

Living History Flight Experience Operations – FAA Issues and Overview (Mar. 2021)

Every year millions of Americans attend air shows and are thrilled by the sight of operational vintage aircraft,¹ particularly from the World War 2, Korean War, and Vietnam War eras. Maintaining and operating such aircraft, particularly military aircraft, is an expensive and daunting task given the scarcity of spare parts and the specialized maintenance and training necessary to keep such aircraft operational. To help defray these expenses, some organizations have offered short flights (now referred to as Living History Flight Experience, or LHFE) in these aircraft for a fee. Such operations implicate Federal Aviation Administration (FAA) regulations in several critical ways and operators of such aircraft conducting flights for compensation require an exemption from sections of the Federal Aviation Regulations (FARs) found at Title 14 of the Code of Federal Regulations.

FAR Background

To operate a LHFE, operators must first petition and obtain from the FAA an exemption from applicable FARs. The specific FARs depend on the type of aircraft to be operated, but generally include provisions prohibiting operation of aircraft with limited or experimental certificates from performing operations for compensation or hire and provisions requiring operations for compensation or hire to be conducted under Part 121 or 135 and in accordance with FAA-issued operations specifications.



The firm's practice encompasses virtually every aspect of aviation law, including advising operators of vintage military aircraft about Living History Flight Experience exemptions and operations, in addition to a broad range of other aviation regulatory matters.

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Historical Background

The first LHFE exemption was granted to the Collings Foundation (“Collings”) in 1996.² Collings petitioned for an exemption to operate its B-17 and B-24 aircraft for educational and historical purposes. Collings sought to accept contributions for local flights from the public to help offset maintenance costs and ensure crew operating experience. Collings’ B-17 and B-24 aircraft held limited and experimental airworthiness certificates, respectively, which (without an appropriate exemption) precluded their operation for compensation or hire.

In granting the exemption, the FAA observed that the “only way for a person to actually experience the flight characteristics of [Collings] airplanes is to be able to fly in the actual airplane.”³ As justification for granting the exemption, the FAA stated that preservation of U.S. aircraft history is in the public interest, much like the preservation of historic buildings and landmarks, and the public had expressed a desire to experience flight in historic aircraft. As a condition to the grant of the exemption, the FAA required Collings to (among other things) adhere to specific maintenance, flight crew, and operational conditions, and required it to remain a 501(c)(3) nonprofit.

Policy Background

In 2004, the FAA issued a policy limiting the scope of LHFE exemptions to World War 2 and older aircraft (specifically, crew-served aircraft developed prior to December 31, 1947) and stating that it did not intend to grant exemptions to operators of supersonic jets. By way of explanation, the FAA noted public interest (e.g., the opportunity to experience a B-17 or B-24 while the aircraft can still be safely maintained) and safety factors (older and slower multi-engine aircraft allow time for corrective measures in the event of an in-flight emergency).⁴

The FAA issued an expanded and revised policy in 2007.⁵ Among other things, the FAA stated that it would consider exemptions for former military turbine-engine powered aircraft, despite those aircraft raising concerns about the type and quality of training available for crews, maintenance, and inspection personnel. The FAA also provided a detailed list of criteria it would apply in deciding whether to grant an exemption.

In 2011 the FAA imposed a moratorium on new requests or amendments to LHFE exemptions.⁶ In a tersely worded explanation the FAA noted the “evolution of LHFE operations in the private sector” and “the availability of new and more capable military aircraft” which “raised public safety and public policy concerns that the FAA needs to assess.”⁷

In 2012, the FAA held a three-day public meeting to provide the public with an opportunity to give their views and information to the FAA. Citing a 2006 draft policy statement⁸ (the precursor to the agency’s 2007 policy) which announced an intention to consider applications for aircraft non-standard category aircraft on a case-by-case basis, including turbine-engine aircraft, the FAA expressed strong reservations about subsequent developments for potential new business models based on LHFE exemptions, including

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plans to permit members of the general public to operate aerial combat flights with hands-on experience in the aircraft, and therefore sought public input, including input on a list of questions posed by the FAA.

In 2015 the FAA issued a new Notice of Policy Statement (“Policy”) addressing LHFE operations and lifting the 2011 moratorium.⁹ The Policy provided the following new criteria for petitioners to meet to obtain LHFE exemptions.

First, the aircraft for which the exemption is sought must be “historically significant.” This means the aircraft must have been U.S. operated, not currently in service, fragile (i.e., only a few remaining), have a type design that is at least 50 years old, and it cannot have an available standard category aircraft analog.

Second, the petitioner must designate a “responsible person” as a point of contact for the FAA and implement an operational control structure or chain of command within the petitioner’s manual system for pilots, maintenance, and support personnel.

Third, the FAA stated its intention to use Safety Risk Management (SRM)¹⁰ and Equivalent Level of Safety (ELoS) principles to guide its review of petitions. Petitioners must assure the FAA that they have identified and mitigated hazards and risks.

Fourth, the petitioner must be able to demonstrate that it has a manual system “similar in terms and intent” to those required by Part 135.

Fifth, the FAA included other considerations for its assessment of petitions. These include ensuring LHFE operations are limited to a flight experience and not flight training, aerobatics, or passenger operation of the aircraft controls.

The FAA will deny petitions which do not fully address these criteria.¹¹ The Policy remains in effect today and forms the basis for current FAA exemption determinations.

Noteworthy Exemptions

The Army Aviation Heritage Foundation¹² has, with a notable exception, held exemptions to operate surplus military aircraft since 2001.¹³ These include Vietnam War-era UH-1H “Huey” and AH-1 “Cobra” helicopters. In 2003, AAHF filed a routine petition for renewal of its LHFE exemption (then limited to the UH-1). Commercial helicopter operators filed letters in opposition to the petition, arguing (among other things) that the UH-1H was not vintage, obsolete, or rare, and further that the military still operated the UH-1H and Bell still manufactured the 205¹⁴ as a standard certificated aircraft. The commercial operators also argued that AAHF could not meet safety standards given that it did not have the same manuals and resources as the Army, nor did it have an FAA-approved drug testing program.

The FAA denied AAHF’s petition¹⁵ on the grounds that military turbine aircraft similar or equivalent to the UH-1H remained in production or were readily available in the market. The FAA also explained that the UH-1H was not a World War 2 vintage aircraft and grant of an exemption was thus inconsistent with FAA’s then-current LHFE exemption policy.

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AAHF subsequently petitioned for reconsideration, citing factual and policy errors in the FAA's decision.¹⁶ The FAA eventually issued a one-year extension (later extended), citing the release of future guidance concerning LHFE exemptions.¹⁷

In August 2009, the FAA denied Collings' petition for an exemption to operate McDonnell Douglas F-4 Phantom, McDonnell Douglas TA-4J Skyhawk, Classic Fighter Me-262 and Fiesler Fi-56 "Storch" aircraft.¹⁸ Citing the 2007 policy, the FAA determined that the Fiesler (a German World War 2 reconnaissance aircraft) was not eligible because it was not "historically significant in the context of U.S. aeronautical history." The FAA also determined that the Me-262 (a reproduction of the original fighter/bomber, manufactured by Messerschmitt) was, as a reproduction, not historically significant. The FAA deferred action on the F-4 and TA-4J until it received more information concerning ejection seats, which the FAA viewed with concern.

Collings subsequently requested that the FAA reconsider its denial with respect to all four aircraft.¹⁹ With respect to the Storch and the Me-262, Collings pointed out that (among other things) the FAA's policy was expressly drafted to consider non-U.S. aircraft if their operational and maintenance history was adequately documented. Collings also explained the importance of both aircraft to aviation history²⁰ and reminded the FAA that it had previously granted exemptions to operators of replica aircraft.²¹ With respect to the F-4 and TA-4J, Collings pointed out that the FAA's policy included consideration of crew egress systems and that the systems were maintained to manufacturer and military standards. The FAA eventually granted LHFE exemptions to Collings for most of the additional aircraft.²²

Recent Developments

In a well-publicized and tragic October 2019 incident, a B-17G ("Nine-O-Nine") being operated under a LHFE exemption crashed during an emergency landing attempt in Hartford, Connecticut, killing seven and injuring six. On March 25, 2020, the FAA revoked the operator's exemption permitting LHFE operations (for all the operator's aircraft) on the grounds that continued operations would adversely impact the safety of the operator's aircraft, their airmen, passengers, and others.²³

In its revocation, the FAA assessed the operator's compliance with its exemption conditions and limitations and identified several issues. First, the FAA determined that the B-17's crew chief had not been trained – a critical oversight given that the operator's General Operations Manual assigned multiple duties to the crew chief including handling emergencies. The FAA also found that the operator did not comply with its Safety Management System (SMS) in several ways, including training in the existence of the program, the existence of maintenance discrepancies, the non-existence of periodic audits, and the combination of functions in one person (the pilot of the aircraft was also the Director of Maintenance, which the FAA determined created a situation that could not ensure adequate oversight of passenger-carrying operations). An inspection of the engines revealed several indicia of error and neglect, such as unserviceable magnetos

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and spark plugs worn/fouled and out of tolerance, all indicating a lack of maintenance in accordance with the General Maintenance Manual.

Citing the B-17 crash, the FAA subsequently issued new National Policy to its Aviation Safety Inspectors (ASIs) requiring enhanced oversight of LHFE operations.²⁴ The National Policy requires ASIs to audit all LHFE exemption holders by the end of 2021 and ensure their compliance with the FARs, exemption conditions and limitations, and manual systems.

On March 23, 2021, following a virtual meeting,²⁵ the National Transportation Safety Board (NTSB) made recommendations to the FAA concerning several types of operations for compensation or hire being conducted under FAR Part 91 (general operating and flight rules), including LHFE flights.²⁶ Among other things, the NTSB recommended that the FAA develop safety standards, or equivalent regulations, for such operations. With reference to LHFE operations, the NTSB recommended that Order 8900.1, Flight Standards Information Management System,²⁷ be revised to include specific guidance for ASIs overseeing LHFE operations to help them identify hazards and ensure operators are appropriately managing risks.

Current FAA Practice

The FAA continues to grant LHFE exemptions to operators for a wide variety of aircraft.²⁸ As noted above, LHFE operations are presently subject to greater FAA oversight.

Key Takeaways

Petitioners seeking LHFE exemptions must ensure they include information addressing each of the elements of the FAA's Policy, and petitions must confirm to the requirements of FAA regulations governing petitions for exemptions. The FAA may, and frequently does, reject applications that do not conform to these requirements.

Operators seeking exemptions should be prepared to accept a comprehensive list of conditions and limitations focusing on manuals, maintenance, documentation and recordkeeping, training, public disclosures, reporting, and operations.

Finally, applicants are well-advised to consult with counsel to ensure that their requests are consistent with FAA policy and requirements.

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¹ During the COVID-19 crisis virtually all such events have been cancelled, but in “normal” years the International Council of Air Shows estimates that 325-350 shows are held annually with a total North American attendance of 10-12 million people. See <https://airshows.aero/Page/AboutAS-Facts> (accessed Mar. 23, 2021).

² Exemption No. 6540, Docket No. 28660 (Nov. 8, 1996).

³ *Id.* at 3.

⁴ *Cited in* Notice of Policy Statement, “Policy Regarding Living History Flight Experience Exemptions for Passenger Carrying Operations Conducted for Compensation and Hire in Other Than Standard Category Aircraft”, 80 Fed. Reg. 43012 (July 21, 2015).

⁵ Notice of Policy Statement, “Exemptions for Passenger Carrying Operations Conducted for Compensation and Hire in Other Than Standard Category Aircraft”, 79 Fed. Reg. 57196 (Oct. 9, 2007).

⁶ Policy Statement, “Moratorium on New Exemptions for Passenger Carrying Operations Conducted for Compensation and Hire in Other Than Standard Category Aircraft”, 76 Fed. Reg. 16239 (Mar. 23, 2011).

⁷ *Id.* at 16240.

⁸ Notice of Draft Policy Statement, “Exemptions for Passenger Carrying Operations Conducted for Compensation and Hire in Other Than Standard Category Aircraft”, 71 Fed. Reg. 15087 (Mar. 27, 2006).

⁹ Notice of Policy Statement, “Policy Regarding Living History Flight Experience Exemptions for Passenger Carrying Operations Conducted for Compensation and Hire in Other Than Standard Category Aircraft”, 80 Fed. Reg. 43012 (July 21, 2015).

¹⁰ See FAA Order 8040.4B, Safety Risk Management Policy, issued May 22, 2017.

¹¹ See, e.g., September 29, 2020 Letter from Robert C. Carty in Docket FAA-2020-0401.

¹² <https://armyav.org/>

¹³ See Docket FAA-2001-11090.

¹⁴ The Bell 205 is the civilian version of the UH-1H.

¹⁵ Letter from John M. Allen (Mar. 15, 2004), Docket FAA-2001-11090. The FAA did, however, permit AAHF to operate at air shows during the 2004 season to which AAHF had already committed.

¹⁶ The factual arguments included the FAA’s erroneous understanding of the role of the UH-1H model in Vietnam, significant differences in the civilian and military versions of the helicopter, the date production ceased, and the current lack of availability of the UH-1H model in the market. The policy arguments included pointing out sudden, unarticulated changes to FAA policy and incorrect application of law and the FAA’s own precedent in approving turbine-powered aircraft.

¹⁷ Letter from Steve. W. Douglas (Sept. 16, 2004), Docket FAA-2001-11090.

¹⁸ Letter from Chester D. Dalbey (Aug. 28, 2009), Docket FAA-2001-11089.

¹⁹ Application for Partial Reconsideration of August 28, 2009 Exemption Letter, Docket FAA-2001-11089 (Sept. 28, 2009).

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²⁰ The Storch, for example, was a reliable short-takeoff-and-landing aircraft and was used in a commando raid to rescue an imprisoned Mussolini during World War 2. The Me-262 was the world's first operational jet fighter, entering service with the German Luftwaffe in 1944. Both aircraft influenced modern aircraft development.

²¹ The Policy now in effect expressly excludes replicas (80 Fed. Reg. 43012, 43014 (July 21, 2015)) although the FAA grandfathered a previously-approved replica. See Exemption No. 6541P, Docket FAA-2001-10876 (May 3, 2017)(Experimental Aircraft Association's "Spirit of St. Louis" Ryan NYP replica). The Ryan NYP was subsequently removed from the exemption at the petitioner's request in 2019.

²² The Storch, F-4, and TA-4J were approved by Partial Grant of Petition for Reconsideration dated May 7, 2010. The FAA deferred a decision on the Me-262 replica.

²³ Rescission of Existing Exemption and Denial of Petition to Exempt Exemption, Docket FAA-2001-11089 (Mar. 25, 2020). The operator had also petitioned for an extension and amendment of their LHFE experience, which the FAA denied.

²⁴ National Policy, "Living History Flight Experience Enhanced Oversight", N 8900.573 (Dec. 10, 2020).

²⁵ NTSB Virtual Meeting, Part 91 Revenue Passenger-Carrying Operations, (Mar. 23, 2021) (webcast), <https://www.nts.gov/news/events/Pages/2021-DCA20SP001-BMG.aspx> (accessed Mar. 24, 2021).

²⁶ Abstract, NTSB Virtual Meeting of March 23, 2021, <https://www.nts.gov/news/events/Documents/2021-DCA20SP001-BMG-Abstract.pdf> (accessed Mar. 24, 2021). These include sightseeing flights conducted in hot air balloons, intentional parachute jump flights, and LHFE and other vintage aircraft flights.

²⁷ Order 8900.1 constitutes FAA's Flight Standards Division policy and guidance for ASIs.

²⁸ E.g., Exemption No. 1912A, Docket FAA-2018-0265 (Jan. 11, 2021) (Boeing B-29 Stratofortress); Exemption No. 6802R, Docket FAA-2002-11285 (Boeing B-29 Superfortress, Boeing B-17 Flying Fortress, Consolidated B-24 Liberator, Curtiss SB2C Helldiver, Douglas A-26 Invader, Douglas SBD Dauntless, Grumman TBM Avenger, North American B-25 Mitchell, North American P-51 Mustang, Lockheed T-33 Shooting Star, North American T-28A Trojan); Exemption No. 17763A (Mar. 26, 2020) (Cessna T-37 Tweet).