



NASA FAR Supplement Regulatory Review No. 1

Comments on the Proposed Rule published at
78 Fed. Reg. 23199 (April 18, 2013).

Submitted to the National Aeronautics and Space Administration online at
<http://www.regulations.gov>.
[RIN number 2700-AE01]

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June 17, 2013

Dear Ms. Pomponio:

Please accept these comments in response to NASA FAR Supplement Regulatory Review No. 1, Proposed Rule, which was published for public comment at 78 Fed. Reg. 23199 (April 18, 2013).

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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 United States Government regarding government 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.

ASA is an active participant in efforts to increase and support safety, and these have led ASA to work on solutions to counterfeit parts issues. The ASA-100 accreditation program, which is coordinated with the Federal Aviation Administration's Advisory Circular 00-56A, has been very successful in helping companies to develop quality assurance systems that identify and remedy aircraft parts issues (including counterfeit parts). The result of this standard has been a noticeable reduction in counterfeit parts problems in the commercial aviation industry.

ASA works with the FAA and other US regulatory authorities, as well as non-US regulatory authorities, to develop and maintain programs designed to support aviation safety as it relates to distribution, maintenance and installation of aircraft parts. In this context, ASA has sponsored and delivered counterfeit parts training to hundreds of companies and thousands of people in the aviation industry. ASA training has addressed identification of counterfeit parts, development of quality systems designed to detect such parts, counterfeit prevention and reporting and cooperation with/support of government investigations. ASA also works with other

government and industry bodies to address counterfeit issues. ASA chaired the FAA-Industry Suspected Unapproved Parts (SUPs) Task Group (NASA OIG was an active participant in this endeavor), has worked on numerous U.S. and European parts regulatory groups examining related issues, and is currently working with the International Aerospace Quality Group (IAQG) to develop a counterfeit parts chapter for the IAQG Supplier Control Management Handbook.

ASA has over 500 members. ASA's members are typically small businesses. Most of them employ between 2 and 20 employees, although some members are among the largest companies in the industry.

ASA's membership has a tremendous interest in fighting against counterfeit goods. ASA has a long history of working with regulators and industry to identify and eliminate counterfeit goods. ASA applauds the NASA's efforts bring clarity to this important issue of aerospace safety.

Comments

Issue

The proposed rule offers the following definition of "counterfeit goods":

"Counterfeit goods" means an item that is an unauthorized copy or substitute that has been identified, marked, and/or altered by a source other than the item's legally authorized source and has been misrepresented to be an authorized item of the legally authorized source.

78 Fed. Reg. at 23201. The proposed rule then goes on to define "legally authorized source" as

"Legally authorized source" means the current design activity or the original manufacturer or a supplier authorized by the current design activity or the original manufacturer to produce an item.

Id. The proposed definition appears likely to cause confusion by implying that only OEMs or their licensees may manufacture a particular part, as well as containing ambiguous language that does not aid in clarifying the definition of "counterfeit goods."

Analysis

FAA-Accredited Distributors Provide a Good Source of Genuine Parts

Many aircraft parts distributors in the commercial aviation market have become accredited to the FAA Voluntary Industry Distributor Accreditation Program (FAA Advisory Circular 00-56A).

As part of the accreditation program, such companies have developed and implemented robust receiving inspection programs and other quality systems in order to prevent the proliferation of counterfeit parts (*inter alia*). The companies are audited by third party accreditation organizations, and the FAA provides oversight to the third party accreditation organizations.

FAA audits of the AC 00-56A program have found that the program is effective and contributes to aviation safety. The number of counterfeits able to enter the commercial aviation industry has been reduced dramatically through the FAA's program.

NASA may wish to consider either implementing a program similar to the FAA program, or making use of the existing FAA program as one part of NASA's counterfeit mitigation strategy. ASA would be happy to provide advice to NASA if NASA was interested in adopting or supporting such a program.

There are Existing Counterfeit Definitions Upon Which NASA May Rely

The aerospace industry has a long history of grappling with the definition of "counterfeit" for the purpose of counterfeit parts and goods. The FAA defines "counterfeit part" as "[a] part made or altered so as to imitate or resemble an 'approved part' without authority or right" FAA 8120.10A Chg. 1.

In 2011 the Aerospace Industries Association (AIA) issued a report entitled "Counterfeit Parts: Increasing Awareness and Developing Countermeasures." In that report, AIA proposed the following definition: "Counterfeit parts are defined as a product produced or altered to resemble a product without authority or right to do so, with the intent to mislead or defraud by presenting the imitation as original or genuine." Counterfeit Parts: Increasing Awareness and Developing Countermeasures at 9, available at <http://www.aia-aerospace.org/assets/counterfeit-web11.pdf>.

The United States Code also offers a definition of "counterfeit." Although not pertaining directly to counterfeit aircraft parts, the Lanham Act defines a counterfeit as "a spurious mark which is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127. This definition is informative, as the essence of a counterfeit good is the misrepresentation of the mark under which it is sold.

The Trademark Counterfeiting Act provides further clarification explaining that a counterfeit mark is one that is "likely to cause confusion, to cause mistake, or to deceive." 18 U.S.C. § 2320.

The use of the words "unauthorized copy or substitute" in the definition in the Proposed Rule has the potential to cause confusion because it may be read to address properly approved aircraft parts, such as PMA or TSOA items, which are often considered to be "substitutes" for parts produced by OEMs. PMA and TSO parts, by definition, are "identified [and] marked" by "a source other than" the original manufacturer.

Some aircraft parts that are approved for production by the FAA have also been qualified for purchase by the Department of Defense as substitutes for OEM Parts, alternatives to OEM parts, a source of parts no longer produced by an OEM, or as Commercial-Off-The-Shelf (COTS) items.

FAA Regulations Authorize Substitute Aircraft Parts

Many aircraft parts distributors sell a variety of legally-produced parts. But various parties in the past have tried to malign their competitors' parts by calling them "unapproved," "unauthorized," or "bogus." When safe and legal parts are mislabeled in this way, it causes a hardship for industry participants, and it also causes a hardship for end-users (like NASA) who may find themselves unable to purchase otherwise legal parts because of inartfully-applied labels that are often the result of competitive factors rather than legal (or compliance) factors.

The FAA approves "substitute" civil aircraft parts and authorizes them to be produced. They may have identical performance parameters to the OEM parts that they replace, although they will be distinguished through markings or other indicia of source.

PMA and TSOA manufacturers do not misrepresent or mislabel their parts as that of the aircraft production certificate holder. Rather, they identify these products as their own genuine articles, intended to compete with OEM goods. FAA regulations require specific markings that carefully distinguish such parts. E.g. 14 C.F.R. § 45.15 (FAA marking requirements for PMA, TSOA and critical parts).

Notwithstanding this fact, the use of the word "substitute" in the proposed definition has the potential to be misconstrued as including PMA and TSO parts, causing those properly approved and manufactured parts to be improperly identified as counterfeit under the definition (common nomenclature for these parts today includes an identification of the OEM parts for which they are FAA-approved substitutes – this information is commonly listed on the PMA supplement published by the FAA).

Additionally, as a competitor offering equivalent or better parts as the original, it is also clear that such parts would not be "authorized" by the OEM with whom the parts manufacturer competes. The use of the words "unauthorized copy" have the potential to cause confusion, by implying that the OEM's authority is necessary to produce equivalent competing parts. Although this is true of an identical part produced under an OEM license (which may then be authorized to be marked under the OEM marking scheme), it is otherwise inaccurate.

NASA's Proposed Definition Threatens to Interfere with Existing Industry and Regulatory Approval Mechanisms for Aftermarket Parts

With respect to civil aircraft parts, the FAA routinely approves aftermarket aircraft parts that have the equivalent or superior physical and performance characteristics as OEM parts. The OEM legally has no input into whether these parts are authorized to be produced – the authorization is the sole prerogative of the FAA. Under NASA’s proposed definition, it is possible that confusion may arise as to who has the authority to approve the design and manufacture of equivalent aerospace parts. It must be made clear that a part that is legally produced under a U.S. government approval (like a FAA- PMA part) is not a counterfeit part simply because the part has identical performance characteristics or is offered as a substitute for the OEM part (despite the fact that the part is “unauthorized” by the OEM).

FAA-approved aftermarket aircraft parts are very likely to be viewed as “unauthorized” from an OEM perspective or as a “substitute.” However, while such approved parts may not be authorized by an OEM or be viewed as a substitute to an OEM part, they clearly lack the hallmark of a counterfeit good, which is the element of confusion or deception. The fact that FAA regulations and policy require them to be marked in a distinct way that differentiates them from OEM parts helps to prevent such confusion or deception.

Finally, the definition of “legally authorized source” also appears likely to cause confusion as well as proscribe future PMA parts. The definition includes “current design activity,” which appears intended to allow for the production of PMA parts. However, the phrasing is ambiguous and could possibly be construed in the future to mean only the design of the OEM, or be construed to operate as a freeze in time, foreclosing any future PMA parts as not a “current design activity.”

The phrase “current design activity” seems more likely than not to cause confusion as to who or what actually constitutes a “legally authorized source” without adding clarification to the preceding definition of “counterfeit good.”

Recommendation

In order to better clarify the definition of “counterfeit goods” as well as to promote consistency in the aerospace industry, ASA recommends discarding the definitions offered in the Proposed Rule and instead adopting a definition similar to the one proposed by AIA in its 2011 report:

“Counterfeit parts are defined as a product produced or altered to resemble a product that is identified by a trademark, without authority, permission or license from the trademark holder, with the intent to mislead or defraud by presenting the imitation as the product identified by the trademark.” *[note that this language includes minor modifications to the AIA definition to make it fit better into NASA’s requirements]*

This definition eliminates the potential for confusion regarding who has the authority to approve the design and manufacture of a part by removing phrases such as “unauthorized copy” and “substitute.” The proposed definition includes the hallmark element of a counterfeit, which is the

intent to mislead. It also eliminates the well-intentioned, but confusing, definition of “legally authorized source.”

Conclusion

ASA looks forward to working with the NASA to better improve the definition and identification of counterfeit goods. Your consideration of these comments is greatly appreciated.

Respectfully Submitted,

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

Jason Dickstein
General Counsel
Aviation Suppliers Association