

## NBAA MEMBER RESOURCE

### FAA Legal Interpretation Permits Reimbursements for Certain Personal Flights

August 29, 2011

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The Federal Aviation Administration (FAA) generally prohibits aircraft operators from seeking reimbursements for the costs associated with flights conducted under 14 CFR Part 91. Certain exceptions to this general prohibition may be found in 14 CFR § 91.501. This NBAA Member resource addresses an FAA chief counsel interpretation that provides an exception under which it may be permissible for an employee to reimburse the company for costs associated with *certain* personal flights.

On December 30, 2010, the FAA issued a letter to NBAA Vice President, Operations, Education & Economics Mike Nichols reinterpreting a 1993 chief counsel opinion, known as the “Schwab Interpretation,” which generally provided that an executive cannot reimburse the company for costs incurred in using the company’s aircraft for his or her vacation flights. The “Nichols Interpretation” now permits companies to accept reimbursements from certain executives of a pro rata share of the cost of certain non-business flights when the aircraft is operated under Part 91 of the FAA Regulations (FAR), only if the following conditions are met:

1. The company’s governing body (e.g., its board of directors) takes action naming the key executive(s) whose travel plans are routinely changed within a short time by the company for business reasons due to his or her position in the company.
2. The company maintains a list of these executive(s) and, upon request, makes the list available to the FAA for inspection.
3. The company keeps records documenting its determination that the executive was traveling on a “routine personal” flight such as a vacation.

## **BACKGROUND**

The 1993 Schwab Interpretation held that flights for an executive's personal purposes are not incidental to, and within the scope of, the company's business for purposes of FAR § 91.501(b)(5), which only permits companies operating flights under Part 91 to accept reimbursements for flights that are not only incidental to, but also within the scope of, the company's business.

When NBAA urged the FAA to reconsider the Schwab Interpretation, NBAA argued:

[F]or many companies, the constant and immediate availability of key personnel is so vital that the company has effective control over their schedules. Indeed, whether a company can afford to allow a key person physically to leave the office at a particular time may not be known until hours before the start of a family vacation or other personal event, whether planned in advance or only recently scheduled. The company may also require the key person promptly to return to the office at any time should a business exigency arise demanding his or her physical presence. Given the limited commercial transportation options, especially when last minute arrangements are required, the company's aircraft is not only essential to the key person's ability to enjoy even a brief vacation with his or her family, or to attend to another personal matter, but is frequently also the only way for the company to maximize the key person's efficiency and effectiveness. In these circumstances, it is the company whose business interests are served by the availability and flexibility the company's aircraft provides.

In the Nichols Interpretation, the FAA agreed that control over a high-level employee or official's schedule and the employee's ability to be recalled at any time are compelling reasons for allowing a company to be reimbursed by an individual whose position merits such a high level of interference into his or her travel plans. In short, the FAA recognized that in some cases executives' travel plans may be subject to change on short notice by the company due to the company's business needs. In these circumstances, the Nichols Interpretation holds that the flights are incidental to, and do fall within the scope of the company's business, and therefore the company may accept reimbursements from its executive for these personal flights under FAR 91.501(b)(5).

*See also:*

- Appendix A: Comparison With Time-Sharing Arrangement
- Appendix B: Frequently Asked Questions
- Appendix C: The legal interpretation to Mr. Star from Donald P. Byrne, assistant chief counsel, regulations division, Interpretation 1993-17 (August 2, 1993) (the "Schwab Interpretation").
- Appendix D: The NBAA letter to the FAA requesting reconsideration of the Schwab Interpretation (March 1, 2010).
- Appendix E: The FAA's reply to NBAA's Mike Nichols (December 30, 2010) (the "Nichols Interpretation").

## **THREE REQUIREMENTS UNDER NICHOLS INTERPRETATION**

### **Corporate Governance Action**

The Nichols Interpretation states that it would be "appropriate" for the board of directors, or equivalent governing body, to list the executives who would be permitted to reimburse the company for certain personal flights. The list of executives must be by name; a blanket description of which individuals may be covered would not be acceptable in the FAA's view. Executives covered under this interpretation should be approved by some action of the board of directors. The action could be in the form of a resolution specific to this issue, or it could be addressed via other formal means, such as an action by the board's compensation committee or via the executive's employment contract, for example.

The interpretation does not require that the executives be named in a particular document or be approved by any particular officer. The best practice for this action is to include it in the corporate minutes. It may also be necessary to refer to the reimbursement arrangement in other documents such as the company's aircraft use policy, personnel handbook, and employment contract(s).

Companies are discouraged from approving a large number of executives to reimburse for personal flights under this interpretation. The FAA does not believe that all officers and directors of a company are likely to be subject to the level of company control discussed in this interpretation.

### **List of Individuals Whose Travel Plans Are Subject to Change**

The Nichols Interpretation requires that the company keep a list of the executives "whose position with the company requires him or her to routinely change travel plans within a short time period." The requirement that the company "routinely" require the executive to change travel plans on short notice may be difficult to meet in the case of an executive whose travel plans have never actually been changed by the company. Companies preparing such a list of executives should consider assembling information supporting their conclusion that the executive's travel plans have in fact been changed by the company in the past.

In many cases, executives on the list will be those executives who do not control their own schedules, since the company can direct them to change travel plans on short notice. However, it would also appear to include a CEO whose personal travel plans may not be subject to any other individual's direction, but whose personal travel plans may nevertheless be routinely subject to change on short notice due to compelling business reasons.

Of course, the spouse and dependents of the executive could not meet the requirements to be included on this list (assuming they are not performing services for the company). Nevertheless, since the executive can reimburse the company for the costs of a flight and since there typically are no significant additional costs incurred by the spouse and dependents accompanying the executive on the flight, it would be permissible for the executive to reimburse the company for the full cost of the executive's personal flight, notwithstanding that the spouse and dependents are also on board. However, if the executive is on a flight for company business and the spouse and dependents are traveling for personal purposes, then reimbursement for the non-business travelers would not be appropriate. Similarly, reimbursement would not be permissible if the spouse and dependents are traveling for personal purposes and the executive is not on the flight.

### **Records Indicating That the Flight Is a Routine Personal Flight**

The Nichols Interpretation only permits reimbursements for flights that are for "routine personal travel such as vacations." In this context, a flight would be routine personal if it is subject to change on short notice for compelling business reasons at the company's direction. While the interpretation discusses the company's ability to recall the executive as a rationale supporting the interpretation, it is not necessary to show that the executive was actually subject to recall while on the trip. It only is necessary that the trip was subject to change at the company's direction on short notice.

In contrast, a flight would not meet this routine personal classification if it is unlikely that the company would require the executive to reschedule the flight, even for compelling business reasons. The interpretation offers as possible examples flights to the wedding or funeral of a close family member or to have necessary or urgent medical treatment.

The interpretation provides the affirmative requirement that the company keep records indicating that it made the determination that the flight was for routine personal travel. It does not specify any particular form for these records. Accordingly, it would appear sufficient to note this determination on the flight logs, on a separate schedule, on the invoice presented to the executive, or in some other records that will be retained by the company.

The interpretation only requires that the records indicate that the determination was made that the flight was for routine personal travel. It does not explicitly state that the records must explain any reasons supporting this determination. However, it would be a good practice for the records to provide some explanation supporting the determination. For example, the records could state that the trip is for a vacation or to visit family.

## ADDITIONAL FAA REGULATORY CONSIDERATIONS

### The Interpretation Applies to Operations Under FAR Part 91 (Not Part 135)

Since the Nichols Interpretation interprets FAR § 91.501(b)(5), it can only apply to aircraft operations under FAR Part 91. Accordingly, a company that charters its aircraft under FAR Part 135 from a charter company could not accept a reimbursement from its executives for their personal flights on the aircraft under the interpretation. (Such a reimbursement would appear to place the company in the position of acting as an indirect air carrier in violation of federal aviation statutes administered by the Department of Transportation. See 49 U.S.C. Subtitle 7.) While a company that owns a fractional interest in an aircraft operated under FAR Part 91, Subpart K, should be able to apply the interpretation, a company that owns a fractional interest operated under Part 135 could not.

### Foreign Civil Aircraft

A U.S.-registered aircraft that is owned, controlled or operated by a foreigner is considered a foreign civil aircraft. One way for a foreign entity to achieve U.S. registration is through an owner trust. If the beneficial owner of the trust (e.g., the company that owns the aircraft) wishes to enter into a time-sharing agreement under FAR § 91.501(b)(6) with an individual (e.g., an executive), the U.S. Department of Transportation (DOT) requires that the aircraft owner obtain special authorization under DOT Regulations § 375.70. Likewise, a special authorization would be required from the DOT to permit such a non-citizen company to accept reimbursements under the interpretation.

See NBAA's web resources on Foreign Civil Aircraft (Part 375) at [www.nbaa.org/part135](http://www.nbaa.org/part135) for more information.

### Truth-in-Leasing

In the case of aircraft operated under FAR Part 91, certain agreements such as leases, including time-sharing agreements, must be filed with the FAA and certain other procedural requirements must be complied with under the truth-in leasing provisions in FAR § 91.23. However, a reimbursement arrangement under the Nichols Interpretation would not be classified as a lease or other document subject to these truth-in-leasing rules.

## TAX CONSIDERATIONS

### Federal Transportation Excise Tax

Federal excise tax (FET) applies to air transportation service. The IRS has ruled that FET applies to time-sharing arrangements, since those arrangements constitute the provision of air transportation. Priv. Ltr. Rul. 9322002 (Feb. 9, 1993). Likewise, companies should expect that reimbursements received under the Nichols Interpretation will be subject to FET. For more information on FET, see the *NBAA Federal Excise Tax Handbook* at [www.nbaa.org/taxes](http://www.nbaa.org/taxes).

### Reimbursements Reduce SIFL Income

When an employee travels on a company aircraft for non-business purposes, the company ordinarily must report the value of the flight to the employee as a taxable fringe benefit. The fringe benefit can be reported at a charter rate or at the Standard Industry Fare Level (SIFL) rate. Treas. Reg. § 1.61-21(b)(6), (g). However, the amount reportable to the executive is reduced by any reimbursement received from the executive for the flight. Treas. Reg. § 1.61-21(b)(1). Therefore, reimbursements received for a personal flight under the interpretation would reduce the amount reportable as a fringe benefit for that flight. This reduction would not constitute a violation of the consistency rule applicable under the SIFL rules. Treas. Reg. § 1.61-21(g)(14).

### Conflicting Definitions of "Routine Personal" Travel

The interpretation's use of the term "routine personal" travel may cause confusion because the tax rules use that same term with respect to the classification of flights as entertainment or non-entertainment. However, the term "routine personal" travel has a very different meaning under the tax rules.

Under the tax rules, companies generally are not permitted to deduct the cost of flights provided to employees for their personal entertainment travel (except to the extent of the amount reported as income to the employee, such as amounts reported at the SIFL valuation). In contrast, companies generally are permitted to deduct the cost of flights for the employee's personal non-entertainment purposes, as long as the appropriate fringe benefit is reported to the employee, such as amounts reported at SIFL rates.

In distinguishing between personal entertainment and personal non-entertainment purposes, the Treasury Regulations explain that "routine personal" travel is generally considered to be non-entertainment. Treas. Reg. § 1.274-2(b)(1). The example of routine personal travel provided in the regulations is commuting to and from work.

While the FAA considers vacations to be "routine personal" travel for purpose of the interpretation, the IRS considers vacations to be entertainment activities and would not classify vacations as routine personal travel. The conflicting definitions of this single term will undoubtedly cause confusion for those keeping records of the purposes of a company's flights. Accordingly, when the term "routine personal" is used in the records, it will be important for the records to clarify whether the term is used in the FAA or the tax context.

See *NBAA Personal Use of Business Aircraft Handbook* for more information on this subject in the tax content at [www.nbaa.org/personal-use](http://www.nbaa.org/personal-use).

## **SECURITIES & EXCHANGE COMMISSION (SEC) CONSIDERATIONS**

### **Reporting of Perquisites**

SEC rules require public companies to disclose in their annual meeting proxy statements detailed compensation information regarding their executive officers and directors. SEC Regulation S-K, Item 402. This information may include perquisites such as the unreimbursed aggregate incremental cost of personal flights.

Public companies may want to consider accepting reimbursements under the Nichols Interpretation to minimize the unreimbursed aggregate incremental costs of personal flights subject to disclosure. While the interpretation is not applicable to travel by a spouse and dependents when the executive is traveling on business, there would not appear to be significant aggregate incremental costs of such a flight.

### **Filing of Form 8-K Notice with SEC**

SEC Form 8-K requires public companies to report material compensation arrangements and other agreements with executive officers and directors. Item 5.02(e), Form 8-K. Accordingly, public companies should consider whether disclosure on Form 8-K is required for reimbursement arrangements under the Nichols Interpretation.

See NBAA's resources on SEC regulations applicable to business aviation at [www.nbaa.org/personal-use](http://www.nbaa.org/personal-use).

## **APPENDIX A: COMPARISON WITH TIME-SHARING AGREEMENT**

On July 24, 2008, the FAA issued a letter to Jeffrey M. Bauer clarifying that a corporation may enter into a time-sharing agreement regarding its aircraft with an individual company official. Many companies use such time-sharing agreements to enable the company to receive reimbursement from the individual company official for such official's personal use of the company aircraft.

Reimbursement arrangements under the Nichols Interpretation bear some similarities to time-sharing arrangements, but there are important differences. The following is a comparison of several aspects of these arrangements:

- Time-sharing arrangements must be documented in a time-sharing agreement filed with the FAA under the truth-in-leasing rules. Reimbursement arrangements under the Nichols Interpretation require the company to keep a list of executives whose travel plans may be changed on short notice, but there is no requirement to file an agreement with the FAA under the truth-in-leasing rules.
- Reimbursements for flights under time-sharing arrangements are limited to a prescribed formula. The Nichols Interpretation permits reimbursements up to the full pro rata cost of the flight.
- Time-sharing agreements authorize reimbursements for any personal travel. To qualify for reimbursement under the Nichols Interpretation, the travel must qualify as "routine personal" travel.
- Companies implementing reimbursement arrangements under the Nichols Interpretation must keep records indicating that the reimbursed flights are routine personal travel. This can cause confusion with records kept for tax purposes, since the tax definition of "routine personal" travel is very different from the FAA definition.
- Time-sharing agreements permit reimbursements for travel by spouse and dependents irrespective of whether the executive is traveling for business or personal purposes, or is not present on the flight. The Nichols Interpretation permits reimbursement of the full cost of certain flights when the executive is traveling for personal purposes notwithstanding that the spouse and dependents are also on board. However, the Nichols Interpretation does not permit reimbursements for travel by the spouse and dependents when the executive is traveling for business purposes or when the executive is not on the flight.
- Both time-sharing arrangements and reimbursement arrangements under the Nichols Interpretation are subject to FET.

## APPENDIX B: FREQUENTLY ASKED QUESTIONS

### 1. How does the FAA define full costs?

FAR § 91.501(b)(5) allows reimbursement for the "carriage of officials, employees, guests and property of a company airplane...and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane."

### 2. Must an executive covered under the Nichols Interpretation pay the fully allocated costs of routine personal (for FAA purposes) flights or is another amount acceptable?

The specific costs listed in FAR § 91.501(b)(5) will be specific to a particular flight and it is the maximum amount that can be reimbursed for flights covered by this interpretation. An amount less than this may be reimbursed, but under no conditions can the company make a profit from flights conducted under FAR § 91.501(b)(5).

### 3. Suppose a flight is scheduled for business purposes, and an executive covered under this interpretation would like to fly along for personal purposes. Can the executive reimburse the company for the pro-rata cost of his or her seat on this business flight?

Because the flight will take place in any event, even if the executive's schedule were changed by the company, this flight would not qualify under the interpretation. If, however, the company dispatched another aircraft specifically for this executive, due to the company-directed schedule change, reimbursement could be obtained under the interpretation.

### 4. Is there any reporting requirement?

- SEC Form 8-K requires public companies to report material compensation arrangements and other agreements with executive officers and directors. Item 5.02(e), Form 8-K. Accordingly, public companies should consider whether disclosure on Form 8-K is required for reimbursement arrangements under the Nichols Interpretation.
- From an FAA perspective, a 91.501(b)(5) reimbursement arrangement under the Nichols Interpretation would not be classified as a lease or other document subject to these truth-in-leasing rules.

### 5. What type of safe harbor calculation could be used to determine expenses? Can I use a third-party benchmark or must I use my actual expenses?

FAA regulations and previous legal interpretations make it clear that a company cannot earn a profit when charging for flights under 14 CFR § 91.501(b)(5). NBAA recommends the company document and retain records of the actual costs for a flight conducted under this arrangement. No charge, assessment, or fee made under this Nichols Interpretation can be in excess of the cost of owning, operating and maintaining the airplane. There is a risk associated in using third party data in that it could exceed your costs of owning, operating and maintaining the airplane. While 91.501(b)(5) describes the actual costs that cannot be exceeded, it does not require that the company seek reimbursement of the full costs of owning, operating, and maintaining the aircraft.

### 6. We currently have a time-sharing agreement. Must we void that agreement and start using this interpretation?

Each company may have a different perspective and your aviation legal counsel can advise on the pros and cons of voiding, or keeping in place, a time-sharing agreement. Remember that not all employees will be deemed so important to the company that they could be called back on a moment's notice. Similarly, there is no guarantee that all flights for key employees approved under such a policy will fall into a category that allows reimbursement, so there may be value in maintaining time-sharing agreements.

## APPENDIX C: 1993 SCHWAB INTERPRETATION

August 2, 1993

Letter to Mr. Star

This is in response to your letter of June 22, 1992. We regret the delay in responding to you.

Your question concerns Section 91.501 of the Federal Aviation Regulations of Subpart F of the Federal Aviation Regulations (FAR). Subpart F applies to the operation of large and turbojet-powered multiengine civil airplanes of U.S. registry not required to be operated under Parts 121, 125, 129, 135 and 137 of Chapter 1 of the FAR.

You advise that your client, Charles Schwab & Co., Inc. (the "Company") leases, without crew, an airplane ("the airplane") covered by the applicability of Subpart F. The airplane is used by the Company for usual corporate purposes including transportation of officials, employees and guests of the Company.

Section 91.501(d) provides, in pertinent part, as follows: (d) The following may be charged, as expenses of a specific flight, for transportation as authorized by paragraphs (b)(3) and (7) and (c)(1) of this section:

Paragraph (b)(3) addresses demonstration of an airplane to prospective customers. Paragraph (b)(7) allows the carriage of property under certain circumstances. It does not apply to carriage of persons. We believe it is clear that neither of these paragraphs applies to the carriage you describe. Paragraph (c)(1) defines "time sharing agreement." Please note that a lease is involved in a time sharing agreement. There is no indication that the carriage you describe takes place pursuant to a time sharing agreement.

The paragraph that applies to the carriage of officials, employees and guests of a company is (b)(5). It reads as follows: (5) Carriage of officials, employees, guests and property of a company on an airplane operated by that company, or the parent or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating and maintaining the airplane, *except that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company* (emphasis supplied).

We call to your attention the underscored language. Agency interpretations of this language have held that no charge may be made when officials, employees and guests are carried on a company airplane for vacation, pleasure trip or similar purposes. Their presence on the airplane is not considered to be within the scope of, and incidental to, the company's business.

Your letter contains extensive arguments and theories designed to persuade us that the Charles Schwab Company should be allowed to charge Mr. Schwab when he is carried for vacation, pleasure or similar purposes. We have considered each argument and theory. Without intending to detract from your eloquence, we must advise you that we do not agree. It may very well be that the Company wants to maintain prompt communications with Mr. Schwab when he is on pleasure trips. That desire, however, does not alter that fact that he is traveling for pleasure. As stated, the Agency's interpretations have held that such carriage is not within the scope of, and incidental to, the company's business. The ability of the Company to communicate with him is in no way dependent upon charging him for carriage for such purposes.

You also mentioned IRS considerations. Please be advised that interpretation and application of aviation safety regulations is not dependent on, or affected by, what may be consistent with IRS regulations.

We noticed your reference to an operations company that Charles Schwab & Co. Inc. uses to perform maintenance and operation of the airplane. We also note that you state that control of operation of the airplane is under Charles Schwab & Co., Inc. We do not make a finding regarding whether or not the Company has "operational control" of the operation of the airplane

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(See 14 CFR Section 1.1) Whether or not the Company has operational control of its airplane depends upon an analysis of all the facts relevant to its operation. One of the elements to be considered is the written agreement between the operations company and the Charles Schwab Company and how the parties implement that agreement. The local Flight Standards District Office, in this case the FSDO and Burlingame, together with the Assistant Chief Counsel for the Western-Pacific region, should review all pertinent factors bearing on operational control.

The terms "operate" and "operational control" are defined in Part I of the Federal Aviation Regulations (14 CFR 1.1) as follows: Operational control with respect to a flight means the exercise of authority over initiating, conducting or terminating a flight.

A person has operational control if that person exercises complete control over the phases of aircraft operation requiring aviation expertise. Operate, with respect to aircraft, means use, cause to use or authorize to use aircraft for the purpose of air navigation including the piloting of aircraft with or without the right of legal control (as owner, lessee or otherwise).

We are sending a copy of this letter to the Burlingame FSDO and the Assistant Chief Counsel at Los Angeles. If a determination of operational control of the Company's airplane has not been accomplished either or both will contact the Company.

Again, we regret that delay in responding to you. Thank you for your patience.

[signed]

Donald B. Byrne

FAA Assistant Chief Counsel, Regulations Division

## **APPENDIX D: NBAA LETTER TO FAA REQUESTING REINTERPRETATION**

March 1, 2010  
Mr. David Grizzle  
Chief Counsel  
Federal Aviation Administration  
800 Independence Avenue, SW  
Washington, DC 20590

Dear Mr. Grizzle:

In 1993, the FAA issued an interpretation in response to the request made on behalf of Charles Schwab & Co., Inc. (the "Schwab Interpretation") that Mr. Schwab be permitted to reimburse the company when he is carried for vacation, a pleasure trip or similar purposes. The FAA determined that under 14 C.F.R. §91.501(b)(5), no charge may be made when officials, employees, and guests are carried on a company airplane for vacation, a pleasure trip, or similar purposes. This interpretation was based on the FAA's determination that the presence of the official, employee or guest on the airplane is not "within the scope of" the company's business.

Based on the significant changes in the nature of business and the workplace and advances in technology since that interpretation, NBAA respectfully requests the FAA to reconsider its interpretation and, upon reconsideration, allow a company to obtain reimbursement from limited, key personnel when the company makes a written determination that it is within the scope of the company's business that the individual fly on the company aircraft even when traveling for vacation or other personal purposes.

For many companies, business is today conducted globally on a 24/7 basis. Many companies outfit their aircraft so that the persons being carried are in constant communication with the company even if traveling for vacation, a pleasure trip, or similar purposes. In addition, even for companies that do not have high technology communication systems installed on their aircraft, the company's ability to provide the key personnel on the aircraft with a suitable inflight working environment enables them to maximize productivity during flight, thereby enhancing the business efficiency of the company.

In addition, for many companies, the constant and immediate availability of key personnel is so vital that the company has effective control over their schedules. Indeed, whether a company can afford to allow a key person physically to leave the office at a particular time may not be known until hours before the start of a family vacation or other personal event, whether planned in advance or only recently scheduled. The company may also require the key person promptly to return to the office at any time should a business exigency arise demanding his or her physical presence. Given the limited commercial transportation options, especially when last minute arrangements are required, the company's aircraft is not only essential to the key person's ability to enjoy even a brief vacation with his or her family, or to attend to another personal matter, but is frequently also the only way for the company to maximize the key person's efficiency and effectiveness. In these circumstances, it is the company whose business interests are served by the availability and flexibility the company's aircraft provides.

The availability of business aircraft for such travel purposes also enables the company to attract and retain high level and high quality key officers, directors, and other key personnel.

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At the same time, companies, especially publicly traded companies, are increasingly sensitive to the need to be reimbursed for the cost of these flights. With respect to publicly traded companies, shareholders may expect full reimbursement. Moreover, many officers, directors and key personnel want to reimburse the company fully. While the company and its key personnel could enter into a time sharing agreement, reimbursement under a time sharing agreement is limited under subsections 91.501(c) and (d) to certain variable costs, whereas reimbursement permitted under subsection 91.501(b)(5) covers the proportionate costs of owning, operating, and maintaining the aircraft.

While most company employees do not fall within these circumstances, we ask the FAA to recognize that for certain companies and certain of their officers, directors and other key personnel, the realities of the modern day workplace are such that it is in the fundamental interests of the company to require certain individuals to use the company aircraft, even when their travel is for vacation, a pleasure trip, or a similar purpose. Thus, the company insists that the individual use the business aircraft for the company's benefit, so the flight should be regarded as within the scope of the company's business.

We recognize that it is important to confine this request for reconsideration to appropriate cases; that is, distinctions must be drawn to identify the persons that may, under certain circumstances, reimburse a company under §91.501(b)(5) for the use of the company's aircraft for vacation, a pleasure trip, or similar purposes. We have looked to other Federal agencies to see if they have drawn any distinctions between company directors, officers or other key personnel that might be useful. Although we recognize that the FAA is not bound by the actions or guidance of other agencies, we believe it is useful to note that both the SEC and IRS employ the concept of "specified individuals" in the context of certain reporting requirements and taxation issues. "Specified individuals" generally include officers, directors and more than 10 percent owners of a company. The officers are defined by reference to securities laws and include the principal financial officer, principal accounting officer or controller, vice presidents in charge of a principal business unit, division or function and any other officer who performs a similar policy-making function. Such a classification could be of use to the FAA in this situation.

To further limit the application, the FAA may wish to require a company to determine in writing, such as a resolution of the company's board (or equivalent governing body) or other formal action of the entity, that the use of the company's aircraft by a certain "specified individual" is within the scope of the company's business, regardless of the purpose of the specified individual's travel. Such a requirement would ensure that a company carefully evaluates whether its business purpose are served in providing the company aircraft to an individual for vacation, a pleasure trip, or a similar purpose. We believe that in today's business climate, the company is the party in the best position to make this "scope" determination. Such a determination would allow the company to demand and accept reimbursement, and the specified individual to reimburse the company, for the full proportionate costs of owning, operating, and maintaining the aircraft.

We are not asking the FAA to overturn or rescind its Charles Schwab interpretation. Rather, we ask the FAA to recognize that in certain limited circumstances, a company may determine it is within the scope of the company's business for a certain individuals to use the company aircraft when traveling on vacation or for pleasure or personal purposes.

Sincerely,

[signed]

Mike Nichols

NBAA Vice President, Operations, Education & Economics

## APPENDIX E: FAA INTERPRETATION LETTER TO NBAA

December 30, 2010

Mr. Mike Nichols

National Business Aviation Association

1200 18th Street NW, Suite 400

Washington, DC 20036

Dear Mr. Nichols,

This is in response to your March 1, 2010 letter that requested the FAA consider revising the long-standing "Schwab Interpretation." See Legal Interpretation to Mr. Star from Donald P. Byrne, Assistant Chief Counsel, Regulations Division (Aug. 2, 1993). Specifically, you asked the FAA to consider narrowing its broad prohibition provided in the Schwab Interpretation by allowing a company to seek reimbursement for certain high-level employees and officials using the company aircraft for personal travel.

The FAA generally prohibits aircraft operators from seeking reimbursement for the costs associated with flights conducted under 14 C.F.R. § 91. Certain exceptions to this general prohibition may be found in 14 C.F.R. § 91.501. One such exception provides for the limited reimbursement for the "carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or subsidiary of that parent, when the carriage is within the scope of, and incidental to, the business of the company ... and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating and maintaining the airplane." See 14 C.F.R. § 91.50 1(b)(5); see also Legal Interpretation to BSTC Corporation from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations (June 22, 2009) (discussing what items and charges may be included as costs of owning, operating, and maintaining the airplane and the appropriate methods used by operators to calculate these expenses).

You requested the FAA allow a company to obtain reimbursement from limited, high-level employees and officials when the company makes a written determination that it is within the scope of the company's business that the individual fly on the company aircraft during personal travel. You note several instances where personal travel on company aircraft may be within the scope of the company's business, and therefore reimbursement would be appropriate. First, the business may require constant communication with the employee and/or the employee must conduct meaningful, real-time work aboard the company aircraft. Additionally, you note the constant and immediate availability of key personnel may be so vital that the company has effective control over the employee's schedule and the employee might be recalled at any time during personal travel.

The Office of the Chief Counsel sought public comment on this issue due to its possible significant impact on the regulated community. In July, we published a proposed interpretation in the Federal Register. See Proposed Legal Interpretation 75 Fed. Reg. 39,196 (July 8, 2010).

The FAA rejects the NBAA's argument that personal travel is within the scope of, or incidental to, the company's business when the employee would need to remain in constant contact with the company or have the opportunity to conduct meaningful, real-time work on the company aircraft. The advances in communication technology weaken the argument that the use of company aircraft is necessary for personal travel for these reasons.

The FAA agrees, however, that control over a high-level employee or official's schedule and the employee's ability to be recalled at anytime is a more compelling argument for allowing a company to be reimbursed for the personal travel by an individual whose position merits such a high level of interference into his or her travel plans. High-level employees and officials

(continued)

may be unable to reliably schedule personal travel due to the nature of their employment. The FAA recognizes that routine personal travel, such as vacations, could be cancelled up to the last moment because of compelling business concerns. As such, the company may determine that it is more efficient to provide the company aircraft for the entire trip, rather than reimburse the individual for the cost of cancelled commercial airfare. Likewise, the company may accommodate the individual's altered plans by providing the company aircraft when the compelling business concern has been resolved. The company's ability to alter an individual's travel plans on short notice may render a flight both within the scope of, and incidental to, the company's business. Thus, the FAA determines that a company could be reimbursed for the pro rata cost of owning, operating, and maintaining the aircraft when used for routine personal travel by an individual whose position merits such a high level of company interference into his or her personal plans.

It is important to note that not all personal travel would meet the conditions for reimbursement. A high-level employee or official may have personal travel plans that are unlikely to be altered or cancelled, even for compelling business reasons. For example, absent an emergency, it may be unlikely that a high-level employee would be expected to miss a significant event, such as a wedding or funeral of a close family member. It is also unlikely that an employee would be expected to cancel or reschedule necessary or urgent medical treatment. These examples, however, are not a strict prohibition on the reimbursement for specific types of personal travel in all instances. Rather, they are provided as guidance to companies as they develop their policies and determine whether the personal travel in question would qualify for reimbursement. The company should keep records indicating that it has made a determination that the flight in question was of a routine personal nature.

In order to prevent abuse of the proposed change, a company should maintain and regularly update a list of individuals whose position with the company require him or her to routinely change travel plans within a short time period. The company should be prepared to share this list with the FAA if requested. The FAA recognizes that the Securities Exchange Commission and Internal Revenue Service employ the concept of "specified individuals" in the context of certain reporting requirements and taxation issues. These individuals generally include officers, directors, and more than 10 percent owners of a company. The FAA does not believe that all officers and directors of a company are likely to be subject to the level of company control discussed above. Rather than issue a blanket description of which individuals may be covered by the proposed revision, the FAA believes it is appropriate for the company's board, or equivalent governing body, to list which company individuals are so situated.

We appreciate your patience and trust that the above responds to your concerns. This response was prepared by Nancy Sanchez, an attorney in the Regulations Division of the Office of the Chief Counsel, and was coordinated with the General Aviation and Commercial Division of Flight Standards Service. Please contact us at (202) 267-3073 if we can be of further assistance.

Sincerely,

[signed]

Rebecca B. MacPherson

FAA Assistant Chief Counsel for Regulations, AGC-200

## **ACKNOWLEDGMENTS**

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