



JONES DAY
COMMENTARY

RECENT FAA ACTION CHANGES PART 135 LANDSCAPE

The Federal Aviation Administration (“FAA”) recently issued Notice N8000.347, which revises the operations specifications (“Op Specs”) that govern 14 C.F.R. Part 119 certificate holders conducting operations under 14 C.F.R. Part 135. Investigation and analysis of aircraft accidents involving Part 135 charter operations prompted issuance of the Notice and revisions of the Op Specs. These revisions will have a major impact on owners of aircraft who want to use their aircraft in Part 135 charter operations, as well as the Part 135 charter operators themselves. Owners of aircraft, including businesses owning and operating aircraft for business purposes, who operate under Part 91 often cannot fully utilize the aircraft and seek to defray costs of aircraft ownership and operation by placing the aircraft with a Part 135 charter operator and obtaining revenue therefrom. Conversely, it is attractive for Part 135 charter operators to obtain part-time use of a corporate aircraft for charter purposes because there are no capital costs associated with acquiring the aircraft, only an effective sharing of revenue generated by the chartering. In this Notice, the FAA expresses significant concern over certain commercial arrangements that call into question whether

a Part 135 charter operator really has control over the operations of the aircraft under the authority of its certificate. To combat this problem, the FAA has revised Op Spec A008 and Op Spec A007 to place greater emphasis on issues of operational control.

The critical requirement under Notice N8000.347 is that a Part 119 certificate holder conducting operations under Part 135 must maintain control and authority over the initiation, continuity, conduct, and termination of its Part 135 flights. The FAA analyzes a certificate holder’s level of control in a holistic and fact-specific manner. Notice N8000.347 makes it clear that the FAA will “look through” the formal structure of an arrangement when evaluating compliance. This Op Spec makes it incumbent on the owner and Part 135 charter operator to document and handle their arrangement properly, or else they may well find themselves in violation of FAA regulations.

It is increasingly common for aircraft owners to enter into arrangements with Part 135 charter operators whereby the Part 135 charter companies operate the aircraft under a lease arrangement, with the owner

using the Part 135 charter company's services on a regular basis. These arrangements are attractive to owners because they allow the owners to combine the tax advantages of aircraft ownership with an additional income stream from charter operations. The lease arrangement between the aircraft owner and Part 135 charter company is extremely important. While this arrangement has many benefits, the owner and Part 135 charter company must be careful to stay within the FAA's rules regarding operational control, particularly after the release of Notice N8000.347. Aircraft owners will not be able to take advantage of arrangements with Part 135 operators if they are unwilling to truly cede operational control.

One of the greatest challenges for aircraft owners and Part 135 charter operators is the proper handling of flight crew issues. Many aircraft owners develop a strong attachment to a particular pilot or pilots, and these owners would like to use their favorite pilots even when chartering their aircraft back from the Part 135 charter operator. The owner cannot directly supply the crew to the charter, as this would be an illegal "wet lease" under F.A.R. 119.53. To avoid this problem, "owner's pilots" can work for the charter operation as the Part 135 charter operator's "agents" under an agreement separate from the lease or use agreement. This arrangement allows owners to *potentially* get their favorite flight crews when chartering back their aircraft. Problems may arise, however, if the owners are effectively guaranteed to get the flight crews they request when chartering back their aircraft.

It is critical for both aircraft owners and Part 135 charter operators to understand that simply designating an owner's pilot as an agent of the charter company does not eliminate the danger of violating the FAA rules. Notice N8000.347 mandates that regardless of the formal relationship between the Part 135 charter company and the aircraft owner, the Part 135 charter company must make the flight crew and aircraft assignments. While the owner can ask for a specific aircraft and flight crew, when making charter requests, the owner cannot veto the Part 135 charter company's choices. The substance-over-form approach promulgated by Notice N8000.347 suggests that even informal arrangements that give owners an effective veto over assignments will be scrutinized and treated harshly by the FAA.

Notice N8000.347 also increases the restrictions of "Doing Business As" ("DBA") fictitious names for charter operators. The thrust of the rules is to prevent the use of DBA names in a way that could falsely imply to the public that a noncertified entity has a certificate. DBAs operating noncertified entities must now be approved by A.F.S.-200. Again, the FAA's concern is that improper use of DBA names confuses the issue of who ultimately has operational control of the aircraft.

Additionally, Notice N8000.347 has created a sophisticated two-tier classification system for charter-operator personnel. In brief, the top tier is "management" personnel who must be direct employees of the Part 135 charter operator (*i.e.*, they must receive a W-2 from the Part 135 charter operator). The second tier carries out management's instructions and includes pilots and mechanics. The first tier may delegate operational control to the second tier, usually through the pilot-in-command. The net effect of the complicated system is to further specify the level of control a Part 135 charter operator must have.

Violation of these rules could have very serious consequences. Perhaps the greatest risk a violator faces is denial of insurance coverage. Most insurance policies covering aircraft have exceptions to coverage if an accident happens while the aircraft is operated in violation of FAA rules. As the Notice N8000.347 rules about control are intimately tied to concerns about flight safety and accident responsibility, violations of these rules will likely be highly relevant to any insurance coverage litigation. Violators also face direct enforcement action by the FAA, which has a range of enforcement mechanisms at its disposal.

The changes made by Notice N8000.347 are quite extensive and often call for a highly fact-specific application of complex regulatory standards. For this reason, it is important for both aircraft owners (who want to allow their aircraft to be utilized in charter operations) and charter operators (who want to utilize such aircraft) to make understanding Notice N8000.347 a priority.

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