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

Office of the Chief Counsel

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

January 28, 2011

Jim Powell
[redacted]

Re: Request for Legal Interpretation on
Minimum Equipment List Preamble:
Repair Program

Dear Mr. Powell:

This responds to your December 15, 2009, letter requesting a legal opinion on issues you raised referencing certain phrases that appear in the Preamble to the Federal Aviation Administration's (FAA) Master Minimum Equipment List (MMEL) applicable to air carrier aircraft. On June 22, 2010, Edmund Averman, an attorney on my staff, advised you by letter that we were coordinating your request with the Air Carrier Maintenance Division (AFS-330) in the FAA's Office of Flight Standards because that office administers and enforces the FAA's Minimum Equipment List (MEL) rules. On July 8, 2010, that office responded with a memorandum that provided references to FAA documents and policy in response to your questions. We are incorporating that information in this response as appropriate to the issue raised. We are responding to your questions in order.

What is the definition of MEL Preamble referenced "earliest opportunity"?

> You augmented this question by noting that, in many instances, an aircraft with an MEL deferral circulates through multiple maintenance bases and remains on the ground for sufficient time for the airline to perform the repair at issue, yet no action is taken to repair the inoperative item. Consistent with that, you note that air carrier personnel often advise flight crewmembers that they will not repair the deferred discrepancy until the maximum number of days permitted by the FAA-approved MEL—and this is so even when time, material, and tooling is available to effect the repair before a scheduled flight departs.

Response: While the phrase "earliest opportunity" does appear in the Preamble to an MMEL, nowhere is it defined. The MMEL Preamble is advisory/exlpanatory material, not regulatory—it was not adopted through public notice and comment rulemaking procedures, though the MEL concept and regulations were so adopted. While "earliest opportunity" is not mandatory beyond what is required in the approved MEL, we agree that sooner is better

than later. Insight into the phrase's meaning may be garnered from a reading of the complete paragraph in the MMEL Preamble, along with the preamble to one of the public rulemakings, specifically, for example, Notice No. 89-2 (54 FR 3320, January 23, 1989) (copy enclosed). The MMEL Preamble paragraph at issue states:

> The MEL is intended to permit operation with inoperative items of equipment for a period of time until repairs can be accomplished. It is important that repairs be accomplished at the *earliest opportunity*. In order to maintain an acceptable level of safety and reliability the MMEL establishes limitations on the duration of and conditions for operation with inoperative equipment. (Emphasis added.)

As the MMEL Preamble from which you quote advises, an MMEL for a particular aircraft type is developed by the FAA in cooperation with the holder of the type certificate for that aircraft. The MMEL derived from that process is the basis for an individual operator's MEL for its particular aircraft and operation. The MEL concept was developed following the FAA's determination that strict compliance with type certification requirements was not necessary to maintain the type certification level of safety under appropriate circumstances. "The MEL is intended to permit operation for a minimum period of time until repairs can be accomplished." (56 FR 12306, March 22, 1991.)

The MMEL Preamble from which you quote also advises that the MEL "does not contain obviously required items such as wings, flaps, and rudders." In fact, the applicable Part 121 regulation precludes certain types of essential items from the MEL. Section 121.628(b) precludes, among other things: "Instruments and equipment that are either specifically or otherwise required by the airworthiness requirements under which the airplane is type certificated and which are essential for safe operations under all operating conditions."

While ideally all items of equipment on an aircraft would be operable during flight, experience has shown that under certain conditions the design standards of safety can be maintained with certain items of equipment inoperative because of circumstances such as redundancy of equipment or a relevant operating limitation (*e.g.*, certain lights may not be essential during daytime operations). The items on an MEL are those the FAA has determined may be inoperative while ensuring an acceptable level of safety under the specified conditions and limitations.

These conditions and limitations typically include a fixed "time to repair" requirement on items within a category. (*Id* at 3321.) Certainly, if the "earliest opportunity" occurs before the "time to repair" deadline, it may be desirable to repair or replace the item at that time, but the regulations do not require this—the FAA having determined, in cooperation with the type certificate holder, that the level of safety required by the airworthiness certification rules will be maintained. In fact, the applicable Part 121 regulation provides that: "An approved Minimum Equipment List, as authorized by the operations specifications, constitutes an approved change to the type design without requiring recertification." (14 C.F.R. § 121.628(a)(2).) Accordingly, if the aircraft with a properly deferred MEL item is also in conformance with its type certificate in all other respects and is in condition for safe operation, it is considered to be in an airworthy condition.

FAA Order 8900.1, Volume 4, Chapter 4, Section 1, paragraph 4-629, Item A. Repair Interval states, in pertinent part: "Although the MEL might permit multiple days of operation with certain inoperative equipment, operators must repair the affected item as soon as possible." This statement in the order reflects the desirability of a "sooner rather than later" concept. FAA orders, however, provide direction and guidance to FAA employees to assist them in the performance of their duties—they impose no regulatory obligations on regulated persons. The quoted guidance to FAA inspectors is useful to encourage inspectors to work with the air carriers they oversee to encourage those carriers to adopt policies that would effect repairs before the *time to repair* deadline when feasible.

What is the definition of MEL Preamble referenced "controlled and sound repair program"?

> You augmented this question by stating that '[A]irline management often uses as an excuse for not repairing an aircraft the fact that they have NO PARTS." And you suggest there are a number of cases where, despite many modern ways of obtaining parts quickly (*e.g.*, internet parts search, parts inventory agreements, overnight delivery, parts exchange programs, or shipping parts for free onboard company aircraft), no efforts are made to timely get the parts to the aircraft in need.

Response: As is the case with your first question, the phrase you are inquiring about is not defined, either in the MMEL Preamble or in the regulations. The full paragraph from which you quote states:

> Operators are responsible for exercising the necessary operational control to ensure that an acceptable level of safety is maintained. When operating with multiple inoperative items, the interrelationships between those items and the effect on aircraft operation and crew workload will be considered. Operators are to establish a *controlled and sound repair program* including the parts, personnel, facilities, procedures and schedules to ensure timely repair. (Emphasis added.)

It appears to us that the complete sentence containing the phrase "controlled and sound repair program" largely defines what should comprise such a program. The key seems to be that an operator should have a repair program that will ensure "timely repair." It is in an air carrier's best interest to have such a program. If it does not, it runs the risk of having one or more deferred items exceeding the time to repair limit. If that happened and the carrier operated the aircraft anyway, it would be subject to substantial civil penalties for operating an unairworthy aircraft.

FAA Order 8900.1, Volume 4, Chapter 4, Section 7, paragraph 4-799, Item B.12, states, in pertinent part:

The POI should coordinate closely with both the PMI and the operator on the MEL management program. Operators must develop an MEL management program as a comprehensive means of controlling the repair of items listed in the approved MEL. Operators must include a description of the program in their maintenance manual or other documents. The MEL management plan must include the following:

- A method for tracking the date and time of deferral and repair;
- The procedures for controlling extensions to maximum repair categories;
- A plan for coordinating parts, maintenance personnel, and aircraft at a specific time and place for repair;
- A review of items deferred due to unavailability of parts; and
- The specific duties and responsibilities of the managers of the MEL management program, listed by job title.

As noted above, FAA orders provide guidance to FAA employees and do not place regulatory obligations on the public. However, because an air carrier may use an MEL only if the FAA has issued operations specifications authorizing its use, the above elements become de facto requirements and should be incorporated in some form in a carrier's MEL repair program.

What is the CMO responsibility for administering these two issues?

You augmented this question by stating that the PMI and another maintenance inspector in at least one CMO [Certificate Management Office] have indicated there is no requirement to repair or attempt to repair an MEL defect item even if labor, parts and opportunity exists, until the clock runs out on that particular MEL item time limit.

Response: Specific guidance to FAA personnel in overseeing an air carrier's MEL program is found in FAA Order 8900.1, Flight Standards Information Management System, Volume 10, Chapter 2, Section 8, Air Transport Oversight System (ATOS), Safety Attribute Inspection (SAI), 1.3.5 MEL / CDL / Deferred Maintenance (AW). For FAA oversight responsibility, the order provides:

To determine if the operator's Minimum Equipment List (MEL) / Configuration Deviation List (CDL) and Deferred Maintenance process:

- Meets all applicable requirements of Title 14 of the Code of Federal Regulations (14 CFR) and FAA policies,

- Incorporates the safety attributes, and
- Identifies any shortfalls in the operator's MEL/CDL/Deferred Maintenance process.

As with your first two questions, your concern seems to be with whether an air carrier corrects/repairs MEL-deferred items before the approved "time to repair." The CMO responsibilities cannot go beyond what those offices may legally enforce. As discussed elsewhere in this letter, by regulation, an approved MEL constitutes an approved change to the aircraft's type design, and so long as the deferred items are repaired within the approved allotted times, the level of safety contemplated by the original type certificate is assured. A CMO, in fulfilling its oversight responsibilities should, among other things, ensure that their air carriers are meeting their own responsibilities in timely correcting/repairing items deferred under their approved MELs.

What are the FAR 121 pilot in command safety responsibilities regarding operation of aircraft with defects, MEL and otherwise, given a recent civil judge's injunction against a pilot group and other threatening actions from air carrier administrators?

> You augmented this question by noting two concerns. First: Anecdotally, you noted that recently a civil judge issued an injunction against a pilot group, who, among other things, declined to operate an aircraft with MEL items deferred. You indicated that the judge reasoned the airline would not have presented the aircraft for service if it were not fit for flight. Second: Noting that under FAA enforcement cases air carrier pilots are bound to "exercise *beyond ordinary care,*" you state that airline managements are using more aggressive tactics against pilots who attempt to fulfill their FAA-mandated obligations to safely operate their aircraft. (Emphasis yours.)

Response: Both air carriers and their pilots are held to the highest standard of care and safety. The FAA's governing statute requires that the FAA, both when prescribing regulations and when issuing air carrier operating certificates, consider the duty of an air carrier to provide service with the highest possible degree of safety in the public interest. (49 U.S.C. §§ 44701(d)(1) and 44702(b)(1).) In addition, the National Transportation Safety Board (NTSB) has consistently held that pilots who hold Airline Transport Pilot Certificates are held to the highest standard of care. *See, e.g., Administrator v. Moeslein*, NTSB Order No. 5354 at 5 (2008), 2008 WL 205094 (N.T.S.B.); *Administrator v. Ahl*, NTSB Order No. EA-4701 at 2 (1998), 1998 WL 655578 (N.T.S.B.), *citing Administrator v. Combs*, NTSB Order No. EA-3616 at 6 (1992), 1992 WL 172768 (N.T.S.B.).

Several regulations govern both a pilot's and an air carrier's responsibilities for operation of an aircraft with defects, depending, of course, on the seriousness of the defect. In the first instance, 14 C.F.R. § 91.7 prohibits any person from operating an unairworthy aircraft. This rule states:

> (a) No person may operate a civil aircraft unless it is in an airworthy condition.
>
> (b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

Similarly, 14 C.F.R. § 121.153(a)(2) provides, in pertinent part, that "no certificate holder may operate an aircraft unless that aircraft—

> (2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, ...

Additional pilot in command safety of flight responsibilities when operating air carrier aircraft are set forth in **14 C.F.R. § 121.533 Responsibility for operational control: Domestic operations.** That rule provides, in pertinent part:

> (b) The pilot in command and the aircraft dispatcher are jointly responsible for the preflight planning, delay, and dispatch release of a flight in compliance with this chapter and operations specifications.
>
> (c) The aircraft dispatcher is responsible for—
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> * * * * *
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> (3) Cancelling or re-dispatching a flight if, in his opinion or the *opinion of the pilot in command*, the flight cannot operate or continue to operate safely as planned or released.
>
> (d) Each pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and airplane.

14 C.F.R. § 121.533 (emphasis added). See also our March 26, 2008, interpretation letter to Mr. Christopher Witkowski, Director, Association of Flight Attendants (copy enclosed), which addressed MEL-related issues, with particular reference to 14 C.F.R § 121.563, on **Reporting mechanical irregularities**, and 14 C.F.R § 121.627, on **Continuing flight in unsafe conditions**.

With respect to a pilot's making airworthiness/safety assessments under the above-referenced regulations, it is important to note that if an item is properly deferred under an approved MEL (including that the item is within the "time to repair" limitation), the FAA has made a determination that the aircraft conforms to its (amended) type certificate. And, absent some other reason it does not, and if the aircraft is otherwise in a condition for safe operation, it is considered airworthy.

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.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulations, AGC-200

Enclosure