

MEMORANDUM

TO: Kirk Van Tine
Ken Mead

FROM: Sarah MacLeod
Executive Director

Christian A. Klein
Legislative Counsel

RE: Baker Botts ICA Strategy Coordination Options

DATE: August 3, 2006

Thank you for your memorandum summarizing the potential avenues the Association and its members might pursue to ensure the availability of basic aviation maintenance information at a reasonable cost.

This memorandum summarizes your options in italics and offers our observations of each with a guideline for prospective involvement from an appropriate team at Baker Botts. We are looking forward to developing a strategic partnership with your law firm that takes advantage of the unique knowledge and strategic capabilities of each team member. The cooperative effort must consider more than the single issue discussed in our memoranda; it must reflect a long term strategy for the Association and its members' relationship with the international legislative and regulatory community.

(A) Regulatory Options

(1) Definition of ICA — ARSA could petition the FAA to clarify or amend the list of required contents of ICA to specifically include maintenance instructions for aircraft components as opposed to mere removal and replacement instructions. Arguably, allowing OEMs to fulfill their obligations by providing only remove and replacement instructions avoids the intent of the regulation, which is to make maintenance information readily available to owners, operators and other persons required to comply with these instructions.

During the Association's review of Order 8110.54, its committee carefully considered the required contents of all ICAs¹. Our recommendations were based upon a clearer definition of what was "essential to the continued airworthiness" of the aircraft, aircraft engine or propeller. When the FAA issued its final version of the guidance material, it did not adopt our suggested content or indicate why it did not.

¹ As you pointed out in your memorandum, the ICA information required by the appendices for aircraft in parts 23, 25, 27 and 29, differ from the requirements in the appendices for engines and propellers found in parts 33 and 35. In all cases, however, the design approval holder is directed to provide information "essential to the continued airworthiness" of the product.

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We did not pursue this avenue any further. However, several specific opportunities come to mind:

- (a) Petition the FAA to change or clarify Order 8110.54 based upon the history and language of the appendices to the certification regulations and the requirements of the maintenance regulations.
- (b) Petition for rulemaking to change the appendices clarifying the language relating to content requirements based upon the latest policies expressed by the FAA².

Cooperative efforts include a comprehensive review of the regulations, policies and guidance relating to the information essential to continued airworthiness of aviation products. After complete familiarization, development of a more specific strategic effort for achieving a balanced approach to the amount of information required to ensure the continued airworthiness of civil aviation products.

- (2) *Petition for Rulemaking: Pursue an amendment to § 21.50(b) to clarify that maintenance and/or overhaul manuals — if they exist — are part of the ICAs and to clarify the phrase “make those instructions available.”*

This option must be placed in context with other efforts. The FAA reaction to such a petition would most likely be negative; therefore, the petition would need to be filed in conjunction with other actions and the strategy must include follow on actions when the inevitable happens.

Cooperative efforts should include this option in the review and strategic planning set forth in paragraph (A)(1).

- (3) *Definitions of Overhaul, Repair, Maintenance, and Replacement — Explore how these terms are interwoven throughout the ICA regulations, highlighting inconsistencies and ambiguities for agency clarification or legal attack.*

The term maintenance includes inspection, repair, overhaul and the replacement of parts³; and the term overhaul⁴ is separately “defined”, however, the amount of information required to

² The FAA has released policy and guidance that indicates it is not satisfied with the amount of maintenance information provided by OEMs. For example: 70 FR 70922 (11/23/05) “Reduction of Fuel Tank Flammability in Transport Category Airplanes” at 70937-8—admonishing the design approval holder to prepare detailed service instructions for required modifications; (Provide the references to the “cooperative” memo put out last year, the policies expressed in the Wide Spread Fatigue NPRM (design holders to provide more information to allow operations past the “retirement” limits), language contained in most TSOs for maintenance data). Further, as a result of the Certification Process Study, the agency has committees working on defining “key safety items” for which comprehensive design and maintenance information will be required from design approval holders.

³ 14 CFR part 1.1 defines maintenance.

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accomplish the actions is not consistent nor is it understood. As such, this option is also important to an overall strategy for defining the information that must be made available to ensure the continued airworthiness of civil aviation products.

(4) Request a Reinterpretation: Petition for a change to the FAA's interpretation of §21.50(b) as inconsistent with 49 U.S.C. §44704 or other applicable sections regarding certification. The argument would be that the statute sets out requirements for certification, and the FAA's interpretation of the ICA regulations makes it unnecessarily difficult and expensive for part 145 repair stations to meet the certification requirements.

This option obviously requires more research to ensure that the statute defines the certification requirements for repair stations in enough detail to support the argument suggested or to determine whether another argument would be more persuasive.

Cooperative efforts would be included in those already discussed. The Association would perform the statutory research necessary to determine the viability of the option.

(5) Seek Alternative Methods for Approval of Overhaul Manuals—What processes can independent repair stations pursue to develop their own overhaul procedures without OEM assistance or blessing?

This option is possible under the regulations but technically difficult and ultimately not in the best interest of safety. Alternative maintenance methods, techniques and practices can be developed independent of the design approval holder. However, if the result would be a major repair (which would include most component overhauls), each manual would have to be based upon technical and engineering data developed and approved under 14 CFR part 21. In some cases, it would require (in essence) a recertification of the article.

Additionally, the maintenance instructions would have to be approved by each civil aviation authority, such as the European Aviation Safety Agency, to be used on non-U.S. registered aircraft. The instructions would also have to be accepted or approved by each air carrier customer under that certificate holder's maintenance program. Finally, if individual repair stations pursued this option there would be a myriad of instructions with a variety of results, which would create a nightmare if any unairworthy conditions developed.

Cooperative efforts would include determining how to use this option as an unsavory alternative that is allowed by the regulation but is not in the interest of safety.

⁴ 14 CFR § 43.2(a) sets for the actions that must be taken to use the term overhaul in a maintenance record.

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(B) Litigation Options

The Association is unfamiliar with the legal elements for most of the options set forth under this section. Cooperative efforts would require the Association to develop a comprehensive understanding of the issues and facts necessary for success or viability of each option.

(1) Suit against OEM alleging violation of applicable regulations — Depending on the facts of individual cases, ARSA may be able to allege that a particular OEM is not complying with existing FAA regulations. The approach here contemplates that ARSA demonstrate in a particular instance that an OEM improperly withheld information required by ICA content regulations, claiming its inclusion would violate a proprietary interest.

Your suggestion does not include the underlying cause of action available for such an option. The Association has filed formal complaints under 14 CFR part 13; however, it is unfamiliar with any other legal remedy available under this theory.

(2) Suit against FAA to enforce a non-discretionary duty — ARSA would maintain that the FAA is not enforcing its own regulations. The legal argument must be clear and free of any countervailing interpretation. This is a difficult argument because the agency's interpretation of its own regulations would be subject to Chevron deference.

This option also must be explored after the Association has a firm grasp of the elements for success. The action may be more viable if filed under the engine or propeller regulations which require more specific maintenance information on components than do the rules for aircraft.

(3) Suit against FAA challenging existing ICA regulations — ARSA would maintain that current regulations and FAA's application of those regulations unlawfully reduce safety by encouraging repair stations to develop competing — and obviously less consistent — overhaul procedures than those created and endorsed by OEMs with the benefit of proprietary design and manufacturing data. Instead, independent repair stations must obtain independent FAA-approval for repairs performed without access to the expert overhaul manuals withheld by OEMs.

This option seems to be fraught with difficulties; however, the facts that would need to be gathered may establish that the lack of ICAs unlawfully reduces safety.

(4) U.S. Antitrust Law — There are several theories that, depending on the specific facts and supporting evidence, could provide grounds to assert that an OEM's conduct in discriminating against independent maintenance providers by withholding necessary maintenance materials and/or parts (or by charging higher prices for such products) violates one or more U.S. antitrust laws. Potential theories include the following:

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- (a) *The OEM's conduct, to the extent that it reflects some price (or possibly other) restraint of trade agreed upon between an OEM and such OEM's authorized maintenance provider, violates Sherman Act §1 as concerted conduct that unreasonably restrains trade.*
- (b) *The OEM's conduct, to the extent it may be characterized as conditioning the sale of one product, e.g., maintenance services, on the buyer's purchase of another, separate product in a market in which the OEM possesses market power, e.g., maintenance documentation or parts, violates Sherman Act §1 and/or Clayton Act §3 as per se illegal tying. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) (plaintiff, alleging that Kodak had unlawfully tied the sale of service for its copy machines to the sale of Kodak parts, had presented sufficient evidence of the various required elements of a tying claim to defeat summary judgment).*
- (c) *The OEM's conduct, to the extent it may be characterized as willful, exclusionary conduct to acquire or maintain monopoly power in a properly-defined relevant antitrust market (presumably some defined aircraft service market) in which the OEM has monopoly power, violates Sherman Act §2. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992) (denying summary judgment on Sherman Act §2 claim against plaintiff where genuine issues of fact existed as to whether Kodak had monopolized or attempted to monopolize the copier service market by refusing to provide parts to independent service operators); but see Verizon Communications Inc. v. Trinko, 540 U.S. 398 (2004) (Verizon's conduct in denying rivals access to local telephone network elements in violation of FCC open access rules "not a recognized antitrust claim" under an "essential facilities" theory or otherwise).*
- (d) *The OEM's conduct, to the extent that it may be characterized as selling (but not licensing) the same goods of like grade and quality to two competing buyers in contemporaneous transactions at different price levels — violates the Robinson-Patman Act §2(a).*

It is important to note that the likelihood of success on each of these potential claims depends entirely on the relevant facts. A review of the facts may reveal that all the necessary elements are not present or that a particular OEM has defenses available to it, including, perhaps, that it is engaged in what is actually pro-competitive, justifiable vertical business conduct with down market participants. Whether, ultimately, any of these potential claims may be viable to assert against a particular OEM (and/or possibly their authorized maintenance providers) will turn on a detailed assessment of the facts. The type of additional information required to undertake such an assessment includes, for example: the specific OEM conduct at issue; conditions and competitor shares in affected market categories; product alternatives; the nature of any restrictive terms of agreement between an OEM and its authorized service providers; the OEM's asserted justifications, etc. Further detailed analysis of the FAA rules and their application to a specific OEM's conduct also may be required to determine what, if any, antitrust implications a violation of such rules

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may have in a specific circumstance. We are prepared to discuss these additional informational needs with you in detail as you find appropriate.

These options are intriguing to the Association; however, the facts and resources necessary to pursue them must come directly from its members.

The cooperative arrangement must include a strategy for obtaining the additional information and using the potential anti-trust litigation in an overall strategy for the Association and its members. Additionally, we know that a number of members have been involved in anti-trust litigation efforts under several of these theories. We must endeavor to gather as much information as possible regarding the individual cases to further understand the viability of the various options.

In any event, the strategic planning must include the best methods for gathering the necessary facts and data from both the industry and individual companies. It seems that at a minimum we must develop aviation maintenance economic information, whether or not anti-trust litigation is ever pursued.

(5) EU Competition Law Theories — In addition, and again depending on the specific facts of each case, there may be basis to assert claims for violations of EU competition law, specifically Articles 81 and 82 of the EC Treaty. Article 81 prohibits agreements and concerted action “which have as their object or effect the prevention, restriction or distortion of competition within the common market.” Article 82 prohibits “abuse of a dominant position” in a particular market to the detriment of trade between Member States. While Articles 81 and 82 are commonly thought of as the rough European equivalents of Sherman Act §§ 1 and 2, respectively, there are differences in their application and, in some cases, they may condemn a wider range of conduct than U.S. courts find violative of U.S. antitrust laws.

*The EC has expressly recognized that a firm with a dominant market position in certain circumstances may infringe Article 82 by refusing access to an “essential facility,” i.e., “a facility or infrastructure, without access to which competitors cannot provide services to their customers.” *Sea Containers - Stena Sealink*, D. Comm. Dec. 21, 1993, 1994 OJ L 15/8; but cf. *Verizon Communications Inc. v. Trinko*, 540 U.S. 398, 410-11 (2004) (noting that that Supreme Court has never recognized the essential facilities doctrine and sees no need to recognize or repudiate it in the instant case). Moreover, while outcomes in EU refusal-to-deal cases vary based on the facts, in at least one case, *Volvo/Veng*, ECJ Oct. 5, 1988, 1988 ECR 6211, the EU Court of Justice has recognized that “an arbitrary refusal to supply spare parts to independent repairers” by an auto body repair part supplier holding a dominant position could violate Article 82.*

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Since the Association's membership is international, these options must be explored in a similar manner to the anti-trust litigation opportunities. While the Association has developed an excellent working relationship with the EASA, it has not extended its resources to the European Union. However, the Association is currently working on submitting complaints to the EASA similar to the part 13 complaints filed with the FAA. As mentioned under the previous option, developing a strategy to obtain the proper facts for determining viability is an important first step.

(C) Government Relations—Competitive Options

- (1) *Department of Justice (DOJ)* — After a thorough review of the facts, if a legal basis exists, meet with DOJ to discuss the antitrust issues identified above.
- (2) *Department of Transportation (DOT)* — Again, after a review of the facts, if a legal basis exists, meet with the DOT General Counsel and competition attorneys to review the competition issues described above. The General Counsel is in a position to influence the FAA to revise its existing rules on the issues identified above.

The cooperative arrangement must include a strategy for gathering the economic and safety information essential to obtaining the interest of both DOJ and DOT. These data will also be essential to almost any argument and option.

(D) Government Relations—Legislative Option

The current authorization for aviation programs administered by the FAA expires on September 30, 2007. Several issues are taking shape as the centerpieces of the Congressional debate:

- *Current financing mechanisms including whether and how to alter the way the aviation trust fund is financed, such as by proposing—*
 - *user fees,*
 - *new taxes, or*
 - *other methods of raising revenue*
- *To what extent to allow foreign ownership of U.S. airlines; and*
- *How to develop and pay for the Next Generation Air Transportation System.*

We propose adding a fourth area of focus to the reauthorization debate by shaping the legislative argument in two ways:

- *The first would be to expand the availability of basic repair information as a crucial element of improving aviation safety.*

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- *Second, the FAA's current ICA rules represent, in effect, an economic regulation. Economic regulation is vested in the DOT Office of the Secretary, not the FAA, which is a safety agency. Though FAA says it is only engaged in "safety" regulation, it has specifically delegated much of this role to industry. Industry decisions will be driven by factors other than or in addition to safety, the most notable being those that support their own economic interests. The case is that the appropriate place for consideration and oversight of this issue is not the FAA, but the Office of the Secretary, due to its involvement in issues such as anti-competitive practices and alliances.*

The first step is to identify natural industry allies and champions in the U.S. Congress.

- *Alliances — Additional support from allies in industry will increase the chances of success of any government relations effort that involves approaching the U.S. Congress. Working with the Air Transport Association and Air Carrier Association of America, we would approach air carriers about their vested interest in the issue — current practices add costs and expenses. Carriers have a vested interest in choosing maintenance providers and the information necessary to ensure cost effective maintenance is readily available. Replacing parts is certainly more expensive than effective repairs. While all airlines are potential allies, we would need to explore with ARSA which carriers would be particularly interested in the business case.*
- *Congress — ARSA members obviously need to enlist the support of key Congressional officials. In some cases, these company officials would want to reach out to Representatives and Senators from states and districts where ARSA membership is most pronounced. More broadly, the Congressional strategy would involve Members of Congress who have influence on the relevant committee(s), and who would advocate for clarification of the current regulatory scheme, either in statute or in the text of a committee or conference report. ARSA's past efforts in this area provide a solid foundation upon which to build.*

Visits could be made to members of Congress and relevant chairs and ranking minority members to educate and advocate for support on the issue. We envision a hearing in the House and Senate devoted almost exclusively to this matter.

In the House of Representatives' Transportation and Infrastructure Committee, Republican Representatives Young, LaTourette, Petri, Mica, Duncan, and LoBiondo could be sympathetic, and among Democrats, Representatives Costello, DeFazio, and Oberstar would likely be supportive, notwithstanding union issues.

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Should control of the House switch from Republican to Democrat as a result of the November 2006 election, Rep. Oberstar would be in a position of great influence as the probable Chairman of the committee. The likelihood of success improves if the control of the House changes hands. Mica, Petri, and Duncan will be contenders for the Chairmanship if Republicans retain control. Young is term-limited and must leave the Chairmanship.

On the Senate Commerce, Science and Transportation Committee, Republican Senator Sununu is approachable, and Senator Hutchison is a natural ally given her past service as a Member of the National Transportation Safety Board. We think Senator Lott would find this issue of interest as well. Union issues could present barriers to locating Democrats interested in taking on this issue, but potential allies nonetheless exist in Senators Dorgan, Pryor, Wyden, and Lautenberg. McCain, who has not been active on the Committee since Chairman Stevens took over, is also approachable.

We note that the House Energy & Commerce Committee has been concerned with motor vehicle owners' "right to repair," and the committee is preparing to act on legislation that has broad, bipartisan support. It is possible the committee would be a sympathetic audience for similar complaints expressed by the aviation repair community, and visits could be made to seek advice and support from Chairman Barton, as well as to advocate for consideration. The fate of the auto vehicle legislation will be clear before this Congress adjourns.

- *Oversight Agencies – A good case could be made to have the Government Accountability Office ("GAO") and the DOT Office of Inspector General (DOT "OIG") launch a full scale review of the safety concerns and practices in this area. The reviews would have to get underway soon if they are to play a role in the reauthorization debate. Preferably, these offices would undertake the review pursuant to a Chair/Ranking Member request from committees of jurisdiction in both chambers.*

The Association has been working diligently to introduce the civil aviation maintenance industry to the United States Congress. It has raised the awareness of many key members of Congress, but has not specifically requested support for the ICA issue. It was successful in having legislation on the ICA issue introduced and passed by the House in large part due to the Association's relationship with David Schaffer (former counsel for the House Aviation Subcommittee) who was intimately familiar with ICA issue.⁵ Efforts failed for several key

⁵ ARSA convinced David Schaffer of the inequity of the current regulatory interpretation and enforcement policies as part of its congressional educational campaign; his personal interest in the subject was encouraged by the

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reasons, most notably lack of influence in the Senate and strong opposition from the manufacturer associations. As you will note from our attached information on past and future activities, we have developed language we believe “corrects” the regulatory deficiency and we have a strategy for its introduction and consideration.

Cooperative efforts must include application of your expertise to a careful consideration of the less obvious issues confronting the Association and its members with respect to this issue and its long term legislative/regulatory activities. For example, our membership includes OEMs that are both for and against the “ICA” issue. Further, current member involvement and influence is substantially less than the manufacturers’ associations and members even if the economics indicate that both industries are equally important to international financial health. Ultimately, the Association must take this opportunity to grow, yet it cannot “bite off more than it can chew”. Your team’s experience and expertise will help us balance the myriad issues inherent in each option.

(E) Other Arguments

- (1) Are carriers contractually bound to supply part 145 repair stations with ICA and other overhaul manuals for the planes they service? Is this obligation being met? If not, could such a requirement be included in future contracts for repair services? If the ICA and other repair manuals available to the carriers are more detailed than those available to the repair stations, the carriers may be a source for this information.*

ARSA is gaining experience in air carrier/repair station contracts. Most aircraft and airframe maintenance contracts or relations involve the air carrier providing particular maintenance instructions, such as work cards. However, component maintenance providers are expected to possess the basic manuals. Air carriers usually reference the component maintenance or overhaul manual as the basis for the work and only provide specific requirements that are in addition to or different from the basic manual, such as an engineering order.

ARSA has never particularly cared for depending upon the air carrier to provide information since (a) the regulations require the information from the design approval holder and (2) not all maintenance is performed on air carrier aircraft. This approach can be used with respect to particular situations but is not the ultimate answer. However, since providing maintenance information to providers of choice adds costs to the owner/operator, this argument can certainly help develop alliances.

response from the “big four” on the Aviation Subcommittee. The ARSA Board of Directors has expressed its desire to include Mr. Schaffer as part of any future strategic legislative team.

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The cooperative arrangement must consider how to develop this option as an avenue for specifically situated owner/operators and repair stations. It should also be considered as leverage when developing alliances with owner/operator groups.

- (2) If the requirements of overhaul manuals/repair instructions have effectively been incorporated into the FAA regulations, there may not be any copyright protection. Does the FAA maintain records of the overhaul manuals and repair instructions they approve? Are they public records and could they be the subject of a FOIA request?*

This option requires a review of existing information developed for the Association⁶ plus any recent rulings in the area of intellectual property protection. With respect to obtaining basic maintenance or overhaul information under the Freedom of Information Act, the current response from the submitter of the data and the FAA is that such information is exempt as information that would competitively harm the company if released and/or that it is proprietary information. Further, most submitters do not leave the information with the FAA long enough for an effective FOIA request or appeal.

However, the cooperative effort could consider the steps necessary for challenging an AD that does not provide the basic information necessary for substantive comments, i.e., an appropriate challenge under the Administrative Procedure Act (APA). Even if the Association does not take on the challenge, it is an option that an individual member might decide to pursue. The Association could be instrumental in providing the legal roadmap for such an action.

- (3) Awareness of developing safety issues and problems — Open access to knowledge about how to repair engines and aircraft parts could lead to advancements in safety and recognition of developing safety issues. Repair stations are a key part of the industry and have an important role to play in advancing knowledge of safety.*

- (4) Repair Techniques — Open access to overhaul and repair manuals could allow the development of new techniques for cost-effective repairs. The barriers to part 145 repair stations developing these techniques on their own are high enough now. Regulations which reduce those barriers (such as making overhaul and repair information more available) could also encourage greater competition among repair stations.*

Both these arguments can be incorporated into the overall strategy. The cooperative effort should consider how to gather facts to support the economic and/or technical arguments.

⁶ Please reference the memorandum developed by Burr and Forman on the “fair use” of Service Bulletins specifically referenced in Airworthiness Directives.

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(F) Conclusion

The options set forth in your memorandum require development of a cooperative effort which will result in—

- (1) A plan for exchanging the knowledge and information necessary to develop a detailed analysis of the applicable facts and law under each option or in the case of the legislative options, to develop a detailed implementation plan.
- (2) A plan for obtaining the facts necessary for each legal or legislative option.
- (3) A detailed analysis on each viable option.
- (4) A strategic plan for implementing the options that will ensure basic maintenance information is made available at a reasonable cost while enhancing the Association's viability for its members nationally and internationally.
- (5) Implementation of specific components of each option by various team members.

As we have mentioned, the Association has been working on the ICA issue for almost twenty years. While this issue is key to many aspects of "good government" it is not the only issue facing the civil aviation maintenance industry. Whether a repair station is part of a manufacturer's organization or is "independent" from such control, the entire industry is subject to many political and economic forces. We believe the legislative and regulatory climate is ripe for the aviation maintenance industry's issues and the Association must take a lead in key areas. We need a strategic partner that is willing to—

- Help guide the Association in developing its general strategy and tactics which will increase the viability, visibility and reputation of the contract maintenance industry,
- Discuss the pros and cons of each option on the ICA issue within that context,
- Help refine positions and arguments with respect to general strategy and tactics as well as the ICA issue and
- Step in with appropriate influence in key areas.

The key to developing the cooperative strategic alliance is an exchange of knowledge and information. In other words, each team member must be appropriately "brought up to speed" on specific aspects of ARSA's overall strategic plan as well as each option for the ICA issue. In some cases, it will be Association staff or members, while in others it will be Baker Botts team members. At the same time, we should avoid "reinventing" the wheel if a particular aspect is already understood or being pursued sufficiently.

We envision the arrangements will be on an hourly or flat fee and "retainer" basis. For example, sitting down together for a day or two to review ARSA's strategic plan, to specifically evaluate each option and to establish the facts or information necessary for pursuing the viability of each

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ICA option could be on a flat fee basis. Legal research on any particular issue could be on an hourly basis. Finally, strategic development and implementation of specific legislative components could be on a retainer basis.

During our last conversation, you indicated that “the ball was in ARSA’s court”. In response—

- We have developed and attached another memorandum that summarizes all the actions we have taken on the ICA issue. We have also provided an excel spreadsheet which depicts the specific actions that are, can or will be taken with respect to various activities along with draft legislative language. We are hopeful these documents can help Baker Botts propose appropriate financial arrangements for accomplishment of the steps outlined above. The other documents mentioned in this memorandum can be reviewed as part of the “getting to know you” step outlined as an initial step.
- We have discussed our desire to bring Baker Botts in as a strategic partner with our Board of Directors. We have also arranged for an Executive Committee meeting to discuss your original memorandum, our response and any financial estimates that you may provide in response to our potential arrangements. These discussions are in anticipation of being able to present this potential strategic alliance in more detail to the Board of Directors during its October meeting and to the Strategic Leadership Conference on November 1.

We are hopeful that you will be able to provide a financial estimate for the steps outlined above. Of course, the specific time required for any research need not be provided, however, the hourly fee for various Baker Botts participants, the flat fee for familiarization and strategic planning efforts along with a suggested retainer arrangement for legislative implementation would be welcome. We look forward to working with you. If you need further information, please do not hesitate to contact us.

Attachments: Memo on ICA history
Draft legislation
Excel spreadsheet for various activities



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TO: Sarah MacLeod
FROM: Virginia K. Scattergood
DATE: August 2, 2006
RE: History of ARSA ICA Efforts

The following is historical information on ARSA's regulatory and legislative efforts to resolve the Instructions for Continued Airworthiness (ICA) issue. Major events and efforts are listed chronologically. A copy of our ICA Task Matrix, which includes specific tasks, meetings, follow ups, and potential industry supporters is attached. Please let me know if you need additional documentation or have any questions.

Solving the ICA problem has been an ARSA priority since the Association's founding in 1984. Between 1984 and 2003 the Association gained extensive knowledge of the industry and its myriad business interactions. It developed its own relationships with the governing agencies and legislators. ARSA has done extensive research into the history of ICA regulations, dating from the Civil Air Regulations (CARs) that pre-date the FAA through the establishment of the current regulations in 14 CFR §21.50(b), in 1981. After developing its reputation for regulatory knowledge and fairness, the Association commented on the inconsistencies of the FAA's 14 CFR §21.50(b) application on numerous occasions.

The Association has leveraged every available opportunity to underscore the ICA problem's significant safety aspects. Senior government experts working on issues that involve following maintenance manuals—including NTSB accident investigations and Department of Transportation Office of Inspector General (OIG) studies—regularly seek ARSA's input. Among the reports that cite specific examples of current maintenance manuals not being followed and/or available to the maintenance provider are the NTSB's final report on the January 2000 crash of Alaska Airlines Flight 261 (issued in December 2002¹) and the OIG's July 2003 report on U.S. air carrier repair station usage.²

In 2003, ARSA began to work the ICA issue on the legislative front. Following the Association's first Legislative Day, the association leveraged its longstanding relationship with House Aviation Subcommittee staff and succeeded in convincing the leadership of the House Transportation & Infrastructure (T&I) Committee to include ICA

¹ NTSB accident report AAR-02/01 (adopted December 30, 2002), pp. 38, 97, 99-100.

² DOT OIG report AV-2003-047 (issued July 8, 2003), p. 21

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language in the chairman's mark of "Vision 100", the Century of Reauthorization Act (H.R. 2115). The ARSA ICA proposal became Section 419 (later section 420, due to the addition of a manager's amendment).

Immediately after H.R. 2115 was introduced, ARSA began its grassroots campaign, assisting members in sending letters to House members asking for support. ARSA also worked directly with members of the T&I Committee and Aviation Subcommittee to build support for the ICA language. Primary proponents of ARSA's position were Reps. Denny Rehberg (R-MT), Steve LaTourette (R-OH), and Eddie Bernice Johnson (D-TX). The leading House opponent of ARSA's position was Rep. Jerry Moran (R-KS).

As the House vote on Vision 100 approached, ARSA successfully worked with contacts on the House Rules Committee to head off an effort by Moran to remove the ICA language on the House floor. ARSA also drafted floor statements for sympathetic members of Congress to give in support of the ICA language. The House passed Vision 100 (including ARSA's ICA language) on June 11, 2003 by a vote of 418-8.

The next day, the Senate passed its own version of the FAA reauthorization bill (S. 824), which did not include ICA language. The Senate bill was authored by Commerce Committee Chairman John McCain (R-AZ), and was co-sponsored by Senators Fritz Hollings (D-SC), Trent Lott (R-MS), and John D. Rockefeller, IV (D-WV). Although their views on ICA were not expressed, we have targeted Senators McCain, Lieberman, and Rockefeller as potential allies in the Senate.

Conference committee members were appointed to resolve the differences between the bills, including Senators McCain (AZ), Ted Stevens (AK), Conrad Burns (MT), Lott (MS), Kay Bailey Hutchison (TX), Hollings (SC), Daniel Inouye (HI), Rockefeller (WV), and John Breaux (LA). ARSA rallied its member companies to contact their representatives and senators (in particular, those on the conference) to request section 420 be kept in the bill during conference.

ARSA targeted several key states, contacting member companies to write to their representatives in support of section 420. Those targeted states included: Alaska, California, Florida, Georgia, Kansas, Ohio, Oklahoma, Texas, and Washington. These were targeted because of the large concentration of ARSA members in these areas, as well as the potential that their representatives would be helpful.

During July 2003, ARSA and the National Air Transportation Association (NATA) worked with Sen. Jim Inhofe (R-OK) to build support for a "Dear Colleague" letter by Inhofe encouraging conferees to retain the ICA language. Inhofe's letter was co-signed by Sens. George Voinovich (OH) and Lisa Murkowski (AK).

As the conference proceeded during the summer of 2003, ARSA kept in constant communication with House Aviation Subcommittee staff. At one point, opponents of ARSA's provision offered a compromise that would have done nothing to truly resolve

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the ICA issue. ARSA rejected the compromise on the premise that the status quo was preferable.

It is much easier to stop legislation than to get something enacted; ARSA's efforts to build support for the ICA provision in the Senate were unsuccessful. It was unable to overcome the objections to the ICA language by Sen. Hollings, then ranking member of the Commerce Committee. When the Vision 100 conference report was filed, it did not include the ICA provision. The conference report (sans ICA language) passed 211-207 on October 30, 2003.

ARSA learned several key lessons from its 2003 legislative effort. Chief among them was that the manufacturers would seek to discount the safety rationale for ICA availability and claim that ARSA's position was rooted instead in economics. The evidence cited: the lack of formal complaints filed with the FAA alleging ICA violations.

Armed with several ICA policy-related documents released by the FAA (including the 1999 "Whitlow letter," the 2003 "McCurdy letter, and several advisory circulars (ACs); please refer to the June 7, 2006 memorandum for details), ARSA began documenting ICA violations.

ARSA filed a Part 13 complaint against Airbus on October 3, 2003 to address the misinterpretations of 14 CFR §21.50(b). The complaint alleged that Airbus did not provide ICA to certificated repair stations as required by the Federal Aviation Regulations. Airbus responded to the complaint in December 2003, stating that the company is not in violation of the FARs. The FAA has not formally responded to the complaint.

Concurrently with the Airbus complaint effort, ARSA organized an ICA committee comprised of 10 aviation companies, including: Chromalloy Gas Turbine Corporation; Delta Air Lines; Hamilton Sundstrand; HEICO Corporation; Honeywell; Lufthansa Technik AG; Moog, Inc. Aircraft Group; The NORDAM Group; Pratt & Whitney; Sargent Controls & Aerospace; and SR Technics Switzerland. Together the committee created a proposed ICA policy and submitted it to the FAA on August 20, 2004 as part of the joint industry comments to draft Order 8110.ICA.

On July 1, 2005, the FAA released Order 8110.54, "Instructions For Continued Airworthiness Responsibilities, Requirements, And Contents." None of the committee's language was adopted in the final document.

On November 23, 2005, ARSA filed its second ICA-related complaint with the FAA, this time against Rolls-Royce Corporation. Rolls-Royce responded in February 2006. Although the complaint has been docketed, permitting further investigation, there has been no FAA response.

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On July 3, 2006, an ARSA member sent an official letter to Parker Hannifin Corporation, a Parts Manufacturer Authority (PMA) holder, requesting ICA. Parker has been given 30 days to respond to the request for ICA. If it does not, ARSA will file a complaint with the FAA.

Research of Technical Standard Order Authorization (TSOA) items and producers are currently underway. ARSA hopes to file a complaint against a TSO holder that manufactures for Airbus.³ In addition, we are investigating the European Aviation Safety Agency (EASA) process for filing a complaint. ARSA intends to use its Part 13 complaints as a basis for review by EASA.

By filing or preparing complaints against Airbus, Rolls-Royce, a PMA holder, a TSOA holder and via EASA, ARSA has demonstrated that ICA violations are prevalent throughout all possible industry segments.

With the lessons learned from the 2003 reauthorization, ARSA regrouped and developed a plan for introduction of ICA legislation in 2007 during the next FAA reauthorization. ARSA's plan includes stronger grassroots efforts, a wider network of contacts in the House and Senate, cultivating relationships with committee leadership (especially in the Senate), and obtaining increased membership in Montana and Alaska for grassroots efforts. The attached matrix includes the status of these efforts, including: the timeline for legislative and regulatory items, status of congressional meetings, targeted members, facility visits, and potential fundraisers.

The kickoff to this new initiative began in the lead up to the 2006 Legislative Day, which took place on March 24. While the meetings members set up in 2005 provided a basis for ARSA to continue staff contacts, ARSA believed more could be done. As part of the 2006 Legislative Day ramp-up, member companies in targeted states were specifically encouraged by ARSA staff to attend.⁴ Attendees were sent in advance ARSA's legislative priorities, and ARSA staff helped set up meetings with relevant legislators. These efforts resulted in over 30 different meetings between ARSA members and congressmen. The attached matrix shows the meetings held through the past two legislative conferences.

For these meetings, ARSA members were encouraged to talk about FAA reauthorization and the ICA issue. ARSA has followed-up with congressional offices, particularly with members on the aviation subcommittees. These meetings serve to introduce ARSA, with mention of the upcoming reauthorization and a brief overview of the ICA issue. "Lobbying kits," which are given to Hill staff, include a one-page document on ICA reform.

³ See ICA Matrix at "Part 13 Complaint" for additional information.

⁴ See ICA Task Matrix at "ARSA Member List" tab.

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In addition, ARSA conducted a member survey for information on the true cost of ICA. The survey solidified ARSA's belief that many ICA were either unavailable through the manufacturer, or were priced prohibitively.

With the next round of FAA reauthorization set to begin in 2007, ARSA is also reaching out to other aviation coalitions, both to discuss the reauthorization priorities and discuss preliminary plans for the ICA initiative.

ARSA has composed draft legislation in anticipation of the next FAA reauthorization act, which will occur during early 2007. A copy of this draft legislation is attached.

Additional Information

The ARSA Web site contains documents with additional information on its ICA efforts. Please visit the link below for copies of the Airbus complaint and response; a memorandum on the history of ICA regulations; ARSA's joint industry draft ICA policy; and press releases. In addition a sample letter to Congress for members' use and the ICA one-pager is available for download.

ARSA ICA link

<http://www.arsa.org/node/86>

1 **Safe Aviation Maintenance with Equity Act of 2006**

2 **Sec. 1. Short Title**

3 This Act may be cited as the “Safe Aviation Maintenance through Equity Act of
4 2006” or the “SAME Act”

5 **Sec. 2. Findings and Purpose**

6 (a) FINDINGS. – Congress finds the following:

7 (1) Repair stations certificated under Part 145 of Title 14 of the Code of
8 Federal Regulations play a critical role in the safe, efficient and economical
9 operation of the national and international aviation system;

10 (2) Instructions for continued airworthiness are a critical link in the safety of
11 the national and international aviation system;

12 (3) The economic and safety benefits realized through the use of repair
13 stations are optimized when repair stations possess the most current
14 instructions for continued airworthiness;

15 (4) Ensuring the availability of critical safety information contained in the
16 instructions for continued airworthiness enhances the free market, by
17 enabling aircraft owners and operators to choose the best person or entity
18 to perform maintenance, preventative maintenance and alterations to their
19 aircraft.

20 (b) PURPOSE. – The purpose of this Act is to provide Repair Stations, and other
21 persons required by title 14 of the Code of Federal Regulations to follow
22 instructions for continued airworthiness, consistent access to that information at a
23 fair and reasonable price. The Act will ensure that all persons performing

1 maintenance, preventative maintenance and alterations on Administrator
2 approved articles will have access to the same information essential to continued
3 airworthiness. This will allow the work to be accomplished in a uniform manner,
4 thereby maximizing the safety and efficiency of the aviation system.

5 **Sec. 3. Availability of Maintenance Information**

6 (a) IN GENERAL- Chapter 447 is amended by adding at the end the following:

7 **'Sec. 44729. Availability of Maintenance Information**

8 '(a) No later than six months after the effective date of this section, the
9 Administrator of the Federal Aviation Administration shall issue regulations that
10 require a design approval holder to provide or cause to be provided to a person
11 authorized or seeking authorization under title 14 of the Code of Federal
12 Regulations to engage in the maintenance, preventative maintenance or
13 alteration of the design approval holder's article, the instructions for continued
14 airworthiness for the article. To effectuate dissemination, the Administrator shall
15 require a design approval holder to establish a World Wide Web site, within six
16 months of the regulation's issuance, containing its instructions for continued
17 airworthiness. Each Web site shall:

18 '(1) Provide access to full-text, diagrams, tables and any other form of
19 presenting all information required for instructions for continued
20 airworthiness;

21 '(2) Be updated at the same time as any internal or Authorized Maintenance
22 Provider database providing instructions for continued airworthiness;

1 '(3) Provide accessibility using common, readily available software. The
2 design approval holder may not require the use of software, hardware,
3 viewers, or browsers that are not readily available to the general public.
4 Design approval holder shall provide hyperlinks to any plug-ins, viewers or
5 browsers needed to access the design approval holder's Web site.

6 '(4) Provide users of the Web site with a description of the minimum
7 computer hardware and software needed to access the instructions for
8 continued airworthiness (e.g. computer processor speed and operating
9 system software). This description shall appear when a user first logs on to
10 the home page of the design approval holder's Web site;

11 '(5) Provide Short-Term (24 to 72 hours), Mid-Term (30-day) and Long-Term
12 (365-day) Web site subscription options whereby the user will be able to
13 access the site, search for information, and purchase, view and print the
14 information for each article for which the manufacturer holds a design
15 approval;

16 '(6) Allow the user to search the manufacturer Web site by various topics
17 including but not limited to article part number, nomenclature, or part
18 number and nomenclature of the larger assembly on which the article is
19 installed, if applicable;

20 '(7) Allow hyperlinking to the design approval holder's Web site from
21 government and aviation-related Web sites;

22 '(8) Allow access to the design approval holder's Web site with no limits on
23 the modem speed by which users may connect;

1 '(9) Possess sufficient server capacity to allow ready access by user and
2 have sufficient capacity to assure that user may obtain information without
3 undue delay;

4 '(10) Correct or delete broken hyperlinks on a weekly basis;

5 '(11) Allow for Web site navigation that does not require a user to return to
6 the design approval holder's home page or a search engine in order to
7 access a different portion of the site; and

8 '(12) Allow user to print instructions for continued airworthiness.

9 '(b) Cost of required information.

10 '(1) A design approval holder shall make available all information as this
11 section requires at a fair and reasonable price. In determining whether a
12 price is fair and reasonable, consideration may be given to relevant factors,
13 including but not limited to:

14 '(A) The net cost to the approved maintenance provider for similar
15 information obtained from the design approval holder, less any
16 discounts, rebates, or other incentive programs;

17 '(B) The cost to the design approval holder of preparing and distributing
18 the instructions for continued airworthiness, excluding any research and
19 development costs incurred in designing and implementing, upgrading or
20 altering the article. Amortized capital costs for the preparation and
21 distribution of the information may be included;

22 '(C) The price other design approval holders charge for similar
23 information;

1 ‘(D) The ability of persons required to follow the instructions for
2 continued airworthiness to afford the information;

3 ‘(E) The means by which the design approval holder distributes the
4 information;

5 ‘(F) The extent to which the information is used, which includes the
6 number of users, and frequency, duration, and volume of use; and

7 ‘(G) Inflation.

8 ‘(2) Within two months of the issuance of regulations pursuant to this
9 section, each design approval holder shall submit to the Administrator a
10 request for approval of the pricing structure for its Web site and amounts it
11 will charge for the information required to be made available under this
12 section. Subsequent to the Administrator’s approval of a design approval
13 holder’s Web site pricing structure, the design approval holder shall notify
14 the Administrator upon the increase in price of a subscription option that
15 results in a price greater than 20 percent above the previously approved
16 priced for the particular ICA.

17 ‘(A) The design approval holder shall submit a request for approval to
18 the Administrator that sets forth a detailed description of the pricing
19 structure and amounts, and addresses, at a minimum, each of the
20 factors specified in paragraph (b)(1) of this section to determine that the
21 pricing structure and amounts are fair and reasonable.

22 ‘(B) The Administrator shall approve or reject the design approval
23 holder’s initial request within 180 days of its submission.

1 ‘(C) The Administrator may reject or withdraw approval for a pricing
2 structure and amounts based on a finding that the pricing structure or
3 amounts are not, or are no longer fair and reasonable, by sending
4 written notice to the design approval holder explaining the basis for the
5 decision.

6 ‘(D) Following the Administrator’s rejection or withdrawal of approval, the
7 design approval holder shall, within three months following notice of the
8 decision, obtain Administrator approval for a revised pricing structure
9 and amounts by following the approval process described in this section.

10 ‘(3) The Administrator may extend for six months the compliance deadline
11 under this section for a design approval holder who can demonstrate
12 significant hardship in complying with this paragraph within six months after
13 the issuance of regulations under this section.

14 ‘(c) Availability to public; trade secrets.

15 ‘(1) Notwithstanding paragraph (a), upon a showing satisfactory to the
16 Administrator, the design approval holder providing information, or a particular
17 portion thereof pursuant to this section may withhold from release information
18 that, if made public, would divulge methods or processes entitled to protection
19 as trade secrets of that person. The Administrator may consider such
20 information or a particular portion thereof confidential in accordance with the
21 purposes of section 1905 of Title 18.

22 ‘(2) A design approval holder may not withhold from release any record,
23 report or information pursuant to paragraph (c)(1), if:

1 ‘(A) The Administrator determines such information is necessary for the
2 continued airworthiness of an article for which the Administrator has
3 issued a design approval; or

4 ‘(B) The design approval holder directly or indirectly provides such
5 information to an authorized maintenance provider or other person
6 engaged in the maintenance, preventative maintenance or alteration of
7 the design approval holder’s article.

8 ‘(3) A design approval holder shall make instructions for continued
9 airworthiness available to the Administrator, notwithstanding paragraph (c)(1)
10 of this section, for the purpose of carrying out the Administrator’s
11 responsibilities under this section.

12 ‘(d) Prohibited Acts, Liability and Remedies.

13 ‘(1) It is a prohibited act for a person to fail to comply, to cause a failure to
14 promptly provide information as required by this section, or otherwise to fail to
15 comply or cause a failure to comply with any provision of this section.

16 ‘(2) A person who fails or causes the failure to comply with a provision of this
17 section is liable for a violation of that provision. A corporation is presumed
18 liable for a violation of this section committed by its subsidiary, affiliate or
19 parent.

20 ‘(3) Any person who violates a provision of this section shall be subject to civil
21 penalties under 49 CFR § 46301(a). For purposes of determining the amount
22 of a civil penalty, the Administrator shall treat each day for which instructions
23 for continued airworthiness for an article remain unavailable as a violation.

1 '(e) Definitions – In this section, the following definitions shall apply:

2 '(1) ARTICLE- The term 'article' shall have the meaning given to it in part 145
3 of title 14 of the Code of Regulations.

4 '(2) DESIGN APPROVAL HOLDER- The term 'design approval holder' means
5 a person to whom the Administrator issues a type certificate, supplemental
6 type certificate, amended type certificate, parts manufacturer approval,
7 technical standard order authorization, letter of technical standard order
8 design approval, and any other action as the Administrator may determine
9 through rulemaking pursuant to this section.

10 '(3) INSTRUCTIONS FOR CONTINUED AIRWORTHINESS- The term
11 'instructions for continued airworthiness' means any information (and any
12 changes to such information) considered essential to continued airworthiness
13 that sets forth instructions and requirements for performing maintenance,
14 preventative maintenance and alteration on an article. The Administrator shall
15 determine the information essential to continued airworthiness for aircraft,
16 aircraft engine, and propeller as that term is used in Parts 23 through 35 of
17 title 14 of the Code of Federal Regulations through rulemaking pursuant to
18 this section.

19 '(4) APPROVED MAINTENANCE PROVIDER- The term 'approved
20 maintenance provider' means –

21 '(A) A person with whom a design approval holder has a preferential
22 relationship, by which the design approval holder provides instructions
23 for continued airworthiness, service bulletins, or other maintenance data

1 under the terms of a contract, membership agreement, franchise
2 agreement or similar arrangement.

3 '(B) A person whom the design approval holder identifies as a preferred
4 or approved source of maintenance for the design approval holder's
5 articles. This includes the design approval holder's own business entity,
6 if certificated by the Administrator to perform maintenance, preventative
7 maintenance or alteration on the article.

8 **Sec. 4. Conforming Amendment**

9 The table of sections for chapter 447 of title 49 is amended by adding at the end
10 the following:

11 `44729. Availability of maintenance information.'.