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Docket Management Systems
US Department of Transportation
Room Plaza 401
400 Seventh Street, SW.
Washington DC 20590-0001
RE: Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations
Docket number FAA 2001-10047

October 4, 2001

To Whom It May Concern:

My name is John J. Swint. I have been a pilot working for a major Fractional Operation for the past four years. Before coming to the Fractional industry, I worked at an on demand air taxi operation for four years that operated under 14 CFR 135. I would like to share my views on this NPRM from a pilot's perspective.

Fractional Ownership Programs have experienced phenomenal growth over the last several years. The FAA has become concerned as to who is responsible and accountable for these Fractional operations. In 1999 the FAA convened the Fractional Ownership Aviation Rulemaking Committee (FOARC) to determine the rules that these programs should be operated under. The FOARC's recommendation was that Fractional Ownership Programs should be regulated under a new subpart K of 14 CFR 91. I respectfully disagree with the FOARC's recommendation. It is my opinion that Fractional Ownership Programs should be regulated under 14 CFR 135/121. I base my opinion on four key points.

1. The legislative history of aviation regulation.
2. Fractional Owners are NOT in operational control of these aircraft.
3. A United States Federal Circuit Court ruling that a Fractional Ownership Program was a "commercial operation."
4. Higher margins of safety will be maintained by operating in accordance with 14 CFR 135/121.

It is also my opinion that the FAA overstepped its legal bounds by excepting Fractional Ownership Programs from certain requirements of 14 CFR 119.

This NPRM includes proposed changes to current parts of 14 CFR 135/91/61. These changes were included to gain the support of air taxi interest groups. The Fractional Ownership Programs Managers needed this support to keep their programs regulated under the less restrictive 14 CFR 91. The proposed changes to 14 CFR 135/91/61, for the most part, downgrade current safety regulation. It was these same interest groups that demanded that Fractional Ownership Programs be regulated under 14 CFR 135. Without the changes to 14 CFR 135/91/61 the FOARC committee would have never reached a consensus.

LEGISLATIVE HISTORY OF AVIATION

The Air Commerce Act of 1926 was the first major piece of legislation to promote the development of air commerce in the United States. In addition, it was the first indication that the government was going to develop civil aviation through safety regulations. Despite being a 75-year-old defunct law, many of the definitions and terms developed in this law survive in today's aviation regulations. For example, The Air Commerce Act begins with a statement of its purpose. "To **encourage** and **regulate** the use of aircraft in commerce..." This is very similar to the current regulation found in 49 CFR Subtitle VII Part A Section 40104. "The Administrator of the Federal Aviation Administration shall **encourage** the development of civil aeronautics and **safety of air commerce** in and outside the United States."

The House and the Senate began working on their respective versions of The Air Commerce Act of 1926. They wrangled over how much, and who should bare the costs of the proposed legislation. This is basically the same situation we face today in regulating the growing Fractional industry. A delicate balance must be maintained when regulating aviation. The rights of persons operating an aircraft must be weighed against the rights of persons on the ground. It would not be in the spirit of The United States Constitution to require persons operating aircraft for sport or pleasure to comply with overly burdensome regulations. However, those profiting from aircraft operations should be regulated by stricter operating rules. Below are a few of the differences in the versions of The Air Commerce Act of 1926 proposed by the House and the Senate.

Aircraft Registration: The House version of the bill wanted compulsory registration of all aircraft that flew in navigable airspace. The Senate version of the bill required registration only for aircraft engaged in interstate and foreign air commerce.

Aircraft Certification: The House version wanted all registered aircraft to be certified airworthy before they could fly whereas the Senate version limited the requirement only to those aircraft engaged in foreign and interstate air commerce.

Airman Certification: In this provision to insure the capability to functionally perform, the House version wanted periodic examination of all airmen. The Senate version did not specify a time period implying

one-time examination.

Air Traffic Rules: The (House) version required that air traffic rules would apply to all aircraft in navigable airspace, The Senate version required that only those aircraft engaged in interstate and foreign commerce comply with air traffic rules. We cannot be too harsh in our judgment of the Senators' thinking as far as safety is concerned. We must understand that most members of the Congress were unaware of the safety implications of anything less than total compliance with air traffic rules. The Senate wished only to place the burden of regulation on those that **PROFITED MONETARILY** (emphasis added) from the use of the airplane. They did not wish to impede the development of the airplane as a means of pleasure or sport.

You can see that a definite pattern had developed in the thinking of the members of the House and Senate. The House wanted total compliance by all aircraft and airmen while the Senate only required compliance by those that **DERIVED COMPENSATION** (emphasis added) through the use of the airplane.¹

1 Richard Porter B.F.A. M.A. *Aviation Regulation* (Ormond Beach, Porter Publishing 1996) pp. 29-30

Traditional corporate flight departments do not receive compensation by operating their aircraft, so they should not have to comply with stricter regulations. 14 CFR 91.501 allows time sharing between corporate flight departments or individual owners. These types of operations (when no one is being compensated for the operation of the aircraft) should also not be subject to stricter operating rules.

Time sharing operations took a fork in the road when Executive Jet launched their NetJets Fractional ownership operation in 1986. No longer were two or more individuals or flight departments agreeing to share their resources, but a third party was in charge of and defined the terms of the program. Furthermore, Fractional Program Managers are most certainly deriving compensation from the operation of these aircraft. It is my opinion that once a third party enters into a time sharing agreement and profits from the agreement, the program should be regulated under 14 CFR 135/121. I believe that this would be consistent with the history of aviation legislation.

OPERATIONAL CONTROL

It is the FOARC committee's opinion that Fractional owners are in operational control of these aircraft. I must again respectfully disagree with FOARC's conclusion. The traditional criteria applied by the FAA in determining who has operational control have focused on which entity makes certain decisions related to the flight, particularly decisions that bear on the safety of the flight. In my four years as a pilot working for a Fractional Program, I have yet to see an owner meet this definition of operational control. As a matter of fact, at least one major Fractional Program has a written policy that forbids

employees from discussing matters of safety with passengers. How can an owner be in operational control when the Program Manager forbids the pilot from discussing matters of safety with the owner?

The FOARC realized that the owners are not in operational control of these operations and have tried to redefine operational control in order to remain under the less restrictive 14 CFR 91. As a matter of fact, this NPRM includes proposed 91.1013 that requires program managers to inform the owners of these aircraft that they are in operational control. If someone is truly in control of something, do they really need to be informed of it?

Let there be no doubt, the managers of Fractional programs are indeed in operational control of these programs. The managers of Fractional programs decide the crew qualifications, type of equipment on the aircraft, and make day to day safety of flight decisions. If an owner wanted to deviate from the program managers established practices, contrary to safety, the program manager would over rule the owner. If the program manager has the final say in matters of safety, how can the owner be in operational control?

UNITED STATES FEDERAL COURT RULINGS

EXECUTIVE JET AVIATION, INC., Plaintiff-Appellant
v. THE UNITED STATES, Defendant-Appellee

The primary issue at hand in regulating Fractional Ownership Programs is whether these programs are considered a commercial or a noncommercial operation. If the operation is noncommercial, it should be regulated under 14 CFR 91. If the operation is commercial, it should be regulated under 14 CFR 135/121. Federal Courts have already determined that a Fractional Ownership Program is indeed a "commercial operation."

The appellate case (96-5093) involved a dispute over the interpretation of the Internal Revenue Code concerning the taxation of commercial and noncommercial aviation. It was the opinion of Executive Jet Aviation (a Fractional Program Manager) that they should not have to pay a tax imposed on "commercial operators" because Executive Jet Aviation (EJA) was a "noncommercial" operation.

On May 18, 1994, EJA filed a complaint in the Court of Federal Claims seeking to recover the amount of its refund claim. On cross-motions for summary judgment the court determined that the NetJets program operated in substantially the same way as a commercial air charter business. Therefore, the court concluded, EJA was involved in the business of providing transportation "for compensation or hire."

EJA appealed to The United States Court of Appeals for the Federal Circuit. The appellate Court made the following ruling. "The central question is whether EJA was in the "business of transporting persons or property for hire by air." The Court of Federal

Claims stated that it detected “negligible differences between the NetJets aircraft interchange program and the operation of a commercial air charter business.” We agree. In our view, as far as the NetJets program was concerned, EJA was in the “business of transporting persons or property for hire by air.” Consequently, the transportation tax was properly imposed. For the foregoing reasons, the judgment of the Court of Federal Claims is affirmed."

How can the FAA ignore Federal Court rulings and allow Fractional Ownership Programs to be regulated under 14 CFR 91?

ADDITIONAL MARGINS OF SAFETY BY OPERATING UNDER 14 CFR 135/121

14 CFR 135 contains numerous provisions that would enhance safety in Fractional Ownership Programs. One of the most important regulations found in part 135, is the duty and rest requirement for crewmembers. Proposed 91.1057 through 91.1061 would establish flight, duty and rest time requirements for pilots flying Fractional Ownership Programs. These proposed rules define "reserve" as not being part of duty. What this means to a pilot is that he/she could get up at 8:00AM and be on reserve all day. This pilot could stay up until 11:00 PM. At 11:01PM the phone could ring and the pilot would be required to show up for duty and begin a 14 hour or longer duty day. In this example a pilot could be operating an aircraft with no sleep in 29 or more hours. This example might sound unlikely, except for the fact that it has happened to me several times as a Fractional pilot. Is a pilot operating an aircraft with this little sleep what the FAA calls safe? The rest rules for Fractional pilots should be the same as for pilots operating under 14 CFR 135.

The supporters of reserve being considered rest counter that a pilot can refuse a trip when he/she is too tired. This is true; however, the pilot's employer can also refuse to keep the pilot employed for turning down a "legal" trip. This example also might sound unlikely, except for the fact that it happened to me many times as an on demand cargo pilot. I propose a compromise. I would not have a problem having reserve considered rest IF any person who threatens, coerces or intimidates a pilot into taking a trip could be charged with a felony that carries mandatory jail time.

By regulating Fractional Ownership Programs under 14 CFR 135/121, a higher level of safety would be maintained. Currently these programs voluntarily meet and exceed 14 CFR 91, as well as proposed subpart K. In some cases, these programs even exceed 14 CFR 135/121 standards. By voluntarily meeting these high standards, these programs have had an excellent safety record. However, I have seen an erosion of this voluntary compliance.

Additional regulation equals additional cost as well as added safety. As more of these programs start up, the economics will require these programs to meet a lower regulatory standard to remain competitive in the market. Eventually, the goal of these programs will be to just meet the regulatory minimum. If the regulatory minimum were 14 CFR 135/121, the high level of safety we enjoy today will be maintained.

CABOTAGE

Article II of the United State Constitution states, "He (The President of the United States) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." This NPRM includes language that excepts Fractional Ownership Programs from 14 CFR 119. By excepting Fractional Ownership Programs from 14 CFR 119, these programs will not have to comply with 14 CFR 119.33. 14 CFR 119.33 contains a provision requiring persons governed under that part to be a citizen of The United States of America.

By excepting Fractional Ownership Programs from 14 CFR 119, the FAA has overstepped a power that is reserved for the President of the United States with Advice and Consent of the Senate. Is it the intent of the FAA to allow any foreign entity to establish a Fractional Ownership Program in the United States sovereign airspace?

Proposed change to 14 CFR 61.57 and 135.247

The proposed changes to 14 CFR 61.57 and 135.247 are safe and acceptable. I would suggest that the proposed rule be modified slightly to 7 calendar months. This would cover the case where a pilot took a 14 CFR 135.297 checkride grace month early then the following checkride grace month late. In this case the pilot would be current between checkrides in all contingencies.

Proposed change to 14 CFR 91.509 and 14 CFR 135.167

The revisions to 14 CFR 91.509 and 14 CFR 135.167 are unsafe. The recent case where an Airbus had a dual engine flame out over the Atlantic Ocean due to fuel problems is a perfect example why this equipment should be on every overwater aircraft.

Proposed change to 14 CFR 135.385 and 14 CFR 135.387

An Aircraft Flight Manual (AFM) typically determines landing distance without the use of thrust reversers. An operator, attempting to meet minimum compliance, could land within 85% of the effective runway without thrust reversers installed or deferred in accordance with an MEL. The recommendation in this NPRM says, "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 parts 119, 121 and 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. 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. (These) changes would ensure that the current best practices of Fractional ownership program managers would continue".

Reputable Fractional program operators would never think of dispatching a pilot into a runway with only a 15% margin of error without operable thrust reversers. However, this rule, as proposed, would allow this very situation. I have personal knowledge of several on demand air taxi operators that do not have thrust reversers installed who would require pilots to land at the minimum allowed by regulation. Is this the "best practices" of Fractional Ownership Programs?

According to 14 CFR 25.125, aircraft manufacturers may use reverse thrust to calculate landing data if "(reverse thrust) is safe and reliable; is used so that consistent results can be expected in service; and is such that exceptional skill is not required to control the airplane." If the air taxi operators want to land on such runways, I suggest they have the aircraft manufactures include reverse thrust in the AFM landing data as long as such data can comply with 14 CFR 25.125. For example, when I land at KHXD I can typically stop the Cessna Citation Excel I fly in 2400 feet using reverse thrust. The AFM data indicates that the landing distance should have been 3090 feet. The difference can be attributed to the use of reverse thrust. I duplicated all other conditions that the AFM specifies with the exception of using the reverse thrust.

Additionally, several factors that are experienced in the field do not have correction factors in the AFM. These factors such as higher than normal glide path, gusty winds, runway surface, night approach, and pilot technique all add to actual landing distance. If a pilot were to encounter a brake failure on a runway with only a 15% margin of error, I doubt he/she would be able to react quickly enough to initiate a go around or activate emergency brakes. The "60% rule" is the margin of error for these factors.

Below is an example of landing distances that were calculated by using the Cessna Citation Excel Aircraft Flight Manual.

Gross landing weight 16,000 pounds	Gross landing weight 16,000 pounds
Temperature 30 degrees Celsius	Temperature 30 degrees Celsius
Wind Zero	Tail wind 10 knots
Pressure altitude of landing field Sea Level	Pressure altitude of landing field Sea Level
Landing distance 3090'	Landing distance 3660'

Using this data, a Citation Excel could land within 85% of a 3636' runway. This gives the pilots a 546' margin of error. This margin of error disappears if a pilot were to execute this landing at VREF+10 knots. A VREF+10 landing would require 3660' of runway, resulting in an overrun of 24'. A pilot could very easily land at VREF+ 10 knots. Many operators SOP's would consider VREF+10 "within the approach window." The same result would occur if a pilot were to execute a landing with an unknown 10 knot tail wind. The tail wind could be "unknown" because this NPRM does not require weather reporting. Reducing the "60% rule" would be unsafe.

Proposed change to 14 CFR 135.225

Weather reporting is vital to the safe completion of an instrument approach and this section of 14 CFR 135 should not be modified. Without weather reporting how would a pilot know which direction the wind was coming from? If the pilot does not have wind information, how would he/she know which approach to choose?

Additionally, because of the stricter requirements of weather reporting at the destination airport, 14 CFR 135 operations are given relief from the weather requirements of the alternate airport. Any reduction to this rule should see a tightening of the alternate weather required.

Conclusion

As I have pointed out, the legislative history of aviation leads us to a conclusion that if an operation is a money making venture, it should be regulated under stricter operating rules. Federal Court rulings believe one major Fractional program is a pseudo charter operation saying, “negligible differences (can be detected) between the NetJets aircraft interchange program and the operation of a commercial air charter business.” How can the FAA ignore these points and allow Fractional Ownership Programs to be regulated under 14 CFR 91?

From a pilot's perspective this NPRM has overlooked numerous safety measures found in 14 CFR 135/121. These safety measures may not have been as easily overlooked had the FAA included pilots in the FOARC committee to begin with. By not including the pilots in the FOARC, the FAA violated its own rulemaking procedures. This violation of the rulemaking process is a smack in the face of every person who believes in the ideals of a representative Democratic society. The pilots were robbed of their chance to influence this regulation when the FAA chose not to invite us to the FOARC party. Shame on the FAA.

Fractional Ownership Programs should be regulated under 14 CFR 135/121.