



# Federal Aviation Administration

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## Memorandum

Date: April 19, 2023

To: Lawrence Fields, Acting Executive Director of the Flight Standards Service,  
AFX-1

From: Sara Mikolop, Acting Assistant Chief Counsel for Regulations,  
AGC-200

Subject: Request for Reconsideration of Legal Interpretation of “Governmental  
Function” under 49 U.S.C. § 40125

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On April 12, 2023, AFX-1 sought further clarification regarding the application of “governmental function” under the public aircraft operations (PAO) statute, 49 U.S.C. § 40125. We reviewed the plain language of the statute and the legislative history. Upon reviewing the statute, we find it necessary to clarify how the statute is applied when determining whether an operation is a PAO under 49 U.S.C. § 40125. In accordance with paragraph (b) of § 40125, an aircraft cannot be 1) used for commercial purposes or 2) carry an individual other than a crewmember or a qualified non-crewmember.<sup>1</sup>

In addressing the first prong, the FAA has issued several interpretations analyzing whether under § 40125(b), the operation had a governmental function and was being conducted for commercial purposes. Under the statute, “commercial purpose” is defined as “the transportation of persons or property for compensation or hire . . .”.<sup>2</sup> The FAA has construed compensation broadly, in that compensation “does not require a profit, a profit motive, or the actual payment of funds. Rather, compensation is the receipt of *anything of value*.”<sup>3</sup> The FAA has previously found that reimbursement of expenses (fuel, oil, transportation, lodging, meals, etc.), accumulation of flight time, and goodwill in the form of expected future economic benefit could be considered compensation.<sup>4 5</sup>

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<sup>1</sup> 49 U.S.C. § 40125(b) states:

**(b) Aircraft Owned by Governments.—**

An aircraft described in subparagraph (A), (B), (C), (D), or (F) of section 40102(a)(41) does not qualify as a public aircraft under such section when the aircraft is **used for commercial purposes** or to **carry an individual other than a crewmember or a qualified non-crewmember**.

<sup>2</sup> 49 U.S.C. § 40125(a)(1).

<sup>3</sup> [Kirwan Legal Interpretation](#) at 2 (May 27, 2005).

<sup>4</sup> See [Williams Legal Interpretation](#) at 1 (Jul. 9, 2014); [Hancock Legal Interpretation](#) at 1 (Mar. 18, 2013); [Harrington Legal Interpretation](#) at 2 (Oct. 23, 1997).

<sup>5</sup> The D.C. Circuit Court of Appeals and the National Transportation Safety Board have also confirmed this interpretation See *Clair Aero, Inc. v. Nat'l Transp. Safety Bd.*, 223 F. App'x 1 (D.C. Cir. 2007) (“Agency precedent establishes that the receipt of intangible benefits such as goodwill or the expectation of future

In addressing the second prong, consideration of a governmental function is appropriate in the context of having any individuals on board the government aircraft. If the operation is not conducted for commercial purposes and there are non-crewmember individuals on board, the question is whether they are *qualified non-crewmembers*. (Emphasis added.) An individual would be a qualified non-crewmember if they are performing a governmental function. “[Q]ualified non-crewmember’ means an individual, other than a member of the crew, aboard an aircraft . . . whose presence is required to perform, or is associated with the performance of, a governmental function.”<sup>6</sup> A “governmental function” is defined under 49 U.S.C. § 40125(a)(2) as “an activity undertaken by a government, such as national defense, intelligence missions, firefighting, search and rescue, law enforcement (including transport of prisoners, detainees, and illegal aliens), aeronautical research, or biological or geological resource management.” Consequently, the term “governmental function” does not apply for *all* PAO but only in determining qualified non-crewmembers if a non-crewmember on board the government aircraft is performing, or is associated with the performance of, a governmental function. A qualified non-crewmember that meets the statutory definition is permitted on board as part of the PAO. If the non-crewmember does not meet the governmental function requirement, they are not qualified and the operation does not meet the statutory requirements for a PAO.

The only other time the statute references “governmental function” is in paragraph (c),<sup>7</sup> which states that an aircraft owned or operated by the armed forces or that provides other specific services to the armed forces qualifies as a PAO if “the aircraft is operated in the performance of a governmental function . . .”. The absence of similar language in paragraph (b), which applies to aircraft owned by governments, indicates that Congress did not intend to apply the “governmental function” requirement to the aircraft described in paragraph (b) except in determining a qualified non-crewmember.

We also reviewed the legislative history of the PAO statute, which focused on “commercial purposes”<sup>8</sup> in determining whether the operation constitutes a PAO. For example, a House Report noted “[a]s can be seen, the question of whether an aircraft is a public aircraft will often depend on whether it is being operated ‘for commercial purposes.’ In other words, if the government agency receives payment for carrying people in the aircraft, the aircraft would not be a public aircraft.”<sup>9</sup> The legislative history also addresses “governmental function” but only in the context of persons aboard the aircraft. The same House Report noted that “[t]he Advisory Circular also listed the governmental functions being performed by persons aboard the aircraft that would justify classifying that operation as a public aircraft

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economic benefits is compensation under the regulations.”); [Blakely v. Murray](#), NTSB Order No. EA-5061 at 3 (Oct. 28, 2003)(“[C]ompensation need not be direct nor in the form of money. Goodwill is a form of prohibited compensation.”).

<sup>6</sup> 49 U.S.C. § 40125(a)(3)(B) (emphasis added).

<sup>7</sup> 49 U.S.C. § 40125(c) (“Aircraft Owned or Operated by the Armed Forces”). Note that DoD, not the FAA, generally handles armed forces PAO.

<sup>8</sup> As an aside, the legislative history indicates that Congress chose “commercial purposes” as the determining factor to ensure that government entities do not impinge on private sector operations. “As the language of the amendment makes clear, government entities should not be competing with private companies to provide commercial services.” 140 Cong. Rec. H10568 (Oct. 3, 1994).

<sup>9</sup> See H.R. Rep. 106-167(I) at 89 (1999).

operation.”<sup>10</sup> Accordingly, the legislative history indicates that Congress intended the FAA to focus on “commercial purpose” in determining whether a flight constitutes a PAO. The legislative history also indicates that “governmental function” is used primarily in determining whether individuals on board the aircraft are permitted as part of the PAO.<sup>11</sup>

In conclusion, upon review of the statutory text and the legislative history, we find that that the appropriate analysis to determine whether an operation appropriately falls under the public aircraft provision of 49 U.S.C. § 40102(a)(41) is to determine whether the flight will be used for a commercial purpose and whether there are any individuals on board the aircraft other than crewmembers and qualified non-crewmembers. If a non-crewmember is on board, that individual’s presence must be required to perform, or is associated with the performance of, a governmental function.

Regarding existing legal interpretations<sup>12</sup> that address governmental functions, the analysis contained in those legal interpretations specific to governmental functions is no longer applicable for unmanned aircraft or aircraft that do not have individuals besides crewmembers on board, unless those aircraft are owned or operated by the Armed Forces.

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<sup>10</sup> *Id.* at 90.

<sup>11</sup> The only other time “governmental function” is used in the statute is in the context of aircraft owned or operated by the armed forces, and DoD typically handles those operations.

<sup>12</sup> Existing legal interpretations on this topic include [Saur Legal Interpretation](#) (Dec. 15, 2021); [Coults Legal Interpretation](#) (Nov. 12, 2021); [Godown Legal Interpretation](#) (Sept. 23, 2016); [Signer Legal Interpretation](#) (Jun. 9, 2015); [Bond Legal Interpretation](#) (Jun. 7, 2016); [Heumann Legal Interpretation](#) (Aug. 8, 2014); [Williams Legal Interpretation](#) (Jul. 3, 2014); [Williams Legal Interpretation](#) (Jun. 13, 2014); [Barrett Legal Interpretation](#) (Oct. 15, 2012); [Keavney Legal Interpretation](#) (Jul. 27, 2012); [Harris Legal Interpretation](#) (Jun. 8, 2009).



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## Memorandum

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Subject: Request for Reconsideration of Legal Interpretation of “Governmental Function” under 49 U.S.C. § 40125

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AFX seeks further clarification regarding how AGC analyzes what constitutes a “governmental function” under the public aircraft operations (PAO) statute, 49 U.S.C. § 40125.<sup>1</sup> Currently, in determining whether an operation constitutes PAO, FAA evaluates whether the operation has a “governmental function” under 49 U.S.C. § 40125(a)(2). The statute defines “governmental function” as “an activity undertaken by a government, such as national defense, intelligence missions, firefighting, search and rescue, law enforcement (including transport of prisoners, detainees, and illegal aliens), aeronautical research, or biological or geological resource management.” There continues to be debate concerning the limits of “governmental function.”

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<sup>1</sup> Existing legal interpretations on this topic include [Saur Legal Interpretation](#) (Dec. 15, 2021); [Coults Legal Interpretation](#) (Nov. 12, 2021); [Godown Legal Interpretation](#) (Sept. 23, 2016); [Signer Legal Interpretation](#) (Jun. 9, 2015); [Bond Legal Interpretation](#) (Jun. 7, 2016); [Heumann Legal Interpretation](#) (Aug. 8, 2014); [Williams Legal Interpretation](#) (Jul. 3, 2014); [Williams Legal Interpretation](#) (Jun. 13, 2014); [Barrett Legal Interpretation](#) (Oct. 15, 2012); [Keavney Legal Interpretation](#) (Jul. 27, 2012); [Harris Legal Interpretation](#) (Jun. 8, 2009).