

The UPDATE Report



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ASA Conference: Coming Fast!

ASA's Annual Conference is coming up fast! We have compiled one of the best agendas yet, with speakers and workshops on quality assurance, auditing, good business practices, improving your commercial documents, unapproved parts, parting-out aircraft, traceability ... and the list just goes on! We will be joined by FAA Senior Management and by leaders among the air carrier and aircraft recycling communities.

Whether it is just a matter of making some contacts among the customers that are still buying, or discovering the new regulatory changes will affect the way we all do business, this is one Conference that you cannot afford to miss. 

8130-3 Traceability: Is Back-to-Birth Required?

I frequently get questions about the FAA's traceability "regulations." The first answer I give to any such question is that the FAA does not require traceability. But once I can get that answer past my lips, I need to move to the real questions.

One recent traceability question that crossed my desk had to do with repair stations that complete 8130-3 tags. The question asked whether a repair station

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MESSAGE FROM ASA'S PRESIDENT

THE UPDATE REPORT

is the newsletter of the Aviation Suppliers Association.

OUR COMMITMENT

ASA is committed to providing timely information to help members and other aviation professionals stay abreast of the changes within the aviation supplier industry.

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THE UPDATE REPORT STAFF

*Publisher Michele Dickstein
Editor Jason Dickstein
Production Squaw Design*

QUESTIONS ?

EMAIL questions to:
jason@washingtongaviation.com

MAIL questions to:
Jason Dickstein
Aviation Suppliers Association
2233 Wisconsin Ave., NW
Suite 503
Washington, DC 20007
Voice: (202) 347-6899
Fax: (202) 347-6894

OFFICERS:

Mitch Weinberg
(954) 441-2234
Corporate Treasurer

Jason Dickstein
(202) 347-6899
Corporate Secretary

Michele Dickstein
(202) 347-6899
President

Dear Members,

Here is some breaking news that ASA will be addressing at the Conference!

There has been a lot of debate in the United States about whether our trading partners would engage in reciprocal behavior if the United States passes legislation requiring semiannual audits of foreign repair stations. Congressman Oberstar gave a speech several months ago in which he assured Americans that there would be no reciprocity. But it appears that he cannot speak for the Europeans. Daniel Calleja, the EC Director of Air Transport, has asked EASA to develop a plan to ensure that Europe will be "reciprocating in full." EASA, in turn, has developed a reciprocal plan for semiannual audits of the 1,233 EASA-accepted repair stations in the United States. The plan has an implementation date of July 2010.

What this means for US repair stations is that in addition to paying 750 Euros for their annual renewal, they will also pay the costs associated with the actual audits - I have heard estimates of \$30,000 per year, although the actual cost may depend on how EASA implements the plan, and how many US repair stations choose to maintain their EASA 145 privileges. For distributors who rely on repair stations to perform component overhauls, this will likely increase the cost of getting a FAA-EASA dual-release.

The EC and EASA letters describing this program are available on ASA's website, and Jason will also address this situation at the Annual Conference. We really look forward to seeing everyone at the Conference.

Take care,
Michele

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REGULATORY UPDATE

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that uses the 8130-3 tag for approval of work on an aircraft part must confirm “trace back to an FAA-approved source of manufacture of new products and parts.”

There is a legal answer, and then there is a practical answer.

The short legal answer is no, a repair station that uses the 8130-3 tag for approval of work on an aircraft part does not have to confirm “trace back to an FAA-approved source of manufacture of new products and parts.”

There is no FAA requirement for traceability. This was confirmed in a Chief Counsel’s Opinion signed by Kenneth Quinn in the 1990s. Therefore, the FAA has no basis to mandate traceability. Since the FAA cannot mandate that a repair station confirm traceability, the FAA cannot legally mandate that traceability be a required prerequisite for approval for return to service.

Order 8130.21F is an FAA Order, and as such does not apply directly to the industry. This means that when a repair station uses the 8130-3 form as the base document for an approval for return to service to meet the requirements of 14 C.F.R. § 43.9, Order 8130.21F is (at best) merely persuasive guidance and it is not regulatorily required. The true measure of the requirements for approval for return to service is the regulations found at 14 C.F.R. § 43.9, and the primary guidance for interpretation of that regulations is advisory circular (AC) 43-9C (Maintenance Records).

Finally, the FAA would not be permitted to enforce Order 8130.21F as if it were a regulatory requirement, because the Paperwork Reduction Act forbids an agency from bringing an enforcement action for a recordkeeping requirement unless that recordkeeping requirement has been approved by the Office of Management and Budget (OMB). Although the 8130-3 tag has been approved by OMB, the instructions found in Order 8130.21F have not. Furthermore, the form has only been approved by OMB pursuant to its use as an export airworthiness approval under Part 21. Therefore, any instructions, found in the Order, concerning completion of the 8130-3 tag as an approval for return to service or maintenance release tag would be unenforceable.

But now, let’s turn to the practical side of the analysis.

So many people read Order 8130.21F as if it were a regulation, that there is a commercial need for most companies to comply with its terms. But this is not the same thing as a regulatory requirement.

There is no suggestion of a need for back-to-birth traceability for most approvals for return to service; but there is guidance that specifically applies to findings of “new” condition for new-unused aircraft parts.

Order 8130.21F, section 3.3, provides a mechanism for confirming that

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a part is in new condition. Note that this provision only applies when confirming new condition and it is not made applicable to other work performed by a repair station (like completion of an overhaul). Those provisions state that Form 8130-3 may be used for this purpose so long as the repair station follows the conditions of the section, which include confirming back-to-birth traceability.

As we said, the FAA cannot require back-to-birth traceability, and the FAA's Order is not permitted to reflect the only way that a repair station may confirm new condition (it cannot impose a limitation not supported by the existing regulatory framework). But the repair station must use method techniques and practices acceptable to the FAA, so if a repair station is planning to confirm new condition of a part using a mechanism that diverges from Order 8130.21F section 3.3, then it is probably wise to obtain some indicia of FAA-acceptability. OEM manuals, for example, may have tests, inspections or processes to help confirm current airworthiness.

The other things to think about, in examining whether a repair station needs to confirm traceability to a PAH as a component of tagging the part as being in new, unused condition, are practicality and commercial requirements. The repair station must ask itself, as a practical matter, whether it is able to confirm that the part is in new unused condition without reference to the original standards to which it was manufactured. The answer to this question may depend on the nature and complexity of the part. Some complex parts may not be in a condition that permits testing to confirm original condition; in such a case, traceability may represent a very practical method for confirming that the part met FAA-approved conditions at the time it was released from the manufacturer's quality system (the repair station must still confirm that the part has not been subjected to damage or degradation that would affect the airworthiness condition since being released from the manufacturer's quality system). On the other hand, if it is not practical to confirm traceability to the manufacturer, then it does not make sense to impose a standard that cannot be met.

As a commercial matter, a repair station, and its distributor customers, must ask itself whether their customers will accept 8130-3 tags that are completed in non-compliance with Order 8130.21F, despite the fact that the 8130-3 tags are otherwise in compliance with the law. Being legally correct is a cold comfort when no one will accept your work for commercial reasons. While traceability is not a regulatory requirement, it is still an industry norm when examining life-limited parts and distributors will find it difficult to sell a life-limited part without traceability. For this reason, distributors seeking repair station confirmation of new status should strongly consider providing the repair station with the documentation necessary to meet the requirements described in Order 8130.21F, despite the non-regulatory nature of the guidance. 

Your Guide to Hazmat Shipping: Chemical Oxygen Generators

In this month's guide to Hazmat shipping, we will address the proper procedures for shipping chemical oxygen generators. The regulation pertaining to shipping chemical oxygen generators was revised as of October 1st, 2007, so it is important to keep up with the procedures associated with such a shipment.

This article is meant to provide a rough guide to the special regulations that apply to chemical oxygen generators, but it does not take the place of hazardous materials training, and it is not meant to provide legal advice.

Before shipping any hazardous material, it is required that the person doing the shipping be properly trained pursuant to 49 C.F.R. §172.701 et seq.

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Chemical oxygen generators are devices containing chemicals that upon activation release oxygen as a product of their chemical reaction. Shipping of chemical oxygen generators on aircraft was prohibited by the FAA after the May 1996 crash of ValuJet Flight 592. The probable cause of that crash was determined to be a fire started in the cargo bay by chemical oxygen generators which were improperly packaged.

The first step in determining the right method for shipping a hazardous material is to identify the proper shipping name. The proper shipping name for most chemical oxygen generators found in aircraft is "oxygen generator, chemical."

There are many requirements for shipping a chemical oxygen generator, all of which must be carefully followed to ensure compliance. In addition to the normal marking, labeling, packaging and documentation requirements associated with oxygen generators, there are six special requirements addressed in the 49 C.F.R. §173.168, which is the regulation providing special requirements pertaining to chemical oxygen generators. The six special requirements are: approval, impact resistance, protection against inadvertent actuation, packaging, equipment marking, and items forbidden in air transportation.

The first requirement for shipping is approval, which requires that a chemical oxygen generator that is being shipped with a means of initiation attached must be classed and approved by the Associate Administrator. The approval necessary to fulfill this section is generally obtained by the manufacturer of the generator. This approval sets out the chemical oxygen generator's shipping description, division and compatibility group. Before shipping a chemical oxygen generator, you should contact the manufacturer and obtain a copy of the approval. It is not necessary as a distributor to obtain a separate distribution approval, in addition to the approval obtained by the OEM, but as a shipper you must comply with the terms and limitations of the approval.

The second shipping requirement for a chemical oxygen generator is to confirm impact resistance. This requirement is relatively straightforward, merely stating that a chemical oxygen generator to be shipped must be able to withstand, without any packaging, a 1.8 meter drop onto a hard and flat surface. This drop must be done in the position that is most likely to cause the chemical oxygen generator to actuate or to lose its contents. If the chemical oxygen generator has the capacity to withstand this test, it fulfills the second shipping requirement in the regulation. The manufacturer of the chemical oxygen generator should be able to confirm that the chemical oxygen generator meets this requirement.

The third requirement set out in 49 C.F.R. §173.168 for properly shipping a chemical oxygen generator, protection against inadvertent actuation, is that the generator must incorporate one of the methods listed in the regulation for preventing it from accidentally going off while in transit.

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If the chemical oxygen generator being shipped is not installed in protective breathing equipment (PBE), it may satisfy this third shipping requirement by incorporating one of the following three options for mechanical prevention of actuation: (i) two pins that are installed in such a way that each pin can independently prevent the actuator from striking the primer, (ii) one pin and one retaining ring that can independently prevent the same, or (iii) a cover installed over the primer with a pin also installed preventing the actuator from striking the cover. Alternately, a chemical oxygen generator not installed in PBE can meet this third protection option by mechanically shortening the device's electrical leads and shielding the short with metal foil, or, if the device is one with a primer but no actuating mechanism, by placing a protective cover over the primer.

If the chemical oxygen generator is installed in PBE, it must both incorporate a pin that prevents the actuator from striking the primer, and also be placed in a bag or cover of some sort such that the entire PBE device is fully covered to prevent accidental actuation.

The fourth requirement in the regulation for shipping a chemical oxygen generator is a special packaging requirement. The packaging requirement pertains equally to a chemical oxygen generator installed in PBE or to one that is not installed in a PBE. To ship a chemical oxygen generator, the generator or PBE it is installed in must be placed in a rigid outer packaging that conforms with either the requirements set out in 49 C.F.R. Part 178, subparts L and M at the Packaging Group I or II performance level, or, alternately, to meet the performance criteria in the Air Transport Association (ATA) Specification No. 300 for a Category I shipping container. Before packaging a chemical oxygen generator for shipping, you should check the marking on the packaging to confirm that it meets these applicable standards.

In addition to the packaging meeting one of the aforementioned standards, it must also, starting September 30, 2009, meet certain additional requirements if shipping on a cargo-only aircraft. There are four additional requirements applicable to shipping chemical oxygen generators on cargo-only aircraft beginning on this date. The first is that the packaging pass a Flame Penetration Resistance Test set out in the regulations. The second additional requirement for packaging is that it be subjected to the Thermal Resistance Test specified in the regulations. The third added requirement is that if one generator in the package is actuated none of the others may actuate, nor may the packaging material ignite, nor may the outside surface of the package have a temperature of greater than 100 deg. C. This requires a certain level of separation in a package that contains more than one oxygen generator.

Finally, the fourth "new" requirement for packaging, set to begin in September, is that all the features of the packaging must be in good condition while the packaging itself is free of cracks and dents or other abrasions which could affect the flame and thermal penetration characteristics of the packaging. The last of the four additional requirements is to be verified before shipping by a visual inspection of the packaging.

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This is similar to existing requirements for packaging condition.

The fifth main requirement for shipping a chemical oxygen generator is equipment marking. This requirement states that the outside surface of the generator must be marked in a way that indicates that it is an oxygen generator. One example of an appropriate way to mark the equipment given in the regulations is “oxygen generator, chemical.” In many cases, existing OEM marking should fulfill this requirement. If the outside surface of equipment incorporating a chemical oxygen generator is not readily apparent, such as in the case of a sealed passenger service unit, the regulation requires that the equipment be clearly marked to show that there is an oxygen generator inside. The language suggested for this marking is the straightforward “Oxygen Generator Inside.” Most manufacturers’ manuals require the oxygen generators to be removed from passenger service units before the passenger service units are shipped, so this should not generally be an issue for passenger service units (although it is always a good idea to confirm that the oxygen generators have been removed from your passenger service units before shipping the units).

The sixth and final special requirement for the shipping of a chemical oxygen generator is a prohibition. Under the current rules, chemical oxygen generators continue to be forbidden as cargo on a passenger aircraft.

Remember: once a chemical oxygen generator has passed the manufacturer’s expiration date, or after its contents have been expended (so an empty generator cannot be shipped via air at all), it is no longer permitted for transportation on either a passenger or a cargo-only aircraft.


When shipping any hazmat item, only properly trained persons may carry out the shipping processes, and these persons must closely follow the applicable regulations. Failure to use properly trained and certified persons to ship hazmat is a regulatory violation – even if you do everything else correctly – and that failure to train violation, alone, can carry a penalty of \$50,000.

ASA provided hazmat certification classes in Florida and California in June. The next ASA-sponsored class is in Kansas City in October. 

New Net Operating Tax Loss Provision Could Help Your Small Business

This year, the Internal Revenue Service (IRS) will allow small businesses with deductions greater than their 2008 income to use a change in the tax law to get a refund of taxes paid in years past. The new net operating tax provision was enacted as part of the American Recovery and Reinvestment Act of 2009.

The new provision allows small businesses with a 2008 net operating loss (NOL) the option of using this loss against the income earned in the prior five years. Before this new provision was enacted, a NOL could only be used against the income from the prior two years. The extension of the NOL provision in the tax code could help small businesses struggling in the current economic recession stay afloat. If small businesses do not choose the special carryback provision, the normal two year period to apply NOL will remain available. Additionally, the taxpayer can continue to carry forward the NOL balance for up to twenty years if it exceeds the income in the applicable carryback period. Small businesses using a fiscal year have the option of using the new NOL provision for either the tax year that begins in 2008, or the tax year that ends in 2008.

For more information on how to utilize this tax code change, small businesses can look to Revenue Procedure 2009-19, in which the IRS outlines the specifics of the provision and provides legal guidance. Additionally, the IRS’s website at www.irs.gov contains a Question and Answers section on the new provision. 



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Lawsuit Filed in Attempt to Compel Safety Improvements

The National Air Disaster Alliance/Foundation (NADA/F) has filed suit, asking that the District Court for D.C. issue both preliminary and permanent injunctions forcing Transportation Secretary Ray LaHood to order the FAA to implement certain safety recommendations. NADA/F has a stated mission of raising the standard of passenger safety in aviation, and was founded by air crash survivors and victims' family members.

The safety recommendations at issue in the lawsuit come from the NTSB, and concern in-flight icing conditions and runway safety. The lawsuit asks that the injunctions force Secretary LaHood to produce an implementation schedule for the suggestions within 90 days of the court order.

The lawsuit alleges that the DOT and the FAA are failing the traveling public by not evaluating and either accepting or rejecting the NTSB recommendations in a timely fashion. For example, notes NADA/F's filing,

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2009 Hazmat Training



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REMINDER: ASA MEMBERS GET DISCOUNTED REGISTRATION.

Who should attend ?

This course is intended for all individuals who may come into contact with, or make decisions that affect hazardous material (Hazmat) or dangerous goods (DG).

Why should I attend ?


The U.S. Department of Transportation (U.S. DOT) requires that all individuals engaged in handling hazardous materials must be trained at least once every 3 years. Air Carriers are required to be trained annually, and IATA requires training every 2 years.

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All attendees receive a Certificate of Training stating 49 CFR 172 Subpart H training requirements have been met (upon successful completion of all attendance and testing requirements).

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the NTSB first included “Improve Runway Safety” on its list of “Most Wanted Transportation Safety Improvements” the first time NTSB issued such a list, nineteen years ago. However, according to a 2007 study by the Government Accountability Office, air travelers still face high runway collision risks as focus on reducing the issue has waned.

“Reduce Dangers to Aircraft Flying in Icing Conditions” was added to the most-wanted list in 1997, and recently the icing issue has received renewed attention due to the crash of a Colgan Air Q400 in Buffalo, N.Y., which is still being investigated. It is known that prior to this latest crash, the crew of the aircraft observed significant ice accretion on the windows and wings. 

E-Verify- Meant to Be Easy, But Potentially A Costly System For Employers

In response to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the former Immigration and Naturalization Services (INS) and the Social Security Administration (SSA) created a system known as the Basic Pilot/Employment Eligibility Verification Program. This program is now known as E-Verify.

E-Verify was created as an electronic system to check an employee’s work eligibility. Now operated by the Department of Homeland Security (DHS) and SSA, the system runs a check of an employee’s social security number and other information against a centralized database when an employer enters the information from an employee’s I-9. Then, E-Verify indicates either an authorization or a “tentative nonconfirmation.” For a “tentative nonconfirmation” response, an employee has eight federal working days to contest the result with the local SSA office, after which time a “final nonconfirmation” will be issued for a continuing mismatch. The employer is then required to either inform DHS of the employee’s continued employment or to terminate the employee.

The E-Verify service is Internet-based and is provided free to employers who sign up online. Employers are still required to comply with I-9 requirements, such as the presentation of certain documents to determine an applicant’s employment eligibility, but must run the employee through E-Verify as well. While a fast and free way to confirm an employee’s eligibility to work may seem like something that would really benefit employers and employees alike, the realities of the E-Verify system are very different.

For starters, the E-Verify system can determine whether an employee’s social security number is valid, but not whether it belongs to the employee in question. A business could still be employing illegal workers after using E-Verify if the workers in question provided the business with someone else’s social security number and information on their I-9s. Thus, it is important for employers to remember that E-Verify cannot be relied on completely to ensure that employees are in fact authorized to work. This realization can be especially jarring for employers who joined the E-Verify system with the hopes that it would save them fine money for employing illegal workers, if there were a government raid on their business.

There are also limitations on the usefulness of E-Verify for determining employment eligibility for some categories of workers. For example, an H1-B visa is employer specific, but a worker is considered authorized to begin work for a new employer as soon as the new employer files an H1-B portability petition, without waiting for the petition to be approved. E-Verify is not set up to check and see if the worker is working for the right employer; the system will only ensure that the 1-94 number is authorized to work. This means that the employer is not really getting any practical utility from running an H1-B employee through the system.

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Then there is the risk of errors in the system causing tentative nonconfirmation status for employees who are, in fact, authorized to work. E-Verify relies on the Social Security database, which SSA has stated has a 4.1% error rate. Additionally, certain categories of workers who are eligible for employment will have tentative nonconfirmation statuses using E-Verify due to the limitations of the information in the system. This includes foreign students applying for Curricular Practical Training (CPT), which requires work authorization from a student's Designated School Official, but does not require any sort of authorization from DHS. However, employers using E-Verify are still required to check CPT employees in the system, resulting in a tentative nonconfirmation response 100% of the time. Another category of worker these database limitations will affect is refugees and asylees, who are similarly allowed to work but not required to obtain employment authorization documentation through DHS.

In May of 2008, DHS issued a report on the accuracy of the E-Verify system, based on 1,000 entries done in an independent review. This report, "Debunking the E-Verify Error Rate," was published in the Department of Homeland Security Leadership Journal, and stated that 94.2% of queries to the system resulted in confirmations, with .5% getting a tentative nonconfirmation that was resolved, and 5.3% receiving final nonconfirmations. However, it is unclear as to whether those

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who received final nonconfirmations were actually not authorized to work or were just unwilling or unable to iron out the mismatch with the Social Security Office.

Right now E-Verify is a completely voluntary program for most employers. However, some states have made the use of E-Verify mandatory, such as in Arizona, or mandatory for employers in certain sectors, such as in Rhode Island, while several more states currently have legislation pending. Additionally, in June 2008, then-president Bush issued Executive Order 12989, which made the use of E-Verify mandatory for federal contractors and subcontractors. If the government doesn't work out E-Verify's bugs, it may end up costing employers more than it saves them. 

EASA Releases Preliminary Regulatory Impact Assessment on “Replacement Parts”

On March 6th, the European Aviation Safety Agency (EASA) released a Preliminary Regulatory Impact Assessment entitled “Replacement Parts.” In this assessment, EASA reviewed the existing EASA Part 21 regulations pertaining to replacement parts and compared these with the current FAA Parts Manufacturer Approval (PMA) regulations. **EASA concluded that EASA's current regulations are sufficient to support the approval of aftermarket aircraft parts, similar to the FAA's PMA approval, and that EASA needs to issue better guidance to permit the EASA regulations to be used in this way.**

The assessment indicates that EASA Part 21 was created based on certain principals that it still retains, including a clear separation of the regulations dealing with design and production; a requirement of demonstration of design capability, except for minor design changes; a required link with TC Holders for applicants proposing major design changes who need the support of the TC Holders to get certification or design data, and; a considering a replacement part designed by someone who is not the TC holder as a change to the design even if the part is identical to the original.

EASA's stated intent in the assessment was to find a way to create a balance between the conditions for PMA approval in the U.S. and the European Union's rules for designing and producing replacement parts. Towards that end, the assessment goes on to consider four options.

The first option, which the assessment rejects, is to do nothing. The second option is to copy the FAR 21 PMA provisions into EASA Part 21. While the drafters recognized that the economic impact of this option would be beneficial to the EU by increasing European market share of parts manufacturing, and that this option would harmonize the U.S. and EU rules, the assessment also rejects option two. The assessment blames a lack of statistics from the U.S. concerning the safety of the use of identity as a basis for design approval.

The third option discussed in the EASA assessment is to create in EASA Part 21 a new design approval for replacement parts, similar to the FAR regulations but keeping the production approval separate. Option three is also rejected, but EASA states that option three may be used in the future if option four does not manage to achieve the objectives of the task.

EASA chose to follow option four. Option four proposes to leave the Part 21 requirements the same (similar to option one) but it recognizes that the existing regulations can support replacement part approval, and it proposes that EASA explicitly promote the existing regulatory provisions for designing and producing replacement parts.

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Currently, EASA Part 21 allows the design of replacement parts to be approved as either a minor change to design or as a supplemental type certificate, but the provisions are not generally used for this purpose. The assessment indicates that the lack of use of these provisions for replacement parts may be as a result of insufficient guidance, and recommends that EASA better promote these provisions through explicit guidance.

EASA's decision to promote its existing regulations allowing for the approval of replacement parts may lead to a shift in production in Europe. It is certainly meant to encourage aftermarket producers to operate from the European Community. This could open a door to a robust European industry for the production of replacement parts. 

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Michele Dickstein
President
michele@aviationsuppliers.org

Stephanie Brown
Director of Programs
stephanie@aviationsuppliers.org

Erika Schnure
Programs & Membership Assistant
erika@aviationsuppliers.org

Jason Dickstein
General Counsel
jason@washingtonaviation.com

Diane Leeds
Account Services
diane@aviationsuppliers.org

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