

NOTICE

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

N 8900.435

National Policy

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9/8/17

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9/8/18

SUBJ: Proving Test Guidance for Mergers

- 1. Purpose of This Notice.** This notice provides guidance for principal inspectors (PI) and Joint Transition Team (JTT) members in conducting proving tests as a result of mergers and acquisitions (M&A) of certificate holders conducting Title 14 of the Code of Federal Regulations (14 CFR) part 121 operations.
- 2. Audience.** The primary audience for this notice is Flight Standards District Office (FSDO) and certificate management office (CMO) aviation safety inspectors (ASI) who are responsible for oversight of processes and procedures related to the M&A of two or more air carriers with different operating certificates into a single operating certificate (SOC) under part 121. The secondary audience includes Flight Standards (AFS) branches and divisions in the regions and in headquarters (HQ).
- 3. Where You Can Find This Notice.** You can find this notice on the MyFAA employee website at https://employees.faa.gov/tools_resources/orders_notices. Inspectors can access this notice through the Flight Standards Information Management System (FSIMS) at <http://fsims.avs.faa.gov>. Operators can find this notice on the Federal Aviation Administration's (FAA) website at <http://fsims.faa.gov>. This notice is available to the public at http://www.faa.gov/regulations_policies/orders_notices.
- 4. Regulatory Requirement.** Title 14 CFR part 119, § 119.33(c), General Requirements, and part 121, § 121.163, Aircraft Proving Tests.
- 5. Background.** M&A constitute a type of corporate reorganization that occurs for a wide range of reasons. M&A involve the consolidation of entities and/or integration of assets (i.e., the acquisition and integration by Company A of certain operational assets previously owned and operated by Company B) to create synergies, reduce costs, stimulate growth, and ultimately improve the operational strength and profitability of an entity. The economic conditions of the early 2000s led numerous air carriers to reorganize their operations, some resorting to M&A as part of their strategy to emerge from bankruptcy proceedings or achieve economic stability and growth.

a. M&A Transactions. When engaging in M&A transactions, air carriers integrate two or more different types of operations and/or assets into a surviving entity. The surviving entity must demonstrate to the FAA that it can safely conduct all integrated operations. This is achieved by a series of proving tests conducted pursuant to the provisions of § 119.33(c), § 121.163, and ancillary guidance provided by the FAA, in addition to applicable terms and conditions in the approved M&A Transition Plan. The main purpose of the proving tests is to ensure the safety of all operations that will be conducted after the closing of the M&A transaction. Such intent is evidenced by the requirements of §§ 119.33(c) and 121.163.

b. Reduction of Proving Test Hours. FAA policy allows for a reduction of proving test hours based on the surviving air carrier's experience and performance factors. The FAA assesses factors such as (but not limited to) similar types of operations, similar types of airplanes, and experience of airline and management personnel. Elements such as parallel expertise and other capabilities that normally arise in M&A transactions may also determine whether a reduction in the proving test hour requirement is warranted. These determinations are made on a case-by-case basis, and no single factor will result in a guaranteed reduction of the requirement. For example, several years ago, a major airline requested an exemption from all proving tests related to its merger stating it had extensive Operating Experience (OE). However, the exemption was denied since the petition for exemption did not show how an equivalent level of safety would be provided if proving tests were not conducted.

Note: The FAA has approved M&A transactions where proving tests have not occurred prior to the issuance of an SOC and when it has deemed that such approval was appropriate, convenient, and in the interest of safety. In those cases, the surviving certificate holder chose to remove the airplane from the certificate that would have otherwise required proving tests. These authorizations have been granted with an understanding that when parallel operations occur, a partition must be in place. The surviving entity must limit via operations specifications (OpSpecs) the operation of the partitioned airplane, the personnel, and procedures under which they were operated prior to an SOC (i.e., a dispatcher of airline "A" would not dispatch an airplane from airline "B," nor vice versa, until the proving tests are conducted).

6. Discussion. The regulatory preamble from December 20, 1995 states, "the primary focus of proving flights is not simply to test the proficiency of flight crewmembers but to test the company's operational control procedures for the airplanes that will be operated." The complexities of integrating and restructuring operations sometimes require air carriers to run separate or parallel operations under one SOC. Air carriers can be managed as a single entity from both the organizational and managerial perspectives, even though certain departments, equipment, and/or processes may be run independently as parallel operations. The variation in operational structures has prompted the FAA to review its policy regarding the optimum time for conducting proving tests.

a. Transition Plan. The FAA requires the merging carriers to clearly outline in their Transition Plan what the end state of the SOC will be. This means that the Transition Plan must clearly identify which employees, functions, airplanes, and/or other equipment or procedures, if any, will remain fully partitioned post-SOC, and thus will be operated as they existed pre-SOC. The Transition Plan should (a) include the reasoning for implementing a partition and conducting parallel processes, (b) describe how the partition will be accomplished, and (c) address adequate controls to ensure the parallel processes remain in place until after operational partitions have been removed concurrent with the successful completion of proving tests. The Transition Plan should also detail if and when the operational control personnel (including dispatchers and/or flight follower/operational control functions) will be trained, qualified, and utilized to dispatch/release/control flight operations using each airplane type in which they were not utilized prior to SOC. If the air carrier never plans on incorporating certain airplanes, employees, equipment, or other assets, then the Transition Plan should clearly state when they will dispose of such assets.

b. Conditions for Conducting Proving Tests. There are several factors that are essential and must be reviewed and approved prior to making the determination of when the proving tests will be conducted. According to FAA Order 8900.1, Volume 3, Chapter 34, Section 1, Safety Assurance System: Mergers and/or Acquisition of Operational Assets, an SOC may be issued when one set of part 119 management personnel is in place and assumes operational control of the entire organization. The entire entity will be operating under one set of OpSpecs, although the OpSpecs must clearly show differences between the different procedures that will be conducted.

(1) The FAA recognizes that, for the purpose of conducting proving tests as a result of an M&A transaction, the concept of “managerial operational control” might not be sufficient if an air carrier with an SOC is still operating with partitioned employees, functions, airplanes, equipment, and/or procedures. If there are various operational control facilities, and more importantly various sets of procedures, there is no value in doing proving tests until that partition is removed and the air carrier has truly integrated all operations. Thus, there should be flexibility in terms of when to conduct the proving tests. Section 119.33(c) grants the FAA such flexibility, as it states, “all proving tests must be conducted in a manner acceptable to the Administrator.”

(2) In the interest of safety, the FAA should be flexible when assessing each transaction to determine and approve the best time to conduct the proving tests. The flexibility facilitates the safe integration of merged operations and allows the FAA to conduct proving tests that simulate real post-M&A (end-state) operations. This notice allows the air carrier to conduct proving tests after the operational control of all airplanes has been moved into the surviving certificate and those airplanes are operated under a single operational control system without any partitions.

7. Action. Plan the proving tests to occur when the surviving certificate holder has removed the operational control partition. Until that time, the following conditions and limitations will be followed:

- Proving tests must be completed when the operational control of each airplane type is moved onto the surviving certificate holder's operation.
- The air carrier certificate holder must comply with all provisions of OpSpec A502, Air Carrier Merger and/or Acquisition.
- The Transition Plan must outline a method to maintain clear separation between the two operations with partition in place. This could include maintenance personnel and facilities, ground personnel, crew schedulers, dispatchers, and other personnel.
- Once the airplane has been moved over into the surviving certificate holder's operation, it cannot be used on the previous certificate.
- Any company personnel assigned to the operations of the airplane being moved into the surviving certificate holder's operation must have successfully completed all required training before performing any operations using that airplane.

8. Disposition. We will incorporate the information in this notice into Order 8900.1, Volume 3, Chapter 34, Section 1, before this notice expires. Direct questions or comments concerning this notice to the Air Carrier Operations Branch (AFS-220) at 202-267-9518.



John Barbagallo
Deputy Executive Director, Flight Standards Service