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The Voice of Aviation Business

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Aviation Empowerment Act

The Aviation Empowerment Act, S. 2650, introduced by Senator Mike Lee (R-UT) addresses three issues that are claimed to "stifle innovation" in the general aviation community – common carrier definition, flight sharing, and private pilot compensation. It also creates a "personal operator" category to allow a pilot to receive compensation for flights in aircraft with fewer than eight seats.

Background

The FAA has long held that any receipt of a benefit by a pilot from a passenger, for example the sharing of flight expenses, constitutes compensation and is therefore a commercial activity. In order to ensure the safety of the flying public, the FAA requires pilots offering these services be subject to additional licensing and oversight requirements. However, the FAA also sensibly created a limited exception to that requirement (14 CFR 61.113) as a way for persons with a common connection to share the expenses related to a trip with a mutual purpose. For example, a pilot who flies friends, family or co-workers to a common destination like a resort or conference.

The exception, however, must be viewed in proper context. It was never constructed in such a way as to say the flight in question is NOT commercial. Rather, it was created as an exception to the requirement that such flights be conducted by a commercial pilot and, depending on circumstances, a licensed air carrier.

Issue

The FAA (Advisory Circular 120-12A; April 26, 1986) defines the four elements of common carriage as: the (1) holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation or hire.

- Compensation may include bartering for something of value (paying for dinner at the destination), the mere logging of flight time, or paying the pro rata share of operating expenses. Any compensation, even if the pilot won't make a profit, has always been considered compensation by the FAA.
- "Holding out" does not necessarily consist of publishing a flight schedule. Once it becomes known that a flight is available, the pilot is holding out. Again, this is a long-standing position of FAA. If you hold out transportation for compensation, you are a common carrier. Certification from the FAA 14 CFR 119) is required for anyone who operates as a commercial or common carrier, one of the many higher standards air carriers must meet is commercial certificates (minimally) for pilots and more restrictive operating rules (e.g. 14 CFR 135). Private pilot certificates and the general operating rules of 14 CFR 91 are not sufficient to meet the demand for higher standards when the general public is transported.

Recently, entrepreneurs have attempted to use a limited exception (14 CFR §61.113) to commercial carrier certification requirements to bypass the safety, training and aircraft maintenance requirements for pilots who clearly intend to carry passengers for hire. Pilots in the contested operations would be able to provide advertised transportation service as private pilots in private aircraft. This means the passengers, with whom the pilots admittedly have no connection, are receiving air transportation without the numerous regulatory safety nets required for commercial air carriers.

Private pilots:

- Can have as few as 35 hours of flight time
- Are not required to hold ratings permitting flight in poor weather
- Are not covered by DOT drug and alcohol testing programs

- Are generally not required to file flight plans
- Are not required to have on-going training and checking other than a flight review with an instructor (review could be as short as 1 hour flying and 1 hour ground review) once every two years
- Have no requirement for minimum liability insurance

The FAA has determined that flights facilitated by online flight-sharing websites like Flytenow, AirPooler and others do not generally fall under the limited exception and are commercial flights that require additional pilot experience, training and aircraft maintenance. Though the proposed communication platform is new, the idea is not. Previously, the FAA took a similar position related to a business model utilizing a 1-800 telephone number.

The FAA's position, as presented in legal interpretations requested by Flytenow and AirPooler, stated that pilots using online flight-sharing websites are likely in violation of the agency's common carriage requirements. Flytenow challenged the interpretation which was ultimately upheld by the U.S. Court of Appeals. The Court declined Flytenow's request for an en banc rehearing. Flytenow then petitioned the U.S. Supreme Court to hear their case. On January 9, 2017, the Supreme Court denied Flytenow's petition.

Under the Aviation Empowerment Act, a "personal operator" category is created to allow a pilot who has a private pilot certificate to receive compensation for flying persons or property and not be subject to certain commercial airliner regulations if that private pilot flies in an aircraft with eight or fewer seats.

These flight sharing platforms have been less than forthcoming in their efforts to amend the established regulations. They initially claimed they only needed the right to communicate via the internet. The truth is that the FAA doesn't concern itself with *how* anyone communicates. They evaluate whether a given flight is in accordance with the regulations. The real agenda is revealed in what this legislative proposal actually does – it creates new definitions for compensation, common carriage and, with "personal operators" establishes a means for unrestricted and relatively un-surveilled airline-type operations by private pilots. The only restriction is that the pilots use airplanes with eight seats. They would otherwise be permitted to advertise and post flight schedules to the public. This represents a massive, and we believe unintended, deregulation of the existing air carrier industry. Hundreds, and potentially thousands, of currently certificated air carriers would be able to turn in their certificates and carry on their business as "personal operators."

The only way to accommodate flight sharing as envisioned by these entrepreneurs is to unravel the entire federal oversight structure for commercial operations because, quite simply, these operations ***are*** commercial.

The legislative fixes now sought by flight sharing services would provide carte blanche authority for private pilots to establish public transportation services. It would undermine the distinction that rightly exists between private aircraft flights where expenses are shared by individuals with a common purpose and commercial flights where members of the public are transported by aircraft for remuneration.

Another Alternative

Last year, NATA and the general aviation pilots group worked with Representative Mark Sanford (R-SC) and the Transportation & Infrastructure Committee on a similar issue, which resulted in the inclusion in H.R. 4 of Section 516, which requires the FAA to issue clearer guidance on permissible flight sharing and a related GAO study. The inclusion of Section 516 calls for a review of the rationale for federal policy on flight sharing as well as the safety, security, and other concerns related to the practices. We feel this approach provides a comprehensive look at when commercial certification is required as well as a review of the historical rules and regulations as defined by the FAA.