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

**Office of the Chief Counsel**

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

AUG 26 2011

EICHENBERGER & BUCKLEY
A Legal Professional Association
Jerry A. Eichenberger
6099 Frantz Road
Dublin, OH 43017

Dear Mr. Eichenberger,

This is in response to your request for a legal interpretation regarding whether Jay Bird Air, LLC (Jay Bird) can conduct its flights under the operating rules of 14 CFR part 91 and contract with Global Flight Operations to manage its aircraft, to potentially include maintenance of the aircraft, managing maintenance obligations, procuring pilots, providing pilot training, providing all consumables such as fuel and oil, providing scheduling services, and providing catering. You also question whether Jay Bird may then dry lease its aircraft and encourage the lessees of its aircraft to use services provided by Global Flight Operations without impacting the assignment of operational control under the dry lease.

In your request, you stated that Jay Bird owns aircraft, some of which are turbojet airplanes. Jay Bird wants to contract with a third party manager, Global Flight Operations, to manage its aircraft. During a phone conversation on June 29, 2011, you stated that Global Flight Operations would manage all maintenance obligations and schedule operations for Jay Bird. You also stated that Jay Bird wishes to dry lease some of its aircraft to other individuals. Jay Bird has a strong preference for its lessees to use the services provided by Global Flight Operations, and would encourage them to do so. In your letter, you stated that it is Jay Bird's intent for the lessee or lessees of the aircraft to retain operational control of the aircraft operating under the dry lease. You question whether the use of the services provided by Global Flight Operations by the lessees would impact the assignment of operational control under the contract.

The arrangement you describe may raise issues with regard to retention of operational control. Section 91.23 requires that in all leases involving a U.S.-registered large civil aircraft "[t]he name and address . . . and the signature of the person responsible for operational control of the aircraft under the lease . . ." must be contained in the truth-in-leasing clause at the end of the lease. A dry lease of an aircraft is one in which the owner provides the aircraft, and the lessee supplies his or her own flight crew and retains operational control of the flight. *See* Legal Interpretation to George C. Douglas from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (July 31, 2009); Legal Interpretation to Fred Meier from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (June 12, 2009). A wet lease of an aircraft is one in which the owner provides

both the aircraft and the crew and retains operational control of the flight. *See* Legal Interpretation to Douglas; Legal Interpretation to Meier.

Section 1.1 defines operational control, with respect to a flight, as "the exercise of authority over initiating, conducting or terminating a flight." 14 C.F.R. § 1.1. "Exercise of authority" means "the person having operational control must be responsible for and, in fact, exercise the operational expertise required to operate an aircraft." Legal Interpretation to John McRainey from Anthony J. Broderick, Associate Administrator for Regulation and Certification (March 28, 1989).

The determination of who has operational control of an aircraft is a fact-specific inquiry. *See* Legal Interpretation to Gregory S. Walden from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Jan. 20, 2011) (*citing* Legal Interpretation to McRainey; *Administrator v. M&N Aviation, Inc. & Sky Way Enter., Inc.*, EA-5260 (2006); *Administrator v. Darby Aviation*, EA-5159 (2005)). In determining operational control, "[w]henever the aircraft and flight crew are furnished by separate and unrelated persons, it is . . . the policy of the FAA to consider the lessee of the aircraft as the operator so long as he retains control, direction, and responsibility of the aircraft . . . . [However], [w]henever the instrumentalities of transportation, i.e., the aircraft and crew, are furnished by separate persons acting in concert, the situation is not the same. In such cases, the question to be considered is whether the net effect of the actual operational arrangements of the parties places responsibility for the operation of the aircraft in the lessor of the aircraft, the person furnishing the flight crew, or both." 36 FR 19507, 19509 (Oct. 7, 1971); *see* Legal Interpretation to Meier. When an agreement provides for the lease of an aircraft with a flight crew employed by the lessor, operational control normally remains in the hands of the lessor whose employee is the pilot in command of the aircraft. 36 FR 19507, 19509 (Oct. 7, 1971); *see* Legal Interpretation to Meier. Alternatively, when an aircraft and flight crew are furnished by separate and unrelated persons, it is "presumed that the lessee of the aircraft is the operator of that aircraft." 37 FR 14758, 14760 (July 25, 1972).

The FAA determines where operational control lies based on the terms of each lease as well as how the arrangement actually operates. *See* Legal Interpretation to R.C. Novetske from Joseph T. Brennan, Associate Regional Counsel (Aug. 3. 1983) (stating that changing the wording of the lease will have no effect on the FAA's determination of compliance if actual operations continue to violate federal regulations). Jay Bird's interest in contracting with Global Flight Operations to perform maintenance on Jay Bird's aircraft and to schedule Jay Bird's operations, as well as Jay Bird's desire to encourage lessees to procure pilots and crew from Global Flight Operations, may affect the FAA's operational control determination. Jay Bird's delegation of responsibilities to Global Flight Operations may require the FAA to conduct further review to determine if Jay Bird's leases are truly dry leases.

I hope this information has been helpful. This response was coordinated with the General Aviation and Commercial Division of Flight Standards Service. If you have further questions concerning this response, please contact Sabrina Jawed on my staff at 202-267-3073.

Sincerely,

Rebecca MacPherson
Assistant Chief Counsel for Regulations, AGC-200