

DEPARTMENT OF JUSTICE**Office of the Attorney General****28 CFR Part 97**

[OAG 100F; AG Order No. 2640-2002]

RIN 1105-AA77

Establishment of Minimum Safety and Security Standards for Private Companies That Transport Violent Prisoners**AGENCY:** Office of the Attorney General, Department of Justice.**ACTION:** Final rule.

SUMMARY: In the Interstate Transportation of Dangerous Criminals Act of 2000 ("the Act"), Congress instructed the Department of Justice ("the Department") to promulgate regulations providing minimum safety and security standards for private companies that transport violent prisoners on behalf of State and local jurisdictions. The Act provides that the regulations shall not impose stricter standards with respect to private prisoner transport companies than are applicable to certain Department agencies that transport violent prisoners under comparable circumstances. This rule establishes minimum standards in only those areas that Congress identified in the Act by finalizing a proposed rule the Department published on this subject on December 17, 2001, at 66 FR 64934.

DATES: This final rule is effective January 27, 2003.

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SUPPLEMENTARY INFORMATION:**A. Background***What Does This Rule Establish?*

This rule establishes a limited number of minimum safety and security standards for private companies that engage in the business of transporting violent prisoners on behalf of State and local jurisdictions. The final rule requires private prisoner transport companies to establish measures designed to improve public safety by preventing escapes of violent prisoners and establishing appropriate safeguards and procedures in the event of the escape of a violent prisoner. In addition, the rule establishes minimum standards to ensure the safety of violent prisoners during transportation.

Why Is This Rule Needed?

In enacting the Interstate Transportation of Dangerous Criminals Act of 2000, Public Law 106-560 (114 Stat. 2784) (December 21, 2000) ("the Act"), Congress found that State and local jurisdictions are increasingly turning to private companies to transport their violent prisoners, and that escapes have occurred. Congress determined that minimum regulations for the private prisoner transport industry were necessary to provide protection against risks to the public that are inherent in the transportation of violent prisoners and to assure the safety of those being transported.

Does Compliance With These Regulations Mean That Private Prisoner Transport Companies Have Met All of Their Legal Obligations?

No. These regulations implement the Act and do not pre-empt any applicable Federal, State, or local law that may impose additional obligations on private prisoner transport companies or otherwise regulate the transportation of violent prisoners. For example, all Federal laws and regulations governing interstate commerce (e.g., Federal laws regulating the possession of weapons and Federal Aviation Administration or Transportation Security Administration rules and regulations governing travel on commercial aircraft) will continue to apply to private prisoner transport companies. Because these regulations implement the Act, they affect only limited aspects of a private prisoner transport company's operations. Therefore, these regulations are not intended to be model guidelines or a complete set of standards for the private prisoner transport industry. Private prisoner transport companies should be aware that compliance with these regulations will mean only that they will not be subject to the sanctions established in the Act. The regulations are not meant to prevent or discourage private prisoner transport companies from adopting additional or more stringent standards relating to the transportation of prisoners. Similarly, these regulations do not limit the authority of Federal, State, or local governments to impose additional safety requirements or impose a higher standard of care upon private companies that transport violent prisoners. The purpose of these regulations is to enhance public security and the safety of both prisoners and guards during transportation. The regulations are not intended to create a defense to any civil action, whether initiated by a unit of government or any

other party. Thus, for example, compliance with these regulations is not intended to and does not establish a defense against an allegation of negligence or breach of contract. Regardless of whether a contractual agreement establishes minimum precautions, the companies affected by these regulations will remain subject to the standard of care that is imposed by statute and common law upon their activities (or other activities of a similarly hazardous nature).

Overview of the Standards That This Rule Proposes

This final rule (1) requires that private prisoner transport companies comply with minimum standards for fingerprint-based criminal background checks and preemployment drug testing for potential employees; (2) provides minimum standards for the length and type of employee training; and (3) establishes restrictions on the number of hours that transportation employees may be on duty during a given time period. This rule also establishes the minimum standards that private prisoner transport companies must comply with for the use of restraints while transporting violent prisoners, and it establishes categories of violent offenders required to wear identifying clothing. Further, the rule establishes a minimum guard-to-prisoner ratio that must be observed while transporting violent prisoners, and requires that private prisoner transport companies comply with standards regarding employee uniforms and employee identification. In addition, the rule requires private prisoner transport companies to notify local law enforcement officials 24 hours in advance of any scheduled stops in their jurisdiction when transporting violent prisoners. In the event of the escape of a violent offender, the rule requires that the private prisoner transport company personnel immediately notify appropriate law enforcement officials in the jurisdiction where the escape occurs, as well as the governmental entity or privately run incarceration facility that contracted with the private prisoner transport company for the transport of the escaped violent prisoner. Finally, the rule requires that private prisoner transport companies adopt certain minimum standards to protect the safety of violent prisoners in accordance with applicable Federal and State law. Pursuant to section 4(c) of the Act, except for the standards regarding the categories of violent prisoners required to wear brightly colored clothing, these standards are not stricter than the standards applicable to the

United States Marshals Service (USMS), Immigration and Naturalization Service (INS), and the Federal Bureau of Prisons (BOP) when transporting violent prisoners under comparable circumstances.

Who Is Covered By This Final Rule?

This final rule only covers "private prisoner transport companies," which are defined in section 3 of the Act as "any entity, other than the United States, a State, or an inferior political subdivision of a State, which engages in the business of the transporting for compensation, individuals committed to the custody of any State or of an inferior political subdivision of a State, or any attempt thereof." Section 3 of the Act defines a "violent prisoner" as "any individual in the custody of a State or an inferior political subdivision of a State who has previously been convicted of or is currently charged with a crime of violence or any similar statute of a State or the inferior political subdivisions of a State, or any attempt thereof." The term "crime of violence" has the same meaning as in subsection 924(c)(3) of title 18, United States Code. Pursuant to this subsection, a crime of violence is an offense that is a felony and (1) has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or (2) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Certain regulations of the Department of Transportation (DOT) only apply to persons or entities operating vehicles capable of transporting a particular minimum number of passengers. In order to assist private prisoner transport companies to comply with these regulations and so as not to have one Federal agency imposing requirements that differ from the requirements of another agency, the Department refers to appropriate DOT regulations or incorporates them by reference as the Department's standards for implementing various provisions of the Act. This rule implementing Jeanna's Act covers private prisoner transport companies regardless of the number of passengers that their transport vehicle or vehicles are designed to accommodate.

Does This Rule Affect Companies That Only Transport Violent Prisoners Within the Boundaries of One State, Only Those Companies That Transport Prisoners Across State Lines, or All Private Prisoner Transport Companies?

If a company meets the definition of "private prisoner transport company" as defined in section 3(2) of the Act, the company must comply with this rule even if it does not transport prisoners across state lines. Congress passed the Act in order to impose regulations upon a previously federally unregulated industry that operates across the United States and engages in a potentially dangerous activity. In section 2 of the Act, Congress found that, "when a government entity opts to use a private prisoner transport company to move violent prisoners, then the company should be subject to regulation in order to enhance public safety." This finding by Congress indicates that the threat that it intended to remedy was that posed by an unregulated industry engaging in business that could potentially affect the safety of citizens in all states. Although the Act is officially titled the "Interstate Transportation of Dangerous Criminals Act of 2000," it is the Department's view that limiting the Act's provisions to only those companies that cross state borders would create the unacceptable result of leaving unregulated certain members of the industry that Congress clearly intended to regulate. In addition, the definition that Congress provided for "private prisoner transport company" does not require that the company engage in the interstate transportation of violent prisoners in order to be covered by the Act's provisions. The statutory direction of Congress to the Department was clear on this point. Section 4(a) of the Act states that the Department "shall promulgate regulations relating to the transportation of violent prisoners in or affecting interstate commerce." A company that only operates intrastate can affect interstate commerce in several ways (e.g., by using interstate highways, by utilizing communications systems that rely on interstate modes of communications or satellites, by transporting prisoners who generally seek to cross state lines during escapes, by relying on the law enforcement agencies of nearby states in the event of an escape, etc.). Therefore, it is the Department's view that Congress clearly contemplated that, viewed either singly or in the aggregate, private companies that engage in the commercial activity of transporting violent prisoners within a state sufficiently affect interstate

commerce to be covered by the requirements of this final rule.

What Are the Penalties for Noncompliance With the Regulations?

Section 5 of the Act states that violators shall be fined up to \$10,000 per violation and the costs of prosecution. Violators also will be responsible for making restitution to any public entity that expends funds for the purpose of apprehending any violent prisoner who escaped, in whole or in part, because of a violation of the Act. As discussed above, conduct constituting a violation of these regulations may also result in unrelated penalties as a result of criminal, administrative, or civil process pursuant to local, State, or other Federal laws.

Additional Considerations

There is considerable variation in the classification of prisoners that the Department transports and the circumstances under which those prisoners are transported. For example, unlike private prisoner transport companies, INS at times transports entire family groups (of both sexes and of different ages) who have been apprehended after illegally entering the United States. Under other circumstances, INS (along with BOP and USMS) transports offenders who have committed very violent crimes and are considered to be a high security risk. Accordingly, the Department's components that transport prisoners have developed differing standards for prisoner transport that are appropriately tailored to their roles and missions. By requiring the Department to promulgate regulations in this area, Congress appears to have at least two goals in mind. First, uniform standards for transporting prisoners serve to improve public security and the safety of the prisoners and guards during transportation. Second, by providing that the Department's regulations for the private sector not be stricter than those governing the Department's own components, Congress appears to have been concerned that the regulations not be unduly burdensome. The Department shares Congress' concerns that any regulations that the Department issues should not unduly burden private industry, especially small entities, while still addressing the problems that motivated the passage of this Act. However, regulations that fully reflect the considerable variation of the Department's own prisoner transport activities might be so complex as to be burdensome on the affected entities and, nonetheless, still not fully comply with congressional intent in certain areas.

Therefore, consistent with section 4(c) of the Act, for some of the specific requirements of the Act (e.g., that prisoners ordinarily be required to wear brightly colored clothing) the rule establishes standards somewhat more stringent than the standard the Department uses for the transport of prisoners, under certain circumstances. Moreover, for certain requirements that Congress imposed on private entities, the Department may have greater flexibility in its comparable internal procedures because the functions of Departmental agencies differ significantly from those of private prisoner transport companies, and therefore the circumstances are not comparable. For other requirements of the Act (e.g., the guard-to-prisoner ratio), the Department is establishing a one-guard-to-six-violent-prisoner ratio. In the proposed rule, the Department specifically invited comments from private prisoner transport companies, from State and local law enforcement entities, and from the general public concerning what ratio the Department should adopt in the final rule. The Department also sought comment on the potential impacts that these regulations may have on the ability of sheriffs' departments and other operators of local jails to arrange safe and efficient violent prisoner transport in response to writs or other requirements. The responses that the Department received on the proposed rule are discussed in the "Comments Received" section of this final rule.

How Does the Rule Affect the Transportation of Juveniles?

It is the Department's view that the provisions of the Act do not apply to the transportation of juveniles unless the juvenile has been charged or convicted as an adult for a crime of violence as defined in 18 U.S.C. § 924(c)(3). The Act defines a violent prisoner as one "who has previously been convicted of or is currently charged with a crime of violence." The Act gives the term "crime of violence" the same meaning as that term has in 18 U.S.C. § 924(c)(3). Section 924(c)(3) includes in its definition of "crime of violence" the requirement that it be "an offense that is a felony." This should be understood as referring to adults convicted of or facing felony criminal charges and to juveniles who previously have been convicted of or who are being prosecuted as adults for violent felony offenses. Unless juvenile offenders have been or are being tried as adults under federal law, they generally are not considered to have been "convicted" or "charged" with a "crime of violence" as

defined in 18 U.S.C. § 924(c)(3). Instead, they are considered to have been adjudicated delinquent or found guilty (or found "involved") in a juvenile delinquency proceeding, rather than convicted of a crime. E.g., *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir. 1980) ("A successful prosecution under the [Federal Juvenile Delinquency] Act results not in a conviction of a crime but rather in adjudication of a status"). Although some provisions under federal law create an exception to this general understanding by explicitly providing that a "conviction" includes certain juvenile adjudications, e.g., 18 U.S.C. § 924(e)(2)(B) ("violent felony" includes "any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for [a term exceeding one year] if committed by an adult"), neither 18 U.S.C. § 924(c)(3) nor the Act itself contain any language that would support interpreting the Act as including within its scope the transportation of juvenile offenders who have been adjudicated or who are to be tried as juveniles.

Who Was Consulted During the Development of This Rule?

In accordance with the Act, Department of Justice officials met with several representatives of the private prisoner transport industry, the American Correctional Association (ACA), and law enforcement groups, including the National Sheriffs' Association, American Jail Association, National Association of Police Organizations, and the National Association of Government Employees International Brotherhood of Police Officers.

B. Detailed Discussion of the Requirements Covering Private Prisoner Transport

1. Background Checks and Drug Testing Standards for Potential Employees

Under the final rule, potential employees of private prisoner transport companies will have to pass a preliminary fingerprint-based criminal background check prior to being hired. This background check will disqualify from employment those applicants convicted of a misdemeanor crime of domestic violence or any felony conviction. The fingerprint-based criminal background check will be performed by providing the applicant's fingerprints to the governmental agency that is contracting with the private prisoner transport company, for

submission through the state history record repository to the FBI. In the event that the private prisoner transport company is contracting with a privately run incarceration facility, and not directly with a governmental entity, the private prisoner transport company will have to make arrangements through the private incarceration facility to have the checks completed by the governmental entity ultimately requesting the transport. The background check also must include a credit report check, a physical examination, and a personal interview. Also, potential employees of private prisoner transport companies must undergo testing to detect the prior or current use of controlled substances as a condition of employment. The pre-employment drug testing must be done in accordance with applicable State law. In the event that there is no applicable State law, private prisoner transport companies must comply with the pre-employment drug testing requirements that apply to commercial drivers (*See*, 49 CFR 382.301).

2. Length and Type of Employee Training

The Act states that the Department may require that employees of private prisoner transport companies participate in up to 100 hours of preservice training relating to the transportation of prisoners. This training must be in the following areas: use of restraints, searches, use of force (including use of appropriate weapons and firearms), CPR, map reading, and defensive driving. This rule requires private prisoner transport companies to provide their employees with 100 hours of preservice training in those areas. The training of Department personnel who transport violent prisoners is notably more rigorous in length and in type than the 100-hour maximum that Congress established in the Act for private prisoner transport companies. For instance, the BOP requires any employee who assists with prisoner bus transport to have successfully completed, at a minimum, one "probationary" year of service and attended 80 hours of Institutional Familiarization, 120 hours of Introduction to Correctional Techniques, 24 hours of Basic Prisoner Transport, and 80 hours of Bus Operations Training. In addition, a BOP employee must undergo 40 hours of refresher training annually and must possess a commercial drivers license. Similarly, INS employees who transport prisoners must undergo a minimum of 196 hours of training, including 20 hours of driving-related training, 16 hours of first-aid training and CPR, 6

hours of training on conducting searches, 48 hours of training on the use of firearms, and 88 hours of training on the proper use of force. The USMS also requires that its employees who transport prisoners undergo rigorous training, including follow-up courses. As part of its required training regimen, the USMS requires over 100 hours of training in the areas of prisoner handling, prisoner searches, proper application and removal of restraints, tactical training in dealing with combative subjects, the proper escalation and de-escalation of force, vehicle operation, and firearms safety. The final rule does not address the minimum quality standards required for training programs, the need for in-service training, or instructor qualifications, although these are critical factors that enable Department agencies to transport prisoners safely.

3. Number of Hours an Employee May Be on Duty During a Given Time Period

This final rule sets requirements to ensure that drivers of private prisoner transport companies comply with Federal standards that limit the amount of time a commercial driver may be on duty during a given time period. Pursuant to 49 CFR 395.3, no driver of a commercial vehicle may drive more than 10 hours following 8 consecutive hours off duty. A commercial driver will be barred from driving if the driver has been on duty (regardless of whether the employee drove) for 15 hours following 8 consecutive hours off duty. If the motor vehicle carrier operates commercial vehicles every day of the week, a driver will be barred from driving if the driver has been on duty for 70 hours in any period of 8 consecutive days. If the motor vehicle carrier does not operate commercial vehicles every day of the week, a driver will be barred from driving if the driver has been on duty for 60 hours in any period of 7 consecutive days.

4. The Number of Personnel That Must Supervise Violent Prisoners

The Act directs the Department to develop minimum standards for the number of private prisoner transport personnel that must supervise violent prisoners. The Act states that these minimum standards shall not exceed a requirement of one agent for every six violent prisoners. In addition, the Act states that the Department must not impose stricter standards on private prisoner transport companies than are applicable, without exception, to the USMS, BOP, and INS. As a minimum standard, the Department believes that a one-agent-to-six-violent-prisoner ratio is

the most appropriate standard to protect the public from the threat of violent prisoner escapes. Although the Act states that the Department should establish a minimum guard-to-prisoner ratio, the Act also permits the Department to give private prisoner transport companies "appropriate discretion" in this area. The Department sought comment from law enforcement entities, private prisoner transport industry members, and the public as to the proper level of discretion that private prisoner transport companies should have in relation to the one-guard-to-six-violent-prisoner ratio established by this regulation. The responses that the Department received on the proposed rule are discussed in the "Comments Received" section of this preamble.

Department Practices and Procedures

When Department of Justice components transport high-risk, maximum custody, or violent offenders, the guard-to-prisoner ratios are often significantly stricter than one guard for every six prisoners. For instance, when BOP personnel transport their maximum custody inmates on escorted trips (for medical treatment or other purposes), the BOP policy guidelines require that for each such inmate, there must be three BOP staff escorts, one of whom must be a Lieutenant. The guidelines also require that additional BOP staff ride along for the duration of the trip in a follow vehicle. Because BOP policy guidelines recommend that two BOP staff ride in the follow vehicle, the guard-to-prisoner ratio in this case is five guards to one prisoner. BOP policy guidelines require that this guard-to-prisoner ratio be maintained regardless of the number of prisoners being transported. When BOP transports prisoners who do not pose the highest security risk (regardless of the purpose of the trip), the BOP still requires that two employees ride in the van or car in which the prisoners are being transported, but without a requirement for a follow vehicle. Similarly, when USMS transports prisoners in a sedan (with a maximum capacity of three prisoners), USMS guidelines require a minimum of two armed deputies, for a minimum ratio of two guards to three prisoners. If only two prisoners are being transported by the USMS in a sedan, the two-deputy requirement still applies, yielding a ratio of one guard to one prisoner. If, for any reason, a sedan or van with a safety screen is not available, USMS guidelines require a minimum of a one-guard-to-one-prisoner ratio. Similar to the BOP policy, when the USMS transports

prisoners in a van, USMS guidelines require that a minimum of two armed deputies accompany the prisoner. The resulting ratio will be at least two armed USMS deputies for 12 prisoners, yielding a ratio of one guard for six prisoners. INS guidelines require that if an INS detainee is being transported in an unsecured sedan, van, or utility vehicle by one INS officer, there is a minimum guard-to-detainee ratio of one guard for every two INS detainees. If there are more than two INS detainees being transported, there must be another INS guard present. The maximum capacity of an unsecured INS van is six detainees, resulting in a minimum possible guard-to-detainee ratio of one guard to three detainees for travel in an unsecured INS van. For secured sedans, vans, and utility vehicles, there is a minimum requirement of one officer unless the trip is over a long distance or requires stops for food or fuel. In that case, another officer would normally be required. There are instances where Department personnel must transport prisoners in buses, and in these cases, the guard-to-prisoner ratio typically diminishes. At times, this ratio may decrease to less than one guard for every six prisoners. The BOP guidelines require that three BOP staff accompany bus movements (not including the transportation of high risk offenders described above). Similarly, USMS policy mandates that a minimum of two armed deputies and a driver be used during bus transportation. Regulations of the INS require a minimum of two INS agents on each bus; however, the regulations also state that the minimum number of agents should be increased, or an escort vehicle added, if INS agents determine that the risk level of detainees warrants it. Despite any decrease in the guard-to-prisoner ratio, there are numerous Department operating procedures that are not required of private prisoner transport companies that ensure the security of the Department vehicles, officers, and prisoners. For instance, there are Department operating procedures that require buses and other vehicles to have the rear cage door locked while inmates are aboard, to be equipped with security screens that separate the driver from the prisoners, to have steel mesh over the windows and doors, to have inside door handles removed, and to be searched for contraband before and after each prisoner movement. There are extensive Department guidelines that govern the movement of prisoners to and from buses, and also govern prisoner seating arrangements once on the bus. There are additional policies and procedures for

monitoring and controlling prisoner conduct while on the bus and during stops. In addition, Department personnel have extensive training and knowledge of proven safety techniques (e.g., rules that handcuff keys are to be carried on separate key rings from vehicle ignition keys). This rule will not require that any of these measures be adopted by private prisoner transport companies.

Simplified Guard-to-Prisoner Ratio for Industry

As discussed in the preceding paragraphs, the Department's guard-to-prisoner ratio varies depending upon the nature and security classification of the offender, the escape risk, and other factors. This ratio is often significantly stricter than the maximum ratio the Act permits the Department to require for private companies. The Department's ratio is also sometimes less strict than the one-to-six ratio referred to in the Act. The Department's own excellent record in transporting prisoners safely and securely with ratios lower than one guard to six prisoners is due in large measure to the extensive training that custodial and transport personnel receive (training that greatly exceeds the maximum training that the Department is permitted to require by regulation), to the carefully designed physical configuration of the transport vehicles, and to the elaborate procedures set forth in the Department's guidelines. It should be noted that this final rule does not require that private transport companies adhere to all of the Department's own guidelines regarding prisoner transport. Compliance with such guidelines would likely be very expensive for private companies. Further, a multi-tiered approach that the Department follows for conducting its own transport of prisoners would be administratively burdensome for private companies and require them to obtain information about each prisoner (such as their escape risk or security classification) that they are not at present likely to receive from the committing authority. But in the absence of mandated compliance with all of these safeguards, private prisoner transport does not involve "comparable circumstances" that would permit use of ratios more lenient than one to six. In an effort to comply both with the statutory requirement that the guard-to-prisoner ratio not exceed one to six and the statutory requirement that the Department not impose on private companies stricter requirements than it adheres to without exception, the Department requires that private companies transporting offenders not

exceed a ratio of one agent to six violent prisoners. The Department believes that this ratio provides a security level consistent with congressional intent but without imposing an elaborate set of multi-tiered ratios, compliance with which would be complex for private entities lacking the Department's resources. The Department further believes that the circumstances under which it transports prisoners with a ratio less stringent than one to six are fully justified by the additional security precautions that the Department takes that will not be imposed upon private companies. The Department recognizes that the private prisoner transport industry may experience significant variations in the carrying capacity of vehicles used, the number of prisoners transported per trip, and the security levels of the prisoners being transported. The variation among these factors may complicate the construction of a workable guard-to-violent-offender ratio. In the proposed rule, the Department sought input from industry, law enforcement, and the public as to the factors that should guide the development of a minimum guard-to-violent-prisoner ratio. The responses that the Department received on the proposed rule are discussed in the "Comments Received" section of this final rule.

5. Employee Uniforms and Identification

The rule requires that private prisoner transport companies comply with certain minimum requirements for employee uniforms and identification. These standards require the wearing of a uniform with a badge or insignia that identifies to the prisoners and others that the employee is a transportation officer. While engaged in the transportation of violent prisoners, private prisoner transport company employees must wear a uniform that clearly identifies them as such. The uniforms should be readily distinguishable in color and style from uniforms worn by Department of Justice personnel who transport violent prisoners. The rule also directs that private prisoner transport companies require their employees to have identification credentials on their uniform that are visible at all times while they are engaged in the transportation of violent prisoners. The identification credentials must have a photograph of the employee that is at least one inch square, and a printed personal description of the employee, including the employee's name, the signature of the employee, and date of issuance. This standard is in accordance

with Department regulations that require Department employees to carry proper identification (and a badge under certain circumstances). While Department regulations require its employees to possess proper identification at all times, under the final rule, private prisoner transport company employees will only be required to possess and display proper identification while transporting violent prisoners.

6. Uniforms for Violent Prisoners

The Act directs the Department to create standards establishing categories of violent prisoners required to wear brightly colored clothing clearly identifying them as prisoners. Congress has observed that a number of violent prisoners have escaped from private prisoner transport companies while wearing civilian clothing. An escaped violent prisoner wearing civilian clothing presents a much more serious risk to the public than an escaped prisoner who is clearly identified as a prisoner. The absence of any requirement for transported prisoners to wear distinctive and brightly colored clothing has unnecessarily hindered law enforcement officers in their search for escaped prisoners. After consulting with representatives of the law enforcement community, the private prisoner transport industry, and the ACA, the Department has determined that the category of prisoners required to wear distinctive prisoner uniforms should consist of all violent prisoners covered by the Act. Therefore, this rule requires all violent prisoners transported by private prisoner transport companies to wear distinctive clothing that clearly identifies them as prisoners. As currently defined, this category is sufficiently broad to encompass those prisoners who may constitute a threat to public safety without requiring private companies to conduct intensive individualized risk assessments for each prisoner transported. This rule will not prohibit or in any way impede the ability of private prisoner transport companies to require the wearing of uniforms by some or all other prisoners. In the proposed rule, the Department specifically requested comments from interested parties as to whether it would be beneficial to broaden or narrow the category of prisoners required to wear such clothing. The Department recognizes that there are circumstances when it may be inappropriate or impractical to transport violent prisoners in distinctive brightly colored clothing (e.g., traveling on commercial aircraft, to a court appearance, or in the case of a particular physical disability).

In keeping with the intent of the Act, any exceptions to the prisoner clothing requirement will be narrow. The Department sought comment from the public, law enforcement, and industry as to what types of security or other specific considerations may warrant exceptions to the prisoner clothing requirement. Nothing in this final rule will supersede any applicable Federal Aviation Administration or Transportation Security Administration rules or regulations concerning the transportation of prisoners on commercial aircraft. The responses that the Department received on the proposed rule are discussed in the "Comments Received" section of this final rule.

7. Restraints To Be Used While Transporting Prisoners

The Department agencies that transport violent prisoners have similar policies governing the type of restraints that must be used on violent prisoners during transportation. Violent prisoners, and those defined by the BOP to be "Maximum Custody" prisoners, are to be transported in handcuffs, leg irons, and waist chains. This final rule applies this standard to private prisoner transport companies. Violent prisoners are to be transported in handcuffs, leg irons, and waist chains unless the use of all three restraints would create a serious health risk to the prisoner, or unless extenuating circumstances make the use of all three restraints impracticable. Examples of such exceptions would include the pregnancy or physical disability of a violent prisoner. In the proposed rule, the Department sought comment on additional restraint requirements. The responses received are discussed in the "Comments Received" section of this final rule.

8. Notification of Local Law Enforcement Prior to Stops Within Their Jurisdiction

When a prisoner transport vehicle is stopped, the risk of escape is greatest because prisoners may be boarding or exiting the vehicle and guards may be distracted while getting food, fueling the vehicle, or attending to medical or other emergencies. In the Act, Congress found that the private prisoner transport process can last for weeks as violent prisoners are dropped off and picked up at a network of hubs nationwide. Because each stop involves a potentially high security risk, Congress has imposed a requirement that when transporting violent prisoners, private prisoner transport companies are to notify local law enforcement officials 24

hours prior to a scheduled stop in their jurisdiction. For the purposes of this rule, a "scheduled stop" is defined as a predetermined stop at a State, local, or private correctional facility for the purpose of loading or unloading prisoners or using such facilities for overnight, meal, or restroom breaks. Scheduled stops do not include routine fuel stops or emergency stops. Notice is to be given to law enforcement officials prior to these scheduled stops to ensure that the risk of a prisoner escaping is as small as possible. There is no comparable requirement for Department agencies to provide advance notice of scheduled stops because the transporting agency is a law enforcement entity. Any emergency or other disturbance may be instantaneously reported to other law enforcement entities through the Emergency Alert System that links all BOP buses with the central office. There is no need for BOP buses to relate their location to local law enforcement because the BOP central office is able to locate the bus via the Global Positioning System that is installed on each BOP bus. The rule does not require that the use of specific technological equipment be required of private prisoner transport companies, such as the installation of a satellite tracking system that is linked to law enforcement. However, the rule requires that notice of scheduled stops be given to local law enforcement 24 hours prior to the stop.

9. Immediate Notification of Law Enforcement in the Event of an Escape

In the event of the escape of a violent prisoner, the private prisoner transport company must immediately notify appropriate law enforcement officials in the jurisdiction where the escape occurred, and also contact the governmental entity or the privately run incarceration facility that contracted with the transport company. Private prisoner transport companies should be sufficiently equipped to provide immediate notification to law enforcement in the event of a prisoner escape. Law enforcement officials must receive notification no later than 15 minutes after an escape is detected unless the company can demonstrate that extenuating circumstances necessitated a longer delay. Congress imposed this requirement because there was at least one occasion when a violent prisoner's escape from a private transport company was not reported to law enforcement until hours after the escape was detected. Such a delay placed the public at risk and irreparably harmed the ability of law enforcement to secure the area, establish roadblocks,

conduct intensive searches in the vicinity, notify the public about the possibility of danger, and identify relevant witnesses who could have aided in the capture of the prisoner. All Department agencies that transport violent offenders have guidelines that require providing notice to other law enforcement agencies in the event of a prisoner escape during transit. The USMS regulations require that prisoner escapes and attempted escapes immediately be reported to the United States Marshals Communications Center and the U.S. Marshal, Chief Deputy U.S. Marshal, or Supervisory Deputy U.S. Marshal. The United States Marshals Communications Center then notifies the Investigative Services Division and the Prisoner Services Division of the USMS. Similarly, in the event of a prisoner escape from a BOP vehicle, the BOP is required to contact the USMS and the nearest BOP institution, which then begin notifications up the chain of command as necessary. State and local law enforcement will also typically be contacted. Department agencies have adopted a uniform rule in the event of a prisoner escape that the first priority is to secure the remaining prisoners and transport them to their final destination. Under no circumstances will the supervision of the other inmates be relaxed in order to pursue an escaping inmate.

10. Safety of Violent Prisoners

Congress has determined that private prisoner transport companies must provide standards of safety for violent prisoners in accordance with applicable Federal and State law. Department agencies have implemented extensive requirements to ensure the safety of violent prisoners who are transported. In addition to the protections provided by existing State and Federal laws, the Department requires that private prisoner transport companies adopt some of the safety measures that Department agencies have adopted including: requiring safety equipment on buses (including first-aid kits); inspection and maintenance of vehicles; requirements for communications systems on vehicles; prohibitions on any form of tobacco use in vehicles; and requirements that prisoners be searched and restrained in a professional, systematic, methodical, and consistent manner. Similarly, Department agencies engaged in prisoner transport have procedures to conduct searches of vehicles and prisoners as needed to ensure that no contraband or weapons are brought onto the vehicle. To protect the safety of prisoners, Department personnel are rigorously trained in the

proper use of firearms and the appropriate use of force. Also, to protect prisoners, appropriate forms and records must be filed prior to the use of specialized restraints on a prisoner and after a strip search that occurs for reasons other than receipt of a new prisoner (this report documents the identity of the prisoner searched, date, place, time, and duration of the search, reason for the search, names of those present, and a description of any weapons, evidence, or contraband found).

B. Discussion of Various Comments Received in Response to the Proposed Requirements Covering Private Prisoner Transport

1. Background Checks and Drug Testing for Potential Employees

Several transport companies suggested that since they already conduct National Crime Information Center (NCIC) background checks on employees, it is unreasonable to require each company to conduct additional background checks to comply with the Act. They also requested that the rule allow for a discretionary period pending the background check so that employers may begin hiring and training potential employees.

The Department recognizes the need for transport companies to hire and train employees in a timely manner. However, the Act requires potential employees to pass a preliminary fingerprint-based criminal background check *prior* to employment, and these regulations conform to the Act. Therefore, it would be premature and unnecessary for companies to proceed with hiring and training employees prior to knowing the results of the background check. Further, the fact that at least one commenting private company already conducts NCIC background checks does not relieve that company or other transport companies from the responsibility to conduct the background checks required by the Act.

One commenter suggested that language be included in the final rule to address situations where a private prisoner transport company contracts directly with a privately run incarceration facility rather than a governmental entity. The Department has adopted this comment and clarified the final rule on this point.

2. Length and Type of Employee Training

There was large support in favor of a rule requiring 100 hours of pre-service training. Additionally, there were some requests to require that companies (1)

obtain commercial drivers licenses for uniformed employees, and (2) complete an advanced first aid course for uniformed employees.

The Department has no objection to private companies requiring that their drivers have commercial drivers licenses. However, the Act does not require commercial licenses and the Department does not believe it is necessary to achieving the purposes of the Act to impose a driving qualification requirement beyond that which was specified in the Act (*i.e.*, that defensive driving be included in the 100 hours of pre-service training).

A commenter asked for an exception from the pre-service requirements for employees who have graduated from a recognized law enforcement academy.

The Department understands that law enforcement academies provide much of the basic training for most law enforcement officers, and this training is similar in nature to the training required under the 100 hours of pre-service training requirement. However, the Act does not make any exception from its training requirement for individuals who may have been trained at law enforcement academies as law enforcement officers. The focus of the pre-service training prescribed by the Act is on the transportation of prisoners; a focus which might be different from that of law enforcement academies. Therefore, it is necessary to require that uniformed officers undergo 100 hours of pre-service training before they begin transporting prisoners.

3. Number of Hours an Employee May Be on Duty During a Given Time Period

One commenter requested that the Department adjust the 10-hour driving limitation to 12 hours. Further, some companies disagreed with the hours-on-duty requirement asserting that most delays occur while waiting to pick up prisoners at the detention facilities.

Pursuant to regulations of the Department of Transportation (DOT), Federal Motor Carrier Safety Administration at 49 CFR 395.3, no driver may continue to drive more than 10 hours following 8 consecutive hours off duty. The Act requires that the implementing rules shall not be more stringent than the current applicable rules and regulations concerning hours-on-duty. In promulgating this rule, the Department defers to the expertise of DOT regarding the maximum amount of time that drivers should continue to drive. Accordingly, the 10 hours following 8 consecutive hours off duty requirement set forth in DOT's regulations is being used in this rule. In addition, DOT's regulations already take

into account waiting periods, such as those referenced by some commenters, by distinguishing between driving time and waiting time. Should a delay occur in picking up a prisoner, the time the private transport company employee waits will count toward the 15 hour on-duty limitation, not the 10 hour driving limitation. The Department does not believe there is sufficient justification for deviating from DOT's regulations.

4. The Number of Personnel That Must Supervise Violent Prisoners

One commenter claimed that the guard-to-prisoner ratio is inadequate at one to six and took issue with the Department's hesitancy to impose multi-tiered ratios because "compliance * * * would be complex for private entities lacking the Department's resources." (66 FR 64938). Specifically, the commenter believed that the Act did not prohibit establishing a ratio of one to six, with an additional provision that there should never be less than two guards on duty at one time. The Department declines to adopt the commenter's suggestion that these regulations require a minimum of two guards because section 4(b)(4) of the Act requires that the ratio "shall not exceed a requirement of 1 agent for every 6 violent prisoners" and requiring a minimum of two guards would, under some circumstances, exceed the statutory maximum ratio. Another commenter requested that the ratio requirement be changed when transporting prisoners by bus to a 1 to 8 ratio. Another commenter also pointed out that federal law enforcement agencies' ratios are less strict for violent prisoner transport and that private industry standards should be the same as federal law enforcement agencies. As discussed more fully in the **SUPPLEMENTARY INFORMATION** portion of the proposed rule, the Department considered a range of options regarding the guard-to-prisoner ratio. Compliance with such guidelines would likely be burdensome and require stricter standards than the Department adheres to without exception. Although, sometimes, the Department's ratio is less strict than the one-to-six ratio referred to in the Act, the Department's own excellent record in transporting prisoners safely and securely with ratios lower than one guard to six prisoners is due in large measure to the extensive training that custodial and transport personnel receive (training that greatly exceeds the maximum training that the Department is permitted to require by regulation), to the carefully designed physical configuration of the transport vehicles, and to the elaborate

procedures set forth in the Department's guidelines.

Further, the Department continues to be of the opinion that a multi-tiered approach that the Department follows for conducting its own transport of prisoners would be administratively burdensome for private companies and require them to obtain information about each prisoner (such as their escape risk or security classification) that they are not at present likely to receive from the committing authority.

5. *Employee Uniforms and Identification*

One commenter pointed out that since there have been many impersonations of officers in illegitimate uniforms, uniforms should clearly state the name of the transport company, and not imply they are "sworn peace officers."

The rule requires that the uniforms of private prisoner transport company employees be readily distinguishable in color and style from uniforms worn by Department of Justice personnel who transport violent prisoners. Many State and local jurisdictions have parallel requirements that prohibit private security services and others from wearing uniforms too similar to those worn by State and local law enforcement officers. The Department does not believe that changes to the final rule that would impose additional requirements on private prisoner transport companies regarding the uniforms their employees wear are warranted.

Another commenter disagreed with the requirement to display personal information (name badges) on uniforms since prisoners then have access to the personal information of the employees. Employees already carry identification cards and can show their credentials to the appropriate personnel during transportation.

The rule only requires that the identification cards display a one inch square employee photograph, the employee's name, signature, description, and date of issuance. No personal information such as the employee's address, phone number, or social security number appear on the identification. Inclusion of the name on the front of the identification provides a simple means for prisoners and the general public who come in contact with the employees to identify them without providing excessive personal information.

6. *Uniforms for Violent Prisoners*

Several commenters pointed out that climate was a large factor during transportation and that uniforms should

adapt to the climate encountered during transportation (e.g., temperature, snow, rain, wind chill, etc.).

There is no reason why transporting companies cannot provide prisoners with appropriate clothing for varying climates as long as the clothing provided is consistent with the Act (brightly colored and clearly identifying them as prisoners).

One commenter requested that the uniform requirement be waived during neighboring county transportation, since changing in and out of identifiable uniforms may take longer than the actual transportation.

Since the intent of the Act requires exceptions to the clothing requirement to remain relatively narrow, the Department believes it would be contrary to the intent of the Act to waive the requirement that uniforms be worn during short distance or county-to-county transfers.

Another commenter requested that law enforcement agencies determine who violent prisoners are for private transportation companies since they may be unable to adequately determine this on their own.

The Act and regulations define violent prisoners and the Department knows of no basis for the proposition that the companies cannot apply the definition to their charges.

Another commenter disagreed with the requirement that prisoners be required to wear identifying clothing since most law enforcement agencies do not require this until after prisoners are processed and charged formally in a jurisdiction following transportation or extradition.

Again, the intent of the Act requires exceptions to the clothing requirement to remain relatively narrow, and accordingly the Department declines to modify the final rule on this point. The purpose of the Act is clearly furthered by requiring all violent prisoners to wear such clothing.

Another commenter noted that most companies already own uniforms for prisoners, and disagrees with the regulation requiring identical identifiable uniforms.

The Department has adopted this suggestion and is not including a requirement for a standardized uniform. This change allows private transport companies more flexibility to develop their own prisoner uniforms. The private companies must still follow, however, the standard of "brightly colored clothing clearly identifying them as prisoners."

Finally, one commenter noted that prisoners on commercial airlines should be transported in civilian clothing so as

not to attract undue attention from passengers.

The Department notes that the rule already recognizes that prisoner transportation via commercial aircraft is one of the narrow exceptions to the uniform requirements.

7. *Restraints To Be Used While Transporting Prisoners*

Several commenters noted that prisoner restraints during transportation are uncomfortable and cause health problems. One commenter suggested removing the waist-chain during transport.

The Department believes this determination should be placed in the hands of the prisoner transport employee, in the context of a particular prisoner and the transportation circumstances, to determine whether the waist-chain is posing a health risk and could be safely removed while still providing an appropriate level of security.

One commenter requested that prisoner restraints be removed during sleeping arrangements and for eight hours every 48 hours.

The Act contains no language or requirements concerning prisoner restraint removal, and the Department believes that to require such a policy, absent specific congressional direction, might place an undue burden on private transport companies. The Department notes, however, that private transport companies must ensure the *safety* of the prisoners they transport.

8. *Notification of Local Law Enforcement Prior to Stops Within Their Jurisdiction*

One commenter noted that most local law enforcement agencies do not provide companies a means of housing prisoners overnight during transportation and that this problem should be addressed in the new rule.

The Act does not impose any requirements on local law enforcement to provide overnight accommodations for prisoners being transported. Accordingly, this rule imposes no such requirement.

One commenter noted that schedules change during the course of transportation and the 24-hour notice requirement is too rigid.

The Department has no discretion to adopt a different notification policy than is explicitly required by the Act, and therefore the final rule makes no change from the proposed rule on this point. The Department emphasizes that the 24-hour notification requirement was designed to protect public safety

and should not be an excessive burden on private transportation companies.

One commenter noted that “predetermined” stops are too general and can be manipulated. The commenter suggests that notification should be required if a “non-predetermined” stop exceeds five hours.

A “scheduled stop” is defined as a predetermined stop at a State, local, or private correctional facility for the purpose of loading or unloading prisoners or using such facilities for overnight, meal, or restroom breaks. Scheduled stops do not include routine fuel stops or emergency stops. Notice is to be given to law enforcement officials prior to these stops to ensure that the risk of a prisoner escaping is as small as possible. The Department believes this definition is sufficiently clear while allowing necessary flexibility for transport companies. However, without imposing a rigid requirement, the Department recognizes the concerns of the commenter and encourages transport companies to provide notice to law enforcement officials for non-scheduled stops that exceed a reasonable time under the circumstances.

9. Immediate Notification of Law Enforcement in the Event of an Escape

Commenters indicated a general level of support regarding immediate notification in the event of an escape.

10. Safety of Violent Prisoners

One commenter suggested that it should be mandated that all new prisoner transport vehicles be equipped with satellite tracking systems.

The Department considered this requirement during the preparation of the proposed rule. However, such a requirement was not established by the Act and the Department declined to include such a requirement because the cost associated with such a requirement outweighed the potential benefit.

Another commenter requested that:

- (1) Vehicles should comply with General Services Administration (GSA) fleet maintenance requirements;
- (2) any incident involving the use of force by an employee should be documented in a standard format and submitted to the Department;
- (3) in the event that any prisoner develops a serious medical condition during transportation that threatens life or limb he or she must be immediately transported to the nearest hospital or health facility; and
- (4) stops during transport should be made every five hours to allow prisoners to eat and use restroom facilities.

There is no language in the Act mandating that private transportation

company vehicles comply with GSA standards for maintenance. Currently, State, local, and Federal protections against the use of force, as well as State and local safety and maintenance requirements, apply to private prisoner transport companies and their employees and should be adequate in order to provide for the safety of the prisoners being transported. A mandatory stop requirement every five hours is not enumerated in the Act and the Department declines to adopt such a policy. However, while not imposing a rigid requirement for periodic stops, the Department is amending this final rule to make clear the responsibility for private transport companies to take reasonable measures to insure the well being of prisoners in their custody.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is designed to have the lowest possible impact on businesses that transport violent prisoners while still protecting the safety of the public. This final rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 804, and it will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

By this rule, the Department is implementing the requirements of the Act, which impose minimum security and safety standards upon private companies transporting violent offenders. The Act’s requirements, as implemented by these regulations, may increase the operating costs of some of these private companies. While State and local governments are the primary entities that contract with private prisoner transport companies, this final rule does not impose any direct requirements upon State or local governments or upon their law enforcement offices. The Act requires potential private company employees to undergo a background check. Federal law does not permit dissemination of criminal history records to private employers for screening unless statutorily authorized. Because current statutory law does not grant private entities the authority to request Federal criminal history records, the private

prisoner transport companies must arrange to do so with the contracting State or local government. Therefore, to effectuate Congress’ intent, this rule suggests private prisoner transport companies arrange with the State or local law enforcement agency with which they are contracting to obtain a fingerprint-based background check of their employees or potential employees. Local law enforcement agencies routinely provide fingerprinting services for various public purposes (e.g., teacher applicants and bar examinations). If a governmental agency wishes to contract its prisoner transport obligations out to a private company, it will need to make arrangements for submitting the applicant’s fingerprints to the FBI to conduct a criminal history background check on the applicant. The governmental agency submitting the fingerprints would incur the initial financial responsibility associated with these applications. The cost of the background check is determined by individual State procedure, not Federal procedure, and thus will vary from State to State. The Department has been informed that such application fees range from \$14 to \$95. However, even assuming the highest fee, the Department does not anticipate that this requirement will have a significant financial affect on State or local entities. Because of Federal limitations upon dissemination of background information, the Department does not believe that there are other viable options that would allow private companies to meet the background investigation requirement. The Department has no evidence to indicate how much of any possible cost increases upon private businesses—from mandatory background checks or any other requirements imposed by this rule—will be passed along as price increases to the State and local jurisdictions contracting with them. However, because of the relatively small number of private prisoner transport companies and the number of people employed by these companies, the Department believes that this rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

Executive Order 12866

The Department has reviewed this rule in light of Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is a “significant regulatory action” under Executive Order 12866,

section 3(f), Regulatory Planning and Review, and, accordingly, this rule has been reviewed by the Office of Management and Budget.

In particular, the Department has assessed both the costs and benefits of this rule as required by Executive Order 12866, section 1(b)(6), and has made a reasoned determination that the benefits of this regulation justify its costs. Briefly, that assessment is as follows:

The costs that the Department considered included the costs of the various tangible items required by the Act relative to the transport of violent prisoners (*e.g.*, handcuffs, waist chains, prisoner and guard uniforms, etc.) and the various non-tangible items (*e.g.*, the pre-employment physical required by section 97.11.) Further, provisions of the Act and of these regulations impose what might be collectively described as business practices requirements. Examples are the provisions at section 97.11 (requiring a pre-employment interview), at section 97.13 (establishing maximum driving time), and at section 97.14 (establishing a guard-to-prisoner ratio).

The overriding purpose of the Act and of these regulations is to protect the public safety and welfare by preventing the escape of violent prisoners being transported by private companies or, in the event of an escape, to make a prompt re-capture more likely. Escaped violent prisoners can pose a serious danger to the lives and physical well being of individuals and of law enforcement officers and can be a risk to property (such as automobiles) stolen by them to facilitate their escape. Balanced against the costs to the public of death, personal injury, or property damage likely to result from escaped violent prisoners and the resources expended by State and local law enforcement in the re-capture of such prisoners, the burdens imposed by these regulations appear to the Department to be justified by the benefits.

Executive Order 13132

The rule only covers the business practices of private companies. This rule will not have substantial direct effects 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. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b) of Executive Order 12988, Civil Justice Reform.

Paperwork Reduction Act

This rule imposes no new information collection requirements.

Final Regulatory Flexibility Act Analysis

The Department drafted this rule in a way to minimize its impact on small businesses while meeting its intended objectives. At several places in the proposed rule, the Department specifically requested information from affected entities. This information was requested, in part, to assist the Department in determining the nature and extent of the impact the final rule will have on affected entities. Although the Department received some comments, the information it received was not sufficiently detailed to allow it to state with certainty that this rule, if promulgated, will not have the effect on small businesses of the type described in 5 U.S.C. § 605. Accordingly, the Department has prepared the following final Regulatory Flexibility Act analysis in accordance with 5 U.S.C. § 603.

A. Need For and Objectives of This Final Rule

This final rule will implement the Act, which requires the Attorney General to establish regulations imposing minimum safety and security standards on private companies engaged in transporting violent prisoners for State and local jurisdictions. The Act reflects Congress' concerns about the growing number of State and local jurisdictions that are utilizing the services of private companies as an alternative to sworn law enforcement officers when transporting violent prisoners. Congress found that violent prisoners have escaped from private transport companies and that these escapes have led to further crimes committed by the escaped prisoners as well as significant expenditures by law enforcement units attempting to capture the escapees. As a result of these findings, Congress determined that it was necessary to regulate the private prisoner transport industry in order to enhance public safety. Congress required that the Department consult with the ACA and the private prisoner transport industry in promulgating these regulations. Details concerning these consultations are set forth in the proposed rule. 66 FR 64934, 64941.

B. Description and Estimates of the Number of Small Entities Affected by This Final Rule

A "small business" is defined by the Regulatory Flexibility Act (RFA) to be the same as a "small business concern" under the Small Business Act ("SBA"), 15 U.S.C. § 32. Under the SBA, a "small business concern" is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA¹. As the demand for transporting prisoners increases, local and State governments find themselves unable to handle all their transportation needs. Therefore, these governmental entities enter into contracts with private companies to provide for the transportation of their violent prisoners.

Based upon the information available to the Department at present, there appear to be two distinct groups of businesses in the private prisoner transport industry: larger companies that contract with various jurisdictions nationwide, and smaller entities often made up of a few individuals who provide transportation for law enforcement departments on an as-needed basis. Both groups of private transport companies would be regulated by this rule and both fall under the definition of a "small business" pursuant to the RFA. The discussion in this section will first focus on the larger companies involved in transporting violent prisoners and then examine issues specific to the smaller companies.

1. Larger Private Prisoner Transport Companies

In passing the Act, Congress specifically called upon the Attorney General to consult with the ACA and the private prisoner transport industry. During these consultations, the Department learned that there are approximately 10 to 12 larger private prisoner transport companies currently operating in the United States. However, there is no public or private entity that monitors when a private prisoner transport business enters or exits the industry. Therefore, it is difficult to accurately estimate the number of industry participants. The Department has drafted this rule to have the minimum possible impact on these businesses while still complying with the intent of the Act. During the Department's consultations, it was informed that many of the minimum standards contained in this rule are

¹ See 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

already followed by the larger companies. In some instances, the larger industry participants have actually adopted more stringent internal standards than those that would be imposed by the rule. Where the rule requires companies to implement a practice not currently followed, industry opinion was taken into consideration so as to impose no greater burden than necessary.

2. Smaller Entities Engaged in the Transport of Violent Prisoners

In addition to the larger private companies that transport prisoners, the Department believes that there is a large number of smaller entities that contract with State and local authorities to transport prisoners. Although the Department does not have an exact number of smaller companies, the ACA and industry leaders estimated that 500 such entities may exist. The Department was informed that these entities are often composed of merely one or two people who enter into contracts with sheriffs' offices on an as-needed basis. It is therefore difficult to address the impact that the regulation would have on the smaller participants in the industry without knowing approximately how many of these smaller entities transport violent prisoners (and therefore would be regulated) or what their current safety and security practices are. However, the Department is concerned that these smaller companies will experience the greatest impact as a result of these regulations. For example, a minimum standard that imposes a ratio of at least one guard for every six violent prisoners might be a greater burden to a smaller entity that lacks the personnel resources of a larger company. Similarly, the need to possess a sufficient amount of specialized equipment, as required by these regulations, could create a greater economic burden on smaller entities.

3. Impact of These Regulations on Small Governmental Entities

In section 3(2) of the Act, Congress specifically exempted from the minimum standards any Federal, State, or local governmental entity engaged in the transport of violent prisoners. The rule does not regulate these entities. However, the Department is cognizant of the possibility that these regulations may place a burden on small governmental entities that contract with private prisoner transport companies. The Department therefore consulted with the National Sheriffs' Association and the American Jail Association, as well as representatives from local police departments, to gain a better

understanding of the impact this rule will have on their operations. In addition, the Department requested comments from these entities in the proposed rule and received a comment from the National Sheriffs' Association, which indicated its full support for the regulations as proposed.

C. Specific Requirements Imposed That Would Impact Private Companies

1. Standards Requiring the Use of Specialized Equipment

Some of the minimum standards established by this rule might require private companies to purchase various pieces of equipment, thereby causing an increase in expenditures. The standards regarding mandatory restraints, uniforms for agents, identification credentials for agents, and uniforms for violent prisoners fall into this category. By imposing these standards, companies that are not already in possession of these items, or not in possession of a sufficient quantity, would have to purchase them in order to satisfy the requirements of the regulations. However, after consulting with representatives from the industry, the Department believes that the rule will not have a significant economic impact on the larger entities in the private prisoner transport industry. With the exception of prisoner uniforms, all companies consulted indicated that they currently require the use of all equipment specified in this rule. The companies currently use hand-cuffs, leg chains, and waist chains, and all agents are issued uniforms and possess credentials. Therefore, this rule will not propose any new standards that require extra expenditures. Indeed, the private companies consulted by the Department indicated that, in many instances, they require more equipment than the rule requires. For example, many of the companies require "black boxes" on their restraints in order to prevent a prisoner from picking the lock. In addition, many of the companies require their agents to have Global Positioning Systems in their transport vehicles, a feature that goes well beyond the standards required by this rule. The larger companies in the industry do not currently require prisoner uniforms for all violent prisoners. This rule implements a mandatory provision of the Act that requires violent prisoners to be transported in brightly colored clothing that clearly identifies the wearer as a violent prisoner. Because there is no current policy on prisoner attire, this standard would require companies to invest in a sufficient number of prisoner uniforms. Since the

Department received no responses to its request in the proposed rule for comments on the advantages of a standardized uniform, the Department does not establish a standardized uniform in this final rule.

2. Training

This rule requires private companies to train their employees in six enumerated areas for a minimum of 100 total hours of training before the employee may transport violent prisoners. This standard might require private companies to incur the cost of training where their current practices fail to meet the standard. Companies would need to engage qualified instructors with the ability to properly train personnel. However, all of the companies consulted by the Department currently have training procedures in place, many of which are more extensive than those required by the proposed rule. Most of the companies indicated that they require firearms training equivalent to the training received by law enforcement officers. In addition, all of the companies consulted require their personnel to undergo follow-up training during the course of employment. It is therefore unlikely that the new training standards will have a significant impact on the larger industry participants.

3. Personnel

The rule requires a minimum ratio of one guard for every six violent prisoners during transport. It is possible that this standard would require companies to increase their personnel in order to meet the mandated ratio. However, most of the larger companies from which the Department received comments and other information indicated that they already impose minimum guard-to-prisoner ratios, all of which are more stringent than the one established in this rule.

4. Other Standards Imposed on Companies

Many of the minimum standards in this rule will place affirmative duties on private prisoner transport companies. The standards dealing with pre-employment background checks and drug testing, notification of local law enforcement 24 hours before scheduled stops, and immediate notification of law enforcement should an escape occur all fall into this category. Of these, only the first standard regarding conducting background checks and drug testing carries with it the possibility of significantly increased expenditures. While the notification requirements in this rule do place an affirmative duty on

the companies, they do not impose any significant economic burden on the companies. For example, § 97.20(b) requires that vehicles be equipped with a communications system capable of immediately notifying officials of an escape. This requirement could be met by something as simple as a cellular telephone. However, the Department acknowledges that not all areas have cell phone service, and therefore companies may be forced to use a more expensive alternative in those areas.

5. Impact on Smaller Entities

The Department does not have any specific information about how much of an economic impact this rule might have on the smaller industry participants in the foregoing areas: specialized equipment, training, personnel, background checking, and drug testing. However, it is reasonable to assume some aspects of this rule may have a proportionately larger economic impact upon small entities. For example, this may be the case with respect to equipment purchases where, typically, the larger the quantity purchased, the lower the per unit cost becomes. Given the inexpensive nature of handcuffs, leg irons, and waist chains, however, the additional cost burden should not be significant, especially because private prisoner transport companies are likely already to possess this equipment. With respect to the training requirements, there may be a greater impact on a small prisoner transport entity that might have only one or two employees. Such an entity might temporarily have to suspend operations while its agents undergo training. On the other hand, a larger entity with more employees might be able to continue operations while its employees rotate through training. Similarly, it might be easier for larger entities to meet the minimum guard-to-prisoner ratio than it would be for smaller entities. It should be stressed, however, that in promulgating these regulations, the Department is merely implementing the requirements of the Act and that it has attempted to do so with the least economic impact upon any entity, large or small.

D. Reporting and Recordkeeping Requirements

This rule does not impose any additional reporting or recordkeeping requirements on private prisoner transport companies or on the State and local entities that contract with them.

E. Issues Raised and Alternatives Suggested

1. Issues Raised

While consulting with representatives of the larger companies, the Department was apprised of an issue concerning the impact that this rule would have on sheriffs' departments that employ private companies to transport violent prisoners. According to information provided to the Department, many of the local law enforcement offices across the nation employ smaller entities to transport prisoners, not the major companies, when the need arises. The Department, however, cannot exempt these smaller entities from the standards because they clearly fall into the definition of "private prisoner transport company" provided by Congress in the Act. It is important to note that this rule does not impose any minimum standards on governmental entities nor on their employees engaged in official conduct. However, the Department acknowledges the possibility that these entities may be indirectly affected in contracting with private companies.

2. Alternatives Suggested

An alternative suggestion was made during a consultation meeting between the Department and industry representatives concerning whether the Department should provide more guidance as to the quality of training required by this proposed rule. It was suggested that an association, such as the ACA, should develop an accredited training program and that any final rule should require private companies to receive accreditation from such a specified program. However, under constitutional delegation principles, the Department would need to approve the standards recommended by the private entity and such standards would be subject to notice and comment. Therefore, while the Department believes that this suggestion is worth further consideration, the Department declines at this time to impose any requirements regarding the quality of training. A second alternative that was suggested pertained to the requirement that private companies notify local law enforcement when traveling through a jurisdiction. Initially, the Department intended to require 24-hour advance notification to local law enforcement of any scheduled stop within a jurisdiction, with "scheduled stop" broadly defined. However, it was suggested during the Department's consultations with law enforcement and industry leaders that the definition of "scheduled stop" should be more narrowly defined. Law enforcement

groups and industry leaders agreed that if a transport company had to provide notification for any stop, including for such things as refueling, eating, and bathroom trips, the notification requirement could pose a security threat. Therefore, the Department has construed more narrowly the definition of "scheduled stop" so that the regulations apply only to predetermined stops at State, local, or private correctional facilities for the purpose of loading or unloading prisoners, or using such facilities for overnight, meal, or restroom breaks. The Department believes such a definition is consistent with Congress' intent in using that phrase and its meaning under the Act. A third alternative was suggested that would have delayed the implementation and enforcement of these provisions to allow smaller entities a longer period in which to comply with the new regulations. The Act provides no authority for delayed implementation or delayed enforcement of the new regulations. It is the Department's view that public safety would be most effectively protected if these minimum safety and security standards are applied to all private prisoner transportation companies equally, without regard to the size of the company.

F. Conclusion

The Department believes that, given the mandatory nature of the Act, this rule meets its stated objectives while reducing as much as possible the burden imposed on private companies engaged in the private transport of violent prisoners. As statutorily required, the Department consulted with industry leaders and the ACA in developing this rule. The Department took into account their concerns, as well as the concerns of law enforcement representatives, in drafting the rule. The Department intends to maintain an ongoing dialogue with the affected industry and law enforcement entities.

List of Subjects in 28 CFR Part 97

Business and industry, Penalties, Prisoners, Transportation.

Accordingly, for the reasons set forth in the preamble, part 97 of chapter I of Title 28 of the Code of Federal Regulations is added to read as follows:

PART 97—STANDARDS FOR PRIVATE ENTITIES PROVIDING PRISONER OR DETAINEE SERVICES

Sec.

97.1 Purpose.

97.2 Definitions.

97.11 Pre-employment screening.

97.12 Employee training.

- 97.13 Maximum driving time.
- 97.14 Guard-to-prisoner ratio.
- 97.15 Employee uniforms and identification.
- 97.16 Clothing requirements for transported violent prisoners.
- 97.17 Mandatory restraints to be used while transporting violent prisoners.
- 97.18 Notification of local law enforcement prior to scheduled stops.
- 97.19 Immediate notification of local law enforcement in the event of an escape.
- 97.20 Standards to ensure the safety of violent prisoners during transport.
- 97.22 No pre-emption of federal, State, or local laws or regulations.
- 97.24 No civil defense created.
- 97.30 Enforcement.

Authority: Pub. L. 106–560, 114 Stat. 2784 (42 U.S.C. 13726b).

§ 97.1 Purpose.

This part implements the provisions of The Interstate Transportation of Dangerous Criminals Act of 2000, Public Law 106–560, 114 Stat. 2784 (42 U.S.C. 13726b) (enacted December 21, 2000) (“the Act”), to provide minimum security and safety standards for private companies that transport violent prisoners on behalf of State and local jurisdictions.

§ 97.2 Definitions.

(a) *Crime of violence.* The term “crime of violence” has the same meaning as in section 924(c)(3) of title 18, United States Code. Section 924(c)(3) states that the term crime of violence means an offense that is a felony and has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(b) *Private prisoner transport company.* The term “private prisoner transport company” (“company”) means any entity, other than the United States, a State, or an inferior political subdivision of a State, that engages in the business of transporting for compensation individuals committed to the custody of any State or of an inferior political subdivision of a State, or any attempt thereof.

(c) *Violent prisoner.* The term “violent prisoner” means any individual in the custody of a State or an inferior political subdivision of a State who has previously been convicted of or is currently charged with a crime of violence or any similar statute of a State or the inferior political subdivisions of a State, or any attempt thereof.

§ 97.11 Pre-employment screening.

Private prisoner transport companies must adopt pre-employment screening measures for all potential employees. The pre-employment screening measures must include a background check and a test for use of controlled substances. The failure of a potential employee to pass either screening measure will act as a bar to employment.

(a) *Background checks must include:*

(1) A fingerprint-based criminal background check that disqualifies persons with either a prior felony conviction or a State or Federal conviction for a misdemeanor crime of domestic violence as defined in 18 U.S.C. 921;

- (2) A Credit Report check;
- (3) A physical examination; and
- (4) A personal interview.

(b) *Testing for controlled substances.*

(1) Pre-employment testing for controlled substances must be in accordance with applicable State law.

(2) In the event that there is no applicable State law, pre-employment testing for controlled substances must be in accordance with the provisions of Department of Transportation regulations at 49 CFR 382.301 which will apply regardless of whether a private prisoner transport company is covered by Department of Transportation regulations.

(c) The criminal background check references in paragraph (a)(1) of this section may not be submitted directly to the FBI or any other Federal agency. The private prisoner transport companies must arrange the procedures for accomplishing the criminal background checks with their contracting governmental agencies. In the event that the private prisoner transport company is contracting with a privately run incarceration facility, and not directly with a governmental entity, the private prisoner transport company will have to make arrangements through the private incarceration facility to have the checks completed by the governmental entity ultimately requesting the transport.

§ 97.12 Employee training.

Private prisoner transport companies must require the completion of a minimum of 100 hours of employee training before an employee may transport violent prisoners. Training must include instruction in each of these six areas:

- (a) Use of restraints;
- (b) Searches of prisoners;
- (c) Use of force, including use of appropriate weapons and firearms;
- (d) Cardiopulmonary resuscitation (CPR);

(e) Map reading; and

(f) Defensive driving.

§ 97.13 Maximum driving time.

Companies covered under this part must adhere to the maximum driving time provisions applicable to commercial motor vehicle operators, as set forth in Department of Transportation regulations at 49 CFR 395.3 which will apply regardless of whether a private prisoner transport company is covered by Department of Transportation regulations.

§ 97.14 Guard-to-prisoner ratio.

Companies covered under this part must adhere to certain minimum standards with respect to the number of employees required to monitor violent prisoners during transportation. Private prisoner transport companies must ensure that at least one guard be on duty for every six violent prisoners transported. This requirement does not preclude a contracting entity from establishing more stringent guard-to-prisoner ratios.

§ 97.15 Employee uniforms and identification.

(a) *Employee uniforms.* Uniforms used by private prisoner transport companies must meet the following requirements:

(1) Uniforms must be readily distinguishable in style and color from official uniforms worn by United States Department of Justice employees who transport violent offenders;

(2) Uniforms must prominently feature a badge or insignia that identifies the employee as a prisoner transportation employee; and

(3) Uniforms must be worn at all times while the employee is engaged in the transportation of violent prisoners.

(b) *Employee identification.* Identification utilized by private prisoner transport companies must meet the following requirements:

(1) The identification credentials must clearly identify the employee as a transportation employee. The credentials must have a photograph of the employee that is at least one inch square, a printed personal description of the employee including the employee's name, the signature of the employee, and date of issuance; and

(2) The employee must display proper identification credentials on his or her uniform and ensure that the identification is visible at all times during the transportation of violent prisoners.

§ 97.16 Clothing requirements for transported violent prisoners.

Companies covered under this part must ensure that all violent prisoners they transport are clothed in brightly colored clothing that clearly identifies them as violent prisoners, unless security or other specific considerations make such a requirement inappropriate.

§ 97.17 Mandatory restraints to be used while transporting violent prisoners.

Companies covered under this part must, at a minimum, require that violent prisoners be transported wearing handcuffs, leg irons, and waist chains unless the use of all three restraints would create a serious health risk to the prisoner, or extenuating circumstances (such as pregnancy or physical disability) make the use of all three restraints impracticable.

§ 97.18 Notification of local law enforcement prior to scheduled stops.

When transporting violent prisoners, private prisoner transport companies are required to notify local law enforcement officials 24 hours in advance of any scheduled stops in their jurisdiction. For the purposes of this part, a scheduled stop is defined as a predetermined stop at a State, local, or private correctional facility for the purpose of loading or unloading prisoners or using such facilities for overnight, meal, or restroom breaks. Scheduled stops do not include routine fuel stops or emergency stops.

§ 97.19 Immediate notification of local law enforcement in the event of an escape.

Private prisoner transport companies must be sufficiently equipped to provide immediate notification to law enforcement in the event of a prisoner escape. Law enforcement officials must receive notification no later than 15 minutes after an escape is detected unless the company can demonstrate that extenuating circumstances necessitated a longer delay. In the event of the escape of a violent prisoner, a private prisoner transport company must:

- (a) Ensure the safety and security of the remaining prisoners;
- (b) Provide notification within 15 minutes to the appropriate State and local law enforcement officials;
- (c) Provide notification as soon as practicable to the governmental entity or the privately run incarceration facility that contracted with the transport company; and
- (d) Provide complete descriptions of the escapee and the circumstances surrounding the escape to State and

local law enforcement officials if needed.

§ 97.20 Standards to ensure the safety of violent prisoners during transport.

Companies covered under this section must comply with applicable State and federal laws that govern the safety of violent prisoners during transport. In addition, companies covered under this section are to ensure that:

- (a) Protective measures are in place to ensure that all vehicles are safe and well-maintained;
- (b) Vehicles are equipped with efficient communications systems that are capable of immediately notifying State and local law enforcement officials in the event of a prisoner escape;
- (c) Policies, practices, and procedures are in effect to ensure the health and physical safety of the prisoners during transport, including a first-aid kit and employees who are qualified to dispense medications and administer CPR and emergency first-aid;
- (d) Policies, practices, and procedures are in effect to prohibit the mistreatment of prisoners, including prohibitions against covering a prisoner's mouth with tape, the use of excessive force, and sexual misconduct;
- (e) Policies, practices, and procedures are in effect to ensure that juvenile prisoners are separated from adult prisoners during transportation, where practicable;
- (f) Policies, practices, and procedures are in effect to ensure that female prisoners are separated from male prisoners during transportation, where practicable;
- (g) Policies, practices, and procedures are in effect to ensure that female guards are on duty to supervise the transportation of female violent prisoners, where practicable;
- (h) Staff are well trained in the handling and restraint of prisoners, including the proper use of firearms and other restraint devices, and have received specialized training in the area of sexual harassment; and
- (i) Private transport companies are responsible for taking reasonable measures to insure the well being of the prisoners in their custody including, but not limited to, necessary stops for restroom use and meals, proper heating and ventilation of the transport vehicle, climate-appropriate uniforms, and prohibitions on the use of tobacco, in any form, in the transport vehicle.

(a) Policies, practices, and procedures are in effect to ensure that female prisoners are separated from male prisoners during transportation, where practicable;

(b) Policies, practices, and procedures are in effect to ensure that female guards are on duty to supervise the transportation of female violent prisoners, where practicable;

(c) Policies, practices, and procedures are in effect to ensure that juvenile prisoners are separated from adult prisoners during transportation, where practicable;

§ 97.22 No pre-emption of federal, State, or local laws or regulations.

The regulations in this part implement the Act and do not pre-empt

any applicable federal, State, or local law that may impose additional obligations on private prisoner transport companies or otherwise regulate the transportation of violent prisoners. All federal laws and regulations governing interstate commerce will continue to apply to private prisoner transport companies including, but not limited to: federal laws regulating the possession of weapons, Federal Aviation Administration or Transportation Security Administration rules and regulations governing travel on commercial aircraft, and all applicable federal, State, or local motor carrier regulations. The regulations in this part in no way pre-empt, displace, or affect the authority of States, local governments, or other federal agencies to address these issues.

§ 97.24 No civil defense created.

The regulations in this part on private prisoner transport companies are not intended to create a defense to any civil action, whether initiated by a unit of government or any other party. Compliance with the regulations in this part is not intended to and does not establish a defense against an allegation of negligence or breach of contract. Regardless of whether a contractual agreement establishes minimum precautions, the companies affected by the regulations in this part will remain subject to the standards of care that are imposed by constitutional, statutory, and common law upon their activities (or other activities of a similarly hazardous nature).

§ 97.30 Enforcement.

Any person who is found in violation of the regulations in this part will:

- (a) Be liable to the United States for a civil penalty in an amount not to exceed \$10,000 for each violation;
- (b) Be liable to the United States for the costs of prosecution; and

(c) Make restitution to any entity of the United States, of a State, or of an inferior political subdivision of a State, that expends funds for the purpose of apprehending any violent prisoner who escapes from a prisoner transport company as the result, in whole or in part, of a violation of the regulations in this part promulgated pursuant to the Act.

Dated: December 19, 2002.

John Ashcroft,

Attorney General.

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