Federal Aviation Administration

Memorandum

Date: OCT - 2 2017

To: John Duncan, Director, Flight Standard Office, AFS-1

From: Lorelei Peter, Assistant Chief Counsel, AGC-200

Prepared By: Katie Inman, Attorney, AGC-220

Subject: "Exclusive Use" Under 14 C.F.R. § 135.25

This memorandum revises an August 22, 2016 response to your request for clarification concerning 14 C.F.R. §§ 133.19 and 135.25. It addition, it responds to your inquiries concerning use of an aircraft for solo flights during flight training and duration of a certificate. This response contains answers to the three questions you posed, each of which concerns exclusive use.

The August 22, 2016 response will be removed from the legal interpretations database.

"Exclusive Use" and External-Load Operations

You asked whether an operator with a single aircraft can satisfy the "exclusive use" requirements of § 135.25 if that operator holds both an air carrier certificate under part 135 and an operating certificate under part 133. The answer is yes, an operator may use the same aircraft to satisfy both §§ 133.19 and 135.25, because the regulations do not require different aircraft to satisfy each regulation, and because § 135.25(b) permits an operator to use the aircraft "for other than operations under [part 135]." Your question posits a hypothetical scenario involving a helicopter operator who maintains possession, control and use of one helicopter listed on a part 133 operating certificate who now seeks an air carrier certificate under part 135, using the same helicopter to satisfy the "exclusive use" requirement of § 135.25.

Sections 133.19 and 135.25 both require exclusive use of an aircraft. The FAA defines "exclusive use" for purposes of § 135.25(c) by stating a person has exclusive of use of an aircraft when that person "has the sole possession, control, and use of it for flight, as owner, or has a written agreement … in effect when the aircraft is operated, giving the person that possession, control and use for at least 6 consecutive months." In prior legal interpretations, the FAA has emphasized the plain text of the definition of "exclusive use" in § 135.25(c) means an aircraft designated as an exclusive-use aircraft that two different part 135 certificate holders operate cannot be considered an exclusive-use aircraft under § 135.25(c). Letter to Francis M. DeJoseph from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (June 25, 2012).

Section 133.19, which applies to external-load operations, also requires exclusive use of at least one rotorcraft that fulfills certain criteria. Like § 135.25(c), the section defines exclusive use as "the sole possession, control, and use of [the aircraft] for flight, as owner, or has a written agreement … giving him that possession, control, and use for at least six consecutive months."

The plain language of neither §§ 133.19 nor 135.25 prohibits the aircraft that satisfies the exclusive use definition within each section from being used for another *type* of operation. In fact, § 135.25(b) expressly recognizes the possibility that different operational parts may apply depending on the use of the aircraft, by stating, "[h]owever, this paragraph does not prohibit the operator from using or authorizing the use of the aircraft for other than operations under this part and does not require the certificate holder to have exclusive use of all aircraft that the certificate holder uses."

The relevant guidance addressing exclusive use, as well as prior FAA legal interpretations, establishes "exclusive use" is one of the critical components in establishing operational control. The regulatory history of § 135.25 verifies this intention. The preamble accompanying the Final Rule for § 135.25 explains, "only one certificate holder at a time can have an exclusive use contract for a given aircraft," and emphasizes an applicant or certificate holder "should reasonably expect to either own or have exclusive use of at least one aircraft." 43 FR 46763 (Oct. 10, 1978). The preamble also states the rule is intended to provide "positive control for both operation and maintenance of that aircraft." Id. The rule focuses on a single operator having exclusive use of at least one aircraft. Your hypothetical scenario asks about such a circumstance—a single certificate holder, rather than multiple operators or certificate holders.

Based on the foregoing considerations, an operator of external-load operations under part 133 could use an aircraft that fulfills the requirements of both §§ 133.19 and 135.25.

"Exclusive Use" and Flight Training

You also ask whether a part 135 operator's "exclusive use" aircraft that is used in flight training operations for a flight school can be used for solo flights with flight school students, when the same person owns both the part 135 certificate and the flight school.

Your question poses a scenario involving a small airport that has a contract with a person to run a Fixed Base Operation (FBO) that also requires the FBO owner to have a part 135 certificate. In the interest of increasing aircraft utilization, the operator may choose to offer flight instruction, which involves solo flights students take in accordance with part 61. You ask whether such flights are permitted in the exclusive-use aircraft, and whether the solo pilot would need to be an employee or agent of the part 135 certificate holder.

In general, the regulatory part under which the operator derives its authority for each operation must be unequivocal and widely understood by the operator, any associated crew, any student who is operating the aircraft, and the inspector, upon request. Section 135.25(b) contemplates such an operation because it states the text of § 135.25(b) does not prohibit the operator from using or authorizing the use of the aircraft for "other than operations under this part." An operator may use the "exclusive use" aircraft for flight instruction, including solo flights, as long

as the certificate holder's operating manual, company procedures, or other similar documents clarifies these regulatory provisions and authorizes such operations, and the FAA has accepted those procedures.

Termination of Exclusive Use and Duration of Certificate

As noted above, § 135.25(c) sets forth a 6-month consecutive time requirement in defining "exclusive use." The paragraph specifically states the person who has exclusive use must have "possession, control and *use of it for flight*." This language establishes the aircraft used to satisfy the exclusive use requirement of § 135.25(b) must be in an operable condition; hence, the regulatory text's inclusion of the phrase "use of it for flight" in providing the list of requirements.

The FAA is authorized to take enforcement action against an operator who has allowed an operating certificate to become dormant by not maintaining an operable aircraft. For example, in Sunworld International Airlines, Inc. v. NTSB, the United States Court of Appeals for the District of Columbia Circuit affirmed the FAA's revocation of Sunworld's air carrier certificate due to lack of economic authority after FAA personnel facilitated repossession of the airline's only aircraft listed on its OpSpecs. 305 Fed.Appx. 663 (2008). The FAA had notified Sunworld that it planned to revoke the certificate, but withdrew its notice five months later because Sunworld asserted it intended to resume service. The FAA eventually ordered revocation, which the court affirmed because Sunworld had neither possessed nor flown the only aircraft on its OpSpecs for nearly two years at the time the FAA issued the order. The court held Sunworld's intention to resume operations was irrelevant, and stated the FAA was entitled to prosecutorial discretion in determining whether to take action against Sunworld.

In light of this discretion, AFS may consider establishing guidance to set forth a general timeframe in which AFS consults with AGC when considering whether to forego or pursue enforcement action against an operator who, as you ask in your memorandum, may lose the exclusive use of an aircraft due to an unforeseen loss of a lease or an act of God. As you know, the Administrator's updated compliance philosophy encourages consideration of a variety of actions in ensuring adherence to the regulations. AGC is available to assist AFS in the consideration of enforcement options.

This memorandum has been coordinated with the Air Transportation Division, AFS-200.

Federal Aviation Administration

Memorandum

Date: APR 4 - 2016

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

From: John S. Duncan, Director, Flight Standards Service, AFS-1

Subject: Request for Legal Interpretation: 14 CFR Part 135 Section 135.25

Flight Standards Service, AFS-1, is in receipt of a request from the Air Transportation Division, AFS-200 for a legal interpretation of the 14 CFR Part 135 Section 135.25. These are questions arising from the recent General Aviation Principal Operating Inspector Conferences. They are of a relatively pressing nature and will serve as a springboard for the broader discussion of "exclusive use" scheduled for later this year.

1. Can an operator with a single aircraft satisfy the requirements of "exclusive use" if that operator holds both an *air carrier* certificate under Part 135 CFR Section 135 and an *operating* certificate for rotorcraft external load under 14 CFR Part 133? The aircraft to be used as the "exclusive use" aircraft for both certificates would be under the sole possession, control and use of the same person as defined by 14 CFR Section 1.1. The term "exclusive use" of an aircraft by an air carrier dates back to 1949 when it first appeared in regulatory language. Over the ensuing years, its meaning and application has evolved and its legal interpretation has been refined. Currently, the requirement for "exclusive use" falls under 14 CFR 135.25 for an *air carrier* certificate and under 14 CFR Section Part 133.19 for an *operating* certificate for rotorcraft external load operations.

> Scenario: A helicopter operator has one helicopter and a part 133 *operating* certificate in order to conduct external load operations. Is this operator prevented from obtaining a part 135 *air carrier* certificate because they do not have another aircraft to designate as an "exclusive use" aircraft for the separate *air carrier* certificate?

2. If a part 135 operator's "exclusive use" aircraft is used in flight training operations for a flight school, do the flight instructors have to also be employees/agents of the part 135 operator to instruct in this aircraft in order for the operator to maintain sole passion and control? During 91/141 instruction, a student must eventually fly solo with no instructor on board. Can the exclusive use aircraft be allowed to be used for solo flights with students of the flight school in an aircraft that is the "exclusive use" aircraft of the part 135 operator, if the same person owns both the 135 certificate and the flight school?

Scenario: Many small airports have a contract with a person to run a Fixed Base Operation (FBO) that also requires them to have a part 135 air carrier certificate, and therefore, an "exclusive use" aircraft. As a means to increase aircraft utilization, they may choose to offer flight instruction and need to solo students as required by part 61 certification regulations. As long as the operator maintains sole possession, operational control and use of the aircraft, are these flights allowed in the "exclusive use" aircraft? Does the solo pilot have to be an employee/agent of the 135 certificate holder?

3. Finally, how long can the agency allow an operator to retain a certificate after an event causes them to no longer have an "exclusive use" aircraft? Does it matter w/y they no longer have an "exclusive use" aircraft (act of God vice a sale of the aircraft by the operator; unplanned loss of a lease or other)? Whatever time frame is deemed appropriate? What actions must be taken with respect to the operator's part 135 air carrier certificate at the end of that time? Must the FAA initiate action to revoke the air carrier certificate, which could take years, or may the FAA accept the suspension indefinitely in lieu of revocation?

If you have any questions, please contact Chris Holliday, Aviation Safety Inspector, Air Carrier Operations Branch, AFS-250 at (202) 267-4552.