U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

MAY 3 - 2010

Paul N. Sissons
530 W. Esparada Drive
Georgetown, TX 78628-1351

Re: Request for Clarification of Legal Interpretation of 14 C.F.R. § 91.409(f)(3)

Dear Mr. Sissons:

This is a revised response to your December 17, 2009, request for clarification of our December 5, 2008, legal interpretation that addressed the requirement in 14 C.F.R. § 91.409(f)(3) that an owner or operator use a *current* inspection program recommended by the manufacturer. We are issuing this revision to correct a typographical error that appears in the second, fourth, and fifth paragraphs of our letter to you dated May 3, 2010. In those places we mistakenly referred to *§ 91.403(f)* when we intended to refer to *§ 91.409(f)*. We apologize for any inconvenience this may have caused you.

You began your request by quoting from part of a sentence in the second paragraph of that interpretation where we were providing context for the use of the word "current" by discussing its use in other regulations. You referred to our discussion of a 1998 memorandum opinion that explained a requirement in the Federal Aviation Administration's (FAA) aircraft certification rules that required manufacturers to make available, at the time of delivery of an aircraft "a *current* approved" flight manual. 14 C.F.R. § 21.5(a) (emphasis added). Thus, based on the plain language of that section, we concluded that the manufacturer's obligation is indeed fulfilled once and for all at the time of delivery of the aircraft. It is a "make it available at that point in time" provision.

From the overall context of your letter, including an enclosed February 26, 2009, AOPA bulletin entitled: "*Turbine owners get more say in aircraft maintenance*," your question appears to be: Which revision (assuming a manufacturer has, over time, issued revisions to its recommended inspection program) is considered to be *current* at the time an aircraft owner or operator has an aircraft inspected under the provisions of 14 C.F.R. § 91.409(f)(3)? You ask whether, after an aircraft is manufactured and delivered (with then current AFM and maintenance instructions), "each subsequent owner of that particular aircraft can choose to use those approved instructions from the date it was delivered?" You asked alternatively: "Or does it mean that each time the aircraft is bought and sold, the owner has to adopt the latest revised manufacturers [sic] instructions

at the time of sale of the aircraft?" The answer to your first question is "no," and, to the extent your second question is asking whether the new owner, at the time he or she selects an inspection program, must choose a program that is current at that time, the corollary answer is "yes."

The reason the answer to your first question is "no," and the second answer "yes," is found in the plain language of the regulation. For selecting an inspection program, section 91.409(f) provides, in pertinent part: "The registered owner or operator of each airplane . . . must select, identify in the maintenance records, and use one of the following programs for the inspection of the aircraft: . . . " The selection must be from the alternatives provided in subparagraphs (1) through (4). The program at issue here is the option provided by paragraph (3), which states: "A *current* inspection program recommended by the manufacturer." (Emphasis added.) If each subsequent owner could choose inspection instructions (an inspection program) from the date the airplane was delivered, that inspection program would no longer be current for the subsequent owner had it been revised in the interim. This is not a "make it available at that point in time" provision, as discussed above with respect to a manufacturer's obligation to provide a flight manual with the airplane at time of delivery. Rather it is an operating rule setting forth ongoing maintenance requirements.

Our December 5, 2008, interpretation stated: "Therefore, to comply with § 91.409(f)(3) an operator need only adopt a manufacturer's inspection program that is 'current' as of the time he adopts it, and that program remains 'current' unless the FAA mandates revisions to it." The primary issue addressed by that interpretation was whether a manufacturer could unilaterally revise its inspection program and thereby impose additional requirements on an aircraft owner or operator who had validly adopted a program that was current when adopted, but that would be rendered no longer current by the later revision. On May 22, 2009, the FAA's Flight Standards Service published an Information for Operators (InFO) bulletin (copy enclosed) that addresses issues and concerns surrounding the application of section 91.409(f)(3). Question number 2 under the heading of **Frequently asked questions pertaining to § 91.409(f)** is similar to your question; the Flight Standards Service answered: "The new owner would have to select the most current program at the time of purchase. The new owner may not use the program that had been selected by the previous owner." That answer, of course, assumes that revisions had been made after the first owner adopted the inspection program. If no revisions had been made, the former program would still be current for the new owner.

The statement in the February 26, 2009, AOPA bulletin that: "The FAA states that 'current' refers to the version of the maintenance program existing at the time the aircraft was manufactured," goes beyond what we said in our December 5, 2008, interpretation. The *sine qua non* of the interpretation is that, under the Administrative Procedure Act (APA) (5 U.S.C. § 553), private entities (*e.g.*, manufacturers) cannot unilaterally impose legally binding requirements on the public (*e.g.*, manual revisions issued after an owner or operator adopted a program based on that manual in accordance with the then current regulation requiring the option). That would be tantamount to a "substantive rule" of

general applicability, which can be adopted only in accordance with the notice and comment procedures of the APA. As stated above, our interpretation of § 91.409(f)(3) stating that "an operator need only adopt a manufacturer's inspection program that is 'current' as of the time he adopts it, ..." cannot be read to mean that the program an owner or operator adopts could be the program that existed at the time the aircraft was manufactured. It might be, but *only* if the manufacturer had made no revisions to it by the time the new owner or operator adopted it.

This response was prepared by Edmund Averman, an Attorney in the Regulations Division in the Office of the Chief Counsel, and coordinated with the Aircraft Maintenance Division (AFS-300) in the Office of Flight Standards If you have additional questions regarding this matter, please contact us at your convenience at (202) 267-3073.

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