Assistant Administrator means the Assistant Administrator for Intelligence for TSA.

Date of service means—

(1) The date of personal delivery in the case of personal service;

(2) The mailing date shown on the certificate of service;

(3) The date shown on the postmark if there is no certificate of service; or

(4) Another mailing date shown by other evidence if there is no certificate of service or postmark.

Deputy Administrator means the officer next in rank below the Under Secretary of Transportation for Security.

FAA Administrator means the Administrator of the Federal Aviation Administration.

Individual means an individual whom TSA determines poses a security threat.

Under Secretary means the Under Secretary of Transportation for Security.

(c) *Security threat.* An individual poses a security threat when 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.

(d) *Representation by counsel.* The individual may, if he or she so chooses, be represented by counsel at his or her own expense.

(e) *Initial Notification of Threat Assessment.* (1) *Issuance.* If the Assistant Administrator determines that an individual poses a security threat, the Assistant Administrator serves upon the individual an Initial Notification of Threat Assessment and serves the determination upon the FAA Administrator. The Initial Notification includes—

(i) A statement that the Assistant Administrator personally has reviewed the materials upon which the Initial Notification was based; and

(ii) A statement that the Assistant Administrator has determined that the individual poses a security threat.

(2) *Request for Materials.* 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 the releasable materials upon which the Initial Notification was based.

(3) *TSA response.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after receiving the individual's request for copies of the releasable materials upon which the Initial Notification was based, TSA serves a response. TSA will not include in its response any classified information or other information described in paragraph (g) of this section.

(4) *Reply.* The individual may serve upon TSA a written reply to the Initial Notification of Threat Assessment 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 under paragraph (e)(2) if such a request was served. The reply may include any information that the individual believes TSA should consider in reviewing the basis for the Initial Notification.

(5) *TSA final determination.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after TSA receives the individual's reply, TSA serves a final determination in accordance with paragraph (f) of this section.

(f) *Final Notification of Threat Assessment.* (1) *In general.* The Deputy Administrator reviews the Initial Notification, the materials upon which the Initial Notification was based, the individual's reply, if any, and any other materials or information available to him.

(2) *Review and Issuance of Final Notification.* If the Deputy Administrator determines that the individual poses a security threat, the Under Secretary reviews the Initial Notification, the materials upon which the Initial Notification was based, the individual's reply, if any, and any other materials or information available to him. If the Under Secretary determines that the individual poses a security threat, the Under Secretary serves upon the individual a Final Notification of Threat Assessment and serves the determination upon the FAA Administrator. The Final Notification includes a statement that the Under Secretary personally has reviewed the Initial Notification, the individual's reply, if any, and any other materials or information available to him, and has determined that the individual poses a security threat.

(3) *Withdrawal of Initial Notification.* If the Deputy Administrator does not determine that the individual poses a security threat, or upon review, the Under Secretary does not determine that the individual poses a security threat, TSA serves upon the individual a Withdrawal of the Initial Notification and provides a copy of the Withdrawal to the FAA Administrator.

(g) *Nondisclosure of certain information.* In connection with the procedures under this section, TSA does not disclose to the individual classified information, as defined in Executive Order 12968 section 1.1(d), and reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law.

Issued in Washington, DC on January 21, 2003.

J.M. Loy,

Under Secretary of Transportation for Security.

[FR Doc. 03–1682 Filed 1–22–03; 10:09 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Transportation Security Administration

49 CFR Part 1540

[Docket No. TSA–2002–13733; Amendment No. 1540–4]

RIN 2110–AA17

Threat Assessments Regarding Alien Holders of, and Applicants for, FAA Certificates

AGENCY: Transportation Security Administration (TSA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This final rule establishes the procedure by which TSA will notify the subject individual and the Federal Aviation Administration (FAA) of TSA's assessment that an individual who is an alien and who holds or is applying for an FAA airman certificate, rating, or authorization poses a security threat. This procedure provides such individuals notice and an opportunity to be heard before TSA makes a final decision, while furthering the federal government's important and immediate interest in protecting national security and providing the nation with a safe and secure transportation system.

DATES: Effective on January 24, 2003. Submit comments by March 25, 2003.

ADDRESSES: Address your comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number TSA–2002–13733 at the beginning of your comments, and you should submit two copies of your comments. If you wish to receive confirmation that TSA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet to *http://dms.dot.gov.* You may review the public docket containing comments to these regulations in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal

holidays. The Dockets Office is on the plaza level of the NASSIF Building at the Department of Transportation at the above address. Also, you may review public dockets on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Brandon Straus, Office of the Chief Counsel, Transportation Security Administration, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone (202) 493–1224; e-mail: *brandon.straus@tsa.dot.gov.* For information regarding the Economic Analysis, contact Jenny R. Randall, Economist, Office of Security Regulation & Policy, Transportation Security Administration, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone (202) 385–1554; e-mail: *jenny.randall@tsa.dot.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This final rule is being adopted without prior notice and prior public comment. However, the Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; February 26, 1979) provide that, to the maximum extent possible, operating administrations within DOT should provide an opportunity for public comment on regulations issued without prior notice. Accordingly, interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting this amendment. The most helpful comments will reference a specific portion of the rule, explain the reason for any recommended change, and include supporting data. See **ADDRESSES** above for information on how to submit comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with TSA personnel concerning this rulemaking. The docket is available for public inspection before and after the comment closing date.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these rules in light of the comments we receive.

Electronic Access

You can get an electronic copy using the Internet by:

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page *(http://dms.dot.gov/search);*

(2) Accessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html;* or

(3) Visiting the TSA's Laws and Regulations Web page at *http://www.tsa.dot.gov/law_policy/law_policy_index.shtm.*

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the TSA to comply with small entity requests for information and advice about compliance with statutes and regulations within the TSA's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT.** Persons can obtain further information regarding SBREFA on the Small Business Administration's Web page at *http://www.sba.gov/advo/laws/law_lib.html.*

Background

Following the terrorist attacks on the United States on September 11, 2001, Congress recognized the need for a fundamental change in the federal government's approach to ensuring the security of civil aviation. The September 11 attacks highlighted the fact that the security of the civil aviation system is critical to national security and essential to the basic freedom of Americans to move in intrastate, interstate, and international transportation. *See* H.R. Conf. Rep. 107–296, 107th Cong., 1st Sess. 53 (2001).

In order to address the need for heightened security in civil aviation and other modes of transportation, Congress passed the Aviation and Transportation Security Act (ATSA), Pub. L. 107–71, 115 Stat. 597 (November 19, 2001). ATSA established the TSA within DOT, operating under the direction of the Under Secretary of Transportation for Security (Under Secretary). TSA is responsible for security in all modes of transportation regulated by DOT, including civil aviation. Accordingly, ATSA transferred the responsibility for civil aviation security from the FAA to TSA.

ATSA Requirements

As part of its security mission, TSA is responsible for assessing intelligence and other information in order to identify individuals who pose a threat to transportation security and to coordinate countermeasures with other Federal agencies, including the FAA, to address such threats. *See* 49 U.S.C. 114(f)(1)–(5), (h)(1)–(4). Specifically, Congress required TSA to work with the FAA Administrator to take actions that may affect aviation safety or air carrier operations. 49 U.S.C. 114(f)(13).

In the course of carrying out this responsibility, TSA receives information from other federal agencies and other 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).

Based on the Under Secretary's express mandate to identify and coordinate countermeasures to address threats to the transportation system, as well as Congress's express direction for 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, TSA is adopting the procedures set forth herein to notify the FAA when TSA's threat assessment reveals that an alien who is an FAA certificate, rating, or authorization holder or applicant poses a security threat.

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

[1] The registry is formally known as the ''Comprehensive Airmen Information System.''

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.

Under § 1540.117(f), the Deputy Administrator reviews the Initial Notification of Threat Assessment, the materials upon which the Initial Notification was based, the individual's reply, if any, and any other materials or information available to him. The Deputy Administrator will undertake a *de novo* review to determine whether the individual poses a security risk.

If the Deputy Administrator determines that the individual poses a security threat, TSA serves upon the individual a Final Notification of Threat Assessment and serves a copy upon the Administrator. The Final Notification includes a statement that the Deputy Administrator has personally reviewed the Initial Notification, the individual's reply, if any, and any other materials or information available to him, and has determined that the individual poses a security threat. This Final Notification will form the basis of the FAA's revocation of, or denial of, the individual's certificate, rating, or authorization.

If the Deputy Administrator does not determine that the individual poses a security threat, TSA serves upon the individual a Withdrawal of the Initial Notification and serves a copy upon the FAA.

Section 1540.117(g) provides that in connection with this section, TSA does not disclose to the individual classified information, as defined in Executive Order 12968 section 1.1(d), and TSA reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law, such as sensitive security information (SSI), sensitive law enforcement and intelligence information; sources, methods, means, and application of intelligence techniques, and identities of confidential informants, undercover operatives, and material witnesses.

In most cases, the determination that an individual poses a security threat will be based, in large part or exclusively, on classified national security information, unclassified information designated as SSI, or other information that is protected from disclosure by law, such as the Freedom of Information Act (FOIA). *See* 5 U.S.C 552(b)(1), (2), (7).

Classified national security information is information that the President or another authorized Federal official has determined, pursuant to Executive Order (EO) 12958, must be protected against unauthorized disclosure in order to safeguard the security of American citizens, the country's democratic institutions, and America's participation within the community of nations. *See* E.O. 12958 (60 FR 19825, April 20, 1995). E.O. 12968 prohibits Federal employees from disclosing classified information to individuals who have not been cleared to have access to such information under the requirements of that EO *See* E.O. 12968 sec. 3.2(a), 6.2(a)(1) (60 FR 40245, Aug. 7, 1995). If the Assistant Administrator has determined that an individual who is the subject of a threat assessment proceeding poses a threat to transportation security, that individual will not be able to obtain a clearance to have access to classified national security information, and TSA has no authority to release such information to that individual.

The denial of access to classified information under these circumstances is consistent with the treatment of classified information under the FOIA, which specifically exempts such information from the general requirement under FOIA that all government documents are subject to public disclosure. *See* 5 U.S.C. 522(b)(1).

SSI is unclassified information that is subject to disclosure limitations under statute and TSA regulations. *See* 49 U.S.C. 114(s); 49 CFR part 1520. Under 49 U.S.C. 114(s), the Under Secretary may designate categories of information as SSI if release of the information would be detrimental to the security of transportation. The SSI designation allows TSA to limit disclosure of this information to people with a need to know in order to carry out regulatory security duties. *See* 49 CFR 1520.5(b).

Among the categories of information that the Under Secretary has defined as SSI by regulation is information concerning threats against transportation. *See* 49 CFR 1520.7(i). Thus, information that TSA obtains indicating that an individual poses a security threat, including the source of such information and the methods through which the information was obtained, will commonly be SSI or classified information. The purpose of designating such information as SSI is to ensure that those who seek to do harm to the transportation system and their associates and supporters do not obtain access to information that will enable them to evade the government's efforts to detect and prevent their activities. Disclosure of this information, especially to an individual specifically suspected of posing a threat to the aviation system, is precisely the type of harm that Congress sought to avoid by authorizing the Under Secretary to define and protect SSI.

Other types of information also are protected from disclosure by law due to their sensitivity in law enforcement and intelligence. In some instances, the release of information about a particular individual or his supporters or associates could have a substantial adverse impact on security matters. The release of the identities or other information regarding individuals related to a security threat determination by TSA could jeopardize sources and methods of the intelligence community, the identities of confidential sources, and techniques and procedures for law enforcement investigations or prosecution. *See* 5 U.S.C. 552(b)(7)(D), (E). Release of such information also could have a substantial adverse impact on ongoing investigations being conducted by Federal law enforcement agencies, possibly giving a terrorist organization or other group a roadmap of the course and progress of an investigation. In certain instances, release of information could alert a terrorist's coconspirators to the extent of the Federal investigation and the imminence of their own detection, thus provoking flight. Those without access to information about the progress of federal investigations are not in a meaningful position and therefore cannot make judgments about the risk of release of information about that investigation that TSA has relied upon in making a security threat determination.

This intelligence ''mosaic'' dilemma has been well recognized by the courts in concluding both that they are ill-suited to second guess the Executive Branch's determination and that seemingly innocuous production should not be made. The business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak-and-dagger affair. Thousands of pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate. The Fourth Circuit Court of Appeals has observed:

> ''The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course are ill equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in this area.''

United States versus *Marchetti*, 466 F. 2d 1309, 1318 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972). *Halkin* versus *Helms,* 598 F. 2d 1 (D.C. Cir. 1978). *See*

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

establish procedures to notify the FAA Administrator, among others, of the identities of individuals who are 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). Additionally, in 49 U.S.C. 44703(g), as amended by ATSA section 129, Congress required the FAA Administrator to make modifications to the system used for issuing aviation certificates, ratings, or authorizations in order to make the system more effective in combating acts of terrorism.

The Under Secretary has determined that TSA must notify the FAA when TSA's threat assessment reveals an individual who holds an FAA certificate, rating, or authorization or is an applicant for such certification poses a security threat. This determination is based on the Congressional authorization for the Under Secretary to identify and counter threats to transportation security and Congress's express direction that TSA work with the FAA Administrator in taking actions that may affect aviation security or air carrier operations and to communicate information to the FAA regarding individuals who pose a security threat.

Cost of Compliance

TSA has performed an expected cost-benefit analysis for the final rule. To date, from a pool of approximately 1.35 million holders of airmen certificates issued by the FAA in the last ten years, TSA has identified 11 persons who are security threats. Estimating the number of FAA certificates that will be issued in the next ten years, from 2003 to 2012, TSA has found that an estimated nine persons out of an estimated 1.11 million airmen certificates over the ten years will be flagged or at least one person per year. If, however, the estimates are off by as much as a factor of ten, TSA estimates that approximately 100 persons may be impacted over the ten-year period. This estimates equates to ten persons per year over the ten-year period.

This rule allows an impacted party to respond to the TSA-issued Initial Notification in order to refute the finding of the security threat assessment. To date, seven individuals or 63.64% from the 11 identified are in the process of responding to a threat assessment notice from TSA. Assuming this percentage will remain relatively constant, TSA calculated a minimum and maximum number of impacted persons who will respond ranging from one person to six persons per year. Using the value of passenger time per hour for general aviation from *Economic Values for Valuation of Federal Aviation Administration Investment and Regulatory Programs (Values)* (FAA–APO–98–8) as a proxy for the wage rate of the impacted party, TSA estimated the approximate costs to respond to an Initial Notification without legal counsel to be $31.10 per hour in 2001 dollars. TSA assumed it would take an impacted person five hours to respond to the Initial Notification via a written letter requesting releasable materials upon which the decision was made, review any TSA materials, and write a response based upon these materials. An additional $20 was added to cover any costs of postage, copying, and stationery costs. Therefore, the total estimated cost for an individual to respond to TSA's Initial Notification equals approximately $176 per person in 2001 dollars. If an individual chooses to hire legal counsel, the cost rises to approximately $1000 to $1500 based on five hours legal time at between $200–300 per hour.

TSA projected the costs of this rule for impacted parties over the ten-year period of 2003–2012. The range of one person refuting per year without legal counsel to six persons per year refuting with legal counsel was used for analysis. Costs were discounted over the ten-year period using the standard seven percent discount rate as dictated by the Office of Management and Budget (Circular A–94). The total costs for this rule projected over the next ten years ranges from $1,755 (if one person per year responds on his/her own without legal counsel) to $71,735 (if six persons per year hire legal counsel to respond to findings) in 2001 discounted dollars.

Analysis of Benefits

This rule is intended to enhance aviation security. Congress has mandated that the Under Secretary identify and counter threats to the transportation system and national security, as well as, work with the FAA Administrator to take actions that may affect aviation safety or air carrier operations and to communicate information to the FAA regarding individuals who pose a security threat. The primary benefit of the rule will be increased protection to Americans and others from acts of terrorism. The changes envisioned in this rule are an integral part of the total program needed to prevent a criminal or terrorist incident in the future.

Since the mid-1980s, the major goals of aviation security have been to prevent bombing and sabotage incidents. The individuals covered by this rule hold airman certificates, ratings, or authorizations, such as pilot and mechanic certificates, ratings, or authorizations, issued by the FAA under 49 U.S.C. Chapter 447. These certificates, ratings, or authorizations allow these individuals access to aircraft while in maintenance and repair, to fly aircraft, or to operate aircraft navigational equipment. These individuals are in unique positions to disrupt the civil air transportation system and harm the public through acts of air piracy, sabotage, or misuse of the aircraft. As such, these individuals could represent a definitive threat to security.

Comparison of Costs and Benefits

It is estimated this rule will have insignificant incurred costs when compared to the potential benefits. The potential benefits are huge in the number of lives and amount of property within the United States saved from a catastrophic terrorist act by this rule. As such, the small amount of costs and the large positive value of the cost-benefit analysis support the rule as cost-beneficial.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA) established ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

TSA has determined that this rule will not have a significant economic impact on a substantial number of small entities, pursuant to the RFA, 5 U.S.C.

605(b). This determination is based on the fact that the rule affects only individuals, not entities. Additionally, based on the comparison of costs and benefits set forth above, the costs incurred by individuals will be insignificant compared to potential benefits of the rule. Therefore, pursuant to the RFA, 5 U.S.C. 605(b), TSA certifies that this rule will not have a significant impact on a substantial number of small entities. The FAA has also issued a final rule regarding denial and revocation of FAA-issued certificates, ratings, or authorizations and has determined that such denial or revocation will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the TSA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there are no new requirements for information collection associated with this final rule. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a current valid Office of Management and Budget (OMB) control number.

International Trade Impact Statement

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety and security, are not considered unnecessary obstacles. The statute also requires consideration of international standards, and where appropriate, that they be the basis for U.S. standards. The TSA has assessed the potential effect of this rulemaking and has determined that it will have only a domestic impact and, therefore, no effect on any trade-sensitive activity.

Unfunded Mandates Determination

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Pub. L. 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments.

Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.''

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Executive Order 13132, Federalism

TSA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications.

Environmental Analysis

TSA has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

Energy Impact

The energy impact of this final rule has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 49 CFR Part 1540

Air carriers, Aircraft, Airports, Law enforcement officers, Reporting and recordkeeping requirements, Security measures.

The Amendment

In consideration of the foregoing, the Transportation Security Administration amends Chapter XII of Title 49, Code of Federal Regulations, as follows:

PART 1540—CIVIL AVIATION SECURITY: GENERAL RULES

1. The authority citation for part 1540 continues to read as follows:

Authority: 49 U.S.C. 114, 5103, 40119, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

2. Amend part 1540 by adding § 1540.117 to read as follows:

§ 1540.117 Threat assessments regarding aliens holding or applying for FAA certificates, ratings, or authorizations.

(a) Applicability. This section applies when TSA has determined that an individual who is not a citizen of the United States and who holds, or is applying for, an airman certificate, rating, or authorization issued by the FAA Administrator, poses a security threat.

(b) *Definitions.* The following terms apply in this section:

Assistant Administrator means the Assistant Administrator for Intelligence for TSA.

Date of service means—

(1) The date of personal delivery in the case of personal service;

(2) The mailing date shown on the certificate of service;

(3) The date shown on the postmark if there is no certificate of service; or

(4) Another mailing date shown by other evidence if there is no certificate of service or postmark.

Deputy Administrator means the officer next in rank below the Under Secretary of Transportation for Security.

FAA Administrator means the Administrator of the Federal Aviation Administration.

Individual means an individual whom TSA determines poses a security threat.

(c) *Security threat.* An individual poses a security threat when 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.

(d) *Representation by counsel.* The individual may, if he or she so chooses, be represented by counsel at his or her own expense.

(e) *Initial Notification of Threat Assessment.* (1) *Issuance.* If the Assistant Administrator determines that an individual poses a security threat, the Assistant Administrator serves upon the individual an Initial Notification of Threat Assessment and serves the determination upon the FAA Administrator. The Initial Notification includes—

(i) A statement that the Assistant Administrator personally has reviewed the materials upon which the Initial Notification was based; and

(ii) A statement that the Assistant Administrator has determined that the individual poses a security threat.

(2) *Request for materials.* 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 the releasable materials upon which the Initial Notification was based.

(3) *TSA response.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after receiving the individual's request

for copies of the releasable materials upon which the Initial Notification was based, TSA serves a response. TSA will not include in its response any classified information or other information described in paragraph (g) of this section.

(4) *Reply.* The individual may serve upon TSA a written reply to the Initial Notification of Threat Assessment 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 under paragraph (e)(2) if such a request was served. The reply may include any information that the individual believes TSA should consider in reviewing the basis for the Initial Notification.

(5) *TSA final determination.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after TSA receives the individual's reply, TSA serves a final determination in accordance with paragraph (f) of this section.

(f) *Final Notification of Threat Assessment.* (1) *In general.* The Deputy Administrator reviews the Initial Notification, the materials upon which the Initial Notification was based, the individual's reply, if any, and any other materials or information available to him.

(2) *Issuance of Final Notification.* If the Deputy Administrator determines that the individual poses a security threat, the Deputy Administrator serves upon the individual a Final Notification of Threat Assessment and serves the determination upon the FAA Administrator. The Final Notification includes a statement that the Deputy Administrator personally has reviewed the Initial Notification, the individual's reply, if any, and any other materials or information available to him, and has determined that the individual poses a security threat.

(3) *Withdrawal of Initial Notification.* If the Deputy Administrator does not determine that the individual poses a security threat, TSA serves upon the individual a Withdrawal of the Initial Notification and provides a copy of the Withdrawal to the FAA Administrator.

(g) *Nondisclosure of certain information.* In connection with the procedures under this section, TSA does not disclose to the individual classified information, as defined in Executive Order 12968 section 1.1(d), and TSA reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law.

Issued in Washington, DC, on January 21, 2003.

J.M. Loy,

Under Secretary of Transportation for Security.

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