



ALASKA AIR CARRIERS ASSOCIATION

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Subject: Regulatory Requirements vs. Guidance

The purpose of this letter is to draw your attention to the continued use of amended guidance instead of changing regulations through the Administrative Procedures Act. AACAA further requests a thorough assessment of the Federal Aviation Administration regulatory process be conducted, and a determination of FAA conformity to the Administrative Procedures Act be provided as soon as practical. AACAA members have been forced to abide by the department's request for changes to their procedures under threat of enforcement.

On November 16, 2017, the Attorney General published a memorandum addressing the improper use of department guidance documentation. The Attorney General letter is attached, however, below is what AACAA believes is a core summary of intent. The Attorney General wrote:

“In promulgating regulations, the Department must abide by constitutional principles and follow the rules imposed by Congress and the President. These

laws and regulations include the fundamental requirement that agencies regulate only within the authority delegated to them by Congress. They also include the Administrative Procedure Act's need to use, in most cases, notice-and-comment rule-making when purporting to create rights or obligations binding on members of the public or the agency.

Not every agency action is required to undergo notice-and-comment rule-making. For example, agencies may use guidance and similar documents to educate regulated parties through plain-language restatements of existing legal requirements or provide non-binding advice on technical issues through examples or practices to guide the application or interpretation of statutes and regulations. But guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch.”

Alaskan air carriers remain concerned over FAA’s continued use of guidance documents, modified internally without comment from industry, then passed on to Alaskan air carriers as regulation. This action sets a precedent that allows regulation through guidance, bypassing the usual FAA rule-making process, the Administrative Procedures Act and the FAA’s guidance (FS8000.96 Chapter 2.2).

For example, current weather requirements for release and alternate airports are covered in 121.611 and 121.625, respectively:

§121.611 Dispatch or flight release under VFR.

No person may dispatch or release an aircraft for VFR operation unless the ceiling and visibility en route, as indicated by available weather reports or forecasts, or any combination thereof, are and will remain at or above applicable VFR minimums until the aircraft arrives at the airport or airports specified in the dispatch or flight release.

§121.625 Alternate Airport weather minima.

Except as provided in §121.624 for ETOPS Alternate Airports, no person may list an airport as an alternate in the dispatch or flight release unless the appropriate weather reports or forecasts, or any combination thereof, indicate that the weather conditions will be at or above the alternate weather minima specified in the certificate holder's operations specifications for that airport when the flight arrives.

In the above regulations Part 121.611 speaks to “available weather reports or forecasts, or any combination thereof,” and part 121.625 uses very similar language, “appropriate weather reports or forecasts, or any combination thereof.” FAA interprets the regulation to make “or” into “and,” and include restrictions not found in the regulation. There is no requirement within the law for an alternate airport to have a TAF and a weather report. Alaskan air carriers understand the rulemaking process and should FAA desire new regulations, AACA suggests the regular rulemaking process be followed to change the rule.

Secondly, if there is no TAF available for a destination, the Area Forecast was precisely the appropriate substitute weather product. This reinterpretation of Area Forecasts for Part 121 operations is reflected in the latest revision AC 00-45H which was released last year, but in previous iterations of AC 00-45, said the following about Area Forecasts:

“The Area Forecast (in conjunction with AIRMETs, SIGMETs, Convective SIGMETs, CWAs, etc.), is used to determine forecast en route weather and to interpolate conditions at airports which do not have a Terminal Aerodrome Forecast (TAF). As such, it serves as a flight planning and pilot weather briefing aid for use by general aviation pilots, civil and military aviation operations....”

Part 121 was interjected into the latest series of Advisory Circulars regarding Area Forecasts, and it wasn’t until the most recent revision recently released that the text quoted immediately above was removed. It is noteworthy that this change was not accompanied by any changes to the underlying Part 121 regulations.

FAA guidance document 8900.1 is the FAA internal document used to assist the local FAA branches, as well as the onsite FAA representatives, to have a common interpretation of the regulations. It was created some years ago to support the FAA’s attempt to have common enforcement of the regulation regardless of a particular field office (FSDO) location, as there was often a disparity of enforcement between FSDO’s.

8900.1, Section 3, Chapter 26 until recently stated:

“Part 121 requires operators conducting operations within the 48 contiguous States to use weather reports prepared by the U.S. National Weather Service (NWS) or sources approved by the NWS. Although Part 121 does not specify that weather reports prepared or approved by the NWS must be used in Alaska, Hawaii, and U.S. territories, it is FAA policy that weather reports prepared or approved by the NWS must be used by all part 121 operators in

areas where NWS services are available. When operating outside the 48 contiguous States where NWS services are not available, part 121 domestic and flag operations must use weather reports prepared by sources approved by the FAA. Additionally, under part 121, § 121.101(c), certificate holders are permitted to use forecasts prepared from weather reports made by any source approved under an Adverse Weather Phenomena Reporting and Forecasting Subsystem established in compliance with part 121, § 121.101(d). Supplemental operations outside the United States require the use of weather reports produced by sources found satisfactory by the FAA by § 121.119. Any Part 121 visual flight rules (VFR) operation must be based on weather reports prepared by the NWS, sources approved by the NWS or sources approved by the FAA.”

Remarkably this language was eliminated from the 8900.1, again highlighting the convenience of imposing rule through guidance without the inconvenience inherent in the rulemaking process. The guidance previously excluded Alaska, Hawaii, and US Territories from the requirements of weather reports prepared or approved by the NWS when not available. Again there has been no change to the Part 121 regulations and no change to the infrastructure available in Alaska yet requirements are changing concerning guidance documentation and being used to regulate.

There have been no Part 121 accidents or incidents, or changes to regulation that would spur driving any of this action from the FAA. There is an underlying theme within a small group in the FAA who believe the Safety Management System (SMS) process should continually be adding new restrictions as a way to show an improvement in safety. Unfortunately, those who are making the burdensome “new interpretations” have little or no experience regarding firsthand experience in the commercial or private operation of aircraft.

The current SMS process is a valuable tool based on the Deming Process created by W. Edwards Deming who used the Shewart Cycle. None of the methods require change for the sake of change. Changes are driven by system failures, an inefficiency which impacts safety and economics or analyses which show a significant risk of system failure. The regulations being discussed here have been in place and enforced as written for over 50 years, with an excellent safety record.

Last year’s reinterpretation by this small FAA group offers no real inherent safety improvement yet creates an economic burden on air commerce. In addition, this has led to the inability of Alaskan air carriers to provide essential

air service to rural communities or support resource development in remote locations supported solely by air. Effectively, this is an attempt to regulate through guidance, bypassing the usual FAA rule-making process, and not acting within the spirit of the Administrative Procedures Act or the FAA's guidance outlined in FS8000.96 chapter 2.2. The Alaskan air carriers have been told on numerous occasions by FAA personnel that the rule-making process is burdensome and it is easier for those individuals to regulate through guidance and advisory publications.

In some instances, various interpretations have been rewritten several times in an attempt to find a correct "interpretation." Meanwhile, companies attempting to provide goods and services can no longer confidently operate under the regulations as they are written.

The above weather examples should be considered the "canary in a coal mine" of how some divisions of the FAA see the future of regulation enforcement. AACA suggests the Secretary of USDOT, FAA Chief Counsel, and the Office of the Inspector General establish a committee to review FAA's consistency with the Administrative Procedures Act. As this hinders air commerce, it may be prudent to include the Secretary of Commerce.

Should, as we anticipate, the FAA's use of guidance instead of regulations not abide with the constitutional principles or rules imposed by the President and Congress, enforcement activities on the Part 121 weather "interpretation" and others should be deemed no longer relevant.

As it is, to operate by the regulations as written is challenging without first checking on the most recent interpretations. AACA would ask that this same ruling should be applied to numerous other changes in the FAA8900.1 internal guidance, which essentially rewrites Federal law without due process.

Best regards,



Matt Atkinson, Chair
Alaska Air Carriers Association



Jane Dale, Executive Director
Alaska Air Carriers Association

Cc
Senator Dan Sullivan
Congressman Don Young
Senator Lisa Murkowski