



OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

April 2, 2004

The Honorable Marion C. Blakey
Administrator
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

RE: National Air Tour Safety Standards (FAA-1998-4521); 68 Fed. Reg. 60572 (October 22, 2003).

Dear Administrator Blakey:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) submits this comment in response to the above referenced notice of proposed rulemaking. The proposed rule establishes national regulations for commercial air tours conducted in certain powered aircraft. The proposed rule eliminates an existing exemption for Part 91¹ sightseeing flights, requires all air tours to operate in accordance with either Part 121 or Part 135,² sets new pilot flight hour requirements for certain charitable flights, and establishes several new operational and equipment standards for existing commercial air tours.

Advocacy's comment relays concerns expressed by small entities about the proposed rule. As written, the proposed rule is likely to have a significant economic impact on regulated entities, including a substantial number of small sightseeing and air tour operators. After reviewing the proposed rule and the accompanying initial regulatory flexibility analysis (IRFA), Advocacy recommends that the Federal Aviation Administration (FAA) withdraw the rule until the agency is able to obtain adequate data on the operators affected by the rule.

I. Background on the Office of Advocacy

The Office of Advocacy, created in 1976, monitors and reports on agency compliance with the Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).³ The RFA requires federal agencies to determine a rule's economic impact on small entities and consider significant regulatory alternatives that achieve the agency's objectives while minimizing the impact on small entities. Because it is an independent office within the SBA, the views

¹ Throughout this comment letter Part 91 will refer to sightseeing flights.

² Throughout this comment letter Part 135 will refer to commercial air tours.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980), (codified as amended at 5 U.S.C. §§ 601-612).

expressed by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring federal agencies to implement policies protecting small businesses when writing new rules and regulations. Executive Order 13272 instructs Advocacy to provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.⁴ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

II. Background on Existing Sightseeing and Air Tour Regulations

Commercial air tour operators must be certificated under the requirements of Part 119 of Title 14 of the *Code of Federal Regulations* as complying with the operational, safety and training rules outlined in either Part 121 or Part 135.

Currently, an exemption from the certification requirement is provided in Part 119.1(e)(2) for certain nonstop sightseeing flight operators that use the same airport for takeoff and landing and fly within a 25-mile radius. These sightseeing flights currently operate under safety rules in Part 91 of Title 14 and are referred to as Part 91 operators.

The proposed rule would remove the exemption and require all Part 91 flights, except certain charitable and community flights, to be certificated under Part 119 as commercial air tours. The current exemption would sunset six months after the rule is finalized, at which time the Part 91 operators would be required to obtain the certification.

The new rule would also impose new operational and equipment standards on existing commercial air tour operators, referred to as Part 135 operators.

III. The FAA Did Not Comply with the Regulatory Flexibility Act

When developing a proposed rule, an agency must prepare an IRFA if it determines that the proposal may impose a significant economic impact on a substantial number of small entities.⁶ Under Section 603 of the RFA, the IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements,

⁴ E.O. 13272, at § 2(c), 67 Fed. Reg. at 53,461.

⁵ *Id.* at § 3(c), 67 Fed. Reg. at 53,461.

⁶ 5 U.S.C. § 603(a).

including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.⁷

In the proposed rule, the FAA acknowledged that “virtually all of the entities affected by the proposed amendments are small.”⁸ The FAA recognized that the proposed rule would have a significant economic impact on a substantial number of small entities, and therefore performed an IRFA. However, Advocacy is concerned that the IRFA is deficient in several areas, which are discussed in detail below.

A. The FAA Does Not Adequately Explain the Reasons for the Proposed Rule

According to the FAA, the objective of the proposed rule is to “provide a higher and uniform level of safety for commercial air tours... [and] to significantly reduce the accident rate for those currently operating under Part 91.”⁹ However, the agency does not explain the impetus for this rulemaking. Given the numerous federal regulations governing the commercial air tour industry (Part 135 operators), it is unclear why the FAA initiated this rulemaking at this time. Advocacy recommends that the FAA clarify whether higher accident rates, differences in data, or other circumstances changed, warranting new rules. Advocacy also recommends that the FAA explain its assertion that Part 91 accidents could be significantly reduced by requiring those operators to be certified under Part 119. If the FAA believes that the accident rate data for Part 91, or current Part 135, operations reveals a significant trend that could be addressed by the measures in this proposed rule, Advocacy recommends this be made clear to the public.

B. The FAA Appears to Have Underestimated the Number of Small Entities Affected by the Proposal

1. Limited Data on Part 91 and Some Part 135 Operations

The agency estimated that 1,672 Part 91 operators and 453 Part 135 operators would be affected by the rule.¹⁰ However, operators affected by the proposed rule informed Advocacy that the FAA’s estimates do not accurately reflect the industry. Presently, the FAA does not collect data on Part 91 operators. While the FAA has established systems for monitoring and collecting data on Part 135 operators, corresponding systems do not exist for Part 91 operators. The agency’s estimates of Part 91 operators are based on a survey of its Flight Standards District Offices (FSDOs) and the FAA’s 1995 General

⁷ 5 U.S.C. § 603 and 5 U.S.C. § 607.

⁸ 68 Fed. Reg. 60584 (October 22, 2003).

⁹ *Id.*

¹⁰ *Id.*

Aviation and Air Taxi Activity and Avionics Survey (GAATA Survey). The economic analysis for the rule states that the estimates “may understate the true proportion of small operators because FSDOs are less likely to have accurate information on Part 91 sightseeing activity.”¹¹ Similarly, in a report titled “Estimates of the Sightseeing Air Tour Industry Final Report,” (GRA report) GRA, an FAA contractor states, “Because there are few periodic reporting or inspection requirements for Part 91 operators, the FAA has limited contact with them. As a result, little information on their fleets, operations or revenues is available.”¹² The GRA report reveals no systematic means to quantify the number of Part 91 operators. Advocacy believes the numerous assumptions in the FAA’s economic analysis undermine the quality of the data used in the IRFA.¹³

There is also some indication that the agency does not have adequate methods for collecting and tracking flight data for certain Part 135 flights. The National Transportation Safety Board (NTSB) raised questions regarding the FAA’s assertion that Special Federal Aviation Regulation 71 (SFAR 71),¹⁴ which governs air tours in Hawaii, caused a decrease in air tour accidents in that state. The NTSB questioned the FAA’s claim, stating that the “Board does not believe that there is a reliable basis for this conclusion because of the current lack of an accurate, verifiable method of collecting and tracking flight activity data for the specific segments of nonscheduled 14 CFR Part 135 light operations.”¹⁵ The documentation supporting the rule and statements by the NTSB suggest that the FAA is not fully aware of the number of operators affected by the proposal.

2. Flight Schools and Charitable Organizations

It is not clear that FAA’s estimates include flight schools or other charitable organizations such as flight museums, an important and sizeable segment of Part 91 operators. These entities could be significantly affected because they conduct Part 91 sightseeing flights either as a marketing tool or to raise funds. For example, a survey conducted by the Aircraft Owners and Pilots Association (AOPA), indicated that of 373 responding flight schools 92% stated that they offered sightseeing rides to the public and over 45% of the respondents stated that they conducted more than 40 flights per year for the purpose of sightseeing.¹⁶ These responses represent only a fraction of the 1,500 potentially affected flight schools in the United States.

By not including flight schools and certain charitable organizations in its analysis, the agency failed to capture a large number of small entities that are likely to be affected by

¹¹ Office of Aviation Policy and Plans, Federal Aviation Administration, Preliminary Regulatory Evaluation, Initial Regulatory Flexibility Analysis, and Trade Impact Assessment, page 66 (2002).

¹² GRA, Inc., Estimates of the Sightseeing Air Tour Industry Final Report, page 4 (1998).

¹³ *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, Chapter 2, available on Advocacy’s website, <http://www.sba.gov/advo/laws/rfaguide.pdf>.

¹⁴ 14 C.F.R. § 91 (2003). Special Federal Aviation Regulation No. 71.

¹⁵ Comments of the National Transportation Safety Board, to the Notice of Proposed Rulemaking in Dkt. No. FAA-1998-4521, at 1 (Jan. 22, 2004).

¹⁶ Aircraft Owners and Pilots Association. Air Tour NPRM Flight School Online Survey, February 2004. See, <http://www.aopa.org/survey/survey.cfm?id=101>.

the proposed rule. Advocacy urges the FAA to perform outreach to the sightseeing and air tour industry to obtain a more complete understanding of the regulated entities. This will help the agency to more accurately identify the number of small entities that will be affected.

C. The FAA Did Not Accurately Calculate the Economic Impacts of the Proposed Rule on Small Entities

1. Revenue and Flight Hours Estimates

In its IRFA, the FAA states that it does not have information on the potential impact of the proposed rule on revenues and profits.¹⁷ Advocacy appreciates that the agency solicited comments on this issue and we have encouraged the regulated entities to comment on the revenue information used by the FAA to estimate the economic impact on small entities. Despite limited information, the FAA generated revenue data using a mix of the FSDO survey responses, the GAATA survey, data from other sources, and a number of assumptions about the industry. The absence of source data and transparency in the process used to arrive at these estimates make it difficult for Advocacy or the regulated small entities to determine whether the estimates reflect actual revenues earned by Part 91 operators.

Advocacy is concerned, in part, because the revenue figures employed in the IRFA rely on uncertain flight hour estimates for operators. Revenue figures are intended to reflect the number of flight hours a Part 91 operator flies each year as well as the average revenue per flight hour. The agency states that “89 percent of part 91 sightseeing aircraft are estimated to log fewer than 50 sightseeing hours per year.”¹⁸ The FAA calculated the revenues for *all* operators based on this 50 flight hour figure.¹⁹ Except for reference to the total number of flight hours in the GAATA survey, which has incomplete coverage of Part 91 operators, the FAA provides little data to explain the 50 flight hour average estimate for Part 91 operators.

Advocacy’s discussions with the sightseeing industry suggest that many operators, perhaps even a majority, conduct in excess of 50 flight hours each year. For instance, Advocacy spoke with two Part 91 operators who did not operate near major attractions or under any special circumstances. The operators indicated that they flew in excess of 200 hours annually despite providing Part 91 sightseeing tours on a part-time basis.²⁰ Further, the AOPA surveyed 49 members providing Part 91 flights to ascertain characteristics of

¹⁷ 68 Fed. Reg. 60585

¹⁸ Office of Aviation Policy and Plans, Federal Aviation Administration, Preliminary Regulatory Evaluation, Initial Regulatory Flexibility Analysis, and Trade Impact Assessment, page11 (2002).

¹⁹ FAA designates a portion of the operators as “marginal,” defined as flying 10 or fewer hours annually. The marginal group’s revenues are estimated separately in the IRFA based on the 10 flight hour assumption largely because the FAA assumes that these operators will exit the industry due to the high costs of Part 119 certification.

²⁰ February 6, 2004 meeting with air tour industry representatives at the Office of Advocacy.

their business operations, with 63% responding that they conducted more than 50 hours of Part 91 flights annually.²¹

In summary, based on the information available to Advocacy, it is unclear whether FAA's average operator statistics for flight hours and revenue represent even a small portion of the Part 91 industry. While many operators are small and offer Part 91 sightseeing tours only part-time, many others are sophisticated business operations that are not accurately depicted in the FAA's analysis. Discussions with sightseeing and air tour operators suggest that the FAA's use of average flight hours and average net revenues for the industry mischaracterizes many full time operators as part-time and thus underestimates the impact of the rule on operators. Advocacy urges the FAA to talk with the sightseeing and air tour industry to obtain data that more accurately reflects the variation in average number of flight hours and revenues across Part 91 sightseeing flight operators.

2. Business Closures

According to the FAA, approximately 700 of the 1,672 Part 91 operators estimated by the FAA to provide sightseeing flights would choose to stop offering such flights rather than comply with the proposed rule.²² The FAA defined the 700 operators as "marginal" because they are assumed to provide ten hours or less of sightseeing flights per year. The agency determined that the marginal operators would stop offering sightseeing services but could remain in business by obtaining revenue through other means. According to the FAA, sightseeing represents only a small percentage of the marginal operators' total revenue. The FAA did not provide sufficient data in the IRFA to support these claims. The absence of necessary data makes it difficult for Advocacy or an affected small business to ascertain how the "marginal" characterization was derived and whether the FAA is correct in its characterization.

Advocacy is concerned because the FAA recognizes that the rule could cause hundreds of entities to leave the air tour business, yet the agency seems to have taken no steps to mitigate this result. However, the sightseeing and air tour industries contend that requiring a Part 119 certificate would cause thousands, not hundreds of small operators to go out of business. Because the FAA likely underestimated the number of small Part 91 operators and failed to provide accurate data on Part 91 operations, revenues and costs, Advocacy believes the industry's estimate may be sound. Consequently, the actual incidence of business closure is likely to be significantly higher than estimated in the IRFA.

²¹ Aircraft Owners and Pilots Association. Air Tour NPRM Air Tour Operators Online Survey, February 2004. See, <http://www.aopa.org/survey/survey.cfm?id=99>.

²² 68 Fed. Reg. 60585.

3. Economic Impact on Existing Part 135 Operators

The FAA estimates that the proposed rule will cost existing Part 135 operators about \$69 million over ten years. The air tour industry asserts that many of the Part 135 operators are small entities who will not be able to absorb such high costs and remain in business. Additionally, a majority of the existing Part 135 operators primarily provide air tour services in and around national parks and are already subject to federal requirements more stringent than those currently required under Part 135. Thus, the requirements in the proposed rule are duplicative and will impose significant financial burdens on affected Part 135 air tour operators while not obviously improving safety. The FAA should evaluate whether the proposed rule unduly burdens existing Part 135 operators, given the existence of other federal regulations governing their operations.

4. Other Significant Costs Not Considered by the FAA

The FAA estimates that Part 91 operators converting to Part 135 operations would incur approximately \$150 million in expenses for the first ten years after certification. However, the FAA did not include in its calculation costs associated with insurance and down-time while waiting for certification.

The FAA assumes that a Part 91 operator converting to a Part 119 certificate “would experience no difference in liability and, therefore, no difference in insurance costs...”²³ Small operators have expressed strong reservations about the FAA’s assumptions. Part 91 operators contend that their insurance costs will significantly increase if they convert to Part 135 operations. In fact, some operators are worried they will not be able to obtain insurance coverage once they convert to Part 135. The inability to obtain or afford insurance could create a barrier to entry for small operators seeking certification to perform Part 135 operations. The removal of the Part 119.1(e)(2) exemption, coupled with the inability to undertake Part 135 operations could leave many small operators no choice other than to exit the industry. Advocacy recommends that the FAA speak with operators and insurance carriers to conduct additional research before assuming insurance costs will not change as a result of the rule.

The FAA estimates that the certification process will take about three months to a year.²⁴ The Part 119.1(e)(2) exemption is slated to expire six months after the final rule is published. Given the large number of Part 91 operators and limited FSDO personnel, affected entities are concerned that the exemption will expire before they receive certification. Entities will suffer significant revenue loss if this occurs. The FAA intends to require all Part 91 operators to obtain certification within six months. However, by its own estimation, the process may take longer, which could result in the grounding of many Part 91 operators. The agency should evaluate whether six months is sufficient time for affected Part 91 operators to obtain Part 119 certification.

²³Office of Aviation Policy and Plans, Federal Aviation Administration, Preliminary Regulatory Evaluation, Initial Regulatory Flexibility Analysis, and Trade Impact Assessment, pp. 18-19 (2002).

²⁴*Id.* at 14.

D. The FAA Did Not Adequately Analyze Viable Alternatives That Would Achieve Regulatory Objectives While Minimizing the Potential Impact on Affected Small Entities

Section 603(c) of the RFA requires a regulatory agency to include a description of any significant alternatives to the proposed rule that minimize the economic impacts on small entities while still accomplishing the agency's regulatory objectives. The adoption of significant alternatives can often provide regulatory relief to small entities severely affected by agency rulemakings.

In the proposed rule, the FAA analyzed three possible alternatives. The agency did not choose any of the listed alternatives because it asserted the safety objectives of the rule would not be met if any of the alternatives were adopted. Advocacy understands that the FAA desires to improve the safety of air tours to protect the flying public. However, to comply with the RFA, the FAA must describe significant alternatives that minimize the economic impacts on small entities. Significant alternatives should meet the objectives of the rule, in this case, improving safety and minimizing the economic impact on small entities. If the agency is unable to identify regulatory alternatives that meet these criteria, it should conduct outreach to interested groups or solicit comment on the issue.

IV. Conclusion and Recommendations

Due to weaknesses in the data used for the IRFA, Advocacy recommends that the FAA carefully review the comments provided and withdraw the rule to give further consideration to the concerns raised by Advocacy and others commenting on the proposed rule and IRFA. Advocacy encourages the agency to conduct additional research and outreach to identify affected small entities, determine the potential economic impacts of the rule, and identify less burdensome alternatives. If after evaluating the new data, the FAA determines a rule is warranted, the agency could then re-propose the rule with a revised IRFA that reflects the impacts on small entities and analyzes less burdensome alternatives. Advocacy offers the following alternatives for consideration by the FAA to address their objectives while minimizing the regulatory burden on affected small entities.

1. The FAA should consider retaining the Part 119.1 (e)(2) exemption and adding Part 91 data requirements.

Many operators suggested that the FAA retain the Part 119.1 (e)(2) exemption and leave sightseeing flights under Part 91. Rather than converting Part 91 flights, the agency could amend the rule to include certain data reporting elements. For example, the agency could require Part 91 operators to report insurance coverage to the local FSDO. This would alleviate the financial burden of certification under Part 119 while still providing necessary information to the FAA about Part 91 flights.

2. The agency should assess whether regional rulemakings are more appropriate than national standards.

As pointed out by the Office of Information and Regulatory Affairs (OIRA) in its post review letter, the data included in the FAA's regulatory evaluation indicates that about half of the air tour fatalities were based in Alaska during 1993-2000. Given these statistics, the FAA should review its data to determine whether regional rules are more appropriate than a national regulation. The existence of Special Federal Aviation Regulation 71 in Hawaii and Special Federal Aviation Regulation 50-2 at the Grand Canyon National Park underscore the effectiveness of regional regulations.

3. Advocacy recommends that the FAA withdraw the proposed rule and convene either an Aviation Rulemaking Committee (ARC) or an Aviation Rule Advisory Committee (ARAC).

Small entities suggested that an ARC or ARAC would be a more appropriate method of developing national standards for the sightseeing and air tour industries. This alternative would allow the industry to participate more fully in the development of a rule that affects their businesses. It would also allow the FAA the opportunity to evaluate a variety of alternatives with the benefit of industry input and experience.

4. The FAA should consider delaying the expiration of the Part 119.1 (e)(2) exemption.

Advocacy encourages the FAA to delay the expiration date of the Part 119.1(e)(2) exemption, if it continues with this rulemaking. This would allow Part 91 operators to continue conducting sightseeing flights and maintain revenues while they seek Part 119 certification. This will alleviate potential revenue losses and give small operators additional time to complete the certification process.

5. Advocacy suggests that the agency separate the Part 91 helicopter accident rates and Part 91 airplane accident rates.

Advocacy agrees with OIRA's recommendation that the FAA revise the IRFA to differentiate between the helicopter and airplane accident data. A review of the FAA data suggests that combining the Part 91 helicopter accident rates with part 91 airplane accident rates skews the accident percentage for all Part 91 flights. According to FAA's statistics, Part 91 helicopter flights have a higher accident rate than Part 91 airplanes. Advocacy encourages the FAA to analyze the data to determine whether separate requirements for helicopters and airplanes are appropriate.

As written, the proposed rule could cause a substantial number of small operators to exit the commercial air tour industry and impose significant cost burdens on existing air tour operators and others seeking Part 119 certification. However, because of data inadequacies, the full extent of the economic impacts is uncertain. In future rulemakings, if the FAA lacks information about the industry to be regulated, Advocacy suggests the

agency issue an advanced notice of proposed rulemaking (ANPRM). An ANPRM that solicits information from interested parties will help the agency to gather the data essential to developing a more informed rule.

Advocacy encourages the FAA to review the comments provided and withdraw the rule to conduct further outreach with interested parties. To comply with the RFA, a more complete analysis of viable alternatives and the potential economic impacts on small entities is necessary.

Thank you for your consideration of these issues. Should you have any questions or require additional information, please contact me or Carrol Barnes of my staff at (202) 205-6890.

Sincerely,

Thomas M. Sullivan
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Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs,
Office of Management and Budget