

**Preliminary Analysis to Aid Public Comment on  
TSA's Proposed Nude Body Scanner Rule  
(Version 1.0 April 2, 2013)**

On March 26, 2013, the Transportation Security Administration began a court-ordered public comment process on the agency's proposal to deploy body scanners at US airports.<sup>1</sup> The Electronic Privacy Information Center (EPIC) has prepared this preliminary analysis of the agency's proposal to aid public comment.

Section I of the analysis provides background information pertaining to *EPIC v. DHS*, the court case that required TSA to begin the public comment process. Section II provides a summary of the agency notice and proposed regulation. Section III sets out recommendations from EPIC. Section IV identifies other issues that commentators may wish to address.

EPIC encourages the public to submit comments concerning the TSA's use of airport body scanners of concern. The deadline for filing is June 24, 2013. Comments should be submitted at <http://www.regulations.gov/#!submitComment;D=TSA-2013-0004-0001>.

**I. Background Information:**

On July 15, 2011, the D.C. Circuit Court of Appeals ruled that the TSA unlawfully deployed body scanners in US airports for primary screening when it failed to give the public the opportunity to comment on the program.<sup>2</sup> The Court found that "the TSA has not justified its failure to issue notice and solicit comments." The Court also said that the agency practice imposed a substantial burden on the public. According to the Court, "few if any regulatory procedures impose directly and significantly upon so many members of the public."

The Court expressed concern about the TSA's use of body scanners. "It is clear that by producing an image of the unclothed passenger, an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not," wrote the federal appeals court. The judges expressed skepticism about the TSA's claim that a pat-down "is the only effective alternative method of screening passengers." Importantly, the D.C. Circuit found that individuals were not required to undergo the body scanner program instituted by the TSA. "No passenger is ever required to submit to an AIT scan." The Court was also assured by TSA that the agency had "taken steps to mitigate the effect a scan might have upon passenger privacy." On this basis, the Court concluded that the TSA's use of body scanners did not violate the Fourth Amendment or federal privacy statutes.

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<sup>1</sup> 78 Fed. Reg. 18287-18302 (Mar. 26, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-03-26/pdf/2013-07023.pdf>.

<sup>2</sup> *EPIC v. DHS*, 653 F.3d 1 (D.C. Cir. 2011), *available at* [http://epic.org/privacy/body\\_scanners/EPIC\\_v\\_DHS\\_Decision\\_07\\_15\\_11.pdf](http://epic.org/privacy/body_scanners/EPIC_v_DHS_Decision_07_15_11.pdf)

The Court ordered the TSA to “promptly” undertake a public notice and comment rulemaking on its use of body scanners at US airports.

Subsequent to the decision in *EPIC v. DHS*, the US Congress passed legislation that prohibited the TSA from deploying body scanners that did not incorporate privacy filters to obscure the image of air travelers.<sup>3</sup>

## **II. Summary of the TSA’s Proposed Rule:**

The TSA has proposed to modify its current screening procedures by adding the following text to the regulations concerning “Submission to screening and inspection.”<sup>4</sup>

(d) The screening and inspection described in (a) may include the use of advanced imaging technology. For purposes of this section, advanced imaging technology is defined as screening technology used to detect concealed anomalies without requiring physical contact with the individual being screened.

Pursuant to the Court’s order, the TSA is required by law to seek public approval of this change to airport screening procedures. Members of the public are encouraged to submit comments, data, or views on various aspects of the agency’s proposal, including comments that relate to the privacy, public health, economic, environmental, energy, or federalism impacts that might result from the TSA’s rulemaking action.

Section I of the TSA’s Notice of Proposed Rule Making summarizes the proposed rule. Section II describes background information on the proposed rule. Section III describes body scanner screening protocols. Section IV describes body scanner deployment, and Section V describes the TSA’s rulemaking analyses and notices. In Section V, the agency notes that it considered but did not evaluate the use of Walk Through Metal Detectors and Explosive Trace Detection as an alternative screening procedure to the continued deployment of body scanners.

## **III. EPIC’s Recommendations**

EPIC’s primary concern about the agency proposal is the impact that it will have on the privacy rights of individuals. For this reason, EPIC recommends that commentators make the following points to the agency:

(1) Describe the devices as “Nude Body Scanners.” The TSA has downplayed the privacy impact of the program, calling the devices first “Whole Body Imaging” and then “Advanced Imaging Technology.” In fact, the devices are designed to scan the naked human body. For accuracy, we refer to the devices as “NBS” not “AIT.”

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<sup>3</sup> Federal Aviation Administration Modernization and Reform Act of 2012, Pub. L. 112-95, §826, 126 Stat. 132, 122-123 (2012).

<sup>4</sup> 49 C.F.R. § 1540.017 (2013).

(2) Support “Regulatory Alternative #3.” The TSA proposal assumes the continued deployment of Nude Body Scanners. You don’t have to agree. Option #3 proposes instead the use of walk through metal detectors and explosive trace detection devices. We believe that is a more effective, less costly, and less intrusive screening procedure that also minimizes health risks.

(3) Support the right of passengers to opt-out and demand the use of generic image filters. The TSA proposal would give the agency the authority to use NBS without any privacy safeguards. But the federal court made clear that TSA may not require individuals to undergo NBS. Congress also mandated that TSA use generic image filters on individuals that go through body scanners. The TSA must revise its proposal to acknowledge the ruling of the court and the act of Congress.

(4) Describe any personal experiences. Many travelers say they received coercive and punitive pat-downs when they tried to opt-out of body scanners. That is against the law. If this has happened to you, describe in detail noting the airport and the date and your opinion of the agency’s behavior.

#### **IV. Other Issues to Address**

EPIC recognizes that the agency proposal raises many other issues that commentators may wish to address. Here is a brief summary of issues identified so far:

##### *The Ambiguity of Key Terms in the Rulemaking*

The TSA describes the body scanners in some instances as detecting “threats” and in other instances as detecting “anomalies.” The TSA describes the body scanner screening procedure as requiring pat downs. In other instances, the TSA states that the body scanner procedure does not require pat downs. The characterizations are ambiguous and inconsistent.

Commentators may wish to ask the agency to resolve the ambiguous description of the program

##### *The Failure to Establish the Screening Program’s Effectiveness*

The TSA regulation provides only anecdotal evidence in support of the body scanner program. There is no rigorous or scientific justification put forward for the body scanner program. The agency also did not attempt to assess the effectiveness of the program with any other screening procedures, such walk through metal detectors or explosive trace detection devices.

Commentators may wish to call attention to the failure of the agency to establish the program’s effectiveness.

### *The Adequacy of TSA's Cost Benefit Analysis*

The TSA makes the remarkable claim that the agency bears 99% of the cost for the program and assigns no cost to the time that passengers spend going through the TSA airport screening procedures.

Commentators may wish to discuss costs they have incurred because of NBS procedures. These costs include, but are not limited to, the economic impact on individuals who decide not to fly commercially because of NBS, and instead use other forms of transportation.

### *The Adequacy of TSA's Scientific Assessment of NBS Health Risks*

The TSA makes various claims about NBS safety and effects on health. For many of these claims, the TSA cites to its own website.

Commentators may wish to submit scientific and medical reports on the health risks of the body scanners that the agency did not address.

### *The TSA's Accuracy in Describing NBS capabilities*

The TSA makes certain representations about NBS ability to detect metallic and non-metallic items. The agency suggests that the devices are uniquely effective in detecting these threats.

Commentators may wish to challenge the agency's implication that the materials uncovered by NBS would not have been uncovered by other screening procedures.

### *The Impact of the Agency Screening Program on Travelers with Prosthetics and Other Medical Devices*

The agency does not discuss the fact that the body scanner devices routinely identify passengers with prosthetics, catheters, and other medical devices.

Commentators may wish to address the impact that the agency screening procedure has on travelers with medical devices.

### *The TSA's "Layered Approach" to Airport Security*

The TSA describes the use of body scanners as part of a "layered approach" to airport security but does not indicate whether this particular layer is essential or effective.

Commentators may wish to ask the agency to clarify the actual efficacy of the body scanner procedures.

### *The Retention of Images*

The TSA represents that the body scanner devices do not store and record images of naked air travelers. However, the agency fails to acknowledge that images are necessarily stored during the period of time that they are viewed by Transportation Security Officer.

Commentators may wish to ask the agency to clarify the actual storage of images.

*The Sufficiency of TSA's Comparison between NBS and Walk Through Metal Detectors*

The TSA's NPRM provides an inaccurate comparison of NBS and walk through metal detectors.

Commentators may wish to dispute the agency's comparison of NBS and walk through metal detector capability.