U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., S.W.
Washington, D.C. 20591

June ~~1~~4, 2006

Mr. Michael Goldman
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Suite 120
1101 30th Street, NW
Washington, D.C. 20007

RE: Requirements for Operators Holding a Part 125 Letter of Deviation Authority

Dear Mr. Goldman:

We received your letter requesting a legal interpretation of the requirements for operating an aircraft pursuant to a Letter of Deviation Authority ("LODA") issued in accordance with 14 C.F.R. § 125.3. The facts as outlined in your letter are as follows. Company A operates a Boeing 727 under a LODA issued in December 2005. The LODA authorizes noncommercial operations and allows Company A to operate the airplane without a Part 125 certificate or operations specifications (OpSpecs). The LODA also exempts Company A from other specified sections of the rule.[1] Company A uses the airplane to transport its owners, officers, employees and guests in noncommercial operations for Company A's business purposes. Company B is a related entity that is partially owned by Company A. Company B desires to use the airplane to transport its employees for Company B's business purposes. Based on the foregoing, you asked whether Company A could transport Company B's employees on flights for which Company A has no business purpose, or if Company B should obtain its own LODA and dry lease the airplane to transport its own personnel. For reasons more fully explained below, Company A's noncommercial LODA does not permit the carriage of Company B's employees on flights where Company A has no business purpose for the flight other than the carriage of Company B's employees. Thus, Company B must obtain its own LODA to operate the airplane and transport its employees.

As an initial matter, it is helpful to clarify which set of Federal Aviation Regulations apply to the proposed operations. Generally, corporate operations not involving common carriage are governed by Part 91-Subpart F, and specifically §§ 91.501(b)(5) and (b)(6).

[1] Specifically, the Letter of Deviation Authority provides relief from §§ 125.21, 125.27, 125.29, 125.31, 125.33, 125.35, 125.41, and 125.43.

In this case, however, you may not rely on § 91.501(b), but instead, must consider the requirements of part 125 because of the size of the airplane.[2]

Part 125 contains rules governing the certification and operation of airplanes with a passenger seating configuration of 20 or more seats, or a maximum payload capacity of 6,000 pounds or more ("Part 125 Airplanes") when common carriage is not involved. Part 91-Subpart F contains rules governing the operation of large and turbine powered multiengine aircraft. It is the intersection of Part 125 and Part 91- Subpart F that is of critical importance in resolving your inquiry.

Part 91-Subpart F and Part 125

Part 91-Subpart F contains exceptions to some of the commercial operating rules, allowing certain operations to be conducted under Part 91 that would normally be required to be conducted under other commercial regulations. Specifically, § 91.501(b) states that certain operations may be conducted under the rules in Part 91-Subpart F instead of under the commercial operating rules in Parts 121, 129, 135, and 137 when common carriage is not involved. You will note that the language in § 91.501(b) specifically excuses operators from having to comply with parts 121, 135, 137 and 129, but does not include an exception for Part 125.[3] Therefore, an operator conducting a flight not involving common carriage in a Part 125 Airplane, is not excused from the applicability of Part 125. This is because one of the purposes of Part 125 is to ensure that all commercial operations conducted in Part 125 Airplanes, but not involving common carriage, are conducted in accordance with the additional safety requirements in Part 125.

When the FAA originally proposed Part 125, it specifically stated that the purpose of the rule was to amend the applicability of Part 121 so that those rules would apply only to common carriage operations with airplanes certificated to carry 20 or more passengers or a maximum payload capacity of more than 5,000 pounds.[4] The agency further stated that "[c]ommercial operations conducted with those airplanes, but not involving common carriage, would be governed by proposed Part 125."[5] In light of the purpose of the rule, it is helpful to clarify the meaning of "commercial operations" and "operations not

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[2] The FAA notes that even if § 91.501(b) applied, Company A could not transport Company B employees as proposed because Company B is not a wholly owned subsidiary of Company A. *See Federal Aviation Decisions*, 1975-13, 1975-15, and 1985-17. (West Publishing Co.).

[3] The plain language of § 91.501(b) is also consistent with the plain language and policy underpinnings of § 119.1(e)(2). Section 119.1(e) sets forth several types of operations that are excused from complying with the commercial operating rules in Parts 121 and 135. However, those same flights would not be excused from complying with Part 125 if they were conducted in a Part 125 Airplane, where common carriage was not involved.

[4] *See* 44 FR 66324 (Nov. 19, 1979). In the final rule, the payload capacity was increased to 6,000 pounds or more.

[5] *Id*.

involving common carriage" when determining the impact of Part 125 on Part 91 operations.

Commercial Operations

A commercial operation is any operation where the operator receives anything of value in exchange for carrying another person or another person's property.[6] The operations described in §§ 91.501(b)(3), (b)(5), (b)(6) and (b)(7) are commercial operations because they involve an actual exchange of money. The operations described in the other subparagraphs in § 91.501(b) may also be viewed as commercial in certain circumstances because the FAA construes "compensation" to include anything of value, including valuable good will. One of the reasons the agency adopted § 91.501(b) was to allow operators to conduct these types of commercial operations without having to obtain a commercial operating certificate. However, this did not change the nature of the operations themselves. They continue to be commercial operations because compensation is involved.

Operations Not Involving Common Carriage

Section 119.3 defines "operations not involving common carriage" to mean:

1. noncommon carriage;[7]
2. operations in which persons or cargo are transported without compensation or hire;
3. operations not involving the transportation of persons or cargo and;
4. private carriage.[8]

Under this definition, two types of operations are commercial because they involve compensation or hire (*i.e.*, noncommon carriage and private carriage); and two types are noncommercial (*i.e.*, operations in which persons or cargo are transported without compensation or hire and operations not involving the transportation of persons or cargo).

Part 125 and Section 91.501(b)

Considering the definitions of "commercial operations" and "operations not involving common carriage" together, it becomes clear that the operations described in § 91.501(b) meet all of the elements. It follows then that the FAA would not excuse operators from

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[6] *See* 14 C.F.R. § 1.1 (2006) (defining a commercial operator as a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property).

[7] Noncommon carriage means an aircraft operation for compensation or hire that does not involve a holding out to others. Title 14 C.F.R. § 119.3 (2006).

[8] Private carriage is a common law term, not specifically defined in the Federal Aviation Regulations. It has been interpreted to mean an aircraft operation for compensation or hire that does not involve holding out, or that involves very limited holding out. It is often characterized by carriage for one or several selected customers, generally on a long-term basis.

complying with Part 125 when it adopted § 91.501(b) because to do so would have rendered Part 125 meaningless and defeated the purpose of the rule, which was to ensure compliance with Part 125 for all commercial operations conducted in Part 125 Airplanes, but not involving common carriage. Section 91.501(b), therefore, was specifically drafted to allow certain types of commercial operations to be conducted under Part 91, instead of the rules in Parts 121, 135, 137 or 129. However, § 91.501(b) does not reference Part 125 and does not allow commercial operations not involving common carriage to be conducted under Part 91 if the operator uses a Part 125 Airplane.

Having established that the plain language of § 91.501(b) does not excuse operators of Part 125 Airplanes from complying with Part 125 when conducting commercial operations not involving common carriage, the next question to resolve is whether Part 125 Airplane operators may engage in § 91.501(b) operations if they hold a Part 125 LODA exempting them from the certification requirements. The answer to that question is no.

Part 125 LODAs and Section 91.501(b)

When the FAA adopted Part 125, it included provisions for deviation authority. Section 125.3 states that the Administrator may issue a LODA providing operators relief from specified sections of Part 125. A LODA records the FAA's decision to exempt the LODA holder from the requirement to obtain a Part 125 operating certificate or OpSpecs. A LODA may also be issued to Part 125 certificate holders to record the FAA's decision to excuse the certificate holder from other provisions in Part 125.[9]

In recent months, there has been considerable debate about the impact of LODAs on corporate operators. The debate has centered largely on LODAs that were issued as "full" or "blanket" deviations from Part 125. Some have interpreted the term full or blanket deviation to mean a complete exemption from all Part 125 requirements, while others have viewed the term as a misnomer that has resulted in an inconsistent application of the rules.

Although full deviations from Part 125 might have been justified in rare and isolated circumstances, the agency never intended for full or partial deviations to be issued indiscriminately.[10] Instead, full deviations were contemplated for unusual circumstances or operations of a very limited scope. In no case, however, should a deviation be issued for any purpose that would completely eviscerate the rule. As stated above, the purpose of Part 125 is to ensure that all commercial operations conducted in Part 125 Airplanes, but not involving common carriage, are conducted in accordance with Part 125.

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[9] Ideally, Part 125 certificate holders would not be issued a LODA, but instead, would receive an authorization on their OpSpecs documenting the sections of Part 125 with which they do not have to comply. LODAs should be reserved for non-certificate holders to document their exemptions from the certification and OpSpec requirements, as well as from other specified sections of the rule.

[10] *See* 45 FR 67214 (Oct. 9, 1980) (The FAA notes that "it is difficult to foresee more than a few situations in which a deviation from the entire Part [125 rule] could be justified . . .").

Therefore, any deviation (full or partial) that allows those operations to be conducted in Part 125 Airplanes *without* complying with Part 125, is improper. Moreover, it would be illogical to allow an operator who is *not* meeting all of the additional safety requirements in Part 125 to conduct any commercial operation, even if common carriage is not involved. Accordingly, the FAA declines to interpret the deviation authority in Part 125 as a basis for allowing an operator to conduct commercial operations not involving common carriage in a Part 125 Airplane under part 91.[11] This specifically includes the operations described in § 91.501(b).

Other Safety Considerations

In recent years, and particularly after the 9/11 terrorist attacks, the agency has been greatly concerned about full/blanket deviations, in part, because of the reduced oversight for full/blanket deviation holders. Recognizing that the liberal deviation policy could have adverse safety consequences, the agency began taking steps to correct this trend. In August 2002, FAA Flight Standards at headquarters decided that no further blanket deviations should be approved.[12] This decision was made in light of the FAA's authority in § 125.3(b) to terminate or amend LODAs at any time; a provision included in the rule for the very purpose of reining in deviation authority that proved to be inconsistent with the agency's safety goals. The FAA did not summarily revoke LODAs, but it did require all local Flight Standards District Offices (FSDO) to reevaluate previously issued LODAs and determine that operations were consistent with regulatory requirements.

The FAA acknowledges that certain guidance appearing in the 8700 Inspector's Handbook may have caused confusion regarding LODAs in general, and Part 91 operations in Part 125 Airplanes in particular. The FAA Office of Flight Standards has taken steps to resolve this problem, and issued amended guidance to its inspectors that reflects the opinions given here. The regulatory and enforcement divisions of the Office of the Chief Counsel consider this interpretation to be the definitive explanation of the proper scope of a LODA and authorized operations.

Regulatory Requirements for the Proposed Operations

Having outlined the regulatory regime governing your proposed operations, the FAA has determined that Company B is required to obtain its own LODA in order to transport its employees. Company A would be prohibited from transporting Company B's employees

[11] This interpretation is also consistent with other regulatory requirements. For example, § 91.321 allows a candidate in a Federal election campaign to pay an aircraft operator for campaign travel. These operators are permitted to conduct the flights under Part 91 and receive compensation, without possessing a commercial operating certificate authorizing operations under Parts 121 or 135. However, if the operator is conducting the flights in a Part 125 Airplane, that operator is *not* excused from complying with Part 125. *See* §§ 91.321 and 119.1(e)(10).

[12] FAA Notice 8700.20 is enclosed for your review.

unless Company B's employees were traveling as guests[13] on a trip that was conducted *entirely* for Company A's business purposes. In other words, Company B's employees may travel on Company A's airplane, but only for trips that Company A was going to make anyway. If the trip is for the benefit of Company B, then Company A could not conduct the trip without holding a Part 125 certificate authorizing noncommon or private carriage, or a commercial operating certificate for common carriage. Accordingly, Company B should contact the nearest FSDO and obtain a LODA to transport its owners, employees, officers, and guests. The LODA should exempt Company B from complying with specific sections of Part 125, but should not provide a full/blanket deviation from the entire rule. The LODA should limit Company B to noncommercial operations where no compensation of any kind is received, including reimbursement for operating costs. The LODA should also reflect that the carriage of any guests on the airplane must be limited to flights conducted solely for Company B's business purposes.

This interpretation was prepared by the Operations Law Branch of the Office of the Chief Counsel and coordinated with the Air Transportation Division of Flight Standards Service. We trust that it will be useful to you in your continued operations. Please contact Joe Conte of my staff at the address provided above, or by phone at (202) 267-3073, if we can be of further assistance.

Sincerely,

Rebecca MacPherson
Assistant Chief Counsel for Regulations

[13] The ~~term~~ word "guest" is not defined in the Federal Aviation Regulations, but the FAA has interpreted it to mean an individual traveling on the airplane when no charge or fee of any kind is made in exchange for the transportation, including the reimbursement of operating costs. The guest must be traveling on a flight conducted solely for the operator's business purposes.