

PUBLICATION

FAA Policy Changes to Parts 135 and 380 Operations

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Last year, the Federal Aviation Administration (FAA) issued a Notice of Intent to initiate a rulemaking that would prohibit air carriers with FAA authority under 14 CFR 135 from conducting public charter flights under the Department of Transportation's (DOT) 14 CFR 380 economic rules. In response to the Notice of Intent, the FAA received approximately 60,000 public comments. Over the last year, the FAA reviewed these public comments and has recently announced that it intends to begin the rulemaking process by issuing a notice of proposed rulemaking, which we expect in the coming weeks.

By way of background, air carriers that obtain FAA safety authority under Part 135 operate smaller aircraft (having 30 or fewer seats) on a charter basis, and at times, with a very limited schedule. Scheduled flights are generally operated by air carriers with large aircraft that obtain FAA safety authority under 14 CFR 121 – such as American Airlines, Delta Air Lines, and United Airlines – and transport the majority of passengers in the U.S. Carriers holding Part 135 authority are subject to less stringent FAA safety requirements, as compared to Part 121 carriers, but have more limitations in the way they operate and the size of aircraft they can use. In addition to the safety authority granted by the FAA under Part 121 and Part 135, air carriers must also obtain economic authority from the DOT in the form of On-Demand Air Taxi Registration, Commuter Air Carrier Authorization, or a Certificate of Public Convenience and Necessity. Such economic authority gives air carriers the right to transport passengers and cargo for hire and, depending on the FAA safety authority held by the carrier, specifies the type of operation that can be conducted (e.g., on-demand, commuter, or scheduled operations).

Generally, Part 135 air carriers may only conduct three types of operations: (i) "On-demand" flights that utilize aircraft with 30 passenger seats or less (having a payload capacity of 7,500 or less) where the departure time and location and the arrival location are specifically negotiated with each passenger and are not established in a predetermined schedule; (ii) "Scheduled on-demand" flights where the air carrier may operate less than five predetermined scheduled round-trip flights per week using non-turbojet aircraft with nine passenger seats or less (having a payload capacity of 7,500 or less); and (iii) "Commuter" flights where the air carrier may conduct unlimited predetermined scheduled flights (but at least five round-trips per week) in a non-turbojet powered aircraft with nine seats or less (having a payload capacity of 7,500 or less).

However, a Part 135 carrier may operate unlimited flights on a predetermined schedule and route with a turbo-powered aircraft that has up to a 30-passenger seat capacity by seeking additional economic authority from the DOT to operate under its Part 380 Public Charter rules. Obtaining this authority from DOT requires an evaluation of the economic protections for the intended operations (e.g., ensuring passenger funds are protected by a surety instrument) but does not involve any additional scrutiny over the air carrier's operational capability. Thus, while public charter flights conducted by Part 135 and 121 carriers would be held to the same Part 380 economic protections, the carriers are held to different FAA safety requirements. Many of the commenters to the FAA's Notice of Intent have argued that permitting Part 135 carriers to operate under the Part 380 rules is a loophole and that only carriers with Part 121 FAA authority should be permitted to utilize DOT's Part 380 rules.

Currently, Part 135 carriers can operate under Part 380 because public charter flights are specifically excluded from the definition of "scheduled operation" and are included in the definition of "on-demand operation" under

14 CFR 110.2. As such, a public charter flight under Part 380, whether operated by a Part 135 or Part 121 carrier, is considered an "on-demand" operation rather than a "scheduled operation"

In its Notice of Intent, the FAA expressed concern over the growing number of "on-demand" operations being conducted as Part 380 public charter flights, as they have become "essentially indistinguishable from flights conducted by air carriers" under Part 121. The FAA is considering whether the aforementioned exemptions under the definitions in Part 110 should be removed. Such a modification of the rules would eliminate Part 135 carriers' ability to operate public charter flights.

Advocates of the FAA's rulemaking argue that Part 135 carriers are using this loophole to operate scheduled service reserved for Part 121 operators without being held to the same safety standards. Eliminating the exemption would close a loophole that currently presents a risk to the traveling public.

Opponents, on the other hand, argue that there is no evidence that public charter flights operated by Part 135 carriers create any safety risks, and eliminating this exemption would have anti-competitive consequences in the industry, threaten long-standing business models, and deter innovation. They further argue it would also eliminate service to many smaller communities that are not served by the larger airlines operating scheduled service under Part 121.

Conclusion

This alert provides a brief overview of the FAA's intention to begin the rulemaking process to potentially prohibit Part 135 carriers' ability to operate public charters. Please note there are additional, complex aspects of the FAA's intended action, and the summary above is not intended to be comprehensive. If you or your company have any questions please contact [Alexander T. Marriott](#), [James Janaitis](#), [Trey Range](#), or one of Baker Donelson's [Aviation attorneys](#).