

or material for use on type certificated products. Such records are the kind that are relied on by owners, operators, producers, and maintainers to determine the airworthiness of an aircraft, or the acceptability of aircraft products and parts for a given application; therefore, they must be truthful.

Paragraph (c)(2) would prohibit any reproduction or alteration, for fraudulent or intentionally false purpose, of any record that represents the airworthiness of a type certificated product, or the acceptability of any part or material for use on type certificated products.

Paragraph (c) is modeled on similar provisions elsewhere in the regulations, such as §§ 21.2, 43.12, 61.59, and 65.20. These provisions have long been in the regulations and have worked well.

An intentionally false statement consists of (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity. A fraudulent statement consists of these three elements, plus (4) it was made with the intent to deceive, and (5) action was taken in reliance upon the representation. See, *Hart v. McLucus*, 535 F.2d 516, 519 (9th Cir. 1976). There have been many cases under the existing rules interpreting these terms, which will assist in understanding the proposed rule.

Some differences from the current rules should be noted, however. Currently, § 21.2 refers to “\* \* \* a false entry in any record or report that is *required to be kept, made, or used* to show compliance with any requirement for the issuance or the exercise of the privileges of any certificate or approval issued under this part.” (Emphasis added.) For the most part, although a person may be required to show that an acceptable part was installed on an aircraft, the rules do not require any *particular* records to be used to document aircraft products, parts, and materials, and, as discussed above, various records are used. To avoid any misunderstanding, the word “required” is not included in the proposed rule. The proposal is intended to cover any records that, in fact, represent the airworthiness of a type certificated product, or the acceptability of a part or material for installation on a type certificated product.

In addition, the words “kept, made, or used” that appear in current rules are not used in the proposed § 3.5(c); rather, the proposal refers to “any record that represents the airworthiness. \* \* \*”. The words of the current rules might be read by some as focusing on the intent of the person making the record. It is the

FAA’s view, however, that the important issue is whether the record represents to the reader that an aircraft is airworthy, or a part is acceptable, because the reader may rely on the record in making decisions that affect safety. The proposed wording is intended to avoid confusion on this point.

#### *Section 3.5(d) Preventing Misleading Statements*

Proposed § 3.5(d) would provide that no person in any record may express or imply, or cause to be expressed or implied, that a type certificated product is airworthy, or a part or material is acceptable for installation on type certificated products, unless the person can show with appropriate records the representation is true. Under this rule, a person would have to have a demonstrable basis for stating or implying the aircraft is airworthy, or part or material is acceptable for installation. Examples of a demonstrable basis include that the part was produced under a production certificate (PC), parts manufacturer approval (PMA), or technical standard order authorization (TSOA).

There currently is little regulation concerning misleading statements. Some statements may be literally true, but mislead. A statement that a part “fits” a Cessna 172, for instance, may be literally true. But, that statement may mislead a potential buyer to think the part is acceptable for use in a Cessna 172, when it may not be.

In advertisements, shipping papers, inserts in parts boxes, and other records the FAA has seen examples of statements that are worded in such a way that a person may be misled to believe the part is approved by the Administrator or is otherwise acceptable, when neither fact has been demonstrated. Proposed § 3.5(d) is intended to prevent such statements.

In developing this proposal, we have reviewed the Federal Trade Commission’s (FTC) regulation of deceptive advertising, and discussed with the FTC staff the relevance to this proposal of their approach. Although our purposes are quite different—the FTC is concerned primarily with consumer protection, whereas we are concerned exclusively with aviation safety—we’ve concluded that the FTC’s regulatory approach to deceptive advertising establishes an excellent model for this proposal. Therefore, we intend to rely heavily on precedents established by the FTC in resolving interpretative issues that may arise in the application of this proposed rule. The following discussion is, therefore,

derived from our review of the FTC regulatory scheme.

For the purposes of this rule a misleading statement requires (1) a material representation or omission (2) that is likely to mislead the consumer (3) acting reasonably under the circumstances.

Misleading statements include misrepresentations as well as a failure to disclose material information regarding the product. A misrepresentation is an express or implied statement that is contrary to fact. A misleading omission occurs when information necessary to prevent a representation, or a reasonable expectation or belief, from being misleading is not disclosed. In determining whether the omission is deceptive or misleading, we will examine the overall impression created by the representation. Unlike the definition of an intentionally false statement, there does not have to be knowledge that the statement would mislead; nor must there be the intent to deceive. The issue with which the FAA is concerned is whether the representation is likely to mislead rather than whether it causes actual deception.

A representation or omission is considered material if it is likely to affect the consumer’s decisions about the product. The claim must be likely to be believed and acted on in a certain way, and injury must be found likely to exist because of the representation. Injury exists if the consumer would have chosen differently but for the deception. Some statements, especially those affecting health or safety, are presumptively material in nature.

Finally, a representation or omission will be considered from the perspective of a reasonable consumer under the circumstances. In evaluating a particular representation, we will look to the effect of the representation on a reasonable member of the targeted audience. To be considered reasonable, an interpretation of a statement does not have to be the only one. For instance, if an advertiser’s representation suggests more than one meaning to a reasonable consumer, one of which is misleading, the advertiser would be liable for the misleading interpretation.

Proposed § 3.5(d) is also intended to prevent persons from stating or implying that a part is acceptable when the person does not know whether it is acceptable. An example is where a person obtains surplus military parts that lack sufficient documentation to determine whether the parts are approved or acceptable for use on type certificated products, yet advertises them as acceptable parts. Under this proposed paragraph, the person would