APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 18-16396

MARY RIGGS, as Personal Representative of the ESTATE OF JONATHAN NEIL UDALL, for the benefit of the ESTATE OF JONATHAN NEIL UDALL, and PHILIP AND MARLENE UDALL as Next of Kin and Natural Parents of JONATHAN NEIL UDALL, deceased,

Plaintiff-Appellee,

v.

AIRBUS HELICOPTERS, INC.,

Defendant-Appellant,

v.

MATTHEW HECKER; DANIEL FRIEDMAN; BRENDA HALVORSON; GEOFFREY EDLUND; ELLING B. HALVORSON; JOHN BECKER; ELLING KENT HALVORSON; LON A. HALVORSON; SCOTT BOOTH; PAPILLON AIRWAYS, INC., DBA Papillon Grand Canyon Helicopters; XEBEC LLC,

Defendants-Appellees.

Argued and Submitted February 14, 2019
San Francisco, California
Filed September 20, 2019

OPINION

RAWLINSON, *Circuit Judge*:

Appellant-Defendant Airbus Helicopters, Inc. (AHI) appeals the district court's order granting motions to remand to state court. AHI contended that it properly removed this case to federal district court pursuant to 28 U.S.C. § 1442(a)(1) (§ 1442(a)(1)). According to AHI, the district court erroneously determined that AHI did not satisfy the "acting under" requirement of § 1442(a)(1). Reviewing *de novo*, we affirm the judgment of the district court.

I. BACKGROUND

In February, 2018, John Udall, a resident of the United Kingdom, was killed in a helicopter crash while touring the Grand Canyon. The helicopter (Crashed Helicopter) was owned and operated by several of the Hecker Defendants[1] and manufactured by AHI.

Plaintiff-Appellee Mary Riggs (Riggs) filed this action in Nevada state court against AHI and the Hecker Defendants, alleging that the Crashed Helicopter was defectively designed because the fuel tank was not crash-resistant, and could not withstand an impact of a minimal or moderate nature without bursting into flames and engulfing the passenger compartment.[2]

AHI removed the case to federal district court, asserting § 1442(a)(1) as the basis for removal. That provision permits removal to federal court of an action against "any officer (or any person acting under that

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[1] The named Hecker Defendants are: Matthew Hecker, Daniel Friedman, Brenda Halvorson, Geoffrey Edlund, Elling B. Halvorson, John Becker, Elling Kent Halvorson, Lon A. Halvorson, Scott Booth, and Papillon Airways, Inc., DBA Papillon Grand Canyon Helicopters, and Xebec LLC.

[2] In this appeal, the Hecker Defendants are Defendants-Appellees whose interests are aligned with the interests of Riggs.

officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). Riggs and the Hecker Defendants separately moved to remand the case to Nevada state court, on the basis that AHI did not meet the requirements of § 1442(a)(1).

While the motions to remand were pending before the district court, AHI moved to dismiss the lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(2) and (b)(6).[3]

The district court granted Hecker and Riggs's motions to remand. Noting that we have not directly addressed § 1442(a)(1) removal based on an FAA delegation, the district court relied primarily on the Seventh Circuit decision of *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015) addressing an almost identical situation. After applying the reasoning set forth in *Lu Junhong*, the district court ruled that AHI failed to meet the "acting under" requirement of § 1442(a)(1) because AHI's activities "pursuant to its [Federal Aviation Administration] delegation are rule compliance rather than rule making."

II. STANDARD OF REVIEW

"We review *de novo* a district court's decision to remand a removed case . . ." *Corona-Contreras v. Gruel*, 857 F.3d 1025, 1028 (9th Cir. 2017) (citation omitted).

III. DISCUSSION

Before turning to the issue before us, we first review the statutory framework that sets the stage for our decision.

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[3] Because we affirm the district court's order granting the motions to remand, AHI's motion to dismiss is now moot.

Congress has charged the Federal Aviation Administration (FAA) with regulating aviation safety in the United States pursuant to the Federal Aviation Act, 49 U.S.C. § 40101, *et seq*. *See Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc*., 555 F.3d 806, 808 (9th Cir. 2009). Pursuant to this authority, the FAA promulgated the Federal Aviation Regulations (FARs). *See* 14 C.F.R. § 1.1 *et. seq*. Standards for certification of helicopters, such as the Crashed Helicopter, are set forth in 14 C.F.R. § 27.1.

After demonstrating compliance with the FARs, an aircraft owner may obtain a certificate from the FAA approving the aircraft's design. *See* 49 U.S.C. § 44704(a)(1); 14 C.F.R. §§ 21.21, *et. seq*. The FAA requires a supplemental type certificate (Supplemental Certificate) for any design changes to a type-certificated aircraft. *See* 49 U.S.C. § 44704(b). Therefore, AHI could make no design change to the Crashed Helicopter absent the issuance of a Supplemental Certificate.

To help ameliorate the effect of the FAA's limited resources, 49 U.S.C. § 44702(d)(1) provides that the FAA "may delegate to a qualified private person . . . a matter related to–(A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and (B) issuing the certificate." The Eighth Circuit has described this delegation approach as a means of "reducing governmental costs [and] eas[ing] the burden of regulation on the aviation community by expediting the issuance of requested certifications." *Charlima, Inc. v. United States*, 873 F.2d 1078, 1081 (8th Cir. 1989).

Pursuant to 49 U.S.C. § 44702(d)(1), the FAA instituted the Organization Designation Authorization (Designation) program to delegate to organizations, such as AHI, the FAA's authority to inspect aircraft

designs and issue certifications. *See* 14 C.F.R. § 183.41. An FAA Designation "allows an organization to perform specified functions on behalf of the Administrator related to engineering, manufacturing, operations, airworthiness, or maintenance." 14 C.F.R. § 183.41(a). In 2009, AHI became an FAA-certified Designation holder with authority to issue Supplemental Certificates.[4]

The ongoing dispute in this appeal is whether AHI satisfies the "acting under" prong of § 1442(a)(1). AHI contends that it was formally delegated legal authority from the FAA, and that this delegation establishes that it was acting under the federal government for purposes of § 1442(a)(1). As an FAA delegee, AHI asserts that it does more than merely comply with federal law–it assists in carrying out the FAA's duties. Acknowledging that it does not make or promulgate federal law, AHI argues that the district court erroneously relied on the holding from the Seventh Circuit requiring entities to demonstrate a engagement in rule-making rather than rule compliance to satisfy the "acting under" requirement of § 1442(a)(1).

As a private party, AHI must demonstrate that it was "involved in an effort to assist, or to help carry out, the duties or tasks of the federal superior" to satisfy the "acting under" requirement of § 1442(a)(1).

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[4] The dissent references the recent crashes of the Boeing 737 Max to support the argument that Boeing is authorized to self-certify the safety of its fleet. *See Dissenting Opinion*, p. 992 n.2. However, in the aftermath of the tragic crashes, it became clear that the FAA was calling the shots, not Boeing. *See* Luz Lato, Michael Laris, Lori Aratani and Damian Paletta, *Democracy Dies in Darkness*, Washington Post (March 13, 2019) (reporting that the FAA grounded the 737 Max planes after a "recommendation" from Boeing).

Fidelitad, Inc v. Insitu, Inc., 904 F.3d 1095, 1099 (9th Cir. 2018) (citation and internal quotation marks omitted). The pivotal question then is whether AHI was assisting the FAA to carry out the FAA's duties or whether AHI was "simply complying with the law," which would not bring it within the scope of § 1442(a)(1). *Id*. at 1100.[5]

In *Watson v. Philip Morris Cos., Inc*., 551 U.S. 142, 145–47, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007), the United States Supreme Court addressed § 1442(a)(1) in the context of a defendant tobacco company's contentions that its close working relationship with a federal agency that directed and monitored its activities constituted conduct that satisfied the "acting under" requirement. Rejecting this argument, the Court held that Philip Morris did not satisfy the "acting under" requirement of § 1442(a)(1). *Id*. at 157, 127 S.Ct. 2301. In the Court's view, Philip Morris's mere compliance with federal regulations did not constitute "a statutory basis for removal." *Id*. at 153, 127 S.Ct. 2301 ("A private firm's compliance (or non-compliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal official."). According to the Supreme Court, the "acting under" requirement is not satisfied by mere compliance with a regulation "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored."[6] *Id*. The Court in *Watson* also noted that

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[5] The dissent notes that the FAA authorizes certification of others. *See Dissenting Opinion*, p. 994. However, that circumstance has zero effect on the legal analysis dictated by *Watson*.

[6] The dissent makes an effort to distinguish the controlling effect of *Watson* by focusing on the delegation by the FAA of authority to issue certificates. *See Dissenting Opinion*, pp. 994–

Philip Morris had never been delegated legal authority from a federal agency. *See id*. at 156, 127 S.Ct. 2301.

Although we have not directly addressed removal under § 1442(a)(1) based on an FAA designation, we have addressed removal under § 1442(a) in other contexts. In *Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245–47 (9th Cir. 2017), we considered whether the congressionally-authorized delegation of insurance claims administration by the United States Office of Personnel Management (OPM) to private insurers conferred federal officer status upon those private insurers for purposes of § 1442(a)(1). In *Goncalves*, the private insurer placed a subrogation lien on the proceeds of a settlement reached on behalf of Goncalves with Rady Children's Hospital. *See id*. at 1243. Goncalves filed a motion in state court to expunge the lien, and the private insurer removed the matter to federal court. *See id*. In determining whether removal was proper, we addressed the "acting under" provision of § 1442(a)(1). We explained that "[f]or a private entity to be 'acting

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95. However, as the Seventh Circuit cogently observed, several other industries, including the energy and health sectors, certify compliance without "acting under" the regulating agencies. *Lu Junhong*, 792 F.3d at 809–10. As the Seventh Circuit observed: "We doubt that the Justices would see a dispositive difference between certified compliance and ordinary compliance. Indeed, *Watson* rejected an argument . . . that a federal agency hadn't 'just' required compliance with regulations but also had 'delegated authority' to the manufacturer to determine compliance with those regulations. The [Supreme] Court thought that inadequate to make the manufacturer a person 'acting under' the agency." *Id*. at 809 (quoting *Watson*, 551 U.S. at 154–57, 127 S.Ct. 2301). We agree with the Seventh Circuit that the Supreme Court in *Watson* did not articulate a distinction between "certified" compliance and compliance generally. *Watson*, 551 U. S. at 151–52, 127 S.Ct. 2301.

under' a federal officer, the private entity must be involved in an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id*. at 1245 (citation omitted) (emphases in the original). We noted that the actions taken by the private entity "must go beyond simple compliance with the law and help officers fulfill other basic governmental tasks." *Id*. (citation and alterations omitted).

We ultimately concluded that the private insurer was "acting under" a federal officer. Not only did the OPM enter into a contract with the private insurer for a negotiated fee, the contract also authorized the insurer to pursue subrogation benefits that would otherwise be pursued by OPM. *See id*. at 1246–47. But for the actions of the private insurers, OPM would not be reimbursed when an employee successfully pursued a third-party for payment of healthcare expenses incurred by the employee. *See id*. at 1247. OPM delegated to the private insurer the authority to pursue subrogation claims on behalf of the government. *See id*. at 1247. Under these circumstances, we concluded that the private insurer was "acting under" a federal officer. *Id*. We reasoned that the pursuit of subrogation claims took the private insurer "well beyond simple compliance with the law and helped [federal] officers fulfill other basic governmental tasks. *Id*. (quoting *Watson*, 551 U.S. at 153, 127 S.Ct. 2301) (alteration and internal quotation marks omitted).

We recently grappled with the "acting under" requirement of § 1442(a)(1) in *Fidelitad*, 904 F.3d 1095, and we included a thoughtful discussion of *Watson*.[7] In

[7] Our colleague in dissent contends that the majority opinion misapplies *Watson*. *See Dissenting Opinion*, p. 990. However,

Fidelitad, a private company (Fidelitad) that sold drones in Latin America placed orders for the drones from a private drone manufacturer (Insitu). *See id*. at 1097–98. The sales in Latin America required "export licenses from the federal government." *Id*. at 1098. The two companies subsequently had a falling out over the provisions in the export licenses. *See id*. Consequently, Fidelitad filed an action against Insitu asserting, among other claims, that Insitu improperly delayed shipment of Fidelitad's order. *See id*. at 1097. Insitu moved for removal under § 1442(a)(1), arguing that it was "acting under" the federal government because it delayed orders to Fidelitad to ensure that Fidelitad complied with federal export laws. *See id*. at 1098–100.

We held that in order to invoke § 1442(a)(1) removal, a defendant "must demonstrate that (a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a colorable federal defense." *Id*. at 1099 (citations and internal quotation marks omitted). We identified the "central issue" in the case as "whether Insitu was acting pursuant to a federal officer's directions" when denying shipment of the drones. *Id*. (internal quotation marks omitted). We described the "paradigm" of a private entity "acting under a federal officer" as an individual "acting under the direction of a federal law enforcement officer," such as a private citizen assisting in a law enforcement raid. *Id*. (citations and internal quotation marks omitted).

We focused on the fact that no federal officer directed Insitu to delay the orders. *See id*. at 1100.

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that contention completely ignores our similar analysis of *Watson* in *Fidelitad*.

Nevertheless, Insitu maintained that it was "acting under" a federal officer because the delay was for the purpose of ensuring compliance with the International Traffic in Arms Regulation, 22 C.F.R. §§ 120–130, which governs the sale of military goods to foreign governments. *See id*. Citing *Watson* and *Lu Junhong*, we reiterated that mere compliance with governing regulations "does not bring a private actor within the scope of the federal officer removal statute." *Id*.

We explained that *Watson* involved allegations that a cigarette company sold cigarettes that delivered more tar and nicotine than advertised. *See id*. The company removed the case on the basis that it was acting under the direction of a federal officer by using a required test protocol that was "closely monitored by the federal government." *Id*. We described the Supreme Court as unpersuaded by the company's position, noting its holding that removal was not appropriate even though "a federal agency directs, supervises, and monitors a company's activities in considerable detail." *Id*. (citation and internal quotation marks omitted). According to our reading of *Watson* in *Fidelitad*, extensive "federal regulation alone" did not suffice to meet the "acting under" requirement of § 1442(a)(1). *Id*. We also observed that the Supreme Court's rationale in *Watson* counseled rejection of Insitu's argument regarding its stated attempts to not only comply with federal regulations, but to "also attempt[ ] to enforce specific provisions in Fidelitad's export licenses." *Id*. We recognized the Supreme Court's rejection in *Watson* of the notion "that a company subject to a regulatory order (even a highly complex order) is acting under a federal officer." *Id*. (quoting *Watson*, 551 U.S. at 152–53, 127 S.Ct. 2301) (parallel citation and internal quotation marks omitted).

Finally, in *Fidelitad* we acknowledged that government contractors may "act under federal officers." *Id*. (citation omitted). But, we clarified, the government did not contract with Insitu and the regulation and export licenses did not "establish the type of formal delegation that might authorize Insitu to remove the case." *Id*. at 1101 (quoting *Watson*, 551 U.S. at 156, 127 S.Ct. 2301) (alteration omitted).

The dissent seeks to minimize the persuasive power of *Fidelitad* by commenting that a different statutory regime was involved. *See Dissenting Opinion*, p. 995 n.3. However, the dissent's summary comment elides the fact that we were confronted with the identical issue in *Fidelitad* that we resolve in this case, whether the "acting under" requirement of § 1442(a)(1) was satisfied. The dissent also fails to grapple with the reality that in *Fidelitad*, we cited with approval the Seventh Circuit's *Lu Junhong* decision. Finally, despite criticizing the precedent cited by the majority, the dissent did not, and cannot, cite one case from this circuit that supports its analysis of the "acting under" requirement. The best the dissent can muster is a case from the Eleventh Circuit, *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996), decided eleven years prior to *Watson* and an argument from a Solicitor General that was rejected by the Supreme Court. *See Dissenting Opinion*, pp. 993–94.

Our analysis in *Fidelitad* is generally consistent with the approach taken by the Seventh Circuit in *Lu Junhong*, the case relied on by the district court. *Lu Junhong* involved a dispute over the design of a plane that broke apart during flight while landing in San Francisco. *See* 792 F.3d at 807. After being initially sued in state court, Boeing contended that it was entitled to removal under § 1442(a)(1) because it was

"acting under" the authority of the federal government, having been granted the authority by the FAA "to use FAA-approved procedures to conduct analysis and testing required for the issuance of type, production, and airworthiness certifications for aircraft under Federal Aviation Regulations." *Id.* at 807–08. Boeing's argument in *Lu Junhong* mirrors AHI's posture in this appeal.

The Seventh Circuit rejected Boeing's argument. *See id*. at 810. The court reasoned that "we know from [*Watson*] that being regulated, even when a federal agency directs, supervises, and monitors a company's activities in considerable detail, is not enough to make a private firm a person "acting under" a federal agency." *Id*. at 809 (citation and internal quotation marks omitted).

In discussing its rejection of Boeing's argument that it, unlike Philip Morris in *Watson*, possessed formal delegation from the FAA of the authority to certify compliance, the Seventh Circuit explained:

> [T]his [authority] is still a power to certify *compliance*, not a power to design the rules for airworthiness. The FAA permits Boeing to make changes to its gear after finding that the equipment as modified meets the FAA's standards; it does not permit Boeing to use gear that meets Boeing's self-adopted criteria.

Id. at 810 (emphasis in the original).

The Seventh Circuit interpreted *Watson* as requiring the delegation of "rule making" authority rather than "rule compliance" certification to meet the "acting under" standard. *Id*. The Seventh Circuit suggested that, at a minimum, Boeing would have to be delegated "a power to issue *conclusive* certification of

compliance." *Id*. (emphasis in the original). Because Boeing's self-certification was not binding on either the FAA or a reviewing court, the Seventh Circuit determined that Boeing did not come within the "acting under" provision of § 1442(a)(1). *See id*.

The district court in this case adopted the Seventh Circuit's "rule-making-rule-compliance" distinction in finding that AHI was not "acting under" a FAA delegation. Although we cited *Lu Junhong* with approval in *Fidelitad*, 904 F.3d at 1100, we notably did not incorporate the Seventh Circuit's rule-making-rule-compliance dichotomy. Rather, we referenced *Lu Junhong* for the proposition that compliance with the law "does not bring a private actor within the scope of the federal officer removal statute" and neither does delegation of authority "to self-certify compliance with the relevant regulations." *Id*. (quoting *Lu Junhong*, 792 F.3d at 808–10).

We are persuaded by the consistent reasoning of *Watson*, *Goncalves*, and *Fidelitad* to conclude that the district court committed no error in finding that AHI was not "acting under" a federal officer by virtue of becoming an FAA-certified Designation holder with authority to issue Supplemental Certificates. AHI concedes that, as a Designation holder, it "must perform all delegated functions *in accordance with* a detailed, *FAA-approved* procedures manual specific to each [Designation] holder." (emphasis added). Language such as "in accordance with" and "FAA-approved" suggest a relationship based on compliance rather than assistance to federal officers. *Cf. Goncalves*, 865 F.3d at 1245–46 (noting that a private insurer was "acting under" a federal officer when it entered into a contract with a government agency to pursue third-party reimbursements). Importantly, one of the regulations circumscribing an

FAA delegee's authority to certify provides that "each applicant *must allow* the FAA to make any inspection and any flight and ground test necessary *to determine compliance* with the applicable requirements of this subchapter."[8] 14 C.F.R. § 21.33 (emphasis added). This language explicitly denotes compliance and, as discussed, mere compliance with federal directives does not satisfy the "acting under" requirement of § 1442(a)(1), even if the actions are "highly supervised and monitored." *Watson*, 551 U.S. at 153, 127 S.Ct. 2301; *see also Goncalves*, 865 F.3d at 1245; *Fidelitad*, 904 F.3d at 1100.

AHI concedes that it cannot make design changes without approval from the FAA. At oral argument, AHI even acknowledged that the FAA has the authority to rescind any action taken by AHI in connection with the certification process. These facts demonstrate that AHI was duty-bound to follow prescriptive rules set forth by the FAA, thus falling within the "simple compliance with the law" circumstance that does not meet the "acting under" standard. *Goncalves*, 865 F.3d at 1247; *see also Fidelitad*, 904 F.3d at 1100. In sum, AHI's actions as an issuer of Supplemental Certificates fit squarely within the precept of mere compliance with regulatory standards and outside the "acting under" provision of 1442(a)(1). *Watson*, 551 U.S. at 153, 127 S.Ct. 2301.

We foreshadowed the outcome of this case in *Fidelitad*, noting with approval the determination in *Lu Junhong*, 792 F.3d at 808–10, that an "airplane manufacturer was not acting under a federal officer . . .

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[8] The dissent completely disregards this language requiring compliance with FAA regulations. *See Dissenting Opinion*, pp. 994–95 (denying Airbus' compliance obligation).

although federal law gave the manufacturer authority to self-certify compliance with the relevant regulations." 904 F.3d at 1100. In keeping with our analysis in *Fidelitad*, we hold that AHI was not acting under a federal officer although federal regulations gave AHI authority to issue Supplemental Certificates in accordance with FAA regulations. *See id*. Although we agree generally with the holding of *Lu Junhong*, as we did in *Fidelitad*, we decline to adopt the rule-making-rule-compliance distinction articulated by the Seventh Circuit and relied on by the district court. *See Lu Junhong*, 792 F.3d at 810. We are content to rely on the more clearly articulated common analyses from *Watson*, *Goncalves*, and *Fidelitad* focusing on whether the private entity is engaged in mere compliance with federal regulations. *See e.g*., *Fidelitad*, 904 F.3d at 1100.

Finally, AHI relies heavily on the district court decision of *Estate of Hecker v. Robinson Helicopter Co*., 2013 WL 5674982 (E.D. Wash. 2013). In *Hecker*, the plaintiff brought an action in state court, asserting state law claims for wrongful death, negligence, and products liability arising from a helicopter crash. *See id*. at *1. There, as here, the helicopter manufacturer removed the case to federal court under § 1442(a)(1), and the plaintiff moved to remand the case for lack of jurisdiction. *See id*. The district court held that the defendant's status as a Designation holder satisfied the "acting under" requirement. *Id*. at *2. However, not only is *Hecker* non-binding, it was decided before our decisions in *Goncalves* and *Fidelitad*.

IV. CONCLUSION

AHI inspected and certified its aircraft pursuant to FAA regulations and federal law and could not make any structural or design changes without the consent

of the FAA. The Supreme Court decision in *Watson* and our decisions in *Goncalves* and *Fidelitad* fully support the proposition that AHI's mere compliance with federal regulations did not satisfy the "acting under" requirement of § 1442(a)(1). We join the Seventh Circuit in concluding that an aircraft manufacturer does not act under a federal officer when it exercises designated authority to certify compliance with governing federal regulations.[9]

AFFIRMED.

[9] Because we conclude that AHI failed to meet the "acting under" requirement of § 1442(a)(1), we need not and do not address any other arguments advanced by the parties on appeal. *See Fidelitad*, 904 F.3d at 1101 n.4.

O'SCANNLAIN, *Circuit Judge*, dissenting:

The federal officer removal statute authorizes a defendant in a state court civil action to remove the case to federal court if it is "acting under" a federal agency. 28 U.S.C. § 1442(a)(1). In this case, the Federal Aviation Administration ("FAA") "delegate[d]" to Airbus Helicopters, Inc. ("Airbus") the authority to issue "certificates" on the agency's behalf—certificates that the FAA must otherwise issue on its own before an aircraft can be lawfully flown. 49 U.S.C. §§ 44702(d)(1), 44704. Because Airbus undertakes these duties on the FAA's behalf, I conclude that Airbus "act[s] under" a federal agency within the meaning of § 1442(a)(1). I believe that our court's contrary holding misunderstands the FAA's regulatory regime and misapplies the Supreme Court's decision in *Watson v. Philip Morris Cos.*, 551 U.S. 142, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007).

I respectfully dissent.

I

This case turns on the interaction between two statutes: the Federal Aviation Act, *see* 49 U.S.C. § 40103 *et seq.*, and the federal officer removal statute, *see* 28 U.S.C. § 1442.

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In the Federal Aviation Act, Congress charged the FAA with the duty to establish "minimum standards required in the interest of safety" for the "design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers." 49 U.S.C. § 44701(a)(1). The FAA promulgated (and regularly revises) the Federal Aviation Regulations, which delineate such standards. *See* 14 C.F.R. § 1.1

et seq. Given the technological complexity of modern aircraft, these safety standards dictate an aircraft's design from its critical components to its smallest detail. For instance, a helicopter—or, in the FAA's parlance, a "rotorcraft"—must satisfy regulations covering everything from its "landing gear" to the "number of self-contained, removable ashtrays." *Id.* §§ 27.729, 27.853(c)(1).

Besides imposing substantive safety standards, the Act also creates a "multistep certification process to monitor the aviation industry's compliance." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). Before an aircraft can lawfully take flight, the FAA must issue a series of "certifications" or "certificates"—terms that the Act uses interchangeably. The first of these is called a "type certificate," which the FAA "shall issue" if it finds the aircraft "is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed [by the FAA]." 49 U.S.C. § 44704(a)(1). Then, before the manufacturer can mass produce an approved design, it must obtain a "production certificate." *Id.* § 44704(c). To do so, the manufacturer must show that duplicates of the design will, among other things, "conform to the [type] certificate." *Id.* Finally, the owner of each aircraft must obtain an "airworthiness certificate" by showing that the aircraft "conforms to its type certificate and, after inspection, is in condition for safe operation." *Id.* § 44704(d)(1). It is illegal to operate an aircraft without an airworthiness certificate. *See id.* § 44711(a)(1).

Together, these certification requirements prohibit a manufacturer (or the aircraft's eventual owner) from altering an aircraft's design without the FAA's

approval. Instead, if a manufacturer wishes to make changes, it must seek one of two possible certificates. If a "proposed change . . . is so extensive that a substantially complete investigation of compliance . . . is required," then the manufacturer must seek a new type certificate from the FAA. 14 C.F.R. § 21.19. For less significant changes, the holder of a type certificate may seek a "*supplemental* type certificate." 49 U.S.C. § 44704(b)(1) (emphasis added); *see also* 14 C.F.R. § 21.113. Like an ordinary type certificate, a supplemental certificate authorizes the holder then to seek production and airworthiness certificates for the modified design. *See id.* § 21.119.

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Perhaps because of this elaborate certification process, Congress offered the FAA an unusual tool to ease its regulatory burden: the authority to delegate its duties to the private sector. Specifically, the Act states:

> (d) DELEGATION.—(1) Subject to regulations, supervision, and review the Administrator may prescribe, the Administrator may *delegate* to a qualified private person . . . a matter related to (A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and (B) issuing the certificate."

49 U.S.C. § 44702(d)(1) (emphasis added); *see also Varig Airlines*, 467 U.S. at 807, 104 S.Ct. 2755 ("[T]he FAA obviously cannot complete this elaborate compliance review process alone. Accordingly, [the Act] authorizes the Secretary to delegate certain inspection and certification responsibilities to properly qualified private persons.").

Since 1927, the FAA and its predecessor agency have established programs delegating its certification

authority to the private sector—either to individual engineers or to organizations. Establishment of Organization Designation Authorization Program, 70 Fed. Reg. 59,932, 59,932 (Oct. 13, 2005) (codified at 14 C.F.R. pts. 21, 121, 135, 145, 183) [hereinafter *ODA Rule*]. In 2005, the FAA exercised its authority under § 44702(d) to institute the Organization Designation Authorization ("ODA") Program, which "consolidat[es] and improve[s]" the "piecemeal organizational delegations" previously developed. *Id.* at 59,933.

Under such program, the FAA authorizes "ODA Holders" to "perform specified functions on behalf of the Administrator." 14 C.F.R. § 183.41. ODA Holders act as "representatives of the Administrator," and when "performing a delegated function, [they] are legally distinct from and act independent of the organizations that employ them." *ODA Rule*, 70 Fed. Reg. at 59,933. Further, to become an ODA Holder, an organization must sign a memorandum of understanding promising to "comply with the same standards, procedures, and interpretations applicable to FAA employees accomplishing similar tasks." Federal Aviation Administration, *Organization Designation Authorization Procedures*, Order 8100.15, at A1-17 (2006) [hereinafter *ODA Order*].[1]

Since 2009, Airbus has been a "Supplemental Type Certification ODA." *Id.* ¶ 2–6, at 5. In this capacity, Airbus has the authority to "develop and issue

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[1] Order 8100.15 "establishes the procedures, guidance, and limitations of authority [the FAA] grant[s] to an organization" under the ODA Program. *ODA Order*, at i. Since 2006, the FAA has amended Order 8100.15, *see* Federal Aviation Administration, *Organization Designation Authorization Procedures*, Order 8100.15B (2018), but the 2006 version of the Order governed at the time of the subject helicopter's manufacture and sale.

supplemental type certificates . . . and related airworthiness certificates." *Id*. Airbus may issue such certificates both for its own aircraft or for those of other applicants. *See id.* ¶ 11–7, at 88. Although the FAA may revoke Airbus's ODA status or reconsider its issuance of a specific certificate, *see* 49 U.S.C. § 44702(d)(2)–(3), a certificate issued by Airbus carries the same legal consequence as one issued by the FAA: it gives the FAA's formal approval to the aircraft's design (in the case of a supplemental type certificate) or the aircraft itself (in the case of an airworthiness certificate).[2]

B

The federal officer removal statute permits a defendant to remove to federal court a state court action brought against

> "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office . . . ."

28 U.S.C. § 1442(a)(1) (emphasis added). In *Watson*, the Supreme Court held that a person "act[s] under" a federal officer or agency if his actions "involve an effort to *assist*, or to help *carry out*, the duties or tasks of the

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[2] In the aftermath of the recent crash of the Boeing 737 Max in Ethiopia, there seems to be some appetite on Capitol Hill to revisit the FAA's private-public partnership. *See* Thomas Kaplan, *After Boeing Crashes, Sharp Questions About Industry Regulating Itself*, N.Y. Times (Mar. 26, 2019); David Koenig & Tom Krisher, *The FAA's Oversight of Boeing Will Be Examined in Senate Hearings*, Time (Mar. 27, 2019). But until (and unless) such proposals become law, we must apply the statute as it presently exists.

federal superior." 551 U.S. at 152, 127 S.Ct. 2301. Although a "private firm's *compliance* . . . with federal laws, rules, and regulations" does not itself satisfy the statute's "acting under" requirement, *id.* at 153, 127 S.Ct. 2301 (emphasis added), a formal "delegation of legal authority" goes beyond the "usual regulator/regulated relationship," *id.* at 156–57, 127 S.Ct. 2301. Thus, *Watson* counsels that the "delegation of legal authority . . . [to act] on the Government agency's behalf" satisfies § 1442(a)(1)'s "acting under" requirement. *Id.* at 156, 127 S.Ct. 2301.

II

Because the FAA delegates to ODA Holders its formal legal authority to issue certificates, I conclude, in respectful disagreement with the majority's analysis, that Airbus "act[s] under" the FAA.

A

1

Beginning with the text, the Federal Aviation Act compels the conclusion that the FAA delegates formal legal authority to ODA Holders. By its own terms, 49 U.S.C. § 44702(d)(1) authorizes the FAA to "delegate" a "matter related to" the "examination, testing, and inspection necessary to issue a certificate" and "issuing the certificate." To "delegate" means to "give part of one's power or work to someone in a lower position within one's organization." *Delegate*, Black's Law Dictionary (9th ed. 2009); *see also Delegate*, Webster's Third New International Dictionary (unabr. ed. 1986) ("[T]o entrust to another: transfer, assign, commit <power *delegated* by the people to the legislature> <one may [*delegate*] one's authority to a competent assistant>"). Congress's use of "delegate" thus suggests that the FAA may transfer its *own* formal legal powers

to private persons, and the rest of the statute accords with such interpretation. In 49 U.S.C. § 44702(a), for instance, Congress established that the "Administrator of the [FAA] may issue" the long list of certificates mandated by the Act. *See also* 49 U.S.C. § 44704 (same). Accordingly, the responsibility to issue certificates falls in the first instance to the FAA, and it is *this* authority that § 44702(d)(1) allows the agency to "delegate."

Confirming Congress's mandate, the FAA itself describes the ODA Program as a delegation of legal authority. Under the program, ODA Holders like Airbus function as "representatives of the Administrator" and "perform[ ] a delegated function." *ODA Rule*, 70 Fed. Reg. at 59,933; *see also* 14 C.F.R. § 183.41 (similar). The ODA Order states that the program "delegate[s] certain types of authority to organizations," and that such designees "act on the FAA's behalf." *ODA Order*, ¶ 1–1, at 1. Further, these delegees "assist" the agency and "help carry out" its manifold "duties [and] tasks," *Watson*, 551 U.S. at 152, 127 S.Ct. 2301 (emphasis removed), because the "[d]elegation of tasks to these organizations [allows] the FAA to focus [its] limited resources on more critical areas," *ODA Rule*, 70 Fed. Reg. at 59,933.

Altogether, Congress and the FAA expressly said—time and again—that the agency indeed "delegate[s]" to private persons (like Airbus) the authority to issue certificates, and *Watson* counsels that a "delegation of legal authority" satisfies § 1442(a)(1)'s "acting under" requirement. 551 U.S. at 154–57, 127 S.Ct. 2301. It follows that Airbus "act[s] under" the FAA.

2

I am not alone in this view. The Eleventh Circuit came to the same conclusion in *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996), and the Solicitor General has endorsed that court's holding. In its briefing for *Watson*, the Solicitor General argued that the defendant could *not* seek removal under the federal officer removal statute (as the Supreme Court later held), but it cited *Magnin* to support the argument that "a private citizen delegated authority to inspect aircraft by the [FAA] acts under a federal officer in conducting such an inspection and issuing a certificate of airworthiness." Brief for the U.S. as Amicus Curiae Supporting Petitioners at 26, *Watson*, 551 U.S. 142, 127 S.Ct. 2301. "The critical point," the Solicitor General continued, "is that the individual acts on behalf of the FAA Administrator in conducting the inspection." *Id.*

B

Despite the clear evidence of delegation, the majority concludes that Airbus's actions as an ODA Holder constitute mere "compliance" with FAA regulations. *See* Maj. Op. at 994–95. With respect, I believe the majority is wrong.

1

The majority's critical error is that it conflates Airbus's two distinct roles as a manufacturer and as an FAA delegee. Specifically, an ODA Holder acts as *either* the regulated party *or* the regulator—depending on the specific function performed. It is true, of course, that all manufacturers—in their capacity *as* manufacturers—must comply with the FAA's numerous safety standards whenever they design or build an aircraft. But as an ODA Holder, the organization also

acts as a "representative[ ] of the Administrator." *ODA Rule*, 70 Fed. Reg. at 59,933. In this capacity, the manufacturer is "legally distinct from" the organization, and its "authority . . . to act comes from an FAA delegation." *Id*. Put differently, the manufacturer doffs its "aviation industry hat" and dons its "FAA hat," and so clad, the ODA Holder exercises the *agency's* statutory authority to issue certificates.

Perhaps because the issuance of certificates so obviously constitutes an exercise of the FAA's governmental power, the majority seeks to recast the ODA Program as a "*self*-certification" regime. *See* Maj. Op. at 988–90 (emphasis added). The majority borrows such reasoning from *Lu Junhong v. Boeing Co.*, where the Seventh Circuit compared a manufacturer's authority to issue certificates to "a person filing a tax return" compelled to certify that he reported his income "honestly." 792 F.3d 805, 809 (7th Cir. 2015). Such "certified compliance," the court reasoned, was indistinguishable from other forms of "ordinary compliance" deemed insufficient to satisfy § 1442(a)(1). *Id.* at 810.

Once again, the majority—as *Lu Junhong* before it—evinces its misunderstanding of the regulatory regime. Although an ODA Holder issuing a certificate must ensure that the aircraft complies with the FAA's safety standards, the organization's issuance of the certificate does more; it stamps the FAA's imprimatur on the aircraft. In so doing, the ODA Holder exercises a power derived from the agency and independent from its responsibilities as a manufacturer. Indeed, the FAA authorizes ODA Holders like Airbus to issue certificates "to an applicant *other than* the ODA Holder"—thus confirming that such power cannot be reduced to *self*-certification. *ODA Order*, ¶ 11–6, at 88 (emphasis added). And because the nature of the

certification authority should not fluctuate depending on *who* is granted the certificate, the mere fact that Airbus certifies its own aircraft has no bearing on whether it "act[s] under" the FAA.

In short, a true self-certification regime (as with the taxpayer attesting to his income) involves an affirmation that the regulated party completed *his* duty; an ODA Holder's "certification" conveys the *agency's* formal approval to the aircraft.

2

The majority's flawed understanding of the ODA Program blinds it to the differences between this case and *Watson*. There, the defendant—Philip Morris—argued that the FTC had "delegated authority" to test cigarettes for tar and nicotine, and that it "'act[ed] under' officers of the FTC" when it conducted such testing. *Watson*, 551 U.S. at 154, 127 S.Ct. 2301 (emphasis removed). But the Supreme Court "found *no evidence* of any delegation of legal authority from the FTC to the industry association"—the "fatal flaw" in Philip Morris's argument. *Id*. at 156, 127 S.Ct. 2301 (emphasis added). Accordingly, the Court found no reason to treat "the FTC/Philip Morris relationship as distinct from the usual regulator/regulated relationship." *Id.* at 157, 127 S.Ct. 2301.

Eager to fit this case into *Watson*'s mold, the majority casts Airbus as a regulated party complying (or self-certifying compliance) with FAA rules and regulations. *See* Maj. Op. at 988–90. But as shown, Congress and the FAA said that the FAA delegates "legal authority" to act "on the Government agency's behalf." *Watson*, 551 U.S. at 156, 127 S.Ct. 2301. *That* delegation goes well beyond the "usual regulator/regulated relationship," *id.* at 157, 127 S.Ct. 2301, and

as a delegee Airbus "assist[s]" and "help[s] carry out" the duties and tasks of the FAA, *id.* at 152, 127 S.Ct. 2301 (emphasis removed). Under the correct reading of *Watson*, such a scheme satisfies § 1442(a)(1)'s "acting under" requirement. *Id.*[3]

III

The federal officer removal statute allows those who labor on the federal government's behalf, and are therefore sued in state court, to have such case tried in a federal forum. In this case, the FAA authorized Airbus to issue certificates that the agency would otherwise issue on its own, and such delegation satisfies § 1442(a)(1)'s "acting under" requirement. Of course, it might seem strange that a manufacturer's participation in this private-public partnership would permit it to avoid state court; § 1442's core purpose, after all, is to give *federal* officials "a *federal* forum in which to assert *federal* immunity defenses." *Watson*, 551 U.S. at 150, 127 S.Ct. 2301 (emphasis added). But the statute's text is broader still, and our court has discerned a "clear command from both Congress and the Supreme Court that when federal officers *and their agents* are seeking a federal forum, we are to

[3] The Ninth Circuit cases that the majority cites do not support its conclusion. *See* Maj. Op. at 985–88 (citing *Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237 (9th Cir. 2017), and *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095 (9th Cir. 2018)). Both cases apply *Watson* to statutory regimes quite different from the FAA's, and each decision's fact-intensive analysis defies extraction of a simple rule that resolves this case. The majority's broad assertion that the court in *Fidelitad* was "confronted with the identical issue" that we confront here is simply wrong, Maj. Op. at 987–88; *Fidelitad* did not address a situation where an entity had formally and explicitly been delegated authority to issue certificates on behalf of a federal agency, let alone the specific delegation that Airbus acts under here.

interpret section 1442 broadly in favor of removal." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006) (emphasis added). The clear consequence of Congress's handiwork is that FAA delegees perform the agency's tasks. Because Airbus is such a delegee, § 1442(a)(1) entitles it to a federal forum.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. NEVADA

Case No. 2:18-CV-912 JCM (GWF)

MARY RIGGS, *et al.*,

Plaintiff(s),

v.

MATTHEW HECKER, *et al.*,

Defendant(s).

Signed 07/16/2018

ORDER

JAMES C. MAHAN, *United States District Judge.*

Presently before the court is plaintiff Mary Riggs as personal representative of the estate of Jonathan Neil Udall and Philip and Marlene Udall's motion to remand. (ECF No. 15). Specially-appearing defendant Airbus Helicopters, Inc. ("AHI") filed a response (ECF No. 28), to which Riggs replied (ECF No. 37).

Also before the court is defendants Matthew Hecker, Daniel Friedman, Brenda Halvorson, Geoffrey Edlund, Elling Halvorson, John Becker, Elling Kent Halvorson, Lon A. Halvorson, Papillon Airways, Inc., d/b/a Papillon Grand Canyon Helicopters, Xebec LLC, and Scott Booth's (collectively, "the Papillon defendants") motion to remand. (ECF No. 19). AHI filed a response (ECF No. 28), to which the Papillon defendants replied (ECF No. 38).

I. Facts

The present action involves a dispute surrounding a helicopter accident.

On March 2, 2018, Riggs commenced an action in the Eighth Judicial District Court of Clark County, Nevada, against several individual and entity defendants stemming from a February 10, 2018, helicopter crash. (ECF No. 1, Ex. 2). In her claims against AHI, Riggs alleges that the subject helicopter was defectively designed in that the fuel system was not crash-resistant. *Id.*

On May 18, 2018, AHI filed a petition for removal to this court. *Id.* On June 8, 2018, Riggs filed a motion to remand. (ECF No. 15). On June 15, 2018, the Papillon defendants filed a motion to remand. (ECF No. 19). On July 9, 2018, AHI filed a motion to dismiss Riggs's complaint for lack of personal jurisdiction.[1] (ECF No. 36). Riggs subsequently filed a motion to defer briefing on the motion to dismiss (ECF No. 39), and a motion to shorten time (ECF No. 40).

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[1] AHI argues that the court should first consider its motion to dismiss for lack of personal jurisdiction before addressing Riggs's motion to remand. *See* (ECF No. 36). AHI correctly states that "the United States Supreme Court has held that a court can resolve the issue of personal jurisdiction before addressing subject matter jurisdiction." *Id.* at 3. In *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 587-88, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), the Court held that where "a district court has before it a straightforward personal jurisdiction issue presenting no complex question of state law, and the alleged defect in subject matter jurisdiction raises a difficult and novel question, the court does not abuse its discretion by turning directly to personal jurisdiction." Here, the subject matter jurisdiction inquiry does not involve a complex question. Therefore, the court will address Riggs's motion to remand before considering AHI's motion to dismiss. *See id.*

II. Legal Standard

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). Pursuant to 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a).

Procedurally, a defendant has thirty (30) days upon notice of removability to remove a case to federal court. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (citing 28 U.S.C. § 1446(b)(2)). Defendants are not charged with notice of removability "until they've received a paper that gives them enough information to remove." *Id.* at 1251.

Specifically, "the 'thirty day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face' the facts necessary for federal court jurisdiction." *Id.* at 1250 (quoting *Harris v. Bankers Life & Casualty Co.*, 425 F.3d 689, 690-91 (9th Cir. 2005) (alterations in original)). "Otherwise, the thirty-day clock doesn't begin ticking until a defendant receives 'a copy of an amended pleading, motion, order or other paper' from which it can determine that the case is removable." *Id.* (quoting 28 U.S.C. § 1446(b)(3)).

A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. § 1447(c). Remand to state court is proper if the district court lacks jurisdiction. *Id.* "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively

appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, federal subject matter jurisdiction must exist at the time an action is commenced. *Mallard Auto. Grp., Ltd. v. United States*, 343 F.Supp.2d 949, 952 (D. Nev. 2004) (citing *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir.1988)).

On a motion to remand, the removing defendant faces a strong presumption against removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992).

III. Discussion

a. Federal officer removal statute

In the notice of removal, AHI argues that this action is removable because this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1442. *See* (ECF No. 1). AHI contends that this action is removable "because the action involves a person that acted under the authority of an officer or agency of the United States." *Id.* at 3.

28 U.S.C. § 1442(a)(1), known as the federal officer removal statute, offers a federal forum to "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office."

A party seeking removal under § 1442(a)(1) must demonstrate that "(a) it is a person within the meaning of the statute; (b) there is a causal nexus between

its actions, taken pursuant to a federal officer's direction, and plaintiff's claims; and (c) it can assert a colorable federal defense." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006). Here, the parties dispute whether AHI satisfies § 1442(a)(1)'s "acting under" requirement.[2]

i. Whether AHI satisfies § 1442(a)(1)'s "acting under" requirement

The federal officer removal statute extends removal authority only to persons acting under an officer of the United States. *See* 28 U.S.C. § 1442(a)(1). A private person must assist or help carry out the duties or tasks of a federal supervisor in order to qualify as a person "acting under" a federal officer. *See Watson v. Philip Morris Cos.*, 551 U.S. 142, 152, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007).

In *Watson*, the Supreme Court clarified the scope of § 1442(a)(1) as applied to private actors in highly regulated industries. *Watson*, 551 U.S. at 145, 127 S.Ct. 2301. Plaintiff Lisa Watson filed a class action lawsuit against defendant Philip Morris, claiming that the company violated Arkansas law by misrepresenting the amount of tar and nicotine in cigarettes branded as "light." *Id.* at 146, 127 S.Ct. 2301. The defendant removed the case to federal court, contending that it was "acting under" the direct control of regulations promulgated by the Federal Trade Commission, thereby triggering the application of § 1442(a)(1). *Id.* The district court denied plaintiff's

[2] The parties do not dispute that AHI is a person under the statute. *See* 1 U.S.C. § 1 ("in determining the meaning of an Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, and associations.").

motion to remand and the Eighth Circuit affirmed. *Id.* at 147, 127 S.Ct. 2301.

In reversing the Eighth Circuit, the Court acknowledged the statutory requirement to broadly construe § 1442(a)(1), but stated that such construction is not without boundaries. *Id.* "Broad language is not limitless. And a liberal construction nonetheless can find limits in a text's language, context, history, and purposes." *Id.* In limiting the scope of § 1442(a)(1), the Court warned against granting manufacturers access to federal courts merely because of their participation in highly regulated industries:

> In our view the help of assistance necessary to bring a private person within the scope of the statute does not include simply complying with the law. The upshot is that a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone. A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official."

Id. at 152-53. The Court held that a company does not act under a federal officer merely by complying with federal law and regulations in a heavily regulated industry. *See id.* at 153, 157, 127 S.Ct. 2301.

The Ninth Circuit has not directly addressed § 1442(a)(1) removal based on an FAA designation. However, the Seventh Circuit recently applied *Watson* to a § 1442(a)(1) removal claim by an aircraft manufacturer in *Lu Junhong v. Boeing Co*, 792 F.3d 805, 806 (7th. Cir. 2015). In *Lu Junhong*, Boeing argued that it was acting under the FAA because: "(1) the FAA has granted Boeing authority to use FAA-approved proce-

dures to conduct analysis and testing for the issuance of type, production, and airworthiness certifications for aircraft under Federal Aviation Regulations; and (2) FAA Order 8100.9A authorizes and requires it to analyze the adequacy of its autopilot and autothrottle systems and certify that they meet the regulatory requirements of 14 C.F.R. § 25.1309." *Id.*

The Seventh Circuit rejected Boeing's argument that it was entitled to removal under § 1442(a)(1). *Id.* at 808. The court held that "certifications just demonstrate a person's awareness of the governing requirements and evince a belief in compliance." *Id.* Moreover, a "figure of speech [referring to certifications] does not make someone a federal officer or person 'acting under' one." *Id.* at 808-09. Instead, the Seventh Circuit held that "we know from *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007), that being regulated, even when a federal agency 'directs, supervises and monitors a company's activities in considerable detail,' is not enough to make a private firm a person 'acting under' a federal agency." *Id.* at 809 (internal citation omitted).

Moreover, several districts courts have confronted similar arguments for removal in the aviation context. The majority of those courts has remanded the cases to state court. *See, e.g.*, *Dietz v. Avco Corp.*, 168 F.Supp.3d 747, 755 (E.D. Pa. 2016) (holding that the defendants did not act under a federal officer when manufacturing and designing engine components pursuant to FAA authorization under 49 U.S.C. § 44702(d)); *Swanstrom v. Teledyne Cont'l Motors, Inc.*, 531 F.Supp.2d 1325, 1333 (S.D. Ala. 2008) (holding that a defendant cannot claim removal under § 1442(a)(1) simply because it has employees who are designated FAA authorized agents); *Vandeventer v. Guimond*, 494

F.Supp.2d 1255, 1267 (D. Kan. 2007) (holding that a defendant did not stand in the shoes of the FAA, or act under a federal officer or agency, when he conducted airworthiness inspection and certification).

Conversely, several district courts have recognized the government contractor defense in denying motions to remand.[3] *See, e.g.*, *Beckwith v. Gen. Elec. Co.*, No. 09-cv-0216, 2010 U.S. Dist. LEXIS 30360, 2010 WL 1287095 (D. Conn. Mar. 30, 2010) (denying motion to remand as defendant properly alleged government contractor defense); *Boyd v. Boeing Co.*, No. 15-cv-0025, 2015 WL 4371928, 2015 U.S. Dist. LEXIS 91226 (E.D. La. July 14, 2015) (same). However, the Court in *Watson* distinguished the government contractor defense from compliance by holding that "the assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." 551 U.S. at 153, 127 S.Ct. 2301.

Here, AHI argues that, as a holder of a Federal Aviation Administration ("FAA") Organization Designation Authorization ("ODA"), it "acted under" the authority of the FAA with respect to the claims Riggs asserts against it. (ECF No. 1 at 3). This authorization from the FAA to AHI is governed by 49 U.S.C. § 44702(d), which provides that the FAA "may delegate to a qualified person or to an employee under the supervision of that person, a matter related to: (A) the examination, testing, and inspection necessary to

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[3] In *Durham*, the Ninth Circuit dealt with federal contractor immunity. *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) ("Lockheed, like other federal military contractors, performs some activities on military bases that are protected by federal contractor immunity, and others that are not.").

issue a certificate under this chapter [49 U.S.C. §§ 44710, et seq.]; and (B) issuing the certificate." 49 U.S.C. § 44702(d).

AHI contends that the FAA delegation satisfies the "acting under" requirement because AHI "acts on behalf of and assists the FAA in the performance of the agency's federal mandate." (ECF No. 19 at 9). As an FAA designee, AHI "conducts the examination, testing, and inspection necessary to issue STCs, subject to the FAA's comprehensive and regular oversight."[4] *Id.* In light of these responsibilities, AHI argues that it "does more than just comply with the comprehensive and pervasive FAA regulatory scheme – it assists the FAA and helps carry out the FAA's functions – and this removal is based on much more than mere compliance with the regulatory regime." *Id.* at 9-10.

AHI extensively cites *Watson* in its response and argues that removal in this case is consistent with the Court's interpretation of § 1442(a)(1)'s scope. *See id.* AHI correctly notes that "the U.S. Supreme Court in *Watson* held that compliance with regulations alone is insufficient for removal under § 1442(a)(1)." *Id.* at 10. Moreover, AHI referenced a distinction drawn by the Court, stating that "the *Watson* Court held that the 'fatal flaw' in Phillip Morris's assertion of delegated authority was one of 'omission': there was 'no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the

[4] An STC is a supplemental type certificate. (ECF No. 1). STCs are required by the FAA in order for someone other than the type certificate holder to make major design changes to any type-certified aircraft. *Id.* AHI held an STC for the helicopter at issue in the present dispute. *Id.*

Government agency's behalf.'" *Id.* at 11. (citation omitted).

AHI argues that the "fundamental distinction between the FAA scheme here – where AHI was formally delegated authority by the FAA, and the tobacco industry regime in *Watson* – where no such delegation occurred – is the reason why removal here is appropriate." *Id.* AHI notes that "both in its amicus brief and at oral argument [in *Watson*], the U.S. solicitor general offered the FAA's delegation scheme as the 'proper' application of the federal officer removal statute." *Id.*

The Seventh Circuit, in *Lu Junhong*, addressed a similar argument. 792 F.3d at 810. "Boeing points to 49 U.S.C. § 44702(d)(1), which permits the FAA to conserve its resources by transferring some checking and certification functions to manufactures, and the FAA used that power in Order 8100.9A." *Id.* In rejecting Boeing's contention, the Seventh Circuit held that "this is still a power to certify compliance, not a power to design the rules for airworthiness. The FAA permits Boeing to make changes to its gear after finding that the equipment meets the FAA's standards; it does not permit Boeing to use gear that meets Boeing's self-adopted criteria." *Id.* Further, the court held that "when discussing the possibility that delegation might create 'acting under' status, the Court mentioned rule making rather than rule compliance as the key ingredient, and the FAA's order does not allow Boeing to change substantive rules." *Id.* (internal citation omitted).

Here, the FAA delegation under 49 U.S.C. § 44702(d)(1) does not allow AHI to create or change substantive rules. *See* 49 U.S.C. § 44702(d)(1). Moreover, the delegation does not allow AHI to manufacture gear

that meets its own self-adopted criteria. *See id.*; *see also Lu Junhong*, 792 F.3d at 810. Rather, the relevant regulation provides that "each applicant must make all inspections and tests necessary to determine (1) compliance with the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements." 14 C.F.R. § 21.33. Therefore, AHI's activities pursuant to its FAA delegation are rule compliance rather than rule making. *See Lu Junhong*, 792 F.3d at 810.

AHI additionally argues that "[district] courts within the Ninth Circuit that have considered an FAA organizational designee's status have held that such entities act under the FAA for the purposes of § 1442(a)(1)." (ECF No. 28 at 13). AHI correctly notes that several district courts have held that § 1442(a)(1) removal is proper for a party acting pursuant to an FAA delegation under 49 U.S.C. § 44702(d). *See, e.g.*, *Hecker v. Robinson Helicopter Co.*, No. 13-cv-03006, 2013 WL 5674982, at *2, 2013 U.S. Dist. LEXIS 149788, at *2 (E.D. Wash. Oct. 17, 2013) (holding that a defendant's ODA issued under § 44702(d) confers federal status as to any acts undertaken pursuant to that authority); *AIG Europe (UK) Ltd. v. McDonnell Douglas Corp.*, 2003 WL 257702, at *3, 2003 U.S. Dist. LEXIS 1770, at *2 (C.D. Cal. Jan. 28, 2003) (same).

Notably, AHI cites cases that relied on *Magnin v. Teledyn Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996), which predated *Watson*. The Seventh Circuit, in *Lu Junhong*, held that "we think that *Magnin* is inconsistent with *Watson* and cannot be considered authoritative." 792 F.3d at 810. The court agrees. Further, the cases cited by AHI do not reference *Watson*. *See Hecker,* 2013 WL 5674982, at *2, 2013 U.S. Dist. LEXIS 149888, at *2; *see also AIG Europe*

(UK) Ltd., 2003 WL 257702, at *3, 2003 U.S. Dist. LEXIS 1770, at *2. Therefore, the cases cited by AHI are unpersuasive.

The court holds that AHI does not satisfy § 1442(a)(1)'s "acting under" requirement. *See Lu Junhong*, 792 F.3d at 810. Therefore, removal is improper in this case. *See Durham*, 445 F.3d at 1251.

IV. Conclusion

The court will grant the pending motions to remand. The remaining outstanding motions are therefore moot.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Riggs's motion to remand (ECF No. 15) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the Papillon defendants' motion to remand (ECF No. 19) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that this case be, and the same hereby is, REMANDED to the Eighth Judicial District Court of Clark County, Nevada.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed November 21, 2019]

No. 18-16396

D.C. No. 2:18-cv-00912-JCM-GWF
District of Nevada, Las Vegas

MARY RIGGS, as Personal Representative of the ESTATE OF JONATHAN NEIL UDALL, for the benefit of the ESTATE OF JONATHAN NEIL UDALL, and PHILIP AND MARLENE UDALL as Next of Kin and Natural Parents of JONATHAN NEIL UDALL, deceased,

Plaintiff-Appellee,

v.

AIRBUS HELICOPTERS, INC.,

Defendant-Appellant,

v.

MATTHEW HECKER; DANIEL FRIEDMAN; BRENDA HALVORSON; GEOFFREY EDLUND; ELLING B. HALVORSON; JOHN BECKER; ELLING KENT HALVORSON; LON A. HALVORSON; SCOTT BOOTH; PAPILLON AIRWAYS, INC., DBA Papillon Grand Canyon Helicopters; XEBEC LLC,

Defendants-Appellees.

ORDER

Before: SCHROEDER, O'SCANNLAIN, and RAWLINSON, *Circuit Judges*.

Judge Rawlinson voted to deny the Petition for Rehearing or Rehearing En Banc.

Judge Schroeder voted to deny the Petition for Rehearing and recommended denying the Petition for Rehearing En Banc.

Judge O'Scannlain voted to grant the Petition for Rehearing and recommended granting the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

The Petition for Rehearing or Rehearing En Banc, filed October 25, 2019, is DENIED.

APPENDIX D

STATUTORY AND REGULATORY
PROVISIONS INVOLVED

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28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer

of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer—

(1) protected an individual in the presence of the officer from a crime of violence;

(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.

(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

(5) The term "State" includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.

49 U.S.C. § 44701. General requirements

(a) Promoting safety.—The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing—

(1) minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers;

(2) regulations and minimum standards in the interest of safety for—

(A) inspecting, servicing, and overhauling aircraft, aircraft engines, propellers, and appliances;

(B) equipment and facilities for, and the timing and manner of, the inspecting, servicing, and overhauling; and

(C) a qualified private person, instead of an officer or employee of the Administration, to examine and report on the inspecting, servicing, and overhauling;

(3) regulations required in the interest of safety for the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, including the reserve supply of fuel and oil carried in flight;

(4) regulations in the interest of safety for the maximum hours or periods of service of airmen and other employees of air carriers; and

(5) regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security.

(b) Prescribing minimum safety standards.—The Administrator may prescribe minimum safety standards for—

(1) an air carrier to whom a certificate is issued under section 44705 of this title; and

(2) operating an airport serving any passenger operation of air carrier aircraft designed for at least 31 passenger seats.

(c) Reducing and eliminating accidents.—The Administrator shall carry out this chapter in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation. However, the Administrator is not required to give preference either to air transportation or to other air commerce in carrying out this chapter.

(d) Considerations and classification of regulations and standards.—When prescribing a regulation or standard under subsection (a) or (b) of this section or any of sections 44702-44716 of this title, the Administrator shall—

(1) consider—

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a regulation or standard appropriate to the differences between air transportation and other air commerce.

(e) Bilateral exchanges of safety oversight responsibilities.—

(1) In general.—Notwithstanding the provisions of this chapter, the Administrator, pursuant to Article 83 bis of the Convention on International Civil Aviation and by a bilateral agreement with the aeronautical authorities of another country, may exchange with that country all or part of their respective functions and duties with respect to registered aircraft under the following articles of the Convention: Article 12 (Rules of the Air); Article 31 (Certificates of Airworthiness); or Article 32a (Licenses of Personnel).

(2) Relinquishment and acceptance of responsibility.—The Administrator relinquishes responsibility with respect to the functions and duties transferred by the Administrator as specified in the bilateral agreement, under the Articles listed in paragraph (1) for United States-registered aircraft described in

paragraph (4)(A) transferred abroad and accepts responsibility with respect to the functions and duties under those Articles for aircraft registered abroad and described in paragraph (4)(B) that are transferred to the United States.

(3) Conditions.—The Administrator may predicate, in the agreement, the transfer of functions and duties under this subsection on any conditions the Administrator deems necessary and prudent, except that the Administrator may not transfer responsibilities for United States registered aircraft described in paragraph (4)(A) to a country that the Administrator determines is not in compliance with its obligations under international law for the safety oversight of civil aviation.

(4) Registered aircraft defined.—In this subsection, the term "registered aircraft" means—

(A) aircraft registered in the United States and operated pursuant to an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in another country; and

(B) aircraft registered in a foreign country and operated under an agreement for the lease, charter, or interchange of the aircraft or any similar arrangement by an operator that has its principal place of business or, if it has no such place of business, its permanent residence in the United States.

(5) Foreign airworthiness directives.—

(A) Acceptance.—Subject to subparagraph (D), the Administrator may accept an airworthiness directive, as defined in section 39.3 of title 14, Code of Federal Regulations, issued by an aeronautical safety authority of a foreign country, and leverage that authority's regulatory process, if—

(i) the country is the state of design for the product that is the subject of the airworthiness directive;

(ii) the United States has a bilateral safety agreement relating to aircraft certification with the country;

(iii) as part of the bilateral safety agreement with the country, the Administrator has determined that such aeronautical safety authority has an aircraft certification system relating to safety that produces a level of safety equivalent to the level produced by the system of the Federal Aviation Administration;

(iv) the aeronautical safety authority of the country utilizes an open and transparent notice and comment process in the issuance of airworthiness directives; and

(v) the airworthiness directive is necessary to provide for the safe operation of the aircraft subject to the directive.

(B) Alternative approval process.—Notwithstanding subparagraph (A), the Administrator may issue a Federal Aviation Administration airworthiness directive instead of accepting an airworthiness directive otherwise eligible for acceptance under such subparagraph, if the

Administrator determines that such issuance is necessary for safety or operational reasons due to the complexity or unique features of the Federal Aviation Administration airworthiness directive or the United States aviation system.

(C) Alternative means of compliance.—The Administrator may—

(i) accept an alternative means of compliance, with respect to an airworthiness directive accepted under subparagraph (A), that was approved by the aeronautical safety authority of the foreign country that issued the airworthiness directive; or

(ii) notwithstanding subparagraph (A), and at the request of any person affected by an airworthiness directive accepted under such subparagraph, approve an alternative means of compliance with respect to the airworthiness directive.

(D) Limitation.—The Administrator may not accept an airworthiness directive issued by an aeronautical safety authority of a foreign country if the airworthiness directive addresses matters other than those involving the safe operation of an aircraft.

(f) Exemptions.—The Administrator may grant an exemption from a requirement of a regulation prescribed under subsection (a) or (b) of this section or any of sections 44702-44716 of this title if the Administrator finds the exemption is in the public interest.

49 U.S.C. § 44702. Issuance of certificates

(a) General authority and applications.—The Administrator of the Federal Aviation Administration may issue airman certificates, design organization certificates, type certificates, production certificates, airworthiness certificates, air carrier operating certificates, airport operating certificates, air agency certificates, and air navigation facility certificates under this chapter. An application for a certificate must—

(1) be under oath when the Administrator requires; and

(2) be in the form, contain information, and be filed and served in the way the Administrator prescribes.

(b) Considerations.—When issuing a certificate under this chapter, the Administrator shall—

(1) consider—

(A) the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and

(B) differences between air transportation and other air commerce; and

(2) classify a certificate according to the differences between air transportation and other air commerce.

(c) Prior certification.—The Administrator may authorize an aircraft, aircraft engine, propeller, or appliance for which a certificate has been issued authorizing the use of the aircraft, aircraft engine, propeller, or appliance in air transportation to be used in air commerce without another certificate being issued.

(d) Delegation.—

(1) Subject to regulations, supervision, and review the Administrator may prescribe, the Administrator may delegate to a qualified private person, or to an employee under the supervision of that person, a matter related to—

(A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and

(B) issuing the certificate.

(2) The Administrator may rescind a delegation under this subsection at any time for any reason the Administrator considers appropriate.

(3) A person affected by an action of a private person under this subsection may apply for reconsideration of the action by the Administrator. On the Administrator's own initiative, the Administrator may reconsider the action of a private person at any time. If the Administrator decides on reconsideration that the action is unreasonable or unwarranted, the Administrator shall change, modify, or reverse the action. If the Administrator decides the action is warranted, the Administrator shall affirm the action.

49 U.S.C. § 44704. Type certificates, production certificates, airworthiness certificates, and design and production organization certificates

(a) Type certificates.—

(1) Issuance, investigations, and tests.—The Administrator of the Federal Aviation Administration shall issue a type certificate for an aircraft, aircraft engine, or propeller, or for an appliance

specified under paragraph (2)(A) of this subsection when the Administrator finds that the aircraft, aircraft engine, propeller, or appliance is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed under section 44701(a) of this title. On receiving an application for a type certificate, the Administrator shall investigate the application and may conduct a hearing. The Administrator shall make, or require the applicant to make, tests the Administrator considers necessary in the interest of safety.

(2) Specifications.—The Administrator may—

(A) specify in regulations those appliances that reasonably require a type certificate in the interest of safety;

(B) include in a type certificate terms required in the interest of safety; and

(C) record on the certificate a numerical specification of the essential factors related to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

(3) Special rules for new aircraft and appliances.—Except as provided in paragraph (4), if the holder of a type certificate agrees to permit another person to use the certificate to manufacture a new aircraft, aircraft engine, propeller, or appliance, the holder shall provide the other person with written evidence, in a form acceptable to the Administrator, of that agreement. Such other person may manufacture a new aircraft, aircraft engine, propeller, or appliance based on a type certificate only if such other person is the holder of the type certificate or has permission from the holder.

(4) Limitation for aircraft manufactured before August 5, 2004.—Paragraph (3) shall not apply to a person who began the manufacture of an aircraft before August 5, 2004, and who demonstrates to the satisfaction of the Administrator that such manufacture began before August 5, 2004, if the name of the holder of the type certificate for the aircraft does not appear on the airworthiness certificate or identification plate of the aircraft. The holder of the type certificate for the aircraft shall not be responsible for the continued airworthiness of the aircraft. A person may invoke the exception provided by this paragraph with regard to the manufacture of only one aircraft.

(5) Release of data.—

(A) In general.—Notwithstanding any other provision of law, the Administrator may make available upon request, to a person seeking to maintain the airworthiness or develop product improvements of an aircraft, engine, propeller, or appliance, engineering data in the possession of the Administration relating to a type certificate or a supplemental type certificate for such aircraft, engine, propeller, or appliance, without the consent of the owner of record, if the Administrator determines that—

(i) the certificate containing the requested data has been inactive for 3 or more years, except that the Administrator may reduce this time if required to address an unsafe condition associated with the product;

(ii) after using due diligence, the Administrator is unable to find the owner of record, or the

owner of record's heir, of the type certificate or supplemental type certificate; and

(iii) making such data available will enhance aviation safety.

(B) Engineering data defined.—In this section, the term "engineering data" as used with respect to an aircraft, engine, propeller, or appliance means type design drawing and specifications for the entire aircraft, engine, propeller, or appliance or change to the aircraft, engine, propeller, or appliance, including the original design data, and any associated supplier data for individual parts or components approved as part of the particular certificate for the aircraft, engine, propeller, or appliance.

(C) Requirement to maintain data.—The Administrator shall maintain engineering data in the possession of the Administration relating to a type certificate or a supplemental type certificate that has been inactive for 3 or more years.

(6) Type certification resolution process.—

(A) In general.—Not later than 15 months after the date of enactment of the FAA Reauthorization Act of 2018, the Administrator shall establish an effective, timely, and milestone-based issue resolution process for type certification activities under this subsection.

(B) Process requirements.—The resolution process shall provide for—

(i) resolution of technical issues at pre-established stages of the certification process, as agreed to by the Administrator and the type certificate applicant;

(ii) automatic elevation to appropriate management personnel of the Federal Aviation Administration and the type certificate applicant of any major certification process milestone that is not completed or resolved within a specific period of time agreed to by the Administrator and the type certificate applicant; and

(iii) resolution of a major certification process milestone elevated pursuant to clause (ii) within a specific period of time agreed to by the Administrator and the type certificate applicant.

(C) Major certification process milestone defined.—In this paragraph, the term "major certification process milestone" means a milestone related to a type certification basis, type certification plan, type inspection authorization, issue paper, or other major type certification activity agreed to by the Administrator and the type certificate applicant.

(b) Supplemental type certificates.—

(1) Issuance.—The Administrator may issue a type certificate designated as a supplemental type certificate for a change to an aircraft, aircraft engine, propeller, or appliance.

(2) Contents.—A supplemental type certificate issued under paragraph (1) shall consist of the change to the aircraft, aircraft engine, propeller, or appliance with respect to the previously issued type certificate for the aircraft, aircraft engine, propeller, or appliance.

(3) Requirement.—If the holder of a supplemental type certificate agrees to permit another person to

use the certificate to modify an aircraft, aircraft engine, propeller, or appliance, the holder shall provide the other person with written evidence, in a form acceptable to the Administrator, of that agreement. A person may change an aircraft, aircraft engine, propeller, or appliance based on a supplemental type certificate only if the person requesting the change is the holder of the supplemental type certificate or has permission from the holder to make the change.

(c) Production certificates.—The Administrator shall issue a production certificate authorizing the production of a duplicate of an aircraft, aircraft engine, propeller, or appliance for which a type certificate has been issued when the Administrator finds the duplicate will conform to the certificate. On receiving an application, the Administrator shall inspect, and may require testing of, a duplicate to ensure that it conforms to the requirements of the certificate. The Administrator may include in a production certificate terms required in the interest of safety.

(d) Airworthiness certificates.—

(1) The registered owner of an aircraft may apply to the Administrator for an airworthiness certificate for the aircraft. The Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation. The Administrator shall register each airworthiness certificate and may include appropriate information in the certificate. The certificate number or other individual designation the Administrator requires shall be displayed on the aircraft. The Administrator may include in an airworthiness certificate terms required in the interest of safety.

(2) A person applying for the issuance or renewal of an airworthiness certificate for an aircraft for which ownership has not been recorded under section 44107 or 44110 of this title must submit with the application information related to the ownership of the aircraft the Administrator decides is necessary to identify each person having a property interest in the aircraft and the kind and extent of the interest.

(e) Design and production organization certificates.—

(1) Issuance.—Beginning January 1, 2013, the Administrator may issue a certificate to a design organization, production organization, or design and production organization to authorize the organization to certify compliance of aircraft, aircraft engines, propellers, and appliances with the requirements and minimum standards prescribed under section 44701(a). An organization holding a certificate issued under this subsection shall be known as a certified design and production organization (in this subsection referred to as a "CDPO").

(2) Applications.—On receiving an application for a CDPO certificate, the Administrator shall examine and rate the organization submitting the application, in accordance with regulations to be prescribed by the Administrator, to determine whether the organization has adequate engineering, design, and production capabilities, standards, and safeguards to make certifications of compliance as described in paragraph (1).

(3) Issuance of certificates based on CDPO findings.—The Administrator may rely on certifications of compliance by a CDPO when making determinations under this section.

(4) Public safety.—The Administrator shall include in a CDPO certificate terms required in the interest of safety.

(5) No effect on power of revocation.—Nothing in this subsection affects the authority of the Secretary of Transportation to revoke a certificate.

14 C.F.R. § 21.21. Issue of type certificate: normal, utility, acrobatic, commuter, and transport category aircraft; manned free balloons; special classes of aircraft; aircraft engines; propellers.

An applicant is entitled to a type certificate for an aircraft in the normal, utility, acrobatic, commuter, or transport category, or for a manned free balloon, special class of aircraft, or an aircraft engine or propeller, if—

(a) The product qualifies under § 21.27; or

(b) The applicant submits the type design, test reports, and computations necessary to show that the product to be certificated meets the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements of this subchapter and any special conditions prescribed by the FAA, and the FAA finds—

(1) Upon examination of the type design, and after completing all tests and inspections, that the type design and the product meet the applicable noise, fuel venting, and emissions requirements of this subchapter, and further finds that they meet the applicable airworthiness requirements of this subchapter or that any airworthiness provisions not complied with are compensated for by factors that provide an equivalent level of safety; and

(2) For an aircraft, that no feature or characteristic makes it unsafe for the category in which certification is requested.

14 C.F.R. § 21.33. Inspection and tests.

(a) Each applicant must allow the FAA to make any inspection and any flight and ground test necessary to determine compliance with the applicable requirements of this subchapter. However, unless otherwise authorized by the FAA—

(1) No aircraft, aircraft engine, propeller, or part thereof may be presented to the FAA for test unless compliance with paragraphs (b)(2) through (b)(4) of this section has been shown for that aircraft, aircraft engine, propeller, or part thereof; and

(2) No change may be made to an aircraft, aircraft engine, propeller, or part thereof between the time that compliance with paragraphs (b)(2) through (b)(4) of this section is shown for that aircraft, aircraft engine, propeller, or part thereof and the time that it is presented to the FAA for test.

(b) Each applicant must make all inspections and tests necessary to determine—

(1) Compliance with the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements;

(2) That materials and products conform to the specifications in the type design;

(3) That parts of the products conform to the drawings in the type design; and

(4) That the manufacturing processes, construction and assembly conform to those specified in the type design.

14 C.F.R. § 21.93. Classification of changes in type design.

(a) In addition to changes in type design specified in paragraph (b) of this section, changes in type design are classified as minor and major. A "minor change" is one that has no appreciable effect on the weight, balance, structural strength, reliability, operational characteristics, or other characteristics affecting the airworthiness of the product. All other changes are "major changes" (except as provided in paragraph (b) of this section).

(b) For the purpose of complying with Part 36 of this chapter, and except as provided in paragraphs (b)(2), (b)(3), and (b)(4) of this section, any voluntary change in the type design of an aircraft that may increase the noise levels of that aircraft is an "acoustical change" (in addition to being a minor or major change as classified in paragraph (a) of this section) for the following aircraft:

(1) Transport category large airplanes.

(2) Jet (Turbojet powered) airplanes (regardless of category). For airplanes to which this paragraph applies, "acoustical changes" do not include changes in type design that are limited to one of the following—

(i) Gear down flight with one or more retractable landing gear down during the entire flight, or

(ii) Spare engine and nacelle carriage external to the skin of the airplane (and return of the pylon or other external mount), or

(iii) Time-limited engine and/or nacelle changes, where the change in type design specifies that the airplane may not be operated for a period of more than 90 days unless compliance with the applicable acoustical change provisions of Part 36 of this chapter is shown for that change in type design.

(3) Propeller driven commuter category and small airplanes in the primary, normal, utility, acrobatic, transport, and restricted categories, except for airplanes that are:

(i) Designated for "agricultural aircraft operations" (as defined in § 137.3 of this chapter, effective January 1, 1966) to which § 36.1583 of this chapter does not apply, or

(ii) Designated for dispensing fire fighting materials to which § 36.1583 of this chapter does not apply, or

(iii) U.S. registered, and that had flight time prior to January 1, 1955 or

(iv) Land configured aircraft reconfigured with floats or skis. This reconfiguration does not permit further exception from the requirements of this section upon any acoustical change not enumerated in § 21.93(b).

(4) Helicopters except:

(i) Those helicopters that are designated exclusively:

(A) For "agricultural aircraft operations", as defined in § 137.3 of this chapter, as effective on January 1, 1966;

(B) For dispensing fire fighting materials; or

(C) For carrying external loads, as defined in § 133.1(b) of this chapter, as effective on December 20, 1976.

(ii) Those helicopters modified by installation or removal of external equipment. For purposes of this paragraph, "external equipment" means any instrument, mechanism, part, apparatus, appurtenance, or accessory that is attached to, or extends from, the helicopter exterior but is not used nor is intended to be used in operating or controlling a helicopter in flight and is not part of an airframe or engine. An "acoustical change" does not include:

(A) Addition or removal of external equipment;

(B) Changes in the airframe made to accommodate the addition or removal of external equipment, to provide for an external load attaching means, to facilitate the use of external equipment or external loads, or to facilitate the safe operation of the helicopter with external equipment mounted to, or external loads carried by, the helicopter;

(C) Reconfiguration of the helicopter by the addition or removal of floats and skis;

(D) Flight with one or more doors and/or windows removed or in an open position; or

(E) Any changes in the operational limitations placed on the helicopter as a consequence of the addition or removal of external equipment,

floats, and skis, or flight operations with doors and/or windows removed or in an open position.

(5) Tiltrotors.

(c) For purposes of complying with part 34 of this chapter, any voluntary change in the type design of the airplane or engine which may increase fuel venting or exhaust emissions is an "emissions change."

14 C.F.R. § 21.97. Approval of major changes in type design.

(a) An applicant for approval of a major change in type design must—

(1) Provide substantiating data and necessary descriptive data for inclusion in the type design;

(2) Show that the change and areas affected by the change comply with the applicable requirements of this subchapter, and provide the FAA the means by which such compliance has been shown; and

(3) Provide a statement certifying that the applicant has complied with the applicable requirements.

(b) Approval of a major change in the type design of an aircraft engine is limited to the specific engine configuration upon which the change is made unless the applicant identifies in the necessary descriptive data for inclusion in the type design the other configurations of the same engine type for which approval is requested and shows that the change is compatible with the other configurations.

14 C.F.R. § 21.113. Requirement for supplemental type certificate.

(a) If a person holds the TC for a product and alters that product by introducing a major change in type design that does not require an application for a new TC under § 21.19, that person must apply to the FAA either for an STC, or to amend the original type certificate under subpart D of this part.

(b) If a person does not hold the TC for a product and alters that product by introducing a major change in type design that does not require an application for a new TC under § 21.19, that person must apply to the FAA for an STC.

(c) The application for an STC must be made in the form and manner prescribed by the FAA.

14 C.F.R. § 21.115. Applicable requirements.

(a) Each applicant for a supplemental type certificate must show that the altered product meets applicable requirements specified in § 21.101 and, in the case of an acoustical change described in § 21.93(b), show compliance with the applicable noise requirements of part 36 of this chapter and, in the case of an emissions change described in § 21.93(c), show compliance with the applicable fuel venting and exhaust emissions requirements of part 34 of this chapter.

(b) Each applicant for a supplemental type certificate must meet §§ 21.33 and 21.53 with respect to each change in the type design.

14 C.F.R. § 21.117. Issue of supplemental type certificates.

(a) An applicant is entitled to a supplemental type certificate if the FAA finds that the applicant meets the requirements of §§ 21.113 and 21.115.

(b) A supplemental type certificate consists of—

(1) The approval by the FAA of a change in the type design of the product; and

(2) The type certificate previously issued for the product.

14 C.F.R. § 183.41. Applicability and definitions.

(a) This subpart contains the procedures required to obtain an Organization Designation Authorization, which allows an organization to perform specified functions on behalf of the Administrator related to engineering, manufacturing, operations, airworthiness, or maintenance.

(b) Definitions. For the purposes of this subpart:

Organization Designation Authorization (ODA) means the authorization to perform approved functions on behalf of the Administrator.

ODA Holder means the organization that obtains the authorization from the Administrator, as identified in a Letter of Designation.

ODA Unit means an identifiable group of two or more individuals within the ODA Holder's organization that performs the authorized functions.

[EXCERPTS]

70 Fed. Reg. 59,932

Rules and Regulations
Department of Transportation
Federal Aviation Administration
14 CFR Parts 21, 121, 135, 145, and 183
[Docket No. FAA-2003-16685;
Amendment Nos. 21-86, 121-311,
135-97, 145-23, and 183-12]
RIN 2120-AH79

Establishment of Organization Designation Authorization Program

Thursday, October 13, 2005

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule establishes the Organization Designation Authorization (ODA) program. The ODA program expands the scope of approved tasks available to organizational designees; increases the number of organizations eligible for organizational designee authorizations; and establishes a more comprehensive, systems-based approach to managing designated organizations. This final rule also sets phaseout dates for the current organizational designee programs, the participants in which will be transitioned into the ODA program. This program is needed as the framework for the FAA to standardize the operation and oversight of organizational designees. The effect of this program will be to increase the efficiency with which the FAA appoints and oversees designee organizations, and allow the FAA to

concentrate its resources on the most safety-critical matters.

DATES: This amendment becomes effective November 14, 2005. Affected parties, however, do not have to comply with the information collection requirements of §§ 183.43, 183.45, 183.53, 183.55, 183.57, 183.63, or 183.65 until the control number assigned by the Office of Management and Budget (OMB) for this information collection requirement is published in the Federal Register. Publication of the control number notifies the public that OMB has approved this information collection requirement under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: For technical issues, Ralph Meyer, Delegation and Airworthiness Programs Branch, Aircraft Engineering Division (AIR-140), Aircraft Certification Service, Federal Aviation Administration, 6500 S. MacArthur Blvd., ARB Room 308, Oklahoma City, OK, 73169; telephone (405) 954-7072; facsimile (405) 954-2209, e-mail ralph.meyer@faa.gov. For legal issues, Karen Petronis, Office of the Chief Counsel, Regulations Division (AGC-200), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3073; facsimile (202) 267-7971; e-mail karen.petronis@faa.gov.

SUPPLEMENTARY INFORMATION:

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Authority for This Rulemaking

The FAA's authority to issue rules about aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs,

describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Chapter 447—Safety Regulation, Section 44702—Issuance of Certificates. Under paragraph 44702(d), the FAA Administrator may delegate to a qualified private person a matter related to issuing certificates, or related to the examination, testing, and inspection necessary to issue a certificate he is authorized by statute to issue under § 44702(a). Under paragraph (d), the Administrator is empowered to prescribe regulations and other materials necessary for the supervision of delegated persons. This regulation is within the scope of that authority in that it establishes a comprehensive program for the designation of organizations in 14 CFR part 183.

Background

History of Designation Programs

Since at least 1927, the federal government has used private persons to examine, test and inspect aircraft as part of the system for managing aviation safety. The current system of delegations has been evolving since the need for assistance by private persons was recognized over 70 years ago. Beginning in the 1940s, the FAA's predecessor agency, the Civil Aeronautics Administration (CAA) established programs to appoint designees to perform certain tasks for airman approvals, airworthiness approvals and certification approvals. These include the Designated Engineering Representative (DER), Designated Manufacturing Inspection Representative (DMIR), and Designated Pilot Examiner (DPE) programs.

In the 1950s, the rapid expansion of the aircraft industry led to the adoption of the Delegation Option Authorization (DOA) program to supplement the agency's limited resources for certification of small airplanes, engines and propellers. As the first program that delegated authority to an organization rather than an individual, DOA was intended to take advantage of the experience and knowledge inherent in a manufacturer's organization. Currently, DOAs are authorized for certification and airworthiness approvals for the products manufactured by the authorization holder.

The Federal Aviation Act of 1958 established the Federal Aviation Agency and codified the authority of the Administrator to delegate certain matters in section 314 of that Act. When that statute was recodified in the 1990s, the delegation authority was placed in 49 U.S.C. 44702(d) without substantive change to the authority of the Administrator.

The 1960s saw the creation of the Designated Alteration Station (DAS) Program, which was intended to reduce delays in issuing supplemental type certificates (STCs) by allowing the approved engineering staffs of repair stations to issue STCs. As adopted, the DAS program allows eligible air carriers, commercial operators, domestic repair stations and product manufacturers to issue STCs and related airworthiness certificates.

In the 1970s the FAA reviewed its delegated organization programs, which then allowed the approval of major alteration data by a delegated organization, but not approval of major repair data. This review lead to the adoption of Special Federal Aviation Regulation (SFAR) 36 in 1978 to allow eligible air carriers, commercial operators, and domes-

tic repair stations to develop and use major repair data without FAA approval of the data.

In the 1980s, the FAA established the Designation Airworthiness Representative (DAR) program to expand the airworthiness certification functions that individual designees may perform. At the same time, we allowed for organizations to serve as DARs, in a program known as Organizational Designated Airworthiness Representatives (ODARs).

Since the formation of the first organizational designee programs, organizational designees have gained significant experience in aircraft certification matters, and the FAA has gained significant experience in managing these designee programs. We have found that the quality of the approvals processed by these organizations equals those processed by the FAA. Delegation of tasks to these organizations has allowed the FAA to focus our limited resources on more critical areas.

Status of Designees

In understanding these programs, we consider it essential to remember that designees have a unique status. While we refer to these persons and organizations informally as "designees", under part 183 they are referred to as "representatives of the Administrator."

When acting as a representative of the Administrator, these persons or organizations are required to perform in a manner consistent with the policies, guidelines, and directives of the Administrator. When performing a delegated function, designees are legally distinct from and act independent of the organizations that employ them. The authority of these representatives to act comes from an FAA delegation and not a

certificate. As provided by statute, the Administrator may at any time and for any reason, suspend or revoke a delegation. This is true even though some parts of the delegation regulations in part 183 and elsewhere refer to kinds of certificates that denote the authority granted.

An ODA issued under this program is a delegation made under section 44702(d), not a statutorily authorized certificate issued under section 44702(a). The authority of the Administrator to suspend, revoke, or withhold ODA authorization is not subject to appeal to the National Transportation Safety Board.

ODA Program Overview

The FAA is adopting the ODA program as a means to provide more effective certification services to its customers. This final rule adopts the regulatory basis of the ODA program. Companion FAA orders, similar to the draft Order made available for review, will describe the specifics of the program and provide guidance for FAA personnel and for organizations to which we grant an ODA. These orders will also provide information to FAA personnel on how to qualify, appoint, and oversee organizations in the ODA program.

As aviation industry needs continue to expand at a rate exceeding that of FAA resources, the need for the ODA program has become more apparent. According to a 1993 report by the General Accounting Office (GAO/RCED-93-155), the FAA's certification work has increased five-fold over the last 50 years. The ODA program is a consolidation and improvement of the piecemeal organizational delegations that have developed on an "as needed" basis over the last half century. As the FAA's dependence on designees has increased,

so has the need to oversee designated organizations using a single, flexible set of procedures and a systems approach to management. Using our experience with both individual and organizational designees, we have designed the ODA program with these criteria in mind.

The ODA program improves the FAA's ability to respond to our steadily increasing workload by expanding the scope of authorized functions of FAA organizational designees, and by expanding eligibility for organizational designees. One way this program expands eligibility is by eliminating the requirement that an organization hold some type of FAA certificate before it would qualify for designation authorization.

The ODA program also allows the FAA to delegate any statutorily authorized functions to qualified organizations. Expansion of the available authorized functions will reduce the time and cost for these certification activities.

While our current delegations are limited to such organizations as manufacturers, air carriers, commercial operators, and repair stations, this rule formalizes the delegation of functions to any qualified organization. Accordingly, an organization with demonstrated competence, integrity, and expertise in aircraft certification functions is eligible to apply for an ODA.

Creation of the ODA program aids the expansion of the designee system by addressing the delegation of more functions related to aircraft certification, and new functions pertaining to certification and authorization of airmen, operators, and air agencies. For general aviation operations, the rule allows an ODA Unit member to issue airman certificates or authorizations under 14 CFR parts 61, 63, or 91. Additionally,

the rule allows designated organizations to find compliance or conduct functions leading to the issuance of certificates or authorizations for any statutorily authorized function, including—

- Rotorcraft external load operations under 14 CFR part 133;
- Agricultural operations under 14 CFR part 137;
- Air agencies operations under 14 CFR part 141; and
- Training centers operators under 14 CFR part 142 (air carrier functions excluded).

Nothing in the establishment of the ODA program changes any authority or responsibility for compliance with the certification, airworthiness or operational requirements currently in place, such as part 21 or part 121. No current safety requirements are being removed or relaxed. The ODA program does not introduce any type of self-certification.

An Organization Designation Authorization includes both an ODA Holder and an ODA Unit. The ODA Holder is the parent organization to which the FAA grants an ODA Letter of Designation. The ODA Unit is an identifiable unit of two or more individuals within the ODA Holder's organization that performs the authorized functions. The regulations specify separate requirements for the ODA Holder and the ODA Unit.

Because the ODA program eliminates the requirement that an applicant hold an FAA certificate, organizations consisting of consultant engineering and inspection personnel could be eligible for an ODA. Under such circumstances, it is possible the ODA

Holder would have the same composition as the ODA Unit.

ODA Program Policy

As noted earlier in this preamble, FAA orders will outline the specifics of the ODA program and provide guidance for both FAA personnel and for organizations that obtain an ODA. These orders will describe the authorized functions for aircraft-related approvals, such as type certificates and airworthiness certificates, and certain operations-related approvals like airman certificates. While the regulations contain the general requirements of the ODA program, the orders will provide the administrative details. Providing the specifics in orders allows for flexibility to expand or revise the details of the ODA program without further rulemaking, especially since every type of delegated function that may be appropriate for an ODA Unit cannot be foreseen.

In addition to approved delegated functions and the eligibility requirements for delegated functions, the orders address the specific selection, appointment, and oversight procedures the FAA will follow in managing ODA Holders. Additional ODA program details may be described in other FAA orders or policies.

* * *

[EXCERPTS]

ORDER
8100.15

ORGANIZATION DESIGNATION AUTHORIZATION PROCEDURES

* * *

8/18/06

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

* * *

CHAPTER 1. INTRODUCTION

1-1. PURPOSE. This order outlines the Federal Aviation Administration's (FAA) Organization Designation Authorization (ODA) program. Under this program, we (the FAA) can delegate certain types of authority to organizations. We wrote this order for Aircraft Certification Service (AIR) and Flight Standards Service (AFS) personnel, who manage delegated organizations. We also wrote this for organizations granted an ODA to act on the FAA's behalf. This order addresses how to qualify, appoint, and oversee organizations in the ODA program.

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CHAPTER 3. QUALIFICATIONS, RESPONSIBILITIES, AND AUTHORITY

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3-7. MEMORANDUM OF UNDERSTANDING.

a. ODA Holder's Commitment. An ODA holder agrees to use the same care, diligence, judgment, and

responsibility when performing the authorized functions as the FAA would use in performing the function. This commitment starts at the senior management level of the ODA holder and extends through the ODA administrator, ODA unit, and the rest of the applicant's organization. As proof of that commitment, senior management of the organization and the FAA managing office(s) will sign a memorandum of understanding (MOU) that outlines the charter, authority, and responsibility of the ODA holder.

b. Preparing an MOU. The prospective OMT and ODA holder jointly prepare the MOU. The ODA holder's senior management and FAA's managing office(s) must sign the MOU before issuing the ODA. Also, any time a signatory of the MOU changes, the replacement must sign a revised MOU. If an ODA holder's new senior management refuses to sign the MOU, we must terminate the ODA. Appendix 1, figure 14 of this order contains an example of an acceptable MOU. All personnel within the ODA holder that manage ODA unit members in any capacity must read and understand the MOU.

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CHAPTER 11. SUPPLEMENTAL TYPE CERTIFICATION FUNCTIONS

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11-3. FUNCTIONS. Figures 2-2 and 2-3 of this order list the ODA function codes. An STC ODA holder must be able to perform all of the functions required for the alterations for which it may issue an STC. The STC ODA holder's procedures manual must identify the ODA holder's specific authorized functions and limitations. The available STC ODA functions are:

a. Approve Technical Data or Find Compliance to Airworthiness Standards (function code 11010). An STC ODA unit may approve type design and substantiation data, including changes to the data. This includes:

- Approving technical data such as test plans, test data, or analyses
- Witnessing tests
- Reviewing test data to ensure that the test was conducted in accordance with the test plan
- For analytical data, ensuring that an appropriate and validated analytical model or system was used

b. Issue STCs and/or Amendments (function code 11020). An STC ODA unit may issue an STC if it finds that the requirements of 14 CFR §§ 21.113 and 21.115 for issuance of an STC are met.

c. Approve Operational or Repair Information (function code 11040). An STC ODA unit may approve operational information. The specific authority must be defined in the procedures manual. Under this function code the ODA unit may approve an Aircraft Flight Manual Supplement and any associated information such as cargo loading or weight and balance (including revisions) for an STC it issues.

d. Approve Airworthiness Limitations Information (function code 11050). An STC ODA unit may approve changes to airworthiness limitations associated with an STC it issues.

e. Issue Airworthiness Certificates and Approvals. An STC ODA unit may perform the following functions. The ODA unit must comply with 14 CFR part

21; FAA Order 8130.2; Order 8130.21; Order 8130.29, and this order.

(1) Issue Standard Airworthiness Certificate (function code 11061). This includes amending a standard airworthiness certificate for a U.S.-registered aircraft.

(2) Issue Special Airworthiness Certificates (function code 11062) in the experimental category for the purpose of performing research and development, showing compliance with FAA regulations, conducting crew training, and conducting market surveys.

(3) Issue Special Flight Permits (function code 11066) for U.S.-registered aircraft for a purpose outlined in 14 CFR §§ 21.197 (a)(1), (a)(4), or (b).

(4) Issue Special Airworthiness Certificates (function code 11067) for primary category aircraft.

(5) Issue Special Airworthiness Certificates (function code 11068) for restricted category aircraft.

(6) Issue a Replacement for a Lost, Stolen, or Mutilated Standard or Special Airworthiness Certificate (function code 110610) if the proper documentation can be obtained from the applicant.

NOTE: This function is limited to an aircraft being modified under an STC project. This function may also include the replacement of a certificate when the aircraft registration number changes.

f. Establish Conformity Inspection Requirements (function code 11070). An STC ODA unit may set requirements for the extent and kind of conformity

inspections required, and may issue a Request for Conformity or TIA, as applicable.

g. Determine Conformity of Parts and Test Articles (function code 11080). An STC ODA unit may determine whether engines, propellers, products, components, parts, appliances, or test articles conform to the design data.

h. Determine Conformity of Test Setup (function code 11090). An STC ODA unit may determine whether test setups conform to the design data as required by approved test plans.

i. Determine Conformity for Installation and TIA Inspections on a Product (function code 11100). An STC ODA unit may determine whether installations of components, parts, or appliances on a product conform to design data and perform TIA inspections.

j. Perform Compliance Inspections (function code 11110). An STC ODA unit may perform compliance inspections to determine if products comply with the 14 CFR.

k. Perform Approvals in Support of TC ODA Holder Projects (function code 11160). An STC ODA unit may supply data approvals and conformity determinations that are used within a TC ODA holder's system. These approvals are limited to the types of approvals included in the ODA holder's STC authority. The procedures manual must specify the types of airworthiness standards and products for which this authority applies.

* * *

11-7. SUPPLEMENTAL TYPE CERTIFICATION PROGRAMS. A STC ODA holder must use the same process the FAA uses for standard certification pro-

grams (see FAA Order 8110.4 and AC 21-40, Application Guide for Obtaining a Supplemental Type Certificate).

a. STC Program Considerations. The ODA is based upon the ODA unit's demonstrated experience and capability to determine that alteration designs comply with the airworthiness standards and are in a condition for safe operation.

(1) Working with Other STC Applicants. An STC ODA unit may issue an STC to an applicant other than the ODA holder. When issuing the STC to another applicant, the ODA holder must act as an agent for the applicant. The ODA holder's program notification letter must include a letter from the STC applicant noting that the ODA holder is acting on the applicant's behalf and that the applicant understands the responsibilities of an STC holder.

(2) Data Development Responsibilities. An STC applicant must provide substantiating data to show compliance with the applicable airworthiness requirements.

(a) An ODA unit may approve a design only when the ODA unit has a complete understanding of the design, and takes full responsibility for the integrity and completeness of compliance findings for the design and installation of the alteration. An ODA holder, as the STC applicant or its agent, is responsible for overall alteration development, including design integration, development of design and substantiation data, prototype installation, and certification. An ODA holder must substantiate compliance with all airworthiness requirements for the design and installation of the systems and all components (including items pre-

viously approved and used in other applications) involved in the STC.

(b) Lower level design/substantiation data developed by suppliers is acceptable, if the ODA holder is involved in all aspects of showing compliance for the integration of the design and substantiation data.

(c) An ODA holder must review and validate that all data developed by other parties apply to the alteration and provide necessary substantiation of compliance with airworthiness standards. Proper compliance with the airworthiness standards can be established only when type certification requirements are considered early in the design development process. This mandates early involvement by an ODA holder in any program leading to issuance of an STC. This responsibility is in addition to the ODA unit's responsibility when making the findings of compliance for the project.

(3) Additional Party Involvement. Projects that involve numerous parties in the design or manufacture of parts require additional scrutiny on the part of both the ODA unit and the OMT. The OMT must evaluate the capability of an ODA holder to perform such projects, considering the experience and competence of the other parties involved, during the review of the program notification letter.

(4) Additional Knowledge. In addition to showing compliance to the airworthiness standards, an ODA holder is also responsible for finding that the altered product is of a proper design for safe operation. In order to determine this, the ODA holder must consider the product manufacturer's design philoso-

phy, principles, and operational assumptions. Such information may be obtained by reviewing available data such as; original type design data, type certificate data sheets, flight manuals, flight crew operations manuals, or by past experience of the ODA unit. An ODA holder must also consider the procedures employed by the operator of the product and the impact of any alterations previously made to the product. The OMT should assess the ODA unit's experience and knowledge of these considerations when reviewing program notification letters and determining the level of FAA involvement in a project.

b. Adherence to Policy Requirements. As a representative of the FAA, an ODA holder is expected to comply with any certification guidance and policy applicable to the project. Each ODA holder must stay informed of the latest policies applicable to the projects it performs and propose certification plans that conform to these policies. Certification policies can be reviewed on the internet at http://www.airweb.faa.gov/rgl.

(1) Program Notification Letter. The ODA administrator must submit a PNL to the OMT lead early in the project containing the following information. If the project scope or schedule is significantly revised, the ODA administrator must notify the FAA and obtain concurrence with the changes from the OMT before proceeding with the project. By submitting a PNL, the ODA unit is attesting that it has, or can obtain, the appropriate knowledge and understanding of the product manufacturer's design philosophy, principles, and operational assumptions required to determine compliance with the airworthiness standards and determine that no unsafe

feature or characteristic exists in the altered product. The PNL must:

(a) Include an FAA Form 8110-12.

(b) Include a certification plan that contains the information described in appendix 2 of this order.

(c) Include a conformity inspection plan as shown in appendix 1, figure 15 of this order.

(d) Identify any novel or unusual aspects of the program including any international aspects, or foreign airworthiness authorities involved.

(e) Identify any design changes that are considered a "significant project" according to the definition in FAA Order 8110.4.

(f) Specify who will perform the design (excluding certification activities), if other than the ODA holder, the scope of any other party's involvement in the design, and provide a description of how the ODA holder will manage the other parties' activities. The ODA holder must ensure that all certification requirements are met and managed (e.g., periodic contact/meetings with the company performing the design work to monitor design progress, issues of concern, and proposed modifications to the design and/or schedule).

c. Program Notification Letter Coordination.

(1) The OMT lead will coordinate with the OMT for review and concurrence with the original PNL, and any later supplements or changes. The managing ACO will also coordinate with the type certificate managing ACO, as appropriate. In addition, the ACO is responsible for the normal directorate project notification requirements.

(2) As part of the OMT review of the PNL and the associated certification and conformity plans, the OMT will consider whether the ODA holder has, or can obtain, the appropriate knowledge and understanding of the product manufacturer's design philosophy, principles, operational assumptions, and actual operator procedures. The OMT will nonconcur with projects that it determines the ODA holder is not qualified to perform.

(3) If a project is to be performed at an off-site location, the OMT will coordinate with the off-site facility's principal maintenance inspector. This is to verify that the facility has experience with the types of alterations on the specific product(s) (make and model) that the project involves. The OMT will also consider its own ability to oversee and participate in the project, based on the facility's location. The OMT may authorize a project only if:

(a) The work location does not prevent the OMT's necessary involvement and oversight.

(b) The ODA holder has sufficient experience and knowledge to manage the off-site project.

(c) The off-site facility is authorized to approve the altered product for return to service.

d. Specific Findings. The FAA will make specific findings of compliance as follows:

(1) Determine compliance in areas reserved for the FAA, such as regulatory interpretations and equivalent level of safety findings. The ODA holder must request concurrence on the application of all equivalent level of safety findings in writing.

(2) Determine compliance for the emissions and noise requirements of 14 CFR parts 34 and 36.

(3) Determine compliance in areas evaluated by the AEG. These include Instructions for Continued Airworthiness, evaluation of operational suitability, changes to the Master Minimum Equipment List, Aircraft Flight Manual, Flight Crew Operating Manual, crew qualifications, and emergency evacuation demonstrations.

(4) Determine compliance, when necessary, in areas involving new design concepts including the identification of those areas that require the formulation of special conditions in accordance with 14 CFR §21.101(d) or areas where the ODA holder has no prior experience.

(5) Review data, tests, or technical evaluations if the ODA holder has not demonstrated a satisfactory capability during similar projects.

(6) Review areas where service difficulties have resulted from previous ODA holder approvals.

(7) Participate in compliance findings in areas involving known safety-related problems. For example, the ACO should review modifications affecting areas that have previously been the subject of Airworthiness Directive action to ensure that the proposed modification does not adversely affect the Airworthiness Directive-related change.

e. Program Notification Letter Response. The OMT lead will respond to the ODA holder formally, in writing, after receiving the PNL. The OMT lead must respond within 30 days unless the ODA holder agrees to a later response. The response must include:

(1) The OMT's concurrence or non-concurrence with the proposed certification and conformity plans.

(2) Acknowledgement that the certification basis is acceptable, including any limitations, conditions, or objections.

(3) The names and other contact information for FAA engineers, manufacturing inspectors, AEG focal points, and administrative staff assigned to the project.

(4) Identify specific FAA findings and involvement in the project and require the ODA holder to provide adequate notice to the FAA of activities in which the FAA will participate. The FAA response should include direction to the ODA unit members for approval or recommend approval on FAA Form 8100-9.

(5) The requirement that the ODA holder must notify/coordinate with the OMT in a timely manner if the project's scope and/or schedule is significantly revised. Significant changes that should be reported include:

(a) A change in any of the parties involved, or the level of their involvement, in the design or installation of the alteration.

(b) A changes in the location where the prototype installation will be performed.

(c) Any change in the schedule of activities in which the FAA will participate.

(d) Any certification methodology change.

(e) Any other change deemed appropriate by the managing ACO.

NOTE: The OMT should determine any other types of change that require notification, based on the ODA holder's capability and project types. The

OMT and the ODA administrator should ensure that they understand the types of schedule/project scope changes that must be reported.

f. STC Board Meetings. As applicable, the ODA holder will hold STC board meetings in accordance with FAA Order 8110.4. The ODA administrator will chair preliminary, interim, pre-flight, and final STC board meetings on major projects. The ODA administrator will also chair any other meetings necessary to meet the objectives in these procedures. The ODA holder must coordinate scheduling of the meetings with the FAA. During the meetings, the FAA will:

(1) Establish the applicable certification basis.

(2) Identify any areas requiring formulation of special conditions.

(3) Offer special attention, information, and guidance to address new design concepts, service difficulties, FAA policy, and the current state-of-the-art considerations.

(4) Establish those areas of the STC program for which the FAA will make specific findings.

(5) Coordinate program scheduling necessary to accomplish the required FAA participation.

(6) Establish that areas requiring FAA participation have been satisfactorily completed by the FAA.

(7) Review the certification plan and conformity inspection plan.

(8) Review the applicable noise and emission requirements and establish the nature and extent of tests and substantiation expected from the ODA holder.

g. Engineering Approval. Engineering or flight test ODA unit members determine compliance with the FAA regulations. The procedures manual must contain the specific forms and procedures used to determine and document compliance. The procedures manual must identify procedures for developing and approving the conformity inspection plan. The ODA unit must use the proper FAA forms. Engineering or flight test ODA unit members must approve the following records, as applicable, to document compliance:

(1) FAA Form 8100-9 (appendix 1, figure 5 of this order) for compliance findings.

(2) FAA Form 8120-10.

(3) FAA Form 8110-1.

(4) Supplemental Type Inspection Report (part 2), as applicable.

(5) AFM and AFM supplements, as required.

h. Compliance Findings for Equivalent Safety Provisions. After the FAA defines any equivalent safety provisions, engineering and flight test ODA unit members may determine whether the product complies with them. The ODA unit must submit equivalent safety finding results in writing to the OMT for approval.

i. Conformity. Inspection ODA unit members inspect products to determine whether they conform to type design, document results of the inspections, and establish if the product is airworthy.

(1) Prior to any FAA conformity inspection, the product or article must be inspected in accordance with 14 CFR §21.33 and an FAA Form 8130-9 must be completed to satisfy 14 CFR §21.53. Complex sub-

assemblies may require issuance of additional Forms 8130-9. The ODA unit member determining conformity for the FAA may not sign the Form 8130-9. The procedures manual must identify the specific forms and procedures used to document inspection results. See FAA Order 8110.4 for examples of the forms and instructions on how to complete them. The procedures manual must identify the procedures used to develop and approve the conformity inspection plan.

(2) Before any compliance inspection or test, an ODA member must determine that the end product, in-process parts, or test articles conform with the type design. They must document conformity on the following forms (as applicable):

- FAA Form 8100-1
- FAA Form 8110-26 (part 1), as applicable
- FAA Form 8130-3
- FAA Form 8130-9

j. Aircraft Evaluation Group Functions.

(1) Instructions for Continued Airworthiness. Plans regarding ICA must be coordinated with the AEG OMT representative early in the program to ensure that ICA development and acceptance does not delay the program. The AEG OMT representative will determine the level of his involvement during the program notification letter review. The ODA unit must ensure the ICA is accepted upon delivery of the altered product or prior to issuance of the first standard or restricted airworthiness certificate for an altered aircraft, whichever occurs later.

NOTE: Delegation of ICA acceptance will be provided for in the next revision to this order.

(2) Determinations of operational suitability, Master Minimum Equipment List revisions, crew training, etc., may not be delegated to an ODA holder. The managing ACO must coordinate with the appropriate AEG to ensure that all program requirements for which the AEG is responsible are satisfied.

k. Issuing Supplemental Type Certificates. Prior to issuing an STC, the ODA holder must complete FAA Form 8100-11 (see appendix 1, figure 11 of this order) certifying that the STC design complies with FAA regulations. The ODA holder must prepare the STC in accordance with FAA Order 8110.4.

NOTE: The ACO will provide the ODA holder STC numbers on either a project-by-project basis or as a block of numbers for the ODA Unit's use. The numbers will be issued in accordance with FAA Order 8110.4. Each STC issued by an ODA unit must have a "-D" placed after the STC number. For example, SA00125AT-D would be the 125th STC issued through the Atlanta ACO on a small airplane and have been issued by an STC ODA unit. The ACO must include STCs issued by the ODA unit in its monthly reports for the STC summary as described in FAA Order 8110.4.

l. Submission of Data after Certification. The ODA holder must submit the following data within 30 calendar days of the STC issuance date. This data and all project related correspondence must be retained by the ACO:

(1) A statement of completion certifying that the design article satisfies the FAA regulations.

(2) A paper copy of the signed STC and an electronic copy.

(3) A copy of the flight manual supplement.

(4) Any other data identified in the OMT's response to the program notification letter or required by the procedures manual.

m. Transfer of STCs. Only the FAA may transfer an STC. An ODA unit may not transfer an STC by reissuing it in another party's name. An ODA holder that wishes to transfer an STC to another party must follow the standard procedures for transfer of a type certificate (see 14 CFR §21.47 and FAA Order 8110.4).

n. Amendment of an Existing STC. Any STC amendment issued by an ODA holder requires submittal of a program notification letter. Any amendment to an STC must be coordinated with the ACO prior to its issuance. If the ODA unit amends an STC originally issued by the FAA, the ODA unit must include the "-D" designation in the STC number.

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