

# **Operational Control**

## **NATA/NBAA Frequently Asked Questions (FAQs)**

**Policy Guidance issued 02/11/08**

The National Air Transportation Association (NATA) and the National Business Aircraft Association (NBAA) have indicated to the FAA that the questions below are frequently asked by Part 135 operators and aircraft owners and the following policy guidance by the FAA would be helpful. The FAA hopes that these responses are helpful in assisting air carrier operators in determining whether their operations are in compliance with operational control requirements.

**Industry Question 1:** Does Operation Specification A008 or Notice 8900.4 create any expectations for a dispatch function within a Part 135 operation? It has always been understood that 135.79 (Flight Location Requirements) was met by filing a flight plan with the FAA. What guidance can the FAA provide to explain the FAA's expectations for charter operators?

**FAA Response:** Operation Specification A008 does not require part 135 air carriers to have part 121 dispatchers or 121 dispatch-like operations. However, among other things, Part 135 air carriers are required to have tier 1 management personnel assign flight crews to a flight, or series of flights, and are expected to determine, at the beginning of the duty assignment, whether the crewmembers are qualified and the aircraft is in an airworthy condition to perform the Part 135 service.

While there are no dispatch system requirements in part 135, there is a flight locating requirement. However, compliance with flight-locating requirement by itself does not mean that the operator has operational control. Flight locating helps the carrier meet some of the knowledge aspects of operational control (e.g., where is the airplane now or expected to be in x hours?). With relatively simple or basic part 135 operations, it might be possible for the carrier's management officials to keep the daily flight plans in their minds or notepads. For more complex operations, a more robust and technologically sophisticated safety management system may be needed to keep track of where the aircraft are supposed to be. For those Part 135 operators that use documents (paper, computer) to keep track of the whereabouts of each aircraft, those documents do not necessarily need to be located at the operator's headquarters, but they must be accessible in a timely fashion should the operator be asked about a specific flight. To the extent that a carrier files a flight plan with Air Traffic Control, the FAA has said that such a filing satisfies part 135 flight locating requirements. If the carrier does not file a flight plan with Air Traffic Control, it must use an alternative method of locating the aircraft as set forth in Section 135.79.

In addition to being required to locate the aircraft, a carrier properly exercising operational control must be able to show, prior to flight, that the crew is qualified (e.g., is trained, has a current medical certificate and meets duty, flight and rest provisions) and the aircraft is airworthy. OpSpec A008 provides a roadmap by which a carrier must describe its operational control system.

For air carriers conducting remote operations, such operators may release flights from remote locations and still maintain operational control. For example, an operator may provide a pilot with a list of specific operating limitations (e.g. minimum weather requirements for a flight, maximum flight hours per day, duty day limitations, etc.) and provided those limitations are not exceeded; the pilot can proceed to transport cargo or passengers within the specified limitations as set forth in the air carriers operations specifications. However, should conditions exist that would require the pilot to deviate from the initial release, the FAA would recommend that the pilot coordinate such changes with the tier 1 management or its properly authorized delegate. During flight, if a passenger makes a flight diversion request, the pilot should make an attempt to first contact the tier 1 management or its properly authorized delegate, if possible, prior to making the deviation. The pilot needs to keep the tier 1 management and flight locating personnel aware of the current status of the pilot and aircraft. In any event, (including situations where the pilot enroute cannot contact a management official with the carrier), it is the carrier, acting by and through the pilot, that must determine whether the passenger's diversion request can actually be accomplished in conformance with the safety regulations.

When air carrier operations are being conducted, tier 1 management personnel must be able to determine the current status of any given pilot and aircraft conducting part 135 operations. Tier 1 management personnel may rely on a safety management systems process that has been implemented to ensure aircraft and crew compliance or by contacting the flight locating personnel assigned to monitor such flights. This information must be readily available to all tier 1 management personnel when air carrier operations are being conducted.

**Industry Question 2:** Several operators, after their special emphasis inspections, have noted that their POIs were seeking documentation that personnel were “direct employees” and not just “employees.” However, the some POIs were unable explain the differences between those terms. What is the FAA’s definition of the term *direct employee* and how does that differ from the term *employee*?

**FAA Response:** The FAA’s guidance does not distinguish between a direct employee (e.g., a W-2 employee) and other employees. Rather, we distinguish between a direct employee and an agent. The FAA considers the terms “direct employee” and “employee” to mean the same thing. For example, pilots may be either direct employees of the carrier or agents of the carrier, such that the actions or inactions of the pilot-agent are acknowledged as, and considered to be, the acts or inactions of the carrier itself.

Tier 1 functions of the air carrier must be performed by a direct employee of the air carrier while tier 2 functions can be performed by an agent. If someone is your direct employee, you must exercise some control over this person and such person must be “on your books” (i.e. receive a W-2 statement). For tier 1 employees (e.g. Chief Pilot, Director of Operations, and Director of Maintenance) such persons must be direct employees of the certificate holder, with limited exceptions for basic part 135 operators (one pilot and one aircraft).

OpSpec A008 does not prohibit flight locating tasks from being performed by tier 2 personnel, provided systems are in place to ensure tier 1 personnel are notified, or have access to, current information relating to the status of airmen and aircraft conducting part 135 operations. Tier 2

flight locating personnel may also receive notification from flight crewmembers of aircraft needing to change destinations, while enroute, provided such information is passed along to a tier 1 employee for approval. We realize that not all on-demand part 135 operators have real time immediate communication capabilities with pilots who are operating the carriers' airborne aircraft. Nonetheless, the carrier should know who was assigned to operate the flight, when the flight was expected to take off, where the flight departed from and when and where it is expected to land.

**Industry Question 3:** May a certificate holder use an agent (pilot, flight attendant, maintenance professional):

1. If they happen to be employees of the aircraft owner;
2. Provided the agency relationship is documented in writing;
3. Provided the certificate holder provides oversight of operations and maintenance in accordance with Notice 8900.4.

**FAA Response:** Yes, subject to the discussion immediately below. Such agents report to the carrier on operational and maintenance issues and both agents and direct employees must adhere to the directions and instruction and other commands of the carrier (assuming that they are safe and in compliance with the regulations). Furthermore, the carrier must control its agents and direct employees, including pilots, flight attendants, and maintenance professionals. We caution that agency relationships that have arisen pursuant to a wet lease from the aircraft owner to the carrier are forbidden.

It is not necessary to execute a formal agency agreement with maintenance personnel that are acting as vendors since the air carrier is ultimately responsible to ensure that all maintenance is performed properly and in accordance with all applicable regulations. Any maintenance errors that are made are ultimately the responsibility of the air carrier.

**Industry Question 4:** Would a certificate holder be compliant with Operation Specification A008 and Notice 8900.4 (and any/all other applicable FAA regulations) if 100% of the operator's tier 2 personnel used in air carrier operations were agents of the air carrier under a written agency agreement (and the relationship met the requirements found in Notice 8900.4)? If no, why not, and what guidance can the FAA give operators? What ratio of direct employees to agents is permissible?

**FAA Response:** Persons performing tier 2 functions may be either direct employees or agents. However, if all persons performing tier 2 functions are agents, this would raise a red flag warranting further inquiry by the FAA. However, if a person performing a tier 2 function also performs a tier 1 function (e.g., a Chief Pilot acting as an active company pilot), that person must be a direct employee of the air carrier.

It would also warrant further FAA inquiry if a Part 135 operation were to only employ those individuals required to perform tier 1 functions. From a Flight Standards point of view, the FAA would deeply ponder whether to issue an air carrier certificate to this type of operation as it appears very close to a "virtual airline" structure. It is difficult to determine the minimum number of employees an air carrier would need to satisfy the FAA as this is based on specific

facts and circumstances surrounding each unique operator. If an airline had no additional employees beyond those required to perform tier 1 functions, this would raise a red flag with FAA and require additional review.

It is essential that tier 1 management personnel be direct employees of the air carrier. To this extent, the Chief Pilot, Director of Maintenance and Director of Operations, must be direct employees of the operator, except for single pilot, single aircraft, basic part 135 air carriers. For all other air carriers, the previously discussed tier 1 function may not be performed by an agent, but must be direct employees of the air carrier. While the salary of such individuals are not necessarily a factor (although it could be in certain situations. See the A008 Op Spec guidance) when approving personnel for such positions, the FAA will review the oversight and operational control of such personnel when they are selected for these positions. Tier 1 employees should not perform management functions for multiple certificate holders; however, depending on the complexity of an operation, a tier 1 management person could possibly be employed by two certificate holders if both operations were very small and close to one another. Such determination would be on a case-by-case basis as the oversight, responsibilities and operation control feasibility would need to be considered for both operators.

**Industry Question 5:** May an aircraft owner participate in maintenance decisions by soliciting/collecting bids for outside maintenance and choosing, subject to the certificate holder's discretion, between alternate approved maintenance facilities?

**FAA Response:** While an aircraft owner may suggest a maintenance facility, only the air carrier is authorized to choose outside maintenance personnel or facilities. Maintenance must be performed in accordance with the air carrier's approved maintenance and inspection program and any outsourced maintenance must be conducted under the oversight of the carrier's management personnel. If maintenance is accomplished by the aircraft owner, for example, while the owner has possession of the aircraft and is using it under Part 91 only, before the aircraft may be used in Part 135 services, the aircraft must undergo an appropriate airworthiness conformity validation check.

The owner of an aircraft would be able to coordinate selection of maintenance facility with the air carrier (e.g. sending out request for proposals (RFPs) and discussing responses with air carrier) if these are all approved facilities per air carrier maintenance program, and within these limitations, the owner can contribute to the carrier's decision-making process. Additionally, the owner can provide information to air carrier on approved maintenance facilities that may offer a better price/service. If owner is involved in selection of a maintenance facility, it is important that the facility knows they are working on an aircraft used in Part 135 service.

It is permissible to have an aircraft owner's mechanic perform maintenance on a Part 135 aircraft provided someone from the air carrier is aware of the maintenance being performed and the air carrier validates that the work has been performed correctly.

If an aircraft owner chooses a maintenance facility that is not on the air carrier's approved list (e.g. to install a new interior), the facility must be informed, prior to conducting such work, that they are working on a Part 135 aircraft and such work must be validated by the carrier to

ensure that it was performed in accordance with the air carriers maintenance program prior to using it in 135 revenue service.

**Example 1:** An aircraft owner desires to manage costs associated with a planned new interior completion, exterior paint and other maintenance items for its 8-seat aircraft, which is on XYZ's charter certificate. To achieve that, aircraft owner wants to solicit bids for the completion and maintenance work, and interface with the maintenance facility on the work schedule and budget. Aircraft owner informs XYZ Charter of owner's desire to manage this aspect. XYZ Charter provides owner with the names of three approved maintenance facilities; owner sends a Request for Proposal (RFP) to all of them; owner informs maintenance facilities that the aircraft is on XYZ's charter certificate and the aircraft be maintained in accordance with XYZ Charter's maintenance program. The aircraft owner ultimately chooses one of XYZ Charter's approved providers, the work is completed to the owner's satisfaction; maintenance facility logs work as performed in accordance with Part 135 maintenance program, and XYZ Charter validates the logbook entries for conformity prior to the aircraft being placed back into Part 135 service.

**FAA Response:** In this example, there would be no loss of operational control. Key facts are that:

- The air carrier had approved the maintenance facility in advance by providing the aircraft owner with a list of approved facilities. Because the owner was restricted to soliciting bids only from these facilities, the air carrier ultimately decided who will do the maintenance.
- The maintenance facility was informed in advance that the aircraft is on XYZ's D085 and the air carrier will play a role in ensuring the maintenance is in accordance with the 135 air carrier's maintenance program.

**Example 2:** Same facts as Example #1, but aircraft owner also solicits bids from non-approved maintenance facilities and ultimately chooses a non-approved facility without the knowledge of the air carrier.

**FAA Response:** In this example, there would be an operational control issue. The only remedy to avoid a part 135 maintenance violation, if the aircraft is used in a part 135 flight, would be to have a full conformity check as if the aircraft were new to the certificate. That is the only remedy if the aircraft owner uses a maintenance facility that was not approved for part 135 maintenance work for the on-demand carrier.

**Example 3:** Aircraft has 14 seats and is on a Continuous Airworthiness Maintenance Program (CAMP). Aircraft owner had work performed by a small repair shop (Jet Mend U.S.) prior to aircraft being placed on Part 135. Due to customer service issues, the owner had negotiated a two-year warranty with free maintenance labor at that facility. Aircraft undergoes conformity check by air carrier/FAA and aircraft placed into Part 135 service under air carrier's CAMP program for that aircraft make/model. Aircraft owner, on a Part 91 business flight, encounters a maintenance issue and takes the aircraft to Jet Mend U.S. for repair.

**FAA Response:** In this example, the aircraft owner must advise the 135 air carrier of the aircrafts status and either allow the 135 air carrier to schedule the subsequent maintenance with Jet Mend U.S. or the owner may schedule the maintenance. If the owner schedules such work, the owner must advise the maintenance facility that the aircraft is currently on a 135 air carrier certificate. In either case, the 135 certificate holder must validate any and all work that was accomplished on the aircraft prior to returning it to 135 service. Thus, the best thing would be for the carrier to get the PMI's approval to use this facility for the maintenance of the aircraft used by the carrier in its part 135 operations. Failing that, consistent with our answer in example 2, the carrier would have to complete a full conformity check of the aircraft, as if it were new to the certificate, before it could be used again in the carrier's part 135 operations.

**Example 4:** Part 135 operator is conducting a flight for compensation or hire. Aircraft tire goes flat upon landing and requires a tire change. No maintenance personnel covered by Part 121 Appendix I and J are reasonably available to perform maintenance. Air carrier has emergency maintenance performed under 135.251 (c) and 135.255 (c).

**FAA Response:** In this example, the 135 air carrier must schedule the emergency maintenance and must validate any, and all, work that was accomplished on the aircraft prior to returning it to 135 service.

**Industry Question 6:** Operations Specification A008 does not discuss how an operator obtains its support services or if the FAA has any limitations on outsourced support services. Can a certificate holder outsource HR/benefits administration, insurance/financial risk management, invoicing/billing, payroll, accounting, tax or other financial aspects of the charter operation? If no, why not? If yes, are there any restrictions and can the FAA provide guidance on what is acceptable and unacceptable? (e.g., Can the air carrier use an agent billing department, as long as the agency relationship is documented?)

**FAA Response:** There is no hard and fast rule regarding the type and number of support services that may be outsourced. The totality of the facts and circumstances of each particular case will dictate whether the outsourced support services evidence that the carrier has relinquished operational control. In other words, if upon examination of the carrier's operational control system, the FAA finds that the carrier is not exercising one or more of the required elements of its operational control system (e.g., placing a qualified crew in the aircraft and ensuring the aircraft is airworthy) those factors, coupled with the outsourcing of support services, may be evidence that the carrier has relinquished operational control. If outsourcing the types of functions listed above means that the air carrier does not, for example, know before the flight who the customers are or the status of the flight crew (e.g., in terms of recency of operations, training, medical certification), then such outsourcing may demonstrate a loss of operational control. If for example, the carrier is a 'will-not-carry' (HAZMAT) carrier and does not know ahead of time that the customer wants HAZMAT transported, that might indicate a lack of operational control by the carrier.

It is permissible for Part 135 operators to use outsourced payroll company so long as this company does not exercise control over certificate holder employees. For example, if the parent

company of the air carrier provided payroll services and also controlled hiring/firing of air carrier employees, this would be an issue that would require further review of the air carrier's operational control. If the FAA believes the parent company/contractor is exercising control over an air carrier's employee, this would be considered a red flag requiring further review by the FAA. Air carriers can work with its parent company in creating/tracking budgets, but the parent company can not have such control over the budget that would dictate how an aircraft was maintained.

**Industry Question 7:** In general are there any functions that the operator may not outsource, presuming an appropriate relationship is established whereby the operator maintains final approval, authority and responsibility?

**FAA Response:** The carrier may not outsource any function that is listed as an essential element of operational control in paragraph (d.) of Operations Specification A008. This includes subparagraph (d.)(6) Management Personnel and Persons Authorized to Exercise Operational Control. Moreover, to the extent that the carrier outsourced certain record-keeping functions to a contractor, the carrier must nonetheless have immediate access to key safety information, including crewmember records, aircraft maintenance records, etc... It would be unacceptable for the carrier to state that it could not get access to key safety records because the contractor was, for example, closed on the weekend.

**Industry Question 8:** Is it permissible for a parent corporation to make budgetary decisions and human resource decisions (i.e., termination of certain employees) for a sub-corporation that holds a Part 135 certificate without a surrender of operational control to the parent?

**FAA Response:** That facts and circumstances of each particular case will dictate whether a parent corporation's budgetary and/or human resource decisions regarding its sub-corporation air carrier certificate holder results in surrender of operational control to the parent. For example, if a parent corporation orders a pilot to violate the safety regulations and the pilot refuses, the ability of the parent to force the subsidiary to fire the pilot would raise issues about whether the carrier had operational control. To the extent that the pilot complied with the illegal and unsafe order, the FAA might determine that the parent corporation "operated" the flight contrary to the rules and the parent corporation may be subject to enforcement action. Similarly, if a pilot-employee of a corporation that owns a business jet, is ordered by the CEO to bust an altitude clearance or to take off despite a Presidential NOTAM restricting flight at a certain location, then the FAA may find that the CEO "operated" the aircraft contrary to safety rules, in addition to the illegal and unsafe operation by the pilot. (*See the 14 CFR Part 1 definition of "operate"*). It also depends on, for example, how one uses the phrase "budgetary decision." When an ostensible "budgetary decision" by the parent corporation results in the air carrier's derogation of safety, the air carrier has relinquished operational control to the parent. For example, if the air carrier contracts to carry 20 people from point A to point B on an aircraft that would be a new type of aircraft to the certificate holder, but the parent has not allowed the carrier to spend money to fund required pilot training for that new type aircraft before the date of the flight, such a "budgetary" decision would indicate improper operational control by the parent. Similarly, it would be an indication of operational control if a parent directs its subsidiary air carrier not to

give PICs the financial means to pay de-icing contractors at far-flung locations so that flights occur without required deicing.

**Q8 Example 1:** A parent company establishes the budget for the sub-corp. Currently, the certificate holding sub-corp. conducts all pilot training in-house and in accordance with all applicable FARs. The sub-corp. proposed budget request includes a funding increase to send pilots to a Part 142 approved facility instead. The parent company denies the increased budget allotment for training. Has a relinquishment of operational control occurred?

**FAA Response:** It depends. For example, if the carrier noticed certain training deficiencies in its in-house training program and thus the only available legal alternative to its in-house training was to contract with the part 142 facility, then a decision by the non-air carrier not to permit the air carrier to remedy a training deficiency could be viewed as evidence that the air carrier has lost operational control.

**Q8 Example 2:** A parent company provides payroll services and determines/purchases and benefits for the sub-corp. The 14 CFR 119 required management personnel have direct responsibility for oversight of actual operations. Has a relinquishment of operational control occurred?

**FAA Response:** Once again the facts and circumstances of each particular case will dictate whether a parent corporation's budgetary and/or human resource decisions regarding its sub-corporation air carrier certificate holder results in surrender of operational control to the parent. For example, if the parent corporation, under the guise of payroll policy or under the guise of setting general benefits for workers at the carrier decides to retaliate against a pilot who refused to operate contrary to the safety rules at the request of the parent company, then that may be considered weighty evidence of who really has "operational control" of the carrier's part 135 operations. Additionally, a situation could arise whereby the payroll arrangements and other circumstances were such that the pilots believed that it was the parent company that had the power and the legitimate or illegitimate authority to direct the pilot's actions. That could, in the right circumstance, raise issues about operational control. There's a difference between a real payroll contractor that does not have operational control and an entity claiming to be a "mere" payroll contractor that has operational control.

**Industry Question 9:** Will the FAA provide any guidance or expectations for aircraft management companies that have relationships with charter operator(s) but might not hold an air carrier certificate directly? (e.g., In the FAA's analysis of whether or not a charter management program is acceptable, is there any bearing on how many charter management aircraft the operator has versus fully managed aircraft? If so, what is that?)

**FAA Response:** The question and the terms used are not clear. However, the bottom line is that an aircraft management company that does not hold an air carrier certificate is prohibited from operating as an air carrier. Whatever the source of aircraft, it is the air carrier – (not the aircraft management company or aircraft owners that do not hold air carrier certificates) – that must have operational control.

For example, if the aircraft owner hires the management company to fly the owner from point A to point B and the expectation is that the management company is responsible for the safety of the flight, then that flight must be conducted under air carrier rules. On the other hand, if the “management” that is being performed is simply managing to search for a qualified pilot for the aircraft owner to hire for flights in which the aircraft owner is a passenger and where the aircraft owner accepts responsibility and accountability for the actions or inactions of the pilot, such a flight could be a part 91 flight.

The air carrier must conduct each flight where it carries the people or property of another – (for compensation or hire) – under FAA air carrier rules. If the aircraft owner will be the passenger on the flight and if that aircraft owner doesn’t accept responsibility and accountability for the safety of the flight and that aircraft owner is paying, directly or indirectly, for the operator to conduct the flight, then that operator must be an FAA-certificated air carrier and that operator must comply with air carrier safety rules. In other words, simply because an aircraft owner is on his or her own aircraft does not mean that the flight is a part 91 flight. If the aircraft owner hires a so-called aircraft management company, then that doesn’t necessarily mean that the flight with the aircraft owner on board is a part 91 flight.

In certain situations the air carrier manages an aircraft and conducts both Part 135 and Part 91 operations (owner flights). This is permissible provided the aircraft owner understands that the flight is being conducted under Part 91, and the owner is responsible (liable) for the actions and inactions of the flight crew and aircraft operation. If the aircraft owner is not familiar with the Part 135/91 distinction, air carriers should explain that for Part 91 flights the owner is fully responsible/liable for such flight and under Part 91 the management company is not responsible/liable for safety of flight.

A management company may supply pilots and perform other services for the owner so long as owner knows he is in operational control of flight. To ensure the owner is aware of this liability, the owner could be asked to sign an affirmation that he is in operational control of such flights, which is similar to the process used in part 91 subpart k. Management companies should include a statement in their management contracts that state the owner is in operational control of all Part 91 flights and explaining that this means the owner is fully responsible for safety of the flight.

**Industry Question 10:** If an air charter broker is involved in the sale of a charter flight (acting either as the agent of the air carrier, agent of the customer, or as an indirect air carrier consistent with the DOT Policy Statement on the Role of Air Charter Brokers) does the FAA have any views on whether the charter broker can play any role in the invoicing/billing/payment for the flight, and, thus, the direct payment for the flight could come from the air charter broker and not the customer? The air charter broker could be an independent broker or another FAA certificated air carrier that is unable to conduct a flight, so the flight is outsourced to another operator. Or is it the FAA’s view that the air carrier must handle these aspects when flights are brokered? What guidance can the FAA provide and what FAA regulations govern this?

**FAA Response:** The direct carrier can receive payment for the flight from the broker. The broker that is not a certificated air carrier cannot conduct the part 135 flight.

**Industry Question 11:** May an aircraft owner, or representative of an owner, market the charter of his/her aircraft consistent with DOT Policy Statement on the Role of Air Charter Brokers?

**FAA Response:** That facts and circumstances of each particular case will dictate whether the air carrier certificate holder has relinquished operational control to the aircraft owner. Such marketing by the aircraft owner may indicate that operational control has shifted from the air carrier to the aircraft owner, including circumstances wherein the carrier does not know until after the purported part 135 charter flight, that such a flight has even occurred. This type of conduct may result in greater scrutiny by the FAA.

**Industry Follow-up to Question 11:** May an aircraft owner, or representative of an owner, market the charter of his/her aircraft consistent with DOT Policy Statement on the Role of Air Charter Brokers? When an aircraft owner places his aircraft on the certificate of a Part 135 operator may he market this aircraft as available for charter?

**FAA Response:** This would depend on how the marketing is done. The aircraft owner could not hold out as an air carrier. If a flight is conducted as a result of the owner marketing, then the air carrier has to know the flight is occurring and would be in operational control. If the owner tells the air carrier that he is conducting flights under Part 91, but is actually receiving compensation for flight, then the air carrier would be at risk. This would be a problem for everyone involved as the aircraft owner is holding out as charter operator without having a certificate and the flight is being conducted for compensation without air carrier knowing about it. In other words, it would be strong evidence that the carrier has relinquished operational control to the aircraft owner.

The air carrier has a duty to verify that owner flights are being conducted under Part 91 and are not actually flights for compensation or hire. The certificated carrier needs to look for red flags indicating that the flight, purportedly being operated under part 91, is actually being illegally conducted for compensation or hire. Additionally, the air carrier should be cognizant of leased aircraft being owner-operated from certain international destinations returning to the US where restrictions are placed on such departure airports for general aviation aircraft, (unless operated under part 135).

**Industry Question 12:** May an aircraft owner procure the insurance policy for an aircraft on an air carrier certificate?

**FAA Response:** The insurance for the loss of the hull can be procured by the owner or the carrier. The insurance regarding the safety of the actual part 135 operations must reflect that it is the carrier, not the owner, that is conducting the part 135 revenue flights and that it is the carrier's actions or inactions that are being insured. The insurance policy must indicate that it is the air carrier that must approve the flight crew.

Sometimes carriers use clauses like indemnification clauses wherein they seek to get assurances from aircraft owners that if the airplane crashes, even in an operation involving the carriage of third parties for compensation or hire, that the owners will indemnify the carrier for the actions or inactions of the owner. Such clauses are evidence that operational control for the flight has shifted from the air carrier certificate holder to the aircraft owner. Additionally, the insurance

policy should include a provision stating that on all commercial flights the air carrier is the operator and must approve the flight crew.

**Industry Question 13:** May aircraft owners approve or deny each potential charter trip (in the context of the aircraft owner making the aircraft available for a charter flight)?

**FAA Response:** If the aircraft is an exclusive use aircraft, the owner cannot approve or deny a potential charter flight. However, there may be instances in which the aircraft owner's plans, and the air carrier's plans for the use of the aircraft conflict. Assuming that the aircraft is not leased to the carrier (and thus not in the carrier's exclusive possession and control), if the purpose for the owner not making the aircraft available is that the owner needs it for his/her own trip, then that would be OK. The FAA wouldn't characterize that situation as a "denial" of a potential charter trip. If the arrangement is put in terms of "approval" or "denial" of each charter trip, that could be one piece of evidence that might result in an FAA finding of loss of operational control by the part 135 operator. If the non-leased aircraft is simply not available for use by the part 135 operator, then that may well be OK.

An air carrier that truly has operational control of its flights and of its business doesn't need approval from an aircraft owner to conduct a charter *trip*. The carrier can dry lease an aircraft from another owner, perform conformity checks and put that other aircraft on its OpSpecs. The carrier may own or possess other aircraft that would be available for the planned charter trip. The carrier decides whether to conduct a trip or not. The uncertificated aircraft owner doesn't decide whether the charter trip takes place or not.

**NBAA Follow-up to Question 13:** In some charter management arrangements, the aircraft owner needs to approve the *availability of the aircraft* to the charter operator. This question does not intend to imply that the aircraft owner would review (or have any say whatsoever) in the legal aircraft, legal crew, legal passengers, or legal flight tenets of operational control. This question assumes those decisions fall 100% on the air carrier.

**FAA Response:** The aircraft owner can put parameters on where aircraft can be flown for Part 135 flights (e.g. no flights to Mexico). The aircraft owner can advise the operator that the aircraft is unavailable for a charter trip (e.g., aircraft owner is holding the aircraft for a potential Part 91 business trip). An owner can allow or not allow the aircraft to be used on a trip by trip basis to prove active participation in dry leasing business (to deal with passive loss issues) provided the owner conducts such activities as part of his dry leasing business and does not get involved in air carrier operations. In this scenario, the owner is only making decisions to allow or not allow the aircraft to be used as part of dry leasing business.

**Industry Question 14:** When visited by Charter Quest Team (CQT), will their inspection checklist be the same as Notice 8900.16? If no, what inspection guidance is being used?

**FAA Response:** When conducting any inspection, FAA inspectors check to make sure the operator is in compliance with FAA safety rules and check to identify potential unsafe conditions or practices in order to avoid aviation accidents or incidents. They use the checklist contained in Notice 8900.16, FAA Order 8900.1, FAA Job Aids, and their aviation experiences when

conducting inspections and reviews.

**Industry Question 15:** What are Charter Quest Team (CQT) members and Principal Inspectors looking for when reviewing Operations Specifications, aircraft management agreements, charter agreements, or lease agreements?

**FAA Response:** FAA inspectors are looking at whether the air carrier certificate holder is in compliance with FAA safety regulations at the time of the inspection. *In addition, see response to question 14.*

**Industry Question 16:** How is an operator selected for a Charter Quest Team (CQT) audit? Are there a specific number of certificate holders the CQT plans to review before the team is sunset?

**FAA Response:** The scope of FAA inspections/audits is based on the agency's determination of what best serves the public interest. The FAA has extended the deadline for completion of all operational control special emphasis inspections until February 29, 2008.

**Industry Question 17:** The entire industry is concerned about the relationship between a certificate holder and its POI. It is a reality that certificate holders must follow instructions or requirements expressed by the POI as he or she acts on behalf of the Administrator. Yet, right now, it appears too many operators that anything the local FSDO tells the certificate holder cannot be trusted and could be overturned by the CQT or FAA Headquarters. The industry understands that POIs, just like operators, sometimes can make mistakes and the FAA has a duty to ensure regulations and guidance is followed. However, this new lack of trust in the local FSDO puts operators between a rock and a hard place. How will the FAA ensure that the FSDO feedback to an operator on A008 compliance or any other regulatory or safety matter carries any weight?

**FAA Response:** The thrust of this issue is framed in terms of a "new lack of trust" in FAA field personnel. The FAA has made a great effort in allaying any concerns that industry may have regarding the relationship between the carrier and its POI. Over the last several years the FAA has worked closely with industry to identify the elements of operational control and assist them in complying with this essential safety requirement. This included an outreach effort, jointly sponsored by FAA and industry trade associations, through which FAA inspectors and attorneys made presentations throughout the country to both industry and FAA personnel regarding operational control. The feedback from these presentations resulted in the revised Operations Specification A008 and its accompanying guidance, which key industry representatives helped draft and concurred in, prior to its issuance. In addition, following the issuance of the revised Operations Specification, the Flight Standards Service provided additional in-depth training to each Principal Inspector who had oversight responsibility of a Part 135 air carrier.

However, even with such a significant training/outreach effort, mistakes might be made. The Darby decision and the Cleveland National Air Show decision stand for the proposition that the

FAA is not prevented from correcting mistakes/misstatements made by FAA field personnel when such corrective action is in accordance with the law and the public interest.

**Industry Question 18:** What constitutes an emergency warranting an emergency suspension or revocation?

**FAA Response:** Emergency suspension is warranted when the evidence raises a reasonable question as to whether the person/entity, with the apparent capability and likelihood of conducting a flight operation, may lack qualifications to hold the certificate. Emergency suspension may also be warranted when a certificate holder lacks an element of qualifications and the FAA concludes that the deficiency can be corrected, but continued operation pending that compliance in the meantime is contrary to safety. Emergency revocation, on the other hand, is warranted when the person/entity, with the apparent capability and likelihood of conducting a flight operation, has demonstrated a lack of qualifications.

**Industry Question 19:** What questions does the FAA have about operational control or business relationships?

**FAA Response:** In regard to business relationships, please explain how an aircraft owner can claim, for tax purposes, to materially participate in the commercial use of the owner's aircraft (carrying other people's property or other people for compensation or hire) and at the same time legitimately assert that the commercial use of the aircraft is under the "operational control" of the air carrier.

**Industry Question 20:** What are the lessons learned? What can FAA share about "acceptable" and "unacceptable" operations?

**FAA Response:** Below are some of the lessons learned regarding the exercise of operational control.

1. Only approved persons may exercise operational control on behalf of the air carrier certificate holder.
2. The air carrier certificate holder must have adequate controls in place to ensure that officials in a position of authority over flights conducted under the certificate do so safely, and in compliance with regulations, operations specifications, applicable manuals, and accepted or approved procedures.
3. Management of air carrier operations should never be inattentive, distracted, or careless. Hands-off management is not a legitimate excuse for failing to maintain operational control.
4. While an air carrier is in business to make money, its first and foremost obligation is to comply with FAA safety requirements, including operational control. In other words, safety requirements must influence the air carrier's business model, and not the opposite.