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Ms. Lisa Jones
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, N.W.
New Executive Office Building, Room 9013
Washington, DC 20506-0001

Re: OMB Proposed Bulletin for Good Guidance Practices

Dear Ms. Jones:

The Aeronautical Repair Station Association is pleased to submit the following comments to the proposed document referenced above, which the Office of Management and Budget (OMB) posted in the Federal Register on November 30, 2005.

ARSA represents entities certificated under Part 145 of the Federal Aviation Regulations (FARs) and similar rules issued by National Aviation Authorities (NAAs) worldwide. We interact with the Federal Aviation Administration (FAA) on behalf of our members, monitoring their rules and guidance. We also work with other agencies to advance the Association's goals.

ARSA thanks OMB for recognizing the impact guidance material has on the public. We agree with OMB that transparency in this process is critical, as guidance is not rulemaking.

Federal agencies often limit distribution of proposed policies and bulletins to internal staff, despite the fact that new obligations are imposed on the public. Regulated parties are unable to comment because the document is labeled as internal. Once these policies are in effect, it is difficult for organizations such as ARSA to have their comments and concerns heard.

Examples of Rulemaking through Guidance

The FAA Suspected Unapproved Parts (SUPs) program is a classic example of rulemaking through guidance. The FAA issued Order 8120.10, and corresponding Flight Standards Handbook Bulletin for Airworthiness (HBAW) 96-08 and 97-10. These documents directed Inspectors to review repair stations' SUPs procedure. Inspectors then demanded repair stations implement a new reporting and quarantine requirement.

At the time, all repair stations conducted quality control inspections pursuant to the FARs. These inspections are conducted to ensure only airworthy materials are stocked for installation. When SUPs were identified, the repair station would return the part to the seller, fix it or throw it away.

The new bulletin changed the requirements. While the FARs do not dictate that violations of regulations or guidance material be reported to the FAA, the SUPS guidance created a duty to report to the FAA any potential violation of SUPs *policy*, which is itself not a *regulation*. Once the part was reported as a SUP, repair stations needed to keep it quarantined until the FAA told them how it could be discarded. The FAA created this new “obligation,” and the additional costs associated with it, not through public notice and comment on a proposed rule, but through adoption of a policy. Once the policy was in place, inspectors demanded adherence to its requirements as they would regulations.

Issuing internal bulletins to guide inspectors is common practice, but the SUPs bulletins exceeded the scope of internal guidance. No regulatory requirement exists for repair stations to report the presence of SUPs, and no regulation specifies how long to keep them, or how to discard them. ARSA agrees that the proper handling of SUPs is important to safety; however we disagree with the FAA’s implementation of these voluntary measures.

Another example of the FAA’s rulemaking through guidance reached the Court of Appeals for the District of Columbia Circuit. In *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration*,¹ the Court found that the FAA had improperly attempted to change existing policy through a guidance document called a “Notice to Operators.” The Alaska Hunters Association (AHA) had operated aircraft under Part 91 of the FARs for 35 years, based on a 1963 Civil Aeronautics Board (CAB) decision. In 1998, the AHA filed a petition for rulemaking to incorporate the CAB decision into the FAA’s rules. Before considering the petition, the FAA issued a “Notice to Operators” stating that AHA’s operations did not qualify under Part 91. This would require AHA to become a certificated air carrier under Part 135.

The AHA challenged the FAA’s ability to modify an established interpretation through an internal document. The D.C. Court of Appeals sided with AHA, finding the FAA had overstepped its authority. By altering the interpretation of its rule, the FAA effectively made a rule change without providing the notice and comment required by the Administrative Procedures Act (APA).

There are many examples of the FAA creating regulatory requirements through the adoption of guidance. ARSA would be happy to provide additional examples to the OMB, if requested.

¹ 177 F.3d 1030 (D.C. Cir. 1999)

Suggested Changes to “Good Guidance Bulletin”

We respectfully request several changes to the language in the Good Guidance Bulletin. These changes will help to prevent the continued use of guidance documents for rulemaking.

The first change would be an addition to Section II(2) of the proposed bulletin, which lists the standard elements to be included in a significant guidance document. While these are important, they are not all-encompassing. The regulated public needs to be notified of documents that may affect them. ARSA recommends adding the following:

- (viii) Identify the persons effected by the document;
- (ix) Provide identified persons with reasonable time to comment on the proposed policy.

This would force agencies to examine whom the document will impact, regardless of the “internal” designation.

Second, ARSA recommends a series of factors for an agency to examine before issuing guidance documents. To help identify cases where guidance is used for rulemaking, an agency should consider:

- Underlying need for the document;
- Relevant regulatory basis for issuing the document;
- Relevant preceding guidance (i.e., Advisory Circulars, Orders, policy statements, etc.);
- Applicable legal interpretations or decisions (i.e., precedents);
- Ambiguities or inconsistencies in regulations and guidance;
- Persons responsible for administering or enforcing guidance materials;
- Persons affected by the guidance;
- Economic impact on the affected persons;

In reviewing the agency’s responses, OMB can make a determination as to whether the agency is attempting to circumvent the rulemaking process by issuing guidance. This strengthens OMB’s oversight capacity, and provides a valuable check on agency authority.

Additionally, we ask that OMB change the definition of “significant guidance document” in section I(3)(i). Currently, a document must “reasonably be anticipated to lead to an annual effect of \$100 million or more” before an agency is required to publish it in the Federal Register and consider public comments. This threshold encourages agencies to ignore effected parties so they may categorize their document as mere “guidance.” As it currently stands, the FAA and other agencies do not perform a complete economic analysis for internal documents under the Regulatory Flexibility Act. Agencies often take the position that an intra-agency policy only affects their employees. In reality, internal

documents such as the ones mentioned above can have significant economic implications. Even if an analysis is performed, many parties are overlooked, and the true financial impact is not realized. OMB's current definitions allow agencies to continue conducting incomplete analyses in order to circumvent the notice and comment requirements.

Furthermore, if a document will have an economic impact of \$100 million or more per year, this is significant enough to qualify as a rule change, not merely guidance on a pre-existing regulation. Such documents should be held to the notice and comment procedures of the APA.

ARSA recommends OMB remove the \$100 million dollar provision. Rather, agencies should make all guidance documents available for public comment by publishing them on their Web sites. Agencies should also be required to respond to comments within a reasonable amount of time.

Conclusion

The Department of Transportation urges agencies under its authority to make their documents available for public comment. The FAA issues many documents including its HBAW and Flight Standards Bulletins for Airworthiness (FSAW) without providing official notice or opportunity for comment. These documents detail how regulated parties are expected to comply with FAA policy. They also provide an opportunity for the agency to engage in rulemaking without following the requirements of the APA or the Regulatory Flexibility Act. The FAA has the authority to interpret its regulations; however it does not have the power to adopt policy that exceeds the scope of the FARs or the APA.

ARSA believes OMB's goal of monitoring agency compliance with the APA is important. ARSA's suggested changes to the Good Guidance Bulletin would help to further that objective by increasing the visibility of "internal" guidance documents. Regulated parties would be made aware of policies that might affect them, and could comment before it is adopted. Providing transparency to agency's guidance procedures fosters the type of "good government" that ARSA supports.

Thank you for considering our comments. Should you have any questions or desire additional information, please do not hesitate to contact the undersigned at 703 739 9543.

Respectfully Submitted,

A handwritten signature in blue ink that reads "VM Koenig". The signature is written in a cursive style with a large, looped "V" and "M".

Virginia M. Koenig
Associate Counsel