U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

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

JUN 30 2017

Jeffrey T. Hills
Crowe & Dunlevy
500 Kennedy Building
321 S. Boston Ave.
Tulsa, OK 74103-3313

Re: Section 91.501(b)(6) time sharing agreements with dealer-customers

Dear Mr. Hills:

This letter is in response to your November 4, 2016 request for a legal interpretation of 14 CFR § 91.501(b)(6). Specifically, you seek confirmation that your client's planned aircraft operations do not constitute "common carriage" and that the operations may be legally conducted under time sharing agreements pursuant to § 91.501(b)(6), as intended by the parties.

According to your letter, your firm's client is a manufacturing company that sells large, generally very expensive industrial equipment to a network of approximately 25 independently owned industrial dealers in the U.S., which dealers in turn sell exclusively your client's products to end use customers. The company has been operating its corporate aircraft, a turbojet-powered multiengine civil airplane of U.S. registry, in part, in connection with a site visit program for potential end use customers.[1] In addition, personnel from some of the dealers will generally accompany the customers on these trips. Neither the dealers or their personnel nor the potential customers pay any charge, assessment or fee for the flights, consistent with § 91.501(b)(9).

Your client is now contemplating a new arrangement for the transportation of certain key customers and dealer personnel, whereby the dealers would pay some costs for the site visit program flights. Specifically, your client wants to enter into written time sharing agreements, pursuant to § 91.501(b)(6) and as defined in § 91.501(c)(1), with perhaps three to five of the dealers that have demonstrated the greatest ability to utilize the site visit program to effect sales of the company's equipment to end use customers. The

[1] These select potential customers are flown to the company's headquarters and manufacturing facilities for the purpose of introducing them to the company's manufacturing process, exposing the customers to the culture of its workforce, educating them about the company's history and the history of the founders and principals, and introducing the customers to the company's personnel with whom they might speak when calling headquarters.

company would lease its aircraft with flight crew to the dealers and exercise operational control over all time sharing flights. The relevant dealer time share lessee would pay the company no more than the actual amounts permitted under § 91.501(d), and no individual customer or dealer personnel transported under such arrangements would pay any charge, assessment, or fee of any kind for the carriage.

The company does not advertise generally, and would not permit the relevant dealers to advertise generally, the availability of air transportation under the site visit program. You assert that the segment of the public eligible for air transportation is limited to a very narrow group of qualified potential customers, and that the program is "not intended to foster air transportation service for a segment of the public who may be transported, indiscriminately, so long as they pay a fee." Based on these planned operations under the proposed time sharing arrangements, you ask the FAA to concur that the operations would not constitute "common carriage" and that such operations can legally be conducted under part 91, subpart F.

For the purposes of this interpretation, we assume that the subject aircraft meets the requirements of § 91.501(a) and that the past site visit operations fall under the purview of § 91.501(b)(9), as your letter asserts.

Section 91.501(b)(6) allows certain operations of large airplanes not involving "common carriage" to be conducted under part 91, subpart F rules for the "carriage of company officials, employees, and guests of the company on an airplane operated under a time sharing, interchange, or joint ownership agreement as defined in paragraph (c) of this section." Section 91.501(c)(1) defines a "time sharing agreement" as "an arrangement whereby a person leases his airplane with flight crew to another person" and prohibits any charge for flights made under such arrangements, except for those charges allowed under § 91.501(d).

As you correctly point out, "common carriage" is a common law term not defined by statute or regulation. The FAA has issued Advisory Circular 120-12A and numerous interpretations to provide guidance in determining whether a carrier is engaged in common carriage versus private carriage.[2] A carrier becomes a common carrier when it "holds itself out" to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it. There are four elements in defining a common carrier: (1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation.

We note that, as indicated in your letter, your client has historically been operating its site visit program consistent with § 91.501(b)(9), which, like all provisions of § 91.501, requires that the flights be non-common carriage operations. While we agree that, based

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[2] *See, e.g.*, Legal Interpretation to Howard Turner from Rebecca B. MacPherson, Assistant Chief Counsel, Regulations Division (2005); Legal Interpretation to Marshall S. Filler, Esq. from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Dec. 4, 2009); and Legal Interpretation to Gregory S. Winton from Mark W. Bury, Acting Assistant Chief Counsel for International Law, Legislation, and Regulations Division (Aug. 14, 2014).

on the foregoing description of your client's site visit program, the flight operations are likely private carriage and not common carriage, we do not see any discernible difference between the company's past site visit program and the new proposed program, except for the time sharing mechanism. The time sharing arrangements do not appear to implicate the elements of common carriage, such as additional advertisement or an increase in the segment of the public to be transported. Thus, the company's site visit program, which past flights presumably have been legally conducted as non-common carriage operations, should continue to be operated as such should the company enter into the time sharing arrangements, without a holding out of a willingness to transport persons from place to place for compensation.

We do, however, caution that the use of time sharing arrangements to collect charges from dealers and other potential customers may, under more expansive circumstances, be inconsistent with § 91.501(b)(9). That provision allows certain operations of large airplanes not involving common carriage to be conducted under part 91, subpart F rules for the "carriage of persons on an airplane operated by a person in the furtherance of a business other than transportation by air for the purpose of selling them land, goods, or property, including franchises and distributorships, when the carriage is within the scope of, and incidental to, that business and *no charge, assessment, or fee is made for that carriage*" (emphasis added).

Your letter states that your client sells its products to the dealers. Therefore, the dealers are themselves customers of the company, even though they in turn sell the products to end use customers. Section 91.501(b)(9) prohibits the receipt of any payment, including those set forth in § 91.501(d), for the carriage of prospective customers.

As a matter of regulatory construction and policy, we cannot accept as appropriate the use of time sharing arrangements under § 91.501(b)(6) that operate to contravene the text and purpose of § 91.501(b)(9).[3] Section 91.501(b)(9) specifically addresses the carriage of persons on an airplane for the purpose of selling to them goods or other property (including franchises or distributorships) and, therefore, controls over the more general applicability of § 91.501(b)(6) for the carriage of company officials, employees, and guests on an airplane operated under a time sharing agreement. The language of § 91.501(b)(9) was developed, in pertinent part, to ensure that "no charge of any kind may be made for" the carriage of potential customers. To permit operators to charge customers under subpart F would require "constant surveillance and time-consuming investigation by FAA inspectors to determine" whether the charge represents compensation. *See* 37 FR 14758, 14759 (Jul. 25, 1972).

[3] Similarly, the FAA has previously declined to allow an operator to use the time sharing arrangement in § 91.501(c)(1) in a way that contravenes another provision in § 91.501. *See* Legal Interpretation to Rex E. Reese from Rebecca B. MacPherson, Assistant Chief Counsel Regulations Division (Jun. 2008) ("Allowing the parties to agree to one type of arrangement at the beginning and then convert the arrangement at the end when a different cost formula might be more beneficial to one or both parties would defeat the purposes underlying the lines that were drawn by the FAA when this regulation was written").

However, the use of time sharing agreements under § 91.501(b)(6), if limited in number, would mitigate the policy concerns underlying the § 91.501(b)(9) prohibition on charging potential customers for flight services under subpart F. The terms of these agreements should delineate that the only allowable charges are those authorized in § 91.501(d). Such terms, if clear, serve to affirm that the charges represent an amount permitted under the regulations and are not, in fact, compensation that would require certification as a commercial operator.

Please note, however, that the use of time sharing agreements with potential customers must be limited in scope so that the agreements do not effectively defeat the purpose of § 91.501(b)(9). We consider your client's proposed arrangement with three to five of the dealers to be sufficiently limited in number. The FAA cannot accept as appropriate the distinct scenario where a private operator enters into time sharing agreements with all or a substantial number of its potential customers as a means of circumventing the restriction on accepting payments from customers.

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 Richard Doan, Operations Law Branch, Office of the Chief Counsel and coordinated with the General Aviation and Commercial Division of Flight Standards Service.

Sincerely,



Lorelei Peter
Assistant Chief Counsel for Regulations, AGC-200

CROWE & DUNLEVY
ATTORNEYS AND COUNSELORS AT LAW

Jeffrey T. Hills
Direct Tel: (918) 592-9817
Direct Fax: (918) 592-6333

jeffrey.hills@crowedunlevy.com

November 4, 2016

Via Facsimile (202) 267-7971 and U.S. Mail
Lorelei A. Peter
Assistant Chief Counsel, Regulations Division
Office of the Chief Counsel
Federal Aviation Administration
800 Independence Avenue SW
Washington, DC 20591

Re: Request for Interpretation

Dear Lorelei:

We write to seek an interpretation by your office of Section 91.501(b)(6) of the Federal Aviation Regulations ("FARs") in the context of the planned aircraft operations outlined below. Specifically, we seek confirmations that the planned operations would not constitute "common carriage" and that the operations may be legally conducted pursuant to time sharing agreements as intended by the parties.

Operations Profile:

Our client, a corporation formed and existing under the laws of a State in the United States and constituting a "citizen of the United States" as defined in 49 U.S.C. § 40102(a)(15)(C) ("Manufacturer"), owns and operates, using its own employee flight crew members, a turbojet-powered multiengine civil airplane of U.S. registry (the "Aircraft"). Manufacturer's use and operation of the Aircraft is incidental to its non-aviation, primary business of equipment manufacturing and sales, and Manufacturer operates the Aircraft under Part 91 of the FARs.

Manufacturer sells large, generally very expensive equipment to a network of approximately twenty-five independently owned industrial dealers in the continental United States ("Dealers"), which Dealers in turn sell exclusively Manufacturer's industrial products to end use customers. Manufacturer has historically operated its Aircraft, in part, in connection with a site visit program to fly certain potential customers to Manufacturer's headquarters and manufacturing facilities for the purpose of introducing such customers to Manufacturer's manufacturing process, exposing such customers to the culture of Manufacturer's workforce, educating such customers about the company's history and the family history of Manufacturer's founders and principals, and introducing such customers to Manufacturer personnel with whom they might speak when calling Manufacturer's headquarters. Such customers do not pay any

charge, assessment or fee for such carriage, consistent with Section 91.501(b)(9) of the FARs. Some Dealer personnel will generally accompany the customers on trips to Manufacturer's headquarters and manufacturing facilities. Neither Dealer nor such Dealer personnel pay any charge, assessment or fee for such carriage, again consistent with Section 91.501(b)(9) of the FARs, and Manufacturer has historically paid the entire expense of such trips, including the entire cost of the flights to and from Manufacturer's headquarters and manufacturing facilities.

Manufacturer is contemplating a new arrangement for the transportation of certain key customers and Dealer personnel to Manufacturer's headquarters and manufacturing facilities located together in a midwest city in the United States. Specifically, Manufacturer would enter into written time sharing agreements (as defined in Section 91.501(c) of the FARs) with a subset of Dealers (perhaps 3 - 5 of such Dealers) that have demonstrated the greatest ability to utilize the above-described manufacturing facilities site visit program to effect sales of Manufacturer equipment to customers. Manufacturer would exercise operational control over all time sharing flights. As provided in Section 91.501, under each such time sharing agreement, the relevant Dealer time share lessee would pay to Manufacturer no more than the actual amounts permitted under Section 91.501(d). No individual customer or Dealer personnel transported under such arrangements would pay any charge, assessment or fee of any kind for the carriage.

The purpose of the arrangements would be to encourage customer site visits to Manufacturer's facilities as such site visits have proven beneficial in a higher close rate of sales of equipment to customers who have seen the manufacturing facilities and process. In turn, Manufacturer would arrange for greater access to the Aircraft for time share lessee Dealers and their customers who have negotiated and executed time sharing agreements with Manufacturer in place, but, notwithstanding the charges permitted and paid by the relevant dealer to Manufacturer under the time sharing agreement, no equipment sale by Manufacturer to a Dealer, or by a Dealer to a customer, would include any charge for the carriage that had been provided to bring the customer to Manufacturer's headquarters and manufacturing facilities for a site visit. Only customers meeting a select profile based on past equipment purchases, aggregate equipment needs, wherewithal to consummate a purchase of Manufacturer equipment and demonstrated interest in a manufacturing facilities site visit and equipment purchase (and accompanying Dealer sales personnel) would be eligible for the transportation and site visit under the program and relevant time sharing agreement.

Manufacturer would not advertise generally, and would not permit the relevant Dealers to advertise generally, the availability of air transportation under the site visit program, and only flights to and from Manufacturer's headquarters and manufacturing facilities location would be provided pursuant to the time sharing agreements. Although a portion of the Aircraft's availability and use would be reserved for such time sharing flights, a significant portion of the Aircraft's availability and use would continue to be reserved for Manufacturer's own business needs incidental to its own primary business.

Request for Interpretation:

Manufacturer intends that the requirements of Sections 91.501(b)(6), 91.501(c) and 91.501(d) (and of course, to the extent applicable, Section 91.23)) would be fully observed and met in connection with each time sharing agreement and all flights thereunder. We understand

that the time sharing agreement flight operations allowed by Section 91.501(b)(6) are permitted only where "common carriage" is not involved. In this regard, we have reviewed Advisory Circular 120-12A, often cited in legal interpretation letters issued by the Office of the Chief Counsel, as well as various of such interpretation letters and other judicial decisions addressing the common law concepts of both "common carriage" and "private carriage". We understand the essential elements in common carriage involve (i) a holding out to the public or to a segment of the public of a willingness, (ii) to transport persons or property, (iii) from place to place, (iv) for compensation of hire.

We posit that essential elements of common carriage are missing from Manufacturer's time sharing flights plans and that such flight operations would therefore entail only private carriage. While the eligible customers profile discussed above might describe a very small segment of the public, it is clear that such profile is intended to limit potential customers who may participate in the site visit program (and thus who may be transported pursuant to the time sharing agreements) to a very narrow group of qualified persons, and is not intended to foster air transportation service for a segment of the public who may be transported, indiscriminately, so long as they pay a fee. Further, given the incidental nature of the time sharing flights to the overall objectives and business purpose of the site visit program, Manufacturer would clearly not be holding out a willingness to provide air transportation generally to the public or to a segment of the public. Such position is further buttressed by the fact that passengers would not be transported to destinations of their general choosing but would instead only be transported to Manufacturer's headquarters and manufacturing facilities at a single, specific location, solely for the purposes of the site visit program.

Nevertheless, we further understand that "common carriage" is not specifically defined outside of the common law in the FARs or other applicable laws or regulations and is determined objectively on a case-by-case basis. Accordingly, on behalf of Manufacturer, we request an interpretation from your office based on the facts, circumstances and planned operations discussed above. Specifically, we ask whether your office concurs that the planned operations profile outlined above does not constitute "common carriage" and that such operations can legally be conducted pursuant to the provisions of Sections 91.501(b)(6), 91.501(c) and 91.501(d) of the FARs.

Your assistance with respect to the issues presented here will be greatly appreciated by our client. If I can furnish additional information or be available to discuss any of the factual or regulatory issues with you or your office, please advise.

Regards,

Jeffrey T. Hills
For the Firm

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