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

Office of the Chief Counsel

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

AUG - 4 2016

Caryn Schenewerk
SpaceX
1030 15th St. NW
Washington, DC 20005

Re: Whether a captive insurance policy could be permissible under 14 C.F.R. § 440.9.

Dear Ms. Schenewerk:

We recently received your request for interpretation of Title 14, Code of Federal Regulations (14 C.F.R.) § 440.9. Specifically, you asked whether Space Exploration Technologies Corp. (SpaceX) could use a captive insurance company to comply with § 440.9(f) "Insurance requirements for licensed or permitted activities."[1] To support your proposal, you state that captive insurance companies are able to issue policies that reflect "substantially the same terms and conditions of the requirements set forth in [the] regulations" as contemplated in the FAA's NPRM on Financial Responsibility Requirements for Licensed Launch Activities.[2]

A captive insurance company may satisfy § 440.9(f)'s requirements because it could demonstrate an alternative form of financial responsibility.

Part 440 Subpart A "establishes financial responsibility and allocation of risk requirements for any launch or reentry authorized by license or permit."[3] Under part 440, "*financial responsibility* means capable of satisfying a liability obligation as required by 51 U.S.C. Subtitle V, chapter 509."[4] "As a condition of each license or permit, a licensee or permittee must comply with all insurance requirements . . . or otherwise demonstrate the required amount of financial responsibility."[5] Alternatively, "in lieu of a policy of insurance, a licensee or permittee may demonstrate financial responsibility in another manner meeting the terms and conditions for insurance of this part."[6]

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[1] 14 C.F.R. § 440.9(f) states, "In lieu of a policy of insurance, a licensee or permittee may demonstrate financial responsibility in another manner meeting the terms and conditions for insurance of this part. The licensee or permittee must describe in detail the method proposed for demonstrating financial responsibility and how it ensures that the licensee or permittee is able to cover claims as required under this part."

[2] *See* Notice for proposed rulemaking (NPRM), *Financial Responsibility Requirements for Licensed Launch Activities,* 61 FR 38992, 39008 (July 25, 1996).

[3] 14 C.F.R. § 440.1.

[4] 14 C.F.R. § 440.3.

[5] 14 C.F.R. § 440.9(a).

[6] 14 C.F.R. § 440.9(f).

When promulgating the rule, the FAA contemplated the possibility that financial responsibility could be demonstrated without necessarily using standard insurance.[7] The plain meaning of the final rule indicates that the FAA intended the phrase, "in lieu of," to serve as an alternative to standard insurance.[8] The plain meaning is further supported by the preamble to the NPRM, in which the FAA stated financial responsibility can be demonstrated in "an alternative form."[9] The NPRM offered specific examples of "alternative forms" that could potentially demonstrate the requisite level of financial responsibility, "such as insurance purchased from a risk retention group,"[10] which you noted is a type of captive insurance company. An alternative form of proving financial responsibility, such as a risk retention group or captive insurance company, could be permissible under the regulation, so long as that alternative form demonstrates financial responsibility at a level acceptable to the FAA.[11]

A licensee or permittee, who chooses to proceed under § 440.9(f), does not necessarily need to adhere to the requirements of § 440.13. In fact, when a licensee or permittee proceeds under § 440.9(f), it is not always possible for that licensee or permittee to adhere to all the requirements in § 440.13.[12] For example, it would be impossible for a licensee or permittee, using a new insurance company as SpaceX proposes, to obtain a policy "with an insurer of recognized reputation and responsibility," as § 440.13(a)(8) requires. To apply all the requirements of § 440.13 to a licensee or permittee who proceeds under the § 440.9(f) exception provision, would essentially make § 440.9(f) a provision that could never be used. This mistaken application would contradict intent from the NPRM, by invalidating alternative forms of financial responsibility, such as insurance purchased from a "risk retention group." [13] The FAA will not construe the requirements in § 440.13 to frustrate the purpose of § 440.9(f). Therefore, for a licensee who chooses to satisfy § 440.9 by proceeding under the § 440.9(f) exception provision, the FAA would assess financial responsibility on an individualized basis.

I hope this response has been helpful to you. If you have any additional questions or require further information, please feel free to contact my office at (202) 267-3073. This response was prepared by Sarah Sorg, an attorney in the Regulations Division of the Office of the Chief

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[7] Compare 14 C.F.R. § 440.13 (standard conditions of insurance coverage) with 14 C.F.R. § 440.9(f) (allowing an alternative form of financial responsibility in lieu of a policy of insurance). The FAA recognizes the potential for confusion when interpreting §§ 440.13 and 440.9. Section 440.13 contains conditions for "standard" insurance coverage. Section 440.9(f) allows a licensee or permittee to demonstrate financial responsibility "in lieu of" standard insurance.

[8] *Id.*

[9] 61 FR at 39008.

[10] *Id.*

[11] "The licensee or permittee must describe in detail the method proposed for demonstrating financial responsibility and how it ensures that the licensee or permittee is able to cover claims as required under this part." 14 C.F.R. § 440.9(f).

[12] Compare 14 C.F.R. § 440.13(a) "Insurance obtained under § 440.9 must comply with each of the following terms and conditions of coverage" with § 440.9(f) "In lieu of a policy of insurance." It would be illogical to apply § 440.13(a), which states the terms and conditions to comply with § 440.9 as a whole, to § 440.9(f), which serves as an exception provision to the requirements of § 440.9.

[13] As noted earlier, the NPRM specifically listed risk retention groups as an alternative form that licensees or permittees may use. A risk retention group is a type of captive insurance company.
61 FR at 39008.

Counsel, and coordinated with the Licensing and Evaluation Division of the Office of Commercial Space Transportation (AST-200).

Sincerely,

Lorelei Peter
Assistant Chief Counsel for Regulations, AGC-200