

Factual Report – Attachment 14
FAA Legal Interpretation

OPERATIONAL FACTORS

ERA18MA099



Federal Aviation Administration

Memorandum

Date: April 27, 2018

To: Jeffrey Guzzetti, Director, Accident Investigation Division, AVP-100
[REDACTED]

From: Lorelei D. Peter, Assistant Chief Counsel for Regulations, AGC-200

Prepared by: Francisco E. Castillo, Attorney, AGC-220

Subject: NTSB Information Request 18-102 Revised; Re: N350LH Liberty Helicopter, NY, 3/11/2018

This is in response to your revised memo dated March 22, 2018. You requested clarification of whether the flight described below could have been conducted under 14 CFR part 91 (pursuant to a 14 CFR part 119.1(e) exception from certification), or whether it should have been operated under 14 CFR part 135. For your convenience, we restated the pertinent facts and your questions prior to issuing our interpretation of the applicable regulations.

Facts:

1. On March 11, 2018, at approximately 1915 local New York time, a Liberty Helicopters (Operator) AS350B2 helicopter departed on a passenger-carrying flight (Flight in Question).
2. According to the National Transportation Safety Board (NTSB), the helicopter carried five paying passengers whose intent was to take "selfie pictures" of their feet outside the open doors of the helicopter with the New York skyline in the background.
3. The Operator claims the Flight in Question was conducted as an aerial photography operation under part 91, as allowed by § 119.1(e)(4)(iii). According to the Operator, the Flight in Question would depart and arrive at the same location, and would remain within a 25-statute mile radius of the airport.
4. The Operator is certificated under part 119 and is authorized to engage in common carriage under part 135.

5. The Operator is also authorized to conduct commercial air tour operations under part 135, per an FAA-issued operations specification, and nonstop commercial air tours under part 91, as allowed by § 119.1(e)(2) and in accordance with a letter of authorization (LOA) issued under § 91.147.
6. According to the NTSB, the Operator indicated that the Flight in Question was not a nonstop commercial air tour under an LOA issued pursuant to the 119.1(e)(2) exception.
7. The NTSB also informed the FAA that the Flight in Question did not involve “surveying.”

Questions:

The NTSB requested an explanation of the regulatory regime that applies to the Flight in Question. It specifically sought clarification on:

1. Whether § 119.1(e)(7) applies to the Flight in Question, since the operator indicated it was not a nonstop commercial air tour operation subject to the § 119.1(e)(2) exception; and
2. Whether FAA regulations allowed the Flight in Question to be conducted under part 91, or whether it should have been conducted under part 135.

Analysis:

As a general rule, aircraft operators conducting commercial operations must be certificated under part 119 prior to engaging in transportation of passengers or property for compensation or hire. Operations involving compensation or hire that fall within an exception delineated in § 119.1(e), are not subject to the certification requirements of part 119.¹ These exceptions include, amongst others: (1) certain helicopter flights conducted within a 25-statute-mile radius of the airport of takeoff, (2) aerial work operations, and (3) nonstop commercial air tours. The exceptions are mutually exclusive, which means that although a particular flight could satisfy the requirements of multiple exceptions, the operator must know in advance of the flight, how it is being conducted so that the correct operating rules are followed.

A. Helicopter Operations:

Helicopter operations under the 119.1(e)(7) exception must comply with all conditions and limitations established in the regulation. Operators of these flights are not subject to part 119 certification and ancillary operating rules (i.e., part 121 or 135) if they conduct the flights within a 25-statute mile radius of the airport of takeoff, **and**:

¹ See Legal Interpretation to Gregory S. Winton, from Mark W. Bury, Acting Assistant Chief Counsel for International Law, Legislation, and Regulations (Feb. 14, 2013); Legal Interpretation to Doug McQueen, from Mark W. Bury, Acting Assistant Chief Counsel for International Law, Legislation, and Regulations (Apr. 16, 2013).

- i. Not more than two passengers are carried in the helicopter in addition to the required flight crew;
- ii. Each flight is made under day VFR conditions;
- iii. The helicopter used is certificated in the standard category and complies with the 100-hour inspection requirements of part 91;
- iv. The operator notifies the FAA Flight Standards District Office responsible for the geographic area concerned at least 72 hours before each flight and furnishes any essential information that the office requests;
- v. The number of flights does not exceed a total of six in any calendar year;
- vi. Each flight has been approved by the Administrator; and
- vii. Cargo is not carried in or on the helicopter.

Flights that fail to comply with one – or more – of the conditions listed above, may not be operated under the § 119.1(e)(7) exception. They have to be conducted under another § 119.1(e) exception or the authority of a part 119 certificate.

NTSB indicates that the Flight in Question was carrying five paying passengers. Since § 119.1(e)(7)(i) restricts the number of passengers to a maximum of two per flight in addition to the required flight crew, the Flight in Question could not have been operated under the § 119.1(e)(7) exception.

B. Aerial Work and Aerial Photography:

Section 119.1(e)(4) delineates certain types of operations involving aerial work which are not subject to the certification requirements of part 119, even when they involve the transportation of people for compensation or hire. The term “aerial work” is not defined in 14 CFR, and the FAA has construed it to reflect the common import of its language. Thus, it means work done from the air. These flights are restricted in that (i) they must depart and arrive at the same point, (ii) no property of another may be carried on the aircraft, and (iii) only essential persons to the operation may be carried onboard.² If an aerial work operation is conducted as described above, a person essential to achieving the purpose of the flight may subcontract with an operator that does not hold a part 119 operating certificate to conduct the flights under part 91.³

Aerial work operations include: (i) crop dusting, seeding, spraying, and bird chasing; (ii) banner towing; (iii) aerial photography or survey; (iv) fire fighting; (v) helicopter operations in construction or repair work (except for transportation to and from the site of operations); and (vi) powerline or pipeline patrol.⁴ The examples are consistent with the International Civil

² See Legal Interpretation to Jeffrey Hill, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (Mar. 10, 2011); Legal Interpretation to Gregory Winton, from Mark W. Bury, Acting Assistant Chief Counsel for International Law, Legislation and Regulations (Feb. 14, 2013); Legal Interpretation to Steven Saint Amour from Mark W. Bury, Assistant Chief Counsel for International Law, Legislation, and Regulations (Sep. 8, 2014); Legal Interpretation to Samuel T. Ragland, from Lorelei Peter, Deputy Assistant Chief Counsel for Regulations (May 5, 2015).

³ See Legal Interpretation to Steven Saint Amour, from Mark W. Bury, Assistant Chief Counsel for International Law, Legislation, and Regulations (Sep. 8, 2014).

⁴ See § 119.1(e)(4)(i)-(vi).

Aviation Organization's (ICAO) definition of "aerial work," which is "an aircraft operation in which an aircraft is used for specialized services such as agriculture, construction, photography, surveying, observation and patrol, search and rescue, aerial advertisement, etc."⁵

Akin to the term "aerial work," the term "aerial photography" is not defined in FAA regulations. The FAA has opined that the term "connotes a condition where taking pictures or filming is done from the air."⁶ The term should be construed within the boundaries of the general concept of an aerial work operation. The exception is meant for business-like, work-related operations such as newsgathering, aerial mapping, surveying, commercial photography, or commercial filming; not for personal, entertainment, or leisure purposes. If work-related aerial photography is the sole purpose of the flight, then the operator may operate under part 91, whether (a) the operator himself performs the photographic work, (b) the operator hires a photographer to conduct the photographic work, or (c) the operator provides an aerial platform to enable photographers to conduct photographic work.⁷ This exception does not extend to operations in which the primary purpose is sightseeing.⁸

The determination of whether an operation fits within the aerial work exception is made on a case-by-case basis. The FAA looks at the totality of the facts in light of the intent of the operator and the expectations of the passengers. An operation is not subject to the aerial photography exception, if the underlying purpose of the flight is something other than aerial work, even if, as part of the flight, the passengers take photographs with their personal cameras. Although an operator may characterize an operation as aerial work, the FAA makes the final determination based on the totality of the circumstances.

The FAA does not dispute that the Flight in Question might have been intended to allow passengers to take pictures from the air. Nevertheless, and conceding that the FAA has incomplete information about the Flight in Question, it cannot definitely confirm that the flight qualified for the aerial work exception. There is no indication that the Flight in Question was conducted with the sole purpose of engaging in work-related photography. There is some indication that the Flight in Question was conducted for the primary purpose of sightseeing. Even if the flight was conducted for a work-related purpose, there is no indication that all of the passengers were essential to the operation.

C. Commercial Air Tours:

Sections 110.2 and 136.1(d) define a "commercial air tour" as "a flight conducted for compensation or hire in an airplane or helicopter where a purpose of the flight is sightseeing." The definition includes eight factors the FAA *may* consider when determining whether a flight is a commercial air tour. These include:

⁵ See ICAO ANNEX 6 – Part 1 – Operation of Aircraft - International Commercial Air Transport – Aeroplanes (10th Edition, Jul. 2016).

⁶ See Legal Interpretation to Joe M. Sapp, from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (May 17, 2007).

⁷ See Legal Interpretation to Pritchard H. White, from Leland S. Edwards, Jr., Attorney (May 11, 1995).

⁸ See Legal Interpretation to Samuel T. Ragland, from Lorelei Peter, Deputy Assistant Chief Counsel for Regulations (May 5, 2015); Commuter Operations and General Certification and Operations Requirements Final Rule, 60 Fed. Reg. 65832, 65914 (Dec. 20, 1995).

- i. Whether there was a holding out to the public of willingness to conduct a sightseeing flight for compensation or hire;
- ii. Whether the person offering the flight provided a narrative that referred to areas or points of interest on the surface below the route of the flight;
- iii. The area of operation;
- iv. How often the person offering the flight conducts such flights;
- v. The route of flight;
- vi. The inclusion of sightseeing flights as part of any travel arrangement package;
- vii. Whether the flight in question would have been canceled based on poor visibility of the surface below the route of the flight; and
- viii. Any other factors that the FAA considers appropriate.

Commercial air tours may be conducted by operators under (1) a part 119 certificate, subject to the operational requirements of part 135 or part 121, or (2) under part 91, in compliance with an LOA issued under § 91.147 and subject to the provisions of § 119.1(e)(2) for nonstop commercial air tours conducted in an airplane or helicopter having a standard airworthiness certificate, a passenger-seat configuration of 30 seats or fewer and a maximum payload capacity of 7,500 pounds or less, that begin and end at the same airport, and are conducted within a 25-statute mile radius of that airport.

Typically, the primary (but not sole) purpose of a commercial air tour operation is to conduct sightseeing flights. Certain operations that are not labeled as “sightseeing” or “commercial air tours” – and others whose main purpose is not sightseeing – may qualify as commercial air tours. The determination of eligibility is independent from how an operator chooses to characterize the flight. The FAA looks at the overall character of a flight to determine the eligibility as a commercial air tour.⁹

According to the FAA, “experience flights” may qualify as commercial air tour operations. Many operators believe:

they are not offering “sightseeing” flights, and that they just let the passengers “experience” something, [such as] aviation history, military history, or freedom. [A common misunderstanding among the] commenters is that, [in] general, someone carrying people or property for compensation or hire must comply with air carrier rules. While there are exceptions to [the air carrier rules] (such as those found in 119.1(e)), there is no exception for “experience” flights. [The FAA] believes many of these operators not only give the passengers an “experience,” but also do some form of sightseeing and thus fall within the 25-mile exception. The same set of safety standards [applies] to these flights regardless of how the operator chooses to describe them.¹⁰

⁹ See National Air Tour Safety Standards Final Rule, 72 Fed. Reg. 6894 (Feb. 13, 2007): According to the FAA, “although commenters have stated that sightseeing is not always a purpose of the flight, the [Agency] considers the *overall character of the flight* to be sightseeing, even if a *primary purpose* may be the experience of flight.”

¹⁰ See National Air Tour Safety Standards Final Rule, 72 Fed. Reg. 6895 (Feb. 13, 2007).

In light of the above, the Flight in Question would likely qualify as a commercial air tour, even though it was not conducted as such. However, the FAA lacks sufficient information to conclude whether the operation should have been conducted as a commercial air tour under part 91 or part 135. The FAA would need additional facts to evaluate the particularity of the operation, including the intended route, in light of the factors listed under the definition of commercial air tour.

D. Part 135:

If none of the § 119.1(e) exceptions apply, then an operation carrying persons or property for compensation or hire requires a part 119 certificate. Additionally, a commercial air tour operation under 14 CFR part 136, subpart B, requires a part 119 certificate in accordance with § 119.1(e)(2). All such operations by a helicopter must be conducted under the operating rules of part 135.

From: [REDACTED]
To: [Lawrence David](#)
Cc: [Gunther Todd](#); [Bramble William](#); [McKenny Van](#); [REDACTED]
Subject: RE: 19-078 Status of Legal Determination of accident flight
Date: Thursday, April 11, 2019 10:38:00 AM

Hi Capt. Lawrence,

This is in response to NTSB Request 19-078. Please see the note below.

There is no new information on the legal status of the accident flight. Liberty Helicopters was the holder of a part 91 sightseeing (air tours) LOA and the FSDO determined the flight in question was conducted under such authority. This means that the flight was operated as a commercial air tour pursuant to the LOA issued under 91.147, and was excepted from the part 119 certification requirements per 119.1(e)(2).

Have a great day,

Anne

Anne Torgerson
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[REDACTED]

From: Lawrence David <[REDACTED]>
Sent: Thursday, April 11, 2019 8:51 AM
To: Torgerson, Anne (FAA) <[REDACTED]>
Cc: Gunther Todd <[REDACTED]>; Bramble William <[REDACTED]>;
McKenny Van <[REDACTED]>
Subject: Re: 19-078 Status of Legal Determination of accident flight

Hi Anne,
Just following up on the progress of this request.
Thanks
David

From: Lawrence David <[REDACTED]>
Sent: Tuesday, March 5, 2019 1:33 PM
To: [REDACTED]

Cc: Gunther Todd; Bramble William; McKenny Van

Subject: 19-078 Status of Legal Determination of accident flight

Thanks, Anne!

Captain David A. Lawrence
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