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

Office of the Chief Counsel

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

AUG 15 2017

Jason M. Kidd
[redacted]

Re: Request for reconsideration of prior interpretation of § 135.267(d); company policies restricting activities and behavior and "rest"

Dear Mr. Kidd:

This letter is in response to your March 31, 2017 letter posing a number of questions on three distinct issues: the logging of pilot flight time under 14 CFR § 61.51(e)(1)(i); the authority of a part 135 operator to conduct part 91 operations; and the flightcrew member rest requirements in 14 CFR § 135.267.

Specifically, with regard to logging pilot flight time, you ask several questions on the scope and applicability of the term "sole manipulator" in § 61.51(e)(1)(i) and whether a second-in-command may log pilot-in-command flight time under certain circumstances. The FAA has previously issued legal interpretations addressing similar circumstances,[1] which we have enclosed for your convenience. Should you still have questions concerning the FAA's policies in this area, you can contact the General Aviation and Commercial Division, AFS-800, of the Flight Standards Service at (202) 267-1100 for additional guidance.

Your next two questions involve a scenario in which a certificate holder operating under part 135 "manages" an aircraft for an owner and conducts flights on the aircraft for the owner's personal use or that of his employees. You ask whether the certificate holder can operate these flights under part 91 rules and, if so, whether its flightcrew members must still comply with the rest requirements of § 135.267. Because these questions are matters of compliance assistance instead of legal interpretation, we are forwarding them to the Air Transportation Division, AFS-200, of the Flight Standards Service for a response.

Finally, your letter sought clarification on certain aspects of the rest requirements in § 135.267. You reference the part of our previous legal interpretation to you, dated

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[1] *See, e.g.*, the Legal Interpretations to Daniel Murphy from Mark W. Bury, Assistant Chief Counsel for Regulations (Mar. 4, 2015); to Judd Cato from Mark W. Bury, Assistant Chief Counsel for International Law, Legislation and Regulations (Jun. 10, 2014); and to Danny Creech from Mark W. Bury, Acting Assistant Chief Counsel for International Law, Legislation and Regulations (Aug. 8, 2013).

November 13, 2012, pertaining to § 135.267(d) and request that we re-evaluate the position taken there. Subsection 135.267(d) requires that, for unscheduled assignments under § 135.267(b), the certificate holder "must provide for at least 10 consecutive hours of rest during the 24-hour period that precedes the planned completion time of the assignment." In the 2012 legal interpretation to you, the FAA relied on previous interpretations in concluding that "if a crewmember is realistically scheduled to receive 10 hours of rest in a 24-hour period, then 'if the original planning is upset for reasons beyond the control of the [certificate holder], the flight may nevertheless be conducted, even though crew duty time may extend beyond 14 hours' in a 24-hour period" (citations omitted).

You ask that we re-evaluate this interpretation because § 135.267(d) does not provide for any exceptions to the required 10-hour rest period, which you contend is a "hard limit" not subject to the "circumstances beyond the control of the certificate holder" exception found in § 135.267(e).

We have closely reviewed the language in §§ 135.267(d) and (e) and find no reason to reconsider the conclusion reached in our prior interpretation to you and in numerous earlier interpretations.[2] The FAA has consistently determined that § 135.267(d) cannot be construed as a hard and fast rule that 14 hours of duty time must never, under any circumstances, be exceeded. We, therefore, affirm the position taken in our 2012 interpretation to you.

You also express concern that some operators may abuse this view of § 135.267(d) through suspect scheduling practices. To address your concern, we reiterate that the original planned completion time of an assignment must be "realistically scheduled." The determination of whether a schedule is realistic depends upon an examination of all the facts and circumstances in a particular case. A schedule deemed a pretext, in an attempt to circumvent the intent of § 135.267(d), will not be considered to be "realistic."[3]

The last question in your letter seeks clarification on whether company policies restricting the activities or behavior of flightcrew members in excess of FAA regulations are considered "restraints" that violate the rest periods required in § 135.267. In particular, you cite as examples company policies that: restrict alcohol consumption to 12 or 24-hour periods prior to acting or attempting to act as a flightcrew member, which exceed the regulatory restriction of 8 hours (*see* 14 CFR § 91.17(a)(1)); restrictions on tobacco use; and requirements to stay within a given distance of the aircraft, airport, or crew base. You suggest that flightcrew members subject to these policies are not free from all restraint by the certificate holder.

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[2] *See* the Legal Interpretations from Donald P. Byrne, Assistant Chief Counsel for Regulations and Enforcement to Kevin Wilson (Mar. 30, 1992); to Fred R. Hutson (Jan. 16, 1992); to John Barney (Dec. 19, 1991); to D. Keith Hann (Mar. 28, 1991); to Robert B. Thomas (Dec. 6, 1990); and to Marvin E. Autry (Nov. 9, 1990).

[3] *See* the Legal Interpretation to Kevin Wilson, supra.

You correctly note that the FAA has repeatedly determined that "rest" under § 135.267 must be (1) continuous, (2) determined prospectively, and (3) free from all *restraint* by the certificate holder, including freedom from work or freedom from present responsibility for work should the occasion arise (emphasis added).[4] While company policies restricting activities or behavior, such as the ones you use as examples, may constitute "restraints" in the dictionary sense, they cannot be categorically considered "restraints" within the context of the § 135.267 rest requirements. The purpose of the rest requirements is to reduce pilot fatigue. A required rest period must be free from all restraint by the certificate holder to ensure that the flightcrew member's rest is not interrupted by some obligation imposed by the certificate holder. Thus, the FAA does not, as a matter of course, consider all company policies that restrict flightcrew member activities or behavior or impose conditions of employment to be restraints having an adverse impact on fatigue; only those company policies that have a reasonable possibility of interrupting a required rest period would violate the rest provisions in part 135.

Turning to your examples, we do not believe that a certificate holder's policies imposing restrictions on alcohol consumption or tobacco use in excess of what is required by FAA regulations are, without more,[5] restraints that can reasonably interrupt a required rest period. Your third example—that of company policies requiring flightcrew members to stay within a given distance of the aircraft, airport, or crew base—may suggest "standby," "reserve," or "on call" status. The FAA has addressed this issue in past interpretations, and we have consistently determined that being on-call, or on standby or reserve status with an obligation to report for a flight assignment, if called or paged, is not rest because the pilot is not free from restraint.[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 response was prepared by Richard Doan, an attorney in the Regulations Division of the Office of the Chief Counsel, and coordinated with the Air Transportation Division of Flight Standards Service.

Sincerely,

Lorelei Peter
Assistant Chief Counsel for Regulations, AGC-200

Enclosures

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[4] *See, e.g.*, the Legal Interpretation to Daniel Berry from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (May 22, 2009).

[5] *Cf.* with the Legal Interpretation to James W. Johnson from Donald Byrne, Assistant Chief Counsel (Feb. 28, 2002) (determining that time spent submitting to mandatory drug or alcohol testing is not "rest").

[6] *See, e.g.*, the Legal Interpretations to Sean Masterson from Mark W. Bury, Acting Assistant Chief Counsel for International Law, Legislation and Regulations (Aug. 30, 2013) and to Arnold J. Kleiner from Lorelei Peter, Assistant Chief Counsel for Regulations (Sep. 27, 2016).

Jason M. Kidd
[redacted]

March 31, 2017

Office of the Chief Counsel
800 Independence Ave., SW
Washington, DC 20591

To Whom It May Concern:

I am writing today to request legal interpretation regarding logging flight time in accordance with FAA regulations. Additionally, I have two questions regarding rest rules of 135.267 and two regarding Part 91 operations conducted for a Part 135 certificate holder. Please consider the following scenarios. Thank you in advance for your time and consideration.

Question 1: In a true two pilot aircraft (B737, CE-650, etc.) vs. an aircraft that can be flown single pilot (CE-525, BE30, etc.) is there ever a time when an individual may truly be "sole manipulator" of the flight controls? Typically, an SOP is established where the "pilot flying" will manipulate the thrust or power levers, yoke, and rudder pedals while the "Pilot monitoring" or "Pilot not flying" will manipulate the flaps and landing gear at the command of the "pilot flying". With this in mind, is the pilot flying truly the "sole" manipulator of the flight controls? What establishes who is the "sole manipulator" of the flight controls as it pertains to logging PIC flight time in 14 CFR 61.51(e)(1)(i)?

Question 2: A pilot is employed by an air carrier (121 or 135) and is provided training and passes a practical test for an ATP certificate with the appropriate type rating not limited to SIC Privileges only, as part of the air carrier's training program. Additionally,

this pilot completes all required training and checking for the type of operation (as SIC). In this case, a non-specific two-pilot aircraft (B737, CE-650, etc.) is used in the operator's air carrier operations and this pilot is always *assigned* as SIC on the flight. May this pilot, in accordance with 61.51(e)(1)(i), log flight time as pilot-in-command for that time which he or she is "sole manipulator" of the flight controls in spite of not being *assigned* as PIC by the certificate holder? May this pilot log *both* PIC (as "sole manipulator" of the flight controls under 61.51(e)(1)(i)) and SIC (as *assigned* by the air carrier and IAW 61.51(f)(1)) simultaneously for this flight time?

Question 3: Would a pilot employed by an individual or corporation operating under Part 91 (not Subpart K) have the "sole manipulator" rules applied any differently than the same pilot employed in question 2? Do the operating rules of 121 change the opinion vs. operating under part 135 regarding logging of Pilot-In-Command time?

Question 4: A 135 certificate holder "manages" an aircraft, which the aircraft owner does not wish to operate under part 135 to the general public. The only flights the owner of the aircraft wishes to be conducted under 135 are flights for his own use or that of his company employees, when it is beneficial to do so (e.g., international operations). This is for tax purposes. As the aircraft is listed in the certificate holder's Operations Specifications, and the crew members flying that aircraft are all qualified appropriately under the air carrier's training program, are these certain flights able to be conducted under Part 91 for the aircraft owner? Operations Specification A001 outlines that certain flights may be conducted under Part 91, and some of those flights include flights carrying company officials, but the Operations Specification does not list aircraft owner flights under the permitted operations.

Question 5: As a follow-up to question 4, are the certificate holder and crewmembers on these flights required to follow the rest rules of 135.267, as they are for all 135 operations, or is this "exempt" in a way, since the flights are (potentially, depending on your opinion regarding the previous question) operated under Part 91?

Question 6: In a previous interpretation to me returned by your office, it was decided that a crew operating under 135.267 may exceed 14 hours of flight "duty" provided the *planned* completion of the flight assignment (135.267(d)). Granted 91.13 prohibits the crew from operating an aircraft if they are fatigued, but this interpretation does leave crews open to being pushed by management and potentially lied to. A scenario could be where a sales team books a trip *knowing* the crew will not finish and look back to see 10 hours of rest within 24 hours. However, they notify those with operational control that the trip is *scheduled* at a time that *will* permit the crew to finish in compliance with 135.267. As a result, the passengers are "late", and the pilots are legally able to, and "required" by the company though not explicitly (veiled threats of termination or retaliation should the crew refuse to fly the trip) to complete the trip as "scheduled".

I would like to respectfully request a re-evaluation of this interpretation as 135.267(d) does not provide for any exceptions to the required rest period. In fact, the words "reasons beyond the control of the [certificate holder]" were used in the interpretation, but it should be noted that the similar regulatory language appears in 135.267(e), which allows for so-called "compensatory rest" when *flight* time limitations are exceeded due to "circumstances beyond the control of the certificate holder or flight crewmember", but again 135.267(d) allows no exception to the *rest* requirements. It would appear that the regulation as written would require 10 hours in the preceding 24 hours to be a "hard limit", not subjected to circumstances beyond the control of the certificate holder, such as late arriving passengers.

Question 7: Your office has repeatedly determined that rest under 135.267 must be continuous, free from restraint, and prospective. With this in mind, are company policies, in a certificate holder's manual, restricting the activities or behavior of crewmembers in excess of those required by the DOT or FAA, in violation of rest?

One example is alcohol consumption. While the FAA, via 91.17(a) restricts alcohol consumption to 8 hours prior to acting or attempting to act as a crewmember, many companies have a 12- or even 24-hour policy. While the intent is clear, it would seem

that this policy violates the *free from restraint by the certificate holder* provision of a legal rest period. Other such policies include tobacco use, requirements to stay within a given distance (either in statute or nautical miles, or often times driving time, e.g. 1 hour) of the aircraft, airport, or crew base. Do these policies violate rest requirements of 135.267?

Thank you again for your time and attention in this matter

Regards,



Jason M. Kidd,
Chief Pilot
American Broadband and Telecommunications