, TSA also searches for improvised explosive device components, such as timers, initiators, switches, and power sources. Such items may be very small. Advanced Imaging Technology enhances TSA's ability to find these small items and further assists TSA in detecting threats.

V. Rulemaking Analyses and Notices

A. Regulatory Evaluation Summary and Economic Impact Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order (E.O.) 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), as supplemented by E.O. 13563, Improving Regulation and Regulatory Review (76 FR 3821, January 21, 2011), directs each Federal agency to 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 (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) requires agencies to consider the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

B. Executive Orders 12866 and 13563 Assessment

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule is a

[64] See Advanced Imaging Technology (AIT) at *http://www.tsa.gov/traveler-information/traveling-children.*

[65] TSA maintains a list of airports that have AIT machines on its Web site at *http://www.tsa.gov/travelers-guide/ait-frequently-asked-questions.*

[66] Remarks of TSA Administrator John S. Pistole, Homeland Security Policy Institute, George Washington University, November 10, 2011.

[67] ''TSA Week In Review: Non Metallic Martial Arts Weapon Found with Body Scanner,'' *http://blog.tsa.gov/2011/12/tsa-week-in-review-non-metallic-martial.html.*

[68] *http://blog.tsa.gov/2011/12/loaded-380-found-strapped-to-passengers.html.*

[69] ''Advanced Imaging Off To a Great Start,'' April 20, 2010, at *http://blog.tsa.gov/2010/04/advanced-imaging-technology-off-to.html* and ''Advanced Imaging Technology—Yes, It's Worth It,'' March 31, 2010, at *http://blog.tsa.gov/2010/03/advanced-imaging-technology-yes-its.html.*

[70] ''TSA Week in Review: Plastic Dagger Found With Body Scanner,'' May 4, 2012, at *http://blog.tsa.gov/2012/05/tsa-week-in-review-plastic-dagger-found.html.*

[71] ''TSA Week in Review: Comb Dagger Discovered With Body Scanner, 28 Loaded Guns, and More,'' August 17, 2012 at *http://blog.tsa.gov/2012/08/tsa-week-in-review-comb-dagger.html.*

''significant regulatory action'' that is economically significant under sec. 3(f)(1) of E.O. 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this regulation.

In conducting these analyses, TSA has determined:

(1) This rulemaking is a ''significant regulatory action'' as defined in the E.O.

(2) An Initial Regulatory Flexibility Analysis suggests this rulemaking would not have a significant economic impact on a substantial number of small entities.

(3) This rulemaking would not constitute a barrier to international trade.

(4) This rulemaking does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector under UMRA.

These analyses, available in the docket, are summarized below. This NPRM proposes to codify the use of AIT to screen passengers boarding commercial aircraft for weapons, explosives, and other prohibited items concealed on the body. These costs are incurred by airport operators, the traveling public, Rapiscan, and TSA. Some airport operators incur utility costs for the additional electricity consumed by AIT machines. The small percentage of passengers (approximately one percent) who choose to opt out of AIT screening will incur opportunity costs due to the additional screening time needed to receive a pat-down. Rapiscan, a company that manufactures AIT machines, will incur a cost to remove backscatter AIT units in 2013 that have been deployed in previous years.[72] TSA incurs equipment costs associated with the life cycle of AIT machines (testing, acquisition, maintenance, *etc.*); personnel costs to hire TSOs to operate the AIT machines; utility costs at reimbursed airports; and training costs to train TSOs to operate AIT, and to detect and resolve any anomalies that may be discovered during AIT screening.

When estimating the cost of a rulemaking, agencies typically estimate future expected costs imposed by a regulation over a period of analysis. Because the AIT machine life cycle from deployment to disposal is eight years, the period of analysis for estimating the cost of AIT is also eight years. However, as AIT deployment began in 2008, there are costs that have already been borne by airport operators, the traveling public, and TSA that were not due to this rule. Consequently, in the Initial Regulatory Impact Analysis for this rule, TSA is reporting the AIT-related costs that have already occurred (years 2008–2011), but TSA considers the additional cost of this rulemaking to be years 2012–2015. By reporting the costs that have already happened and estimating future costs in this manner, TSA will have considered and disclosed the full eight-year life cycle of AIT deployment.

TSA reports that the net cost of AIT deployment from 2008–2011 has been $841.2 million (undiscounted) and that TSA has borne over 99 percent of all costs related to AIT deployment. TSA projects that from 2012–2015 total AIT-related costs will be approximately $1.5 billion (undiscounted), $1.4 billion at a three percent discount rate, and $1.3 billion at a seven percent discount rate. During 2012–2015, TSA estimates it will also incur over 98 percent of AIT-related costs with equipment and personnel costs being the largest categories of costs. Table 4 below reports the costs that have already happened (2008–2011) by cost category, while Table 5 shows the additional costs TSA is attributing to this rulemaking (2012–2015). Table 6 shows the total cost of AIT deployment from 2008 to 2015.

TABLE 4—NET COST[73] SUMMARY OF AIT DEPLOYMENT FROM 2008–2011 BY COST COMPONENT

[Costs already incurred in $ thousands—undiscounted]

Year	Passenger opt outs	Industry utilities	TSA costs				Total
			Personnel	Training	Equipment	Utilities	
2008	$7.0	$5.7	$14,689.1	$389.5	$37,425.2	$18.8	$52,535.3
2009	32.2	5.7	15,618.6	88.0	42,563.6	20.4	58,328.5
2010	262.2	158.2	247,566.7	5,332.8	119,105.4	241.4	372,666.6
2011	1,384.2	186.7	284,938.7	15,354.4	55,567.2	269.1	357,700.2
Total	1,685.6	356.3	562,813.0	21,164.7	254,661.3	549.6	841,230.6

TABLE 5—COST SUMMARY (NET COST OF AIT DEPLOYMENT 2012–2015) BY COST COMPONENT

[AIT costs in $ thousands]

Year	Passenger opt outs	Industry tilities	TSA costs				Rapiscan removal	Total
			Personnel	Training	Equipment	Utilities		
2012	$2,716.5	$325.7	$375,866.9	$12,043.0	$116,499.3	$473.0	$0.0	$507,924.4
2013	3,991.7	329.3	280,844.3	4,277.5	51,588.8	324.4	1,809.6	343,165.7
2014	4,238.7	312.0	263,677.6	4,190.5	51,397.8	317.7	0.0	324,134.2
2015	5,611.8	300.3	278,580.2	4,144.2	68,052.6	365.7	0.0	357,054.9
Total	16,558.7	1,267.3	1,198,969.0	24,655.2	287,538.5	1,480.9	1,809.6	1,532,279.2
Discounted 3%	15,265.0	1,178.9	1,118,459.3	23,810.2	269,233.7	1,380.7	1,705.7	1,431,033.5
Discounted 7%	13,766.6	1,075.8	1,024,344.7	22,048.8	247,810.4	1,263.8	1,580.6	1,311,890.7

[72] On December 21, 2012, TSA terminated part of its contract with Rapiscan for the Convenience of the Government because it could not meet development related issues in regards to ATR by the Congressionally-mandated June 2013 deadline. As a result of the contract termination, Rapiscan will pay for the removal of all units still in the field.

[73] TSA removed costs related to WTMD that would have occurred regardless of AIT deployment to obtain an estimated net cost for AIT.

TABLE 6—COST SUMMARY (NET COST OF AIT DEPLOYMENT 2008–2015) BY COST COMPONENT

[AIT costs in $ thousands—undiscounted]

Year	Passenger opt outs	Industry utilities	TSA costs				Rapiscan removal	Total
			Personnel	Training	Equipment	Utilities		
2008	$7.0	$5.7	$14,689.1	$389.5	$37,425.2	$18.8	$0.0	$52,535.3
2009	32.2	5.7	15,618.6	88.0	42,563.6	20.4	0.0	58,328.5
2010	262.2	158.2	247,566.7	5,332.8	119,105.4	241.4	0.0	372,666.6
2011	1,384.2	186.7	284,938.7	15,354.4	55,567.2	269.1	0.0	357,700.2
2012	2,716.5	325.7	375,866.9	12,043.0	116,499.3	473.0	0.0	507,924.4
2013	3,991.7	329.3	280,844.3	4,277.5	51,588.8	324.4	1,809.6	343,165.7
2014	4,238.7	312.0	263,677.6	4,190.5	51,397.8	317.7	0.0	324,134.2
2015	5,611.8	300.3	278,580.2	4,144.2	68,052.6	365.7	0.0	357,054.9
Total	18,244.4	1,623.6	1,761,782.0	45,819.9	542,199.9	2,030.4	1,809.6	2,373,509.9

This preamble (in the Background section above) has previously explained in detail the need for AIT and the Congressional direction to pursue AIT. In summary, terrorists continue to test our security measures in an attempt to find and exploit vulnerabilities. The threat to aviation security has evolved to include the use of non-metallic explosives, non-metallic explosive devices, and non-metallic weapons. Below are examples of this threat:

- On December 22, 2001, on board an airplane bound for the United States, Richard Reid attempted to detonate a non-metallic bomb concealed in his shoe.
- On December 25, 2009, a bombing plot by Al Qaeda in the Arabian Peninsula (AQAP) culminated in Umar Farouk Abdulmutallab's attempt to blow up an American aircraft over the United States using a non-metallic explosive device hidden in his underwear.
- In October 2010, AQAP attempted to destroy two airplanes in flight using non-metallic explosives hidden in two printer cartridges.
- In May 2012, during the most recent terrorist plot thwarted, AQAP developed another non-metallic explosive device that could be hidden in an individual's underwear and detonated while on board an aircraft.

As evidenced by the incidents described in the above sections, TSA operates in a high-threat environment. Terrorists look for security gaps or exceptions to exploit. The device used in the December 25, 2009, attempt is illustrative. It was cleverly constructed and intentionally hidden on a sensitive part of the body to avert detection. If detonated, the lives of the almost 300 passengers and crew and untold numbers of people on the ground would have been in jeopardy.

Advanced Imaging Technology is proven technology which provides the best opportunity to detect metallic and non-metallic anomalies concealed under clothing without touching the passenger and is an essential component of TSA's security. Since it began using AIT, TSA has been able to detect many kinds of non-metallic items, small items, and items concealed on parts of the body that would not have been detected using metal detectors. In addition, risk reduction analysis shows that the chance of a successful terrorist attack on aviation targets generally decreases as TSA deploys AIT. However, the results of TSA's risk-reduction analysis are classified.

Passengers do not experience additional wait time due to use of AIT equipment because the x-ray screening of carry-on baggage constrains the overall screening process; they wait for their personal belongings regardless of which passenger screening technology is used.

In Tables 7 and 8 below, we present annualized cost estimates and qualitative benefits of AIT deployment. In Table 7, we show the annualized net cost of AIT deployment from 2012 to 2015. As previously explained, costs incurred from 2008–2011 occurred in the past and are not considered costs attributable to this proposed rule. However, given the life cycle of the AIT technology considered in this analysis is eight years; we have also added Table 8 showing the annualized net cost of AIT deployment from 2008–2015 (a full eight-year life cycle and includes the ''sunk costs'' from 2008 to 2011). Please note that while the *total costs* of AIT deployment for a full eight-year life cycle (2008–2015) are higher than the *total costs* of AIT deployment during the four-year period of 2012–2015, the *annualized* costs ($368,262.8 at seven percent discount) of the full eight-year cycle shown in Table 8 are actually lower than the *annualized* costs ($387,307.7 at seven percent discount) of the 2012–2015 deployment shown in Table 7. As previously shown in Tables 4 and 5, AIT deployment costs in 2008 and 2009 are relatively low compared with the later year AIT expenditures, resulting in lower annualized costs for the eight-year life cycle of 2008–2015. The costs are annualized and discounted at both three and seven percent and presented in 2011 dollars.

TABLE 7—OMB A–4 ACCOUNTING STATEMENT

[$ Thousands for 2012–2015]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (initial RIA, preamble, etc.)
BENEFITS				
Monetized benefits	Not estimated	Not estimated	Not estimated	Initial RIA.
Annualized quantified, but unmonetized, benefits	0	0	0	Initial RIA.

TABLE 7—OMB A–4 ACCOUNTING STATEMENT—Continued

[$ Thousands for 2012–2015]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (initial RIA, preamble, etc.)
Unquantified benefits	The operations described in this proposed rule produce benefits by reducing security risks through the deployment of AIT technology that is capable of detecting both metallic and non-metallic weapons and explosives.			Initial RIA.
COSTS				
Annualized monetized costs (discount rate in parenthesis)	(7%) $387,307.0 (3%) $384,986.7		Initial RIA.	
Annualized quantified, but unmonetized, costs	0	0	0	Initial RIA.
Qualitative costs (unquantified)	Not estimated			Initial RIA.
TRANSFERS				
Annualized monetized transfers: "on budget"	0	0	0	Initial RIA.
From whom to whom?	N/A	N/A	N/A	None.
Annualized monetized transfers: "off-budget"	0	0	0	Initial RIA.
From whom to whom?	N/A	N/A	N/A	None.
Miscellaneous analyses/category	**Effects**			**Source citation (initial RIA, preamble, etc.).**
Effects on state, local, and/or tribal governments	None			Initial RIA.
Effects on small businesses	No significant economic impact anticipated. Prepared Initial Regulatory Flexibility Analysis			Initial Regulatory Flexibility Analysis.
Effects on wages	None			None.
Effects on growth	None			None.

TABLE 8—OMB A–4 ACCOUNTING STATEMENT

[$ Thousands, 2008–2015, eight-year lifecycle]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (initial RIA, preamble, etc.)
BENEFITS				
Monetized benefits	Not estimated	Not estimated	Not estimated	Initial RIA.
Annualized quantified, but unmonetized, benefits	0	0	0	Initial RIA.
Unquantified benefits	The operations described in this proposed rule produce benefits by reducing security risks through the deployment of AIT technology that is capable of detecting both metallic and non-metallic weapons and explosives.			Initial RIA.
COSTS				
Annualized monetized costs (discount rate in parentheses)	(7%) $368,262.8 (3%) $326,410.1			Initial RIA.
Annualized quantified, but unmonetized, costs	0	0	0	Initial RIA.
Qualitative costs (unquantified)	Not estimated			Initial RIA.
TRANSFERS				
Annualized monetized transfers: "on budget"	0	0	0	Initial RIA.
From whom to whom?	N/A	N/A	N/A	None.
Annualized monetized transfers: "off-budget"	0	0	0	Initial RIA.
From whom to whom?	N/A	N/A	N/A	None.

TABLE 8—OMB A–4 ACCOUNTING STATEMENT—Continued

[$ Thousands, 2008–2015, eight-year lifecycle]

Category	Primary estimate	Minimum estimate	Maximum estimate	Source citation (initial RIA, preamble, etc.)
Miscellaneous analyses/category	**Effects**			**Source citation (initial RIA, preamble, etc.).**
Effects on state, local, and/or tribal governments	None			Initial RIA.
Effects on small businesses	No significant economic impact anticipated. Prepared IRFA			IRFA.
Effects on wages	None			None.
Effects on growth	None			None.

As alternatives to the preferred regulatory proposal presented in the NPRM, TSA examined three other options. The following table briefly describes these options, which include a continuation of the current screening environment (no action), increased use of physical pat-down searches that supplements primary screening with WTMDs, and increased use of ETD screening that supplements primary screening with WTMDs. These alternatives, and the reasons why TSA rejected them in favor of the proposed rule, are discussed in detail in Chapter 3 of the regulatory evaluation located in this docket, and summarized in Table 9.

TABLE 9—COMPARISON OF REGULATORY ALTERNATIVES

Regulatory alternative	Name	Description
1	No Action	Under this alternative, the passenger screening environment remains the same as it was prior to 2008. TSA continues to use WTMDs as the primary passenger screening technology and to resolve alarms with a pat-down.
2	Pat-Down	Under this alternative, TSA continues to use WTMDs as the primary passenger screening technology. In addition, TSA supplements the WTMD screening by conducting a pat-down on a randomly selected portion of passengers after screening by a WTMD.
3	ETD Screening	Under this alternative, TSA continues to use WTMDs as the primary passenger screening technology. In addition, TSA supplements the WTMD screening by conducting ETD screening on a randomly selected portion of passengers after screening by a WTMD.
4	AIT Screening (NPRM)	Under this alternative, the proposed alternative, TSA uses AIT as a passenger screening technology. Alarms would be resolved through a pat-down.

C. Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act (RFA) of 1980 requires that agencies consider the impacts of their rules on small entities. For purposes of the RFA, small entities include small businesses, not-for-profit organizations, and small governmental jurisdictions. Individuals and States are not included in the definition of a small entity. TSA has included an Initial Regulatory Flexibility Analysis within the Initial Regulatory Impact Analysis.

This NPRM proposes to codify the use of AIT to screen passengers boarding commercial aircraft for weapons, explosives, and other prohibited items concealed on the body. The only additional direct cost small entities incur due to this rule is for utilities, as a result of increased power consumption from AIT operation. TSA identified 102 small entities that could have potentially incurred additional utility costs due to AIT; however, TSA reimburses the additional utility costs for five of these small entities. Consequently, this rule would cause 97 small entities to incur additional direct costs. Of the 97 small entities affected by this proposed rule, 96 are small governmental jurisdictions with populations less than 50,000. A privately-owned airport is considered small under SBA standards if revenue amounts to less than $30 million. TSA identified one small privately-owned airport.

The small entities incur an additional utility cost as a result of increased power consumption from AIT operation. To estimate the costs of the deployment of AIT on small entities TSA uses the average kilowatt hour (kWh) consumed per unit on an annual basis at federalized airports. Depending on the size of the airport, TSA estimates the average additional utility cost to range from $815 to $1,270 per year while the average annual revenue for these small entities ranges from $69.5 million to $133.1 million per year. Consequently, TSA estimates that the cost of this NPRM on small entities represents approximately 0.001 percent of their annual revenue. Therefore, TSA's Initial Regulatory Flexibility Analysis suggests that this rulemaking would not have a significant economic impact on a substantial number of small entities.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA has assessed the potential effect of this rulemaking and has determined that it

will have only a domestic impact and therefore no effect on any trade-sensitive activity.

E. Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (UMRA) 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.''

This rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply and TSA has not prepared a statement under the Act.

F. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA sec. 3507(d), obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. The PRA defines ''collection of information'' to be ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinion by or for an agency, regardless of form or format…imposed on ten or more persons.'' 44 U.S.C. 3502(3)(A). TSA has determined that there are no current or new information collection requirements associated with this proposed rule. TSA's use of AIT to screen passengers does not constitute activity that would result in the collection of information as defined in the PRA.

G. Executive Order 13132, Federalism

TSA has analyzed this proposed rule under the principles and criteria of E.O. 13132, Federalism. We determined that this action would not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore would not have federalism implications.

H. Environmental Analysis

TSA has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

I. Energy Impact Analysis

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA), Public Law 94–163, as amended (42 U.S.C. 6362). TSA has determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 49 CFR Part 1540

Air carriers, Aircraft, Airports, Civil aviation security, Law enforcement officers, Reporting and recordkeeping requirements, Screening, Security measures.

The Proposed Amendment

For the reasons set forth in the preamble, the Transportation Security Administration proposes to amend Chapter XII, of Title 49, Code of Federal Regulations, as follows:

PART 1540—CIVIL AVIATION SECURITY: GENERAL RULES

■ 1. The authority citation for part 1540 is revised to read as follows:

Authority: 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44925, 44935–44936, 44942, 46105.

■ 2. In § 1540.107, add paragraph (d) to read as follows:

§ 1540.107 Submission to screening and inspection.

* * * * *

(d) The screening and inspection described in (a) may include the use of advanced imaging technology. For purposes of this section, advanced imaging technology is defined as screening technology used to detect concealed anomalies without requiring physical contact with the individual being screened.

Issued in Arlington, Virginia, on March 20, 2013.

John S. Pistole,

Administrator.

[FR Doc. 2013–07023 Filed 3–22–13; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 130103006–3243–01]

RIN 0648–BC89

Fisheries in the Western Pacific; 5-Year Extension of Moratorium on Harvest of Gold Corals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule would extend the region-wide moratorium on the harvest of gold corals in the U.S. Pacific Islands through June 30, 2018. NMFS intends this proposed rule to prevent overfishing and to stimulate research on gold corals.

DATES: Comments must be received by April 25, 2013.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2013–0002, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0002,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous), and will accept attachments to electronic comments in Microsoft Word, Excel, or Adobe PDF file formats only.