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FROM ADIZ TO SFRA: THE FAA'S COMPLIANCE WITH ADMINISTRATIVE PROCEDURES TO CODIFY WASHINGTON, D.C. FLIGHT RESTRICTIONS

MICHELE S. SHEETS*

I. INTRODUCTION

IMAGINE THAT YOU are a pilot flying your privately owned Cessna along the eastern seaboard of the United States on a mid-afternoon pleasure flight. Or, imagine that you are flying your Cessna for business, carrying goods from one place to the next. You know you are approaching the Washington, D.C. area, and you know that certain flight restrictions are in effect, but you do not know exactly what you need to do to fly over metropolitan D.C. Should you contact air traffic control? Should you have filed a flight plan? What are the specific procedures you must follow? Suddenly, the thought of all the restrictions, regulations, and paperwork seems just as threatening as the thought of being intercepted, and possibly shot down, by the F-16 that will surely be sent for you. Tired and annoyed by the thought of complying with all sorts of procedures, you turn your Cessna around and head home.

Now imagine that you are a federal employee charged with guarding the lives of Americans by preventing and combating terrorism and maintaining safety in the skies. While combating terrorism is not the primary thrust of your job, maintaining airspace safety is a significant function, and you take it very seriously. People begin to scurry around you, and you catch word that an aircraft has penetrated the restricted airspace in the nation's capital. The aircraft is unidentified and has made no attempt to contact air traffic control. A Blackhawk and two F-16s have been sent to intercept the aircraft. Your heart plummets

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into your stomach as you wonder whether we are facing another terrorist attack. You hope that the aircraft is only another pilot who did not comply with flight restrictions in the D.C. area.

Flight restrictions around Washington, D.C. sprouted up in the aftermath of September 11 and after the United States sent troops to the Middle East. In August 2005, the Federal Aviation Administration ("FAA") sought to codify the major flight restrictions over Washington, D.C. by issuing the Washington, DC Metropolitan Area Special Flight Rules Area ("DC SFRA") Notice of Proposed Rule Making ("NPRM").¹ The influential Aircraft Owners and Pilots Association ("AOPA") responded to the NPRM, claiming the FAA did not meet the applicable legal standards in issuing the NPRM. But as will be shown, the NPRM is not arbitrary and capricious, meets the regulatory flexibility requirements, provides proper alternatives, and contains an adequate cost-benefit analysis.

This comment will first briefly examine security measures currently in place in the Washington, D.C. area and the logistics of the proposed DC SFRA. Second, the proposed rule will be examined in light of the "arbitrary and capricious" standard set forth in the Administrative Procedure Act. Third, the regulatory flexibility analysis will be examined against the backdrop of recent amendments to the Regulator Flexibility Act. Fourth, the alternatives provided by the FAA will be examined against suggestions from the AOPA. Fifth, the cost-benefit analysis of the proposed rule required under Executive Order 12,866 will be scrutinized. Finally, the conclusion will reiterate that the proposed rule meets the applicable legal standards.

II. WASHINGTON, D.C. FLIGHT RESTRICTIONS

Immediately following September 11, 2001, the FAA halted air traffic in the United States National Airspace System ("NAS"), with the exception of law enforcement, emergency, and military aircraft.² Even as the flight restrictions were gradually lifted, the FAA retained the authority to issue flight restric-

¹ Washington, DC Metropolitan Area Special Flight Rules Area, 70 Fed. Reg. 45,250 (proposed Aug. 4, 2005) (to be codified at 14 C.F.R. pt. 93) [hereinafter DC SFRA NPRM].

² *Id.* at 45,251.

tions under Title 14 of the Code of Federal Regulations.³ Such flight restrictions are issued as Notices to Airmen (“NOTAMs”).⁴

A. SPECIAL FEDERAL AVIATION REGULATION 94

Until February 2005, three flight restrictions guarded the Washington, D.C. area. The first, Special Federal Aviation Regulation 94 (“SFAR 94”), required FAA approval of the safety procedures followed by the Maryland Three airports (College Park Airport, Potomac Airfield, and Washington Executive/Hyde Field), and required aircraft operators to comply with all procedures and meet certain background criteria.⁵ The safety procedures demanded of these airports included requiring the flight crew to present a current airman certificate, a current medical certificate, a government issued form of identification, and a description of each aircraft the operator intended to operate to or from the airport, including the make, model, and registration number.⁶ SFAR 94 also required flight crews to pass a background check, attend a briefing session regarding airport security procedures, have no more than one violation of an air restriction, be authorized to fly to and from the airport, and fly an authorized aircraft.⁷ Pilots were required to file a flight plan to operate in the D.C. area, stay in radio contact with air traffic control (“ATC”), fly an aircraft with an operable transponder and use a discrete transponder code, follow the instructions of ATC while in flight, secure the aircraft upon arrival, and comply with additional information.⁸ While SFAR 94 expired on February 13, 2005, the Transportation Security Administration

³ *Id.*

⁴ FED. AVIATION ADMIN., AERONAUTICAL INFORMATIONAL MANUAL § 3-5-3(a) (2004). NOTAMs can be found on the FAA website, <http://www.faa.gov>.

⁵ 14 C.F.R. pt. 91, SFAR No. 94 (2005).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* A discrete transponder code is issued to an aircraft by ATC before take-off. Discrete transponder codes are required to fly “instrument flight rules” (“IFR”). IFR is required in certain weather conditions and in specified airspace, such as the DC Air Defense Identification Zone. The opposite of IFR is “visual flight rules” (“VFR”). Neither a discrete transponder code nor a flight plan is needed to fly VFR, but the weather must meet certain conditions to allow for VFR flight. Telephone Interview with Sean C. Boynton, Captain, United States Marine Corps, USMC CH-46E helicopter pilot, in Beaufort, S.C. (Jan. 23, 2006) [hereinafter Boynton interview].

("TSA") promulgated the same airport security measures, which are currently in effect.⁹

B. WASHINGTON, DC METROPOLITAN AREA FLIGHT
RESTRICTED ZONE

The second flight restriction is the Washington, DC Metropolitan Area Flight Restricted Zone ("DC FRZ"). The DC FRZ extends to a fifteen-nautical mile radius around the heart of Washington, D.C. and restricts air traffic, except for operations of people required to carry a certificate to fly in the area under FAA regulations.¹⁰ The implementation of the DC FRZ resulted in the loss of the north-south route from Reagan National to Dulles International Airports and narrowed the passageway extending east-west from Reagan National to Baltimore/Washington Airports.¹¹

C. WASHINGTON, DC AIR DEFENSE IDENTIFICATION ZONE

The third flight restriction in the Washington, D.C. area is the Air Defense Identification Zone ("DC ADIZ"). Issued in February 2003, the DC ADIZ encompasses the DC FRZ and extends outward from the FRZ core. Both the DC FRZ and the DC ADIZ were designed to protect the D.C. area from airborne terrorist attacks after consideration of factors such as "the speed of likely suspect aircraft, minimum launch time and the speed of intercept aircraft."¹² The area included in the DC ADIZ follows the Washington Tri-area Class B airspace.¹³ The DC ADIZ "cover[s]

⁹ DC SFRA NPRM, *supra* note 1, at 45,251. See also Maryland Three Airports: Enhanced Security Procedures for Operations at Certain Airports in the Washington, DC Metropolitan Area Flight Restricted Zone, 49 C.F.R. pt. 1562 (2005).

¹⁰ DC SFRA NPRM, *supra* note 1, at 42,252.

¹¹ Michael W. Brown, *TFR Airspace Obstacles and TFR Trivia, A Pilot's Guide to Understanding Restrictions in Today's National Airspace System*, FAA AVIATION NEWS, Nov./Dec. 2003, at 4.

¹² *Id.*

¹³ *Id.* The NAS is divided into classes, and each class has different requirements that pilots must fulfill to fly in the airspace. Class G airspace, for example, is uncontrolled airspace and often does not require pilots to file a flight plan with ATC. Class B Airspace is found around the busiest airports in the country. To fly in Class B airspace, the operator must file a flight plan with ATC and stay in radio communication with ATC. Class B Airspace stretches from the surface of the earth to 10,000 feet mean sea level ("MSL"). The radius of the airspace varies, often with the largest radius at the highest altitude, and becoming increasingly narrow toward the earth's surface. It has been described as an "upside-down wedding cake." FED. AVIATION ADMIN., U.S. DEP'T OF TRANSP., U.S. AIRSPACE CLASSES (AIRSPACE AT A GLANCE CARD), available at http://www.asy.faa.gov/safety_prod-

all the airspace from the ground up to 18,000 feet that falls within [30] miles of Washington Reagan (DCA), within [30] miles of Washington Dulles (IAD), and within [30] miles of Baltimore Washington (BWI) airport.”¹⁴

Pilots are subject to numerous requirements when flying in the DC ADIZ. First, the aircraft must have an operable two-way radio with which the pilot can stay in contact with ATC for the duration of his flight in the DC ADIZ.¹⁵ The aircraft must have “an operating transponder with automatic altitude reporting capability as specified in 14 CFR § 91.215.”¹⁶ Third, pilots intending to fly into the DC ADIZ must file a flight plan with ATC, must activate that flight plan before flying into the DC ADIZ, and must close the flight plan after departing from the DC ADIZ.¹⁷ Fourth, the aircraft must obtain a discrete transponder code.¹⁸ Fifth, the aircraft must receive clearance from ATC to fly into the Class B, C, or D airspace that is within the DC ADIZ.¹⁹ Sixth, the flight crew must maintain two-way radio communications with ATC the entire time they are flying within the DC ADIZ.²⁰

The Department of Homeland Security (“DHS”), the Department of Defense (“DOD”), and the FAA have worked together to implement this plan in an effort to guard the airspace in the United States against further terrorist attacks.²¹ Air defense identification zones have been used previously as a defense mea-

ucts/airspaceclass.htm (last visited Oct. 20, 2006) [hereinafter *Airspace at a Glance*].

¹⁴ Comment from Aircraft Owners and Pilots Association to Ellen Crum, U.S. Dep’t of Transp. (Nov. 2, 2005) [hereinafter *AOPA Comment*]. The AOPA is a not-for-profit organization that has advocated the interests of general aviation pilots and aircraft owners since 1939. History of AOPA, <http://www.aopa.org/info/history.html> (last visited Jan. 20, 2006).

¹⁵ NOTAM 3/2126 pt. 3 (issued Mar. 18, 2003).

¹⁶ *Id.*

¹⁷ *Id.* at pt. 4.

¹⁸ *Id.*

¹⁹ *Id.* at pt. 3. Normally when flying in Class C or Class D airspace, instead of receiving ATC clearance, the pilot only needs to contact ATC before penetrating the airspace and remain in contact while in the airspace. Class C airspace is found surrounding airports with an operational control tower, that are serviced by radar approach control, and that support a specified number of IFR operations or passenger enplanements. Class D airspace is found around airports with an operation control tower. Class E airspace is controlled airspace that is not Class A, Class B, Class C, or Class D. There are generally no entry requirements to penetrate Class E airspace. *Airspace at a Glance*, *supra* note 13.

²⁰ NOTAM 3/2126 pt. 3.

²¹ DC SFRA NPRM, *supra* note 1, at 45,252.

sure, for example, during the Cold War as a defense against the Soviet Union.²² If an unknown aircraft came into an identification zone and could not be identified by radio interrogation, a military aircraft would intercept the unknown aircraft in an effort to identify it.²³ Today, ADIZs guard other areas of airspace in the country, in addition to Washington, D.C., such as the coastal borders of the United States, Alaska, Hawaii, and Guam.²⁴

The FAA and other federal agencies take violations of flight restrictions very seriously. The success of any flight restriction in the D.C. area depends upon the cooperation of numerous federal agencies. When an emergency situation arises, government action is collectively taken by the National Capital Region Coordination Center ("NCRCC"), which includes the FAA, the Secret Service, the Capitol Police, the Customs and Border Protection, the DOD, and the TSA.²⁵ For example, on May 11, 2005, a single-engine Cessna entered the DC ADIZ about forty miles north of DCA.²⁶ The aircraft was not squawking a discrete transponder code, the pilot had not contacted ATC, and no one had filed a flight plan for the aircraft.²⁷ The plane was not considered a security threat until it turned southward, heading directly for the DC FRZ.²⁸ The FAA contacted the Potomac Consolidated Terminal Radar Approach Control ("TRACON") ATC facility, which confirmed the aircraft was not in compliance with DC ADIZ procedure.²⁹ The Customs and Border Protection Office of Marine Operations ("AMO") acted first, launching a Black Hawk helicopter and Citation jet.³⁰ Two F-16s were also sent after the aircraft.³¹ The Black Hawk intercepted the aircraft first but could not communicate with it, leading the DOD to order the F-16s to use flares to alert the pilot.³² The aircraft

²² AOPA Comment, *supra* note 14, at 5.

²³ *Id.* at 5-6.

²⁴ Brown, *supra* note 11, at 4.

²⁵ *General Aviation Security for the Capitol Area: Hearing Before the S. Comm. on Commerce, Science & Transp.*, 109th Cong. 2 (2005) (statement of Jonathan Fleming, Chief Operating Officer of the TSA) [hereinafter *Senate Hearing*].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 3.

²⁹ *Id.* at 4 (statement of Michael Cirillo, Vice President for System Operation of the Air Traffic Organization at the FAA).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

finally made contact with the AMO Citation jet, and the pilots were instructed to follow the Black Hawk and the F-16s to Frederick, Maryland for landing.³³ Ultimately, one of the pilots lost his FAA license as a result of his “inability to navigate adequately, his lack of knowledge of how to respond to an intercept, [and] his failure to communicate with air traffic control”³⁴

D. REQUIREMENTS OF THE PROPOSED WASHINGTON, DC METROPOLITAN AREA SPECIAL FLIGHT RULES AREA

In August 2005, the FAA proposed to codify the expired SFAR 94 and the current DC ADIZ and DC FRZ via the DC SFRA, making these restrictions permanent fixtures in the national airspace system.³⁵ In its summary, the FAA stated the following:

The FAA purposes to codify current flight restrictions for certain aircraft operations in the Washington, DC Metropolitan Area. This action is necessary because of the ongoing threat of terrorist attacks. The FAA intends by this action to help the Department of Homeland Security and the Department of Defense protect national assets in the National Capital region.³⁶

While operating in the DC SFRA, aircraft would be subject to the same requirements now in place for the DC ADIZ, listed above.³⁷ The FAA would also retain the more rigid flight restrictions in the current DC FRZ.³⁸ Part 121 aircraft,³⁹ DOD law enforcement aircraft, and aeromedical aircraft could continue to operate in the DC FRZ but would have to remain in continuous contact with ATC.⁴⁰ The former SFAR 94 would be incorporated by requiring flight communication for aircraft operating from the Maryland Three airports, including the requirements of filing a flight plan, maintaining two-way radio communications, and abiding by transponder procedures.⁴¹ Special procedures would be implemented for two area airports—Bay Bridge and Kentmorr—that would allow pilots to bypass the flight plan

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ DC SFRA NPRM, *supra* note 1, at 45,251.

³⁶ *Id.* at 45,252.

³⁷ *Id.* at 45,253.

³⁸ *Id.* at 45,252.

³⁹ “Part 121” are those pilots and employees carrying a certification to fly in the DC FRZ, and are defined in 14 C.F.R. § 121.

⁴⁰ DC SFRA NPRM, *supra* note 1, at 45,252.

⁴¹ *Id.* at 45,254.

requirement when flying into or out of either airport, as long as the aircraft maintained a certain altitude, followed a certain route, and displayed a certain ATC-assigned transponder code.⁴² Pilots departing from fringe airports (those that are near the outer boundary of the DC SFRA) would not have to file a flight plan or maintain two-way radio contact with ATC if they displayed transponder code 1205 and exited the SFRA by the most direct route.⁴³ Finally, the proposal also seeks to designate the airspace over the D.C. metropolitan area as "National Defense Airspace."⁴⁴

Consequences for those who fail to adhere to the DC SFRA procedures would include criminal penalties such as a fine or imprisonment for willfully violating the DC SFRA procedures.⁴⁵ The FAA could also take administrative action against pilots who violate the DC SFRA by revoking their pilot certificate and/or imposing civil penalties.⁴⁶ Additionally, unidentified aircraft could be subject to direct deadly force if the aircraft is seen as an "imminent security threat."⁴⁷

E. AOPA OPPOSITION TO THE DC SFRA

The AOPA filed a response to the DC SFRA NPRM in early November 2005, listing numerous objections to making the DC SFRA permanent.⁴⁸ First, the AOPA implied that the DC SFRA, if implemented, would be arbitrary and capricious under the Administrative Procedure Act ("APA").⁴⁹ Second, the AOPA questioned the extent of the regulatory flexibility analysis conducted by the FAA.⁵⁰ Third, the AOPA criticized the alternatives to the DC SFRA proposed, and ultimately rejected, by the FAA.⁵¹ Finally, the AOPA alleged the FAA's cost-benefit analysis conducted under Executive Order 12,866 did not consider all relevant factors.⁵²

⁴² *Id.* The transponder code for Bay Bridge Airport would be 1227, and the transponder code for Kentmorr Airport would be 1233. *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 45,253.

⁴⁵ *Id.*; see also 49 U.S.C.A. § 46307 (West 2005).

⁴⁶ DC SFRA NPRM, *supra* note 1, at 45,253.

⁴⁷ *Id.*

⁴⁸ AOPA Comment, *supra* note 14.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

III. IS THE DC SFRA "ARBITRARY AND CAPRICIOUS" UNDER THE ADMINISTRATIVE PROCEDURE ACT?

When Congress passes a law, the administrative agency charged with implementing the rule will often promulgate rules and regulations for the public to follow in order to realize Congress's wishes. Such rulemaking is governed by the APA.⁵³ Generally, agencies are required to publish an NPRM in the Federal Register and should provide "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."⁵⁴

A. THE ARBITRARY AND CAPRICIOUS STANDARD

If challenged, a court will review an agency rule under the "arbitrary and capricious" standard.⁵⁵ This test depends on factors such as the magnitude of the agency's rule and the credibility of the agency's decision.⁵⁶ It is necessary, however, for agencies to demonstrate to the court that their decision was a logical conclusion based on credible information, including an examination of alternative means of regulation.⁵⁷ "An agency must satisfy the court that it has considered all pertinent dimensions of the matter before it and must explain its resolution of contested questions in a reasoned way."⁵⁸

The AOPA compared the DC SFRA to *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.* to illustrate the arbitrary and capricious standard. There, Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, which required the Secretary of Transportation to promulgate motor safety standards in an effort to reduce the number of accidents and deaths from highway traffic

⁵³ See generally Administrative Procedure Act, 5 U.S.C.A. § 551 (West 2005).

⁵⁴ *Id.* § 553(b)(1)-(3). The comment period originally closed on November 2, 2005, but the FAA extended the deadline until February 6, 2006. Washington, DC Special Flight Rules Area; Reopening of Comment Period and Intent to Hold Public Meeting, 70 Fed. Reg. 67,388 (proposed Nov. 7, 2005) (to be codified at 14 C.F.R. pt. 93).

⁵⁵ 5 U.S.C. § 706(2)(A).

⁵⁶ M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1414 (2004).

⁵⁷ *Id.* at 1415.

⁵⁸ *Id.* at 1428.

accidents.⁵⁹ The Department of Transportation ("DOT") originally issued an order requiring the installation of seatbelts in all vehicles in 1967, but through the years the rule underwent numerous modifications until 1981, when the National Highway Traffic Safety Administration ("NHTSA") rescinded the safety standard requiring passive restraint systems (seatbelts that must be engaged by the passenger or driver and airbags) to be put in automobiles.⁶⁰ The NHTSA maintained that the safety benefits found in the 1960s that had prompted a restraint safety standard were no longer evident.⁶¹ Since automobile manufacturers planned to use automatic seatbelts in ninety-nine percent of new automobiles, leaving only one percent of automobiles with airbags, the benefits of airbags would remain untapped.⁶² The unrealized benefits of airbags, in conjunction with the finding that the belts that manufacturers planned to use could be detached and remain so while driving, led the NHTSA to determine that there was no longer a reliable basis demonstrating the safety impact of passive restraints.⁶³ Also, NHTSA estimated that a mandatory automatic restraint system would cost the automobile industry \$1 billion and was unsure about the sufficiency of the system, leading to a potential public perception of the regulation as wasteful.⁶⁴

⁵⁹ *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983).

⁶⁰ *Id.* at 34-38. Soon after the initial requirement that seatbelts be installed in all vehicles (promulgated under Standard 208), the DOT realized that motorists were not wearing seatbelts, so traffic injury rates had not decreased. *Id.* at 34. In 1969, the DOT proposed a requirement of passive restraints (automatic seatbelts or airbags), and by 1972 the DOT required passive restraints for drivers and front seat passengers in all vehicles manufactured after August 15, 1975. *Id.* at 35. For vehicles manufactured from August 1973 until the new standard came into effect in August 1975, manufacturers had the option of using automatic belts and airbags, or of using a lap and shoulder belt with an "ignition interlock," which prevented the car from starting until the seatbelts were engaged. *Id.* Many car manufacturers chose the ignition interlock, but public outcry led Congress to amend the enabling legislation to preclude ignition interlock or continual buzzing as a means to satisfy safety standards. *Id.* at 36. Leadership turnover in the DOT eventually led to Modified Standard 208, under which passive restraint systems (either airbags or automatic belts) would be phased into all cars beginning in 1982. *Id.* at 37. Even though success was reported from those vehicles that implemented passive restraints, in 1981 Modified Standard 208 was delayed a year due to economic hardships in the automobile manufacturing industry. *Id.* at 38. Finally Modified Standard 208 was completely rescinded. *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 38-39.

⁶⁴ *Id.* at 39.

The Court found rescission of the passive restraint system to be arbitrary and capricious because NHTSA did not consider mandatory airbags in automobiles in response to the industry's intent to install detachable seatbelts.⁶⁵ The Court determined that questions about the benefits of detachable belts did not detract from the lifesaving capabilities of airbags.⁶⁶ In addition, the Court noted that the enabling act aimed to reduce traffic injuries and fatalities, and although seatbelts could not achieve such a result, the NHTSA had no basis for failing to require the installation of airbags.⁶⁷ Further, industry resistance to airbags did not justify a decision by NHTSA to rescind the safety standard that allowed for airbag installation as a means of achieving fewer traffic injuries and fatalities.⁶⁸ In short, because early findings indicated airbags could effectively reduce traffic injuries and fatalities, dismissing the option of airbag installation to meet safety concerns by rescinding Modified Standard 208 in its entirety was not a reasoned judgment on the part of NHTSA.⁶⁹

The Court also considered the other ramification of rescinding Modified Standard 208—no longer requiring automatic seatbelts in new automobiles. Because automobile manufacturers planned to install detachable seatbelts, NHTSA could not foresee even a five percent increase in the use of seatbelts.⁷⁰ The Court noted that “[re]scission of the passive restraint requirement would not be arbitrary and capricious simply because there was no evidence in direct support of the agency’s conclusion.”⁷¹ But in this case, the Court found NHTSA’s evidence to be insufficient. First, the safety benefits resulting from seatbelt usage were unquestionable.⁷² Second, NHTSA produced no evidence showing that detachable seatbelts would not be used by motorists despite findings in the record revealing twice as many drivers used detachable automatic seatbelts as used manual seatbelts.⁷³ While the NHTSA believed the users were atypical and that ignition interlocks

⁶⁵ *Id.* at 46.

⁶⁶ *Id.* at 47.

⁶⁷ *Id.* at 48.

⁶⁸ *Id.* at 49.

⁶⁹ *Id.* at 51.

⁷⁰ *Id.* The circuit court, however, concluded that the evidence did not adequately demonstrate that potential increased seatbelt usage would not justify the cost of Modified Standard 208. *Id.*

⁷¹ *Id.* at 52.

⁷² *Id.*

⁷³ *Id.*

(buzzing sounds or locking of the engine until the seatbelt is engaged) skewed the results, the claimants believed the data demonstrated the effectiveness of the safety standard.⁷⁴ The Court recognized that agencies often employ their own judgment in promulgating rules and regulations, but it reiterated that agencies must still justify those decisions and their relation to the facts in the record.⁷⁵ NHTSA failed to justify its decision because it did not take into account the difference between current manual belts, which required action to be effective, and detachable automatic belts, which when reattached, functioned without further action by the passenger or driver.⁷⁶ Such a difference could have led to more frequent use of the detachable automatic belts.⁷⁷ Findings by NHTSA also showed, despite its predictions, that occasional users would realize the benefits of the automatic seatbelts to a greater extent because once attached, the seatbelts would function.⁷⁸ The Court also dismissed NHTSA's argument that the public would resent the increased costs of automobiles because of the required restraint system, after reviewing Congressional intent of the enabling act and finding safety to be the first goal instead of manufacturer preference or public outcry.⁷⁹

Finally, the Court found the rescission to be arbitrary and capricious because NHTSA did not consider, or give reasons for not considering, a non-detachable seatbelt (one that would spool out so the user could exit the vehicle easily).⁸⁰ NHTSA determined that users feared that non-detachable seatbelts would preclude escape in the case of an emergency, but did not explain how emergency release mechanisms would fail to accommodate emergency release situations.⁸¹ All of these reasons led the Court to conclude that rescission of Modified Standard 208 was arbitrary and capricious.

⁷⁴ *Id.* at 53.

⁷⁵ *Id.* at 52.

⁷⁶ *Id.* at 54.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 55.

⁸⁰ *Id.* at 56.

⁸¹ *Id.*

B. FAA'S ANALYSIS UNDER THE ARBITRARY AND
CAPRICIOUS STANDARD

As discussed in *Motor Vehicle Manufacturers*, a court will examine the congressional intent of the enabling statute and will also determine if the agency's decision is supported by sufficient evidence.

The enabling statute for implementation of the DC SFRA, in pertinent part, provides the following:

To establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security, the Administrator [of the FAA], in consultation with the Secretary of Defense, shall (A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; and (B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.⁸²

1. *Factors that Congress Intended for the FAA to Use*

In order to determine Congressional intent, the plain language of the provision should be considered. The enabling statute clearly charges the FAA with establishing airspace restrictions and with ensuring identification. Also, the FAA is ordered to consult with the Secretary of Defense to establish airspace restrictions. The Secretary of Defense, as head of the DOD, acts in accordance with the National Security Act of 1974 (amended in 1949).⁸³ The National Security Act of 1947 begins by stating "[I]t is the intent of Congress to provide a comprehensive program for the future security of the United States"⁸⁴ Also, the Secretary of Defense sits on the National Security Council, undertakes military strength assessments, advises the President on military and national security matters, and "coordinate[s] the policies and functions of the departments and agencies of the Government relating to the national security. . . ."⁸⁵ Based on the functions of the Secretary of Defense and the DOD, it is not rational to interpret the function of the FAA acting in conjunction with the DOD as anything but protecting the country by monitoring the NAS. As a result, it is not implausible

⁸² 49 U.S.C.A. § 40103(b)(3)(A)-(B) (West 2005).

⁸³ 10 U.S.C.A. § 113(a)-(b) (West 2005).

⁸⁴ National Security Act of 1947, 50 U.S.C.A. § 401 (West 2005).

⁸⁵ *Id.* § 402(b).

to assume that Congress would expect the FAA to consider factors relating to potential terrorist threats when promulgating a rule under the authority of 49 U.S.C. § 40103.

In addition, support for the FAA's proposed rule can be found in the agency's history. The FAA was born of the conglomeration of two predecessor agencies with the responsibilities of safety rulemaking and of overseeing ATC.⁸⁶ Today the FAA is charged with many missions, such as supervising operation and maintenance of aircraft, certifying airmen, overseeing the use of airspace, and providing for the "security control of air traffic to meet national defense requirements."⁸⁷ In addition, the FAA possesses statutory authority to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."⁸⁸ Further, the FAA can "establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security."⁸⁹

To accomplish the goals set forth above, the FAA, like any other governmental agency, publishes rules in the Federal Register. The FAA also issues information in other ways to the aviation community. One such way is called a temporary flight restriction ("TFR").⁹⁰ TFRs are governed by Title 14 of the Code of Federal Regulations, §§ 91 and 99.⁹¹ TFRs are issued to pilots in the form of NOTAMs.⁹² Pilots must stay current with all NOTAMs to avoid the loss of their pilot's certificate or interception by government aircraft.⁹³ The FAA increased its use of TFRs in recent years because of an amendment to the Code of Federal Regulations allowing flight restrictions over major sporting events such as air shows and because of constant security

⁸⁶ FED. AVIATION ADMIN., A BRIEF HISTORY OF THE FEDERAL AVIATION ADMINISTRATION, http://www.faa.gov/about/history/brief_history/ (last visited Sept. 10, 2006).

⁸⁷ U.S. DEP'T OF TRANSP., DOT ORGANIZATIONS, <http://www.dot.gov/summary.htm> (last visited Jan. 13, 2006).

⁸⁸ 49 U.S.C.A. § 40103(b)(1) (West 2005).

⁸⁹ *Id.* § 40103(b)(3); *see also* DC SFRA NPRM, *supra* note 1, at 45,250.

⁹⁰ Brown, *supra* note 11, at 1.

⁹¹ *Id.* at 3. *See, e.g., id.* § 91.141 (2005) (protection of the President and other public figures); *id.* § 91.145 (restrictions during aerial and sporting events).

⁹² *See* 14 C.F.R. § 91.137(a) ("The Administrator will issue a Notice to Airmen (NOTAM) designating an area within which temporary flight restrictions apply and specifying the hazard or condition requiring their imposition . . .").

⁹³ Brown, *supra* note 11, at 1.

threats.⁹⁴ In particular, 14 C.F.R. § 99.7 allows for TFR issuance specifically for occasions calling for concern over national security.⁹⁵ Section 99.7 TFRs allow for flight restrictions over military bases throughout the nation, around large cities, over major sporting events, and over sites such as nuclear power plants and refineries.⁹⁶

The day to day operations of the FAA include constant awareness and concern regarding national security. Because of the FAA's continual involvement in national security, and because the FAA is charged with controlling the NAS, the DC SFRA is likely in accord with the factors Congress considered when passing the enabling act underlying the FAA's action.

2. *Connecting Facts in the DC SFRA to the FAA's Decision*

In addition to using factors that Congress intended, an agency must also make a reasoned decision guided by the facts.⁹⁷ The court, however, must comply with the deferential standard.⁹⁸ For example, in *Ranchers Cattleman Legal Fund United Stockgrowers of America v. United States Department of Agriculture*, the United States Department of Agriculture ("USDA") calculated the prevalence rate of cattle from Canada with mad cow disease upon credible data, but the district court favored the calculation of the Ranchers Cattleman Legal Fund, the organization challenging the final rule.⁹⁹ The Ninth Circuit, however, disagreed with the trial court because the information used by the USDA was credible and therefore the USDA could have reasonably relied on it.¹⁰⁰ Furthermore, the Supreme Court has instructed lower courts to defer to agency decisions that are of "less than ideal clarity" if 'the agency's path may reasonably be discerned.'¹⁰¹ For example, the Ninth Circuit deferred to the USDA's finding that the risk to Americans and to U.S. cattle of contracting mad cow disease from importing cattle from Canada (where two inci-

⁹⁴ *Id.* at 1-2.

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* See also 17 C.F.R. § 99.7.

⁹⁷ *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983).

⁹⁸ See *Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078 (9th Cir. 2005).

⁹⁹ *Id.* at 1093-94.

¹⁰⁰ *Id.* at 1094.

¹⁰¹ *Id.* at 1097 (quoting *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 495 (2004)).

dents of the disease had been reported) was "very low."¹⁰² While the district court wanted hard numbers, the circuit court found adequate evidence in the record to support the USDA's conclusions.¹⁰³ The circuit court also stated that rule should be analyzed as a whole instead of dissecting each individual safeguard incorporated in the rule.¹⁰⁴

In conjunction with the USDA's prediction that there was a very small probability of Americans becoming infected as a result of importing Canadian cattle, the court examined other safeguards, such as age limits on the imported cattle (based on the USDA finding that young cattle were less prone to carrying the disease) and the "feed ban" in Canada (where cattlemen were prohibited from feeding their cattle the substances known to cause mad cow disease).¹⁰⁵ The court also noted internal controls, such as cattle slaughtering requirements, implemented to minimize the risk of contaminating meat.¹⁰⁶ Finally, the court recognized the USDA's finding of the overall low incidence of humans contracting mad cow disease.¹⁰⁷

The central problem the FAA attempted to address through the NPRM is the ongoing threat of terrorism in the country, specifically in highly conspicuous areas such as the nation's capital.¹⁰⁸ The FAA asserted its belief that terrorists could strike via general aviation ("GA") aircraft and expressed concern that "the destructive potential of a small aircraft loaded with explosives may be significant."¹⁰⁹ The AOPA disagreed with the FAA that small planes could cause great damage and therefore concluded that these plans could not pose a security risk.¹¹⁰ It noted that "experts have agreed that light aircraft traveling at slow speeds do not pose a serious national security threat, as illustrated by the fact that relatively little damage occurred in the January 5, 2002, incident in which a ninth grade student flew into a Tampa, Florida office tower."¹¹¹ Further, the AOPA cited the

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1095.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ DC SFRA NPRM, *supra* note 1, at 45,250.

¹⁰⁹ *Id.* at 45,256. GA aircraft are privately owned aircraft, including helicopters and charter jets, but not including commercial airliners. Boynton interview, *supra* note 8.

¹¹⁰ AOPA Comment, *supra* note 14, at 9.

¹¹¹ *Id.*

General Accounting Office as saying “the small size, lack of fuel capacity, and minimal destructive power of most general aviation aircraft make them unattractive to terrorists and, thereby, reduce the possibility of threat associated with their misuse.”¹¹²

Despite the AOPA’s assertion, the concerns of the FAA are not unfounded. It is certainly reasonable to conclude that even a small plane filled with explosives could cause severe damage to a building or anything else with which it collides. In its Request to Permanently Codify Temporary Flight Restrictions Over the Washington, DC, Metropolitan Area, the FAA outlined the concern shared by the DHS of an attack on the United States with a GA aircraft. First, the government was alerted to a planned attack of the U.S. Consulate in Pakistan with a small aircraft loaded with explosives.¹¹³ Second, information came to the attention of the government exposing terrorist crop dusting operations.¹¹⁴ Third, the United States had reason to believe that terrorists were planning another suicide hijacking scheme in June 2003.¹¹⁵ Fourth, debriefings of Khalid Shaykh Muhammad, a terrorist detainee, indicated a plan of follow-up terrorist operations to the September 11 attack in the D.C. area.¹¹⁶ Fifth, Muhammad admitted in his testimony to Congress that Al-Qu’ida originally intended to use GA aircraft on September 11, before a last minute change to large commercial aircraft.¹¹⁷ The FAA also expressed concern that a terrorist would not merely crash into a building, but also would use a GA aircraft to transport and use biological, chemical, radioactive, or conventional weapons.¹¹⁸ In addition, it is not beyond all possibility that the FAA is privy to classified information regarding past or future terrorist threats that were calculated into their risk assessment.

The FAA’s announcement of the problem here is more compelling than the NHTSA in *Motor Vehicle Manufacturers Association* in that there, NHTSA was revoking a safety standard based on automobile manufacturer technology, while here the FAA is implementing a safety procedure to combat a known threat.

¹¹² *Id.* at 15 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, INCREASED FEDERAL OVERSIGHT IS NEEDED, BUT CONTINUED PARTNERSHIP WITH THE PRIVATE SECTOR IS CRITICAL TO LONG-TERM SUCCESS, REPORT TO H. COMM. ON APPROPRIATIONS, Subcomm. on Homeland Security, GAO-05-144, at 38 (Nov. 2004)).

¹¹³ DC SFRA NPRM, *supra* note 1, at 45,251.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 45,258.

The above factors, while unable to pinpoint an exact measurement of terrorist threat, paint a picture of justified agency concern over the use of GA aircraft as a vehicle for further terrorist activity aimed at the United States. While this seems to fit the classification of "less than ideal clarity," the agency has left the public and a reviewing court a discernable path. Just as the circuit court in *Ranchers Cattleman* deferred to the USDA's calculation of the prevalence rate of cattle with mad cow disease over the calculation of the Ranchers Cattleman Legal Fund, a court would likely defer to the FAA's contention that a GA plane could present a hazard over the AOPA's contention to the contrary, and therefore find that the DC SFRA is not arbitrary and capricious.

IV. REGULATORY FLEXIBILITY ANALYSIS

As the FAA's analyses are explored, it is important to remember that no final rule has been proposed. As will be discussed below, a challenge may not be brought against a proposed rule. Since the FAA has not promulgated the final DC SFRA, the proposed regulatory flexibility analysis will be analyzed under the initial requirements.

A. THE PURPOSE AND HISTORY OF THE REGULATORY FLEXIBILITY ACT

The Regulatory Flexibility Act ("RFA") requires agencies to consider the impact of a rule on small businesses in the proposed rule phase and in the final rule phase. Under current procedure, an agency promulgating a rule subject to section 553 of the APA will conduct an initial regulatory flexibility analysis.¹¹⁹ The initial analysis should include the following:

- (1) [A] description of the reasons why action by the agency is being considered;
- (2) a succinct statement of the objectives of, and legal basis for, the proposed rule;
- (3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the

¹¹⁹ Christopher M. Grengs, *Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform*, 85 MINN. L. REV. 1957, 1962-63 (2001). A rule is subject to section 553 unless it involves a military or foreign affairs function, an internal agency management or personnel issue, or a "public property, loans, grants, benefits, or contracts . . ." matter. 5 U.S.C.A. § 553(a) (West 2005).

type of professional skills necessary for preparation of the report or record; (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.¹²⁰

After publishing the initial regulatory flexibility analysis in the Federal Register, entities are encouraged to comment on the agency's findings.¹²¹ The agency will then conduct a final regulatory flexibility analysis, which must include the following:

(1) [A] succinct statement of the need for, and objectives of the rule; (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.¹²²

1. Pre-1996

Signed into law by President Carter, the RFA was passed in an effort to ensure that agencies would properly recognize the impact of regulations upon small businesses.¹²³ If a proposed regulation would have a significant impact on a substantial number of small entities, the agency was required to conduct a regulatory flexibility analysis.¹²⁴ In practice, many agencies did not adhere to the RFA, for example, by certifying that small agencies would not be impacted by the proposed regulation. There was no judicial review of agency compliance with the RFA under the

¹²⁰ 5 U.S.C. § 603(b).

¹²¹ *Id.* § 603(a); Grengs, *supra* note 119, at 1963.

¹²² 5 U.S.C. § 604(a).

¹²³ Richard A. Greene, *Recent Developments in Federal Regulatory Policy*, 6 J. SMALL & EMERGING BUS. L. 607, 610 (2002).

¹²⁴ *Id.*; *see also* 5 U.S.C. § 605(b).

original statute.¹²⁵ Agency compliance was monitored by Chief Counsel for Advocacy of the Small Business Administration ("SBA"), but the SBA lacked enforcement powers.¹²⁶ The regulatory flexibility analysis could, however, become part of the entire record, and upon review a court could determine that if the analysis was "so flawed that it undercut the rationality of the rule, then the rule is invalid, not due to of the agency's failure to comply with the RFA, but because the rule violated the rulemaking standards set out in the APA."¹²⁷ But without fear of specific judicial review of the flexibility analysis, agencies complied with the RFA only minimally, if at all.¹²⁸

2. *Post-1996*

These failures caused Congress to pass the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").¹²⁹ The SBREFA brought new requirements to agencies completing a regulatory flexibility analysis. Agencies are now required to state how many small entities will feel the impact of the rule, to give reasons why such an impact on small entities could not be minimized, and to describe the skills needed for recordkeeping compliance with the new rule.¹³⁰ Under the amendment, an agency must also provide a factual basis if it concludes that small entities will not be impacted by the regulation.¹³¹ Congress can now review promulgated rules under the SBREFA.¹³² The SBA was also given an ombudsman through which small businesses may file complaints against an agency's actions.¹³³ By amending the Equal Access to Justice Act, the SBREFA enabled small entities to recover costs and attorney's fees if enforcement of the agency's rule is substantially excessive and unreasonable.¹³⁴

¹²⁵ Barry A. Pineless, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 COMMLAW CONCEPTUS 29, 37 (1997).

¹²⁶ Grengs, *supra* note 119, at 1962.

¹²⁷ Pineless, *supra* note 125, at 37.

¹²⁸ *Id.*

¹²⁹ Greene, *supra* note 123, at 611.

¹³⁰ Pineless, *supra* note 125, at 38.

¹³¹ *Id.*

¹³² Small Business Regulatory Enforcement and Fairness Act of 1996 Pub. L. No. 104-121, §§ 251-253, 110 Stat. 847, 868-74 (*codified as* 5 U.S.C. §§ 801-08); Grengs, *supra* note 119, at 1968.

¹³³ 15 U.S.C.A. § 657 (West 2005); Grengs, *supra* note 119, at 1971.

¹³⁴ Contract With America Act of 1996, Pub. L. No. 104-121 §§ 231-232, 110 Stat. 862-63 (1996); Jeffery J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Us-*

Agencies are not required to modify their rules to accommodate small entities. Instead, agencies are only required to acknowledge the significant issues brought to light during the comment period, summarize the agency's assessment of those issues, and state how the proposed rule was modified as a result of the public comments.¹³⁵

3. *Judicial Review of a Final Regulatory Flexibility Analysis*

The SBREFA also created a cause of action for small businesses against the agency for compliance or noncompliance with the flexibility analysis.¹³⁶ A small entity can now bring a claim to challenge an agency's compliance with the RFA after a final rule has been promulgated, generally within one year of the rule's promulgation.¹³⁷ The court must order a corrective remedy, such as remanding the rule to the agency and not enforcing the rule unless the rule affects special public interests.¹³⁸

Under the judicial review provision, agencies must be careful to use accurate information in their regulatory flexibility analysis.¹³⁹ In *Northwest Mining Ass'n v. Babit*, the Bureau of Land Management ("BLM") announced that small entities were not substantially affected when regulatory action would force small miners to post a bond in order to operate.¹⁴⁰ The BLM failed to use the definition of "small entity" as required under the RFA, which would have required use of the SBA's definition of "small business" within the meaning of the industry.¹⁴¹ Because of a failure to comply with statutory requirements, the court remanded the rule and deferred enforcement.¹⁴²

An agency can also weaken its position by incorrectly using the information in reaching conclusions under the regulatory flexibility analysis.¹⁴³ In *Southern Offshore Fishing Ass'n v. Daley*,

ing Their Newly Granted Power over Federal Regulatory Agencies, 41 WM. & MARY L. REV. 1425, 1441 (2000).

¹³⁵ 5 U.S.C.A. § 604(a)(2) (West 2005); Grengs, *supra* note 119, at 1963-64.

¹³⁶ 5 U.S.C.A. § 611.

¹³⁷ *Id.* § 611(a)(1), (3)(A).

¹³⁸ *Id.* § 611(a)(4).

¹³⁹ Polich, *supra* note 134, at 1457 (explaining that judges will likely remand a regulation to an agency if there is a glaring error in the analysis, such as an improper definition of "small entity").

¹⁴⁰ *Id.* at 1447 (summarizing *Nw. Mining Ass'n v. Babit*, 5 F. Supp. 2d 9 (D.D.C. 1998)).

¹⁴¹ *Nw. Mining Ass'n*, 5 F. Supp. 2d at 15; Polich, *supra* note 134, at 1448.

¹⁴² *Nw. Mining Ass'n*, 5 F. Supp. 2d at 16; Polich, *supra* note 134, at 1448-49.

¹⁴³ Polich, *supra* note 134, at 1458.

the National Marine Fishery Service ("NMFS") certified in both its initial regulatory flexibility analysis and its final regulatory flexibility analysis that small businesses would not be significantly impacted by harvest quotas and minimum fish size requirements.¹⁴⁴ The NMFS maintained that fishermen harmed by the rule could subsidize their income by fishing other types of fish not subject to the quota.¹⁴⁵ The court noted that the conclusion reached by the NMFS was not reasonable because the shark fishermen who filed the complaint could not easily convert their equipment to harvest other types of fish and subsidize their incomes, so the final rule did significantly impact a substantial number of fishermen.¹⁴⁶

4. *The AOPA's Argument*

The AOPA contended that a defective regulatory flexibility analysis can weaken the reasoning behind the rule, resulting in a potential invalidation of the rule.¹⁴⁷ The AOPA cited *Thompson v. Clark*, where a claim was filed against the Secretary of the Interior, in pertinent part, for failing to comply with section 605(b) of the RFA.¹⁴⁸ As with *Northwest Mining Ass'n* and *Offshore Fishing Ass'n*, the agency head in *Thompson* certified that the rule would not significantly impact "a substantial number of small entities."¹⁴⁹ The complaint in *Thompson* alleged insufficient evidence to support the agency head's determination and failure to comply with the RFA because the agency did not publish its reasons for concluding the small entities were not impacted.¹⁵⁰ Contrary to what the AOPA believed the court concluded, the court comes out on the side of limited judicial review.¹⁵¹

¹⁴⁴ *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1424 (M.D. Fla. 1998); Polich, *supra* note 134, at 1443-44.

¹⁴⁵ *S. Offshore Fishing Ass'n*, 995 F. Supp. at 1434; Polich, *supra* note 134, at 1444-45.

¹⁴⁶ *S. Offshore Fishing Ass'n*, 995 F. Supp. at 1436; Polich, *supra* note 134, at 1446.

¹⁴⁷ AOPA Comment, *supra* note 14, at 8 (citing *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984)).

¹⁴⁸ *Id.*; *Thompson*, 741 F.2d at 404.

¹⁴⁹ *Thompson*, 741 F.2d at 403; 5 U.S.C.A. § 605(b) (West 2005).

¹⁵⁰ *Thompson*, 741 F.2d at 404.

¹⁵¹ The AOPA Comment reads:

In *Thompson*, the court evaluated a cost-benefit analysis under the RFA and *concluded*: "For example, if a defective regulatory flexibility analysis caused an agency to underestimate the harm inflicted upon small business to such a degree that, when adjustment is

It is important to note that *Thompson* was decided in 1984, before the SBREFA was passed. At that time, the RFA specifically disallowed judicial review of decisions by an agency concerning the “applicability of any provisions of [the RFA] to any action of the agency,” and further prohibited judicial review of the actual analysis, as well as compliance or noncompliance with the RFA.¹⁵² Since the flexibility analyses could become part of the record of review if the rule was challenged on other grounds, the claim alleged a logical dilemma in that while the rule does not allow for review of the flexibility analysis itself, a court could review the analysis in conjunction with other materials in the record to determine if the rule should stand.¹⁵³ The court disagreed with the petitioner’s conclusion that Congress intended to prohibit interlocutory review but allow for review of the final rule, and instead interpreted § 611 to allow for review of the flexibility analysis with the rest of the record to determine if the rule complies with the enabling statute and other applicable law.¹⁵⁴

5. *The FAA’s Analysis Conducted Under the Regulatory Flexibility Act*

Today’s § 611, as discussed above, allows for “judicial review of agency compliance with the requirements of sections . . . 604 . . .” (the final flexibility analysis).¹⁵⁵ Facing the FAA would be the question of whether a court would consider compliance to be purely procedural, by simply ensuring the FAA provided the information required under § 604 (examined here under § 603 because no final flexibility analysis has been conducted), or whether a court would conduct a more searching review of the information provided to determine if it was adequate to enable the agency to reach its decision.

made for the error, that harm clearly outweighs the claimed benefits of the rule, then the rule must be set aside.”

AOPA Comment, *supra* note 14, at 8 (quoting *Thompson*, 741 F.3d at 405) (emphasis added). The court actually held, however, that it could not review the agency head’s determination that small entities would not be significantly impacted by the new rule.

¹⁵² 5 U.S.C. § 611(a)-(b) (1984), *amended by* Small Business Regulatory Enforcement and Fairness Act of 1996, Pub. L. No. 104-121, §§ 201-53, 110 Stat. 847, 857-74.

¹⁵³ *Id.* § 611(b); *Thompson*, 415 F.2d at 405.

¹⁵⁴ *Thompson*, 415 F.2d at 405.

¹⁵⁵ 5 U.S.C.A. § 611(a)(1) (West 2005).

As to the first factor required under the initial regulatory flexibility analysis, the FAA considered the DC SFRA in an attempt to prevent future terrorist attacks such as those that occurred on September 11, 2001.¹⁵⁶ In the view of the FAA, terrorists gaining access to GA aircraft and potentially transporting chemicals or other hazardous agents poses a significant risk to the capital and to Americans.¹⁵⁷ Second, the objective of the DC SFRA is to "combine all the airspace restrictions within the Washington, DC Metropolitan Area into one regulation."¹⁵⁸ By consolidating current regulations, the FAA aimed to strengthen security in the capital area and aid the DOD and DHS in enforcing security measures.¹⁵⁹

Third, the FAA's initial flexibility analysis classified the group of small entities as small GA airports, or those that are "independently owned with annual revenues of less than \$5 million or owned by a small governmental jurisdiction with a population less than 50,000."¹⁶⁰ The FAA could obtain compliance and cost information on only the Maryland Three airports, of which only Potomac Airfield and Washington Executive/Hyde Field met the definition of "small airports" above.¹⁶¹ Therefore, the FAA's analysis was based on only Potomac Airfield and Washington Executive/Hyde Field, two of the three airports covered by the former DC SFAR 94.¹⁶² While the FAA stated that it could not be sure that the DC SFRA would have a significant economic impact on a substantial number of small entities because of the limited information, it conceded that if the two airports for which it had information were the only two in the DC SFRA, there would be a significant economic impact on a substantial number of small entities.¹⁶³ The FAA also admitted that potentially all pilots who use airports in the D.C. area will feel the impact of the DC SFRA, even if they are based out of airports in other parts of the country, without regard to the difference between pilots who fly for work and pilots who fly for pleasure.¹⁶⁴ Because there is a potential significant impact on a substantial

¹⁵⁶ DC SFRA NPRM, *supra* note 1, at 45,258.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 45,257.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 45,258.

¹⁶⁴ *Id.*

number of small entities, the FAA conducted the entire flexibility analysis.

Fourth, the FAA undertook a limited compliance cost analysis and explained its limitations were due to factors such as the lack of a source with financial information for all airports and a lack of knowledge as to whether these airports can obtain credit.¹⁶⁵ The FAA compared the potential compliance cost of the DC SFRA with the costs incurred by the small airports of the DC SFAR 94 and found that, after complying with DC SFAR 94, security costs to Potomac Airfield were \$63,800.00 and costs to Washington Executive/Hyde Field were \$79,500.00.¹⁶⁶ The cost of complying with DC SFAR 94 was \$252,900.00 to Potomac Airfield and \$334,000.00 to Washington Executive/Hyde Field, including a twenty percent increase for unaccounted costs.¹⁶⁷ Further, the security requirements caused pilots to relocate to other airports, resulting in lost revenue.¹⁶⁸ Aircraft use of the airports generates income through tie-down fees, landing fees, rent, fuel sales, flight schools, sightseeing income, and aircraft rentals.¹⁶⁹ As pilots fled the airports, so did their fees and payments. Airports outside the DC SFRA, but still close to Washington, D.C., will benefit by acquiring new business, but the airports within the DC SFRA will still earn income from pilots who must fly in the restricted area, bringing an estimated \$368,500.00 annually for Potomac Airfield and \$596,500.00 annually for Washington Executive/Hyde Field.¹⁷⁰ The FAA admitted the DC SFRA would "impact the viability of these affected airports."¹⁷¹

As to the final factor of the flexibility analysis, the FAA stated that the DC SFRA will not overlap with any other federal regulations.¹⁷²

If a court simply ran down the checklist of requirements given under the RFA, the FAA's analysis would likely satisfy the inquiry, because it provided information for each factor to the best of its ability. *Ranchers Cattleman* states that the requirements of the RFA are purely procedural and that agencies are simply required to put forth a good faith effort to comply with proce-

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 45,257-58.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 45,258.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

dure.¹⁷³ It is likely that the FAA would have authority to support an argument that the requirements of the RFA are procedural and not substantive, and therefore the FAA's analysis should withstand judicial review.

In *Northwest Mining Ass'n* and *Offshore Fishing Ass'n*, the courts conducted a more searching analysis, but both cases questioned certifications by the agencies that small businesses would not be impacted. If the FAA's flexibility analysis was substantively examined, the court would likely note that the FAA readily admits that small businesses will be impacted. The extent of that impact was based on the information from the airports that currently suffer from the DC ADIZ. The conclusion that small airports will incur financial losses is based on the best information the FAA had at its disposal at the time it issued the NPRM. Deducing that these airports will be impacted and could possibly decide to stop operations is not an unreasonable assessment from the data used by the FAA. For these reasons, the FAA's regulatory flexibility analysis would likely satisfy a court's substantive inquiry.

V. ALTERNATIVES ANALYSIS

A reviewing court also looks for analysis justifying the rule among other alternatives. So long as the agency considers relevant factors, and "articulate[s] any rational connection between the facts found and the choices made," the court will defer to the agency.¹⁷⁴

A. CONSIDERATION OF ALTERNATIVES

United States Air Tour Ass'n v. Federal Aviation Administration illustrates the deferential standard courts use to evaluate an agency's consideration of alternatives to a rule.¹⁷⁵ In that case, the FAA promulgated two rules, in addition to those rules previously promulgated, addressing noise concerns attributed to tour flights over the Grand Canyon.¹⁷⁶ One of the rules capped the number of air tours companies could make over the Grand Canyon, limiting them to the number of flights conducted in the

¹⁷³ *Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1101 (9th Cir. 2005).

¹⁷⁴ *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Ranchers Cattleman*, 415 F.3d at 1093.

¹⁷⁵ See *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997 (D.C. Cir. 2002).

¹⁷⁶ *Id.* at 1003.

year of May 1, 1997 through April 30, 1998.¹⁷⁷ To form this rule, the FAA worked with the National Park Service to evaluate the noise made by aircraft in an effort to restore natural quiet to the Grand Canyon.¹⁷⁸ The Air Tour Association filed suit, claiming in part that the FAA violated the RFA by “fail[ing] to consider significant alternatives that would minimize the Rule’s economic impact on small entities.”¹⁷⁹ The FAA listed alternatives such as altitude restrictions, the use of flight-free zones, and the use of quiet aircraft, among others, with brief descriptions of each suggestion.¹⁸⁰ The court gave this contention little attention though, and simply stated that the FAA listed nine alternatives and explained why each was inferior to the rule ultimately chosen.¹⁸¹

B. THE AOPA’S PROPOSED ALTERNATIVES

The AOPA asserted that current safeguards in conjunction with the DC FRZ would reduce the need for some of the DC SFRA requirements. Specifically, the AOPA pointed to the pilot and student-pilot screening process, whereby the TSA is authorized to direct the FAA to revoke a pilot’s certificate if it finds a security threat.¹⁸² Next, the AOPA described restrictions placed on flight training, such as background checks for flight trainees who are not U.S. citizens and security awareness training for flight school employees.¹⁸³ The TSA is also required to approve foreign-registered GA aircraft before they are cleared to penetrate the NAS.¹⁸⁴ Aircraft security measures have also been taken, such as the AOPA’s Airport Watch System, where pilots are trained to recognize and report suspicious activity at GA airports.¹⁸⁵ Further security measures have also been geared toward identification of pilots. For example, pilots are required to carry a government issued form of identification, and pilots’ certificates now include a hologram to reduce the likelihood of

¹⁷⁷ *Id.* at 1004.

¹⁷⁸ *Id.* at 1004-5.

¹⁷⁹ *Id.* at 1011.

¹⁸⁰ Commercial Air Tour Limitation in the Grand Canyon Nat’l Park Special Flight Rules Area, 65 Fed. Reg. 17,708, 17,729-30 (Apr. 4, 2000) (codified as 14 C.F.R. § 93.319 (2005)).

¹⁸¹ *U.S. Air Tour Ass’n*, 298 F.3d at 1011.

¹⁸² AOPA Comment, *supra* note 14, at 22.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 23.

counterfeiting.¹⁸⁶ Finally, NORAD has implemented a new red and green laser warning system to alert pilots who unknowingly enter the FRZ to make contact with ATC and exit the airspace.¹⁸⁷ The AOPA also noted that numerous security measures taken within the GA industry already may counteract any terrorism threats, such as limited access to training, more oversight of pilot certificates, and measures to prevent unauthorized access to airplanes.¹⁸⁸

C. ALTERNATIVES CONSIDERED BY THE FAA

The DC SFRA NPRM contains a list of alternatives to the proposed rule. First, The FAA considered simply removing the flight restrictions in the D.C. area.¹⁸⁹ But, as the FAA concluded, this would hardly comply with the stated goal of preventing terrorism in the capital area.¹⁹⁰ Second, the FAA thought, and ultimately decided to codify the existing flight restrictions at a cost to airports in the area, but with the benefit of aircraft identification in the capital.¹⁹¹ In its Request to Permanently Codify Temporary Flight Restrictions Over the Washington, DC Metropolitan Area, the FAA explains that the dimensions of the proposed SFRA, consisting of the current DC ADIZ and DC FRZ, are the "minimum acceptable [dimensions and procedures] to successfully accomplish their missions and should be retained on a permanent basis."¹⁹² Third, the FAA examined a plan to combat the terrorism threat by simply shutting down all airports in the restricted area.¹⁹³ In addition to potential Fifth Amendment takings issues, numerous costs would ensue if this option were chosen, ranging from lost profit to the current airports, to expenses for the pilots based at these airports to move to new home airports, to lost business in the area.¹⁹⁴ Accordingly, the FAA did not endorse this option. Finally, the FAA considered retaining the inner, highly restricted FRZ while eliminating the ADIZ around the capital.¹⁹⁵ This option would re-

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 21.

¹⁸⁹ DC SFRA NPRM, *supra* note 1, at 45,259.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 45,252.

¹⁹³ *Id.* at 45,259.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

sult in security regulations that are not adequate to protect the area, and so the FAA purged the idea.¹⁹⁶

The manner in which the FAA undertook the alternative analysis for the DC SFRA does not differ substantially from the manner in which the FAA analyzed alternatives pertaining to the noise level of flights around the Grand Canyon. In its final rule regarding noise in the Grand Canyon area, the FAA briefly described each alternative and explained why the final rule was preferable. The FAA did the same with respect to the DC SFRA. The AOPA proffers a specific alternative of reducing the procedural requirements for a pilot penetrating the DC SFRA, but the FAA believes the very procedures it endorsed are essential to the goal of preventing terrorist attacks.¹⁹⁷ A court would likely defer to the FAA's decision to forego the alternatives in the DC SFRA NPRM, even in light of the AOPA's suggestions.

VI. COST-BENEFIT ANALYSIS

Finally, the AOPA contended that the FAA is required to consider costs and benefits of the DC SFRA under Executive Order 12,866 ("EO 12,866") and should consider costs and benefits under the Unfunded Mandates Reform Act (UMRA).¹⁹⁸

¹⁹⁶ *Id.*

¹⁹⁷ AOPA Comment, *supra* note 14, at 8; *see generally* DC SFRA NPRM, *supra* note 1.

¹⁹⁸ The FAA is not required to undergo a UMRA analysis because the proposed regulation would not have an effect of \$100,000,000.00 annually (\$127,000,000.00 annually when accounting for inflation) on the private sector or government. Unfunded Mandates Reform Act, 2 U.S.C.A. § 1532 (West2005); AOPA Comment, *supra* note 14, at 7; DC SFRA NPRM, *supra* note 1, at 45,259. The AOPA noted that the analyses required under the UMRA and EO 12,866 are essentially the same and so proposed that the FAA should examine costs and benefits, as if conducting an analysis under the UMRA. AOPA Comment, *supra* note 14, at 7.

Essentially, the UMRA requires a cost-benefit and future compliance costs analysis. 2 U.S.C. § 1532. The applicable factors that are required under the UMRA that are not required under EO 12,866 include an assessment of the availability of federal funding to aid in complying with the regulation, the extent of disproportionate effects of the regulation on a particular portion of the private sector, and an estimation of the impact of the regulation on the national economy. *Id.* § 1532.

The items included in the UMRA but not in EO 12,866 are not at issue in the AOPA's comment. There could be any number of reasons why the FAA chose not to conduct the UMRA analysis, such as limited time and resources, or simply that costs and benefits were adequately addressed in the EO 12,866 analysis and the regulatory flexibility analysis.

A. EXECUTIVE ORDER 12,866

President Clinton issued EO 12,866 in 1993 in an effort to create a regulatory system that benefits the nation and its people and is in tune with the nation's economic policies and goals.¹⁹⁹ EO 12,866 is primarily concerned with costs of regulation, benefits to society, and alternatives to the proposed regulation.²⁰⁰ EO 12,866 instructs agencies conducting an analysis to submit their findings to the Office of Management and Budget ("OMB"), the executive office charged with ensuring regulations are "consistent with applicable law, the President's priorities, and the principles set forth in . . . Executive order [12,866]. . . ."²⁰¹ The Office of Information and Regulatory Affairs ("OIRA"), is housed within the OMB reviews the analyses conducted under EO 12,866.²⁰² Oversight of agency compliance with EO 12,866 remains with the executive branch, and the order "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."²⁰³ Many requirements are given in EO 12,866, and so only those of concern to the AOPA are addressed here.

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify but nevertheless essential to consider.²⁰⁴

The OMB offers suggestions to conduct an adequate cost-benefit analysis, such as using a reasonable baseline and discounting dollars to account for inflation, which the FAA incorporates into their analysis as appropriate.²⁰⁵ But quantifying the benefits is

¹⁹⁹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § (1)(a) (Sept. 30, 1993) [hereinafter EO 12,866].

²⁰⁰ See *id.* § (1)(A).

²⁰¹ *Id.* § 2(b).

²⁰² *Id.*

²⁰³ *Id.* § 10.

²⁰⁴ *Id.* § (1)(a).

²⁰⁵ OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, ECONOMIC ANALYSIS OF FEDERAL REGULATIONS UNDER EXECUTIVE ORDER 12866, § (III)(A)(3)(a) (1996), available at <http://www.whitehouse.gov/omb/inforeg/riaguide.html>.

not feasible because they mostly encompass preventing terrorist attacks, and many factors (such as what would be attacked, what property would be destroyed, how many lives would be lost) are simply unknown.

B. COSTS AND BENEFITS THE AOPA CONTENDS SHOULD BE
INCLUDED IN THE EO 12,866 ANALYSIS

The AOPA correctly noted the FAA's classification of the DC SFRA as significant regulatory action because it will "adversely affect in a material way . . . a sector of the economy" ²⁰⁶ Even though the FAA conducted the cost-benefit analysis for significant regulatory action, the AOPA contended that the FAA did not "adequately analyze [the] costs and benefits" of the DC SFRA. ²⁰⁷ First, the AOPA stated that ATC lacks the resources and ability to complete the amount of work that will follow from the implementation of the DC SFRA due to increased flight plans and lack of consistency in applying the current DC ADIZ requirements to each flight. ²⁰⁸ Pilots currently experience delayed wait times because of a clogged ATC system. ²⁰⁹ Pilots are also often unable to obtain the discrete transponder code needed to penetrate the DC ADIZ because of limited phone lines for pilots to call to obtain the code and, even more significantly, limited ATC personnel to answer the phones. ²¹⁰ The costs are felt by people in all fields, such as medical patients awaiting blood or organs, and others in need of overnight shipment of goods or documents. ²¹¹

The AOPA also noted that small businesses in the D.C. area began to recover from the aviation grounding after September 11, but recovery slowed after the implementation of the DC ADIZ in February 2003. ²¹² The AOPA outsourced Aviation Management Consulting Group to analyze the projected economic burden of the DC SFRA, which found, for example, that Leesburg Executive Airport suffered a \$130,000.00 loss in personal income from 2002 to 2004 due to lost jobs in their Fixed Base

²⁰⁶ AOPA Comment, *supra* note 14, at 7; DC SFRA NPRM, *supra* note 1, at 45,255; EO 12,866, *supra* note 199, § 3(f)(1).

²⁰⁷ AOPA Comment, *supra* note 14, at 8.

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.* at 10.

²¹⁰ *Id.* at 11.

²¹¹ *Id.* at 13.

²¹² *Id.* at 12.

Operator sector.²¹³ Airports in the D.C. area experienced a \$28.5 million loss in revenue from 2002 to 2004.²¹⁴ The government is also projected to spend more than \$128.7 million over ten years on the DC SFRA, in conjunction with a loss of tax revenue from businesses in decline from the flight restrictions.²¹⁵

The AOPA found the benefits of the DC SFRA to be overstated. In direct contradiction to information cited by the FAA, the AOPA cited TSA officials as saying there is not a threat of terrorists using GA aircraft.²¹⁶ Also in contradiction to the FAA's concern of a GA aircraft being loaded with explosives or chemicals, the AOPA found that most GA aircraft are so light that they are "less desirable for terrorist purposes."²¹⁷ According to the AOPA, terrorists could not easily obtain explosives because of current Bureau of Alcohol, Tobacco and Firearms restrictions.²¹⁸ Also, other government measures, such as oversight of those attending flight schools and security of planes while at airports, have reduced the risk of terrorism via GA aircraft.²¹⁹ The AOPA challenged the FAA to conduct an analysis of likely threat scenarios to measure the effect of the DC SFAR.²²⁰ Much like the district court in *Ranchers Cattleman*, the AOPA wanted hard numbers. The AOPA further asserted that "innocent pilots who stray into the [DC] ADIZ accidentally" are not a security threat, and the fact that such straying occurs on a daily basis indicates is a sign that the current ADIZ does not work.²²¹

C. THE DC SFRA EO 12,866 ANALYSIS

To determine the costs associated with the DC SFRA, the FAA undertook an analysis to establish who will be affected and to

²¹³ *Id.* at 3.

²¹⁴ *Id.* at 1.

²¹⁵ *Id.* at 13-14.

²¹⁶ *Id.* at 14-15.

²¹⁷ *Id.* at 15.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 14.

²²¹ *Id.* at 18-19. Pilots are responsible for checking NOTAMs and complying with flight restrictions. It is economic waste to send a military aircraft to intercept pilots and to hold administrative hearings for pilots who cannot comply with restrictions, but the idea behind the current DC ADIZ, the Aircraft Defense *Identification Zone*, is to keep a record of who is flying in the restricted airspace. While costly, the use of such measures demonstrates the FAA's dedication to identifying those who penetrate the airspace surrounding Washington, D.C.

what extent by the DC SFRA. The FAA noted that ATC TRACON and Leesburg Automated Flight Service Station ("AFSS") facilities, 150 private airports, the government-owned College Park Airport and the privately-owned Potomac Airfield and Washington Executive/Hyde Field, and all pilots who travel in the DC SFRA, would be affected by the proposed rule.²²² First, to determine the extent to which ATC will be affected, the FAA considered factors such as compensation, benefits, specially trained employees, and the cost to the AFSS, and found that the cost to ATC will be \$184.27 million over ten years.²²³ The FAA calculated the increase in ATC costs based on information from July 2001, 2002, and 2003.²²⁴ The increased costs were found to be \$62.12 million for staffing and an additional \$122.15 million to TRACON air traffic control facility for factors such as increased litigation, pilot deviations, and creating a National Security Special Operations Unit.²²⁵

Next, the FAA considered the financial loss to the Maryland Three Airports. The annual airspace restriction costs to pilots (based on ground and in-flight delays and the time to file flight plans) is projected to be \$171,900.00 at College Park Airport, \$368,500.00 at Potomac Airfield, and \$596,500.00 at Washington Executive/Hyde Field.²²⁶ The annual cost for the Maryland Three airports to comply with the current DC ADIZ restrictions (increased by twenty percent for unaccounted revenue) is \$1.62 million to College Park, \$1.63 million to Potomac Airfield, and \$1.60 million to Washington Executive/Hyde Field.²²⁷ The cost for flight service station specialists to process the flight plans at the Maryland Three airports over ten years is projected to be \$60.64 million.²²⁸ Unfortunately the FAA could not report on the lost revenue that will be incurred by the smaller airports and heliports in the D.C. metropolitan airports because of a lack of information about these entities.²²⁹

The FAA recognized that all pilots flying into the DC SFRA would have to file a flight plan and thus estimated the cost to pilots at \$51.70 million over the next ten years, based on an esti-

²²² DC SFRA NPRM, *supra* note 1, at 45,255.

²²³ *Id.* at 45,256.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 45,356-57.

²²⁷ *Id.*

²²⁸ *Id.* at 45,257.

²²⁹ *Id.*

mated increase in flight plans from 123,800 in 2004 to 135,000 in 2013, an estimated \$48.63 for in-flight delay (\$119.41 per hour), and flight plan processing costs.²³⁰

The benefits of the DC SFRA are, of course, unquantifiable. In addition to enhanced security around the capital region, the benefits of the DC SFRA extend to an overall national effort to combat and prevent terrorism on U.S. soil.²³¹ The FAA also noted that the costs of an event such as September 11 contains classified information and therefore cannot be published, keeping the benefits partially unknown to the public.²³² Identification of all parties flying over the nation's capital as will be required under the DC SFRA will enhance the government's chance of preventing another terrorist act.²³³ Furthermore, the FAA explained that requiring aircraft to be in contact with ATC reduces the need to send military aircraft to intercept wandering pilots.²³⁴ The FAA expects this benefit to increase with time as pilots come to understand the DC SFRA.²³⁵

As noted above, the EO 12,866 analysis is not subject to judicial review. The purpose of the analysis is internal control. The OMB is the recipient of the EO 12,866 analysis, and its contents cannot render the DC SFRA invalid.

VII. CONCLUSION

Immediately following a tragedy like September 11, the FAA likely could have garnered adequate support for the DC SFRA. But as time passed, people came to fear another aircraft terrorist attack less and less. In some ways, this complacency demonstrates that the government is doing its job. While controversy will always exist over how to best prevent another September 11 attack, the fact that passengers and GA pilots choose to fly demonstrates that Americans are regaining confidence in aviation.

The FAA acted in accordance with its statutory responsibilities to ensure security in the NAS through the DC SFRA. Questions such as "Will terrorists strike again using GA aircraft, or any aircraft for that matter?"; "Do other large metropolitan areas in the country warrant protection?"; and "Am I willing to sacrifice busi-

²³⁰ *Id.* at 45,256-57.

²³¹ *Id.* at 45,256.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

ness interests in the name of preventing terrorism?” cannot be answered in a proposed rule, a final rule, or a challenge to a final rule. No one knows if and when terrorism will haunt the United States again, and no one knows the best means of prevention. The FAA has responded to its statutory mandate to the best of its ability under the limitations of fighting an unknown enemy.

The DC SFRA, remembering it is not a final rule, has been shown to withstand the “arbitrary and capricious” standard under the APA because the FAA has acted in accord with Congress’s intent and because the FAA’s decision is a logical conclusion from the facts before it. In regard to the regulatory flexibility analysis, while the AOPA pointed to many systematic factors that would enhance the FAA’s analysis, the case law demonstrates that courts defer to agencies’ decisions. The FAA conducted its analysis based on the information available in the manner it saw best to administer its statutory obligations. Furthermore, the FAA complied with the procedural requirements of the RFA and could likely withstand any procedural or substantive scrutiny by a court. Because the FAA considered alternatives and found their effect to be inferior to the DC SFRA, the FAA would also likely withstand judicial review of the alternatives analysis. Finally, the cost-benefit analysis under EO 12,866 is not subject to judicial review. The FAA has therefore complied with the applicable legal standards, and DC SFRA can likely be implemented.



Articles

