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RE: Treatment of Commercial Parts and COTS Parts under the Bilateral Agreement between the European Union and United States

Dear Ms. Baker and Mr. Duncan:

We are requesting rectification of an issue created by the definition of commercial parts in 14 CFR § 21.1(b)(3). Under the United States' regulatory framework, such parts do not require a production approval[1] and consequently are not usually accompanied by Form 8130-3 when used domestically. However, under the FAA-EASA Technical Implementation Procedures (TIP) and Maintenance Annex Guidance (MAG) commercial parts do require a Form 8130-3. We request the FAA work with EASA so that commercial parts need not be accompanied by Form 8130-3 as a condition for installing them in maintenance subject to the MAG.

We are seeking similar relief for "Commercial-Off-the-Shelf" (COTS) parts. These parts do not meet the definition of commercial part in § 21.1(b)(3) because they are not on a commercial parts list issued by the design approval holder,[2] yet are included in the approved design. However, prior to 2010 these parts did not require a production approval because the manufacturer was not substantially certain at the time of production that a particular part would be installed on a type-certificated product. In the Matter of Pacific Sky Supply, Inc., FAA Order No. 93-19, (June 10, 1993).

Indeed, commercial and COTS parts are not produced and sold for aviation use. They are however, normally referenced in a design approval holder's design and maintenance data such as drawings and specifications, Instructions for Continued Airworthiness, Illustrated Parts Catalogues (IPC), Illustrated Parts Lists (IPL), Illustrated Provisioning Documents (IPD), maintenance and overhaul manuals or other data approved by or acceptable to the FAA. Like commercial parts,[3] COTS parts are typically produced and sold only under the manufacturer's specification and marked only with the manufacturer's markings.

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[1] See § 21.9(a)(4).
[2] Most design approval holders have chosen not to create a commercial parts lists; many will never create such lists.
[3] See § 21.50(c)(2)(ii), which requires commercial parts to be sold only under the manufacturer's specification and marked only with the manufacturer's markings.

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In its 2006 Notice of Proposed Rulemaking to amend part 21 (71 Fed. Reg. 58920, October 5, 2006), the FAA acknowledged the existence and use of COTS parts, although it did not use that term.

> For years, industry has used the term, ''commercial parts,'' in referring to parts that are not designed or manufactured specifically for aviation use such as light bulbs, fire axes, smoke detectors, and so on. Whereas a standard part specification is developed by a consensus standards organization and is publicly available, the design for a commercial part is developed privately.
>
> The FAA recognizes that it is unrealistic to expect manufacturers making thousands of non-aviation parts per day and relatively few aviation parts to obtain a PMA. Enforcement of PMA violations is difficult because the FAA has often been unable to show that these manufacturers are producing with the intent to sell their parts for installation on a type-certificated product. (emphasis added)

When the final rule was adopted,[4] the FAA narrowly defined commercial part under § 21.1(b)(3) and established a new methodology for a DAH to designate commercial parts under § 21.50(c). While acknowledging that COTS parts could be installed under part 43,[5] the FAA included language in § 21.9(a) that a COTS part manufacturer would need a production approval if it knew or should have known that it was reasonably likely its part would be installed on a type-certificated product. This statement is diametrically opposed to the agency's acknowledgement in the above-referenced preamble.

Six years later, few DAH's have chosen to designate commercial parts under § 21.50, while COTS parts are included in the design in the same manner as they were prior to 2010, i.e., without a corresponding production approval. Like commercial parts, COTS parts may be accompanied by a manufacturer's Certificate of Conformance (C of C) and are routinely installed under part 43. Unfortunately, in the absence of Form 8130-3 such parts are ineligible for installation in articles subject to the MAG.

Many of the undersigned entities, while working closely with the FAA and EASA during the agencies' review of MAG Changes 5 and 6, requested that commercial parts (and COTS parts) be excepted from the Form 8130-3 requirement. EASA rejected this proposal because that agency's regulations do not recognize commercial parts or COTS parts. In Europe, such parts must be accompanied by an EASA Form 1 like any other part

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[4] Production and Airworthiness Approvals, Part Marking, and Miscellaneous Amendments, 74 Fed. Reg. 53368 (Oct. 16, 2009).

[5] Id. at 53,374 (explaining that "[t]hose parts that are generally recognized by industry as commercial, but have not been designated on a Commercial Parts List, must be approved for installation in accordance with part 43").

produced under a production organization approval (POA) holder's quality system.[6] While we have doubts about enforcement, we recognize the rejection was based solely on the fact that the two regulatory systems treat these parts differently.

Differences in the agencies' rules and systems must be negotiated to ensure the result does not create an impossible situation for either authority's industry and certificate holders. In this case, the failure to address the difference in the design regulations has created an untenable situation on both sides of the Atlantic.

Commercial parts exported from the U.S. to the EU can only be documented with Form 8130-3 if they have been brought under a PAH's quality system, a rare occurrence (see paragraph 11 of AC 21-45). This is because the PAH must either stock the parts in its own inventory or arrange for a commercial or COTS parts manufacturer to issue the form on its behalf. Either option is unreasonably costly, unduly burdensome and impractical.

COTS parts producers are in a similar position but have the added problem of potentially violating § 21.9(a) if the manufacturers knew or should have known that their parts are installed on type-certificated products. Since this legal standard is, by the agency's own admission, unrealistic for COTS parts we urge the FAA to use newly-adopted § 21.9(a)(7)[7] to except these parts from § 21.9(a).[8]

Maintenance providers subject to the MAG cannot install new commercial parts or COTS parts on articles undergoing maintenance because they are not accompanied by Form 8130-3. Similarly, neither designated airworthiness representatives nor repair stations can qualify an otherwise airworthy commercial or COTS part because the MAG requires traceability to the PAH unless otherwise excepted. A commercial or COTS part traceable only to the DAH does not comply with the MAG.

The undersigned parties are aware that EASA may undertake rulemaking on "required" parts documentation generally, including consideration of commercial parts and possibly COTS parts. In the meantime, U.S. producers of commercial parts and COTS parts cannot issue FAA Form 8130-3 and, without that document, U.S. repair stations and European approved maintenance organizations cannot install these parts in compliance with the TIP and the MAG. This situation must be addressed.

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[6] It is our understanding that some COTS-like parts are used in Europe without EASA Form One, despite the general requirement for EASA Form One.

[7] Section 21.9(a)(7) is scheduled to become effective August 30, 2017.

[8] An exception could be drawn consistent with the scope of the Pacific Sky Supply discussion of intent under tort law.

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We urgently request the FAA initiate talks with EASA to resolve this small but important regulatory difference. The TIP must acknowledge the differences in and the equivalency of the regulatory systems and address the type of documentation that will be acceptable to EASA for different articles. We believe mutual recognition of regulatory differences is a fundamental principle of bilateral agreements and must be applied in this case.

In the meantime, the undersigned recommend that U.S. repair stations and EU approved maintenance organizations be excepted from the Form 8130-3 requirement for U.S.-manufactured commercial parts and COTS parts when installed in articles subject to the MAG. This would treat such parts in the same manner as standard parts and parts fabricated during maintenance.

For the foregoing reasons, the undersigned urge the agencies to revise the TIP and the MAG as set forth below:

(1) Add the following new definitions to paragraph 1.7 of the TIP and re-designate existing subparagraphs 1.7(h) through 1.7(mm) as required:

h. Commercial part – as defined by the FAA in 14 CFR § 21.1(b)(3) means an article listed on an FAA-approved Commercial Parts List included in a design approval holder's Instructions for Continued Airworthiness required by §21.50.

i. Commercial Off-the-Shelf (COTS) part – a part that (1) is not a commercial part or standard part as defined herein, (2) was not manufactured specifically for aviation use, (3) was produced only under the part manufacturer's specification and marked only with the part manufacturer's markings, and (4) is referenced in the design approval holder's design or maintenance data (e.g., Instructions for Continued Airworthiness, Component Maintenance and Overhaul Manuals, Illustrated Parts Catalogue, Illustrated Parts List, Illustrated Provisioning Documents or other data acceptable to or approved by the FAA).

(2) Section V, paragraph 5.1.10 of the TIP be revised by (i) revising the title of the section to read "New Modification, Replacement, Standard, Commercial and COTS Parts" and (ii) adding new subparagraph (d) to read as follows:

(d) The AA shall accept commercial parts and COTS parts exported from the U.S. (i) with FAA Form 8130-3 signed on the left side, or (ii) when traceable to the manufacturer, accompanied by a conformity statement and in a satisfactory condition for installation.

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(3) Section B, Appendix 1, paragraph 10(k)(1)(a) of the MAG be revised by (i) adding new subparagraph (vi) to read as follows, and (ii) by re-designating existing subparagraphs (vi) and (vii) as subparagraphs (vii) and (viii), respectively:

(vi) Commercial parts and COTS parts exported from the U.S. may only be accepted as detailed in subparagraphs 5.1.10(d) of the Technical Implementation Procedures (TIP).

(4) Section C, Appendix 1, paragraph 7(c)(1)(a) of the MAG be revised by (i) adding a new subparagraph (vi) to read as follows, and (ii) by re-designating existing subparagraphs (vi) and (vii) as subparagraphs (vii) and (viii), respectively:

(vi) Commercial parts and COTS parts exported from the U.S. may only be accepted as detailed in subparagraph 5.1.10(d) of the Technical Implementation Procedures (TIP).

Please let us know if you have any questions or desire additional information.

Sincerely,

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