**Standard Operating Procedure:**
**Aircraft Certification Service Project Prioritization and Resource Management**

Comments on the Draft Standard Operating Procedure
published online for public comment

Submitted to the FAA via email to 9-AWA-AVS-AIR-103-SOP@faa.gov
[Fed. Reg. Doc. 2013–10433]

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July 2, 2013

Graham Long
Federal Aviation Administration
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Dear Mr. Long:

Please accept these comments in response to Standard Operating Procedure: Aircraft Certification Service Project Prioritization and Resource Management, which was published for public comment at http://www.faa.gov/aircraft/draft_docs/policy/.

In summary, the current proposed sequencing program remains legally suspect, in that it fails to meet legal prerequisites that apply to a policy of this sort, and it also continues to pose serious policy issues, in that it favors the support of large businesses over small businesses without offering a sound policy basis for such favor.

## Contents



## 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 aviation authorities to help improve the aviation industry's already-impressive safety record.

MARPA represents a diverse group of manufacturing interests – from the smallest companies to the largest - all dedicated to excellence in producing aircraft parts.

MARPA members are committed to supporting airlines with safe aircraft components. MARPA members manufacture and sell aircraft components that provide equal or better

levels of reliability when compared to their original equipment manufacturer competitors.

MARPA supports efforts to produce guidance that increase safety at reasonable costs. MARPA applauds the FAA's efforts to establish fair and reasonable sequencing procedures.

## Procedural Comments

### This Guidance is Very Important

This SOP would have a tremendous effect on the rights of private parties. The sequencing decisions about which projects will get FAA resources, and which ones will be delayed, will have a tremendous impact on business and profitability, because the FAA approval process is often a bottleneck on innovation. A safety improvement project that is delayed for weeks or months could inhibit safety not only because of the delay, but also because for many companies - particularly smaller ones - delay can mean the difference between whether the company is successful or whether the company may run out of financing before it can bring its safety improvement to the marketplace.

### The FAA is Required to Adhere to Standard U.S. Practices

The Constitution's Due Process Clause requires the government to provide fair process to similarly situated persons.[1]

The FAA has an obligation to make its services available to companies without prejudice. If it intends to make distinctions concerning the parties to whom services will be made available, then it must do so with an even-handed and justifiable process.

Existing U.S. government policies make it clear that government policy does not favor the creation of processes that disadvantage small businesses to the benefit of larger competitors.

When agencies have been faced with statutory obligations to provide services and limited resources that preclude them from offering all of the needed services on an immediate basis, the Courts in the past have approved a "first-in first-out" approach.[2] Divergence from such an approach is permitted in exceptional circumstances.

[1] U.S. Const. amend. V.
[2] Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976).

Here, the FAA is attempting to establish a structure that will be different from first-in first-out. The burden would rest with the FAA to demonstrate that such an alternative method is fair, rather than arbitrary and capricious.

## The Guidance Imposes Provisions that Should Be Treated as a New Rule

The proposed SOP would establish parameters for how the United States government chooses to allocate its resources. Although it is proposed in the form of an internal work instruction, this SOP must be treated as an FAA Order because it would affect the rights of private parties.

The SOP in this case fixed a legal relationship, by defining when certain parties may be eligible for FAA services. By defining a legal relationship, this document represents an action that is subject to the protections of the Administrative Procedures Act.[3]

The mere fact that it is captioned as an internal SOP is not dispositive of its status. Courts generally look to the actual effect of an agency document, rather than the caption, to determine whether it is an agency action of the sort that is subject to the protections of the APA.[4] In this case, the fact that the SOP fixes a legal relationship, and that it has a determinative effect, both indicate that the SOP should be treated as a Regulation or Order of the Administrator.[5]

In the Safe Extensions case, the D.C. Circuit explained that even an advisory circular can be subject to the protections of the APA, where the advisory circular affects the relative rights of parties.[6]

Notwithstanding the notice of availability issued in the Federal Register[7], this SOP is subject to the protections of the APA, and should therefore be issued through the formal processes described under the APA, like notice-and-comment rulemaking (including a regulatory flexibility analysis).

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[3] See, e.g., Puget Sound Traffic Ass'n v. Civil Aeronautics Board, 536 F.2d 437, 439 (D.C. Cir. 1976) (explaining that an appealable final agency decision is one which imposes an obligation, denies a right, or fixes some legal relationship).

[4] E.g., Constantino v. Michigan Dept. of State Police, 2010 WL 1531423 at 7 (6th Cir. 2010) (explaining, in the context of review of a rule, that "[t]he label an agency gives to a directive is not determinative of whether it is a rule or a guideline under the APA. Instead, the court is required to review the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." (*citations omitted*)).

[5] As that term is used in 49 U.S.C. § 46105 – as opposed to an internal order of the Administrator that is used purely for directing staff concerning internal activities.

[6] Safe Extensions v. FAA, 509 F.3d 593 (D.C. Cir. 2007) (focusing on the fact that the plaintiff was competitively disadvantaged by the advisory circular).

[7] Proposed Standard Operating Procedure (SOP) of the Aircraft Certification Service (AIR) Project Prioritization and Resource Management, 78 Fed. Reg. 26,203 (May 3, 2013).

### The FAA Should Alter its Practices to Conform with Executive Order 13563, Including Industry Outreach and Demonstrable Objectivity in the Decision-Making Process

Because this SOP is tantamount to a rulemaking, the FAA should have followed the legal requirements associated with rulemaking activities.

The FAA is required to thoroughly review drafts to assess the potential effect on small businesses and to take appropriate account of such effect.[8] There is no evidence in the record that the FAA has satisfied this obligation.

The FAA is required to ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.[9] There is no scientific or technological information found in the docket to support the sequencing process. This creates the appearance of an arbitrary and capricious action on the part of the FAA. If there is scientific or technological information that supports the sequencing decisions, then this information should be made available to the public in the docket, with an appropriate public announcement of availability of the information and a 60-day period in which to review and comment on the information. If there is NO scientific or technological information to support the sequencing decisions, and the decisions have been made arbitrarily, then the fact that they have an adverse effect and are based on arbitrary decisions should render this SOP invalid.

Before re-issuing any notice concerning this SOP the FAA should seek the views of those parties who are likely to be affected, including those who would be adversely affected by being relegated (including but not limited to small aftermarket manufacturing businesses, small repair stations and general aviation parties). Such outreach to affected parties is required under Executive Order.[10]

## Substantive Comments

### The Protocol for Determining the Safety Index is Unnecessarily Subjective

For sequenced projects, the safety index provides the majority of the project's initial priority ranking for purposes of determining which sequenced projects will be worked first. The

[8] Executive Order 13272 § 1 (August 13, 2002).
[9] Executive Order 13563 § 5 (January 18, 2011).
[10] Id. at § 2(c).

safety index for certification and approval projects appears to be based on the following equation:

Safety Index = Safety Impact x Passenger Impact x Affected Fleet

While this appears at first blush to be to be a quantitative determination, the value assignments associated with this equation appear to leave a great deal of room for subjectivity on the part of the value-assigner.

One example of this subjectivity can be found in the assignment of safety impact values for certification projects. This table illustrates the proposed assignment of value:

> *Safety Impact Prioritization Values*
> *• 90: Prevent/Mitigate accident/Near-term safety impact*
> *• 10: Program of defined strategic safety importance / regulatory compliance (programs defined by Congress or the FAA as high priority)*
> *• 4: Product with updated certification basis where the change to the product has some safety enhancement/Longer-term safety impact*
> *• 0: Negligible safety impact*

There are many problems with these value assignments. First, there is no definition of the terms “near-term,” and “longer-term.” This is an important distinction because a near-term safety impact will have an initial safety index over *twenty-two times greater* than the initial safety index of a longer-term safety impact. Without a clear distinction, two otherwise identical projects could be given radically different initial safety indices based on the differing perceptions of the reviewing agents.

The FAA currently has neither a statutory basis nor a regulatory basis for drawing these distinctions and there is no guidance on how to objectively distinguish these two terms. At present, this distinction is left entirely to the discretion of an individual who assigns the values to projects. The actions of these persons appear to be immune from review and in fact immune from any public scrutiny. This raises a dangerous likelihood that the terms will be understood differently from employee to employee and therefore there will be a lack of uniformity among value assignments, which leads to arbitrary distinctions between similarly-situated applicants.

The manner in which the FAA may define a project as high priority also needs to be carefully defined. At present, a note indicates that such projects are "NextGen, congressionally-mandated programs, and Administration imperatives.” It is unclear who will make determination as to what constitutes an “Administration imperative.” This version of the SOP does not even include the note that appeared in the prior sequencing document,

which indicated that such determinations would be made by AIR-1.[11] This it appears that under this document (lacking guidance or management) Administration imperatives may be identified by individuals who are making the sequencing decisions. Once again, this raises a dangerous likelihood that Administration imperatives will be understood differently from employee to employee and therefore there will be a lack of uniformity among value assignments, which could lead to arbitrary distinctions between similarly-situated applicants.

If the power to set Administration imperatives resides with AIR-1, and if AIR-1 delegates this power to the individual offices, so that an individual office can define a project as high priority then an individual office can essentially use that designation to provide an unfair advantage to projects that the individual office deems to be worthy.

On the other hand, if the FAA's Headquarters will centralize the decisions concerning strategic priorities, then it politicizes the safety process, as larger companies with lobbying resources will lobby AIR-1 (and their Congressional representatives) to have their projects designated as priorities (e.g. because of the project's projected potential to produce jobs). Such a designation would permit the designated projects to take priority over long-term safety improvements, even when the project in question provided a negligible safety impact. For example, an air carrier might lobby to have its fleet interior STC deemed "strategically important" - this would permit it to be prioritized over projects that might have a greater safety affect but that came from companies without the political resources to lobby for designation as "strategically important."

Another problem is that a change of negligible safety importance to an avionics system (but that changes weight and balance of the aircraft so that it requires an STC) will literally have an infinitely greater initial safety impact prioritization value (a value of 10, as opposed to 0) of a comparable change to another system if the former change can be tied to NextGen or some other Administration imperative. Thus nearly identical projects could be distinguished based on the lobbying that has gone on behind the projects, rather than based on their true safety impact.

The program has been set up so that certification projects for in-production (5 points) large transport category aircraft (7 points) that can successfully lobby for categorization as a priority project (10 points) will always take priority over other earlier-filed projects (even projects that compete with this project – such as a rival company that had previously submitted an application for an otherwise identical STC) because such projects will enjoy an initial safety index of 350, which means that they will be designated as Top Priority and will be worked immediately within the Office Flow Time. This permits companies to use strategic designation by Congress or the Administration as a means to automatically jump to the front

[11] SOP #: AIR-100-001 Draft Standard Operating Procedure Aircraft Certification Service Project Sequencing at 12. Note that “AIR-1” is the mail stop designator for the Director of the Aircraft Certification Service.

of the line for resources, and in fact to jump ahead of substantially similar projects from small business rivals.

It is inherently unfair for the U.S. government to create a situation where taxpayer-financed resources may be allocated based on lobbying activities, when lobbing has been deemed by the IRS to be NOT an ordinary and necessary business expense.[12]

The ambiguities and politicization of this process permit an entirely subjective assessment of value points based on the individual assessor's determination, combined with the applicant's lobbying power. This sort of subjective assessment of value points is inappropriate and will lead to arbitrary and capricious behavior. It is also most likely to have the greatest negative impact on small business competitors.

## For Sequenced Projects, There is a Potential Unfair Advantage for Established Companies Against New Market Entrants

There are elements of the safety index calculation that appear to favor existing companies over newer companies, and that also seem to favor companies with existing product lines over new market entrants. There is no statutory basis or regulatory basis to permit such disparate treatment.

One example of this sort of disparate treatment can be found in the Affected Fleet values portion of the safety index calculation. In Appendix One, the FAA has assigned safety index values for certification and validation projects. One of the variables in this equation is the "Affected Fleet" index. The suggested values provided in that calculation assign a value of "3" where the affected fleet consisted of 5 or more aircraft. They assign a value of "1" where the affected fleet consisted of fewer than 5 aircraft. But regardless of the size of the affected fleet, if the project will be incorporated into a production line then it is assigned a value of "5." This may permit very different SI values to be assigned to two similar projects that are only different because of the type of production approvals currently held by the applicants.

*Affected Fleet Values*
- *5: Incorporation into production line*
- *3: Greater than 5 aircraft*
- *1: 5 or fewer aircraft*

First of all, the term "incorporation into product line" is vague. But it appears to refer to situations where there is an existing product being manufactured and the manufacture wishes to introduce a change into the product line, for instance, where an aircraft

[12] Business Expenses, IRS Publ. 535 p.45 (March 24, 2011) (explaining that lobbying expenses are not deductible as ordinary and necessary business expenses).

manufacturer wishes to alter the aircraft through introduction of new technology. Whether this supposition about the meaning of the phrase is correct, or some other meaning is intended, the phrase should be more specifically defined in the guidance.

While the idea of committing FAA resources to projects that will affect a larger fleet seems to makes sense at first blush (from the perspective of achieving a larger effect with the FAA's scant resources), the idea of prioritizing the commitment of FAA resources to projects that will be incorporated into a production line does not make sense from a policy point-of-view, and it affords an unfair advantage to certain competitors relative to other competitors. Because of the make-up of the aerospace marketplace, this unfair advantage is most like to favor large businesses over small businesses and established businesses over new market entrants.

For example, let's say that the market has recognized an improved way to do something on an aircraft (for example, by virtue of a recently expired patent that has now come into the public domain). Both the airframe manufacturer and an independent competitor decide to design an aircraft part that implements the new technology. If both parties seek the same STC using the same underlying data, then the aircraft manufacturer will start with a safety index 1.66x higher than the independent company, by virtue of the fact that the aircraft manufacturer can claim that they are implementing the change in the product line (and selling to the aftermarket), while the competitor is merely selling to the aftermarket. This places the independent competitor at an unfair disadvantage (having to wait longer for resources) that is not warranted by any safety rationale. Even if the competitor applies for the (otherwise identical) STC first, the FAA will prioritize resources to the airframe manufacturer who applies second because of the sequencing mechanism that is proposed.

## The Applicant Showing or Designee Finding Rating (ASDF) is Unfairly Biased Against Small Businesses

The Draft Order attempts to balance the Safety Index rating against the ASDF rating to incentivize applicant showings and designee findings in the application in order to reward those companies that relieve some or most of the FAA's burden. Although this approach makes some sense from the FAA's standpoint of limited resources, it is also unfairly biased against companies with limited resources, and would undermine the efforts of many small businesses.

An ASDF rating is calculated based on two factors: (1) Percentage of airworthiness regulations with applicant showing only or Designee finding of compliance, and (2) Number of findings retained by FAA personnel. The purpose of applying both a percentage of showings and findings and a raw number of findings is to ensure that both large and small projects are evaluated equitably in determining priority. However, the same process unfairly

discriminates against those companies with fewer resources seeking approval of a project identical to that of a company with significant resources.

Using the previous example, in which an airframe manufacturer and an independent competitor decide to design an aircraft part that implements the new technology, it quickly becomes apparent that the airframe manufacturer may receive a priority increase for an identical project simply by virtue of its available resources. A smaller company may not be able to afford to pay a Designee to make a large percentage of findings, whereas a larger company may have the resources to do so, or may make such showings independently. Because the large company is able to make a large percentage of findings, and leave the FAA with a low number of retained regulatory findings, the large company may earn a higher ASDF rating than the small company, putting the small company at a competitive disadvantage in the marketplace without any corresponding safety benefit.

The final ASDF rating is used in combination with the Safety Index to determine project priority, as shown in Table A-7. Those companies that have more resources at their disposal, either to implement ODA or utilize the services of designees, are essentially able to purchase priority over those smaller companies—who must rely on the FAA to make regulatory findings of compliance—by obtaining a higher ASDF rating. Such weighting places small businesses and companies that have not yet implemented, or cannot afford to implement, an ODA program at a competitive disadvantage that is not warranted by any safety rationale.

## Conclusion

As can be seen, serious issues remain with the proposed sequencing guidance. MARPA looks forward to working with the FAA to better improve aviation safety and resource commitment. We are happy to sit down with you to work on ways to improve the guidance if you would like further input. Your consideration of these comments is greatly appreciated.

Respectfully Submitted,

Modification and Replacement Parts Association