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**Comments in response to 68 Federal Register 23808 (May 5, 2003)
Submitted Electronically to: <http://dms.dot.gov>
and in duplicate by United States First Class Mail**

**False and Misleading Statements Regarding Aircraft
Products, Parts and Materials
Comments on the Notice of Proposed Rulemaking**

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Docket Management System
U.S. Department of Transportation
400 Seventh Street, SW
Room Plaza Level 401
Washington, DC 20590-0001

Docket No. FAA-2003-15062

Dear Sir or Madam:

Please accept these comments in response to the Federal Register Notice of Proposed Rulemaking published at 68 Federal Register 23808 (May 5, 2003) (False and Misleading Statements Regarding Aircraft Products, Parts and Materials) [hereinafter "False and Misleading Statements NPRM"].

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What is AEA?

The Aircraft Electronics Association (AEA) is an international organization representing over 1,100 company members dedicated to the general aviation electronics industry. AEA’s membership includes avionics repair stations, manufacturers and distributors. AEA supports efforts to improve the safety and quality of aircraft components and maintenance; in particular, AEA supports efforts to eliminate fraud and imprecision associated with commercial transactions in aircraft parts.

Summary of AEA’s Position

AEA fully supports efforts to eliminate fraud in the industry, as well as efforts to clarify business terms and transactions. However, AEA cannot support vague standards that would cause more harm than good to our efforts to eliminate fraud and misleading statements. For this reason, AEA recommends that the language of this rule be tightened to eliminate vague standards that could be applied in nearly any case. These vague standards include those addressing implications (as opposed to affirmative statements) and those addressing the terms “airworthiness” and “acceptable for installation,” which have long defied definition despite the FAA’s best efforts.

In addition, AEA and its members are strong supporters of the freedoms and protections guaranteed by the Constitution. AEA opposes regulations that would purport to permit otherwise unconstitutional searches. For this reason, AEA opposes the search provisions found in section 3.5(f).

Finally, this proposal would impose new responsibilities on the FAA. The FAA would for the first time assume an obligation to pursue commercial speech violations that may be unrelated to safety issues. The FAA is already having difficulties in fulfilling its current regulatory obligations. There are other administrative and law enforcement agencies that already address fraud adequately, and there has been no showing that they have failed to adequately respond to fraud and related issues in the aviation industry.

I. FAA Has Failed to Establish Appropriate Regulatory Standards

FAA is proposing to establish a new FAR part (Part 3) that would set forth standards by which the FAA would bring enforcement actions concerning false and misleading statements regarding aircraft products, parts and materials. Several of the standards set forth in the False and Misleading Statements NPRM, however, are impermissibly vague and subjective. This renders the rule overbroad in its applicability and unconstitutional in its effect.

A. The Proposed Rule's Applicability is Overbroad (§ 3.1)

Proposed section 3.1, the applicability section, reads as follows:

This part applies to persons engaged in aviation-related activities, as set forth in this part.

The proposed applicability of this rule is overbroad. It permits the FAA to exercise jurisdiction over matters that do not involve aviation safety. For example, an internal company memorandum (which qualifies as a company record under the proposed rule)¹ that incorrectly describes an aircraft part as airworthy would reflect a violation of this rule, despite the fact that the misstatement was not intentional, and did not represent a record of the sort upon which a third party might rely. Most companies have quality systems and other mechanisms to detect such misstatements before they could have any adverse effect. In many cases, the instances may be self-reported to an accreditation body in order to permit auditing to assure that the problem does not recur. Errors of this nature that do not have an adverse affect on safety should not be subject to FAA civil penalty.

We recommend that the applicability statement be limited as follows:

¹ The definition of the term "record" encompasses ALL records – not just those with aviation safety significance.

RECOMMENDED NEW LANGUAGE FOR SECTION 3.1:

This part applies to records, and the persons who make them, when those records concern aircraft products, aircraft parts, or aircraft materials. This part only applies to records upon which someone might reasonably rely in making a decision authorized under this chapter that could affect the airworthiness of an aircraft or the safety of flight.

B. AEA Supports FAA's Efforts to Prohibit Fraud (§ 3.5(c))

Proposed subsection 3.5(c), captioned as a "prohibition against false statements," prohibits anyone from making fraudulent or intentionally false statements representing the airworthiness of any type certificated product, or the acceptability of any part or material for use on type certificated product. There is sufficient case law on fraud and intentionally false statements that this represents a reasonably objective standard. AEA supports provisions of this nature: provisions that establish standards that can readily be understood by the industry.

Proposed subsection 3.5(c), however, is similar in many respects to existing rules affecting AEA members that concern fraudulent statements in aircraft maintenance records. Under 14 C.F.R. § 43.12, repair stations are already prohibited from making fraudulent or intentionally false entries in, or the fraudulent reproduction or alteration of, any record or report maintained in accordance with Part 43. This rule has proven effective over time, and repair stations and other maintenance providers have a firm understanding of where and how the rule applies. In AEA's view, 14 C.F.R. § 43.12 provides sufficient protection against fraudulent or intentionally false statements concerning aircraft parts by maintenance providers such as its member repair stations. Records and reports made, kept, or used to show compliance with the requirements of Part 43 are the most important class of documents on which members of the public rely when making airworthiness determinations concerning parts. The ability to take certificate action against violators, moreover, gives the FAA credible enforcement options.

AEA is not fully convinced that the proposed extension of prohibitions against fraudulent or intentionally false statements in other kinds of records and/or by other types of parties is warranted. Notwithstanding the fact that existing laws appear to be sufficient to address parts fraud, and the addition of concurrent jurisdiction through FAR 3 appears to be unnecessary, AEA sees no other problems with proposed section 3.5(c).

C. Subsections 3.5(d) and 3.5(e) Contain Serious Flaws

AEA has particular concerns regarding the language of subsections 3.5(d) and 3.5(e).

1. Regarding Implicit Representations as Violations Creates a Unworkably Subjective Standard

Section 3.5(d) proposes to make it a regulatory violation to imply (or cause to be implied) facts concerning airworthiness or acceptability for installation unless those facts can be verified in records. Section 3.5(e) proposes to make it a regulatory violation to imply (or cause to be implied) that a product, part, or material meets FAA airworthiness standards unless the person can verify that the product, part, or material was produced under an FAA production approval.

There is no objective standard that lets the industry know what sort of communication is considered to *imply* a fact.

When no standard of conduct is specified at all, the prohibition is unconstitutionally vague. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). Unconstitutionally vague laws have been described as those where "men of common intelligence must necessarily guess at its [the law's] meaning." *Id.* In the proposed regulation at issue here, one must guess at what it means to imply a fact – what level of affirmative act is necessary, and upon what subjective standard will an unspoken fact reflect an implication?

2. The Proposed Rule Omits Any Intent Requirement

Other agencies have applied a deceptive language standard to certain communications. For example, the Security and Exchange Commission's rule 10b-5 addresses fraud and deceit. In order for misleading statements to be actionable under Federal regulations, though, there is generally a scienter requirement. *E.g.*, *SEC v. Infinity Group Co.*, 212 F.3d 180, 191-192 (3rd Cir. 2000) (explaining the scienter requirement of SEC rule 10b-5).

The proposed FAR 3 contains no scienter requirement. This diverges from existing U.S. legal policy and creates yet another unworkable standard. An 'implication' element would make scienter difficult, if not impossible, to prove. This is because in the absence of proof of intent, the courts will often construe the logical consequences of one's actions as evidence of intent to accomplish those logical consequences. *E.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997); *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968); *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 227 (S.D.N.Y. 1975). Thus the plain language of a statement may be used to construe intent. Under the FAA's proposed rule, the violation would be based, not on the plain language of a statement, but rather something the plain language *implies*. In such a situation, one would not be able to use the plain language as evidence of scienter because the plain language is not the basis of the violation – the implication is.

Another significant difference between other agency regulations concerning deceit and the FAA's proposed regulation concerning fraud and misleading statements is that the other agency regulations exist in a context of a rich body of regulatory

information concerning what is an acceptable documentation or statement and what is not. There is no comparable body of regulatory information in this case. In fact, the FAA currently has *no* regulations that explain what commercial documentation concerning parts ought to include or address. Reliance on industry standards would be inappropriate in this situation because of the lack of uniform industry standards – a fact that contributes to confusion in the industry, but also a fact that would not be remedied by the proposed regulation.

The FAA proposes to create a regulation that does not include scienter as an element. Thus, persons in the industry would be strictly liable for their violations, but in the absence of clear standards of conduct, their violations would still be based on the subjective determination of an FAA inspector as to what constitutes a “misleading” implication. Creating a regulatory violation that imposes a strict liability standard without establishing well-defined objective standards of conduct is simply too vague an approach to withstand constitutional scrutiny.

It would be unprecedented for the FAA to proceed with a regulation that imposes strict liability concerning commercial documentation (a regulation in which scienter is not an element of the violation). Such a step should not be taken without a clear need or Congressional mandate – neither of which is present in this case.

3. The Proposed Standards Are Unconstitutionally Vague in this Context

Section 3.5(d) proposes to make it a regulatory violation to imply (or cause to be implied) facts concerning airworthiness or acceptability for installation unless those facts can be verified in records. There is no clear description of what “airworthiness” really means. The FAA has admitted that there is no regulatory definition, and explained that the reason there is no regulatory definition is because the term is used in different ways throughout the regulations. See FAA Chief Counsel Interpretation 1988-16 (June 17, 1988). According to that Chief Counsel opinion, there is no need to define what airworthy means, because in each case where the term is used in the regulations, “it is clearly used as a summarizing or shorthand term denoting the aggregate of requirements that are concurrently spelled out.” *Id.* Accordingly, there is no description of what the term means in this proposed regulation.

For example, in the context of post-maintenance operation, an aircraft is generally considered to be airworthy when the aircraft conforms to type design and is in a condition for safe operation. See, e.g., FAA Chief Counsel Interpretation 1991-30 (May 22, 1991). Requiring a person describing an aircraft as airworthy to rely on some form of record to prove airworthiness in this context would make it necessary for that person to have access to the type design data in order to prove conformity with the type design. This is unreasonable, since type design holders generally protect type design information as trade secrets. It is also contrary to long-established practice in which inspections are carried out on aircraft using standard

industry practices or manufacturer-defined practices in order to assess airworthiness.

There is even less authority to explain what it means to be “acceptable for installation.” In one advisory circular, acceptable parts are circularly described as those that have been found acceptable through test and inspection. *See Eligibility, Quality, & Identification of Aeronautical Replacement Parts*, Advisory Circular 20-62D para. 4(b) (May 24, 1996) (also finding that standard parts and owner-operator produced parts are also acceptable). One may presume that this term is meant to reference something like the findings made by an installer of a part who makes a determination of compliance under 14 C.F.R. § 43.13(b). Determining compliance with 14 C.F.R. § 43.13(b) is a specialized function engaged in by persons authorized to conduct maintenance activities under Part 43. Generally, it is NOT separately documented under standard industry practice. There is no FAA guidance on how to document such a finding separate from the process of installation of the part after it has been determined “acceptable for installation.” This term, “acceptable for installation,” is impermissibly vague in this context.

Finally, there is no clear standard for what sort of records would be considered sufficient in this context. The FAA has no regulations for what sort of records must be transferred with a part. This issue is further addressed in section 4, *infra*.

4. Section 3.5(e) Could *Require* Fraud in Some Cases

Section 3.5(e) proposes to make it a regulatory violation to state or imply that a product, part, or material meets FAA airworthiness standards unless the person can verify that the product, part, or material was produced under an FAA production approval. Where no such proof is available, the part must be clearly and expressly described as NOT produced under an FAA production approval.

This is an unworkable standard for several reasons. First, it is possible for a part to meet FAA airworthiness standards without having been produced under an FAA production approval. Owner-operator produced parts, parts produced in the context of a maintenance operation, and parts produced under a foreign approval and accepted in the United States under a bilateral agreement are just a few examples. Parts that cannot be traced back to a production approval holder can often still be inspected and tested to confirm that they meet the requirements for which they are intended.

In addition, this proposed standard simply does not work for many parts in the industry because it is common for parts to be divorced from the proof that they were produced under an FAA production approval. Most parts installed in aircraft cannot be proven to have been produced under a production approval – there is simply no chain of evidence to make that verification. This is the reason that repair stations and other installers 1) rely on post-manufacture certifications from other parties concerning airworthiness, and 2) engage in pre-installation tests and inspections to confirm airworthiness.

Many parts removed from aircraft for repair or overhaul suffer from this same problem – lack of back-to-birth traceability. Under the proposed regulation, the holder of such parts would have to make the unenviable choice of 1) failing to assert or imply airworthiness (an overhaul tag, for example, implies airworthiness since a part cannot be described as overhauled unless it was tested and met the overhaul standards – 14 C.F.R. § 43.2), which would be devastating to business relationships in the aviation industry or 2) affirmatively stating that the part was NOT produced under an FAA production approval – a statement that is most likely inaccurate.

This also requires a sort of reverse palming off that would appear to violate the Lanham Act. *See, e.g., Williams v. Curtiss-Wright Corp.*, 691 F.2d 168, 174 (2d Cir. 1982) (issuing a preliminary injunction to prevent reverse palming-off of aircraft parts). The person who stated that the part met FAA airworthiness requirements but that it was not produced under an FAA production approval would be marketing the part in a manner inconsistent with the trademark holder's markings. Since the Lanham Act would prohibit such representations, the FAA regulations should not require such representations.

The sort of reliance on documentation that this proposed rule attempts to foster would actually be dangerous to the industry – blind reliance on traceability to an approved manufacturer could be dangerous if a part has been subject to intervening damage or degradation since the time of manufacture – this is the reason that the regulations focus an installer's duties on assuring airworthiness, rather than on ascertaining production approval status: the regulations as they currently stand recognize the importance of an independent assessment of airworthiness at the time of installation. Regulations that suggest that it is acceptable to describe a part as airworthy merely because it was produced under a production approval threaten to undermine the redundancies in our system that help maintain quality and safety.

5. The FAA is Requiring Reliance on Records That Often Do Not Exist in the Absence of Any FAA Standard that Requires this Documentation

Section 3.5(d) and 3.5(e) both require reliance on records. The preamble to the proposed rule suggests that the records are “the kind that are relied on by owners, operators, producers and maintainers to determine the airworthiness of an aircraft, or the acceptability of aircraft products and parts.” *See False and Misleading Statements NPRM*, 68 Federal Register 23808, 23810-811 (May 5, 2003). However, even in this situation there are no clear standards for what one may use and what one may not use. Installers may rely on records or they may rely on non-record evidence, like visual inspection of the part, dimensional inspections, destructive testing of representative samples from a lot of hardware, or parts markings.

The FAA has published no clear standard as to what sort of records would be considered sufficient in this context. Part of the reason there is no clear published standard is because documentation is not required at all for parts. Current FAA

rules do not even require that documentation be issued for parts, or that documentation be maintained for parts. *E.g.*, FAA Chief Counsel Interpretation 1992-35 (June 1, 1992) (explaining that there is no uniform method for tracking life limits, and that any method that achieves the goal of accurately knowing current life status is sufficient). It is only a matter of recent industry standard that documentation has been commercially required for aircraft parts – historically parts were often bought and sold with little or no documentation. As a consequence, many, many parts in the inventories of industry parties do not have the sort of records that would seem to be required under this proposal.

It may be argued that Part 43 has reasonably clear standards for documentation following a maintenance activity. 14 C.F.R. § 43.9. However, these sorts of records are explicitly excepted from the proposed regulation, because there is already an antifraud rule that applies to them. 14 C.F.R. § 43.12. Thus, the only clear exposition of parts documentation standards in the regulations is not even a standard applicable to the proposed regulation.

In fact, FAA guidance permits a wide variety of documentation to follow parts in the commercial arena. *See, Eligibility, Quality, & Identification of Aeronautical Replacement Parts*, Advisory Circular 20-62D para. 7 (May 24, 1996) (providing seven different recommended documents for identifying acceptable replacement parts, but failing to explain what information should be included in the commercial documentation). This allowance of a wide variety of documents, with no standard for what is or is not acceptable, suggests that the FAA has no standards for what would constitute sufficient records to constitute verification under this new regulation. This flaw makes the regulation void for vagueness.

The FAA's existing recommended standards for commercial documentation are broad and may be summarized as saying that whatever documentation one receives should be passed on to subsequent purchasers. *See Voluntary Industry Distributor Accreditation Program*, Advisory Circular 00-56A (June 13, 2002) (providing a table listing a wide range of documentation that is permissible, as long as the documentation received is then transferred to the subsequent purchaser of the part, keeping the information available for future purchasers). This does not impose limits on what sort of commercial documentation may be produced and distributed.

Whereas the FAA has no general requirements for parts documentation, and no published standards for what is acceptable or not acceptable among commercial documents, there is an insufficient foundation upon which to rest the FAA's proposed rule. Before promulgating the rule that requires adequate documentation as a condition of otherwise truthful assertions, the FAA should first concentrate on establishing reasonable uniform standards for commercial documentation.

II. The Proposed Rule Permits Unconstitutional Searches

AEA objects to subsection 3.5(f). This subsection states that

[E]ach person who expressly or by implication represents, or causes to be expressly or by implication represented, in any record that a type certificated product is airworthy, or a part or material is acceptable for installation on type certificated product, shall allow the Administrator to--

- (1) Inspect and copy records relating to the source and acceptability of the product, part, or material; and
- (2) Inspect the product, part, or material.

The Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions pursuant to civil as well as criminal investigations. *E.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). Unless some recognized exception to the warrant requirement applies, a warrant is necessary to conduct an inspection. *Id.* at 313; *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) ("Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause"). The FAA has identified no exception to the warrant requirements of the Fourth Amendment that would apply in this case, and accordingly there is no opportunity to comment on the FAA's reasoning for this intrusion on the Fourth Amendment.

Even those exceptions generally applicable to businesses subject to a regulatory scheme are inapplicable to the factual situation before the agency. The FAA has made the privileges of operation under a Part 145 certificate contingent on permitting FAA inspections to audit compliance. This appears to searches to assess compliance in the context of a certificate holder but there is no corollary privilege to permit a search of a non-certificate holder.

Donovan v. Dewey identified an exception that arises when "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme, and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." 452 U.S. 594, 600 (1980). Unlike the mine safety inspection program in *Donovan v. Dewey*, however, there is no Congressional finding that the aviation industry has a poor safety record (or a poor record for veracity) that has a significant deleterious effect on interstate commerce. *Donovan v. Dewey*, 452 U.S. 594, 602 (1980). Instead, the FAA admits that there are at best only isolated incidents of false or misleading statements. *E.g.*, False and Misleading Statements NPRM at 23808.

In the context of a regulatory inspection system of business premises – even one that is carefully limited in time, place, and scope – the legality of the search depends on the authority of a valid statute. *United States v. Biswell*, 406 U.S. 311, 315 (1972). There is no valid statutory authority in this case.

Finally, there are public interest exceptions to the warrant requirement. These arise only where there is a showing that the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara v. Municipal Court*

of *San Francisco*, 387 U.S. 523, 533 (1967) (warrantless searches not allowed when no prior showing of particular need has been made); cf. *Schmerber v. California*, 384 U.S. 757, 770-771 (1966) (dynamic nature of blood alcohol level justified warrantless blood testing for alcohol). There has been no such showing that the burden of obtaining a warrant would frustrate the law enforcement goals in this case. In fact, the past history of successful warrant-based searches in the aviation industry weighs against the application of this exception.

III. FAA Does Not Have the Resources or Expertise to Handle this New Responsibility

Part 3 would require the FAA to begin overseeing the wide range of commercial documentation that circulates throughout the industry and review it to assess its compliance with new standards set forth in the rule. This proposed rule regulates commercial speech as opposed to safety-related documentation. Because this proposal falls outside of the FAA's core mandate, the FAA is likely to be ill-prepared to enforce this proposed rule – the FAA lacks the technical expertise to enforce commercial speech standards, it lacks published standards to apply to commercial speech, and its personnel lack training on commercial speech issues.

The FAA lacks the resources and expertise to properly enforce the proposed regulations in an objective, uniform fashion. If the FAA takes over regulation of commercial speech in the aviation industry, it is likely that other agencies with concurrent jurisdiction will reallocate their scarce resources to avoid duplication of effort. If this happens, and the FAA is unable to commit sufficient resources to the enforcement of these proposed regulations, it could result in a diminution of law enforcement activity monitoring commercial speech within the aviation industry – a consequence that would achieve the opposite result from the one intended.

A. Lack of Resources

Some of the new standards established in FAR 3 are well known to law enforcement personnel. The standards for fraud, for example, are well established within the law. This does not mean that individual employees of the FAA, who have not previously been tasked with enforcing such standards, know or understand them. In fact, fraud prevention training has not been a part of the FAA's inspector curriculum because it is not currently something that falls within the FAA's enforcement responsibilities.

At the same time, the FAA is proposing other standards – like the standard for implied misleading statements – that are not as well understood in the law enforcement community. Such standards would require a special emphasis in training because of their novelty. These standards may be analogous to similar standards established by other regulatory regimes (such as the deceptive statements standard used by the SEC), or they may develop differently. The current NPRM does not provide sufficient details about how these novel and vague standards will be interpreted to gauge what sort of training would even be necessary.

These new training requirements, and the new responsibilities associated with the proposed new FAR Part 3, present the FAA with a significant resource allocation problem. Currently, the FAA does not have the resources to accomplish the functions already described in its regulations. See, e.g., Resource Utilization Measure, 66 Fed. Reg. 38387, 38389 (July 24, 2001) (explaining that the FAA does not have the resources to continue performing certain tasks). It does not make sense to add a significant new responsibility – oversight of commercial documentation – when the FAA does not have the resources to perform its current tasks.

B. FAA's Different Expertise and Congressional Intent Suggest that FAA is Not Meant to Engage in This Sort of Oversight

Furthermore, the new task that the FAA is setting for itself, oversight of commercial documentation, does not match well with the core competencies of the FAA. The FAA has field inspectors with significant experience in areas like maintenance, manufacturing, operations, and the oversight of these activities. The FAA does not currently hire inspectors to assess commercial documentation for fraud purposes.

There are other agencies within the Federal Government that already address such functions, and that have a demonstrated core competency in oversight of fraud. The Federal Trade Commission, for example, has laws and regulations that already address issues of commercial fraud. Fraud is also addressed by local law enforcement activities, and also by Federal prosecutions. Aircraft parts fraud in particular is subject to a new federal statute that has proven very effective in its short tenure. See 18 U.S.C. § 38. The existence and use of this Federal statute obviates the need for the FAA to claim concurrent jurisdiction.

The FAA does not have a legislative mandate to duplicate the functions of the FTC for these purposes. In fact, Congress has indicated its intent to prevent the FAA from assessing questions of fraud. In recent legislation concerning revocation of certificates as a consequence of findings of fraud, Congress kept the FAA separated from the decision-making process related to fraud. Instead of permitting the FAA to hold hearings concerning findings of fraud in order to assess whether a revocation was warranted, Congress directed the FAA to revoke certificates based on the findings of other courts and agencies. 49 U.S.C. § 44726. The FAA was specifically prohibited from reviewing such findings. 49 U.S.C. § 44726(b)(2). Only upon a request from a law enforcement agency was the FAA permitted to disturb the automatic revocation. 49 U.S.C. § 44726(a)(2) (permitting an exception based on the request of law enforcement).

The FAA's resources are stretched thin, and other agencies already regulate fraud adequately with the assistance of the FAA. The FAA does not currently regulate commercial speech so it is not one of the FAA's core competencies. There is no pressing need for these regulations.

CONCLUSION

For the reasons described in these comments, AEA asks the FAA to replace the language of proposed section 3.1 with the AEA recommended language, and to strike in their entirety sections 3.5(d), 3.5(e), and 3.5(f).

Respectfully Submitted,



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