



United States Department of Transportation
TRANSPORTATION SECURITY ADMINISTRATION

400 Seventh Street, S.W.
Washington D.C. 20590

MAR 14 2003

Mr. Phil Boyer
President
Aircraft Operators and Pilots Association
421 Aviation Way
Frederick, MD 21701

Dear Mr. Boyer:

I would like to respond to the concerns you have raised in the correspondence and conversations we have had over the past few days regarding the Transportation Security Administration's rule governing security threat assessments of holders of airman certificates. Before addressing the specific concerns have raised, I would like to relate the context in which TSA adopted the rule.

Prior to September 11, 2001, the use of background checks to uncover security concerns was not part of the Federal Aviation Administration's airman certification process. As you may know, the General Accounting Office recently issued a report that confirmed the need for additional security measures in issuing airman certificates.

Under the Aviation and Transportation Security Act (ATSA), Congress required TSA to notify the FAA Administrator of the identity of individuals known to pose, or suspected of posing, a threat to civil aviation or national security. See 49 U.S.C. 114(h)(2). TSA learned last year that individuals who were listed on a "no fly" list created from submissions of information by federal law enforcement and intelligence agencies held airman certificates. This revelation highlighted the need for TSA to act as quickly as possible to issue regulations that would allow the agency, consistent with its statutory duty, to inform FAA that an individual holding an airman certificate posed a potential threat to aviation security.

Turning to the concerns voiced in your letter of February 19, 2003, TSA's rule establishes the procedures that TSA follows when determining that an individual holding an airman certificate poses a threat to civil aviation or national security. TSA adopted the procedures in the rule to target the relatively small group of individuals identified as potential threats to the security of civil aviation or to national security. Moreover, the rule was reviewed by the Transportation Security Oversight Board¹ as well as the

¹ The TSOB now is within the Department of Homeland Security and is composed of the following officials or their designees: the Secretary of Homeland Security; the Secretary of Transportation; the Attorney General; the Secretary of Defense; the Secretary of the Treasury; the Director of the Central Intelligence Agency; and a representative of the National Security Council. See 49 U.S.C. § 115(a), (b)(1)(as amended by Pub. L. No. 107-296, § 426, 116 Stat. 23136 (Nov. 25, 2002)).

Department of Justice, which was deeply involved in the drafting of the rule. The results of TSA's application of its procedures to date demonstrate the very limited effect of TSA's efforts on the vast majority of individuals holding airman certificates. For example, based on TSA's review to date of 1.2 million certificate holders, TSA has determined that only eight individuals, all of whom are non-resident aliens, pose a security threat. Of these eight, only four have chosen to challenge TSA's determination.

The authority to issue and revoke airman certificates rests with FAA. TSA's role, as assigned by Congress under ATSA, is to notify the FAA Administrator of the identity of individuals known to pose, or suspected of posing, a threat to civil aviation or national security. See 49 U.S.C. 114(h)(2). TSA is not initiating any independent investigations of certificate holders' activities and affiliations and has no plans to engage in such reviews. Rather, TSA's actions to date have been predicated on threat information, including classified intelligence information, obtained from other federal agencies. When TSA receives this information, it is incumbent upon the agency to analyze it and take appropriate action. In the cases of the individuals referred to above, TSA determined that the appropriate action was to notify the FAA that the individuals posed a security threat.

TSA issued the rule in response to an immediate need to take action to address a civil aviation security concern. TSA issued the rule without delaying its effective date pending public comment based on the determination that such a delay, on balance, would not serve the public interest. That said, TSA recognizes the value of public comment in all rulemaking proceedings, and we have invited comments on the rule from all affected parties. Be assured that we will seriously consider all comments received and make modifications to the rule where appropriate.

TSA's rule provides significant procedural safeguards, and these safeguards will ensure that airman certificates will not be arbitrarily or erroneously revoked. For example, with respect to U.S. citizens holding certificates, TSA's procedures require review and approval by the Assistant Administrator for Intelligence before TSA provides its initial notification to FAA that the individual poses a threat. Moreover, the rule provides that TSA consider an individual's request for an opportunity to be heard and allows the individual both to request materials relied upon in making the initial notification and to submit evidence before TSA takes further action.² Finally, the rule provides that the Deputy Administrator and, thereafter, the Under Secretary must make final determinations that the individual poses a threat.

You noted that an individual whose certificate is revoked may have access to only limited information related to TSA's security threat determination because of the classified nature of the information. In this regard, TSA faces a conundrum. Classified

² TSA may, however, refuse to provide this material if disclosure would raise security or other concerns and proceed to issue a final determination. If that action is challenged, a reviewing court could assess the materials *in camera* but the materials would not be provided to opposing counsel. See, e.g., Global Relief Found. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002) (reviewing types of actions in which *ex parte* consideration of evidence is permissible); National Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001) (*in camera, ex parte* review consistent with Due Process).


intelligence information may indicate that an individual poses a threat to aviation security, but such information cannot be shared with that individual without endangering national security.

You also noted that a certificate holder's avenue of administrative appeal of TSA's security threat determination is entirely within TSA, without review by a third party such as the National Transportation Safety Board. While the certificate revocation is appealable to the NTSB, the FAA anticipates that the NTSB will limit its review of TSA's action to assuring that the FAA based its determination on an appropriate notification from TSA. When an agency determination is based on classified intelligence information and the judgment to be made is one that is predictive in nature, national security concerns warrant leaving the matter to the expertise and discretion of the agency charged with making the determination. Therefore, TSA believes that review of its security threat determinations by the NTSB, whose expertise is in aviation safety matters, is not appropriate. Regardless, I have opened dialogue with the Department of Homeland Security to seek a final appeal review level there. I will keep you posted as to our progress.

TSA leaves it to the determination of a federal court as to whether TSA's security threat determinations are appropriately subject to judicial review. In the context of a judicial challenge to a TSA security threat determination, TSA will argue such judgments should be committed to TSA's discretion.³

In closing, TSA is committed to ensuring the security of all aspects of the civil aviation system in a fair and effective manner. In doing so, TSA must be vigilant in ensuring that those who potentially threaten aviation security do not enjoy a governmentally-issued license to engage in civil aviation. At the same time, TSA must afford appropriate due process protections to those affected by its actions. I hope I have addressed your concerns.

Sincerely yours,



J.M. Loy, ADM
Administrator

³ See United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972), (noting that courts are ill-equipped to review agency judgments involving foreign intelligence).