



121 North Henry Street
Alexandria, VA 22314-2903
T: 703 739 9543 F: 703 739 9488
arsa@arsa.org www.arsa.org

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By e-mail to: carol.e.giles@faa.gov
steven.w.douglas@faa.gov
rusty.jones@faa.gov

Carol E. Giles
Manager
Aircraft Maintenance Division
Federal Aviation Administration
950 L'Enfant Plaza, S.W.
5th Floor
Washington, D.C. 20024-2123

Steven W. Douglas
Assistant Division Manager

Russell J. Jones
Manager
AFS-320 Special Programs Branch

RE: Guidance on 14 C.F.R § 91.409(f)(3) in response to Assistant Chief Counsel's Interpretation dated December 5, 2008

Dear Carol, Steve and Rusty:

On a Thursday afternoon, February 26, 2009, conference call with Bob Cohn and me, you invited us to submit additional material to assist the Federal Aviation Administration's (FAA) Flight Standards Service (AFS) in responding to the far-reaching repercussions of the Assistant Chief Counsel's Interpretation (dated December 5, 2008) regarding the term "current" in 14 C.F.R. § 91.409(f)(3).

By way of background, § 91.409(f) requires the registered owner or operator ("Operator") to "select, identify in the aircraft maintenance records, and use one of the following programs for the inspection of the aircraft." The inspection program set forth in § 91.409(f)(3) is "a current inspection program recommended by the manufacturer."

The Assistant Chief Counsel's interpretation states that "current" as used in that paragraph does not mean "current" as of today, but rather "current" as of the time the operator "adopts" the inspection program. As we explained on the call, we believe that interpretation is erroneous, and, we disagree that the Administrative Procedure Act (APA) requires that interpretation. Section 91.409(f)(3) was itself promulgated by full rulemaking procedures and there was no suggestion at the time nor in the rulemaking that "a current inspection program recommended by the manufacturer" means anything other than the latest currently recommended program, which, as the Interpretation acknowledged, is how the provision has "historically...been interpreted." Ultimately, if the Operator did not wish to adopt the most current program, it had the option under § 91.409(f)(4) to opt for another program approved by the FAA. However, we will leave addressing the substance of the Interpretation to a later time.

For immediate purposes, the new Interpretation is causing significant confusion among certificated repair stations that provide inspection services and FAA Aviation Safety Inspectors ("ASIs"), in terms of how to apply § 91.409(f)(3). This confusion is putting maintenance providers in Catch-22 situations. Therefore, ASIs and repair stations (many of which have disassembled aircraft in hangars currently undergoing detailed inspections affected by this Interpretation) need guidance **immediately** from your Office on how to

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apply § 91.409(f)(3) in light of the December 5 Interpretation and consistent with other regulations.

We believe it is essential for AFS-300 promptly to issue guidelines as follows:

- (1) The Operator must demonstrate to the maintenance provider performing the inspection that the Operator has properly "selected" an inspection program and "identified [it] in the aircraft maintenance records" at the time of the adoption.** [That is what the express language of § 91.409(f) and the follow on § 91.417 require.]
- (2) Operators cannot retroactively adopt a manufacturer's inspection program.** [To permit a retroactive adoption of an "older" inspection program would enable an Operator to circumvent the plain, mandatory language of § 91.409(f), which requires a timely selection and identification of an inspection program in its aircraft maintenance records.]
- (3) If the Operator has not identified the program in the aircraft maintenance records, the maintenance provider would be required to use the inspection program recommended by the manufacturer at the time of the inspection.** [This is consistent with §§ 43.13¹ and 91.417², as well as the December 5 Interpretation.³ It is also consistent with FAA Order 8900.1, Change 36, October 3, 2008, at 6-42(C)(1), which provides that "inspectors must recognize that these [large aircraft inspection] programs must be either currently recommended by the manufacturer or currently in use by 14 CFR part 121 or 135 operators who are supplying the program. . . . The intent of this requirement is to prevent the use of obsolete programs."]
- (4) If the Operator has properly "adopt[ed] a manufacturer's inspection program" in its aircraft maintenance records (December 5 Interpretation, at 2-3) that is other than the inspection program recommended by the manufacturer at the time of the inspection, the Operator is responsible for providing the 'older' selected program to the maintenance provider performing the inspection.** [This

¹ "Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in §43.16." (Emphasis added.)

² Section 91.417 deals with "Maintenance Records," and uses the term "current" in several places where the only reasonable reading of that term would be the "most recent" or "up-to-date" record.

³ The December 5 Interpretation did not encompass a situation wherein the Operator fails to properly select and identify its chosen inspection program in the aircraft maintenance records. Indeed, as was discussed on the conference call, the December 5 Interpretation of § 91.409(f)(3) presupposes that the Operator has properly made such a selection and identification in its aircraft maintenance records.

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is consistent with §§ 43.13(a), 145.109 and 145.207 all of which require maintenance providers to maintain current documents and data (not "old" ones) when performing the relevant work, including airworthiness directives, instructions for continued airworthiness, maintenance manuals, overhaul manuals, standard practice manuals, service bulletins, other applicable data acceptable to or approved by the FAA, and to have a method for ensuring currency (in a repair station manual).]

We strongly urge the FAA to issue the above-referenced guidance **immediately** to provide direction to repair stations and other maintenance providers as well as ASIs. Time is of the essence. Aircraft are disassembled in hangars throughout the country undergoing inspections implicated by this new Interpretation; numerous other aircraft are scheduled to undergo such inspections in the near future.

Finally, you should be aware that we believe that it was inappropriate and contrary to the APA to issue the Interpretation in light of its wholesale change of policy with respect to § 91.409(f)(3) without following notice and comment rulemaking procedures. Even at this late date, the FAA should initiate a rulemaking to clarify the rule and consider this Interpretation with the benefit of input from interested stakeholders. We will address this with your Counsel's office in the near future.

Your Servant,

A handwritten signature in blue ink, appearing to read "Sarah MacLeod". The signature is fluid and cursive, with the first name "Sarah" written in a larger, more prominent script than the last name "MacLeod".

Sarah MacLeod
Executive Director

cc: Robert E. Cohn
Patrick Rizzi
Edmund Averman