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Position Paper on Harmonizing International Rules for Business Aircraft Operations

Summary

The lack of worldwide harmonized rules for determining if operations are either commercial or non-commercial can result in unequal treatment of operators conducting international operations. In particular, the differences are most applicable to fractional ownership operations whereby some States determine them to be non-commercial whereas others have deemed them commercial.

This Paper reviews the various positions and issues of ICAO Member States and reviews the implications of the lack of harmonization.

The Paper concludes that solutions are required and makes recommendations as follows:

1. ICAO be requested to conduct a study, the purpose of which would be to produce a policy with respect to a methodology for determining the commercial or non-commercial nature of international aircraft operations. In essence the policy would provide specific guidance with respect to the meaning of “remuneration or hire”.

2. In the event of a dispute between States while the study is being conducted, associations (with the assistance of IBAC when requested) will encourage their respective civil aviation authorities to refrain from regulatory action related to fractional ownership operations, pending development of international policy by ICAO.

Issue

Differences exist in States' rules, definitions and interpretations applicable to commercial and non-commercial operations of business aviation aircraft. These differences can result in unequal treatment, particularly as they apply to international fractional ownership operations.

Unequal treatment of business aviation operations between States can result in trade advantages to one State over another and business advantage to one company over another, and therefore impacts on the efficiency and cost effectiveness of business aviation services. Examples of the different rules applicable to commercial and non-commercial are:

a) economic rules require commercial flights to have specific or general authority (permits) to operate in the State, whereas non-commercial operations do not need prior approval;

b) operating rules for corporate aircraft (non-commercial) offer more freedom than those for Air Transport (commercial) as they permit operations on short notice without advance approvals, thus accommodating the flexibility demands of businesses (efficiency); and

c) customs rules applicable to non-commercial operations normally permit carriage of passengers (within some limits) between locations within a foreign State, whereas similar freedoms are not permitted in Air Transport (cabotage) without advance approval.

The business aviation industry 'raison d'être' is the safe, secure and efficient transportation of business passengers and goods rapidly and efficiently between locations of business activity. The economic viability of businesses often depends on short notice transportation of personnel; without this flexibility the world's corporations face considerable economic penalty with potential impact on global productivity and national economies.

In particular, business aviation fractional ownership activities are being subjected to rules in various States that lack harmonization.

Purpose

This Position Paper presents options and recommends solutions for promoting harmonized international rules for the business aviation transportation of passengers and goods, particularly for those in fractional ownership activities, into and between locations in States.

Background

Although shared aircraft ownership has existed since the early days of aviation, the concept of fractional ownership programs was not fully developed until 1987. Since that time a number of fractional programs have been introduced, primarily in the United States, Europe and South America. Worldwide, the number of aircraft in these programs is over 800.

Since the birth of the modern fractional ownership programs there has been considerable debate regarding whether or not these operations should be deemed commercial or non-commercial. The distinction is important as fractional ownership operations are designed to transport persons on business travel for which flexibility is critical. Business aviation requires the ability to move people rapidly between sites of business activity. The freedom allowed for non-commercial flights under the Chicago Convention provides this flexibility and is one of the principal reasons why corporations own and operate aircraft.

Some States have conducted formal studies to determine how to classify fractional ownership. For example, in the USA, a committee that studied the matter recommended, and the FAA accepted, that the programs should be regulated as non–commercial (under FAR Part 91).

Other States that have conducted studies concluded differently, some declaring that the operations are non-commercial and others that they are commercial. In particular, the United Kingdom has clearly stated in correspondence pursuant to the US NPRM process that they consider the operations commercial. Many States are reserving judgment.

The International Civil Aviation Organization (ICAO), the European Commission (EC) and the European Joint Aviation Authorities (JAA) have not completed reviews nor have they officially declared a position in any way. However, the many potential differences in how States treat fractional ownership operations gives rise to the issues addressed in this paper.

International harmonization of both aviation and customs rules is an objective of both the International Civil Aviation Organization and the World Customs Organization (WCO); for the aviation community this is the ideal. However, the reality is that differences exist throughout the world in the rules and their interpretations. When the differences apply to international aviation operations there is inevitably both safety and economic penalty implications for aircraft operators.

This paper summarizes the significant number of relevant positions and issues under the following categories:

a) Convention of the International Civil Aviation Organization (ICAO).

b) ICAO Annex Part 6 Parts 1 and 2.
c) U. S. Rule making.
d) US economic rules.
e) US Customs rules
f) European Union (EU) Customs Code.
g) EU policy on harmonization.
h) JAA/FAA Harmonization.
i) Joint Aviation Authorities – JAR OPS 2.
j) World Customs Organization.
k) Various European States' input to US Rule making.

In conclusion, this paper makes recommendations for short and long-term resolution.

Convention on International Civil Aviation

The Convention on International Civil Aviation (Chicago 1944) was established "*in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically*". Relevant articles in the Convention and summaries of their intent are as follows (Attachment A contains the Articles):

a) Article 1 -- Sovereignty
Every State has exclusive sovereignty over its airspace.

b) Article 5 -- Right of non-scheduled flight
Rights of non-scheduled flights to land or fly over States and to make stops for "non-traffic" purposes without prior permission. Scheduled or non-scheduled commercial flights can carry passengers to and from the State subject to regulations and conditions of that State.

c) Article 7 -- Cabotage
Right of each State to refuse permission to a foreign carrier to transport passengers commercially from one location to another in that State.

d) Article 11 -- Applicability of air regulations
Rules relating to the admission, departure or operation of foreign aircraft must be applied equally, without distinction as to nationality. Aircraft flying in another State must follow that State's rules on entering, departing or flying within the territory.

e) Article 12 -- Rules of the air

i) All aircraft being operated in a State must follow the State's rules "*relating to the flight and maneuver of aircraft* ".
ii) All aircraft certified in a State must follow the rules of that State "*relating to the flight and maneuver of aircraft* ", wherever they are flying.
iii) Requirement to keep rules uniform, to the greatest possible extent, with the Convention.

Analysis of the Convention indicates the following:

a) Commercial or Non-Commercial
There is nothing in the Convention to give guidance regarding determination of commercial or non-commercial as applied to fractional ownership operations. Commercial is referred to as flights for "*remuneration or hire*", but no definition or explanation is given. There is nothing in the Convention that implies that "operational control" has any bearing on the determination (Note: the US rulemaking placed emphasis on operational control).

b) Rights of Commercial versus Non-Commercial
The Convention clarifies rights of non-commercial flights to stop without prior permission. Non-commercial flights can carry passengers within a State.

c) Equal Treatment
The Convention seems clear in Article 11 that States must treat all aircraft from other States equally. It is unclear if the Article allows a State to impose its own determination of classification of commercial or non-commercial.

d) Rules of the Air
Article 12 seems to apply only to 'rules of the air' and as such likely does not apply to classification of operations. There is a conflict in Article 12 as it requires rules of the air in accordance with both the rules of the State in which it is flying and with the State of registry. No guidance is given if there are differences.

ICAO Annex 6, Part 1 and 2

Annex 6 provides for the international operating rules for aircraft. The relevant Parts are (1) Commercial Air Transport and (2) General Aviation (non-commercial). A number of principles were established when developing Annex 6, Part 2 for general aviation. Included was the principle of:

> *<u>Freedom of Action</u> – The maximum freedom of action consistent with maintaining an acceptable level of safety should be granted to international general aviation*.

The Annex 6 definition of Commercial Air Transport refers to "*remuneration or hire*". There is no guidance provided with respect to interpretation of "*remuneration or hire*". There is no reference to "operational control" as being a consideration in determining if an operation is commercial or non-commercial. General aviation is defined as neither commercial air transport nor aerial work.

S 3.1 of Annex 6, both Parts 1 and 2, require the operator or pilot-in-command to "*comply with the laws, regulations and procedures of the States in which the aeroplane is operated*". This standard appears to be all-encompassing and is not limited to rules of the air. It would be possible to conclude that compliance is required pursuant to a State's rules with respect to commercial and non-commercial determinations. However, Annex 6 is an operating standard and was not likely intended for economic rules, therefore there is question regarding the applicability of S 3.1 in Annex 6 applicable to an 'economic' determination.

In conclusion, Annex 6 is not considered definitive with respect to determining if fractional operations are either commercial or non-commercial. The Annex does appear to permit States to deny operations of an aircraft if not operating to the same rules as that State.

US Rulemaking

The final rule on fractional ownership (Part I, Subpart K) was published September 9,2003 thus declaring the operations to be non-commercial.

The rational for the decision published in the final rule provides details of the process and the new rule (Part 91 Subpart K) as developed by the committee studying the issue.

The Fractional Ownership Aviation Rulemaking Committee (FOARC) met over many months. In the end, unanimous agreement was reached and the results submitted to the FAA. The FAA made some minor adjustments and used the FOARC input to draft the NPRM.

Rationalization for the decision to regulate fractional ownership under non-commercial rules is based on the following (a detailed explanation from the US NPRM is included as Attachment B):

a) <u>Operational Control</u>
The committee determined that owners in fractional programs exercise an adequate level of operational control. They also pointed out that

fractional owners have similarities to whole aircraft owners in that they research aircraft types, acquire an interest in an aircraft, purchase aviation expertise and are exposed to risk of loss or damage.

b) Commercial and Non-Commercial Activities
The primary rational was based on rule making when Part 91 Subpart D (now Subpart F) was originally established. At that time the US focused on the commercial versus non-commercial motive a company has in operating the aircraft. A conclusion was reached at the time that agreements for the loan of an aircraft, exchange, sharing of an aircraft, time-sharing arrangements, interchange agreements, and joint ownership arrangements should be regulated under Part 91 (non-commercial). It was made very clear that corporations should be allowed to contract with management companies and it "*provides that charges covering the normal operating expenses of the aircraft and the salary of the crew may be made under a time sharing or interchange agreement…"*

In conclusion the NPRM states that "*fractionally owned and operated aircraft share more of their regulatory characteristics with the owners of non-commercial operated aircraft than with on-demand operators*."

US Economic Rules

Although Part 91 is an aircraft operating rule, it provides the primary guidance in the US for determining if the fractional operations should be considered commercial or non-commercial for economic regulation purposes.

Related US economic rules are as follows:

a) 49 CFR 41703
Allows navigation of foreign civil aircraft only if reciprocal privilege is granted US aircraft.

b) 14 CFR 375
This Part serves to "*regulate the admission to, and navigation in, the United States of foreign civil aircraft other than aircraft operated under authority contained in a foreign air carrier permit or exemption. This part also contains provisions that specify the extent to which certain classes of flight operations by foreign civil aircraft may be conducted, and the terms and conditions applicable to such operations*." Non-commercial aircraft may be operated into the US and carry passengers from point to point. Commercial charters without a foreign air carrier certificate are required to have a permit which allows up to six operations per year.

US Customs Regulations

Private aircraft are not required to obtain formal customs clearance upon departure. However, customs entry and clearance requirements do apply to air charter and air taxi operators. Crewmembers and passengers on a private aircraft arriving in the U.S. must make declarations.

On arrival, cargo and unaccompanied baggage, not carried for hire, aboard a private aircraft may be listed on a baggage declaration. On departure, when a private aircraft leaves the U.S. carrying cargo not for hire, the Bureau of Census and the Export Administration regulations and any other applicable export laws must be followed.

European Union Customs Code

The EU Customs Code was changed in 2001 by changing the definition of commercial operations. Relevant information is as follows:

The regulation in question is "Commission Regulation (EC) No 993/2001 of 4 May 2001 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code", which went into effect on July 1, 2001.

The 2001 regulation amends, among other things, Title III of Part II of the 1993 regulation.

Part II, Title III, Chapter 5 - Temporary importation

Section 2 - Conditions for total relief from import duties

Subsection 1 - Means of transport

Article 555

1. For the purposes of this subsection:

(a) "commercial use" means the use of means of transport for the transport of persons or of goods for remuneration or in the framework of the economic activity of an enterprise;

(b) "private use" means the use other than commercial of a means of transport;

(c) "internal traffic" means the carriage of persons or goods picked up or loaded in the customs territory of the Community for setting down or unloading at a place within that territory.

Article 558

1. Total relief from import duties shall be granted for means of road, rail, air, sea and inland waterway transport where they:

(a) are registered outside the customs territory of the Community in the name of a person established outside that territory; however, if the means of transport are not registered, the above condition may be deemed to be met where they are owned by a person established outside the customs territory of the Community;

(b) are used by a person established outside that territory, without prejudice to Articles 559, 560 and 561; and

(c) in the case of commercial use and with the exception of means of rail transport, are used exclusively for transport which begins or ends outside the customs territory of the Community; however, they may be used in internal traffic where the provisions in force in the field of transport, in particular those concerning admission and operations, so provide.

The EU has agreed to review the definition in 1 (a) above as it has serious implications for all business aircraft operations. In the interim, while the review is being conducted, European States seem to be withholding implementation of the damaging definition.

EU Policy on Harmonization

The EU has stated policy to harmonize aviation rules with the US and to that end has proposed a Transatlantic Common Aviation Area, the aim of which is to establish a transatlantic single market, replacing the various bilateral agreements between EU member States and the US. Given this policy there should be a desire to harmonize rules and treatment of respective operations.

JAA/FAA Harmonization

This is an annual forum whereby European JAA and FAA authorities meet to try to harmonize rules (primarily only airworthiness rules to date). Although fractional ownership rules have been discussed, no progress has been made. It is unlikely that this forum could resolve this complex issue.

Joint Aviation Authorities – JAR OPS 2

The JAA has issued an Advanced Notice of Proposed Amendment (A-NPA) for a rule that would provide for the regulation by JAA States of Corporate Aviation operations. Nothing in the definition of Corporate Aviation or elsewhere in the operational rules gives guidance on the determination of fractional operations as being inclusive or otherwise within non-commercial corporate operation.

World Customs Organization

The International Convention on the Simplification and Harmonization of Customs procedures (Kyoto Convention) promotes international harmonization. In particular Specific Annex J, Chapter 1 applies to travelers. One standard under the 'Entry' provision states – "*The facilities granted in respect of means of transport for private use shall apply whether the means of transport are owned, rented or borrowed by non-residents and whether they arrive with, before or after the traveler*".

The Convention clearly defines private / commercial use and describes business use of a means of transport as being 'private'. However, the conditions on Temporary Admission are the main problem, particularly the statement " *it is imported and used by the persons resident in a territory other than that of temporary importation*". They specifically state that the conditions will "*help to distinguish foreign means of transport (which receive TI) from national ones (in free circulation). They prevent national residents from avoiding the payment of import duties and taxes by registering abroad the means of transport they purchase".*

The implication is that operators will not be able to carry residents internally within a Customs territory on a means of transport under Temporary Admission.

Various State Positions on Fractional Rules

Generally, European Union States appear to consider fractional ownership operations to be commercial. Responses to the US NPRM from the UK and France clearly presented this opinion. The UK response disagreed that the fractional owners exercise operational control. The response from France advised that an in depth analysis concluded that the service was for "*remuneration or hire*".

Regardless of the position taken by the French DGAC during the NPRM process, the Minister of Transport has directed the Inspection Generale de l'Aviation Civil

(IGACEN) to conduct a study to determine if fractional ownership programs should be considered commercial or non-commercial.

The rational expressed by the UK for considering the operations to be commercial is as follows:

- the shareholders and the corporation are different legal entities, with the former paying the latter for use of the aircraft: and
- the payments made for upkeep and utilization of the aircraft constitute "valuable consideration" under the terms of Article 102 of the Air Navigation Order (which is a key test for whether permission needs to be sought).

IBAC has approached the UK government through the UK Representative on the ICAO Council to determine the likely action by the UK government with respect to fractional operations of non UK registered aircraft when entering the UK. The response from the UK Representative confirms that the UK considers fractional ownership to be commercial operations; however, the response does not indicate how non-UK fractional operations will be treated from a regulatory point of view if they are operated to rules differing from those in the UK.

Analysis

The root of the problem lies in the varying interpretations of the meaning of "remuneration or hire". Since there is no guidance within ICAO policy on what constitutes "remuneration or hire", both States and individuals have made their own interpretations. Further complicating the issue is that fractional ownership programs take many forms and States and individuals are jumping to conclusions based on their knowledge of one of the fractional designs.

Given that fractional ownership is one form of 'managed services', this long-standing arrangement has been inadvertently drawn into the debate. Managed services are provided by operating entities to aircraft owners through services such as maintenance, flight crews and operational control. Since early days of aviation, States have accepted that the meaning of 'remuneration' does not apply to 'managed services' and that such operations are clearly non-commercial. However, recent unofficial statements by some government officials that "in their opinion" such services should be considered commercial have caused some confusion. Given the historical position of States that 'managed services' are indeed non-commercial it is highly unlikely that any State would suddenly reverse its position. Nevertheless, resolution of the meaning of "remuneration or hire" should address this issue.

There does not appear to be a universal position within the business aviation community on whether fractional ownership should be deemed commercial or

non-commercial. In most cases the positions are based on individual interpretations of a given design and may also relate to personal preferences based on social or tax reasons. In some States there are considerable tax advantages when operating commercially and operators that have a commercial AOC for tax and social reasons do not like the idea of a non-commercial fractional company being in competition.

A strong position taken by the business aviation community would be beneficial; however, such an industry position is likely to be treated with some skepticism as the position would be viewed as biased. It would be better if the determination could be made from a legal perspective by an authoritative body. For example, if the International Civil Aviation Organization conducted an analysis and produced guidelines to supplement the "remuneration or hire" rule, there is a better probability of a harmonized international position. Such a study would include methodology for determining how to apply "remuneration or hire" in assessing each particular operation on its own merit.

However, such a study by ICAO would take some time. In the meantime it is highly desirable to avoid regulatory enforcement action by a State against aircraft registered in another State based on differences of position on fractional ownership interpretations. Any such action should be addressed as soon as possible by the relevant associations involved, by advising the authorities of the policy work being conducted at ICAO.

There may be a number of options to provide for an interim "equal treatment" resolution when a dispute arises. One method would be for States to agree to accept, on an interim basis, the designation by the State of registry regardless of their own rules. To ensure equitability for operators, States must allow operators to operate commercially or non-commercially on any given day or flight depending on the person(s) carried and purpose of the flight. If the owner, lessor, company employees, family or guests are carried with no remuneration paid for the transportation, that flight would be deemed non-commercial in international operations if the operator so chooses. The regulatory freedom for an operator to move between commercial and non-commercial is widely accepted by authorities worldwide, but it must be universal if equal treatment is to be assured. This would allow operators that operate commercially in their own State for tax reasons to operate non-commercially when flying to another State.

Recommendations

The following recommendations are proposed:

1. ICAO be requested to conduct a study, the purpose of which would be to produce a policy with respect to a methodology for determining the

commercial or non-commercial nature of international aircraft operations. In essence the policy would provide specific guidance with respect to the meaning of “remuneration or hire”.

2. In the event of a dispute between States while the study is being conducted, associations (with the assistance of IBAC when requested) will encourage their respective civil aviation authorities to refrain from regulatory action related to fractional ownership operations, pending development of international policy by ICAO.

Attachment A
Relevant ICAO Convention Provisions

Article 1 -- Sovereignty

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

Article 5 -- Right of non-scheduled flight

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.
Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or a hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may considered desirable .

Article 7 -- Cabotage

Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State.

Article 11 -- Applicability of air regulations

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with

by such aircraft upon entering or departing from or while within the territory of that State.

Article 12 -- Rules of the air

Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

Attachment B
US Decision on Fractional Ownership Regulation

General

The US has promulgated Part 91, Subpart K, which classifies fractional ownership programs as non-commercial.

The rational for the decision details of the deliberations in making the rule as well as details of the new Subpart K as developed by a Committee struck by the FAA to examine the issue.

The Fractional Ownership Aviation Rulemaking Committee (FOARC) consisted of a vast range of expertise and met over a period of many months. In the end, unanimous agreement was reached and the results submitted to the FAA. The FAA made some minor adjustments and used the FOARC input to draft the NPRM and the final rule.

This summarizes the rational explained in the FOARC report for deciding that fractional ownership operations should be governed under non-commercial rules.

Operational Control and Regulatory Responsibility

Safety is the shared responsibility of the entire aviation community. The FAA's objective is to assure the optimum level of safety for aircraft operations. Prior to the introduction of fractional ownership programs, the Federal Aviation Regulations implicitly recognized differing levels of operational control and regulatory responsibility among persons traveling by air, and provided levels of oversight intended to maintain an optimum level of safety in view of these differences.

In general, airline passengers exercise no control over and bear no responsibility for the airworthiness or operation of the aircraft aboard which they are flown. Because the traveling public has no control over, or responsibility for, airline safety-of-flight issues, an optimum level of public safety is provided by the FAA's imposition of very stringent regulations and oversight under part 121 and the sections of part 135 applicable to scheduled service.

In general, on-demand or supplemental air charter passengers exercise limited control over but bear no responsibility for the operation of the aircraft aboard which they are flown. On-demand or supplemental air charter passengers negotiate the point and time of origin and destination of the flight, and may have the ability (subject to the pilot's supervening authority) to direct or redirect the flight. Under these circumstances, the optimum level of public safety is provided

by the FAA's imposition of stringent regulations and oversight under part 121 or part 135.

In general, aircraft owners flying aboard aircraft they own or lease exercise full control over and bear full responsibility for the airworthiness and operation of their aircraft. Under these circumstances, the optimum level of public safety is provided by the FAA's imposition of general operating and flight regulations and oversight under part 91.

These policies and differing levels of responsibility were reflected in the development of Part 91, subpart D, subsequently subpart F, which governs most of business aviation today.

Commercial and Non-Commercial Flight Activities

In creating the new subpart, the FAA continued its longstanding policy that individuals and corporations may operate their aircraft under part 91 and included these operations as the cornerstone of the new subpart. This policy is currently embodied in § 91.501(b)(4), which allows a person to operate his or her aircraft "for his personal transportation, or the transportation of his guests when no charge, assessment, or fee is made for the transportation," and in § 91.501(b)(5), which allows for the "[c]arriage of officials, employees, guests, and property of a company on an airplane operated by that company . . . when the carriage is within the scope of, and incidental to, the business of the company . . . ."

In preserving these uses under part 91, the FAA chose to focus on the commercial (on-demand charter) or non-commercial (business or personal) motive a company or individual has in operating an aircraft, rather than on the form of the arrangements that led to the acquisition of the aircraft interest. In proposing the new subpart, the FAA pointed out that, "in order to augment or more fully utilize their fleets, many corporate aircraft operators entered into agreements for the loan, exchange, or sharing of their aircraft" (36 FR 19509). The FAA permitted such arrangements to continue under the new subpart, and specifically allowed for even more complex arrangements, such as time-sharing arrangements, interchange agreements, and joint ownership arrangements. In explaining its determination that such arrangements do not affect which part of the Federal Aviation Regulations the aircraft should operate under, the FAA stated in the preamble to the final rule (37 FR 14758):

> "[T]he decision to proceed with the upgrading of part 91 for large and turbine-powered multiengine airplanes is an important threshold step in the FAA policy to remove, to the extent possible, those differences in the safety standards that [are] primarily economic in nature and result in unnecessary restrictions or limitations on aircraft operators. In accordance with that policy, the need for different or additional safety standards for corporate operations should be resolved on the basis of safety, rather than

> economics or juristic semantics. Safetywise, we have determined that neither the relationship of the corporations nor the type of compensation received for the services rendered should be relevant or controlling under the standards of the new subpart D for the various corporate kinds of operations that do not involve common carriage.
>
> "In order to make this change in policy clear to all interested persons, § 91.181(b) includes a list of the kinds of operations that may be conducted under subpart D. In addition, § 91.181(c) of subpart D expressly provides that charges covering the normal operating expenses of the aircraft and the salary of the crew may be made under a time sharing or interchange agreement as defined in that section. This policy also applies to a corporation regardless of its relationship, if any, to the corporation for which the carriage is conducted. Accordingly, the application of subpart D to a corporate operator will no longer be dependent on whether that operator is a parent or subsidiary corporation or a member of a conglomerate. It should be noted, however, that if a corporation is established solely for the purpose of providing transportation to the parent corporation, a subsidiary or other corporation, the foregoing policy does not apply. In that case, the primary business of the corporation operating the airplane is transportation and the carriage of persons or goods for any other corporation, for a fee or charge of any kind, would require the corporation operating the airplane to hold a commercial operator certificate under part 121 or 135, as appropriate."

This statement of the intent of subpart D highlights the importance of identifying, in the context of shared aircraft ownership and use arrangements, the person in operational control of the aircraft at any given time. Historically, this information has been used to determine whether an operation may be conducted under part 91 with adequate assurance of public safety, or must be conducted under the requirements of on-demand air passenger service under part 135. This statement also highlights the longstanding ability of aircraft owners to purchase aviation expertise for the purpose of managing, maintaining or otherwise aiding the operation of the aircraft they operate under part 91.

Current § 91.501 authorizes, under part 91, operations involving the personal use of aircraft (§ 91.501(b)(4)), the use of aircraft within the same corporate group (§ 91.501(b)(5)), and the use of time sharing agreements (§ 91.501(c)(1)), interchange agreements (§ 91.501(c)(2)), and joint ownership agreements (§ 91.501(c)(3)) within or outside of the same corporate group (§ 91.501(b)(6)).

General Discussion of the Proposal

It is within this legal context that the FOARC considered the regulation of fractional ownership programs today. During these deliberations, the FOARC determined that fractional owners flying aboard fractionally-owned aircraft contractually acknowledge and exercise substantial control over and bear substantial responsibility for the airworthiness and operation of their aircraft. Like whole aircraft owners, fractional owners can initiate, conduct, redirect and terminate a flight. Fractional owners also operate their aircraft under part 91 only for themselves and their guests and may not offer transportation for hire to the general public unless they do so under part 135 or part 121. Additionally, it should be noted that both fractional owners and whole aircraft owners: 1) conduct research so that they can be assured that they will select the right aircraft and realize an adequate return from their capital investment; 2) acquire an interest in an aircraft through a significant capital investment; 3) purchase aviation expertise for the purpose of managing, maintaining or otherwise aiding the operation of the aircraft they operate under part 91, including the option to select flight crews and; 4) bear the risk of loss or damage to the aircraft and the risk of diminution of value of the aircraft.

Based on its analysis of fractional ownership program arrangements, the FOARC concluded that fractional owners flying aboard fractionally-owned and operated aircraft share more of their regulatory characteristics with the owners of non-commercially operated aircraft than with on-demand operators. Consequently, the FOARC concluded that fractional ownership programs are properly regulated under part 91 of the Federal Aviation Regulations. Fractional owners operating under part 91 are engaged in non-commercial operations and, as such, may not offer air transportation services (common carriage), air commerce services for compensation, chargeback, or hire without appropriate air carrier certification and appropriate economic authority, although fractional owners may be compensated to the extent permitted under applicable existing sections of part 91.

Fractional owners differ from a majority of whole business or personal aircraft owners in that 1) fractionally-owned aircraft typically have multiple owners, 2) their aircraft's availability is as a component of a pooled fleet, 3) the owners of a fractionally-owned aircraft agree to use the services of a single company to manage their aircraft, and 4) all owners agree to a uniform aircraft configuration. The FOARC concluded that these characteristics, unique among general aviation operations, suggest additional regulatory oversight under part 91.

To clearly define the safety responsibilities of fractional owners and fractional ownership program managers under the Federal Aviation Regulations, the FOARC recommended that a new subpart K of 14 CFR part 91 be established to regulate fractional ownership programs. Proposed subpart K clarifies the conditions under which fractional owners exercise operational control of fractional ownership program aircraft and specifies a fractional aircraft program manager's obligations with respect to its provision of aircraft management services related to the airworthiness and operation of fractional ownership program aircraft.

The FOARC recommended that proposed subpart K of part 91 should apply only to fractional ownership program aircraft and not to other business aircraft arrangements including traditional flight departments, the use of management companies providing aviation expertise, flying clubs, partnerships or other ownership forms that do not meet the definition of “fractional ownership program” set forth in proposed subpart K. Fractional ownership programs may be operated under part 121 or part 135, instead of proposed subpart K of part 91, if they comply with the requirements of those parts. Operations conducted under part 121 or part 135, as applicable, are not required to comply with proposed subpart K.

Existing fractional ownership programs have adopted best practices that have resulted in an outstanding safety record. The FOARC recommended that many of those best practices, together with new requirements, be codified in proposed subpart K. The FOARC recognized that the regulatory requirements proposed in subpart K impose a significant new regulatory standard upon all current and future fractional owners and program managers. The FOARC believed that this standard was necessary in the public interest to ensure the optimum level of public safety for fractional ownership program operations.

The FOARC concluded that certain changes to part 135 are required. As the FOARC evaluated existing best practices in the industry and parallel provisions of part 135 in developing proposed subpart K, the FOARC determined that certain provisions of proposed subpart K provide a level of safety equivalent to the parallel provisions of part 135. Corresponding amendments are proposed to the pertinent sections of part 135 to permit an alternative means of compliance for on-demand operators under these sections of part 135, as appropriate. These changes also reflect improvements in technology and the ability to operate safely as proven by the operating experience of business aircraft operators, including fractional owners.

The FOARC recommended that, if this proposal is adopted, the FAA work closely with the affected parties and the industry to develop guidance and to implement the changes proposed to parts 91 and 135. The FOARC also recommended that the FAA commit sufficient resources to implement these changes.

The FOARC recommended that the FAA also establish a national point of contact for fractional ownership operational and airworthiness issues to ensure standardization of the implementation process and policy application. The FOARC recommended that procedures be put in place by FAA to ensure that fractional program managers also are subject to FAA oversight and surveillance equal to that experienced by part 135 or part 121 operators. The FOARC also recommended that approvals for fractional ownership program operations (such as MELs, RVSM, manual reviews and maintenance programs) be conducted

through a process similar to part 135 and/or part 121 processes and procedures, as appropriate.

The FOARC recommended that the FAA provide equivalent assistance to part 135 operators endeavoring to meet the revised part 135 regulations. Finally, the FOARC recommended that the FAA conduct appropriate training and ensure that any internal administrative changes, necessary for on-going oversight of compliance with these regulations, are made. The consensus achieved by the FOARC was contingent upon the FAA's commitment to fully implement the FAA inspection and oversight requirement of part 91, subpart K to the degree currently employed in part 135 operations.

Attachment C
Definitions

Fractional Ownership (From US NPRM)

(1) A fractional ownership program or program means any system of aircraft exchange involving two or more airworthy aircraft that consists of all of the following elements:

(i) The provision for fractional ownership program management services by a single fractional ownership program manager on behalf of the fractional owners;
(ii) One or more fractional owners per program aircraft, with at least one program aircraft having more than one owner;
(iii) Possession of at least a minimum fractional ownership interest in one or more program aircraft by each fractional owner;
(iv) A dry-lease aircraft exchange arrangement among all of the fractional owners; and
(v) Multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program.

(2) A dry-lease aircraft exchange means an arrangement, documented by the written program agreements, under which the program aircraft are available, on an as needed basis without crew, to each fractional owner.

(3) A fractional ownership interest means the ownership of an interest or holding of a multi-year leasehold interest and/or a multi-year leasehold interest that is convertible into an ownership interest in a program aircraft.

(4) A minimum fractional ownership interest means--
(i) A fractional ownership interest equal to, or greater than, one-sixteenth (\1/16\) of at least one subsonic, fixed-wing or powered-lift program aircraft; or
(ii) A fractional ownership interest equal to, or greater than, one-thirty-second (\1/32\) of at least one rotorcraft program aircraft.

(5) A fractional owner or owner means an individual or entity which possesses a minimum fractional ownership interest in a program aircraft and which has entered into the applicable program agreements; provided, however, that in the

case of the flight operations described in paragraph (b)(6)(ii) of this section, and solely for purposes of requirements pertaining to those flight operations, the fractional owner operating the aircraft shall be deemed to be a fractional owner in the program managed by the affiliate.

(6) A fractional ownership program aircraft or program aircraft means:

(i) An aircraft in which a fractional owner has a minimal fractional ownership interest and which has been included in the dry-lease aircraft exchange pursuant to the program agreements, or

(ii) In the case of a fractional owner from one program operating an aircraft in a different fractional ownership program managed by an affiliate of the operating owner's program manager, the aircraft being operated by the fractional owner, so long as the aircraft is:

(A) Included in the fractional ownership program managed by the affiliate of the operating owner's program manager, and

(B) included in the operating owner's program's dry-lease aircraft exchange pursuant to the program agreements of the operating owner's program.

(7) Fractional ownership program management services or program management services mean administrative and aviation support services furnished in accordance with the applicable requirements of this subpart or offered by the program manager to the fractional owners, including, at a minimum, the establishment and implementation of program safety guidelines, and the coordination of the following:

(i) The scheduling of the program aircraft and crews;

(ii) Program aircraft maintenance;

(iii) Crew training for crews employed, furnished or contracted by the program manager or the fractional owner;

(iv) Satisfaction of recordkeeping requirements; and

(v) Development and use of a program operations manual and maintenance program manual.

(8) A fractional ownership program manager or program manager means the entity that offers fractional ownership program management services to fractional owners, and is designated in the multi-year program agreements referenced in paragraph (b)(1)(v) of this section to fulfill the requirements of this chapter applicable to the manager of the program containing the aircraft being flown. When a fractional owner is operating an aircraft in a fractional ownership program managed by an affiliate of the owner's program manager, the references in this subpart to the flight-related responsibilities of the program manager apply, with respect to that particular flight, to the affiliate of the owner's program manager rather than to the owner's program manager.

(9) Affiliate of a program manager means a manager which, directly,

or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, another program manager. The holding of at least forty percent (40%) of the equity and forty percent (40%) of the voting power of an entity shall be presumed to constitute control for purposes of determining an affiliation under this subpart.