U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

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

JUN 19 2014

David M. Kroontje
[redacted]

Dear Mr. Krontje:

This letter is in response to your February 3, 2014 request for a legal opinion regarding the applicability of 14 C.F.R. parts 91 and 135 to a corporate business model where an aircraft management company would purchase two aircraft, and then sell eight 1/8 ownership shares in each aircraft to prospective customers. Each customer would be one of eight FAA-registered owners on both of these aircraft. Your letter has requested clarification on whether flights conducted by your management company would need to be conducted under part 135 or whether those flights could be conducted under part 91. In a follow-up telephone conversation in February 2014, you indicated that the customers would be required to exclusively use your aircraft management services which will provide flight crews and maintenance crews. Customers will not be able to specify pilots or mechanics of their own choosing.

Typically, when one corporation provides transportation by air for compensation or hire to another entity, the regulations require that the operator hold a part 119 certificate. As you correctly highlight in your letter, the FAA does allow some operations for compensation or hire to be conducted under the rules found in part 91, but only when these operations meet certain requirements.

Page three of your interpretation request states that you believe that your business model does not involve common carriage. However, you should note that part 135 is not limited to common carriage, it also includes non-common and private carriage. See Gorman v. NTSB,[1] which determined that under § 119.23(b) even a carrier providing intrastate transportation for only a single company must hold a part 119 certificate authorizing operations under part 135. As proposed, it is possible that your operation could be considered private carriage for hire or non-common carriage, requiring a 119 certificate authorizing part135 operations. See § 119.23(b). Unless otherwise permitted under § 91.501, your operation appears to require a part 119 certificate authorizing part 135 operations.

The FAA permits owners of aircraft who select their pilots and maintenance providers, and use the aircraft for their own personal use, to conduct flights under part 91. But your

[1] 558 F.3d 580 (D.C. Cir), cert denied, 130 S.Ct. 374, 175 L.Ed.2d 157 (2009)

customers would be required to use your pilots. *See* Aircrane, Inc. v. Butterfield[2], In Aircrane, the court put great weight on whether a person had flexibility to choose his own pilots and found that since the lessor really had control over the choice of pilots, the lessor had operational control.

In making the determination that a flight falls under part 91 instead of part 135, the FAA would look at a number of factors, including who owns or leases the aircraft, who maintains liability for the flight operation, who selects the pilots, who conducts the maintenance, and who has responsibility for dispatching and following the aircraft. When all of these factors lie with the beneficiary of the flight, the flight is generally considered to be a part 91 flight. However, a requirement that aircraft owners use a particular provider of maintenance and pilots would tend to indicate that that company had actual control over the flights, and that the company should hold a part 119 certificate. Sections 91.1011(a) and 91.1013, regarding fractional ownership management companies and fractional owners, contains useful instructions concerning operational control responsibilities. For example, to be found to hold operational control, each owner must take responsibility for compliance with applicable regulations, enforcement actions for non-compliance and assume the liability risk for personal injury or property damage.

Determining whether the operation as proposed in your letter necessitates a part 119 certificate, turns on the specific facts in relation to the above-listed requirements. Such a determination is beyond the scope of this letter without further information. However, the safest option is to obtain a part 119 certificate.

You also asked whether your operation would fit into the rules of part 91, subpart K. To do so, your proposed operation must meet the requirements found in § 91.1001. The FAA cannot provide business advice to private entities on how to meet the requirements in this section, which are clearly spelled out.

You have also asked whether you may use the provisions of. § 91.501 under the terms of NBAA exemption 7897d. This exemption allows operators who use aircraft which do not meet the weight or engine requirements of § 91.501(a) to use the exceptions found in § 91.501(b). Specifically, you have asked whether multiple aircraft may be used by a group of owners when operating under NBAA exemption 7897d. It appears that you are referring to § 91.501(b)(5). This regulation places no limitation on the number of aircraft that may be jointly owned and operated by a group of owners

To the extent that you are asking whether the § 91.501(b)(5) exception would apply to your business model, we believe it would not. Section 91.501(b)(5) requires a parent/subsidiary relationship among the company employees flying on the aircraft where the parent or subsidiary is operating the aircraft and has a business *other than providing transportation by air*. Since your company appears to be in the business of providing transportation by air and does not appear to be in a parent or subsidiary relationship with the customers, you would not be able to use this exemption.

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[2] 369 F. Supp.598 (E.D. PA 1974).

Additionally, you asked whether all pilots must be direct employees of one of the joint owners or whether one of the joint owners may contract with a separate entity to provide piloting services. If you are referring to § 91.501(b)(6), it does not appear that your business model fits the joint ownership, time-sharing or interchange agreements (as defined in § 91.501(d)). Thus, your business model could not use § 91.501(b)(6).

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 letter has been prepared by Robert Spitzer, Attorney, Northwest Mountain Region,

Sincerely,

Mark W. Bury
Assistant Chief Counsel for International
Law, Legislation and Regulations, AGC-200