May 24 1990

Mr. Wendell L. Willkie,
II General Counsel
Department of
Commerce Washington,
DC 20230

Dear Mr. Willkie:

Thank you for your letter of February 1, 1990, concerning reimbursement to those who provide transportation to Department of Commerce employees for official travel. In your letter you stated:

> Under our present implementing regulations, the Department accepts gifts of travel only when the circumstances do not create some appearance of impropriety. Nonetheless, I believe that our interests may be best served from time-to-time by offering to reimburse the donor for the donated travel. Reimbursement would remove the gift aspect of the travel, which would then be accepted for the convenience gained by not having to rely on a scheduled airline. In addition, senior officials may avoid questions about accepting such travel by offering to reimburse donors for their personal travel, even where the travel may be properly accepted under the usual standards of conduct criteria.
>
> We would appreciate formal guidance from your office regarding whether there are any circumstances under which FAA rules will allow for reimbursement. My inquiry relates to individually owned and corporate planes, as well as personal and official travel.

The issue is, as you have acknowledged, whether acceptance of reimbursement under the circumstances described in your letter makes the operator subject to the operating certificate requirements of the Federal Aviation Regulations (FAR), or whether the operation may be conducted without a certificate under the provisions of Subpart D of Part 91 of the FAR. We analyzed your question only in the context of the FAR.

Subpart D of Part 91 (14 C.F.R Part 91), Sections 91.181 through 91.2151 prescribes operating rules, in addition to those prescribed in other Subparts of Part 91, for large and turbojet-powered multi-engine civil airplanes of U.S. registry. Pursuant to an exemption, members of the National Business Aircraft Association may operate small aircraft in accordance with Subpart D.

Subpart D contains, among other things, provisions which allow an operator of an airplane to receive limited reimbursement for the carriage of certain persons, without an operating certificate, when common carriage is not involved. Section 91.181(b)(5) applies to the carriage of persons and property on an airplane and it reads in pertinent part, as follows:

> (b) Operations that may be conducted under the rules of this subpart instead of those in Parts 121, 123, 129, 135, or 137 of this chapter, when common carriage is not involved, include:
>
> (5) The carriage of ... guests ... of a company on an airplane operated by that company, ... when the carriage is within the scope of, and incidental to, the business of that company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company.

This regulation allows a company to make the specified charges for the carriage of officials, employees and guests of the company operating the airplane, or of a subsidiary or parent of such company, when such carriage is within the scope of and incidental to the business of the company operating the airplane and the company's business is not air transportation. It is clear that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company.

We wish to point out that paragraph (b)(5) permits recovery of the specified types of expenses for airplanes operated by a company. That regulation does not permit recovery of such expenses when an airplane is operated by an individual, as contrasted with a company. With respect to distinguishing between personal or official travel by representatives of the Department of Commerce, it would not be relevant to the question of whether the operator may receive reimbursement under the FAR without an operating certificate. As stated, the test is whether the carriage of a guest is within the scope of, and incidental to, the business of the operating company.

You also asked about an appropriate measure of reimbursement. Under Section 91.181(0(5) and the other provisions of Subpart D, only the expenses explicitly authorized by the regulation may be received by the operating company. Expenses allowed under that section may not exceed the cost of owning, operating, and maintaining the airplane.

Of necessity this letter is written in general terms since you did not give us any specific fact situations. If you have specific facts which you would like us to consider, please feel free to provide them to us for a more definitive opinion.

Sincerely,

Gregory S. Walden

Chief Counsel