



Issues Papers

Comments on the Draft Advisory Circular
Submitted to the FAA by email via maddie.miguel@faa.gov

Submitted by the Modification and Replacement Parts Association

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May 17, 2010

Madeleine Miguel
Federal Aviation Administration
Aircraft Engineering Division, AIR-100
Certification Procedures Branch, AIR-110
950 L'Enfant Plaza, SW
Washington, DC 20024

Dear Ms. Miguel:

Please accept these comments on the draft advisory circular, Issues Papers, which was published for public comment.

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Who is MARPA?

The Modification and Replacement Parts Association was founded to support PMA manufacturers and their customers. Aircraft parts are a vital sector of the aviation industry, and MARPA acts to represent the interests of the manufacturers of this vital resource before the FAA and other government agencies.

MARPA is a Washington, D.C.-based, non-profit association that supports its members' business efforts by promoting excellence in production standards for PMA parts. The Association represents its members before aviation policy makers, giving them a voice in Washington D.C. to prevent unnecessary or unfair regulatory burden while at the same time working with the FAA to help improve the aviation industry's already-impressive safety record.

MARPA represents a diverse group of interests – from the smallest companies to the largest - all dedicated to excellence in producing aircraft parts. MARPA's members provide data to the FAA in order to support PMA applications, so the policies and standards published in FAA issue papers could be very important to their compliance strategies.

Summary of the Comments

MARPA applauds the FAA's efforts to establish more uniform standards for the handling of Issue Papers. MARPA has a number of systemic comments designed to help promote a better Issue papers system that will support the FAA's aims while also meeting legal requirements.

Comments

Issue Papers Should Be Treated in a Manner Consistent with Existing Governmental Policies

The text of the draft advisory circular makes it clear that issue papers are being (or will be) used to affirmatively set new regulatory standards. For example, they are being used to establish new certification standards based on new scientific information. They are being used to set new quasi-regulatory standards where it is deemed that the current regulations are inadequate to address an issue. The draft advisory circular also states that issue papers are being used to set national

precedent. This is, effectively, a form of rulemaking through issue papers. The Courts have previously forbidden agencies from developing new rules (as opposed to new interpretations of existing rules) through such informal means. It is also fundamentally unfair to set regulatory standards on an ad hoc basis without codifying those standards and applying those standards uniformly to all applicants. Therefore, if the Issue Papers will set new standards then they must be promulgated as rules before they can be issued and enforced.

If quasi-regulatory standards will be set or made through issue papers, then we strongly recommend that all issues papers be treated as proposed rules, published in the Federal Register for public comment, and otherwise processed in accordance with the requirements of the Administrative Procedures Act, the Paperwork Reduction Act, and other relevant laws.

The Issue Paper process is also being used to make findings of “Equivalent Level Of Safety (ELOS).” The AC explains that this happens where literal compliance with a certification regulation cannot be shown. This sort of relief from the literal language of the regulations is the same as an exemption. There is an existing process in the regulations for petitioning for exemption. E.g. 14 C.F.R. § 11.61 et seq. If some parties are permitted to obtain exemptions through the more informal ELOS/Issue Paper process, and other applicants are required to follow the formal process for petitioning for exemption, then this creates a fundamental unfairness in the system, and we recommend that the process for ELOS be standardized and published in the regulations so that it meets the exemption requirements currently found in Part 11 of the FAA's regulations, or presents a formal regulatory basis for diverging from the exemption process.

Summary of Basic Protections to Preserve Due Process

The FAA is proposing to issue definitive policy in Issue Papers. The FAA is also proposing to issue changes to regulatory interpretations through Issue Papers. E.g. Section 4 of the Draft AC. The FAA also appears to proposing to set new quasi-regulatory standards where the existing regulations are deemed inadequate to completely address a subject. All of these efforts affect the manner in which the public demonstrates compliance to the regulations. As a consequence, and for the reasons previously stated above, we recommend that the following minimum standards should apply to all Issues Papers:

- All issue papers that establish new regulatory standards (rather than interpreting existing standards) must be treated as rules and should be promulgated in accordance with the Administrative Procedures Act.
- All issue papers that create novel standards for addressing new technologies must be treated as rules and should be promulgated in accordance with the Administrative Procedures Act.
- Issue papers are anticipated to be used both for establishing new standards and for interpreting existing standards. In order to clarify the category and the proper processing procedures, all issue papers that interpret existing standards should be identified as interpretive, and should specifically identify the regulatory or statutory language that is being interpreted (to avoid inadvertently issuing a new standard as if it were an apparent interpretation and also to clarify which vague language is being interpreted).
- All issue papers that establish new documentation standards or documentation requirements must be treated as rules and must be promulgated in accordance with both the Administrative Procedures Act, and the OMB approval requirements of the Paperwork Reduction Act.
- All issue papers that establish new standards that are higher than standards applied to comparable products or parts in the past should be promulgated in accordance with the Administrative Procedures Act to preserve Equal Protection for similarly situated applicants, and to clarify the safety reasons that previously-used standards are no longer considered adequate.
- All issue papers that set or alter FAA policy must be made available to the public. There should be no “secret policies” for accomplishing compliance to the airworthiness standards of the regulations. Issue papers could (for example) be published among the policy documents currently found on the FAA's Regulatory and Guidance Library.

Detailed Recommendations

FAA Compliance Decisions Should be Made Based on Publicly Available Rules

In some cases, PMA applicants have been told that the FAA has made "life" (or "lifing") decisions on parts for which no life limit is published based on confidential issue papers. This means that the government is establishing

"secret rules" based on issue papers, and that subsequent PMA applicants are being held to these "secret" standards that have never been published in the rules. "Secret rules" are unacceptable in the U.S. government system. For these reasons, we vehemently oppose any FAA effort to establish or enforce "secret" standards found in issue papers. We feel that if an issue paper is to be used to interpret the certification standards, then the FAA's detailed description, argument, and disposition of the issue (the FAA's detailed opinion) must be published and available to the public before it can be enforced.

Set Time Limits

In some cases, approval projects have been significantly delayed while the FAA drafted an issue paper that set a new standard to apply to the project. MARPA members have complained about year-long delays to approval projects while they await a FAA issue paper. In addition to the fact that the new standards are fundamentally unfair when they add new quasi-regulatory burdens to an application after the application has already been initiated, the time delay associated with the FAA's efforts to create these new standards is also fundamentally unfair. MARPA recommends that the FAA set a time limit for the publication of issue papers that are intended to be used with a particular project. MARPA recommends that the time limit be set as not more than 30 days after the PMA application process is initiated; we also recommend that any issue paper published after the date a project is begun (or after the date on which FAA is notified of the initiation of the project) should be optional, but not mandatory, as applied to that project.

Avoid Balkanization of FAA Policy

It is unclear, from the advisory circular, who in the FAA has the authority to establish policy by publishing an issue paper. There also appears to be no mechanism for examining previous issue papers to identify precedent. Thus, it appears quite possible that two different Aircraft Certification Offices (ACOs) could issue conflicting policy. To resolve these inconsistencies, we recommend that (1) the advisory circular should describe a mechanism by which the FAA will identify which offices are competent to issue which sorts of issue papers and on which subjects, and (2) the advisory circular should describe a mechanism by which the issuing office of an issue paper will examine existing precedent to ensure compatibility. The draft advisory circular lists various possible types of issue papers, but it does not say which offices of the FAA are permitted to issue which types of issue papers, nor does it specify any issue paper limits on offices. This runs the risk of permitting a further balkanization of FAA policy.

Permit Appeal of Unsubstantiated Decisions

While issue papers are often based on agreements concerning the appropriate method for moving forward on a technical issue, they do not need to be based on such agreements. An issue paper can be issued based on the decision of a FAA office, or a project can be held up perpetually if the parties do not agree upon the correct approach to a technical issue. If issue papers are to be formally entrenched in the FAA's policy-making system, then there must be a formal mechanism for appealing decisions made by the FAA when the approval/certification applicant disagrees with the technical merits. There also needs to be a mechanism for appealing disagreements when the disagreement has caused the issue paper process to become derailed, and where FAA failure to issue an issue paper or other decision on the disputed issue is causing the entire project to become derailed.

It is not sufficient to say that the applicant must first complete its certification process before it can appeal an issue paper decision, because the issue paper decision could reflect hundreds of thousands or even millions of dollars worth of testing - many companies do not have the resources to delay an appeal of a technical decision to the end of the approval process. Thus, a process for obtaining interlocutory appeal of field office technical decisions is necessary.

Recommended Changes to the Definitions

We also recommend the following specific changes to the Definitions section found in appendix B. Please note, that terms that are not used in the advisory circular should not be defined in the advisory circular - this practice creates a grave potential for misuse and inconsistency. The FAA already have many advisory circulars that are published with differing and even inconsistent definitions. Defining terms that are not even used in the advisory circular increases the risk of inconsistent or out-of-date advisory definitions, while providing no benefit (there is no benefit in these cases because the defined terms are not used).

- The term “amended TC” should be removed from the list of definitions, because the term is not used in the advisory circular and therefore does not need to be defined in the advisory circular.

- The term “certification plan” should be removed from the list of definitions, because the term is not used in the advisory circular and therefore does not need to be defined in the advisory circular.
- The definition of the term “Certificating authority” needs to be revised because it is legally inaccurate. It is possible for a foreign entity to apply to a certificating authority for a certificate. Thus, if a European company applies only to the FAA for an STC (e.g. for a US-registered aircraft owned by the foreign entity), then the certificating authority for the STC is the FAA, and not EASA. We recommend eliminating everything in the definition after the first sentence, and we recommend expanding the definition to be more general. The new definition should read:
- The aviation authority responsible for issuing the original design approval or certificate (such as a TC, STC, PMA or TSOA).
- The term “Methods of Compliance,” as found in the definitions section, should be made singular (“Method of Compliance”) in order to coincide with the usage in the advisory circular. We also recommend dropping the second sentence of the definition, because a description of a thing is not the same as the thing; and therefore the definition of a method of compliance should not include a description of a method of compliance.
- The definition of the term “Parts Manufacturer Approval” is conjunctive (both replacement and modification) when it should be disjunctive (the definition should include approvals for replacement or modification parts). Otherwise the definition could be read as limiting the definition to approvals issued for parts that are both replacement and also modification parts.
- The term “significant change” should be removed from the list of definitions, because the term is not used in the advisory circular and therefore does not need to be defined in the advisory circular.

Conclusion

MARPA generally supports FAA efforts to standardize government practices; however, when those standardization efforts appear to establish new methods for issuing binding standards in contravention to the Administrative Procedures Act, and without the protections of the Administrative Procedures Act, then this is troubling.

We recommend that the issue paper process either be confined to interpretation (in which case the issue papers should be available to the entire industry) or else

the process should be bounded by the formalities associated with creation of new binding standards (e.g. the formalities found in the Administrative Procedures Act, etc.).

We appreciate your consideration of these comments.

Respectfully Submitted,

A handwritten signature in black ink that reads "Jason Dickstein". The signature is written in a cursive style with a large, prominent "J" and "D".

Jason Dickstein
President

Modification and Replacement Parts Association