Federal Aviation Administration

Memorandum

Date: September 4. 2024

To: Lawrence Fields, Acting Executive Director, Flight Standards Service, AFX-1

From: Laura Megan-Posch, Assistant Chief Counsel for Regulations, AGC-200

Prepared by: Chin Pann, Senior Attorney, AGC-210

Subject: Re: Request for Legal Interpretation of Title 14 Code of Federal Regulations Section 91.409(f)(3), Manufacturer's Recommended Inspection Program

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Date: 2024.09.04 10:25:28 -04'00'

This memorandum responds to your November 28, 2022, memorandum (Request) requesting a legal interpretation of Title 14 Code of Federal Regulations (14 CFR) § 91.409(f)(3) regarding a manufacturer's recommended inspection program. In that letter, the Aircraft Maintenance Division (AFS-300) requested an interpretation on the "applicability of 14 CFR § 91.409(f)(3) to an aircraft that was not type-certificated and not produced under 14 CFR part 21," such as an experimental aircraft under §21.191(a)(c) or (d). Specifically, the Request asked the following questions:

a. "May the owner or operator of an aircraft that was not produced under 14 CFR Part 21 (a non-type certificated aircraft), select and use a 'current inspection program recommended by the manufacturer' of that aircraft as provided in § 91.409(f)(3)?
b. If § 91.409(f)(3) is applicable to non-type certificated aircraft, then who 'specifically' would be the manufacturer specified in the rule?"

As discussed further below, we have not found any support in the plain language of the regulation or its rulemaking history to interpret § 91.409(f)(3) as requiring that the subject aircraft be type-certificated. Based upon a prior interpretation, a manufacturer for purposes of § 91.409(f)(3) is the person (or persons) who fabricated and assembled the major portion of the aircraft. With the facts presented in greater detail below, there is insufficient information to demonstrate that the former military owner discussed in the Request was the manufacturer of the KC-135R airplanes in question.

Background

As background information, the Request provided the following information:

> "A private company purchased several KC-135R airplanes from a foreign military and made application in the US for a special airworthiness certificate - experimental category under 14 CFR § 21.191(a), (c) and (d).
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> These aircraft were manufactured according to military design standards (not type-certificated under part 21), and subsequently operated by the foreign military that wholly controlled the aircraft's maintenance and inspection program. The private company now presents the foreign military's inspection program as its selection under § 91.409(f)(3), and contends this inspection program meets the requirements of § 91.409(e) and (f)."

AFS-300 also concluded in the Request that "a § 91.409(f)(3) inspection program . . . may only be selected if the aircraft was type-certificated and produced under 14 CFR Part 21" and that because "these KC-135R airplanes were not type-certificated and were not produced under an FAA production approval, the § 91.409(f)(3) inspection program does not apply." AFS-300 also concluded that "the foreign-military's inspection program does not constitute 'an inspection program recommended by the manufacturer', since the foreign military cannot be considered a 'manufacturer' under any current or previous definition accepted or published by the FAA." Finally, AFS-300 concluded that "a manufacturer's recommended inspection program does not exist, and this applicant must develop and submit an inspection program under § 91.409(f)(4) for review and approval as required by § 91.409(g)" that contains the information required by § 21.193.

Discussion

a. Whether § 91.409(f)(3) is an Option Only for Type-Certificated Aircraft

Neither the plain language of § 91.409(f)(3), nor a review of the rulemaking history of that provision expresses a requirement that the aircraft must be type-certificated. The FAA first promogulated the predecessor to § 91.409(f)(3) in a final rule published on July 25, 1972.[1] That final rule provided in 14 CFR 91.217(b)(4) that the registered owner or operator of each airplane governed by what was then §91.217(b) must select and use one of five options for an inspection program. One of those five options was to select "A current inspection program recommended by the manufacturer." Subsequent rulemaking made no substantive changes to the language of the provision, but moved this text from §91.217 to §91.169, and then later to § 91.409(f)(3) where it resides today.[2]

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[1] 37 FR 14758, July 25, 1972.

[2] *See* 47 FR 41076, September 16, 1982 (moving the provision from §91.217 to §91.169) and 54 FR 34284, August 18, 1989 (moving the provision from §91.169 to § 91.409(f)(3)).

The plain language of the provision does not impose a requirement that the aircraft in question must be type certificated and to interpret so here would require one to read additional requirements into the text of the provision.[3] Additionally, none of the rulemaking history related to this provision provided any discussion as to the definition of "manufacturer" or indicated an intent to limit this option only to type certificated aircraft. A review of published FAA policy and guidance has also failed to disclose any published FAA policy position that an aircraft must be type-certificated in order to select an inspection program pursuant to § 91.409(f)(3). To interpret § 91.409(f)(3) as only being available for aircraft that are type certificated without any indication of such intent in the plain language of the regulation or its rulemaking history would call into question whether the public was given fair notice of such intent and the benefit of notice and comment procedures as required by the Administrative Procedures Act (APA).[4] As the FAA has stated in a prior interpretation, under the APA, the unambiguous regulatory text of a provision can only be changed via legislative rulemaking and not through an interpretation.[5]

There is, however, some historical support for AFS-300's conclusion that a § 91.409(f)(3) inspection program is only available if the aircraft is type-certificated. Under Part 18 of the Civil Air Regulations (CAR), which is a predecessor to the current Federal Aviation Regulations, the CAR had long contained a definition of "manufacturer" which defined the word in terms of holding a type or production certificate. CAR Part 18 involved the maintenance, repair, and alteration of airframes, powerplants, propellers, and appliances and the final version of its definition of manufacturer was as follows:

> "A manufacturer is any person who:
> (a) Holds a type or production certificate for and manufactures an aircraft, aircraft engine, propeller, or appliance, or
> (b) Manufactures an approved appliance in accordance with a specification issued by the Administrator."[6]

Subsequently, a recodification of CAR Part 18 into a "Part 43 [New]" was published in 1964 and the CAR Part 18.1 definition of manufacturer was omitted as "surplusage" and therefore was never published into the new Part 43.[7] Additionally, CAR Part 1 contained

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[3] This common-sense proposition is commonly known as the "Supremacy-of-Text" canon of construction. *See, e.g.*, BRYAN A. GARNER & ANTONIN SCALIA, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE 2 (2015), *available at* https://judicature.duke.edu/articles/a-dozen-canons-of-statutory-and-constitutional-text-construction/.

[4] 5 U.S.C. §§551-559, 701-706.

[5] *See* Letter to Aaron Enzer from Lorelei Peter, Acting Assistant Chief Counsel for Regulations, AGC-200 (August 24, 2015).

[6] CAR Part 18.1, amended July 17, 1956.

[7] *See* 29 F.R. 5449, April 23, 1964. The "Distribution Table" in this Miscellaneous Amendments shows the former CAR Part 18.1 omitted as "Surplusage". This amendment did not contain any substantive discussion on the omission of the Part 18.1 definition of manufacturer from the new Part 43, but the amendment's summary states that the purpose of the recodification program is to "streamline and clarify present regulatory language and delete obsolete or redundant provisions" and that to "attempt substantive changes

definitions of prime and subsidiary manufacturer, with the final versions of those definitions as follows:

> "(6) *Prime manufacturer*. A prime manufacturer means the person who initiated the design and construction of the product and who applied for the type certificate, or any person to whom a current right to reproduce the product has been transferred.
> (7) *Subsidiary manufacturer*. A subsidiary manufacturer means the person who contracted with the prime manufacturer to produce and to supply to the prime manufacturer major assemblies and components which are manufactured in conformity with the prime manufacturer's approved drawings and data for the fabrication of the product."[8]

A recodification of CAR Part 1 into a "Part 1 [New]" was published on May 15, 1962 and these definitions of prime and subsidiary manufacturer were omitted from the new Part 1 as surplusage.[9] This deletion of the CAR Part 18 definition of manufacturer and Part 1 definition of prime/subsidiary manufacturer occurred six and eight years, respectively, prior to the creation of the inspection program option that currently resides in § 91.409(f)(3).

Contrary to this historical CAR definition of manufacturer and prime/subsidiary manufacturer, which were omitted from the regulations, Title 14 CFR currently uses the term manufacturer in numerous contexts, including with respect to aircraft that do not necessarily receive a type or production certificate. For example, the vast majority of unmanned aircraft (UA) operating in the national airspace system today do so without receiving a type or production certificate from the FAA, operating either in accordance with the requirements of 14 CFR Part 107, Small Unmanned Aircraft Systems, or through some waiver, exemption, or other process. Yet the regulations governing UA include requirements related to the manufacturer of the UA.[10] Stating that a regulation using the term "manufacturer" in these contexts means that the regulation is only available or applicable to UA that have a type or production certificate would clearly be irrational and

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… would delay the project and be contrary to the ground rules specified for" the program. *Id.* Webster's New World Dictionary, 3rd Ed. (Copyright 1994) defines surplusage as (1) being more than is needed, useful or wanted, surplus, excessive; (2) not needed, unnecessary, irrelevant; and (3) extravagant, prodigal.

[8] CAR Part 1 with Amendment 1-1 through 1-9, issued December 5, 1963.

[9] *See* 27 FR 4587, May 15, 1962. The amendment adding the new Part 1 stated the following: "Definitions, now contained in the FAA Regulations, that do not appear in this part, have been omitted as surplusage or will be executed in revising the parts to which they apply. The fact that they do not appear in Part 1[New] does not mean, in each case, that they have been dropped. Many of the terms previously defined will be used without definition since none is necessary. In other cases, the term will be used but spelled out so as to make definition unnecessary." *Id*.

[10] *See*, *e.g.*, 14 CFR 47.14, Serial numbers of unmanned aircraft (involving the UA manufacturer's serial number); 14 CFR 89.130, Confirmation of identification (requiring the UA manufacturer and model name); and 14 CFR 107.140, Category 4 operations (ensuring the person performing any maintenance, preventive maintenance, alterations or inspections on small UA adheres to certain aspects of the manufacturer's maintenance manual or instructions for continued airworthiness).

contrary to the intent of those regulations. This would also be true in the context of other aircraft like light-sport aircraft and experimental amateur built aircraft, which also are not necessarily required to have a type or production certificate,[11] yet are governed by regulations that include references to the term "manufacturer". Hence, while at one time the FAA under the historical CARs defined "manufacturer" in terms of holding the type or production certificate for an aircraft, the FAA's current use of the term in 14 CFR is not so limited in at least several contexts.

Finally, the FAA Office of Chief Counsel previously issued a legal interpretation affirming that the owner or operator of an experimental amateur-built aircraft may select and use a "current inspection program recommended by the manufacturer" as provided in § 91.409(f)(3). In a February 1, 2010, legal interpretation to Mr. Eric Atkins (2010 Interpretation), the FAA considered who is the manufacturer of an amateur-built aircraft in relation to § 91.409(f)(3).[12] That interpretation stated that for an amateur-built aircraft certificated under § 21.191(g), the person(s) who fabricated and assembled the major portion of the aircraft was the aircraft's "manufacturer" and that such a person "who has fabricated and assembled an amateur-built turbine-powered rotocraft from an eligible kit may select an inspection program which that person, acting as the manufacturer, has recommended."[13] Although not directly at issue, the interpretation placed no requirement that the amateur-built rotocraft must be a type-certificated aircraft produced under 14 CFR Part 21.[14]

Accordingly, while the prior CAR definition of manufacturer and prime manufacturer does provide some support for the proposition that the FAA previously considered a manufacturer of an aircraft, for purposes of maintenance, repair and alteration of airframes, as being limited to those persons or entities that manufacture a type or production certificated aircraft, the plain language of § 91.409(f)(3), its rulemaking history, the intervening six and eight years between the elimination of those CAR definitions and the creation of § 91.409(f)(3), the uses of "manufacturer" in Title 14 of the CFR with respect to certain non-type or production certificated aircraft, and the existing 2010 Interpretation all weigh heavily against the rationality of interpreting § 91.409(f)(3) as being reserved only for aircraft which are type certificated. As such, we do not interpret § 91.409(f)(3) as requiring that the aircraft be type certificated and produced under 14 CFR Part 21.

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[11] *See* 14 CFR 21.190 in reference to issuance of a special airworthiness certificate for a light-sport category aircraft and 14 CFR 21.191 in reference to issuance of an experimental certificate for an amateur-built aircraft.

[12] Letter to Elic Atkins from Rebecca B. MacPherson, Assistant Chief Counsel, Regulations Division, AGC-200 (February 1, 2010).

[13] *Id.*

[14] The 2010 Interpretation did note the inspection program used would have to be FSDO-approved in accordance with the operating limitations issued for the aircraft and that FSDO approval was a critical element of the process of ensuring that the aircraft is in a condition for safe operation.

b. Who Would be the Manufacturer Specified in § 91.409(f)(3)?

As to who would qualify as a manufacturer for purposes of § 91.409(f)(3), there is currently no definition of "manufacturer" in part 91 or part 1 of 14 CFR. A review of FAA policy and guidance has revealed two places where the FAA has defined manufacturer that would be relevant for consideration: the 2010 Interpretation and Advisory Circular 65-32A, Certification of Repairmen (Light-Sport Aircraft), dated February 8th, 2013 (AC 65-32A).

As noted above, the 2010 Interpretation defined "manufacturer" for purposes of selecting a manufacturer's inspection program under § 91.409(f)(3). The 2010 Interpretation states that "the FAA considers the person (or persons) who fabricated and assembled the major portion of the aircraft to be the aircraft's 'manufacturer' or 'builder'" for an amateur-built aircraft certificated under §21.191(g). The 2010 Interpretation further states that the FAA interprets "manufacturer" consistently with this determination for purposes of selecting an inspection program under § 91.409(f) for an amateur-built turbine powered rotocraft.[15] Here, too, for purposes of selecting an inspection program under § 91.409(f)(3) for a foreign former military aircraft, the term "manufacturer" should also be interpreted consistently with the 2010 Interpretation definition. Although the 2010 Interpretation involved an amateur-built aircraft and the current interpretation request involves KC-135R former military aircraft, there is nothing to indicate that the availability of the § 91.409(f)(3) option would differ in this respect.

As an additional consideration, Section 3v of AC 65-32A defines "manufacturer" as

> "[a]ny entity engaged in the production of an [light-sport aircraft (LSA)] or component used on an LSA. For an LSA issued a special airworthiness certificate under § 21.190, an entity that has built the LSA under a consensus standard and assumed the responsibility for the continued airworthiness of that aircraft."

Although this advisory circular is not a binding regulation, it is an expression of the agency's current definition of "manufacturer" in reference to LSAs. LSA are not required to be type-certificated.

As applied to the current case, the aircraft being manufactured to military design standards would not by itself qualify a former owner, military or otherwise, as the manufacturer of the aircraft under either the 2010 Interpretation or AC 65-32. Providing design standards or similar build or operation requirements may simply be indicative of customer requirements and does not necessarily mean the person or entity manufactured the aircraft. The limited facts presented in the Request fail to demonstrate that the former military owner fabricated and assembled the major portion of the aircraft such that said

[15] While the 2010 Interpretation references "§ 91.409(f)" in making this statement, the applicant in that interpretation was specifically asking the FAA who is considered the manufacturer of an amateur-built aircraft for purposes of § 91.409(f)(3).

owner could be considered the manufacturer of the aircraft. The prior military owner may merely be a customer who requested a manufacturer to modify an existing aircraft for military use[16] or may have contracted for a manufacturer to build a new aircraft in accordance with its design specifications but for which the military owner did not fabricate and assemble the major portion of such aircraft.

However, that does not mean that a former military owner may never be considered the manufacturer of an aircraft. There may be circumstances where such a military owner may be able to demonstrate that it did indeed fabricate and assemble the major portion of the aircraft such that it would qualify as the manufacturer of the aircraft. The burden would be on the applicant to demonstrate that the former military owner was indeed the manufacturer of the subject aircraft rather than merely the customer of the actual manufacturer if the applicant desires to avail itself of the inspection program option provided in § 91.409(f)(3).

Finally, although there is no regulation that defines a manufacturer, the FAA has for experimental aircraft recognized military inspection programs as separate from a manufacturer's recommended inspection program and has addressed them as an option under part 91.409(f)(4) rather than under part 91.409(f)(3).[17]

We appreciate your patience and trust that the above responds to your inquiry.

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[16] For example, the FAA recognizes a Military Commercial Derivative Aircraft, which is a commercially produced aircraft with an FAA type certificate and produced under an FAA production approval that is then modified to varying extent for military use. *See* FAA Order 8110.101A, Chapter 1, Section 1.c. defining Military Commercial Derivative Aircraft, dated February 25, 2015.

[17] *See* FAA Order 8900.1 Vol. 6, CHG 562 dated November 28, 2017, Chapter 1, Part 91 Inspections, Section 6-42(C) (discussing the manufacturer inspection program as a separate, distinct option from the military inspection program with respect to an inspection program proposed under part 91.409(f)(4) for an experimental aircraft).