

courtesy,

## National Business Aviation Association

Source:

<http://web.nbaa.org/public/ops/part135/wetlease/>

### Introduction

Earlier this year [2007], the FAA published operations specification (OpSpec A008) to Part 135 charter operators. Staff members from NBAA worked closely with the FAA on issues related to aircraft charter management, particularly operational control of aircraft lease/use arrangements. While NBAA succeeded in advocating for the FAA to remove many particularly harmful provisions from the OpSpec, industry still had serious concerns with FAA's guidance. In response, NBAA provided FAA with recommendations to address these concerns. On May 25, 2007, the FAA issued revised guidance in Notice 8900.4 which adopts many of the changes proposed by NBAA.

Many charter aircraft are not owned by the charter operator. It is common for an aircraft to be flown by the owner's crew under Part 91 for the owner's personal or business purposes. When the owner is not using its aircraft, the aircraft may be made available to a charter operator, following a rigorous conformity process. The charter operator may then conduct air carrier flights for charter customers. In a typical arrangement, the charter operator will pay the aircraft owner for each hour the aircraft is flown. Many issues have arisen with respect to operational control and the lease or use agreements between the aircraft owner and the charter operator. After a detailed investigation, FAA concluded that a new operational control OpSpec, and supporting guidance documentation is necessary to ensure adequate operational control systems for Part 135 operations.

### Dry vs. Wet Leasing

Under a dry lease arrangement, the aircraft owner provides the aircraft only – no crew. If at least one crew member is provided in the lease arrangement, this becomes a wet lease, as defined in the Federal Aviation Regulations 14 CFR §119.3. Further into the FARs, §119.53(b), does not allow a wet lease between a certificate holder and a person not authorized to engage in common carriage. That means that an aircraft owner who wants to provide the aircraft and the crewmembers to a charter operator for charter flights would also have to become a certificated air carrier. Obviously, this defeats the purpose of adding one's aircraft to someone else's charter certificate.

Often, aircraft provided for charter, are not provided via a lease agreement, but through other means, such as a management agreement, use agreement, or custody agreement. These agreements, whether verbal or written,

may be considered by the FAA when determining if a wet lease exists.

NBAA recommends that anyone engaged in an aircraft charter management structure review their charter management/lease agreements with qualified, experienced aviation attorneys to ensure the leases are compliant with applicable FARs.

### Who Employs the Crew?

Two scenarios are most common with respect to pilot employment:

- 1) The aircraft is managed by an aviation management company and as part of the aviation services and expertise the management company provides the crew. The management company typically is an air carrier and will conduct the charter flights; or
- 2) The aircraft owner employs full-time crew and wants to make this crew available to the certificate holder for charter flights.

There are numerous other constructs and variations on each of these themes. It will be imperative for aircraft owners and charter companies engaged in aircraft charter management to review their structures and agreements with qualified aviation attorneys.

Generally, in Situation #1, there are no wet lease concerns because the aircraft owner simply makes the aircraft available to the certificate holder and the certificate holder provides the crew and conducts the air carrier flights. However, a thorough understanding of operational control responsibilities and liabilities is necessary with respect to these situations. When the owner flights are conducted under Part 91, who has operational control for these flights? Does the owner know that s/he is in operational control and what that means? Review the operational control briefing below, including the fractional regulations addressing operational control, for more details on this issue.

If you look at §119.3 and §119.53(b) in the Federal Aviation Regulations, you will note that Situation #2 presents some significant challenges for the parties involved. Yet for many years, numerous charter companies have used the crews that are employed by the aircraft owner for air carrier flights. The FAA, via its Inspectors who have oversight of the air carrier certificate, had approved these arrangements. The concern then is one of a legal nature – the definition of a wet lease, and a practical nature – who has control over the crew?

It has always been the certificate holder's responsibility to ensure the crews received training and checking in accordance with the certificate holder's FAA approved training program, and complied with all the regulatory requirements imposed on the certificate holder, in order to fly for the air carrier.

If the crew met the certificate holder's requirements (e.g., for training, checking, crew rest) and the certificate holder had proper oversight and control of their operations via a comprehensive operational control system, then from a safety perspective it should not matter who employs the pilots.

In its revised A008 guidance (Notice 8900.4), the FAA discusses the possibility of the owner's pilots being used by the certificate holder. The FAA makes clear that any agreement between the certificate holder and owner's pilots must be independent of the agreement that provides the aircraft to the certificate holder. In these situations, the FAA indicates that the owner's pilots must either be direct employees or agents of the certificate holder. Also, any additional compensation that the pilots receive for revenue flights operated by the certificate holder must come from the certificate holder and not from the aircraft owner.

To ensure that the owner has not improperly provided both aircraft and pilots to the certificate holder, the FAA will likely conduct additional fact-finding. The FAA will want proof that the pilots are allegiant to the certificate holder for air carrier-conducted flights. The burden will be on the air carrier to prove their operational control system is such that the owner does not and cannot control the crew.

Between July 1 and December 31, 2007, FAA Inspectors will meet with each Part 135 operator to conduct a special emphasis inspection on Operational Control. Part 135 operators will have to show the FAA how they maintain operational control for all Part 135 flights, including compliance with all aspects of Notice 8900.4.

It always has been and remains imperative today that the air carrier has the responsibility to approve, and right to assign, the crew that will fly air carrier flights. The aircraft owner cannot influence the air carrier's selection of crew and, as such, there cannot be any financial penalties should the air carrier choose to use a different crew.

### **Independent Contractors**

FAA attorneys have indicated that the use of the term "Independent Contractors" for pilots of Part 135 flights would be a "red flag" for the FAA. While many Part 135 air carriers have a need to use contract pilots to cover absences due to pilot vacations, training and sick days, the contract pilots would still need to be employees or agents of the air carrier, and meet all of the crew requirements stated above. The use of Independent Contractors as a pilot suggests that the pilot would be independent, and operating with their own authority. As such, the air carrier would not have control over the pilots and, therefore, they could have surrendered operational control to the Independent Contractors.

### **Operational Control**

Air carriers can have the best legal agreements in the world, ones that match all FAA's regulations and requirements. But if the legal agreements are not supported by strong safety procedures, the entire operation is at risk for an accident or incident. As part of its A008 guidance to inspectors, the FAA elaborates on operational control – what it is and how to achieve it. Operators are urged to review the Opspec and the Guidance, determine what steps need to be taken to strengthen the operational control system, document the system, educate owners, educate crew, seek the approval of the FAA, and eventually accept the new A008 Opspec.

### **Operational Control Briefing**

NBAA recommends that air carriers adopt the practice of informing the pilots and the passengers who has operational control of a flight and what that means. This is not a regulatory requirement for pure Part 91 or Part 135 flights, yet it makes absolute sense to do so. This will help the PIC know under which FAR the flight is to be conducted and who has operational control and passengers onboard the aircraft should be certain as well.

The fractional regulations contain rules requiring an operational control disclosure, both when the fractional customer contracts with the fractional program and prior to each flight (§91.1011 Operational control responsibilities and delegation and §91.1013 Operational control briefing and acknowledgment). Prior to each flight, fractional program managers brief the passengers to inform them under which regulations the flights will be conducted and who has operational control of the flight.

NBAA believes this operational control briefing would be extremely beneficial in the charter industry, particularly when the aircraft is managed for the owner by the air carrier and the air carrier's pilots fly flights, under part 91, for the aircraft owner (NOTE: the aircraft owner would have operational control for these Part 91 flights).

### **DBAs and Franchised Air Carrier Operations**

During review of charter agreements, the FAA uncovered numerous situations which they view as franchised air carrier operations. Franchising operations is not permitted and in June 2005 the FAA issued Notice 8400.83 as guidance to FAA Inspectors and air carriers on operational control and fictitious business names, known as DBAs ("doing business as").

These arrangements could create confusion as to who is exercising operational control of the part 135 flight. Therefore, in Notice 8400.83, FAA reminded aircraft owners, management companies, and other persons that do not hold air carrier certificates that air carrier operations can only be conducted under the direct control and authority of those air carriers that have been issued air carrier cer-

tificates. While there are some circumstances that DBAs might make sense, these are very limited.

**Related Resources:**

- FAA Notice 8400.83 – Operational Control and Fictitious Business Names  
<http://web.nbaa.org/public/ops/part135/8400-83.pdf>
- NBAA Guidance on FAA Notice 8400.83  
<http://web.nbaa.org/public/ops/part135/8400-83guidance.php>
- Docket No. FAA–2005–22765: Wet Lease Policy Guidance  
<http://web.nbaa.org/public/ops/part135/FAA-2005-22765.pdf>
- NBAA Comments to FAA on Docket No. FAA-2005-22765  
<http://web.nbaa.org/public/ops/part135/NBAACommentsFAA-2005-22765.pdf>

To learn more, or **to join NBAA:**

**<http://web.nbaa.org/public/membership/>**