



## **DEPARTMENT OF HOMELAND SECURITY**

### **Transportation Security Administration**

#### **49 CFR Parts 1542 and 1544**

#### **Recordkeeping Requirements for Criminal History Record Checks; Airport and Aircraft Operator Security; Technical Amendments**

**AGENCY:** Transportation Security Administration, Department of Homeland Security (DHS).

**ACTION:** Final rule; technical amendments.

**SUMMARY:** The Transportation Security Administration (TSA) is issuing technical amendments to certain aviation security regulations. The technical amendments to the regulations clarify that airport operators and aircraft operators are required to retain only the criminal records, including the application for a criminal history records check (CHRC), associated with an individual's current CHRC, CHRC certification, or authorization to perform a covered function and not records associated with previous CHRCs or employment investigations. Also, the technical amendments clarify that the records may be stored in paper or electronic form.

**DATES:** This rule is effective as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** David Siegmund; Airport Security Programs; Aviation Division; Policy, Plans, and Engagement; (571)227-4325; david.siegmund@tsa.dhs.gov.

**SUPPLEMENTARY INFORMATION:** You can find an electronic copy of this rule using the Internet by accessing the Government Publishing Office's web page at <https://www.govinfo.gov/app/collection/FR> to view the daily published *Federal Register* edition or by accessing the Office of the Federal Register's web page

at <https://www.federalregister.gov>. Copies are also available by contacting the individual identified in the **FOR FURTHER INFORMATION CONTACT** section.

### **Small Entity Inquiries**

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires TSA to comply with small entity requests for information and advice about compliance with statutes and regulations within TSA's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Persons can obtain further information regarding SBREFA on the Small Business Administration's web page at <https://advocacy.sba.gov/resources/reference-library/sbrefa/>.

### **I. Discussion of the Rule**

TSA is making technical amendments to regulatory recordkeeping requirements related to CHRCs that workers for airport and aircraft operators are required to undergo. Beginning in 1996, the FAA required airport and aircraft operators to conduct employment investigations for certain workers. Following the terrorist attacks on September 11, 2001, the FAA determined that the employment investigations did not adequately protect transportation security and published the CHRCs final rule on December 6, 2001.<sup>1</sup> The rule required the completion of CHRCs for individuals with unescorted Security Identification Display Area security functions such as screening of cargo or accepting checked baggage for transport.<sup>2</sup>

For airport operators, the current regulations require retention of all employment history investigation files conducted before December 6, 2001, the fingerprint application and CHRC results conducted after December 6, 2001, and any CHRC certifications

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<sup>1</sup> 66 FR 63474 (Dec. 6, 2001). FAA aviation security functions were transferred to TSA under 67 FR 7939 (Feb. 20, 2002).

<sup>2</sup> See also 49 CFR 1544.229 and 1544.330 (expanding CHRC requirements to include flightcrew members).

received after December 6, 2001.<sup>3</sup> For aircraft operators, the current regulations require retention of employment history investigation files conducted before December 6, 2001, and fingerprint application and CHRC results conducted after December 6, 2001.<sup>4</sup> The regulations also require airport and aircraft operators to retain these records until 180 days after the individual's access has expired or their authority to perform a covered function is terminated.<sup>5</sup>

When these regulations were promulgated, airport and aircraft operators were required to complete only one CHRC for covered individuals.<sup>6</sup> However, as a result of the terrorist attacks of September 11, 2001, the modern threat environment, and TSA's risk-based approach to aviation security, TSA has issued security program amendments and security directives requiring airport and certain aircraft operator workers to undergo recurrent CHRCs. For instance, TSA required workers with unescorted access to airport Security Identification Display Areas and sterile areas to complete CHRCs every 2 years, and then to participate in the Rap Back program. As a result of the recurrent CHRC requirements and a strict reading of the recordkeeping regulations, covered entities retain numerous copies of CHRC applications and results. Retaining these records is burdensome and costly. Moreover, TSA does not need prior CHRC applications and results to assess compliance with the existing CHRC requirements. Therefore, TSA is clarifying the existing regulations to state that operators must retain only the records relating to the current CHRC.

For §§ 1542.209 and 1544.229, the technical amendments remove the date of December 6, 2001, and the requirements concerning employment investigations that applied before that date in the rule text because that language is no longer necessary.

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<sup>3</sup> See 49 CFR 1542.209(k)(1) through (3).

<sup>4</sup> See 49 CFR 1544.229(k)(1) and (2).

<sup>5</sup> See 49 CFR 1542.209(k)(5), 1544.229(k)(4).

<sup>6</sup> 66 FR 63474 (Dec. 6, 2001).

Also, the technical amendments now include the phrase “in electronic or paper form as authorized by TSA” to clarify that either hard copy or electronic forms are permissible. When the regulation was originally published, the primary means of record maintenance was in paper/hard copy, which has changed over time to electronic document storage. TSA is adding the phrase “associated with the individual’s current ID media, CHRC certification, or authorization to perform a covered function” to clarify that only the current CHRC records must be retained. TSA is revising the title of “Certification” to “Certifications” to grammatically conform with other references to certifications in the rule text. Finally, TSA is removing the phrase “all investigations” to more accurately reflect that airport and aircraft operators are only required to preserve certain records.

For § 1544.230, the technical amendments add the phrase “[t]he airport operator must maintain the following information associated with an individual’s current authorization to be a flightcrew member, in electronic or paper form, as authorized by TSA.” This change clarifies that either hard copy or electronic forms are permissible and that only the current CHRC records must be retained for flightcrew records checks. The technical amendments also delete extraneous phrases from § 1544.230 so that the recordkeeping language is similar to §§ 1542.209 and 1544.229.

## **II. Good Cause and Procedural Rule Exceptions from Notice and Comment and Delayed Effective Date**

TSA is issuing this final rule change as a technical amendment without a notice of proposed rulemaking or delayed effective date. The Administrative Procedure Act authorizes agencies to forgo the notice and comment requirements if it “for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B); *see also* 5 U.S.C. 553(d)(3)

(allowing agency to forgo a delayed effective date for a substantive rule upon a finding of good cause).

TSA believes notice and comment concerning reducing the recordkeeping requirements is unnecessary as it is a limited amendment to reflect processes and security needs that have changed overtime. It is unnecessary to seek notice and comment on the rule changes because the new language imposes no new substantive burden and reflects current security and compliance procedures. Further, it is unnecessary for the rule to have a delayed effective date as the amendment merely reduces recordkeeping requirements. Operators may continue to retain old criminal applications and records but are not required to do so. For these reasons, TSA believes that bypassing the ordinary notice and comment procedure and the delayed effected date requirement is justified in the totality of the circumstances.

In addition, 5 U.S.C. 553(b)(A) permits agencies to forgo notice and comment when issuing “rules of agency organization, procedure, or practice,” *i.e.*, a procedural rule. “A useful articulation of the exemption’s critical feature is that it covers agency actions that do not themselves 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.”<sup>7</sup> The exemption “preserve[s] agency flexibility when dealing with limited situations where substantive rights are not at stake.”<sup>8</sup> Here, TSA is removing a requirement to retain the old CHRC records that were written when only one CHRC was required. As a matter of agency procedure and practice, TSA does not need to review old CHRC records and applications in order to assess an operator’s current compliance with the vetting

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<sup>7</sup> *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

<sup>8</sup> *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

regulations. In addition, the delayed effective date requirements under 5 U.S.C. 553(d) do not apply to procedural rules.

TSA is issuing these final rule changes through technical amendments and not as a notice of proposed rulemaking. The technical amendments reflect current Agency procedures and impose no new substantive requirements. However, it is important to note that even if these revisions were not considered technical amendments, they fall within other exceptions to notice and comment under the Administrative Procedure Act.<sup>9</sup>

### **III. Regulatory Analyses**

#### *A. 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 section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. This rule does not call for a new collection of information under the PRA. CHRC recordkeeping requirements are currently covered under Information Collection Request 1652-002 (Airport Security Program). CHRC recordkeeping burden estimates within the Information Collection Request already align with CHRC recordkeeping clarifications identified in the technical amendment and thus do not require revision at this time.

#### *B. Executive Orders 12866 and 13563 Assessment*

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) 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,

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<sup>9</sup> See 5 U.S.C. 551-559.

public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The OMB has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, OMB has not reviewed this regulatory action.

This technical amendment clarifies CHRC recordkeeping requirements which may result in cost savings associated with no longer retaining old CHRCs and storing such records electronically. This technical amendment does not impose any new substantive burden and reflects current security and compliance procedures.

#### *C. Regulatory Flexibility Analysis*

The Regulatory Flexibility Act of 1980 (RFA)<sup>10</sup> 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. The RFA's regulatory flexibility analysis requirements apply only to those rules for which an agency is required to publish a general notice of proposed rulemaking pursuant to 5 U.S.C. 553 or any other law. *See* 5 U.S.C. 604(a). As discussed previously, TSA did not issue a notice of proposed rulemaking for this action as exempted by 5 U.S.C. 553(b). Therefore, a regulatory flexibility analysis is not required for this rule.

#### *D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-38, UMRA) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule or final rule for which the agency published a

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<sup>10</sup> Public Law 96-354 (94 Stat. 1164, Sept. 19, 1980), codified at 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

proposed rule, which includes any Federal mandate 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.

Regulations are only reviewable under UMRA when an agency has published a notice of proposed rulemaking as defined by 5 U.S.C. 553(b).<sup>11</sup> This rule is exempted from notice and comment under 5 U.S.C. 553(b). TSA did not publish a notice of proposed rulemaking; thus, this rule is exempt from UMRA's requirements pertaining to the preparation of a written statement.

#### *E. Executive Order 13132*

Under Executive Order 13132 (Federalism), agencies must consider whether a rule has federalism implications. TSA has determined that this rule does not have federalism implications because it does not create a substantial direct effect on States, on the relationship between the National Government and States, or the distribution of power and responsibilities among the various levels of government.

#### *F. 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. The Trade Agreement Act does not consider legitimate domestic objectives, such as essential security, as unnecessary obstacles. The statute also requires that international standards be considered, and where appropriate, that they be the basis for U.S. standards. This technical amendment will not have an adverse impact on international trade.

#### *G. Energy Impact Analysis*

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<sup>11</sup> See 2 U.S.C. 658(10); 5 U.S.C. 601(2).

TSA assessed the energy impact of this action in accordance with the Energy Policy and Conservation Act,<sup>12</sup> and determined that this technical amendment is not a major regulatory action under the provisions of the Energy Policy and Conservation Act.

#### *H. Environmental Analysis*

TSA has reviewed this technical amendment for purposes of the National Environmental Policy Act of 1969<sup>13</sup> and has determined that this action will not have a significant effect on the human environment. This action is covered by categorical exclusion numbers A3(a) (for actions of a strictly administrative or procedural nature) and (b) (that implement, without substantive change, statutory or regulatory requirements) in DHS Management Directive 023-01 (formerly Management Directive 5100.1), Environmental Planning Program, and Instruction Manual 023-01-001-01, Rev. 1, which guides TSA compliance with the National Environmental Policy Act.

#### *I. The Congressional Review Act*

Before a rule can take effect, 5 U.S.C. 801, the Congressional Review Act (CRA), requires agencies to submit the rule and a report indicating whether it is a major rule to Congress and the Comptroller General. Under 5 U.S.C. 804(3)(C), rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties are not considered to be a rule for the purposes of the CRA. This technical amendment is a rule of agency organization, procedure, or practice that will not substantially affect the rights or obligations of non-agency parties, thus is not required to be submitted for review under the CRA.

### **List of Subjects**

#### **49 CFR Part 1542**

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<sup>12</sup> As codified at 42 U.S.C. 6362.

<sup>13</sup> As codified at 42 U.S.C. 4321-4347.

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

#### **49 CFR Part 1544**

Air carriers, Aircraft, Airmen, Airports, Aviation safety, Explosives, Freight forwarders, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

For the reasons stated in the preamble, the Transportation Security Administration amends chapter XII, of title 49, Code of Federal Regulations as follows:

#### **PART 1542 – AIRPORT SECURITY**

1. The authority citation for part 1542 continues to read as follows:

**Authority:** 49 U.S.C. 114, 5103, 40113, 44901-44905, 44907, 44913-44914, 44916-44917, 44935-44936, 44942, 46105.

2. Revise § 1542.209(k) to read as follows:

#### **§ 1542.209 Fingerprint-based criminal history records checks (CHRC).**

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(k) *Recordkeeping.* The airport operator must maintain the following information associated with an individual's current identification (ID) media in electronic or paper form, as authorized by TSA:

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

(2) *Certifications.* The airport operator must maintain the certifications provided under paragraph (n) of this section.

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

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

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## **PART 1544 – AIRCRAFT OPERATOR SECURITY: AIR CARRIERS AND COMMERCIAL OPERATORS**

3. The authority citation for part 1544 continues to read as follows:

**Authority:** 49 U.S.C. 114, 5103, 40113, 44901-44905, 44907, 44913-44914, 44916-44918, 44932, 44935-44936, 44942, 46105.

4. Revise § 1544.229(k) to read as follows:

**§ 1544.229 Fingerprint-based criminal history records checks (CHRC): Unescorted access authority, authority to perform screening functions, and authority to perform check baggage or cargo functions.**

\* \* \* \* \*

(k) *Recordkeeping.* The aircraft operator must maintain the following information associated with an individual's current identification (ID) media, CHRC certification, or authorization to perform a covered function in electronic or paper form, as authorized by TSA:

(1) *Fingerprint application.* The aircraft operator must physically maintain, control, and, as appropriate, destroy the fingerprint application and the criminal record. Only direct aircraft operator employees may carry out the responsibility for maintaining, controlling, and destroying criminal records.

(2) *Protection of records.* The records required by this section must be maintained in a manner that is acceptable to TSA and in a manner that protects the confidentiality of the individual.

(3) *Duration.* The records identified in this section with regard to an individual must be maintained until 180 days after the termination of the individual's authority to perform a covered function. When files are no longer maintained, the criminal record must be destroyed.

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5. Revise § 1544.230(h) to read as follows:

**§ 1544.230 Fingerprint-based criminal history records checks (CHRC): Flightcrew members.**

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(h) *Recordkeeping.* The aircraft operator must maintain the following information associated with a current authorization to be a flightcrew member, in electronic or paper form, as authorized by TSA:

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

(2) *Protection of records.* The records required by this section must be maintained by the aircraft operator in a manner that is acceptable to TSA and in a manner that protects the confidentiality of the individual.

(3) *Duration.* The records identified in this section with regard to an individual must be made available upon request by TSA and maintained until 180 days after the termination of the individual's privileges to perform flightcrew member duties with the

aircraft operator. When files are no longer maintained, the criminal record must be destroyed.

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Dated: January 10, 2025.

**David P. Pekoske,**

*Administrator.*

[FR Doc. 2025-00773 Filed: 1/14/2025 8:45 am; Publication Date: 1/15/2025]