

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 1**

[Docket No. 27836]

Use of Public Aircraft**AGENCY:** Federal Aviation Administration, DOT.**ACTION:** Notice of reconsideration of legal interpretation and invitation for comments.

SUMMARY: The Federal Aviation Administration (FAA) is reconsidering a previously issued legal interpretation of the term "commercial purposes" used in the definition of "public aircraft" that appears in the Federal Aviation Act of 1958, as amended. The reason for this action is to assess whether the interpretation is appropriate, and if it is not, to issue an appropriate interpretation.

DATES: Comments must be received on or before August 31, 1994.

ADDRESSES: Send comments in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, ATTN: Rules Docket (AGC-200), Docket No. 27836, 800 Independence Avenue SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: John Walsh (AGC-100), (202) 376-6406, 701 Pennsylvania Avenue NW., Suite 925, Washington, DC 20004.

SUPPLEMENTARY INFORMATION: Under the Federal Aviation Act of 1958 (Act), as amended, aircraft fall into one of two major categories, "civil" or "public". Civil aircraft are regulated in every aspect of their construction, maintenance, and operation by the Federal Aviation Administration (FAA). Public aircraft are free from such regulation except with regard to air traffic rules.

The two classes of aircraft are defined in the Act as follows:

"Civil aircraft" means any aircraft other than a public aircraft.

"Public aircraft" means any aircraft used exclusively in the service of any government or of any political subdivision thereof including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes. For purposes of this paragraph, "used exclusively in the service of" means, for other than the Federal Government, an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days.

Act, Section 101 (17), (36); 49 U.S.C. App. 1301 (17), (36).

In April, 1993, in response to an inquiry from a private sector operator, I issued an interpretation of the term "used for commercial purposes" as that term appears in the definition of "public aircraft" in the Act. Under the interpretation, a government-owned aircraft must be operated under the Federal Aviation Regulations (FAR) applicable to civil aircraft when compensation is received for operating the aircraft on behalf of another state or local government. The interpretation was not new in its analytical approach. It only restated, in the context of a novel question, the FAA's previous interpretations that receipt of any compensation for the operation of one's aircraft constitutes operating the aircraft for "commercial purposes" within the meaning of the statutory definition. When a county sheriff whose operation was the subject of the interpretation became aware of the interpretation, he asked for the opportunity to submit information and argument on the subject. I agreed to reconsider the interpretation, and the sheriff submitted information. In the meantime, others who became aware of the reconsideration process submitted information, also. After consideration of all the submitted information found relevant to the legal question, I confirmed the interpretation in a letter to the sheriff's county attorney, dated December 1993.

That letter has apparently been widely disseminated among private and public sector operators that have an interest in the issue. Since its issuance, the FAA has been advised by local government agencies, by Federal government agencies, and by Congressional sources, that the interpretation is having an unintended effect that they view as detrimental to public safety. These sources advise that certain public agencies' wildfire suppression capabilities are reduced by the unavailability of aircraft that do not comply with the FAR, but which previously had been considered by those public agencies to be available for those uses. The FAA has been advised that this shortage creates an imminent danger to life and property from wildfires.

Some of those same sources have also urged that the FAA reconsider whether reimbursement by one government entity to another for the use of the latter's aircraft to carry out a governmental duty of the reimbursing agency constitutes "commercial purposes" within the Act. In support of their request, they have provided a legal

analysis of the Act that is different from the FAA analysis and that warrants consideration.

In further support of reconsideration, the sources point to what they consider an anomalous result when the law is applied as interpreted. That is, a government entity can use its aircraft in fire suppression activities on its own land without complying with the FAR, but must comply with the FAR when operating on behalf of another jurisdiction, only because the economics of government require reimbursement in the latter case. This circumstance, they urge, indicates that the FAA is making decisions based on economic factors rather than on safety considerations. Finally, the same sources urge expedited treatment of the request for reconsideration in view of the emergency circumstances they perceive to be extant in regard to wildfires in the western forests.

At the same time, other interested parties have urged that there are sufficient private sector resources available to support wildfire suppression activities. Those parties claim to be disadvantaged in their efforts to obtain contracts to perform that work by the fact that public sector aircraft do not have to bear the cost of compliance with the FAR. These parties also urge that their operations are, by virtue of their compliance with the FAR, inherently safer than public aircraft operations.

In view of the public safety situation that has been reported to the FAA; the apparently anomalous situations permitted by the Act as currently interpreted, and the possible merits of a different legal interpretation of the Act that has been provided to the FAA, it is appropriate to reconsider whether reimbursement by one government for the use of another government's aircraft to carry out a governmental duty means the resulting operation is for a commercial purpose. The arguments advanced in support of such review suggest some uncertainty in the statutory definition, as applied to intergovernmental reimbursement, and it is possible that, upon reconsideration, a different interpretation might be reached. The parties to whom the previous interpretation was issued, as well as other parties who have recently written the agency expressing concern, are being advised by mailed copies of this notice that the matter is again under review.

This reconsideration should be completed within 90 days. Interested persons are invited to submit any arguments, views, or information they consider relevant. All material received



U.S. Department
of Transportation
Federal Aviation
Administration

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MAR

Mr. J.W. Bruce Camp, Jr.
Vice President, Customer and Product Support
Bell Helicopter TEXTRON
Post Office Box 482
Fort Worth, Texas 76101

Dear Mr. Camp:

This is in reply to your letter of September 7, 1999, concerning pilot normal and emergency flight procedure familiarization training courses provided by Bell Helicopter to governmental entities operating Bell OH-58 and UH-1 military surplus helicopters. It is our understanding the aircraft used for this training do not have civil airworthiness certificates. As such, the aircraft may only be used for "public aircraft" operations.

In your letter, you request that the Federal Aviation Administration reconsider its position that such training does not constitute "public aircraft" operation. You indicate the training provided by Bell is given to qualified pilots, and the course work is not done incident to training pilots for part 61 qualification, or rating, or recency of experience requirements. You also state the training is provided to permit safe performance by the pilots of operations of the type listed in the definition of "public aircraft."

In pertinent part, Public Law 103-411 states that a public aircraft:

"does not include a government-owned aircraft —

"(ii) transporting passengers other than —

"(I) transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management . . ."

Although the above language does not include "training" in the list of governmental functions, the statute does not provide an exhaustive list of governmental functions. In Advisory Circular 00-1.1, Government Aircraft Operations, Chapter 1, paragraph 2d, the agency took the position that under the above definition, training flights would be

considered a governmental function if the persons on board are being trained on the aircraft to perform a governmental function, including one of the functions listed in the statute, e.g., firefighting, law enforcement, or search and rescue. For example, the type of aircraft you have described may be used to train law enforcement SWAT team personnel to deploy from the aircraft, as this would be considered a governmental function. However, pilot initial, recurrent, or upgrade flight training would not be considered a governmental function.

In light of the information presented in your letter, we have reconsidered whether familiarization training on aircraft used to perform governmental functions should be included within the scope of governmental functions, since it is a type of training that is intended to facilitate the ability of governmental entities to carry out those functions. We have determined that under the limited circumstances articulated below, training flights to familiarize certain pilots with the performance characteristics of the aircraft to be used in performing the types of governmental functions set forth in the statutory definition may be considered "public aircraft" operations as this type of training is "mission-related" training.

It is our opinion that training provided by a governmental entity, either "in-house" or by contract, for the purpose of familiarizing its pilots with normal and emergency flight procedures necessary for the successful performance of mission-related operations (i.e., operations to perform a governmental function) is a governmental function if the following conditions are met:

1. The purpose for the training is not to meet any training requirements for certificates or ratings issued under 14 C.F.R. part 61 or part 63.
2. The individuals receiving the training are employed by the governmental entity to operate the aircraft to perform governmental functions.
3. The training is for the purpose of familiarizing the pilot with the aircraft so that in a future flight the pilot may fly the aircraft to the site where the governmental function is to be performed, perform the mission, return the aircraft, and handle any emergency that may arise during the operation.
4. The training will be given in an aircraft that is owned by the governmental entity receiving the training and that will be used to perform governmental functions.
5. Where the governmental entity contracts for the training, the contract states that the governmental entity receiving the training is operating those training flights and is legally responsible for the overall safety of the flight. Moreover, the contract clearly states that the contractor providing the training is not conducting the flights, but instead providing instructors to the governmental entity for the governmental entity's training flights.

Provided familiarization training is conducted in accordance with the above conditions, it would be considered a governmental function and the instructor pilot would be "a

person . . . whose presence is associated with the performance" of the governmental function being carried out by the governmental entity.

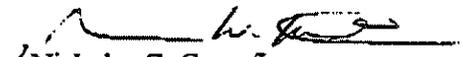
If the above conditions are met, the governmental entity may provide this type of training "in-house" or contract for the training.

In summary, Bell may continue to provide instructors to its governmental customers for normal and emergency flight procedure familiarization training in the customer's helicopter, provided such training meets the above conditions. It must be clear that the governmental entity that contracts to receive the training acknowledges ahead of time that it is operating the aircraft during those training flights. Flights to conduct training that meets these conditions would be considered "public aircraft" operations.

It is important to note that this interpretation merely extends the determination of what constitutes "mission-related" (governmental function) training to include the narrow type of training described above. The use of an aircraft to conduct pilot initial, recurrent, or upgrade flight training to meet civil aircraft requirements would not be considered a governmental function. Such flights would constitute civil aircraft operations, which are subject to all applicable Federal Aviation Regulations.

I hope this letter has been responsive to your request. If you have any questions, please contact Eileen Weikel Johnson, Senior Attorney, Great Lakes Region at 513-533-8508.

Sincerely,


Nicholas G. Garaufis
Chief Counsel

(B) causing or authorizing the operation of aircraft with or without the right of legal control of the aircraft.

(33) "person", in addition to its meaning under section 1 of title 1, includes a governmental authority and a trustee, receiver, assignee, and other similar representative.

(34) "predatory" means a practice that violates the antitrust laws as defined in the first section of the Clayton Act (15 U.S.C. 12).

(35) "price" means a rate, fare, or charge.

(36) "propeller" includes a part, appurtenance, and accessory of a propeller.

(37) "public aircraft"—

(A) means an aircraft—

(i) used only for the United States Government; or

(ii) owned and operated (except for commercial purposes), or exclusively leased for at least 90 continuous days, by a government (except the United States Government), including a State, the District of Columbia, or a territory or possession of the United States, or political subdivision of that government; but

(B) does not include a government-owned aircraft—

(i) transporting property for commercial purposes; or

(ii) transporting passengers other than—

(I) transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or

(II) transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States.

An aircraft described in the preceding sentence shall, notwithstanding any limitation relating to use of the aircraft for commercial purposes, be considered to be a public aircraft for the purposes of this part without regard to whether the aircraft is operated by a unit of government on behalf of another unit of government, pursuant to a cost reimbursement agreement between such units of government, if the unit of government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation was necessary to respond to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator was reasonably available to meet the threat.

(38) "spare part" means an accessory, appurtenance, or part of an aircraft (except an aircraft engine or propeller), aircraft engine (except a propeller), propeller, or appliance, that is to be installed at a later time in an aircraft, aircraft engine, propeller, or appliance.

(39) "State authority" means an authority of a State designated under State law—

(A) to receive notice required to be given a State authority under subpart II of this part; or

(B) as the representative of the State before the Secretary of Transportation in any matter about which the Secretary is required to consult with or consider the views of a State authority under subpart II of this part.

(40) "ticket agent" means a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.

(41) "United States" means the States of the United States, the District of Columbia, and the territories and possessions of the United States, including the territorial sea and the overlying airspace.

(b) **Limited Definition.**—In subpart II of this part, "control" means control by any means.

Author: Felix L. Lococo at AFS230

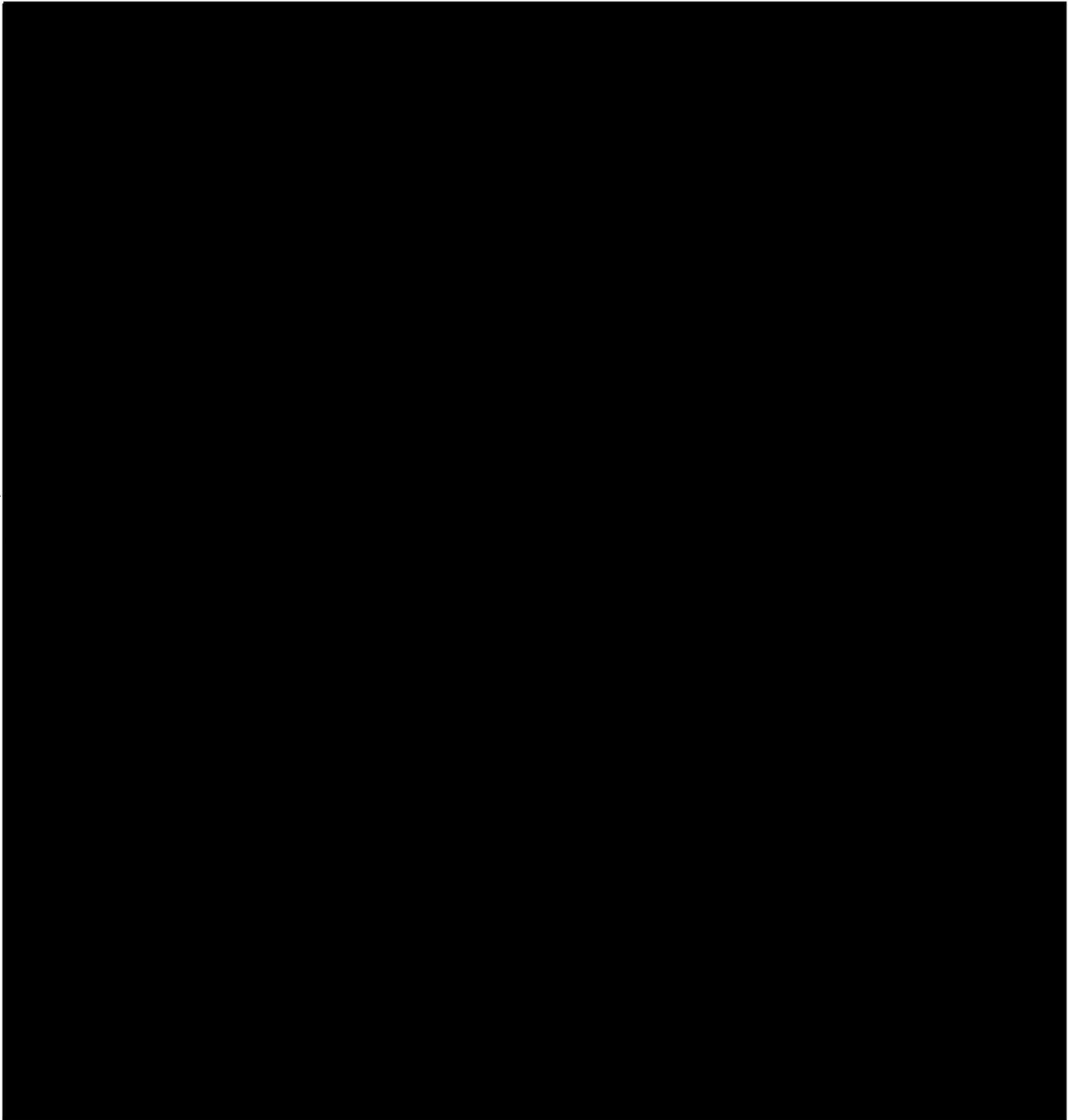
Date: 4/19/95 7:10 PM

Priority: Normal

Subject: Public/Government Aircraft Advisory Circular

----- Message Contents -----

Attached is the new Advisory Circular for Government/Public Aircraft.
The file is in MS Word 2.0 format



4/19/95 00-1.1

GOVERNMENT AIRCRAFT OPERATIONS

1. PURPOSE. The purpose of this advisory circular (AC) is to provide guidance on whether particular government aircraft operations are public aircraft operations or civil aircraft operations under the new statutory definition of "public aircraft." This AC contains the Federal Aviation Administration's (FAA) intended application of key terms in the new statutory definition. For operations that have lost public aircraft status under the new law, this AC provides information on bringing those operations into compliance with FAA safety regulations for civil aircraft. It also provides information on applying for an exemption. This AC provides acceptable, but not exclusive, means of complying with the law. Agencies which conduct public aircraft operations are encouraged to comply with the Federal Aviation Regulations (FAR), even when they are not required to do so. They and the flying public will benefit from their voluntary adherence to the enhanced safety standards set out in the regulations. The FAA will continue to provide assistance to public agencies which seek to voluntarily comply with the regulatory requirements.

2. REFERENCE. 49 U.S.C. § 40102(A)(37).

3. RELATED MATERIAL.

a. AC 00-2.8, Advisory Circular Checklist, lists documents that provide guidance on many of the processes required to be followed in the certification and operation of civil aircraft.

b. AC 00-44FF, Status of Federal Aviation Regulations, provides the current public status of the Federal Aviation Regulations (FAR), prices, and order forms.

c. AC 20-132, Public Aircraft, provides guidance that public aircraft status under the Federal Aviation Act does not permit operations outside the territorial limits of the United States without a valid airworthiness certificate.

d. AC 120-12A, Private Carriage Versus Common Carriage of Persons or Property, furnishes general guidelines for determining whether transportation operations by air constitute private or common carriage.

e. AC-120-49, Certification of Air Carriers, provides information and guidance on the certification process for air carriers under FAR Parts 121 and 135.

f. Guide to Federal Aviation Administration Publications provides guidance on identifying and obtaining FAA and other aviation-related publications issued by the Federal government.

Note: Copies of the above documents may be obtained from the Department of Transportation, M-45.3, General Services Section, Washington, DC 20590.

Original signed by:

Thomas C. Accardi
Director, Flight Standards Service

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CHAPTER 1. DETERMINING WHETHER OPERATIONS ARE PUBLIC OR CIVIL.

1. PUBLIC AIRCRAFT DEFINITION.

a. Background. In recent years, there has been an increasing interest in matters involving operations of public aircraft, which are generally exempt from compliance with the Federal Aviation Regulations.

(1) One area of interest is related to government agencies' receipt of reimbursement for their operation of government-owned aircraft. Prior to the enactment of the Public Law 103-411, the Independent Safety Board Act Amendments of 1994, "public aircraft" was defined to exclude "any government-owned aircraft engaged in carrying persons or property for commercial purposes." (P.L. 100-223, 1987). The FAA's long-standing interpretation has been that, where there is a receipt of compensation, such an operation is "for commercial purposes" and that such an operation therefore is not a public aircraft operation. This interpretation has been applied to intergovernmental arrangements wherein one government agency receives compensation for providing aircraft services to another government agency. Such services may be provided for firefighting, search and rescue or other governmental functions. Many government operators objected to the FAA's interpretation, claiming that such an interpretation impeded their governmental missions. They urged that it was impractical or impossible to obtain the services commercially, and that it was too costly to conduct their operations under the Federal Aviation Regulations as civil aircraft.

(2) On October 9, 1994, Congress passed the Independent Safety Board Act Amendments, Pub. L. 103-411, which changed the definition of the term "public aircraft." The law was signed by President Clinton on October 25, 1994.

(3) On January 26, 1995, the proposed advisory circular on Government Aircraft Operations was published in the Federal Register. 60 Fed. Reg. 5237. The proposed advisory circular set forth the FAA's understanding of the terms set forth in the new statute and the agency's intended application of those terms. The proposed advisory circular requested comments from affected parties on the positions taken by the FAA.

(4) Between January 26 and the current date, the FAA received and considered numerous comments from federal, state, and local governmental organizations as well as from representatives of private aircraft operators. Additionally, the FAA received an opinion of the Office of Legal Counsel, United States Department of Justice. That opinion, dated March 31, 1995, addresses whether the transport of prisoners on government aircraft falls within the statutory definition of "public aircraft." The opinion advised

that the position taken by the FAA in the proposed advisory circular regarding the transport of prisoners was unnecessarily restrictive. It discusses generally the terms used in that section of the statute which relate to the transporting of passengers in government-owned aircraft and advises that those terms would more appropriately be given slightly broader interpretation than that in the proposed advisory circular. The FAA modified its position to accord with the legal direction received.

b. Legislative History. The general purpose of the new law, as reflected in the legislative history, is to extend FAA regulatory oversight to some government aircraft operations. In part, Congress determined that government-owned aircraft, which operate for commercial purposes or engage in transport of passengers, should be subject to the regulations applicable to civil aircraft. The new law (with certain exceptions) preserved as public aircraft operations, those relating to the performance of certain governmental functions and, further, allowed public agencies to receive reimbursement from other public agencies for some operations conducted in response to significant and imminent threats. The FAA was also authorized to grant exemptions for operations whose status had changed as a result of the new law.

c. Statutory Text. The new definition of public aircraft enacted by Congress is as follows:

"(1) an aircraft--

(i) used only for the United States Government; or

(ii) owned and operated (except for commercial purposes) or exclusively leased for at least 90 continuous days by a government (except the United States Government), including a State, the District of Columbia, or a territory or possession of the United States, or political subdivision of that government; but

(2) does not include a government-owned aircraft--

(i) transporting property for commercial purposes; or

(ii) transporting passengers other than--

(A) transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or

(B) transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States.

(3) An aircraft described in the preceding sentence shall, notwithstanding any limitation relating to use of the aircraft for commercial purposes, be considered to be a public aircraft for the purposes of this part without regard to whether the aircraft is operated by a unit of government on behalf of another unit of government, pursuant to a cost reimbursement agreement between such units of government, if the unit of government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation was necessary to respond to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator was reasonably available to meet the threat." 49 U.S.C. 40102 (a) (37).

d. Operational Nature of Definition. The status of an aircraft as "public aircraft" "civil aircraft" depends on its use in government service and the type of operation at the aircraft is conducting at the time. Rather than speaking of particular aircraft as public aircraft or civil aircraft, it is more precise to speak of particular operations as public or civil in nature. Example: An aircraft owned by a state government is used in the morning for a search and rescue mission. During the search and rescue operation, the aircraft is a public aircraft. Later that same day, however, the aircraft is used to