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

Office of the Chief Counsel

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Washington, D.C. 20591

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Richard Kafka
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Re: Request for Legal Interpretation Pertaining to the Meaning of "Substantial Change" in 14 C.F.R. § 121.374(o)

Dear Mr. Kafka,

This is in response to your October 29, 2012, letter posing two questions about the provisions of 14 C.F.R. 121.374(o). First, you ask what the phrase "substantial change" means in § 121.374(o). Second, you ask whether § 121.374(o) requires that the FAA approve or accept a substantial change to maintenance or training procedures that were used to qualify a certificate holder for extended operations (ETOPS).

Section 121.374 applies to ETOPS flights that use a two-engine airplane. Subsection 121.374(o) states that:

> Each substantial change to the maintenance or training procedures that were used to qualify the certificate holder for ETOPS, must be submitted to the CHDO [certificate-holding district office] for review. The certificate holder cannot implement a change until its CHDO notifies the certificate holder that the review is complete.

To answer your first question, we note that a substantial change is a change that materially alters the content of the maintenance or training procedures. Determining whether a change is substantial is a fact-specific inquiry. Because your letter does not describe the specific type of change you are contemplating, we cannot tell you whether that change would be considered substantial.

The FAA addressed this issue in the preamble to the Notice of Proposed Rulemaking (NPRM) that proposed new § 121.374 (68 FR 64730, Nov. 14, 2003). The agency stated:

> Following approval of the maintenance and training procedures established to qualify for ETOPS; *substantial changes* to those

> procedures must be submitted to the Certificate Holding District Office (CHDO) and approved before they may be adopted. The determination of what constitutes *substantial changes* should be negotiated between between the certificate holder and the CHDO. This is to allow some flexibility depending on the certificate holder's ETOPS experience and performance history. The CHDO may require submission of all changes for a new ETOPS operator or for an operator experiencing difficulties. However, as experience is gained, the CHDO may reevaluate what changes it needs to approve. (68 FR 64765 (emphasis added).)

To answer your second question as to whether the FAA review of a proposed substantial change to a maintenance or training procedure that must be completed before the change may be implemented is considered an FAA acceptance or an approval, it is our opinion that it is in the nature of an **approval**. While normally an FAA approval is evidenced by an affirmative approval (*e.g.*, granted by letter, stamp of approval, issuance of operations specifications, or some other official means), the fact that in this case the certificate holder may not implement the change until the FAA positively advises that its review is complete, makes the process tantamount to an official approval. Conversely, while the terms "acceptance" or "accepted by" are not defined in the regulations, the process generally works as follows. The terms often appear in FAA guidance material applicable to a certificate holder who has placed in its manual(s) or other FAA compliance document(s) a requirement that the referenced item be submitted to the FAA for the agency's review and "acceptance." This generally applies to an item (*e.g.*, data; methods, techniques, and practices; manual contents; tools; materials; equipment; etc.) that the agency and the certificate holder have agreed should be submitted to the FAA for review and acceptance prior to use. If after review the agency *accepts* the proposed item and communicates this acceptance to the submitter by a means set forth in the manual or other compliance document (typically either an affirmative communication or an agreed upon passage of time with no negative action), the item is considered *accepted* by the FAA for purposes of complying with the applicable regulations.

Our opinion is further supported by both the FAA's discussion of the requirement in the NPRM's preamble (quoted above, indicating the agency's intent that substantial changes be approved) and the text of the proposed rule (proposed as § 121.374(h)), which stated:

> (h) *Procedural changes*. Any substantial changes to the maintenance or training procedures established to qualify for ETOPS must be submitted to the CHDO and approved before they may be adopted. (68 FR 64793.)

Inexplicably, in the publication of the Final Rule (72 FR 1801, January 16, 2007), the agency offered no explanation of why the text of the above requirement was changed. In the absence of such an explanation, and in view of the clear intent articulated by the FAA in its proposal that substantial changes be approved, we conclude that the intent remains; accordingly, when the FAA notifies a certificate holder that its review of a

proposed change is complete, unless the notification advises of a disapproval, we consider the notification to be an approval.

As an aside, we note that the FAA's published guidance to certificate holders and others on ETOPS also addresses this issue—unfortunately without clarifying it. Advisory Circular AC 120-42B, titled **Extended Operations (ETOPS and Polar Operations**, states, in Paragraph 502, captioned **Changes to Approved ETOPS Operations, Maintenance and Training Procedures**:

> Following final ETOPS approval, if a certificate holder determines a need to make substantial changes to its ETOPS operations, maintenance and training procedures, it should submit such changes in a timely manner to the CHDO for review and *acceptance* before incorporation. (Emphasis added.)

While that guidance uses the word *acceptance* rather than *approval*, based on the above discussion, it is our opinion that in this circumstance they are one and the same. We note that, under this guidance, the certificate holder proposing the change may not incorporate it unless and until the CHDO accepts it. Here the regulation requires affirmative notification to the certificate holder of this acceptance. As we noted above, this is tantamount to an approval.

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Edmund Averman, Attorney, International Law, Legislation, and Regulations Division of the Office of the Chief Counsel, and coordinated with the Air Transportation Division (AFS-200) and the Aircraft Maintenance Division (AFS-300) of the Flight Standards Service.

Sincerely,

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