



## **Issues Papers**

Comments on the Draft Advisory Circular  
Submitted to the FAA by email via [maddie.miguel@faa.gov](mailto:maddie.miguel@faa.gov)

## **Submitted by the Aviation Suppliers Association**

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May 17, 2010

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Federal Aviation Administration  
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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 ASA?

Founded in 1993, ASA represents the aviation parts distribution industry, and has become known as an organization that fights for safety in the aviation marketplace.

ASA and ASA's members are committed to safety, and seek to give input to the FAA regarding FAA policies so that the aviation industry and the government can work collaboratively to create the best possible guidance for the industry and the flying public.

## Summary of the Comments

ASA applauds the FAA's efforts to establish more uniform standards for the handling of Issue Papers; nonetheless, ASA advises caution with respect to any effort that would establish new regulatory interpretations or standards that are not made available to the public. ASA also cautions with respect to any effort that would establish new quasi-regulatory standards without resort to the published rulemaking and exemption provisions of laws like the Administrative Procedures Act, the Federal Aviation Act, and the Paperwork Reduction Act. With these cautions in mind, ASA has a series of recommendations that we believe will help to improve this draft guidance.

## 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***

### **The Issue Paper Development Process Should Avoid Infringing DOT Policy on Ex Parte Communication**

Failure to publish issue papers before attempting to apply their element to applicants could mean that the government is establishing "secret rules" based on issue papers, and that subsequent applicants are being held to these "secret" standards that have never been published in the rules. These "secret rules," when developed as a consequence of conversations between the FAA and one company, but applied to another company, amount to *ex parte* communication

leading to quasi-regulatory promulgation - such communications violate the spirit of the *ex parte* rule found in 14 C.F.R. Part 11 Appendix 1 (Oral Communications with the Public During Rulemaking).

*Ex parte* communication in the context of quasi-regulatory promulgation raises the same concerns as *ex parte* communication during the regulatory promulgation process. It fosters a policy-setting environment that is unacceptable in the U.S. government system. For these reasons, we oppose any FAA effort to establish or enforce standards developed through *ex parte* communication and published 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, and the public should be afforded an opportunity to review these detailed elements and to comment or respond.

## **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. Industry companies 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. ASA recommends that the FAA set a time limit for the publication of issue papers that are intended to be used with a particular project. ASA recommends that the time limit be set as not more than 30 days after the 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

ASA generally supports FAA efforts to standardize government practices; however, when those standardization efforts appear to establish new methods for

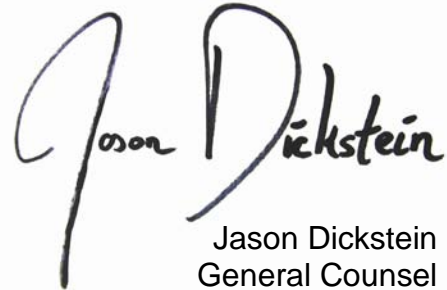


issuing binding standards in contravention to the Administrative Procedures Act, and without the protections of the Administrative Procedures Act, then this is troubling.

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 "D".

Jason Dickstein  
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Aviation Suppliers Association