



Comments in Response to the FAA NPRM

Falsification, Reproduction, Alteration, Omission, or Incorrect Statements, 89 F.R. 8560
(February 8, 2024).

Docket Number FAA–2024-00872

Submitted to the FAA via regulations.gov
April 5, 2024

**Submitted by the
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Washington, DC 20591

Dear Mr. Stuart:

Please accept these comments in response to the FAA NPRM *Falsification, Reproduction, Alteration, Omission, or Incorrect Statements*, which was published at 89 FR 8560 on February 8, 2024.

Contents

| | |
|--|---|
| 1. Who is MARPA? | 2 |
| 2. Extension of the Proposed Rule to Forbid Honest Mistakes: This Element Should Be Withdrawn..... | 2 |
| 3. This Approach to Honest Mistakes is Contrary to FAA’s Existing Policy Concerning Documentary Mistakes | 4 |
| 4. Proposed Section 3.401 Expands the Applicability of the Regulations and this is a Problem When Applied to the Strict Liability Offense Proposed Under Section 3.405 | 5 |
| 5. This is a Significant Regulatory Action..... | 7 |
| 6. Conclusion | 8 |

1. 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 the aviation industry 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 regulations that increase the aviation industry's already excellent safety record.

2. Extension of the Proposed Rule to Forbid Honest Mistakes: This Element Should Be Withdrawn

We recommend that proposed section 3.405 be dropped from the proposed rule.

Proposed section 3.405 forbids (1) material incorrect statements and (2) omissions of material fact. There is no knowledge or intent element associated with this violation. This proposed regulation would make such violations strict liability violations.

This proposed rule would have the effect of forbidding honest mistakes and would provide no regulatory relief in cases where the honest mistake was discovered and corrected.

Traditionally, fraud and misleading statements have required some intent by the actor in order to be actionable.¹ In a commercial transaction, an unintended falsehood is typically considered to be a mistake of fact that is merely a contract issue and not a tort nor an enforcement issue.² This is distinguished from the intent typically associated with fraud and misleading statement laws. The proposed rule diverges from legal norms by proposing a strict liability offense in proposed section 3.405.

There is no mitigation in the proposed regulation for correction of an honest mistake. Therefore, the regulation would disincentivize such corrections, because such corrections would be implicit admissions of such mistakes (and thus an implicit admissions of a regulatory violation). This appears to be the opposite of what the industry intends to happen in such cases.

For example, imagine that a manufacturer issues a completed aircraft article from its quality system. Such an article would typically bear an 8130-3 tag that states the airworthiness condition of the part. Now imagine that the article reflects a quality escape that is not discovered until after the part is released with its paperwork (for example, an audit reveals an error in processing, or a customer communication reveals that the part number was improperly printed on the 8130-3 tag). Normal practice would be to immediately recall the part and to take steps to prevent the part from being installed in an aircraft. But under the proposed rule, the 8130-3 tag would become a materially false statement. It would not be fraud or misrepresentation because there was no intent at the time it was signed/released. Under standard practices today the manufacturer would work closely with the FAA on the recall effort.

But under the new paradigm represented by the proposed rule, the incorrect statement on the 8130-3 tag would become an independent regulatory violation. A recall or correction would reflect an implicit admission that the original document had borne a material incorrect statement, and that prior incorrect statement would reflect a regulatory violation. Under the plain language of the proposed regulations, neither recall of the article nor correction of the mistake would change the regulatory impact of the mistake.

Mistakes happen in the real world, and giving the FAA the power to punish such mistakes on a strict liability basis is contrary to the FAA's stated positions with respect to "just culture," especially as that concept has been discussed in the context of safety management systems. Under the just culture paradigm, the FAA has promoted the idea of self-disclosure of safety hazards in a non-punitive environment.³ Creating a punitive environment in which simple

¹ Restatement of Torts §§ 531-36 (1938) (explaining that intent is a necessary element of torts of deceit, including fraud).

² *E.g.* Ca. Civ. Code §§ 1567, 1577 (explaining that mistake of fact voids the consent to a contract; *cf. In re Gross*, 288 B.R. 655, 661-62 (Bankr. E.D.N.Y. 2003) (a malicious prosecution action cannot be based on an unintended falsehood).

³ *E.g.* Fields, *A Just Culture for Safety*, FAA Safety Briefing (Jan/Feb 2024) ("what might have once required the use of an enforcement action for a pilot deviation may now involve training, education, or counseling — a compliance action — to resolve. The FAA recognizes that some deviations are caused by a simple mistake or could

mistakes can be readily punished (even if self-disclosed) is contrary to the “just culture” environment that the FAA is trying to foster.

For these reasons, we recommend that the strict liability offense described in proposed section 3.405 be dropped from the proposed rule.

3. This Approach to Honest Mistakes is Contrary to FAA’s Existing Policy Concerning Documentary Mistakes

The FAA permits production approval holders to issue 8130-3 tags.⁴ It also permits the issue of 8130-3 tags through designees, who are authorized to issue the tag for demonstrably airworthy parts in accordance with guidance⁵ and regulations.⁶ Such issuance falls within the scope of the proposed regulations.

The FAA has published guidance explaining the mechanism for correcting honest mistakes that are found in FAA 8130-3 tags that have been issued by designees.⁷ The current FAA guidance allows the originator of a form with an error to recover a copy of the incorrect form and reissue the form. The reissued form would be attached to a copy of the form with the error, and the reissued form would bear the legend:

“This FAA Form 8130-3 corrects the error(s) in Block(s) [enter block number(s) corrected] of the FAA Form 8130-3 [enter form tracking number] dated [enter issuance date] and does not cover conformity/condition/release to service.”⁸

By using the authority given in the FAA’s guidance, the issuer would be admitting to a regulatory violation of proposed section 3.405. This would subject the issuer to enforcement action for violation of 3.405. The proposed rule at section 3.405 would establish a punitive approach to a process that is already well-controlled. There is no policy reason for doing this,

stem from a lack of training, a lack of knowledge, diminished skills, or procedures that are not working as they should. A compliance action is a more effective way of correcting the issue and preventing reoccurrence”); *Safety Culture Assessment and Continuous Improvement in Aviation: A Literature Review*, FAA Report No. DOT/FAA/AM-23/13 (May 2023) (“Another method of assessing elements of organizational culture is to obtain employee self-reports of hazards, threats (near misses or close calls), accident precursors, and other safety-related events. This can be done by utilizing voluntary or mandatory reporting programs; to maximize success, these systems should be voluntary, confidential, and non-punitive.”)

⁴ 14 C.F.R. § 21.137(o) (permitting a production approval holder to issue the tag for its own parts).

⁵ *Procedures for Completion and Use of the Authorized Release Certificate, FAA Form 8130-3, Airworthiness Approval Tag*, FAA Order 8130.21H CHG 1 (Jan 11, 2016).

⁶ 14 C.F.R. § 21.331; see also 49 U.S.C. § 44702(d).

⁷ *Procedures for Completion and Use of the Authorized Release Certificate, FAA Form 8130-3, Airworthiness Approval Tag*, FAA Order 8130.21H CHG 1 para. 1-11 (Jan 11, 2016).

⁸ *Id.* at para. 1-11(b).

and as stated above, imposing such a penalty could have the unintended consequence of causing issuers of 8130-3 tags to refuse to issue corrected forms when potential errors are identified.

4. Proposed Section 3.401 Expands the Applicability of the Regulations and this is a Problem When Applied to the Strict Liability Offense Proposed Under Section 3.405

The applicability clause of proposed section 3.401 extends the applicability of the regulation to any person subject to the requirements of a long list of regulations. That list includes subchapter C: and this would include applicants for airworthiness approvals.⁹ Applicants for airworthiness approvals typically present evidence of airworthiness to FAA designees. FAA designees are private persons who are delegated the authority to act on behalf of the FAA in examinations necessary to issue certificates, as well as actual issuance of such certificates.¹⁰ The applicability clause of proposed section 3.401 would therefore expand the scope of the new Part 3 regulations to communications between an applicant and a FAA designee. This appears to be an expansion beyond the scope of the FAA’s prior false statement regulations and would expand the FAA’s authority into commercial communications between private persons.

To the extent that this expansion of scope reflects false and misleading statements that are made with intent, the Association supports such an expansion; but to the extent this new regulation addresses “honest mistakes,” the Association feels that this is an unwarranted extension of the FAA’s authority over honest mistakes in commercial communications.

It is unwarranted for at least two reasons. First, as previously discussed, traditionally the law has not imposed enforcement on honest mistakes,¹¹ but rather has required an element of intent in order to bring civil penalty action or other enforcement action against false statements. Even in the case of existing simulator regulations and medical regulations, the existing regulatory clauses that address incorrect statements merely authorized rescission of decisions based on the incorrect statements¹² – they do not authorize penalties. In contrast, the proposed rule at section 3.405 would generally forbid incorrect statements, which would mean that violation of this regulation

⁹ 14 C.F.R. § 21.1(a)(1)(iv) (applying Part 21 to airworthiness approvals); 14 C.F.R. 21.1(a)(2) (applying Part 21 to applicants for airworthiness approvals).

¹⁰ 49 U.S.C. § 44702(d); *see also* 14 C.F.R. Part 183.

¹¹ The Preamble to this rule cites to 14 C.F.R. §§ 60.33(c)(1–2) and 67.403 as provisions that forbid incorrect statements. Civil penalties and certificate actions, though, are only authorized for fraud under the simulator rules of Part 60. 14 C.F.R. § 60.33(a-b). The sanction for incorrect statements is withdrawal of approvals that were based on the incorrect statement. 14 C.F.R. § 60.33(c). Similarly, the medical regulations under Part 67 will penalize fraud (14 C.F.R. § 67.403(a-b)) but merely authorize the withdrawal of approvals based on incorrect statements (14 C.F.R. § 67.403(c)). Each of these represents an equitable remedy of rescission of the approval that was based on incorrect information. Thus, the prior precedent does not support the notion that penalties could be assessed for mere incorrect information.

¹² *Id.*

would authorize civil penalties.¹³ By making honest mistakes a strict liability offense, this is a significant divergence from the current norms.

Second, the preamble to the proposed rule explains several bases for the rule, but none of them actually support the strict liability offense for honest mistakes that is described under proposed section 3.405.

- A) One stated basis for the rule is found in 49 U.S.C. § 44701(a)(5), which establishes the authority of the FAA to prescribe regulations and minimum standards necessary for safety in air commerce and national security. Because there is no intent associated with the honest mistakes that would be forbidden under this proposed rule, there is no ability to consciously forbear from making such honest mistakes. Thus, the proposed rule would not have a positive impact on the behavior of persons in the industry. Because it would have no positive impact on the behavior of persons in the industry, the rule does nothing to promote safety and thus fails to fall within the scope of 49 U.S.C. § 44701(a)(5).¹⁴ In addition, as previously discussed, there is a very real possibility that the rule could discourage correction of honest mistakes, which would have a potentially negative impact on safety; thus suggests that the proposed rule would have the opposite effect from what Congress intended under 49 U.S.C. § 44701(a)(5).
- B) The FAA also claims that the rule is issued under 49 U.S.C. 44702–44709, which prescribe the FAA's authority to issue different types of certificates to various individuals and entities and to amend, modify, suspend, or revoke those certificates as appropriate. The FAA has made no argument that a strict liability offense for honest mistakes is appropriate or necessary. The claim that this consolidates all existing falsification regulations into a general rule is not applicable to the strict liability offense because there is no current strict liability offense for honest mistakes. Thus the authority to revoke certificates for “appropriate” reasons does not authorize a new strict liability offense.
- C) The FAA also claims that this “NPRM also falls within the scope of 49 U.S.C. 46301 since this section authorizes the assessment of civil penalties for noncompliance with the general falsification provision.” This section authorizes the assessment of civil penalties for noncompliance with regulations. It does not specify falsification provisions, nor does it authorize a strict liability offense for honest mistakes. Thus, it cannot be used as the basis for promulgating a new strict liability offense for honest mistakes.

¹³ *E.g.* 49 U.S.C. § 46301(a)(1)(B) (authorizing penalties for regulatory violations).

¹⁴ In the alternative, if the FAA contends that the strict liability offense will affect behavior in a manner that has a positive affect on safety, then the FAA should explain how behavior will change and should account for this change in behavior in the cost-benefit analysis.

None of the FAA's purported statutory supports for the proposed section 3.405 actually support the promulgation of this regulation, especially in light of the broad applicability section found in proposed section 3.401. MARPA therefore requests that proposed section 3.405 be dropped from the rule.

5. This is a Significant Regulatory Action

The FAA states that this is not a significant regulatory action. We disagree.

Under executive order 12866, a proposed regulation is a "significant regulatory action" if the rule would (a) raise novel legal or policy issues, or (b) create a serious inconsistency with other actions being taken by the federal government.¹⁵

As previously discussed, proposed section 3.405 creates a novel enforcement approach to incorrect statements by creating a strict liability enforcement mechanism for honest mistakes. As previously discussed, this is contrary to normal legal practice.

The courts have recognized that the application of strict liability regulations may seem "harsh and unfair. However, the Legislature, in its wisdom, has determined that the overriding public interest in assuring safe air travel offsets any potential unfair individual applications of [a strict liability statute]."¹⁶ It is obvious from this statement that the offset to the "unfair nature" of a strict liability offense is the fact that the strict liability standard has been approved by Congress. In this case, though, while Congress has approved of FAA standards against fraud,¹⁷ no such statute has authorized the FAA to create a new strict liability offense against honest mistakes (this lack of statutory support was discussed in the section 4, above).

In addition, as also previously discussed, this is also contrary to existing FAA policy pronouncements, which have encouraged a just culture environment. It also radically changes the FAA's approach to error correction, which has historically been supportive of error correction.¹⁸ Because of the creation of an inconsistency with other FAA policies, this proposal reflects a significant regulatory action.

MARPA recommends that the FAA (1) revise the treatment of this rulemaking to reflect the fact that it is a significant regulatory action or (2) drop section 3.405.

¹⁵ Executive Order 12866 § 3(f)(2,4) (1993).

¹⁶ *United States v. Gutierrez*, 624 F.Supp. 759, 761 (E.D. N.Y. 1985).

¹⁷ *E.g.* 49 U.S.C. § 44726 (permitting refusal of certificates to persons convicted of fraud); 49 U.S.C. § 46302 (providing penalties for knowing false information about an on-aircraft offense).

¹⁸ *Procedures for Completion and Use of the Authorized Release Certificate, FAA Form 8130-3, Airworthiness Approval Tag*, FAA Order 8130.21H CHG 1 para. 1-11 (Jan 11, 2016) (permitting the issuer to correct an error and freely issue the corrected form).

6. Conclusion

Thank you for making this NPRM available. We recommend that the FAA eliminate proposed section 3.405 from this proposed rule.

Respectfully Submitted,

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

Jason Dickstein
President
Modification and Replacement Parts Association