

Proposed Rule on Passenger Screening Using Advanced Imaging Technology

Final Summary of Public Comments

Docket TSA-2013-0004

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**Prepared by
ICF Incorporated**

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Table of Contents

Table of Acronyms and Abbreviations.....i

Introductionii

1. General feedback on the Notice of Proposed Rulemaking (NPRM)1

 1.1 General support for the proposed requirements in their entirety.....1

 1.2 General opposition to the proposed requirements in their entirety.....1

 1.2.1 General statements that AIT screening should be eliminated.....2

 1.2.2 General statements that TSA has overstepped / should cede security screening to airports/carriers.....3

 1.3 Other general comments.....3

2. Legal Issues4

 2.1 Statutory authority / legislative history / congressional direction to pursue use of AIT4

 2.2 Administrative Procedures Act concerns.....5

 2.3 Fourth Amendment Due Process Concerns7

 2.4 Other Legal Issues.....9

3. Effectiveness in Addressing Security Threats10

 3.1 Evolving threats to security10

 3.2 Layers of security (e.g., TSA deployment, intelligence gathering, Secure Flight, explosive detection)11

 3.3 Deployment of AIT (e.g., coverage/timeline)12

 3.4 Threat detection by AIT12

 3.4.1 Ability to detect anomalies (e.g., concealed under clothing or elsewhere)12

 3.4.2 Ability to detect types of explosives14

 3.4.3 AIT effectiveness (e.g., accuracy, false positives)14

 3.5 Other comments on the effectiveness of addressing security threats16

 3.5.1 Screening measures in foreign countries (e.g., AIT use in Europe, screening measure in Israel)16

4. AIT Screening Protocols16

 4.1 Types of AIT equipment.....17

 4.1.1 Laboratory and operational testing of AIT equipment17

 4.1.2 Types.....17

 4.1.2.1 Backscatter technology (e.g., Rapiscan)17

4.1.2.2	Millimeter wave technology (e.g., L-3 ProVision)	18
4.1.2.3	Other types	19
4.2	Privacy Safeguards and Concerns for AIT	19
4.2.1	Technologies & Procedures for Safeguarding Privacy	19
4.2.1.1	Use of ATR Software	19
4.2.1.2	AIT data protection controls (e.g., transmission and viewing of images, data storage, and copying capabilities)	19
4.2.1.3	Opt-out option	20
4.2.1.3.1	Concerns about pat-down procedure (e.g., physical/psychological trauma)	21
4.2.1.4	Other technologies and procedures for safeguarding privacy	21
4.2.2	Other Privacy Concerns (e.g., adequacy of Privacy Impact Assessments, "AIT" misnomer/"nude body scanner")	22
4.3	Health and Safety Concerns	23
4.3.1	Physical concerns	23
4.3.1.1	Radiation effects	23
4.3.1.2	Other physical concerns	24
4.3.2	Other safety and health concerns	24
4.4	AIT Screening Procedures at the Checkpoint (for issues not related to privacy)	24
4.4.1	Sensitive Security Information/non-public nature of TSA's Standard Operating Procedures	25
4.4.2	Adequacy of information/signage for passengers about what to expect with AIT screening	25
4.4.3	Selection of Candidates to Receive Additional Screening	26
4.4.3.1	Clarification of what constitutes 'an anomaly'/'anomalies'	26
4.4.3.2	Profiling concerns	26
4.4.4	Adequacy of SOPs to those with special needs and medical conditions/equipment that make them ineligible for AIT	27
4.4.4.1	Families	27
4.4.4.2	Passengers with disabilities and medical conditions/equipment that make them ineligible for AIT	27
4.4.4.3	Others (e.g., transgender individuals)	28
5.	Rulemaking Analyses	29
5.1	Regulatory Evaluation and Economic Impact Analysis	29

5.1.1	Costs	29
5.1.1.1	Passenger Opportunity Costs.....	29
5.1.1.2	Airport Utility Costs.....	30
5.1.1.3	TSA Costs.....	30
5.1.1.3.1	Personnel.....	30
5.1.1.3.2	Training.....	30
5.1.1.3.3	Equipment.....	30
5.1.1.3.4	Utilities.....	31
5.1.1.4	Other Costs	31
5.1.2	Benefits.....	32
5.1.3	Other impacts	33
5.1.3.1	Health impacts.....	33
5.1.3.2	Travel impacts.....	33
5.1.3.3	Other impacts	33
5.1.4	Regulatory Alternatives	34
5.1.4.1	Alternative #1 (no action).....	34
5.1.4.2	Alternative #2 (pat-down).....	34
5.1.4.3	Alternative #3 (ETD screening)	34
5.1.4.4	Alternative #4 (NPRM).....	35
5.1.4.5	Other alternatives (e.g., WTMD, canine).....	35
5.1.4.6	Adequacy of comparative analysis between AIT and alternatives	35
5.1.4.7	Other comments on alternatives.....	36
5.1.5	Other comments on RIA	36
5.2	Initial Regulatory Flexibility Analysis.....	37
5.3	Other Regulatory Analyses (e.g., international trade, unfunded mandates, paperwork reduction, Federalism).....	37
5.4	Other (e.g., risk management, risk-reduction analysis).....	38
6.	Other comments on the Proposed AIT Rule	39
6.1	Request for extension of comment period.....	39
6.2	Comments on the regulatory text (e.g., omission of opt-out language from regulatory text).....	39
6.3	Other comments on the Proposed AIT Rule	41

7. Comments outside the scope of the proposed AIT rule42

7.1 Anecdotes about TSA screening activities unrelated to AIT44

Table of Acronyms and Abbreviations

AIT	Advanced Imaging Technology
APA	Administrative Procedures Act
ATR	Automatic target recognition
BDO	Behavioral detection officer
DNA	Deoxyribonucleic acid
EO	Executive Order
ETD	Explosive Trace Detection
GAO	Government Accountability Office
NEPA	National Environmental Policy Act
NPRM	Notice of Proposed Rulemaking
PETN	Pentaerythritol tetranitrate
PSC	Passenger screening canines
RIA	Regulatory Impact Assessment
SOP	Standard operating procedures
SPOT	Screening Passengers by Observation Techniques
TSO	Transportation Security Officer
THz	Terahertz
TSA	Transportation Security Administration
USB	Universal Serial Bus
WTMD	Walk-through metal detector

Introduction

On March 26, 2013, the Transportation Security Administration (TSA) published a notice of proposed rulemaking (78 FR 18287) to obtain public comment on its proposal to revise civil aviation security regulations to clarify that TSA may use advanced imaging technology (AIT) for passenger screening. Through August 13, 2013, TSA had received a total of 5,534 public submissions on the proposed rule in docket TSA-2013-0004. Approximately 535 of these submissions were identified as copies of form letters and 100 either “not germane” or duplicates. The remaining submissions - over 4,890 - included some unique content requiring analysis. On TSA’s request, ICF has analyzed these unique submissions and summarized them in today’s report.

ICF’s process for analyzing public comments builds upon its commercial web-based CommentWorks® software product. As a first step, ICF imported the submissions received by TSA into CommentWorks for analysis. ICF staff developed an issue outline to include key issues identified in the proposed AIT rule and addressed by the commenters and received TSA approval of the draft issue outline. ICF staff then analyzed all unique comment letters, identifying whether each submission contained substantive excerpts (“bracketing”), and used the issue outline to associate each excerpt to the issue(s) to which it applies (“coding”).

After analyzing all of the unique submissions, ICF coded excerpts from these letters by issue. ICF staff then distilled the content from the verbatim excerpt quotes into the detailed comment summaries that are included in today’s document. The comment summaries that follow are organized into issue topic areas, as indicated in the table of contents. This summary report, however, is not intended to be an exhaustive discussion of all unique comments received on the proposed rule. Rather, it attempts to capture common themes discussed by commenters and highlight particular issues detailed in some of the more substantive of comments. The content of this report should be viewed with ICF’s other final reports and deliverables on this project to gain a full understanding of the themes addressed by the commenters on the rule. Taken together, these materials should provide a comprehensive picture of the opinions expressed by the public.

1. General feedback on the Notice of Proposed Rulemaking (NPRM)

Comments associated with this issue category are summarized in the subsections below.

1.1 General support for the proposed requirements in their entirety

Approximately 290 submissions included a statement of general support without offering additional substantive rationale in their comments. Many commenters expressed general approval for AIT use for a variety of reasons. For example, several individual commenters stated that they have medical conditions (e.g., metallic implants, metallic artificial joints, prostheses) which prevent them from being screened by metal detectors, and that they prefer the ease and quickness of AIT to the pat-down procedure to which they would otherwise be subject.¹ Several other commenters argued that the inconveniences of AIT implementation (e.g., perceived invasion of privacy) are outweighed by the need to ensure the safety of airline passengers and other American targets (e.g., 'threats' due to terrorism).² In making their arguments in favor of AIT use, many commenters also cited the terrorist attacks on September 11, 2001.³

Many individual commenters expressed, generally, that they didn't have any concerns related to the use of AIT.⁴ In response to other public comments opposed to AIT, several individual commenters questioned the significance of the impacts on privacy or safety concerns.⁵ Several individual commenters also expressed a preference for AIT over pat-down techniques, though they did not provide any information regarding if or why pat-downs would otherwise be their primary means of TSA screening.⁶

1.2 General opposition to the proposed requirements in their entirety

Approximately 940 submissions included general statements of opposition to continued use of AIT without offering additional substantive rationale in their comments. Many individual commenters opposed the proposed provisions because of general concerns pertaining to, privacy,⁷ health,⁸ cost,⁹ and/or civil liberties.¹⁰ Some individual commenters also expressed general criticism of TSA and its staff.¹¹

¹ J. Kingston, E. Royce, Anonymous [0662], M. Cotter, S. Lee, Anonymous [0807], H. Hougen, M. Pastel, C. Davis, A. Martinez.

² P. Robinson, M. Johnson, Anonymous [0919], J. Burnham, H. Tozis, Ryan [1179], J. Bentz, W. Bush, S. Turco, S. Gill.

³ M. Laustra, J. Mottile, Raymond [1830], T. Goheen, Nicholas [2076], B. Summers, Anonymous [2569], R. Dominguez, M. van Gils-Cardinal.

⁴ D. Bingham, Jonathan [0693], T. Lawton, M. Kapral, J. Sims, N. Smith, R. Ems, Anonymous [2082], T. Lawton, P. Freeman.

⁵ Anonymous [0604], Mike M. [0830], J. Edwards, John [1030], Anonymous [1442], Christian [1526], S. Grondahl, Joe [1825], W. Kohler, S. Dolan, Anonymous [3821].

⁶ J. Barry, J. Watson, Joe [2324], A. Florian, E. Creskovich, T. Wolf.

⁷ Anonymous [0061], K. Stephenson, C. Clark, Anonymous [0865], C. Maglothin, V. Carney, B. Solomon, M. Mermall.

⁸ I. Dinitrov, Anonymous [0071], K. Stephenson, A. Scofield, T. Bacon, L. Shane, Anonymous [1175], Anonymous [1223].

⁹ Anonymous [0144], Anonymous [0163], Anonymous [0170], K. Schendel, J. Faulkner, B. DeCoster, W. Bakes, L. Hobbs, W. Burke.

Several individual commenters also expressed a desire for TSA to be disbanded and/or defunded.¹² A few commenters, including individual commenters and a non-profit organization, claimed that TSA's summary of the proposed rule was a misrepresentation of the facts and screening options.¹³

The pat-down alternative option to AIT screening was a polarizing issue. Many individual commenters expressed a strong preference for the pat-down; many also stated that they always request a pat-down in lieu of AIT screening.¹⁴ A separate group of individual commenters, however, expressed strong opposition and criticism of current pat-down procedures.¹⁵ Although some individual commenters expressed their preference to receive a pat-down, they stated that they feel "punished" by TSA staff upon requesting the alternative screening measure.¹⁶

The effectiveness of AIT in ensuring safe airline travel was also challenged by many commenters. Several individual commenters questioned AIT's effectiveness, generally.¹⁷ Many individual commenters expressed the view that the requirements were just "security theater" and did not make passengers safer; some commenters also argued that the "security theater" had the further negative impact of giving American citizens a false sense of security.¹⁸ Several individual commenters further argued that AIT use has not resulted in the capture of any terrorists.¹⁹ Numerous alternatives (e.g., use of canines, focus on intelligence gathering and/or tracking of suspicious people, "puffer" machines) were offered by individual commenters as being preferable alternatives.²⁰ Many individual commenters stated a preference for walk-through metal detectors (WTMD).²¹ Also, reinforced cockpit doors were cited by many individual commenters as being an adequate response to flight safety concerns.²²

1.2.1 General statements that AIT screening should be eliminated

Approximately 1,190 submissions included general statements requesting the elimination of AIT. Many individual commenters, a non-profit organization, and a community organization specifically opposed

¹⁰ Anonymous [0072], P. Lau, D. Hixson, Gloria [0248], J. Hollinger Pascal, J. Thierrien, C. deLorm, A. Kugler, V. Goli.

¹¹ Anonymous [0063], B. Hall, J. Brantingham, G. Roberts, K. Beachy, Onederer [0251], G. Clark, Anonymous [1581].

¹² Anonymous [0052], W. Getty, N. Bruner, K. Spicer, M. Martinez, A. Keller, M. Ziemann, J. Buske, M. Hamilton, T. Todorovac.

¹³ C. Wilson, Anonymous [644], National Association of Airline Passengers (NAAP).

¹⁴ K. Williams, W. Heigh, Anonymous [0835], Anonymous [0849], David [0911], E. Carson, Christopher [1157], M. Lair, J. Elliott, Anonymous [1302].

¹⁵ Linda [0057], S. Smith, Anonymous [0516], Anonymous [1289].

¹⁶ T. Ferrara, Schmidt [1549].

¹⁷ R. Torn, Anonymous [1064], J. Wills, Anonymous [1284], P. Tisch.

¹⁸ C. Myers, J. Rock, Anonymous [0955], S. Smoogen, M. Meersman, Anonymous [0991], C. Knopse, Anonymous [1081], S. Spade, J. Humphrey.

¹⁹ David [0113], J. Reyka, D. Suddes, R. Fritz, F. William.

²⁰ Nathan [1197], Anonymous [1252], Anonymous [1281], J. Stapleton.

²¹ A. Scofield, T. Bacon, J. Borden, P. Gonzalez, Tim [1134], A. Austin, Anonymous [1178], Anonymous [1207], W. Liu, Anonymous [1252], Anonymous [1601].

²² Anonymous [0460], Anonymous [0462], J.D.H. [0931], Anonymous [1055], Tim [1134], S. Owings, Anonymous [1281], C. Welsh, P. Miller.

AIT screening devices and called on TSA to remove them from airports.²³ Several individual commenters suggested that alternative safety measures be employed in lieu of AIT screening.²⁴

1.2.2 General statements that TSA has overstepped / should cede security screening to airports/carriers

Approximately 130 submissions included general statements critical of TSA on this issue. Many individual commenters remarked that TSA has overstepped its authority and that the agency should be eliminated.²⁵ Additionally, many individual commenters argued that airport security costs and responsibilities should be returned to the owners of airports and/or airlines.²⁶ The issue of personal freedoms was raised by many individual commenters, who called for their return to airline passengers.²⁷ An individual commenter cited a recent poll demonstrates, in the commenter's opinion, that the percentage of Americans who are not willing to sacrifice personal freedoms in the fight against terrorism is larger than the percentage who are willing, and that the percentage of Americans who think the government will go too far in the fight against terrorism exceeds the percentage who think the government will not go far enough.²⁸

1.3 Other general comments

Approximately 775 submissions made other general points regarding the proposed rule. The majority of these commenters pertained to AIT's effect on potential airline passengers' travel choices. Many individual commenters indicated that they no longer travel by air in response to AIT screening measures.²⁹ Similarly, many other commenters indicated that they limit their airline travel as much as possible because of AIT measures.³⁰ An individual commenter cited a recent news article which highlights increasing ridership of Amtrak over airline travel.³¹ Several other individual commenters argued that "foreigners" no longer want to travel to the United States because of AIT screening measures.³²

Many commenters mentioned their support for the use of racial profiling tactics instead of AIT, and argued that such measures would be more efficient and effective.³³ Another commenter suggested that

²³ M. Ramoneda, Anonymous [557], J. Appelbaum, Anonymous [1728], K. Bloom, S. Mayer, Anonymous [5056], S. Abraham, National Association of Airline Passengers (NAAP), Freedom To Travel USA.

²⁴ K. Bloom, A. Figueroa, D. Williams, Anonymous [0762], Anonymous [1074], G. Jennings, G. Dusbabek, D. Pitchfork, J. Brown.

²⁵ R. Caston, Jr., G. Lockhard, C. Johnson, B. McD, J. Levin, Anonymous [1196], J. May, J. Axelsen, P. Roest.

²⁶ B. Richards, C. Johnson, K. Murphy, D. Ross, J. Crawford, Anonymous [0397], Michael [2852], T. Griffin, M. Miller, Anonymous [3957].

²⁷ J. Sweatt, Anonymous [1792], D. Ryan, G. Schwartzkopf, R. Flourney, M. Mecum, J. McGarlandt, Anonymous [2629].

²⁸ Anonymous [2730].

²⁹ M. Graham, Anonymous [0202], D. Babel, K. Snell, E. Hilf, Gloria [0248], H. Heminger, E. Krietlow, S. Hoover.

³⁰ C. Moffitt, J. Rella, Jr., K. Porter, R. Moore, Kathleen [0411], S. York, M. Wyszomierski, L. Posey, Anonymous [4318].

³¹ Anonymous [0549].

³² Anonymous [0862], R. Ellis, J. Nuttall.

³³ R. Wyse, M. Schick, E. Hilf, M. Applegate, L. Head, Anonymous [1223], D. King, Anonymous [1475], Anonymous [2002], K. Egan.

backscatter technology was adopted because of lobbying by politically-connected individuals with a financial interest in the machines.³⁴

2. Legal Issues

Comments associated with this issue category are summarized in the subsections below.

2.1 Statutory authority / legislative history / congressional direction to pursue use of AIT

Approximately eight commenters addressed TSA's authority to implement the use of AIT during passenger screening. Generally, commenters addressing this topic argued that TSA exceeded its authority in implementing AIT.

Some commenters addressed the 2004 congressional directive related to TSA's instructions regarding development of screening equipment. An individual commenter suggested that Congressional direction specifically included the investment and deployment of AIT.³⁵ A privacy advocacy group, a non-profit organization, and individual commenters, however, argued that TSA's implementation of AIT is inconsistent with Congressional direction.³⁶ Specifically, a privacy advocacy group argued that TSA's deployment of AIT is inconsistent with a qualifier in the Congressional directive – that the agency develop equipment to detect threats “that terrorists would likely try to smuggle aboard an air carrier aircraft.” The group argued that TSA has demonstrated an overly broad interpretation of Congress's authorization and that, although the agency repeatedly cites AIT's abilities to identify weapons, the NPRM does not establish how such weapons are likely to be smuggled aboard planes by terrorists. The group further argued that “[s]ufficient analysis must evaluate [AIT] and alternatives on the ability to detect weapons and explosives likely to be used by terrorists, and demonstrate that [AIT] best achieves this goal with concrete evidence.” The commenter argued that the analysis on which TSA currently relies fails to do either satisfactorily.³⁷

An individual commenter expressed concern that TSA did not act in accord with congressional direction because the agency acted without public input, without independent testing, and pursued a technology which the commenter argued was purchased as part of a “corrupt deal.”³⁸ Another individual commenter argued that Congress authorized TSA to procure and deploy AIT only as a secondary screening tool at security checkpoints – not as a primary means of screening.³⁹ Other individual commenters stated that, even if the proposed deployment of AIT has been authorized by Congress, the proposed use of AIT is not necessarily legal or the appropriate course of action⁴⁰ and that TSA was not performing the agency's own

³⁴ J. Tillery.

³⁵ N. Chan.

³⁶ Electronic Privacy Information Center (EPIC), National Association of Airline Passengers (NAAP), K. Bloom, C. Wilson.

³⁷ Electronic Privacy Information Center (EPIC).

³⁸ K. Bloom.

³⁹ C. Wilson.

⁴⁰ Anonymous [0644].

due diligence in trying to restrain the executive and legislative branches subsequent to Congressional direction.⁴¹

Some commenters addressed TSA's statutory authority and other issues related to TSA's jurisdiction. A non-profit organization referenced 49 U.S.C. § 44903(b)(2)(A) and 49 U.S.C. § 4903 (b)(2)(B) to support its statements that the proposed rule is inconsistent with TSA's direction to protect passengers and the public interest in promoting air transportation and intrastate air transportation. The organization stated that TSA is not authorized "to sexually assault passengers" under current statutes or regulations.⁴² An individual commenter claimed that TSA, a federal agency, has no jurisdiction over public airports, which the commenter stated are mostly on state land.⁴³

2.2 Administrative Procedures Act concerns

Approximately 50 commenters addressed concerns related to the Administrative Procedures Act (APA), 5 U.S.C. § 550 *et seq.* Generally, commenters who addressed APA concerns raised arguments that TSA has not adequately complied with APA requirements or other judicial findings in the *EPIC v. DHS* court case.

Several commenters, including non-profit organizations, a privacy advocacy group, and individual commenters, expressed discontent that TSA did not comply with APA requirements prior to initial deployment of AIT.⁴⁴ One of the non-profit organizations, which represents airline passengers, argued that the "failure to solicit and heed advice and comment from passengers and the public weakens security and jeopardized the safety of all passengers, aircrew, and airport personnel."⁴⁵ A privacy advocacy group expressed frustration that the agency allegedly received two petitions from dozens of civil liberties organizations to institute a rulemaking proceeding, yet failed to comply.⁴⁶ A few individual commenters argued that, if TSA had initially complied with rulemaking procedures, the public would have likely rejected the proposed action and TSA would not have been able to deploy the technology.⁴⁷ One individual commenter argued that a Congressional directive is insufficient to supplant TSA's duty to make a "reasonable and reasoned decision."⁴⁸ A privacy advocacy group and an individual commenter raised further concerns regarding the money spent on the deployment of AIT despite lack of opportunity for public comment.⁴⁹

Commenters also discussed their thoughts on the *EPIC v. DHS* court case and holding. Several individual commenters supported one of EPIC's arguments during the case on the invasive nature of AIT scanners.⁵⁰

⁴¹ H. Waldron.

⁴² National Association of Airline Passengers (NAAP).

⁴³ J. Buske.

⁴⁴ Electronic Privacy Information Center (EPIC), Competitive Enterprise Institute and Robert Crandall, National Association of Airline Passengers (NAAP), D. Williams, N. Bickers.

⁴⁵ National Association of Airline Passengers (NAAP).

⁴⁶ Electronic Privacy Information Center (EPIC).

⁴⁷ K. Bloom, Anonymous [0557], L. Underwood.

⁴⁸ W. Niebling.

⁴⁹ K. Bloom, Electronic Privacy Information Center (EPIC).

⁵⁰ Anonymous [1075], R. Wilson, Anonymous [2892], Anonymous [2968], K. Hanson.

Another individual commenter opposed the court holding, which allowed TSA to continue use of AIT until the agency came into compliance with APA requirements.⁵¹ A privacy advocacy group claimed that the NPRM incorrectly stated the holding of the *EPIC v. DHS* case.⁵²

The amount of time taken by TSA to comply with various orders in the *EPIC v. DHS* holding was also discussed by commenters. A privacy advocacy group and many individual commenters expressed displeasure regarding the length of time that elapsed between the court decision and the issuance of the NPRM.⁵³ The privacy advocacy group stated that it filed three mandamus petitions during the elapsed two-year period.⁵⁴ An individual commenter stated that TSA took a year longer than legally allowed to cease use of AIT scanners without Automatic Target Recognition (ATR) software.⁵⁵ A few individual commenters expressed skepticism over the timing of the issuance of the NPRM occurring so close temporally to a terrorist attack (i.e., the Boston marathon bombing), and one of those commenters opined whether TSA did so to gain public sympathy.⁵⁶

Commenters raised concerns regarding whether legal requirements resulting from the *EPIC v. DHS* case were met through the issuance of the NPRM. Several commenters, including a non-profit organization and individual commenters, claimed that the legal requirements ordered by the U.S. Court of Appeals for the D.C. Circuit in the *EPIC v. DHS* holding were not met.⁵⁷

Commenters also provided their opinions regarding the sufficiency of the NPRM in meeting APA requirements. Several commenters, including advocacy groups, a non-profit organization, and individual commenters, argued that the proposed rule and justification provided in the preambulatory text would not meet the 'arbitrary and capricious' standard applied to agency actions under the APA.⁵⁸ Specifically, the privacy advocacy group made the following arguments in support of a claim that the NPRM failed to meet the arbitrary and capricious standard:⁵⁹

- “[R]elevant factors concerning effectiveness, stronger alternatives, and health risks” were not considered;
- No clarification is provided to describe what qualifies as an ‘anomaly’ or to distinguish between ‘anomalies’ and threats’ under the SOPs;
- Information is not provided to notify the public how the detection of anomalies advances TSA’s objectives;
- TSA has not examined the relevant data nor articulated a satisfactory explanation for its proposal;
- TSA does not adequately support its claims that AIT scanners are more effective than WTMDs or Explosive Trace Detection (ETD); and

⁵¹ Anonymous [0213].

⁵² Electronic Privacy Information Center (EPIC).

⁵³ Electronic Privacy Information Center (EPIC), Paul [0646], M. Burns, Anonymous [1294], R. Smith, R. Michael, B. Young, Anonymous [4717], Anonymous [4988], Anonymous [4992].

⁵⁴ Electronic Privacy Information Center (EPIC).

⁵⁵ J. Strauser.

⁵⁶ M. Burns, R. Carew, M. Trapp.

⁵⁷ Competitive Enterprise Institute and Robert J. Crandall, Anonymous [5133], H. Waldron.

⁵⁸ Anonymous [0427], J. Thompson, Anonymous [1194], N. Shapiro, J. Koe, Electronic Privacy Information Center (EPIC), The Cato Institute.

⁵⁹ Electronic Privacy Information Center (EPIC).

- Failure to consider an important aspect of the problem – comparison of the proposed action against regulatory alternatives.”

Commenters also alleged further impermissible omissions from the NPRM. Advocacy groups and a few non-profit organizations argued that the proposed regulatory language effectively failed to provide the public with adequate notice and denied the public the opportunity to provide meaningful comment because the rule is too broad and vague, and descriptive information on the program has been omitted.⁶⁰ One of the advocacy groups noted, specifically, that the secret classification of the agency’s risk-reduction analysis does not sufficiently apprise the public, as required under APA.⁶¹ A privacy advocacy group stated that the regulatory impact analysis (RIA) relied heavily on anecdotal evidence of AIT success, citing ‘experience’ as a reasonable basis on which to determine AIT capabilities; the group, however, contested that such failure to inform the public of its metric constitutes a failure to provide meaningful opportunity to comment.⁶² Another alleged omission in the NPRM is cited by an advocacy group, which argued that the failure to include information regarding an opt-out alternative in the proposed rule is a failure under the APA to show the terms or substance of the proposed rule.⁶³

Commenters also raised issues regarding TSA accountability as a result of TSA’s past noncompliance with APA requirements. One individual commenter argued that noncompliance with APA requirements was indicative of a larger problem – a situation in which TSA acts as it chooses without accountability.⁶⁴ Another individual commenter requested TSA commit to complying with APA requirements in the future.⁶⁵ And a non-profit organization requested that TSA hold public hearings and forums in the future before imposing new procedures and policies, but specified that the agency should retain the authority to declare emergency regulations and procedures without public hearings or a comment period.⁶⁶

2.3 Fourth Amendment Due Process Concerns

Approximately 160 commenters addressed concerns related to Fourth Amendment due process protections. The vast majority of commenters argued that implementation of AIT constituted a violation of Fourth Amendment rights.

The explicit due process requirements listed in Fourth Amendment text regarding search and seizure (i.e., warrants, probable cause) were cited by many individual commenters. These individual commenters argued that AIT implementation fails to meet the standard of a Constitutionally-permissible search.⁶⁷ Specifically, some individual commenters argued that TSA cannot conduct such searches without a

⁶⁰ The Cato Institute, Competitive Enterprise Institute and Robert J. Crandall, Electronic Privacy Information Center (EPIC), The Identity Project.

⁶¹ The Cato Institute.

⁶² Electronic Privacy Information Center (EPIC).

⁶³ The Cato Institute.

⁶⁴ B. Liddel.

⁶⁵ K. Bloom.

⁶⁶ FlyerRights.org.

⁶⁷ J. Cooper, A. Chippan, R. Yates, B. Wright, Anonymous [1105], K. Gifford, S. Robertson, Anonymous [2164], B. Hendricks, Anonymous [4717].

warrant.⁶⁸ Individual commenters also claimed that the purchase of an airline ticket and/or a desire to travel is insufficient to give TSA “probable cause” to conduct a search.⁶⁹

Jurisprudence on ‘administrative searches,’ was also cited by commenters, who argued that AIT would be impermissible under these judicial standards. Several individual commenters cited the holding in *United States v. Davis*, 482 F.2d 893, which found that administrative searches must be “no more intrusive or intensive than necessary, in light of current technology, to detect weapons or explosives, confined in good faith to that purpose, and passengers may avoid the search by electing not to fly.”⁷⁰ Several individual commenters argued that the AIT screening process fails to meet this standard because elements of the scan and the opt-out alternative are too intrusive (e.g., the resulting images produced by AIT and body parts searched in the pat-down) and the scope of the scan is not tailored narrowly enough to exclusively identify weapons, explosive, and incendiaries (e.g., AIT is able to identify items such as adult diapers and women’s sanitary products, which commenters argued are outside the scope of threats sought to identify).⁷¹ Individual commenters recommended alternative search methods that they thought were less invasive and better suited to meet TSA’s need, such as x-raying suitcases,⁷² WTMD,⁷³ and suggested that the agency may be able to meet the probable cause standard if AIT were used as a secondary instead of primary means of defense.⁷⁴ Another individual commenter argued that, in some situations, there is no alternative to flying.⁷⁵

Other court cases cited regarding judicial standards relating to administrative searches include: *U.S. v. Pulido-Baquerizo*, 800 F.2d 899⁷⁶, *U.S. v. Skipworth* (5th Cir. 1973),⁷⁷ *U.S. v. Hartwell*,⁷⁸ *Camera v. Municipal Court*,⁷⁹ *Missouri v. McNeely*,⁸⁰ *Katz v. United States*, 389 U.S. 347.⁸¹ An individual commenter also cited a court decision pertaining to virtual strip searches (*Reynolds v. City of Anchorage*, 6th Cir. 2004) to support their opposition to AIT.⁸²

An advocacy group argued that in the *EPIC v. DHS* court case, which found that AIT fell within the administrative search exception to Fourth Amendment protection, the issue was not ripe for decision because the court did not have a rulemaking record before it. The advocacy group further argued that the

⁶⁸ J. Cooper, B. Grainger, J. Kindt, L. Hobbs, S. Robertson, J. Baxa, Anonymous [3735], R. Castron, Jr., Anonymous [3946], C. Mason-Middleton.

⁶⁹ Anonymous [0041], J. Cooper, B. Grainger, A. Kilbourn, Anonymous [0561], Abigail [1103], S. Bradford, E. Fields, Anonymous [4510], D. Williams.

⁷⁰ A. Miller, W. Garmer, J. Cooper, I. Gelfand, K. Bloom, D. Goh, N. Shapiro, M. Schwartz, T. Burns.

⁷¹ W. Garmer, Anonymous [0419], D. Gyzinya, K. Bloom, Anonymous [0557], S. Roberts, I. Williamson, J. Corbett.

⁷² I. Gelfand.

⁷³ Anonymous [1555].

⁷⁴ J. Kindt.

⁷⁵ A. Figueroa.

⁷⁶ A. Miller, M. Schwartz.

⁷⁷ Cyber Privacy Project.

⁷⁸ Anonymous [4627], R.W. [4688].

⁷⁹ Freedom to Travel USA.

⁸⁰ H. Edes.

⁸¹ N. Chan, D. Goh.

⁸² Cyber Privacy Project.

court may invalidate the *EPIC v. DHS* holding regarding Fourth Amendment rights protection now that an NPRM has been issued.⁸³

An individual commenter argued that, even though AIT use was not found to be in violation of the Fourth Amendment in *EPIC v. DHS*, the subsequent issuance of an NPRM, which does not specify the degree to which AIT will be used to promote the government's interest, may result in TSA's failure to meet the balancing test applied to Fourth Amendment rights cases.⁸⁴

2.4 Other Legal Issues

Approximately 40 commenters raised other legal issues pertaining to the proposed action in the NPRM. Generally, commenters raising these issues argued that TSA's proposed action violates a Constitutional right, or otherwise fails to meet a statutory or judicial standard.

In addition to claims regarding the Fourth Amendment due process concerns, several individual commenters, a non-profit organization, and a few advocacy groups raised claims that the following explicit constitutional rights are violated by either AIT scanners or the opt-out alternative pat-down: First Amendment, generally, as well as the specific freedom of assembly,⁸⁵ Second Amendment right to bear arms,⁸⁶ Fifth Amendment due process rights of the criminally accused,⁸⁷ Sixth Amendment rights of the accused,⁸⁸ Eighth Amendment protection against cruel and unusual punishment,⁸⁹ Ninth Amendment retention of unenumerated rights,⁹⁰ Tenth Amendment reserved powers clause,⁹¹ and Fourteenth Amendment equal protection clause.⁹² Commenters, including individual commenters, and advocacy groups, argued that AIT also violates the following implied Constitutional rights: right to travel⁹³ and right to privacy.⁹⁴

Commenters did not generally provide further substantive legal arguments in support of these claims of Constitutional rights violations. An advocacy group, however, cited a Supreme Court case (*Aptheker v. Secretary of State*, 378 U.S. 500), which held that if a law "too broadly and indiscriminately restricts the right of travel" it "thereby abridges the liberty guaranteed by the Fifth Amendment." The commenter further cited the court holding as stating that in determining the constitutionality of a law, it is "important to consider that Congress has within its power 'less drastic' means of achieving the congressional objective of safeguarding our national security."⁹⁵ Another advocacy group cited 49 U.S.C. §§ 40101 and

⁸³ The Cato Institute.

⁸⁴ L. Bradbury.

⁸⁵ Anonymous [0329], B. Liddel, The Identity Project.

⁸⁶ B. Liddel.

⁸⁷ T. Boedeker, B. Liddel, R. Farquhar, Cyber Privacy Group.

⁸⁸ B. Liddel.

⁸⁹ B. Liddel.

⁹⁰ B. Liddel.

⁹¹ Anonymous [1929], R. Farquhar.

⁹² Cyber Privacy Project.

⁹³ Anonymous [1973], B. Liddel, K. Bloom, R. Farquhar, J. Nelson, Cyber Privacy Group, U.S. Justice Foundation.

⁹⁴ Anonymous [1973], Cyber Privacy Group, Anonymous [4960].

⁹⁵ U.S. Justice Foundation.

40103 and the International Covenant on Civil and Political Rights, a treaty which the U.S. has ratified, as further reinforcing the right to travel. The commenter argued that the NPRM does not recognize that travel by air and, specifically, by common carrier, is a right and that TSA must evaluate its proposed actions within that context.⁹⁶ Similarly, an individual commenter argued that TSA's action regarding AIT scanners involves limitations of rights and, therefore, strict scrutiny should be the judicial review standard applied.⁹⁷

An individual commenter cited the following court cases as the basis for objecting to AIT scanners: *U.S. v. Guest*, 383 U.S. 745 (1966) and *Shapiro v. Thompson*, 394 U.S. 618 (1969).⁹⁸ The commenter provided no specific citations or further legal justification to support the objection.

A variety of other legal issues were also raised by commenters, including.

- One individual commenter argued that it is outside of TSA's mission to identify and confiscate items that are not a threat (e.g., illegal drugs) and that such "mission creep" is an inappropriate use of federal funds and distracts TSA staff from their actual mission.⁹⁹
- Another individual commenter claimed that implementation of AIT scanners presumes travelers guilt, which is in violation of America's principal of the presumption of innocence.¹⁰⁰
- Other individual commenters argued that AIT use and/or pat-downs violate laws (e.g., sexual molestation).¹⁰¹
- One individual commenter claimed that the proposed rule in the NPRM is "unconstitutionally vague."¹⁰²
- Another individual commenter argued that the Administrator of TSA, Mr. Pistole, acted illegally relating to AIT and that he should be removed from office and charged.¹⁰³
- A non-profit organization suggested that TSA review and modify its policies to ensure that they do not "conflict with existing state law procedures protecting children from physical and sexual assault" nor "conflict with existing child protective services legislation."¹⁰⁴

3. Effectiveness in Addressing Security Threats

Comments associated with this issue category are summarized in the subsections below.

3.1 Evolving threats to security

Approximately 70 commenters addressed the evolving threats to aviation security addressed by TSA in the proposed rule.

⁹⁶ The Identity Project.

⁹⁷ K. Bloom.

⁹⁸ A. Page.

⁹⁹ K. Bloom.

¹⁰⁰ R. Kiddler.

¹⁰¹ Anonymous [2250], John [3202].

¹⁰² D. Linder.

¹⁰³ M. Kuhns.

¹⁰⁴ National Association of Airline Passengers (NAAP).

Some commenters claimed that TSA's screening efforts are not attributable to the decrease in aircraft-related terror attempts since September 11, 2001. For example, a few individual commenters and a non-profit organization claimed that the threat attempts listed in the NPRM were thwarted by intelligence efforts, not TSA screening.¹⁰⁵ Other individual commenters, however, supported TSA's efforts to deploy tools like AIT scanners to detect and deter future attacks.¹⁰⁶

A few individual commenters credited secured cockpits and stricter policies for cockpit access for the success of minimizing terrorist attacks on commercial airlines post-September 11, 2001.¹⁰⁷ Furthermore, a few individual commenters suggested that in addition to enhanced cockpit security, passenger awareness and their willingness to fight back is what deters terrorists from targeting planes.¹⁰⁸

Several commenters provided comments on TSA's discussion in the NPRM regarding the evolving threat from non-metallic explosives. A few individual commenters suggested that TSA's increased deployment of screening protocols and technology in response to the increased threat of non-metallic explosives is not sustainable because terrorists will likely find other ways to hide devices.¹⁰⁹ Similarly, a few commenters suggested that AIT will not always be effective because threats are always changing.¹¹⁰ Suggesting that it is misleading, a few individual commenters disagreed with TSA's claim that non-metallic threats are new because, these types of weapons have been used for several decades.¹¹¹ One of these individuals suggested that, although AIT may be effective in screening for non-metallic weapons, it may not be the most cost-effective method.¹¹²

A few individual commenters suggested that the long lines at checkpoints, which the commenters asserted are created by TSA screening, are more attractive targets to terrorist than airplanes.¹¹³ Lastly, several individual commenters argued that there is no evidence indicating that terrorist threats similar in magnitude to September 11, 2001 are increasing.¹¹⁴

3.2 Layers of security (e.g., TSA deployment, intelligence gathering, Secure Flight, explosive detection)

Approximately 20 commenters addressed the layers of security that TSA described in the NPRM. For example, a privacy advocacy group suggested that the layered approach discussed by TSA is not supported by data and, therefore, does not justify the need for AIT. The commenter also suggested that TSA revise the layered approach so weaknesses in security can be identified.¹¹⁵ Furthermore, a few

¹⁰⁵ L. Bradbuy, G. Smith, National Association of Airline Passengers (NAAP), C. Wilson.

¹⁰⁶ S. Egunyomi, S. Redlus, Anonymous [3487].

¹⁰⁷ Anonymous [0329], K. Bloom, Anonymous [1728], J. Pritz, R. Johnson, J. Thompson.

¹⁰⁸ P. Wagenet, M. Lyon.

¹⁰⁹ K. Bloom, M. Arnus.

¹¹⁰ Anonymous [1284], M. Freeman, A. Huttleston, K. Walton.

¹¹¹ Anonymous [0644], C. Wilson.

¹¹² Anonymous [0644].

¹¹³ M. Lyon, K. Bloom, M. Mermall, I. Belokrinitsky.

¹¹⁴ K. Bloom, T. White.

¹¹⁵ Electronic Privacy Information Center (EPIC).

commenters suggested that TSA focus on other security methods, such as profiling, interviewing, and “Pre-check” screening programs will identify dangerous individuals.¹¹⁶

A few commenters discussed the effectiveness of the layered approach. For example, an individual suggested that the efficacy of AIT screening has not been scientifically proven. The commenter further suggested that since there are other approaches used by TSA to identify potential threats, AIT would be most useful as a secondary screening method instead of as the primary screening method.¹¹⁷ A professional association, however, stated that because of the advanced methodologies of adversaries, technologies like AIT scanners are needed to secure air travel. The commenter suggested that techniques involving human intervention, such as Screening Passengers by Observation Techniques (SPOT); the Behavioral Detection Officer (BDO) program and passenger screening canines (PSC) would also be useful.¹¹⁸

An advocacy group suggested that TSA’s “trusted traveler program” approach will weaken security because it can eliminate entire classes of passengers from AIT screening. The commenter suggested that TSA consider other, less invasive and cost effective screening procedures that would allow TSA to implement AIT as a secondary, rather than a primary, screening tool. Furthermore, the commenter suggested that TSA enhance layers of security by testing canine bomb detection, face recognition, and explosive residue machines, in an effort to reduce the need for AIT scanning.¹¹⁹

3.3 Deployment of AIT (e.g., coverage/timeline)

No comments addressed this issue.

3.4 Threat detection by AIT

3.4.1 Ability to detect anomalies (e.g., concealed under clothing or elsewhere)

Approximately 110 submissions provided comments on the efficacy of AIT detecting anomalies on a passenger. Some commenters claimed that AIT scanners are not effective because they cannot detect items that are concealed. Examples of areas that commenters claimed objects go undetected include concealment under fake skin, under skin folds, under shoes, implanted bombs, and objects hidden inside of a person.¹²⁰ A few individuals claimed that objects are not detected if concealed on the side of the body.¹²¹ Discussing the results of an alleged test conducted at two airports, a commenter claimed that a passenger was able to bring an empty metal box through a Rapiscan Backscatter X-Ray scanner without detection. The commenter hypothesized that the metal box went undetected by the scanner because the

¹¹⁶ R. Walette, Heather, P. Gangloff, B. Cook, Anonymous [2925].

¹¹⁷ Anonymous [1308].

¹¹⁸ Air Line Pilots Association, International.

¹¹⁹ FlyerRights.org.

¹²⁰ Anonymous [0040], M. Ramoneda, J. Cooper, J. Tillery, K. Bloom, C. Smith, Anonymous [0779], Anonymous [2677], A. Etter, K. Koscher, J. Corbett.

¹²¹ Anonymous [0040], B. Granzeau, Anonymous [2677], J. Corbett.

rate at which the backscatter beams reflect off of the metal is the same rate of reflection as the background. The commenter concluded that if an object like the metal box is placed at the side of a body, the object beam reflection will look no different than the blackened background.¹²² According to another individual commenter, a publication in the Journal of Homeland Security concluded that explosives with low “Z” like plastics are viewed as flesh by the scanner because flesh is also low “Z.”¹²³

A few individuals expressed concern that because AIT cannot differentiate between threatening objects and non-threatening objects, the passengers carrying non-threatening objects are subject to more intrusive, secondary searches like pat-downs.¹²⁴ A community organization asked that TSA clarify how AIT can detect anomalies concealed under layers of clothing. This commenter noted that travelers of the Sikh religion are often subject to secondary searches even if the AIT scanner did not identify any anomalies.¹²⁵ An individual commenter, however, suggested that continued use of AIT will reduce the number of pat-downs as well as enhance detection of non-metallic weapons. It was suggested that AIT checkpoints be re-designed to minimize the level of intrusion and embarrassment concerns associated with scanned images.¹²⁶

Some individual commenters suggested that the WTMD is more effective at detecting metallic items than AIT. A few of these individual commenters suggested that WTMD is as effective as AIT, but they preferred WTMD because they are less invasive than the AIT scanner.¹²⁷ A few individual commenters referred to a video posted by a blogger that the commenters claimed portrayed a man who was able to conceal objects (both metal and non-metal) from an AIT scanner by sewing the objects into the lining of his shirt.¹²⁸

An individual commenter also argued that there is not enough evidence of increased threats using non-metallic objects to justify the need for body scanners. The commenter explained that prior to AIT, non-metallic objects were detected by less-invasive means including WTMDs, bomb-sniffing dogs, and explosive detection machines. The commenter also claimed that non-metallic weapons that are small enough to conceal on the body do not pose a threat.¹²⁹ One individual commenter, however, discussed examples where the use of the AIT scanner was instrumental in identifying weapons concealed under clothing. The commenter suggested that they are unaware of any other technologies that could effectively detect explosives and other objects.¹³⁰

A privacy advocacy organization claimed that TSA has not provided enough information about what AIT can detect. The commenter suggested that the agency has not made a distinction between an “anomaly” and a “threat”.¹³¹

¹²² J. Corbett.

¹²³ S. Gentry.

¹²⁴ Anonymous [0040], S. Richart, P. Rez, J. Corbett.

¹²⁵ The Sikh Coalition.

¹²⁶ S. Krawczyk.

¹²⁷ A. McCarthy, C. Mullen, K. Koscher, S. Schoen.

¹²⁸ C. Mullen, S. Gentry, Kurt [4903], S. Schoen.

¹²⁹ C. Mullen.

¹³⁰ S. Egunyomi.

¹³¹ Electronic Privacy Information Center (EPIC).

3.4.2 Ability to detect types of explosives

Approximately 40 commenters discussed the ability of AIT to detect plastic, powder, and liquid explosives. According to one individual commenter, a 2010 U.S. Government Accountability Office (GAO) report claimed that unnamed agents were able to pass through security checkpoints with explosive and bomb parts undetected.¹³² Another individual commenter argued that since there are claims that AIT cannot detect powder explosives, AIT scanners are not fulfilling 49 U.S.C § 44925, the statutory provision which TSA has used as justification for deploying AIT.¹³³ Furthermore, a community organization argued that deployment of AIT does not fulfill Section C of the NPRM, Congressional Direction to Pursue AIT, which states “The Secretary of Homeland Security shall give a high priority to developing, testing, improving, and deploying, at airport screening checkpoints, equipment that detects non-metallic, chemical, biological, and radiological weapons, and explosives.”¹³⁴

Some commenters suggested that the explosives used by the “underwear bomber” and “shoe bomber” would not be detected by the AIT scanner.¹³⁵ An individual commenter argued that the reason the “underwear bomber” and “shoe bomber” failed was because of the complexities involved with detonation of the explosives, not because of TSA screening efforts.¹³⁶ Two privacy advocacy groups expressed concern regarding the ability of the AIT to detect powder explosives.¹³⁷ For example, one of the advocacy groups expressed concern that AIT scanners cannot detect pentaerythritol tetranitrate (PETN) (the powder explosive used by the “underwear bomber”), because, as the commenter claimed, this chemical continues to be used in other domestic and international terror attempts.¹³⁸ An individual commenter suggested that AIT scanners would not be able to detect explosives that are molded into specific shapes.¹³⁹

An individual commenter suggested that, although the AIT scanners can adequately detect metal in firearms and concealed knives, security screening should also be able to detect explosives with “negligible” false negative rates and low false positive rates. The commenter recommended that a reasonable detection limit would be no lower than 20 percent of the amount of the explosive needed to bring an airplane down. The commenter suggested that systems that detect significant quantities of explosives or detonators should be used for screening baggage and items concealed under clothing.¹⁴⁰

3.4.3 AIT effectiveness (e.g., accuracy, false positives)

Approximately 200 commenters commented on the effectiveness of AIT. Many commenters, including a non-profit organization, an advocacy group, and individual commenters, made general assertions that AIT

¹³² K. Bloom.

¹³³ R. Carew.

¹³⁴ Freedom to Travel USA.

¹³⁵ S. Thrasher, A. McCarthy, W. G.

¹³⁶ A. McCarthy.

¹³⁷ Electronic Privacy Information Center (EPIC), Cyber Privacy Project.

¹³⁸ Electronic Privacy Information Center (EPIC).

¹³⁹ B. Granzeau.

¹⁴⁰ P. Rez.

scanners are ineffective because of reported high false positive rates.¹⁴¹ Several commenters, including a non-profit organization and a community organization, claimed that the false detection of non-threatening objects leads to “resolution pat downs” where passengers are subjected to unnecessary, invasive screening.¹⁴² An individual referenced incidents which, the commenter asserted, caused passengers embarrassment when their medical device raised a false alarm.¹⁴³

An individual commenter argued that the high rate of false positives causes security checkpoint lines to move slowly, which subsequently requires TSA to use WTMD to relieve the backup.¹⁴⁴ A few individuals expressed concern regarding a false sense of security created for TSA officers and passengers by the large volume of false alarms caused by AIT scanners. The commenters concluded that the false sense of security weakens security.¹⁴⁵ Similarly, an individual commenter argued that the process of responding to false positives (searching for non-threatening objects) takes TSA’s focus off of identifying actual threats.¹⁴⁶ Another individual commenter claimed that the high failure rates resulted in the discontinued use of AIT in countries like Ireland and Germany.¹⁴⁷

A few individuals and an advocacy group claimed that AIT scanners are ineffective.¹⁴⁸ Some individual commenters and an advocacy group claimed that TSA has not provided data on the effectiveness of AIT in identifying threatening objects.¹⁴⁹ An individual commenter suggested that travelers may be more accepting of the reported invasiveness of AIT scanners if TSA revealed data regarding the effectiveness of the technology (i.e. false positive and false positive rates).¹⁵⁰

An individual commenter argued that AIT scanners would not be effective in identifying a passenger with a threatening weapon because the passenger would plan their travel from airports or terminals that do not utilize AIT scanners at checkpoints. The commenter suggested that the passenger could also avoid detection via AIT scanner by placing the weapon on a companion passenger under 12 years of age or on a pet. The commenter also suggested that the AIT scanners are ineffective at making air travel safer because the long lines that result from AIT scanning leave passengers more vulnerable to terror attacks on airports.¹⁵¹ An individual commenter, however, suggested that the AIT scanners are more effective as a deterrent to terrorists than random pat-downs or profiling because of the expectation that all passengers entering the sterile area are to be scanned by the AIT device. The commenter also suggested that the AIT scanner is effective because it removes the human/emotional aspect from screening.¹⁵²

¹⁴¹ L. Simeone, J. Cooper, Anonymous [0329], Rebecca [0416], J. Taylor, Steve D, Anonymous [4063], C. Corbett, FlyerRights.org, National Association of Airline Passengers (NAAP).

¹⁴² J. Cooper, Anonymous [0354], I. Gelfand, K. Bloom, Anonymous [0557], Anonymous [4025], PrivacyActivism, E. Worrell, M. Powell, Freedom To Travel USA.

¹⁴³ Anonymous [5056].

¹⁴⁴ A. McCarthy.

¹⁴⁵ Anonymous [4025], K. Hanson.

¹⁴⁶ K. Bloom.

¹⁴⁷ S. Richart.

¹⁴⁸ M. Armus, Steve D., A. Etter, J. Corbett, B. Liddel, Anonymous [2793], I. Williamson, K. Bloom, K. Hanson, FlyerRights.org.

¹⁴⁹ N. Shapiro, A. McCarthy, FlyerRights.org, C. Wilson, H. Waldron.

¹⁵⁰ A. McCarthy.

¹⁵¹ S. Gentry.

¹⁵² S. Krawczyk.

3.5 Other comments on the effectiveness of addressing security threats

Approximately 360 commenters provided additional comments related to the effectiveness of AIT in addressing security threats. Most commenters made general assertions that AIT scanners would not be effective in addressing security threats.¹⁵³ Many commenters suggested that AIT scanners are no more effective at addressing security threats than other, less invasive screening methods.¹⁵⁴ A few individual commenters and advocacy groups suggested that the NPRM has not adequately justified the ability of AIT to significantly reduce the threat of terror attacks on aircrafts compared to alternative screening practices.¹⁵⁵ According to one commenter, the use of AIT scanners makes air travel more vulnerable to terrorism.¹⁵⁶ Another advocacy group suggested that a cost benefit analysis of the AIT would identify how effective the scanners are at deterring terrorism compared to screening alternatives.¹⁵⁷ It was suggested by an advocacy group that although the AIT scanners can detect anomalies, TSA secondary searches are not effective at determining if an anomaly is an actual threat or, in fact, a false positive.¹⁵⁸

3.5.1 Screening measures in foreign countries (e.g., AIT use in Europe, screening measure in Israel)

Approximately 180 commenters discussed screening measures used in foreign countries. The majority of commenters recommended that TSA consider implementing a screening system similar to the one used by Israel.¹⁵⁹ Several individual commenters and a privacy advocacy group claimed that countries, such as those in the European Union, Germany, Italy, and Israel, have discontinued use of the AIT because the technology is ineffective and produced a high rate of false positives.¹⁶⁰ A few individual commenters claimed that the AIT scanners were removed from other countries because of health and safety concerns.¹⁶¹

4. AIT Screening Protocols

Comments associated with this issue category are summarized in the subsections below.

4.1 Types of AIT equipment

¹⁵³ D. Turner, A. Schauer, B. Wake, M. Kuhns, L. Budney, Anonymous [4631], J. Stiefel, Anonymous [4970].

¹⁵⁴ M. Louw, V. Boyd, D. M. J. Johansson, Anonymous [2042], J. Atkinson, E. Lemon, D. Pennella, M. Pasamonik, Z. Delaney.

¹⁵⁵ C. Carrigan, N. Shapiro, R. Bonner, C. Mullen, Electronic Privacy Information Center (EPIC), The Cato Institute.

¹⁵⁶ J. Corbett.

¹⁵⁷ FlyerRights.org.

¹⁵⁸ S. Gentry.

¹⁵⁹ C. Johnson, J. Bergeland, Anonymous [0138], T. Bacon, Anonymous [0143], Michelle [0154], Anonymous [0174], Gloria [248], Anonymous [1159].

¹⁶⁰ L. Simeone, B. Fisher, Anonymous [0354], K. Bloom, A. McCarthy, D. Hildebrand, S. Richart, Anonymous [2793], I. Williamson, Steve D, Electronic Privacy Information Center (EPIC).

¹⁶¹ K. Bloom, K. Adams, N. Shapiro, Electronic Privacy Information Center (EPIC).

4.1.1 Laboratory and operational testing of AIT equipment

Approximately 40 submissions discussed testing of AIT scanners. Several commenters claimed that no testing has been conducted by independent parties, or they expressed concern that TSA did not publicly release the results of AIT equipment testing.¹⁶² A few individual commenters objected to having TSA test the scanners on the traveling public.¹⁶³ An individual commenter suggested that validation tests should include evidence of attempts to defeat a screening technique. It was suggested that if the results indicate that AIT is less effective for screening than other devices, TSA take action to discontinue use of AIT in favor of technology that the tests favor.¹⁶⁴ A few individual commenters suggested that the AIT scanners be tested for safety.¹⁶⁵ A non-profit organization asserted that AIT scanners are not regularly tested or inspected by State inspectors, who examine medical x-ray units.¹⁶⁶ An individual commenter expressed the need for long term studies, including potential effects of the AIT equipment if it were to malfunction, become “out of spec,” or suffer from poor maintenance.¹⁶⁷

4.1.2 Types

4.1.2.1 Backscatter technology (e.g., Rapiscan)

Approximately 65 submissions addressed this technology. Many individual commenters opposed the use of Backscatter technology because of the reported health threat.¹⁶⁸ According to several commenters, x-ray radiation is cumulative and the risk that effects over a lifetime, such as skin cancer, are not well known.¹⁶⁹ A few individual commenters added that the people who may be most at risk are TSA personnel working near the scanners and frequent flyers, who are already exposed to radiation from high altitude flying.¹⁷⁰ In addition, another individual commenter suggested that, even if the risk to one individual is small, when the machines are used on hundreds of millions of people, the probability that some set of individuals acquire cancer is significant.¹⁷¹ A few of the commenters noted that the European Union has banned backscatter screening technology and TSA should do the same.¹⁷²

One commenter warned that ionizing radiation may cause Deoxyribonucleic acid (DNA) damage that leads to carcinogenesis and that a model used by the health physics community would predict an 8×10^{-9} probability of a fatal cancer, about the same as the probability of being killed by a terrorist in an airplane.¹⁷³

¹⁶² R. Steinbach, E. Clark, Anonymous [0569], M. DeLeo, D. Anderson, C. Connolly, Anonymous [1875], Anonymous [1701].

¹⁶³ K. Bloom, Anonymous [557], Anonymous [4063], A. Etter, FlyerRights.org, S. Roberts, C. Carrigan.

¹⁶⁴ S. Schoen.

¹⁶⁵ S. Johnson, B. Wright, L. Anderson, A. Schlesinger, A. Graham.

¹⁶⁶ National Association of Airline Passengers (NAAP).

¹⁶⁷ Anonymous [0644].

¹⁶⁸ J. Cooper, K. Bloom, J. Taylor, S. Richart, J. Wroclawski, N. Bickers, K. Tinker, T. Burns, K. Koscher.

¹⁶⁹ A. Nicholson, J. Perry, Anonymous [377], Anonymous [367], S. Gasper, R. Layton, R. Tanner, R. Cabrales, K. Hwang.

¹⁷⁰ Anonymous [3425], J. McCruin.

¹⁷¹ N. Bickers.

¹⁷² N. Bickers, K. Koscher, Anonymous [0217], L. Edwards, D. Betts, M. Anisfield.

¹⁷³ P. Rez.

However, the commenter expressed the belief that the real danger is very high local radiation exposures if the mechanical scanning mechanism and associated systems for shutting off the x-ray beam all fail. Another individual disputed TSA's assertion that independent tests had been conducted on backscatter technology, and the commenter claimed that subsequent information showed that the tests were flawed, their results were misused, or they were not conducted by truly independent entities.¹⁷⁴

A few commenters, including an individual commenter and a privacy advocacy group, remarked on the ineffectiveness of backscatter machines.¹⁷⁵ One of them suggested that the x-ray beam may not be able to distinguish between explosives and tissue when an explosive package is shaped to fit in with natural body contours. An individual commenter observed that even though TSA is removing backscatter scanners from airports, until the process is complete, they will continue to be used at some airports.¹⁷⁶ Another individual recommended that TSA investigate the bad management decision that led to a waste of tax dollars on, what the commenter described as, an obviously unacceptable technology.¹⁷⁷

4.1.2.2 Millimeter wave technology (e.g., L-3 ProVision)

Approximately 30 submissions addressed this technology. Many commenters, including individual commenters and non-profit organizations, asserted that although TSA claims that millimeter wave scanners are safe, they were unconvinced. Several of these commenters pointed out that no long-term, independent testing has been done.¹⁷⁸ Others noted that the scanners still emit a form of radiation and may be harmful.¹⁷⁹ A non-profit organization added that babies, small children, pregnant women, the elderly, and people with impaired immunity would be at a higher risk than others.¹⁸⁰ An individual commenter remarked that studies have shown a trend toward higher rates of brain and other tumors in those who use cell phones, which produce a similar form of non-ionizing radiation.¹⁸¹ Two other individuals suggested that there is some speculation that millimeter wave exposure can be harmful to human DNA because of resonance effects.¹⁸²

Although a few commenters supported the use of millimeter wave technology over backscatter technology, an individual and an advocacy organization argued that they were disinclined to take the government at its word with regard to health assurances because the government has been wrong before, including TSA assurances about Rapiscan machines.¹⁸³ An individual commenter expressed the opinion that millimeter wave machines are no more acceptable than other scanners, but those who must fly will choose them to avoid a full-body search.¹⁸⁴

¹⁷⁴ K. Bloom.

¹⁷⁵ P. Rez, Electronic Privacy Information Center (EPIC), Kurt [4903].

¹⁷⁶ J. Tillery.

¹⁷⁷ H. Waldron.

¹⁷⁸ L. Simeone, J. Cooper, J. Taylor, N. Shapiro, R. Carew. FlyerRights.org, National Association of Airline Passengers (NAAP).

¹⁷⁹ K. Adams, T. Harris, Anonymous [4063].

¹⁸⁰ National Association of Airline Passengers (NAAP).

¹⁸¹ T. Burns.

¹⁸² J. Taylor, P. Rez.

¹⁸³ I. Williamson, U.S. Justice Foundation.

¹⁸⁴ N. Bickers.

One individual commenter recommended another technology for detecting explosives – passive Terahertz (THz) imaging. According to the commenter, there would be no probing radiation, but the warm body emits sufficient THz radiation to form an image, with high explosives standing out in the image as a dark patch.¹⁸⁵

4.1.2.3 Other types

No comments addressed this issue.

4.2 Privacy Safeguards and Concerns for AIT

4.2.1 Technologies & Procedures for Safeguarding Privacy

4.2.1.1 Use of ATR Software

Approximately 40 submissions discussed TSA's use of ATR Software. Numerous submissions from individual commenters argued that even though Automatic Target Recognition (ATR) software displays a generic outline on the screen at the checkpoint, ATR does not eliminate air travelers' concerns.¹⁸⁶ Many of these commenters, including individuals and advocacy groups, expressed opposition to the use of ATR because, according to the commenters, ATR can be disabled and the scanners are capable of producing explicit, nude pictures that may be view by TSA staff.¹⁸⁷ Individual commenters and an advocacy group asserted that ATR does not alleviate concerns about the intrusiveness of scanning, its ineffectiveness, the violation of privacy, and possible health effects.¹⁸⁸ A few individuals and a professional association, however, expressed support for the use of ATR because the technology helps mitigate passengers' privacy concerns.¹⁸⁹

¹⁸⁵ P. Rez.

¹⁸⁶ J. Harkness, Anonymous [1960], Anonymous [2945].

¹⁸⁷ O. Wright, J. Tillery, K. Bloom, C. Smith, Anonymous [1728], R. Carew, D. McLain, Electronic Privacy Information Center (EPIC), Cyber Privacy Project, The Cato Institute.

¹⁸⁸ A. Figueroa, S. Richart, Association for Airline Passenger Rights, K. Adams.

¹⁸⁹ N. Chan, Air Line Pilots Association, International.

¹⁹⁰ S. Harriel, M. Doyle, John [1030], R. Jones, B. Mouring, M.R. [1503], Matt [1540].

¹⁹¹ O. Wright, L. Simeone, M. Ramoneda, J. Cooper, Anonymous [0644].

¹⁹² K. Bloom, Association for Airline Passenger Rights, A. Etter, National Gay and Lesbian Task Force, U.S. Justice Foundation.

¹⁹³ Association for Airline Passenger Rights, S. Harriel, D. Doumakes, Anonymous [2656], Anonymous [2206], Anonymous [42] (coded to 4.2.1.3.1), S. Johnson (coded to 4.2.2).

4.2.1.2 AIT data protection controls (e.g., transmission and viewing of images, data storage, and copying capabilities)

Approximately 120 submissions addressed the issue of data protection controls. Numerous individual commenters suggested that they were not convinced by TSA's assertions about data protection.¹⁹⁰ Several individual commenters mentioned reports of incidents involving recorded and leaked images from scanners, such as the reported release of 35,000 images created by a Rapiscan machine at a courthouse in Florida.¹⁹¹ Other individuals and advocacy groups warned that because the scanners have the capability to store and transmit images, at least some storage of images by TSA and viewing by others is likely.¹⁹² Some of these commenters alleged that TSA had falsely stated that previous imaging machines could not store, transmit, or print images.¹⁹³

A privacy advocacy group pointed out that the scanners were designed to include Ethernet connectivity, Universal Serial Bus (USB) access, and hard disk storage, but the proposed rule does not include safeguards against storing, copying, or otherwise circulating images.¹⁹⁴ An advocacy group added that the scanners are worse than a physical strip-search because they produce an image that computers can store indefinitely, transfer around the globe in seconds, and copy an infinite number of times without the copies degrading.¹⁹⁵

According to an individual commenter, law enforcement officers can record images without the passenger's knowledge.¹⁹⁶ Some commenters, including individuals and a privacy advocacy association, recommended that TSA clarify what happens to the images captured, who gets to see them, and whether the practice of deleting the image after each screening is absolute.¹⁹⁷ A couple of individual commenters also suggested that TSA should show the public exactly how detailed the image seen in the screening room is, or allow passengers being scanned to observe the personnel monitoring the images.¹⁹⁸ A few individuals, however, expressed support for TSA's efforts to protect passenger privacy by ensuring that the images are anonymous and are automatically deleted from the system after they are cleared by the remotely located security officer.¹⁹⁹

4.2.1.3 Opt-out option

Approximately 100 submissions provided comments on the opt-out screening option. Many individual commenters and an advocacy group stressed the importance of having TSA retain the opt-out option, although some pointed out that many passengers select the pat-down over AIT only because they consider it the lesser of two evils.²⁰⁰ Other individuals and a privacy advocacy group emphasized that the pat-down is not a reasonable alternative.²⁰¹ Many individual commenters remarked that when they choose to

¹⁹⁴ Electronic Privacy Information Center (EPIC).

¹⁹⁵ The Cato Institute.

¹⁹⁶ S. Thrasher.

¹⁹⁷ C. Joy, R. Carew, Electronic Privacy Information Center (EPIC), M. Lyon, S. Abraham.

¹⁹⁸ Anonymous [87], Anonymous [3123].

¹⁹⁹ S. Egunyomi.

²⁰⁰ J. Wroclawski, C. Wilson, J. Cooper, S. Egunyomi, D. Goh, K. Koscher, Anonymous [5056], U.S. Justice Foundation.

²⁰¹ Anonymous [50], National Gay and Lesbian Task Force, L. Cuellar, C. Mullen, T. Burns, S. Schoen.

opt-out of AIT, they are treated with suspicion, public ridicule, hostility, and retaliation (e.g., long and intentional delays) by the screener, and passengers are often unable to monitor their belongings.²⁰² Other individuals and advocacy groups objected to the way some TSA staff conduct pat-downs, asserting they are more invasive and intrusive than necessary to detect weapons or explosives.²⁰³

4.2.1.3.1 Concerns about pat-down procedure (e.g., physical/psychological trauma)

Approximately 275 submissions commented on their concerns and experiences regarding pat-down procedures. Numerous commenters, including a community organization, a non-profit organization, and individual commenters, characterized the advanced pat-down as groping or sexual assault that involves touching or rubbing of the breasts and genitals of passengers.²⁰⁴ At a minimum, the pat-downs were called rough and painful, invasive, offensive, intrusive, humiliating, demeaning, and degrading.²⁰⁵ Several individuals, a non-profit organization, and an advocacy group, expressed concern for children that must undergo touching during pat-downs.²⁰⁶ Many individuals and an advocacy group also mentioned psychological trauma caused by pat-downs, particularly for rape survivors and victims of sexual abuse.²⁰⁷ Several commenters opined that TSA screeners deliberately make the opt-out unpleasant so that passengers will use the AIT scanners.²⁰⁸ A few individual commenters noted that enhanced pat-downs impose unnecessary risks, given that most TSA screeners do not change their gloves often enough to prevent the spread of disease.²⁰⁹

4.2.1.4 Other technologies and procedures for safeguarding privacy

Approximately 25 submissions suggested other technologies and procedures for safeguarding privacy. Among the procedures recommended by one individual were: (1) allowing a person to leave if selected for a manual search, provided the person exhibits no other suspicious behavior, and (2) maintaining scanning devices with standards similar to medical equipment.²¹⁰ One commenter suggested that if the AIT screening procedures detect potentially dangerous objects hidden in passengers' private areas, the passengers should be allowed to remove the suspicious objects, to show them to TSA officers, and to be rescreened using AIT.²¹¹ Another individual suggested developing technology to combat scanner fatigue, providing oversight in screening rooms, and addressing the threat of privacy or security breaches when the status of a passenger is relayed by two-way radio.²¹²

²⁰² C. Smith, J. Appelbaum, C. Mullen, R. Carew, PrivacyActivism, C. Wilson.

²⁰³ D. McClain, O. Wright, J. Corbett.

²⁰⁴ S. Simeone, M. Joyce, Rebecca [416], K. Bloom, J. Koe, J. Corbett, S. Gentry, E. Gathman, Freedom To Travel USA, National Association of Airline Passengers (NAAP).

²⁰⁵ J. Cooper, Anonymous [644], A. Figueroa, S. Richart, Jan [3713], S. Abraham, Cyber Privacy Project, Consumer Federation of America.

²⁰⁶ J. Cooper, J. Kindt, J. Corbett, S. Gentry, National Association of Airline Passengers (NAAP), U.S. Justice Foundation.

²⁰⁷ J. Corbett, S. Gentry, S. Richart, I. Williamson, J. Coe, E. Gathman, H. Waldron, Cyber Privacy Project.

²⁰⁸ J. Cooper, D. Williams, Anonymous [512], A. Etter, S. Gentry, Anonymous [4827], H. Edes, National Association of Airline Passengers (NAAP).

²⁰⁹ B. Liddel.

²¹⁰ K. Tinker.

²¹¹ V. Gaponenko.

4.2.2 Other Privacy Concerns (e.g., adequacy of Privacy Impact Assessments, “AIT” misnomer/“nude body scanner”)

Approximately 470 submissions addressed other concerns related to privacy. Many individual commenters, a non-profit organization, and advocacy groups expressed the opinion that the devices should be called Nude Body Scanners or Naked Body Scanners to indicate specifically how TSA uses them, and other commenters preferred Electronic Strip Searches or virtual strip searches or nude-o-scopes.²¹³ Numerous individuals insisted that AIT scanners violate an individual’s right to privacy, that TSA’s privacy safeguards are inadequate, and that the scanners should not be used on children.²¹⁴ Some commenters argued that, if scanners are viewing anything under a person’s clothing, then that person’s privacy is not being protected, because anything under the clothing is intentionally hidden and not intended to be viewed by man or machine.²¹⁵ An advocacy group agreed that the AIT defeats the privacy-protecting function of clothing and allows an image of the unclothed person to be created.²¹⁶ An individual commenter argued that the problem with TSA’s use of AIT for primary screening is that it teaches people that it is normal and acceptable for the government to use technology to look under their clothing. The commenter added that the body beneath one’s clothing and the contents of one’s pockets have traditionally been understood as among the most important and intimate zones of privacy.²¹⁷

One commenter noted that passengers must reveal private medical conditions to TSA officers who are not trained in medicine, and other commenters argued that investigating private details of passengers’ bodies is deeply offensive and has no security value.²¹⁸ A community organization agreed that privacy is invaded when a passenger is forced to share personal secrets that are not otherwise observable in public – especially sensitive medical and transgender issues.²¹⁹ One commenter, however, expressed the opinion that over the years, TSA staff has gotten less disrespectful of individual passenger privacy.²²⁰

A privacy advocacy group pointed out that since January 2008, TSA has published four Privacy Impact Assessments regarding the agency’s deployment of body scanners at U.S. airports.²²¹ The commenter opined that all of these have failed to identify the numerous privacy risks to air travelers. An individual commenter suggested that TSA should be required to regularly report to Congress about its efforts to discover weaknesses in its mechanisms to protect the privacy of individuals scanned by its systems.²²²

²¹² K. Koscher.

²¹³ Rebecca [416], K. Bloom, Anonymous [557], S. Richart, M. Powell, Cyber Privacy Project, Consumer Federation of America, The Cato Institute.

²¹⁴ Anonymous [329], J. Tillery, Anonymous [1308].

²¹⁵ K. Muratore.

²¹⁶ The Cato Institute.

²¹⁷ S. Schoen.

²¹⁸ T. Harris, S. Gentry.

²¹⁹ Freedom To Travel USA.

²²⁰ Lisa [1435].

²²¹ Electronic Privacy Information Center (EPIC).

²²² Anonymous [5204].

4.3 Health and Safety Concerns

4.3.1 Physical concerns

One submission mentioned general physical effects related to AIT. A professional association stated its belief that AIT emissions present a negligible health risk to passengers, airline crewmembers, airport employees, and TSA staff.²²³

4.3.1.1 Radiation effects

Approximately 460 submissions addressed radiation effects associated with AIT use. Numerous commenters expressed general concern regarding exposure to radiation without mentioning either backscatter or millimeter wave technology. Some of these commenters suggested that no dose of x-rays is safe.²²⁴ Many individual commenters, and an advocacy group, however, expressed their concern about the radiation from backscatter x-ray scanners, which they asserted could lead to the development of cancer.²²⁵ Many individuals also warned that exposure to millimeter wave radiation could hold the potential for long-term health effects and that additional studies are needed.²²⁶ Some commenters concluded that, even if the current x-ray scanners are removed, the proposed rule would not prevent their reintroduction should software become available to address privacy issues.²²⁷

Several commenters, including a privacy advocacy organization, a non-profit organization, and individual commenters, cautioned that TSA screeners could be at risk and should be provided with dosimetry meters to ensure that their exposure is within acceptable limits.²²⁸ An individual commenter stated that, although TSA stated that the radiation scan only affects the surface of the skin, skin cancer is the largest segment of cancer in the world and it is caused by radiation exposure on the skin.²²⁹ Another commenter stated that eyes are particularly susceptible to radiation.²³⁰ A few individuals suggested that imaging technology using radiation should not be used at all since alternatives exist.²³¹ Other commenters asserted that the question that needs to be asked with respect to the safety of AIT scanning is not whether the increase in deaths is below some arbitrary value, but whether the lives saved through avoiding a terrorist attack are greater than the lives lost through an increased incidence of cancer or other diseases arising from the use of AIT scanners.²³² Lastly, a few individuals mentioned that because of their exposure to radiation for medical treatment, they are not comfortable getting further, unnecessary exposure from AIT scanners.²³³

²²³ Air Line Pilots Association, International.

²²⁴ J. Buske, A. Slater, M. Freeman, S. Ainslie, Hannah [1443], S. Leach.

²²⁵ P. Freitas, M. Joyce, K. Adams, M. Schwartz, K. Koscher, K. Muratore, S. Gentry, K. Tinker, T. Burns, Association for Airline Passenger Rights.

²²⁶ Anonymous [50], Anonymous [1105], B. Granzeau, William G [1786], R. Golden, I. Williams, Anonymous [4063], A. Etter, K. Muratore, T. Burns.

²²⁷ P. Freitas, Anonymous [557], J. Taylor.

²²⁸ P. Freitas, C. Smith, T. Pierson, K. Koscher, S. Gentry, Electronic Privacy Information Center (EPIC), National Association of Airline Passengers (NAAP).

²²⁹ T. Pierson.

²³⁰ M. Schwartz.

²³¹ David S [182], M. Freeman, Anonymous [0217].

²³² G. Smith, Anonymous [0273].

²³³ L. Freeman, Greg [0795], Anonymous [1411].

4.3.1.2 Other physical concerns

Approximately 10 submissions mentioned other physical concerns. A few commenters objected to the physical touching in a pat-down, which would be required if the scanner detects an anomaly.²³⁴ Some individuals suggested that the machines amount to a medical examination performed by someone who is not a trained medical professional.²³⁵

4.3.2 Other safety and health concerns

Approximately 270 submissions mentioned other safety and health concerns related to AIT. Numerous individual commenters generally asserted that they consider the safety of the AIT scanners to be uncertain and that they are concerned that AIT is harmful to their health.²³⁶ A few individual commenters expressed concern about the maintenance and calibration of the scanners.²³⁷ Another commenter suggested that the discomfort felt by passengers from AIT scanners could be mitigated if display screens and the screeners looking at them were moved to a different location where the screeners cannot see the passengers and the passengers cannot see the screeners.²³⁸ According to another individual commenter, the AIT scanners and pat-downs are a physical and psychological attack on an individual, and the passenger must restrain himself or herself from natural instincts to move away from harmful physical contact to ensure their privacy and to avoid health risks.²³⁹

4.4 AIT Screening Procedures at the Checkpoint (for issues not related to privacy)

Approximately 20 submissions discussed AIT screening procedures at security checkpoints. Some comments suggested that the AIT process increases the wait time at security checkpoints. Specifically, a few individual commenters asserted that the requirement to remove articles of clothing, belts, and other items slows the process of screening.²⁴⁰

A couple of commenters discussed the combination of AIT scanners and pat-downs. For example, an individual commenter questioned why AIT scanners are used as the primary screening tool instead of a secondary tool.²⁴¹ A non-profit organization suggested that the combination of AIT and the use of resolution pat-downs²⁴² has discouraged passengers from flying and created a negative reputation for TSA and TSA staff.²⁴²

According to an individual, screening procedures are not implemented consistently at checkpoints and airports because TSA employees are not familiar with the procedures.²⁴³

²³⁴ E. Gathman, Electronic Privacy Information Center (EPIC), Cyber Privacy Project.

²³⁵ C. Smith, Anonymous [3450], Anonymous [3458], N. Bickers, B. Einstein.

²³⁶ D. Maxwell, C. Bray, Anonymous [0711], B. Champion, T. Miller., J. Hampton, Amanda [0826], Anonymous [0897].

²³⁷ K. Sherwood, Anonymous [2459], G. Mason, D. Nelson.

²³⁸ S. Krawczyk.

²³⁹ T. Harris.

²⁴⁰ J. Cooper, M. Powell, Anonymous [4827].

²⁴¹ J. Kindt.

²⁴² National Association of Airline Passengers (NAAP).

²⁴³ Anonymous [0644].

Another individual commenter asserted that since metal detectors and pat-downs are the screening methods used for TSA employees and passengers using TSA's Pre-Check screening process, public travelers should be screened in the same manner.²⁴⁴ Similarly, a few individuals suggested that there are several loopholes in the AIT screening process (groups of passengers that are ineligible for AIT) that render AIT useless.²⁴⁵

4.4.1 Sensitive Security Information/non-public nature of TSA's Standard Operating Procedures

Approximately 30 submissions provided comments regarding the non-public nature of TSA's Standard Operating Procedures (SOPs). Most commenters questioned why information about screening procedures is not released to the public. An individual commenter asserted that because the AIT scanners have been deployed, and "enhanced pat-downs" are in effect, TSA should be able to release procedures for the screening process.²⁴⁶ An advocacy group argued that, if TSA does not provide its SOPs to the public, the public will be unaware of the checkpoint requirements, prohibitions, and what constitutes a screening. The commenter suggested that TSA has kept the SOPs from the public so screening practices can be varied and unpredictable.²⁴⁷ According to an individual commenter, because TSA has not released data regarding the effectiveness of AIT scanners and the number of prohibited items detected by AIT, the NPRM will not be taken seriously.²⁴⁸

4.4.2 Adequacy of information/signage for passengers about what to expect with AIT screening

Approximately 30 submissions provided remarks about the adequacy of information/signage for passengers about the AIT screening process. For example, an advocacy group claimed that TSA currently lists the scanner as optional in small print on an 11 x 14 inch poster at a crowded checkpoint.²⁴⁹ Also, an individual commenter suggested that the majority of passengers are uninformed about the risks associated with AIT and the screening process.²⁵⁰ This commenter, as well as another individual, stated that passengers need to know what is expected of them at TSA checkpoint before they can give consent to how they will be searched.²⁵¹ Similarly, another commenter asserted that because TSA has the authority to fine passengers for refusing to complete a screening, it is incumbent upon TSA to publish the screening rules with details about the screening process.²⁵²

Another individual commenter claimed that the *EPIC v. DHS* judgment required TSA to develop written rules for screening at transit checkpoints. The commenter suggested that the terminology used in these rules should be more descriptive of what will and will not occur during pat-downs.²⁵³

²⁴⁴ R. Kidder.

²⁴⁵ Anonymous [4025], K. Hanson.

²⁴⁶ S. Richart.

²⁴⁷ The Identity Project.

²⁴⁸ N. Shapiro.

²⁴⁹ National Gay and Lesbian Task Force.

²⁵⁰ K. Bloom.

²⁵¹ K. Bloom, M Lyon.

²⁵² I. Williamson.

Some commenters discussed signage regarding the option to opt-out of AIT. For example, individuals and a privacy advocacy association suggested there is a lack of adequate signage informing passengers of the right to opt-out of AIT.²⁵⁴ One of these individual commenters suggested that, in order to allow passengers adequate time to read about their right to opt-out of AIT, these signs should be posted throughout the security waiting area instead of in the area where passengers are being called forward for screening.²⁵⁵ A non-profit organization claimed that passengers continue to report that signage is not available, even though TSA stated in the NPRM that detailed explanation of AIT procedures are available on its website and signs are posted at checkpoints.²⁵⁶

4.4.3 Selection of Candidates to Receive Additional Screening

4.4.3.1 Clarification of what constitutes ‘an anomaly’/‘anomalies’

Approximately three commenters suggested that TSA clarify what constitutes an “anomaly.” For example, a non-profit organization and an individual commenter claimed that because non-threatening items are identified as “anomalies” by AIT scanners, innocent passengers are required to go through often humiliating and degrading “resolution pat-downs” that are not necessary.²⁵⁷ A privacy advocacy group claimed that although TSA refers to AIT’s ability to detect non-metallic “anomalies” and non-metallic “threats”, the agency has not clarified the difference between the two.²⁵⁸ Lastly, an individual commenter claimed that, although AIT scanners can detect anomalies, often times the nature of the anomaly goes unresolved because the secondary screening pat-down does not reveal if the anomaly is a threat or not.²⁵⁹

4.4.3.2 Profiling concerns

Approximately 40 commenters expressed concerns regarding profiling. A few individual commenters, for example, claimed that TSA staff intentionally chose young, female travelers for pat-downs at a higher rate than other travelers.²⁶⁰ According to one of these commenters, TSA screeners have been found to use code words to communicate when they would like a female passenger to be pulled for a pat-down.²⁶¹ Other commenters suggested that TSA staff discriminate against children and elderly woman. It was the concern of an individual commenter that an enhanced pat-down of a child can be detrimental to the child’s understanding of the appropriateness of an adult touching them. Furthermore, the individual commenter suggested that the separation of the child from their parent for screening results in distress for both the parent and child.²⁶² A community organization suggested that those with medical issues are often chosen for secondary screening at a higher rate than those without medical issues.²⁶³

²⁵³ S. Richart.

²⁵⁴ K. Bloom, S. Schoen, R. Carew, PrivacyActivism, Electronic Privacy Information Center (EPIC).

²⁵⁵ S. Schoen.

²⁵⁶ PrivacyActivism.

²⁵⁷ S. Richart, PrivacyActivism.

²⁵⁸ Electronic Privacy Information Center (EPIC).

²⁵⁹ S. Gentry.

²⁶⁰ J. Cooper, J. Corbett.

²⁶¹ J. Corbett.

²⁶² J. Corbett.

According to a community organization, although the TSA website explains that the head coverings of travelers, including Sikh turbans, could be subject to additional security screening, TSA staff has advised Sikh travelers that screening of the turbans are mandatory, even if the screening device has not alarmed during screening. The same commenter also claimed that Sikh travelers continue to experience disparate rates of secondary screening despite TSA's website stating that AIT scanners can detect threats under layers of clothing without physical inspection of the traveler. The commenter concluded that TSA should conduct public, independent audits of TSA screening practices to determine the extent of profiling based on "race, ethnicity, religion and national origin."²⁶⁴ A non-profit organization, however, suggested that implementing a policy of not profiling passengers based on ethnicity, religion, and national origin would undermine risk based security strategies.²⁶⁵

4.4.4 Adequacy of SOPs to those with special needs and medical conditions/equipment that make them ineligible for AIT

4.4.4.1 Families

Approximately five commenters discussed the adequacy of security SOPs as they relate to families. A couple of individual commenters recommended that TSA should not allow adults to search children for the purposed of pat-downs.²⁶⁶ Furthermore, one of these commenters also asserted that it is inappropriate for children under the age of 18 to be exposed to the AIT scanner.²⁶⁷ Although one individual commenter stated that children should never be separated from their parents, another individual commenter suggested that all travelers, including children and their families, should be subject to AIT because all other travelers are subject to AIT.²⁶⁸

4.4.4.2 Passengers with disabilities and medical conditions/equipment that make them ineligible for AIT

Approximately 100 submissions provided comments related to passengers with disabilities or medical conditions which make them ineligible for AIT screening. Several commenters expressed their general opposition towards the use of AIT scanners for those with medical conditions. Other responses on this topic include comments from individual commenters who explained that because of their insulin pumps they do not have a choice but to opt-out of the AIT scanner and therefore are subjected to invasive pat-downs and longer screening periods.²⁶⁹ Other commenters asserted that the AIT scanners are discriminatory against those with physical disability or medical issues.²⁷⁰ Some commenters suggested that travelers with physical disabilities should not be made to go through the often taxing process of pat-down procedures.²⁷¹

²⁶³ Freedom To Travel USA.

²⁶⁴ The Sikh Coalition.

²⁶⁵ FlyerRights.org.

²⁶⁶ J. Schreibman, W. Novack.

²⁶⁷ J. Schreibman.

²⁶⁸ K. Bloom, W. Novack.

²⁶⁹ Elizabeth [5179], Anonymous [0133], J. Rachiele, S. McLaughlan.

²⁷⁰ G. Levin, W. Thomson, Anonymous [0269], B. Garner, M. Taylor, M. Alm, M. Clark, Anonymous [4843].

²⁷¹ K. Morrow, E. Grimshaw.

Some commenters, however, expressed support for the use of the AIT scanner. For example, travelers with joint replacements stated a preference for AIT scanners because a full body search would otherwise be required as a result of WTMDs.²⁷² An individual commenter who expressed support for the AIT scanner also recommended that the scanners be enlarged to accommodate medical equipment carried by travelers.²⁷³

A privacy advocacy group stated that TSA has not considered the negative impact the proposed rule has on travelers with special needs, particularly those with medical devices. The commenter argued that aside from pat-downs that the commenter described as embarrassing or humiliating, no alternative screening is discussed for those travelers who have medical devices, like prosthetics and pacemakers, which prevent them from being screened using an AIT scanner.²⁷⁴

Lastly, an individual commenter expressed fear that the electromagnetic field of the AIT scanners may be calibrated to a level that would cause their heart pump to malfunction.²⁷⁵

4.4.4.3 Others (e.g., transgender individuals)

Approximately 575 submissions provided other comments regarding adequacy of SOPs to those with special needs and medical conditions/equipment that make them ineligible for AIT. The majority of these comments were from individual commenters who expressed concern regarding the AIT screening procedures and related privacy issues for transgender individuals.²⁷⁶ Several commenters, including advocacy groups, stated that transgender individuals are concerned that the screening process will lead to discrimination, the revelation of their gender status, and humiliation.²⁷⁷ An individual commenter asserted that transgender people are often times faced with heightened scrutiny of their bodies and documents because of a lack of education and prejudice of TSA screeners.²⁷⁸ Some individual commenters and advocacy groups explained that the screening process for transgender individuals with prosthetics can be difficult because the prosthetics are detected as anomalies by the AIT scanners, which leads to a more extensive search of their person and questioning from TSA staff.²⁷⁹ An advocacy group recommended that if the definition of anomalies was changed to “the detection of prohibited foreign items that pose special risks of creating physical danger in the aviation environment,” the public’s trust in TSA would increase.²⁸⁰ Lastly, some individual commenters and advocacy groups discussed the need for an alternative to pat-downs and AIT screening for transgender people.²⁸¹

²⁷² E. Hannum, B. Carlile, Machele [2113], B. Hancock, C. Thompson, Anonymous [2944], C. Starwser.

²⁷³ D. Salguero.

²⁷⁴ Electronic Privacy Information Center (EPIC).

²⁷⁵ C. Lang.

²⁷⁶ S. Gentry, National Gay and Lesbian Task Force, S. Melchert, Marnie [0605], Anonymous [0606], M. Mantri, S. Lumpkin, Anonymous [2592], Drake [3377], Jennifer [4136].

²⁷⁷ E. Pace, Transgender Law Center, Pride Foundation, E. Worrell, E. Jenkins.

²⁷⁸ L. Cuellar.

²⁷⁹ L. Cuellar, Pride Foundation, D. McLain, National Gay and Lesbian Task Force, S. Melchert.

²⁸⁰ National Gay and Lesbian Task Force.

²⁸¹ S. Melchert.

A few commenters including an advocacy group and individual commenters expressed concern for the emotional effect pat-downs and viewing imaging of one's body can have on travelers who have experienced past emotional and physical trauma due to sexual assaults.²⁸²

5. Rulemaking Analyses

Comments associated with this issue are summarized in the subsections below.

5.1 Regulatory Evaluation and Economic Impact Analysis

5.1.1 Costs

Approximately 15 submissions addressed the overall costs associated with the proposed rule. Several individual commenters and a non-profit organization stated that AIT scanners would be too costly, and suggested that TSA invest in other, less expensive screening methods.²⁸³ Another individual commenter stated that the cost analysis should have included a rigorous probability and statistical analysis to estimate "difficult to compute" costs for sub-populations.²⁸⁴ For example, the commenter suggested that TSA include costs for travelers that are more vulnerable to radiation, immune-suppressed, or suffering from skin cancer. With regard to the RIA document posted in the docket, an individual commenter asked TSA to clarify the units for the cost data included in Summary Tables 4 through 6.²⁸⁵

5.1.1.1 Passenger Opportunity Costs

Approximately 20 submissions addressed passenger opportunity costs associated with the proposed rule. Individual commenters and advocacy groups argued that TSA did not include adequate costs for passenger delays due to AIT.²⁸⁶ Using average time lost passing through security and average wage rates, several of these commenters estimated additional passenger opportunity costs ranging from \$450 million²⁸⁷ per year to \$15.2 billion per year.²⁸⁸ One commenter estimated the additional delay in terms of lost lifetimes, and claimed the proposed rule would lead to 18 lifetimes lost per year due to waiting in passenger screening lines.²⁸⁹ An advocacy group cited a 2008 report that found TSA security increased delays by 19.5 minutes in 2004.²⁹⁰ A commenter also suggested that TSA estimate other opportunity costs associated with opt-outs, including the cost of enduring the pat-down itself, because both the passenger and the TSA agent would prefer to avoid the pat-down.²⁹¹

²⁸² S. Gentry, National Gay and Lesbian Task Force, E. Gathman, D. M. [1926], Anonymous [1957]

²⁸³ A. McCarthy, B. Granzau, A. Etter, National Association of Airline Passengers (NAAP).

²⁸⁴ G. Jenkins.

²⁸⁵ D. Dobson.

²⁸⁶ A. McCarthy, M. Lococo, W. Niebling, The Identity Project, T. Nesbit, S. Gentry, The Cato Institute.

²⁸⁷ W. Niebling.

²⁸⁸ M. Lococo.

²⁸⁹ A. McCarthy.

²⁹⁰ The Cato Institute.

²⁹¹ T. Nesbit.

5.1.1.2 Airport Utility Costs

An individual commenter suggested that TSA underestimates airport utility costs because the analysis uses a constant utility cost per unit installed over the eight-year lifecycle.²⁹² The commenter argued that since electricity prices have increased at an average rate of 1.53 percent annually, if the analysis allows for the price of electricity to grow at this rate (instead of holding it constant), the total estimated utility cost would increase.

5.1.1.3 TSA Costs

Approximately 10 submissions addressed TSA's costs associated with the proposed rule. A commenter claimed that by incurring \$1.5 billion in costs to-date without following the proper protocol under the APA, TSA has committed a gross breach of its fiduciary responsibility.²⁹³ Other commenters suggested that TSA's AIT-related costs are unjustifiably high.²⁹⁴ Another commenter urged TSA to document and disclose all AIT-related costs, including purchase price, maintenance costs, and personnel costs, for example.²⁹⁵

5.1.1.3.1 Personnel

Eight submissions addressed TSA's personnel costs associated with the proposed rule. Some commenters stated that AIT operation requires more Transportation Security Officers (TSOs) than WTMD, which results in larger payroll costs.²⁹⁶ Another commenter argued with TSA's estimates of personnel costs.²⁹⁷ Specifically, referencing the constant salary used to estimate personnel costs in the regulatory impact assessment (RIA), the commenter argued that using a salary level that grows over time by 1.15 percent would increase personnel costs by \$33 million.

5.1.1.3.2 Training

No comments addressed this issue.

5.1.1.3.3 Equipment

Approximately 60 submissions addressed TSA's equipment costs associated with the proposed rule. A few commenters identified equipment costs that they asserted were missing from the RIA. An individual commenter and a non-profit organization asked TSA to clarify whether the analysis accounts for the cost of installing AIT scanners in every security lane.²⁹⁸ One commenter compared TSA's equipment costs to independent estimates and concluded that TSA's lower cost estimates do not include an estimate of the number of AIT scanners needed nationwide.²⁹⁹ Another commenter claimed that the analysis does not

²⁹² T. Nesbit.

²⁹³ N. Shapiro.

²⁹⁴ C. Mullen, K. Hanson.

²⁹⁵ G. Jenkins.

²⁹⁶ Anonymous [4025].

²⁹⁷ T. Nesbit.

²⁹⁸ A. McCarthy, Competitive Enterprise Institute and Robert L. Crandall.

²⁹⁹ Competitive Enterprise Institute and Robert L. Crandall.

include the cost associated with replacing the AIT scanners every eight years.³⁰⁰ An individual commenter asked TSA to provide detail on the maintenance cost assumptions in the analysis.³⁰¹ The commenter urged TSA to base AIT maintenance costs on actual experience (e.g., total service calls required in recent years). Another commenter declared that the AIT machines are expensive, and recommended other security-related equipment that TSA could invest in instead (e.g., improved sensors for baggage).³⁰²

5.1.1.3.4 Utilities

One submission addressed airport utility costs associated with the proposed rule. An individual commenter suggested that TSA underestimates TSA's utility costs because the analysis uses a constant utility cost per unit installed over the eight-year lifecycle.³⁰³ The commenter stated that electricity prices have increased at an average rate of 1.53 percent annually. If the analysis allows for the price of electricity to grow at this rate (instead of holding it constant), the total estimated utility cost would increase.

5.1.1.4 Other Costs

Approximately 520 submissions addressed other costs associated with the proposed rule. Several commenters identified additional costs that they asserted should have been included in the RIA. A few commenters, including an individual commenter and advocacy groups, suggested that the increased security measures would have a cost impact on the aviation and travel industries which the RIA does not quantify.³⁰⁴ The commenters cited research that shows demand for air travel could decline by six percent, reduce airline revenue, and increase airline costs and passenger fees. Other commenters recommended that TSA include estimates for legal costs in the cost benefit analysis because of the likelihood of further litigation regarding the use of AIT.³⁰⁵ An individual commenter suggested that AIT scanners would result in medical equipment costs to passengers (e.g., damage to insulin pumps).³⁰⁶ An advocacy group urged TSA to include costs associated with infringement on civil liberties and on privacy, but acknowledged that these costs are not easily quantifiable.³⁰⁷

An individual commenter requested that TSA provide clarification on the assumptions used to develop the AIT program management costs (i.e., 10 percent of passenger screening costs).³⁰⁸ Another individual commenter suggested that TSA consider using a random selection AIT screening process in order to reduce the costs of the rule.³⁰⁹

³⁰⁰ S. Roberts.

³⁰¹ T. Nesbit.

³⁰² K. Sherwood.

³⁰³ T. Nesbit.

³⁰⁴ M. Lococo, The Cato Institute, U.S. Justice Foundation.

³⁰⁵ L. Bradbury.

³⁰⁶ S. Gentry.

³⁰⁷ The Cato Institute.

³⁰⁸ T. Nesbit.

³⁰⁹ L. Bradbury.

5.1.2 Benefits

Approximately 20 submissions addressed the area of benefits associated with the proposed rule. Many individual commenters and a non-profit organization observed that TSA did not quantify the benefits of AIT or provide documentation to support the claims made in the benefits analysis.³¹⁰ One of the commenters asserted that it is not acceptable for TSA to keep its risk-based benefits analysis confidential, and urged TSA to assess the risk of a terrorist attack relative to the risks associated with AIT (e.g., cancer and increased roadway fatalities).³¹¹ Another commenter recommended that TSA provide an estimate of how much AIT reduces the probability of a successful terrorist attack, or provide a break-even analysis that would estimate of the number of terrorist threats that must be prevented in order to cover the costs of the AIT.³¹² A non-profit organization stated that the risk reduction benefits that TSA claims in the analysis are not attributable to AIT because there have been no successful terrorist attacks originating from U.S. airports since September 11, 2001, even before TSA began deploying AIT scanners.³¹³ Another commenter stated that AIT scanners provide negligible security benefits.³¹⁴

Several individual commenters and a non-profit organization discussed benefits in terms of the number of attacks that need to be thwarted in order to justify the costs of the AIT rule. Some of these commenters, including two non-profit organizations, cited a research study that concluded that AIT would need to avert more than one attack originating from U.S. airports every two years in order to justify the cost of the scanners. The commenters stated that AIT would not achieve this threshold.³¹⁵ An individual commenter suggested that had AIT scanners been used over the last 12 years, only two attacks would have been avoided. The commenter claimed this would not have justified the cost.³¹⁶ Another individual stated that people are more at risk of dying in motor vehicle accidents than in a terrorist attack on an airplane originating in the U.S. The commenter concluded that AIT would not be the most efficient approach to reducing risk.³¹⁷ According to an individual, AIT will not increase security to the degree TSA claims it does until AIT is implemented in every airport and every security lane. The commenter suggested that the absence of an attack cannot be attributed to AIT.³¹⁸

Some commenters recommended types of benefits that should be analyzed. An individual commenter suggested that TSA quantify the benefits of the rule in terms of lives saved and avoided disruptions to the economy.³¹⁹ Another commenter stated that the analysis should consider the potential benefits of reallocating the costs associated with AIT to other screening methods.³²⁰

³¹⁰ K. Bloom, M. Lococo, T. Nesbit, J. Corbett, G. Jenkins, National Association of Airline Passengers (NAAP).

³¹¹ K. Bloom.

³¹² T. Nesbit.

³¹³ National Association of Airline Passengers (NAAP).

³¹⁴ Anonymous [2677].

³¹⁵ Anonymous [0718], Competitive Enterprise Institute and Robert L. Crandall, National Association of Airline Passengers (NAAP).

³¹⁶ L. Bradbury.

³¹⁷ Anonymous [1308].

³¹⁸ G. Jenkins.

³¹⁹ W. Niebling.

³²⁰ J. Wroclawski.

5.1.3 Other impacts

5.1.3.1 Health impacts

Five submissions addressed other health impacts associated with the proposed rule. Several individual commenters identified health impacts that TSA should have accounted for in the cost-benefit analysis. The commenters suggested that the analysis should include costs or risk information for radiation-related illness, emotional distress, and special medical conditions.³²¹

5.1.3.2 Travel impacts

Approximately 80 submissions addressed other travel impacts associated with the proposed rule. Many commenters, including non-profit organizations, an advocacy group, and individual commenters claimed that the traveling public would avoid air travel, causing individuals to substitute driving or taking the train for flying.³²² Some of these commenters stated that there would be increased roadway fatalities as a result of the increase in motor vehicle travel (some estimated as many as 500 additional deaths per year). The commenters suggested that the analysis should account for the cost associated with these additional fatalities.³²³ Other commenters indicated that reduced air travel, including from international tourists, would affect the airline industry and TSA should estimate these financial impacts.³²⁴

Many other commenters, including a non-profit organization and individuals, suggested that the proposed rule would increase wait times at the security checkpoints, leading to passenger delays.³²⁵ Some commenters estimated that these additional wait times from AIT would delay a passenger by at least 15 minutes. The commenters urged TSA to account for the additional time spent by passengers waiting to pass through airport security. An individual commenter suggested that AIT would reduce wait times for screening, particularly for passengers with joint replacements that would otherwise trigger WTMDs.³²⁶

5.1.3.3 Other impacts

Six submissions addressed other impacts associated with the proposed rule. Two individual commenters suggested that using AIT scanners would lead to lost or stolen baggage.³²⁷ Another commenter claimed that the RIA failed to account for decreases in economic productivity as a result of the rule.³²⁸ Further, an individual commenter suggested that the proposed rule is not justified because the investment in AIT scanners would not reduce mortality by as much as other government programs or initiatives. In

³²¹ K. Bloom, S. Roberts, J. Corbett, G. Jenkins.

³²² J. Cooper, Rebecca [0416], B. Liddel, W. Niebling, T. Harris, A. Etter, Competitive Enterprise Institute and Robert L. Crandall, PrivacyActivism, M. Lyon, K. Muratore, J. Corbett, S. Gentry, Anonymous [4827], The Cato Institute, C. Wilson.

³²³ K. Bloom, M. Joyce, G. Smith.

³²⁴ H. Waldron.

³²⁵ S. Roberts, B. Granzeau, Anonymous [2677], K. Bloom, W. Niebling, C. Mullen, Anonymous [4025], A. Etter, PrivacyActivism, C. Wilson, H. Waldron, T. Burns.

³²⁶ S. Mayer.

³²⁷ I. Gelfand, T. Burns.

³²⁸ K. Bloom.

particular, the commenter suggested that AIT would not prevent terror attacks, but would instead redirect them to alternate locations.³²⁹ Another commenter stated that the analysis should consider the use of newer technologies which might work better and cost less.³³⁰ An advocacy group urged TSA to include passenger privacy impacts in the cost-benefit analysis.³³¹

5.1.4 Regulatory Alternatives

5.1.4.1 Alternative #1 (no action)

Approximately 20 submissions commented on Alternative #1 (no action). Several individual commenters and non-profit organizations expressed support for Alternative #1 (no action), and urged TSA to revert to the use of metal detectors as the primary screening method.³³²

5.1.4.2 Alternative #2 (pat-down)

Approximately 25 submissions commented on Alternative #2 (pat-down). Several commenters suggested that screening consisting of pat-downs and metal detectors would be sufficient.³³³ A few commenters suggested that because AIT scanners are not effective and intrusive, pat-down screening should be used instead.³³⁴

5.1.4.3 Alternative #3 (ETD screening)

Approximately 680 submissions commented on Alternative #3 (ETD screening). Many individual commenters, a non-profit organization, and advocacy groups expressed support for Alternative #3 (ETD screening) without providing additional substantive comment.³³⁵ A few of these commenters suggested that the use of ETD and WTMDs are more effective, less costly, and less intrusive.³³⁶

5.1.4.4 Alternative #4 (NPRM)

No comments addressed this issue.

5.1.4.5 Other alternatives (e.g., WTMD, canine)

Approximately 670 submissions commented on other alternatives for TSA consideration. Several commenters, including a non-profit organization, a privacy advocacy group, and individual commenters,

³²⁹ G. Smith.

³³⁰ G. Jenkins.

³³¹ National Gay and Lesbian Task Force.

³³² Anonymous [2793], Rachel [3355], N. Shapiro, T. Harris, C. Mullen, A. Etter, PrivacyActivism, S. Gentry, National Association of Airline Passengers (NAAP), H. Waldron.

³³³ Anonymous [0692], DeBaillon [1372], Anonymous [1821], M. Teates.

³³⁴ Anonymous [4025], Anonymous [1777].

³³⁵ M. Ramoneda, K. Bloom, Anonymous [1308], R. Kidder, M. Schwartz, Jan [3713], E. Pace, Competitive Enterprise Institute and Robert L. Crandall, J. Koe, Electronic Privacy Information Center (EPIC).

³³⁶ L. Clark, K. Rolfes, M. Wolbe.

recommended that TSA return to using WTMDs, magnetometers, and wands during the screening process.³³⁷ Other commenters urged TSA to rely on traditional police and intelligence work and canine explosives detection teams to detect and deter threats.³³⁸ A few commenters provided additional alternatives for TSA's consideration. One commenter recommended that TSA use mass spectrometry methods to detect threats in air samples.³³⁹ Other commenters suggested that TSA should explore other technologies to reduce reliance on AIT and pat-downs and to be able to detect explosives within body cavities.³⁴⁰ A non-profit organization recommended that TSA consider testing face recognition, explosive residue machines, and suspicious behavior systems for secondary screening.³⁴¹ Another non-profit organization urged TSA to use less invasive screening technologies such as infrared imaging.³⁴²

5.1.4.6 Adequacy of comparative analysis between AIT and alternatives

Approximately 25 submissions addressed the adequacy of TSA's comparative analysis between AIT and the alternatives. Several commenters suggested that TSA did not provide an adequate justification for AIT relative to the alternatives. For example, a commenter stated that AIT is approximately 10 times more expensive than magnetometers, but that the analysis does not evaluate the costs and benefits of AIT against magnetometers.³⁴³ Another commenter recommended that TSA quantitatively compare the benefits of AIT to the baseline condition (e.g., by how much does AIT reduce the probability of a successful terrorist attack).³⁴⁴ A privacy advocacy group suggested that TSA does not adequately characterize AIT's effectiveness in comparison to the alternatives. The commenter also claimed that the analysis does not support its conclusions that AIT is more effective than the alternatives, and does not identify AIT's weaknesses relative to the alternatives.³⁴⁵ This privacy advocacy group and a non-profit organization both suggested that the analysis does not adequately compare the effectiveness of AIT to Regulatory Alternative #3. As a result, TSA does not acknowledge that WTMD and ETD can be just as effective as AIT, and in terms of shortcomings, ETD and AIT share some of the same disadvantages.³⁴⁶

5.1.4.7 Other comments on alternatives

Approximately 35 submissions provided other comments on the alternatives. A few commenters made other recommendations to TSA with regard to alternatives. For example, an individual commenter urged TSA to conduct research on alternative screening technology, provide educational outreach on the security measures to the public, and train flight attendants and inform passengers of what to do in response to suspicious activity.³⁴⁷ Another individual commenter claimed that TSA violated the APA by

³³⁷ J. Tillery, B. Granzau, Cyber Privacy Project, Anonymous [2793], National Association of Airline Passengers (NAAP).

³³⁸ T. Harris, K. Koscher, Cyber Privacy Project, FlyerRights.org.

³³⁹ Anonymous [1308].

³⁴⁰ C. Carrigan, E. Pace.

³⁴¹ FlyerRights.org.

³⁴² National Association of Airline Passengers (NAAP).

³⁴³ Anonymous [1105].

³⁴⁴ T. Nesbit.

³⁴⁵ Electronic Privacy Information Center (EPIC).

³⁴⁶ Electronic Privacy Information Center (EPIC), Consumer Federation of America.

³⁴⁷ A. Figueroa.

not providing a scientific basis for its evaluation of the efficacy of AIT and the proposed alternatives.³⁴⁸ An advocacy group suggested that the NPRM describes the proposed alternatives in “all or nothing” terms, rather than proposing a layered approach using a variety of the screening methods described in the alternatives. The commenter recommended using AIT as a secondary screening method on a more limited basis.³⁴⁹ Another individual commenter asked why TSA does not require travelers to go through both AIT and WTMD. The commenter suggested that travelers should be subjected to both technologies.³⁵⁰

5.1.5 Other comments on RIA

Approximately 120 submissions provided other comments on the RIA. Many commenters cited existing research on the costs and benefits of AIT, or recommended new research on the costs and benefits of AIT.³⁵¹ A few individual commenters and an advocacy group recommended that TSA conduct a study of the various impacts of AIT, including privacy impacts.³⁵² Another commenter referred to Dr. Sommer Gentry’s analysis of AIT which, according to the commenter, found that the screening device would need to prevent two or three terrorist attacks the size of September 11, 2001 each year in order to be cost effective.³⁵³ An individual commenter cited a cost-benefit analysis conducted by the Journal of Homeland Security and Emergency Management where the commenter questioned the cost-effectiveness of AIT.³⁵⁴ An advocacy group concluded that independent, scholarly risk management and cost-benefit analyses of AIT have been conducted.³⁵⁵ According to the commenter, these studies have found that AIT scanners do not reduce risk enough to justify the costs. Another advocacy group suggested that a cost benefit analysis of the AIT would identify how effective the scanners are at deterring terrorism compared to screening alternatives.³⁵⁶ Another commenter requested that an independent party analyze the costs compared to other possible investments, such as traffic safety or cancer research.³⁵⁷

Several commenters declared that the cost-benefit analysis in the NPRM is insufficient and inadequate and referred to AIT as costly.³⁵⁸ The commenters suggested that the analysis does not justify the cost relative to the risks or improvement in TSA’s ability to detect threats to safe air travel. A privacy advocacy group claimed that TSA did not fully evaluate the costs and benefits of AIT as compared to WTMD and ETDs, as required under Executive Order (EO) 13563 and EO 12866.³⁵⁹ An individual commenter urged TSA to account for all of the risks associated with AIT and include difficult to quantify costs in the analysis.³⁶⁰ A non-profit organization stated that despite their cost, AIT scanners are cost-beneficial in deterring aviation terrorism when compared to pat-downs.³⁶¹

³⁴⁸ Electronic Privacy Information Center (EPIC).

³⁴⁹ National Gay and Lesbian Task Force.

³⁵⁰ Anonymous [5297].

³⁵¹ J. Corbett, M. Ramoneda, D. Goh, E. Pace, D. Hildenbrand, C. Wilson, National Gay and Lesbian Task Force,

³⁵² The Cato Institute, Anonymous [0077].

³⁵³ J. Corbett.

³⁵⁴ M. Ramoneda.

³⁵⁵ National Gay and Lesbian Task Force.

³⁵⁶ FlyerRights.org.

³⁵⁷ D. McNelly

³⁵⁸ S. Abraham, H. Waldron, A. McCarthy, S. Thrasher, M. Lococo, Jim B. [2764], K. Bloom, Electronic Privacy Information Center (EPIC), The Cato Institute, FlyerRights.Org.

³⁵⁹ Electronic Privacy Information Center (EPIC).

³⁶⁰ G. Jenkins.

³⁶¹ FlyerRights.org.

5.2 Initial Regulatory Flexibility Analysis

Three submissions provided comments on the initial regulatory flexibility analysis. Individual commenters and an advocacy group critiqued TSA's initial regulatory flexibility analysis. A couple of commenters recommended that the analysis estimate the costs incurred by small business entities, such as sole proprietors.³⁶² The commenters claimed that the impacts on small entities would include time lost as well as lost revenue from tourists (e.g., fewer air travelers, both foreign and domestic). An advocacy group urged TSA to withdraw the NPRM, prepare an RFA analysis that accounts for the impacts on small entities, and provide another opportunity for comment.³⁶³ The commenter suggested that the NPRM erroneously excludes individuals from the definition of "small entities." The commenter stated that many individual travelers are self-employed individuals and sole proprietors which qualify as small entities. The commenter estimated that the impact on "small entities" is at least \$2.8 billion per year.

5.3 Other Regulatory Analyses (e.g., international trade, unfunded mandates, paperwork reduction, Federalism)

Four submissions provided comments on other regulatory analyses. A few individual commenters suggested that TSA should have performed an Unfunded Mandates Reform Act analysis. A commenter stated that the proposed rule would impact State, Local, and tribal governments as a result of the increased road traffic caused by the rule (i.e., travelers substituting from air to motor vehicle travel). The commenter explained that TSA failed to account for costs associated with State, Local, and tribal governments responding to additional motor vehicle accidents and providing additional road maintenance.³⁶⁴ Another commenter claimed that the costs of the rule would be passed onto passengers in the form of the September 11th Security Fee, which would be a burden triggering an analysis under the Unfunded Mandates Reform Act.³⁶⁵

A non-profit organization and an individual commenter suggested that the proposed rule would have a substantial direct effect on States under EO 13132, Federalism.³⁶⁶ Both commenters discussed the experience of Texas, which attempted to pass an anti-groping law that would have affected TSA's screening process. According to the commenters, news reports claimed that TSA sent the Texas legislature a letter threatening to close all Texas airports if the bill passed. The commenters suggested that TSA's interference with a State legislature's activity demonstrates the substantial direct effect AIT would have on States. One of the commenters also explained that States are responsible for inspecting radiological devices and licensing unit operators. As a result, the commenter suggested that the rule would require State governments to inspect the AIT units and license operators of AIT units, which would have a direct effect on States.³⁶⁷

³⁶² A. McCarthy, H. Waldron.

³⁶³ The Identity Project.

³⁶⁴ H. Waldron.

³⁶⁵ K. Koscher.

³⁶⁶ National Association of Airline Passengers (NAAP), H. Waldron.

³⁶⁷ National Association of Airline Passengers (NAAP).

Two individual commenters stated that TSA must prepare an environmental impact statement in accordance with National Environmental Protection Act (NEPA).³⁶⁸ One of the commenters urged TSA to assess the human health impacts associated with AIT. The other commenter explained that the environmental impact statement would need to assess the impact of increased motor vehicle travel (e.g., air pollution, traffic, and car accidents) on the environment.

5.4 Other (e.g., risk management, risk-reduction analysis)

Approximately 20 submissions provided comments on other topics related to the rulemaking analyses. Many commenters addressed the issue of risk, risk management, and risk-reduction analysis. Some commenters suggested that the risks AIT is meant to mitigate do not justify the costs associated with AIT.³⁶⁹ One commenter stated that over the past 12 years, AIT scanners would not have prevented enough attacks to justify the costs (i.e., only two bombings in the past 12 years and a cost of \$3.6 billion).³⁷⁰ A non-profit commenter, an advocacy group, and an individual commenter all referenced a recent study by Mueller and Stewart to explain that the existing risk of a terrorist attack on an airliner does not justify the costs of AIT.³⁷¹

Another set of commenters urged TSA to provide a detailed risk reduction analysis to support the rulemaking, such as the classified version that TSA cited in the NPRM.³⁷² The commenters suggested that TSA at least release a redacted version or a summary of its risk-reduction analysis of AIT. A non-profit organization stated that TSA is obligated to disclose whether AIT would cost-effective in reducing risk, and the risk-reduction analysis would be able to demonstrate this. The commenter cited another risk-reduction analysis that was published by academic researchers in a peer-reviewed journal to indicate that these analyses can be published without revealing technical details or threat information that may legitimately be kept confidential.³⁷³

An individual commenter recommended that TSA design the AIT rule so that the agency would be able to conduct a “look back” analysis after the rule is implemented. The commenter explained that TSA would be able to collect empirical data on impacts such as AIT’s effectiveness of detecting various security threats, and the amount of time added to the security screening process.³⁷⁴ Another individual commenter referenced the report *A Community Safety System Balancing Risk, Cost, and Freedom*, and suggested that TSA analyze the cost and benefits of AIT in the areas of personal privacy, freedom, and convenience.³⁷⁵

³⁶⁸ J. Koc, H. Waldron.

³⁶⁹ H. Waldron, Competitive Enterprise Institute and Robert L. Crandall, S. Gentry, The Cato Institute.

³⁷⁰ L. Bradbury.

³⁷¹ Competitive Enterprise Institute and Robert L. Crandall, S. Gentry, The Cato Institute.

³⁷² C. Wilson, Jim B. [2764], Competitive Enterprise Institute and Robert L. Crandall, T. Nesbit, The Cato Institute.

³⁷³ Competitive Enterprise Institute and Robert L. Crandall.

³⁷⁴ W. Niebling.

³⁷⁵ W. Becker.

6. Other comments on the Proposed AIT Rule

Comments associated with this issue category are summarized in the subsections below.

6.1 Request for extension of comment period

No comments addressed this issue.

6.2 Comments on the regulatory text (e.g., omission of opt-out language from regulatory text)

Approximately 545 commenters provided comments that were specific to the NPRM text. Some individual commenters and an advocacy group made the general assertion that the proposed rule is vague.³⁷⁶ More specifically, individual commenters, a non-profit organization, and an advocacy group suggested that the NPRM is not clear regarding a passenger's right to other screening methods other than AIT.³⁷⁷ A few individual commenters suggested that, by not discussing alternative screening options, TSA is implying that passengers do not have a right to opt-out and be screened by a pat-down inspection.³⁷⁸ Further, an advocacy group requested that the language in the proposed rule should codify that all pat-down searches are to be conducted by officers "of the same self-identified gender as the traveler," and not the gendered listed on the identification or the gender assigned to the passenger at birth.³⁷⁹ One of these commenters suggested that text be added to the CFR that will include alternatives for those with medical or other sensitive needs.³⁸⁰

In addition to suggesting that language describing the right to alternative screening is added to the NPRM, an individual commenter suggested that text also be included that states that appropriate notice to passengers about the use of AIT and the opt-out option is developed and posted.³⁸¹ An advocacy group claimed that current notification of the opt-out option is not large enough and placed in an area where passengers will not see the notice.³⁸² One of these commenters argued that the NPRM suggests that a passenger who opts-out of AIT screening is perceived as disrupting the security system.³⁸³

A few individual commenters and advocacy groups asserted that TSA clarify key terms in the NPRM, including "screening", "anomaly", and "submit".³⁸⁴ Similarly, an individual commenter and an advocacy group suggested that lack of details regarding screening and inspection leaves passengers uninformed of what TSA's authority is specifically and what options the passengers have.³⁸⁵ The advocacy group suggested that the lack of clarity leaves TSA checkpoint procedures unpredictable and inconsistent.³⁸⁶

³⁷⁶ R. Golden, I. Williamson, The Identity Project, K. Koscher, J. Corbett, R.W [4688].

³⁷⁷ The Cato Institute, Competitive Enterprise Institute and Robert L. Crandall, R. Golden, M. Armus, R. Carew.

³⁷⁸ R. Golden, M. Armus, R. Carew, A. Etter, Competitive Enterprise Institute and Robert L. Crandall.

³⁷⁹ National Gay and Lesbian Task Force.

³⁸⁰ K. Bloom.

³⁸¹ R. Carew.

³⁸² National Gay and Lesbian Task Force.

³⁸³ R. Golden.

³⁸⁴ K. Bloom, The Identity Project, National Gay and Lesbian Task Force.

³⁸⁵ I. Williamson, The Identity Project, S. Gentry.

³⁸⁶ The Identity Project.

Several commenters generally asserted that the definition of AIT is ambiguous. A few commenters, including a privacy advocacy group, suggested that the definition of AIT does not discuss production of images and does not apprise the public of the AIT screening program.³⁸⁷ Similarly, a non-profit organization suggested that the definition of AIT is too broad in that it allows TSA to use other tools and technologies in addition to AIT.³⁸⁸ An individual commenter suggested that the vagueness of the regulation leaves the reader with limited understanding of the intention of the NPRM.³⁸⁹

Similarly, an advocacy group suggested that the proposed rule should be revised to clarify the rights and responsibilities of passengers and TSA with regard to AIT scanning. The commenter argued that the D.C. Court opinion in *EPIC v DHS* provides more information about TSA policy than the proposed rule and that the proposed rule does not fulfill the Court order. This commenter concluded that the rulemaking process for AIT scanning should begin anew.³⁹⁰ According to an advocacy group, clarifying the limits of screening objectives will enhance the public's trust in TSA's screening program.³⁹¹

Some commenters provided suggestions as to how the proposed rule could include protection for passengers. A non-profit organization requested that a "code of conduct" towards passengers and a "passenger bill of rights" be included in the proposed regulations.³⁹² An individual commenter provided several suggested edits to the final rule that address codifying minimum protections of the passenger.³⁹³ Furthermore, an advocacy group suggested that 1) passengers have the option to be screened in private and with a witness of the passenger's choosing; 2) there be a limitation on the requirement for a passenger to lift or remove clothing; and 3) "resolution" pat-downs be limited to the areas on the body where an anomaly was detected by the AIT scanner. The same advocacy group suggested that the TSA Traveler's Civil Rights Policy be codified in the final rule and should include nondiscrimination on the basis of gender identity.³⁹⁴

An advocacy group and individual commenters suggested that the NPRM language stating, "AIT screening is currently optional, but when opting out of AIT screening, a passenger will receive a pat-down," indicates that TSA may impose mandatory AIT screening for all passengers in the future.³⁹⁵

Some commenters recommended specific text to be added to the proposed rule. For example, an individual commenter provided NPRM language that they asserted would 1) allow TSA to search locations that are likely targets; 2) protect the Fourth Amendment concerns of private citizens; 3) eliminate costs associated with legal challenges; and 4) lower operation costs.³⁹⁶ Another individual commenter suggested that the threat level would be better represented if TSA replaced "high-threat environment" with "Fewer than 1 in 10 billion passengers present an actionable threat to commercial passenger flights."³⁹⁷

³⁸⁷ Electronic Privacy Information Center (EPIC).

³⁸⁸ Competitive Enterprise Institute and Robert L. Crandall.

³⁸⁹ J. Corbett.

³⁹⁰ The Cato Institute.

³⁹¹ National Gay and Lesbian Task Force.

³⁹² National Association of Airline Passengers (NAAP).

³⁹³ E. Pace.

³⁹⁴ National Gay and Lesbian Task Force.

³⁹⁵ U.S. Justice Foundation, A. Stent, R.W [4688]

³⁹⁶ L. Bradbury.

³⁹⁷ D. Dobson.

A few commenters, including individual commenters, a community organization, and a non-profit organization, suggested additional language specific to Section 1540.107. For example, an individual commenter proposed adding text to clarify that screening to detect anomalies will be conducted using “the least intrusive means.”³⁹⁸ A community organization provided several paragraphs for expanding Section 1540.107(d). The proposed language includes specifics regarding how and when AIT can be used; when enhanced pat-down searches are to be conducted; information provided to passengers prior to AIT screening; language regarding a pat-down search option; and language addressing the images generated by AIT.³⁹⁹ A non-profit organization suggested that the proposed rule refer to AIT as “active” imaging technology as opposed to “advanced” so the technology can be differentiated from “passive” imaging technology.⁴⁰⁰

An advocacy group suggested that in order to assure passengers that images from the AIT scanners will not be retained, the definition of the AIT scanners should describe the technology as one that, “allows screening without subsequent retention of individual passenger image data.” The same commenter suggested that training provided to TSOs, including training regarding how to work with diverse populations, be required in the final rule.⁴⁰¹

6.3 Other comments on the Proposed AIT Rule

Approximately 85 commenters provided additional comments on the proposed AIT rule. Commenters generally asserted that AIT machines are slow. An individual commenter asserted that the majority of passengers are uninformed about the risks associated with AIT scanners, their option to opt-out, and TSA’s authority.⁴⁰²

A few commenters discussed TSA’s selection to use Rapiscan as the vendor for AIT scanners. According to some individual commenters, the choice of using Rapiscan as the vendor is inappropriate because former Department of Homeland Security chief Michael Chertoff was reported to have lobbied for Rapiscan and AIT prior to his departure from the agency.⁴⁰³

A couple of commenters suggested that independent studies and audits be conducted on scanners to confirm the safety and effectiveness of the technology.⁴⁰⁴

Some commenters, including public citizens and non-profit organizations, expressed concern regarding the potential theft of personal items during AIT screening.⁴⁰⁵ Three of these commenters suggested that alternatives like WTMD allows the passenger to maintain control of their non-metallic valuables during screening and that control is relinquished when a passenger is separated from their possessions to be screened by an AIT scanner.⁴⁰⁶

³⁹⁸ L. Cuellar.

³⁹⁹ Freedom to Travel USA.

⁴⁰⁰ National Association of Airline Passengers (NAAP).

⁴⁰¹ National Gay and Lesbian Task Force.

⁴⁰² K. Bloom.

⁴⁰³ K. Bloom, P. Marcus, Anonymous [1728].

⁴⁰⁴ Anonymous [0812], C. Joy, Anonymous [2677].

⁴⁰⁵ A. McCarthy, PrivacyActivism, C. Mullen, J. Corbett, National Association of Airline Passengers (NAAP).

⁴⁰⁶ A. McCarthy, C. Mullen, Anonymous [4827].

A few commenters discussed TSA's assertion that the public generally approves of the AIT scanners. For example, an individual commenter argued that this claim was not followed by data regarding the public's approval.⁴⁰⁷ Other commenters suggested that TSA should not assume the lack of complaints about AIT to be support for the use of AIT.⁴⁰⁸ For example, a privacy advocacy organization suggested that TSA has not taken into consideration the number of passengers who choose AIT scanners over opt-out screening because it is faster, not because they prefer the scanner. The commenter also suggested that TSA has not considered the number of people who forego commercial air travel because of the use of AIT scanners.⁴⁰⁹ Another individual commenter, however, asserted that national ABC and CBS news polls indicated that the majority of poll participants favored full body x-ray scanners at airports.⁴¹⁰

According to another individual commenter, the AIT scanners have created a tenuous relationship between TSOs and travelers that is detrimental to security.⁴¹¹

Further, an individual commenter suggested that TSA issue an ANPRM to allow for the public to comment on the use of AIT and allow TSA to gather other relevant data.⁴¹² An advocacy group and an individual commenter asserted that TSA only issued a NPRM because it was court ordered.⁴¹³ Other commenters argued that TSA had the option to request public input prior to implementing and deploying AIT scanners.⁴¹⁴

Lastly, an individual commenter claimed that because the proposed rulemaking has not address the potential impacts that TSA screening activities may have on rape victims, TSA should cease the use of body imaging technology, cease the practice of pat-downs, and rely on the use magnetometers.⁴¹⁵

7. **Comments outside the scope of the proposed AIT rule**

Approximately 90 submissions addressed other issues that were beyond the scope of the proposed AIT rule. Some of these out-of-scope issues addressed by commenters were the following:

- A few individual commenters made general assertions that because air travel is not as dangerous as other modes of transportation, emphasis and funds should be placed on other transportation safety and/or high-profile events⁴¹⁶
- Some individual commenters suggested that TSA staff are not trained in screening techniques, and how to behave professionally.⁴¹⁷

⁴⁰⁷ A. McCarthy.

⁴⁰⁸ S. Schoen, Electronic Privacy Information Center (EPIC).

⁴⁰⁹ Electronic Privacy Information Center (EPIC).

⁴¹⁰ S. Egunyoni.

⁴¹¹ S. Gentry.

⁴¹² J. Koe.

⁴¹³ U.S. Justice Foundation, S. Abraham.

⁴¹⁴ K. Bloom, D. Goh.

⁴¹⁵ J. Koe.

⁴¹⁶ Anonymous [3124], A. Kauffman.

⁴¹⁷ J. Littel, Kevin [1119], Anonymous [0741], Anonymous [1654], K. Ostrovsky, S. Carron, K. Chapman, Anonymous [3498].

- A couple of individual commenters suggested that the use of AIT may become common place in other venues where security searches occur including courthouses, schools, stadiums, political rallies, and other places.⁴¹⁸
- An individual commenter asserted that since TSA staff do not follow the “liquid policy,” it should be eliminated for travelers. According to the same commenter the “shoe policy” can also be eliminated because shoes can be screened with WTMDs.⁴¹⁹
- A few individual commenters suggested that TSA create a process to hold TSA employees accountable for their actions. A couple of individual commenters recommended that employees wear badges with contact information like their full name and badge number, for example.⁴²⁰ One of these commenters also suggested that TSA place employees on probation for receiving three or more customer service reports within six months.⁴²¹ Another individual commenter suggested that any processes for anonymous reporting be publicized.⁴²²
- An individual commenter provided commentary on his experience working for TSA while anonymously authoring a blog through which he described his experiences and observations as a TSA employee.⁴²³
- A few individual commenters expressed concern and provided information regarding the reported off-duty criminal activities of TSA screeners.⁴²⁴
- A commenter submitted his opinion regarding the government’s position and intentions as they relate to passenger safety, the history behind the origins of the September 11, 2001 attacks, and offered personal accounts of traveling via airplane.⁴²⁵
- A community organization provided a list of goals for airport security.⁴²⁶
- Lastly, an advocacy group provided information regarding the term “transgender” and referred to what it asserted was U.S Office of Personnel Management guidance on the process of gender transition.⁴²⁷

7.1 Anecdotes about TSA screening activities unrelated to AIT

Approximately 80 commenters provided anecdotal accounts related to their experiences being screened by TSA. The majority of these comments referred to personal accounts of pat-downs, including assertions that the opt-out pat-downs were abusive or violating, and statements regarding the extended wait times for pat-downs.⁴²⁸ Other individual commenters stated that

⁴¹⁸ K. Bloom, Justin [2189].

⁴¹⁹ Anonymous [2793].

⁴²⁰ Anonymous [2793], B. Birgen.

⁴²¹ Anonymous [2793].

⁴²² A. Woodall.

⁴²³ K. Hanson.

⁴²⁴ J. Corbett, A. Burns.

⁴²⁵ G. Dix.

⁴²⁶ Freedom to Travel USA.

⁴²⁷ National Center for Transgender Equality.

⁴²⁸ L. Clark, E. Contour, Anonymous [0424], D. Hughes, J. Thompson, Anonymous [0594], K. Soule, M. Vincent,

because of their negative pat-down experiences, they have cancelled air travel plans.⁴²⁹ Several commenters suggested, generally, that the security at airports has not increased the safety of air travel.⁴³⁰

Anonymous [2799].

⁴²⁹ Anonymous [0353], Kevin [1119], Jennifer P., Anonymous [3691].

⁴³⁰ K. Porko.