

Were any other discrepancies noticed during this inspection?		
<b>For Ercoupe Service Memorandum No. 35</b>		
Did you perform steps 1, 2, and 7 of the Ercoupe Service Memorandum No. 35?	NO	YES
Were any other discrepancies noticed during this inspection?		
<p><i>Send report to:</i> Roger A. Caldwell, Aerospace Engineer, FAA, ANM-100D, Denver ACO, 26805 East 68th Avenue, Room 214, Denver, Colorado 80249-6361; <i>fax:</i> (303) 342-1088; <i>E-mail:</i> roger.caldwell@faa.gov; and Univair Aircraft Corporation, 2500 Himalaya Road, Aurora, Colorado 80011</p>		
Figure 1		

### Paperwork Reduction Act Burden Statement

(g) A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120-0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES-200.

### Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Denver ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(2) Before using any approved AMOC, notify your Principal Maintenance Inspector or Principal Avionics Inspector, as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

(3) AMOCs approved for AD 52-02-02 are approved as AMOCs for this AD.

### Related Information

(i) For more information about this AD, contact Roger Caldwell, Aerospace Engineer, FAA, Denver ACO, 26805 East 68th Ave., Room 214, Denver, Colorado 80249-6361; telephone: (303) 342-1086; fax: (303) 342-1088; e-mail: roger.caldwell@faa.gov.

(j) For service information identified in this AD, contact Univair Aircraft Corporation, 2500 Himalaya Road, Aurora, Colorado 80011; telephone: (303) 375-8882, facsimile: (303) 375-8888; Internet: <http://univairparts.com>. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust

St., Kansas City, MO 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

Issued in Kansas City, Missouri, on April 7, 2011.

**Earl Lawrence,**

*Manager, Small Airplane Directorate, Aircraft Certification Service.*

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**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2010-1167]

#### Proposed Airworthiness Directive Legal Interpretation

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Proposed airworthiness directive interpretation.

**SUMMARY:** The Federal Aviation Administration is considering issuing a legal interpretation on various provisions in the regulations applicable to airworthiness directives. Comments from the public are requested to assist the agency in developing the final legal interpretation.

**DATES:** Comments must be received on or before May 16, 2011.

**ADDRESSES:** You may send comments identified by Docket Number FAA-2010-1167 using any of the following methods:

*Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.

*Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

*Hand Delivery or Courier:* Bring comments to Docket Operations in

Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Fax:* Fax comments to Docket Operations at 202-493-2251.

**FOR FURTHER INFORMATION CONTACT:** John King, Staff Attorney, Regulations Division, Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: 202-267-3073.

### SUPPLEMENTARY INFORMATION:

#### The Request

The Federal Aviation Administration's (FAA) Organization/Procedures Working Group (WG) of the Airworthiness Directive Implementation Aviation Rulemaking Committee (AD ARC) requested that the FAA provide a legal interpretation of several provisions in 14 Code of Federal Regulations (CFR) that would help resolve a number of issues that have been debated within the WG. These issues partly result from certain changes made in the plain language revision to CFR part 39 in 2002 (see 67 FR 48003, July 22, 2002).

#### Question 1—Continuing Obligation

Some members of the WG question the extent of an aircraft operator's continuing obligation to maintain an AD-mandated configuration. They ask about two regulations:

#### Section 39.7 What is the legal effect of failing to comply with an airworthiness directive?

Anyone who operates a product that does not meet the requirements of an applicable airworthiness directive is in violation of this section.

#### Section 39.9 What if I operate an aircraft or use a product that does not meet the requirements of an airworthiness directive?

If the requirements of an airworthiness directive have not been met, you violate § 39.7 each time you operate the aircraft or use the product.

The majority WG opinion is that the language of § 39.7, and its predecessor § 39.3, imposes an operational mandate that the requirements of the AD be maintained for each operation occurring after the actions required by the AD are accomplished. They conclude that § 39.9 expresses the well-established legal position that for continuing operations of products that do not comply with an AD, each flight is a separate violation.

The minority WG opinion is that if the unsafe condition identified in the AD was fixed at a moment in time, then § 39.7 no longer applies. The conclusion of the WG minority was that even if the product was determined to be in a condition contrary to the requirements of the AD at a later time, this change in configuration may be a violation of CFR 43.13(b), but not § 39.7.

#### **Proposed Response 1—Continuing Obligation**

Section 39.9 notes the need for both initial action by the aircraft operator and continued compliance by that aircraft operator with the AD requirements. Section 39.9 was added to the final rule in 2002 as a result of comments that the proposed version of the rule language combined compliance and non-compliance issues in one heading (proposed § 39.5, final version is § 39.7 of the 2002 rulemaking). The final rule preamble stated that the agency added § 39.9 “to refer to § 39.7, which is the rule that operators will violate if they fail to operate or use a product without complying with an AD that applies to that product.”

Section 39.9 explains the continuing obligation for aircraft operators to maintain the AD-mandated configuration. Section 39.7 imposes an operational requirement. Because the AD imposes an enforceable requirement to accomplish the mandated actions, the only way to give § 39.7 any meaning is to recognize that operators are required to maintain the AD-mandated configuration. Once the AD requirements are met an operator may only revert to normal maintenance if that maintenance does not result in changing the AD-mandated configuration.

The objective of part 39 and ADs generally is not just to require accomplishment of particular actions; it is to ensure that, when products are operated, they are free of identified unsafe conditions. Section 39.7 is the regulatory means by which the FAA prevents reintroduction of unsafe conditions. In 1965 the FAA recognized that maintenance may be the cause of some unsafe conditions: “The

responsibilities placed on the FAA by the Federal Aviation Act justify broadening the regulation [part 39] to make any unsafe condition, whether resulting from maintenance, design, defect, or otherwise, the proper subject of an AD.” (Amendment 39–106; 30 FR 8826, July 14, 1965). Prior to Amendment 39–106 ADs could not be issued unless the unsafe condition was related to a design feature. After Amendment 39–106 ADs could be issued for unsafe conditions however and wherever found. The FAA does not issue ADs as a substitute for enforcing maintenance rules. If a maintenance process is directly related to an unsafe condition, that maintenance action would be proper for an AD. Particularly for unsafe conditions resulting from maintenance, it would be self-defeating to interpret § 39.7 as allowing reversion to the same maintenance practices that caused or contributed to the unsafe condition in the first place.

#### **Question 2—Additional Actions**

Some members of the WG questioned the extent of an aircraft operator’s obligation to accomplish actions referenced in an AD beyond those actions necessary to resolve the unsafe condition specifically identified in an AD.

The opinion of these WG members is that a reasonable interpretation of the language in § 39.11 directing action to “resolve an unsafe condition” limits the FAA from requiring actions that do “not relate to correcting” the identified unsafe condition. In other words, an AD is limited to those tasks that resolve the unsafe condition, even if other tasks are explicitly listed in the AD or in a referenced service bulletin (SB). Even if § 39.11 doesn’t explicitly limit the types of actions that the FAA may mandate in ADs, these members believe that ADs are limited to imposing requirements that are both necessary and “directly related” to addressing an unsafe condition because that is the sole purpose of ADs, as defined in part 39. The belief is that this would allow an operator to comply with those actions that, in the operator’s opinion, correct the unsafe condition without having to obtain an alternative means of compliance (AMOC) for other actions, such as access and close-up procedures, that are “not directly related” to addressing that identified unsafe condition.

Other members of the WG have the opinion that § 39.11 is merely descriptive of the types of actions required by an AD; it neither imposes obligations on the operator nor limits the FAA’s authority in issuing an AD.

These members believe that, given the FAA’s broad regulatory authority, ADs may impose requirements that operators may not consider necessary and “directly related” to resolving the unsafe condition.

#### **Proposed Response 2—Additional Actions**

The FAA points to the language contained in § 39.11 that answers the WG’s second question.

#### **Section 39.11 What actions do airworthiness directives require?**

Airworthiness directives specify inspections you must carry out, conditions and limitations you must comply with, and any actions you must take to resolve an unsafe condition.

First Title 49, United States Code, § 44701, establishes the FAA’s broad statutory authority to issue regulations in the interest of aviation safety, and the issuance of an AD is an exercise of this authority. While describing the types of actions required by ADs, § 39.11 does not limit the broad authority established by the statute. The requirements of the AD are imposed by the language of the AD itself, and not by § 39.11. Thus an AD may require more actions than correcting the specific unsafe condition. An example would be an AD requirement for certain continuing maintenance actions to prevent or detect the unsafe condition in the future.

In developing an AD, the FAA exercises its discretion in determining what actions are to be required in the interest of aviation safety. This discretion is limited only by the Administrative Procedure Act’s prohibition on rulemaking actions that are “arbitrary and capricious.” Provided the actions required by an AD are reasonably related to the purpose of resolving the unsafe condition, it is within the FAA’s discretion to mandate them. For example, service information frequently includes instructions for accessing the area to be worked on to address the unsafe condition. Because these access instructions are reasonably related to addressing the unsafe condition, it is within the FAA’s discretion to mandate them.

We understand that some members of the AD ARC believe that some ADs are overly prescriptive with respect to mandated actions that they believe are unnecessary to address the unsafe condition. As explained previously, § 39.11 does not address this concern. Rather, the rulemaking process by which individual ADs are adopted provides the public with an opportunity to identify and comment upon these concerns with each AD. In addition,

each AD contains a provision allowing for approval of an AMOC, which allows operators to obtain relief from requirements they consider unnecessary or unduly burdensome.

### Question 3—Use of the term “Applicable”

A WG member cited the use of the term “applicable” in a specific AD, AD 2007–07–02 (72 FR 14400, March 28, 2007), which contains these requirements:

(f) Within 60 months after the effective date of this AD: Modify the activation mechanism in the chemical oxygen generator of each passenger service unit (PSU) by doing *all the applicable actions specified in the Accomplishment Instructions of the applicable service bulletin specified in Table 1 of this AD.* [Emphasis added.]

The WG member asked for an explanation of the FAA’s use of the word “applicable” in the two instances of its use in paragraph (f) of the AD.

### Proposed Response 3—Use of the Term “Applicable”

“Applicable” has the same meaning in both places in paragraph (f). The second usage references Table 1 in the AD that identifies the model(s) of airplanes to which each service bulletin applies. So the “applicable service bulletin” is the one that applies to each corresponding airplane model, as indicated in the table in the AD. Similarly, “all the applicable actions” specified in each applicable service bulletin are those actions that are identified as applying to a particular airplane. “Applicable” is a necessary qualifier in this context for two reasons: (1) In many ADs, the referenced service bulletins specify different actions for different airplane configurations, typically identified as “Group 1, Group 2,” *etc.* (2) In many ADs, the referenced service bulletins specify different actions depending upon conditions found during accomplishment of previous steps in the instructions, for example, if a crack is smaller than a specified size, repair in accordance with the Structural Repair Manual; if larger, repair in accordance with a method approved by the Aircraft Certification Office. So “applicable” limits the AD’s requirements to only those that are specified in the service bulletin for the configuration and conditions of the particular airplane. We intend for the word “applicable” to limit the required actions to those that apply to the particular airplane under the specific conditions found.

The opinion that “applicable” in this context should be interpreted to refer only to those actions in the service

bulletin that are necessary to address the unsafe condition, and that operators should not be required to accomplish any other actions that they determine are not necessary, is incorrect. Without the modifier “applicable,” the requirement to accomplish “all actions specified in the service bulletin” would literally mandate accomplishing all actions, whether or not applicable to the configuration and condition of a particular airplane. The modifier “applicable” is necessary to avoid this literal, but unintended and likely overly burdensome, meaning.

For example, in AD 2007–07–02 different actions are required depending on the conditions found while accomplishing the modification. The adjective, “applicable,” is necessary to limit the required actions to those that are indicated for the conditions found. The purpose of the phrase, “by accomplishing all the applicable actions specified,” is to eliminate precisely the ambiguity that would be introduced by the WG members’ question. The operator is required to accomplish “all” the actions that are “applicable” to the affected airplane, without allowing discretion to determine which ones are, in the operator’s opinion, “necessary” to address the unsafe condition.

### Question 4—Impossibility

A member of the AD ARC questions whether an AD needs to specifically address “impossibilities” (for example, an AD requiring an action that is not possible for the specific aircraft to which the AD applies, such as modifying parts that have been removed during an earlier alteration).

### Proposed Response 4—Impossibility

The FAA points to the language of §§ 39.15 and 39.17 that answers the fourth question.

#### Section 39.15 Does an airworthiness directive apply if the product has been changed?

Yes, an airworthiness directive applies to each product identified in the airworthiness directive, even if an individual product has been changed by modifying, altering, or repairing it in the area addressed by the airworthiness directive.

#### Section 39.17 What must I do if a change in a product affects my ability to accomplish the actions required in an airworthiness directive?

If a change in a product affects your ability to accomplish the actions required by the airworthiness directive in any way, you must request FAA approval of an alternative method of compliance. Unless you can show the change eliminated the unsafe condition, your request should include the specific actions that you propose to address the

unsafe condition. Submit your request in the manner described in § 39.19.

If a change to a product makes it impossible to comply with the requirements of an AD, then the operator must request an AMOC approval.

The FAA does not have the resources to determine the modification status of every product to which the AD may apply. If it is impossible to comply with an AD as written, that does not mean the product does not have the unsafe condition. The only way to make sure the product does not, or that there is another acceptable way to address it, is to require an operator to obtain an AMOC approval.

For several years before part 39 was revised in 2002 the FAA included a Note in every AD that contained the same substance as the regulation. This revision to the regulations was a result of some operators claiming that an AD did not apply to a particular airplane because the airplane’s configuration had changed, even though that airplane was specifically identified in the “Applicability” paragraph of the AD. But a change in product configuration does not necessarily mean that the unsafe condition has been eliminated, and in some cases the unsafe condition may actually be aggravated. So it is necessary to emphasize that the “Applicability” paragraph of the AD determines AD applicability, not the configuration of an individual airplane. In the case of the affected component having been removed from the airplane, the operator must obtain an AMOC approval. If the removed component is replaced with a different component that may or may not retain the unsafe condition, this is a technical issue that must be addressed through the AMOC process. There are infinite variations on the “impossibility” issue that cannot be anticipated when drafting an AD but for which the AMOC process is well suited.

Issued in Washington, DC, on April 7, 2011.

**Rebecca B. MacPherson,**

*Assistant Chief Counsel for Regulations.*

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