January 14, 2004
Howard J. Grooters,
LLC 650 West 12th
Avenue Suite 222
Eugene, Oregon 97402

Dear Mr. Grooters:

This is in response to your January 6, 2004, letter, requesting a legal opinion on an issue pertaining to the provisions of the new Subpart K to 14 CFR Part 91, involving the regulation of fractional aircraft ownership programs. Specifically, you ask whether the provisions of Part 91 or Part 135 (14 CFR) would apply to a fractional ownership operation that, during its startup phase, fails to meet the requirements of Subpart K Sections 91.1001(b)(5)(ii) and (v), requiring such programs operating under Subpart K to have "two or more airworthy aircraft", and to have in place a "dry-lease aircraft exchange arrangement among all of the fractional owners".

You argue in your letter that since fractional ownership programs were permitted by the FAA to operate under 14 CFR Part 91 prior to the enactment of Subpart K, that it stands to reason that a fractional ownership program that does not currently meet all the provisions of the new regulations should not be subject to Part 135 while transitioning to a multi-aircraft fractional ownership program.

In our view, your proposed operation would be subject to the provisions of 14 CFR parts 119 and 135, for the following reasons. Long-standing interpretations of the Federal Aviation Regulations have articulated the "single source rule", providing that where one party either directly or indirectly provides both an aircraft and a crew to a person seeking air transportation, that provider has operational control of the flight. This principle is explained in a series of NTSB decisions [see, e.g., Administrator v Gilbertson & Martin, 3 NTSB 1683 (1979); Administrator v Dade Helicopter Jet Services, Inc., 6 NTSB 374 {1988); Administrator v Davis, EA-4225 (1994); and Administrator v Nix, EA-4825 (2000)], and is codified in the FAR 119.3 definition of "wet lease" (any leasing arrangement whereby a person agrees to provide an entire aircraft and at least one crewmember).

Although the fractional ownership program proposed in your letter differs in one key respect from the arrangements reviewed in these decisions (i.e., the person being transported would own a fractional ownership interest rather than lease a fractional term interest in the aircraft transporting them), your proposed "Aircraft Management LLC" would still be providing both an aircraft (through its sales of a fractional ownership interest in the aircraft) and crew {pilot services provided by the two pilots forming the majority interest in the aircraft management organization). That organization would be considered to be a "commercial operator" subject to FAR Parts 119 and 135 (See applicability provisions of FARs 119.1 and 135.1), under the FAR. 1.1 definition of that term, "a person who for compensation or hire engages in the carriage by aircraft in air commerce of persons or property..."

Although you state in your letter that each of the fractional owners of the single aircraft (rather than Aircraft Management LLC) would be exerting operational control over their own fractional interest, without the full benefit of Subpart K this would be questionable, for the reasons stated in the above-discussed decisions.

The new Subpart K to Part 91 (14 CFR) was designed to legitimize the growing fractional ownership industry, which had operated in a regulatory "grey area" for years with respect to Parts 91 and 135. It imposes strict safety standards upon such operations (including extensive training, testing, and manual development) and most significantly, states that while the fractional owner has ultimate operational control, when that owner delegates performance of tasks to the program manager, or relies upon the program manager's expertise, the program manger shares operational control and thus the responsibility for regulatory compliance (Section 91.1011).

In our opinion, unless and until a startup fractional ownership operation completely meets the Section 91.1001(5) definition of a "fractional ownership program", including the requirements of Sections 91.1001(b)(5)(ii) and (v), (requiring such programs operating under Subpart K to have "two or more airworthy aircraft", and a "dry-lease aircraft exchange arrangement among all of the fractional owners"), and is issued management specifications under Section 91.1015, it cannot take advantage of the exception from 14 CFR Parts 119 and 135 provided by the new Subpart K.

Sincerely,

Karl B. Lewis
FAA Attorney