Federal Aviation Administration

Memorandum

Date: DEC - 2 2010

To: Charlotte Flight Standards District Office

cc: Lawrence Fields, Manager, Flight Standards Division, AEA-200

From: Rebecca B. MacPherson, Assistant Chief Counsel, AGC-200

Subject: Legal Interpretation Regarding Part 125 Letter of Deviation Authority (LODA)

The following is in response to a request for a legal interpretation submitted by the Charlotte Flight Standards District Office (FSDO) through Lawrence Fields, Manager, Flight Standards Division, AEA-200, regarding the limitations set forth in a Part 125 Letter of Deviation Authority (LODA), and whether operating limitations applicable to one 125 operator should be applied to all part 125 operators.

Your first question asks for the definition of "within the scope of and incidental to the business of the company" as used in an A125 LODA, paragraph 3(a)(5). First, we note that the A125 LODA allows operators who would otherwise be subject to the certification and operating rules under part 125 to operate under the provisions of 14 C.F.R. § 91.501 provided they comply with the limitations set forth in the LODA. The limitations of the LODA mirror the requirements of § 91.501 and thus, the agency's interpretations of § 91.501 are instructive in determining compliance with the limitations of the LODA. *See* FAA Order 8900.1, Vol. 2, Ch. 6, § 3, para. 2-715. The LODA in question authorizes the operator to conduct operations not involving common carriage as long as such operations are in accordance with the following limitation:

> 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.

See 14 C.F.R. § 91.501(b)(5) (containing the identical regulatory requirement as the LODA limitation in question). You present several scenarios in which a 125 LODA holder transports personnel and guests on various flights and inquire as to whether the carriage is within the scope of, and incidental to, the business of the company operating the airplane. Additionally, you

inquire whether the company operating the airplane may charge for reimbursement for the cost of owning, operating and maintaining the airplane.

Whether such carriage is within the scope of, and incidental to, the business of the company operating the airplane will depend on the specific facts. *See* Legal Interpretation to Frank Q. Nebeker from Donald P. Byrne, Acting Assistant Chief Counsel, Regulations and Enforcement Division (July 13, 1990). The FAA has, however, previously interpreted the phrase "within the scope of, and incidental to, the business of the company" in various § 91.501 contexts. *See* Legal Interpretation to BSTC Corporation from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (June 22, 2009) (noting transportation of mining employees and guests appears to be incidental to and within scope of operator's geological business); Legal Interpretation to Scott C. Burgess from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Nov. 25, 2008) (noting transportation of automotive dealership employees and guests must be incidental to and within scope of operator's real estate development business); Legal Interpretation to Mr. Wilkie from Kenneth B. Quinn, FAA Chief Counsel (June 10, 1992) (explaining that it is not enough for the government and the company in question to be 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).

You present a scenario in which one company, ABC, provides "racing engines and technical engine support" to another company, XYZ racing, a 125 LODA holder. These companies contract to have XYZ racing transport ABC personnel to each race, at no charge. You asked whether this carriage is within the scope of, and incidental to, the business of the company operating the airplane. In such a scenario, it appears that this carriage is within the scope of, and incidental to, the business of the XYZ racing. Thus, it may be appropriate for XYZ to seek reimbursement for expenses, should it choose to do so, as long as the charge for the carriage does not exceed the cost of owning, operating and maintaining the airplane. *See* Legal Interpretation to BSTC Corporation from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (June 22, 2009) (discussing what items and charges may be included as costs of owning, operating, and maintaining the airplane and the appropriate methods used by operators to calculate these expenses).

You present a second scenario in which XYZ racing, a 125 LODA holder, is approached by ABC racing regarding the carriage of ABC personnel on XYZ's aircraft, with ABC offering to pay for its share of the expenses. ABC and XYZ are separate entities with no apparent business relationship, other than both being race teams travelling to the same destination. Without additional information, however, we are not able to address whether the transport of ABC personnel is within the scope of, and incidental to, the business of XYZ racing. XYZ racing may, nonetheless, transport ABC racing personnel as guests of their company when the carriage is not within the scope of, or incidental to, their business but no charge of any kind may be made for the carriage of the guests.

Your second question asks whether operating limitations applicable to a specific 125 operator should be applied to all part 125 operators. You also ask for clarification regarding the definition of "holding out" as used in 14 C.F.R. § 125.11(b).

Holding out is one of the three essential elements of common carriage. *See* Legal Interpretation to Howard Turner from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (2005). Although the number of contracts and customers an operator serves can be a factor in determining whether there is a holding out for purposes of common carriage, additional factors may also be used to determine whether a 125 operator is holding out its services to the public, contrary to the requirements of part 125. *See id.* In regards to whether the operating limitations placed on a specific 125 operator should be imposed on all operators, we note that the DOT placed these limitations on that operator upon review of its operations and a determination that it appeared to be holding out its services to the general public, contrary to the certification requirements of part 125. Operating limitations are based on an individual company's operating practices; therefore it is inappropriate to apply them to all part 125 operators in general. If it appears that a 125 operator is holding out to the public, an inspector should review its operations and take appropriate action.