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U.S. Department of Transportation  
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400 Seventh Street, S.W.  
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Docket Number: FAA-2001-10047  
Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations

Dear Administrator Garvey:

I am writing in support of certain proposed rules and to express my concerns over others. But first, I would like to thank you for creating the FOARC, and thank Chairman Christensen and the members of the committee for their hard work on such a challenging issue. I especially applaud NBAA President John W. Olcott and his team for keeping NBAA members so well informed through each step of this process.

In any agency action, we should be concerned with its fairness, accuracy, efficiency, and acceptability. The fairness and efficiency are certainly well-tended through this process. However, the accuracy and acceptability of the actions raise concerns. While I agree that the committee gave considerable attention to the substantive operational process of the proposed rules, I believe that the proposed Subpart K could have an unintended, detrimental economic effect on the business aviation industry without an appreciable increase in safety.

I propose that the existing Part 91 rules, along with the arms-length contracts between informed fractional owners and program managers, allow market forces to create the most efficient and appropriate safety-to-cost ratio. So based on the information currently available to me, I question whether the bulk of this effort is necessary or warranted in light of its possible effects on the economy and this market segment. I will expand on this and other concerns in the following sections. If you're viewing this document with Microsoft Word, you may click on the links below to go directly to a particular section in this document.

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## **1. Proposed Subpart K rules may be a far greater burden than benefit.**

“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.”

*FAA Docket 11437, Notice dated July 24, 1972*

*37 Fed. Reg. 14758, 14759*

I agree with NBAA President Olcott that the first question we should ask of any proposed regulation is “Will this increase safety?” Despite the above docket quote, I believe the industry and its customers would also expect the immediate follow up question to be, “Will the increase in safety be worth the cost?”

In the present action, it is difficult to tell. The FAA says there are problems of identifying responsible parties in a fractional setting. But the FOARC noted that the rationale for the proposed rules is simply to codify existing market practices. So the implementation of the rule will likely not have a near-term impact on safety, and will likely freeze fractional programs at an existing “consensus” level of safety, giving a economic disincentive to any future safety innovations to satisfy future market demands. While a rule may be said to define a floor and not a ceiling, in practice the regulatory floor tends to also define the maximum safety investment required to show “due care”, beyond which any additional investment may be economically wasteful and thus unlikely to occur. So instead of increasing safety, we may be precluding future innovation that would add to the safe and efficient use of business aviation.

As for the problem of identifying responsible parties, has the FAA found errant fractional programs that are not meeting the market minimum to date? Are there fractional programs in the works that are defining an operation at an intolerable level of safety process? If there are, perhaps the market will weed those programs out much more quickly and efficiently than the issuance of these proposed rules. There are a great number of players who do it right, at a reasonable cost, and their efforts and innovations will likely be sought out by the marketplace, without additional regulation.

While safety is the primary concern of the industry and the regulators, we must still concern ourselves with economic realities. We could easily regulate our way to complete aviation safety by choking off every innovative program and grounding every aircraft in the fleet. Obviously there is a balancing to be performed. Great weight should absolutely be given to safety concerns. But I believe that the regulators must still view every proposed regulation with an eye toward the economic effect and the “juristic semantics” inherent in the proposed rules. You can bet that the owners, program managers, investors, and the tort and tax bar will be watching closely. If we do not consider both today, we might find ourselves with lots of nicely drafted regulations lacking a viable industry to regulate.

I believe the existing Part 91 rules, as apparently followed by the vast majority of fractional ownership programs (hereafter program(s)), along with contractual relationships with their customer/owners, serves the role necessary to achieve maximum safety in these programs.

As noted in the FOARC proposal, the majority of fractional programs play under the existing Part 91 rules, while a few have chosen to operate under Part 135 for varying reasons. The Part 91 programs have obviously found economic benefit from being there. And obviously, the growth of those programs shows they have found an ownership market willing to participate under those rules. I assume that had the fractional owners wanted to pay the additional costs to acquire

the level of “safety” under Part 135 operations, a greater market demand would have been shown for those programs.

It has been reported that Part 91 programs have a greater safety record than part 135 operations. If we force the programs to operate under a Part 135-like regulatory atmosphere (while calling it a Part 91, Subpart K operation), what evidence do we have that the new rules will increase safety as a tradeoff for the increased costs of operation?

The FOARC is likely correct in its assumption that the existing program managers are very capable of running their operations under the new Subpart K rules. However, those rules will incur additional costs which will obviously be passed on to the owners. But along with the owner’s pecuniary costs now come mandated program monitoring costs which will likely be impractical for some companies to bear. In conversation with several program owners, I asked whether they would even know where to look in a log book to determine whether an annual inspection had been completed. I received a blank stare and a quip, “What’s a log book? That’s not my problem!” Under the proposed Subpart K, it would necessarily become the owner’s problem, something they may not be able, let alone willing, to undertake.

The burden is not solely on the program managers and the owners. While it is possible that the FAA could manage their heightened program monitoring duties with existing staff, I would expect that this monitoring would be in lieu of other operational necessities. Someone else in the regulatory environment is going to lose services, and the losers would likely be other Part 91 General Aviation players.

I would respectfully request that a better definition be provided of the safety benefits to be gained by adding regulations on the fractional program market. And, I would ask for a closer inspection of the possible economic impact these rules might have on the business aviation industry and those owners who depend on business aviation in their pursuance of commerce. Only then will we have enough information to know whether these proposed rules strike an acceptable balance. I do not believe it is enough to say that the “costs are minimal because everyone is already doing it this way.”

## **2. Proposed Subpart K rules may stifle the fractional ownership market.**

The programs are already in a precarious position as a legal fiction. Great arguments have been made that the programs fall within the “owner operated” segment, and I agree with them. However, counter arguments have gained strength, especially in light of industry marketing practices, the uninformed public’s view of the industry, the inter-industry turmoil, and the opinion of at least one federal court. *Executive Jet Aviation, Inc. v. U.S.*, 125 F.3d 1463 (C.A. Fed. 1997) (finding for the purposes of levying the air transportation tax, EJA was in the business of transporting persons or property for hire by air and that negligible differences could be found between the fractional program and a commercial air charter operation.)

A quick review of program marketing materials and advertising shows a great sell of the “sizzle” and benefits of fractional ownership. But it gives little notice of the liabilities inherent in such ownership. For those who do not take the next step and review the actual program contracts, there is little knowledge about owner responsibilities. To the uninitiated, the programs are far more like on-demand operations because an owner may never fly in the N-number aircraft “owned.” Instead, the ownership interest is viewed more like a shareholder’s stake in a company that owns/flies a pool of aircraft. If there is a public demand for further regulation of fractional markets, it is likely emerging from this under-informed group.

Even the owners contribute to the image problem. A casual survey of owners shows they view their holding as little more as a pre-paid number of charter hours, and they have little expectation of additional ownership rights or responsibilities. They do not expect to have “operational control” beyond the power to decide on their flight’s destination, and to vote with their checkbook for the best program.

The concept of owner’s operational control is a magnet for tort actions. In the event of an accident, the owner’s “significant liability risk” is based on the owner’s “operational control” of the program in a joint and several liability relationship with the program manager. But will the liability risk be limited to the owner on board? A good case might be made for naming all the “owners” in a specific N-number in a claim for damages, perhaps even all the owners in a particular fractional program might be named. Even the possibility of this extended liability may send owners shopping for ways to decrease their risk.

Owners may choose to shield their liability by pushing programs back into the 135 arena and contractually pushing responsibilities/liabilities back on the program managers. But whether under proposed Subpart K or otherwise, these costs will be reflected in the total costs of ownership. Prospective owners may be less likely to buy into programs due to costs and legal uncertainties. New programs may face insurmountable costs of entry into the market. Weaker programs may be eliminated. Limited competition may give established program managers the opportunity of a quasi-monopoly on fractional services, if they choose to provide them at all.

Business aviation has been already hurt by the weakening economy. The September 17, 2001 edition of *Aviation Week & Space Technology* noted that the industry was facing a “market headwind” and that “activity on orders [of new aircraft] has certainly moderated.” And while the FAA has been tasked with “assigning and maintaining safety as the highest priority in air commerce” (49 U.S.C. § 40101(a)(1)), they have also been charged with “placing maximum reliance on competitive market forces and on actual and potential competition (49 U.S.C. § 40101(a)(6)). While the original assignment of “promoting, encouraging, and developing civil aeronautics and a viable, privately-owned United States air transport industry” has been lowered in priority to 49 U.S.C. § 40101(a)(14), it still remains in the FAA’s to-do list.

I do not believe that stifling competition or harming innovative programs is the intended effect of these rules. However, because the FOARC report did not detail much discussion of these issues, and because the committee’s consensus report does not allow us to view whether there was any such debate, I would ask that the Administrator carefully consider the economic effect on the industry before finalizing these proposed rule changes.

### **3. Proposed Subpart K may encroach on other Part 91 operations.**

I am very appreciative of the FOARC efforts to ensure that any proposed Subpart K regulations are separated from other existing Part 91 rules. However, I wonder whether simply defining a separate Subpart K goes far enough toward protecting against the encroachment of onerous regulations on the existing rules. I understand the purpose of inferring “owner control” by placing the proposed rules in Part 91. But as examined above, this may be a forced fit without much beneficial effect.

Assuming the above questions were answered to show a significant safety threat that could be met only through the establishing of new regulations, and that those regulations met a reasonable economic impact review, perhaps the various interests would be better served through the creation of a separate Part to house the fractional program regulations. The clear delineation could be made thus:

- Part 91 – Owner full control/full responsibility
- Part XX – Owner and Program Manager in dual control/shared responsibility
- Part 135 – Program manager in full control/full responsibility

I realize this is a simplistic approach, but it may serve to better represent the reality of the duality of control considered under specific fractional ownership rules, if those rules are actually deemed necessary at all. And it might make it more difficult for “seepage” to occur between the subparts.

#### **4. Appearance of industry capture may affect “acceptability”**

Before launching into this argument, I wish to restate my respect for the members of FOARC and appreciation of the Administrator for the creation of this panel. I firmly believe these intricate regulations are efficiently made more accurate when those regulated play a role in defining the rules. The highly-competent FOARC players and the inclusion of DOT personnel more than adequately serves the accuracy and efficiency issues of agency regulations. Fairness has been enforced through this comment process and the requirements of the Administrative Procedure Act § 553 were even over-served by the FOARC public hearings.

However, acceptability of this proposed regulation among certain communities may be more difficult because of the appearance of “industry capture” of the regulatory body through this process. The 27-member committee was established by the Administrator to lend their impressive knowledge and expertise to the rulemaking procedure. Their united front in the consensus recommendation is commendable, but despite detailed FAA review it may be claimed by some that this NPRM is simply a *ver batim* rubber-stamp of the industry recommendation.

I am not sure what certain audiences will think of the report that FAA and DOT staff on the FOARC did not participate in the consensus voting, instead limiting their involvement to providing direction and input during the deliberations. FOARC neither claimed nor was granted decision making power, so this process does not rise to any sort of APA or *Carter v. Carter Coal Co.* challenge. 298 U.S. 238, 56 S.Ct. 855 (1936). However, the delegation doctrine requires that rulemaking be an administrative function, done by a presumptively disinterested government officials and not by “representatives of the various constituencies interested in regulation.” 66 Fed. Reg. 37520, 37521 (July 18, 2001). In this case we are well served by the quality of the chosen committee, and their careful process. But future such rulemaking efforts might benefit from this same or greater level of industry inclusion without the appearance of agency abdication of authority.

#### **5. Program manager certificate actions - § 13.19**

I believe the FAA should absolutely have a role in enforcing safety rules through the suspension or revocation of management specifications under proposed 14 C.F.R. § 13.19. I also believe that program managers should have due process similar to other certificate actions. If legislative authority is required to make complete the process of review up to the NTSB, then by all means it should be requested.

I am concerned over the effect that a management specifications suspension/revocation would have on the owners in a fractional program. There is currently no provision in the proposed § 13.19 to inform the owners of a pending action. If the owners are even nominally in “operational control”, they should have notice of problems affecting the operation so as to make good on their proposed Part 91 Subpart K responsibilities.

## **6. Owner “operational control” implications - § 91.1011**

Under this rule, the owner’s operational control responsibility may be delegated back to the program manager. However, the owners and program managers remain jointly responsible to the FAA for compliance. The FAA has enforcement control over the program manager by the ability to suspend or revoke the “management specifications” in a quasi-certificate action. But what enforcement authority does the FAA have over an ownership interest, which is neither certificated nor otherwise granted by the FAA? It would appear that an action against an owner for any such non-compliance would have little enforcement weight.

## **7. Specific proposed rule questions.**

### Proposed § 91.1001(b)(4) minimum fractional ownership interest.

I recognize the FOARC concern of preventing unscrupulous program managers from using proposed Subpart K to get around Part 135 restrictions on on-demand charters. And, I appreciate the thought that went into defining a 1/16 fixed-wing share (1/32 for rotorcraft) as the minimum for that purpose. Rather than quibble over the relative difference between a “good” 1/16 share and a “bad” 1/17 share, I would propose that the Administrator be given the authority to issue a waiver of the minimum share requirement on an application by the prospective owner and program manager, similar to that procedure outlined in proposed § 91.1053(b). There may very well be small companies who could benefit from business aviation who would otherwise be precluded from entering the fractional market under this plan. Granted, there is likely a minimum share under which it is not economically feasible for a program manager to add another owner to a program. But such a definition of “minimum shares” without opportunity for review and waiver would likely not withstand an arbitrary and capricious challenge.

### Proposed § 91.1001(b)(9) Affiliates.

I oppose this provision in light of the prospect of FAA getting mired in the review of corporate governance. The SEC has a hard enough time with that.

I am also concerned that the FOARC wished to preclude “the possibility that large networks of fractionally-owned aircraft could be established among unrelated programs where there is not a sufficient common influence to ensure that the programs are administered safely.” (66 Fed. Reg. 37520, 37525 (July 18, 2001)). This would appear to be a protectionist provision, which may not be reasonably related to safety. The ability for an innovative program manager (or set of program managers) to show a “sufficient nexus” for an administrative waiver would be difficult in light of this rule.

If the issue is truly safety, then an “affiliate” program manager’s compliance with her “management specifications” under proposed Part 91, Subpart K, along with specific provisions of quality control in an interchange contract between the primary and affiliate program manager would likely be adequate assurance of safety practices. The owner could retain final control over the aircraft used by contract, and the proposed Subpart K rules would likely extend ownership inspection rights to the affiliated program.

### Proposed § 91.1007 Advance notice of non-program aircraft substitution.

Whether a non-program or affiliate program aircraft is substituted for a primary program aircraft, the program manager should at least be asked to at make a “reasonable effort” to notify the fractional owner and/or her designated passengers of the equipment before a fractional flight.

### Proposed § 91.1013 Owner’s Understanding.

Perhaps the owners briefing should occur *before* the signing of an initial program management services contract to ensure that owners are made fully aware of their prospective responsibilities. Given the questions concerning the true scope of ownership liability, the provision in § 91.1013(1)(iii) should be expanded to warn of the owner’s liability risk even when the owner is not in “operational control.”

Proposed § 91.1015(b) Administrator right to inspect ownership list

I assume that this rule provides the mechanism for enforcing the minimum share requirement. But I would like to understand any further purpose for the inspection by the FAA of a private contractual relationship. There may be privacy issues stemming from this rule, and I would respectfully request consideration of those and a limitation of uses included in this rule.

Proposed § 91.1015(g) Employee information

Given the importance of the program manager to the safety of flight, perhaps employees who perform material duties should be recurrently trained, rather than simply be kept “informed” of their duties and responsibilities.

Proposed § 91.1035(c) Passenger notification of entity in operational control.

If the passenger is the guest of an owner who is not aboard, I’m not certain what purpose this rule serves except to define liability. Unless they are aware of the rules and their importance, this information will fall on disinterested, if not deaf, ears. Providing this information as part of a pre-flight briefing would not add to the safety of the flight, and would simply be another detail to distract the crew from other, more important, duties.

**8. Rules for which I voice my support.**

Proposed § 61.57(e), Recent flight experience: Pilot in Command

I agree with the proposed changes to clarify this rule. Anything the FAA can do to make the 14 C.F.R easier to comprehend and more relevant to current situations is welcome.

Proposed § 91.1053(b) Flight Crew Experience Waiver

I believe that in certain circumstances, a crewmember may be qualified with fewer than the prescribed flight hours. While I doubt that the FSDO will grant many such waivers, I am encouraged that the FOARC and FAA recognize that small players would otherwise have great difficulty launching competitive operations.

Proposed § 135.385 Landing limitations

Under the proposed limitations, I believe the restricted 85% rule maintains an adequate safety margin. While I can sympathize with the concerns over the noise of increased operations frequency, I believe the positive economic impact of bringing business to smaller airports will be a great benefit to a greater number of communities.

**9. Secretary of Transportation approval may be required.**

I believe that an economic analysis of this proposed rulemaking pertaining to fractional ownership rules may show it has at least a “substantial and material effect on the economy, a sector of the economy, productivity, competition, or jobs.” I also believe that this proposed regulation raises “novel or significant legal or policy issues arising out of legal mandates that may substantially and materially affect other transportation modes.” Perhaps, therefore, the provisions of 49 U.S.C. 106(f)(3)(B)(I) and (II) are implicated in some, but not all of this proposed rulemaking.

**10. Conclusion.**

I appreciate the work of the FOARC and the FAA in this matter. While this may not be the industry's top priority in light of recent world events, I am glad for the opportunity to participate in continuing the business of America.

Thank you for your consideration of my comments. I look forward to the next steps concerning these matters.