Air Transport Association

January 17, 2002

Docket Management System
U.S. Department of Transportation
400 Seventh Street, SW
Room: Plaza 401
Washington, DC 20590

Re: Docket No. FAA-2001-10999
Criminal History Records Checks

Dear Sir or Madam:

On behalf of our respective members, the Air Transport Association of America, Inc. (ATA)[1] and the Regional Airline Association (RAA)[2] submit the following comments on the FAA's final rule relating to Criminal History Records Checks (CHRC), 66 Fed. Reg. 63474, effective when published on December 6, 2001 (the Rule). The Rule applies to all airport and aircraft operators that have adopted security programs under 14 CFR Parts 107 and 108, respectively.

ATA and RAA appreciate the opportunity to comment on the Rule, and respectfully request the FAA to make a limited number of modifications affecting its implementation by airlines and airports. ATA and RAA members support the FAA's initiative to substantially expand the scope of airport and airline employees who are subject to CHRC -- requiring essentially all individuals with unescorted

[1] ATA members are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, JetBlue Airways, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are: Aerovias de Mexico, Air Canada, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

[2] RAA has 51 member airlines and carried 94% of the 88 million regional airline passengers who flew on regional airlines in 2001.

Air Transport Association of America, Inc.
1301 Pennsylvania Ave., NW – Suite 1100 Washington, DC 20004-1707
(202) 626-4000

SIDA access and all individuals who are authorized to perform screening functions to undergo extensive background checks. This will be a massive undertaking that will require hundreds of thousands of *current* airline employees to undergo CHRCs before December 6, 2002, as well as all new applicants going forward from December 6, 2001.[3] The changes we recommend will improve the practicality of the Rule and reduce its administrative burdens.

For a number of reasons, we are concerned that the process will be much more difficult for the air carriers than it initially appears, resulting in considerable processing delays that cascade into operational problems and delays. Among other things, (1) there are insufficient electronic processing scanners available to air carriers and airports to meet the demand for automated processing, and therefore most fingerprints must be submitted manually on fingerprint cards approved by the FBI; and (2) the procedure for removing FAA as the intermediary collecting the fingerprint cards/fees as currently provided in Secs. 107.209(e)(7)(f)/ 108.229(e)(7)(f) and substituting a non-governmental entity (as we understand is contemplated under a contract between the FAA and the American Association of Airport Executives (AAAE)) is, to the best of our understanding, essentially undefined. It is inevitable that the sheer volume of fingerprint cards to be submitted by airport and air carrier operators over the next 11 months,[4] when combined with a new submission agency (AAAE) and process, will result in confusion, processing errors, and processing problems. For these reasons, and for the reasons discussed below, we urge the FAA to adopt the modifications we propose.

1. Preemption of State and Local Laws. In order to avoid actual or perceived conflicts with state laws relating to fingerprinting, background checks and/or privacy, the final rule should state that it preempts all otherwise applicable state and local laws. The FAA has done this in other contexts where state and/or local laws might be inconsistent with FAA regulations or might interfere with their implementation, such as drug and alcohol testing and pilot records. Given the overriding national public interest in aviation security, the necessity of implementing these regulations uniformly in virtually every state of the union, and the unique circumstance that airports are by and large state or local agencies, a strong preemption statement is required. Therefore, we recommend that the FAA add to 14 CFR §§ 107.209 and 108.229 the following new paragraph in the body of the Rule:

> "[Insert Section Number]. This section preempts any state or local law, rule, regulation, order or standard covering its subject matter, including, but not

[3] FAA estimates that 1.06 million employees will need to be processed in 2002, and approximately 275,000 employees per year thereafter, for a 10 year estimate of 3.52 million employees.

[4] See footnote 3, above.

limited to, fingerprinting, privacy rights, criminal history background checks, recordkeeping and dissemination of results."

2. Sec. 108.229(c) and 107.209(c). These parallel sections require that individuals who had unescorted SIDA access privileges, or who performed screening functions, prior to December 6, 2001, are subjected to a fingerprint-based CHRC by December 6, 2002.

Issue and Recommendation: The primary issue here is that during the course of calendar year 2002, airline schedules for obtaining CHRC of their employees with existing SIDA access may not be aligned with airport cycles for renewing media authorizing SIDA access. In these circumstances, it will be disruptive and it will add administrative and out-of-pocket expenses if airlines are forced by airports to obtain CHRC according to each individual airport's renewal cycle instead of pursuant to an airline's comprehensive schedule for its employees. So long as airlines obtain the CHRC by December 6, 2002, airports should not be allowed to dictate to airlines when the CHRC is obtained for their employees. Therefore, we recommend that FAA add a new subparagraph (1)(iii) in §108.229(c), and similar language in § 107.209(c), as follows:

> "(iii) Each aircraft operator shall determine the schedule for obtaining fingerprint-based CHRC on its employees. Airport operators may not withhold renewal of identification media for such individuals prior to December 6, 2002, if they have not yet been subjected to a CHRC by their aircraft operator-employer."

A secondary issue is that some airports have taken the position that individuals must undergo a CHRC each time their media expires and must be renewed. This construction of the regulations amounts to an annual CHRC requirement. Such a construction is inconsistent with the regulations and inconsistent with the FAA's own view of the regulations, as indicated by the estimate that 275,000 individuals will be processed annually after the first year. 66 Fed. Reg. 63480.

FAA should make clear that an airport's renewal cycle (whether annual or otherwise) for SIDA media is not considered to be an "application" for unescorted SIDA access that triggers the requirement for CHRC.

3. Sec. 107.209(b)&(c) and 107.209(m)&(n). These provisions, which must be read together, require an airport to obtain CHRC on an individual seeking/retaining SIDA access unless the airport <u>elects</u> to accept an airline's certification that the employee has been subjected to CHRC. However, airport operators may elect not to accept such certifications by airlines.

Issue and recommendation. We believe these provisions were drafted with the expectation that airports would accept airline certifications in most instances, but

leaving airports some flexibility to ensure that specific individuals are subjected to CHRC based on particularized concerns. However, the Rule does not articulate this view, and already several large hub airports are refusing to accept airline certifications regarding their employees who have been subjected to CHRC. This situation is unacceptable because it creates another administrative burden and can significantly increase the costs for airlines without justification, and it means that airline-employers are not in control of their employees and information about their employees. Refusing to accept airline certifications creates unnecessary administrative burdens and expense for airlines, and wastes the time of individual employees. It results in no identifiable public benefit, and renders meaningless the responsibility placed on airlines regarding their employees.

For this reason, we recommend that FAA revise these provisions to require airport operators to accept certifications by airlines regarding their employees as to past CHRC (with respect to subparagraph (m)) or as to the airline's compliance with § 108.229 (with respect to subparagraph (n)), unless an airport can articulate a particularized concern on an individual basis for not accepting the airline-employer's certification.

4. Sec. 108.229 (e)(1). This section prescribes the information that must be included on the fingerprint application provided by the air carrier to an individual who is to fingerprinted. The Rule, however, limits the fingerprint application to "only" the specific information listed.

Issue and Recommendation: Beginning December 7,2002 (once the mandated CHRCs are completed on current air carrier employees), fingerprint applications will most often be provided to applicants, not current employees. They will be included in a packet of information provided to applicants satisfying a range of statutory and individual air carrier requirements. Currently, standard industry practice is to include fingerprint applications as part of a multifunctional form to obtain information and provide notices concerning a variety of employment-related matters. This practice reduces the administrative burden of the application process on both employers and employees. To ensure efficiency and facilitate the application process, the fingerprint application form should continue to be multifunctional. Including additional information on the application – such as the verification of the required two forms of identification, as well as personal identifying information in addition to the individual's name (used, for example, to aid in the maintenance of accurate records and for audit purposes) – will not compromise the purpose or intent of the Rule, or the performance of the record checks. Therefore, we recommend that this subsection be revised by deleting the word "only" in subparagraph (1).

5. Sec. 108.229(g)(2). This section[5] allows air carriers 45 days to investigate an individual's arrest for a disqualifying offence (with no disposition shown on the

[5] Parallel Section 107.209(g)(2) allows airport operators this same 45-day investigation period.

CHRC). If the air carrier cannot determine that the arrest did not result in a disqualifying criminal offense within 45 days after obtaining the CHRC, the carrier must suspend the individual's unescorted access authority or authority to perform screening functions.

Issue and Recommendation: This provision gives airlines some flexibility in working with their employees, and affords employees an opportunity to clarify information regarding an arrest. However, some airports are undermining the purpose of this provision by *immediately* revoking SIDA badges once notified of an airline employee's arrest – before the 45 day time period has run and before the air carrier has had an opportunity to determine the disposition of the arrest. Such actions are inconsistent with this provision, raise issues of basic fairness to employees and erode employee morale and loyalty. In addition, it is very disruptive to carrier scheduling and personnel policies and may lead to staffing shortages – particularly at security checkpoints – and may subject carriers to employee grievance actions or even civil litigation. For these reasons, we recommend that FAA advise airports that they may not prematurely revoke SIDA access and must wait for air carrier notification under the 45-day investigation period permitted to air carriers under the Rule.

6. Section 108.229(i). Subparagraph (1) of section 229(i) applies to individuals first seeking unescorted access after December 6, 2001. Subparagraph (1)(ii) permits an air carrier to make a final determination to deny unescorted access authority or authority to perform screening functions if an employee fails to give notice within 30 days of his or her intent to correct information in a criminal record that the employee believes is inaccurate.

Issue and Recommendation: A parallel provision, however, is not found in subparagraph (2), which applies to individuals already having unescorted access privileges on December 6, 2001. Air carriers need the authority to make final determinations regarding unescorted access with respect to an existing employee who fails to give notice of his or her intent to correct a criminal record within the 30-day window. We recommend that FAA insert a new subparagraph (2)(ii) that gives air carriers the same authority provided in subparagraph (1)(ii).

7. Sections 108.229(j) and 107.209(j). These parallel sections relate to dissemination of CHRC results.

Issues and Recommendation: Although airlines have their own Submitting Office Numbers (SON), for a variety of reasons airports will be submitting CHRC requests for airline employees using the airport's SON numbers. Indeed, as noted above, some airports are refusing to accept airline certifications regarding their employees and are requiring the CHRC to be done under the airport SON. When this occurs, the airport receives the CHRC report, not the airline-employer. However, as stated earlier, there is no policy reason why airlines also should not receive CHRC reports on their employees when this occurs. Airlines-as-

employers have a right and a need to know the information contained in CHRC reports on their own employees. It makes no sense to allow airlines to receive CHRC reports for some employees but not others simply on the basis of who submits the CHRC request. Such a rule would be arbitrary and capricious, and could create unforeseen liability risks for airlines. Furthermore, authorizing airlines to receive CHRC reports on their employees is consistent with the authority granted to the Administrator to designate others to receive this information. For these reasons, these parallel provisions should be amended to insert the following new subparagraph:

> "(4) The air carrier that employs, sponsors, or contracts with the individual to whom the record pertains."

Current subsection (4) should be renumbered as subsection (5). The preamble should also instruct airports that absent extraordinary reasons, CHRC reports should always be provided in a timely manner to the air carrier that employs, sponsors or contracts with an individual for whom the airport has obtained the CHRC.

8. Proposed New Sec. 108.229(n). Sections 107.229(m)&(n) provide that an airport operator is in compliance with its obligations under paragraphs (b) and (c) when it accepts a certification from an aircraft operator that the aircraft operator has complied with Section 108.229 for its employees and contractors required to have CHRCs. However, there is no comparable provision in Sec.108.229 stating that an aircraft operator is in compliance with its obligations under Sec. 108.229(b)&(c) if it accepts documentation from an airport demonstrating that the airport, pursuant to Sections 107.209(b) and (c), has conducted a fingerprint-based CHRC on an airline employee or contractor who is required to have one. As noted above, in some cases airports will conduct CHRCs on airline employees and contractors.

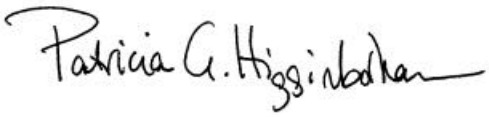
Recommendation: For consistency, and to avoid unnecessary duplication of effort and administrative burdens, we recommend that a parallel section be added to Section 108.229 that states an aircraft operator is in compliance with the requirements of Section 108.229(b) if it receives documentation demonstrating that an airport, pursuant to Sections 107.209(b) and (c), has conducted a fingerprint-based CHRC on an employee or contractor of the air carrier, and the CHRC does not disclose a disqualifying offense. Additionally, as discussed in paragraph 3 above, under these circumstances airports should be required to provide to the employing or sponsoring air carrier a copy of the CHRC report.

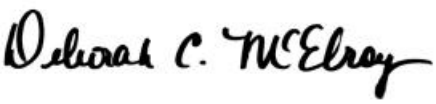
> 108.229(n). Documentation by Airport Operators. An aircraft operator is in compliance with its obligations under Section 108.229(b) if it receives documentation demonstrating that an airport, pursuant to Sections 107.209(b) and (c), has conducted

a finger-print based CHRC on an individual that does not disclose that he or she has a disqualifying offense. Airport operators shall provide all relevant documentation relating to the CHRCs on airline employees or contractors, including the results, to the individual's employing or contracting aircraft operator.

Our members urge the FAA to adopt these recommendations as quickly as possible as they will improve the practicality of the Rule and reduce its administrative burdens. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,





Patricia G. Higginbotham
Assistant General Counsel
Air Transport Association
of America, Inc.

Deborah C. McElroy
President
Regional Airline Association