U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

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

APR 20 2018

Roy Goldberg
Stinson Leonard Street
1775 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006

Dear Mr. Goldberg:

This letter responds to your December 21, 2017 email request for an interpretation of 14 C.F.R. § 440.17. Specifically, you ask whether a company that sells commercial off-the-shelf electronics products ("vendor") to a contractor of a licensee would be required to sign a reciprocal waiver of claims. You further state that the vendor has no physical involvement with launch or reentry, nor does its employees, agents, etc. In this hypothetical, the licensee is licensed by the Federal Aviation Administration (FAA) in accordance with 51 U.S.C. chapter 509. The reciprocal waiver of claims is required by 51 U.S.C. § 50914(b) and 14 C.F.R. § 440.17.

Under 14 C.F.R. § 440.17, a licensee assumes financial responsibility for property damage it sustains and for bodily injury or property damage sustained by its own employees resulting from licensed activities, regardless of fault. The law requires launch licenses to contain a provision requiring the licensee to make a reciprocal waiver of claims with applicable parties[1] involved in launch services under which each party to the waiver agrees to be responsible for personal injury to, death of, or property damage or loss sustained by it or its own employees resulting from an activity carried out under the applicable license, regardless of fault. 51 U.S.C. § 50914(b)(1)(A); 14 C.F.R. § 440.17(b). Additionally, if the U.S. Government, any agency, or its contractors and subcontractors are involved in the licensed activities, the U.S. Government must make a reciprocal waiver of claims with the licensee, customers of the licensee, contractors and subcontractors of both the licensee and customers, and any space flight participants.[2] 51 U.S.C. § 50914(b)(2); 14 C.F.R. § 440.17(c).

Title 14 CFR § 440.3 defines contractors and subcontractors as "those entities that are involved at any level, directly or indirectly, in licensed or permitted activities, and includes suppliers of property and services, and the component manufacturers of a launch vehicle, reentry vehicle, or payload." Although this definition is broad in order to ensure

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[1] Applicable parties means contractors, subcontractors, and customers of the licensee; contractors and subcontractors of the customers; and space flight participants. 51 U.S.C. § 50914(b)(l)(B).

[2] The government's "waiver applies only to the extent that claims are more than the amount of insurance or demonstration of financial responsibility required under subsection (a)(l)(B) of [51 U.S.C. § 50914]." 51 U.S.C. § 50914(b)(2).

liability insurance coverage for third-party claims against any contractor or subcontractor involved directly or indirectly in licensed launch or reentry activities, the FAA has noted that "not all private participants in licensed launch activities are necessarily expected to accede to the reciprocal waiver of claims scheme in order to effect its purpose. Only those participants who have their personnel or property involved in licensed launch (or reentry) activities, and who may make claims against other participants as a result of loss or damage sustained by their personnel or (to their) property in the event of an accident, should be expected to enter into reciprocal waivers of claims." *Financial Responsibility Requirements for Licensed Launch Activities*, NPRM, 61 FR 38992, 39012 (July 25, 1996); *cited by Financial Responsibility Requirements for Licensed Reentry Activities*, NPRM, 64 FR 54448, 54463 (Oct. 6, 1999).

It is unlikely that a vendor of commercial off-the-shelf electronics products would be able to bring a claim against other participants in licensed activity as a result of loss or damage to its property. However, the licensee or its contractors and subcontractors would be in the best position to determine which entities must enter into a reciprocal waiver of claims. It is worth mentioning that the indemnification provisions in the reciprocal waiver of claims require a party to indemnify another party to the agreement from claims by the indemnifying party's contractors, subcontractors, and, in the case of customers, customer, arising out of the indemnifying party's failure to properly implement the waiver requirement. 14 CFR § 440.17(b) and (c)(1)(ii). The indemnifying party should therefore carefully consider whether an entity may be able to bring a claim. If a party is able to bring a claim, and has not executed a reciprocal waiver of claims, the indemnifying party would be responsible for indemnifying that claim. We hope this guidance is helpful in determining whether or not the vendor should enter into a reciprocal waiver of claims.

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 Sabrina Jawed, Airman Certification, Air Traffic and Commercial Space Law Branch, Office of the Chief Counsel and coordinated with the Office of Commercial Space Transportation.

Sincerely,



Lorelei Peter
Assistant Chief Counsel for Regulations, AGC-200

From: Goldberg, Roy [mailto:roy.goldberg@stinson.com]
Sent: Thursday, December 21, 2017 12:47 PM
To: Peter, Lorelei (FAA) <lorelei.peter@faa.gov>
Subject: Informal question regarding application of Cross Waiver of Liability Regulation (14 CFR 440.17) to Commercial Off the Shelf Electronics Supplier (not involved with launch or reentry activities)

Dear Ms. Peter, I have a very basic question which seems rather clear to me but would really appreciate any insight you might have. I am quite familiar with the requirements in the Commercial Space Launch Act of 1984, as amended, 51 U.S.C. 5001-50923 and 14 CFR 440.17 (effective Oct. 17, 2016), but am not clear on the following question: Does the requirement from cross waivers of liability apply to a company that sells commercial off the shelf (COTS) electronics products to a contractor of the licensee? In this scenario, the seller of the COTS – which is either a "vendor" or "subcontractor" to the contractor – has no physical involvement with launch or reentry (nor does its employees, agents, etc.). Rather, they just sell electronics to the contractor which in turn supports the licensee.

Given that the intention behind the law and regulations appears to be to ensure that all companies and personnel involved in the launch or reentry activity waive all possible claims, it seems quite the stretch to apply the waiver requirement to the vendor of the COTS, who, in almost Escher type fashion, theoretically would need to involve its downstream seller and so on and so forth.

Any informal help would be greatly appreciated. Thanks

Roy Goldberg
Stinson Leonard Street
1775 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006
(202) 728-3005
Roy.goldberg@stinson.com

Roy Goldberg | Partner | Stinson Leonard Street LLP
1775 Pennsylvania Avenue NW, Suite 800 | Washington, DC 20006-4605
T: 202.728.3005 | M: 301.908.3268 | F: 202.572.9942
roy.goldberg@stinson.com | www.stinson.com
Legal Administrative Assistant: Yvette Trammell | 202.572.9902 |
yvette.trammell@stinson.com

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