DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 71 and 97

[Docket No. FAA–2004–19247; Amdt. Nos. 71–33, 97–1335]

RIN 2120–AI39

Revision of Incorporation by Reference Provisions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule removes the incorporation by reference of certain FAA orders and terminal aeronautical charts from the Code of Federal Regulations. The previous IBR of these materials inappropriately designated them as regulatory. Instead, the FAA is incorporating by reference the instrument procedures and weather takeoff minimums that are documented on FAA forms. This change ensures that the appropriate material is incorporated by reference into the FAA's regulations.

DATES: This rule is effective June 2, 2005. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of June 2, 2005.

FOR FURTHER INFORMATION CONTACT: Thomas E. Schneider, AFS–420, Federal Aviation Administration, P.O. Box 25082, Oklahoma City, OK 73125; telephone (405) 954–5852; facsimile (405) 954–2528; e-mail *thomas.e.schneider@faa.gov.*

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

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) Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm;* or

(3) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Be sure to identify the docket number, notice number, or amendment number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478) or you may visit *http://dms.dot.gov.*

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact your local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at *http://www.faa.gov/avr/arm/sbrefa/cfm.*

Statutory Authority for This Rulemaking

The FAA's authority to issue this final rule is derived, in part, from 49 U.S.C. 40103, which requires the FAA to prescribe air traffic regulations on the flight of aircraft for navigating, protecting, and identifying aircraft; protecting individuals and property on the ground; using the navigable airspace efficiently; and preventing the collision of aircraft. Furthermore, under 49 U.S.C. 44701(a), the FAA promotes safe flight by prescribing regulations and minimum standards for other practices, methods, and procedures necessary for safety in air commerce.

Background

On April 8, 2003, the FAA adopted the final rule titled "Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points'' (68 FR 16943; April 8, 2003), which incorporated by reference into 14 CFR 97.20 FAA Orders 8260.3B and 8260.19C, and the terminal aeronautical charts.

Upon staff review, the FAA concluded the incorporation by reference (IBR) of these orders and terminal aeronautical charts was in error and resulted in the inappropriate designation of certain material as regulatory. The two orders originally incorporated by reference set forth the criteria used by the FAA to develop instrument approach procedures (IAPs) and instrument flight rules (IFR) takeoff minimums. The components that must be regulatory are the actual procedures and the takeoff minimums, not the developing criteria. Thus, only IAPs and takeoff minimums, which are delineated on FAA Forms, should be incorporated by reference. Similarly, it is not appropriate to incorporate by reference terminal aeronautical charts, as these charts merely depict IAPs and takeoff minimums.

On October 5, 2004, therefore, the FAA published a Notice of Proposed Rulemaking (NPRM) (69 FR 59755, Oct. 5, 2004) proposing to correct the IBR of the material referenced above. The FAA proposed to incorporate by reference the standard instrument procedures documented on FAA Forms 8260–3, 8260–4, 8260–5 and the takeoff minimums on 8260–15A.

Discussion of Comments

Three entities commented on this rule: Airbus, the Aircraft Owners and Pilots Association (AOPA) and the Air Line Pilots Association, International (ALPA). All commenters generally supported the proposal.

AOPA commented that the FAA should support Localizer Performance with Vertical Guidance (LPV) approaches for IFR access to general aviation airports. AOPA also commented that while the incorporation by reference of departure procedures on FAA Form 8260–15A may establish obstacle departure procedures on every departure conducted under IFR, the FAA should not require pilots to follow these procedures on every flight. AOPA argues that air traffic control (ATC) may require pilots to deviate from the procedures, which would cause a conflict with the departure procedures. Moreover, AOPA objects to the use of forms to impose new operational requirements upon the general aviation community without a specific operating requirement in 14 CFR part 91. Airbus also seeks clarification of the purpose for incorporating FAA Form 8260–15A.

LPV procedures are not part of this rulemaking and this comment is outside the scope of this rulemaking. Form 8260–15A provides weather takeoff minimums and textual departure procedures. At the outset, we regret that the NPRM did not identify specifically that only the weather takeoff minimums articulated on form 8260–15A were proposed for incorporation. Consequently, this may have resulted in confusion as to whether associated departure procedures were also proposed for incorporation. This amendment distinguishes that the instrument approach procedures on FAA forms 8260–3, –4, and –5 and the weather takeoff minimums articulated on FAA form 8260–15A are IBR. Editorial changes reflecting the above clarification are in the regulatory text.

With respect to the IBR of FAA form 8260–15A, we believe that AOPA misunderstands the applicability of this form and the relevant part 91 regulation. This amendment does not add any operational requirements for part 91 operators. Under current 14 CFR 91.175(f), in pertinent part, ''Unless otherwise authorized by the Administrator, no pilot operating an aircraft under parts 121, 125, 129, or 135 of this chapter may take off from a civil airport under IFR unless weather conditions are at or above the weather minimums for IFR takeoff prescribed for that airport under part 97 of this chapter. If takeoff minimums are not prescribed under part 97 of this chapter for a particular airport, the following minimums apply to takeoffs under IFR for aircraft operating under those parts * * *.'' This section does not apply to operations conducted under part 91. It currently requires operators (conducting operations under part 121, 125, 129, or 135) to comply with the weather takeoff minimums prescribed in part 97 for specified airports, and in the alternative if no weather takeoff minimums are specified in part 97, then § 91.175(f) specifies the required weather takeoff minimums. This rule provides the vehicle to incorporate by reference the weather takeoff minimums delineated on FAA form 8260–15A for designated airports in part 97. The operational requirement to comply with the takeoff minimums codified in part 97 already exists. Unless the aircraft operator obtains an authorization in accordance with § 91.175(f) to conduct its operations using weather takeoff minimums different from those specified in part 97, the takeoff minimums in part 97 must be met. This amendment does not add any new operational requirements for part 91 operators.

ALPA supports the proposal and specifically requests that special instrument approach procedures described on FAA form 8260–7 also be incorporated by reference into part 97 so that industry and the flying public have the same opportunity to comment and participate in the development of these procedures.

Special instrument procedures are designed to meet the unique needs of particular operators and are approved by the FAA for limited use. Often, specific equipment and training are required to use these procedures. These procedures are authorized to specific users and are not available for general use by the flying public. Comments addressing the administrative process followed to authorize special procedures is outside the scope of this rulemaking.

The FAA is adopting the amendments as proposed with the clarification that only the weather takeoff minimums listed on form 8260–15A are incorporated by reference. Furthermore, the Office of the Federal Register has changed the location at which materials that are incorporated by reference may be examined. The materials are no longer available for examination at the Office of the Federal Register. Instead, the materials are now available for examination at the National Archives and Records Administration. Section 97.20(b) is updated accordingly.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new information collection requirement associated with this final rule.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

Economic Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination 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 Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act also requires agencies to consider international standards and, where appropriate, use them as the basis of U.S. standards. 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 private sector, of $100 million or more annually (adjusted for inflation).

For regulations with an expected minimal impact the above-specified analyses are not required. The Department of Transportation's Order DOT 2100.5, which prescribes policies and procedures for simplification, analysis, and review of regulations, states that if it is determined that the expected impact is so minimal that the action does not warrant a full evaluation, a statement to that effect and the basis for it is included in the regulation. Since this final rule is administrative in nature removing inappropriate incorporation by reference of material from FAA regulations and adding appropriate incorporation by reference material, these changes will not impact the integrity of existing rules. As a result, this final rule will have a minimal economic impact.

The FAA has determined that this rule—(1) has benefits that justify its costs, is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures; (2) will not have a significant economic impact on a substantial number of small entities; (3) will not have any effect on barriers to international trade; and (4) does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes ''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 business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and 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 agency determines 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.

This final rule is administrative in nature correcting an earlier action that resulted in an inappropriate designation of certain material as regulatory. Consequently, the FAA certifies the rule will not have a significant economic impact on a substantial number of small entities.

Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, 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 FAA has assessed the potential effect of this rulemaking and has determined that it will impose no economic impact on domestic and international entities.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act) 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 an expenditure of $100 million or more (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.'' The FAA currently uses an inflation-adjusted value of $120.7 million in lieu of $100 million.

This rule does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The FAA has determined that this action would not have a substantial direct effect on the States, on 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 would not have federalism implications.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined that this rulemaking action qualifies for the categorical exclusion identified in paragraph 312(f) and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The FAA has determined that it is not a significant energy action under the executive order because it is not a significant regulatory action under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

14 CFR Part 71

Airspace, Navigation (air).

14 CFR Part 97

Air traffic control, Airports, Navigation (air), Incorporation by reference, Weather.

The Amendments

■ In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations, as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR 1959–1963 Comp., p 389.

§ 71.11 [Amended]

■ 2. Amend § 71.11 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 3. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, and 44721–44722.

■ 4. Revise § 97.20 to read as follows:

§ 97.20 General.

(a) This subpart prescribes standard instrument procedures and weather takeoff minimums based on the criteria contained in FAA Order 8260.3, U.S. Standard for Terminal Instrument Procedures (TERPs), and other related Orders in the 8260 series that also address instrument procedure design criteria.

(b) Standard instrument procedures and associated supporting data adopted by the FAA are documented on FAA Forms 8260–3, 8260–4, 8260–5. Weather takeoff minimums are documented on FAA Form 8260–15A. These forms are incorporated by reference. The Director of the Federal Register approved this incorporation by reference pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. The standard instrument procedures and weather takeoff minimums are available for examination at the FAA's Rules Docket (AGC–200) and at the National Flight Data Center, 800 Independence Avenue, SW., Washington, DC 20590, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) Standard instrument procedures and weather takeoff minimums are depicted on aeronautical charts published by the FAA National Aeronautical Charting Office. These charts are available for purchase from the FAA's National Aeronautical Charting Office, Distribution Division, 6303 Ivy Lane, Suite 400, Greenbelt, MD 20770.

Issued in Washington, DC, on April 21, 2005.

Marion C. Blakey,

Administrator.

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