Federal Aviation Administration

Memorandum

Date: FEB 20 2013

To: Larry Richards, Manager, Flight Standards Division, ACE-200

From: Mark W. Bury, Acting Assistant Chief Counsel, International Law, Legislation and Regulations Division, AGC-200

Prepared by: Dean E. Griffith, Attorney, AGC-220

Subject: Wet Leasing

This memorandum is in response to your February 17, 2012 request for legal interpretation of two scenarios involving lease of aircraft.

Scenario I

In the first scenario corporation A1 manages aircraft that are owned by other entities. It also makes the aircraft available to "participants" in a "shareholder/participant agreement." To become a participant a party buys $1,000 worth of stock in A1 and is then made a member of A1's Board of Directors. According to your memorandum, the agreement states that purchase of stock "creates only the opportunity for the Participant to receive the services offered by [A1] and the benefits available under the [aircraft] leases." Participants also pay a monthly management fee and pay an hourly fee to use the aircraft and a pilot.

Corporation A2 provides the aircraft management services for A1 and also provides pilot services to program participants.

Filings with the state secretary of state's office indicate that A1 and A2 are registered to the same address and that one individual serves in leadership positions in both corporations.

Regarding this scenario you ask whether the arrangement: (1) constitutes a wet lease; (2) would qualify the company as a commercial operator; and (3) meets the definition of a direct air carrier, on demand operation and common carriage.

First you ask whether this arrangement constitutes a wet lease. The FAA recognizes two general types of leases—wet leases and dry leases. A dry lease of an aircraft is one in which the lessor provides the aircraft and the lessee supplies his or her own flight crew and retains operational control of the flight. Under a wet lease, the lessor provides both the aircraft and the crew and normally retains operational control of the flight. Whether a lease is a wet or dry lease is

determined on a case-by-case basis and the FAA will look at factors such as whether the companies are acting in concert to make a determination that a purported dry lease is in fact a wet lease. *See* Legal Interpretation to Eric L. Johnson, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Aug. 11, 2011). The practical effect of engaging in a wet lease is that the lessor retains operational control of the operation and may be required to hold an operating certificate because it is providing air transportation. *Id.*

You state in your letter that A1 provides the aircraft to program participants and that another company, A2, provides the pilots although participants "understand they can obtain pilot services from any qualified pilot but all choose to use" A2. On its face this appears to be a dry lease because the aircraft are being supplied by A1 and A2 is providing the pilots. Nevertheless, you present several facts in your letter indicating that the two companies are acting together to provide the aircraft and crew as a package – including the uniform selection of A2's pilots and the apparent control of A1 and A2 by one individual as evidenced by the corporate filings. Accordingly, we believe that scrutiny is warranted as to whether A1 is truly engaged in a dry lease with the program participants.

Your second question is whether the facts presented meet the definition of a "commercial operator" as defined by § 1.1. A commercial operator is a "person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375" of title 14. 14 C.F.R. § 1.1. An "air carrier" means "a person who undertakes directly by lease, or other arrangement, to engage in air transportation." *Id.* "Air transportation" means "interstate, overseas, or foreign air transportation or the carriage of mail by aircraft." *Id.* Both air carriers and commercial operators operating in air commerce are required to hold a part 119 certificate. *See* § 119.1. Based on your letter it appears that A1 may be a commercial operator or an air carrier, however we do not have enough information to definitively categorize the operations.

Finally, you ask whether the combined activities of A1 and A2 meet the definitions of "direct air carrier," "on-demand operation," and "common carriage" as defined in § 110.2. We interpret your question to be asking whether the companies are providing on-demand common carriage operations. A company is engaged in common carriage when it (1) holds out a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire. *See* Advisory Circular 120-12A (Apr. 24, 1986). It appears from your letter that the "program" A1 offers, on a "first-come-first-serve basis" that allows participants to "receive the services offered" by A1 could be construed to mean that A1 is engaging in common carriage.

In summary, with the facts as you have presented them in your letter, it appears that the arrangement between A1, A2, and program participants is in fact a wet lease because aircraft and pilots are being provided by the same entity. If the arrangement is a wet lease, the company providing the aircraft and crew would need to obtain a part 119 certificate and operated its aircraft in accordance with part 135. However, we note that additional facts may indicate that the arrangement is a dry lease.

Scenario II

In the second scenario Company A owns an aircraft and leases the aircraft to several businesses and individuals. Seven of the entities to which aircraft are leased are intertwined with A's parent company (PC). Company A bills all lessees for an hourly rate to use the aircraft, flight time and fuel, and occasionally other expenses related to the flight.

Company A pays Company B a monthly fee to arrange for maintenance and to hanger its aircraft. Company B also provides pilot services. Lessees are given a list of qualified pilots to use in the aircraft, but all lessees choose to use Company B for pilot services.

First, you ask whether A is a flight department company. A flight department company is a company organized solely for the purpose of owning and operating aircraft to transport people or property for compensation or hire. *See* Legal Interpretation to Joseph A. Kirwan, from Rebecca B. MacPherson, Assistant Chief Counsel Regulations Division (May 27, 2005). According to your request, A, a subsidiary of PC owns the aircraft being leased for compensation to businesses that are "intertwined with" PC. From the facts you provide it appears that A may be a flight department company. If A is a flight department company then it would be required to hold a part 119 air carrier operating certificate because the air transportation provided by the company is not "incidental" to the company's business. *See* Legal Interpretation to Kirwan.

Next, you ask whether the arrangements between A and the intertwined business lessees constitute wet leases. As described in your letter, A has entered into purported dry leases with 12 businesses, entities, and individuals. A gives the lessees a list of qualified pilots however all lessees choose to use pilot services of one company – Company B. A also contracts with B for aircraft management services. B pays for some costs incurred for managing the aircraft with a credit card issued to the president of B by A's parent corporation. As discussed in the first scenario, whether an arrangement is a wet or a dry lease is made on a case-by-case basis. We have stated in previous interpretations that even if styled as a dry-lease, a pattern of evidence showing that parties in acting in concert to furnish an aircraft and crew may reveal the arrangement to be a wet lease. *See* Legal Interpretation to Johnson. Here because of the relationship between A and B and the fact that all lessees use pilots provided by B would warrant additional scrutiny regarding whether A is truly engaged in dry leasing.

Next, you ask whether A is a commercial operator as defined in 14 C.F.R. § 1.1. A commercial operator is a "person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property, other than as an air carrier or foreign air carrier or under the authority of Part 375" of title 14. 14 C.F.R. § 1.1. An "air carrier" means "a person who undertakes directly by lease, or other arrangement, to engage in air transportation." *Id.* "Air transportation" means "interstate, overseas, or foreign air transportation or the carriage of mail by aircraft." *Id.* Both air carriers and commercial operators operating in air commerce are required to hold a part 119 certificate. *See* § 119.1. Based on your letter it appears that A may be a commercial operator or an air carrier, however we do not have enough information to definitively categorize the operations.

Finally, you ask whether the combined activity of A and B meets the definition of "direct air carrier," "on-demand operation," and "common carriage" as defined in § 110.2. We interpret

your question to be asking whether A and B are providing on-demand common carriage operations. A company is engaged in common carriage when it (1) holds out a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire. *See* Advisory Circular 120-12A (Apr. 24, 1986). We cannot opine on this question without additional information regarding A's activities with respect to offering transportation services.

This response was coordinated with the Air Transportation Division and General Aviation and Commercial Division of Flight Standards Service. Please contact us at (202) 267-3073 if we can be of additional assistance.