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Reauthorizing and Restructuring the Transportation Security Administration's Aviation Security Functions: Legislative Issues and Approaches

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Reauthorizing and Restructuring the Transportation Security Administration's Aviation Security Functions: Legislative Issues and Approaches

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Summary

Authorization for aviation security functions carried out by the Transportation Security Administration (TSA) are set to expire at the end of FY2006. In the Senate, a reauthorization bill (S. 1052) has been introduced that would set authorized amounts for aviation security near current appropriated levels, but would increase funding for maritime and land security functions, which make up a relatively small component of the TSA's overall budget. In the House, a reauthorization bill has not yet been introduced, but a proposal to restructure the TSA's aviation security functions (H.R. 4439) has been offered. Under the proposed restructuring plan, a performance-based Aviation Screening Organization (ASO) would be established within the TSA to carry out day-to-day federal screening operations. The bill also seeks to improve the Screening Partnership Program (SPP) under which airports can elect to use private screeners instead of federal TSA screeners in an effort to increase participation in this program. By separating out TSA's regulatory oversight functions from screening operations and promoting the use of private screening partners, the bill seeks to address, in part, a concern expressed by some over the TSA's dual role as both the policymaker and regulator of aviation security at airports and the provider of screening services for airline passengers and their baggage. This report will be updated as needed.

Funding Levels and Priorities. Since the terrorist attacks of September 11, 2001, the federal budget for the Transportation Security Administration (TSA) has grown to over \$6 billion annually, with a large proportion (about 87%) going for aviation security operations, chiefly the screening of airline passengers and baggage, and the deployment of air marshals on passenger flights. The TSA's initial authorization for aviation security functions was set to expire at the end of FY2005, but was extended through FY2006 by the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). That initial authorization — set forth in the Aviation and Transportation Security Act (ATSA; P.L. 107-71) — allowed for such sums as may be necessary to carry out aviation security-related functions. This language provided extensive flexibility to

appropriators and the Administration to set budgets needed to meet the aviation security mandates set forth in ATSA including the deployment of federal screeners at all commercial passenger airports and 100% electronic screening of passenger bags — objectives that were initially entered into with a relatively high level of risk and uncertainty. In the five years since the TSA's creation, the initial budgetary risk and uncertainty has declined considerably, and will likely continue to stabilize. Therefore, as Congress examines and debates the first multi-year TSA reauthorization measure since its creation, authorizing committees may seek to more explicitly define the TSA's future funding levels and priorities.

The Transportation Security Improvement Act of 2005 (S. 1052) — a TSA reauthorization measure introduced by Senator Stevens — does not seek significant changes to funding amounts for aviation security compared to amounts appropriated over the past two years, but proposes proportionally larger increases for maritime and land security and TSA's intelligence functions, which would nonetheless continue to make up a relatively small percent of the TSA's overall budget. The bill would authorize expenses for the TSA as outlined in **Table 1**. A similar bill to reauthorize the TSA beyond FY2006 has not yet been introduced in the House.

Table 1. Proposed Authorization and Appropriated Funding Levels for TSA
(\$ Millions)

		2006	2007	2008
Aviation	Senate (S. 1052):	5,000	5,250	5,500
	Appropriated (a):	5,293		
Maritime & Land	Senate (S. 1052):	394	354	354
	Appropriated:	36		
Intelligence	Senate (S. 1052):	300	320	340
	Appropriated:	21		
Research & Development	Senate (S. 1052):	300	320	340
	Appropriated:	(b)		
Administration	Senate (S. 1052):	530	535	540
	Appropriated:	489		

Sources: P.L. 109-90; S. 1052.

- a. Amounts appropriated for aviation include appropriations for Federal Air Marshals, but do not include \$250 million allocated to the Aviation Security Capital Fund under Title 49 U.S.C. § 44923. FY 2006 appropriated amounts have not been adjusted to reflect rescissions enacted in P.L. 109-148.
- b. In FY2006, TSA Research & Development (R&D) functions were moved to the Science & Technology Directorate and consolidated with other R&D activities.

Financing Aviation Security. Various alternative financing mechanisms may be debated during the reauthorization and appropriations processes as present user fees fall well short of offsetting total federal costs for aviation security. Presently, airline passengers pay a \$2.50 per leg fee, not to exceed \$5.00 per one way flight. Additionally, airlines each contribute an aviation security infrastructure fee (ASIF) that has an overall cap equal to the amount that the airlines collectively spent on passenger and baggage

screening in calendar year 2000.¹ When ATSA was enacted, many believed that these fees would cover a large portion, if not all, of the cost for aviation security. However, in recent years, passenger and airline fee collections have netted less than 35% of the direct costs for airport screening operations, air marshals, and airport security infrastructure. The financially-troubled airline industry generally opposes security fee increases arguing they will hurt revenues by increasing the total cost of airline travel, forcing airlines to either cut ticket prices or lose passengers. On the other hand, unless the fee structure is changed, lawmakers are faced with the prospect of continuing to pay for a substantial amount of the total cost for aviation security using general fund contributions during a time of increasing pressure to reduce deficit spending. The FY2007 President's budget proposal recommends replacing the current passenger fee schedule with a flat per-passenger fee of \$5.00 for each one-way trip. While a FY2006 plan to raise the existing segment-based fees failed to garner much support in Congress, the Administration views the proposed fee based on one-way trips as being more palatable because it would not impose higher fees on connecting passengers and would better reflect passenger utilization of the aviation security system since passengers typically undergo security screening only once for every one-way trip.

Under a plan proposed in S. 1052, the TSA would be required to promulgate new rulemaking, subject to congressional review, before imposing air carrier security fees that would continue or replace the ASIF beyond FY2006. Additionally, S. 1052 would require the TSA to study alternative methods for collecting passenger security fees besides using the airlines to collect these fees as part of ticket purchases. Alternatives suggested in the legislative proposal include vending kiosks, automated vending devices, the Internet, and other remote vending sites. If any of these fee collection methods is determined to be feasible, the TSA would then be required to develop systems utilizing these alternative collection methods for the purpose of assessing their efficiency. The bill, however, does not propose to alter the existing passenger fee schedule.

A Performance-Based Airport Screening Organization. The House — while not yet considering a TSA reauthorization bill as such — is considering a measure that would more substantively alter the organizational structure of the TSA. The Transportation Security Administration Reorganization Act of 2005 (H.R. 4439), introduced by Representative Lungren, seeks to establish a performance-based organization, referred to as the Airport Screening Organization (ASO), to manage the day-to-day passenger and baggage screening functions of the TSA. By separating out TSA's regulatory oversight function of aviation security from screening operations and promoting the use of private screening partners, the bill seeks to address, in part, a concern expressed by some over the TSA's dual role as both the policymaker and regulator of aviation security and the provider of airport security screening.²

The proposed ASO's mission would be to improve these screening operations through increased efficiency, better use of advanced technologies, reduced costs, and a more effective response to the needs of the traveling public while enhancing aviation security. The ASO would be run by a chief operating officer (COO) and is

¹ See Title 49 U.S.C. §44940.

² See, for example, Robert W. Poole, Jr. *Airport Security: Time for a New Model*. Policy Study 340 (Los Angeles, CA: Reason Public Policy Institute, January 2006).

organizationally similar to the performance-based Air Traffic Organization (ATO) recently created within the Federal Aviation Administration (FAA) to oversee air traffic operations and the acquisition and maintenance of air traffic facilities and equipment. Like the FAA's reorganization, the proposed reorganization of the TSA would separate the operations and technology functions from regulatory development, oversight, and enforcement functions. Under the plan, the COO would be responsible for developing a 5-year strategic plan outlining measurable performance goals for gauging the effectiveness, efficiency, and productivity of aviation screening operations. The existing Senate proposal for TSA reauthorization (S. 1052) contains no similar provisions for restructuring the TSA.

Partnerships with Private Screening Entities. H.R. 4439 also seeks several modifications to the existing security screening opt-out program, a provision of ATSA (P.L. 107-71) that allows airports to request private screeners instead of federal screeners. Initially, private screening contracts were established at five airports under a pilot program, and in November 2004, all commercial passenger airports became eligible to request that screening operations be handed over to private firms. However, while those airports already in the pilot program all elected to continue using private screeners, few other airports have sought to convert to private screeners. While the TSA has certified more than 30 vendors to provide security screening at airports, so far it has awarded only one contract to provide airport screening services under its Screening Partnership Program (SPP) at Sioux Falls Regional Airport, South Dakota.³ It anticipates fully converting the five existing pilot program airports to the SPP program by May 2006. A variety of factors have contributed to the reluctance of airports to switch to private screening operations including perceived program constraints, concerns over potential repercussions from opting out of the federal screening program, and concerns over potential liability exposure for airports that request private screeners. The concerns over potential airport liability were largely addressed in the FY2006 Department of Homeland Security Appropriations Act (P.L. 109-90, Sec. 547) which extends liability protections to airport operators that request private screening contracts. Previously, only private screening companies were covered under statutory liability limits set forth in the Homeland Security Act of 2002 (P.L. 107-296).

H.R. 4439 contains language to ensure that funding for aviation security is allocated among airports according to a cost-based formula without regard to whether the airport is staffed with federal or private screeners. The bill further requires the TSA to develop standard operating procedures and requirements for private screening operations. Private screening firms that meet these requirements will be issued certificates of conformance, and liability protections provided to screening entities under provisions of the Homeland Security Act of 2002 (P.L. 107-296; 6 U.S.C. Sec. 443) would be extended to airport operators and other third parties, although, as noted above, liability protections for airports with private screeners were addressed in P.L. 109-90. H.R. 4439 would require the TSA to set performance goals for private screening operations and allows the TSA to provide incentives for private screening entities that meet or exceed performance expectations. Additionally, to provide airports with an incentive to request private screeners, H.R. 4439 allows the TSA to award airports with grants to cover aviation

³ Transportation Security Administration. "Covenant/Lockheed Team Selected as Private Screening Contractor at Sioux Falls." *Press Release*, December 16, 2005.

security costs of up to 90% of the annual cost savings realized by converting to private screeners, subject to the availability of appropriations. The bill would also require each airport with federal screeners to submit written notice to the TSA on an annual basis specifying whether the airport intends to submit a request for private screeners or continue using federal screeners.

Airport Screening Performance. Improving the quality and performance of the screener workforce was a central element of the public policy debate leading to the creation of the TSA and the nationwide deployment of federal screeners. However, the overall effectiveness of these efforts has been brought into question by audits indicating that “[i]mprovements are still needed in the screening process to ensure that dangerous prohibited items are not being carried into the sterile areas of airports, or do not enter the checked baggage system.”⁴ Factors cited for the failures to perform adequately included screener training, equipment and technology, policies and procedures, and management and supervision of screening operations. Despite considerable attention to this area, the most recent follow-up audit by the DHS Office of Inspector General noted that significant improvements in screening performance may not be possible without system-wide deployment of new technologies such as backscatter x-ray, explosive detection portals, and document scanners.⁵

Several provisions in P.L. 108-458 addressed specific needs for checkpoint screening technologies and improved screener performance. While congressional oversight of the TSA’s progress to address these specific screening technology and performance issues may heighten during the second session of the 109th Congress, H.R. 4439 addresses the issue from a broader organizational management perspective. Specifically, H.R. 4439 calls for the proposed ASO to develop and execute a 5-year strategic plan for improving screening effectiveness, efficiency, and productivity and would set specific, measurable performance goals in each of these areas at various levels of the organization. The Senate bill (S. 1052), on the other hand, contains provisions more specifically addressing issues of screener training and recruitment. S. 1052 would require the TSA to report on the adequacy of screener training focusing on any multi-hour weekly training requirements, assessing the degree to which such requirements are met and whether such requirements are “appropriate, workable, and desirable.”⁶ S. 1052 also calls for establishing a pilot program at three or more airports for training high-school seniors hired as student interns to perform airport screening functions. S. 1052 would also establish a waiver process allowing convicted criminals to be hired as airport screeners after determining that they do not pose a security or terrorism risk.

Passenger Identification and Risk Assessment. A long-standing objective since the terrorist attacks of September 11, 2001 has been to evolve airline passenger screening into a process that more fully considers the degree of risk posed by individual passengers, the argument being that risk-based assessments of passengers could aid in

⁴ Department of Homeland Security, Office of Inspector General. *Follow-Up Audit of Passenger and Baggage Screening Procedures at Domestic Airports (Unclassified Summary)*. OIG-05-16 (March 2005).

⁵ *Ibid.*

⁶ S. 1052, Sec. 203, p. 11

focusing limited screening resources on those passengers that pose an elevated or unknown risk and may streamline the security screening for those passengers who pose little or no security risk. Meeting this objective, however, has proved difficult, partly because of lingering privacy and passenger data protection concerns. An apparent inability to adequately address these concerns resulted in the TSA scrapping its controversial Computer Assisted Passenger Prescreening-II (CAPPS II) program and has led to delays in launching Secure Flight, a system designed to check passenger names against the consolidated terrorist watchlist.

While meeting the objectives of carrying out risk-based assessments of airline passengers was addressed in the original ATSA legislation and revisited in P.L. 108-458, the current legislative proposals are more directly focused on issues related to acceptable forms of passenger identification and the prescreening of passengers on inbound international flights. Specifically, H.R. 4439 would require passengers to present tamper-resistant identification that includes the individual's full legal name, date of birth, gender, photograph and signature such as driver's licenses and personal identification cards that meet the requirements of the Real ID Act of 2005 (49 U.S.C. §30301 note). Passengers unable to present acceptable identification would be subject to additional physical screening at checkpoints, and passengers who knowingly present false identification would be subject to criminal penalties. Additionally, H.R. 4439 would require the TSA to launch a pilot program at two or more foreign airports utilizing automated systems to prescreen passengers against the consolidated terrorist watchlist prior to boarding international flights bound for the United States. Language in the bill also encourages the DHS to pursue international cooperative efforts to set technology standards for passenger data systems. H.R. 4439 would also require the DHS to review the existing Computer Assisted Passenger Prescreening System (CAPPS) — a passenger risk assessment tool run by the airlines — and evaluate whether it should be continued after full deployment of Secure Flight. Also, H.R. 4439 would require the development of processes to ensure that secondary screening is not conducted on passengers who have either been cleared by fingerprint based background checks conducted by the DHS or hold a security clearance issued by the DHS. Participants in the forthcoming Registered Traveler program, for example, may benefit from this by voluntarily undergoing background checks in exchange for expedited screening without the chance of being singled out for secondary screening.

Other Possible Issues. A variety of other lingering aviation security issues may arise during the TSA reauthorization process including air cargo security and general aviation security. However, the legislation currently under consideration appears to be more specifically focused on issues related to the security of passenger airline operations. Besides those issues already discussed above, H.R. 4439 proposes several modifications to the program to train and deploy armed pilots — the Federal Flight Deck Officer (FFDO) Program — that are designed to: improve the accessibility and reduce the cost of training for participating pilots; increase the utilization of armed pilots on international flights; and improve communications and exchange of security-related information to pilots in the program. The Senate bill (S. 1052) addresses continuing concerns over security risks at foreign aircraft repair stations by proposing to place a moratorium on FAA certification of these facilities unless the TSA reviews and audits them, an unfilled statutory requirement mandated by Vision 100 — The Century of Aviation Authorization Act (P.L. 108-176, Title 49 U.S. Code §44924) in December 2003.