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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA-2016-9154; Amdt. No. 91-348]

RIN 2120-AK88

Incorporation by Reference of ICAO Annex 2; Removal of Outdated North Atlantic Minimum Navigation Performance Specifications

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule better aligns FAA regulations regarding the North Atlantic (NAT) Minimum Navigation Performance Specifications (MNPS) with the relevant International Civil Aviation Organization (ICAO) standards. The ICAO NAT Region is transitioning from the decades-old MNPS navigation specification to a more modern, Performance-Based Navigation (PBN) specification. This rule also incorporates by reference the current version of Annex 2 (“Rules of the Air”) to the Convention on International Civil Aviation (the “Chicago Convention”), hereinafter referred to as “ICAO Annex 2,” in the FAA’s regulations.

DATES: This regulation is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The incorporation by reference of the publication listed in the rule is approved by the Director of the Federal Register as of [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see “How To Obtain Additional Information” in the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Kevin C. Kelley, Flight Technologies Division, Flight Standards Service, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8854; e-mail Kevin.C.Kelley@faa.gov. For questions about ICAO Annex 2, contact the FAA’s Office of International Affairs at (202) 267-1000.

SUPPLEMENTARY INFORMATION:

Authority for this Rulemaking

The FAA is responsible for the safety of flight in the U.S. and for the safety of U.S. civil operators, U.S.-registered civil aircraft, and U.S.-certificated airmen throughout the world. The FAA’s authority to issue rules on aviation safety is found in title 49 United States Code (U.S.C.). Subtitle I, Section 106(f) and (g), describe the authority of the FAA Administrator. Subtitle VII of title 49, Aviation Programs, describes in more detail the scope of the agency’s authority. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise his authority consistently with the obligations of the U.S. Government under international agreements.

This rule is promulgated under the authority described in title 49, subtitle VII, part A, subpart III, section 44701, General requirements. Under that section, the FAA is charged broadly with promoting safe flight of civil aircraft in air commerce by prescribing, among other things, regulations and minimum standards for practices,

methods, and procedures that the Administrator finds necessary for safety in air commerce and national security.

This rule is also promulgated pursuant to title 49 U.S.C. 40103(b)(1) and (2), which charge the FAA with issuing regulations: (1) to ensure the safety of aircraft and the efficient use of airspace; and (2) to govern the flight of aircraft for purposes of navigating, protecting and identifying aircraft, and protecting individuals and property on the ground.

This regulation is within the scope of FAA's authority under the statutes cited above, because it amends 14 CFR 91.703, 91.705, 91.905, and 91.1027 and Appendices C and G to part 91, to better align FAA regulations with changes to international standards for operations in airspace over the high seas. This rule also incorporates by reference the current version of ICAO Annex 2 in FAA regulations.

I. Background

A. Summary of the NPRM

On September 29, 2016, the FAA published an NPRM (81 FR 66877) in which it proposed several amendments to part 91 to improve the alignment between FAA regulations and ICAO standards relevant to operations over the North Atlantic and in other airspace over the high seas. As a result of ICAO renaming the NAT MNPS airspace as the NAT High Level Airspace (NAT HLA) and requiring PBN specifications to operate in NAT HLA by January 2020, the references to NAT MNPS in FAA regulations are outdated. Accordingly, the FAA proposed to remove all instances of MNPS in 14 CFR part 91.

In the NPRM, the FAA also stated that the prescriptive references to navigational specifications in part 91 were not necessary, since operators are required to comply with

ICAO Annex 2, when operating over the high seas. Article 12 of the Chicago Convention states, in pertinent part, “Over the high seas, the rules in force [with respect to the flight and maneuver of aircraft] shall be those established under this Convention.” The Foreword to ICAO Annex 2 further states that the ICAO “...Council resolved, in adopting Annex 2 in April 1948 and Amendment 1 to the said Annex in November 1951, that the Annex constitutes [r]ules relating to the flight and [maneuver] of aircraft within the meaning of Article 12 of the [Chicago] Convention.” The Foreword to ICAO Annex 2 further states that, “[o]ver the high seas, therefore, these rules apply without exception.” The international standard in ICAO Annex 2, paragraph 5.1.1, states that: “Aircraft shall be equipped with suitable instruments and with navigation equipment appropriate to the route to be flown.”

In the NPRM, the FAA also proposed to incorporate by reference the current version of ICAO Annex 2.

II. Discussion of Public Comments and Final Rule

A. Comments and Final Rule

The FAA did not receive any comments on the NPRM. With this final rule, the FAA adopts the changes as proposed, except as follows. First, in § 91.703, the name of the relevant ICAO unit, the name of the street on which the unit is located, the address of the unit’s website, and the address of the National Archives and Records Administration (NARA) website where information about material incorporated by reference into federal regulations can be found have all been updated in the final rule to reflect current information. Second, the FAA neglected to include the relevant ICAO unit’s telephone number and email address, as well as the agency phone number for questions from the public regarding ICAO Annex 2, in the NPRM and includes them in this final rule.

Third, in the NPRM, the FAA also proposed to remove, but inadvertently neglected to propose to reserve for future use, § 91.705 and Appendix C to part 91. The FAA reserves for future use § 91.705 and Appendix C to part 91 in this final rule. These are minor technical changes that have no substantive effect on regulated entities. Except as described in this paragraph, explanations for the changes to §§ 91.703, 91.705, and 91.1027 and Appendices C and G to part 91 are contained in the NPRM.

Further, in preparing the final rule, the FAA also discovered that it had not proposed to remove the reference to “91.705 Operations within the North Atlantic Minimum Navigation Performance Specifications Airspace” from the list of rules subject to waiver in § 91.905 although the NPRM proposed to remove, and this final rule does remove, § 91.705 from the CFR. Consequently, removing the reference to § 91.705 from the list of rules subject to waiver in § 91.905 has no substantive effect on regulated entities. The FAA removes the reference to § 91.705 from § 91.905 in this final rule.

B. Incorporation by Reference

As part of the changes proposed in the NPRM, the FAA proposed to incorporate by reference the current version of ICAO Annex 2, up to and including Amendment 45, applicable on November 10, 2016. ICAO Annex 2 contains the ICAO standards that make up the rules of the air applicable to the flight and maneuver of civil aircraft operating over the high seas. ICAO Annex 2, including all amendments through Amendment 32, was incorporated by reference into § 91.703, effective April 9, 1997 (62 FR 17480, Apr. 9, 1997). Since then, an additional thirteen amendments to ICAO Annex 2 have been published, creating an ambiguity about the version of ICAO Annex 2 applicable to operators of U.S.-registered civil aircraft in high seas airspace. The

amendments to ICAO Annex 2 since the previous incorporation by reference are described in Table 1 in the NPRM (81 FR at 66878).

The FAA noted in the proposed rule that the incorporation by reference of ICAO Annex 2 in § 91.703 did not include the proper language conveying the approval of the Director of the Federal Register. The FAA proposed to incorporate by reference the current version of ICAO Annex 2, including appropriate language to reflect the approval of the Director of the Federal Register. This final rule incorporates by reference ICAO Annex 2, up to and including Amendment 45, applicable on November 10, 2016, into § 91.703.

ICAO Annex 2 is available through the International Civil Aviation Organization (ICAO), Marketing and Customer Relations Unit, 999 Robert Bourassa Boulevard, Montreal, Quebec H3C 5H7, Canada. Also, you may obtain this document on the Internet at <http://store1.icao.int/> or by contacting the ICAO Marketing and Customer Relations Unit by telephone at (514) 954-8022 or by email at sales@icao.int. It is also available for inspection at the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

III. Regulatory Notices and Analyses

A. Regulatory Evaluation

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall 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 (Public Law 96-354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Public Law 96-39) prohibits

agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Agreements Act requires agencies to consider international standards and, where appropriate, that they be 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 with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this rule. The reasoning for this determination follows.

This rulemaking better aligns the FAA's regulations regarding operations in NAT airspace with the relevant ICAO standards. ICAO's NAT Region is transitioning from the decades-old MNPS navigation specification to a more modern, PBN specification. The FAA is also incorporating by reference the current version of ICAO Annex 2 in § 91.703. This action removes all references to MNPS from 14 CFR part 91 and will not impose any new requirements.

Under the Chicago Convention, flights operating in international airspace over the high seas must follow the international standards set forth in ICAO Annex 2. United

States operators have historically complied with provisions relevant to high seas airspace in ICAO Annex 2. As operators are already complying with ICAO's provisions relevant to operations over the high seas, the FAA believes this rule removing references to MNPS from 14 CFR part 91 and incorporating by reference the current version of ICAO Annex 2 will impose minimal cost. The FAA requested comments on this determination and received none. Therefore, the FAA maintains that this final rule will impose only minimal cost, has determined that this rule 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.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Public Law 96-354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives 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 this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration." 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 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 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.

The FAA recognizes that there are substantial numbers of small entities operating aircraft over the high seas. This rule, however, does not impose a significant economic impact. Flights in international airspace over the high seas must follow the international standards set forth in ICAO Annex 2. Today, United States operators comply with ICAO Annex 2 when flying over the high seas. This rule updates United States regulations to better align with the current version of ICAO Annex 2 effective in high seas airspace, and imposes no new requirements. Thus, all affected entities will incur only minimal costs. The FAA requested and received no comment on the proposed minimal cost determination, and therefore maintains the same minimal cost determination for the final rule.

Therefore, as provided in section 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Public Law 96-39), as amended by the Uruguay Round Agreements Act (Public Law 103-465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the

United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. 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 rule and determined that it improves alignment between FAA regulations and international ICAO standards for the purpose of protecting safety. Consequently, the rule complies with the Trade Agreements Act, as amended by the Uruguay Round Agreements Act.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) 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 (in 1995 dollars) 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 \$155 million in lieu of \$100 million. This rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. 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 requirement for information collection associated with this final rule.

F. International Compatibility

In keeping with U.S. obligations under the Chicago Convention, it is FAA policy to conform to ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has published differences with ICAO Annex 2 in the United States Aeronautical Information Publication (AIP), section GEN 1.7, “Differences From ICAO Standards, Recommended Practices, and Procedures.” The differences listed in the U.S. AIP for ICAO Annex 2 are minor in nature and have no relation to the ICAO Annex 2 requirement for aircraft to be operated with navigation equipment appropriate to the route to be flown. This is consistent with the FAA’s support of international compatibility and its obligations under the Chicago Convention.

G. Environmental Analysis

FAA Order 1050.1F 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 this rulemaking action qualifies for the categorical exclusion identified in paragraph 5-6.6 and involves no extraordinary circumstances.

IV. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal 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.

B. Executive Order 13211, Regulations that Significantly Affect Energy Supply, Distribution, or Use

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

C. Executive Order 13609, International Cooperation

Executive Order 13609, Promoting International Regulatory Cooperation, (77 FR 26413, May 4, 2012) promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policy and agency responsibilities of Executive Order 13609, Promoting International Regulatory Cooperation and has determined that it will support international regulatory cooperation. This rule removes potential ambiguities about the version of ICAO Annex 2 applicable to the operations of U.S.-registered civil aircraft over the high seas. ICAO Annex 2 contains the international standards applicable to civil aircraft operations over the high seas. This rule also removes outdated references to MNPS, consistent with ICAO’s transition to PBN specifications for operations in the NAT HLA.

D. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, directs that, unless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed. In addition, any new incremental costs associated with new regulations shall, to the extent permitted by law,

be offset by the elimination of existing costs. Only those rules deemed significant under section 3(f) of Executive Order 12866, “Regulatory Planning and Review,” are subject to these requirements. As determined in Section IV.A., above, this is not a significant rule under Executive Order 12866. Accordingly, this rule is not subject to the requirements of Executive Order 13771.

V. How To Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the Internet —

1. Search the Federal eRulemaking Portal (<http://www.regulations.gov>);
2. Visit the FAA’s Regulations and Policies Web page at http://www.faa.gov/regulations_policies/ or
3. Access the Government Publishing Office’s Web page at <http://www.gpo.gov/fdsys/>.

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9680.

B. Comments Submitted to the Docket

Although the FAA has not received any comments on the proposed rule, any comments submitted to the docket for this rulemaking in the future may be viewed by going to <http://www.regulations.gov> and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA’s 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.).

C. 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. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the FOR FURTHER INFORMATION CONTACT heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 91

Air carrier, Air taxis, Air traffic control, Aircraft, Airmen, Aviation safety, Incorporation by reference.

The Amendment

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

PART 91--GENERAL OPERATING AND FLIGHT RULES

1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 1155, 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506-46507, 47122, 47508, 47528-47531, 47534, Pub. L. 114-190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

2. Amend § 91.703 as follows:

a. Amend paragraphs (a)(1) and (3) by removing the word “annex” and adding, in its place, the word “Annex”;

b. Remove the first sentence of paragraph (a)(4); and

c. Revise paragraph (b) to read as follows:

§ 91.703 Operations of civil aircraft of U.S. registry outside of the United States.

* * * * *

(b) Annex 2 to the Convention on International Civil Aviation, Rules of the Air, Tenth Edition—July 2005, with Amendments through Amendment 45, applicable November 10, 2016, is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the FAA must publish a document in the Federal Register and the material must be available to the public. All approved material is available for inspection at U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590 and is available from the International Civil Aviation Organization (ICAO), Marketing and Customer Relations Unit, 999 Robert Bourassa Boulevard, Montreal, Quebec H3C 5H7, Canada; <http://store1.icao.int/>; or by contacting the ICAO Marketing and Customer Relations Unit by telephone at 514-954-8022 or by email at sales@icao.int. For questions about ICAO Annex 2, contact the FAA's Office of International Affairs at (202) 267-1000. It is also available for inspection 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.

§ 91.705 [Removed and Reserved]

3. Remove and reserve § 91.705.

§ 91.905 [Amended]

4. Amend § 91.905 by removing “91.705 Operations within the North Atlantic Minimum Navigation Performance Specifications Airspace.”

§ 91.1027 [Amended]

5. Amend § 91.1027 (a)(2) by removing “MNPS.”

APPENDIX C to PART 91 – [Removed and Reserved]

6. Remove and reserve Appendix C to part 91.

7. Amend Appendix G to part 91 by revising paragraph (a)(2) of section 8 to read as follows:

Appendix G to Part 91—Operations in Reduced Vertical Separation Minimum (RVSM) Airspace

* * * * *

Section 8. Airspace Designation

(a) * * *

(2) RVSM may be effective in the High Level Airspace (HLA) within the NAT. The HLA within the NAT is defined by the volume of airspace between FL 285 and FL 420 (inclusive) extending between latitude 27 degrees north and the North Pole, bounded in the east by the eastern boundaries of control areas Santa Maria Oceanic, Shanwick

Oceanic, and Reykjavik Oceanic and in the west by the western boundaries of control areas Reykjavik Oceanic, Gander Oceanic, and New York Oceanic, excluding the areas west of 60 degrees west and south of 38 degrees 30 minutes north.

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Issued under authority provided by 49 U.S.C. 106(f) and (g), 40101(d)(1), 40103(b)(1) and (2), 40105(b)(1)(A), and 44701(a)(5) in Washington, DC, on July 18, 2017.

Michael Huerta,
Administrator.

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