Office of the Chief Counsel

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July 14, 2020

Mr. Marshall S. Filler
Counsel for Tab Associates, Inc. d/b/a Island Tyme
117 North Henry Street
Alexandria, VA 22314-2903

Re: Legal Interpretation of 14 CFR § 135.338(a)(1)

Dear Mr. Filler,

This is in response to your letter dated May 8, 2020, concerning the flight instructor qualification requirement in § 135.338(a)(1) of Title 14 of the Code of Federal Regulations (14 CFR). You specifically raised the issue of whether a flight instructor who is qualified in the H18 aircraft[1] (also known as the Beech 18) may provide flight instruction to other Island Tyme pilots in the company's PA-23-250[2] (Aztec) airplane, even if the flight instructor is not specifically qualified as a flight instructor in the Aztec.

Section 135.338(a)(1) states that, "[f]or purposes of this section and § 135.340, a flight instructor (aircraft) is a person who is qualified to instruct in an aircraft, in a flight simulator, or in a flight training device for a particular type, class, or category aircraft." Section 135.338(b) contains the qualification requirements that a person must meet to serve as a flight instructor in an aircraft under a part 135 training program. Additionally, § 135.338(b) prohibits a certificate holder from using a person as a flight instructor unless that person satisfies the qualification requirements specified in paragraph (b).

In your letter, you explained that the use of the word "or" in § 135.338(a)(1) would ordinarily indicate that type, class, or category are all acceptable compliance options. You stated, however, that the FAA has taken a different approach. You referenced the legal interpretations the Federal Aviation Administration (FAA) issued to Mr. Brian Sutch in 2014 (Sutch) and Mr. Mark H. Mirkin in 2018 (Mirkin), which both interpreted the recency of experience requirements for check airmen and flight instructors in §§ 135.337(f)(1) and 135.338(f)(1), respectively. These recency of experience requirements contain the same language at issue—"type, class, or category." You explained that the Sutch interpretation concluded that flight instructors must be

[1] The Beechcraft H18 is a twin-engine, low-wing, tailwheel light aircraft manufactured by the Beech Aircraft Corporation.

[2] The Aztec PA-23-250 is a twin-engine, low-wing Piper aircraft.

qualified in the same type of aircraft in which they provide flight instruction. However, you pointed out that Mirkin distinguished between aircraft requiring a type rating and those that do not. In Mirkin, the FAA concluded that "[b]ecause the purpose of the requirements is for experience in a similar aircraft, the aircraft type must be the same. If the aircraft does not have a type rating, then the class and category, in that order, must be the same." You believe the rationale in the Mirkin legal interpretation should apply to the situation presented by Island Tyme. Therefore, because neither the Beech 18 nor the Aztec require a type rating to act as PIC,[3] you think the class and category, in that order, must be the same. And, the Beech 18 and the Aztec are both multi-engine land airplanes, which means they are in the same "class" and "category".

The Sutch and Mirkin interpretations, which addressed the phrase "type, class, or category" in the context of the recency of experience requirements in §§ 135.337(f)(1) and 135.338(f)(1), appear to have reached different conclusions.[4] In addition, the FAA has not yet interpreted the requirement of § 135.338(a)(1), which uses the phrase "type, class, or category" in a different context than §§ 135.337(f)(1) and 135.338(f)(1). In interpreting the phrase "type, class, or category" in § 135.338(a)(1), we find it necessary to rely on the definitions in § 1.1, the canons of construction, and the intent as evident in preamble discussions.

Definitions in 14 CFR § 1.1

The definition of "type" in § 1.1 of 14 CFR applies to the phrase "type, class, or category" in § 135.338(a)(1). Section 1.1 defines terms that are used in the FAA's regulations. These definitions apply unless the context of the regulation requires otherwise.[5] Section 1.1 defines the term "type," with respect to the certification, ratings, privileges, and limitations of airmen, as "a specific make and basic model of aircraft, including modifications thereto that do not change its handling or flight characteristics." In § 135.338(a)(1), the term "type" is not modified by another term or phrase. Additionally, unlike § 135.293(b), the context of the regulation does not require the term "type" to mean something other than its definition in § 1.1.[6]

With respect to your argument that the term "type" in § 135.338(a)(1) refers only to those aircraft that require type ratings, the FAA disagrees. If the FAA intended the term "type" in the phrase "type, class, or category aircraft" to mean an aircraft must be the same type only if a type rating is required, then the FAA would have expressly modified the term "type" as it has done in

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[3] 14 CFR § 61.5(b)(7)

[4] The FAA notes that the Sutch and Mirkin interpretations are addressed at conclusion of this document.

[5] 14 CFR § 1.1 (stating that the definitions in § 1.1 are to be "used in Subchapters A through K of this chapter, unless the context requires otherwise").

[6] For an example of a regulation that contains a definition of the word "type," see 14 CFR § 135.293(b). In § 135.293(b), the regulation states that for a helicopter, type means "basic make and model". *See also* Legal Interpretation to Mr. B. Dan Crowe, Jr. (Aug. 13, 2009) (finding that the definition of "type" in § 1.1 applied to the term "type" in § 135.327 because, unlike § 135.293(b), § 135.327 did not contain a definition of the word "type").

other regulations.[7] Specifically, the FAA would have expressly stated "if a type rating is required" in the regulation. This position is supported by the presumption of meaningful variation, which is a canon of construction used in interpreting statutes and regulations.[8] Under this presumption, if a word or phrase used in the regulations is changed to a different word or phrase in another regulation, the different words or phrases are intended to have different meaning.[9]

For the reasons stated above, the FAA finds that the definition of "type" in § 1.1 should control for purposes of § 135.338(a)(1).[10] Accordingly, the term "type" refers to more than an aircraft that requires a type rating. Per § 1.1, the term "type" in § 135.338(a)(1) means "a specific make and basic model of aircraft."[11]

Canons of Construction

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[7] *See* 14 CFR §§ 135.4(a)(3) and (4), 135.247(a)(1) and (2). These regulations all modify the term "type" by expressly stating "if a type rating is required". *See also* 14 CFR §§ 61.57, 91.1055, 142.65(b)(1), 142.53(b)(1) (also modifying the term "type" by expressly stating "if a type rating is required).

[8] "Where a legislature includes particular language in one section of a statute but omits it from another section of the same or a related act, it generally acts intentionally and purposely in the disparate inclusion or exclusion. The omission of the same term or phrase from a similar section is significant to show different legislative intent for the two sections." 2A Sutherland Statutory Construction § 46:6 (7th ed.); *see Digital Realty Trust, Inc. v. Somers,* 138 S.Ct. 767, 776 (2018) ("[W]hen Congress includes particular language in one section of a statute but omits it in another[,] … this Court presumes that Congress intended a difference in meaning.") (citing *Loughrin v. United States,* 134 S.Ct. 2384, 2390 (2014)); *see also State Farm Fire and Cas. Co. v. U.S. ex rel. Risby,* 137 S. Ct. 436, 442 (2016) (stating that "[t]his Court adheres to the general principle that Congress' use of 'explicit language' in one provision 'cautions against inferring' the same limitation in another provision") (citing *Marx v. General Revenue Corp,* 133 S.Ct. 1166, 1177 (2013)).

[9] "Different words used in the same, or a similar, statute are assigned different meanings whenever possible. Identical words used in different parts of the same, or a similar, statute usually have the same meaning." 2A Sutherland Statutory Construction § 46:6 (7th ed.); *see Wisconsin Central Ltd. v. U.S.,* 138 S.Ct. 2067, 2071 (2018) (presuming that differences in language conveys differences in meaning); *Henson v. Santander Consumer USA, Inc.,* 137 S. Ct. 1718, 1723 (2017) (presuming that identical words used in different parts of the same statute carry the same meaning); *IBP, Inc. v. Alvarez,* 546 U.S. 21, 34 (2005) (relying, in part, on "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning").

[10] This determination is consistent with case law concerning statutory interpretation that involves legislative definitions. Courts have generally found that when the legislature defines a word or phrase in a statute, that definition is controlling. *See Digital Realty Trust, Inc. v. Somers,* 138 S.Ct 767, 776 (2018) ("'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning") (citing *Burgess v. United States,* 553 U.S. 124, 130 (2008)); *see also* 2A Sutherland Statutory Construction § 47:7 (7th ed. 2007).

[11] *See* Legal Interpretation to Mr. Crowe (Aug. 13, 2009) (finding that the definition of "type" in § 1.1 applies in § 135.327 because unlike § 135.293, § 135.327 does not contain a definition of the word "type").

The terms "type," "class," and "category" are each defined in § 1.1. When applying these definitions to 135.338(a)(1), however, the FAA finds that the requirement is ambiguous.[12] As previously stated, "type" means the "specific make and basic model of aircraft" for purposes of § 135.338(a)(1). The term "class", with respect to the certification, ratings, privileges, and limitations of airmen, means "a classification of aircraft within a category having similar operating characteristics." And, the term "category", with respect to the certification, ratings, privileges, and limitations of airmen, means "a broad classification of aircraft." As evident from these definitions, the type of aircraft is more specific than the class of aircraft, and the class of aircraft is more specific than the category of aircraft.[13] In light of the training and qualification requirements in part 135, which are primarily type specific, the requirement in § 135.338(a)(1) that states a flight instructor is "a person who is qualified to instruct in an aircraft, in a flight simulator, or in a flight training device *for particular type, class, or category aircraft*" (emphasis added) is ambiguous.

If the FAA interpreted § 135.338(a)(1) as allowing a flight instructor who is qualified to instruct in a multiengine airplane to provide flight instruction in either the "type, class, or category" of aircraft regardless of whether the person meets the qualification requirements for that aircraft, the result would be wholly unreasonable. Such an interpretation would allow a flight instructor who is qualified to instruct in one multiengine airplane to provide flight instruction in any multiengine airplane, regardless of type and handling characteristics. Additionally, if "category" were interpreted as being one of three compliance options in § 135.338(a)(1), that would allow a flight instructor who is qualified to instruct in an airplane to provide flight instruction in any airplane despite not being qualified in the particular type or class of airplane. For example, a flight instructor who is qualified to instruct in a single-engine airplane would be allowed to provide flight instruction in a multiengine airplane. Even in the general aviation community,[14] a flight instructor must be qualified to provide flight instruction in a multiengine airplane prior to exercising flight instructor privileges in a multiengine airplane.[15] Additionally, this unreasonable interpretation of § 135.338(a)(1) would be inconsistent with the flight instructor qualification requirements specified in § 135.338(b) that are type-specific.[16]

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[12] The phrase "type, class, or category" was added to the regulations in part 135 in the 1996 final rule. Final rule, *Training and Qualification Requirements for Check Airmen and Flight Instructors,* 61 FR 30734 (June 17, 1996).

[13] The Beech 18 and the Aztec, which are the aircraft in the issue you presented, are in the same category and class of aircraft (e.g. airplane category multiengine class).

[14] In adopting regulations for air carriers, the FAA is required to "consider the duty of an air carrier to provide service with the highest possible degree of safety in the public interest; and differences between air transportation and air commerce." 49 U.S.C. § 44701(d)(1).

[15] *See* 14 CFR § 61.195(b) (stating that "[e]xcept as provided in paragraph (c) of this section, a flight instructor may not conduct flight training in any aircraft unless the flight instructor: (1) holds a flight instructor certificate with the applicable category and class rating; (2) holds a pilot certificate with the applicable category and class rating; and (3) meets the requirements of paragraph (e) of this section, if applicable," which contains the type rating requirement).

[16] The qualification requirements specified in § 135.338(b)(1) through (6) refer to training, checking, recency of experience, and certification requirements, which are contained in other regulations under part 135. Thus, while paragraphs (b)(1) through (6) do not expressly state "type," many of the requirements referenced require the training or checking to be obtained in the particular type of aircraft.

To ascertain the meaning of the phrase "type, class, or category" in § 135.338(a)(1), the FAA finds it necessary to read the phrase in the context of the regulation in its entirety. Canons of construction prescribe that all language in a statute be given effect. Therefore, the FAA should construe regulatory text so that no word or clause is rendered superfluous, void, or insignificant.[17] Section 135.338(a)(1) states that, "[f]or purposes of this section and § 135.340, a flight instructor (aircraft) is a person who is qualified to instruct in an aircraft, in a flight simulator, or in a flight training device for a particular type, class, or category aircraft." This requirement does not impose any specific qualification requirements on the person seeking to serve as a flight instructor under a part 135 training program. Rather, it states who a flight instructor of an aircraft is for purposes of § 135.338 and 135.340. Section 135.338(b) contains the actual qualification requirements that a person must meet to serve as a flight instructor under part 135. Section 135.338 states that "[n]o certificate holder may use a person, nor may any person serve as a fight instructor (aircraft) in a training program established under [part 135] unless, with respect to the type, class, or category aircraft involved, that person" meets the requirements specified in § 135.338(b)(1) through (6).

When the requirement in § 135.338(a)(1) is read in the context of the regulation in its entirety, it is evident that a person must satisfy the qualification requirements of § 135.338(b)(1) through (6) to be "qualified to instruct in an aircraft." Interpreting § 135.338(a)(1) to the contrary would nullify the prohibition in § 135.338(b) and the qualification requirements in § 135.338(b)(1) through (6). Several of the qualification requirements must be met in the type of aircraft.[18] There are a few qualification requirements, however, that depend on the category and class of aircraft.[19]

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[17] "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809 (1989). "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000). Likewise, all parts, provisions, and sections of Title 14 of the C.F.R. must be read together in order to best ascertain and give effect to their meaning.

[18] For example, *see* § 135.243 (requiring the person to hold at least a commercial pilot certificate with appropriate category and class ratings, and *if required, an appropriate type rating for the aircraft*) (emphasis added); §§ 135.329, 135.331, 135.345, and 135.347 (containing some of the training requirements referenced in § 135.338(b)(2) and requiring certain training to be obtained in the particular *type aircraft*) (emphasis added); § 135.351 (containing the recurrent training requirements referenced in § 135.338(b)(2) and requiring each certificate holder to ensure that each crewmember receives the recurrent training and is adequately trained and currently proficient for the *type aircraft* and crewmember position involved) (emphasis added); § 135.297 (containing the PIC instrument proficiency check requirements and requiring the check to be completed in the *type aircraft* if the person is assigned to only one type and, if assigned to more than one type, requiring the check to be completed in *each type of aircraft* to which the person is assigned, in rotation) (emphasis added); § 135.293(b) (containing the competency check requirements and requiring the pilot to pass a competency check in the *type of aircraft*, if helicopter, multiengine airplane, or turbojet airplane) (emphasis added); § 135.247(a) (containing the recency of experience requirements and requiring them to be met in an aircraft of the same category and class and, *if a type rating is required, of the same type*) (emphasis added).

[19] For example, *see* § 135.243 (requiring the person to hold at least a commercial pilot certificate *with appropriate category and class ratings*, and if required, an appropriate type rating for the aircraft) (emphasis added); § 135.297 (containing the PIC instrument proficiency check requirements and, for persons assigned to pilot both single-engine and multiengine aircraft, requiring the pilot to take the instrument proficiency check in the multiengine aircraft, and

Because a flight instructor will be qualified for a particular type, class, or category aircraft depending on the qualification requirement, the FAA finds that the phrase "for a particular type, class, or category aircraft" in §135.338(a)(1) is intended to serve as a general overarching description of a qualified flight instructor for purposes of §§ 135.338 and 135.340. As explained in the next section, this conclusion is consistent with preamble that suggests § 135.338(a) was intended only to serve as an applicability provision for § 135.338. In hindsight, the FAA recognizes that the provision in § 135.338(a)(1) would have been less ambiguous had the agency stated "type, class, or category aircraft, *as applicable*" (emphasis added). The FAA may consider making a clarifying amendment to this provision in a future rulemaking.

Preamble

The regulatory history and preamble discussions support the conclusions reached above. Prior to 1996, the check airmen and flight instructor qualification requirements were contained in § 135.337. Section 135.337(a) stated that, "[n]o certificate holder may use a person, nor may any person serve, as a flight instructor or check airman in a training program established under [part 135] unless, *for the particular aircraft type involved,* that person" met the requirements specified in paragraphs (a)(1) through (7).[20]

In 1996, the FAA issued a final rule that amended the training and qualification requirements for check airmen and flight instructors under parts 121 and 135. In that final rule, the FAA made § 135.337 applicable only to check airmen and added new § 135.338 to contain the qualification requirements for flight instructors. Additionally, the FAA created new qualification requirements that allow check airmen and flight instructors under §§ 135.337(c) and 135.338(c), respectively, to check or instruct in flight simulators and flight training devices.[21]

In the preamble to the final rule, the FAA discussed the changes to § 135.337, which applies to check airmen, at length and then stated that § 135.338, which applies to flight instructors, is

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each succeeding check alternately in single-engine and multiengine aircraft); § 135.293(b) (containing the competency check requirements and requiring the pilot to pass a competency check in the *class of aircraft*, if single-engine airplane other than turbojet) (emphasis added); § 135.247(a) (containing the recency of experience requirements and, for aircraft that do not require a type rating, requiring the recency experience to be met in an aircraft of the same *category and class*) (emphasis added).

[20] Prior to 1996, § 135.337(a)(1) required the person to hold the airman certificate and ratings that must be held to serve as a PIC in operations under part 135. Section 135.337(a)(2) required the person to satisfactorily complete the appropriate training phases for the aircraft, including recurrent training required to serve as a PIC in operations under this part. Section 135.337(a)(3) required the person to satisfactorily complete the appropriate proficiency or competency checks required to serve as a PIC in operations under this part. Section 135.337(a)(4) required the person to satisfactorily complete the applicable training requirements of § 135.339. Section 135.337(a)(5) required the person to hold a Class I or Class II medical certificate required to serve as a PIC in operations under this part. Section 135.337(a)(6) and (7) contained requirements specific to persons seeking to serve as check airmen.

[21] The qualification requirements for persons conducting checks or training in simulators were the same as those for check airmen conducting checks in aircraft with two exceptions. There is no requirement to hold a medical certificate and the recency of experience requirements are not required of part 135 check airmen (simulator). Instead, the check airmen (simulator) may meet the recency of experience requirements of paragraph (f). 61 FR at 30736-37.

"virtually identical." Accordingly, the preamble explanation of the changes made to § 135.337 was intended to apply to § 135.338 as well.

In the preamble to the final rule, the FAA explained that the final rule changes the applicability of § 135.337 and then proceeded to explain paragraph (a).[22] As a result, it appears that §§ 135.337(a) and 135.338(a) were intended to serve as applicability provisions to clarify who §§ 135.337 and 135.338 applied to.

After addressing applicability, the preamble states that paragraph (b) contains the eligibility requirements to serve as a check airman (aircraft). With respect to these eligibility requirements, the FAA states that "[w]ith some editorial revisions and an additional requirement to satisfy the recency of experience requirement of § 135.247, the eligibility requirements [in § 135.337(b) for check airmen (aircraft)] remain the same as current requirements." Therefore, the FAA finds that the 1996 final rule was not intended to change the eligibility requirements for flight instructors, which are the qualification requirements specified in § 135.338(b), except for the editorial revisions made and the addition of the recency of experience requirement. The FAA recognizes that the terminology was changed from "particular type aircraft" to "particular type, class, or category aircraft" in § 135.338(b).[23] Based on the preamble, this change was intended to be a minor editorial revision to § 135.338(b). The phrase was also used in the applicability provision in § 135.338(a). Nevertheless, no certificate holder may use, nor may any person serve as, a flight instructor in an aircraft under part 135 unless that person satisfies the specific qualification requirements in § 135.338(b) with respect to the particular type, class, or category aircraft, as applicable.

For the reasons explained above, the preamble supports the conclusion that § 135.338(a) was intended to serve as an applicability provision and § 135.338(b) contains the qualification requirements for a person seeking to serve as a flight instructor in an aircraft under a part 135 training program. A person may not rely on the broad applicability provision in § 135.335(a)(1) as a means to circumvent the qualification requirements specified in § 135.338(b). Accordingly, a person may not serve as a flight instructor of an Aztec under a part 135 training program unless that person satisfies the qualification requirements of § 135.338(b) with respect to the Aztec.

Previous Legal Interpretations on "Type, Class, or Category"

In light of the research conducted to support this legal interpretation, the FAA has decided to withdraw the Sutch and Mirkin interpretations. The interpretation of the phrase "type, class, or category" in § 135.338(a) is largely dependent on the context of the regulation in its entirety. Therefore, the FAA's legal interpretation of § 135.338(a) does not fully apply to the recency of experience requirements in § 135.337(f) and 135.338(f). Like § 135.338(a)(1), however, the term "type" in § 135.337(f)(1) is not modified by another term or phrase. And, the context of the regulation does not require the term to mean something contrary to the definition in § 1.1. As a

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[22] The preamble used the phrases "particular type aircraft" and "particular type, class, or category aircraft" interchangeably. For example, while the regulatory text used the term "particular type aircraft" in § 135.337(a)(1), the preamble explained that regulatory text by stating "particular type, class, or category aircraft."

[23] The predecessor regulation to § 135.338(b) was § 135.337(a).

result, the FAA finds that the definition of "type" in § 1.1 also applies to the term "type" in § 135.337(f)(1). The FAA is therefore withdrawing Mirkin because it erroneously interpreted "type" as "type, if a type rating is required." In addition, the FAA is withdrawing the Sutch interpretation because it erroneously interpreted the "or" in § 135.337(f)(1) as an "and," which had the effect of always requiring the recency of experience in the type of aircraft despite the term "or" in the requirement.

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 Katie Patrick, Attorney in the Regulations Division of the Office of the Chief Counsel, and coordinated with the Air Transportation Division of the Flight Standards Service.

Sincerely,

Lorelei Peter
Assistant Chief Counsel for Regulations, AGC-200