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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 119, 121 and 135

Docket No. FAA-2003-15571; Amdt Nos. 119-8, 121-286, and 135-83]

RIN 2120-AI00

DOD Commercial Air Carrier Evaluators

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This final rule clarifies existing regulations as they apply to Department of Defense (DOD) commercial air carrier evaluators. These amendments are necessary to clarify DOD's congressionally mandated cockpit evaluation mission and authority for the aviation security community and for industry. DOD's Air Mobility Command (AMC) will create and issue a new credential to permit DOD commercial air carrier evaluators uninterrupted access to the cockpit for evaluations. These amendments explicitly clarify existing DOD legal authority and responsibilities.

DATES: This final rule is effective July 10, 2003 ~~*[Insert date of publication in the Federal Register]*~~. gma 7/8/03

You may send your comments to reach us on or before ~~*[Insert date 30 days after date of publication in the Federal Register]*~~ August 11, 2003. gma 7/8/03

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 at the beginning of your

comments, and you should submit two copies of your comments. If you wish to receive confirmation that FAA received your comments, include a self-addressed, stamped postcard.

You may also submit comments through the Internet at http://dms.dot.gov. You may review the public docket containing comments to these proposed regulations in person in the Dockets Office between 9:00 a.m. and 5:00 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: Lt Col. Tom Barrale, USAF, Department of Defense Air Mobility Command Liaison Officer to FAA Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-7088.

SUPPLEMENTARY INFORMATION

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, federalism, or security impacts that might result from this rule. The most helpful comments reference a specific portion of the rule, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

All comments received will be filed in the docket. The FAA will develop a report that summarizes each substantive public contact with the FAA personnel concerning this

rulemaking. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the ADDRESSES section of this preamble between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the web address in the ADDRESSES section.

We will consider all comments we receive on or before the closing date for comments. We may change this rule based on the comments we receive.

If you want the FAA to acknowledge receipt of your comments, include with your comments a pre-addressed, stamped postcard that identifies the docket number. We will stamp the date on the postcard and mail it to you.

Availability of Final Rule

You can get an electronic copy using the Internet by taking the following steps:

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

(2) On the search page type in the last four digits of the Docket number shown at the beginning of this notice. Click on "search."

(3) On the next page, which contains the Docket summary information for the Docket you selected, click on the final rule.

You can also get an electronic copy using the Internet through the Office of Rulemaking's web page at http://www.faa.gov/avr/armhome.htm or the Government Printing Office's web page at http://www.access.gpo.gov/su_docs/aces/aces140.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. Make sure to identify the amendment number or docket number of this final rule.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under FOR FURTHER INFORMATION CONTACT. You can find out more about SBREFA on the Internet at our site, http://www.gov/avr/arm/sbrefa.htm. For more information on SBREFA, e-mail us 9-AWA-SBREFA@faa.gov.

Background

The DOD contracts for passenger and air cargo movements from air carriers certificated by the FAA. Pursuant to Public Law 99-661 (November 14, 1986), the DOD is required to conduct capability evaluations of these carriers to ensure each is able to satisfy the unique requirements of military contracts and adhere to the DOD Commercial Air Carrier Quality and Safety Requirements as codified in Title 32 of the Code of Federal Regulations (CFR), part 861. Generally, DOD surveillance requirements include an initial on-site capability survey with a recurring on-site survey every 2 years thereafter, a performance evaluation every 6 months, periodic ramp inspections, and operational evaluations conducted periodically on aircraft (Pub. L. 99-661, November 14, 1986). These operational evaluations apply only to carriers that are under contract with DOD or carriers desiring to enter contracts with DOD. Specific guidance can be found in DOD Directive 4500.53. In general, these cockpit observations are subjective in nature and

serve to validate that the actions of the aircrews are in line with the procedures and policies of the company. The four major categories observed in flight are airmanship, crew coordination, safety awareness, and judgment. In the event discrepancies in compliance with the Federal Aviation Regulations are noted, such discrepancies will be brought to the attention of the FAA and the Air Carrier. Follow-up actions will be dependent upon the severity of the discrepancy as determined by the Air Mobility Command, Survey and Analysis Office (AMC/DOB).

Cockpit observations are one means by which evaluators assess the effectiveness of programs during the on-site capability surveys and performance evaluations. DOD commercial air carrier evaluators require uninterrupted access to the flight deck to perform their congressionally mandated duties. The existing language in 14 CFR parts 121 and 135 does not explicitly include DOD commercial air carrier evaluators among those persons authorized access to the flight deck. DOD commercial air carrier evaluators have relied upon the authority contained in 14 CFR 121.547(a)(4) to evaluate part 121 air carriers. Section 121.547 states in relevant part: "(a) No person may admit any person to the flight deck of an aircraft unless the person being admitted is . . . (4) Any person who has the permission of the pilot in command and is specifically authorized by the certificate holder management and by the administrator." There is no analogous section in part 135.

For many years, DOD commercial air carrier evaluators have relied on the FAA, the air carrier, and the pilot in command authorizing their access to conduct the air carrier evaluation mission. The current process is both cumbersome, including the issuance of FAA Form 8430-6, and unnecessary. It requires the DOD Survey and

Analysis Office to obtain and maintain specific approval from each and every air carrier their evaluators are to assess. DOD's ten commercial air carrier evaluators are responsible for conducting cockpit evaluations on over 140 different carriers contracted with the Department of Defense.

The absence of explicit authority in the regulation listing "DOD commercial air carrier evaluator" and the lack of a well-known DOD evaluator credential is significantly hindering the congressionally mandated DOD air carrier evaluation mission—especially in the wake of 9/11. While DOD and FAA Flight Standards Service personnel understand the role of the DOD commercial air carrier evaluator, it is often misunderstood by those in aviation security and the crewmembers on those flights being evaluated by DOD.

The DOD will continue to ensure the proper coordination with the air carrier in advance of these evaluations through a simplified process. These amendments will make clear the authority of DOD commercial air carrier evaluators to conduct cockpit evaluations by explicitly including them in the regulation text. These changes, accompanied by the creation of an S&A Form 110B evaluator credential should alleviate the problems DOD commercial air carrier evaluators are facing in the field with minimum impact.

The FAA believes the efficiency of the DOD cockpit observation program will be greatly enhanced by amending the relevant sections of 14 CFR 119, 121, and 135 to specifically include DOD commercial air carrier evaluators. Further, the creation of the S&A Form 110B credential will allow DOD commercial air carrier evaluators to gain cockpit access without having to follow the FAA Form 8430-6 process, and without

having to obtain and maintain the specific permissions for every cockpit evaluation. The DOD will require its commercial air carrier evaluators to carry with them an S&A Form 110B credential, their military orders, and a current military ID while conducting an evaluation. The S&A Form 110B credential will be analogous to the 110A credential held by FAA inspectors in terms of gaining cockpit access. However, a DOD commercial air carrier evaluator may not use his S&A Form 110B credential on any air carrier that is not under contract with the Department of Defense. A DOD commercial air carrier evaluator may use the credential on specific flights that may not be contracted so long as the air carrier itself maintains a contract with the DOD. The only exceptions to the existing contract criteria are when an air carrier is going through an initial survey or applying for a contract or both—in these instances the credential is valid without a contract.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has reviewed and determined that these amendments do not constitute a new or additional information collection activity.

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 reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these proposed regulations.

Justification for No Notice and Immediate Adoption

This action is being taken without providing the opportunity for prior notice and public comment. The FAA finds that prior notice and public comment are impracticable and contrary to the public interest, pursuant to section 553 of the Administrative Procedure Act (APA). Section 553(b)(B) of the APA permits an agency to forego 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 would delay the potential safety benefit of this rulemaking. FAA asks for comment with publication of this rule, and will consider all comments received during the comment period. If changes to the rule are necessary to address aviation safety more effectively, or in a less burdensome but equally effective manner, FAA will make such changes. The FAA finds the need to facilitate the use of a new credential for DOD commercial air carrier evaluators is good cause for making this final rule effective immediately.

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and benefits of a regulatory change. We are not allowed to propose or adopt a regulation unless we make a reasoned determination that the benefits of the intended regulation justify its costs. Our assessment of this proposal indicates that its economic impact is minimal. Since its costs and benefits do not make it a "significant regulatory action" as defined in the Order, we have not prepared a "regulatory impact analysis." Similarly, we have not prepared a "regulatory evaluation," which is the written

cost/benefit analysis ordinarily required for all rulemaking proposals under the DOT Regulatory and Policies and Procedures. We do not need to do the latter analysis where the economic impact of a proposal is minimal.

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 Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act 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 Act.

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 action imposes no costs on any small entities subject to this rule; however, it may provide some unquantifiable benefits to some of them. Consequently, the FAA

certifies that the rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Analysis

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, 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. In accordance with the above statute and policy, the FAA has assessed the potential effect of this final rule to be minimal and therefore has determined that this rule will not result in an impact on international trade by companies doing business in or with the United States.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 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 UMRA 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 SFAR does not contain such a mandate. Therefore, the requirements of Title II of UMRA do not apply.

Executive Order 13132, Federalism

The FAA 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. Therefore, we determined that this final rule does not have federalism implications.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

Energy Impact

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA Pub. L. 94-163, as amended (42 U.S.C. 6362) and FAA Order 1053.1. It has been determined that the final rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects

14 CFR Part 119

Administrative practice and procedure, Air carriers, Aircraft, Aviation safety, Charter flights, Reporting and recordkeeping requirements.

14 CFR Part 121

Air carriers, Aircraft, Airmen, Alcohol abuse, Aviation safety, Charter flights,

Drug abuse, Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.

14 CFR Part 135

Air taxis, Aircraft, Airmen, Alcohol abuse, Aviation safety, Drug abuse, Drug testing, Reporting and recordkeeping requirements.

The Amendments

In consideration of the foregoing the Federal Aviation Administration amends Chapter I of Title 14 Code of Federal Regulations as follows:

PART 119—CERTIFICATION: AIR CARRIERS AND COMMERCIAL OPERATORS

1. The authority citation for part 119 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1153, 40101, 40102, 40103, 40113, 44105, 44106, 44111, 44701-44717, 44722, 44901, 44903, 44904, 44906, 44912, 44914, 44936, 44938, 46103, 46105.

2. Amend § 119.3 by adding a new definition in alphabetical order to read as follows:

§ 119.3 Definitions.

* * * * *

<u>DOD commercial air carrier evaluator</u> means a qualified Air Mobility Command, Survey and Analysis Office (AMC/DOB) cockpit evaluator performing the duties specified in Public Law 99-661 when the evaluator is flying on an air carrier that is contracted or pursuing a contract with the U.S. Department of Defense (DOD).

* * * * *

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

3. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701-44702, 44705, 44709-44711, 44713, 44716-44717, 44722, 46105.

4. Amend § 121.547 by revising paragraphs (a)(2) and (c)(1) to read as follows:

§ 121.547 Admission to flight deck.

(a) * * *

(2) An FAA air carrier inspector, a DOD commercial air carrier evaluator, or an authorized representative of the National Transportation Safety Board, who is performing official duties;

* * * * *

(c) * * *

(1) An FAA air carrier inspector, a DOD commercial air carrier evaluator, or authorized representative of the Administrator or National Transportation Safety Board who is checking or observing flight operations;

* * * * *

5. Add a new § 121.548(a) to read as follows:

§ 121.548(a) DOD Commercial Air Carrier Evaluator's Credential.

Whenever, in performing the duties of conducting an evaluation, a DOD commercial air carrier evaluator presents S&A Form 110B, "DOD Commercial Air Carrier Evaluator's Credential," to the pilot in command of an airplane operated by the

certificate holder, the evaluator must be given free and uninterrupted access to the pilot's compartment of that airplane.

6. Amend § 121.583 by revising paragraph (a)(3) to read as follows:

§ 121.583 Carriage of persons without compliance with the passenger-carrying requirements of this part.

(a) * * *

(3) An FAA air carrier inspector, a DOD commercial air carrier evaluator, or an authorized representative of the National Transportation Safety Board, who is performing official duties.

* * * * *

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

7. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 106(g), 41706, 44113, 44701-44702, 44705, 44709, 44711-44713, 44715-44717, 44722.

8. Add a new § 135.76 to read as follows:

§ 135.76 DOD Commercial Air Carrier Evaluator's Credentials: Admission to pilots compartment: Forward observer's seat.

(a) Whenever, in performing the duties of conducting an evaluation, a DOD commercial air carrier evaluator presents S&A Form 110B, "DOD Commercial Air Carrier Evaluator's Credential," to the pilot in command of an aircraft operated by the certificate holder, the evaluator must be given free and uninterrupted access to the pilot's

compartment of that aircraft. However, this paragraph does not limit the emergency authority of the pilot in command to exclude any person from the pilot compartment in the interest of safety.

(b) A forward observer's seat on the flight deck or forward passenger seat with headset or speaker must be provided for use by the evaluator while conducting en route evaluations. The suitability of the location of the seat and the headset or speaker for use in conducting en route evaluations is determined by the FAA.

9. Amend § 135.85 by adding a new paragraph (h) to read as follows:

§ 135.85 Carriage of persons without compliance with the passenger-carrying provisions of this part.

* * * * *

(h) A DOD commercial air carrier evaluator conducting an en route evaluation.

Issued in Washington, DC, on JUL 0 3 2003

Marion C. Blakey

Marion C. Blakey
Administrator

Certified to be a True Copy

John Allen