

sources identifying specific individuals who pose security threats. TSA also receives, on a regular basis, copies of the airmen registry from the FAA.¹ In some cases, individuals identified by other agencies as security threats hold or have applied for airman certificates, ratings, or authorizations, such as pilot certificates, mechanic certificates, and special purpose pilot authorizations, issued by the FAA under 49 U.S.C. Chapter 447. Individuals who pose security threats and hold FAA certificates, ratings, or authorizations are in positions to disrupt the transportation system and harm the public.

In ATSA, Congress specifically required the Under Secretary to establish procedures to notify the FAA Administrator, among others, of the identity of individuals known to pose, or suspected of posing, a threat of air piracy or terrorism, or a threat to airline or passenger safety. 49 U.S.C. 114(h)(2). Congress required the FAA Administrator to “make modifications in the system for issuing airman certificates related to combating acts of terrorism.” 49 U.S.C. 44703(g).

The Under Secretary has an express mandate to identify and coordinate countermeasures to address threats to the transportation system. In addition, Congress has expressly directed TSA to work with the FAA Administrator with respect to actions that may affect aviation safety or air carrier operations and to communicate information to the FAA regarding individuals who pose a security threat. Therefore, TSA is adopting the procedures set forth herein to notify the FAA of a security threat concerning a U.S. citizen who holds or is applying for an FAA certificate, rating, or authorization.

Congress has given the TSA broad powers related to the security of civil aviation, including the authority to receive, assess, and distribute intelligence information related to transportation security. The TSA is charged with serving as the primary liaison for transportation security to the intelligence and law enforcement communities. See 49 U.S.C. 114(f)(1) and (5). The Under Secretary is uniquely situated as an expert in transportation security, based on his functions, responsibilities, duties, and powers, to determine whether sufficient cause exists to believe that an individual poses a threat to aviation security. Congress, in ATSA, committed to the TSA’s discretion the role of assessing such threats and

communicating them to other agencies, including the FAA, for appropriate action.

In ATSA, Congress also created the Transportation Security Oversight Board (TSOB). 49 U.S.C. 115. The members include the Secretary of Transportation, the Attorney General, the Secretary of Defense, the Secretary of the Treasury, and the Director of the Central Intelligence Agency, or such officials’ designees, as well as one member appointed by the President to represent the National Security Council and one member appointed by the President to represent the Office of Homeland Security. The Under Secretary is required to consult with the TSOB in establishing procedures for notifying the Administrator of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism, or a threat to airline or passenger safety. 49 U.S.C. 114(h)(2). The Under Secretary has consulted with the TSOB regarding the procedures set forth in this rule.

Discussion of the Final Rule

This final rule adds a new § 1540.115 to 49 CFR part 1540, entitled “Threat assessments regarding citizens of the United States holding or applying for FAA certificates, ratings, or authorizations.” New § 1540.115 sets forth the procedure that TSA follows when notifying the FAA of certain individuals who pose a security threat.

Section 1540.115(a) provides that the notification procedure applies when TSA has determined that an individual holding or applying for an FAA airman certificate, rating, or authorization poses a security threat. This rule applies to citizens of the United States. A separate rule published in this **Federal Register** applies to aliens.

Section 1540.115(b) of the final rule sets forth the definitions of certain terms used in the rule, some of which are discussed further below.

Under § 1540.115(c) of the final rule, an individual poses a security threat if the individual is suspected of posing or is known to pose: (1) A threat to transportation or national security; (2) a threat of air piracy or terrorism; (3) a threat to airline or passenger security; or (4) a threat to civil aviation security. This definition is based on 49 U.S.C. 114(f) and (h), which authorize the Under Secretary to identify and counter threats to the transportation system and to communicate information to the FAA regarding individuals who pose a security threat.

While the Under Secretary has been granted full discretion to conduct threat assessments and act upon them, TSA

recognizes that notifying the FAA that an individual poses a security threat will have significant consequences. Further, the individual may have information that he or she may wish the Under Secretary to consider in making a final decision. Accordingly, the procedure in this final rule provides an individual with an opportunity to respond before the Under Secretary makes a decision on the threat assessment.

Section 1540.115(d) of this final rule makes clear that the individual may, if he or she so chooses, be represented by counsel, at his or her own expense, in the proceedings described in the final rule.

Section 1540.115(e)(1) provides that if the Assistant Administrator for Intelligence for TSA (Assistant Administrator) determines that an individual poses a security threat, the Assistant Administrator will serve upon that individual an Initial Notification of Threat Assessment and serve it upon the FAA. This Initial Notification will form the basis for the FAA to delay the issuance of or to suspend the individual’s certificate, rating, or authorization pending completion of TSA’s process.

Section 1540.115(e)(2) provides that not later than 15 calendar days after the date of service of the Initial Notification, the individual may serve a written request for copies of releasable materials upon which the Initial Notification was based.

In this section “date of service” has the same meaning as the definition of that term in the Rules of Practice in Transportation Security Administration Civil Penalty Actions and TSA’s Investigative and Enforcement Procedures. See 49 CFR 1503.211(d). We note that, while § 1503.211(e) of the Rules of Practice also provides for additional time for a party to act after service by mail, this rule incorporates additional time in the stated time frames and no additional time will be added for that purpose under this rule.

Section 1540.115(e)(3) provides that not later than 30 calendar days, or such longer period as TSA may determine for good cause, after TSA receives the individual’s request for copies of the releasable materials, TSA will respond.

Under Section 1540.115(e)(4), not later than 15 calendar days after the date of service of the Initial Notification or the date of service of TSA’s response to the individual’s request for releasable materials, if such a request was made, the individual may serve a written reply to the Initial Notification. The reply may include any information that the individual believes the Under Secretary

¹ The registry is formally known as the “Comprehensive Airmen Information System.”