Will publish in part 6 of the Federal Register on Oct. 5, 2004

[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 71 and 97

[Docket No. FAA-2004-19247; Notice No. 04-12]

RIN 2120-AI39

Revision of Incorporation by Reference Provisions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA is proposing to remove the incorporation by reference of certain FAA Orders and terminal aeronautical charts from the provisions of 14 CFR part 97 and incorporate by reference instead instrument procedures that are documented on FAA forms. The FAA also proposes a conforming amendment in 14 CFR part 71. This change would ensure that the appropriate material is incorporated in the FAA's regulations.

DATE: Send your comments on or before November 4, 2004 ~~[Insert date 30 days after date of publication in the Federal Register]~~

ADDRESSES: You may send comments identified by docket number FAA-200X-XXXXX using any of the following methods:

- DOT Docket web site: Go to http://dms.dot.gov and follow the instructions for sending your comments electronically.
- Government-wide rulemaking web site: Go to http://www.regulations.gov and follow the instructions for sending your comments electronically.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW, Nassif Building, Room PL-401, Washington, DC 20590-001.
- Fax: 1-202-493-2251.
- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, S.W., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the "SUPPLEMENTARY INFORMATION" section of this document.

Privacy: We will post all comments we receive, without change, to http://dms.dot.gov, including any personal information you provide. For more information, see the Privacy Act discussion in the SUPPLEMENTARY INFORMATION section of this document.

Docket: To read background documents or comments received, go to http://dms.dot.gov at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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.Schneider@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The FAA also invites comments relating to the

economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA asks that you send two copies of written comments.

The FAA will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed 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.

Privacy Act: Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment 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 19477-78) or you may visit http://dms.dot.gov.

Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed late if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

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. The FAA 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:

(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.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. Be sure to identify the docket number, notice number, or amendment number of this rulemaking.

Background

On December 17, 2002, the FAA published a Notice of Proposed Rulemaking (NPRM) titled "Area Navigation (RNAV) and Miscellaneous Amendments" (67 FR 77326; Dec. 17, 2002). In that NPRM, the FAA proposed to revise § 97.20 to remove the incorporation by reference (IBR) of standard instrument approach procedures as described on FAA Forms 8260-3, 8260-4 and 8260-5. The FAA instead proposed to incorporate by reference into § 97.20 FAA Orders 8260.3B, United States Standard for Terminal Instrument Procedures (TERPS) and 8260.19C, Flight Procedures and

Airspace, and terminal aeronautical charts. Incorporating a publication by reference into the Code of Federal Regulations means that the information contained in that publication in fact becomes regulatory. Any subsequent modification is a rule change and is accomplished by rulemaking under the Administrative Procedures Act.

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 adopted the proposed amendments to 14 CFR § 97.20. Upon staff review, the FAA concluded that the incorporation by reference of FAA Orders 8260.3B and 8260.19C and the terminal aeronautical charts was in error and resulted in the inappropriate designation of certain material as regulatory.

Section 97.20

Specifically, FAA Order 8260.3 provides agency policy and standardized methods for designing instrument flight procedures. The FAA follows this policy for the preparation, approval, and promulgation of terminal instrument procedures. FAA Order 8260.19, provides guidance for administering the Flight Procedure and Airspace Program. It also defines responsibilities, establishes criteria and provides standards to assure effective and orderly processing of all types of procedure actions.

Section 91.175(a) requires a pilot to use an instrument procedure prescribed in part 97, unless otherwise authorized by the FAA, when it is necessary to conduct an instrument letdown to a civil airport. Consistent with this requirement, the FAA, via rulemaking, adopts instrument procedures by amending § 97.20. While the adopted instrument procedures become part of § 97.20, the agency policy and criteria for designing, preparing and approving the procedure should not become part of § 97.20, as

they are not regulatory actions and should not be incorporated by reference into part 97. Similarly, it is not appropriate to incorporate by reference terminal aeronautical charts, as those charts merely depict the instrument procedures for use by the pilot.

The FAA is proposing to revise §97.20 by removing the IBR of FAA Orders 8260.3 and 8260.19. Additionally, the IBR of terminal aeronautical charts would be removed. The FAA instead would incorporate by reference the instrument procedures detailed on FAA Forms 8260-3, 8260-4, 8260-5 and 8260-15A into § 97.20.

The proposed text for § 97.20 would set forth the FAA Forms that contain the instrument procedures that would be IBR, and provide information to the public as to where the procedures may be examined. It also provides information on the availability of aeronautical charts depicting standard instrument procedures.

The FAA currently coordinates all new and revised TERPS criteria and procedures in Orders 8260.3 and 8260.19 with those organizations affected, both public and private, in accordance with the coordination process contained in FAA Order 1320.1, *FAA Directives Systems*. In addition, the agency coordination process for these two orders includes any person requesting the opportunity to comment.

Section 71.11

The FAA proposes to delete paragraph (b), and the existing paragraph (c) would be redesignated as paragraph (b). This section would conform to § 97.20, which would remove the IBR of FAA Orders 8260.3 and 8260.19.

The Director of the Federal Register must approve all rules that incorporate by reference material into the Code of Federal Regulations. If this rule is adopted as proposed, the FAA will submit a final rule to the Director of the Federal Register seeking

approval to incorporate by reference into § 97.20 the instrument procedures on FAA forms.

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 proposed 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, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Assessment

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 (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 private sector, of $100 million or more annually (adjusted for inflation).

We determined this proposed 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.

However, 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 proposed regulation. Since this NPRM is administrative in nature removing inappropriate interpretation by reference 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 proposed rule will have a minimal economic impact. The FAA requests comments with supporting justification regarding the FAA determination of minimal impact.

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 proposed 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 proposed 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 the same costs on domestic and international entities and thus have a neutral trade impact.

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 NPRM does not contain such a mandate. The requirements of Title II of the Act do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this proposed 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 1050.1D 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 proposed rulemaking action qualifies for a categorical exclusion.

Regulations that Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this NPRM 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), Weather.

The Proposed Amendments

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 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 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, and 8260-15A, and were approved for incorporation by reference by the Director of the Federal Register pursuant to 5 U.S.C. 552(a) and 1 CFR Part 51. The standard instrument procedures are available for examination at the Rules Docket (AGC-200) and at the National Flight Data

Center, 800 Independence Avenue, SW., Washington, DC 20590, and at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

(c) Standard instrument procedures are depicted on aeronautical charts published by the FAA National Aeronautical Charting Office and 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 SEP 2 9 2004

John M. Allen
Acting Director, Flight Standards Service

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