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DEPARTMENT OF ENERGY

10 CFR Part 810

RIN 1994–AA05

Assistance to Foreign Atomic Energy Activities

AGENCY: National Nuclear Security Administration (NNSA), Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: DOE issues procedures for the imposition of civil penalties for violations of the provisions of the Atomic Energy Act of 1954 (AEA) that restrict participation by U.S. persons in the development or production of special nuclear material outside of the United States. This final rule provides procedures to implement a statutory amendment contained within the *John S. McCain National Defense Authorization Act for Fiscal Year 2019.*

DATES: This rule is effective February 13, 2023.

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SUPPLEMENTARY INFORMATION:

I. Background

DOE's 10 CFR part 810 regulation (part 810) implements section 57 b.(2) of the AEA (42 U.S.C. 2077), as amended. Part 810 controls the export of unclassified nuclear technology and assistance. It enables peaceful nuclear trade by helping to ensure that nuclear technologies exported from the United States will not be used for non-peaceful purposes. Part 810 controls the export of nuclear technology and assistance by identifying some activities as ''generally authorized'' by the Secretary of Energy (Secretary), thereby requiring no further authorization under part 810 by DOE prior to engaging in such activities. For activities and/or destinations that are not generally authorized, part 810 requires a ''specific authorization'' by the Secretary. Part 810 also details a process to apply for specific authorization from the Secretary and specifies the reporting requirements for generally and specifically authorized activities subject to part 810. Violations of section 57 b. of the AEA and part 810 may result in revocation, suspension, or modification of authorizations, pursuant to 10 CFR 810.10, as well as criminal penalties, pursuant to 10 CFR 810.15.

Section 3116(b) of the *John S. McCain National Defense Authorization Act for Fiscal Year 2019* (NDAA), Public Law 115–232, amended section 234 a. of the AEA (42 U.S.C. 2282(a)) to clarify DOE's authority to impose civil penalties for violations of section 57 b. of the AEA, as implemented under part 810. On October 3, 2019, DOE published a notice of proposed rulemaking (NOPR) to update part 810 to include new procedures to implement this authority. (84 FR 52819) On November 4, 2019, DOE published a notice extending the deadline for public comments from November 4, 2019 to December 4, 2019. (84 FR 59315). DOE is issuing the final rule.

II. Description of Changes in the Final Rule

In response to comments from the public, the final rule reflects a revision of § 810.15 (c)(12) to clarify the burdens of proof that apply in hearings conducted pursuant to § 810.15(c)(6). The NOPR stated in § 810.15(c)(12) that ''[t]he person requesting the hearing has the burden of going forward and of demonstrating that the decision to impose the civil penalty is not supported by substantial evidence.'' This section is revised and clarified in the final rule to state that ''DOE shall have the burden of proving the violation(s) as set forth in the final notice of violation by a preponderance of the evidence. The person to whom the notice of violation is addressed shall have the burden of proving any affirmative defense by a preponderance of the evidence. The amount of the penalty associated with any violation which is upheld shall be adopted by the Administrative Judge unless not supported by the facts.''

In response to public comments concerning the approach to adjusting civil monetary penalties for inflation, DOE also revised § 810.15(c) to update the maximum penalty amount from the amount that would have been applicable when the NOPR was published, *i.e.,* $102,522, to the amount applicable currently, *i.e.,* $112,131. This maximum penalty amount reflects the current civil penalty amount adjusted from the original statutory penalty as required to be adjusted annually by the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), Public Law 114–74, 129 Stat. 599, codified at 28 U.S.C. 2461 note. Under the 2015 Act, DOE issues annual inflation adjustments to all of its civil monetary penalties by rule published in the **Federal Register**. The final rule is revised to clarify this point.

The final rule also makes a minor change to § 810.15(c)(5) to state that the Deputy Administrator for Defense Nuclear Nonproliferation ''will'' issue a final notice of violation rather than ''may'', as was stated in the proposed rule.

The final rule contains no other changes to the NOPR published on October 3, 2019.

III. Discussion of Public Comments and the Final Rule

A. Comments Received

On October 3, 2019, DOE published the NOPR. On November 4, 2019, DOE

published a notice extending the deadline for public comments from November 4, 2019 to December 4, 2019. DOE received 16 comments from 16 entities in response to the October 3, 2019 NOPR, including one comment that was postmarked after the deadline and was not considered. DOE additionally received one request for extension from the Nuclear Energy Institute (NEI), which was granted.

NEI provided a comprehensive set of comments, and these comments were endorsed by eight other commenters: Exelon Generation Company (Exelon), Duke Energy Corporation (Duke), STARS Alliance (STARS), the Ad Hoc Suppliers Group (AHSG), the Ad Hoc Utility Group (AHUG), Precision Custom Components, LLC (PCC), Holtec International Corporation (Holtec), and BWX Technologies, Inc. (BWXT).

The following six entities also provided timely comments before the deadline: Florida Power and Light Company (''FPL,'' on behalf of itself and on behalf of its affiliates, NextEra Energy Seabrook, LLC, NextEra Energy Duane Arnold, LLC, and NextEra Energy Point Beach, LLC); Morgan, Lewis & Bockius LLP (Morgan Lewis); Miles & Stockbridge P.C.; a group of students from Rutgers Law School; Aaron Ahern; and one anonymous commenter. One comment, postmarked after the deadline, was not considered in the rulemaking and is not otherwise referenced in the Discussion of Public Comments.

The 15 comments considered fell into one of four categories: communications between DOE and alleged violators, penalty amounts and limitations, hearings, and other comments.

B. Communications Between DOE and Alleged Violators

1. Clarifications on Voluntary Self-Disclosure (VSD)

NEI, BWXT, Duke, Exelon, Holtec, Miles & Stockbridge, PCC, STARS, and the Rutgers law students requested clarifications from DOE on voluntary self-disclosure procedures and policy, including the specific types of information that should be included in a VSD and the mitigating impact of VSDs on civil penalties. Commenters stated that this type of information would help incentivize self-disclosures, improving the effectiveness and efficiency of the part 810 enforcement program.

DOE has provided information related to VSDs in guidance documents. DOE guidance regarding self-disclosures of violations of part 810 is set forth on the part 810 website (*https://www.energy.gov/nnsa/10-cfr-part-810*), under ''Part 810 Frequently Asked Questions,'' and was referenced in the NOPR. Persons with questions on VSDs can also submit a request for advice or a request for determination to DOE pursuant to § 810.5. Based on the comments received, DOE will consider issuing additional guidance on self-disclosures, but DOE has determined that these comments do not require changes to the rule itself.

2. Alternative Dispute Resolution, Pre-Decisional Enforcement Conferences, and Settlement Agreements

AHUG, NEI, Exelon, STARS, AHSG, PCC, Holtec, BWXT, Duke, and Morgan Lewis expressed concern that the proposed civil penalties procedures did not provide for alternative dispute resolution (ADR), pre-decisional enforcement conferences (PEC), or settlement outside the formal procedures set forth in § 810.15(c). Commenters stated that ADR and PECs would offer collaborative resolution for violations of part 810, reducing the need for the civil penalties process which may be expensive, time-consuming, and contentious. Commenters also suggested that DOE recognize the possibility of entering into a settlement agreement prior to or during formal adjudication.

DOE agrees that ADR and PEC are potentially useful tools in compliance and enforcement. The final rule describes the process for DOE to impose civil penalties where warranted, but the rule would not prevent DOE from making use of PEC in advance of issuing a notice of violation. Similarly, the rule would not prevent DOE from making use of ADR instead of issuing a notice of violation, nor would it prevent DOE from reaching settlement agreements with an alleged violator at any point in the enforcement process. Accordingly, DOE will consider making use of ADR, PEC, and settlement agreements where appropriate in implementing this rule, but the comments do not require changes to the text of the rule itself.

3. ''No Action'', ''Warning,'' ''Zero Penalty'', or ''Closeout'' Notices.

AHUG, NEI, Exelon, STARS, AHSG, PCC, Holtec, BWXT, and Morgan Lewis asked that DOE state explicitly that possible outcomes of part 810 enforcement actions include not just civil penalties, but also ''no action,'' ''warning,'' ''zero penalty,'' or ''closeout'' notices. The commenters observed that the use of such notices would incentivize companies to self-report violations and would provide DOE with the flexibility to address violations without penalties where warranted.

DOE agrees that such notices are potentially useful tools in compliance and enforcement. The final rule describes the process for DOE to impose civil penalties where warranted and does not prevent DOE from issuing ''no action,'' ''warning,'' ''zero penalty,'' or ''closeout'' notices instead of a notice of violation, where appropriate. Accordingly, DOE will consider making use of such notices where appropriate in implementing this rule, but the comments do not require changes to the text of the rule itself.

4. Explanation of the Amount of a Proposed Civil Penalty

NEI commented that § 810.15(c)(5) should be amended to include a requirement that the Deputy Administrator for Defense Nuclear Nonproliferation specify in a final notice of violation how the factors enumerated at § 810.15(c)(5)(i) through (viii) support the amount of the civil penalty. The commenter stated that this change is necessary for the alleged violator to have a meaningful opportunity to appeal the final notice.

The regulation has been updated to clarify that each notice of violation and final notice of violation will include an explanation of how the factors at § 810.15(c)(5) were considered. The person to whom the notice of violation is addressed may contest any factual allegations underlying that analysis at a hearing held pursuant to § 810.15(c)(6). However, the hearing is to contest the allegations in the final notice of violation and does not extend to the discretionary determination regarding the amount of the civil penalty based on those allegations. With regard to that discretionary determination, application of the factors in § 810.15(c)(5) involves the exercise of policy-informed judgment, which is the province of DOE officials, not of the Administrative Judge. Thus, if the Administrative Judge concludes that a violation has occurred, the Administrative Judge will not amend the applicable penalty for that violation unless it is not supported by the facts, in which event the Administrative Judge will include such information in the Administrative Judge's recommended decision to the Under Secretary.

C. Penalty Amounts and Limitations

1. Clarification on ''Continuing Violations''

AHUG, NEI, Exelon, Duke, FPL/NextEra, STARS, AHSG, PCC, Holtec, BWXT, and Morgan Lewis requested

clarification on what constitutes a ''continuing violation.'' For example, NEI asked whether an unauthorized export of Part 810-controlled information through a single email to a foreign entity would constitute a single violation, or a continuing violation for each day that the foreign entity subsequently held or processed the data. Some commenters requested revisions to the rule in this regard, while other commenters merely requested clarification from DOE on the issue. For example, FPL/Next Era suggested ''that NNSA publish guidance to outline in advance the factors that will govern its decision making'' with regards to the issue of continuing violations.

In the NOPR, § 810.15(c) stated that, ''[i]f any violation is a continuing one, each day from the point at which the violating activity began to the point at which the violating activity was suspended shall constitute a separate violation for the purpose of computing the applicable civil penalty.'' In this case, ''violating activity'' refers to an action by a person that violates section 57 b. of the AEA. In the example cited in the comment from NEI the person committed a single violation on the day that they sent the email, and the maximum penalty in this case would be $100,000, as adjusted for inflation. By contrast, a U.S. company that granted a foreign national access for five successive days to a facility wherein the foreign national had access to part 810-controlled information without the required specific authorization from DOE would have committed a continuing violation.

DOE acknowledges that examples of this kind provide clarity to the regulated community as to how DOE intends to implement this final rule. However, DOE has determined that it would not be appropriate to modify the text of the rule itself to include such examples. Instead, DOE has provided clarifying guidance through this preamble statement, and DOE will consider providing additional information in a future guidance document describing the agency's implementation of this rule.

Some commenters also recommended that, when continuing violations do occur, DOE should only apply its authority to impose a separate penalty for each day of the violation for especially severe violations, that the application of daily penalties should be otherwise limited to certain circumstances, or that DOE should refrain from imposing daily penalties altogether.

DOE notes its authority under section 234 of the AEA to impose civil penalties for each day of a continuing violation is not limited to violations of any particular type or severity. However, when continuing violations are identified, DOE will not mechanistically apply daily penalties, but rather will use the factors described in § 810.15(c)(5) to determine an appropriate penalty that may be equal to or less than the maximum.

2. Detailed Determination Criteria for Penalty Levels

AHUG, AHSG, NEI, FPL/NextEra, Morgan Lewis, and STARS commented that DOE should provide more detailed criteria for determining the amount of a monetary civil penalty, including mitigating and aggravating factors. Some commenters cited specific factors that should have a mitigating impact on penalties, such as corrective actions and self-disclosure. AHUG and AHSG also requested that the rule be revised to state that DOE will not exercise its civil penalty authority until the agency has provided more guidance on penalty determination criteria.

DOE recognizes that effective regulation sometimes involves issuance of guidance documents that explain how the agency will implement the rule. In this case, some commenters requested that more detailed penalty determination criteria be added to the rule itself, while other commenters requested that the information be provided in separate guidance.

After due consideration of these comments, DOE has decided not to add more detailed penalty calculation criteria to the rule itself, beyond the eight factors already listed at § 810.15(c)(5)(i) through (viii). Adopting a mechanistic formula for calculating civil penalties within the rule itself would make it extremely difficult for DOE to ensure that penalty amounts are appropriate in each case and could result in excessive penalty amounts in many cases.

In response to these comments, DOE may develop and issue subsequent guidance that provides additional detail on how DOE will implement § 810.15(c)(5)(i) through (viii) for the calculation of civil penalties, based on due consideration of the commenters' suggestions and experience in implementing the rule. However, given the level of detail that is already included in this rule, DOE will not delay the implementation of its legal and regulatory enforcement authority pending completion of the guidance document that the commenters requested.

3. Limiting Penalties to Certain Types of Violations

AHUG, AHSG, Duke, and FPL/NextEra commented that civil penalties should only be applied in the case of willful violations, or that other types of violations should be exempted from civil penalties, such as violations that occur within a certain ''grace period'' after the effective date of this rule, violations related to the unauthorized transfers of technology related to light-water nuclear reactors, actions committed by individual employees of a company in violation of policies and procedures, or violations that do not constitute a ''clear unauthorized transfer of technology.''

Willful violations of the statute are subject to criminal enforcement under section 222 of the AEA. Pursuant to section 234 of the AEA, any person who violates any provision of section 57 of the AEA shall be subject to a civil penalty. This provision of law establishes strict liability and does not require that violations be willful. DOE cannot change the statutory standard of culpability by rule exempting inadvertent violators, nor would the Department seek to do so, given that a negligent violation of part 810 can be as damaging to national security as a willful violation. Similarly, DOE cannot categorically exempt any other category of violation from such penalties. As such, DOE will not revise the rule in response to this comment. However, pursuant to § 810.15(c)(5), DOE will consider the degree of culpability and the gravity of the violation, among other factors, in determining the amount of the civil penalty to be imposed.

4. Statute of Limitations for Part 810 Civil Penalties

AHUG and AHSG recommended that DOE's enforcement policy or procedures specify that there is a 5-year statute of limitations for violations subject to civil penalties, pursuant to 28 U.S.C. 2462. DOE agrees that its authority to impose civil penalties is subject to this limitation and will consider including this information in a subsequent guidance document. However, this comment does not require changes to the text of the rule, because the statute of limitations applies.

5. Penalties for Violations Occurring Prior to Adoption of the Rule

NEI, STARS, Holtec, BWXT, PCC, and Morgan Lewis commented that DOE should only impose civil penalties for violations that occur after the final rule enters into force. The commenters observed that the imposition of civil

penalties retroactively is not authorized under the AEA, and in some cases they recommended that the text of the rule be changed to specify that it does not apply to violations that preceded the rule's entry into force.

As required by existing law, DOE will only impose civil penalties for violations that occur after this final rule enters into force. In the event that DOE learns of a continuing violation that began prior to this rule's effective date but continued thereafter, DOE may impose a civil penalty only for the period of the continuing violation that followed the effective date of this rule. Given that DOE does not have the legal authority to impose retroactive penalties, DOE has determined that no changes are required to the text of the rule in this regard.

6. Inflation Adjustment for the Maximum Penalty

NEI, FPL/NextEra, Holtec, STARS, PCC, BWXT, Morgan Lewis, and Miles & Stockbridge expressed concern that DOE would calculate inflation adjustments so as to make the maximum penalty $265,815, as opposed to $102,522.

The NOPR's preamble discussed alternate approaches for calculating the maximum civil penalty. However, DOE does not intend to adopt this alternate calculation method or to revise the maximum penalty listed in § 810.15(c), except to make ongoing, incremental adjustments for inflation on an annual basis in accordance with OMB guidance.

DOE updated § 810.15(c) to reflect the maximum civil penalty amount of $112,131 (*See* 87 FR 1061). This amount was calculated using a formula established in the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 by which all Federal agencies undertake an annual inflation adjustment to existing civil monetary penalties. DOE will undertake future annual adjustments to this maximum penalty amount under that 2015 Act. All future annual adjustments will be made by rule and published in the **Federal Register**. DOE also updated § 810.15(c) to clarify this point.

7. Effective Date of Rule

Duke, Holtec, and Exelon commented that this rule should not become effective until six months after publication to allow time for companies to adjust to and understand the rule. DOE has reviewed this comment and notes that this final rule establishes procedures for imposing monetary civil penalties for violations of Part 810, but the rule does not alter persons' long-standing obligation to comply with the regulation itself. As such, DOE has determined that it is reasonable and appropriate for this rule to become effective 30 days after its publication.

D. Hearings

1. Burden of Proof

NEI, AHUG, AHSG, Exelon, Duke, STARS, PCC, Holtec, BWXT, Morgan Lewis, and Miles & Stockbridge commented that, with regards to hearings conducted pursuant to § 810.15(c)(6), the text of the proposed rule did not expressly place the burden of proof on DOE, the proponent of the civil penalty, as required by the Administrative Procedure Act (APA).

The NOPR stated in § 810.15(c)(12) that ''[t]he person requesting the hearing has the burden of going forward and of demonstrating that the decision to impose the civil penalty is not supported by substantial evidence.'' In response to the comments received, DOE has revised this section in the final rule to state the following: ''DOE shall have the burden of proving the violation(s) as set forth in the final notice of violation by a preponderance of the evidence. The person to whom the notice of violation is addressed shall have the burden of proving any affirmative defense by a preponderance of the evidence. The amount of the penalty associated with any violation which is upheld shall be adopted by the Administrative Judge unless not supported by the facts.'' This change addresses the concerns raised by the commenters regarding burden of proof.

2. Role of the Under Secretary

NEI, Exelon, BWXT, STARS, PCC, and Holtec expressed concern that, after a hearing has been conducted and the Administrative Judge has forwarded their recommended decision to the Under Secretary, the Under Secretary might impose a steeper monetary penalty than that imposed by the Administrative Judge, find a violation when the Administrative Judge did not, or otherwise impose a harsher punishment than the Administrative Judge imposed. The text of the proposed rule at § 810.15(c)(14) would expressly give the Under Secretary the power to compromise, mitigate, or remit the recommended penalty of the Administrative Judge, but does not give the Under Secretary the authority to increase the penalty. Given that the text comports with the comments, DOE has determined that no change to the text in the final rule is required.

3. Appeal Sep Between the Recommended and Ultimate Decisions

Rutgers Law School students commented that the proposed rule should be revised to create an additional appellate review step between the Administrative Judge's decision and the final decision by the Under Secretary. The commenters argue that a different DOE regulation includes such an intermediate step, and that use of an intermediate appellate step in the part 810 civil penalties process could decrease the number of legal challenges to DOE penalty decisions and increase DOE's chances of success in court when challenged. Additionally, AHUG and AHSG commented that DOE should designate the Under Secretary to hear appeals of the Administrative Judge's decision, which would constitute an additional appeal step beyond the process described in this rule.

DOE has reviewed the comments and determined that it has developed a robust administrative process for adjudicating appeals of its civil penalty determinations, notwithstanding the potential use of such intermediate steps in any other DOE regulatory process. As such, DOE has determined that an additional appellate step is not necessary in this case, because the rule already includes two separate opportunities for individuals to appeal or otherwise contest an alleged violation, pursuant to § 810.15(c)(2) and (6). The rule also includes a third opportunity for penalties to be mitigated through the Under Secretary's review of the Administrative Judge's decision under § 810.15(c)(14). Accordingly, DOE has determined that no change to the rule is required in this case.

4. Conducting Hearings Prior to the Imposition of Civil Penalties

AHUG and AHSG commented that DOE should provide the alleged violator with a full administrative hearing before determining that a civil penalty should be imposed. The commenters argue that such an approach is required under the APA. These observations are closely linked to the commenters' contention that the hearing process described in § 810.15(c)(12) would place the burden of proof on the alleged violator, rather than DOE. As described above, in response to the comments received from AHUG, AHSG, and others, DOE has revised § 810.15(c)(12) in this final rule to clarify the issue of the burden of proof.

In addition, DOE has concluded that, with the revision to § 810.15(c)(12) described above, the hearing process in this rule is fully consistent with the

requirements of the APA. The process described in this rule provides all persons with the option to request a hearing, but also allows alleged violators to address violations without a hearing by either paying the proposed penalty or by contesting the proposed penalty in writing. After careful consideration, the request from the commenters that a hearing take place at the beginning of the civil penalty process would unnecessarily limit the flexibility of both DOE and the alleged violator, and would increase legal costs and burdens on both sides.

5. Confidentiality of Hearings

Morgan Lewis commented that DOE should maintain its procedures as set forth in the NOPR for protecting classified information, and other information protected from public disclosure by law or regulation, during hearings. This final rule makes no changes to these provisions and therefore comports with the comment.

E. Other Comments

1. Guidance on Authority To Impose Civil Penalties for Violations of Part 810

Morgan Lewis commented that the National Defense Authorization Act for Fiscal Year of 2016 directed DOE to issue guidance with respect to the use of the clear and intended authority of the Secretary of Energy under section 234 of the Atomic Energy Act of 1954 to impose civil penalties, including fines. Morgan Lewis recommended that DOE issue such guidance ''no later than concurrently with the final rule on civil monetary penalties.'' DOE has reviewed the comment and determined that no additional guidance is required at this time. Accordingly, DOE will make no change to the text of the rule in response to this comment, and the effective date of the rule will not be delayed.

2. Clarification on the Scope of the Part 810 Regulation

Morgan Lewis, NEI, FPL/NextEra, Duke, AHSG, STARS, and an anonymous commenter stated that the scope of the part 810 regulation is ambiguous and requested that DOE clarify the regulation. In some cases, the commenters requested that DOE delay issuing a final rule on monetary civil penalties until these clarifications have been made.

These comments relate to the existing scope of the part 810 regulation, as issued as a final rule on February 23, 2015, as opposed to the NOPR at hand. Comments and suggestions outside the scope of this rulemaking regarding other aspects of the part 810 program will not be addressed here.

IV. Regulatory Review

A. Executive Order 12866

The final rule has been determined to not be a significant regulatory action under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. National Environmental Policy Act

DOE has determined that the rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A5 of appendix A to subpart D, 10 CFR part 1021, which applies to a rulemaking that amends an existing rule or regulation and that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's website: *https://www.energy.gov/gc/office-general-counsel.*

This rule would update 10 CFR 810.15 to include procedures for the imposition of civil penalties. DOE has reviewed the changes under the provisions of the *Regulatory Flexibility Act* and the procedures and policies published on February 19, 2003. The changes do not expand the scope of activities currently regulated under 10 CFR part 810.

DOE has conducted a review of the potential small businesses that may be impacted by this rule. This review consisted of an analysis of the number of businesses impacted generally in Fiscal Years 2016 and 2017, and a determination of which of those are considered ''small businesses'' by the Small Business Administration. Small businesses impacted by part 810 generally fall within two North American Industry Classification System codes: engineering services (541330) and computer systems designs services (541512). Often, their requests for authorization include the transfer of computer codes or other similar products. A total of 89 businesses and other entities submitted reports and applications pursuant to the regulation during this time period. DOE estimates that approximately 10% of those entities impacted by part 810 are small businesses. As such, of those 89 entities that submitted reports and applications under part 810, approximately 9 are estimated to be small businesses.

Small businesses exporting nuclear technology like all other regulated entities, would be subject to civil penalties for violations of part 810. Further, the requirements for small businesses exporting nuclear technology would not substantively change because the proposed revisions to this rule do not add new burdens or duties to small businesses. The obligations of any person subject to the jurisdiction of the United States who engages or participates directly or indirectly in the production of special nuclear material outside the United States have not changed in a manner that would provide any significant economic impact on small businesses. Because the changes to this rule would not alter the businesses' standards or processes for receiving part 810 authorization, there would be no impact on these businesses' ability to comply with part 810 in the same manner they have previously.

On the basis of the foregoing, DOE certifies that the rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Paperwork Reduction Act

The collection of information requirements have been approved under OMB Control Number 1901–0263. The rule would provide procedures for imposing civil penalties for a violation

of part 810. There would be no collection of information under the rule.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For regulatory actions likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a),(b)). UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at *https://energy.gov/gc/office-general-counsel.*) DOE examined this rule according to UMRA and its statement of policy and has determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and tribal government, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

F. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b), Executive Order 12988 specifically requires that Federal agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met, or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

G. Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this rule and has determined that it would not preempt State law and 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. No further action is required by Executive Order 13132.

H. Treasury and General Government Appropriations Act, 1999

Section 654 of the *Treasury and General Government Appropriations Act, 1999* (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. The rule would have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant regulatory action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Congressional Review

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

List of Subjects in 10 CFR Part 810

Foreign relations, Nuclear energy, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on December 23, 2022, by Jennifer Granholm, Secretary of Energy. That document with the original signature and date is maintained by

DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 6, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, the Department of Energy amends part 810 of chapter III, title 10 of the Code of Federal Regulations as set forth below.

PART 810—ASSISTANCE TO FOREIGN ATOMIC ENERGY ACTIVITIES

■ 1. The authority citation for part 810 is revised to read as follows:

Authority: Secs. 57, 127, 128, 129, 161, 222, 232, and 234 AEA, as amended by the *Nuclear Nonproliferation Act of 1978,* Pub. L. 95–242, 68 Stat. 932, 948, 950, 958, 92 Stat. 126, 136, 137, 138 (42 U.S.C. 2077, 2156, 2157, 2158, 2201, 2272, 2280, 2282), the *Intelligence Reform and Terrorism Prevention Act of 2004,* Pub. L. 108–458, 118 Stat. 3768, and sec. 3116 of the *John S. McCain National Defense Authorization Act for Fiscal Year 2019,* Pub. L. 115–232; Sec. 104 of the *Energy Reorganization Act of 1974,* Pub. L. 93–438; Sec. 301, *Department of Energy Organization Act,* Pub. L. 95–91; *National Nuclear Security Administration Act,* Pub. L. 106–65, 50 U.S.C. 2401 *et seq.,* as amended.

■ 2. Section 810.1 is amended by adding paragraph (d) to read as follows:

§ 810.1 Purpose.

* * * * *

(d) Specify civil penalties and enforcement proceedings.

■ 3. Section 810.15 is amended by adding paragraph (c) to read as follows:

§ 810.15 Violations.

* * * * *

(c) In accordance with section 234 of the AEA, any person who violates any provision of section 57 b. of the AEA, as implemented under this part, shall be subject to a civil penalty, not to exceed $112,131 per violation, such amount to be adjusted annually for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. If any violation is a continuing one, each day from the point at which the violating activity began to the point at which the violating activity was suspended shall constitute a separate violation for the purpose of computing the applicable civil penalty. The mere act of suspending an activity does not constitute admission that the activity was a violation and does not waive the rights and processes outlined in paragraphs (c)(4) through (14) of this section or otherwise impact the right of the person to appeal any civil penalty that may be imposed.

(1) In order to begin a proceeding to impose a civil penalty under this paragraph (c), the Deputy Administrator for Defense Nuclear Nonproliferation or his/her designee, shall notify the person by a written notice of violation sent by registered or certified mail to the last known address of such person, of:

(i) The date, facts, and nature of each act or omission with which the person is charged;

(ii) The particular provision or provisions of section 57 b. of the AEA, as implemented under this part, involved in each alleged violation;

(iii) The penalty which DOE proposes to impose, including an explanation of how the factors at paragraph (c)(5) of this section were considered;

(iv) The opportunity of the person to submit a written reply within 30 calendar days of receipt of such preliminary notice of violation showing why such penalty should not be imposed; and

(v) The possibility of collection by civil action upon failure to pay the civil penalty.

(2) A reply to the notice of violation must:

(i) State any facts, explanations, and arguments which support a denial of the alleged violation;

(ii) Demonstrate any extenuating circumstances or other reason why a proposed penalty should not be imposed or should be mitigated;

(iii) Discuss the relevant authorities which support the position asserted;

(iv) Furnish full and complete answers to any questions set forth in the notice of violation; and

(v) Include copies of all relevant documents.

(3) If a person fails to submit a written reply within 30 calendar days of receipt of a notice of violation, the notice of violation, including any penalties therein, constitutes a final decision, and payment of the full amount of the civil penalty assessed in the notice of violation is due 30 calendar days after receipt of the notice of violation. Such failure to submit a reply constitutes a waiver of the rights and processes outlined in paragraphs (c)(4) through (14) of this section.

(4) The Deputy Administrator for Defense Nuclear Nonproliferation or his/her designee, at the written request of a person notified of an alleged violation, may extend in writing, for a reasonable period, the time for submitting a reply.

(5) If a person submits a timely written reply to the notice of violation, the Deputy Administrator for Defense Nuclear Nonproliferation will make a final determination whether the person violated or is continuing to violate a requirement of section 57 b. of the AEA, as implemented under this part. Based on a determination that a person has violated or is continuing to violate a requirement of section 57 b., as implemented under this part, the Deputy Administrator for Defense Nuclear Nonproliferation will issue to that person a final notice of violation that concisely states the violation, the amount of the civil penalty imposed, including an explanation of how the factors in this paragraph were considered, further actions necessary by or available to the person, and that upon failure to timely pay the civil penalty, the penalty may be collected by civil action. The Deputy Administrator for Defense Nuclear Nonproliferation will send such a final notice of violation by registered or certified mail to the last known address of the person. The amount of the civil penalty will be based on:

(i) The nature, circumstances, extent, and gravity of the violation or violations;

(ii) The violator's ability to pay;

(iii) The effect of the civil penalty on the person's ability to do business;

(iv) Any history of prior violations;

(v) The degree of culpability;

(vi) Whether the violator self-disclosed the violation;

(vii) The economic significance of the violation; and (viii) Such other factors as justice may require.

(6) Any person who receives a final notice of violation under paragraph (c)(5) of this section may request a hearing concerning the allegations contained in the notice. The person must mail or deliver any written request for a hearing to the Under Secretary for Nuclear Security within 30 calendar days of receipt of the final notice of violation. If the person does not request a hearing within 30 calendar days, the final notice of violation, including any penalties therein, constitutes a final decision, and payment of the full amount of the civil penalty assessed in the final notice of violation is due 45 calendar days after receipt of the final notice of violation.

(7) Upon receipt from a person of a written request for a hearing, the Under Secretary for Nuclear Security or his/her designee, shall:

(i) Appoint a Hearing Counsel; and

(ii) Forward the request to the DOE Office of Hearings and Appeals (OHA). The OHA Director shall appoint an OHA Administrative Judge to preside at the hearing.

(8) The Hearing Counsel shall be an attorney employed by DOE, and shall have all powers necessary to represent DOE before the OHA.

(9) In all hearings under this paragraph (c):

(i) The parties have the right to be represented by a person of their choosing, subject to possessing an appropriate information access authorization for the subject matter. The parties are responsible for producing witnesses on their behalf, including requesting the issuance of subpoenas, if necessary;

(ii) Testimony of witnesses is given under oath or affirmation, and witnesses must be advised of the applicability of 18 U.S.C. 1001 and 18 U.S.C. 1621, dealing with the criminal penalties associated with false statements and perjury;

(iii) Witnesses are subject to cross-examination;

(iv) Formal rules of evidence do not apply, but OHA may use the Federal Rules of Evidence as a guide; and

(v) A court reporter will make a transcript of the hearing.

(vi) The Administrative Judge has all powers necessary to regulate the conduct of proceedings:

(vii) The Administrative Judge may order discovery at the request of a party, based on a showing that the requested discovery is designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint;

(viii) The Administrative Judge may permit parties to obtain discovery by any appropriate method, including deposition upon oral examination or written questions; written interrogatories; production of documents or things; permission to enter upon land or other property for inspection and other purposes; and requests for admission;

(ix) The Administrative Judge may issue subpoenas for the appearance of witnesses on behalf of either party, or for the production of specific documents or other physical evidence;

(x) The Administrative Judge may rule on objections to the presentation of evidence; exclude evidence that is immaterial, irrelevant, or unduly repetitious; require the advance submission of documents offered as evidence; dispose of procedural requests; grant extensions of time; determine the format of the hearing; direct that written motions, documents, or briefs be filed with respect to issues raised during the course of the hearing; ask questions of witnesses; direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential); and otherwise regulate the conduct of the hearing;

(xi) The Administrative Judge may, at the request of a party or on his or her own initiative, dismiss a claim, defense, or party and make adverse findings upon the failure of a party or the party's representative to comply with a lawful order of the Administrative Judge, or, without good cause, to attend a hearing;

(xii) The Administrative Judge, upon request of a party, may allow the parties a reasonable time to file pre-hearing briefs or written statements with respect to material issues of fact or law. Any pre-hearing submission must be limited to the issues specified and filed within the time prescribed by the Administrative Judge;

(xiii) The parties are entitled to make oral closing arguments, but post-hearing submissions are only permitted by direction of the Administrative Judge;

(xiv) Parties allowed to file written submissions, or documentary evidence must serve copies upon the other parties within the timeframe prescribed by the Administrative Judge;

(xv) The Administrative Judge is prohibited, beginning with his or her appointment and until a final agency decision is issued, from initiating or otherwise engaging in *ex parte* (private) discussions with any party on the merits of the complaint;

(xvi) The Administrative Judge is responsible for determining the date, time, and location of the hearing, including whether the hearing will be conducted via video conference; and

(xvii) The Administrative Judge shall convene the hearing within 180 days of the OHA's receipt of the request for a hearing, unless the parties agree to an extension of this deadline by mutual written consent, or the Administrative Judge determines that extraordinary circumstances exist that require a delay.

(10) Hearings shall be open only to Hearing Counsel, duly authorized representatives of DOE, the person and the person's counsel or other representatives, and such other persons as may be authorized by the Administrative Judge. Unless otherwise ordered by the Administrative Judge, witnesses shall testify in the presence of the person but not in the presence of other witnesses.

(11) The Administrative Judge must use procedures appropriate to safeguard and prevent unauthorized disclosure of classified information or any other information protected from public disclosure by law or regulation, with minimum impairment of rights and obligations under this part. The classified or otherwise protected status of any information shall not, however, preclude its being introduced into evidence. The Administrative Judge may issue such orders as may be necessary to consider such evidence in camera including the preparation of a supplemental recommended decision to address issues of law or fact that arise out of that portion of the evidence that is classified or otherwise protected.

(12) DOE shall have the burden of proving the violation(s) as set forth in the final notice of violation by a preponderance of the evidence. The person to whom the notice of violation is addressed shall have the burden of proving any affirmative defense by a preponderance of the evidence. The amount of the penalty associated with any violation which is upheld shall be adopted by the Administrative Judge unless not supported by the facts, in which event the Administrative Judge will include such information in the Administrative Judge's recommended decisions to the Under Secretary for reconsideration of the amount of the penalty based on the Administrate Judge's resolution of the factual issues.

(13) Within 180 days of receiving a copy of the hearing transcript, or the closing of the record, whichever is later, the Administrative Judge shall issue a recommended decision. The recommended decision shall contain findings of fact and conclusions regarding all material issues of law, as well as the reasons therefor. If the Administrative Judge determines that a violation has occurred and that a civil penalty is appropriate, the recommended decision shall set forth the amount of the civil penalty based on the factors in paragraph (c)(5) of this section.

(14) The Administrative Judge shall forward the recommended decision to the Under Secretary for Nuclear Security. The Under Secretary for Nuclear Security shall make a final decision as soon as practicable after completing his/her review. This may include compromising, mitigating, or remitting the penalties in accordance with section 234 a. of the AEA, as amended. DOE shall notify the person of the Under Secretary for Nuclear Security's final decision or other action

under this paragraph in writing by certified mail, return receipt requested. The person against whom the civil penalty is assessed by the final decision shall pay the full amount of the civil penalty assessed in the final decision within 30 calendar days unless otherwise determined by the Under Secretary for Nuclear Security.

(15) If a civil penalty assessed in a final decision is not paid as provided in paragraphs(c)(3), (6), or (14) of this section, as appropriate, the Under Secretary for Nuclear Security may request the Department of Justice to initiate a civil action to collect the penalty imposed under this paragraph in accordance with section 234 c. of the AEA.

(16) The Under Secretary for Nuclear Security or his/her designee may publish redacted versions of notices of violation and final decisions.

[FR Doc. 2023–00342 Filed 1–11–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1246; Project Identifier MCAI–2022–00675–T; Amendment 39–22291; AD 2022–27–06]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. (Type Certificate Previously Held by Yaborã Indústria Aeronáutica S.A.; Embraer S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. This AD was prompted by a report of uncommanded setting of the barometric reference in both primary flight displays (PFDs) due to the architecture of data communication of the Control I/O modules, which interconnect the display controllers to the air data system. This AD requires installing updated Primus EPIC software, as specified in an Agência Nacional de Aviação Civil (ANAC) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 16, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 16, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1246; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For material incorporated by reference in this AD, contact ANAC, Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email *pac@anac.gov.br;* website *anac.gov.br/en/.* You may find this material on the ANAC website at *sistemas.anac.gov.br/certificacao/DA/DAE.asp.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2022–1246.

FOR FURTHER INFORMATION CONTACT: Hassan Ibrahim, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3653; email *Hassan.M.Ibrahim@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. The NPRM published in the **Federal Register** on October 20, 2022 (87 FR 63704). The NPRM was prompted by AD 2022–05–04, effective May 25, 2022, issued by ANAC, which is the aviation authority for Brazil (ANAC AD 2022–05–04) (referred to after this as the MCAI). The MCAI states that there was a report of uncommanded setting of the barometric reference in both PFDs due to the architecture of data communication of the Control I/O modules, which interconnect the display controllers to the air data system. The possibility of erroneous indications for both pilots, combined with possible adverse meteorological conditions could result in an increase of flightcrew workload. This condition, if not addressed, could interfere with the decisions taken by the flightcrew during critical phases of flight.

In the NPRM, the FAA proposed to require installing updated Primus EPIC software, as specified in ANAC AD 2022–05–04. The FAA is issuing this AD to address uncommanded setting of the barometric reference in both primary flight displays, which could interfere with the decisions taken by the flightcrew during critical phases of flight, and possibly result in reduced controllability of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1246.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from the Air Line Pilots Association, International (ALPA) who supported the NPRM without change.

Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. This AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

This AD requires ANAC AD 2022–05–04, which specifies procedures for installing updated Primus EPIC software. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 121 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD: