



Amend the Secure Flight Program Regulations

Issue

The Proposed Rule and Regulations drafted by the Transportation Security Administration (“TSA”) as part of the Secure Flight Program (“SFP”), which require that airlines request gender data of all passengers when making a reservation in order to determine whether the passenger is on a federal “watch list,” would subject transgender passengers to enhanced scrutiny in the screening process, civil and criminal sanctions for fraudulent misrepresentation, and embarrassing invasions of personal and medical privacy.

Short Answer

TSA should amend Proposed Regulation 49 C.F.R. § 1560.3 in its Final Rule by changing the definition of “Passport Information” and “Secure Flight Passenger Data” to delete “gender” from the required data that airline operators must request of passengers. If the Proposed Rule and Regulations are approved as currently drafted, TSA should issue a new Notice of Proposed Rule Making (NPRM) that would amend 49 C.F.R. § 1560.3 by deleting “gender” from the required data that must be requested from passengers. If TSA declines to issue a NPRM, then TSA should issue guidance on several Regulations that would protect transgender travelers from bias.

Background

TSA has issued a NPRM requiring that airline operators request that all passengers making flight reservations input their full name, date of birth, and gender.¹ The SFP will then take this information and automatically check those passengers against its “watch list” databases.² Although airlines would be required to request gender data, the NPRM does not require that passengers input gender in order to complete their reservation. Passengers who decline to enter gender would be subjected to enhanced scrutiny in the screening process to determine if they are in fact the individuals on the “watch list” because the airline operator would be instructed to examine the individual’s identity documents and to insert the missing data into the computer.³

Transgender travelers are placed in a double-bind under the Proposed Rule. If the transgender individual declines to state his or her gender, then he or she might be subjected to enhanced scrutiny on a repeated basis. TSA has failed to provide any guidance on whether enhanced screening would result due to an airline operator noting a discrepancy between the transgender individual’s identity documents and his or her physical appearance. In practice, it is likely that airlines would feel obligated to investigate any perceived discrepancy in identity out of their duty to ensure passenger safety.⁴ If the transgender individual does enter their gender data at the time of reservation, and it

¹ See Secure Flight Program Notice of Proposed Rulemaking, 72 Fed. Reg. 48356, 48371, 48388 (Aug. 23, 2007) (proposed regulation 49 C.F.R. § 1560.101(a)).

² These “watch lists” are also called the “Federal No Fly and Selectee Lists.” 72 Fed. Reg. at 48357.

³ See DEPT. OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE SECURE FLIGHT PROGRAM 12 (Aug. 9, 2007), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_secureflight.pdf (hereinafter, PIA); 72 Fed. Reg. at 48366.

⁴ “[A] covered aircraft operator can designate a more restrictive boarding pass status in conjunction with other TSA or aircraft operator procedures.” 72 Fed. Reg. at 48374.



does not conform to either his or her appearance or to his or her identity documents, then the transgender person would have a “profile of suspicious character,” subjecting the individual to enhanced scrutiny as well. Thus, the Proposed Regulations would discriminate against transgender passengers in security screening for failure to conform to the gender stated in their identity documents.

Furthermore, the proposed regulations would encourage confusion among transgender travelers, airline operators, and TSA employees. TSA provides absolutely no guidance regarding how a transgender individual should enter his or her gender when making a reservation because a transgender individual may have multiple forms of documentation that list his or her gender differently.⁵ In addition, the NPRM fails to define “gender” in 49 C.F.R. § 1560.3, creating greater uncertainty among transgender travelers. Most disturbing, however, is that transgender travelers who do enter their gender information may be subjected to 49 C.F.R. § 1540.103(b), which prohibits making a fraudulent or intentionally false record entry when making a reservation. Violations of 49 C.F.R. § 1540.103(b) carry civil penalties of \$2,500 to \$6,000 and a criminal referral.⁶ Even if penalties were later dropped, nothing in the NPRM or existing TSA policy protects the transgender traveler from the inconvenience, legal costs, and embarrassment of a single individual’s bias.

TSA states that an individual’s full name, gender, and date of birth are “critically important” to determining whether an individual is on the “watch list.”⁷ In particular, the Department of Homeland Security argues that “[m]any names do not indicate gender because they can be used by either gender” and that gender information would “reduce the number of false positive watch lists matches.”⁸ However, in practice, an individual would not avoid enhanced screening if his or her full name and date of birth matched an individual on the “watch list,” yet the individual stated that her or she were of a different gender than the listed individual. TSA states that, as part of the “matching” process, it may require additional information to resolve a possible misidentification, requiring the aircraft operator to communicate additional information such as “height, hair color, eye color and distinctive scars.”⁹ Requiring all passengers to include gender information as an initial matter does little to avoid “watch list” mismatches, while substantially burdening transgender travelers. TSA’s security interests could be satisfied by only requiring a passenger’s gender when additional information became necessary to identify an individual.

Recommendation

If TSA has not yet issued a Final Rule: The Assistant Secretary for Homeland Security (“TSA”) should issue a Final Rule amending proposed 49 C.F.R. § 1560.3 that would eliminate “gender” from the information that airline operators must request of passengers making reservations.

⁵ For example, an individual might have a male gender marker on a passport, due to the State Department’s requirement that an individual have completed gender reassignment surgery to change gender, but might have a female gender marker on a driver’s license or other identification with a more permissive gender change policy.

⁶ See TRANSP. SEC. ADMIN., TSA SANCTION GUIDELINES 2 (Jul. 15, 2004), http://www.tsa.gov/assets/pdf/Sanction_Guidance_for_Individuals_7-15-2004.pdf.

⁷ See 72 Fed. Reg. at 48364.

⁸ See PIA, *supra* note 3, at 12.

⁹ 72 Fed. Reg. at 48374.



If TSA adopts the current language as the Final Rule: The Assistant Secretary for Homeland Security (TSA) should issue a new Proposed Rule that would amend the new 49 C.F.R. § 1560.3 that would eliminate “gender” from the information that airline operators must request of passengers making reservations.

If TSA declines to issue a new Proposed Rule: The Assistant Secretary for Homeland Security (“TSA”) should draft extensive guidance and procedures informing passengers, airline operators, and TSA employees on the proper treatment of transgender passengers under the Secure Flight Regulations.

Authority

TSA is responsible for performing passenger and baggage screening at commercial airports.¹⁰ Section 4012 (a) of the Intelligence Reform and Terrorism Prevention Act (“IRTPA”) requires the Assistant Secretary of Homeland Security (Transportation Security Administration) to assume from aircraft operators the function of conducting pre-flight comparisons of airline passenger information to Federal government watch lists for international and domestic flights.¹¹ IRTPA directs the Assistant Secretary to establish a “watch list” matching system that will not produce a large number of “false positives,” but it does not have any specific requirement that gender data be requested or collected as part of this function. Congress gave the Assistant Secretary a broad grant of authority and discretion to determine the means of implementing a “watch list” match system, and these goals are not contravened by declining to request gender data from commercial airline passengers. Thus, the Assistant Secretary has the authority to perform the above recommendations.

¹⁰ Aviation and Security Act (ATSA), Pub. L. 107-71 (2001).

¹¹ Pub. L. 108-458 (2004).