

OPERATIONAL CONTROL: IT'S NOT JUST FOR CHARTER CARRIERS.

Part 91 aircraft operators need to consider operational control issues as well.

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The concept of “operational control” has recently been a hot topic in business aviation. To be sure, most of the FAA attention to this issue has focused on Part 135 charter carriers and their managed aircraft. However, the FAA is aware of similar operational control issues in Part 91 operations and it may soon turn its attention there.

According to the official FAA definition, the term operational control “with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight.” In layman’s terms, it simply means who is responsible for safety and regulatory compliance for a particular flight. As a result of an accident at Teterboro Airport involving a business jet, the FAA began taking a closer look at operational control issues and policies, particularly with respect to “managed” airplanes that are owned by one person and placed on someone else’s Part 135 charter certificate. This effort involved development of a new Part 135 operations specification -A008- as well as special inspections of many Part 135 carriers using managed airplanes. The new operations specification and the special inspections focused on providing a clear answer to the question: Who has operational control? For any Part 135 charter flight, the answer had better be the Part 135 carrier. Indeed, some high-profile enforcement actions have been the result of these special inspections where the FAA determined that the Part 135 carrier did not, in fact, have operational control of its flights.

But what about an airplane owner that does not allow their airplane to be used for Part 135 charter? Can they safely ignore the whole question of who has operational control? Well, no not really.

Of course, if an airplane owner has its own organic flight department, the issue sort of takes care of itself. There should be little question that the company that owns and operates the airplane using its own employees as pilots has operational control of all the flights in its airplane. Thus, the question of who has operational control is easily answered.

However, it is becoming more common for airplane owners to hire professional aircraft management companies to manage their airplanes even though they do not intend to offer the airplane for Part 135 charter. Some of these management companies may also have Part 135 certificates and some may not. However, in either case, they provide pilots, maintenance and other aviation services to the airplane owner so that the owner can operate the airplane. In other words, they function as the “flight department” for the

owner. However, while it is clear that an owner has operational control when using its own organic flight department, under these management arrangements it is not always so clear and the FAA is concerned about this issue.

Why isn't it clear who has operational control under these arrangements? Well, for one thing, all the aviation expertise resides with the management company. Indeed, the very reason the owner hired the management company is because it did not want to get involved in the technical issues of airplane ownership and operation. Another reason may be that the owner does not want to assume the responsibility (and liability) for operating the airplane. Such an owner may ask: How can we accept responsibility for something we clearly know nothing about? Good question, but the FAA says you must accept that responsibility if the airplane is to be operated under the non-commercial rules of Part 91. The answer is that certain tasks (such as piloting and maintenance) can be delegated to a management company but the safety and regulatory responsibility for such tasks cannot be delegated. In contrast, if responsibility for operation of the airplane is placed on the management company, the FAA says the flights must be conducted by the management company under Part 135.

What should an airplane owner do to avoid FAA problems with operational control. First, consider whether the airplane should, in fact, be operated under Part 135 for owner flights. The greatest advantage of this solution is insulation of the airplane owner from responsibility and liability for any flights. Essentially, the owner becomes just another charter customer. In addition, there may be state tax planning opportunities if the airplane is operated only under Part 135.

Of course, there is no free lunch and this solution comes with some disadvantages and costs. The airplane may be subject to a longer depreciation schedule (7 vs. 5 years). All owner flights will be subject to the 7.5% federal excise tax (although there will be a partial credit for fuel taxes). Finally, some flights that might have been possible under Part 91 may not be under the stricter rules in Part 135. To determine if this solution is right, an airplane owner needs to review its own situation and review all the options with the aircraft management company, its risk managers and its aviation counsel.

If you've completed such a review and concluded that Part 91 is the solution that makes sense for you, it's time to make sure that the respective duties and responsibilities of the management company and the airplane owner are properly documented. It should be clear that the management company is providing only certain aviation services, such as pilots and maintenance, and is not providing transportation to the owner. It should also be clear that the owner clearly accepts responsibility for operational control for all its flights, even though it is using services provided by the management company. Finally, care should be taken not to use devices such as indemnity provisions to shift responsibility for the airplane operation from the owner back to the management company. The FAA says it regards such arrangements as "red flags" that raise questions about operational control. That is not to say that the management company cannot be held accountable for the services it provides-it can. It just needs to be done with care.

What's the bottom line for a Part 91 airplane owner/operator using a management company? Make sure you've carefully evaluated all your options and have gotten the best advice you can from your aviation professionals including experienced aviation counsel.

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Mr. Weller's practice emphasizes the areas of business aircraft transactions and operations. As a past Chairman of the NBAA Tax Committee and current member of the NBAA Regulatory Issues Advisory Group, he has extensive experience in negotiating and drafting aircraft purchase, lease, management, and charter agreements, and providing aviation regulatory and planning services to aircraft owners, operators, and managers. Mr. Weller also has substantial experience with aircraft fractional ownership programs. As a participant in the FAA's Fractional Ownership Advisory Rulemaking Committee, he helped to draft the rules for fractional ownership operations. He has also served on the FAA advisory committee that recommended changes to Part 135.

Before entering private practice, Mr. Weller worked as an attorney with the FAA and CAB. He received his law degree in 1977 from the University of Virginia.