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

Office of the Chief Counsel

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

DEC 28 2017

Procopio
Attn: Eli W. Mansour, Partner
12544 High Bluff Drive
Suite 300
San Diego, CA 92130

Re: Assessment of proposed dry lease arrangement

Dear Mr. Mansour,

This is in response to your letter dated September 1, 2017, requesting an interpretation of whether certain facts give rise to an operation that may be conducted pursuant to 14 CFR part 91.

Issue: Does the proposed arrangement constitute (1) a dry lease, which enables the aircraft to be operated under § 91.501(b)(5), or (2) a wet lease, which requires an air carrier certificate and economic authority?

Facts:

1. Party A is a shareholder of Company B, and the chief executive officer (CEO) of Company C;
2. Party A holds an FAA airline transport pilot (ATP) certificate and type rating for several turbojet aircraft;
3. Company B is a special purpose entity that owns a large turbojet aircraft;
4. Company C (Lessee) wishes to dry lease Company B's (Lessor) aircraft, to operate it in its trade or business, under 91.501(b)(5);
5. The proposed lease will comply with all requirements established in 91.23;
6. There will be no payment or other consideration from Lessee to Lessor;
7. Party A (Pilot) – in its capacity as CEO of Lessee – intends to serve as pilot in command (PIC) of the aircraft operated by Lessee;
8. The Pilot will receive no compensation for its flight crew services; and
9. Lessee will enter into a management services agreement with an unrelated third party, to provide a second pilot and fuel services.

Analysis:

Certain aircraft operations may be conducted under §91.501 when common carriage is not involved.

Section 91.501(b)(5) applies to operators of certain aircraft and allows the "carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company."

Non-common carriage under §91.501(b)(5) may be carried out in aircraft owned or dry leased by a company, as long as the company retains full operational control of the flights, and operates the aircraft under part 91 in furtherance of its business activities, which cannot be related to air transportation.

As a general rule, if an entity does not operate an aircraft, but rather its sole purpose is to own and lease it, then the entity does not need to become certificated under part 119. The parties to a lease agreement should ensure the lease: (a) complies with all regulatory requirements (including the truth-in-leasing provisions of § 91.23), (b) is duly executed, (c) effectively transfers operational control and related responsibilities to the operator, and (d) conforms to applicable laws, regulations, and formalities of the jurisdiction governing the agreement.

If the aircraft is dry leased, the FAA will conduct a case-by-case analysis to determine whether the companies entered into a proper dry lease agreement and whether Lessee effectively assumed operational control of the aircraft. The Agency will evaluate Lessee's discretion to procure independent flight crews, and will look for any pattern of evidence that denotes that the parties to the lease agreement "acted in concert" through a combination of transactions or dealings to furnish a "leasing package" that includes both the aircraft and crewmembers. The FAA will consider who maintains liability for the operation of the flights, who conducts maintenance, and who dispatches the aircraft. *See* Legal Interpretation to David M. Kroontje, from Mark W. Bury, Assistant Chief Counsel for International Law, Legislation and Regulations (Jun. 19, 2014). The goal of conducting this analysis is to identify and prevent the execution of "wet leases in disguise" which seek to avoid part 119 certification. *See* Legal Interpretation to Eric L. Johnson, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Aug. 11, 2011).

Your letter indicates that the Pilot is the shareholder of Lessor. He is also the CEO of Lessee, who intends to dry lease Lessor's plane, to operate it in its trade or business under §91.501(b)(5). You ask, whether the FAA would deem the lease to be a wet lease rather than a dry lease if the Pilot – who holds an FAA ATP certificate and type rating for several turbojet aircraft – serves as PIC of the aircraft, when operated by Lessee.

The mere fact that the Pilot is concurrently a shareholder of Lessor and the CEO of Lessee, does not – by itself – denote the presence of a wet lease arrangement. In a follow up conversation with one of my staff attorneys, you indicated: (a) that the sole purpose of Lessor is to own the aircraft, (b) that the Pilot has no affiliation to Lessor (i.e., employee, manager, or director) other than as disclosed above, (c) that Lessor has no employees, and (d) that if the Pilot were allowed to serve as PIC, he would do so in his capacity as employee of Lessee. Furthermore, according to your letter, the Pilot "will not receive any additional compensation for his being a pilot on flights operated by [Lessee]." You added that the aircraft's type certificate requires two pilots, and thus Lessee will enter into a management services agreement with an unrelated third party to procure the second pilot required to operate the aircraft and provide fuel services.

The facts presented in your letter do not suggest the presence of a wet lease in disguise for the following reasons:

First, there is no indication that the Pilot is employed in any capacity, flies for, nor has any relationship to Lessor, other than as a shareholder.

Second, Lessor has no employees. Thus, it cannot – nor will it – hire out any employees to provide any kind of flight services to Lessee. Its sole purpose is to own and lease the aircraft to third parties.

Third, Lessee appears to have independent discretion in procuring flight crews. It intends to use the services of the Pilot – an employee of Lessee – but will also contract with an independent third party management company for the provision of additional flight crew, services, and facilities.

Fourth, the Pilot will fly Lessee's leased aircraft in his capacity as employee of Lessee, and will receive no compensation for his services.[1] In fact, the Pilot's core work with Lessee is in his capacity as CEO, and thus, piloting the aircraft is not a condition for his employment or professional advancement.

Fifth, Lessee will assume all operational control and related responsibilities and liabilities, and will operate the aircraft as it were its own for the term of the lease.

For the reasons stated above – absent any other issue or alternate fact, and assuming the lease is enforceable and in full compliance with the laws that govern the agreement[2] – we believe the lease agreement presented in your scenario can be categorized as a dry lease.

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[1] The FAA defines compensation in broad terms, which includes the logging of flight time whenever a pilot does not pay for the cost of operating an aircraft.

[2] The FAA cannot comment on issues of state law. However, we remind you that most jurisdictions require some kind of consideration for an agreement to be enforceable. If as a result of a lack of consideration the agreement was deemed unenforceable, the entities would likely face an operational control challenge due to uncertainty as to who assumed operational control of the aircraft.

We trust this response adequately addresses your questions. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Francisco E. Castillo, General Attorney in the Regulations Division of the Office of the Chief Counsel, and coordinated with the General Aviation and Commercial Division of the Flight Standards Service.

Sincerely,

Lorelei Peter
Assistant Chief Counsel for Regulations, AGC-200

Procopio

PROCOPIO
12544 High Bluff Drive
Suite 300
San Diego, CA 92130
T. 858.720.6300
F. 619.235.0398

ELI W. MANSOUR
P. 858.720.6336
eli.mansour@procopio.com

AUSTIN
DEL MAR HEIGHTS
PHOENIX
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SILICON VALLEY

September 1, 2017

VIA PRIORITY MAIL

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

To Whom It May Concern:

We are writing to request legal interpretation regarding whether the facts of the proposed aircraft operation outlined in this letter may be conducted under the provisions of Part 91 of the Federal Aviation Regulations (FAR). Please consider the following scenario:

Party A is an individual who holds an FAA ATP certificate and type ratings for several turbojet aircraft. Party A is also the 100% owner of Company B, LLC, a special purpose entity that owns a large turbojet aircraft.

Company C, Inc. desires to operate the aircraft in its trade or business under Part 91, as permitted by 91.501(b)(5) and will enter into a dry lease with Company B, LLC. The dry lease will not involve any payment or other consideration from C, Inc. to B, LLC – but is being entered into as required under 91.23;

Party A desires to fly the aircraft when it is being operated by C, Inc. This is incident to his being CEO of C, Inc. and desiring to fly on the trips conducted by C, Inc. incident to its business. Party A will not receive any additional compensation for his being a pilot on flights operated by Company C, Inc. Party A is typed as both PIC and SIC in the aircraft and may perform both functions.

Lastly, Company C, Inc. will enter into a management services agreement with an unrelated third party company, Company D, Inc., under which a second pilot will be provided for the aircraft (Type Certificate requires 2 pilots), as well as fuel services.

The question to be discussed is whether the above arrangement would constitute a dry lease between Company B, LLC and Company C, Inc., as intended and contemplated, or whether it could be interpreted as Party A engaging in a wet lease to Company C, Inc., requiring an air carrier certificate and economic authority.

Thank you for your time and consideration in this matter.

Very truly yours,

Eli W. Mansour

EWM