FAA Draft Order 8110.54A, Instructions for Continued Airworthiness Responsibilities, Requirements, and Contents

Comments
Submitted by email to Samuel.r.colasanti@faa.gov

Submitted by the Aviation Suppliers Association

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Responsibilities, Requirements, and Contents
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Submitted by email to Samuel.r.colasanti@faa.gov

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RE: FAA Draft Order 8110.54A

Dear Mr. Colasanti

Please accept these comments on the proposed Order, FAA Order 8110.54A, Instructions for Continued Airworthiness Responsibilities, Requirements, and Contents, which was offered to the public for 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 members regularly obtain maintenance, repair and overhaul on their used parts. They are therefore consumers of maintenance services. In addition, 25% of ASA's membership hold FAA repair station certificates, and those companies rely on ICAs. Thus, when a proposed rule deals with continued airworthiness, it has the potential to affect ASA's members and customer base. ASA and ASA's members are committed to safety, and seek to give input to the FAA regarding FAA Orders so that the aviation industry and the government can work collaboratively to create the best possible guidance for the industry and the flying public.

Comments on the Proposed Rule

The following comments on draft FAA Order 8110.54A are organized by the section of order being commented on, followed by the issue ASA is addressing for that section, and ASA's proposed remedy to the issue.

Chapter 2, Paragraph 2

ISSUE: The last sentence of this section is ambiguous, as it may be interpreted to require that ICAs address information related to a product (as that term is described in Part 21) even when the part or alteration to which the ICA is related is limited to one small aspect of the complete product. Association members have provided anecdotal stories about FAA inspectors demanding that ICA for a PMA, or a targeted repair or alteration, address issues that are outside the scope of the PMA, or a targeted repair or alteration.

PROPOSED REMEDY: The last sentence of this paragraph should read "The ICA <u>for a product</u> must contain …"

Chapter 2, Paragraph 3

ISSUE: This section lists the various things that may be considered design approvals. It does not specifically list field approvals. The bullet point for changes to type design does not include repairs, because repairs are not changes to type design. The FAA has required field approval applicants to provide ICAs, and some inspectors have required this in circumstances that do not reflect changes to type design. Elsewhere in the Order, it is suggested that some repairs may require ICAs. This document creates an ambiguity as to when a field approval is a design approval for which ICAs are required.

PROPOSED REMEDY: In order to clear up this ambiguity, the FAA should decide whether major repairs are design approvals that may require ICAs, and should maintain consistency throughout the entire document. If the FAA decides that repairs are design approvals that require ICAs, then the FAA should amend the regulations to impose ICA requirements on repairs, just as they are currently imposed on parties who apply for type certificates.

Chapter 2, Paragraph 7

ISSUE: This section provides guidance for ICAs for major repairs; however, the FAA does have a repair design approval certificate, nor does the FAA have regulations that directly impose regulatory burdens on repair design approvals. As a consequence, there is no rule that requires that the applicant for a repair data approval create ICAs. Creating ICAs is a recordkeeping requirement, as that term is described in Title five of the U.S. Code. For other design approval holders, that recordkeeping requirement has been approved as part of the OMB approval of the Part 21 regulations. The OMB approval relied on burden estimates that considered only applicants for certificates under Part 21; that OMB recordkeeping requirement did not anticipate that such a recordkeeping requirement be imposed on other parties in the industry, and it did not include parties who create non-STC alterations and parties who create repairs. As a consequence, imposing the ICA creation requirement on such parties without rulemaking or OMB approval of the process is a violation of the Paperwork Reduction Act.

PROPOSED REMEDY: If the FAA decides that repairs and non-STC alterations are design approvals that require ICAs, then the FAA should amend the regulations to explicitly impose ICA requirements on repairs and non-STC alterations, just as they are currently imposed on parties who apply for type certificates, ATCs and STCs.

Chapter 4, Paragraphs 11 and 12

ISSUE: The parenthetical in each of these sections states "(If CMM information was developed to demonstrate compliance to 14 C.F.R. §§ 21.50 and 26.1(a), then the CMM is part of the ICA)" The reference to § 21.50 is incorrect. That section requires ICAs to be made available. The sections that require ICAs to be created are sections 23.1529, 25.1529, 27.1529, 29.1529, 31.82, 33.4, and 35.4. Furthermore, it is the appendices that permit reliance on CMMs. Therefore the reference should be to those sections with which compliance is to be found.

PROPOSED REMEDY: We recommend that this parenthetical be amended to read as follows: "(If CMM information was developed to meet a regulatory requirement for ICAs, such as the requirement found in certain appendices that permits an applicant for a type certificate to rely on CMMs, then the CMM is part of the ICA)"

Chapter 6, Paragraph 2(c)

ISSUE: Some design approval holders have developed licensing agreements that require an air carrier/repair station entitled to receive the ICAs (under 21.50) to surrender certain rights as a condition of obtaining the manuals to which the air carrier/repair station is entitled. Examples of the provisions that have been found in such licensing agreements that we've reviewed include (but are not limited to):

(1) that the party seeking ICAs agrees not to share the manuals with any other parties (in violation of § 121.379(a), which requires air carriers to have the contractors perform maintenance according to the air carrier manuals, – those instructions usually include the ICAs per § 121.367(b)), 121.375 (requiring a training program to ensure that contractors are aware of manual requirements) and § 145.205(a) (requiring the repair station to follow the air carrier's program, which usually includes the ICAs)
(2) that the party seeking ICAs agrees not to obtain manuals or data from any other party aside from the design approval holder (anticompetitive)
(3) that the party seeking ICAs agrees not to obtain aircraft parts from any other party aside from the design approval holder (anticompetitive)
(4) that the party seeking ICAs agrees not to use PMA parts (anticompetitive)
(5) that the party seeking ICAs agrees not use DER repairs
(6) that the party seeking ICAs agrees to surrender the ICAs upon the termination of the licensing agreement (despite the fact that the party remains entitled to receive the ICAs)

It is a regulatory violation for a design approval holder to refuse to comply with section 21.50 in a situation where that regulation applies.

Some design approval holders have claimed that they have copyright in the ICAs and that this entitles them to refuse to share the ICAs. The Courts have questioned whether there is really a valid copyright in ICAs Gulfstream Aerospace Corporation v. Camp Systems International, Inc, 428 F. Supp. 2d 1369, 1375 (S.D. Georgia, 2006). The Courts have also found that notwithstanding any alleged copyright, there is a fair use exception that forbids the design approval holder from asserting copyright protections to prevent third parties from obtaining manuals. Id. It has even been said that preventing parties in the industry from obtaining manuals is anti-competitive.

Furthermore, if there is a valid copyright, a copyright only protects the author/publisher's ability to profit from the work. The first sale doctrine has always prevented the copyright holder from controlling the work once it has been sold. Courts have stated that it is inappropriate to use intellectual property rights like copyright to obtain additional rights that are not accorded by the intellectual property laws Bobbs-Merrill Co. v. Strauss, 210 U.S. 339, 350-351 (1908), *invoking the first sale doctrine and chastising a copyright holder for attempting to control all future sales of a book at a fixed price*; Quality King Distributors v. L'anza Research Intern., 523 U.S. 135, 136 (1998). Thus, "licensing agreements" that seek to control the ICAs after they have been made available to the parties entitled to obtain them represent inappropriate "overreaching" by the design approval holders.

Some design approval holders have claimed that they have trade secrets in the ICAs. This is nonsensical. A touchstone of trade secret law is that the party who has a trade secret must take steps to maintain the secrecy. The ICAs are created in the context of a regulation (§ 21.50) that requires the ICAs to be made available to certain parties. Therefore, there can be no expectation of secrecy. With no reasonable expectation of secrecy, ICA trade secret claims are unfounded.

It is inappropriate for a design approval holder to condition its compliance with a regulation (§ 21.50) on a third party's willingness to surrender its rights; such a practice has been decried by the courts and the practice also inhibits safety to the extent that it inhibits regulated parties from complying with the FAA's safety regulations.

PROPOSED REMEDY: Add a new subsection to the end of Paragraph 6-2 that reads as follows:

"c. If a party can show that they meet the 'make available' criteria in paragraphs 6-4(a)(1) through 6-4(a)(4), then it is inappropriate for the design approval holder to apply additional conditions to the 14 C.F.R. § 21.50 obligation to provide ICAs that are not included within the regulation. The ACO/ECO must not approve a design approval holder's program for distribution of ICAs and changes if the program requires the party who meets the 'make available' criteria to surrender

rights as a condition of obtaining the ICAs or changes to the ICAs. The ACO/ECO should carefully review any agreement that the design approval holder might impose on parties already entitled to the ICAs and changes, to assure that it does not impose additional eligibility criteria over and above the criteria of the regulations. The ACO/ECO should make it clear to design approval holders that they may not condition their compliance with § 21.50 on completion of an agreement that imposes additional eligibility criteria over and above the criteria of the regulations."

Chapter 6, Paragraph 4(a)(1)

ISSUE: This section is limited to ICAs for TC, ATC and STC. This is inconsistent with the FAA's position that other design approval holders should be required to prepare ICAs. It is also inconsistent with the plain language of section 21.50, which applies to design approval holders (not just TC, ATC and STC holders). If other design approval holders are required to prepare and make available ICAs then they should also be covered under this subsection. Therefore, an apparent limitation to TCs, ATCs and STCs is inappropriate.

PROPOSED REMEDY: Change this subsection to read "Application for the latest amendment to the design approval associated with the ICAs was made by the design approval holder on or after January 28, 1981

Chapter 6, Paragraph 4(a)(2) Issue 1

ISSUE: This section limits the obligation to provide ICAs only to design approvals for which the application included both 21.50 and 26.1 as part of the certification basis. The inclusion of 26.1 is inappropriate. Part 26 is a recent addition to the regulations. If the ICA requirement were limited to those applications for which both 21.50 and 26.1 were part of the certification basis, then the design approval applications submitted between 1980 and the effective date of Part 26 would no longer need to comply with 21.50(b). This is plainly contrary to the 14 CFR § 21.50(b), which required sharing ICAs before the promulgation of Part 26.

PROPOSED REMEDY: We recommend striking the reference to section 26.1 in this provision – if the certification basis included section 21.50 then the fact that it included the later-promulgated 26.1 does not matter. In the alternative, sections 21.50 and 26.1 should be separated by the disjunctive "or" rather than the conjunctive "and."

Chapter 6, Paragraph 4(a)(2) Issue 2

ISSUE: This section limits the obligation to provide ICAs only to design approvals for which the application included all of the parenthetical sections (section 23.1529 etc.) as part of the certification basis. The inclusion of all of these sections is inappropriate, as they are mutually exclusive (including both transport and non-transport categories, as well as rotorcraft and fixed-wing standards). If the ICA requirement were limited to those applications for which all of the sections listed in the parenthetical were part of the certification basis, then no design approvals would be subject to the requirement. This is plainly contrary to the 14 CFR § 21.50(b), which required sharing ICAs.

PROPOSED REMEDY: We recommend striking the parenthetical reference in its entirety – no certification basis will include all of the sections listed in the parenthetical. In the alternative, the list of sections in the parenthetical should be separated by the disjunctive "or" rather than the conjunctive "and.

Chapter 6, Paragraph 4(a)(3) Issue 1

ISSUE: This sub-section limits repair station access to ICAs to those situations where the repair station is required by chapter one of 14 CFR to comply with ICA for the product part. This provision has already found itself open to interpretation, as parties have argued that no repair station is really required to comply with the manuals. This argument, which has been used as the basis for denying manuals and updates to repair stations, is ridiculous in light of the requirement in 14 CFR § 145.109(d) that requires a repair station to have the manuals, and the case law that requires a repair station to follow the manuals Marion C. Blakey, Administrator, Federal Aviation Administration, v. Millennium Propeller Systems, Inc., NTSB Order No. EA-5218 (April 12, 2006).In light of this regulation and case law, this provision adds nothing, because all repair stations are required to comply with ICA under existing case law. Because this provision adds nothing, but has been interpreted in a manner that plainly contradicts the regulations' intent (to provide competent and uniform instructions where maintenance is performed), it should be removed.

PROPOSED REMEDY: We recommend that this clause be amended be eliminating the portion that reads: "…, and is required by chapter 1 of 14 CFR to comply with ICA for the product/part"

Chapter 6, Paragraph 4(a)(3) Issue 2

ISSUE: This sub-section limits repair station access to ICAs to those situations where the repair station has the product/part "listed in their limitations." Only

repair stations with limited ratings have limitations. See 14 C.F.R. § 145.61. Repair stations with class ratings do not have limitations. Therefore, it would be impossible for a class rated repair station to have a product/part "listed in their limitations." Furthermore, capabilities lists are optional and in some cases repair stations that have requested the privilege of having a capabilities list have been refused by the FAA to be permitted to use such a list, so it would be inappropriate to interpret the term "limitations" to mean capabilities lists.

PROPOSED REMEDY: We recommend that reference to the need to have the product/part in the repair station's limitations be removed.

Chapter 6, Paragraph 4(a)(3) Issue 3

ISSUE: This interpretation creates a "catch-22" situation. A repair station must have the maintenance manuals (data) in order to add the product/part to its ratings or capabilities list. See 14 C.F.R. §§ 145.51(b), 145.215(c). But according to this provision, an applicant for a rating or capability cannot obtain the manuals until it has obtained the rating or capability. This situation makes the ICA publisher a gate-keeper, giving them the capability to permit or prevent new entrants to the MRO market, since it is impossible for an applicant to obtain a rating without the ICAs. Because so many ICA publishers are also MRO owners, this permits them to forestall and regulate competition in the market, contrary to the standards described in Kodak v. Imaging Technical Services.

The FAA has stated that it does not regulate competition, but by imposing a "catch-22" structure that prohibits new market entrants without the permission of an existing market entrant, it has implicitly regulated competition by providing a policy mechanism that permits MRO competitors that are also design approval holders to prevent new MRO competition (a mechanism that is not visible on the face of the rule, but is instead a creature of policy-level interpretation of the rule).

A change to this subsection that permits ratings change applicants to obtain ICAs before approval of the application would be consistent with the FAA's policy of not regulating competition, because it would remove the current practice of using the FAA's regulations as a mechanism for inhibiting competition. Potential competitors, though, would still need to obtain the tooling and equipment necessary to perform the work (and there is no regulatory obligation for the design approval holder to provide such tooling and equipment), so the FAA would not be 'opening the door' to unqualified competitors.

PROPOSED REMEDY: We recommend that this clause be amended to read: "The requester (repair station) of the ICA is (1) currently rated for the product/part, or (2) has filed a conditional application for a change in rating that would expand the repair station's ratings to include product/part, and the application has been conditioned upon obtaining the ICAs."

Conclusion

ASA feels that with the suggested changes, FAA Order 8110.54A, Instructions for Continued Airworthiness Responsibilities, Requirements, and Contents, will be a valuable tool that will aid in the safety of the aviation industry.

Thank you for affording industry this opportunity comment on the proposed rule to make it better serve the needs of the flying public (and the industry that serves them). We appreciate the efforts of the FAA in this regard.

Your consideration of these comments is greatly appreciated.

Respectfully Submitted,

Jason Dickstein
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