BEFORE THE
TRANSPORTATION SECURITY ADMINSTRATION
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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| In the Matter of<br><br>Security Programs for Aircraft 12,500 Pounds or More | Docket No. TSA-2002-11604 |

**COMMENTS OF D & K AVIATION, INC.**

D & K Aviation, Inc. ("D & K"), an air taxi operator conducting charter flights under Part 135 of the Federal Aviation Regulations ("FAR's") and Part 298 of the Department of Transportation Regulations, hereby respectfully submits its comments to the final rule adopted by the Transportation Security Administration ("TSA") on February 15, 2002 for effectiveness on June 24, 2002. Although the rule was made final, the TSA invited interested parties to submit written comments on or before April 23, 2002. The new rule requires operators of aircraft with a maximum takeoff weight of 12,500 pounds or more to adopt and carry out specified security related measures. The rule will be referred to herein as the "12,500 Rule".

Currently, D & K operates under FAR Part 135 three Cessna Citation Bravo aircraft and one Cessna Citation II aircraft. The Citation II has a maximum certificated takeoff weight ("MTOW") of approximately 15,000 pounds, although it has only 7 passenger seats. The Citation Bravo has a MTOW of 14,800 pounds, and like the Citation II, can only transport 7 passengers. In addition, D & K operates a Cessna Citation Jet 1 (CJ1) that has a MTOW of approximately 10,600 pounds and seating for 5 passengers. D & K conducts flights as an on-demand air taxi operator under the authority of Part 298 of the DOT's regulations and does not need, nor does it possess, a certificate of public convenience and necessity to do so. D & K also holds a Part 135 certificate issued by the FAA.

The world of commercial aviation has changed dramatically since the events of September 11, 2001 ("9/11"). That which was considered routine will never be viewed that way again. Either mandated by law (pursuant to the Aviation and Transportation Security Act ("ASTA") (Public Law 107-71) or common sense, virtually all participants in the aviation industry have approached providing their services with the need for enhanced security. D & K applauds the work of the TSA and

understands and appreciates, as do others in the industry, the need for insuring aviation is never again turned into a terrorist weapon aimed at the United States. Lest there be any misunderstanding, D & K is fully supportive of the adoption of any lawful and reasonable set of TSA rules that are carefully calibrated to address the degree of risk presented by operators of larger aircraft and which take into account the methods of operations employed by such operators, no matter what set of regulation they operate under.

However, D & K is compelled to put on the record that the 12,500 Rule is not consistent with the specific mandate of Congress to require only a certain category of larger aircraft operators to adopt a security plan. As such, the TSA rule, to the extent it applies to air taxi operators that do not possess DOT-issued certificates of public convenience and necessity is *ultra vires* and cannot and should not be adopted in its current form. D & K will set forth below the legal reasoning supporting its position and requests the TSA to carefully consider the limits imposed on it by the Congress when passing section 132(a) of ASTA.

D & K submits that it is important to the long term objectives of the TSA, that it operate solely within the

legal framework established by Congress. Attempts to exercise authority not delegated to the TSA, will only call into question the basis for its actions at a time when all Americans must never be given a legitimate reason to question those entrusted by Congress to insure our safety. The TSA must be sensitive to leaving any impression that its actions are not carefully grounded and supported by law and practicality. This means the TSA must not only act within the specific authority delegated to it by Congress, but must also seek to understand the nature of the aviation operations it seeks to regulate. Such initiative will insure its rules will achieve their intended goals, without unduly burdening those in the industry that are required to carry out new regulations. D & K will address these issues below starting with the legality of the 12,500 Rule.

## I. THE 12,500 RULE IS UNLAWFUL AS ADOPTED BY TSA

The 12,500 Rule incorporates various amendments to Part 1544 of the TSA regulations that were themselves just adopted this past February. Among the rule changes, is one requiring air taxi operators conducting private charters with larger equipment (aircraft with a maximum certificated takeoff weight of 12,500 pounds or more) to adopt and comply with a specified security program even if the

charter passengers do not enplane from or deplane into an airport sterile area. To the extent this TSA rule applies to air taxi operators, it exceeds the requirements of ATSA and is therefore unlawful.

In adopting the rule, the TSA stated that the February 15, 2002 amendment was made necessary by §132(a) of ATSA which required the TSA to "implement a security program for charter air carriers (as defined in section 40102(a)(13) of title 49, United States Code) with a maximum certificated takeoff weight of 12,500 pounds or more."

Among the amendments incorporated in the 12,500 Rule is a change to §1544.101 requiring aircraft operators (broadly defined to include those who engage in air transportation using any type of aircraft) to adopt and implement security programs as defined in the regulation. Prior to this amendment, aircraft operators, including air taxi operators, that conducted defined "private charters"[1]

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[1] Private charter means any aircraft operator flight—

(1) for which the charterer engages the total passenger capacity of the aircraft for the carriage of passengers; the passengers are invited by the charterer; the cost of the flight is borne entirely by the charterer and not directly or indirectly by any individual passenger; and the flight is not advertised to the public, in any way, to solicit passengers.

with aircraft of any takeoff weight were not required to adopt and carry out a security program unless the private charter passengers were enplaned from or deplaned into a sterile area. See §1544.101(f).

The amendment to §1544.101 now requires that operators conducting flights with aircraft with a MTOW of 12,500 pounds or more must adopt a security program under revised §1544.101(d) when conducting any scheduled or charter service. D & K understands that, although it is not a defined term in §1540.5, the TSA defines "charter service" to include both public and private charters, both of which are defined in §1540.5. Consequently, the 12,500 Rule for the first time requires air taxi operators that conduct private charters with larger equipment to adopt and comply with a formal security program, even if passengers do not flow through airport sterile areas.

Although the TSA stated that the amendment to §1544.101 was required by §132(a) of ATSA, the TSA rule exceeds the specific mandate of §132(a) which directs the TSA to impose security program requirements on some, but

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(2) For which the total passenger capacity of the aircraft is used for the purpose of civilian or military air movement conducted under contract with the Government of the United States or the government of a foreign country. §15441540.5.

not all, charter carriers. Specifically, as quoted above, Congress only directed the TSA to require security programs for operators of aircraft with a MTOW of 12,500 pounds or more, if the operators are "charter air carriers" as defined in §40102(a)(13) of the federal transportation statute. This section of the statute states that "'charter air carrier' means an air carrier holding a certificate of public convenience and necessity that authorizes it to provide charter air transportation." Air taxi operators, conducting flights with aircraft of 12,500 pounds takeoff weight, do not possess such certificates.

As a general rule, direct air carriers engaged in air transportation are required by §41101 of the federal transportation statute to possess a certificate of public convenience and necessity in order to do so. 49 U.S.C. §41101. However, the DOT, in the exercise of its authority to grant exemptions from the requirements of the federal transportation statute (49 U.S.C. §40109) has established a class of air carriers that are exempt from the requirement to possess a certificate of public convenience and necessity. These carriers are referred to as "air taxi operators" and are defined in Part 298 of the DOT's regulations. 14 C.F.R. Part 298.2. To be considered an

air taxi operator a carrier must operate with defined "small aircraft," must not possess a certificate of public convenience and necessity, must register with the DOT and most possess and show evidence of the required liability insurance. 14 C.F.R. §298.3. Small aircraft are aircraft other than "large aircraft" which are defined in Part 298 as any aircraft designed to have a maximum passenger capacity of more than 60 seats or a maximum payload capacity of more than 18,000 pounds. 14 C.F.R. §298.2(h).

It can and should be presumed that Congress was fully aware of the implications of defining "charter air carrier" in §132(a) of ATSA as excluding air taxi operators that, as a class, have historically been and continue to be exempt from the requirement to obtain, and do not possess, certificates of public convenience and necessity. The TSA either did not appreciate or understand the important distinction Congress made in adopting §132(a). This section of ATSA is directed specifically to the regulation by the TSA of general aviation and air charters, and therefore limits the discretion of the Administration to adopt rules encompassing greater or different categories of operators than those specified by §132(a).

The Congress certainly had good reason to order the TSA to make distinctions between those aircraft operators that are required to adopt and carry out security programs and those that are not (such as to prevent the disparate treatment of on-demand air taxi operators and fractional ownership programs discussed in part II below). The TSA is not free to exceed the authority given to it by Congress when it so directly and precisely established by law the categories of aircraft operators that are subject to TSA rules.

The rule which requires non-certificated charter air carriers (including air taxi operators) to adopt and carry out security programs clearly exceeds the intent of Congress in adopting §132(a) of the ATSA. Any attempt to comport such a rule with the express provisions of that section would necessarily violate two well established rules of statutory construction: the presumption against surplusage and *expressio unius est exclusio alterius*.

First, Congress specifically stated in §132(a) of the ATSA that the TSA shall "implement an aviation security program for charter air carriers (<u>as defined in section 40102(a)(13) of title 49, United States Code</u>) with a maximum certificated takeoff weight of 12,500 pounds or

more." Interpreting §132(a) as authorizing the TSA to require all charter air carriers that operate such aircraft to implement and carry out security programs, regardless of whether they fall within the definition of §40102(a)(13), would render this key provision of §132(a) completely meaningless. Such an interpretation of the statute would violate the "'endlessly reiterated principle of statutory construction … that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.'" Independent Ins. Agents of Am. v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000)(quoting Qi-Zhuo v. Meissner, 70 F.3d 136, 139 (D.C. Cir. 1995)); See also Mail Order Assoc. of Am. v. United States Postal Service, 986 F.2d 509, 515 (D.C. Cir. 1993) (statutes are to be construed, where possible, so that no provision is rendered inoperative or superfluous, void or insignificant).

In addition, the cannon *expressio unius est exclusio alterius* (to express or include one thing implies the exclusion of the other) supports the conclusion that Congress did not authorize the TSA to require all charter air carriers to adopt and carry out security programs. "[W]here the context shows that the 'draftsmen's mention of

one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives,' the cannon is a useful aid." Independent Ins. Agents of Am. v. Hawke, 211 F.3d at 644(quoting Shook v. District of Columbia Finan. Responsibility and Management Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998)). Because §132(a) specifically addresses the TSA's authority to implement security programs for charter air carriers, and Congress specifically provided that this authority includes those charter air carriers that meet the definition of §40102(a)(13), the TSA is not authorized to impose such a requirement on other charter air carriers that do not fall within this definition.

Any other general grant of authority found in the statute cannot reasonably be read to confer upon the TSA the authority to impose such requirements on other charter air carriers. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)(it is a commonplace of statutory construction that the specific governs the general). Statutory sections such as 49 U.S.C. § 114(l)(1)(granting TSA authority to issue, rescind, and revise such regulations as are necessary to carry out its functions) and 49 U.S.C. § 44903(b)(authorizing TSA to prescribe

regulations to protect passengers and property against an act of criminal violence or aircraft piracy) do not provide the TSA with unfettered authority to impose regulations that are outside the precise bounds of the authority granted to it by Congress. In this case, Congress has specifically provided that the TSA is to require security programs for charter air carriers that fall within the definition of §40102(a)(13). The TSA is not permitted to ignore this specific directive of Congress and impose such a requirement on all charter air carrier, irrespective of whether they meet the definition of 40102(a)(13), under the guise of its general authority to prescribe regulations.

Moreover, §114(l)(1) and §44903 may be read to simply authorize the TSA to issue regulations, a common attribute of other DOT modal administrations. Nothing on the face of these two provisions of the statute suggest in the slightest that the Congress' limiting language in §132(a) of ATSA can be overridden by the TSA by relying upon merely procedural sections of the statute.

Under this analysis the TSA's February 15, 2002 amendment to §1544.101, requiring non-certificate holders to adopt and carry out a security program, exceeds the

authority of the TSA to lawfully adopt and enforce such regulations on Part 298 registered air taxi operators.

## II. THE 12,500 RULE PROVIDES FOR DISPARATE TREATMENT OF SIMILAR TYPES OF OPERATIONS

One of the reasons D & K is opposed to the rule is that it has the affect of treating similar operations very differently. Specifically, operators like D & K compete with fractional ownership programs that operate under §91.501 of the FAR's and are not subject to the 12,500 Rule even though their aircraft perform similar missions to those of D & K, have MTOWs of 12,500 pounds or more and seat a greater number of passengers. No rational exists which would exclude one group of operators from the reach of the rule, but include a similar group with similar operating characteristics. If considerations of safety and security mandate imposition of the 12,500 Rule to operators that do not possess DOT-issued certificates of public convenience and necessity, then the same would be true of those operating similarly large aircraft under §91.501 of the FAR's.

There is no substantive difference, from the perspective of security and safety concerns, between a company sending its employees on a fractionally owned aircraft weighting 12,500 pounds or more and a firm making

use of the services of an air taxi operator. The same is true if a individual charters an aircraft for his or her private use or uses a fractionally owned aircraft. In all instances the passengers are either employed by the owner or charterer, as the case may be, or are guests of the owner/charterer. In both situations the passengers will generally personally know or have knowledge of each other, having worked as colleagues or being otherwise acquainted, thereby lowering if not eliminating security concerns[2]. In both instances, the flights are business or personally related travel and generally neither enplane nor deplane into a secured airport, but rather use the facilities of a fixed base operator[3].

Put succinctly, there are no practical differences between the two types of operations, but yet they will be subject to vastly different regulatory regimes. One, the air taxi operator, must adopt and carry out a 12,500 security plan, while the other, the fractional owner, is

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[2] D & K requires its customers to appoint a lead passenger who is responsible for advising the pilot-in-command that each of the passengers is part of the group and the pilot-in-command is required to review and check the company identification card of each passenger.

[3] D & K has no objection to the application of some element of TSA rules in situations where passengers are enplaned or deplaned into a sterile airport environment without having first been screened.

under no similar requirement and may come and go as it pleases without any consideration of airplane, airway or airport security. D & K raises this issue because it is fundamentally unfair to impose costly regulatory burdens on one subset of operators of large equipment (when not required by Congress to do so) and exclude similar operators even though the same safety and security factors are involved. D & K urges the TSA to review carefully the practical affect of its new regulation and to insure that safety and security requirements either apply only to those the Congress directed be subject to the rule, or to make the rule applicable to all similar operators of larger aircraft, no matter what authority they operate under.

D & K assumes that the TSA has no desire or interest in pitting one industry group against another, but that, in fact, is the unintended affect of the 12,500 Rule. The TSA has no reason to tilt the competitive playing field for one group or another, and D & K does not believe the Administration necessarily intended to do so when it adopted the 12,500 Rule. However, now that the fact has been brought to its attention, D & K urges the TSA to take the steps necessary to avoid such an unintended and unnecessary result.

Apart from the disparate treatment accorded air taxi operators and fractional aircraft operators, the 12,500 Rule as written by the TSA strikes a rather peculiar balance. Using the D & K fleet as an example, it operates with two aircraft types with MTOW in excess of 12,500 pounds, namely the Cessna Citation II and the Citation Bravo. However, despite the takeoff weight of the aircraft, they can only accommodate seven passengers. The aircraft are mainly chartered by companies for the movement of their employees and guests to business centers or to other company facilities and offices. However, there are many aircraft types that have a greater number of seats but have MTOWs of less than 12,500 pounds and are operated by air taxi operators. Although the Congress can and did make an arbitrary distinction by requiring the TSA to regulate the operations of certificate-holding air carriers operating heavier aircraft, the TSA is not empowered to make similar arbitrary distinctions. By expanding the operators subject to the 12,500 Rule to include some, but not all, non-certified operators operating aircraft of similar weight, the TSA has compounded the arbitrariness of the rule. On review, D & K urges the TSA to conform the

scope and applicability of the rule to that set by Congress in §132(a) of ATSA.

## III. PRACTICALITY REQUIRES AMENDMENT TO THE 12,500 RULE

Although the legal basis for the 12,500 Rule is lacking, D & K will also comment on some of the practical issues raised by the rule that makes compliance difficult, if not impossible, for many operators. D & K respectfully requests the TSA to review the rules with the objective of revising them to bring them into line with the realities of on-demand air taxi operations, assuming as D & K will throughout this section of its comments, that there is no legal impediment to adoption of the rule, although for the reasons stated above such is not the case.

First, it should be noted that the core of the 12,500 Rule is unclear as it is currently written. Section 1544.101(e) reads as follows:

> (e) Twelve-five program—contents: For each operation described in paragraph (d) of this section, the aircraft operator must carry out the following, and must adopt and carry out a security program that meets the applicable requirements of §1544.103 (c):
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> (1) The requirements of §§1544.215, 1544.217, 1544.219, 1544.223, 1544.230, 1544.235, 1544.237, 1544.301 (a) and (b), 1544.303, and 1544.305.
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> (2) Other provisions of subparts C, D, and E that TSA has approved upon request.

> (3) The remaining requirements of subparts C, D, and E when TSA notifies the aircraft operator in writing that a security threat exists concerning that operation.

Section (e) states that operators must adopt and carry out a security program that complies with §1544.103 (c), which contains twenty specified requirements, and must carry out the ten specific security functions listed in §1544(e)(1). The TSA must immediately clarify for the industry which specific security functions contained in §1544.103(e) it intended to mandate. If one were to interpret the section as only requiring compliance with the cross referenced sections of the TSA regulations enumerated in §(e)(1), then 12,500 Rule operators would only need to comply with the following subsections of §1544.103(c): (8), (9), (10), (12), (18), (19) and (20). D & K seeks clarification of the scope of §1544.101(e) and reserves the right to submit additional comment once the regulation is fully explained and clarified.

Apart from the need for this essential explanation, D & K would note some of the practical aspects of the 12,500 Rule. New §1544.230 requires fingerprint-based criminal history record checks for flightcrew members. D & K would accept a flightcrew background check requirement subject to

an understanding that fingerprints can be collected by local police officials to insure that flightcrew members of operators in small urban areas need not travel long distances simply to be fingerprinted. In prior conversations a D & K representative had with representatives of the TSA, D & K was advised that only TSA-approved fingerprint collectors would be permitted due to chain of custody issues for fingerprint samples. D & K believes that the fingerprint samples should be capable of being forwarded for analysis using the same custody and control procedures used to collect urine samples under existing DOT procedures applicable to air carriers. The TSA representative with whom D & K spoke was unsympathetic to this concern and insisted that fingerprinting will only be authorized at approved locations, which may or may not be convenient to operators and employees of operators not located in major metropolitan areas. D & K seeks clarification of §1544.230 as it will apply to air taxi operators.

The 12,500 Rule mandates that each operator designate and use a Ground Security Coordinator ("GSC") for each domestic and international flight, which individual has prescribed functions at each airport. §1544.215(b) While

well intended, the requirement is unreasonable in the context of on-demand type charter operators. The number of United States airports to which air taxi operators may operate is over 5,000, while the number of air carrier airports to which Part 121 carriers may conduct operations is only approximately 500. Moreover, by the very nature of the air taxi business, operators seldom fly over fixed routes to frequently or routinely used airports. Hence, it is simply impossible for each operator to have an assigned GSC at each airport at which it may operate. As an alternative, D & K requests that the Pilot-In-Command of each flight be deemed the GSC, similar to the designation of the Pilot-In-Command as the In-flight Security Coordinator. See §1544.215(c). Operators would provide necessary training to such designees to insure ground security is maintained.

D&K does not object to the requirement to transport a Federal Air Marshal on any flights conducted by it, subject to seat availability. See §1544.223. Unlike the situation in Part 121 scheduled service situations, where Federal Air Marshals can easily be accommodated, even in aircraft carrying a full passenger load, air taxi operators cannot realistically refuse a charter customer the use of the

entire seating and cargo capacity of the aircraft chartered and paid for by the customer. Where an Air Marshal to request space on a full charter flight, no air taxi operator is in a position to require the customer to give up a seat on its exclusively engaged airplane. Likewise, no air taxi operator is in a position to conceal the presence of a Federal Air Marshal in the context of a corporate or individual charter flight where all of the passengers work for the same company or are acquainted with one another and would obviously recognize the presence of a stranger. Indeed, because the bulk of the operations conducted by D & K and other air taxi operators consist of corporate or individual charter flights booked by customers of long standing, the need for the services of a Federal Air Marshal would not represent the best and highest use of these valuable law enforcement resources. Again, space permitting D & K would transport a Federal Air Marshal, however, D & K must question the effectiveness and purpose of the requirement to do so under circumstances whereby it cannot disclose the presence of the law enforcement officer.

Another practical problem presented by the 12,500 Rule is the requirement to prepare and update annually a

contingency plan. See §1544.301. The TSA must be far more specific about the contents of any such plan. For example, what precise contingencies must an operator anticipate in the plan and, if the contingencies shift, how will an operator know if its plan meets any such new contingency? While appearing purposeful and reasonable, without much more information, the naked requirement to produce and update a contingency plan will not allow operators to realistically respond to any likely emergency.

Other practical issues can be raised in connection with the TSA 12,500 Rule, and the National Air Transportation Association will do so in its written comments. However, fundamental to the final adoption of the 12,500 Rule, is the requirement that it be lawful and consistent with §132(a) of ATSA. Unfortunately, the TSA has exceeded its mandate by imposing this new rule on operators of aircraft with a MTOW of 12,500 pounds or more, whether or not such operators possess a certificate of public convenience and necessity, as specified by Congress.

Respectfully submitted,

SILVERBERG, GOLDMAN & BIKOFF, L.L.P.

Attorneys for
**D & K AVIATION, INC.**

By: Robert P. Silverberg

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