

*The Law Firm
of
Obadal and MacLeod, p.c.
121 North Henry Street
Alexandria, VA 22314-2903*

Anthony J. Obadal (licensed in Washington, D.C.)
Sarah MacLeod (licensed in VA)
Christian A. Klein (licensed in NC, Washington, D.C. and VA)

TEL: (703) 739-9485

FAX: (703) 739-9488

MEMORANDUM

TO: Sarah MacLeod
Marshall Filler
Christian Klein

FROM: Joanna C. Feldman

DATE: March 30, 2002

RE: "Make Available"

Introduction

The Civil Air Regulations and current Federal Aviation Regulations contain provisions requiring manufacturers to "make available" or "to furnish" instructions that will facilitate proper maintenance or alteration, to those engaged in those activities on civil aviation products and articles. Because neither the Civil Aeronautics Authority nor the Federal Aviation Administration offer guidance into what the phrase "make available" means, this memorandum explores other federal agencies' use of these phrases and the general way they has been interpreted.

Current Federal Aviation Regulation ("FAR") § 21.50(b) sets forth:

The holder of a design approval, including either the type certificate or supplemental type certificate for an aircraft, aircraft engine, or propeller for which application was made after October 14, 1981, shall furnish at least one set of complete Instructions for Continued Airworthiness, prepared in accordance with §§ 23.1529, 25.1529, 27.1529, 29.1528, 31.82, 33.4, or 35.4 of [Chapter 14], as applicable, to the owner of each type aircraft, aircraft engine, or propeller . . .¹

After furnishing the Instructions for Continued Airworthiness ("ICA"), the holder of a design approval must "make available those instructions [and any changes] to any other

¹ 14 C.F.R. § 21.50(b) (2001).

person required by [Title 14] to comply with any of the terms of those instructions.”²
FAR § 43.13(a) requires

[e]ach 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 § 43.16.³

Similarly, FAR § 145.57(a) makes it clear that

[e]xcept as provided in § 145.2 [of this chapter], each certified domestic repair stations shall perform its maintenance and alteration operations in accordance with the standards in part 43 of this chapter. It shall maintain, in current condition, all manufacturers’ service manuals, instructions, and service bulletins that relate to the articles that it maintains or alters . . .⁴

It is upon these three regulations that this memorandum is based. Other federal agencies regulations also require maintenance information to be “made available,” “provided” or “furnished,” and a discussion of how several interpret those phrases is set forth below.

Discussion

40 C. F.R. 86.094-38 (2002) – Maintenance instructions.

Chapter I – Environmental Protection Agency

Subchapter C – Air Programs

Part 86 – Control of Emissions from New and In-Use Highway Vehicles and Engines

Subpart A – General Provisions for Emission Regulations for 1977 and Later Model Year New Light-Duty Vehicles, Light-Duty Trucks and Heavy-Duty Engines, and for 1985 and Later Model Year New Gasoline Fueled, Natural Gas-Fueled, Liquefied Petroleum Gas-Fueled and Methanol-Fueled Heavy-Duty Vehicles

In 1995 the Environmental Protection Agency (“EPA”) in 40 C.F.R. Part 86, “Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines: Certification and Test Procedures,” issued new regulation § 86.094-38.⁵ Entitled “Maintenance instructions,” this section “require[s] that manufacturers provide to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines all information necessary to make use of the [onboard diagnostic system] and any information for making emission-related diagnosis and repairs . . .”⁶ This language

² 14 C. F.R. § 21.50 (2001).

³ 14 C. F.R. § 43.13(a) (2001).

⁴ 14 C.F.R. § 145.57(a) (2001).

⁵ 60 Fed. Reg. 40,474 (Aug. 9, 1995).

⁶ 60 Fed. Reg. 40,474, 40,475 (Aug. 9, 1995); 40 C.F.R. § 86.094-38(g)(1) (2001). 40 C.F.R. § 86.094-38(g)(1) states:

is taken straight from section 202(m)(5) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990, which directs the EPA to issue regulations containing such requirements.⁷

The EPA discussed the purpose and effect of the new provision in the final rulemaking published August 9, 1995.⁸

The purpose of the [on-board diagnostic] system and emission-control systems is to reduce emission levels of various pollutants. For such systems to achieve projected levels of emission reductions, it will be essential that they be adequately maintained and repaired. This will require automotive technicians to possess the knowledge necessary to identify and repair improperly operating emission-related systems and components. This knowledge is acquired, in part, by having access to information on the operation and repair of such systems and related components.⁹

Concerned with trade secrets, the EPA included the provision in § 86.094-38 that the information must be provided “unless such information is protected by section 208(c) [of the Clean Air Act and Clean Air Act Amendments of 1990] as a trade secret.”¹⁰ However, classification of information as a trade secret will not bar disclosure “if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other person engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines.”¹¹ This exception avoids what would probably be a well-used defense by manufacturers – that most, if not all of the information, would be considered a non-disclosable trade secret. As indicated in its own discussion, clearly the EPA was concerned about the plight of the independent, and likely smaller, repair stations.

To date, automotive technicians employed by manufacturer franchisees have had access, through their employer, to needed emission-related service and repair information. The same is not always true of other individuals who repair and service vehicles. Some manufacturers do not make available to the public all the information

“(g) Emission control diagnostic service information:

- (1) Manufacturers shall furnish or cause to be furnished to any person engaged in the repairing or servicing of motor vehicle or motor vehicle engines, or the Administrator upon request, any and all information needed to make use of the on-board diagnostic system and such other information, including instructions for making emission-related diagnosis and repairs, including, but not limited to, service manuals, technical service bulletins, recall service information, data stream information, bi-directional control information, and training information, unless such information is protected by section 208(c) [of the Clean Air Act and the Clean Air Act Amendments of 1990] if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines.”

⁷ 60 Fed. Reg. 40,474, 40,475 (Aug. 9, 1995).

⁸ 60 Fed. Reg. 40,474 (Aug. 9, 1995).

⁹ 60 Fed. Reg. 40, 474, 40,475 (Aug. 9, 1995).

¹⁰ 40 C.F.R. § 86.094-38 (2002).

¹¹ 40 C.F.R. § 86.094-38 (2002).

needed to adequately service and repair motor vehicles. Further, when information is made available, it may be difficult to locate and time consuming to obtain.

It is especially important for independent technicians to have access to needed emission-related service and repair information, including training information. It has been estimated that independent technicians are responsible for conducting up to 80% of all repairs. * * * Considering the large number of vehicles serviced by independent technicians, it is essential that such individuals have access to adequate emission-related repair and service information.¹²

The exception as written saves, if not promotes, competition among repair and maintenance personnel and stations, and it is also designed to help consumers. "Today's regulations are intended to preserve freedom of choice by consumers in where they obtain service and repair of emission-related systems. This can only be achieved by ensuring that all sectors of the automotive service industry have access to the information needed to perform such service and repairs."¹³

To ensure this admittedly necessary information is made available, § 86.094-38 contains a provision regarding the cost of the information. "All information required to be made available by this section shall be made available to persons referred to in this section at a fair and reasonable price, as determined by the administrator."¹⁴ It is important to note that it seems that the EPA uses the word "furnished" and the passive form of "make available" interchangeably. In one section, manufacturers must "furnish" the information to specific persons; in a later section, the information is required to be "made available."¹⁵

Furthermore, "[a]ny information which is not provided at a fair and reasonable price shall be considered unavailable."¹⁶ Acknowledging that "cost is an integral part," the EPA examined the concept of availability.¹⁷

Available is defined as "that which can be got, had or reached or that one can avail oneself of." A prerequisite to getting an item is having the ability to afford it. The Agency is concerned that if emission-related service

¹² 60 Fed. Reg. 40,474, 40,475 (Aug. 9, 1995).

¹³ Id.

¹⁴ 40 C.F.R. 86.094-38 (g)(3) (2002) reads:

"(3) All information required to be made available by this section shall be made available to persons referred to in this section at a fair and reasonable price, as determined by the Administrator. In reaching a decision, the Administrator shall consider all relevant factors, including, but not limited to, the cost to the manufacturer of preparing and/or providing the information, the type of information, the format in which it is provided, the price charged by other manufacturers for similar information, the differences that exist among manufacturers (e.g., the size of the manufacturer), the quantity of the material contained in a publication, the detail of the information, the cost of the information prior to the effective date of this section, volume discounts, and inflation."

¹⁵ Compare 40 C.F.R. § 89.094-38(g)(1) and (g)(3) (2002).

¹⁶ 40 C.F.R. § 86.094-38(g)(4) (2002).

¹⁷ 60 Fed. Reg. 40,474, 40,481 (Aug. 9, 1995).

information is priced in a manner that precludes its purchase and subsequent use then it is unavailable as that term is commonly defined.¹⁸

In addition to using Webster's New World Dictionary's definition of available to support its logical conclusion, the EPA also relied on Congressional comments.

Further, the cost of service information was of concern to Congress as evidenced by the statement of then Senator Gore, the Senator that introduced the "information availability" provision of the [Clean Air Act Amendments of 1990]. * * * The Senator stated that "when we require [manufacturers] to promptly provide information needed, we recognize that we do not want to require somebody to provide a lot of expensive manuals absolutely for free, but we do not want the kind of charges that make this a profit center. We want them to provide the information, which will allow competition in the aftermarket and allow small business operators to get in the repair business. Otherwise, you force vehicle owners to go only to the major automobile manufacturers' places of business."¹⁹

21 C.F.R. § 1030.10 (2002) – Microwave ovens

Chapter I – Food and Drug Administration, Department of Health and Human Services

Subchapter J – Radiological Health

Part 1030 – Performance Standards for Microwave and Radio Frequency Emitting Products

On October 6, 1970, the Department of Health, Education, and Welfare ("HEW"), after finding that a new rule was necessary for the protection of the public health and safety, added new § 78.212 to Title 42, "Public Health," of the Code of Federal Regulations.²⁰ Entitled "Performance standard for microwave ovens," the regulation prescribed "a performance standard applicable to the emission of microwave radiation from microwave ovens manufactured for use in homes, restaurants, food vending, or service establishments, on interstate carriers, and in similar locations."²¹ Applicable to the issue at hand is subsection (c)(4), which required the following:

Manufacturers of microwave ovens to which this section is applicable shall provide or cause to be provided:

- (i) To servicing dealers and distributors and to others upon request, for each oven model, adequate instructions for service adjustments and service procedures including clear warnings of precautions to be taken to avoid possible exposure to microwave radiation . . .²²

¹⁸ 60 Fed. Reg. 40,474, 40,481 (Aug. 9, 1995)(quoting Webster's New World Dictionary, 3rd e.g., p. 94, 1988).

¹⁹ 60 Fed. Reg. 40, 474, 40,481 (Aug. 9, 1995); 60 Fed. Reg. 40,474, 40,481 n.3 (Aug. 9, 1995)(quoting 36 *Cong. Rec.* 3272 (1990)).

²⁰ 35 Fed. Reg. 15,642 (Oct. 6, 1970).

²¹ *Id.*

²² 35 Fed. Reg. 15,642, 15,643 (Oct. 6, 1970).

HEW offered no discussion of this provision or why it was necessary to include it in the new rule. Furthermore, research has not revealed any provision requiring those making repairs to follow the manufacturer's instructions.

The section was recodified at 21 C.F.R. § 1030.10 in 1973.²³ Just over seven months later, the Food and Drug Administration ("FDA") proposed amending the section "by adding requirements that specific microwave safety instructions be included in user and service manuals . . ." ²⁴ The amendment proposed to revise § 1030.10(c)(4) and add new § 1030.10(c)(5)

to explicitly state the required precautionary instructions for all microwave oven users and service personnel and specify the required means of presentation. These instructions would state the precautions necessary to avoid possible exposure to microwave radiation. It is proposed to require these instructions in exact wording to avoid the previous situation in which the thoroughness and means of presentation of precautions varied markedly from manufacturer to manufacturer. Retained in the new § 1030.10(c)(5) would be the requirement for adequate service instructions.²⁵

§ 1030.10(c)(4) was to be re-titled "*User instructions*," and § 1030.10(c)(5) was drafted as follows:

Service instructions. Manufacturers of microwave ovens to which this section is applicable shall provide or cause to be provided to servicing dealers and distributors and to others upon request, for each oven model, adequate instructions for service adjustments and service procedures, and, in addition, radiation safety instructions which . . .²⁶

The proposed language was finalized in 1975.²⁷ In response to comments received about to whom the information must be made available, the FDA clarified that "although one intent of the proposed amendment is to discourage unqualified user servicing, this should not be accomplished by withholding service information from those who may have the technical skills to use such information."²⁸

²³ 38 Fed. Reg. 28,623 (Oct. 14, 1973).

²⁴ 39 Fed. Reg. 18,797 (May 30, 1974).

²⁵ 39 Fed. Reg. 18,797, 18,799 (May 30, 1974).

²⁶ 39 Fed. Reg. 18,797, 18,799 (May 30, 1974).

²⁷ 40 Fed. Reg. 14,750 (Apr. 2, 1975).

²⁸ 40 Fed. Reg. 14,750, 14,751 (Apr. 2, 1975).

21 C.F.R. § 1050.10 (2002) – Ultrasonic Therapy Products

*Chapter I – Food and Drug Administration, Department of Health and Human Services
Subchapter J – Radiological Health*

Part 1050 – Performance Standards for Sonic, Infrasonic, and Ultrasonic Radiation-Emitting Products

In 1976 the FDA proposed adding new rules “prescribing a performance standard for ultrasonic therapy and surgery products.”²⁹ Like the regulations for microwave ovens, the proposal included a section requiring distribution of service information.

(f) *Information requirements – (1) Servicing information.* Manufacturers of ultrasonic therapy or surgery products shall provide or cause to be provided to servicing dealers and distributors, and to others upon request, *at a cost not to exceed the cost of preparation and distribution*, adequate instructions for operation, service, and calibration, including a description of those controls and procedures that could be used to increase radiation emission levels, and a schedule of maintenance necessary to keep equipment in compliance with this section. The instructions shall include adequate safety precautions that may be necessary regarding ultrasonic radiation exposure.³⁰

The FDA did clarify that the type of information discussed in the proposed regulation is the minimum that manufacturers should provide.³¹ With little discussion regarding the new requirement in § 1050.10(f)(1), the rule was finalized on February 17, 1978.³² Note that, as opposed to the microwave oven regulations, the new regulations address the cost of preparing and distributing the instructions.

Also like the microwave oven regulations, the proposed standards for ultrasonic therapy and surgery products in § 1050.10 included a provision that required manufacturers to provide user information or an operation manual with each product.³³

[(f)] (2) *User information.* Manufacturers of ultrasonic therapy or surgery products shall provide as an integral part of any user instruction or operation manual that is regularly supplied with the product, or, if not so supplied, shall cause to be provided with each ultrasonic therapy or

²⁹ 41 Fed. Reg. 23,973 (Jun. 14, 1976).

³⁰ 41 Fed. Reg. 23,973, 23,976 (Jun. 14, 1976)(emphasis added).

³¹ 41 Fed. Reg. 23,973, 23,974 (Jun. 14, 1976).

³² 43 Fed. Reg. 7,166 (Feb. 17, 1978).

³³ 41 Fed. Reg. 23,973, 23,976 (Jun. 14, 1976); see also 21 C.F.R. § 1020.40(c)(9):
(9) Instructions.

(i) Manufacturers of cabinet x-ray systems shall provide for purchasers, and to others upon request at a cost not to exceed the cost of preparation and distribution, manuals and instructions which shall include at least the following technical and safety information: Potential, current, and duty cycle ratings of the x-ray generation equipment; adequate instructions concerning any radiological safety procedures and precautions which may be necessary because of unique features of the system; and a schedule of maintenance necessary to keep the system in compliance with this section.

21 C.F.R. § 1020.40(c)(9) (2002).

surgery products, and to others upon request, *at a cost not to exceed the cost of preparation and distribution*: Adequate instructions concerning assembly, operation, safe use, any safety procedures and precautions that may be necessary regarding the use of ultrasonic radiation, and a schedule of maintenance necessary to keep the equipment in compliance with this section....³⁴

This section was also finalized on February 17, 1978.³⁵

46 C.F.R. § 109.301 (2002) – Operational readiness, maintenance, and inspection of lifesaving equipment.

Chapter I – Coast Guard, Department of Transportation

Subchapter I-A – Mobile Offshore Drilling Units

Part 109 – Operations

Subpart C – Operation and Stowage of Safety Equipment

Recognizing that survival at sea may depend on safety equipment, in 1989 the Coast Guard proposed to revise the lifesaving equipment regulations for various marine vessels.³⁶ Ultimately, the regulations covered the information that must be made available from the manufacturer and required persons performing the repairs to follow those instructions. Additionally, only those facilities approved by the Commandant were eligible to perform the maintenance. After a series of regulatory actions, including interim final rules with request for comments, the Coast Guard officially revised § 109.301.³⁷ Relevant to the issue at hand is section (g):

(g) Servicing of inflatable lifesaving appliances, inflated rescue boats, and marine evacuation systems. . .

(2) Each inflatable lifejacket must be serviced in accordance with servicing procedures meeting the requirements of Part 160, subpart 160.176 of this chapter. Each hybrid inflatable lifejacket must be serviced in accordance with the owners manual and meet the requirements of part 160, subpart 160.077 of this chapter.

(3) Each inflatable liferaft must be serviced – * * *

(ii) In accordance with servicing procedures meeting the requirements of part 160, subpart 160.051 of this chapter.

(4) Each inflated rescue boat must be repaired and maintained in accordance with the manufacturer's instructions. All repairs must be made at a servicing facility approved by the Commandant (G-MSE), except for emergency repairs carried out on board the unit.³⁸

³⁴ 41 Fed. Reg. 23,973, 23,976 (Jun. 14, 1976)(emphasis added).

³⁵ 43 Fed. Reg. 7,166 (Feb. 17, 1978).

³⁶ 54 Fed. Reg. 16,198 (Apr. 21, 1989).

³⁷ 61 Fed. Reg. 864 (Jan. 10, 1996); 61 Fed. Reg. 25,272 (May 20, 1996).

³⁸ 61 Fed. Reg. 25,272, 25,302 (May 20, 1996).

The regulations also specify what must be included in manufacturer's instructions for onboard maintenance of lifesaving appliances, which includes maintenance and repair instructions.³⁹

§ 109.301 was amended again in 1997 to update obsolete references to old regulations. The Coast Guard revised § 109.301(g)(3)(ii) to read, "(3) Each inflatable liferaft must be serviced - . . . (ii) in accordance with servicing procedures meeting the requirements of part 160, subpart 160.151 of this chapter."⁴⁰ § 109.301(g)(4) was immaterially revised in 1998 by removing "(G-MSE)" after the word Commandant.⁴¹

46 C.F.R. § 122.730 (2002) – Servicing of inflatable liferafts, inflatable buoyant apparatus, inflatable life jackets and inflated rescue boats.

Chapter I – Coast Guard, Department of Transportation

Subchapter K – Small Passenger Vessels Carrying More than 150 Passengers or with Overnight Accommodations for More than 49 Passengers

Part 122 - Operations

Subpart G - Operational Readiness, Maintenance and Inspection of Lifesaving Equipment

On January 10, 1996, the Coast Guard revised the regulations affecting small passenger vessels.⁴² Included in this revision was § 122.730. Like § 109.301, § 122.730 set forth:

(b) Each inflatable liferaft and inflatable buoyant apparatus must be serviced: ***

(2) In accordance with the servicing procedures under § 160.151 in subchapter Q of this chapter, or other standard specified by the Commandant.

(c) Each inflatable life jacket must be serviced in accordance with the servicing procedure under § 160.176 in subchapter Q of this chapter, or other standard specified by the Commandant.

(d) Each hybrid inflatable life jacket or work vest must be serviced in accordance with the servicing procedure under § 160.077 in subchapter Q of this chapter, or other standard specified by the Commandant.

(e) Repair and maintenance of inflated rescue boats must be in accordance with the manufacturer's instructions. All repairs must be made at a servicing facility approved by the Commandant, except for emergency repairs carried out on board the vessel.⁴³

³⁹ 61 Fed. Reg. 25,272, 25,301 (May 20, 1996); 46 C.F.R. § 109.301(b) (2002).

⁴⁰ 62 Fed. Reg. 35,392 (Jul. 1, 1997). See also discussion of 46 C.F.R. § 160.151, *infra*.

⁴¹ 63 Fed. Reg. 52,802, 52,816 (Oct. 1, 1998).

⁴² 61 Fed. Reg. 864, 943 (Jan. 10, 1996).

⁴³ 61 Fed. Reg. 864, 943 (Jan. 10, 1996).

§ 122.730(b)(2) was later revised to read, “At a servicing facility approved by the Commandant to service that particular brand.”⁴⁴

46 C.F.R. §§ 131.545 (2002) – Maintenance in general.

Chapter I – Coast Guard, Department of Transportation
Subchapter L – Offshore Supply Vessels
Part 131 – Operations
Subpart E – Tests, Drills, and Inspections

§ 131.545 requires that the manufacturer’s instructions for maintenance and repair be aboard the vessel, and that “maintenance is carried out to comply with the instructions required by paragraph (a).”⁴⁵ One exception is included: “(d) The cognizant OCMI may accept, instead of the instructions required by paragraph (a) of this section, a program for planned shipboard maintenance that includes the items listed in that paragraph.”⁴⁶

46 C.F.R. § 131.580 (2002) – Servicing of inflatable liferafts, inflatable lifejackets, inflatable buoyant apparatus, and inflated rescue boats.

Chapter I – Coast Guard, Department of Transportation
Subchapter L – Offshore Supply Vessels
Part 131 – Operations
Subpart E – Tests, Drills, and Inspections

The requirements of § 130.580 echoes the regulations discussed above:

(b) Each inflatable liferaft and inflatable buoyant apparatus must be serviced – * * *

(2) In compliance with subpart 160.151 of this chapter.

(c) Each inflatable lifejacket must be serviced in compliance with subpart 160.176 of this chapter.

(d) Each hybrid inflatable lifejacket or work vest must be serviced in accordance with the manual provided under § 160.077-29 of this chapter.

(e) Repair and maintenance of inflatable rescue boats must follow the manufacturers’ instructions. Each repair, except an emergency repair made aboard the vessel, must be made at a servicing facility approved by the Commandant (G-MSE).⁴⁷

⁴⁴ 62 Fed. Reg. 51,353 (Sept. 30, 1997).

⁴⁵ 46 C.F.R. § 131.545(a)(2) and (b) (2002).

⁴⁶ 46 C.F.R. § 131.545(d) (2002).

⁴⁷ 46 C.F.R. § 131.580 (2002).

46 C.F.R. §160.151-35, -37, -39, -41, -47, -57, -59, -61 (2002)

Chapter I – Coast Guard, Department of Transportation
Subchapter Q – Equipment, Construction and Material: Specifications and Approval
Part 160 – Lifesaving Equipment
Subpart 160.151 – Inflatable Liferafts (SOLAS)

§§ 160.151-35 through 160.151-61 are important sections that parallel the FAA's regulations requiring manufacturer's to prepare and make available maintenance instructions. Currently, § 160-151-35, entitled, "Servicing," states, in part:

(b) Manufacturer's requirements. To retain Coast Guard approval of liferafts, the manufacturer must:

(1) Prepare a servicing manual or manuals complying with § 160.151-37 to cover each model and size of liferaft that the manufacturer produces. The manual or manuals must be submitted to the Commandant for approval.

(2) At least once each year, issue a list of revisions to the manual or manuals, and issue a list of bulletins affecting the manual or manuals, that are in effect.

(3) *Make available* to each servicing facility approved by the Coast Guard the manual or manuals, the revisions, the bulletins, the plans, and any unique parts and tools that may be necessary to service the liferaft. . . .⁴⁸

The Coast Guard proposed adding § 160.151-35(b)(3) on October 18, 1994.⁴⁹ Unfortunately, there is no real discussion of what it would mean to make the manual available, although the Coast Guard does clarify that the proposal would require unique parts and servicing tools to be made available at a reasonable cost determined by the manufacturer.⁵⁰ The proposed rule became final on May 9, 1997, without any further discussion regarding the phrase in question.⁵¹

The other significant regulations in subpart 46 C.F.R. subpart 160.151 are:

§ 160.151-37 Servicing manual.

(a) The servicing manual must provide instructions on performing the following tasks:

(1) Removing the inflatable liferaft from the container for testing without damaging the liferaft or its contents.

(2) Examining the liferaft and its container for damage and wear including deteriorated structural joints and seams.

(3) Determining the need for repairs.

⁴⁸ 46 C.F.R. § 160.151-35 (2002)(emphasis added).

⁴⁹ 59 Fed. Reg. 52,590 (Oct. 18, 1994).

⁵⁰ 59 Fed. Reg. 52,590, 52,596 (Oct. 18, 1994).

⁵¹ 62 Fed. Reg. 25,525 (May 9, 1997).

- (4) Performing each repair which can be made by a servicing facility.
- (5) Identifying repairs that the manufacturer must perform.
- (6) Determining when liferaft equipment must be replaced.
- (7) Conducting tests required by § 160.151-57.
- (8) Repacking the liferaft.
- (9) Changing the maximum height of stowage of the liferaft by changing the length of the painter.
- (10) Special equipment limitations or packing instructions, if any, necessary to qualify the liferaft for a particular height of stowage.
- (11) Changing the service of the liferaft by changing the contents of the equipment pack.
- (12) Proper marking of the liferaft container, including approval number, persons' capacity, maximum height of stowage, service (equipment pack), and expiration date of servicing.
- (13) A list of parts for –
 - (i) Survival equipment;
 - (ii) Compressed-gas cylinders;
 - (iii) Inflation valves;
 - (iv) Relief valves; and
 - (v) Repair equipment.
- (14) The necessary pressures for each size of approved liferaft for conducting the “Necessary Additional Pressure” test required by § 160.151-57(k). . . .

(c) Each manual *provided* under this section⁵²

§ 160.151-39 Training of servicing technicians.

- (a) The training program for certification of servicing technicians must include--
 - (1) Training and practice in packing an inflatable liferaft, repairing buoyancy tubes, repairing inflation-system valves, and other inspections and operations described in the approved servicing manual⁵³

§ 160.151-41 Approval of servicing facilities.

- (a) To obtain and maintain Coast Guard approval as an “approved servicing facility” for a particular manufacturer’s inflatable liferafts, a facility must meet the requirements, and follow the procedures, of this section.
- (b) The owner or operator of a servicing facility desiring Coast Guard approval shall apply to the cognizant OCMI. The application must include

* * *
- (c) The owner or operator of the servicing facility shall arrange for an inspection with the OCMI to whom the owner or operator applied under paragraph (b) of this section. A currently trained servicing technician shall

⁵² 46 C.F.R. § 160-151.37 (2002)(emphasis added).

⁵³ 46 C.F.R. § 160-151.39 (2002).

successfully demonstrate the complete service to each make and type of liferaft for which approval as a servicing facility is sought, in the presence of a Coast Guard inspector or of a third-party inspector accepted by the OCMI, or such technician shall present evidence of having performed such service at the time of initial refresher training. The service must include * * *

(e) Each servicing facility must employ at least one servicing technician who has successfully completed the manufacturer's training described in § 160-151.39(a) or (b) . . .⁵⁴

§ 160.151-47 Requirements for owners and operators of servicing facilities.

To maintain Coast Guard approval, the owner or operator of each servicing facility approved by the Coast Guard must –

(a) Ensure that servicing technicians have received sufficient information and training to follow instructions for changes and for new techniques related to the inflatable liferafts serviced by the facility, and have available at least one copy of each manufacturer's approved servicing manual, revision, and bulletin; * * *

(c) Ensure that each liferaft serviced under the facility's Coast Guard approval is serviced by or under the direct supervision of a servicing technician who has completed the requirements of either § 160.151-39(a) or (b);

(d) Ensure that each liferaft serviced under the facility's Coast Guard approves is serviced in accordance with the approved manual . . .⁵⁵

§ 160.151-57 Servicing procedure.

(a) Each inflatable liferaft serviced by a servicing facility approved by the Coast Guard must be inspected and tested in accordance with paragraphs (b) through (f) of this section, and the manufacturer's servicing manual approved in accordance with § 160.151-35(b)(1).⁵⁶

§ 160.151-59 Operating instructions and information for the ship's training manual.

(a) The liferaft manufacturer shall make operating instructions and information for the ship's training manual available in English to purchasers of inflatable liferafts approved by the Coast Guard, to enable vessel operators to meet regulations III/18.2, 19.3, 51, and 52 of SOLAS
* * *

(c) The operating instructions required by paragraphs (a) and (b) of this section must also be made available in the form of an instruction placard.⁵⁷ * * *

⁵⁴ 46 C.F.R. § 160-151.41 (2002).

⁵⁵ 46 C.F.R. § 160.151-47 (2002).

⁵⁶ 46 C.F.R. § 160.151-57 (2002).

⁵⁷ 46 C.F.R. § 160.151-59 (2002).

§ 160.151-61 Maintenance instructions.

(a) The liferaft manufacturer shall make maintenance instructions available in English to purchasers of inflatable liferafts approved by the Coast Guard, to enable vessel operators to meet regulations III/19.3 and III/52 of SOLAS.

(b) The maintenance instructions required by paragraph (a) of this section must include –

(1) A checklist for use in monthly, external, visual inspections of the packed liferaft;

(2) An explanation of the requirements for periodic servicing of the liferaft by an approved servicing facility; and

(3) A log for maintaining records of inspections and maintenance.⁵⁸

46 C.F.R. § 160.176-5 (2002) – Approval procedures.

Chapter I – Coast Guard, Department of Transportation

Subchapter Q – Equipment, Construction, and Materials; Specifications and Approval

Part 160 – Lifesaving Equipment

Subpart 160.176 – Inflatable Lifejackets

In 1985, the Coast Guard proposed adding new § 160.076 to title 46 of the Code of Federal Regulations.⁵⁹ Without discussing the portions of the addition relevant to the “make available” issue, § 160.076-25 was drafted:

§ 160.076-25 Approval Procedures.

(a) *Modifications to General Procedures.* Subpart 159.005 of this chapter contains the approval procedures. Those procedures must be followed, excepted as modified in this paragraph. * * *

(3) The application must also include the following: * * *

(v) The service manual and written guidelines required by § 160.076-19(c) and § 160.076-19(d) and the user’s manual required by § 160.076-21.⁶⁰

§ 160.076-25 was finalized and recodified in 1989 to § 160.176-5.⁶¹ The only material change was in § 160.176-5 (3)(v): “The service manual and written guidelines required by §§ 160.176-19(c) and 160.176-19(d) of the part and the user’s manual required by § 160.176-21 of this Part.”⁶²

⁵⁸ 46 C.F.R. § 160.151-61 (2002).

⁵⁹ 50 Fed. Reg. 21,878 (May 29, 1985).

⁶⁰ 50 Fed. Reg. 21,878, 21,895 (May 29, 1985).

⁶¹ 54 Fed. Reg. 50,316, 50,317 (Dec. 5, 1989).

⁶² 54 Fed. Reg. 50,316, 50,321 (Dec. 5, 1989).

46 C.F.R. § 160.176-19 (2002) – Servicing.

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Subchapter Q – Equipment, Construction, and Materials; Specifications and Approval

Part 160 – Lifesaving Equipment

Subpart 160.176 – Inflatable Lifejackets

§ 160.076-19 was included in the same NPRM that proposed § 160.076-25.⁶³ When drafted, the parts of the regulation significant to the issue at hand were:

§ 160.076-19 Servicing.

(a) *General.* This section contains requirements for servicing facilities, manuals, guidelines, and records. Other regulations in this chapter require inflatable life jackets to be serviced at these facilities at a 12 month interval.

(b) *Servicing facility.* (1) Each manufacturer of an approved inflatable life jacket must provide one or more approved facilities for servicing those life jackets. The manufacturer must notify the Commandant (G-MVI-3) whenever an approved facility no longer provides servicing of any life jacket design listed in guidelines required by paragraph (d) of this section.

* * *

(3) In conducting life jacket servicing, each servicing facility must use personnel described in its guidelines and follow the procedures in the service manual required by this section.

(4) Each service facility must have an up to date manufacturer's service manual for each design of life jacket serviced.

(c) *Service Manual.*

(1) Each manufacturer of an approved inflatable life jacket must provide a service manual for the jacket.

(2) Each service manual must explain in detail the following: . . .⁶⁴

Again, without much discussion, the Coast Guard finalized the rule on December 5, 1989.⁶⁵ However, the regulation was revised substantially:

§ 160.176-19 Servicing. . . .

(b) *Servicing facilities.* Each Coast Guard approved servicing facility must meet the requirements of this paragraph and paragraph (d) of this section in order to receive and keep its approval for each make and model of lifejacket. Approval is obtained according to § 160.176-5(c) of this Part.

(1) Each servicing facility must conduct lifejacket servicing according to its servicing guidelines and follow the procedures in the service manual required by this section.

* * *

⁶³ 50 Fed. Reg. 21,878 (May 29, 1985).

⁶⁴ 50 Fed. Reg. 21,878, 21,894 (May 29, 1985).

⁶⁵ 54 Fed. Reg. 50,316 (Dec. 5, 1989).

(4) Each servicing facility must have a current manufacturer's service manual for each make and model of lifejacket serviced. . . .

(c) *Service manual.*

(1) Each manufacturer of an approved inflatable lifejacket must prepare a service manual for the lifejacket. The service manual must be approved by the Commandant according to § 160.176-5(b) of this part.

(2) The manufacturer must make the service manual, service manual revisions, and service bulletins available to each approved servicing facility.

(3) Each service manual must contain the following:

(i) Detailed procedures for inspecting, servicing, and repackaging the liferaft. . . .

(d) *Servicing facilities guidelines.* Each servicing facility must have written guidelines that include the following: * * *

(5) Requirements to –

(i) Ensure each inflatable lifejacket serviced under its Coast Guard approval is serviced in accordance with the manufacturer's service manual;

(ii) Keep servicing technicians informed of each approved servicing manual revision and bulletin and ensure servicing technicians understand each change and new technique related to the lifejackets serviced by the facility. . . .⁶⁶

46 C.F.R. § 199.190 (2002) – Operational readiness, maintenance, and inspection of lifesaving equipment.

*Chapter I – Coast Guard, Department of Transportation
Subchapter W – Lifesaving Appliances and Arrangements
Part 199 – Lifesaving Systems for Certain Inspected Vessels
Subpart B – Requirements for All Vessels*

The last provision applicable to the issue at hand is § 199.190.⁶⁷ Specifically, the regulations sets forth:

(g) Servicing of inflatable lifesaving appliances, inflated rescue boats, and marine evacuation systems. * * *

(2) Each inflatable lifejacket must be serviced in accordance with servicing procedures meeting the requirements of part 160, subpart 160.176 of this chapter. Each hybrid inflatable lifejacket must be serviced in accordance with the owners manual and meet the requirements of part 160, subpart 160.077 of this chapter.

(3) Each inflatable liferaft and inflatable buoyant apparatus must be serviced –

⁶⁶ 54 Fed. Reg. 50,316, 50,332-33 (Dec. 5, 1989).

⁶⁷ 46 C.F.R. § 199.190 (2002).

(i) In accordance with servicing procedures meeting the requirements of part 160, subpart 160.151 of this chapter;

* * *

(4) Each inflated rescue boat must be repaired and maintained in accordance with the manufacturer's instructions. All repairs to inflated chambers must be made at a servicing facility approved by the Commandant, except for emergency repairs carried out on board the vessel. * * *

(i) Periodic servicing of launching appliances and release gear. * * *

(5) Lifeboat and rescue boat release gear must be serviced at the intervals recommended in the manufacturer's instructions, or as set out in the shipboard-planned-maintenance program.⁶⁸

Again, unfortunately, the Coast Guard offered little comment regarding these provisions.

Conclusion

While the Coast Guard regulations do not shed much light into how "make available" should reasonably be interpreted, the language and the context surrounding the phrase supports the fact that excessive cost would not be acceptable. The FDA's regulations regarding microwaves and other devices also lend their support to this theory, but it is the EPA's emissions regulations that offer the best evidence that the government cannot ignore manufacturer pricing policies with respect to making required maintenance information available.

⁶⁸ 46 C.F.R. § 199.190 (2002).