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

Office of the Chief Counsel

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

MAY - 6 2011

Mr. Joseph D. Cimperman
Director of Operations
Flight Options
26180 Curtiss Wright Parkway
Cleveland, OH 44143

Dear Mr. Cimperman:

In a letter dated October 6, 2010, you requested a legal interpretation to resolve conflicts you believe exist between provisions of Federal Aviation Administration (FAA) Order 8900.1 and part 135 check airman regulations. Specifically, you believe that language contained in "FAA Order 8900.1, Volume 3, Chapter 20 Check Airman, Instructor and Supervisor Programs for Title 14 CFR Part 121 and 135 Certificate Holders, Section 2 Check Airman Approval and Surveillance" (FAA Order 8900.1) conflicts with the requirements for check airmen approval and training found in 14 C.F.R. §§ 135.337(a)(1) and 135.339 (a)(2).

Section 135.337(a) defines check airmen (aircraft and simulator) and §§ 135.337(b) and (c) provide the criteria that must be met in order to qualify as a part 135 check airman (aircraft and simulator). In accordance with §§ 135.337(b) and (c), in order to act as a check airman or use a person as a check airman (aircraft or simulator) a check airman candidate must complete the applicable training requirements of § 135.339. *See* 14 C.F.R. §§ 135.337(b)(4) and (c)(4).

Further, Section 135.339(a)(2) states,

> (a) No certificate holder may use a person nor may any person serve as a check airman unless--…
> (2) Within the preceding 24 calendar months, that person satisfactorily conducts a proficiency or competency check under the observation of an FAA inspector or an aircrew designated examiner employed by the operator. The observation check may be accomplished in part or in full in an aircraft, in a flight simulator, or in a flight training device. This paragraph applies after March 19, 1997.

See 14 C.F.R. § 135.339(a)(2). Section 135.339(a)(2) does not specify separate observation requirements for aircraft check airmen and simulator check airmen. Rather, it allows the observation of a proficiency check or competency check conducted by an aircraft or simulator check airman to be accomplished in either an aircraft, flight simulator or flight training device.

Guidance regarding the processes for FAA inspectors to evaluate check airmen qualifications, and initial and transition training and checking, are found in FAA Order 8900.1, Volume 3, Chapter 20, Section 2, Paragraphs 3-1422 - 3-1426. This guidance provides a five-phase process that FAA inspectors must abide by in the course of determining FAA approval of check airmen candidates. *See* id. In your request for a legal interpretation, you raise concern about paragraphs 3-1425(E)(1) and (2) which describe phase four of the five-phase check airman approval process.

- Paragraph 3-1425(E)(1) states that, inspectors evaluating a "Proficiency Check Airman—Aircraft…must evaluate this candidate while the candidate conducts a proficiency check or competency check in an aircraft in flight. The inspector should observe the candidate conducting the entire check in the aircraft…" *See* FAA Order 8900.1, Volume 3, Chapter 20, Section 2, Paragraph 3-1425(E)(1). The paragraph allows an exception to the requirement that an inspector observe a check airman candidate in flight, conditioned on the approval of the Principal Operations Inspector (POI) by stating, "With the approval of POI, the inspector may observe part of the check in the aircraft and the remainder in a simulator or an approved flight-training device (FTD)." *See* id.

- Paragraph 3-1425(E)(2) states that, inspectors evaluating a "Proficiency Check Airman—Simulator…must evaluate this candidate while the candidate conducts the simulator or (FTD) segment of an actual proficiency check, or competency check, as applicable." *See* FAA Order 8900.1, Volume 3, Chapter 20, Section 2, Paragraph 3-1425(E)(2).

The guidance described above, instructs inspectors to conduct an evaluation of an aircraft check airman's abilities to conduct a proficiency or competency check while the check airman conducts such a check in an aircraft in flight, unless an exception is made by the POI. *See* FAA Order 8900.1, Volume 3, Chapter 20, Section 2, Paragraph 3-1425(E)(1). The guidance also requires inspectors to conduct an evaluation of a simulator check airman's abilities to conduct a proficiency or competency check while the check airman conducts such a check in a simulator flight training device. *See* FAA Order 8900.1, Volume 3, Chapter 20, Section 2, Paragraph 3-1425(E)(2).

As a general principle, guidance material such as FAA Order 8900.1 does not have the force and effect of a regulation on an operator. FAA Order 8900.1 provides directions to FAA inspectors regarding the execution of their oversight responsibilities. To the extent that the material in FAA Order 8900.1 conflicts with a binding regulation, the regulation takes precedence.

In this instance, the guidance material in FAA Order 8900.1 conflicts with § 135.339(a)(2) in that § 135.339(a)(2) does allow for the observation of a proficiency check or competency check conducted by a check airman (aircraft or simulator), to be conducted in either an aircraft, flight simulator or flight training device, provided that the FAA inspector or designated examiner observes an actual check. We note that part 135 allows portions of proficiency checks and competency checks to be conducted not only in an aircraft, but also

in a simulator or other appropriate training device if approved by the Administrator. *See e.g.* 14 C.F.R. §§ 135.293 and 135.297. Nevertheless, 14 C.F.R. § 135.339(a)(2) does not require observation of a check airman conducting a proficiency or competency check in an aircraft in flight. Thus, given the conflicting guidance material, we have forwarded this issue to the Flight Standards Service for further review.

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Sara Mikolop, Attorney, Operations Law Branch of the Regulations Division of the Office of the Chief Counsel, and coordinated with the Air Transportation Division of the Flight Standards Service.

Sincerely,

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