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

Office of the Chief Counsel

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

JAN 27 2014

Sarah MacLeod
Executive Director
Aeronautical Repair Station Association
121 North Henry Street
Alexandria, VA 22314-2903

Dear Ms. MacLeod:

This responds to your request for a legal interpretation confirming that certain language in FAA Order 8110.103A is incorrect. Specifically, the order states:

> **f. *Question:*** The AD [airworthiness directive] requires that I accomplish specific instructions in a SB. Those instructions require actions from a manual, and the manual requires actions from a standard practice manual. My operating procedure differs from the standard practice manual. Do I need an AMOC to keep using my operating procedure?
>
> ***Answer:*** Yes. You must accomplish the specific instructions in the SB specified in the AD, including any second- or third-tier documents that are required to complete the action(s).

In your letter, you state that second and third-tier documents are not approved for incorporation by reference (IBR) in accordance with regulations of the Administrative Committee of Federal Register (1 CFR part 51). You also quote the following language from 5 U.S.C. 552(a)(1): "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the *Federal Register* and not so published." From this you conclude that the quoted language from Order 8110.103A is incorrect.

The quoted language from Order 8110.3A is correct. Your quotation from § 552(a)(1) is incomplete. For purposes of analyzing your request, the language you omitted is essential: "**Except to the extent that a person has actual and timely notice of the terms thereof,** a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." (Emphasis added) This exception recognizes the long-standing legal principle that actual notice is at least as effective as constructive notice. For many years, courts have recognized that persons are subject to requirements of which they have actual notice, even if the issuing agency has not published them in the Federal Register or obtained approval for IBR.[1]

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[1] See, e.g., Tearney v. NTSB, 868 F.2d 1451 (1989) (Pilot on notice that taxiing with passengers standing is violation); U.S. v. Bowers, 920 F.2d 220 (1990) (Income tax evasion); U.S. v. Mowat, 582 F.2d 1194 (1978) (Criminal trespass)

The documents that are typically referenced as second or third-tier references in ADs are documents that most operators and maintenance providers use to perform maintenance on affected aircraft. These documents include aircraft maintenance manuals, overhaul manuals, standard practices manuals, and service bulletins. Under 14 CFR 145.109(d),[2] certificated repair stations are generally required to have these documents for aircraft on which they perform work. Therefore, if a repair station complies with this requirement, it would have actual notice of these referenced documents.[3]

As you may be aware, the FAA recently took civil penalty enforcement action against Aviation Technical Services, Inc. (ATS, an ARSA member) for failing to comply with an AD because it failed to accomplish instructions specified in a secondary reference in the AD. The administrative law judge upheld the FAA's finding of violation against ATS for failing to use those references, and the judge specifically found ATS had actual notice of those documents.[4] In his decision, the judge correctly recognized the effect of the actual notice exception to the requirement for publication. Whether a respondent has actual notice of secondary references in ADs would be a factual issue to be resolved in each case.[5]

Even if a person does not have actual notice of secondary references in ADs, that person would not be able to simply ignore the AD requirements. The AD itself is enforceable, and any primary reference (e.g., a service bulletin) that is properly approved for incorporation by reference is also enforceable. If the person does not have actual notice of a secondary reference and, therefore, is unable to use that reference to comply with the AD, or if, as stated in the quoted question, a person simply prefers to use a different method, 14 CFR 39.19 allows that person to seek approval for an alternative method of compliance (AMOC). Section39.19 allows use of the AMOC only if it is approved by the identified ACO manager.[6] Under these circumstances, the

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[2] "A certificated repair station must maintain, in a format acceptable to the FAA, the documents and data required for the performance of maintenance, preventive maintenance, or alterations under its repair station certificate and operations specifications in accordance with part 43. The following documents and data must be current and accessible when the relevant work is being done: (1) Airworthiness directives, (2) Instructions for continued airworthiness, (3) Maintenance manuals, (4) Overhaul manuals, (5) Standard practice manuals, (6) Service bulletins, and (7) Other applicable data acceptable to or approved by the FAA."

[3] Your letter references provisions of 1 CFR part 51. Since that part only contains requirements for obtaining IBR approval, they are not relevant to this response.

[4] Although ATS filed an appeal, before perfecting the appeal it settled the case for the full civil penalty amount awarded by the judge.

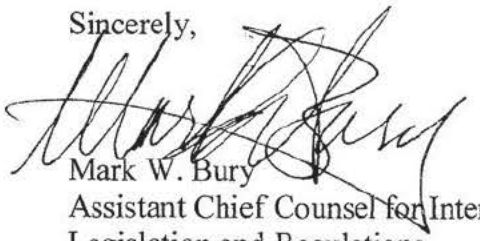
[5] We are requesting that the Aircraft Certification Service provide guidance to its Aviation Safety Engineers to determine that affected persons are likely to have actual notice of any secondary references before approving service bulletins and other documents that are intended to be referenced in ADs.

[6] **§39.19 May I address the unsafe condition in a way other than that set out in the airworthiness directive?** Yes, anyone may propose to FAA an alternative method of compliance or a change in the compliance time, if the proposal provides an acceptable level of safety. Unless FAA authorizes otherwise, send your proposal to your principal inspector. Include the specific actions you are proposing to address the unsafe condition. The principal inspector may add comments and will send your request to the manager of the office identified in the airworthiness directive (manager). You may send a copy to the manager at the same time you send it to the principal inspector. If you do not have a principal inspector send your proposal directly to the manager. You may use the alternative you propose only if the manager approves it.

person is neither "required to resort to" nor "adversely affected by" the secondary reference. The person is simply required to obtain approval for the method actually used. If a person records having complied with the AD without having either complied using all referenced documents or obtained approval for an AMOC, he would be in violation of the AD.

This response was prepared by Douglas Anderson, Northwest Mountain Deputy Regional Counsel, and was coordinated with the International Law, Legislation, and Regulations Division of the Office of the Chief Counsel. Please contact us at (202) 267-3073 if we can be of further assistance.

Sincerely,



Mark W. Bury
Assistant Chief Counsel for International Law,
Legislation and Regulations