Federal Aviation Administration

Memorandum

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To: Aeronautical Center Counsel, AMC-7

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Subject: Elements that Constitute an "Aircraft" for Registration Purposes.

I. Issues

What does "aircraft" mean for purposes of US aircraft registration?

Can a disassembled aircraft be an "aircraft" for aircraft registration purposes or can an aircraft be registered if it's missing an essential component?

What is the significance of the use of the word "aircraft" in the 3 specified situations regarding the application for a US aircraft registration certificate under Part 47 of the Federal Aviation Regulations?

II. Discussion of Three Aircraft Certification Rules and an FAA Legal Interpretation of One of Those Rules and of the Word "Aircraft" as Used in the Statute.

Sections 47.33, 47.35 and 47.37 set forth different evidentiary factors regarding the applicant's asserted ownership of an aircraft in 3 situations: (1) if the aircraft

had not been previously registered anywhere; (2) if the aircraft was last previously registered in the US; and (3) if the aircraft was last previously registered in a foreign country. All three sections have similar paragraphs (a) and (b) in terms of the documentation necessary for the US Aircraft Registry to process the application. However, the two provisions regarding aircraft that were "last previously registered in the [US]" (section 47.35) and that were "last previously registered in a foreign country" (section 47.37) do not have any provisions similar to paragraphs (c) and (d) of section 47.33 (regarding aircraft not previously registered anywhere). Those paragraphs ((c) and (d)) provide the following:

> (c) The owner of an amateur-built aircraft who applies for registration under paragraphs (a) and (b) of this section must describe the aircraft by class (airplane, rotorcraft, glider, or balloon), serial number, number of seats, type of engine installed, (reciprocating, turbopropeller, turbojet, or other), number of engines installed, and make, model, and serial number of each engine installed; and must state whether the aircraft is built for land or water operation. Also, he must submit as evidence of ownership an affidavit giving the U.S. registration number, and stating that the aircraft was built from parts and that he is the owner. If he built the aircraft from a kit, the applicant must also submit a bill of sale from the manufacturer of the kit.
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> (d) The owner, other than the holder of the type certificate, of an aircraft that he assembles from parts to conform to the approved type design, must describe the aircraft and engine in the manner required by paragraph (c) of this section, and also submit evidence of ownership satisfactory to the FAA, such as bills of sale, for all major components of the aircraft.
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> (underscoring added for emphasis)

In essence, most of paragraphs (c) and (d) identify what a non-Type Certificate Holder must provide to the FAA in order for the FAA to make a finding that the item described is an *aircraft*. In short, the applicant of an amateur-built aircraft or a type certificated aircraft, which the owner of the aircraft assembles from aircraft parts to conform to the approved type design [of the type certificate holder], must describe certain features of the "built" or "assembled" aircraft and must describe

the "engine installed" in order for the FAA to determine whether the item described is an aircraft that is eligible to be registered.

Does the absence of a paragraph (c) and (d) -- in regard to sections 47.35 and 47.37 -- mean that if an applicant *asserts* that he is registering an *aircraft* either "last previously registered in the [US]" or "last previously registered in a foreign country", then he cannot be asked to provide evidence as extensive as that required under 47.33 regarding an aircraft not previously registered anywhere? No, it does not mean that. The applicant can always be asked for proof that the item that he is seeking to register is an *aircraft.* The item that is the subject of the application for aircraft registration certificate must be found -- by the FAA-- to be an aircraft in order for it to be registered on the US Aircraft Registry.

The FAA Aeronautical Center Counsel ruled as far back as 1982 – in regard to section 47.33(d) – that an applicant who sought to register only the fuselage as an "aircraft", where the type certificate indicated that the type design required a single engine, would be denied until the aircraft was complete with the installation of an appropriate engine. The Aeronautical Center Counsel noted that the statutory definition of an "aircraft" means

> Any contrivance now known or hereafter invented, used, or designed for navigation of, or flight, in the air.[1]

The Aeronautical Center Counsel interpreted the terms "invented" and "used" to mean that the aircraft *was a complete thing in being*, and the term "design" refers to the *totality of its essential components*. He concluded that, when taken together, the definition of "aircraft" means the complete entity: fuselage, wings, engine(s). empennage and all of the essential elements of its design that make it an aircraft. He also concluded if any essential element was missing, it is not at that point an aircraft for purposes of *initial* registration.

III. The FAA -- in Practice -- Has Been Applying the Analysis in the 1982 Legal Interpretation Regarding Section 47.33 and Regarding the Meaning of "Aircraft" to Other Aircraft-Registration-Situations.

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[1] The Aeronautical Center Counsel cited the Federal Aviation Act of 1958 (49 U.S.C. [Appendix] section 101(5)) which has now been codified in 49 U.S.C. section 40102(a)(6) (2014).

The 1982 legal interpretation addressed a 47.33(d) situation in which the aircraft had not been previously registered anywhere (thus, the 1982 interpretation addressed a registration application that was for the *initial* registration *anywhere*). However, agency practice over the past 34 years has been to question and investigate, in the appropriate circumstances, whether the applicant's assertion that the item specified in the application was still an "aircraft" that had been already previously registered in the US or a foreign country. This FAA practice is logical and legal. First, the headings for both sections 47.35 and 47.37 use the term "aircraft". Thus, both sections 47.35 and 47.37 concern the alleged previously registered "aircraft" and thus require that the item that is the subject of the application is, and remains, in fact an "aircraft", as defined in the statute and as interpreted in practice by the FAA.

Second, Title 49 of the US Code sets forth eligibility criteria for "aircraft" to be registered in the United States. See 49 U.S.C. sections 44102 and 44103. It is axiomatic that if an item does not meet the statutory definition of "aircraft", it cannot be registered in the US as an "aircraft".

Lastly, from an accuracy-of-records point of view (FAA Aircraft Registry) and an FAA oversight point of view, the possible registration of non-aircraft as "aircraft" could have unintended consequences. For example, recently the FAA adopted a final rule wherein aircraft registration certificates expire after 3 years unless the aircraft owner files for renewal. 14 C.F.R. section 47.40(c). Before this regulatory amendment, US aircraft registration certificates had no expiration date resulting in thousands of aircraft registered when some had been destroyed, lost or not in a condition resembling an aircraft. A purpose of the new rule was to eliminate aircraft registration certificates for those owners, who did not claim that what was registered as "aircraft" remained aircraft. It would make no sense, and undermine a purpose of the new rule, if the FAA allowed applicants to newly register as an "aircraft" that which was no longer an "aircraft".

IV. Court Decisions Regarding the FAA's Broad Discretion to Interpret the Word "Aircraft" and Two Court Decisions -- in Lawsuits Among Private Party Litigants -- that Fully Support How the FAA Interprets "Aircraft" for FAA Aircraft-Registration-Purposes.

The following court cases are instructive on the FAA's broad statutory authority to interpret its enabling legislation and instructive on how courts interpret "aircraft" under 49 USC section 40102(a)(6) and an identical definition of "aircraft" in another statute.

In Fielder v. United States [herein "Fielder"] 423 F. Supp. 77 (US Dist. Ct. C.D. California) (1976), a wife sued the United States for the death of her husband in a hang glider. She sued under the Federal Torts Claims Act (herein, "FTCA") for the failure of the FAA to determine that hang gliders were "aircraft" and for failing to prescribe rules for their safety. Under the FTCA, Congress generally waived the United States' sovereign immunity from lawsuits in torts cases. But Congress provided an exception to the FTCA's waiver of sovereign immunity for "discretionary functions". An agency's failure to engage in discretionary rulemaking was viewed as a discretionary function that was excluded from the permitted lawsuits against the US under the FTCA. Later, in the seminal case of U.S. v. Varig, 467 U.S. 797 (1984), the Supreme Court ruled that the FAA's failure to withhold a type certificate for a Boeing 707 because the Boeing 707's trash receptacles did not meet applicable safety standards was a discretionary function and thus the US was immune from a lawsuit. The Fielder court dismissed the case using, in part, the following analysis:

> 49 U.S.C. section 1421(a)[2] empowers the Administrator of the ...[FAA] to prescribe rules and regulations which promote the safety of aircraft. 49 U.S.C. section 1301(5)[3] defines aircraft in a broad and general manner, *thus leaving to the sole and sound discretion of the Administrator the duty of determining what devices constitute aircraft within the meaning of the Act.*
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> ...
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> The Administrator's alleged failure to determine that hang gliders were aircraft within the meaning of the Federal Aviation Act is a discretionary function, and suit thereon, under Tort Claims Act, is barred...
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> (Italicized emphasis added) Fielder, at p. 82.

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[2] Now codified at 49 U.S.C. section 44701(a).
[3] Now codified at 49 U.S.C. section 40102(a)(6).

In the case of In re AE Liquidation, Inc. v. Eclipse Aerospace, Inc., 444 B.R. 509 (US Bankruptcy Court, D. Delaware) (2011) (herein, "Eclipse"), some customers of Eclipse Aerospace (the manufacturer of the Eclipse aircraft) sought a judgment that "partially constructed aircraft" were subject to a constructive trust. The customers argued that because they were required to prepay a portion of the purchase price (typically 60%), they wanted the court to recognize that the 26 partially completed aircraft were in this constructive trust. Thus, they argued that the 26 partially constructed aircraft were not the property of the Eclipse Aerospace bankruptcy estate, but instead were their property. Among other reasons, the Eclipse court found against the customers with the following analysis:

> ...the FAA Registration Statute does not apply to [within production] Aircraft. That statute [the FAA Registration Statute] applies only to aircraft that are completed and have been or could have been registered with the FAA...Aircraft parts and partially completed aircraft do not fit [the] definition [of aircraft in] ... 49 U.S.C. section 40102(a)(6).

Eclipse at pp. 514-515.

In United States Aviation Underwriters Inc. v. Nabtesco Corp., 697 F.3d 1092, (9th Cir., 2012) (herein, "Nabtesco"), an insurance company, as subrogee, sued an aircraft parts manufacturer alleging that a Cessna Citation 560 aircraft accident occurred, on August 17, 2009, due to the manufacture of a defective nose landing gear actuator. Nabtesco, the manufacturer of the actuator, succeeded in convincing the 9th Circuit to affirm the district court's dismissal of the case under the statute of repose. In 1994, Congress enacted an 18-year statute of repose set forth in the General Aviation Revitalization Act of 1994 (herein, "GARA").[4]

Actuator number 339 was manufactured in April 1990 and installed as a new, original part on a different airplane, a Cessna 550 aircraft, on October 24, 1990. That aircraft was delivered to its first purchaser on October 30, 1990, more than 18 years before the accident of the Cessna Citation 560. However, on April 2, 2007,

[4] GARA was enacted under Public Law No. 103-298, 108 Stat. 1552. It is codified in the notes to 49 USC section 40101.

actuator number 339 was installed (as a used part) on the aircraft that suffered the accident.

The issues before the 9th circuit were whether the GARA statute of repose applied or not to manufacturers of aircraft components; when the 18-year period commenced; and whether the 18-year countdown to repose could be extended to a new 18-year countdown by installing a replacement aircraft component on the accident-aircraft.

The court ruled that GARA applied to the manufacturers of component parts to the aircraft (regardless of whether they were originally installed or whether they were installed as approved replacement parts). The court ruled that in regard to a component aircraft part which was installed as new/original on an aircraft, the 18-year period commenced with delivery to the purchaser or lessee from the manufacturer or with delivery of the aircraft to a person engaged in the business of selling aircraft or leasing aircraft. The court ruled that actuator 339's 18-year countdown to repose commenced with the original aircraft (Cessna 550) delivery to the first purchaser. Finally, the court rule that the fact that at some undetermined point actuator 339 was removed from the Cessna 550 and later installed in 2007 on the accident-aircraft (the Cessna 560), neither affected the accident-aircraft's 18-year countdown to repose, nor did it affect actuator 339's countdown to repose. In other words, the 2007 installation of actuator 339 (a used part) into the accident-aircraft did not interrupt or affect the nonstop ticking of the clock to repose by the aircraft manufacturer (in regard to the accident aircraft) or the aircraft parts manufacturer (from the time it was delivered a new and original to the Cessna 550 aircraft, despite being removed from the Cessna 550 and installed later, as a used part, on the accident-aircraft, the Cessna 560.)

GARA defines "aircraft" the same as the statutes applied to and by the FAA. In fact, the court noted that section 3(1) of GARA cites 49 USC section 40102(a)(6). Nabtesco at pp. 1097-1098. In regard to GARA, and thus implicitly in regard to the definition of "aircraft" used in the statutes that apply to the FAA, the Nabtesco court wrote:

> The statute is silent as to whether an "aircraft" includes its constituent parts. It stands to reason, though, that the manufacturer of the engine or cockpit is

> as much a "manufacturer of the aircraft" as the maker of the wings or the rudder. If there is any distinction among them, the statute does not say so. Thus, it is more natural to construe "the aircraft" to mean the aircraft including its component parts.

Nabtesco at pp. 1097-1098.

V. Conclusion

The 1982 legal interpretation of section 47.33(d) by the FAA's Aeronautical Center Counsel has been applied -- by the FAA in practice -- not only to aircraft that were never registered anywhere (i.e., the situation covered by 47.33), but also to aircraft that had been previously registered in the US or a foreign country (i.e., the situations covered by sections 47.35 and 47.37 respectively). This interpretation-by-practice is the logical conclusion that in a case where the FAA suspects someone may be attempting to register an incomplete aircraft or a disassembled aircraft as an "aircraft", the FAA is permitted to make further inquiry. This is due to the fact that aircraft registration statutory provisions restrict US aircraft-registration to "aircraft". Thus, the FAA was completely correct that it needed to interpret the meaning of aircraft. The 1982 legal interpretation of 47.33(d) and of the statutory term "aircraft" led to the logical outgrowth of the FAA practice to investigate suspect situations. Sometimes the FAA investigations resulted in the FAA disallowing the registration of incomplete aircraft that had been previously registered in the US or in a foreign country, e.g.:

1. Where the aircraft registration applicant asserts that an item is an "aircraft", but the applicant states, or the FAA finds, that the asserted "aircraft" is missing a critical component;
2. Where the aircraft registration applicant asserts that an item is an "aircraft", but admits, or the FAA finds, that the item has a damaged, destroyed, outdated or unapproved critical component affixed to, or installed on, it;
3. Where the aircraft registration applicant asserts that an item is an "aircraft", but admits, or the FAA finds, that the item has aircraft parts that exceed a time-in-service limit or that the logs -- regarding the aircraft

or maintenance -- are suspect or missing (e.g., concerning the actual time-in-service of an aircraft or part);

4. Where the aircraft registration applicant asserts that an item is a type of "aircraft", but admits, or the FAA finds, that the item lacks the documentation (e.g., aircraft certification standards or maintenance standards or the data plate) needed in order to determine whether the item is an aircraft of a certain type; or
5. Where the aircraft registration applicant asserts that an item is an "aircraft", but the applicant admits, or the FAA finds, that so-called aircraft is in an unassembled or disassembled condition.

The decisions by the three courts discussed earlier are at least instructive – if not controlling -- for the proposition that the FAA has broad authority to interpret the word "aircraft" and that in order to register an item as an "aircraft" it must in fact be an aircraft. Two of the courts (the US Court of Appeals for the 9th Circuit and the Federal Bankruptcy Court) interpreted the word "aircraft" to be a complete aircraft, with all critical components present, installed and operable.

If an item is legitimately registered as an aircraft, the fact that over the course of its three-year registration it might, for example, become damaged or it might have a critical component removed, will not affect the validity of its aircraft registration certificate issued to the aircraft owner-applicant. The FAA's new three year aircraft registration rule will allow the aircraft registration certificate to remain valid. But if the aircraft is totally destroyed or scrapped, the aircraft registration certificate is ineffective (14 C.F.R. section 47.41(a)(3)) and must be returned to the FAA in accordance with 14 C.F.R. section 47.41(b)(3).