

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 FAA 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 § 1540.117 to 49 CFR part 1540, entitled "Threat assessments regarding aliens holding or applying for FAA certificates, ratings, or authorizations." New § 1540.117 sets forth the procedure that TSA follows when notifying the FAA of certain individuals who pose a security threat.

Section 1540.117(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 aliens, not to citizens of United States. A separate rule published in this **Federal Register** applies to United States citizens. The agency is not required to afford aliens the same processes afforded to United States citizens who apply for or hold airman certificates. Pursuant to 49 U.S.C. 44703(e), the FAA Administrator may restrict or prohibit issuance of an airman certificate to an alien for any

reason. Additionally, the FAA Administrator may make issuing the certificate to an alien dependent on a reciprocal agreement with the government of a foreign country. At this time, TSA has determined that certain aliens pose a security threat, but has not made such a determination as to any U.S. citizen.

As discussed further below, under the final rule the Deputy Administrator of TSA makes the final security threat determination, under a delegation of authority from the Under Secretary. The Deputy Administrator is the officer next in rank below the Under Secretary. Under a rule published separately in this **Federal Register** setting forth TSA's procedures governing security threat determinations for citizens of the United States, the Under Secretary is the final decision maker for threat assessments for those categories of individuals. This difference between the two rules reflects the greater level of process due to citizens of the United States under law.

Section 1540.117(b) of the final rule sets forth the definitions of certain terms used in the rule, some of which are discussed further below.

Under § 1540.117(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 TSA has been granted full discretion to conduct threat assessments and act upon them, the agency 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 TSA to consider in making a final decision. Accordingly, the procedure in this final rule provides an individual with an opportunity to respond before TSA makes a final decision on the threat assessment.

Section 1540.117(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 1540.117(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 1540.117(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.

Under § 1540.117(b)(2), "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 1540.117(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 1540.117(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 TSA a written reply to the Initial Notification. The reply may include any information that the individual believes TSA should consider in making a final decision.

Section 1540.117(e)(5) provides that not later than 30 calendar days after TSA receives the individual's reply, or such longer period as TSA may determine for good cause, TSA serves a final decision in accordance with paragraph (f) of this section.

TSA recognizes that this process provides shorter time periods for the individual and TSA to act than many administrative proceedings. However, recognizing that the individual's certificate, rating, or authorization will be delayed or suspended by the FAA during this period, this procedure is designed to permit the Deputy Administrator to make a final determination quickly, ensuring that the affected individual obtains a prompt review of any issues that are raised.