

aircraft." The law was signed by President Clinton on October 25, 1994.

(3) On January 26, 1995, the proposed advisory circular on Government Aircraft Operations was published in the **Federal Register**, 60 FR 5237. The proposed advisory circular set forth the FAA's understanding of the terms set forth in the new statute and the agency's intended application of those terms. The proposed advisory circular requested comments from affected parties on the positions taken by the FAA.

(4) Between January 26 and the current date, the FAA received and considered numerous comments from federal, state, and local governmental organizations as well as from representatives of private aircraft operators. Additionally, the FAA received an opinion of the Office of Legal Counsel, United States Department of Justice. That opinion, dated March 31, 1995, addresses whether the transport of prisoners on government aircraft falls within the statutory definition of "public aircraft." The opinion advised that the position taken by the FAA in the proposed advisory circular regarding the transport of prisoners was unnecessarily restrictive. It discusses generally the terms used in that section of the statute which relate to the transporting of passengers in government-owned aircraft and advises that those terms would more appropriately be given a slightly broader interpretation than that in the proposed advisory circular. The FAA has modified its position to accord with the legal direction received.

b. *Legislative History.* The general purpose of the new law, as reflected in the legislative history, is to extend FAA regulatory oversight to some government aircraft operations. In part, Congress determined that government-owned aircraft, which operate for commercial purposes or engage in transport of passengers, should be subject to the regulations applicable to civil aircraft. The new law (with certain exceptions) preserved as public aircraft operations, those relating to the performance of certain governmental functions and, further, allowed public agencies to receive reimbursement from other public agencies for some operations conducted in response to significant and imminent threats. The FAA was also authorized to grant exemptions for operations whose status had changed as a result of the new law.

c. *Statutory Text.* The new definition of public aircraft enacted by Congress is as follows:

- "(1) an aircraft—
 - (i) used only for the United States Government; or
 - (ii) Owned and operated (except for commercial purposes) or exclusively leased for at least 90 continuous days by a government (except the United States Government), including a State, the District of Columbia, or a territory or possession of the United States, or political subdivision of that government; but
- (2) Does not include a government-owned aircraft—
 - (i) Transporting property for commercial purposes; or
 - (ii) Transporting passengers other than—
 - (A) Transporting (for other than commercial purposes) crewmembers or other

persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or

(B) Transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States.

(3) An aircraft described in the preceding sentence shall, notwithstanding any limitation relating to use of the aircraft for commercial purposes, be considered to be a public aircraft for the purposes of this part without regard to whether the aircraft is operated by a unit of government on behalf of another unit of government, pursuant to a cost reimbursement agreement between such units of government, if the unit of government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation was necessary to respond to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator was reasonably available to meet the threat." 49 U.S.C. 40102(a)(37).

d. *Operational Nature of Definition.* The status of an aircraft as "public aircraft" or "civil aircraft" depends on its use in government service and the type of operation that the aircraft is conducting at the time. Rather than speaking of particular aircraft as public aircraft or civil aircraft, it is more precise to speak of particular operations as public or civil in nature. *Example:* An aircraft owned by a state government is used in the morning for a search and rescue mission. During the search and rescue operation, the aircraft is a public aircraft. Later that same day, however, the aircraft is used to fly the governor of the state from one meeting to another. At that time, the aircraft loses its public aircraft status and must be operated as a civil aircraft.

e. *Effective Date.* The effective date of the new statute is April 23, 1995.

2. Meaning of Key Statutory Terms

The FAA interprets various words, phrases, and clauses in the statutory definition (in their order of appearance in the statute) as follows:

a. *"For Commercial Purposes."* The FAA has consistently taken the position that this term means "for compensation or hire". The test historically applied to determine whether an operation is for "compensation or hire" is whether the operator receives direct or indirect payment for the operation. It is not necessary that a flight be conducted for profit to constitute an operation for "compensation or hire," the term may be applicable even where there is no intent or ability to make a profit from the flight. Even where there is only cost-reimbursement from a unit of one government to a unit of another for the operation of an aircraft, such reimbursement constitutes "compensation." Accordingly, operations conducted pursuant to cost-reimbursement arrangements between units of government are considered to be "for

commercial purposes." The new statute provides a limited exception allowing for public aircraft status where the unit of government on whose behalf the operation is conducted certifies that the operation was necessary to respond to a significant and imminent threat to life or property and that no service by a private operator was reasonably available to meet the threat. By providing this limited exception, Congress clearly recognized that operations conducted pursuant to cost-reimbursement agreements are to be considered "for commercial purposes." Generally, a transfer of funds by one element of government to another element within that same government will not be treated as compensation. Operations conducted pursuant to those arrangements are not considered "for commercial purposes" where the reimbursement is essentially an accounting of transactions within the same unit of government.

(1) One state agency reimburses another agency of the same state for conducting operations on its behalf using a state-owned aircraft. If the two agencies share a common treasury, the operation is not "for commercial purposes" within the meaning of the statute.

(2) A federal agency reimburses a state agency for conducting aircraft operations on the former's behalf using state-owned aircraft. Such an operation is considered to be "for commercial purposes." Generally, this operation would be a civil aircraft operation, unless the federal agency certified that the operation was necessary to respond to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator was reasonably available to meet the threat. In that case, the operation would be considered a public aircraft operation.

b. *"Whose Presence is Required to Perform."* This phrase means that the person is aboard the aircraft for the purpose of performing a task or duty directly related to an ongoing governmental function of the sort enumerated in the statute. It indicates that the person's presence is essential to the performance of that function.

(1) Examples:

(i) Firefighters who are being transported for the purpose of engaging in a current firefighting activity are considered persons whose presence is essential for the performance of that activity. The transport of firefighters directly to a firefront by aircraft as part of a mission for which the use of an aircraft is necessary would constitute an accepted activity. Similarly, the transport of firefighters to a base camp by aircraft where they are to be dispersed to the firefront may be viewed in the same manner.

(ii) Officials who are conducting law enforcement operations while in an aircraft would be considered as being required for the performance of that governmental function. Thus, the carriage of law enforcement personnel performing aerial surveillance would be considered as necessary to perform the law enforcement function. So too, might officials who are being transported for the purpose of engaging in a law enforcement activity. For example, the carriage of officers to the scene of a public disturbance for the purpose of