October 13, 2023

David H. Boulter
Associate Administrator for Aviation Safety
Federal Aviation Administration
800 Independence Avenue SW
Washington, DC 20591

RE: Docket No. FAA–2023–1857; Revisions to the Regulatory Definitions of ‘‘On-Demand Operation’’, ‘‘Supplemental Operation’’ and ‘‘Scheduled Operation’’

Dear Mr. Boulter:

The Airline Passenger Experience Association, General Aviation Manufacturers Association, Helicopter Association International, International Flight Services Association, National Air Transportation Association, National Association of State Aviation Officials, and National Business Aviation Association appreciate the opportunity to comment on the FAA's above-captioned notice of intent to consider revisions to 14 CFR § 110.2, which supplies the definitions that have long authorized FAA-certificated air carriers to operate under part 135 public charter flights with the economic authority granted by the DOT in 14 CFR part 380. Collectively, the undersigned associations represent over 10,000 members, including more than 100 commercial airlines that each provide a unique passenger experience; thousands of companies that rely on aviation to make their businesses more efficient and successful; over 140 airplane, rotorcraft, engine, and avionics manufacturers; and state government agencies with an interest in ensuring access to the National Aviation System. Members also include part 121 and part 135 certificated air carriers that, for years, have operated aircraft safely and reliably on behalf of public charter operators under part 380. We have seen firsthand how part 380, when applied within the

definitions in 14 CFR § 110.2, has unlocked substantial public benefits, especially in the case of service to small communities without any degradation of safety.

On that note, Congress chose to begin the exhaustive provisions of the US Code governing aviation with an important direction: that the Secretary of Transportation and the FAA Administrator must, among other things, consider the protection of aviation safety and small-community air service "as being in the public interest."[1] Changes to regulatory definitions could have unintended negative consequences throughout the entire part 135 community—an established industry segment providing safe and secure transportation options that meet the diverse needs of thousands of communities across the nation.

Therefore, if the FAA resolves to conduct a rulemaking to amend section 110.2 after reviewing comments on the referenced notice, we would respectfully urge the FAA to make very precise, surgical changes that neither compromise safety nor damage the already-challenged market for air service to small communities, as these matters have been considered vital and in the public interest for decades.

That said, in our view, rulemaking is not justified at this time. Revising 14 CFR part 110 will hurt competition, the environment, emerging technologies, innovation, and small communities.

The FAA's notice of intent solicits comments, data, and other information regarding:

- the effects of any removal of the part 380 exception (including any effect on service to small and underserved communities);
- potential impacts on competition, innovation, and emerging technologies;
- alternative regulatory structures that could apply to the provision of commercial passenger services under a regime other than part 121 or part 135;
- if the FAA were to adopt a rule, the reasonable period of time needed to allow affected operators to obtain appropriate certificates and authorizations to transition their operations to the applicable operating parts of 14 CFR; and
- any additional topics interested parties believe should be considered.

The Effects of Any Removal of the Part 380 Exception (Including Any Effect on Service to Small and Underserved Communities)

When the FAA announced the Commuter Rule in the 1990s, moving some scheduled flights from the rules of part 135 to part 121, the FAA expressly and intentionally excluded public charter operations conducted under part 380 and included such flights in the definition of on demand operations despite the fact that the certificate holder's determination of departure location, arrival location, and departure time is otherwise a distinguishing factor in scheduled

[1] 49 U.S.C. § 40101(a)(1), (a)(11), (d)(1).

flights. The FAA issued a notice of proposed rulemaking[2] and final rule[3] to amend the definitions in 110 to clarify the intent of the rule. No comments were filed in response to the amendment.

Under part 380, a Public Charter operator (PCO) organizes a charter flight with a direct air carrier (DAC) and sells the seats to the public. The PCO and DAC negotiate the departure location, arrival location, and departure time. In the case of a "direct-sale" public charter program, the PCO and the DAC are the same entity provided they satisfy all of the usual DOT consumer protections requirements.

For more than 45 years, part 135 carriers have operated aircraft safely and reliably on behalf of public charter operators under DOT part 380, unlocking substantial public benefits and providing valuable air transportation to many communities that otherwise would not have commercial air service. FAA certificated air carriers operating under 14 CFR part 135 provide expanded competitive air service to many destinations across the United States, maximizing consumer choice and improving the passenger experience. If, as some opponents of the part 135/part 380 business model urge, the FAA makes significant changes to the regulations, it would severely disrupt this service and in numerous cases deprive entire communities of air service, even though other than the unsubstantiated claims of special interest groups that there is a safety issue, there has been no evidence of such issues in the 25+ years since the rule was adopted.

One of the most significant side-effects of airline deregulation in 1978 was major carriers' elimination of service to smaller destinations that proved uneconomical for the size of aircraft they operated. Unfortunately, the high cost of jet service, including due to the pilot shortage, in many cases made it economically infeasible to operate jet service to small communities that as a result of their size could not generate as many passengers as the larger hubs. As major airlines pulled out of small communities, smaller operators filled the void, connecting small communities to large airline hubs, ensuring citizens in small and rural communities would continue to have access to the domestic and international air transportation system. In many cases, without part 135/380 service, many small communities would not have air service, which remains vital, because, especially in the western United States, the distances between small communities and major airports are so great that air service is the only viable way to connect these communities.

In creating the Alternate Essential Air Service (EAS) program, Congress expressly allowed EAS communities to review carrier service proposals, including services operated as public charters under part 135, and advise DOT on what service the community should receive. If air service is preferred, often, the only option is public charters under part 135. The FAA should not preempt community choices set by Congress.

[2] 62 Fed Reg 5076-77 (Feb 3, 1997).
[3] 62 Fed. Reg. 13248 (Mar. 19, 1997).

Moreover, numerous flights under part 380 are conducted between small communities, without federal subsidy or use of EAS funds. General aviation and part 135 operators have access to 5,000 airports in the US, whereas major airlines serve only the nation's largest 500 airports. If the FAA revised the regulations to prohibit the operation of part 380 public charter flights under part 135, some communities would lose the only regular air service they have today, and many others would have no chance of ever receiving such service. At a time when small community service is in jeopardy for multiple reasons, including pilot shortages, part 380 offers an innovative business model that can sustainably serve smaller airports and do so safely, which is why many communities actively seek such services. Indeed, we are unaware of any accident or serious incident involving an operation under part 135 using economic authority granted under part 380 and involving a jet airplane. No accidents. No incidents.

Similarly, as the FAA considers whether to revise definitions that largely define the scope of the part 380 program, the agency should be mindful of the unintended consequences of such an action. For example, revisions to section 110.2 could create unreasonable barriers to entry into the market among new-entrant air carriers, especially those that will introduce innovative and game-changing technology that will increase small communities' access to the air transportation system and thereby serve strong public interests. We would respectfully urge the FAA, at minimum, to consult with the DOT before making regulatory changes that would effectively bar new entrants from obtaining economic authority under the public charter program that falls under DOT, rather than FAA, jurisdiction. Furthermore, the loss of air service under part 380 in rural areas could force air travelers to take to the roads–a fundamentally less safe mode of transportation than air transportation. The agency noted this type of perverse result in a 1992 rulemaking regarding use of child restraint systems on board flights operated under part 121 and that its economic analysis flagged the likelihood that a mandate in that final rule would drive more flyers to the roads, where they are objectively less safe. Ultimately, the FAA elected to institute a permissive, rather than mandatory, regulation.[4] We would respectfully urge that the agency take the same approach in this case. Especially without objective data quantifying a safety risk associated with public charters, the agency should not take action that would likely end air service for many communities and force travelers in those communities to travel by road.

Additionally, again because the FAA is considering definitional changes that would affect the scope of part 380 participation–and could well end some operators' eligibility for or ability to sell air transportation as public charters as well as create unreasonable barriers to entry for new entrants–we believe that coordination between the FAA and the DOT is absolutely essential, so that the FAA fully understands the ramifications of amendments to section 110.2. We note that the DOT's Office of Aviation Consumer Protection is well-equipped to address any issues

[4] 57 Fed. Reg. 42662, 42663 (Sept. 15, 1992).

related to transparency and fairness to consumers among part 380 public charters through the DOT's statutory authority to interdict unfair and deceptive practices.[5]

Removing the public charter exception in 14 CFR part 110 will thwart competition and injure numerous small communities with no countervailing public benefit.

Potential Impacts on Competition, Innovation, and Emerging Technologies

In an industry where four major airlines control more than 80% of the domestic market, part 380 provides much-needed competition in a highly concentrated marketplace, often ensuring secondary markets and small communities continue to have options for meeting the air transportation needs of their citizens. Modifying the definitions in part 110 to eliminate operations conducted as public charters from the coverage of part 135 will remove the opportunity for innovative business models, including business models in development (such as eVTOL) that will support proliferation of environmentally sustainable emerging technologies.

Currently, there are electric aircraft designs in the pipeline. While initial designs are projected to seat 4-6 passengers, future designs are expected to accommodate up to 30 passengers. The developers and operators intend for these aircraft to operate under business models currently facilitated by 14 CFR part 110. Historically, the flexibility provided by part 380 has been instrumental in aiding helicopter and small aircraft operators, offering them a viable commercial route. Removing this flexibility could not only limit the scope of upcoming Advanced Air Mobility (AAM) ventures but also slow down the industry's overall commercial growth.

The current regulatory flexibility, if retained, has the potential to facilitate the adoption of AAM commercial operations. Conversely, reducing this flexibility will likely escalate operational costs, pushing passengers toward alternative transportation means that will very likely result in a larger carbon footprint.

If the FAA eliminates the flexibility provided under the 135/380 model, they will eliminate the opportunity for carriers to meet the needs of small communities with smaller, more efficient, innovative aircraft, which cannot be operated under part 121; only aircraft certified under part 25 can be operated under part 121.

Removing the part 380 exception in 14 CFR part 110 will be detrimental to competition, innovation, and aviation emerging technologies.

Alternative Regulatory Structures that Could Apply to the Provision of Commercial Passenger Services Under a Regime Other than Part 121 or Part 135

[5] *See* 49 U.S.C. § 41712.

and

If the FAA Were to Adopt a Rule, the Reasonable Period of Time Needed to Allow Affected Operators to Obtain Appropriate Certificates and Authorizations to Transition Their Operations to the Applicable Operating Parts of 14 CFR

If the FAA intends to amend 14 CFR part 110, it should convene an Aviation Rulemaking Committee to facilitate formal dialogue and recommendations for alternative regulations that would continue to promote innovation while also meeting the needs of small and rural communities. The FAA should also task the ARC with determining an appropriate implementation period for any proposed alternative regulatory framework. Part 135 operators and PCOs could only estimate a timeline to transition their operations to new rules only when an understanding of required changes is available.

The FAA should convene an ARC before proposing or implementing regulatory changes that would impact flights operated under part 135 or 380.

Any Additional Topics Interested Parties Believe Should Be Considered

Despite the FAA's assertion to the contrary, the complexity of part 135/380 operations has not changed materially. PCOs continue to negotiate the departure location, arrival location, and departure time with the DAC, and "direct-sale" part 380 operations are nothing new. The safety rules have only improved and continue to work well. An increase in the frequency of operations does not imply a decrease in safety. In fact, there are many situations when an increase in operations and, thereby, qualifications and experience can lead to enhanced safety.

It appears the FAA has published this notice without sufficient consideration of applicable data. There exists absolutely no data whatsoever establishing that public charter operations conducted under part 135 are less safe than other flights. Proponents of a rule change make this claim without citing a single accident or a single incident associated with an operation conducted under the part 135/380 exceptions in section 110.2. Nor do they offer a persuasive safety-based argument as to why the historical delineation between parts 121 and 135 should be discarded. The adage "if it ain't broke, don't fix it" comes to mind. The FAA is currently evaluating comments in response to an NPRM proposing to impose a requirement for all part 135 certificate holders to implement a safety management system (SMS). Under the proposal, the same rule, 14 CFR part 5, would govern the SMS for operations conducted under parts 121 and 135, eliminating a perceived safety gap. Many part 135 certificate holders, including the operators conducting most public charter operations, already have an active SMS program. It appears remaining operators will soon be required to implement an SMS under part 5.

Air carriers operating under the rules of part 121 must mitigate fatigue in accordance with part 117. The same NPRM proposing to require SMS for part 135 operators indicates the FAA intends for such operators to address fatigue-related safety concerns through SMS. In essence, operators will identify areas where the current part 135 regulations leave an opportunity to enhance fatigue mitigation and address those opportunities. This is another example of the narrowing gap between parts 121 and 135.

Part 135 requires fixed wing PICs to have an ATP. Thus, the only difference versus part 121 concerns the second in command (SIC), who must have a commercial certificate. But the SIC must actively demonstrate his or her ability to fly the aircraft as well as an ATP certificate holder. Specifically, the SIC is required to undergo annual training and checking approved by the FAA. During these qualification events SICs must perform each maneuver to a standard equivalent with a PIC, which is to say, to the level of an ATP certificate holder. The FAA explains this training requirement in Order 8900.1 Volume 3, Chapter 19, Section 7, which states:

> The standard required for basic checks is at least that required for obtaining the certificate which must be held to act as a PIC. For example, an SIC holding a commercial certificate with an instrument rating who is making an instrument landing system (ILS) approach in a G-V must perform to the same standard of proficiency as the PIC seated in the left seat who holds an ATP Certificate and a G-V type rating.

If the FAA ultimately chooses to ignore the lack of valid safety concerns and promulgate rulemaking to placate the vocal minority of commercially motivated stakeholders, a requirement for all flight crewmembers conducting Part 380 Public Charter operations to hold type ratings, when available, would close any regulatory gap while minimizing harm to small communities, innovative business models, and competition in general. Changing regulations could eliminate well-paying jobs at all levels of the industry while hurting economic competition, carbon emissions reduction, emerging technologies, aviation innovation, and service to small communities. Any changes to the regulation should be driven not by the economic interest of competitors, but by an identified safety need.

The public charter regulations in part 380 allow for a broad array of safe, secure, and procompetitive air service options for US consumers, whether the flights are conducted under part 121 or part 135. Indeed, flights operated for part 380 PCOs fully comply with all required authorizations from the DOT, FAA, and TSA - authorizations obtained with full transparency before these agencies. The safety and value of these operations have proven themselves through an impeccable safety record. No accidents. No incidents.

We ask the FAA to leave the current definitions of on-demand operations, supplemental operations, and scheduled operations intact and refrain from amending section 110.2. Removing the authorization in that section for operation of Part 380 public charter flights with aircraft of up to 30 passenger seats under part 135 will damage competition, the environment, emerging technologies, innovation, and small communities without enhancing safety in any material respect.

Sincerely,

Airline Passenger Experience Association (APEX)

General Aviation Manufacturers Association (GAMA)

Helicopter Association International (HAI)

International Flight Services Association (IFSA)

National Air Transportation Association (NATA)

National Association of State Aviation Officials (NASAO)

National Business Aviation Association (NBAA)