

also e.g., *Kasza versus Browner*, 133 F. 3d 1159, 1166 (9th Cir. 1998) (Quoting Halkin); *J. Roderick MacArthur Foundation versus Federal Bureau of Investigation*, 102 F. 3d 600, 604 (D.C. Cir. 1996) (“As we have said before, ‘Intelligence gathering is akin to the construction of a mosaic’” (citation omitted)).

For the reasons discussed above, TSA will not provide to the individual under these procedures any classified information, and TSA reserves the right not to disclose SSI or other sensitive material not warranting disclosure or protected from disclosure under law.

#### Good Cause for Immediate Adoption

This action is being taken without providing the opportunity for notice and comment, and it provides for immediate effectiveness upon adoption. The Under Secretary has determined this action is necessary to prevent imminent hazard to aircraft, persons, and property within the United States. TSA, after consultation with the FAA, has determined that this action is necessary to minimize security threats and potential security vulnerabilities to the fullest extent possible. The FAA, TSA, and other federal security organizations have been concerned about the potential use of aircraft to carry out terrorist acts in the United States since September 11. This rule codifies the fundamental and inherently obvious principle that a person who TSA determines poses a security threat should not hold an FAA-issued airman certificate.

The Under Secretary finds that notice and comment are unnecessary, impracticable, and contrary to the public interest, pursuant to section 553 of the Administrative Procedure Act (APA). Section 553(b) of the APA permits an agency to forgo notice and comment rulemaking when “the agency for good cause finds \* \* \* that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest.” The use of notice and comment prior to issuance of this rule could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman certificate. Further, the Under Secretary finds that good cause exists under 5 U.S.C. 553(d) for making this final rule effective immediately upon publication. This action is necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States.

#### Economic Analyses

Changes to Federal regulations must undergo several economic analyses.

First, E.O. 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation).

This regulatory evaluation applies to both this rule, which applies to aliens, and to the corresponding rule, which applies to citizens of the United States. While, to date, all individuals whom the Under Secretary has assessed as threats have been aliens, TSA is not able to predict which individuals, who may be subject to TSA threat assessments, may be citizens of the United States or aliens in the future. This regulatory evaluation examines the costs and benefits of TSA notifying the FAA of its assessment that an individual holding or applying for an FAA certificate, rating, or authorization poses a security threat. TSA is taking this action in an ongoing effort to improve national security. The procedure of notification and action taken by the FAA and TSA could prevent aircraft, persons, and property in the United States from imminent peril by the denial or revocation of FAA certificates, ratings, or authorizations of those individuals who pose a security threat.

The Assistant Administrator for Intelligence makes a determination regarding an individual posing a security threat who also holds or is applying for an FAA certificate, rating, or authorization. The Assistant Administrator then issues an Initial Notification to the FAA Administrator and the subject individual. At that time, the individual has the opportunity to act in three ways: (1) Reply and request the materials that the determination is based on; (2) reply without first requesting the materials, or (3) do nothing. The Deputy Administrator makes the final review and issues the Final Notification or a Withdrawal of Initial Notification to the FAA Administrator and the subject individual. It is the FAA Administrator

who will take action and deny or revoke the FAA certificate, rating, or authorization if the Deputy Administrator determines that the individual poses a security threat.

TSA has determined that this rule is not, an economic impact, a “significant regulatory action” as defined in E.O. 12866, Regulatory Planning and Review, but due to the potential public interest in this rule it is considered to be a “significant regulatory action” under that Executive Order and under the DOT Regulatory Policies and Procedures. TSA determines this final rule does not have a significant economic impact on a substantial number of small entities. Regarding paperwork reduction, there are no new requirements for the collection of information associated with this rule. In terms of international trade, the rule will neither impose a competitive trade disadvantage to U.S. aircraft operators operating overseas nor foreign aircraft operators deplaning or enplaning passengers within the United States. In terms of the Unfunded Mandates Act, the rule will not contain any Federal intergovernmental mandates or private sector mandates.

#### Introduction and Background

ATSA (49 U.S.C. 114) makes TSA responsible for security in all modes of transportation regulated by DOT, including civil aviation. Additionally, ATSA transferred the duty of ensuring civil aviation security from the FAA to TSA. To carry out its security mission, TSA must assess intelligence and other information in order to identify individuals who pose a threat to security. In doing so, TSA must coordinate with other federal agencies, including the FAA, to address these threats. 49 U.S.C. 114(f)(13) specifically requires TSA to work with the FAA Administrator to take actions that may affect aviation safety or air carrier operations.

While performing the duty of ensuring civil aviation security, TSA receives information from other agencies and other sources identifying particular individuals who pose security threats. In some cases, these individuals hold airman certificates, ratings, or authorizations, such as pilot or mechanic certificates, ratings, or authorizations that were issued by the FAA in accordance with 49 U.S.C. Chapter 447. These individuals who pose security threats and hold FAA certificates, ratings, or authorizations are in positions to disrupt the civil aviation transportation system and harm the public.

In ATSA, Congress specifically required the Under Secretary to