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| RECEIPT NUMBERS: | | RECEIPT NUMBER |
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| NAME  Federal Aviation Administration  Flight Standards District Office  ADDRESS  CITY STATE ZIP | |  |
| RE: | Compliance with 14 CFR [§ 145.221(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3ef0a953d5da0569d9d94254a850f79a&node=se14.3.145_1221&rgn=div8) | |

Dear NAME:

This response is to explain this company’s compliance with Title 14 of the Code of Federal Regulations (CFR) [§ 145.221(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3ef0a953d5da0569d9d94254a850f79a&node=se14.3.145_1221&rgn=div8).

The undersigned contends that the section was issued in violation of the Administrative Procedure Act (APA),[[1]](#footnote-1) and is therefore unenforceable.[[2]](#footnote-2) Thus, any allegation that this repair station is in non-compliance because it is not reporting *all* failures, malfunctions and defects is without merit. The company complies with the version of [§ 145.221(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3ef0a953d5da0569d9d94254a850f79a&node=se14.3.145_1221&rgn=div8) in force before November 10, 2014 by submitting reports on serious failures, malfunctions and defects.

In 2001, the word “serious” was removed from 14 CFR [§ 145.221](http://www.ecfr.gov/cgi-bin/text-idx?SID=3ef0a953d5da0569d9d94254a850f79a&node=se14.3.145_1221&rgn=div8);[[3]](#footnote-3) in 2003 the word was appropriately reinserted as a direct consequence of public comments.[[4]](#footnote-4) The agency’s subsequent removal[[5]](#footnote-5) of the word “serious” without notice or public comment violated the APA, and is therefore invalid.

The APA prescribes procedural requirements for creating or amending agency rules in order for them to have the force of law. Unlike general policy statements or interpretive regulations, rules that impose binding obligations on the public (*i.e.*, “substantive” and “legislative” rules) must be properly noticed and submitted to the public for comment.[[6]](#footnote-6) Indeed, the DC Circuit expressly rejected claims that agencies have the “inherent authority” to make even the most minor corrections to previously implemented regulations without complying with the APA’s notice and comment requirements.[[7]](#footnote-7) In the instant case, the FAA imposed entirely new substantive reporting obligations under the service difficulty reporting requirement without complying with the APA. To add insult to injury, the word “serious” was removed after it was deliberately inserted following proper notice and comment rulemaking procedures.

Courts have ruled that an agency’s failure to comply with the APA results in invalidation and likely vacature of the rule.[[8]](#footnote-8) As such, any action taken by the FAA to enforce the new data reporting requirement is invalid and cannot be enforced.

Furthermore, as established by comments to the rulemaking dockets, reports of all failures, malfunctions and defects are not only impossible to compile but their collection does not improve aviation safety.[[9]](#footnote-9) Even if we hired extra personnel to report any failure, malfunction or defect on every unit received, as well as every piece part within those articles that required replacement or repair, it is impossible to provide “all” of the information. The data required by 14 CFR [§ 145.221(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=3ef0a953d5da0569d9d94254a850f79a&node=se14.3.145_1221&rgn=div8) is often not available to the repair station for the units received, let alone for every piece part.

Finally, when corrective actions are clearly set forth in the data required by 14 CFR   
[§ 145.109](http://www.ecfr.gov/cgi-bin/text-idx?SID=3ef0a953d5da0569d9d94254a850f79a&node=se14.3.145_1109&rgn=div8) or provided by the air carrier under 14 CFR [§ 145.205](http://www.ecfr.gov/cgi-bin/text-idx?SID=3ef0a953d5da0569d9d94254a850f79a&node=se14.3.145_1205&rgn=div8) the flaw need not be reported at all. The reporting system needs to obtain “precursors” to safety issues, not act as a repository for flaws that can and are routinely corrected under the existing safety requirements.

For the above stated reasons, the repair station respectfully requests this matter be discussed within the office management, region and national policy divisions as well as the agency’s legal department. If further action is deemed appropriate, we will respond accordingly; otherwise, we look forward to the matter being closed.

We look forward to the prompt resolution of this matter. If you have any questions, do not hesitate to contact me.

Sincerely,

NAME

TITLE

|  |  |  |
| --- | --- | --- |
| cc: | Mark Bury, Assistant Chief Counsel | mark.bury@faa.gov |

1. [5 U.S.C. §§ 551 *et seq*.](http://www.gpo.gov/fdsys/pkg/USCODE-2013-title5/pdf/USCODE-2013-title5-partI-chap5-subchapII.pdf) [↑](#footnote-ref-1)
2. *See, e.g.,* *R & W Flammann GmbH v. U.S.*, 339 F.3d 1320, 1324 (Fed. Cir. 2003) (“A regulation that contravenes a statute is invalid.”). [↑](#footnote-ref-2)
3. Repair Stations, [66 Fed. Reg. 41088](http://www.gpo.gov/fdsys/pkg/FR-2001-08-06/pdf/01-19362.pdf) (August 6, 2001). [↑](#footnote-ref-3)
4. Repair Stations: Service Difficulty Reporting, [68 Fed. Reg. 75380](http://www.gpo.gov/fdsys/pkg/FR-2003-12-30/pdf/03-31884.pdf) (December 30, 2003). [↑](#footnote-ref-4)
5. Repair Stations, [79 Fed. Reg. 46971](http://www.gpo.gov/fdsys/pkg/FR-2014-08-12/pdf/2014-18938.pdf) (August 12, 2014). [↑](#footnote-ref-5)
6. *See* [5 U.S.C. § 553(b)](http://www.gpo.gov/fdsys/pkg/USCODE-2013-title5/pdf/USCODE-2013-title5-partI-chap5-subchapII-sec553.pdf); *State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989). [↑](#footnote-ref-6)
7. *See* *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 752 (D.C. Cir. 2001) (rejecting EPA’s ability to make technical corrections to a rule that were the result of word processing errors without submitting those changes for notice and comment). [↑](#footnote-ref-7)
8. *See*, *e.g.*, *State of Alaska U.S. Dep't of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989) (invalidating Department of Transportation orders concerning advertising by airlines for failure to comply with the APA’s notice and comment requirements); *Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741, 752 (D.C.Cir.1991) (invalidating EPA rules for classifying hazardous substances for notice and comment violations). Moreover, any agency action taken under an invalid rule has no legal effect. *W.C. v. Bowen*, 807 F. 2d 1502, 1505 (9th Cir. 1987) (“An agency rule which violates the APA is void. Agency action taken under a void rule has no legal effect”) (citations omitted). [↑](#footnote-ref-8)
9. *See* Repair Stations: Service Difficulty Reporting Rulemaking, [68 Fed. Reg. 75380](http://www.gpo.gov/fdsys/pkg/FR-2003-12-30/pdf/03-31884.pdf) (December 30, 2003); [Aeronautical Repair Station Association, Petition for Rulemaking on 14 CFR § 145.221, Docket No. FAA-2014-0767](http://arsa.org/wp-content/uploads/2014/09/Section.145-221-Petition-20140922.pdf) (September 22, 2014). [↑](#footnote-ref-9)