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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 129

Docket No. FAA-2002-12504; **Amendment No. 129-36**

RIN 2120-AH70

Security Considerations for the Flightdeck on Foreign Operated Transport Category Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments

SUMMARY: This action clarifies the applicability of regulations addressing flightdeck security and operational procedures for foreign carriers operating to and from the United States. It also makes other technical corrections to the regulation.

DATES: This rule is effective on 12/30/2002 ~~*[insert date of publication in the **Federal Register**]*~~. Comments must be received by 2/28/2003 ~~*[insert date 60 days after date of publication in the **Federal Register**]*~~.

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 FAA-2002-12504 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 to http://dms.dot.gov. You may review the public docket containing comments to this final rule 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.

Comments that you may consider to be of a sensitive security nature should not be sent to the docket management system. Send those comments to the FAA, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW, Washington, D.C. 20591.

FOR FURTHER INFORMATION CONTACT: Mike E. Daniel, International Programs and Policy Office, AFS-50, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591; telephone (202) 385-4510; facsimile (202) 385-4561; e-mail mike.e.daniel@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

This final rule is being adopted without prior notice and prior public comment. The Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; February 26, 1979), however, provide that, to the maximum extent possible, operating administrations of the 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 such written data, views, or arguments, as they may desire. Comments relating to the environmental, energy, federalism, or international trade impacts that might result from this amendment are also invited.

Comments must include the regulatory docket or amendment number and must be submitted in duplicate to the DOT Docket Management System address specified above.

All comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this final rule, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

The FAA will consider all comments received on or before the closing date for comments. Late filed comments will be considered to the extent practicable. This final rule may be amended in light of the comments received.

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

Availability of Rulemaking Documents

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 document number of the item you wish to view.

You can also get an electronic copy using the Internet through FAA's web page at http://www.faa.gov/avr/arm/nprm.cfm or the Federal Register'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 docket number and amendment number of this rulemaking.

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 SBRFA 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

On June 21, 2002, the FAA issued a final rule to require improved flightdeck security and operational and procedure changes to prevent unauthorized access to the flightdeck on passenger carrying aircraft and some cargo aircraft operated by foreign carriers under the provisions of 14 CFR part 129 (67 FR 42450; Amendment No. 129-33). Part 129 was amended with the objective of ensuring that foreign operators conducting service to and from the United States under 14 CFR part 129 would have flightdeck security measures commensurate with those of 14 CFR part 121 carriers operating in the United States.

In addition to opening a 60-day comment period for Amendment 129-33, the FAA held a public meeting on July 30 to allow the public an additional opportunity to

participate in the rulemaking process. A copy of the transcript of the public meeting has been placed into the docket; comments from the public meeting as well the comments in the docket will be dispositioned, and a notice will be published by the FAA in the Federal Register.

After reviewing several issues raised at the public meeting, the FAA decided that certain issues need to be clarified immediately.

Applicability

Part 129 governs foreign operators who operate either within the United States, except for overflights, or who operate solely outside the United States, but with aircraft registered in the United States. In the case of operations within the United States, except for overflights, part 129 is effectively equivalent to both part 121 and 135 in terms of the types of operations conducted and the aircraft used. With part 121 flightdeck security improved, the FAA was concerned that part 129 operations would be more attractive targets for terrorist actions if security was not similarly improved.

In Amendment 129-33, the FAA's intent was "to have consistent flight deck security requirements for parts 121 and 129." This action is consistent with, but more restrictive than the new International Civil Aviation Authority (ICAO) Security of the Flight Crew Compartment standards, which will apply only to airplanes with a maximum takeoff weight of 45,500 kg (about 100,000 lbs) or with a passenger seating capacity greater than 60, because the ICAO requirement is not inclusive of all the types of airplanes that would be required to operate under part 121 in the United States. Even though part 129 covers the operational equivalent of both parts 121 and 135, the FAA has not applied the flightdeck security requirements to carriers operating under part 135 in the

United States. In amendment No. 129-33, no distinction was made regarding foreign air carrier operations that are equivalent to part 135 operations.

Section 129.28(a) mandates that there be a flightdeck door on passenger carrying operations" that parallels the requirement in § 121.313. We also indicate "this requirement is intended to prevent the removal of flightdeck doors, and is not expected to result in installation of flightdeck doors where none existed." As the rule is presently written, however, it would require doors meeting the requirements of § 129.28 on such aircraft as Learjets, Falcons, etc., and helicopters, which was not the FAA's intent. To resolve this situation, the FAA is adding a new paragraph to restrict the applicability to transport category airplanes with 20 or more passenger seats. While this is not an exact correlation with part 121, it is a reasonable approximation, and there are currently no known airplane types that would be excluded under part 129 that are required to comply under part 121.

In addition, the final rule uses the term, "transport category aircraft," which includes transport category rotorcraft (type certificated under part 29), as well as transport category airplanes. As with the parallel part 121 rule, the FAA intended that the requirements apply only to transport category airplanes, and § 129.28 is revised accordingly.

Finally, the flightdeck security requirements in Amendment 129-33 apply to any passenger carrying transport category aircraft "operated" by the foreign air carrier. This would include operations of newly manufactured aircraft that are being delivered to the foreign air carrier, and would have the effect of requiring installation of the strengthened flightdeck door before the delivery flight. In many cases, the foreign air carriers, like

their domestic counterparts, have made arrangements to have the door strengthened by a third party after delivery of the airplane, and the FAA did not intend to interfere with these arrangements. As with the part 121 regulation, the FAA intends that the door be strengthened before entering revenue service. Therefore, § 129.28(a) and (c) are amended to create an exception for newly manufactured airplanes on non-revenue delivery flights.

Elimination of the Overflight Provision

Section 129.1(a) covers foreign carrier operations "within the United States," which conflicts with the requirement in § 129.28 that imposes the requirement both for operations "within the United States or on overflights." In general, the FAA has no practical means of conducting surveillance of foreign carriers other than on the ground within the United States. Accordingly, we are changing the phrase "within the United States or on overflights" to read "within the United States, except for overflights" in § 129.28.

Compliance Date

In section 129.28(a)(2), we indicate that foreign carriers cannot operate in the United States without the door installed between the pilot compartment and any other occupied compartment after January 15, 2002. The intent of the compliance date in § 129.28 (a)(2) for all-cargo airplanes was to prevent a foreign carrier from removing a door that was installed as of that date. Amendment 129-33, which imposed the requirement, was not issued until June 21, 2002, and no advance public notice of this requirement was provided to the foreign carriers. To resolve this issue, the FAA is changing the compliance date contained in paragraph § 129.28 (a)(2) to read "June 21, 2002," the issuance date of the final rule.

Justification for Immediate Adoption

This action is necessary to clarify the applicability and requirements of the existing part 129 regulations. The deadline for compliance with these regulations is imminent, and delaying issuance of this action pending notice and public comment would place numerous affected operators in potential non-compliance, contrary to the FAA's intent in adopting the part 129 regulations. Because the circumstances described herein warrant immediate action by the FAA, the Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and contrary to the public interest. Further, the Administrator finds that good cause exists under 5 U.S.C 553(d) for making this final rule effective immediately upon publication.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to implement ICAO Standards and Recommended Practices to the maximum extent practicable. The need for improved flightdeck security is an operational and security issue and is demonstrably necessary to provide safe operation within the United States. This amendment clarifies Amendment 129-33.

Economic Evaluation, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates 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 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 Trade Agreements Act (19

U.S.C. section 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 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 (Public Law 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.)

In conducting these analyses, FAA has determined this rule (1) has benefits which justify its costs; (2) is a "significant regulatory action" as defined in Executive Order 12866 and is "significant" as defined in DOT's Regulatory Policies and Procedures; (3) will not have a significant impact on a substantial number of small entities; (4) will have little effect on international trade; and (5) does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

For regulations with an expected minimal impact the above-specified analyses are not required. The Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If it is determined that the expected impact is so minimal that the proposal does not warrant a full evaluation, a statement to that effect and the basis for it is included in the proposed regulation. The FAA has determined that there are no costs associated with this final rule. Instead, this rule change relieves operators of foreign registered airplanes from costs

that would have been inadvertently imposed on them in the adoption of Amendment 129-33. This change effectuates the original intent of Amendment 129-33 revisions.

Regulatory Flexibility Act

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 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 side-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 action is cost relieving. Therefore, the FAA certifies that 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 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. The FAA has assessed the potential effect of this rulemaking and has determined that it will have a minimal effect on international trade.

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 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.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has determined that there are no requirements for information collection associated with this rule.

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 would 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 rule 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 rule is not a major regulatory action under the provisions of the EPCA.

List of Subjects

14 CFR Part 129

Aircraft, Aviation safety, Reporting and recordkeeping requirements, Safety, Transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends part 129 of Title 14 Code of Federal Regulations, as follows;

Part 129—OPERATIONS: FOREIGN AIR CARRIERS AND FOREIGN OPERATORS OF U.S.-REGISTERED AIRCRAFT ENGAGED IN COMMON CARRIAGE

1. The authority citation for part 129 continues to read as follows:

Authority: 49 U.S.C.1372, 40113, 40119, 44101, 44701-44702, 44705, 44709-44711, 44713, 44716-44717, 44722, 44901-44904, 44906, 44912, 46105, Pub.L. 107-71 sec. 104.49 U.S.C.

2. Revise § 129.28 to read as follows:

§ 129.28 Flightdeck security.

(a) After August 20, 2002, except for a newly manufactured airplane on a non-revenue delivery flight, no foreign air carrier covered by § 129.1(a), may operate:

(1) A passenger carrying transport category airplane within the United States, except for overflights, unless the airplane is equipped with a door between the passenger and pilot compartment that incorporates features to restrict the unwanted entry of persons into the flightdeck that are operable from the flightdeck only; or

(2) A transport category all-cargo airplane within the United States, except for overflights, that has a door installed between the pilot compartment and any other occupied compartment on or after June 21, 2002, unless the door incorporates features to restrict the unwanted entry of persons into the flightdeck that are operable from the flightdeck only.

(b) To the extent necessary to meet the requirements of paragraph (a) of this section, the requirements of § 129.13(a) to maintain airworthiness certification are waived until April 9, 2003. After that date, the requirements of § 129.13(a) apply in full.

(c) After April 9, 2003, except for a newly manufactured airplane on a non-revenue delivery flight, no foreign air carrier covered by § 129.1(a) may operate a passenger carrying transport category airplane, or a transport category all-cargo airplane that has a door installed between the pilot compartment and any other occupied compartment on or after June 21, 2002, within the United States, except for overflights, unless the airplane's flightdeck door installation meets the requirements of paragraphs (c)(1) and(2) of this section or an alternative standard found acceptable to the Administrator.

(1) Resist forcible intrusion by unauthorized persons and be capable of withstanding impacts of 300 joules (221.3 foot-pounds) at the critical locations on the door, as well as a 1,113-newton (250 pounds) constant tensile load on the knob or handle, and

(2) Resist penetration by small arms fire and fragmentation devices to a level equivalent to level IIIa of the National Institute of Justice Standard (NIJ) 0101.04.

(d) After August 20, 2002, no foreign air carrier covered by § 129.1 may operate a passenger carrying transport category airplane, or a transport category all-cargo airplane that has a door installed between the pilot compartment and any other occupied compartment on or after June 21, 2002, within the United States, except for overflights, unless the carrier has procedures in place that are acceptable to the civil aviation authority responsible for oversight of the foreign air carriers operating under this part to prevent access to the flightdeck except as authorized as follows:

(1) No person other than a person who is assigned to perform duty on the flight deck may have a key to the flight deck door that will provide access to the flightdeck.

(2) Except when it is necessary to permit access and egress by persons authorized in accordance with paragraph (d)(3) of this section, a pilot in command of an airplane that has a lockable flight deck door in accordance with § 129.28(a) and that is carrying passengers shall ensure that the door separating the flight crew compartment from the passenger compartment is closed and locked at all times when the airplane is being operated.

(3) No person may admit any person to the flight deck of an airplane unless the person being admitted is—

(i) A crewmember,

(ii) An inspector of the civil aviation authority responsible for oversight of the part 129 operator, or

(iii) Any other person authorized by the civil aviation authority responsible for oversight of the part 129 operator.

(e) The requirements of paragraph (a) through (d) except (d)(3), do not apply to transport category passenger carrying airplanes originally type certificated with a maximum passenger seating configuration of 19 seats or less, or to all-cargo airplanes with a payload capacity of 7,500 pounds or less.

Issued in Washington, DC on DEC 23 2002

Marion Blakey

Marion Blakey

Administrator

Certified to be a True Copy

Bonnie Fritts

Bonnie Fritts