Federal Aviation Administration

Memorandum

Date: March 28, 2011

To: Jeff Gordon, CMU Frontline Manager, Van Nuys Flight Standards District Office (FSDO), WP-1

From: Rebecca MacPherson, Assistant Chief Counsel, Regulations Division, Office of the Chief Counsel, AGC-200

Subject: Operating Limitations for Experimental Exhibition Aircraft

This memorandum responds to your March 17, 2010 request to Naomi Tsuda, Regional Counsel, AWP-7, for an interpretation regarding the applicability of certain operating limitations issued for experimental aircraft certified for the purpose of exhibition under the provisions of Title 14, Code of Federal Regulations (14 CFR) § 21.191(d). That request was forwarded to my office for a response.

Specifically, you refer to two operating limitations that are found in paragraph 161 of FAA Order 8130.2F, Airworthiness Certification of Aircraft and Related Products. That order specifies that these operating limitations be issued to all experimental aircraft certificated for the purpose of exhibition.

Operating limitation 10 states:

> No person may be carried in this aircraft during the exhibition of the aircraft's flight capabilities, performance, or unusual characteristics at airshows, or for motion picture, television, or similar productions, unless essential for the purpose of the flight. Passengers may be carried during flights to and from any event outlined in the program letter or during proficiency flying, limited to the design seating capacity of the aircraft.

Operating limitation 12 states:

> No person may operate this aircraft for carrying persons or property for compensation or hire.

These operating limitations are issued pursuant to the provisions of 14 CFR § 91.319. Section E of FAA Form 8130-7, Special Airworthiness Certificate, specifies that operating limitations

issued with that certificate are part of that certificate. This provision is further reiterated in operating limitation 2 issued for these aircraft.

You indicate that your office has received an application for a motion picture waiver from a person operating a military jet trainer certified as an experimental aircraft for the purpose of exhibition. You also note that in discussions with the operator your office has stated that the operating limitations issued for the aircraft do not permit the operator to receive payment for filming a person at the controls of the aircraft and providing that person with a DVD of that event, even if the operator refers to the activity as a "motion picture, television or similar production." You then pose a series of questions which are answered below.

You initially ask whether it would be a violation of 14 CFR § 91.9(a) and the aircraft's operating limitations for an operator to charge a member of the public for filming him or her in the aircraft during flight and whether the lack of a definition of "motion picture" or "similar production" precludes taking enforcement action.

Section 91.319(a)(2) states that "no person may operate an aircraft that has an experimental certificate— (2) [c]arrying persons or property for compensation or hire." This provision is also reiterated in operating limitation 12 for experimental exhibition aircraft. As the operator of the aircraft is clearly receiving compensation not only to film that person operating the controls of the aircraft, but also to carry that person while the aircraft is in flight, the operator would not only be in violation of § 91.319(a)(2) but would also be operating the aircraft contrary to its operating limitations.

Although you state that the aircraft is a "military jet trainer," it is certificated as an experimental aircraft for the purpose of exhibition and therefore considered a civil aircraft for purpose of compliance with § 91.9. That section specifies that "no person may operate a civil aircraft without complying with approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry." Although this aircraft may not have an approved Flight Manual it clearly has been certificated with operating limitations issued by FAA, which prescribe certain requirements. Since carrying a person for compensation in this aircraft would be contrary to operating limitations issued by the FAA, it would also be a violation of § 91.9(a). The lack of a definition of "motion picture" or "similar production" would not preclude taking action.

Additionally, § 44711(a)(1) of Title 49, United States Code (49 USC) states that "[a] person may not — (1) operate a civil aircraft in air commerce without an airworthiness certificate in effect or in violation of a term of the certificate." As the operating limitations issued for the aircraft are considered part of its airworthiness certificate, operation of the aircraft in contravention of its operating limitations would also be contrary to this statutory provision.

You next ask whether the phrase "unless essential for the purpose of the flight" in operating limitation 10 is "equally problematic." You note that the person being filmed, "the 'star' of the 'movie,'" could be construed to be essential for the purpose of the flight.

As noted above, operating limitation 10 states that no person may be carried in the aircraft during the exhibition of the aircraft's flight capabilities, performance, or unusual characteristics

at airshows, or for motion picture, television, or similar productions, unless essential for the purpose of the flight. The agency does not consider carrying a person on an aircraft while making a DVD of that person operating the controls of the aircraft during the flight to constitute carrying that person for a "motion picture, television, or similar production" when the DVD is intended primarily for that individual's personal use. Accordingly, the agency need not reach a determination as to whether the carriage of the person is essential for the purpose of the flight.

In your next question you note that Judge Geraghty in Administrator v. Gilliss, NTSB Docket No. SE-18703, 2009 WL 3803220 (October 21, 2009), indicates that a flyover of a parade, such as that referenced in the case, did not constitute a "demonstration of unusual characteristics. There's no demonstration of capabilities." You question whether it is "now impossible to take enforcement action against a pilot/operator for carrying a passenger (specifically a non-pilot passenger) during a flyover of a scheduled event (Limitation 10)."

In the Gilliss case the provisions of an operating limitation similar to operating limitation 10 were at issue. That limitation stated that "no person may be carried in this aircraft during the exhibition of the aircraft's flight capabilities, performance, or unusual characteristics unless essential for the purposes of flight." The limitation did not contain a reference to "motion picture, television, or similar productions." In that case the Administrative Law Judge noted that there was no testimony regarding any demonstration of the performance, capabilities, or unusual characteristics of the aircraft. Administrator v. Gilliss was decided on the basis of the evidence presented in that particular case. The decision in that case would not preclude enforcement action against an operator for carrying a passenger during a flyover of a scheduled event, such as at an airshow. The decision in that case, however, emphasizes the need for the introduction of substantive evidence clearly indicating that a demonstration of the aircraft's flight capabilities, performance, or unusual characteristics did indeed occur, when such facts are necessary to prove the substance of an allegation.

In your last question you ask whether the agency has any recourse under part 91 if the operator of a jet fighter certified as an experimental aircraft for the purpose of exhibition advertises to provide rides in that aircraft for compensation.

There are no provisions in part 91 prohibiting a person from advertising to conduct rides in such an aircraft for compensation. Regulatory violations under part 91 would only occur if the flights were actually conducted. However, you should also note that § 119.5(k) states that "no person may advertise or otherwise offer to perform an operation subject to this part unless that person is authorized by the Federal Aviation Administration to conduct that operation." The exception in § 119.5(e)(2) typically used to permit nonstop commercial air tours within a 25-statute mile radius of an airport to be conducted under the provisions of part 91 would not apply to operations conducted in this aircraft as it does not have a standard airworthiness certificate. Accordingly, a person advertising to conduct such rides for compensation in an experimental aircraft certified for the purpose of exhibition would not be in compliance with § 119.5(k) unless those operations were conducted in accordance with the provisions of part 119 or otherwise authorized. Although advertising to conduct such flights may also be the subject of other laws, this office takes no position with regard to their applicability.

You conclude by noting that passengers are frequently presented as non-paying passengers accompanying a pilot on a proficiency flight and that the receipt of compensation for a flight may be difficult to prove. Whether compensation has been provided is a matter to be determined in a specific administrative action. It should be noted, however, that if an operator is determined not to have received compensation for a flight carrying a passenger that person could be carried during proficiency flying and to or from any event outlined in the operator's program letter but not during the exhibition of the aircraft's flight capabilities, performance, or unusual characteristics at an airshow unless that person was essential to the conduct of the flight.

This response was prepared by Paul Greer, an attorney in the Regulations Division in the Office of the Chief Counsel, and coordinated with the General Aviation and Commercial Division (AFS-800) of the Flight Standards Service. If you have additional questions regarding this matter, please contact my office at (202) 267-3073.