U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

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

Memorandum

Date: November 27, 2024

To: Lawrence Fields, Executive Director, Flight Standards Service, AFX-1

From: Laura Megan-Posch, Assistant Chief Counsel for Regulations, AGC-200

Cc: Lynsey Scott, Manager, AGC-240

Subject: Rescinding the Shaw Legal Interpretation (Feb. 4, 2008)

LAURA JANE MEGAN-POSCH

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Date: 2024.12.04 07:24:46 -05'00'

This memorandum memorializes that the Shaw Legal Interpretation (Feb. 4, 2008) is rescinded as of December 2, 2024.[1] The purpose of the Shaw Legal Interpretation was to explain whether compensation for certain experimental aircraft operations would be prohibited under § 91.319. The Office of the Chief Counsel is rescinding this Legal Interpretation because it is no longer necessary due to subsequent updates to FAA regulations.[2] Therefore, the Shaw Legal Interpretation is no longer valid and may not be relied upon for any purpose. If you require further assistance, please contact my staff.

[1] See Public Aircraft Logging of Flight Time, Training in Certain Aircraft Holding Special Airworthiness Certificates, and Flight Instructor Privileges Notice of Proposed Rulemaking (NPRM), 88 FR 41194 (June 23, 2023). This NPRM stated that the Shaw Legal Interpretation (Feb. 4, 2008) would be rescinded should the NPRM's proposed modifications to part 91 become final. The final rule was published on October 2, 2024, with an effective date of December 2, 2024, 89 FR 80310 (Oct. 2, 2024).

[2] See Public Aircraft Logging of Flight Time, Training in Certain Aircraft Holding Special Airworthiness Certificates, and Flight Instructor Privileges Final Rule, 89 FR 80310 (Oct. 2, 2024).

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FEB 4 2008

Bob Shaw
Flight Support, Inc.
223 Bolivar Drive
Yorktown, VA 23692-4915

Dear Mr. Shaw:

This is in response to your e-mail of May 2, 2007, in which you requested an FAA interpretation as to whether the receipt of revenue for certain operations of an aircraft with an experimental airworthiness certificate would be prohibited by 14 CFR§ 91.319(a)(2).

Your request states that your client, Flight Support, Inc. owns a transport category business jet with an experimental airworthiness certificate and wants to lease the aircraft to a Department of Defense (DOD) contractor. The contractor, in turn, will lease the aircraft to a third company (third party subcontractor), who will then lease the aircraft to DOD.

In addition to providing the aircraft to DOD, the third party subcontractor will maintain and operate the aircraft with its own crew. The aircraft will be used for developing, testing, and evaluating defense related systems.

In a phone conversation with a member of my staff on September 6, 2007, you acknowledged that the nature of the intended operations may change over any given period of time; some operations possibly qualifying as public aircraft operations while some will be civil aircraft operations.

Because this office does not know the specific details of any particular operation, we are not able to determine which would qualify as public aircraft operations or which would be civil operations. However, your request for an opinion assumes the civil operation of the aircraft. Our response addresses the applicability of section 91.319(a)(2) to civil aircraft operations.

Section 91.319(a)(2) prohibits the operation of an aircraft with an experimental certificate that involves carrying persons or property for hire or compensation. Your letter asserts that the prohibition against the carriage of persons or property for hire only applies when such carriage is a major enterprise for profit and does not apply when the activity is incidental to the course of other business. You state that the third party subcontractor's carriage of persons and property (for hire) would be incidental to the course of flight testing and, in itself, is not a major enterprise for profit. Accordingly, you seek the FAA's opinion as to whether the flight test activities described are restricted by the "compensation or hire" provision of the rule.

Rescinded

14 CFR §1.1 defines "commercial operator" as a person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property. The definition further states that *"Where it is doubtful that an operation is for "compensation or hire,"* the test applied is whether the carriage by air is merely incidental to the person's other business or is, in it self, a major enterprise for profit." (Emphasis added). In other words, you do not apply the "major enterprise for profit" test unless it is doubtful whether an operation is for compensation or hire.

Given the facts you describe, it appears there will be compensation for the operations described above. Thus, the subcontractor would be a "commercial operator." That stated, the original question remains; are these operations prohibited under 14 CFR 91.319(a)(2)?

The FAA has consistently taken the position that an operation for compensation or hire is prohibited under §91.319(a)(2) when it involves the transportation by air of persons or property of another, but not when it involves the transportation of the operator's employees or property. More precisely, flights are not considered for compensation or hire if the operator is carrying only his own employees who are necessary for the purpose of the flight. However, if the operator carries persons or property of another and receives compensation that operation would be a violation of section 91.319(a)(2). In your case, the scenario would apply to the carriage of DOD employees even if they are on board the flight in furtherance of the primary purpose of the flight; e.g., equipment flight testing.

Also, be advised that as a general rule, when flights involve the carriage of persons or property for compensation or hire, they must be conducted with a commercial operating certificate under 14 CFR part 121 (for large airplanes) or part 135 (for rotorcraft and smaller airplanes). However, 14 CFR part 119 provides that certain operations do not have to be conducted under part 135. Section 119.1(e) excludes aerial work operations from part 135 application. Examples of aerial work operations include flights that have the same departure and destination points and flights that are conducted for the purpose of positioning an airplane to a second location. These operations may be conducted under part 91. If an additional purpose of the flight is to transport persons to a place other than the place of origin, i.e., dual purpose flights, the flight is not considered an aerial operation. Such an operation, if it is conducted for compensation or hire, is properly conducted under part 121 or part 135.

Rescinded

Finally, §91.319(a)(1) states that no person may operate an aircraft that has an experimental certificate for other than the purpose for which the certificate was issued. Accordingly, the operator is responsible for obtaining an airworthiness certificate for civil aircraft operations and operating the aircraft within the limits of that certificate.

The following discussion outlines four potential scenarios that may pertain to your proposed operations. All scenarios assume that the aircraft is issued an experimental certificate, flights are conducted within the operating limitations of that certificate, and compensation is received for the operation.

A. If the operator conducts an aerial flight with his own employees or property aboard the airplane, there is no violation of parts 121 or 135 or section 91.319(a)(2). The flight is not considered for compensation or hire.

B. If the operator conducts a dual purpose flight with his own employees or property aboard the airplane, there is no violation of parts 121 or 135 or section 91.319(a)(2) because the flight is not considered for compensation or hire.

C. If the operator conducts an aerial flight under part 91 with the persons or property of another aboard the aircraft, there is a violation of section 91.319(a)(2); however, there is no violation of parts 121 or 135.

D. If the operator conducts a dual purpose flight with the persons or property of another aboard the airplane, and the flight was conducted under part 91, there is a violation of either part 121 or part 135 as well as a violation of section 91.319(a)(2).

This response was prepared by Angela Washington, Attorney in the Regulations Division of the Office of Chief Counsel and has been coordinated with the Flight Standards Service at FAA Headquarters. If you have additional questions regarding this matter, please contact us at your convenience at (202) 267-3073.

Sincerely,

Rebecca Byers MacPherson

Rebecca B. MacPherson
Assistant Chief Counsel for
Regulations Division, AGC-200

Rescinded