Jun 16, 1992

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

Dear Mr. Willkie:

Thank you for your letter July 11, 1991, requesting further clarification of the rules regarding payments to corporations for transportation on private airplanes. We apologize for the delay in responding to your letter.

Your letter asks a number of questions. Some of the answers will tend to overlap, but we will try to address each issue. Our function is to interpret the Federal Aviation Regulations (FAR). While we do not pass on the ethical aspects of the situations presented, we do note that certain ethical guidance in this area does exist, such as the Ethics Reform Act and the implementing GSA regulations, which you cite in your letter.

All of the questions you ask concern Subpart F, section 91.501, of the FAR. This subpart applies to the operation of large and of turbojet-powered multi-engine civil airplanes. Some operators of small airplanes may also use this section by means of an exemption granted to members of the National Business Aircraft Association (NBAA) and certain individuals.

Under 91.501(a), the rules of Subpart F, including the expense recoupment provisions, do not apply to the described airplanes if they are required to be operated under the certification rules of Parts 121, 125, 129, 135, and 137 at Subchapter G of the FAR. FAR 91.501 is aimed primarily at the corporate airplane operator who wishes to conduct company business without following the more stringent safety and certification requirements of the FAR that apply to commercial operators responsible for transporting the public. FAR 91.501(b)(5) allows a company to carry only its employees, property, officials, and guests without being certified as a commercial operator, as long as no reimbursement is made to the company for travel that is not within the scope of, and incidental to, the business of the company. Reimbursement to the company is limited to actual operating expenses, and no profit is contemplated.

FAR 91.501(b)(5)applies because your questions raise issues of reimbursement to a corporation for carriage of a government official as a guest on a corporate aircraft.

FAR 91.501(b)(5), in pertinent part, allows:

> Carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the 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.

The word "officials" in the first line of the regulation means company officials and not government officials. A government official can only be classified as a guest in FAR 91.501(b)(5). The first test, therefore, is whether the carriage of a government official as a guest reasonably can be considered to be "within the scope of, and incidental to, the business of the company." If so, the company may be reimbursed, not to exceed the cost of owning, operating, and maintaining the airplane.

If the travel of the government official as a guest aboard a corporate aircraft is not "within the scope of, and incidental to, the business of the company," receipt by the company of any remuneration, compensation or benefit for the carriage triggers the requirement to hold an appropriate FAA operating certificate.

In your first question you ask, "... If a private company leases or charters an aircraft, may it accept reimbursements for air transportation in situations where a company owning the airplane may not, or are the reimbursement rules identical for travel on corporate-owned and corporate-leased aircraft?"

Because of the context in which you mention "lease or charter," we assume that you describe the situation where a company charters an airplane from an operator who holds an appropriate FAA operating certificate and who supplies the airplane and crew for one trip. The company would assume no control or interest as operator of the airplane. If the cost of the charter is divided equally and paid to a certificated commercial operator,

the sharing of expenses would not be different from dividing the cost of a cab to the airport. Because the flight is conducted by an operator holding an FAA operating certificate, it is taken out of the FAR 91.501 context.

Your second question, with subparts, concerns reimbursements to companies for travel related to company business. You give a number of scenarios and ask which events are considered travel for which reimbursements may be accepted. Please understand that for reimbursements to be allowed, there would have to be a finding that the carriage is "within the scope of, and incidental to, the business of the company," for carriage of Department of Commerce officials.

In fact situation (a) you ask about travel to a company shareholders meeting, at which Government officials will participate.

To answer the question it is necessary to make assumptions because we do not have any facts about the company or its business. We assume that the participation of the officials in the shareholders meeting is "within the scope of, and incidental to, the business of the company."

In that case, reimbursement by the Government to the company under the standard set in FAR 91.501(b)(5) is permitted.

In part (b) of question 2, you ask about travel to a company directors or officers meeting, at which Government officials will participate. Again, the dearth of facts provided forces us to make the same assumption that we did in our response to part (a). With this assumption, the travel of government officials is reimbursable to the company under FAR 91.501(b)(5).

As for the remaining parts of question 2, we feel that we would have to make too many more assumptions to answer these questions. We need more circumstances, including the business of the company, the agency the government official represents, the nexus between the government official and the business of the company, and whether the company would be making the trip regardless of the presence of the government officials. Without this, we can advise you only that each company would bear the burden of showing how the carriage of Department of Commerce officials, or any other guest, for that matter, is "within the scope of, and incidental to, the business of the company."

One way to make that showing would be a Board of Directors' resolution and opinion of the company's general counsel, which fully explains why that carriage is "within the scope of, and incidental to, the business of the company." Another would be correspondence between the Commerce Department and the company explaining the purpose of the trip.

Each scenario involves a situation where the travel of the government official appears, at most, to be tangentially related to the business of the company. You should be aware that the FAA has adopted a strict interpretation of FAR 91.501. This provision represents an exception to certification requirements for commercial operators and air carriers. One of the FAA's principal safety policies is that a person who transports another for compensation or hire must maintain a high level of safety by obtaining and maintaining an appropriate FAA operating certificate. To serve the public interest in carrying out this policy, we resolve any doubt about whether FAR 91.501 applies in favor of requiring the operator to be certificated under one of the Parts requiring an operating certificate, with their stricter safety requirements.

This is how we would view each of the remaining scenarios you have presented if we receive more facts. At this time, however, we can make several observations. It is not enough alone for the Government and the company to be both separately interested in the same thing, or to be going to the same destination, or both, for the carriage of a guest to be considered "within the scope of, and incidental to, the business of the company." Mutual interest is not enough. The government's interest may well run counter to the interests of the company. Nor does a desire on the part of the government to reimburse for transportation to avoid the appearance of impropriety mean that carriage by the company is automatically "within the scope of, and incidental to, the business of the company," so that payment can be accepted.

The third question is "May a company accept reimbursement for travel unrelated to company business?" We assume the persons offering reimbursement are government officials or other persons who are carried as guests on corporate aircraft. As explained earlier, the answer is that acceptance of reimbursement would, under FAR 91.501(b)(5), require that the operator be certificated.

In the fourth question you ask, "Do the restrictions that apply to a non-airline company also apply to a company that operates a hotel, resort, or similar tourism-related activity and that provides air transportation to its facilities as part of its general operations?" The only difference in application of the restrictions would be if the resort companies were certificated under some part of the FAR, such as Part 121, Part 125, or Part 135. That certification would remove the operation from the provisions of FAR 91.501.

Provision of air transportation by a hotel or resort to its facilities as part of its general operations, even at no charge, has been held to be common carriage. Las Vegas Hacienda v. CAB, 298 F.2d 430 (9th Cir. 1962) cert. denied 360 U.S. 851 (1962).

In the fifth question you ask, "Do the restrictions discussed above also apply if the travel includes transportation to or from a foreign destination, or do special rules apply?" The FAA jurisdiction extends to operation of United States-registered aircraft in foreign countries, and the FAR apply equally to foreign flights as to domestic flights, with certain exceptions not relevant to this discussion, such as foreign air traffic control rules.

In the sixth question you ask about personal travel. "Although the primary purpose of this letter concerns reimbursements by the Commerce Department, there may be situations in which we determine that acceptance of transportation on a corporate airplane for personal travel should be declined. Do the same rules apply for reimbursements by an individual as apply for reimbursements by a Federal agency?" The answer is yes.

In your last question you ask about calculations for reimbursements: "If reimbursements are permitted, please describe the method for calculating appropriate reimbursements and the items which should be included in the calculations. For example, are all relevant costs added (fuel, landing fees, overhead) and then divided by the number of persons flying? Can we continue to use first class commercial airline rates or are we required to use actual costs?"

FAR 91.501(b)(5) allows reimbursement not to exceed the cost of owning, operating, and maintaining the airplane. Certainly the fuel, landing fees and overhead mentioned in the question are properly included. Most operators have an hourly cost figure for operation of their airplane that includes many items that fall into the broad categories given in the FAR. Because these categories are so broad, we have not made a comprehensive list of what items can and cannot be included; it is more a question of what items a diligent airplane owner can become aware of and

reasonably include. The FAR makes no mention of first class airline rates as a measure of reimbursement, and only allows the owner payment for the cost of owning, operating, and maintaining the airplane.

Note that the FAR does not prevent an airplane owner from accepting less reimbursement, it only prohibits the owner from accepting more than the cost of airplane ownership, operation, and maintenance.

It is likely that any savings that result from paying the operator's costs rather than the fare applicable to a commercial flight, in situations where payment is permitted, would be viewed as a gift to the agency, or the individual, as the case may be. In the case of official travel, unless the agency has appropriate authority to accept them, such gifts could be viewed as unauthorized augmentations of appropriations. If the cost of traveling on corporate planes exceeds the GSA contract price for the trip, the traveler may not get full reimbursement.

The division of costs, whether on a per passenger basis, per group, or some other basis, is more a consideration of the government's travel reimbursement limits. The airplane owner should not be concerned with whether reimbursement for costs comes from one or all government officials on board the aircraft, as long as the total is correct. To divide costs equally among passengers seems most equitable, but the regulation does not address this issue. The airplane owner cannot make a profit, but can only recover costs. Also note that the list of ten recoverable costs given in FAR 91.501(d) does not apply to reimbursement given for carriage of a guest under FAR 91.501(b)(5). Reimbursement is limited to the cost of owning, operating, and maintaining the airplane.

We hope this information is helpful.

Sincerely

Kenneth P. Quinn
Chief Counsel