AVIATION BUSINESS ADVOCATES

October 13, 2023

Docket Operations Office, M-30
U.S. Department of Transportation
1200 New Jersey Avenue SE
West Building, Room W12-140
Washington, DC 20590-0001

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RE: DOCKET NO. FAA-2023-1857, NOTICE OF INTENT TO CONSIDER REVISIONS TO THE REGULATORY DEFINITIONS OF "ON-DEMAND OPERATION", "SUPPLEMENTAL OPERATION" AND "SCHEDULED OPERATION"

The National Air Transportation Association (NATA) represents a nationwide array of aeronautical service providers necessary for a vibrant general aviation sector. Our member companies provide fuel, on-demand air charter, aircraft rental, storage, flight training, aircraft maintenance, parts sales, line support, and business aircraft and fractional ownership fleet management. NATA members range in size from large companies with international presence to include smaller, single-location operators that depend exclusively on general aviation for their livelihood. Among the membership are hundreds of on-demand operators, some of which provide flight services under contract with Public Charter operators.

NATA appreciates the opportunity to submit comments on this matter and the FAA's willingness to conduct this review in a public forum permitting maximum engagement from stakeholders and the public.

Public Charter operations are regulated under 14 CFR 380 – long-standing rules that permit an authorized party to contract with any direct air carrier, to include air taxis (i.e., on-demand operators) and commuters operating under part 135 as well as other air carriers operating under part 121. The part 380 regulations stipulate that a Public Charter operator is authorized to engage in the formation of groups for transportation on the aircraft it charters. Once air transportation has been chartered, the Public Charter operator may sell the available space on the aircraft to the public.

There are numerous requirements that the Public Charter operator, considered an indirect air carrier, must meet. Regulations regarding the charter contract with the direct air carrier, consumer disclosures, financial protections, and other requirements are specified. NATA notes that the consumer protections stipulated in part 380 are quite strong and some exceed those required of the part 121 air carriers conducting traditional scheduled services.

The FAA notice requesting comment offers that there is some level of confusion in the marketplace, but offers nothing to support the conclusion, only the allegations that such confusion *might* exist. NATA counters that there is no actual confusion, only concern over economic competition on the part of certain carriers operating scheduled services under part 121 and perhaps concerns within the FAA as to what level of oversight is appropriate for on-demand carriers with a high frequency of operations. NATA points out that the DOT has jurisdiction over consumer awareness, education, protection, and whether entities offering and providing air transportation are engaged in unfair or deceptive practices. The FAA's role is to ensure the operation of aircraft is compliant with the applicable safety regulations.

Unquestionably, there is an increase in the number of part 380 operators and operations. As such, NATA and the industry are willing to engage in a thoughtful discussion and evaluation of the existing regulatory framework, but we object to the mischaracterization of these operations as flouting the regulations or inherently unsafe. These business models serve a consumer need and the associated operators have been repeatedly acknowledged by both the FAA and DOT to conform to the current regulations.

Other commenters to this docket have pointed to safety data regarding part 135 operations as a justification to bar all part 380 contracts with on-demand operators. The use of that data without appropriate context is inappropriate and the FAA must base any decisions on an accurate understanding of a complex industry. As the FAA is fully aware, but perhaps those outside of the part 135 environment are not, part 135 operations include a level of diversity and uniqueness that is not present in the very homogeneous operations of the part 121 scheduled airline community.

Part 135 includes operations involving commercial helicopters, seaplanes, skiplanes, emergency medical services, cargo, air tours, off-shore, remote area, and airplanes ranging from single-engine

pistons to large multi-engine jets. Analysis of existing safety data is subject to significant limitations and is unable to permit direct comparisons to the part 121 safety data.

The part 135 accident rate data includes all of the various types of operations in the industry and information on the annual number hours flown (necessary to provide an accurate accident rate) is submitted via an annual voluntary survey. As such, there is no way to derive an accident rate for any specific operational category. For example, one cannot calculate an accident rate for multi-engine part 25 certified turbojet aircraft in passenger-carrying operations (which is essentially what the scheduled 121 accident rate measures) due to the inability to allocate survey-reported hours to any specific type of aircraft or operational mission.

Ultimately, the safety record of any individual operator or industry is only a snapshot of a precise moment in time and neither the FAA nor other commenters have provided a detailed safety analysis or record of accidents or incidents involving part 135 on-demand operators conducting flights chartered by part 380 operators. Proper procedure and compliance with rulemaking requirements dictate that any new regulatory burdens are adequately supported by facts, not conjecture or unsubstantiated fears driven by competitive interests that wish to thwart the success and growth of new business models.

Part 135 on-demand and commuter operators, to include those working with Public Charter operators are successfully serving a consumer need while operating within the existing, well-defined regulatory framework. The proffered solution to the FAA's concern with Public Charters is to revise certain definitions to eliminate reference to part 380. The deletion of these references would not necessarily have the effect the FAA suggests. The determination as to whether a flight on behalf of a part 380 operator a "charter" and not a "scheduled" flight is not contingent on the inclusion of the part 380 language in the definitions. Rather, it is how and when a direct air carrier is engaged, and how the terms of three specific flight parameters identified in the regulatory definition of "scheduled operation" are determined.

As established in 14 CFR 110.2 (and previously in part 119) a flight is a "scheduled operation" when the (direct) air carrier establishes and offers in advance three elements of the transportation: the departure location, the arrival location, and the departure time. The FAA has clearly and consistently stated that only when all three elements are set by the carrier is the flight "scheduled"

and that a flight is still considered on-demand when the carrier determines up to two of the three elements. For this reason, part 380 operations are in all ways on-demand charters when a part 135 operator is engaged. Most often it is the part 380 customer specifying all three elements of service. The presence of absence of references to part 380 has no real bearing on whether the contract between customer and carrier is scheduled or non-scheduled. It is the terms of the engagement, and how many of them the carrier determines, that is key.

Moving all part 380 operations to part 121 carriers is not feasible or possible in some instances. While there are some operators who provide a significant number of flights to 380 operators, there are many part 135 operators whose engagement is infrequent. Also, many of these aircraft are smaller passenger capacity aircraft not typically used, or that are ineligible for use in, part 121. A move to bar all part 380 contracts with on-demand carriers would eliminate these small aircraft and infrequent but necessary operations.

There have been many part 135 operators engaged in part 380 operations before and after the part 119 regulations were adopted. Importantly, none of these operations seemed to trigger the concerns now voiced most loudly by those with interests in part 121 operations. It appears that the concerns of the part 121 community were triggered only when certain operators were able to establish successful business models that may compete economically with the providers of scheduled operations. That some providers of scheduled flight services view robust part 380 operations as competition is not a justification for FAA action. If there are tangible issues of consumer confusion or allegations of unfair or deceptive practices, the DOT has authority to act. The DOT also has authority to amend the part 380 regulations, if necessary to provide acceptable protection and oversight.

Remarkably, the FAA appears to willfully ignore its own regulatory history on this subject in its request for comments. The so-called commuter rule, when issued in 1995, was silent on public charter operations. This silence did not bar such operations from occurring. The oversight regulations of part 380 were already in place and provided an authorized public charter operator to contract with any direct air carrier, including part 135 on-demand (air taxi) and commuter operators as well as the part 121 carriers. With the regulations prior to the commuter rule, and the

commuter rule as finalized in December 1995, a part 135 operator could provide flights to a 380 operator.

At some point, the FAA determined it was appropriate to ensure that the regulations plainly reflected this fact. In March 1997, the FAA issued an additional rulemaking intended to *clarify the intent of the regulations.* In this final rule, the FAA included the references to part 380 operations that it now considers removing. The stated purpose of adding references to part 380 was to make it clear that public charter operations conducted under 14 CFR part 380 are not considered scheduled operations.

Because the 1997 amendments were clarifying, not authorizing, it is likely that the mere elimination of that language would not prohibit a part 135 operator from performing flights for a part 380 operator. This is because the contract between customer (a part 380 operator) and direct carrier (a part 135 operator) is an on-demand charter. The customer possessing additional authority from the DOT to resell seats is not pertinent in determining the operational requirements for the flight.

The FAA did not seek to revise the regulations to include a new operational authority for the carriers in 1997. The agency was merely seeking to clarify what was *already authorized*. There were no objections to these clarifying changes, and they were adopted.

In the years following implementation of part 119, there were subsequent requests to the Chief Counsel for interpretation related to the operation of part 380 flights by on-demand carriers. In every instance, the FAA itself has been consistent and clear that charter contracts between a part 380 operator and a part 135 operator are just that – charter (not scheduled) service. There is no confusion on this matter when one reviews the relevant and available regulatory history.

Others commenting to this docket have repeatedly alluded to the "One Level of Safety" mantra popularized by pilot unions and other interests at the time of the part 119 rulemaking. To set the record straight, this marketing term has never been FAA policy, never appeared in the part 119 rulemaking, and ignores the facts of that rulemaking. While there were indeed several part 135 carriers that were required to transition to part 121 with the implementation of part 119, there were many commuter carriers that remained in part 135. Today, there are over 50 commuter carriers

operating under part 135. There are also many on-demand operators who also provide limited numbers of scheduled flights under their operational authority. The regulations, including the part 119 commuter rule, have always recognized that there are multiple ways to achieve operational safety. This is perhaps best demonstrated by industry adoption of Safety Management Systems (SMS). One of the core tenants of SMS is that it is scalable and can adapt to various types of operations.

Should an in-depth FAA review point to shortcomings in the operations of any part 135 carrier, regardless of whether part 380 flights are involved, the agency has existing authority and responsibility to investigate, surveil operations, and to hold carriers accountable for their compliance with the applicable regulations. To-date, the FAA has not provided any information alleging non-compliance by existing operators.

The FAA has wide-ranging authority to allocate its workforce in support of air carrier operations. Should the agency determine that part 135 operators engaging in a certain level of operations requires additional oversight and support it can implement those changes. While not common in part 135, a Certificate Management Office (CMO) has been established for some operators on occasion. If the FAA's primary concern with part 380 operations is that there are a small number of carriers conducting a meaningful level of operations, NATA would support the agency taking the necessary steps, such as the CMO model, to ensure that adequate oversight occurs.

There are many ways to achieve safe operations in our ecosystem of regulations. The structure of our aviation regulations is premised upon a risk-based approach that considers costs, benefits, type of operation, equipment used, and many other factors. Moving all part 380 flights to part 121 carriers, as is being considered, would effectively bar many existing operations. Part 121 certification is an exceptionally long process. It is unclear how many existing part 135 operators would even be able to complete such a conversion. For instance, there are some part 380 operations that use part 135 aircraft that are certificated under part 23, which are ineligible for part 121 operations. Likewise, a part 380 operation using helicopters would be prohibited as they are also not eligible for use in part 121. Emerging aircraft in the Advanced Air Mobility space would be unable to operate in part 121 given their certification basis and relatively small passenger loads.

Many of the aircraft and configurations currently in use for part 380 operations do not fit within part 121 framework and the lack of smaller passenger count aircraft would effectively eliminate most existing part 380 operations.

NATA appreciates the FAA's desire to bring these issues in to the public forum to ensure proper debate occurs that considers all relevant factors.

Sincerely,

Alan Stephens
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