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

Office of the Chief Counsel

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

OCT - 3 2011

Mark Haberkorn
[redacted]

Mr. Haberkorn,

This letter is in response to your request for a legal interpretation received on June 9, 2011 regarding private pilot privileges and limitations of 14 CFR § 61.133. In your letter, you present several scenarios and question whether they comply with Part 61. Summary of the scenarios you present, background information, and responses to the questions follow below.

Factual Background

Your first three questions involve a general scenario in which you and your wife are flying from Raleigh, NC to Long Island, NY in your Piper Arrow and receive a pro rata share operating expense reimbursement from your additional passengers. You also write that you understand you are not authorized to engage in common carriage. First, you ask whether you may advertise, on Facebook, the specific time and date that you are travelling to the wedding in order to carry two additional passengers with you to Long Island in exchange for a pro rata reimbursement of the operating expenses. Second, you further state that you then receive a response to your Facebook post described above from two friends that express an interest in travelling to Long Island with you in order to attend a baseball game. You question whether you and your passengers share a "common purpose" in this scenario. Third, you question whether you may post the same information as describe above on a fixed based operator's (FBO) bulletin board instead of on Facebook. Lastly, you pose a general question about receipt of the pro rata expenses through Paypal and whether it is "legal for others besides the pilot to profit on a flight," as Paypal extracts a 3% commission from any fees paid through their service.

Applicable law

Private pilots are prohibited from carrying passengers for compensation or hire with certain exceptions. *See* 14 CFR § 61.113(a)-(d). Section 61.113(c) allows a private pilot to receive a pro rata reimbursement from his passengers for fuel, oil, airport expenditures, or rental fees, so long as the pilot and his passengers share a bona fide common purpose for conducting the flight. *See* Legal interpretation to Don Bobertz from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (May 18, 2009); Legal interpretation to Guy Mangiamele from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Mar. 4, 2009). Absent a bona fide common purpose, reimbursement for the pro rata share of operating expenses constitutes compensation for the flights, thus requiring a part 119 certificate to conduct

commercial operations.[1] *See* Bobertz Interpretation (finding no common purpose when a pilot made nine trips to transport members of a canoe club, three at a time, to a race site because the pilot did not attend the race and the only purpose for conducting the flights was to transport the canoe club).

Though not defined in FAA regulations, common carriage is a common law term.[2] Federal courts have developed its definition over many years. *See* Legal interpretation to Howard Turner from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (2005). Holding out to the public or a segment of the public is the "crucial determination" in deciding if one has engaged in common carriage or not. *See* Woolsey v. Nat'l Transp. Safety Board, 993 F.2d 516, 523 (5th Cir. 1993). The holding out can be accomplished by any "means which communicates to the public that a transportation service is indiscriminately available" to the members of that segment of the public it is designed to attract. *See* Transocean Airlines, Enforcement Proceeding, 11 C.A.B. at 350 (1950). FAA Advisory Circular 120-12A explains that a holding out may be accomplished through a variety of ways; signs and advertising are the most direct means, but not the only methods. There may also be a holding out without advertising, where a reputation to serve all is sufficient to constitute an offer to carry all customers. Whether or not the holding generates little success is not a factor.

Analysis

1). You question whether advertising, on Facebook, the specific time and date of your trip to your "friends/family/acquaintances" would be acceptable as a private pilot, since you do not consider yourself to be holding out to "the general public." As described above, holding out is accomplished when one communicates to the public, or a segment to the public, that transportation services are indiscriminately available to any person with whom contact is made.

While you offer no additional details about the nature of the post or how large your Facebook audience is, the FAA cautions that this type of advertising may be construed as holding out. Advertising is not confined to print media, such as magazines or newspapers, and advancing technology allows one to quickly reach a large audience through the electronic communications and internet posts. Additionally, even if you limit the transportation services to a class or segment of the general public (such as Facebook users), it may still be considered holding out if it expresses a willingness to provide transportation for *all within this class or segment to the extent of its capacity*. Legal interpretation to William A. Dempsay from Donald P. Byrne, Acting Assistant Chief Counsel for Regulations and Enforcement (June 5, 1990). Finally, the FAA cannot determine or approve in advance what type of advertising or soliciting are considered a holding out of air transportation service without all available facts concerning a specific situation. *See* Legal interpretation to Earl H. Simmons, Jr. from Donald

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[1] The FAA construes the term compensation very broadly; any reimbursement of expenses, including a pro rata share of operating expenses, constitutes compensation. *See* Legal Interpretation to Mike Sommer from Rebecca MacPherson, Assistant Chief Counsel for Regulations (Oct. 8, 2010).

[2] There are four essential elements in common carriage; 1) a holding out, 2) to transport persons or property, 3) from place to place, 4) for compensation or hire. *See* Woolsey v. Nat'l Transp. Safety Board, 993 F.2d 516, 522 (5th Cir. 1993); *see also* FAA Advisory Circular 120-12A.

P. Byrne, Acting Assistant Chief Counsel for Regulations and Enforcement (July 27, 1989) (advising a travel club that the use of mass media, salesmen, travel club brochures, and other forms of advertising or recruitment cannot be approved in advance without all available, specific facts).

I have included a copy of the article "Come Fly With Me," contained in the September/October issue of the FAA Safety Briefing, which may be a helpful reference as it discusses exceptions for private pilots that carry passengers for compensation or hire (archived editions of the FAA Safety Briefing may also be found online at www.faa.gov/news/safety_briefing).

2). Second, you question whether you and your passengers share a common purpose if you are travelling to Long Island for a wedding but your passengers express an interest in going to Long Island to attend a baseball game. The existence of a bona fide common purpose is determined on a case-by-case basis. Based on these facts, there appears to be a bona fide common purpose, as the destination was dictated by the pilot, not the passengers, and both you and your passengers have personal business to conduct in Long Island. The purpose of this flight is not merely to transport your passengers to Long Island. *See* Bobertz Interpretation (explaining that a pilot who planned to attend a race and transported a race team to and from the race site would have a bona fide common purpose with his passengers for those two flights, but not for additional flights conducted in order to transport more team members back and forth); Legal Interpretation to Thomas H. Chero from John H. Cassady, Assistant Chief Counsel for Regulations and Enforcement (Dec. 26, 1985) (finding no common purpose if the pilot is transporting passengers to a destination where the pilot has no particular business to conduct).

3). You question whether you may post the specific time and date that you are travelling to Long Island on an FBO's bulletin board in order to carry two additional passengers with in exchange for a pro rata reimbursement of the operating expenses. Again, the FAA cautions that this type of advertising may be construed as holding out (*see* explanation in question 1 above).

4). Lastly, you pose a general question about receipt of the pro rata expenses through Paypal and whether it is "legal for others besides the pilot to profit on a flight" since Paypal extracts a 3% commission from fees submitted through their site. Assuming a bona fide common purpose exists, a pilot may seek pro rata reimbursement *from his passengers, not from a third party* (such as an employer). *See* 14 C.F.R. § 61.113(c); Legal Interpretation to Ronald R. Lamb from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Mar. 1, 2010). So long as the pilot does not pay less than his pro rata share of expenses, and only seeks reimbursement from fellow passengers, then the pilot is in compliance with § 61.113(c). Whether or not such payment comes through an online payment system such as Paypal has no bearing on the legality of this situation. However, payment through Paypal would suggest that there is an interest in carrying passengers with whom there is no previous personal relationship and that the offer to accept passengers is being made to the general public (see concerns raised in question 1 above).

We appreciate your patience and trust that the above responds to your concerns. This response was prepared by Nancy Sanchez, an attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the General Aviation and Commercial Division of Flight Standards. Please contact us at (202) 267-3073 if we can be of further assistance.

Sincerely,

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

enclosure