

113TH CONGRESS }
2d Session }

SENATE

{ REPORT
113-273 }

AVIATION SECURITY STAKEHOLDER
PARTICIPATION ACT OF 2013

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 1804



NOVEMBER 17, 2014.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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AVIATION SECURITY STAKEHOLDER PARTICIPATION ACT OF 2013

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Mr. ROCKEFELLER, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 1804]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1804) to amend title 49, United States Code, to direct the Assistant Secretary of Homeland Security (Transportation Security Administration) to establish an Aviation Security Advisory Committee, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

S. 1804 would permanently establish an aviation security advisory committee (ASAC) for the Transportation Security Administration (TSA) to advise the Assistant Secretary of Homeland Security (TSA Administrator) on aviation security matters. S. 1804 would also modify the requirements for the existing ASAC and exempt it from the Federal Advisory Committee Act (FACA) (5 U.S.C. App.).

BACKGROUND AND NEEDS

The Federal Aviation Administration (FAA) established the ASAC in 1989 following the bombing of Pan American World Airways Flight 103 over Lockerbie, Scotland. When the TSA was established in 2001, the sponsorship of the ASAC transferred to the TSA. Throughout its history, the ASAC has been subject to FACA, which has limited the length of its charter, and imposed public disclosure and other requirements. Furthermore, the TSA has allowed

the ASAC charter to lapse multiple times, depriving stakeholders of a forum to engage the TSA in discussions of security concerns. In addition, as much of the TSA's policy justifications are considered sensitive security information, the ASAC has been inhibited from having open discussions of factors driving the TSA's policy-making decisions.

S. 1804 would mitigate these issues by permanently establishing the ASAC, making FACA not applicable to the ASAC, and instructing the TSA Administrator to share sensitive security information with ASAC members as appropriate.

To address concerns expressed by aviation security stakeholders that their input and insight into the TSA's decision-making process has not been sufficiently considered or valued, the bill would add reporting and recommendation feedback requirements. These requirements would aim to ensure stakeholder input is appropriately reviewed, and recommendations are thoughtfully considered by the TSA Administrator. On several occasions the TSA has set out on courses of action that had to be changed when stakeholders objected because they would have been harmed: situations that could have been avoided through strengthened communication between aviation security stakeholders and the TSA. While Congress cannot easily codify rules to determine in advance the sensitive security information that is appropriate for ASAC members to access on the wide variety of issues they may examine, the Committee expects the TSA Administrator will liberally grant access to all relevant information on issues the ASAC examines. Should any of this information be classified, the Secretary of Homeland Security should use the authority under section 114(u)(8) of title 49, United States Code, to expedite security clearances for ASAC members for such access. Expanded access to relevant sensitive information should improve the ability of the ASAC to meaningfully address security problems in a collaborative and constructive fashion with the TSA.

In recent years, the TSA has shifted its focus from one-size-fits-all security to an intelligence-driven, risk-based approach to security. By following a process that assesses the various risks to transportation security, and by examining the available options to focus its efforts on the most efficient risk mitigation, the TSA has improved its ability to promote security while also reducing burdens on travelers and aviation stakeholders. It is important that the TSA continue making progress in this direction. Accordingly, S. 1804 would instruct the ASAC to consider risk-based approaches as it develops recommendations on aviation security issues.

While many potential harms could theoretically threaten transportation, a risk-based approach means that ASAC efforts should be focused on those scenarios that arise from the combination of: (1) demonstrably extant attackers who have both intent and capability to cause harm; (2) attack paths that are not mitigated by existing countermeasures (wherein capability gaps exist); and (3) attacks that, if successful, would cause significant harm. Based on those criteria, scenarios that are high-risk should be examined alongside the costs to mitigate them. Costs would include those borne by the government, industry, passengers, or other stakeholders. While some costs (e.g., impacts on individual liberties) may be difficult to quantify, they must also be incorporated into a holistic analysis.

The Committee received a multi-signatory letter of support for S. 1804 from the Aeronautical Repair Station Association, Aircraft Owners and Pilots Association, Airlines for America, Airports Council International—North America, American Association of Airport Executives, Cargo Airline Association, General Aviation Manufacturers Association, Helicopter Association International, International Air Transport Association, National Air Carrier Association, National Air Transportation Association, National Association of State Aviation Officials, National Business Aviation Association, NetJets Association of Shared Aircraft Pilots, Regional Airline Association, Security Industry Association, Security Manufacturers Coalition, Southwest Airlines Pilots Association, and U.S. Travel Association.

SUMMARY OF PROVISIONS

S. 1804 would codify the ASAC, establish its stakeholder membership and chairperson representation, and direct the establishment of subcommittees. At a minimum, subcommittees would be required to address air cargo security, general aviation, perimeter and access control, and security technology. Other subcommittees could be established if they are determined necessary by the TSA Administrator and the ASAC. All subcommittees would be required to approach issues from a risk-based perspective. S. 1804 would set the maximum ASAC membership at 34 members, with 19 specific stakeholder categories that must be represented. ASAC members could be granted access to sensitive security information as appropriate to perform their advisory duties. The ASAC would submit an annual report to the TSA Administrator with its recommendations for improving aviation security, and the TSA Administrator would be required to provide feedback on all recommendations, including a plan of action for those chosen to be implemented and a justification for those not implemented.

LEGISLATIVE HISTORY

S. 1804 was introduced on December 11, 2013, by Senator Tester and was referred to the Committee on Commerce, Science, and Transportation of the Senate. Senator Begich is a cosponsor. A TSA oversight hearing was held on April 30, 2014. On July 23, 2014, the Committee met in open Executive Session and, by a voice vote, ordered S. 1804 reported with an amendment in the nature of a substitute. A related bill, H.R. 1204, is substantially similar. It was introduced by Representative Bennie Thompson on March 14, 2013, and referred to the Homeland Security Committee, Subcommittee on Transportation Security, of the House of Representatives. H.R. 1204 has five Democratic and three Republican cosponsors. The Subcommittee on Transportation Security forwarded H.R. 1204 to the full House Homeland Security Committee by voice vote on July 24, 2013. The House Homeland Security Committee reported H.R. 1204 by voice vote on December 2, 2013. The House of Representatives passed the bill by a vote of 411–3 on December 3, 2013.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget

Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 1804—Aviation Security Stakeholder Participation Act of 2014

S. 1804 would establish, within the Transportation Security Administration (TSA), an advisory committee to make recommendations on issues related to aviation security. The bill would specify details related to the organizational structure and reporting requirements of the proposed committee.

Under current law, TSA already operates an advisory committee related to aviation security. According to TSA, the agency currently spends less than \$100,000 annually to operate the existing committee, which has a mission and organizational structure that is similar to that of the advisory committee envisioned under S. 1804. As a result, CBO estimates that implementing S. 1804 would have no significant additional cost. S. 1804 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 1804 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On November 21, 2013, CBO transmitted a cost estimate for H.R. 1204, the Aviation Security Stakeholder Participation Act of 2013, as ordered reported by the House Committee on Homeland Security on October 29, 2013. S. 1804 and H.R. 1204 are similar, and the CBO cost estimates for the two pieces of legislation are the same.

The CBO staff contact for this estimate is Megan Carroll. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 1804 is intended to improve aviation security stakeholder input by making permanent the existing ASAC. ASAC membership is voluntary for aviation security stakeholders. S. 1804 would set the maximum ASAC membership at 34 people, approximately a 25 percent increase compared to the existing advisory committee's membership limit of 27.

ECONOMIC IMPACT

S. 1804 is expected to have a positive economic impact. By fostering better communication between the TSA and industry stakeholders, the TSA's policy decisions can better account for industry interests. When intelligence indicates a transportation security threat exists, industry input can help guide a TSA response toward less economically impactful measures.

PRIVACY

The reported bill is not expected to have any impact on the privacy rights of the public. It authorizes the TSA to vet ASAC mem-

bers' backgrounds for access to sensitive security information, but only on a basis that is voluntary for the members.

PAPERWORK

S. 1804 would codify several pieces of documentation, including: periodic reports by the ASAC to the TSA Administrator on issues the ASAC examines; an annual report by the ASAC to the TSA Administrator covering its activities and recommendations over the past year; written feedback by the TSA Administrator to the ASAC on each recommendation; an action plan by the TSA Administrator on each ASAC recommendation that the TSA Administrator intends to implement, including a justification by the TSA Administrator for any ASAC recommendations that will not be implemented, and a report to Congress by the TSA Administrator containing information relating to ASAC recommendations; upon congressional request, a briefing on any feedback provided by the TSA Administrator to the ASAC; and upon congressional request, a report by the TSA Administrator to Congress providing information relating to ASAC recommendations.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that the Act would be cited as the "Aviation Security Stakeholder Participation Act of 2014."

Section 2. Aviation Security Advisory Committee

Section 2 would add a new section 44946 to the end of subchapter II of chapter 449 of title 49, United States Code, establishing the ASAC within the TSA. This new section would codify the ASAC for the purpose of developing recommendations for improvements to aviation security. The ASAC would periodically report on issues raised by the TSA Administrator or by a majority of its membership, and approve recommendations agreed upon by the subcommittees. After approval by the ASAC, those recommendations would be delivered to the TSA Administrator, who would be required to consult the ASAC as appropriate regarding security matters. The ASAC would also be required to submit an annual report to the TSA Administrator to provide information on its activities, findings, and recommendations over the previous year. The TSA Administrator would be required to provide feedback to the ASAC on each of its recommendations, include an action plan to implement recommendations with which the TSA Administrator concurs, and provide a justification for rejecting any recommendations with which the TSA Administrator does not concur. The Committee expects that the TSA Administrator may modify some recommendations before implementing them, and in this case the TSA Administrator should include justification for those modifications in an implementation action plan. The TSA Adminis-

trator would be required to notify Congress on feedback provided to the ASAC, and to provide a briefing upon request. If a briefing is requested, prior to that briefing the TSA Administrator would submit to Congress a report providing information relating to the ASAC recommendations.

The TSA Administrator would appoint all ASAC members. S. 1804 would set the maximum ASAC membership at 34 members, which would be approximately 25 percent more people than the existing ASAC membership limit of 27. The ASAC membership would be required to include representatives of at least 19 constituency groups, which would be 10 more groups than the 9 required on the existing ASAC. The required constituency groups would be as follows: air carriers; all-cargo air transportation; indirect air carriers; labor organizations representing air carrier employees; labor organizations representing transportation security officers; aircraft manufacturers; airport operators; airport construction and maintenance contractors; labor organizations representing employees of airport construction and maintenance contractors; general aviation; privacy organizations; travel industry; airport-based businesses, including minority-owned small businesses; businesses that conduct security operations at airports; aeronautical repair stations; passenger advocacy groups; aviation technology security industry, including screening technology and biometrics; victims of terrorist acts against aviation; and law enforcement and security experts.

ASAC members would be required to meet at least semiannually, would be prohibited from receiving pay, allowances, or benefits from the Federal Government by reason of their ASAC service, and could be removed for cause at any time by the TSA Administrator. Within 60 days of an ASAC member's appointment, the TSA Administrator would determine whether there is cause for restricting them from accessing sensitive security information. Without such cause, the TSA Administrator could grant access to sensitive security information that is relevant to the member's advisory duties. The ASAC would have a chairperson elected by the appointed members.

S. 1804 would provide for ASAC subcommittees to develop specific issue recommendations. At a minimum, subcommittees would be required to address air cargo security, general aviation, perimeter and access control, and security technology. Other subcommittees may also be created as necessary to examine issues raised by the TSA Administrator or the ASAC. ASAC subcommittees would be required to consider risk-based approaches in addressing issues. Each subcommittee would be co-chaired by a Government and an industry official, and would include subject matter experts with expertise that is relevant to the subcommittee's assigned issues. They would meet at least quarterly and provide input to ASAC annual reports.

S. 1804 would provide that FACA would not apply to the ASAC.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in *italic*, existing law in which no change is proposed is shown in roman):

TITLE 49. TRANSPORTATION

SUBTITLE VII. AVIATION PROGRAMS

PART A. AIR COMMERCE AND SAFETY

SUBPART III. SAFETY

CHAPTER 449. SECURITY

SUBCHAPTER II. ADMINISTRATION AND PERSONNEL

§ 44946. Aviation Security Advisory Committee

(a) *ESTABLISHMENT.*—*The Assistant Secretary shall establish within the Transportation Security Administration an aviation security advisory committee.*

(b) *DUTIES.*—

(1) *IN GENERAL.*—*The Assistant Secretary shall consult the Advisory Committee, as appropriate, on aviation security matters, including on the development, refinement, and implementation of policies, programs, rulemaking, and security directives pertaining to aviation security, while adhering to sensitive security guidelines.*

(2) *RECOMMENDATIONS.*—

(A) *IN GENERAL.*—*The Advisory Committee shall develop, at the request of the Assistant Secretary, recommendations for improvements to aviation security.*

(B) *RECOMMENDATIONS OF SUBCOMMITTEES.*—*Recommendations agreed upon by the subcommittees established under this section shall be approved by the Advisory Committee before transmission to the Assistant Secretary.*

(3) *PERIODIC REPORTS.*—*The Advisory Committee shall periodically submit to the Assistant Secretary—*

(A) *reports on matters identified by the Assistant Secretary; and*

(B) *reports on other matters identified by a majority of the members of the Advisory Committee.*

(4) *ANNUAL REPORT.*—*The Advisory Committee shall submit to the Assistant Secretary an annual report providing information on the activities, findings, and recommendations of the Advisory Committee, including its subcommittees, for the preceding year.*

(5) *FEEDBACK.*—*Not later than 90 days after receiving recommendations transmitted by the Advisory Committee under paragraph (4), the Assistant Secretary shall respond in writing to the Advisory Committee with feedback on each of the recommendations, an action plan to implement any of the recommendations with which the Assistant Secretary concurs, and a justification for why any of the recommendations have been rejected.*

(6) *CONGRESSIONAL NOTIFICATION.*—*Not later than 30 days after providing written feedback to the Advisory Committee under paragraph (5), the Assistant Secretary shall notify the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Homeland Security of the House of Representatives on such feedback, and provide a briefing upon request.*

(7) *REPORT TO CONGRESS.*—Prior to briefing the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Homeland Security of the House of Representatives under paragraph (6), the Assistant Secretary shall submit to such committees a report containing information relating to the recommendations transmitted by the Advisory Committee in accordance with paragraph (4).

(c) *MEMBERSHIP.*—

(1) *APPOINTMENT.*—

(A) *IN GENERAL.*—Not later than 180 days after the date of enactment of the Aviation Security Stakeholder Participation Act of 2014, the Assistant Secretary shall appoint the members of the Advisory Committee.

(B) *COMPOSITION.*—The membership of the Advisory Committee shall consist of individuals representing not more than 34 member organizations. Each organization shall be represented by 1 individual (or the individual's designee).

(C) *REPRESENTATION.*—The membership of the Advisory Committee shall include representatives of air carriers, all-cargo air transportation, indirect air carriers, labor organizations representing air carrier employees, labor organizations representing transportation security officers, aircraft manufacturers, airport operators, airport construction and maintenance contractors, labor organizations representing employees of airport construction and maintenance contractors, general aviation, privacy organizations, the travel industry, airport-based businesses (including minority-owned small businesses), businesses that conduct security operations at airports, aeronautical repair stations, passenger advocacy groups, the aviation security technology industry (including screening technology and biometrics), victims of terrorist acts against aviation, and law enforcement and security experts.

(2) *REMOVAL.*—The Assistant Secretary may review the participation of a member of the Advisory Committee and remove such member for cause at any time.

(3) *PROHIBITION ON COMPENSATION.*—The members of the Advisory Committee shall not receive pay, allowances, or benefits from the Government by reason of their service on the Advisory Committee.

(4) *MEETINGS.*—The Assistant Secretary shall require the Advisory Committee to meet at least semiannually and may convene additional meetings as necessary.

(5) *MEMBER ACCESS TO SENSITIVE SECURITY INFORMATION.*—Not later than 60 days after the date of a member's appointment, the Assistant Secretary shall determine if there is cause for the member to be restricted from possessing Sensitive Security Information. Without such cause, and upon the member voluntarily signing a non-disclosure agreement, the member may be granted access to Sensitive Security Information that is relevant to the member's advisory duties. The member shall protect the Sensitive Security Information according to part 1520 of title 49 of the Code of Federal Regulations.

(6) *CHAIRPERSON.*—A stakeholder representative on the Advisory Committee who is elected by the appointed membership of the Advisory Committee shall chair the Advisory Committee.

(d) *SUBCOMMITTEES.*—

(1) *MEMBERSHIP.*—The Advisory Committee chairperson, in coordination with the Assistant Secretary, may establish within the Advisory Committee any subcommittee that the Assistant Secretary and Advisory Committee determine to be necessary. The Assistant Secretary and the Advisory Committee shall create subcommittees to address aviation security issues, including the following:

(A) *AIR CARGO SECURITY.*—The implementation of the air cargo security programs established by the Transportation Security Administration to screen air cargo on passenger aircraft and all-cargo aircraft in accordance with established cargo screening mandates.

(B) *GENERAL AVIATION.*—General aviation facilities, general aviation aircraft, and helicopter operations at general aviation and commercial service airports.

(C) *PERIMETER AND ACCESS CONTROL.*—Recommendations on airport perimeter security, exit lane security and technology at commercial service airports, and access control issues.

(D) *SECURITY TECHNOLOGY.*—Security technology standards and requirements, including their harmonization internationally; technology to screen passengers, passenger baggage, carry-on baggage, and cargo; and biometric technology.

(2) *RISK-BASED SECURITY.*—All subcommittees established by the Advisory Committee co-chairs shall consider risk-based security approaches in the performance of their functions that weigh optimum balance of costs and benefits in transportation security, including for passenger screening, baggage screening, air cargo security policies, and general aviation security matters.

(3) *MEETINGS AND REPORTING.*—Each subcommittee shall meet at least quarterly and submit to the Advisory Committee for inclusion in the annual report required under subsection (b)(4) information, including recommendations, regarding issues within the subcommittee.

(4) *SUBCOMMITTEE CHAIRS.*—Each subcommittee shall be co-chaired by a Government and an industry official.

(e) *SUBJECT MATTER EXPERTS.*—Each subcommittee under this section shall include subject matter experts with relevant expertise who are appointed by the respective subcommittee chairperson.

(f) *NONAPPLICABILITY OF FACA.*—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Advisory Committee and its subcommittees.

(g) *DEFINITIONS.*—In this section:

(1) *ADVISORY COMMITTEE.*—The term “Advisory Committee” means the aviation security advisory committee established under subsection (a).

(2) *ASSISTANT SECRETARY.*—The term “Assistant Secretary” means the Assistant Secretary of Homeland Security (Transportation Security Administration).

(3) *PERIMETER SECURITY.*—

(A) *IN GENERAL.*—The term “perimeter security” means procedures or systems to monitor, secure, and prevent unauthorized access to an airport, including its airfield and terminal.

(B) *INCLUSIONS.*—The term “perimeter security” includes the fence area surrounding an airport, access gates, and access controls.

