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THE CHANGING FACE OF PASSENGER AIR TRANSPORTATION: THE BLURRY LINE BETWEEN PART 121 AND 135 OPERATORS

KENT S. JACKSON
LORI N. EDWARDS

I. INTRODUCTION

IN THE PAST one hundred years, aviation has transformed from the first powered aircraft that carried Orville Wright aloft on December 17, 1903,1 to an industry that transports individuals and cargo throughout the world. This industry, while diverse enough to include everything from gliders and hot-air balloons, to single-engine aircraft, to the largest transport category aircraft, is divided into only four categories of operating regulations: General Aviation Part 91, On-Demand/Commuter Part 135, Transport Category Aircraft Part 125, and Domestic/Flag/Supplemental Part 121.2 Every type of manned aviation operation falls into at least one of these categories.3 The real issue is into which category or categories it falls. This is the question that may be answered very clearly or muddied even further by a joint FAA/industry endeavor that has begun already: the Part 125/135 Aviation Rulemaking Committee.4

From a consumer standpoint, if an individual wants to buy a ticket for one seat to travel from point A to point B, he or she contacts an airline. If an individual wants to fly from Point A to Point B, on her schedule, she contacts a charter operator. However, another type of operator exists, called a Commuter, which provides services that can look like airline or charter service, depending on the expectation of the customer.

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3 See id. §§ 91.1(a), 121.1, 125.1, 135.1.
The Federal Aviation Administration (FAA), realizing that the public could mistake certain operators as airlines when they were not, and that questions involving the classifications of new types of aircraft and operations were beginning to be asked frequently, established a Part 135/125 Aviation Rulemaking Committee.\(^5\) While the title of the Committee suggests that only Parts 125 and 135 will be reviewed, the scope of its review and rewrite is broad, including Parts 91, 119, and 121.\(^6\) Essentially Madam Administrator has given a group of industry representatives carte blanche to review and submit their recommended rewrites back to the FAA as the aviation industry's solution to any problems with any of the operating regulations for aircraft.\(^7\) With such an extensive scope of review, one of the main issues, as pointed out by several comments to this rulemaking action, is applicability: which rules govern which types of operations?\(^8\)

The issue of applicability is most important as it relates to Parts 119, 121, and 135.\(^9\) Parts 121 and 135 govern all commercial transportation in aircraft, meaning that if passengers are going to pay for their air travel, they will be transported by either a Part 121 or Part 135 operator.\(^10\) To adequately draw the distinction between these two types of operators, the question of applicability must be focused on the issue of method of classification. To make a workable regulation that directs operations to the correct categories, a method of identifying the operation is a necessary first step. Once the method is chosen, 14 C.F.R. section 119.21 merely lays out the defined categories and directs

\(^5\) Id. ("Industry dynamics, new technologies, new aircraft types and configurations, and current operating issues and environment mandate a comprehensive review and rewrite of sections 135 and 125.").

\(^6\) Id. ("This review will also include related portions of parts 91, 119, 121, and other regulations.").

\(^7\) Id.


\(^9\) 14 C.F.R. § 119.21(a) (2004).

\(^10\) Id. § 119.1(a)(1) (Part 119, which funnels operators into 135 or 121, applies "to each person operating or intending to operate civil aircraft [a]s an air carrier or commercial operator, or both, in air commerce.").
operators to either Part 121 or 135. However, choosing the mode of classification may cause the greatest difficulty because each option creates a line that puts certain operators under less extensive regulation than others. Throughout the regulations, different levels of oversight and compliance exist based on a myriad of classifications including the following: scheduled/unscheduled operations, size of aircraft, complexity of aircraft, and location of operations. Considering all the aspects of classification and the interests of the operators that would be affected by a change, it is the position of this article that the method of classification used to draw the distinction between operation under Parts 121 and 135 should be whether the operation is scheduled or unscheduled, and this distinction should be clearly defined and consistent with the plain meaning of the words “scheduled” and “unscheduled.”

This note will begin in Part II by exploring the historical distinctions between Parts 121 and 135, and how these distinctions have evolved into the current regulatory structure. Evaluating the current state of regulation, it will proceed in Parts III and IV into an analysis of the statutory underpinnings of the regulations and how they are currently applied in the field. This analysis will demonstrate the conclusion that the scheduled/unscheduled distinction should be the threshold question for classification under Part 119.

II. THE DISTINCTIONS BETWEEN PARTS 121 AND 135 FROM THE PAST TO THE PRESENT

A. REGULATORY EVOLUTION PRIOR TO 1988

1. The Road to Regulation

Although powered flight has been around for a century, the regulatory structure that governs it is not nearly as old. After the Wrights’ first flight and before the creation of the Air Commerce Act of 1926, a period existed where aircraft were just built

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11 Id. § 119.21(a) (directing Domestic, Flag, Supplemental, Commuter, and On-Demand Operations, which are all defined terms in 14 CFR § 119.3, into either Part 121 or Part 135).
12 Id. The distinction between Domestic and Supplemental is the presence of a schedule, the distinction between Domestic and Commuter is the size of the aircraft, the distinction between Supplemental and On-Demand is the size of the aircraft, etc. See id. § 119.3.
13 Id. §§ 119.3, 119.21.
and people just flew, with little or no oversight.\textsuperscript{15} When this golden age of barnstorming was coming to an end many pilots were asking: "you gonna license the clouds, and the rain, and put highways in the sky for people to follow?"\textsuperscript{16} In answering this question the government replied "yep, all that too, along with airlines and air mail, and there's going to be big money in it too, if you're smart."\textsuperscript{17}

Although the regulation of aviation began in 1926,\textsuperscript{18} the modern rules that developed distinctions between types of aviation were not established until 1953.\textsuperscript{19} In 1953 the Civil Aeronautics Board (CAB), faced with regulating a growing industry to which turbine-powered aircraft had been added,\textsuperscript{20} set the line of distinction based on the maximum certificated takeoff weight ("MCTW") of the aircraft.\textsuperscript{21} If an aircraft's MCTW was "12,500 pounds or less," it was considered a small aircraft subject to the regulations under Part 135.\textsuperscript{22} If an aircraft had a MCTW higher than 12,500 pounds, it was classified as a large aircraft, and operated under Part 121.\textsuperscript{23} Although the line was based on a distinction in the MCTW of the aircraft, the true thrust behind the distinction was the predicted type of operation for different aircraft: large aircraft for scheduled operations and small aircraft for on-demand operations.\textsuperscript{24}

This distinction served several purposes and was intended to help the CAB separate the major airlines of the day from the on-demand operators; a necessary distinction because only the airlines were required to obtain a "Certificate of Public Convenience and Necessity" (CPCN).\textsuperscript{25} Based on the MCTW distinction, the commercial aviation market was not split evenly. Precious few airlines had received a CPCN, yet thousands of air


\textsuperscript{16} The Great Waldo Pepper (Paramount Pictures 1975).

\textsuperscript{17} Id.


\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id.
taxi operators had been certificated. At first glance, this split may not seem to have served the purposes of the CAB, because the distinction was so one-sided. Prior to 1970, it generally served its purpose of separating the scheduled carriers from the on-demand carriers. The air taxi operators generally were small and got most of their business from ancillary services like aircraft rental and pilot training. Some of them most likely provided light scheduled service, but the majority of scheduled air transportation was provided by the airlines that were governed by Part 121.

2. Industry Response to First Regulations

As time went by, the aircraft manufacturers began to take notice of the distinction the CAB had drawn. To capitalize on the huge gap between the airlines and the small air taxi operators, aircraft manufacturers began to design and manufacture aircraft with a MCTW of 12,500 pounds or less, and as many as twenty passenger seats. With aircraft that would not force an operator into the more burdensome regulation of Part 121 and that could really be used for transportation of passengers, air taxi operators slowly began to offer scheduled services, much like the airlines. As Part 135 operators increasingly took note of the economic advantages of offering scheduled service in small aircraft under Part 135, a new class of operators was born: scheduled commuters. Although this new class of operators represented only a small portion of the total number of air taxi operators, they had succeeded in creating a market foothold that still survives today.

26 Id.
27 Id. This section reads:
Before 1970, the typical air taxi operator was a fixed-base operator, usually at a small airport, that owned fewer than five airplanes and provided on-demand air transportation as well as other services, such as training new pilots and selling and renting small airplanes. Typically, the air taxi portion of such an operator’s business was a small part of that business and rarely involved any scheduled operations.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id. Commuter Air Carriers are still governed under Part 135. 14 C.F.R. § 135.1 (2003).
3. Economic Deregulation

One of the biggest regulatory changes to hit the aviation industry occurred in 1978 with the Airline Deregulation Act. Prior to this legislation, Part 121 airlines were very restricted in their ability to provide service. Part 121 airlines were required to obtain approval from the CAB to act as an air carrier and to serve a certain market along a certain route and also were required to adhere to the rates for carriage set by the CAB. Generally, as a part of this approval, they also were required to serve small markets in between large cities along their route, even though it was not economical to serve these markets with large aircraft. After deregulation, the airlines were free to abandon these smaller markets, which opened the door for the traditional air taxi operators and the newer scheduled commuter operators to take over. Through alliances between the Part 135 operators and the Part 121 operators, the traditional hub and spoke system was born, where passengers in remote areas would fly on small aircraft to an airline hub, where they would be pooled together with passengers from many other departure points and fly to their final destination. Under these alliances, passengers would be transported by two completely separate operators, governed by two different sets of regulations. Recognizing the disparity of the new situation, the FAA immediately upgraded the standards under Part 135 to bring them more in line with Part 121.

Beginning in 1978, the operational aspects of Part 135 changed several times to continue alignment with Part 121. Most of these changes centered around the equipment on the

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35 Id.
40 Id.
41 Id.
42 Id.
43 Id.
PART 121 AND 135 OPERATORS

aircraft with the general result being that the same aircraft operated under Part 121 or Part 135 along the same route would generally be equipped with the equivalent minimum level of instrumentation and safety equipment. However, differences between Parts 121 and 135 still exist. The most important of these is the economic advantage still available under Part 135 due to its increased flexibility over Part 121 in many instances.


1. The Effects of Deregulation

Deregulation allowed the aviation industry to explode. With the loosening of economic regulation and the accompanying growth in the industry, the aviation industry reached a point in 1988 where there were 130 Part 121 air carriers (airlines), 170 Part 135 commuter air carriers (providing scheduled service with smaller aircraft), and 3,700 Part 135 on-demand operators (air charter operators), and an annual turnover rate of 450 operating certificates. Not only was there a large number of operators in the industry, and a large number entering and leaving each year, these operators were now using much more complex, turbine-powered aircraft with seating for up to thirty passengers. Many operators added even more complexity by conducting more than one type of air transportation. It was not uncommon for one of the large air carriers to conduct domestic, supplemental, and commuter operations, assuming the burden of keeping each separate operation in compliance with the correct set of operating regulations.

In the same year that the Airline Deregulation Act was passed, the FAA, in an effort to streamline certificate processing in the face of the flood of applications submitted each year, introduced Special Federal Aviation Regulation 38 (“SFAR 38”).

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44 Id.
45 Id. See discussion infra Part IV for more information on the exact advantages under the current regulations.
47 Id.
48 Id.
49 Id.
Under SFAR 38 the old system of issuing separate certificates for each type of operation was abandoned and replaced with a system where an applicant was issued a single certificate for air carrier operations—an Air Carrier Operating Certificate—and a single certificate for all other operations—an Operating Certificate. 51 Both of the new types of certificates covered operations under 121 or 135 as specifically authorized in the certificate. 52 The operations authorized and the regulations governing were laid out in the carrier’s operations specifications. 53 This simplification through SFAR 38 was intended to be a temporary entry into to the regulatory fray left in the wake of deregulation. Therefore, the FAA did not revise the affected Federal Aviation Regulations (“FAR”) to bring them in line with SFAR 38. 54 The FAA’s reasoning for not updating the FAR was the potential for additional Congressional action on deregulation. 55

2. Abandoning the MCTW Distinction

While waiting for Congressional action on the regulations, the FAA took the first step toward changing the Part 121/135 distinction since the initial MCTW distinction was established. 56 On October 9, 1980, the FAA issued a Final Rule, which focused primarily on updating the aircraft certification requirements for large aircraft and redefining the distinction between Part 91 (General Aviation) and commercial operations. 57 The driving forces for this rulemaking effort were the recommendations resulting from a large aircraft study conducted by the Assistant Secretary for Safety and Consumer Affairs under the Secretary of Transportation to create new regulations for large, turbine, pressurized, and aircraft operating in non-common carriage. 58 As a part of these changes, the Final Rule also abandoned the

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52 Id.

53 Id.

54 Id.

55 Id.

56 Certification and Operation Rules for Certain Large Airplanes; Establishment of Part and Miscellaneous Amendments to Existing Regulations, 45 Fed. Reg. 67214 (Oct. 9, 1980).

57 Id.

58 Id.
MCTW distinction between Parts 121 and 135, and replaced it with another distinction based on the type of aircraft used.\textsuperscript{59}

To address the poor safety record of large aircraft and the problems with classification of operations, the FAA created Part 125 as the fourth set of certification and operating regulations.\textsuperscript{60} All aircraft with "a seating capacity of 20 or more passengers, or a maximum payload capacity of 6,000 pounds or more" that were not regulated under Part 121 or 135 were moved to the new Part 125, where the standards were more in line with Part 121.\textsuperscript{61} To further the goal of alignment between the various regulations and in the spirit of simplifying distinctions as proposed by SFAR 38, the FAA also assigned a seating capacity and maximum payload capacity as the dividing line between Parts 121 and 135.\textsuperscript{62} The line, drawn at "a seating capacity of 30 or less or a maximum payload capacity of 7,500 pounds or less" for Part 135 and more than thirty seats or 7,500 pounds for Part 121, seemed to be a natural break at the time for properly classifying operators engaged in common carriage to increase industry safety based on the accident data reported by National Transportation Safety Board (NTSB).\textsuperscript{63}

Substantive action by Congress directed toward the regulations never came, and by 1985 the FAA was forced to extend SFAR 38 as SFAR 38-2.\textsuperscript{64} In addition to extending the original SFAR 38, 38-2 also sought to clarify, yet again, which regulations applied to which types of operations.\textsuperscript{65} Part of this clarification included a definition of "scheduled operations" identifying them as "operations that are conducted in accordance with a published schedule for passenger operations, which includes dates or times (or both), that is openly advertised or otherwise made readily available to the general public."\textsuperscript{66} However, SFAR 38-2 was also only a temporary fix to the applicability problem, which merely gave the FAA time to determine the best course of action regarding Parts 121 and 135.\textsuperscript{67}

\textsuperscript{59} Id.
\textsuperscript{60} Id. at 67215.
\textsuperscript{61} Id. at 67217.
\textsuperscript{62} Id. at 67216.
\textsuperscript{63} Id.
\textsuperscript{65} Id. at 39853.
3. The First Steps to Fix the Problems from Deregulation

By 1988, the FAA had finally decided to take the "first step towards permanent solutions to [the] problems resulting from industry changes since economic deregulation." On October 12, 1988, the agency issued a Notice of Proposed Rulemaking (NPRM) announcing as its first goal to create a new Part 119 to replace the SFAR 38 series as the "permanent guide" to applicability for Parts 121 and 135. The secondary goal of the NPRM was to revise the certification and operating requirements under Parts 121 and 135 to bring them in line with the changes in the industry. While the FAA considered Part 135 "to provide a level of safety comparable to part 121," it recognized that changes in the industry necessitated another look at the thirty seat/7,500 pound distinction. Mirroring the motivation for the 1980 rulemaking, the proposed changes to Part 135 under the 1988 NPRM were also prompted by accident data; however, this time the FAA zeroed in on the Part 135 commuter group, instead of the much broader large aircraft category.

In an initiative to push more of the Part 135 operators under the stricter guidance of Part 121, the FAA proposed to drop the thirty seat portion of the distinction down to ten seats and clarified that the distinction of "10 or more" would apply to scheduled operations, with all non-scheduled operations that did not fall into Part 125 based on size remaining under Part 135. In addition to the distinction based on seating capacity, the FAA also proposed that all turbojets, of any size, used in "scheduled passenger-carrying operations" also would be thrown into Part 121. Referring back to its statutory mandate "to consider 'the duty of an air carrier to provide service with the high-

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68 Id.
69 Id.
70 Id.
73 See discussion infra Part V (for an explanation of the differences between Part 135 and Part 121).
75 Id.
est possible degree of safety in the public interest," the FAA opined that the move from thirty seats to ten seats was the best option to classify those operators conducting scheduled service to better serve their duty to promote air safety.\footnote{Id. (quoting 49 U.S.C. 44701(d)(1)(A)).} This dividing line would move most of the commuter operators at the time under the Part 121 umbrella, with the exception of the operators in Alaska and Hawaii, where air transportation is vastly different and resembles the true vision of an air taxi operator even with scheduled operations.\footnote{Id. at 16234.} The FAA's proposal to move the dividing line to ten seats also squared with the current NTSB proposal for reducing accidents.\footnote{Id. at 16236.}

In addition to the changes in the aircraft distinction, the FAA was also being pressured by the industry to change the definition of scheduled operations.\footnote{Passenger-Carrying and Cargo Air Operations for Compensation or Hire, 53 Fed. Reg. 39852 (Oct. 12, 1988).} As strictly construed under SFAR 38-2, an operator with even a single flight whose date or time was published or advertised would be required to operate under Part 121.\footnote{Id. at 39854.} With the 1978 promulgation of the Public Charter rules, the FAA felt that charter operations had become more viable and would too closely resemble scheduled operations to remain under Part 135 if the SFAR 38-2 definition was retained.\footnote{Id. See discussion infra Part IV.B.3 for more information on Part 380.} So, to allow the charter operators regularly serving a set market to remain under Part 135, the FAA proposed a "frequency of operation" test.\footnote{Passenger-Carrying and Cargo Air Operations for Compensation or Hire, 53 Fed. Reg. 39852, 39854 (Oct. 12, 1988).} If the operator made fewer than 5 trips per week between the same two points then they could remain under Part 135.\footnote{Id.}

On December 20, 1995, the FAA adopted the changes to Parts 121 and 135, making Part 135 solely for "scheduled passenger-carrying operations in non-turbojet airplanes with 9 or fewer passenger seats, on-demand operations with airplanes with 30 or fewer passenger seats, operations in single-engine airplanes, and operations in rotorcraft."\footnote{Commuter Operations and General Certification and Operations Requirements, 60 Fed. Reg. 65832, 65837 (Dec. 20, 1995).} The majority of the commenters opposed to the new rule were the small commuter air carriers be-

\begin{thebibliography}{99}
\bibitem{76} Id. (quoting 49 U.S.C. 44701(d)(1)(A)).
\bibitem{77} Id. at 16234.
\bibitem{78} Id.
\bibitem{80} Id. at 39854.
\bibitem{81} Id. See discussion infra Part IV.B.3 for more information on Part 380.
\bibitem{83} Id.
\end{thebibliography}
ing forced to move into Part 121, but a few also objected to any change in the current distinction between scheduled and unscheduled operations, which allowed even on-demand operators to conduct certain amounts of scheduled operations. As a result of these comments, the FAA decided to move the aircraft distinction from thirty seats to ten, but decided to retain the “frequency of operation” phrase outlined in SFAR 38-2. The FAA reasoned that the “frequency of operation” condition would not affect Part 121 and would be a useful distinction in Part 135 for small, non-turbojet aircraft with nine or fewer seats where the type of operation was so varied that some leeway on occasional, scheduled flight should be allowed. In response to several comments about the test itself, the final definition was revised to include flights where the operator “offers in advance the departure location, departure time, and arrival location,” with the “frequency of operations” test being moved under the definition of “On-Demand.” The FAA also reasoned that the operation of the smaller jets was too similar to operations under Part 121 to be allowed to remain in Part 135; therefore, scheduled operations in any size of turbojet powered aircraft would fall under Part 121.

To streamline the process of determining which regulations a particular operator would be certificated under and operate under, the FAA adopted the proposal to create Part 119. Part 119 was designed to act as a funnel through which each particular operation would pass and be channeled toward the correct certification and operating Part. This meant that the key to its proper operation was to get the definitions of the different types of operations correct. As to be expected, these definitions were the main points of contention among the commenters. The general sentiment among commenters was that the distinctions between the operations were not drawn clearly enough, to which the FAA replied that it was comfortable with the definitions it had established and would retain them until such a time as they no longer suited the industry’s needs.

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85 Id.
86 Id. at 65838.
87 Id.
88 Id. at 65915-16 (codified at 14 C.F.R. § 119.3 (2003)).
89 Id. at 65838.
90 Id. at 65879.
91 Id. at 65837.
92 Id. at 65838.
III. THE CURRENT REGULATORY SCHEME

The distinction between being classified as a Part 121 or Part 135 operator today exists through the gateway of Part 119. If an individual desires to operate any civil aircraft "as an air carrier or commercial operator, or both, in air commerce" or any large aircraft—twenty seats or more or 6,000 pound maximum payload capacity or more—then Part 119 applies.\(^93\) The heart of the applicability of Part 119 is contained in section 119.21(a) where Domestic, Flag, Supplemental, Commuter, and On-Demand operations are routed to either Part 121 or 135.\(^94\) To act as a direct air carrier the individual must "provide[] or offer[] to provide air transportation and [have] control over the operational functions performed in providing that transportation."\(^95\) The definition of a direct air carrier is essentially a more focused version of the definition of common carriage, which as adopted by the FAA includes the following elements: "1) holds itself out to the public as willing to 2) transport persons or property 3) for compensation or hire."\(^96\)

Under section 119.21(a) Domestic, Flag, and Supplemental operations are routed into Part 121, and Commuter and On-Demand into Part 135.\(^97\) To determine which type of operation is being conducted an operator must refer back to the definitions in section 119.3, where the following distinctions for fixed-wing aircraft conducting common carriage operations in the United States are made: Domestic, Supplemental, Commuter, and On-Demand.\(^98\)

The most complex operations utilizing the largest aircraft fall under the distinction of a Domestic operation, with characteristics that include: conducting scheduled operations and using any turbojet aircraft, any aircraft with "more than 9 passenger seats," or any aircraft with "a payload capacity of more than 7,500 pounds."\(^99\) At the other extreme of commercial air transportation are the On-Demand operators. The classification On-Demand is applied to charter operations where the customer specifically negotiates at least one of the following: the depart-

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93 14 C.F.R. § 119.1(a).
94 Id. § 119.21(a).
95 Id. § 119.3 (reference the definition of Direct Air Carrier).
97 14 C.F.R. § 119.21(a).
98 Id. § 119.3.
99 Id. (reference the definition of Domestic Operation).
ture time, departure location, or arrival location. On-Demand operators conducting charter operations are also limited to smaller aircraft, which must not be configured with more than thirty passenger seats or have more than 7,500 pounds of payload capacity. Although understanding the need for distinctions between the airlines or Domestic operators at one end and the small On-Demand charter operators at the other end may be quite simple, rationalizing the differences between the operators in between is much more difficult.

The words On-Demand easily lend themselves to the idea of charter; the customer requests service on its schedule from an operator. However, the definition of On-Demand also encompasses scheduled passenger service when its frequency of operation is “less than five round trips per week on at least one route between two or more points according to the published flight schedules.” However, the On-Demand operator conducting scheduled service is further limited to non-turbojet aircraft with “9 seats or less . . . and a maximum payload capacity of 7,500 pounds or less.” In order to conduct scheduled operations under Part 135, with a frequency of operations of five or more round trips per week, an operator will have to be classified as a Commuter, and will still be limited to non-turbojet aircraft with “9 seats or less . . . and a maximum payload capacity of 7,500 pounds or less.”

Just as the classification of Commuter serves as a bridge between true Part 135 On-Demand operations and Domestic operators, the classification of Supplemental allows operations similar to those of On-Demand operators to be conducted under Part 121. In order to conduct Supplemental passenger-carrying operations the departure time, departure location, and arrival location must be “specifically negotiated with the customer.” Although, the operations allowed under the classification of Supplemental are similar to those allowed under On-Demand, Supplemental operators are allowed to utilize any turbojet aircraft, any aircraft with “more than 30 seats,” any aircraft with “a payload capacity of more than 7,500 pounds,” or any

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100 Id. (reference the definition of On-Demand Operation).
101 Id. (reference the definition of On-Demand Operation).
102 Id. (reference the definition of On-Demand).
103 Id. (reference the definition of On-Demand).
104 Id. (reference the definition of On-Demand).
105 Id. (reference the definition of Supplemental).
propeller-driven aircraft with “more than 9 seats and less than 31 seats.”

Under the current scheme not only must the type of aircraft utilized be evaluated, the type of operation must also be evaluated by answering two distinct questions: Is this a scheduled operation, and what is its frequency of operation? Through these two questions the potential exists for two very similar operations of the same aircraft to be placed under completely separate certification and operating structures with the reasoning behind the distinction becoming fuzzy.

IV. APPLICATION OF THE DISTINCTIONS TODAY

A. THE BLURRED LINE

As an example of the impact of the frequency of operations and aircraft size distinctions, the following comparisons demonstrate how two aircraft with only slight differences would be subject to either Part 121 or 135:

1. Example 1 – Large Turboprop Operation v. Small Turbojet Operation

a. Operator A:

Operator A utilizes a fleet of fifty (50) Beechcraft King Air B200s providing scheduled service throughout the Midwest. Operator A publishes a schedule that outlines the departure location and time and the arrival location of each flight, and includes more than five round trips per week between several pairs of specific points.

B200 Specifications:

- Engine Type – Turbo-propeller
- Maximum Cruise Speed – 270 knots

106 Id. (reference the definition of Supplemental).
107 14 C.F.R. § 119.3. This section reads:

Scheduled operation means any common carriage passenger-carrying operation for compensation or hire conducted by an air carrier or commercial operator for which the certificate holder or its representative offers in advance the departure location, departure time, and arrival location. It does not include any passenger-carrying operation that is conducted as a public charter operation under part 380 of this title.

Maximum Number of Passenger Seats – 13
Passenger Seat Configuration – 9 (for executive comfort)
Maximum Payload Capacity\(^{109}\) – 2,683 lbs
300 nautical mile Trip Time\(^{110}\) – 1 hr, 7 min

b. Operator B:

Operator B utilizes a single Cessna CJ1 providing scheduled service throughout the Midwest. Operator B publishes a schedule that outlines the departure location and time and the arrival location of each flight, which includes more than five round trips per week between two specific points.

*CJ1 Specifications:\(^{111}\)

- Engine Type – Turbojet
- Maximum Cruise Speed – 380 knots
- Maximum Number of Passenger Seats – 6
- Passenger Seat Configuration – 6
- Maximum Payload Capacity\(^{112}\) – 1,940 lbs
- 300 nautical mile Trip Time\(^{113}\) – 48 minutes

c. Example 1 Comparison

Both Operator A and B fall under the definition of Scheduled Operation because they publish flight schedules with a defined departure point, time, and arrival point.\(^{114}\) However, because Operator B utilizes a turbojet powered aircraft to provide this scheduled service, it is automatically routed to Part 121, while Operator A, because it utilizes a turbo-propeller aircraft configured with only 9 seats, is routed to Part 135.\(^{115}\) Both operators in Example 1 fly consistently between points in the same region of the United States; their trip time for the same flight is only 19

\(^{109}\) 14 C.F.R. § 119.3 (reference definition of Maximum Payload Capacity, Maximum Zero Fuel Weight, less Empty Weight). 11,000 pounds – 8,317 pounds = 2,683 pounds.

\(^{110}\) 60 minutes (300 NM + 270 knots) = 66.2 – 1 hour, 7 minutes


\(^{112}\) 14 C.F.R. § 119.3 (reference definition of Maximum Payload Capacity, Maximum Zero Fuel Weight, less Empty Weight). 8,400 pounds – 6,460 pounds = 1,940 pounds.

\(^{113}\) 60 minutes (300 NM + 380 knots) = 47.37 – 48 minutes

\(^{114}\) 14 C.F.R. § 119.3 (reference the definition of Scheduled operation).

\(^{115}\) See discussion *supra* Part III.
minutes apart; and Operator A has 49 more aircraft than Operator B, each of which as configured can carry 3 more individuals per flight. If both operators fly each of their aircraft only 400 hours a year, with each trip being 300 nautical miles, Operator A will transport 158,194 more passengers per year than Operator B. However, Operator B is being held to the same requirements that airlines are held to under Part 121, and Operator A is only required to comply with Part 135.

2. Example 2 – Frequency of Operations: Four Round Trips per Week v. Five Round Trips per Week

a. Operator A:

Operator A utilizes a fleet of ten turbo-propeller powered aircraft, configured with nine passenger seats, providing scheduled service throughout the Midwest. Operator A publishes a schedule that outlines the departure location and time and the arrival location of each flight, and includes no more than four round trips per week between any two points, one set being between Airport Red and Airport Blue.

b. Operator B:

Operator B also utilizes a fleet of ten turbo-propeller powered aircraft, configured with nine passenger seats, providing scheduled service throughout the Midwest, and publishes a schedule that outlines the departure location and time and the arrival location of each flight. However, Operator B’s schedule includes five round trips per week between Airport Red and Airport Blue.

c. Example 2 Comparison

Both Operators provide scheduled service to the same market, with the same type and number of aircraft. The only distinction is that Operator B offers one more scheduled round trip between Airport Red and Airport Blue per week than Operator A. Due to this one extra trip a week, Operator B is considered a Commuter operating under Part 135, while Operator A

\[ \text{Operator A} - (400 \text{ hours} + 1 \text{ hour, 7 minutes}) \times (50 \text{ aircraft} \times 9 \text{ passengers}) - 161,194 \text{ passengers flown per year}; \text{Operator B} - (400 \text{ hours} + 48 \text{ minutes}) \times (1 \text{ aircraft} \times 6 \text{ passengers}) = 3,000 \text{ passengers flown per year}. \]

Difference between Operator A and B: 161,194 - 3,000 = 158,194 more passengers flown by Operator A.

\[116\] See Part IV.A.2.

\[117\] See Part IV.A.2.
A is considered an On-Demand operator and is also subject to the regulations under Part 135.  

**B. ANALYSIS OF THE EXAMPLES**

1. Aircraft Specification Distinctions

Although the line between Parts 121 and 135 must be drawn somewhere, the current distinctions are arbitrary and do not represent a point where two operations are sufficiently different for them to be routed to different Parts of the regulations. In Example 1, the operator routed to Part 135 was providing almost fifty-four times more air transportation than the operator routed to Part 121, even though Part 121 was intended to govern scheduled airlines generally thought to provide the bulk of the passenger transportation. Although the beginnings of the Part 121/135 distinction based on aircraft specifications were intended merely as a shorthand for separating the scheduled and on-demand operators, the distinction clearly goes beyond that purpose and now represents a point where a much more complex operator is allowed to operate under the less burdensome Part 135, and the operator with a smaller business is forced to comply with Part 121.

The FAA clearly recognized that the aircraft specification distinction has been outgrown several times by the industry and has subsequently moved the distinction back, routing smaller and smaller aircraft into Part 121. While these changes may have temporarily solved the problem, the FAA is, once again, on the verge of rewriting Part 135, and several comments to the proposed rulemaking suggest that the distinctions between Parts

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119 The definitions of On-Demand and Commuter in Section 119.3 lay out the frequency of operation distinction based on the number of scheduled round trips per week. If an operator conducts five or more scheduled round trips per week between two specific points, the operation will be classified as a Commuter. If the operator conducts four or less scheduled round trips it will be classified as On-Demand. 14 C.F.R. § 119.3 (2003).

120 See supra note 110. 161,194 \( \div \) 3,000 \( - \) 53.73


122 Id.

123 See Part IV.A.1.


125 See supra notes 8-9.
121 and 135 drawn under Part 119 be reevaluated in light of the changes in the industry.\textsuperscript{126}

To correct this discrepancy the FAA could take several different stands, including the following: make no change to the aircraft distinction, which would allow the discrepancies apparent in Example 1 to remain a part of the industry; move all turbine-powered aircraft into Part 121 (turbojets and turbo-propeller aircraft including the B200 in Example 1); or remove the aircraft distinction entirely, leaving the line between Parts 121 and 135 based solely on the type of operation. If the FAA continues to stand by its policy of "one level of safety,"\textsuperscript{127} the inconsistency in application of the operating regulations apparent in Example 1 will at least force the agency to take a long look at the true differences between Operators A and B. Once the agency has arrived at that point, it is difficult to imagine that it would continue to allow an operator like A, with a much more complex operation, to be governed by Part 135 when its competitor B is forced to comply with Part 121.

To correct this inconsistency the agency could opt to move all the turbo-propeller powered aircraft under Part 121 by changing the definitions of Domestic, Commuter, and On-Demand under section 119.3 to read "turbine powered aircraft."\textsuperscript{128} This option would leave only reciprocating engine-powered aircraft the ability to provide scheduled service under Part 135. This change would eliminate the inconsistency in Example 1, because the B200 would now also be under Part 121 as a turbine powered aircraft. However, the same inconsistency could be demonstrated merely by replacing the B200 under Operator A with a reciprocating engine powered aircraft and giving Operator B a comparably sized turbo-propeller powered aircraft.

Regardless of where the aircraft specification distinction is drawn, there are either enough different types of aircraft in ser-
vice to change the example so that the same inconsistent outcome would result, or the manufacturers would create the aircraft to capitalize on any market that existed.\textsuperscript{129} In addition, although lines can be drawn between the basic performance statistics of the different aircraft, their systems are virtually the same. The cockpits of turbojet, turbo-propeller, and reciprocating engine aircraft can be filled with the latest technology in GPS equipment, multi-function displays, and other aspects of a "glass cockpit," and the aircraft themselves can be pressurized for flights at higher altitudes.\textsuperscript{130} From a passenger's perspective, the inside of a turbojet, turbo-propeller, and reciprocating engine-powered aircraft can be made to look and feel virtually the same, with the same amenities and the same result of being transported between point A and B being accomplished.

If the aircraft specification distinction is abandoned, there no longer would be a distinction between Domestic operators under Part 121 and Commuter operators under Part 135, except that commuter operators still would be held to the frequency of operations test.\textsuperscript{131} A line would need to be drawn to replace the aircraft specification distinction, or Commuter operators would need to be moved into Part 121, with the distinction between Parts 121 and 135 becoming whether an operator conducts scheduled service, or possibly scheduled service at a certain frequency of operation.

2. Frequency of Operations Distinction

The "frequency of operations" test, although created to allow On-Demand operators to provide minimal scheduled service and to distinguish between the Commuter and On-Demand operators,\textsuperscript{132} provides no useful distinction under Part 135. By being classified as a Commuter under the frequency of operations test, the operator only acquires three additional or different duties, even though that operator is providing the same type of


\textsuperscript{131} See supra Part III.

scheduled service that a Part 121 operator provides. First, a Commuter operator must comply with the crewmember qualifications and training requirements of Subpart N and O under Part 121 instead of the requirements of Subparts E, G, and H of Part 135. Additionally, the Pilot in Command (PIC) for a Commuter operation must have at least 100 hours PIC time in the aircraft make and model when the operator substitutes an autopilot for the required Second in Command (SIC) pilot. Finally, each PIC for a Commuter operation is also required to have the additional operating experience of ten hours for single engine aircraft, fifteen hours for multi-engine, reciprocating powered aircraft, twenty hours for multi-engine, turbine powered aircraft (other than turbojet), and twenty-five hours for turbojet aircraft. This additional experience must be obtained while carrying passengers in commuter operations with a qualified check pilot supervising (unless the aircraft is new to fleet in which case the experience can be gained during the proving runs).

The more logical point at which to make a distinction is where the type of operation changes. If an individual is purchasing a ticket from an operator that provides scheduled service, it is unlikely that individual will see a distinction between an operator that provides four round trips a week between two points and an operator that provides five. From this person’s perspective both operators are certificated, and therefore, should both be providing the same level of service. Having heard of the FAA’s policy of “one level of safety,” the individual would have a valid excuse for assuming that these two operators are the same; but under the regulations this assumption would be incorrect. It is much more likely that an individual would recognize a difference between operators if instead of merely purchasing a ticket for a scheduled flight, the individual had to negotiate the departure time, departure point, and/or destination.

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133 Id. § 119.3. Domestic and Commuter both provide Scheduled Service with no upward limit on the number of round trips between two points. See id.
134 Id. § 135.3(b).
135 Id. § 135.105(a).
136 Id. § 135.244.
137 Id.
139 14 C.F.R. § 119.3 (reference definition of Schedule Operation).
3. Part 380 – “Public Charter”

Part 380 provides another interesting twist to the discussion about applicability of Parts 121 and 135. Under the current definition, “any passenger-carrying operation that is conducted as a public charter operation under Part 380” is not considered a Scheduled Operation.\footnote{Id.} For example, with a creative use of 14 C.F.R. Part 380, one company, Indigo, at one point was providing “regular and frequent service” that consisted of four daily flights between Midway (Chicago) and Teterboro (New Jersey), and was doing so utilizing a Part 135 On-Demand carrier.\footnote{Id.} Indigo facilitated these flights as an “indirect air carrier” under Part 380 with authorization from the Department of Transportation (DOT).\footnote{Id.} Indigo’s role was to deal directly with the public, selling the seats on each flight through its website, the Sabre reservation system, and through travel agents.\footnote{Id.} All the while Air-Serv, “Indigo’s sister company” and the entity that held the Part 135 certificate, provided the actual operation of the aircraft.\footnote{Id.} Both Indigo and Air-Serv were owned by New World Holdings in Chicago.\footnote{Id.}

Under 14 C.F.R. Part 380 a U.S. Public Charter Operator, which is defined as an Indirect Air Carrier with authorization to form groups for Public Charter,\footnote{14 C.F.R. § 380.2 (reference definition U.S. Public Charter Operator).} may do so with the only restriction being that the actual air transportation must be provided by a Direct Air Carrier.\footnote{Id. § 380.10(d).} In Indigo’s situation, Air-Serv met the definition of a Direct Air Carrier by being a certificated Part 135 operator.\footnote{Id. § 380.2 (reference definition of Direct Air Carrier); 14 C.F.R. § 298.2 (2003) (reference definition of Air Taxi Operator).} And, although a Charter Flight, as defined by section 380.2, “does not include scheduled air transportation ... sold on an individually ticketed ... basis,” its definition includes “a flight operated under the terms of a charter contract
between a direct air carrier and its customer."\textsuperscript{149} Indigo, operating as an Indirect Air Carrier, was the entity selling the tickets and publishing a schedule, while Air-Serv, the Direct Air Carrier, provided an entire aircraft to its customer Indigo, which specified the schedule and route that the aircraft would travel on. Therefore, the "flight operated under the terms of a charter contract between a direct air carrier and its customer" was a flight operated by Air-Serv for its customer Indigo, with no schedule being set and no individual tickets being sold by Air-Serv. Essentially, customers were funneled to Indigo, which sold them individual tickets and joined them into groups large enough to fill the aircraft operated by Air-Serv. Then Indigo would contract with Air-Serv to provide the actual lift.

The Department of Transportation (DOT) places no limits on a U.S. Public Charter Operator’s ability or inability to provide scheduled service under Part 380, except in section 380.3(a) where the regulations authorize Public Charters to be operated "on a one-way or round-trip basis, with no minimum group or contract size," and to "be sold on an air-only basis, or with mandatory or optional land arrangements."\textsuperscript{150} By setting up an operation under Part 380, an entity like New World Holdings had the ability to bypass any of the distinctions drawn in Part 119 and provide service similar to Part 121 type operations under a Part 135 On-Demand certificate, the least restrictive option in Parts 121 or 135.\textsuperscript{151}

\textbf{C. The Proposal}

Operators should be classified based on the type of operation they conduct. If an operator is conducting scheduled operations, they should be funneled into Part 121, and if they are conducting true on-demand operations they should be operating under Part 135. The aircraft specification and frequency of operation distinctions would be abandoned as initial questions for classification, and the definition of Scheduled Operation would remain the same.\textsuperscript{152} Under this scheme, an operator evaluating

\textsuperscript{149} \textit{Id.} § 380.2 (reference definition of Charter Flight).
\textsuperscript{150} \textit{Id.} §§ 380.2, 380.3, 380.10.
\textsuperscript{151} \textit{See supra} Part III, IV.B.2.
\textsuperscript{152} 14 C.F.R. § 119.3 (2003) This section reads: Scheduled operation means any common carriage passenger-carrying operation for compensation or hire conducted by an air carrier or commercial operator for which the certificate holder or its representative offers in advance the departure location, departure
Parts 121 and 135 to determine the type of operation to provide would ask the single question of whether the operation is scheduled or not scheduled. If the operator wanted to publish a schedule defining the departure point, arrival point, and departure time, it would be required to be certificated and operate under Part 121.153 If the operator did not want to publish a schedule containing these three items, it could be certificated and operate under Part 135. This distinction would finally bring the regulations back to the point where they began, with a recognition that desigation under either Part 135 or Part 121 is merely a shorthand method of distinguishing between scheduled and unscheduled operations.154

Although the Part 380 back door for providing scheduled operation would effectively remain open under this proposal, such designation would not be the same as providing traditional scheduled service. As outlined above,155 an operator must receive economic fitness approval from the Department of Transportation (DOT), which includes approval of the operation's structure and economic stability. The Indigo operation described above was not in line with the true spirit of Part 380, and both Indigo and the DOT (at least indirectly) faced criticism from the industry for allowing this type of operation.156 It is unlikely that, faced with a similar proposal, the DOT would approve this type of operation again.

V. EFFECTS OF MOVING TO ONE DISTINCTION BASED ON THE TYPE OF OPERATION PROVIDED

Currently forty-nine Commuter Operators utilize airplanes (rotorcraft operators are not included) that would have to move to Part 121, if the definition of Scheduled Operation became the distinction between Parts 121 and 135.157 Compliance with Part 121, as opposed to Part 135, would involve several changes, the first of which being that these operators would have to ob-

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153 Id. § 119.3 (reference definition of Schedule Operation).
155 See supra Part IV.B.3.
156 See Harrison, supra, note 143.
tain approval of the routes and airports they intended to utilize, instead of merely making self-determinations that their aircraft are capable of conducting the intended flights.\textsuperscript{158} In addition to obtaining approval for routes and destinations, the procedure for adding new aircraft to the operation, referred to as proving runs, would increase in cost because Part 121 requires fifty flight hours for these runs instead of the twenty-five required under Part 135.\textsuperscript{159} This new requirement also has the potential to become more acutely offensive to the current Commuter operators after the recently promulgated changes to section 135.145 become effective. These changes will only require the twenty-five hours of proving runs for adding any turbojet aircraft for operators that currently have a turbojet on the certificate.\textsuperscript{160}

In addition, some of the current Commuter operators would also have to come into compliance with the Extended Range Operation with Two Engine Airplanes (ETOPS) requirements of Part 121 if they serve routes "that contain [ ] a point farther than 1 hour flying time (in still air at normal cruising speed with one engine inoperative) from an adequate airport."\textsuperscript{161} These operators may also have to outfit their aircraft with additional general equipment depending on the type of aircraft they utilize.\textsuperscript{162} They will also have to add emergency medical equipment to all their aircraft, along with ensuring the necessary training for their crewmembers on its usage.\textsuperscript{163} Finally, the current Commuter operators would most likely have to add to their total number of employees due to the required addition of dispatchers,\textsuperscript{164} flight attendants on aircraft with ten or more seats instead

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\textsuperscript{158} Compare Part 121 (E) with Part 135 (performance standards). 14 C.F.R. §§ 121 (E), 135.

\textsuperscript{159} Compare 14 C.F.R. § 121.163(b) with 14 C.F.R. § 135.145(a).

\textsuperscript{160} Currently section 135.145(a) requires the proving runs for each new turbojet aircraft added to the certificate unless the operator has previously done the proving runs on "that aircraft or an aircraft of the same make and similar design." Id. § 135.145(a). Under the Final Rule issued by the FAA that will become effective on Nov. 17, 2003, the proving runs for adding a new turbojet aircraft will only be required if it is the first turbojet aircraft being added to the certificate, instead of requiring them each time a different turbojet aircraft is added. Regulation of Fractional Aircraft Ownership Programs and On-Demand Operations, 68 Fed. Reg. 54520, 54586 (Sept. 17, 2003).

\textsuperscript{161} 14 C.F.R. § 121.161(a).

\textsuperscript{162} See id. § 121 (4) – (K) (2003).

\textsuperscript{163} See id. § 121(X).

\textsuperscript{164} Id. § 121.395.
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of twenty or more, compliance with maintenance personnel duty times, and the age sixty rule.

The approval of routes and airports for current Commuter operators would most likely be one of the biggest adjustments to make. Instead of having the freedom under Part 135 to go anywhere, anytime as long as the runway length was long enough and other airport services were available, these operators would be forced to demonstrate to the FAA prior to conducting operations into each airport and along each route that they were capable of doing so safely. However, because these operators are already providing scheduled service, the burden of proving to the FAA that they can do what they have already been doing safely for some time would not be as difficult as it seems at first glance. The most noticeable difference for these operators would be that if they decided to begin service to a new location they would have to obtain prior approval, but this is not a heavy burden to place on an operator that could be transporting thousands of people along the new route each year.

The addition of a dispatch program, more proving run hours, ETOPS, flight attendants in smaller aircraft, and any additional aircraft equipment are all things that would be scaled to the size of the operation and the type of aircraft utilized. This scalability is directly in line with the FAA’s policy of “one level of safety,” where only those items truly needed to maintain the same level of safety between different operations are required. None of the current Commuter operators would most likely be required to comply with standards on these items comparable to airline size operators under Part 121. It would be difficult for these operators to argue that these requirements, in a version scaled back to fit their individual operations, would not be worth at least as much in safety as they would cost the operator in dollars to implement. The same economic–versus–safety argument would also have to be made for maintenance duty times, and for emergency medical equipment, which do not seem out of line when visions of aircraft crashes come to mind. While these additions would invariably cost the current Commuter operators

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165 Compare section 121.391(a)(1) with section 135.107. Id. §§ 121.391(a)(1), 135.107.

166 Id. § 121.377.

167 Id. § 121.383(c).

more money, the FAA determined that at least at certain levels of operational complexity or size of aircraft, their benefits outweigh their costs for the operators currently under Part 121. If these additions truly cost more than they are worth for the current Commuter operators, they could merely be scaled back further, to the point where they only become required where their benefits outweighed their costs.\textsuperscript{169}

The final change that could prove to be a large problem for some operators is the age sixty rule. Under this rule individuals are no longer allowed to serve as a pilot under Part 121 when they reach the age of sixty.\textsuperscript{170} This issue, while obviously extremely important to the pilots who lose their jobs at age sixty, is not a strong argument for the current Commuters that would be forced to comply with it under Part 121. With the extreme downscaling of the airline industry, and the resultant furlough of thousands of pilots, no pilot shortage exists that would harm a Commuter forced to hire only those pilots under the age of sixty.

\section*{VI. CONCLUSION}

The dividing lines between Parts 121 and 135 are not effective and are not a true measure of the differences apparent in the aviation industry. The distinction based on the type of aircraft utilized no longer serves as a useful shorthand for the true line the government initially intended to draw. The distinction based on frequency of operations also fails to serve its intended purpose. It is based on an arbitrary point within the range of scheduled operations, rather than on the real difference: the type of operation being conducted. Under this analysis, the most logical point to draw the line is the definition of scheduled operations. Operators that provide scheduled service would have to comply with Part 121, and operators that provide unscheduled or on-demand service would have to comply with Part 135.

Moving the distinction to scheduled versus unscheduled is warranted, even though it would require the forty-nine current commuter operators to move to Part 121. There will be costs

\textsuperscript{169} This could be accomplished by implementing a scalable list of requirements in Part 121, which would only become effective at certain levels of operational complexity, or be scaled to appropriately address the complexity of each individual operation. Each of the differences between Part 121 and Part 135 could be individually evaluated to determine at what point in operational complexity it became necessary to ensure "One Level of Safety."

\textsuperscript{170} 14 C.F.R. § 121.383(c).
associated with moving these operators, but these costs are scale-
able and primarily dependent upon the size of operation and
type of aircraft each operator chooses to utilize. These costs are
also outweighed by the benefits of having a division based on a
real difference between the operators. If the industry truly
needs “one level of safety,” the method that drives the applica-
bility of different regulations must be one based on a genuine
dividing line between the operators.