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RE: Comments to Docket No. FAA-2010-1167, proposed Airworthiness Directive interpretation

The Aeronautical Repair Station Association (ARSA) respectfully submits the following comments to the proposed Airworthiness Directive (AD) interpretation published in the Federal Register on April 14, 2011.¹

ARSA is the principal association for the international aviation maintenance industry. Its members include aircraft operators, aviation maintenance facilities and individuals certificated by the Federal Aviation Administration (FAA). As such, the proposed interpretation directly impacts ARSA members.

General Comments

The proposed interpretation fails to correlate existing rules.

A direct relationship clearly exists between the design, production, operating and maintenance rules in Title 14, Code of Regulations (14 CFR)². This synergy cannot be ignored by viewing individual rules – such as part 39 – in isolation; doing so ignores the regulatory structure which results in conflicting requirements and considerable confusion. When applied as intended, the rules provide a logical means to address unsafe conditions in both new products and operating aircraft.

In particular, a part 21 design approval establishes the correct and acceptable operation and configuration for an aircraft type. When an unsafe condition is discovered, a design change occurs to rectify the issue for production aircraft³ and when appropriate, an AD is issued to correct the problem in the operating fleet.

Once a design change is instituted, the operational and maintenance requirements must be followed to ensure the aircraft is flown within its design and maintained in such a way

¹ 76 FR 20898

² All references in this document are to 14 CFR.

³ In practice, such changes normally take place long before an AD has been issued; this step ensures each product or article the production approval holder presents for airworthiness certification or approval is in a condition for safe operation (§ 21.146(c)). If an AD were issued and such action had not been taken, the FAA can direct the type certificate holder to make changes (§ 21.99).

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that it is returned to at least its original condition. When an aircraft is altered, particularly by a mandatory change required by an AD, the change must comply with the applicable airworthiness standard⁴ and thereafter must be maintained to meet the definition of airworthiness. As the FAA Office of the Chief Counsel stated in its March 26, 2008 legal interpretation to Mr. Christopher Witkowski:

The National Transportation Safety Board (NTSB) long ago adopted a standard for airworthiness that was based on the statutory requirement for the issuance by the FAA of an airworthiness certificate for an aircraft. A seminal case is *Administrator v. Doppes*, 5 NTSB 50, 52 N.6 (1985) (“The term ‘airworthiness’ is best defined by reference to Section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. § 1423(c)) which imposes a two-prong definition. In order to be airworthy, an aircraft (1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation.”) (*Emphasis added*)

It is imperative for the FAA to recognize the fact that the vast majority of ADs are accomplished through maintenance or alteration actions. Accordingly, part 43 provides the only method by which those steps may be taken. Stated differently, although the mandatory AD action may stem from part 39, performance of any required maintenance or alteration steps falls squarely within part 43.

Recognizing the distinctions between the rules, and focusing on the true requirements of part 39, avoids significant problems presented by FAA’s proposed interpretation.

Although the FAA practice of wholesale incorporation of service documents into an AD is rationalized by noting the potential for obtaining alternative means of compliance (AMOC), the agency must consider its resources. In practice, if every typographical error and misstatement in referenced material were corrected⁵, the industry would grind to a halt as the FAA labored to approve the influx of AMOCs.

Indeed, the very existence of such errors in material “incorporated by reference” draws the FAA’s current practice of issuing ADs into question. Instead of creating an AD to precisely and directly address an unsafe condition, the FAA simply adopts manufacturer service information in its entirety, with apparently limited review. The FAA cannot abrogate its responsibility in that manner.

Further, the fact that such service information normally contains steps that are ancillary to correcting the unsafe condition – but must be followed under the proposed interpretation – raises the issue of FAA’s ability to uniformly enforce its rules. For

⁴ For instance, part 25 for transport category aircraft.

⁵ Under the rationale in the interpretation, proper accomplishment of the AD requires that such errors be corrected; obtaining an AMOC is the avenue presented for “deviations” of this type.

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instance, the interpretation states that methods of access⁶ specified in a service document that is incorporated⁷ into an AD can be enforced. The only plausible means for the FAA to enforce such provisions is by an FAA inspector directly observing the steps taken to access the work area; the result is uneven enforcement of these AD “requirements.” The fact that such steps are even considered in a discussion of AD compliance shows that the interpretation has lost the purpose of the part 39 rules; the agency should have a laser-like focus on ensuring the unsafe condition is addressed, rather than concerning itself with non-essential steps.

Finally, the “strict and continued compliance” posture of the proposed interpretation is not agreed upon within the FAA. Differing views exist among decision makers in FAA flight standards and aircraft certification, and there is disagreement among the directorate counsel, who are delegated the responsibility for issuing ADs. These facts will ensure ad hoc, arbitrary application of the proposed interpretation, and will foster disregard for existing regulation.

For the foregoing reasons, and as discussed further below, ARSA requests that the proposed interpretation be withdrawn.

Comments Specific to the Proposed Interpretation

To ensure we address all issues raised in the proposal, our comments restate excerpts of the proposed interpretation in *italics* with responses to each proposal in **bold**.

Proposed Response 1—Continuing Obligation

Section 39.9 notes the need for both initial action by the aircraft operator and continued compliance by that aircraft operator with the AD requirements.

The cited rule addresses operation of an aircraft or use of a product when “the requirements of an airworthiness directive have not been met”. Clearly, the rule contemplates accomplishment of AD requirements⁸ prior to flight.

ARSA submits that there are ADs that require one-time actions and others that mandate continuing actions until “terminating” requirements are developed.⁹ Therefore, a blanket statement that all ADs require both initial and continuing action is overbroad.

⁶ Examples include access doors, service panels and covers, but removal of items to make access easier are often included as well.

⁷ Such incorporated information becomes the AD.

⁸ Notably, the language of the rule is past tense (i.e., “have not been met”) signaling that the focus is on initial AD compliance.

⁹ For example, a number of existing ADs require only repetitive inspections but, as is often the case, a revised AD may be issued if a final corrective action becomes available.

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Further, in the case of a “terminating” AD, continued compliance falls to the regulations covering operational and maintenance requirements. An AD that required a change to the aircraft flight manual or mandated a certain configuration of the aircraft would not remain within the purview of § 39.9 forever. That is, once the AD actions have been accomplished separate rules apply to the proper operation and condition of the aircraft.

As noted above, to be airworthy, an aircraft must conform to its type certificate, if and as that certificate has been modified by ADs, and must be in condition for safe operation. The operating and maintenance rules do not change or disappear simply because an AD has been issued against the aircraft.

Section 39.9 was added to the final rule in 2002 as a result of comments that the proposed version of the rule language combined compliance and noncompliance issues in one heading (proposed § 39.5, final version is § 39.7 of the 2002 rulemaking). The final rule preamble stated that the agency added § 39.9 “to refer to § 39.7, which is the rule that operators will violate if they fail to operate or use a product without complying with an AD that applies to that product.”

Again, the cited rule is aimed at operations without initial or repetitive AD actions having been accomplished.

The FAA has explicit regulations that ensure “continued compliance” with a mandated configuration. Specifically, part 43 requires that all maintenance, preventive maintenance and alterations be performed in such a manner as to return the article to at least its original or properly altered condition.¹⁰

As a result, if an AD is issued and a new configuration is mandated, all maintenance actions subsequent to initial AD accomplishment must be performed in a manner that meets the altered condition specified in the AD; failure to do so is a “maintenance” violation under part 43.¹¹

This concept is evident in the preamble to the 2002 final rule which states that operators “will violate [§ 39.7] *if* they fail to operate or use a product without complying with an AD that applies to that product.” (*Emphasis added*) Surely, had the intent been to reintroduce § 39.9 for failure to adhere to the required configuration once the AD has been complied with, the preamble would have noted that fact.

¹⁰ See § 43.13.

¹¹ That is, for AD mandated configurations, a part 39 “compliance” violation does not occur after the AD has initially been accomplished.

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The correct interpretation is clear in the preamble to the previous final rule¹² which stated that “[t]he FAA does not issue ADs as a substitute for enforcing maintenance rules.”

Section 39.9 explains the continuing obligation for aircraft operators to maintain the AD-mandated configuration. Section 39.7 imposes an operational requirement. Because the AD imposes an enforceable requirement to accomplish the mandated actions, the only way to give § 39.7 any meaning is to recognize that operators are required to maintain the AD-mandated configuration.

There is no doubt that part 39 “imposes an enforceable requirement to accomplish the [AD] mandated actions”. However, once the AD-mandated configuration has been completed, the “purpose” of § 39.7 is fulfilled; continued airworthiness is assured through part 43.

Once the AD requirements are met an operator may only revert to normal maintenance if that maintenance does not result in changing the AD-mandated configuration.

This notion is not supported by existing regulations. All maintenance falls under part 43; there is no distinction between “normal maintenance” and “AD maintenance.”

The objective of part 39 and ADs generally is not just to require accomplishment of particular actions; it is to ensure that, when products are operated, they are free of identified unsafe conditions.

It is interesting to note how easily “plain language” can be misconstrued; the history of part 39 and the language in today’s regulation do not support this blanket statement. The reason part 39 exists is to ensure that operators are aware of and directed to “address” unsafe conditions—period. Once the unsafe condition is addressed, the design of that aircraft has changed and the “unsafe” condition cannot be reintroduced without running afoul of part 43.

Section 39.7 is the regulatory means by which the FAA prevents reintroduction of unsafe conditions.

On the contrary, § 39.7 addresses a known and clearly defined unsafe condition in a product that is likely to exist or develop in other products of the same type design. The regulation does not address the reintroduction of unsafe conditions.

In 1965 the FAA recognized that maintenance may be the cause of some unsafe conditions: “The responsibilities placed on the FAA by the Federal Aviation Act justify broadening the regulation [part 39] to make any unsafe condition, whether resulting

¹² 30 FR 8826 (July 14 1965)

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from maintenance, design, defect, or otherwise, the proper subject of an AD.” (Amendment 39–106; 30 FR 8826, July 14, 1965). Prior to Amendment 39–106 ADs could not be issued unless the unsafe condition was related to a design feature. After Amendment 39–106 ADs could be issued for unsafe conditions however and wherever found. The FAA does not issue ADs as a substitute for enforcing maintenance rules. If a maintenance process is directly related to an unsafe condition, that maintenance action would be proper for an AD. Particularly for unsafe conditions resulting from maintenance, it would be self-defeating to interpret § 39.7 as allowing reversion to the same maintenance practices that caused or contributed to the unsafe condition in the first place.

If changes to a maintenance process are required to address an unsafe condition the resulting AD will become either an airworthiness limitation¹³ or another limitation required to be followed by maintenance personnel.

Similarly, if an unsafe condition is addressed by an AD that changes the operating limitations in the aircraft flight manual, a pilot could not fly contrary to that “new” limitation without violating an operating rule; the pilot would not be charged with failure to “accomplish” an AD once the flight manual was updated.

In either case, the AD is issued to “force” a change to the design of the operating fleet; once that change is accomplished, part 39 has been satisfied.

Proposed Response 2—Additional Actions

First Title 49, United States Code, § 44701, establishes the FAA’s broad statutory authority to issue regulations in the interest of aviation safety, and the issuance of an AD is an exercise of this authority. While describing the types of actions required by ADs, § 39.11 does not limit the broad authority established by the statute. The requirements of the AD are imposed by the language of the AD itself, and not by § 39.11. Thus an AD may require more actions than correcting the specific unsafe condition. An example would be an AD requirement for certain continuing maintenance actions to prevent or detect the unsafe condition in the future.

ARSA strongly disagrees with the notion that § 39.11 does not limit the FAA’s authority. If an AD requires actions beyond what is necessary to directly “address” an unsafe condition, not only is the rule violated, it is a misuse of the FAA’s rulemaking power.

Prior to Oct. 20, 1964, airworthiness directives were issued under part 507¹⁴ as provided in the Civil Air Regulations § 1.24¹⁵ At that time, part 507 ADs were

¹³ See § 43.16

¹⁴ A Final Rule effective Nov. 20, 1964 (29 FR 14403) created part 39 which replaced part 507 and pertinent parts of CAR § 1.24, upon which part 507 was based.

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promulgated under the Administrator’s general rulemaking power,¹⁶ in conjunction with the notice and comment requirements of the Administrative Procedures Act (APA).

In July 1964 a final rule¹⁷ was issued to “remove certain procedural restrictions imposed on the FAA with regard to the issue of airworthiness directives.” The preamble to that rule stated, in part, that:

The Agency recognizes that use of ADs to correct improper or inadequate maintenance on the part of particular persons or organizations would impose an unreasonable burden on the vast majority of persons who comply with the regulations and properly maintain their aircraft. The Agency, accordingly, will not issue ADs as a substitute for enforcing maintenance rules. The issue of ADs is governed by the Administrative Procedure Act and its provisions relating to public notice and procedure. In addition, we agree with the commentators that the Federal Aviation Act of 1958 allows only the issue of minimum standards and reasonable rules and regulations. ADs are no different than the other types of rules issued by this Agency and we cannot and will not issue an AD unless we are convinced that its need and scope are fully justified. (*Emphasis added*)

Those rules formed the basis for part 39. It is therefore clear that the circumstances under which the agency can issue ADs are limited; namely, when a definable unsafe condition in a particular product is identified. In its own words, the FAA “promised” to narrowly address unsafe conditions through ADs issued under part 39. Therefore, ADs requiring more actions than necessary to directly address a specific unsafe condition are improper.

The FAA must follow its rule. That fact is clear under the “Accardi doctrine”¹⁸ which holds that an agency must abide by its regulations.¹⁹ In this instance, the directive is very clear; § 39.5 states that: “[The] FAA issues an airworthiness directive addressing a product when we find that: (a) An unsafe condition exists in the product; and (b) The condition is likely to exist or develop in other products of the same type design.”

¹⁵ Section § 1.24 stated “Service experience changes. (a) Where the Administrator finds as a result of service experience that an unsafe condition exists with respect to a design feature, part or characteristic of any product, and that such a condition is likely to exist or develop in other products of the same type design, he shall provide notice (usually through an AD) thereof for all operators of products of that type, and the product shall not thereafter be operated until the unsafe condition has been corrected, unless otherwise authorized by the Administrator under specified conditions and limitations, including inspections.”

¹⁶ Regulations of the Administrator, Part 405 Rule Making Procedures, Dec. 31, 1958.

¹⁷ 30 FR 8826

¹⁸ *Accardi v. Shaughnessy*, 347 U.S. 260.

¹⁹ Regulations validly prescribed by the Administrator are binding upon the agency as well as the citizen. ADs that require action outside the limitations of part 39 fail to adhere to this “black letter” doctrine.

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In developing an AD, the FAA exercises its discretion in determining what actions are to be required in the interest of aviation safety. This discretion is limited only by the Administrative Procedure Act's prohibition on rulemaking actions that are "arbitrary and capricious." Provided the actions required by an AD are reasonably related to the purpose of resolving the unsafe condition, it is within the FAA's discretion to mandate them. For example, service information frequently includes instructions for accessing the area to be worked on to address the unsafe condition. Because these access instructions are reasonably related to addressing the unsafe condition, it is within the FAA's discretion to mandate them.

ARSA strongly disagrees with the FAA's assertion that its AD process adheres to the arbitrary and capricious requirements of the APA.²⁰

The APA provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²¹ An agency rule is arbitrary and capricious if the agency "...entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."²²

If brought before a court of law, the Association believes the proposed interpretation would not pass the arbitrary and capricious test, especially since matters of safety is involved. Requirements needed to address an unsafe condition must be absolutely clear; if an AD – which in essence are manufacturer's service information incorporated wholesale – is unclear on exactly what is mandated to directly address the specified unsafe condition, the agency has created a problematic enforcement and compliance position for itself and the industry.

In order for the FAA to "exercise its discretion in determining what actions are to be required in the interest of aviation safety," agency rules must be clear on their face and should not require FAA interpretation. An AD must be understandable to the person who will perform the action described. Since the majority of ADs are accomplished by maintenance or alteration actions, the steps can only be performed by persons identified in § 43.3.

Therefore, it is ultimately an individual mechanic or technician that will perform the work specified in an AD. The regulation, or in this case AD requirements,

²⁰ 5 U.S.C. § 706(2)(A) (1994)

²¹ APA § 706

²² Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 US 29 (1983).

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must be understandable to that mechanic or technician. It is unacceptable to issue an AD that will require agency interpretation and a team of engineers (and, apparently, lawyers) to decipher.

ADs incorporating documents with hundreds of pages are clearly arbitrary and capricious. Nevertheless, the FAA fully condones such complex ADs; as stated in Appendix A to Order 8110.103A²³:

f. *Question:* The AD requires that I accomplish specific instructions in a SB. Those instructions require actions from a manual, and the manual requires actions from a standard practice manual. My operating procedure differs from the standard practice manual. Do I need an AMOC to keep using my operating procedure?

***Answer:* Yes. You must accomplish the specific instructions in the SB specified in the AD, including any second- or third-tier documents that are required to complete the action(s). (*Emphasis added*)**

Although industry and FAA personnel have expressed frustration time and again in understanding exactly what is required to directly address an unsafe condition – versus information contained in a referenced service document – the proposed interpretation does not specifically address the problem. Instead, AD requirements are couched in the broadest of terms, in an approach that brings to mind the maxim “if everything is important, then nothing is important;” that rationale fails to meet the specific intent in part 39 of only addressing the unsafe condition.

We understand that some members of the AD ARC believe that some ADs are overly prescriptive with respect to mandated actions that they believe are unnecessary to address the unsafe condition. As explained previously, § 39.11 does not address this concern. Rather, the rulemaking process by which individual ADs are adopted provides the public with an opportunity to identify and comment upon these concerns with each AD. In addition, each AD contains a provision allowing for approval of an AMOC, which allows operators to obtain relief from requirements they consider unnecessary or unduly burdensome.

ARSA agrees that ADs are overly prescriptive. The FAA is utilizing the part 39 process, reserved for issuing rules that focus on addressing defined unsafe conditions, to rubber stamp entire service bulletins. Such documents normally contain information having nothing to do with unsafe conditions.

²³ Titled, “Alternative Methods of Compliance (AMOC)”.

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Design approval holders have additional requirements to abide by, and contract and tort law dictate further instructions than are unnecessary to directly address unsafe conditions. This contributes to superfluous questions of compliance and AMOC requests.

The agency cannot relinquish its responsibility to ensure its rules are clear and unambiguous.

Proposed Response 3—Use of the Term “Applicable”

“Applicable” has the same meaning in both places in paragraph (f). The second usage references Table 1 in the AD that identifies the model(s) of airplanes to which each service bulletin applies. So the “applicable service bulletin” is the one that applies to each corresponding airplane model, as indicated in the table in the AD. Similarly, “all the applicable actions” specified in each applicable service bulletin are those actions that are identified as applying to a particular airplane. “Applicable” is a necessary qualifier in this context for two reasons: (1) In many ADs, the referenced service bulletins specify different actions for different airplane configurations, typically identified as “Group 1, Group 2,” etc. (2) In many ADs, the referenced service bulletins specify different actions depending upon conditions found during accomplishment of previous steps in the instructions, for example, if a crack is smaller than a specified size, repair in accordance with the Structural Repair Manual; if larger, repair in accordance with a method approved by the Aircraft Certification Office. So “applicable” limits the AD’s requirements to only those that are specified in the service bulletin for the configuration and conditions of the particular airplane. We intend for the word “applicable” to limit the required actions to those that apply to the particular airplane under the specific conditions found.

As stated previously, under part 39 the FAA cannot make anything applicable that is not directly related to the unsafe condition. The “applicable” actions may therefore pertain to a particular airplane, but necessarily must be limited to the actions necessary to directly address the unsafe condition.

The opinion that “applicable” in this context should be interpreted to refer only to those actions in the service bulletin that are necessary to address the unsafe condition, and that operators should not be required to accomplish any other actions that they determine are not necessary, is incorrect. Without the modifier “applicable,” the requirement to accomplish “all actions specified in the service bulletin” would literally mandate accomplishing all actions, whether or not applicable to the configuration and condition of a particular airplane. The modifier “applicable” is necessary to avoid this literal, but unintended and likely overly burdensome, meaning.

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We disagree. The proposed interpretation literally mandates accomplishing all actions, whether or not applicable to correcting the unsafe condition. Including tasks that are ancillary to such corrective actions is contrary to part 39.

For example, in AD 2007–07–02 different actions are required depending on the conditions found while accomplishing the modification. The adjective, “applicable,” is necessary to limit the required actions to those that are indicated for the conditions found. The purpose of the phrase, “by accomplishing all the applicable actions specified,” is to eliminate precisely the ambiguity that would be introduced by the WG members’ question. The operator is required to accomplish “all” the actions that are “applicable” to the affected airplane, without allowing discretion to determine which ones are, in the operator’s opinion, “necessary” to address the unsafe condition.

The very fact that an AD is cited in this context shows that the FAA has failed to properly identify the specific unsafe condition, as required by part 39. There should be no ambiguity in addressing the unsafe condition, but the FAA creates ambiguity by issuing ADs that incorporate voluminous service documents and then takes the position that every action in the referenced material is required because the corrective action exists somewhere within that information. This “shotgun approach” is contrary to part 39.

The FAA must specify the unsafe condition and particular actions required to correct that condition. Owing to the fact that the majority of ADs involve maintenance or alterations tasks, the necessary actions must be accomplished under part 43.

Proposed Response 4—Impossibility

If a change in a product affects your ability to accomplish the actions required by the airworthiness directive in any way, you must request FAA approval of an alternative method of compliance. Unless you can show the change eliminated the unsafe condition, your request should include the specific actions that you propose to address the unsafe condition. Submit your request in the manner described in § 39.19.

If a change to a product makes it impossible to comply with the requirements of an AD, then the operator must request an AMOC approval.

The FAA does not have the resources to determine the modification status of every product to which the AD may apply. If it is impossible to comply with an AD as written, that does not mean the product does not have the unsafe condition. The only way to make sure the product does not, or that there is another acceptable way to address it, is to require an operator to obtain an AMOC approval.

For several years before part 39 was revised in 2002 the FAA included a Note in every AD that contained the same substance as the regulation. This revision to the regulations

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was a result of some operators claiming that an AD did not apply to a particular airplane because the airplane's configuration had changed, even though that airplane was specifically identified in the "Applicability" paragraph of the AD. But a change in product configuration does not necessarily mean that the unsafe condition has been eliminated, and in some cases the unsafe condition may actually be aggravated. So it is necessary to emphasize that the "Applicability" paragraph of the AD determines AD applicability, not the configuration of an individual airplane. In the case of the affected component having been removed from the airplane, the operator must obtain an AMOC approval. If the removed component is replaced with a different component that may or may not retain the unsafe condition, this is a technical issue that must be addressed through the AMOC process. There are infinite variations on the "impossibility" issue that cannot be anticipated when drafting an AD but for which the AMOC process is well suited.

Although §§ 39.15 and 39.17 address changes by modifying, altering or repairing an area addressed by an AD, the proposed interpretation goes further by including removed components in the same context.

An AMOC should not be required for removed components if that component is the source of the unsafe condition; instead, the AD should specify that it applies to installed components. For example, an operator should not need to obtain an AMOC for an AD requiring the replacement of a particular actuator with a different part number actuator – and prohibiting reinstallation of the original part number actuator – if that operator previously installed the new part number actuators in its fleet. The operator in that case has previously complied with the AD.

Conclusion

The proposed interpretation should be withdrawn; alternatively, the FAA must ensure that the interpretation acknowledges the totality of the agency's rules by recognizing the roles of design, production, operation and maintenance on compliance with part 39.

Respectfully submitted,



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