Volume 21, Issue 4 • August 9, 2013

The UPDATE Report

CONGRATULATIONS TO THE FOLLOWING COMPANIES ON THEIR ASA-100 ACCREDITATION:

AAR Aircraft Services
Indianapolis, IN

AerReach LLC
Irving, TX

Airworthy Parts International
Chatham, IL

Global Aviation Sourcing/ Aviation Precision Resource
Essex Jct, VT

GoAero LLC
Greensboro, NC

Jet X Aerospace
Bensenville, IL

Sky Mart Sales Corp.
Miami, FL

Viman Aviation
San Diego, CA

• AND •

Aero Supplies
Mississauqa, Ontario, Canada

AirGroup America
Mars, PA

American Jet Industries
Canoga Park, CA

Austin Aerotech
Austin, TX

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ASA Comments on NASA Counterfeit Parts Proposal

On June 17, ASA filed comments with NASA regarding the proposed definition of "counterfeit goods" detailed in the proposed "NASA FAR Supplement Regulatory Review No. 1."

The issue of counterfeit goods in aerospace has received a significant amount of attention in recent years. As we have explained previously, efforts by Congress and the Administration to curtail the presence of counterfeit parts in the supply chain has the potential to impose significant burdens on distributors. Requirements to identify counterfeit goods, repair or replace parts, or indemnify government purchasers, even for the actions of distant subcontractors or component suppliers, means that every distributor must be vigilant.

The NASA proposal included a number of vague terms and open-ended concepts that could have permitted the term counterfeit parts" to be applied against parts that are neither counterfeit nor problematic. ASA offered alternative language that was consistent with current legal definitions, and that was far less likely to include "good parts" that the industry knows to be acceptable for installation. Because of its precisions, the ASA language would allow the industry to more readily identify the parts that are problems, and it would also allow the government to more easily prosecute those run afoul of the standards.

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INSIDE THIS ISSUE:

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.

The UPDATE Report is just one of the many benefits that ASA offers members. To learn more about our valuable educational programs, please contact ASA.

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Dear Colleagues,

It was great to see our members at the ASA Annual Conference in Las Vegas. We celebrated ASA's twentieth year with a reception at the House of Blues Foundation Room, had seventy people working at the Quality Committee meeting, and then held the ASA and AFRA Annual Conference which included a full agenda focusing on parts distribution along with networking and social events.

ASA presented Dave Damron as the 2013 Edward J. Glueckler award recipient. Dave was recognized for his contributions to the Quality Committee. His ability to ask probing questions and point out potential issues isn't the entire picture as to why he was the recipient; rather it is Dave's willingness to provide a solution to the issue and if none exist, to lead a subgroup to address the issue and suggest a solution. He has been dedicated to improving and internationalizing ASA-100 and working with industry on documentation. His willingness to lead and work on a committee to resolve issues and to promote quality has elevated the profile of distributors throughout the supply chain.

The "H" revision of FAA Order 8130.21 has finally been released. It does not become effective until February 1, 2014, but we'd appreciate it if our members would look at it now and let us know whether they see any issues, so we can respond to those issues before the effective date. Historically, whenever a new revision of the Order has been released it is followed by interpretation issues. If you have any problems with your DAR issuing and 8130-3 due to a new policy requirement please let us know.

Next week ASA will be calling for nominations for the Board of Directors. If you are interested in running please let me know. If you have questions about the role and responsibilities of a Director, I or any of the current Directors are available to discuss.

ASA will be at ACPC and exhibiting at the ANF. If you are attending please stop by the booth.

Take care, Michele

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ASA's experience with AC 00-56 and with the FAA's SUPs program shows that one of the best ways to mitigate the problems posed by counterfeit parts is to ensure that everyone has a clear understanding of what is—and what is not—acceptable. By educating the industry based on clear guidelines, the entire industry becomes the government's eyes and ears, and the industry becomes an important partner in the fight against counterfeit parts. ASA is working hard on multiple fronts to ensure that the definition of a counterfeit part remains concise, narrow, and legally accurate, to avoid imposing unnecessary and unhelpful burdens on the industry. In addition to ASA's regulatory work, we are also working with IAQG on developing helpful guidance to assist in the identification of counterfeit parts.

To read more of ASA's comments on this NPRM, as well as other rulemaking issues, visit www.aviationsuppliers.org.

ASA Meets with FAA

Recently, ASA met with representatives of the FAA to discuss the ongoing success—and the future—of the AC 00-56A Voluntary Industry Distributor Accreditation Program.

Since its beginning in 1996, the AC 00-56 program has become the industry standard for ensuring distributor reliability. The program began in the mid-90s as a response to concerns over suspected unapproved parts. The program was intended to facilitate development of an industry accreditation program and voluntary industry oversight of parts distributors. It has been a great success.

ASA has managed the AC 00-56 accreditation database since its inception. In addition to managing the database, ASA also promulgates the ASA-100 standard—one of the standards by which a distributor can demonstrate compliance with the requirements of AC 00-56A. In 2004, the FAA performed an audit of ASA as an accreditation organization, and found that ASA had a quality system that far exceeded the requirements of AC 00-56.

In the decade since the FAA performed its audit, the number of distributors accredited and listed on the AC 00-56A database has doubled. And about 40% of all accredited distributors are accredited to the ASA-100 standard.

One of the elements that have made AC 00-56A such a remarkable success is the enthusiasm with which the industry has adopted the program. Due to the voluntary nature of the program, and the FAA's hands-off approach, the program, including development of

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Aviation Airmotive
Miami, FL

Aviation Spares & Services Int'l
Redmond, WA

Format Aerospace
Wichita, KS

Global Solutions Group
Laguna Hills, CA

Global Turbine Parts
Jupiter, FL

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Third Star Aviation
Miami, FL

Universal Asset Management
Memphis, TN

Upsilon International Corporation
Torrance, CA

FOR THEIR REACCREDITATION TO THE ASA-100 STANDARD

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accreditation standards and the funding of audits to ensure compliance to those standards, is completely industry funded. Because industry crafts the standards, accreditation organizations are able to apply real-world knowledge to develop requirements that increase safety while avoiding excessive and unnecessary burden.

Customers have recognized and embraced the safety benefits provided by the accreditation program. For many customers, accreditation to ASA-100 or another standard is a threshold requirement to initiating a business relationship. At ASA, we regularly receive calls from a range of businesses seeking to confirm that a distributor is listed in the AC 00-56A database. That commercial practices now lean heavily toward requiring participation in the voluntary accreditation program ensures that participation will continue to grow. Even non-U.S. distributors are seeking AC 00-56A accreditation because their customers demand it.

The program's ability to ensure that quality, genuine parts are sold by distributors is one of the primary reasons for the program's wide commercial adoption. Its success is demonstrated by the fact that there are far fewer instances of counterfeit parts in the commercial aviation part distribution chain than in other supply chains, such as NASA or the Department of Defense. Audits performed at regular intervals ensure ongoing—not one-time—compliance to the standard.

Given the obvious success of the AC 00-56A program, ASA has begun to urge the FAA to revisit the Order and work toward issuing a draft revision. ASA has suggested that this is an opportunity to update and modernize the standard, for instance by eliminating references to outdated forms and organizations. It is also an opportunity to modify the Order to better reflect international reliance on the 00-56A standard.

As the FAA moves forward with the next revision to AC 00-56, it will be important that the industry participate in the process to ensure the Voluntary Industry Distributor Accreditation Program remains the reliable industry standard it has become. ASA looks forward to working with the FAA to ensure AC 00-56A continues to improve safety in the aviation industry.

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ASA Comments on the EASA Safety Management Proposal

ASA offered comments on EASA's recent Part 145 Notice of Proposed Amendment (NPA). ASA made numerous suggestions related to the various proposals in the hopes of assisting EASA in order to assist in a more gradual incorporation of these changes, as well as to address proposals that appeared to fall outside the scope of SMS.

The objective of the sweeping NPA was to incorporate SMS principles into Part 145, but most of our comments were directed at tertiary changes which were not required by SMS but rather which seemed to be included because the SMS rulemaking reflected an adequate "vehicle" on which to attach these riders. The proposed changes have the potential to touch not only repair stations, but also distributors and manufacturers.

Among the issues addressed by ASA's comments was the disconnect between the proposed language, which would have required EASA Form 1 for all parts except those for which a regulatory exception is found. The effect of the change would be to leave language in the advisory guidance excluding standard parts from this requirement, but no such exception would remain in the regulations. This would mean that distributors and repair stations would not be able to buy standard parts directly from the source manufacturers (who often have no ability to issue an EASA Form 1). Instead, they would have to buy them from the production approval holder, who would procure the standard parts and then attach an EASA Form 1 to the parts. This would do nothing to enhance safety, and the only likely effect would be to dramatically increase the cost of standard parts.

Another issue addressed was a proposed regulation that, as written, could have required an individual Form 1 to be issued for each discrete component of an article. For instance, in the case of an engine overhaul, the proposed rule could have been read to require each blade on a given disc have a unique Form 1, the disc itself to have a Form 1, and so on. ASA recommended revising the proposed change to clarify that the intent of the rule was to ensure the safety of each component without imposing the burden of including a Form 1 for each discrete component contained within a larger component. Thus, it made more sense to write the rule so that a part must have an EASA Form 1 before being fitted to an aircraft, but so that individual subcomponents would not need EASA Form 1 as an intermediate step in the overhaul process (which would simply increase the cost of an overhaul without improving safety).

To read more of ASA's comments on this NPA, as well as other rulemaking issues, visit www.aviationsuppliers.org.

Guarding against Foreign Corrupt Practices

The aviation supply business is a global industry. Companies with an international reach must be aware not only of the laws and regulations of the United States, but also those of the countries in which they seek to conduct business. Unfortunately, the rule of the day in some of those countries is not law and order, but rather, corruption. Distributors doing business in such countries must be careful about whom they transact business with, and how that business is done, or risk running afoul at home of the Foreign Corrupt Practices Act.

History and Scope

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977 in response to the discovery of widespread bribery of foreign officials by U.S. companies. A Resource Guide to the U.S. Foreign Corrupt Practices Act

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(Nov. 14, 2012) at 2. As explained by Congress, the purpose of the FCPA was to eliminate the practice of bribing foreign officials to provide a level business playing field and to restore public confidence in American business. Id.

The FCPA prohibits "issuers," "domestic concerns," and "any person" other than an issuer or domestic concern from using the mail or instrumentalities of interstate commerce to corruptly pay, promise, or offer to pay anything of value to a foreign official, political party, or candidate in order to assist in obtaining or retaining business, or directing business to any person. See 15 U.S.C. §§ 78dd-1-78dd-3. In layman's terms, the FCPA prohibits a company or person from paying any kind of bribe, in cash, kind, or other, to anyone even remotely affiliated or potentially affiliated with a foreign government, for the purposes of influencing decisions related to business transactions.

The prohibitions of the FCPA anti-bribery provisions are broad. The provisions prohibit payment to officials for such purposes as: (1) influencing any act or decision of an official in his official capacity; (2) inducing the official to do or omit any act in violation of his lawful duty; (3) securing any improper advantage; and (4) inducing the official to use his influence with a foreign government or instrumentality to affect or influence an act or decision of that government or instrumentality. See, e.g., 15 U.S.C. § 78dd-1.

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What Kinds of Payments Are Covered?

Payments intended to induce or influence officials for the purpose of gaining a business advantage are typically analyzed under what the SEC terms the "business purpose test." The business purpose test is broadly interpreted and applies not only to direct payments to secure advantage, such as a bribe to win a government contract, but also to payments to receive favorable treatment not available to competitors, such as preferential tax or customs requirements. See, e.g., United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004).

Although the FCPA does exempt a small category of payments for "routine governmental action," the definition is narrowly limited to actions such as obtaining permits licenses, or other official documents to qualify a person to do business in a foreign country; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; and providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration. E.g., 15 U.S.C. § 78dd-1(f)(3)(A).

The FCPA explicitly excludes from the definition of "routine governmental action" decisions by foreign officials whether or on what terms to award or continue business with a particular party. Even payments for those actions deemed "routine" may subject a company to liability if they appear suspicious.

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The FCPA also allows for payments that are reasonable and bona fide expenditures, such as travel and lodging, incurred by the foreign official, related to "the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof." E.g., 15 U.S.C. § 78dd-1(c)(2). Bona fide expenditures must be for a legitimate business purpose; expenses for primarily personal entertainment and travel purposes may violate the FCPA. Exotic trips, junkets, and lavish entertainment expenses are viewed dimly by the SEC and have previously been the subject of enforcement actions. See, e.g., Complaint, SEC v. Lucent Technologies Inc., No. 07-cv-2301 (D.D.C. Dec. 21, 2007).

Care must also be taken under the FCPA's accounting provisions to properly characterize legitimate travel expenses to avoid the appearance of corrupt intent. See 15 U.S.C. § 78m. The FCPA recognizes that certain expenses are a legitimate aspect of conducting business. However it is extremely important that such expenses are properly accounted for and are not used as an attempt to skirt the anti-bribery provisions of the law. Paying for airfare and overnight lodging to view an equipment demonstration is probably legitimate; paying for a month-long "equipment demonstration" on a Caribbean Island is not.

Liability for the Actions of your Employees and Business Partners

Not only must companies avoid corrupt actions themselves, they must also be vigilant over their employees, third-party agents, and partners in joint ventures.

Before discussing liability for the actions of third parties, it is important to reiterate that employers are responsible for the actions of their employees under the doctrine of respondeat superior. An employer is liable for the actions of its employee if the employee's actions were (1) committed while on the job; (2) within the scope of the employee's job responsibilities; and (3) intended to benefit the employer to some degree.

The FCPA also specifically contemplates employees and agents working on behalf of a principal or employer, stating that it is "unlawful for any . . . employee or agent . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance" of any improper payment scheme. E.g., 15 U.S.C. § 78dd-1(a).

It is easy to envision a scenario in which an employee, such as a member of a company's sales force, would offer something of value (or respond to a suggestion that something of value be offered) to a foreign official in order to win for the salesperson's company a government contract. Such an action falls squarely within the prohibitions of the FCPA, and would create liability for the employer both under the statute itself, as well as under the common law. Even where an employee is primarily motivated by his own personal gain, such as earning a large commission, the fact that the sale would also benefit the company is sufficient to find a violation.

In addition to the scenario in which a company exercises direct control over their employees or agents, a company

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or person is also liable for the known action of their third-party agents. The FCPA states that it is unlawful to pay, offer, or promise anything of value to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to any foreign official, party, or candidate, for any of the purposes proscribed by the FCPA. E.g., 15 U.S.C. § 78dd-1(a)(3). The term "any person" reaches third-party agents as well as joint ventures.

Liability for the actions of third-party agents and partners in joint ventures depends on a person's knowledge of the improper conduct or circumstances. As stated above, it is a violation of the FCPA to promise or pay value to a third party "knowing that all or a portion of" that value will be used in a way that violates the statute. Id. The FCPA defines a person's state of mind as "knowing" if "such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially likely to occur; or such person has a firm belief that such circumstance exists or that such result is substantially certain to occur." E.g., 15 U.S.C. § 78dd-1(f)(2)(A). It is therefore not required that a person actually know or have confirmation of improper conduct or circumstance; only that a person know that it is highly likely that such conduct will occur or circumstances exist.

Be Proactive in Avoiding Corrupt Practices

Liability cannot be avoided by willful blindness or deliberate ignorance of the actions taken by third-parties and joint venture partners. In anticipating the use of third party agents the FCPA states that "knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist. E.g., 15 U.S.C. § 78dd-1(f)(2)(B). To prevent circumvention of the FCPA, Congress explained that willful blindness "should be covered so that management officials could not take refuge from the act's prohibition by their unwarranted obliviousness to any action (or inaction), language or other 'signaling device' that should reasonably alert them of the 'high probability' of an FCPA violation." H.R. Rep. No. 100-576 at 920. Liability cannot be avoided by remaining deliberately ignorant of improper conduct.

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In describing willful blindness in an FCPA case, a Federal court in New York explained that "a court can properly find willful blindness only where it can almost be said the defendant actually knew. He suspected the fact, he realized its probability; but he refrained from obtaining final confirmation because he wanted in the event to be able to deny knowledge." See United States v. Kozeny, 643 F. Supp. 2d 415, 418 (S.D.N.Y. 2009) (quoting United States v. Nektalov, 461 F.3d 309, 315 (2d Cir. 2006)). The defendant must have decided not to learn the fact, not merely failed due to negligence. Id.

Due to its nature, a determination of what constitutes willful blindness often depends on circumstantial evidence. See United States v. Kozeny, 667 F.2d 122, 134 (2d Cir. 2011). A person deliberately attempting to avoid knowledge is highly unlikely to record his attempts to avoid obtaining that same knowledge. See id. Due diligence therefore plays an important role in demonstrating that a person "actually believes that such circumstance does not exist." By performing proper due diligence, a company should be able to detect potential improper conduct by a third-party, or, more importantly, demonstrate that a good-faith effort was made to root out any such conduct. Such efforts are important because negligent failure to uncover improper conduct by a third party is not a basis for liability. See H.R. Rep. No. 100-576 at 920 ("'[S]imple negligence' or 'mere foolishness' should not be the basis for liability).

The Department of Justice and SEC recommend that companies be aware of common red flags related to third parties. Such red flags include: excessive commissions to third party agents; unreasonably large discounts to third party distributors; vague consulting agreements; close relationships between agents and foreign officials; and payments requested to offshore bank accounts. Relationships with, and the conduct of, third parties requires fact-intensive investigation. The DOJ and SEC therefore also recommend implementation of a compliance program that includes provisions for due diligence of prospective foreign agents.

Companies that wish to determine whether certain proposed conduct or transactions would violate the FCPA may obtain an opinion from the Attorney General pursuant to the Foreign Corrupt Practices Act Opinion Procedure. 28 C.F.R. § 80.1 (2012).

The takeaway of the FCPA is that businesses must avoid paying bribes or other compensation to foreign officials even when bribes are the way business gets done. Not only must companies avoid such corrupt action themselves, but they must also be aware of the actions of their employees and business partners, who may have their own motives for improperly influencing officials. It is therefore critical that distributors have oversight and due diligence procedures in place to monitor the manner in which business with foreign governments and government entities is conducted.

ASA is blogging!

Check out the two blogs on the ASA website:

- **Cavu Café: Royboy's Prose & Cons**

  and the
- **ASA Web Log by Jason Dickstein**

CALENDAR OF EVENTS

ASA Workshop Series/Training

September 17, 2013 . . . . . **REGULATORY WORKSHOP** • *Los Angeles, CA*

September 20, 2013 . . . . . **REGULATORY WORKSHOP** • *Seattle, WA*

ASA 2014 Annual Conference

June 15-17, 2014 . . . . . **Fairmont at Georgetown** • *Washington, DC*

Industry Events

August 17-20, 2013 . . . . . **ACPC** • *Orlando, FL*

CONTACT US!

ASA Staff is always interested in your feedback. Please contact us with any comments or suggestions.

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