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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No.: FAA-2019-0562; Amdt. No. 91-355]

RIN 2120-AL16

Revision to Automatic Dependent Surveillance-Broadcast (ADS-B) Out Equipment and Use Requirements

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Interim Final rule.

SUMMARY: This interim final rule modifies the requirement that all aircraft equipped with Automatic Dependent Surveillance-Broadcast Out (ADS-B Out) must transmit at all times. This rulemaking provides an exception to ADS-B requirements, removing the transmission requirement for sensitive operations conducted by Federal, State and local government entities in matters of national defense, homeland security, intelligence and law enforcement. The changes provide relief to those Federal, State and local government agencies that operate aircraft equipped with ADS-B Out but need the ability to terminate the transmission signal when conducting sensitive national defense, homeland security, intelligence and law enforcement missions that could be compromised by transmitting real time identification and positional flight information over ADS-B. This rulemaking also allows the FAA to except certain aircraft from operating a transponder or

transmitting ADS-B Out, when doing so would jeopardize Air Traffic Control (ATC) functions.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: Send comments identified by docket number FAA-2019-0562 using any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.
- Mail: Send comments to Docket Operations, M-30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE, Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.
- Hand Delivery or Courier: Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Fax: Fax comments to Docket Operations at 202-493-2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

Docket: Background documents or comments received may be read at <http://www.regulations.gov> at any time. Follow the online instructions for accessing the docket or Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Scott Rosenbloom, Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267-2943; email scott.rosenbloom@faa.gov.

SUPPLEMENTARY INFORMATION:

I. Authority and Good Cause for this Rulemaking

A. Legal Authority

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code (49 U.S.C.). Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103, Sovereignty and use of airspace, and Subpart III, Section 44701, General requirements. Under section 40103, the FAA is charged with prescribing regulations on: (1) The flight of aircraft, including regulations on safe altitudes; (2) the navigation, protection, and identification of aircraft; and (3) the safe and efficient use of the navigable airspace. Under section 44701, the FAA is charged with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods,

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

This interim final rule is within the scope of sections 40103 and 44701 because it exempts certain operations from the ADS-B Out and transponder-on requirements in order to preserve the security and safety of these operations, and the safe execution of air traffic control functions.

B. Good Cause for Dispensing with Notice and Comment and for Immediate Adoption

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C.) authorizes agencies to dispense with notice and comment procedures for rules when the agency for “good cause” finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under this section, an agency, upon finding good cause, may issue a final rule without seeking notice and comment prior to the rulemaking.

The FAA finds there is good cause to issue the rule without seeking prior notice and comment because complying with the transmission requirement while waiting for a proposed rule to be finalized will draw greater attention to operational vulnerabilities that expose government aircraft performing sensitive missions to immediate risk and compromise the operations security of missions necessary for national defense, homeland security, intelligence and law enforcement. In support of this determination, the FAA notes that other organizations have discussed these vulnerabilities and have urged FAA to address them promptly, including in the 2018 GAO Report *Urgent Need for DOD and FAA to Address Risks and Improve Planning for Technology That Tracks Military Aircraft (GAO-18-177)*, which can be found in the docket for this interim final rule.

Additionally, the FAA finds good cause to revise the regulation to permit pilots to turn off their transponders in certain circumstances where the safe provision of air traffic control services would be compromised. By regulation, a pilot is required in controlled airspace to operate with his or her transponder on at all times. During the development of this rule, the FAA determined there are circumstances when air traffic control has directed the pilots of non-lead aircraft engaged in formation flights to turn off their transponders. Controllers took this action because the close proximity of the aircraft in formation flight creates a risk to the safe execution of ATC services through audio and visual collision alerts and overlapping information displayed to the controller. As the safe provision of air traffic services necessitates continuation of ATC's policy, seeking prior public notice and comment on this provision is unnecessary.

In addition, in accordance with 5 U.S.C. 553(d)(1), the FAA is making this interim final rule effective upon publication because it is a substantive rule that relieves a restriction and there is an immediate need for operators conducting sensitive government missions to exercise relief from the transmission requirement.

II. Comments Invited

Consistent with the Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 11034; February 26, 1979), which provide that to the maximum extent possible, operating administrations for the DOT should provide an opportunity for public comment on regulations issued without prior notice, the Department requests comment on this interim final rule. The Department encourages persons to participate in this rulemaking by submitting comments. The Department will

consider late filed comments to the extent practicable. This interim final rule may be amended based on comments received.

III. Background

On October 7, 2007, the FAA published a notice of proposed rulemaking (NPRM) to mandate ADS-B Out.¹ The FAA deemed it critical to move from ground-based surveillance and navigation to more dynamic and accurate airborne-based systems and procedures in order to modernize America's air transportation system to make flying even safer, more efficient, and more predictable. ADS-B equipment is an advanced surveillance technology that combines an aircraft's positioning source, aircraft avionics, and a ground infrastructure to create an accurate surveillance interface between aircraft and air traffic control.

ADS-B Out, which is the subject of this rulemaking, periodically broadcasts information about each aircraft, such as identification, current position, altitude, and velocity, through an onboard transmitter. ADS-B Out provides air traffic controllers with real-time position information that is, in most cases, more accurate than the information available with current radar-based systems. With more accurate information, ATC will be able to position and separate aircraft with improved precision and timing.

In response to the ADS-B Out NPRM published in 2007, the Department of Defense (DOD) submitted a comment² identifying concerns with the mandate for all

¹ *Automatic Dependent Surveillance—Broadcast (ADS-B) Out Performance Requirements to Support Air Traffic Control (ATC) Service*, NPRM, 72 FR 56947 (Oct. 5, 2007).

² <https://www.regulations.gov/docket?D=FAA-2007-29305>

aircraft equipped with ADS-B Out to transmit that information at all times. The concern was based on this new standard being adopted by a multitude of aviation authorities worldwide, advancing aircraft surveillance capabilities, but subjecting it to potential security vulnerabilities. On May 28, 2010, the FAA published the final rule, *Automatic Dependent Surveillance-Broadcast (ADS-B) Out Performance Requirements to Support Air Traffic Control (ATC) Service*.³ The final rule was effective on August 11, 2010, and mandates that all aircraft operating in the airspace described in § 91.225 of the rule have ADS-B Out technology operational by January 1, 2020. Additionally, the final rule requires aircraft equipped with ADS-B Out technology to transmit at all times, irrespective of the date of equipage. The final rule did not include a national security or law enforcement exception to the requirement that all aircraft that are equipped with ADS-B Out must transmit ADS-B Out at all times, and the FAA noted that it was not operationally feasible to assign different performance requirements dependent on the nature of the operation. However, the FAA did state that it would collaborate with the DoD and other federal agencies to accommodate national defense missions while supporting the needs of all other NAS users.

Over the last few years, the rapid evolution of flight tracking technology in the private sector has impaired the ability of Federal, State and local government entities to successfully execute sensitive missions for the purposes of national defense, homeland security, intelligence and law enforcement when required to transmit ADS-B Out. The

³ *Automatic Dependent Surveillance-Broadcast (ADS-B) Out Performance Requirements to Support Air Traffic Control (ATC) Service*, Final Rule, 75 FR 30193 (May 28, 2010).

FAA has hosted multiple interagency meetings to discuss ADS-B security risk mitigations for sensitive flights. Interagency participants included DOD, Department of Homeland Security (DHS), Federal Bureau of Investigation (FBI), and other intelligence and law enforcement entities. All interagency participants voiced strong concerns about the negative impact to their respective missions from public access to real time ADS-B flight identification and positional data.

Additionally, the FAA is aware of some instances where operating a transponder or transmitting ADS-B Out would jeopardize the safe execution of air traffic control functions. For example, when aircraft are conducting formation flight, the close proximity of the aircraft to each other causes distracting audio and visual alerts on a controller's display. Controllers are able to silence these alerts, but are still subject to multiple, overlapping information elements on the controller's display that make it difficult to discern information.

This rule will give the FAA the necessary flexibility to adjust its air traffic control procedures to accommodate sensitive government missions and otherwise ensure the safe execution of air traffic control functions. The FAA expects this rule to maintain the safety and efficiency of the NAS without negative effect on users.

IV. Discussion of the Rule

This rulemaking amends Title 14, Code of Federal Regulations (CFR), § 91.225(f), to add exceptions to the requirement that each person operating an aircraft equipped with ADS-B Out must operate such equipment in the transmit mode at all times. Section 91.225, paragraph (f), is revised to provide relief from the mandatory

transmit requirement for sensitive missions for the purposes of national defense, homeland security, intelligence and law enforcement where transmitting ADS-B Out would compromise safety or the security of the mission. Paragraph (f) is further revised to allow ATC to direct aircraft not to transmit if transmitting would jeopardize the safe execution of air traffic control functions. This rulemaking also amends 14 CFR § 91.215(c) to expressly allow ATC to direct aircraft to cease transponder operations in situations where operating the transponder would jeopardize the safe execution of ATC functions.

A. Exception for Aircraft Performing a Sensitive Mission for National Defense, Homeland Security, Intelligence or Law Enforcement Purposes.

The FAA acknowledges that there will be some sensitive missions conducted by Federal, State, or local governments that could be compromised by sending flight data over ADS-B. Therefore, this rulemaking allows the aircrew to disable ADS-B transmissions if the aircraft is performing a sensitive mission for the purposes of national defense, homeland security, intelligence or law enforcement *and* if transmitting could reasonably be expected to compromise the security of the mission or pose a risk to the aircraft, crew, or people and property in the air or on the ground.

Aircraft that transmit in compliance with § 91.225(f) may be detectable by the general public using readily available and inexpensive open source third party networked receivers. ADS-B Out avionics transmit flight data information once per second, including critical information such as the aircraft identification, Global Positioning System position, velocity, and altitude. Independent third party flight tracking software is

capable of interpreting the raw ADS-B Out data and presenting a graphical display of the aircraft's exact flight path over the ground in real time.

The proliferation of open source third party flight tracking networks is generally not a concern for non-sensitive flight operations, which comprise the overwhelming majority of total flight operations. Commercial airlines, in particular, have embraced open information sharing of their flight data since the late 1990s. However, if the success of a sensitive flight mission is dependent on its ability to operate undetected by the potential adversary or target, a third party's ability to independently track who and where an aircraft is in real time can pose a risk to the success of the mission, and, at times, to the safety of the personnel and assets conducting the mission.

The operations security of a sensitive government mission is considered compromised when an adversary is able to obtain critical information about that mission because the adversary now has the potential to use that critical information to prevent the successful completion of the mission, including endangering the aircraft. Specifically, special U.S. Federal flights, State or local government flights, including contractual flights in support of those operations, conducting sensitive missions, such as but not limited to, combat air patrol, intercept, counter-drug, counter-terrorism, VIP transport, homeland security, and border surveillance may be relieved from openly broadcasting their identity and position over a link that is easily received and resolved by third-party actors and the general public.

The FAA will defer to each agency regarding whether a mission falls under this exception, and determine whether transmitting would compromise the operations security of the mission or pose a safety risk to the aircraft, crew, or people and property in the air

or on the ground. Once the FAA receives a request to terminate broadcasting, the FAA will issue authorizations to turn ADS-B Out off following an assessment that the operations can be accommodated without any negative impact on the safety and efficiency of the NAS. The FAA will not make an independent assessment of national security, homeland security, or law enforcement considerations. The purpose of the rule is to allow law enforcement and other security agencies to take appropriate measures to protect operational security and the safety of their operators. The FAA expects that each agency will establish its own policies and conduct its own assessment to determine whether the mission should be excepted from the transmitting requirement. Because this relief is being granted to support sensitive security operations, however, the FAA anticipates that non-transmission of ADS-B Out will not be routinely used by agencies that have been granted this relief. The FAA further expects that each agency will conduct this assessment on a broad mission set basis; there is no intent for the FAA to administer ADS-B Out off authorizations on a dynamic, per flight, per mission or per unit basis. The FAA believes there will be no impact to safety or the efficient use of the NAS, and as such per mission authorizations are unnecessary and could result in disruption to sensitive operations that must be conducted with immediacy. However, as with all operations in the NAS, ATC will continue to monitor trends and changes that could impact safety and will modify or amend authorizations to the extent that operations have a negative effect.

Once an agency has determined the broad mission sets that should be excepted from the transmitting requirement using its internal policies and assessment criteria, it must contact the FAA for authorization to conduct these broad mission sets without

transmitting. In order to maintain both the security of the qualifying mission sets and the safety of the NAS, the FAA must verify the following: aircraft equipage and the inclusion of that aircraft into existing FAA support and protection processes for the classified and sensitive unclassified missions conducted in the NAS. This verification is necessary to ensure safe separation when qualifying mission sets are excepted from the transmitting requirement. The FAA does not intend to coordinate ADS-B Out off authorizations on a dynamic, per flight, per mission, or per unit basis. Rather, the FAA expects coordination for ADS-B Out off authorization to be handled at the highest possible agency organization level. For instance, ADS-B Out off authorizations for DoD aircraft should be handled at the DoD agency level, not at an individual service level (i.e., Air Force, Army, Navy), and not at an individual unit level (i.e., 89th Airlift Wing at Joint Base Andrews).

To initiate the process, Federal, State and local government organizations should contact FAA System Operations Security via email at 9-ATOR-HQ-IFOS@faa.gov. To facilitate timely response, government organizations should ensure that the subject line of the email to 9-ATOR-HQ-IFOS@faa.gov contains “ADS-B Authorization under 14 CFR 91.225(f)(1)”, and that the body of the email includes the government organization point-of-contact name and contact information. Once a Federal, State or local government entity receives authorization by following the process listed above, it may conduct those operations for which it received authorization without transmitting. The FAA will make adjustments if there is an impact on air traffic control systems, including ADS-B, or the NAS that makes such changes necessary.

There may be some broad mission sets conducted by Federal, State, or local governments that do not meet their internal assessment determination for national security risk or risk to the aircraft, crew, or people and property in the air or on the ground, but may still require relief from the transmission requirement. In these situations, an agency can still seek relief through the exemption process. As such, the FAA recommends that agencies review exemptions where the FAA has provided relief from current transponder requirements, as these current exemptions will provide valuable guidance regarding how FAA will consider additional requests in a way that does not compromise the safety or efficient operation of the NAS. After review, an agency could then request an amendment to those exemptions and add a request for relief from the applicable ADS-B Out requirements under 14 CFR 91.225. For example, the U.S. Navy and U.S. Air Force have exemptions for transponder off areas. These exemptions could be amended to include ADS-B Out relief, or an agency could petition the FAA to designate new operational training areas exempt from the ADS-B transmitting requirement. If no current exemptions exist, an agency could petition for a new exemption under 14 CFR part 11. As in the case of the other provisions of this rule, FAA does not believe that the use of such exemptions should become routine, and should be limited to areas in which such relief represents an integral mission need of the requestor.

B. Exception to Preserve the Safe Execution of Air Traffic Control Functions.

This rulemaking also excepts certain aircraft from operating a transponder or transmitting ADS-B, when such transmissions would compromise the safe execution of air traffic control functions as determined by ATC. The exception allows ATC to direct

aircraft not to transmit only when ATC has determined that such transmissions would compromise the safe execution of ATC functions.

One instance during which aircraft operating a transponder or transmitting ADS-B in accordance with § 91.215(c) and § 91.225(f), respectively, causes distracting alerts for air traffic controllers is when all aircraft flying in formation are transmitting. Formation flight involves more than one aircraft which, by prior arrangement between the pilots, operate as a single aircraft with regard to navigation and position reporting to ATC. Separation between aircraft within the formation is the responsibility of the flight lead and the pilots of the other aircraft in the flight. This includes transition periods when aircraft within the formation are maneuvering to attain separation from each other to effect individual control, and during join-up and breakaway. A standard formation is one in which a proximity of no more than 1 mile laterally or longitudinally and within 100 feet vertically from the flight leader is maintained by each wingman.⁴ Formation flying is used by both military and civilian pilots.

During formation flight, the close proximity of aircraft and their data/identification tags displayed on the radar display can, at a minimum, clutter the ATC display making it hard for ATC to determine the exact location of the aircraft to provide appropriate separation from other aircraft. Additionally, an air traffic controller will receive repeated audio and visual alerts (flashing data tag) that aircraft are within close proximity to each other. These alerts can distract controllers and redirect their attention to

⁴ Aeronautical Information Manual, Pilot/Controller Glossary.

aircraft with approved separation and away from other instances where the controller may need to provide control instruction to maintain necessary separation. In these cases, once aircraft are “joined up” as a flight, it is in the best interest of flight safety to direct subsequent “wingmen” in the flight to squawk stand-by or stop squawk since control instructions are provided to only the lead and there are established separation minima from formation flights. In the instance of non-standard formation, it is general practice to have the lead aircraft squawk, along with the trail/last aircraft, a subset beacon code with altitude. In order to minimize these conflicting or overlapping data reports, this rule allows ATC to direct only the lead aircraft flying in formation to transmit ADS-B or operate his or her transponder.

The previous example illustrates one instance the FAA has identified where operating a transponder or transmitting ADS-B jeopardizes the safe execution of air traffic control functions. This requirement should not be construed as requiring that all aircraft equip such that the pilot can turn ADS-B transmission off. Rather, this requirement provides ATC with the flexibility to direct pilots to turn ADS-B or transponder equipment off in certain situations. If a pilot is directed to turn ADS-B off, and is unable to do so, ATC will work with the pilot to determine a safe alternative course of action. Ultimately, this rule allows a controller to direct pilots to turn off ADS-B or transponder equipment if ATC determines that leaving the equipment on would jeopardize the safe execution of air traffic control functions. The FAA expects operators to continue using the exemption process for operations that do not meet the safe execution of air traffic control functions standard included in this rule.

V. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 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 (Pub. L. 96-354), as codified in 5 U.S.C. 603 *et seq.*, requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96-39), as amended, 19 U.S.C. Chapter 13, 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 (Pub. L. 104-4), as codified in 2 U.S.C. Chapter 25, 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).

In conducting these analyses, the FAA has determined that this interim final rule has benefits that justify its costs. This rule is a significant regulatory action, as defined in section 3(f) of Executive Order 12866, as it raises novel policy issues contemplated under that Executive Order. As notice and comment under 5 U.S.C. 553 are not required for this interim final rule, the regulatory flexibility analyses described in 5 U.S.C. 603 and 604 regarding impacts on small entities are not required. This rule will not create unnecessary obstacles to the foreign commerce of the United States. This rule will not impose an

unfunded mandate on State, local, or tribal governments, or on the private sector, by exceeding the threshold identified previously.

A. Regulatory Evaluation

Prior to initiating this interim final rule, the FAA considered three alternatives, all of which were deemed inadequate because they failed to meet sensitive U.S. Government operations security needs, were deemed untimely with regard to implementation prior to January 1, 2020, or may result in higher costs than this rule.

The first alternative to this rule that was considered was masking the identity of a sensitive aircraft while still transmitting ADS-B Out. In this scenario, third parties would still be able to receive ADS-B Out data on the aircraft's precise location/track, velocity, and altitude. DoD aircraft routinely enter and exit Special Use Airspace, so third parties can reasonably assume that ADS-B tracks entering and exiting Special Use Airspace are associated with DoD aircraft, thus rendering the masked identity ineffective. Likewise, low altitude surveillance conducted by Federal agencies or state/local law enforcement agencies has a distinctive track/flight pattern that also renders the masked identity ineffective. In addition, FAA held a face-to-face meeting with interagency participants on June 30, 2017, and asked interagency participants whether masking would be a sufficient alternative to address their operations security concerns (OPSEC). Interagency representatives unanimously stated that masking was insufficient; their preferred solution to mitigate operational security issues was authority to turn ADS-B Out off.

The second alternative considered by the FAA was encryption of the ADS-B Out transmissions for sensitive aircraft; however, no encryption solution currently exists. The

FAA will monitor technological advances and consider using future technological solutions that could be feasible alternatives, including encryption.

The third alternative considered by the FAA is the use of the exemption process for agencies to petition the FAA for authority to turn ADS-B Out off. For this alternative, the technical solution is the same as the technical solution for this rule; however it is less efficient. The exemption process would require review by multiple FAA offices, instead of review by the one FAA office designated by this rule. Review by multiple FAA offices and the requirement to publish certain information for each exemption in the Federal Register would increase overall FAA processing time for each request. Finally, the exemption process requires agencies to submit their requests to the FAA at least 120 days in advance of the date they need the exemption to be in place.

This interim final rule allows the FAA to except certain aircraft from operating a transponder or transmitting ADS-B Out, when doing so would compromise certain sensitive government missions or jeopardize the safe execution of ATC functions. In both scenarios, the aircraft will continue to rely on existing equipment to transmit with ATC thereby maintaining safety of flight operations.

In the first instance, to preserve the safety and security of certain sensitive government missions, this rule excepts aircraft performing missions for the purposes of national defense, homeland security, intelligence or law enforcement from transmitting ADS-B Out if transmitting out could reasonably be expected to compromise the mission or pose a risk to the aircraft, crew, or people and property on the ground. The FAA recognizes that the lack of encryption over the ADS-B Out data link could compromise certain missions or put aircrew, aircraft and personnel and property on the ground at

risk. As previously stated in this preamble, those agencies performing safety and security sensitive missions will notify the FAA one-time at the highest possible agency organizational level as opposed to on a dynamic, per mission, per flight or per unit basis to exclude them from the requirement.

In the second instance, this rule excepts certain aircraft from operating a transponder or transmitting ADS-B Out when transmitting would compromise the safe execution of air traffic services. At this time, the only operation of which the FAA is aware that would jeopardize the safe execution of air traffic control functions due to operating a transponder or transmitting ADS-B Out requirements is formation flight. Specifically, formation flight causes unnecessary and distracting alerts on ATC displays when all aircraft performing the flight are transmitting out. This rule allows the FAA to except certain aircraft from operating a transponder or transmitting ADS-B Out when doing so would jeopardize ATC functions.

The FAA expects this interim final rule will have benefits that justify its costs since it maintains the safety and security of certain sensitive government missions and allows the FAA to except certain aircraft from operating a transponder or transmitting ADS-B Out when doing so would jeopardize ATC functions. In addition, affected aircraft will continue to rely on existing equipment to transmit with ATC thereby maintaining safety of flight operations.

As stated above, the FAA does not expect this authority to be routinely used by agencies that have been granted this relief. As such, the FAA does not believe that this process will induce a significantly greater volume of flights receiving permission to operate without ADS-B Out broadcasting and will not reduce the general advantages

conveyed by ADS-B Out deployment in the U.S. airspace in terms of cost savings and traffic management efficiency.

The FAA also considered potential costs to the public. The FAA does not believe permitting certain categories of missions from operating without ADS-B Out broadcasting will reduce any of the benefits identified in earlier ADS-B Out rulemakings related to other users of the NAS, including safety and efficiency gains through improved situational awareness to pilots voluntarily operating with ADS-B In. In addition, the FAA does not foresee that the authorizations will negatively impact unmanned aircraft system (UAS) integration efforts.

This rule will provide unquantified cost savings by relieving affected operators from applying for exemptions. In the absence of this rule, operators seeking to be exempted from the requirement to operate a transponder or transmit ADS-B Out would have to seek an exemption from the FAA in the future. The cost savings associated with avoiding applying for exemptions will accrue to both the FAA and the agencies seeking exemptions. The FAA does not currently maintain data on the number or type of flights receiving ADS-B Out broadcasting exemptions through the existing exemption process, nor on the length of time it takes agencies to request and receive an exemption and thus is unable to quantify the value of any potential time savings.

B. Regulatory Flexibility Determination

Section 603 of the Regulatory Flexibility Act (RFA) requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever an agency is required by 5 U.S.C. 553 to publish a general notice of proposed rulemaking for any proposed rule. Similarly, section 604 of the RFA requires an agency to prepare a

final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553 after being required to publish a general notice of proposed rulemaking. RFA analysis requirements are limited to rulemakings for which the agency “is required by section 553 or any other law, to publish a general notice of proposed rulemaking for any proposed rule.” 5 U.S.C. 603(a). FAA found good cause for implementing an immediate effective date. As prior notice and comment under 5 U.S.C. 553 are not required to be provided in this situation, the analyses in 5 U.S.C. 603 and 604 are not required.

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 interim final rule and determined that it will respond to a domestic safety objective and is not considered an unnecessary obstacle to trade.

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 interim final 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. According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number.

The FAA has determined that there would be no new information collection associated with the revision to § 91.225, paragraph (f), to exempt certain ADS-B Out-equipped entities from the requirement to transmit at all times.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to 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 modified regulations.

However, the FAA has recently learned that in 2018 the European Aviation Safety Agency (EASA) has proposed changes to their ADS-B requirements to

accommodate the operations security needs of State aircraft. The EASA final report proposes the following major change to amend the existing implementing rule, (EU) 1206/2011 ACID IR:

“Add to point 3 of ANNEX II

(d) State aircraft engaged on nationally sensitive operations or training, that require security and confidentiality.”

This change would provide the opportunity for State aircraft operators to revert back to Secondary Surveillance Radar (SSR) for such categories of flights in order to prevent their flight data information from becoming publicly available on internet platforms. The EASA change for State aircraft is the same technical solution chosen by the FAA for sensitive U.S. Government operators in this rule.

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.

VI. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this interim final rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would 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, would not have Federalism implications.

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

The FAA analyzed this interim final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a “significant energy action” under the executive order and would not be 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, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609, and has determined that this action would have no effect on international regulatory cooperation.

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

This interim final rule is expected to be an EO 13771 deregulatory action. Details on the deregulatory effects of this rule can be found in the Regulatory Evaluation section. This rule will provide unquantified cost savings by relieving affected operators from applying for exemptions. In the absence of this interim final rule, operators seeking to be excepted from the requirement to operate a transponder or transmit ADS-B Out would

have to seek an exemption from the FAA. The cost savings associated with avoiding applying for exemptions will accrue to both the FAA and the operators seeking exemptions. The FAA requests comment on this designation of the rule for EO 13771 purposes.

VII. Additional Information

A. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

1. Searching the Federal eRulemaking Portal (<http://www.regulations.gov>);
2. Visiting the FAA's Regulations and Policies web page at http://www.faa.gov/regulations_policies or
3. Accessing the Government Publishing Office's web page at <https://govinfo.gov>.

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9677.

All documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the Internet through the Federal eRulemaking Portal referenced in item (1) above.

B. Comments Submitted to the Docket

Comments received 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 of 1996 (SBREFA) 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 traffic control, Aircraft, Airmen, Airports, Aviation Safety.

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, 20101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–56507, 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 § 91.215 by revising paragraph (c) to read as follows:

§ 91.215 ATC transponder and altitude reporting equipment and use.

* * * * *

(c) *Transponder-on operation.* While in the airspace as specified in paragraph (b) of this section or in all controlled airspace, each person operating an aircraft equipped with an operable ATC transponder maintained in accordance with § 91.413 of this part shall operate the transponder, including Mode C equipment if installed, and shall reply on the appropriate code or as assigned by ATC, unless otherwise directed by ATC when transmitting would jeopardize the safe execution of air traffic control functions.

* * * * *

3. Amend § 91.225 by revising paragraph (f) to read as follows:

§ 91.225 Automatic Dependent Surveillance-Broadcast (ADS-B) Out equipment and use.

* * * * *

(f) Each person operating an aircraft equipped with ADS-B Out must operate this equipment in the transmit mode at all times unless—

(1) Otherwise authorized by the FAA when the aircraft is performing a sensitive government mission for national defense, homeland security, intelligence or law enforcement purposes and transmitting would compromise the operations security of the mission or pose a safety risk to the aircraft, crew, or people and property in the air or on the ground; or

(2) Otherwise directed by ATC when transmitting would jeopardize the safe execution of air traffic control functions.

* * * * *

Issued under authority provided by 49 U.S.C. 106(f), 106(g), 40103, and 44701(a), in
Washington, DC, on July 11, 2019.

Daniel K. Elwell,

Acting Administrator

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