Memorandum

U.S. Department
of Transportation

**Federal Aviation
Administration**

Subject: Legal Interpretation of 14 C.F.R. § 91.409(f)(3)

Date: DEC 5 2008

From: Assistant Chief Counsel for Regulations, AGC-200

Reply to
Attn. of:

To: Manager, Aircraft Maintenance Division, AFS-300

This is in response to your August 25, 2008, request for a legal interpretation on the use of the phrase "current maintenance instructions." Your request, including the factual circumstances contained in associated background materials accompanying the request, is premised on 14 C.F.R. § 91.409(f)(3), which uses the phrase "current inspection program." You framed the issue as: Whether, if a manufacturer amends its maintenance/inspection instructions, an affected aircraft operator is obliged to comply with the new instructions in order to be in compliance with § 91.409(f)(3). You stated that historically this has been interpreted to mean that, when a manufacturer updates its maintenance instructions, an operator is obliged to comply with these new instructions. It is our opinion that the operator is not so obliged. The legal conclusions below are equally pertinent to either type of document—*current maintenance instructions* or *current inspection program.*

A 1998 memorandum from the then Assistant Chief Counsel for Regulations[1], addressed the meaning of "current" with respect to certain regulatory requirements. The memorandum noted that, "[a]ccording to Webster's II Dictionary the adjective 'current' means belonging to the present time." The memorandum distinguished between the use of the term in the context of making available to an aircraft owner a *current* Airplane Flight Manual (AFM) "at the time of delivery of the aircraft," (in which case the "current" obligation is fulfilled at the point in time of the aircraft delivery once and for all), and its use where there are no similar words of limitation and the nature of the obligation to be "current" is *ongoing.* In the memorandum's discussion, the context of the ongoing obligation was the obligation under 14 C.F.R. § 121.141(a) for an air carrier to keep a *current* AFM. The air carrier's duty would be to incorporate subsequent amendments issued by the manufacturer into the AFM of an airplane it operated, thereby keeping the AFM current. This is essentially a paperwork requirement to keep the manuals up to date. That rule was adopted through notice and comment procedures required by the Administrative Procedure Act (APA) (5 U.S.C. § 553), and the obligation incumbent on the regulated entities (air carriers) was determined at the time of adoption and does not change over time, unless amended by another notice and comment rulemaking process.

[1] Memorandum from the Assistant Chief Counsel for Regulations, AGC-200, dated October 8, 1998, on Legal Interpretation of Certain Provisions of Parts 21, 25, 91 and 121.

The 1998 memorandum also broached the question whether, under 14 C.F.R. § 91.9(a), an operator could be required to comply with a change to an operating limitation in an AFM if the change had not been made through the notice and comment procedures of the APA. Section 91.9(a) requires, in pertinent part, that "no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual . . . ." Because the specific question had not been asked, the memorandum reserved the issue for another day.[2] That day is now. Our answer is that an operator could not be so required, and our reasoning is the same as discussed below in answer to your questions concerning required compliance with "current" (*i.e.*, subsequently issued changes to maintenance manuals or inspection programs). If such compliance were required, this would be tantamount to private entities issuing "rules" of general applicability without meeting the notice and comment requirements of the APA, and the public would not have had an opportunity to comment on these future limitations changes.

The legal implications of the issue you raise are similar to those discussed above on future-issued limitations changes to an AFM. If "current" in § 91.409(f)(3) and similarly worded regulations could be read to mean an ongoing obligation, manufacturers unilaterally could impose regulatory burdens on individuals through changes to their inspection programs or maintenance manuals. In essence, they would be making rules that members of the public affected by the change would have to follow. Under the APA, a rule is any agency statement "designed to implement, interpret, or prescribe law or policy . . . ." For purposes here, a rule is any statement that imposes legal requirements. In order for an agency to adopt a rule, it must comply with the APA, specifically, 5 U.S.C. § 553. That section requires notice and comment procedures for rules imposing requirements unless the agency makes a "good cause" finding that such procedures are "impractical, unnecessary, or contrary to the public interest" (for example, an emergency Airworthiness Directive (AD)).

If the word "current" in § 91.409(f)(3) and other similarly worded provisions did mean an ongoing obligation, when manufacturers make changes to their instructions and programs (which often accompany newly-produced models of products, but which also cover the previously-produced models), the new requirements could impose financial and other burdens on owners and operators of older aircraft that they did not bargain for. An interpretation of the regulation that would allow manufacturers unilaterally to issue changes to their recommended maintenance and inspection programs that would have future effect on owners of their products would not be legally correct. This would run afoul of the APA. It would mean that our regulations effectively authorize manufacturers to issue "substantive rules," as that term is used in the APA, *i.e.*, it would enable them to impose legal requirements on the public. This would be objectionable for at least two reasons. First, and most significantly, the FAA does not have authority to delegate its rulemaking authority to manufacturers. Second, "substantive rules" can be adopted only in accordance with the notice-and-comment procedures of the APA, which does not apply to manufacturers.

Moreover, nothing in the regulatory history of § 91.409(f)(3) indicates that the agency intended future changes to inspection programs issued unilaterally by manufacturers to be binding on an operator who had already adopted a specific program that was current at the time of adoption. (*See* 36 FR 19507, October 7, 1971, and 37 FR 14758, July 25, 1972.) Therefore, to comply with § 91.409(f)(3) an operator need only adopt a manufacturer's

---

[2] *See* the memorandum's footnote 1.

inspection program that is "current" as of the time he adopts it, and that program remains "current" unless the FAA mandates revisions to it. Such a mandate would be adopted in the form of either an AD or an amendment to the operating rules. Although manufacturers' program revisions do not require operators to revise their inspection programs, operators may incorporate these revisions, and typically do so. This is an acceptable practice, and it fully complies with § 91.409(f)(3).

We agree with AFS-300 that a rulemaking change to clarify the meaning of § 91.409(f)(3) and similarly-worded regulations to remove the ambiguity associated with the term "current" would be beneficial. AGC-200 staff will work with your staff in developing clarifying rule text and associated preamble language.

This response was prepared by Edmund Averman, an Attorney in the Regulations Division of the Office of the Chief Counsel. If you have additional questions regarding this matter, please contact us at your convenience at (202) 267-3073.

Rebecca B. MacPherson