The Regulation of Fractional Ownership: Have the Wings of the Future Been Clipped

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TABLE OF CONTENTS

I. INTRODUCTION ........................................... 322
   A. THE GROWTH OF FRACTIONAL OWNERSHIP ...... 323
   B. THE GENESIS OF SUBPART K ...................... 328

II. THE FRACTIONAL OWNERSHIP AVIATION RULEMAKING COMMITTEE .................. 332
   A. THE DEVELOPMENT OF THE FOARC RECOMMENDATION .................. 334
   B. THE FOARC'S PROPOSED REGULATION OF PROGRAM MANAGERS ............... 343
   C. FOARC'S PROPOSED REVISIONS TO PART 135 .... 350
   D. THE ROAD FROM THE FOARC RECOMMENDATION TO THE NPRM ...................... 352

III. THE ISSUANCE OF THE NPRM ........................ 355

IV. THE RESPONSE TO THE NPRM ......................... 370

V. WHERE IS THE FRACTIONAL OWNERSHIP MARKET GOING? ........................ 388
   A. THE ONGOING DEVELOPMENT OF THE FRACTIONAL OWNERSHIP MARKET ............ 388
   B. WHAT DOES THE FUTURE HOLD? .................................... 395

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I. INTRODUCTION

Over the past several decades, business aviation has grown substantially. Although there has been some slowdown as a result of the economy, the long term prospects for business aviation remain strong. Part of the growth is a result of dissatisfaction with commercial airlines. A greater portion, however, stems from the heightened awareness of the value of busi-

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3 See Dennis Quick, Local Companies Take Off On Air-Travel Trend, Charleston Regional Bus. J., Feb. 25, 2002 ("high-end business travelers, increasingly frustrated with the delays and flight reductions in commercial airline travel, had been gravitating toward fractional ownership"); Joe Sharkey, Business Travel: The Corporate Jet Business is Booming, Even as the Airlines Complain About a Softening Economy, N.Y. Times, May 2, 2001, at C6 ("corporate jets – once derided as symbols of decadence and wretched excess – have become practical travel alternatives for a steadily growing number of companies" due in part to commercial airline delays, rising business fares and inconvenient airline scheduling). See also CIT's Annual Corporate Aircraft Outlook Predicts Cautious, Continued Optimism for 2000-2001; Following a Record Year, CIT Identifies Factors Leading to Ongoing Industry Expansion, Bus. Wire, Oct. 4, 2000 (the growth of business aviation is partially a result of growing negative reaction to commercial flight delays).
ness aviation as an economic tool.\textsuperscript{4} Following the tragic events of September 11, 2001, business aircraft and fractional ownership programs are also viewed by many companies as a way in which to increase security for their employees.\textsuperscript{5}

A. THE GROWTH OF FRACTIONAL OWNERSHIP PROGRAMS

As public awareness has grown, so too has the variety of acquisition alternatives; or perhaps, public awareness has grown because of the variety of alternatives. In either case, one of the most popular methods of acquiring business aircraft is through fractional ownership programs\textsuperscript{6} which allow a party to acquire

\textsuperscript{4} For a general discussion of the benefits and value of business aviation, see Andersen White Paper, supra note 1. See also Lowe, CA Forecast, supra note 2; Jay Palmer, The New Jet Set, BARRON'S ONLITE, NOV. 19, 2001; David A. Lombardo, Bizav Will Weather Economic Turbulence, AVIATION INT'L NEWS, Aug. 2001, at 36 (corporate aircraft are viewed as a tool and not as a luxury or perk); Kirby J. Harrison, Bizjet Market Thriving at $94B Over Next Decade, Predicts Teal, AVIATION INT'L NEWS, July 2001, at 22 (business jets have become “less of an elite product and more of a commodity”); Richard Aboulafia, Quest for Corporate Efficiency Helps Buoy Business Jet Market, AVIATION WK. & SPACE TECH., Jan. 15, 2001, at 99 (corporate jets are “held in high esteem due to what could be termed a ‘cult of productivity’”); Intelligence, Wkly. Bus. Aviation, Oct. 2, 2000, at 147 (there has been “almost a contagious acceptance of business aircraft use” because of its obvious benefit to productivity and efficiency”); Anthony L. Velocci, Jr., Bizjet Demand Robust; Asian Market Taking Off, AVIATION WK. & SPACE TECH., Oct. 9, 2000, at 131 (the use of business aircraft has spread as businesses realize the value of the aircraft, “not only in their daily operations, but as a tool to make business more productive”); The (Private) Jet Set, FORTUNE, May 14, 2001, at S8; Business Aircraft Utilization Strategies: A Guide for Management, NAT'L BUS. AVIATION ASS’N (“NBAA”) 1999.

\textsuperscript{5} See Lowe, CA Forecast, supra note 2 (“the fallout from September 11 appears to have spurred the interest in fractional or corporate aircraft ownership”); Tom Incantalupo, Demand Up for Charter Planes: Boost in Business After Terror Acts, Newsday (New York), Nov. 4, 2001, at A14; Palmer, supra note 4; Mark Phelps, Pax Flocking to Charter and Fractional Operations, AVIATION INT'L NEWS, Nov. 2001, at 5; Aftermath, supra note 2, at 139-40, 143 (fractional ownership programs have received “renewed interest and new interest”); Alex Kuczynski, Private Skies of the Very Rich, N.Y. TIMES, Oct. 7, 2001, sec. 9, at 1; Micheline Maynard, Corporate Planes: Perks or Necessities?, N.Y. TIMES, Sept. 23, 2001, at C6 (“[i]n the aftermath of the attacks, many corporations are expected to rely even more heavily on private planes – through leases, purchases and fractional ownership deals. . .”).

\textsuperscript{6} See, e.g., Andersen White Paper, supra note 1, at 2 (fractional ownership, which increased by more than 50% per year for the past three years, is the fastest growing segment of business aviation); Chad Trautvetter, Aircraft Ownership & Operations Options Special Report: Finding the Right Direction to Take Isn’t All ‘One Size Fits All,’ AVIATION INT’L NEWS, Mar. 2001, at 60, 62 (fractional ownership is the fastest growing segment of business aviation); Ethan Krimins, Business Aircraft May Help Airlines Attract Business Passengers, AVIATION DAILY, Feb. 22, 2001, at 7 (the number
less than a whole aircraft. In fact, because fractional ownership programs offer the participants the ability to acquire only as much of an aircraft as is needed, these programs have not only remained attractive but have continued to grow substantially in spite of the economic downturn.

In general terms, fractional ownership programs are multi-year programs covering a pool of aircraft, most of which are owned by more than one party and all of which are placed in a dry lease exchange pool and available to any program participant when the aircraft in which such participant owns an interest is not available. As an integral part of these multi-year programs, a single management company provides the management services to support the operation of the aircraft by the owners, and administers the aircraft exchange program on behalf of owners in fractional ownership programs has grown an average of 56% per year since 1986).


See Fractional Shareholder Growth; Fractional Aircraft Fleet Growth, WKLY. BUS. AVIATION, Sept. 17, 2001, at 136. See also Kirby J. Harrison, Bizet Market Thriving at $94B Over Next Decade, Predicts Teal, AVIATION INT’L NEWS, at 22 (business aviation continues to grow in spite of a sluggish economy with fractional ownership programs helping to fuel market growth); Mark Odell, Fractional Owners Keep Sector Flying, FIN. TIMES (LONDON), June 18, 2001, at 9 (the continued growth in fractional ownership has minimized the impact of the economic downtown on business aviation); Fractional Aircraft Ownership Continues to be High Growth Segment, Analysts Say, WICHITA BUS. J., Jan. 26, 2001, at 19 (the economic slowdown could increase the interest in fractional ownership programs because the outright purchase of an aircraft may not be financially viable). But see Kerry Lynch, United Launching Its Own Fractional Ownership Plans With Business Jets, WKLY. BUS. AVIATION, Apr. 30, 2001, at 203 (although there has been a decline in the sale of fractional shares and some shares have been turned back, the major fractional ownership programs have not had a major problem because of the backlog of orders).

A dry lease is the lease of an aircraft where the crew is provided by the lessee. See Interpretation 1991-53, 3 Fed. Av. Dec. I-126 (Sept. 23, 1991) (Clark Boardman Callaghan).

Historically, fractional ownership programs have referred to the dry lease exchange as an “interchange.” The “interchange” component of a fractional ownership program, however, is not an “interchange” as defined by the Federal Aviation Regulations (“FARs”), but rather contemplates that each of the aircraft will be operated by the party using it at the time. See FAA General Operating & Flight Rules, 14 C.F.R. §§ 91.501 (b), (c)(2) (2001). See also Wings of the Future, supra note 7, at 1000-01.

half of all of the participants. By purchasing an interest in an aircraft that is part of the program, an owner gains round-the-clock access to a private aircraft at a fraction of the cost.\(^{12}\) Because fractional ownership programs allow parties to purchase the percentage of an aircraft reflecting their actual needs, the programs appeal to a wide range of users including newcomers to business aviation\(^{13}\) as well as companies seeking to supplement their own fleet of business aircraft without the expense of having to purchase or lease additional aircraft.\(^{14}\) Due to their flexibility and broad market appeal, existing fractional ownership programs continue to grow\(^{15}\) and a wide variety of new pro-

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\(^{12}\) See Lombardo, supra note 4, at 36. See also James Christiansen, Exploring FOARC’s Outcome, PROF. PILOT, May 2000, at 66 [hereinafter Exploring FOARC].

\(^{13}\) See Lombardo, supra note 4, at 36 (fractional ownership programs are attracting companies that would never have acquired aircraft); Paul Lowe, FAA Forecast Predicts Bright Future for GA, AVIATION INT’L NEWS, Apr. 2001, at 55 (a large portion of the business base for fractional ownership programs are first time users of business aircraft) [hereinafter Lowe, Bright Future for GA]; Holly Hubbard Preston, Fractional Ownership Gives Frequent Flyers a Piece of the Action, INT’L HERALD TRIBUNE, Mar. 3, 2001, at 13 (fractional ownership is a way of introducing people to business aviation); Used Corporate Jet Values Have to Deal With Weakening U.S. Economy, AIRCRAFT VALUE NEWS, Feb. 12, 2001 (“[f]ractional ownership has opened up a whole new market, allowing many more corporations to participate in what was once a very exclusive club”).

\(^{14}\) See generally Exploring FOARC, supra note 12, at 66; Velocci, supra note 4, at 131 (traditional flight departments have used fractional ownership to supplement their fleets; however, such usage has declined 6% since 1999); Oliver Sutton, Fractional Market Boom Hits Europe, INTERAVIA BUS. & TECH., Sept. 1, 2000, at 35 (many businesses use fractional shares to complement their own fleet); 1999 NBAA Business Aviation Study, Utilization Strategies, J.D. Power and Associates (1999).

\(^{15}\) Fractional ownership programs have grown exponentially since their startup. In fact, according to AvData Inc., the number of fractional owners grew from less than 100 in 1992 to more than 2,500 in the first quarter of 2001. See Steve Lott, United to Launch Business Jet Unit, Acquire Up to 200 Corporate Aircraft, AVIATION DAILY, Apr. 26, 2001 at 1, 2. The NetJets program had over 260 aircraft and 2200 owners in November 2001. See Comments of Executive Jet Aviation, Inc., Docket No. FAA 2001-10047-207, at 1 (Nov. 16, 2001), available at http://dms.dot.gov/search [note to readers: all FAA Docket comments and letters cited throughout this article are available through the DOT’s Document Management System at this website]. Flight Options, the largest program with pre-owned aircraft had 86 aircraft with over thirty new aircraft on order before it announced in December 2001 that it and Raytheon Air would be combining their programs into a new program owned 50.1% by Flight Options and 49.9% by Raytheon. See Flight Options and Travel Air Combining Fractional Programs, AIN Alerts, AVIATION INT’L NEWS, Dec. 20, 2001. The formal agreements to combine the two programs were executed in March 2002. See Press Release, Flight Options, Flight Options Finalizes Deal With Raytheon Travel Air (Mar. 21, 2002), at http://www.flightoptions.com/media/viewnews.asp?ID=50. The combined company
grams, both foreign\textsuperscript{16} and domestic, have come on line.\textsuperscript{17}

was up and running on April 1, 2002, with its two distinct programs – one offering pre-owned aircraft and the other offering new aircraft (i.e., five years or younger). See Nigel Moll, Gloves Come Off In Two-Way Frax Fracas, AVIATION INT’L News, May 2002, at 1, 74. With approximately 4,500 fractional interest owners in the spring of 2002, there can be no question that fractional ownership is a thriving market. See Grant McLaren, Fractional Ownership, PROF. PILOT, Apr. 2002, at 52, 53. While these owners are divided among various programs, the major programs account for the vast majority. For example, NetJets had approximately 2,500 owners and 421 aircraft in its program. Flight Options had over 1,600 owners and 203 aircraft after completing the merger with Raytheon Travel Air, and FlexJet had 116 aircraft. Id. at 52-54. In fact, NetJets has been described as “the eighth largest ‘airline’ in America, running anywhere from 250 to 350 flights a day.” See Bill Wagstaff, The Power of a Trim Tab, AVIATION INT’L News, June 2001, at 2.

\textsuperscript{16} The development of the fractional ownership market is not confined to the United States. See, e.g., Flying Group Responds to Fractional Competition, EUROPEAN BUS. AIR News, June 2002, at 5 (fractional ownership is the largest part of the business for the Belgian operators which comprise Flying Group); Claudio Lucchesi, Fractional Ownership: A Piece of the Action, Rotor & Wing, Mar. 2001, http://www.aviationtoday.com/reports/rotorwing/previous/0301/0301fract.htm (Heli Solutions launched a helicopter fractional ownership program in Sao Paulo, Brazil with the objective of making helicopter ownership economically feasible for small business and increasing the popularity of helicopters); Fractionals for India, GBJ eNEWS, Sept. 6, 2000 (Aviators (India) Private Limited, along with two partners, is planning to begin the first fractional ownership program in India); SpanAir, at http://www.span-air.com (last visited July 21, 2002) (SpanAir offers one-tenth interests in airplanes and helicopters in India); RobinJet Pte. Ltd., Private Air Charter in Asia, at http://www.robinjet.com/fr.html (last visited May 31, 2002) (RobinJet offers one-third interests in aircraft providing 200 flight hours per year). Even the international programs of the major fractional providers in the US have been transformed. Bombardier’s Flexjet fractional ownership program in Europe has been converted to a charter operation called Jet Membership. A similar charter program has been set up by Bombardier in Asia. See Michael A. Taverna and Douglas Barrie, Bombardier’s Retreat Reflects European Malaise, AVIATION WK. & SPACE TECH., May 27, 2002, at 50. Other companies are seeking investors in order to create a fractional ownership program. See Eurosky Executive Summary, at http://www.businessplans.org/EuroSky/EuroSO0.html. Although there is a proliferation of new programs and potential new programs, other programs have shut down. See, e.g., Airshare Frax Operation Calls it Quits, AVIATION INT’L News, June 2000, at 8 (the UK based fractional ownership program which began operations with two Cessna Citation Jets discontinued its sale of interests and is evaluating whether the program will be relaunched).

\textsuperscript{17} See, e.g., Rifton Aviation Launches Fractional Program, AINONLINE NEWS ALERT, Aug. 9, 2001 (Rifton is offering quarter shares in aircraft in its fractional program, JetLimited NY, but will retain one-quarter interest in each aircraft); Frax Program Aiming for ‘Individual’ Buyers, AVIATION INT’L News, May 2001, at 10 (Rectrix Aviation, which has two Learjets and is focusing on individuals based within a 300 mile radius of Sarasota, Florida, does not require long-term contracts, has no use limitations and matches hourly fees to actual costs); Daryl Murphy, Newly Opened VIP Jets Plans Frax Ops in Texas, AVIATION INT’L News, Jan. 2001, at 8 (VIP
Although some of the newer programs are described as fractional ownership programs, they do not fit the standard model of fractional ownership and would not meet the definition proposed by the FAA. Some of the newer and smaller “fractional ownership programs” have solicited potential new customers in-

Jets based in Arlington, Texas, offers a program concentrating on the Dallas-Fort Worth Metroplex region and other points within 150 to 200 miles; Kirby J. Harrison, Wichita Firm Forms Fractional Program, AVIATION INT’L News, Oct. 2000, at 10 (Executive AirShare will sell shares of Raytheon King Air 350 and C90B aircraft for its Wichita’s Mid-Continent Airport based program focusing on local businesses and individuals in the Midwest market region); Intelligence, WKLY. AVIA-

TIONS, June 26, 2000, at 14 (JetOne partnered with Daimler-Chrysler Aviation to provide a fractional ownership program based at Waterford Oakland County International Airport in Michigan offering shares in pre-owned Citation II aircraft). Fractional ownership programs have also been formed for military aircraft. See http://www.airwarbirds.com/fractional_ownership.htm (last visited Aug. 12, 2001) (a TA-4J Skyhawk is available for fractional ownership by persons meeting certain levels of experience and qualifications).

18 See infra notes 167-168 and accompanying text. See, e.g., AirShares Elite, http://www.airshareselite.com/faq.html (last visited May 31, 2002) (the AirShares Elite program offers its customers partial ownership of a fleet of aircraft by selling interests in a limited liability company that owns the aircraft); Own Your Own TA-4[J, at http://www.airwarbirds.com/fractional_ownership.htm (last visited May 31, 2002) (offering only one TA-4[J Skyhawk for “fractional ownership”); Frax Program Aiming for ‘Individual’ Buyers, AVIATION INT’L News, May 2001, at 10 (Rectrix Aviation will not require long-term contracts). Some of the programs are structured for owner pilots and do not contemplate the provision of crew services by the program manager. See OurPLANE Inc., at http://www.ourplane.com/about.asp (last visited June 10, 2002) (OurPLANE’s fractional ownership program manages factory-new aircraft among a small group of pilots who are pre-screened and purchase “an elite ‘leaseship’” enabling them to “own an exclusive right-to-use” of such aircraft); East Coast Operator Sells First Share, BUS. & COM. AVIATION, Mar. 2000, at 26 (CarinaStar sells shares primarily in owner-flown Beech Bonanza A-36s and Baron 58s with usage keyed to the number of days and not hours). In addition to the multitude of fractional ownership programs for aircraft, the concept of fractional ownership has worked its way into other industries. See Active Yacht Brokerage: Active YachtFractions, http://www.activeyachts.com/fractions/fractions_why.html (last visited May 31, 2002) (Yacht Fractions, Ltd., a company based in Cornwall, United Kingdom, has created Active YachtFractions, a program which involves the sale and management of yachts); Vicki Lee Parker, Fractional Ownership of Boats Becomes More Popular, HOTEL ONLINE, THE NEWS OBSERVER (although many fractional ownership programs for boats have failed, the concept is catching on). In addition, private residence clubs have been developed which involve a small number of buyers who share ownership of a luxury resort estate property. Unlike fractional ownership of aircraft, these programs provide owners with rights only to the specific property in which they own an interest and do not allow them to exchange properties with other owners in the club. See Hospitality Services-Closer Look: Where to Find Private Residence Clubs, CENDANT MEDIA CENTER TRENDS & INFORMATION, Mar. 18, 2002.
interested in sharing specific aircraft, while other sales of fractional shares have been advertised in classifieds on the internet. Ever since fractional ownership was introduced in 1986 by Executive Jet Aviation through its NetJets program, virtually all fractional ownership programs have been operated under Part 91, placing full responsibility for regulatory compliance with the fractional owners. Despite the prominence and phenomenal growth of these programs, however, the term "fractional ownership" is not defined or even mentioned by name in Part 91 or anywhere else in the FARs. With the rule proposed by the FAA, all of that is about to change.

B. THE GENESIS OF SUBPART K

In spite of (or perhaps because of) the success of fractional ownership programs, they have been the focal point of significant controversy within the industry. This controversy falls into two general categories. The first category includes flight departments that view fractional ownership programs as a threat...
to their continued existence. The second includes Part 135 air taxi operators which believe that fractional ownership programs have an unfair economic advantage due to their ability to operate under Part 91. In addition to the concerns raised by different segments of the industry, the rapid growth and size of the programs attracted the attention of the FAA.

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24 See, e.g., Exploring FOARC, supra note 12, at 66; Lowe, Bright Future for GA, supra note 13, at 55 (the widespread closure of flight departments has not occurred as the business aviation community believed; in fact, fractional ownership programs may be responsible for an increase in traditional flight departments since 1993); J. Mac McClellan, Who Makes the Call?, FLYING Apr. 2000, at 15. See also Wings of the Future, supra note 7, at 1012-13; Collogan, Fractional Ownership Fracas, supra note 23, at 98 (although corporate pilots and flight department managers see fractional ownership as a threat, only approximately twenty flight departments have been closed solely to be replaced by fractional ownership). There are many unrelated reasons for flight departments being closed. For example, some flight departments close because of budget cuts or the acquisition of the company by a larger company that already has a flight department or by a company that does not believe in corporate aviation. Flight departments also close because of corporate restructuring, changes in high level personnel, low utilization, high deadhead costs and many other reasons. See Gordon Gilbert, Bankruptcies Spell Trouble for Flight Depts, AVIATION INT'L NEWS, Mar. 2002, at 1, 79; Mark Phelps, Fractionals Aren't the Only Demon Facing Traditional Flight Departments, AVIATION INT'L NEWS, Apr. 1999, at 29.

25 Air carriers that use aircraft with thirty or less seats (or nine or less for turbojets) and do not follow published schedules are considered to be on-demand operators. See FAA Certification, 14 C.F.R. § 119.3 (2001). These operators are considered air taxi operators by the U.S. Department of Transportation ("DOT"). See FAA Exemptions for Air Taxi & Commuter Air Carrier Operations, 14 C.F.R. § 298.3 (2001).

26 Many Part 135 air taxi operators view the service provided by fractional programs as similar to their own but free from the restrictive rules under which they operate. See John Croft, Fractional Ruling Promises Air Taxi Bonus, AVIATION Wk. AND SPACE TECH., Aug. 3, 2001, available at http://www.aviationnow.com (last visited May 31, 2002). These operators believe that the difference in standards is giving fractional ownership programs an unfair advantage and resulting in a loss of business. Id. See also Gordon Gilbert, FAA Sets Frax Rulemaking Machinery Into Motion, AVIATION INT’L NEWS, Mar. 2001 at 1, 44 [hereinafter Gilbert, Frax Rulemaking]; Exploring FOARC, supra note 12, at 66; McClellan, supra note 24, at 15; Howard Banks, Getting Fractured, FORTUNE, Nov. 29, 1999, at 54. See also Norris, supra note 23, at 24; Collogan, Fractional Ownership Fracas, supra note 23, at 98.

27 See Kerry Lynch, FAA Agrees With Industry On Regulating Fractional Providers, BUS. AVIATION, July 13, 2001, at 1; Kerry Lynch, FAA Unveils Fractional Aircraft Ownership Proposal, BUS. AVIATION, July 11, 2001, at 1; National Airspace System Activity and Sources of Demand, at 24, at http://www.nas-architecture.faa.gov/CATS/Documents/00_ACE_CD/00_ACE/Chptr_3.pdf. See also Collogan, Fractional Ownership Fracas, supra note 23, at 99 (the scope of the fractional ownership operations itself should warrant examination and the application of a higher standard).
In 1996, the FAA began to question whether Part 91 was the appropriate regulatory environment for the operation of fractionally owned aircraft.\(^{28}\) The broad focus of the FAA's inquiry was on "operational control."\(^{29}\) Specifically, the FAA questioned whether each fractional owner has operational control of flights on its aircraft and/or flights on interchange aircraft. If the fractional owner does not have operational control, is such control vested in the management company administering the program? Of course, if the program manager is viewed as having operational control, the fractional programs would be governed by FAR Part 135 which regulates air taxi operators.\(^{30}\)

Once the FAA's concerns became public, various industry groups met with the FAA in an effort to ensure that their lines of business would continue unimpaired.\(^{31}\) As the FAA's review moved forward, it became apparent to the industry that the best way to ensure the continued viability of each segment would be for all of the factions to pull together and present a unified solution to the FAA.\(^{32}\) This unified effort resulted in the issuance of Guidelines and Responsibilities for fractional ownership owners and program managers that were developed using Part 135 regulations as the starting point.\(^{33}\) The Guidelines were intended to

\(^{28}\) See Wings of the Future, supra note 7, at 1014-26.

\(^{29}\) Id. at 1015-16.

\(^{30}\) Id. at 1002-06.

\(^{31}\) See Exploring FOARC, supra note 12, at 66. See also Wings of the Future, supra note 7, at 1016-21.

\(^{32}\) In November 1998, the NBAA hosted a series of meetings intended to find a way of handling fractional ownership that would address the concerns raised by the different segments of the business aviation community involved in or affected by these programs. See Wings of the Future, supra note 7, at 1021-26. See also Exploring FOARC, supra note 12, at 66 (the industry hoped that the development of voluntary guidelines would quash the ever-rising controversy).

\(^{33}\) See Safety Guidelines & Responsibilities for Fractional Aircraft Owners and Fractional Aircraft Program Managers, developed by NBAA, National Air Transportation Association ("NATA") and General Aviation Manufacturers Association ("GAMA"), dated Jan. 1999 [hereinafter "Guidelines"].
provide a “safe harbor” for fractional ownership programs to operate under Part 91.

The Guidelines established safety and operational practices for the fractional program managers, including (i) manual requirements, (ii) flight crew staffing experience, training, scheduling and record-keeping requirements; (iii) flight, duty, and rest time guidelines for flight crews; and (iv) standard operating procedures. They also required that the program manager brief each fractional owner on operational control responsibilities, and that each owner review and sign an “Acknowledgment of Fractional Owner’s Operational Control Responsibilities” which would specify the implications of the

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34 The Guidelines defined fractional ownership as:

I. Any system of aircraft exchange involving two or more airworthy aircraft that consists of all of the following elements:
   a. The provision for Fractional Program Management Services by a single Program Manager on behalf of the Fractional Owners.
   b. One or more Fractional Owners per Program Aircraft, with at least one Program Aircraft having more than one Owner.
   c. Possession of at least a Minimum Fractional Ownership Interest in one or more Program Aircraft by each Fractional Owner.
   d. A Dry-Lease Aircraft Exchange arrangement among all of the Fractional Owners and the Program Manager.
   e. Multi-year Program agreements covering the Fractional Ownership, Fractional Program Management Services, and Dry-Lease Aircraft Exchange aspects of the Program.

See Guidelines, supra note 33, at III.A.

35 In developing a safe harbor, the NBAA-hosted group believed the FAA’s and the industry’s concerns could be adequately addressed without the need for a rulemaking proceeding, especially since the FAA had previously authorized the use of a safe harbor in connection with air carrier audits required by the regulations governing passenger facility charges. See FAA Passenger Facility Charges, 14 C.F.R. § 158(d) (2001); FAA Passenger Facility Charge Audit Guide for Air Carriers, 64 Fed. Reg. 44,777 (Aug. 17, 1999).

36 See Wings of the Future, supra note 7, at 1022-26.

37 See Guidelines, supra note 33, at V.B.1.

38 See id. at V.D.

39 See id. at V.I. Unlike the FARs, the Guidelines allow exceptions to the flight and duty time limitations to be made as long as they are approved by the senior flight operations supervisor on duty and are agreed to by the flight crew in question. See id.; cf. FAA Operating Requirements, 14 C.F.R. §§ 135.261-73 (1998).

40 See Guidelines, supra note 33, at IV.C, D, and V.J.

41 See id. at V.O.

42 See id. at IV.G. The Guidelines also require a pre-flight passenger briefing during which passengers are advised which party has operational control and whether the flight is being conducted as a private operation under Part 91 or as a commercial operation under Part 135 or 121. Id. at V.Q. In order to ensure that
owner having operational control of the aircraft, namely that the flight will be conducted as a private operation under Part 91, and the owner, as the person having operational control, will have responsibility for regulatory compliance, exposure to FAA enforcement for non-compliance, and potential liability for personal injury or property damage resulting from flight-related incidents.

The Guidelines, which were delivered to the FAA in January 1999, were viewed by industry as a workable method of ensuring safety while providing the FAA with a standard against which it could determine the appropriate operating rules for a program and measure the program's compliance with the FARs. The FAA, however, did not view the Guidelines as an acceptable method for ensuring the continued safety of fractional ownership programs because they did not have the force of law.

II. THE FRACTIONAL OWNERSHIP AVIATION RULEMAKING COMMITTEE

Although the Guidelines provided a structure in which fractional ownership programs could be operated, the FAA wanted a structure that would provide it with direct access to the party in the best position to ensure the continued safety of operation — namely, the program manager. Because fractional ownership programs are premised on the operation of the fractional aircraft by the owners under Part 91, the FAA did not believe that

the FAA can identify the party having operational control, the Guidelines required the issuance of a written document specifying which party has operational control and under which FAR part a flight is being conducted and required that the document be carried in the cockpit during the flight and retained for 30 days after the flight. Id. at V.P.

Operational Control is defined by the Guidelines as "the exercise of authority over initiating, conducting or terminating a flight." See id. at III.F.1. The definition further provides that:

[i]n the context of a Fractional Ownership Program, the Fractional Owner is in Operational Control of a Program flight when the Fractional Owner (a) has the rights and is subject to the limitations set forth in section III of [the Guidelines], (b) has directed that a Program Aircraft carry passengers or property designated by the Fractional Owner, and (c) the aircraft is carrying those passengers or property.

Id. at III.F.

If an owner operates more than 25% in excess of the total flight hours allocated to such owner, such excess hours may not be operated under Part 91. See id. at V.R.

See id. at IV.F.
the existing regulations gave it the legal authority to regulate the fractional program manager. As a result, the FAA made it clear that regulations would be issued. To accomplish this objective, the FAA Administrator established the Fractional Ownership Aviation Rulemaking Committee to "serve as a forum for interaction among FAA, the fractional owners, fractional and traditional management companies, and charter operators." The Order directed the committee "to propose such revisions to the Federal Aviation Regulations and associated guidance material as may be appropriate with respect to fractional ownership programs." Neither the Order nor the FAA Administrator ever indicated that the safety of the fractional ownership programs was a concern. To the contrary, it was hoped that the FOARC would provide recommendations that would help to en-

46 R. Randall Padfield, NBAA's Olcott Faces the Fractional Challenge, Head-On, NBAA CONVENTION NEWS, Oct. 12, 1999, at 10. Without regulations that would specifically govern fractional ownership programs, the FAA was concerned that each of the fractional owners and the fractional program manager would shift the responsibility for compliance to each other leaving the FAA to try to sort out the responsibilities. See also Paul Lowe, Frax Regulations Emerge as NPRM, Comments Due, AIN ONLINE, AVIATION INT'L NEWS, Aug. 10, 2001 (existing regulations do not clearly allocate responsibility for safety and compliance) [hereinafter Lowe, Frax Regulations]; Cindy Skrzycki, FAA Targets 'Fractional Ownership,' WASHINGTON POST, Aug. 7, 2001, at E01 (without regulations, the FAA had difficulty determining whether operational control was vested in the owner or the program manager).

47 Wings of the Future, supra note 7, at 1031-32.

48 The Fractional Ownership Aviation Rulemaking Committee ("FOARC") was established on October 6, 1999 under the authority originally granted to the Administrator in section 230 of the FAA 1996 Reauthorization Act. 49 U.S.C. § 106(p)(5) (2001). This authority allows the FAA to create industry panels without the constraints of the Federal Advisory Committee Act ("FACA"). See 5 U.S.C. Appendix § 2 (1997).

49 Order, Subj: Fractional Ownership Aviation Rulemaking Committee, signed by Jane F. Garvey, Administrator, dated Oct. 6, 1999 [hereinafter the "Order"]. The Order granted the FOARC authority until Dec. 31, 1999, unless sooner terminated or extended. The time period set forth in the Order was extended to allow continued discussions by the FOARC and to permit it to reconvene to discuss issues and to provide further input following FAA internal review of the FOARC Recommendation. See also David Collogan, Fractional Committee Attempting to Bring Real-World Experience to Process, WKLY. BUS. AVIATION, Jan. 24, 2000, at 37 [hereinafter Collogan, Real-World Experience].

50 See Order, supra note 49.

51 Paul Lowe, FAA Frax Group Stays Mum of Finding, AVIATION INT'L NEWS, Jan. 2000, at 3 (the fractional programs have a good safety record and have large safety budgets); Banks, supra note 26, at 54 (the major fractional programs meet or exceed many of the requirements applicable to charter operators).
sure that the high level of safety experienced by fractional ownership programs to date would continue.\textsuperscript{52}

Recognizing that the industry had a significant stake in and a wide range of views regarding fractional ownership programs, the Administrator selected individuals representing the various segments of the industry which offer, use or are affected by fractional ownership programs. Ultimately, twenty-seven members were appointed representing the various constituencies interested in regulation of fractional ownership program operations, including, among others, on-demand charter operators, fractional ownership program managers and owners, aircraft manufacturers, corporate flight departments, traditional aircraft management companies, aircraft financing and insurance companies, industry trade associations, representatives of the FAA, the DOT and foreign civil aviation authorities and were assisted by designated advisors and counsel.\textsuperscript{53}

A. THE DEVELOPMENT OF THE FOARC RECOMMENDATION

In order to fulfill its purpose within the timeframe established by the FAA Administrator, the FOARC scheduled nine days of meetings in November and December 1999, two of which were set aside for public hearings to provide the public an opportunity to comment or present positions on this issue.\textsuperscript{54} During this

\textsuperscript{52} See Kent S. Jackson, \textit{New Rules for Fractionals and Air Charter}, Bus. & Com. Aviation, Sept. 2001, at 140 [hereinafter \textit{New Rules}]; see generally Lowe, Frax Regulations, supra note 46; Skrzycki, supra note 46; Exploring FOARC, supra note 12. The FOARC believed that the enhanced regulations proposed in Subpart K, which were developed based on the best practices of the major fractional programs, would ensure that the exemplary safety record of fractional ownership would continue. Exploring FOARC, supra note 12.

\textsuperscript{53} NPRM, supra note 22, at 37,521. See also FAA’s Fractional Ownership Committee to Begin First of Three Sessions This Week, WKLY. Bus. Aviation, Nov. 15, 1999, at 225-26. Many of the members and participants had been involved in discussions with the FAA throughout the course of the FAA’s review of these programs regarding the appropriate regulatory structure and had participated in the development of the Guidance. FAA’s Fractional Ownership Committee to Begin First of Three Sessions This Week, WKLY. Bus. Aviation Nov. 15, 1999, at 223.

\textsuperscript{54} Notice of these public meetings was provided in the Federal Register. See FAA Fractional Ownership Advisory Committee, 64 Fed. Reg. 66,229 (Nov. 24, 1999); NPRM, supra note 22, at 37,521. Although fractional ownership was one of the most controversial issues faced by business aviation in years, only four parties made presentations to the FOARC during the public meetings. Fractional Ownership Aviation Rulemaking Committee’s Only Session, WKLY. Bus. Aviation, Dec. 6, 1999, at 262. This perhaps was a result of the fact that virtually all positions were represented on the FOARC. See Letter from the FOARC to The Honorable Jane F. Garvey, Administrator, and Mr. Thomas E. McSweeny, Associate Administrator
short time, the FOARC needed to address the multitude of issues involved in fractional ownership and reconcile the vastly different positions represented by the FOARC members and participants.  

Based on the wide range of perspectives on the committee and the strength of the disagreement between different factions, a good deal of time was spent during the initial meetings identifying each party's position. Following these presentations, it became clear that there were common inter-

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55 Recommendation Transmittal Letter, supra note 54, and Regulation of Fractional Aircraft Ownership Programs: The Recommendation of the Fractional Ownership Aviation Rulemaking Committee, Feb. 23, 2000 [hereinafter "Recommendation Transmittal Letter"], at 1. An additional thirteen written comments were submitted in the public docket. See FAA Docket No. FAA-1999-6483. These comments were submitted by Raytheon Travel Air on behalf of its fractional owners, United Business Jet, Inc., Aero Charter, West Bend Air, Inc., John L. Doyle, WestJet Air Center, Inc., Southwest Safaris, Tulsair Beechcraft Inc., Midwest Flying Services, Inc., Robert A. Wilson, RAW, Inc., MarcAir and Joel R. Brandstetter. Several Part 135 operators believed that fractional ownership programs belonged under Part 135 because of the competitive edge they had under Part 91. See Comments of Aero Charter, West Bend Air, Inc., Tulsair Beechcraft Inc., Midwest Flying Services, Inc., and RAW, Inc. One party stated that fractional ownership did not neatly fit into either Part 91 or Part 135 and that a new Part should be established for it. See Comments of WestJet Air Center, Inc. Participants in fractional ownership programs, however, wished to remain under Part 91. See Comments of Raytheon Travel Air on behalf of its fractional owners. Other parties wanted to ensure that any regulations governing fractional ownership would not prevent a partnership from being formed to share an aircraft nor would they prevent small programs from being developed. See Comments of Southwest Safaris. United Business Jet was concerned that the minimum requirement of two aircraft, three owners and three pilots per aircraft was "restrictive, excessive, and monopolistic." Instead, it believed that a company should be able to "market itself as a 'Fractional Ownership Provider' with only one aircraft and no owners." See Comments of United Business Jet, Inc.


57 See, e.g., New Rules, supra note 52, at 140 (mistrust was so strong, the first day was spent arguing about who could sit at the table); Exploring FOARC, supra note 12, at 68 ("there was a lack of trust between the fractionals and the charter community, and between everyone and the FAA").

ests, albeit approached from different perspectives. As a general rule, the FOARC members and participants agreed that it was important to retain the flexibility provided by Part 91, Subpart F,\(^5\) that there was no safety reason to require fractional ownership programs to be operated under Part 135\(^6\) and that Part 135 operators deserved relief from some of the archaic rules that limited their flexibility.\(^6\) With the fundamental agreement on many of the goals, the members of the FOARC agreed that the committee would attempt to reach consensus recommendations and that, absent consensus, majority and minority reports would be provided to the FAA.\(^6\)

The members and participants of FOARC agreed that an appropriate starting point would be to define fractional ownership.\(^6\) Since many of the parties had participated in the development of the Guidelines, the FOARC’s definition of a fractional ownership program was virtually identical to that set

\(^5\) See Wings of the Future, supra note 7, at 1002-06. For a discussion of the operations permitted under Subpart F, see Corporate Aircraft Operations, supra note 11, at 993-1006. The FAA had made clear that any changes to Subpart F for the purpose of regulating fractional ownership programs would not be surgical and that the industry could expect such changes to impact a broad range of business aviation operations. See Exploring FOARC, supra note 12, at 66, 68. See also Jack Olcott, FOARC Recommendation Submitted to FAA, NBAA DIGEST, Mar. 2000, at 2.

\(^6\) See Emma Kelly, Fractional Could Escape Change, FLIGHT INT’L, Feb. 29, 2000, at 38; Collogan, FOARC Delivers NPRM, supra note 55, at 94, 98. Frax Group Recommends ‘Special K,’ AVWEB NEWS WIRE, at 2-3, at http://www.avweb.com/newswire/news0008b.html (Feb. 24, 2000); See Frax Working Group Makes Regulatory Recommendations to the FAA, AVFLASH, Feb. 24, 2000; Collogan, Real-World Experience, supra note 49, at 37. See also Barbara Cook, The Factions of Fractional Ownership, AIRPORTNET, July 8, 2000. The safety record of business aviation in general and fractional ownership programs in particular was described in detail during the public portion of the FOARC’s meetings. See In the Matter of Public Meeting on Fractional Ownership, FAA Docket No. FAA-1999-6483-13, at 33-38 (Nov. 30, 1999). In addition, based in large part on the sophistication of the business aircraft being operated and the exemplary safety record of the fractional ownership programs, it was determined that some of the more stringent provisions of Part 135 could be relaxed as long as the Part 135 operator meet certain qualifications. See NPRM, supra note 22, at 37,523; 37,529; 37,531.

\(^6\) See Exploring FOARC, supra note 12, at 66, 68.

\(^6\) See Collogan, Real-World Experience, supra note 49, at 37. See also Collogan, Fractional Ownership Fracas, supra note 23, at 100 (the different segments of the industry need to find common ground and “develop a unified industry position before the FAA does it… and comes up with something no one likes.”). Although many in the industry believed that the intense difference of opinions among members of the FOARC virtually assured its failure, the members viewed it as a unique opportunity to make a difference and have a hand in the resolution of the issue. See New Rules, supra note 52, at 140.

\(^6\) Wald, supra note 55, at 27.
forth in the Guidelines. Specifically, the FOARC defined fractional ownership as: any system of aircraft exchange involving two or more airworthy aircraft that consists of all of the following elements:

(i) The provision for fractional ownership program management services by a single fractional ownership program manager on behalf of the fractional owners;
(ii) One or more fractional owners per program aircraft, with at least one program aircraft having more than one owner;
(iii) Possession of at least a minimum fractional ownership interest in one or more program aircraft by each fractional owner;

64 Guidelines, supra note 33, at III.A.1. In fact, the FOARC Recommendation was largely based on the Guidelines. See Paul Lowe, Criticism of NBAA Eases Over Fractional NPRM, AVIATION INT'L. NEWS, Sept. 1, 2001, at 4.
65 FOARC Recommendation, supra note 55, at § 91.1001(b)(1).
66 The FOARC Recommendation defined “fractional ownership program management services” as administrative and aviation support services furnished in accordance with the applicable requirements of this subpart or offered by the program manager to the fractional owners, including, at a minimum, the establishment and implementation of program safety guidelines, and the coordination of the following:

(i) The scheduling of the program aircraft and crews;
(ii) Program aircraft maintenance;
(iii) Crew training for crews employed, furnished or contracted by the program manager or the fractional owner;
(iv) Satisfaction of recordkeeping requirements; and
(v) Development and use of a program operations manual and maintenance program manual.

67 The FOARC defined a “fractional ownership program manager” as the “designated entity that offers fractional ownership program management services to fractional owners.” Id. § 91.1001(b)(8).
68 A “fractional owner” is “an individual or entity which possesses a minimum fractional ownership interest in a program aircraft and which has entered into the applicable program agreements.” Id. § 91.1001(b)(5).
69 A “program aircraft” was defined by FOARC as “an aircraft in which a fractional owner has a minimum fractional ownership interest and which has been included in the dry-lease aircraft exchange pursuant to the program agreements.” Id. § 91.1001(b)(6).
70 The FOARC defined a “fractional ownership interest” as the “ownership of an interest or holding of a multi-year leasehold interest and/or a multi-year leasehold interest that is convertible into an ownership interest in a program aircraft” and a “minimum fractional ownership interest” as:

(i) A fractional ownership interest equal to, or greater than, one-sixteenth (1/16) of at least one subsonic, fixed-wing or powered-lift program aircraft; or
(iv) A dry-lease aircraft exchange arrangement among all of the fractional owners;
and
(v) Multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program. With the definition as the starting point, the FOARC worked to reconcile the various points of view presented by the members and participants as well as the views offered by the public in an effort to reach a consensus.

Perhaps the most significant issue to be resolved was operational control since that would be a critical factor in determining whether Part 91 or Part 135 was the appropriate regulatory regime. The parties supporting the placement of fractional ownership programs under Part 135 believed the program manager had operational control and should therefore be subject to the same regulations as the Part 135 charter operators. On the

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71 A "dry-lease aircraft exchange" is defined as "an arrangement, documented by the written program agreements, under which the program aircraft are available, on an as needed basis, and subject to specified conditions, without crew, to each fractional owner." Id. § 91.1001(b)(2).

72 The FARs specify "[o]perational control, with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight." FAA Definitions & Abbreviations, 14 C.F.R. § 1.1 (2001).

73 If the fractional owner has operational control, Part 91 would be appropriate. If, however, it was determined that the program manager had operational control, the fractional ownership programs would need to be operated under Part 135. See Wings of the Future, supra note 7, at 1002. See also New Rules, supra note 52, at 140.

74 Because the Part 135 operators saw no distinction between the services provided by the fractional program managers and those provided by Part 135 on-demand air taxi operators, they believed that the fractional program managers had an unfair competitive advantage. See supra note 26 and accompanying text. As a result, they believed that the application of Part 135 was the only effective
other hand, the parties that supported continued regulation of fractional ownership programs under Part 91 believed that the fractional owner had operational control and, as such, should be entitled to the same regulatory flexibility as the owners of whole aircraft. Much of this debate centered on the degree to which an aircraft owner could hire outside aviation expertise while continuing to operate under the same rules as owners with in-house aviation expertise.

In an effort to classify the fractional owners' flights, the FOARC engaged in an in-depth analysis of the similarities and differences among operators of wholly owned aircraft, passengers using charters, and fractional owners. Such an analysis revealed that fractional owners share more characteristics with

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75 The parties supporting Part 91 saw no difference in the role played by the program manager in fractional ownership programs and the role played by a management company for an individual owner of a whole aircraft. See Wings of the Future, supra note 7, at 1016-17.

76 See US Fractional Ownership Steps Into New Subpart K Territory, GLOBAL BUS. JET, Apr. 2000, at 2. Although the FAA permits owners to obtain aviation expertise from outside their organization as well as to engage in certain compensatory operations under Part 91, many other countries require certification for company flight departments, outside management companies as well as the types of cost-sharing practices permitted under Part 91, Subpart F. Id. For example, the U.K. Civil Aviation Authority believes that the operator of an aircraft is the party responsible for (1) obtaining the appropriate Certificate of Airworthiness, (2) arranging maintenance, (3) keeping the aircraft's logbooks, (4) producing documents and records when required, (5) ensuring that the crew are suitably trained and licensed, and (6) employing flight crew. Based on this analysis, the program manager would be the operator and, under UK law, fractional ownership would fall under the definition of public transport requiring the program manager to hold an Air Operators' Certificate. As a result, even U.S. registered fractional ownership aircraft would be required to hold an Air Operators' Certificate regardless of the position taken by the FAA. See Presentation of Mr. Geoff Parker, Head Flight Operations Policy, United Kingdom Civil Aviation Authority.

77 See FOARC Recommendation, supra note 55, at 6. This analysis was undertaken because the appropriate regulations for a particular flight are largely determined by the degree of control a passenger exercises over the operation of the flight and the degree of responsibility taken by the passenger for the airworthiness and operation of the aircraft. The greater the responsibility, the more flexible the operating rules. Id.
the owners of whole aircraft than they do with charter passengers. Based on the similarities between fractional owners and owners of whole aircraft, the FOARC then tackled the FAA's concerns regarding operational control. In addressing this issue, the FOARC believed that the traditional analysis of operational control was not appropriate since the typical fractional aircraft owner does not have aviation expertise. Nevertheless, in order for the fractional owner to operate under Part 91, the owner must have operational control. An examination of the operation of business aircraft in general and fractional ownership in particular supported the FOARC's belief that fractional ownership was properly regulated under Part 91.

The FOARC's analysis was based, in part, on the FAA's longstanding policy that the proper regulatory environment should be determined by the "commercial (on-demand charter) or non-commercial (business or personal) motive a company or individual has in operating an aircraft, rather than on the form of the arrangements that led to the acquisition of the aircraft interest." This policy was first expressed by the FAA thirty years ago when it examined the cost-sharing mechanisms that were being used by aircraft operators to help defray part of the cost associated with the more complex business aircraft that were becoming available. Specifically, the FAA stated its intent:

- to remove, to the extent possible, those differences in the safety standards that [are] primarily economic in nature and result in unnecessary restrictions or limitations on aircraft operators.

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78 The FOARC agreed that fractional owners can initiate, conduct, redirect and terminate a flight and may only operate their aircraft under Part 91 for themselves and their guests; they may not offer transportation for hire to the general public unless they do so under Part 135 or Part 121. *Id.* Attention was also paid to the financial investment and the responsibility assumed as a result thereof. Specifically, as is the case with whole aircraft owners, fractional owners (1) conduct research so that they can be assured that they will select the right aircraft and realize an adequate return on their capital investment; (2) acquire an interest in an aircraft through a significant capital investment; (3) purchase aviation expertise for the purpose of managing, maintaining or otherwise aiding the operation of the aircraft they operate under Part 91, including the option to select flight crews; and (4) bear the risk of loss or damage to the aircraft and the risk of diminution of value of the aircraft. *Id.*

79 See *id.* See also NPRM, *supra* note 22, at 37,526-27.

80 FOARC Recommendation, *supra* note 55, at 10-11. Typically, the entity that had aviation expertise and made the decisions bearing on the safety of the flight would be viewed as the party with operational control. *Id.* However, under longstanding practice, the FAA has permitted aircraft owners to purchase aviation expertise and remain under Part 91. *Id.* at 8.

81 NPRM, *supra* note 22, at 37,521.
accordance with that policy, the need for different or additional safety standards for corporate operations should be resolved on the basis of safety, rather than economics or juristic semantics.\textsuperscript{82}

Based in part on this decades old policy and analysis, the FOARC agreed that the fractional owner could delegate the performance of the tasks that comprise operational control while at the same time maintain the overall responsibility for the manner in which these tasks are performed.\textsuperscript{83}

Although the fractional owner’s operational control supported the recommendation that fractional ownership continue to be governed by Part 91,\textsuperscript{84} the FOARC believed that there were enough differences between whole aircraft owners and fractional owners to justify additional regulation.\textsuperscript{85} The FOARC believed that notwithstanding (or perhaps because of) the owner’s delegation of the performance of certain of the tasks associated with operational control, it is important to ensure that each fractional owner understand the responsibility and potential liability that goes hand in hand with operational control and that the fractional owner make an informed decision regarding its role and responsibility for compliance.\textsuperscript{86} To accomplish this, the FOARC recommended that the program manager be required to brief the fractional owner on the owner’s operational control responsibilities and the implications of assuming such responsibility and that the fractional owner execute an acknowledgment confirming its understanding of these issues.\textsuperscript{87}

The FOARC also recommended that a detailed pre-flight pas-

\begin{itemize}
\item \textsuperscript{82} Id. at 37,522 (quoting 37 Fed. Reg. at 14,758).
\item \textsuperscript{83} FOARC Recommendation, supra note 55. In addition to the delegation of aviation tasks by fractional owners, the FOARC noted that a similar delegation was often found with owners of whole business aircraft who contracted with management companies to obtain aviation support services. Id.
\item \textsuperscript{84} Id. at 8-9.
\item \textsuperscript{85} Unlike whole aircraft, (1) fractionally-owned aircraft typically have multiple owners, (2) the availability of the aircraft is a component of a pooled fleet, (3) the owners of a fractionally-owned aircraft agree to use the services of a single company to manage their aircraft, and (4) all owners agree to a uniform aircraft configuration. Id. at 9. See also Recommendation Transmittal Letter, supra note 54.
\item \textsuperscript{86} FOARC Recommendation, supra note 55, at § 91.1011.
\item \textsuperscript{87} Id. at 12, § 91.1013. Among other things, the fractional owner must be informed that whenever the owner is in operational control, it is (1) responsible for compliance with all FARs applicable to the flight, notwithstanding the fact that it has contracted with the program manager to carry out tasks related to compliance, (2) exposed to FAA enforcement action for any noncompliance, and (3) exposed to significant liability risk in the event of any personal injury or death resulting from the flight.
\end{itemize}
senger briefing be conducted to ensure, among other things, that the passenger understood which entity had operational control on that flight and whether such flight would be conducted under commercial or non-commercial rules.88

Despite the fact that the parties’ roles and responsibilities would be set forth in the agreements and the owner would be briefed prior to flight, the FOARC believed that the interrelationship between all of the fractional owners and the program manager mandated that the regulations specify when a fractional owner would be in operational control and therefore responsible for compliance with all applicable requirements. Accordingly, it stated that the fractional owner would have operational control when it has directed that a program aircraft9 carry persons or property designated by the owner and the aircraft is carrying such persons or property.90 On the other hand, if a program aircraft is being used for administrative purposes such as demonstration, positioning, ferrying, maintenance, or crew training, and no persons or property designated by such owner are being carried, or the aircraft being used for the flight is operated under Parts 121 or 135, the fractional owner would not have operational control or the associated responsibilities.91

In addition to ensuring that fractional owners understand their responsibilities, the FOARC wanted fractional owners to be able to confirm that the program manager is appropriately performing the delegated tasks. To accomplish this, the FOARC recommended that the contract between the fractional owner and the program manager grant the fractional owner the right to inspect and audit the program manager’s records and safety procedures.92 Since program managers also use outside operators to provide lift,93 the FOARC recommended that fractional owners be advised of such substitutions in advance.94 With such background information and an ability to monitor the performance of the program manager, the FOARC believed that the

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88 Id. at 13, § 91.1035.
89 A “program aircraft” is an aircraft in which a fractional owner has a minimum fractional ownership interest and which is included in the dry-lease aircraft exchange pursuant to the program agreements. Id. § 91.1001(b)(6).
90 Id. § 91.1009(a).
91 Id. § 91.1009.
92 Id. at 11, § 91.1003.
93 See Wings of the Future, supra note 7, at 997.
94 See FOARC Recommendation, supra note 55, § 91.1007.
fractional owner could satisfactorily exercise operational control.

B. THE FOARC'S PROPOSED REGULATION OF PROGRAM MANAGERS

The FOARC also believed that the significant role played by the program manager warranted its regulation.\(^{95}\) Not only would such regulation set the standards for the program manager's performance, it would also subject the program manager to direct FAA safety regulation and enforcement.\(^{96}\) The FOARC proceeded to identify the program manager's independent obligations\(^{97}\) and based on the well developed procedures used by the existing fractional ownership programs, the FOARC recommended that the best practices of the fractional ownership industry be used as one of the building blocks for the development of Subpart K.\(^{98}\) With these practices and the application of many of the safety procedures and requirements of Parts 119 and 135, the FOARC developed a comprehensive set of recommendations that, if adopted, would govern fractional ownership programs.\(^{99}\) First, to ensure that the manager could fulfill its independent obligations and that the FAA could appro-

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\(^{95}\) See id. at 12. See also New Rules, supra note 52, at 140.

\(^{96}\) In discussing the regulation of program managers, the FOARC determined that many program managers already had systems and procedures in place to ensure the safety of the operation and considered themselves subject to FAA surveillance and enforcement. See FOARC Recommendation, supra note 55, at 12. Because the services provided by the program manager are critical to aviation safety and the FAA, in other areas, has placed independent responsibility on parties notwithstanding the fact that they are not operating aircraft, regulation of the program manager was appropriate. Id. See also FAA Repair Stations, 14 C.F.R. pt. 145 (2001).

\(^{97}\) See FOARC Recommendation, supra note 55, at 9.

\(^{98}\) Id.

\(^{99}\) Id. at 9-10. In addition, to ensure that the standards would be rigorously followed and enforced, the FOARC recommended that the level of scrutiny given fractional ownership programs be the same as that given to Part 135 and Part 121 operations. See id. at 12. The FOARC also recommended certain technical revisions. Specifically, it recommended that sections 119.1 and 125.1 be amended to include a reference to part 91, subpart K to make it clear parts 119 and 125 are not applicable to fractional ownership program aircraft. See FOARC Recommendation, supra note 55, at 22; FAA Certification & Operations, 14 C.F.R. §§ 119, 125 (2001). There was a concern that, without this clarification, a fractional ownership program aircraft having more than 20 seats or a maximum payload capacity of 6,000 pounds or more would be required either to be covered by a Part 125 certificate or would need a deviation from Part 125. See 14 C.F.R. §§ 125.1(a) (applicability), 125.3 (deviation authority).
appropriately evaluate and monitor the program manager, the FOARC recommended that program managers have management specifications. These specifications would detail, among other things, the program manager’s practices and procedures and provide a detailed explanation of the procedures to ensure the airworthiness of the aircraft and safety of flight. The existence of such a document would also facilitate the FAA's oversight and surveillance of these programs.

Conceptually, the management specifications were based on operations specifications issued to carriers operating under Parts 135 and 121 of the FARs and would contain, among other things, information identifying the fractional owners, the registration and serial number of each aircraft in the program, the authorizations, limitations, and procedures under which each kind of operation is conducted, including inspection and maintenance requirements and emergency equipment, the location of the program manager’s principal base of operations, other business names used by the program manager, weight and balance procedures, and any devia-

100 The management specifications would be issued only to program managers that satisfied a comprehensive set of requirements. See infra notes 103-125 and accompanying text.

101 See FOARC Recommendation, supra note 55, at 13, § 91.1015(a).

102 See id. at 12. The FOARC Recommendation included, among other things, a procedure for amending, suspending, or revoking management specifications and for the FAA to ensure that the program manager continued to comply with the requirements set forth in the management specifications. See id. §§ 91.1017-19.

103 Compare FOARC Recommendation, supra note 55, § 91.1015 with FAA Certification, 14 C.F.R. § 119.49 (2001). Although management specifications are patterned after operations specifications issued to air carriers, the FOARC distinguished them from the operations specifications to avoid the perception that a program manager was certificated because certification could interfere with the operations of fractional ownership programs under Part 91 and result in a loss of the critical flexibility provided by Part 91. See Wings of the Future, supra note 7, at 1002-06.


105 Compare FOARC Recommendation, supra note 55, § 91.1015(a)(4) with 14 C.F.R. § 119.49(a)(4).

106 Compare FOARC Recommendation, supra note 55, § 91.1015(a)(2) with 14 C.F.R. § 119.49(a)(6), (a)(8).

107 Compare FOARC Recommendation, supra note 55, § 91.1015(a)(5) with 14 C.F.R. § 119.49(a)(1).

108 Compare FOARC Recommendation, supra note 55, § 91.1015(a)(6) with 14 C.F.R. § 119.49(a)(2).

109 Compare FOARC Recommendation, supra note 55, § 91.1015(a)(7) with 14 C.F.R. § 119.49(a)(9).
The program manager would also be required to develop a program operating manual\textsuperscript{111} that would contain procedures and requirements relating to operational issues, maintenance and other procedures and keep the manual on board each program aircraft\textsuperscript{112}. As with the management specifications, the contents of the manual were based on the requirements for Part 135 manuals\textsuperscript{113} and include, among other things, procedures for ensuring compliance with aircraft weight and balance limitations; identification of category and class of aircraft authorized, crew complements, details for pre-employment, random, and post accident drug and alcohol abuse programs for employees engaged in safety sensitive program operations; types and areas of operations authorized; accident notification requirements; and procedures for the pilot in command to confirm the performance of required airworthiness inspections, the correction or proper deferral of mechanical irregularities or defects reported for previous flights and the approval for the aircraft to return to service.

The manual will also detail the methods for obtaining maintenance, preventive maintenance, and servicing of the aircraft at places where previous arrangements have not been made; reporting and recording mechanical irregularities that arise before, during and after a flight, and for the continuation of flight if any item of equipment becomes inoperative or unserviceable en route; refueling aircraft; ensuring compliance with emergency procedures and procedures for the evacuation of persons who may need the assistance; approved aircraft inspection program performance planning that takes into account take off, landing and enroute conditions; an approved Destination Airport Analysis establishing procedures for establishing runway margins at destination airports when reduced runway operating lengths would be utilized; and a system for preserv-
tion and retrieval of maintenance recordkeeping information.\textsuperscript{114}

The FOARC also included a provision requiring aircraft proving tests when a fractional ownership program first commences operations or when it adds a more complex category or new class of aircraft.\textsuperscript{115} To be listed on the management specifications, an aircraft would be required to have a cockpit voice recorder, flight recorder, ground proximity warning system, airborne thunderstorm detection equipment or airborne weather radar, and a traffic alert and collision avoidance system if such equipment would be required if that aircraft were operating under Part 135.\textsuperscript{116} With respect to additional overwater equipment requirements the FOARC used the existing "30 minutes or 100 miles" standard.\textsuperscript{117} However, to ensure that this provision would be consistently interpreted, the Recommendation stated that the additional overwater equipment requirements would not apply to a pressurized turbine-powered aircraft certified to an altitude greater than 25,000 feet unless it proceeded "more than 30 minutes or 100 miles from the nearest shore, whichever is greater."\textsuperscript{118}

To help ensure that the program manager could fulfill its responsibilities, detailed provisions regarding the crew were also included in the Recommendation.\textsuperscript{119} Specifically, a program manager would be required to employ a minimum of three pilots per program aircraft,\textsuperscript{120} conduct a pilot safety background check\textsuperscript{121} and implement a drug and alcohol abuse recognition

\textsuperscript{114} See FOARC Recommendation, supra note 55, § 91.1025.

\textsuperscript{115} Under the Recommendation, a program manager would be required to satisfy a 25 hour proving test requirement. Id. § 91.1041. Although the FOARC Recommendation did not explain what it meant by "a more complex category or new class of aircraft," the NPRM did provide an explanation. See infra note 184 and accompanying text.

\textsuperscript{116} FOARC Recommendation, supra note 55, § 91.1045. The FOARC noted that such equipment is already installed on aircraft operated in many of the existing fractional ownership programs. Id.

\textsuperscript{117} FAA General Operating & Flight Rules, 14 C.F.R. § 91.509(b) (2001). The FOARC noted that some FAA offices interpret this requirement as the lesser of 30 minutes or 100 miles. See FOARC Recommendation, supra note 55, § 91.1045. The application of such an interpretation to modern business jets results in a substantial reduction of the 100 mile radius. Id.

\textsuperscript{118} Id. § 91.1043.

\textsuperscript{119} Id. §§ 91.1049-51.

\textsuperscript{120} Id. § 91.1049(b).

\textsuperscript{121} Id. § 91.1051. The specific information to be obtained was based on the Pilot Records Improvement Act of 1996 ("PRIA"). See Pilot Records Improvement Act of 1996, Pub. L. No. 105-142, 111 Stat. 2650; 49 U.S.C. § 44936 (2001).
and prevention program.\textsuperscript{122} In addition, all pilots used by the program manager would have to meet minimum experience requirements that are higher than those applicable to Part 135 operators.\textsuperscript{123} As a related matter, pairing requirements would be imposed for the crew at all times to ensure that, as a team, the crew has adequate experience for the type of operation and the particular aircraft.\textsuperscript{124} To maximize a crewmember’s experience in particular aircraft, the FOARC also recommended that no flight crew member be assigned to more than two aircraft types that require a separate type rating.\textsuperscript{125}

When it came to crew flight and duty time limitations, however, the FOARC believed that the requirements in Subpart K did not need to be identical to those contained in Part 135. In the current regulatory environment, Part 91 fractional owner-
ship programs are not subject to any flight and duty restrictions.\(^\text{126}\) The absence of such restrictions has long been a point of contention for Part 135 operators who must comply with a rigorous set of flight and duty time restrictions. In an effort to address these disparities, the FOARC included in the Recommendation a detailed set of requirements for fractional ownership programs. These requirements, while intended to ensure that flight and duty time and rest periods were appropriately balanced and that the crew would have adequate rest to operate safely, were also intended to enable fractional ownership programs to retain the flexibility that is the hallmark of business aviation operations under Part 91. For example, under Subpart K, a crew member in a fractional ownership program whose flight time exceeds ten hours but is less than sixteen hours, would be required to have a rest period equal to the total hours on duty, while under Part 135, sixteen hours of rest would be required.\(^\text{127}\) However, unlike Part 135, the FOARC included provisions for minimum rest periods for east-west flights that cross five or more time zones,\(^\text{128}\) a definition of reserve status\(^\text{129}\) and defined standby status as a type of duty.\(^\text{130}\) Although the requirements were not identical, the FOARC believed that, on

\(^{126}\) See Wings of the Future, supra note 7, at 1004.

\(^{127}\) Compare FOARC Recommendation, supra note 55, § 91.1059(c) with 14 C.F.R. § 135.267(e).

\(^{128}\) See FOARC Recommendation, supra note 55, §§ 91.1059(c), 91.1061(a). The Recommendation defined a multi-time zone flight as “a continuous east or west flight crossing five (5) or more time zones that is not north of 60 degrees north latitude or south of 60 degrees south latitude.” Id. § 91.1059(a). The inclusion of such a provision was intended to reflect the realities of business aircraft operations and Circadian rhythm patterns.

\(^{129}\) Reserve status is defined as:

that status in which a flight crew member, by arrangement with the program manager: holds himself or herself fit to fly to the extent that this is reasonably within the control of the flight crew member; remains within a reasonable response time of the aircraft as agreed between the flight crew member and the program manager; and maintains a ready means whereby the flight crew member may be contacted by the program manager. Reserve status is not part of any duty period. A flight crew member on reserve status who is called to duty may perform a normal duty period under §§ 91.1059 or 91.1061 if, following the flight crew member’s last duty period, the flight crew member received the minimum rest before duty required by § 91.1059 or § 91.1061, respectively, before entering reserve status.

\(^{130}\) Standby is defined as “that portion of a duty period during which a flight crew member holds himself or herself in a condition of readiness to undertake a
balance, the totality of the Subpart K requirements provided an equivalent level of safety.

Another major regulatory difference tackled by the FOARC related to the balanced field length requirement. Although a Part 135 operator may operate an aircraft only to a destination if the aircraft can be landed within 60% of the runway,\textsuperscript{131} Part 91 operators, including fractional owners, may operate to any airport with a runway meeting the requirements of the Airplane Flight Manual.\textsuperscript{132} Also, Part 91 operators may begin an instrument approach to an airport that has no weather reporting facility and determine when it approaches the airport whether the weather is good enough to land the aircraft safely,\textsuperscript{133} while Part 135 operators may not.\textsuperscript{134} In an effort to reconcile these differences, the FOARC agreed that aircraft operated in fractional ownership programs should comply with an 85% balanced field length requirement,\textsuperscript{135} that either the destination airport or the alternate airport should have an approved weather reporting facility and that a current local altimeter setting for the destination airport be available,\textsuperscript{136} and that there be limitations on IFR flights where weather conditions are at or above takeoff minimums but are below authorized IFR landing minimums.\textsuperscript{137}

Under the proposed regulatory scheme, the fractional owner and the program manager would be jointly and severally responsible for the airworthiness, safe operation and maintenance of fractional ownership program aircraft, and compliance with the applicable regulations.\textsuperscript{138} Because the regulations would apply to the fractional owner and the program manager "with equal and concurrent force, and with equal exposure to FAA enforce-
ment,”\textsuperscript{139} the FOARC believed that the FAA’s concern that the parties may attempt to shift responsibility would be eliminated since enforcement action could be taken against the fractional owner and/or the program manager. This approach would also give each party a vested interest in ensuring compliance by the other.

C. FOARC’S PROPOSED REVISIONS TO PART 135

In addition to proposing a detailed set of requirements for both the fractional owners and the program managers, the FOARC recommended that certain provisions of Part 135 be amended. There were two primary driving forces behind this recommendation. First, without a relaxation of some of the archaic operating rules in Part 135, the FOARC would never reach a consensus.\textsuperscript{140} Second, many of the operating restrictions found in Part 135 are woefully out of date and do not reflect the technological advances and operating experience of the last several decades.\textsuperscript{141} By relaxing some of these restrictions to reflect the current state of technology and operating experience, the competitive concerns raised by the Part 135 operators could be addressed without any adverse effect on safety.\textsuperscript{142}

\textsuperscript{139} Id. In fact, the Recommendation placed the responsibility for compliance on the fractional owner, the program manager, the flight crew, and ground and maintenance personnel. See id. at 12.

\textsuperscript{140} See Croft, supra note 26 (the relaxation of some of the Part 135 restrictions was used as a “tradeoff” to get the Part 135 operators to agree to keep fractional ownership programs under Part 91). See also R. Randall Padfield, It’s Time to ‘Vote’ on the Fractional NPRM, AVIATION INT’L NEWS, Sept. 1, 2001, at 2. The FOARC Recommendation will help to create a more level playing field by increasing the requirements for fractional ownership programs and easing some of the requirements for air taxis.

\textsuperscript{141} See Croft, supra note 26, and discussion infra note 144. Some of these changes were intended to reconcile the ways in which the regulations were being interpreted by different FAA offices. See FOARC Recommendation, supra note 55, at 20, notes 117-118 and accompanying text. For example, the FOARC recommended that when a Part 135 operator uses pressurized turbine-powered aircraft certified to an altitude greater than 25,000 feet, the standard be “more than 30 minutes or 100 miles from the nearest shore, whichever is greater.” See id. § 135.167(d).

\textsuperscript{142} See id. at 17. In terms of safety, the FOARC was comfortable recommending a relaxation of these requirements since the Part 135 operators generally operate the same type of equipment as is used in fractional ownership programs and there has been no safety concern with the fractional ownership programs. In fact, the data reflects that the safety record of the Part 91 fractional operations exceeds that of Part 135 jet operators. See also Croft, supra note 26.
Among other things, the FOARC recommended that, under certain circumstances, the runway length requirement be changed from 60% to 85% and that instrument flight operations be authorized to airports where there is no FAA-approved weather reporting facility. In addition, the FOARC recommended that the requirement for proving tests be limited to circumstances where significantly different aircraft are being added to an operator’s fleet and that a limited exception be

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143 These recommended changes, however, were viewed as significant enough to warrant that they be available only to “qualified on-demand operators.” Specifically, in order for a Part 135 operator to avail itself of the additional flexibility provided by the proposed changes, the operator would be required to meet the crew experience, pilot operating limitations and pairing requirements of proposed sections 91.1053 and 91.1055. See supra notes 123-124, infra note 189 and accompanying text.

144 See FOARC Recommendation, supra note 55, § 135.385. In making these recommendations, the FOARC noted that the 60% rule, which has been in place for over fifty years, was based on outdated concerns that are no longer valid. Specifically, the 60% runway length rule was developed because of the unpredictability of airplane landing performance during the 1930s and 1940s and the fact that significant performance variations existed even among a single aircraft model. Similarly, because there were not standardized maintenance procedures and parts and components were only replaced when they failed, the mechanical condition of the aircraft largely depended on the capabilities of the particular mechanic who was working on the aircraft and the assumption that no parts or components would fail at a particular time. See id. at 15. Since that time, aviation has undergone substantial technological development and standardization, including, among other things, a greater understanding of the physics of stopping an aircraft, approved airplane repair manuals, sophisticated forms of pilot training, weather forecasting, commonality of airport designs, and more rigorous certification requirements. Id. at 15-17. See also New Rules, supra note 52, at 140, 142-144.

145 See FOARC Recommendation, supra note 55, § 135.225. Based on the extensive experience gained from the operation of aircraft to airports without FAA-approved weather reporting facilities, the FOARC believed that as long as the operator had a weather report from an FAA-approved weather reporting facility at either the destination or alternate airport and a current local altimeter setting for the destination airport or procedures in the manual for determining that setting, weather reporting at the destination airport was not necessary. As such, the FOARC believed that the use of this alternate method of compliance would provide a level of safety equivalent to the requirements currently found in the FARs. See FOARC Recommendation, supra note 55, at 19. Without this alternate method, the operator cannot begin an instrument approach to an airport that does not have an FAA-approved weather reporting facility. See FAA Operating Requirements, 14 C.F.R. § 135.225 (2001). See also New Rules, supra note 52, at 144.

146 See FOARC Recommendation, supra note 55, § 135.145. The FOARC noted that the FAA currently requires proving tests whenever a new type of aircraft is added to the operator’s fleet regardless of its similarity to existing aircraft in the fleet. Under the recommended change, proving runs would be required only at
provided to the stringent drug and alcohol testing rules when an unanticipated maintenance requirement arises.\textsuperscript{147}

D. \textbf{The Road From the FOARC Recommendation to the NPRM}

On February 23, 2000, the FOARC presented the Recommendation to the FAA Administrator. This Recommendation was only the first step in the regulatory process that ultimately led to the issuance of the proposed Subpart K that, for the first time, would regulate fractional ownership programs.\textsuperscript{148} When the Recommendation was submitted, the FAA was advised that the FOARC’s agreement to permit fractional ownership programs to continue to operate under Part 91 was part of a package and that without the accompanying relaxation of Part 135, the consensus would be lost.\textsuperscript{149} The FOARC also stressed that the Rec-
ommendation was intended to address only fractional ownership programs and provide some relief for Part 135 operators; it was not intended to and should not affect traditional Part 91 flight departments or management companies.\textsuperscript{150} The FOARC further requested that, after reviewing the Recommendation, the FAA advise it whether the concept was acceptable.\textsuperscript{151}

Following the FAA’s initial review of the Recommendation, the FOARC was reconvened in April 2000 to discuss the FAA’s response.\textsuperscript{152} In spite of some potentially controversial issues, the FOARC members and participants worked through the issues and preserved the consensus.\textsuperscript{153} With the open issues clarified and the FAA’s questions answered, the FOARC finalized the Recommendation and re-submitted it to the FAA in July 2000.\textsuperscript{154}


\textsuperscript{151} Intelligence, Wkly. Bus. Aviation, Mar. 27, 2000, at 141; McKenna, supra note 21, at 47. Assuming the concept was acceptable, the FOARC advised the FAA that members of the FOARC were willing to fund the preparation of the economic analysis that is required by law for all proposed rules. See Collogan, FOARC Delivers NPRM, supra note 55, at 98.

\textsuperscript{152} See Fractional Ownership Committee Recommendations Go to FAA, Aviation Daily, Aug. 3, 2000, at 6; Intelligence Wkly. Bus. Aviation, July 31, 2000, at 47; NPRM, supra note 22, at 37-521. Prior to the meeting, there were concerns that certain individuals within the FAA objected to the concepts underlying the FOARC’s Recommendation. See Intelligence, Wkly. Bus. Aviation, Apr. 24, 2000, at 189.

\textsuperscript{153} Intelligence, Wkly. Bus. Aviation, May 1, 2000, at 201. With the FAA’s agreement as to the concept of the Recommendation, Phaneuf Associates was retained by the FOARC to prepare an economic analysis. See Exploring FOARC, supra note 12, at 70. See also Paul Lowe, Frax Recommendations on Fast Track to NPRM, Aviation Int’l News, June 2000, at 3. This analysis was used in connection with the FAA’s obligation to examine the economic implications of a proposed rule. See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (regulatory planning and review); Regulatory Flexibility Act, 5 U.S.C. §§ 601 et. seq (1997).

\textsuperscript{154} Intelligence, Wkly. Bus. Aviation, July 31, 2000, at 47. See also Fractional Ownership Committee Recommendations Go To FAA, Aviation Daily, Aug. 3, 2000, at 6. The revised version reflected further clarifications to the Recommendation that were developed during frequent exchanges among the FOARC members and participants. For purposes of this article, the differences between the FOARC Recommendation and the NPRM will be based on the February 2000 version of the Recommendation since that was the only version that was made publicly available. Upon submission of the revised version, the FOARC had fulfilled its stated objective. Recognizing, however, that issues remained, NATA formed the Fractional Aircraft Business Council (FABC) to “represent and promote the interests of aviation businesses that sell and manage fractional aircraft ownership programs.” See NATA Launches Fractional Aircraft Business Council, NATA Release, May 21, 2001.
Following the submission, the emphasis shifted from the FOARC’s work to the issuance of the formal notice of proposed rulemaking by the FAA. As the Presidential election approached, the FAA was under increasing pressure to issue a Notice of Proposed Rulemaking (“NPRM”).\footnote{Intelligence, Wkly. Bus. Aviation, Aug. 21, 2000, at 83. The importance of the issuance of the proposed rule apparently was emphasized by including the progress of the effort in the performance evaluations of certain FAA officials. Id.} With the high priority assigned to the fractional ownership issue, the FAA was expected to issue the proposed rule in December.\footnote{Kirby Harrison, Frax Part 91 Subpart K NPRM Due in December, Aviation Int’l. News, Sept. 2000, at 72. The FAA’s ability to expedite the regulatory process was helped by the FOARC’s agreement to fund the regulatory and economic analysis. Id. During the process, the FOARC took all steps it could to ensure that the rulemaking stayed on track and expressed concern when the pace appeared too slow. Intelligence, Wkly. Bus. Aviation, Sept. 18, 2000, at 125.}

Not surprisingly, the delays in the election results and the transition to a new presidential administration slowed the processing by the FAA of the proposed rule.\footnote{Intelligence, Wkly. Bus. Aviation, Jan. 22, 2001, at 37.} The delay was not a long one, however, and the FAA Administrator signed off on the proposed rule on January 31, 2001. Once the proposed rule was approved by the FAA Administrator, it was forwarded to the Office of the Secretary at the DOT.\footnote{Gilbert, Frax Rulemaking, supra note 26, at 1. See also Intelligence, Wkly. Bus. Aviation, Feb. 5, 2001, at 59.} Unlike the FAA which examines the rule primarily for its safety implications, the DOT focuses on the broader issues presented by the proposed rule, including, among other things, the effect of the proposed rule on competition.\footnote{Intelligence, Wkly. Bus. Aviation, Apr. 2, 2001, at 155. Although no major issues had surfaced at the DOT, the new administration’s need to fill key policy positions at the DOT delayed the review process. Id.} As with the FAA, the change in administration resulted in a delay in DOT’s signoff on the proposed rule.\footnote{DOT Finishes Review of Frax Proposal, Aviation Int’l News, July 2001, at 3.} The DOT ultimately signed off on the proposed rule on June 4, 2001, approximately two months later than anticipated.\footnote{Id.} The proposed rule was then forwarded to its last step in the chain of review – the Office of Management and Budget (“OMB”) which had thirty days to review the proposal.\footnote{Intelligence, Wkly. Bus. Aviation, July 2, 2001, at 1.} In late June, the OMB returned the proposal to the FAA for “cosmetic changes.”\footnote{Id.}
III. THE ISSUANCE OF THE NPRM

On July 11, 2001, the long-awaited notice of proposed rulemaking establishing the regulatory environment in which fractional ownership programs would be operated and relaxing some of the Part 135 restrictions was placed on public display at the Office of the Federal Register. The NPRM, which was published in the Federal Register on July 18, 2001, adopted the FOARC Recommendation virtually in its entirety. Although the NPRM is substantially identical to the FOARC Recommendation, certain changes were made during the FAA's review process. On some issues, the FAA merely presented the FOARC Recommendation without taking a position itself and sought public comment on the matter. In other areas, changes re-

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164 NPRM, supra note 22, at 37,520. In keeping with the FOARC Recommendation, the NPRM had a ninety day comment period, requiring comments to be submitted no later than October 16, 2001. Id. As a result of the terrorist attacks of September 11, 2001 and the diversion of the aviation industry's resources, a request for an extension of the comment period was filed by the NATA and NBAA on October 1 and 3, 2001, respectively. See Comments of Jacqueline E. Rosser, Manager, Flight Operations, NATA, Docket No. FAA-2001-10047-44 (Oct. 1, 2001); Letter from Douglas Carr, Director, Government Affairs, NBAA, Docket No. FAA-2001-10047-47 (Oct. 3, 2001). In addition, the National Transportation Safety Board ("NTSB") requested a 90-day extension, in part, because of its belief that the events of September 11, 2001 will increase the demand for fractional ownership and the potential safety issues associated with such expansion. See Comments of John Clark, Director, Office of Aviation Safety, NTSB, Docket No. FAA-2001-10047-49 (Oct. 3, 2001). Although a request for an extension had previously been submitted in the docket (see Letter of John J. Swint, Docket No. FAA-2001-10047-3) (July 15, 2001)), only in response to the post-September 11 requests did the FAA extend the comment period until November 16, 2001. See FAA Regulation of Fractional Aircraft Ownership Programs, 66 Fed. Reg. 52,878 (Oct. 18, 2001).


166 For example, the FAA did not expressly support the concept of affiliate programs or the flight and duty time rules that would apply under Subpart K. Instead, they either set forth issues or alternatives on which they requested comment. See NPRM supra note 22, at 37,525-26; infra notes 221-228, at 37,532-33 (affiliates); and infra notes 196-211 (flight and duty time). The FAA also asked for comment on whether an NTSB appeal procedure was required for covered management specifications. The FAA noted that it would decide whether to pursue additional statutory authority to implement that provision after reviewing the comments it receives. Id. at 37,523. The FAA also requested comment on the use of a Destination Airport Analysis to permit the use of a runway that does not meet the 85% requirement. See infra note 188.
flected the input of the FOARC or that of the responsible agencies.

As a starting point, the FAA adopted the FOARC's definitions of fractional ownership and its related concepts.\textsuperscript{167} Under the definition, a fractional ownership program would exist if there was: (1) a designated program manager; (2) one or more owners per fractional ownership program aircraft, with at least one aircraft having multiple owners; (3) possession of a minimum fractional ownership interest in one or more program aircraft by each fractional owner; (4) a dry lease aircraft exchange agreement among all the owners; and (5) a set of multi-year program agreements.\textsuperscript{168} One of the critical components of the definition is the requirement for a minimum fractional ownership interest.\textsuperscript{169} Specifically, in order to fall within Subpart K, an owner's interest in an aircraft could be no less than one sixteenth \((1/16)\) of a subsonic, fixed-wing, or powered-lift fractional ownership program aircraft, or one thirty-second \((1/32)\) of a rotorcraft.\textsuperscript{170} By requiring a minimum interest, the FAA believed that it could minimize potential abuse by persons seeking to offer charter transportation under Subpart K.\textsuperscript{171} If a program involving

\textsuperscript{167} NPRM, \textit{supra} note 22, at 37,524-26, § 91.1001(b). The definitions were based in large part of the definitions established by an industry working group in 1999. \textit{See supra} note 34 and accompanying text. \textit{See also Wings of the Future, supra} note 7, at 1002-03.

\textsuperscript{168} NPRM, \textit{supra} note 22, at 37,524-25, § 91.1001(b)(1).

\textsuperscript{169} NPRM, \textit{supra} note 22, at 37,525, § 91.1001(b)(4).

\textsuperscript{170} \textit{Id.} The difference between the minimum interest size for fixed wing aircraft and for helicopters is based on their different operating characteristics. Among other things, helicopters used in fractional ownership programs generally do not operate over distances of more than a few hundred miles while fractionally owned fixed wing aircraft used in fractional ownership programs operate between airports that are frequently hundreds if not thousands of miles apart. As a result of the more limited operating capabilities of helicopters, it was decided that the same goals could be achieved with a smaller percentage ownership interest. \textit{Id.} The NPRM proposed to cover only fixed wing aircraft and helicopters and not supersonic aircraft since no supersonic business aircraft exist today. In the event such aircraft are developed, specific regulatory provisions would be considered at that time. \textit{Id.}

\textsuperscript{171} \textit{Id.} at 37,525. Without the requirement for a minimum interest, there was concern that a 1/1000 interest in a used light piston single-engine airplane might be sold to a party which would then be entitled to an "ownership" interest amounting to a few hours of occupied flight time in the aircraft, with pilot provided. Since that was clearly not the intent of fractional ownership, the FOARC determined and the FAA agreed that aviation safety would be compromised if such programs could be operated under Subpart K. \textit{Id.} In addition, the FAA noted that a program that requires an owner to make only a small capital outlay or pay unreasonably small fees, in relation to the value of the aircraft that the
shared aircraft does not have all of these characteristics, it is not a fractional ownership program. Instead, it would fall under the aircraft sharing mechanisms under Part 91, Subpart F,\textsuperscript{172} be a flying club or aircraft partnership, or belong under Part 135.\textsuperscript{173}

owner actually will use in the program, would be considered a sham and ineligible for Subpart K. For example, if an owner could buy a fractional interest in smaller aircraft with the intent of using only the program's larger aircraft, such a program would be considered a ruse to avoid the certification requirements under Parts 121 or 135. \textit{Id.} at 37,526, § 91.1005. \textit{See generally, Croft, supra note 26; Lowe, Frax Regulations, supra note 46, at 56.}

\textsuperscript{172} \textit{See NPRM, supra note 22, at 37,524. For a detailed discussion of the sharing mechanisms available under Part 91, Subpart F, see Corporate Aircraft Operations, supra note 11, at 997-1006. If the operation fits neither under Subpart F nor under Subpart K, it must be considered whether the program manager is providing services as a common carrier. The NPRM states that “ownership interests that meet all the other criteria of fractional ownership but are less than the minimum ownership interest would not be eligible to operate under subpart K.” \textit{See NPRM, supra note 22, at 37,525. Although not specifically stated in the NPRM, the discussion regarding the purpose to be served by the requirement of a minimum interest, makes it apparent that such a program would be required to operate under Part 135 or Part 121, as appropriate. The NPRM’s failure to make such a clear statement, however, is an omission, which if not corrected, may be relied upon by some companies in an effort to avoid the stringent requirements of both Subpart K and Part 135. In addition, to prevent the program manager from selling charter transportation under the guise of a fractional ownership program, the NPRM provides that the number of hours made available to the owner not exceed the total hours associated with its share. To the extent additional hours are provided, they would need to be operated under Part 121 or 135. \textit{See NPRM, supra note 22, at 37,526, § 91.1005(c). In discussing the concept of additional hours, the preamble to the proposed rule includes the qualification “consistent with current industry practice.” \textit{Id.} at 37,526. The intent of this qualification is not detailed in the preamble. Currently, certain programs provide owners with additional hours either because the owner has referred customers or as an enticement to join the program. These additional hours are generally provided for at the outset as part of the purchase of the interest as opposed to being provided when an owner has used up its hours before the end of the term and wishes to increase the number of hours. As a result, the provision of additional hours at the outset should be permitted to continue since it is “consistent with current industry practice.” Until the final rule is issued and the FAA’s guidance material is developed, however, the manner in which this issue will be handled is not clear.}

\textsuperscript{173} In the preamble to the proposed rule, the FAA agreed with the FOARC’s recommendation that “proposed subpart K of part 91 should apply only to fractional ownership program aircraft and not to other business aircraft arrangements including traditional flight departments, the use of management companies providing aviation expertise, flying clubs, partnerships or other ownership forms such as joint ownership.” \textit{See NPRM supra note 22, at 37,522. See also Lowe, Frax Regulations, supra note 46, at 56 (“FAA continued its longstanding policy that individuals and corporations may operate their aircraft under Part 91”); New Rules, supra note 52, at 142 (Subpart K will not apply to other “business aircraft arrangements including traditional flight departments, the use of man-
Perhaps one of the most significant aspects of the proposed rule is that it permits fractional ownership programs to continue to be operated under Part 91. In making this decision, the FAA agreed that there are greater similarities between fractional owners and owners of whole aircraft than between fractional owners and charter customers.\textsuperscript{174} The FAA also agreed that traditional notions of operational control were not useful for fractional ownership programs and that a fractional owner could retain operational control of the aircraft notwithstanding the fact that it delegated the performance of certain tasks to the program manager.\textsuperscript{175}

Because of the vital role played by the program manager, however, the FAA believed that an independent regulatory mechanism was needed for the program manager and that the issuance of management specifications would serve that purpose.\textsuperscript{176} The FAA accepted, in all material respects, the FOARC's Recommendation regarding the programs and processes that the program manager would be required to have in place in order to hold management specifications.\textsuperscript{177} Specifically, the program manager would be required, among other
things, to implement formal training programs and procedures for ongoing checks, develop and disseminate detailed manuals, observe recordkeeping requirements, comply with minimum crew staffing and crew experience and pairing requirements, and perform background checks on pilots. Requirements would also be imposed regarding the aircraft operated in fractional ownership programs. Specifically, all program aircraft would be required to carry a cockpit voice recorder, flight recorder, ground proximity warning system, airborne thunderstorm detection equipment or airborne weather radar, and a traffic alert and collision avoidance system to the extent that such equipment would be required if that aircraft were operating under Part 135. The program manager would also be required to conduct proving tests before aircraft could be listed on the program manager's management specifications. By including such requirements, the FAA believed it

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178 Id. at 37,533, §§ 91.1063-87, 91.1093-107, 91.1111. For purposes of the initial training, the FAA acknowledged that under certain circumstances, on-the-job training would be permitted. Id. at 37,527.

179 Id. at 37,527, §§ 91.1023-1025.

180 Id. at 37,527, §§ 91.1027, 91.1113. Because some of the program managers also hold Part 135 certificates, they are already subject to extensive recordkeeping requirements. See FAA Operating Requirements, 14 C.F.R. § 135.63 (2001). So as not to create an additional set of recordkeeping requirements, these program managers would be permitted to use records they maintain under Part 135 to satisfy the equivalent requirements of Subpart K.

181 Id. at 37,532, §§ 91.1049-1055. As a general proposition, the NPRM would require each program manager to have a minimum of three pilots per aircraft and to use two pilots when passengers are on board. Id. at 37,532, § 91.1049(b), (d). Recognizing that the rigid application of such requirements could impact certain programs far more than others, the FAA did provide for deviations based on the size and scope of the operation as long as the circumstances reflected that a high safety standard would nevertheless be maintained. Id.

182 Id. at 37,532, § 91.1051. Unlike Part 135 operators, however, the program manager would be able to use the pilot as long as background information is requested within 90 days of such employee's starting date. Id. See supra note 121 and accompanying text.

183 Id. at 37,531, § 91.1045.

184 Id. at 37,531, § 91.1041. The FOARC recommended that proving tests be required only when a fractional ownership program first commences operations or when it adds a more complex category or new class of aircraft. The original FOARC Recommendation did not, however, explain the meaning of "a more complex category or new class of aircraft." See supra note 115 and accompanying text. The NPRM makes clear that proving tests would be required only before the initial use of "either an aircraft for which two pilots are required under the aircraft type certification requirements or a turbojet powered airplane." See NPRM, supra note 22, at 37,531, §§ 91.1041, 135.145(a).
would be better able to monitor the operations and ensure that
the highest level of safety is maintained.\footnote{By requiring management specifications, the FAA would have an opportunity to review all of the practices and procedures used by the program manager. It would also enable the FAA to conduct inspections and checks on an ongoing basis. \textit{See} NPRM, \textit{supra} note 22, \S 91.1019. It should be noted, however, that because of the private nature of the flights, the FAA would not have the right to conduct en route inspections as are permitted under Part 135. \textit{Compare} NPRM, \textit{supra} note 22, \S 91.1019 \textit{with} 14 C.F.R. \S 135.73.}

In terms of operating restrictions, the NPRM also adheres closely to the FOARC Recommendations.\footnote{See \textit{ supra} notes 115-137 and accompanying text.} Among other things, the FAA would require, as a general rule, that aircraft operated in fractional ownership programs operate only to airports where the aircraft can land within 85% of the runway,\footnote{See \textit{ supra} note 22, at 37,528-29, \S 91.1027. This would be the first time that such a restriction would be applied to Part 91 operations. \textit{Id.} at 37,528.} although under certain circumstances the proposed rule would even permit a shorter runway to be used.\footnote{Under certain circumstances, aircraft would be permitted to exceed the 85% requirement provided that the program manager's manual contains a Destination Airport Analysis procedure approved by the FAA. \textit{Id.} at 37,529. \textit{See} \textit{ supra} note 22, \S 91.1025(o). Any Destination Airport Analysis that would permit the 85% runway length restriction to be exceeded would be required to establish procedures for setting runway safety margins at destination airports by taking into account: (1) pilot qualifications and experience; (2) aircraft performance data to include normal, abnormal, and emergency procedures as supplied by the aircraft manufacturer; (3) airport facilities and topography; (4) runway conditions (including contamination); (5) airport or area weather reporting; (6) appropriate additional runway safety margins, if required; and (7) other criteria that affect aircraft performance. \textit{Id.} \S\S 91.1025(o), 135.23(r). The FAA specifically requested comments on the criteria for approval of a destination airport analysis. \textit{Id.} at 37,529.} The proposed rule also offers some relief from the runway length restriction for Part 135 operators.\footnote{See \textit{ supra} note 22, at 37,529, \S 135.385. In order to avail itself of the less restrictive landing requirement, a Part 135 operator would be required to comply with the same flight crew experience, pilot operating limitations and crew pairing requirements that apply to program managers. \textit{Id.} at 37,529, \S 91.1053 (the pilot in command would be required to have a minimum of 1,500 hours of flight time and an airline transport pilot certificate and the second in command would be required to have a minimum of 500 hours and a commercial pilot certificate with instrument ratings), \S 91.1055 (crew pairing requirements). In the case of the level of experience, the Subpart K requirements exceed those applicable to Part 135 operators. \textit{See} 14 C.F.R. \S 135.243(c)(2) (pilot in command is required to have at least 1,200 hours of flight time). With respect to the second in command, there is no minimum experience requirement.}\footnote{See \textit{ supra} note 22, at 37,529, \S 91.1025, \S 91.1053.} In addition, the rule would impose for the first time a requirement that the destination airport have approved weather reporting or, if it does not, that an alternate
airport that does have weather reporting be selected. The rule would further require that both the destination and the alternate airport have a current local altimeter setting or a current alternate altimeter setting provided by the facility designated on the approach chart for that airport. As in the case of the runway length restrictions, the proposal would offer relief to Part 135 operators from the weather reporting requirements.

By establishing a set of standards and requiring the program manager to develop and implement a formal set of procedures, the FAA would be able to monitor the programs and ensure their continued safety. If a program manager fails to comply with the regulations, procedures, or its management specifications, the FAA would have the ability to take enforcement action against the manager, including the suspension or revocation of management specifications. Given the significance of the management specifications, the NPRM contains provisions relating to the due process requirements if the FAA seeks to suspend or revoke a program manager's management specifications. Specifically, it would require that any such suspension or revocation of management specifications be handled in a manner similar to that for certificate actions. The implementation of such procedures, however, will require a statutory amendment.

Among the more politically sensitive parts of the NPRM are the proposed flight and duty rules. Although flight and duty

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190 See NPRM, supra note 22, at 37,530-31, § 91.1039.
191 Id. at 37,530.
192 The FAA noted that it had previously denied exemptions requested by Part 135 operators seeking relief from the weather reporting facility requirement. Id. The FAA acknowledged, however, that fractional ownership program aircraft have safely operated similar equipment under Part 91 without the existence of a weather reporting requirement by relying on the facilities at nearby airports. Id. As a result, the FAA proposes to enable Part 135 operators to avail themselves of the same provisions as an alternative means of compliance with the destination airport weather reporting facility requirements under Part 135. Id. As in the case of the runway length requirement, this alternative means of compliance would be available only to qualified on-demand operators. See supra note 143.
193 See NPRM, supra note 22, § 91.1015(c).
194 See id. at 37,523, § 13.19.
195 This would be accomplished through an amendment to the existing § 13.19. See FAA Investigative & Enforcement Procedures, 14 C.F.R. § 13.19 (2001). See NPRM, supra note 22, at 37,523, § 13.19(c), (e). Among other things, the FOARC wanted to ensure that program managers would have procedural protections similar to those available to certificate holders, including the right to appeal any suspension or revocation to the National Transportation Safety Board. Id. at 37,523.
196 Id. at 37,532-33, §§ 91.1057-61.
rules have never applied to Part 91 operations, the FOARC recommended and the FAA proposed a detailed set of flight, duty and rest requirements for pilots flying fractional ownership program aircraft on program flights. While the requirements are not identical to those applicable to Part 135 operators, the FOARC believed they were adequate to prevent undue fatigue, ensure the safety of fractional ownership program aircraft operations, and provide a degree of rest equivalent to or greater than that provided under regulations applicable to air carriers. The only circumstance where the Subpart K flight, duty and rest rules would not meet Part 135 requirements is where flight time exceeds ten hours, with total duty time less than sixteen hours. Subpart K would require a rest period equal to the total hours on duty while Part 135 would require sixteen hours of rest. On balance, however, the FOARC believed that in the context of the fractional ownership operating environment, the proposed flight, duty and rest requirements provided a level of safety sufficient to justify the regulations. The FAA, however, neither supported nor opposed the FOARC’s recommendation on this issue. Instead, the FAA identified alternate approaches for the handling of this issue and requested comments on the approaches described as well as solicited alternate approaches. Under one approach, Subpart K would be subject to a different set of flight, duty and rest requirements than those applicable to Part 135 on-demand air taxis. Under another, the flight, duty and rest requirements would be the same

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197 Wings of the Future, supra note 7, at 1004.
198 NPRM, supra note 22, at 37,532-33.
200 NPRM, supra note 22, at 37,532. For example, the NPRM defines standby status as a type of duty. Id. No such definition exists, however, for air carriers. See 14 C.F.R. §§ 135(f), 121(r-s). In addition, Subpart K would not only define reserve status, but would also require pilot acceptance of reserve status and require a minimum of ten hours of uninterrupted rest prior to entering that reserve status. See NPRM, supra note 22, at 37,532, 37,549, § 91.1057(a). Furthermore, because of concerns about Circadian rhythm patterns, the proposed limitations include minimum rest periods for east/west flights that cross five or more time zones. See id. at 37,532-33, §§ 91.1057-59.
201 NPRM, supra note 22, at 37,532, § 91.1059.
202 Id. at 37,532. See also FAA Operating Requirements, 14 C.F.R. § 135.267(e).
203 NPRM, supra note 22, at 37,532.
204 Id. Among other things, the FAA will consider the approach suggested by the on-demand air taxi task force. See infra note 211 and accompanying text.
205 NPRM, supra note 22, at 37,533.
for Subpart K and Part 135 operations. In examining the issue, the FAA asked (1) whether the proposal in the NPRM is appropriate for a single pilot operation; (2) whether the application of different flight, duty and rest requirements for this segment of the industry versus air carriers operating under Parts 121 and 135 could be justified; (3) whether the proposal should contain a definition of reserve status and, if so, whether the definition is adequate and would provide sufficient opportunity for rest outside of a flight crewmember's normal sleep cycle; and (4) whether there should be duty limitations and rest requirements for flight attendants.

The treatment of the flight and duty time aspect of the proposed rule likely stems from the fact that flight and duty rules have always evoked controversy and the existence of strong positions on each side of the argument, namely those asserting that the requirements are too strict and those asserting that they are not strict enough. In fact, following the submission of the FOARC Recommendation, a great deal of activity has taken place. For example, a Part 135 on-demand air charter industry task force suggested that a new flight and duty time regulatory structure be applied to that segment of the industry and presented a paper to the FAA in that regard. Whether the

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206 Id.
207 Although the NPRM requires two pilots for fractional aircraft, single pilot operations would be permitted under deviation authority. See NPRM, supra note 22, at 37,533, § 91.1049(b).
208 NPRM, supra note 22, at 37,533.
209 For example, legal action was instituted against the FAA as a result of a letter issued by the deputy chief counsel in late 2000 wherein he interpreted the rule in a manner contrary to the language of the rule and well-established precedent. Comments of James W. Whitlow, Deputy Chief Counsel of FAA, to Captain Richard D. Rubin, Allied Pilots Association (Nov. 20, 2000), available at http://www.alliedpilots.org/Public/FTDT/faq_chief_counsel.asp (advising carriers that they would need to recalculate past duty and rest periods in the event schedules were disrupted, as opposed to simply recalculating future scheduling assignments as had been done for many years and as was authorized by the rule). The "Whitlow Letter" was followed by a Notice of Enforcement. See FAA Flight Crewmember Flight Time Limitations, 66 Fed. Reg. 27,548 (May 17, 2001). See also FAA Operating Requirements, 14 C.F.R. § 135.265 (2001). Although a federal circuit court initially stayed the enforcement of the rules in the manner described in the Whitlow Letter, the stay was lifted in May 2002. See Air Transp. Ass'n of Am. v. FAA, 169 F.3d 1 (D.C. Cir. 2001); Order dated May 31, 2001. See also Fact Sheet: Pilot Flight Time and Rest, FAA News, Oct. 2001, at http://www.faa.gov/apa/FACTSHEET/2001/fact1oct.htm (last visited May 31, 2002).
210 NPRM, supra note 22, at 37,533.
211 NPRM, supra note 22, at 37,533. The task force was comprised of members of the NATA, Helicopter Association International ("HAI"), and NBAA. The task
Subpart K provision will impact the review of the Part 135 requirements or whether the Part 135 requirements will impact Subpart K remains to be seen.

The NPRM also addresses the sensitive issue of drug and alcohol testing. Since Subpart K was developed using Part 135 as a starting point, there could be no doubt that drug and alcohol testing would be considered. Although such testing programs are not proposed for program managers, Subpart K does propose to require drug and alcohol misuse education programs. Under this requirement, flight crew, flight instructors, flight attendants, and maintenance personnel who are the direct employees of the program manager would be required to undergo such a program and in the case of those who are indirect employees (i.e., employed through a contractor), the program manager would be required to verify that the employee has completed such a program. Only if emergency maintenance is necessary suggested to the FAA that the existing Part 135 on-demand flight and duty time regulations be replaced with an alternate structure that would retain the same rest requirements while establishing two types of reserve duty: scheduled and extended. With a scheduled reserve status, the flight crew would be expected to accept an assignment while the expectation that the assignment would be accepted would be far less with the extended status. Because scheduled reserve is based on the likelihood that the flight crew will be called up, it would have a rest period both before and after the scheduled reserve assignment. See Paul Lowe, Air Groups Offer Flight Duty, Rest Alternatives, Aviation Int'l News, Sept. 2000, at 4.

See supra note 122 and accompanying text.

NPRM, supra note 22, at 37,531. The NPRM notes that many companies have imposed alcohol and/or drug testing requirements on their own initiative. Id. Although proposed Subpart K does not impose a drug or alcohol testing requirement, the FAA clearly notes that it was not intended to prevent a program manager from implementing such a program in accordance with state and federal law but distinct from the federally mandated program required by Appendices I and J to Part 121. Id. at 37,531-37,532. Because such a program is not required, however, the program manager cannot represent that the testing is being done under the FAA required program nor can it use the federal drug and alcohol custody and control forms. Id. at 37,532. As a related matter and in an effort to ensure that prospective customers make informed decisions, the program manager must advise its prospective customer whether a testing program is in place and, if so, compare it with the scope of federally mandated programs for air carriers. Id. at 37,531. The disclosure requirement will be satisfied as long as a customer is provided this information sufficiently in advance of its purchase of an interest to enable the customer to engage in a meaningful review of the options. Id. at 37,531-32.

Id. at 37,531.

Id. The drug and alcohol misuse and education programs could use air carrier programs as a model or could be developed by the program manager. Id. at 37,532. This education requirement would be satisfied as long as the individual
required at an outlying airport where no trained maintenance personnel are available would a program manager be permitted to use someone not covered by such a program.\textsuperscript{216} In that case, however, the program manager would be required to report to the Drug Abatement Program Division within ten days of its occurrence.\textsuperscript{217} In an effort to provide an equivalent type of relief for Part 135 operators which, under existing regulations, may not use an individual unless he or she is covered by an FAA-approved drug and alcohol testing program,\textsuperscript{218} the NPRM, if adopted, will modify, to a limited extent, the drug and alcohol testing requirements applicable to Part 135 on-demand air taxi operators.\textsuperscript{219} Specifically, the Part 135 operator would be permitted to use someone who is not covered by an FAA-approved drug and alcohol testing requirement if emergency maintenance is required at an outlying airport, provided that such emergency maintenance is reported to the Drug Abatement Program Division within ten days of its occurrence.\textsuperscript{220}

Another significant issue relates to the ability of the program manager to permit owners to use aircraft in a separate program operated by an affiliate of the program manager.\textsuperscript{221} The NPRM

\begin{itemize}
\item \textsuperscript{216} For purposes of this proposed rule, emergency maintenance would be maintenance that is not scheduled and is made necessary by an aircraft condition that was not discovered prior to departure. The exception would also apply to on-demand charter operators that operate flights on a non-scheduled basis to diverse airports. See NPRM, supra note 22, at 37,532.
\item \textsuperscript{217} The notification requirement is intended to minimize the opportunity for abuse of the exception. \textit{Id.} It should be noted that the notification period was extended to ten days from the twenty-four hour period originally recommended by the FOARC. See supra notes 122 and 147 and accompanying text.
\item \textsuperscript{218} Under federal law, a Part 135 operator may only permit an individual who is covered by an FAA-approved drug and alcohol testing program to perform a safety sensitive function, such as aircraft maintenance. See FAA Operating Requirements – Domestic, Flag & Supplemental Operations, 14 C.F.R. § 121(i)-(j) (2001) (drug testing, alcohol testing).
\item \textsuperscript{219} NPRM, supra note 22, at 37,532.
\item \textsuperscript{220} See supra notes 122, 147, and 217 and accompanying text.
\item \textsuperscript{221} See NPRM, supra note 22, at 37,525. See also \textit{Wings of the Future}, supra note 7, at 986-88 for a discussion of affiliated relationships in the NetJets program. In discussing the current affiliate situation, the FAA noted that the program agreements in that case make clear that for purposes of flights in the program managed by the affiliate, the affiliate program manager has the flight-related responsibilities and not the program manager in charge of the program in which the owner holds an interest in an aircraft. See NPRM, supra note 22, at 37,525-26.
\end{itemize}
JOURNAL OF AIR LAW AND COMMERCE

proposes that owners be permitted to operate aircraft in affiliated programs as long as the programs are related closely enough to ensure that there is "sufficient common influence in the related programs to ensure that the programs adhere to similar safety practices." In an effort to prevent large networks of fractionally-owned aircraft from being developed among unrelated programs where there is not a sufficient common influence to ensure that the programs are administered safely, an "affiliate of a program manager" is defined as a:

manager which, directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, another program manager. The holding of at least forty percent (40%) of the equity and forty percent (40%) of the voting power of an entity shall be presumed to constitute control for purposes of determining an affiliation under this subpart.

The definition is based on the belief that a significant commitment by the manager of one program (or the manager's parent, affiliate or subsidiary) to the financing and/or strategic decision making of the other program or programs would provide the necessary commonality to permit owners in each related program to use the aircraft in the other program(s). Because the definition, however, creates only a presumption, the FAA could find that companies that do not meet the forty percent threshold are affiliates or that companies meeting such threshold are not.

Although owners in affiliated programs may use aircraft in any of the programs, such use does not change the owner's obligations; the owner will remain in operational control regardless

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222 See NPRM, supra note 22, at 37,525. The FOARC members were concerned about the implications of fractional ownership programs being franchised and permitting owners in the franchised programs to use aircraft in any of the franchised programs. Id.

223 See NPRM, supra note 22, at 37,541, § 91.1001(b)(9). Because the test to determine affiliation is not a test of corporate control, more than one company may be in "control" of a program manager. If they are deemed affiliates, the owners in each program may use the aircraft in the other related program or programs. Id. at 37,526.

224 In such a case, the parties seeking to establish the affiliation would have the burden of showing a sufficient nexus between the programs to justify owners in one program using aircraft in another related program. See NPRM, supra note 22, at 37,525.

225 In this case, the FAA would have the burden of showing that there is not a sufficient nexus to consider the program managers to be affiliates. See NPRM, supra note 22, at 37,525-26.
2002] THE REGULATION OF FRACTIONAL OWNERSHIP 367

of the entity from which it obtains the aircraft.\textsuperscript{226} However, because of the interdependency between a fractional owner and its program manager, the NPRM addresses the respective roles of the owner’s program manager and the affiliate of such program manager and makes clear that when a fractional owner is operating an aircraft in a fractional ownership program managed by an affiliate, the affiliate has the responsibilities that would otherwise be vested in the owner’s program manager, albeit only for that flight.\textsuperscript{227} Because of the significance that such affiliations could have, the FAA specifically requested that the public comment on the concept of affiliated programs.\textsuperscript{228}

In addition to the imposition of numerous requirements on the program manager, the NPRM contains clear limitations on the manner in which the owner may use its interest.\textsuperscript{229} Specifically, the NPRM makes clear that the owner must comply with the same standards applicable to the owners of whole aircraft operating under Part 91. Among other things, this means that the fractional owner may not receive compensation for its operation of an aircraft in a fractional ownership program except to the extent permitted under Part 91.\textsuperscript{230} The fractional owner has the same rights and obligations as an owner of a whole aircraft with regard to all of the cost sharing mechanisms available

\textsuperscript{226} \textit{Id.} at 37,526.

\textsuperscript{227} \textit{Id.}

\textsuperscript{228} The FAA’s request for comments is directed not only to the concept, but also to the regulatory language. Specifically, the FAA asked whether the definition of an affiliate program is adequate and whether the contractual arrangements are sufficiently detailed to ensure owners have legal possession, custody, and use of an aircraft when using aircraft from an affiliate company. The FAA also asked for additional input to assist it in developing guidance and oversight in this area. \textit{Id.}

\textsuperscript{229} The same justification that resulted in the issuance of Subpart D of Part 91 (recodified in 1990 as Subpart F) was applied in the development of Subpart K—namely, that “the need for different or additional safety standards for corporate operations should be resolved on the basis of safety, rather than economics or juristic semantics.” \textit{See} NPRM, \textit{supra} note 22, at 37,522 (quoting 37 Fed. Reg. 14,758-59 (1972)) and \textit{supra} notes 81-82 and accompanying text. With this fundamental tenet in mind, the FAA decided that in order to determine the appropriate regulations to apply to fractional ownership programs, it should “focus on the commercial (on-demand charter) or non-commercial (business or personal) motive a company or individual has in operating an aircraft, rather than on the form of the arrangements that led to the acquisition of the aircraft interest.” \textit{See} NPRM, \textit{supra} note 22, at 37,521. For a discussion of the history of Subpart D, \textit{see} Wings of the Future, \textit{supra} note 7, at 982-83. The FAA permitted various types of cost sharing arrangements including time-sharing, interchange and joint ownership. \textit{Id.} \textit{See also} Corporate Aircraft Operations, \textit{supra} note 11, at 997-1006.

\textsuperscript{230} NPRM, \textit{supra} note 22, at 37,526, § 91.1005.
under Part 91.\textsuperscript{231} As such, a fractional owner would be able to carry federal candidates and engage in affiliated group operations, time sharing, interchange and joint ownership arrangements, among others, pursuant to which they would be permitted to receive limited reimbursement provided that all prerequisites to such operations are satisfied.\textsuperscript{232} 

As is clear, the proposed rule addresses the obligations of both the program manager and the owner. In fact, the proposed rule not only imposes independent obligations on both the program manager and the owner, it also requires that certain provisions be included in the contracts between the parties and that certain information be shared by the parties.\textsuperscript{233} Among other things, the contract must include provisions to ensure that the owner has the right to inspect and to conduct audits of the program manager, that the program manager has the obligation to ensure that the program complies with the requirements of Subpart K and that the owner will be advised when aircraft outside the program are going to be used.\textsuperscript{234} Subpart K also requires that each owner be briefed on its responsibilities and potential liability and that it sign an acknowledgment of such matters as part of the contracting process.\textsuperscript{235}

\textsuperscript{231} NPRM, \textit{supra} note 22, at 37,524, §§ 91.501(a), 91.501(b)(10). As currently written, the cost-sharing mechanisms found in Part 91, Subpart F are available only to persons operating U.S. registered, large or multi-engine turbojet aircraft. \textit{See} FAA General Operating & Flight Rules, 14 C.F.R. § 91.501(a) (2001). By way of an exemption covering all NBAA members, these provisions are also available to smaller aircraft and helicopters. \textit{See Petition of NBAA, FAA Exemption No. 1637U}, (Aug. 25, 2000). \textit{See also Corporate Aircraft Operations, supra} note 11, at 998. The NPRM, however, would eliminate that requirement to the extent the aircraft at issue is being operated in accordance with Subpart K. NPRM, \textit{supra} note 22, at 37,524, § 91.501(b)(10).

\textsuperscript{232} See 14 C.F.R. § 91.321 (carriage of federal elected officials); § 91.501(b)(5) (affiliated group operations); § 91.501(b)(6) (timesharing, interchange and joint ownership). For a detailed discussion of such operations, \textit{see Corporate Aircraft Operations, supra} note 11, at 997-1006.

\textsuperscript{233} NPRM, \textit{supra} note 22, at 37,526, §§ 91.1003, 91.1007. This is not the first time the government has regulated contractual provisions in the aviation industry. \textit{See DOT Public Charters, 14 C.F.R. § 380.31} (2001) (required provisions for contract between passenger and public charter operator).

\textsuperscript{234} NPRM, \textit{supra} note 22, at 37,526. The FAA acknowledges that most fractional ownership program documents currently in existence include such provisions in their agreements. The FAA goes on to state that such rights of inspection and audit are not intended to require the program manager to provide to the owner the manager’s financial records or records pertaining to the confidential movements of other owners. \textit{Id.}

\textsuperscript{235} NPRM, \textit{supra} note 22, at 37,527, § 91.1013. In addition to advising the owner that it will be in operational control of its flights, it must also advise the
Based on the comprehensiveness of the proposed rules which impose requirements on the owner and program manager and provide for the joint and several responsibility of the owner and program manager for the safe operation of the flight and for compliance with the FARS, the FAA stated that the proposed rule, if adopted, will "satisfy FAA concerns regarding fractional owners' and fractional-ownership program managers' accountability and responsibility for compliance with these proposed regulations, particularly with respect to operational control issues." Since many of the proposed rules are based on their Part 135 counterparts or existing operations which have already proven themselves to be safe, the FAA believes that the regulation of fractional ownership programs under Subpart K will provide an appropriate level of safety for these kinds of operations and an enforceable structure to that the high level of safety currently existing in fractional ownership programs continues.

Recognizing the significant changes that would result from the adoption of the proposed rule and the fact the fractional ownership industry has grown to a multi-billion dollar industry, the FAA proposes to implement the rule over a fifteen-month period using a phased-in compliance schedule. This would allow existing fractional ownership programs to continue operating pending their transition to Subpart K while new programs

owner of the implications of such operational control. Specifically, the program manager must state that when the owner is in operational control, the owner is: (1) responsible for compliance with the management specifications and all regulations applicable to the flight, even when the owner has contracted with the program manager to carry out tasks related to compliance; (2) exposed to FAA enforcement action for any noncompliance; and (3) exposed to significant liability risk in the event of any personal injury or death resulting from the flight. Id. at 37,527.

With joint and several responsibility, the "regulatory responsibility for the safe operation of a fractional ownership program aircraft is shared with equal and concurrent force, and with equal exposure to FAA enforcement." Id. at 37,526-27.

Id. at 37,523.

Id. at 37,521.

Id. See also Recommendation Transmittal Letter, supra note 54; Collogan, Real-World Experience, supra note 49, at 37.

NPRM, supra note 22, at 37,523. The FAA previously used a phased-in compliance schedule when a new set of regulations would require a change in operations by existing carriers. See FAA Certification, 14 C.F.R. § 119.2 (2001); FAA Commuter Operations, 60 Fed. Reg. 65,832, 65,879 (Dec. 20, 1995). Such a compliance schedule helps not only to minimize the disruption of existing operations, it also avoids a concentrated drain on FAA resources.
coming on line would be required to comply with Subpart K.\textsuperscript{241} In addition, because of the significant change that will take place in the industry, the FAA advised that it would not only work closely with the industry to develop guidance and to implement the proposed changes, but also that the FAA would commit sufficient resources to implement these changes.\textsuperscript{242} With a phase-in, the FAA will have the time to train its inspectors,\textsuperscript{243} to create the infrastructure to support the surveillance and monitoring of fractional ownership program managers and owners\textsuperscript{244} and to establish the processes and procedures to be used by the program manager to obtain the necessary authorizations.\textsuperscript{245}

IV. THE RESPONSE TO THE NPRM

Despite the involvement of a broad range of interested parties in the development of the Recommendation, the controversy over fractional ownership has not ended. When the comment period closed on November 16, 2001, over two hundred comments had been submitted representing a wide range of parties with diverse views. In fact comments continued to be submitted through the spring of 2002. The fact that the FOARC included fractional program managers, flight departments, Part 135 operators, fractional owners and many other interested parties\textsuperscript{246} did not prevent many commenters from objecting to the composition of the FOARC and the resultant Recommendations that

\textsuperscript{241} Lowe, Frax Regulations, supra note 46, at 56 (the phased implementation will allow continued operations by existing programs under the current version of Part 91 while transitioning to Subpart K). The FAA requested comments on the concept of a phased-in compliance schedule. See NPRM, supra note 22, at 37,523.

\textsuperscript{242} NPRM, supra note 22, at 37,523. To facilitate a smooth transition and to help ensure a consistent approach by the different FAA offices, the FOARC recommended that the FAA also establish a national point of contact for fractional ownership operational and airworthiness issues to ensure standardization of the implementation process and policy application. Id.

\textsuperscript{243} Lowe, Frax Regulations, supra note 46, at 56 (a training period for FAA inspectors will follow the issuance of the rule).

\textsuperscript{244} The implementation of a level of surveillance and oversight equivalent to that applied to Part 135 was one of the bases on which the Part 135 community signed on to the proposal. See NPRM, supra note 22, at 37,523. See also FOARC Recommendation, supra note 55, at 10.

\textsuperscript{245} The FAA notes in the preamble that the FOARC recommended that the program manager use approval and acceptance procedures similar to those used by Part 135 operators (such as RVSM, MELs, maintenance programs and manual reviews). See NPRM, supra note 22, at 37,523.

\textsuperscript{246} See supra note 53 and accompanying text.
formed the basis of the NPRM.\textsuperscript{247} Such comments were submitted primarily by civic parties and pilots.\textsuperscript{248} Many of these parties believed that the opportunity to comment on the proposed rule was not an adequate substitute for participation in the FOARC

\textsuperscript{247} One party took the position that the makeup of the FOARC had "the overall effect of the foxes (FOARC) gathering to determine how they will guard the chicken coop (safety of fractional flight operations)." See Comments of Richard J. Smith, Docket No. FAA-2001-10047-184 (Oct. 15, 2001).

\textsuperscript{248} Numerous comments were filed by residents of Santa Monica who believe that the rulemaking process is tainted due to the failure to include civic leaders in the FOARC process and the failure to prepare an environmental impact statement. Many of these commenters urge the FAA to start the process over again by creating a new committee that would be all-inclusive and would evaluate a broader range of issues before forming recommendations. See Comments of Charles E. Doering, Docket No. FAA-2001-10047-64 (Oct. 9, 2001) (the FAA should conduct a full environmental impact review and include community representatives on the FOARC); Comments of Chris Watts, Docket No. FAA-2001-10047-68 (Oct. 9, 2001) (representatives of schools and communities adjacent to general aviation airports should be included in the FOARC); Comments of Paul and Doris Holmes, Docket No. FAA-2001-10047-75 (Oct. 8, 2001) (it is "undemocratic that only business interests have been included on the FOARC committee and not other affected individuals such as school principals and home owners as well as airport staff"); Comments of Kevin Rice, Docket No. FAA-2001-10047-68 (Oct. 7, 2001) (without citizen involvement, the "health [and] welfare is being stolen from the citizens living in the neighborhoods of general aviation airports"); Comments of Jason S. McBride, Docket No. FAA-2001-10047-80 (Oct. 9, 2001) ("Public Interest Groups [should] be included in [the] evaluation of changes of any Aviation regulations that will impact communities surrounding General Aviation Airports."); Comments of Barbara Blankenship, Docket No. FAA-2001-10047-82 (Oct. 11, 2001) (the "committee’s decisions will not be credible or enforceable" because FOARC did not include airport operators and public interest groups). Other parties criticized the failure to include pilots in the FOARC. See, e.g., Comments of Steven K. Becker, Docket No. FAA-2001-10047-39 (Sept. 21, 2001) (the NPRM should be voided because the FOARC was formed without the "valuable perspective of pilots"); Comments of Andrew Hall, Docket No. FAA-2001-10047-46 (Sept. 21, 2001); Comments of Joshua B. Doxsee, Docket No. FAA-2001-10047-73 (Oct. 4, 2001) (management and industry personnel participated in the FOARC without the benefit of input from the pilots responsible for operating the aircraft); Comments of Peter Britt, Docket No. FAA-2001-10047-83 (Oct. 10, 2001) (the FOARC failed to include members of the pilot workforce, experts in the field of pilot fatigue, nor "contrary to appearances, [did it include] any representatives of the fractional owners of these aircraft"). These parties believed that without their input, the FOARC could not adequately address the myriad of issues that must be considered before recommending a regulatory structure for fractional ownership programs.
process. On the other hand, many parties praised the process by which the FAA developed the NPRM.

Comments were also submitted regarding the scope and application of the proposed rule both in the context of the proposed changes and in the context of the proposed modifications to Part 135. Parties objecting to the changes to Part 135 saw them as the equivalent of a pay-off to the Part 135 operators to convince them to support Subpart K. Some parties expressed concern not only with the proposed degree of relaxation to Part 135's operating rules, but also with the mere fact that changes were being proposed. Others went so far as to suggest that the FOARC process and the resultant rulemaking is in violation of law.

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249 One commenter suggested that the FAA issue a supplemental notice of proposed rulemaking to enable the public to evaluate the proposed rule before it is issued in final form. See Comments of Kaiser Air, Inc., Docket No. FAA-2001-10047-168 (Oct. 19, 2001).

250 See, e.g., Comments of Executive Jet Aviation, Inc., supra note 15, at 1-2; Comments of Nat'l Air Transp. Ass'n, Docket No. FAA-2001-10047-212, at 3-4 (Nov. 16, 2001); Comments of Bombardier Bus. Jet Solutions, Inc., Docket No. FAA-2001-10047-213, at 2 (Nov. 16, 2001); Comments of Thomas E. Ciotti, Docket No. FAA-2001-10047-13 (Aug. 7, 2001) ("the process used in [the development of the proposed rule] was not only fair and impartial but was a remarkable example of accomplishment through cooperation between industry and government"); Comments of Robert F. Marinace, Docket No. FAA-2001-10047-43 (Sept. 25, 2001) ("[b]y including the industry through the FOARC process, the interests of all parties have been served").

251 One commenter suggested that the determination of whether a Part 135 operator is entitled to avail itself of the flexibility made available as a result of the proposed amendments should hinge not on whether the operator is, as a general rule, eligible, but rather whether the crew of a particular flight for which flexibility is sought, is eligible. See Comments of Kaiser Air, Inc., supra note 249.

252 See generally Comments of Peter Britt, supra note 248.

253 See, e.g., Comments of Teamsters Misc. and Indus. Workers Union, Local 284, Docket No. FAA-2001-10047-174, at 6 (Oct. 16, 2001) ("the FOARC was neither chartered for, nor was the public made aware of, [the fact] that changes to Part 135 were not considered in this rulemaking effort"); Comments of Mitchell Michel, Docket No. FAA-2001-10047-153 (Oct. 16, 2001) (there was no reason to change Part 135; the intent was only to regulate fractional ownership); Comments of Rob McKenna, Docket No. FAA-2001-10047-5 (July 23, 2001); Comments of Jack R. Butler, Columbia Helicopters, Inc., Docket No. FAA-2001-10047-9 (Aug. 2, 2001); Comments of Mark Waldon, Docket No. FAA-2001-10047-14 (Aug. 15, 2001). In fact, the very existence of the proposed changes to part 135 have been portrayed as evidence that Part 135 operators were "bought-off" in order to achieve consensus. See Comments of Teamsters, supra, at 2, 4.

254 Several parties believe that the make-up of the FOARC was in violation of the law. See, e.g., Comments of John J. Swint, Docket No. FAA-2001-10047-15 (Oct. 4, 2001) (by failing to include pilots in the FOARC, the FOARC was not fairly balanced in violation of the Federal Advisory Committee Act and the resul-
In terms of Part 91 operations, parties were concerned that owner-pilot shared aircraft programs could be subject to Subpart K because the definition of fractional ownership program management services did not readily distinguish between programs that routinely provide crews services and those that contemplate the operation of the aircraft in the programs by the owners themselves. Although the FAA noted in the NPRM that it intended that Subpart K would apply only to fractional ownership programs and not to "other business aircraft arrangements including traditional flight departments, the use of management companies providing aviation expertise, flying clubs, partnerships or other ownership forms such as joint ownership," the definition, if read broadly, could inadvertently include owner-pilot shared ownership programs, which in turn would make such programs unviable. To distinguish the owner-pilot programs, these parties requested that the FAA make clear that Subpart K is intended to govern only the programs where the flight crew is provided or, at a minimum, offered by the program manager. The requirement of FACA were not followed, "a challenge to this proposal could be mounted in Federal Court on the basis that the FOARC was not balanced fairly"). These parties, however, incorrectly refer to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 3 (1997), as the governing law. Although the statute contains detailed requirements for certain types of committees, the Administrator has independent statutory authority to appoint an aviation rulemaking committee to which the FACA will not apply. See 49 U.S.C. § 106(p)(5) (2001) ("The Federal Advisory Committee Act (5 U.S.C. App. 5) does not apply to the [Management Advisory] Council or such aviation rulemaking committees as the Administrator shall designate." (emphasis added)). This authority is also reflected in the FAA's own internal orders. See Order 1110.30C, Committee Management (Oct. 20, 1997), at 24 ("the Administrator may designate certain rulemaking committees as exempt from FACA"). It is this latter statutory authority that was used to appoint the FOARC.

255 NPRM, supra note 22, § 91.1001(b)(7) (defining fractional ownership program management services to include, among other things, "(i) The scheduling of the program aircraft and crews" and "(iii) Crew training for crews employed, furnished or contracted by the program manager or the fractional owner").

256 NPRM, supra note 22, at 37,522. Some of the concerns are based on the application of the term "fractional ownership" to situations where it appears there are merely co-owners for a single aircraft and not a true fractional ownership program. See Comments of Steven E. Weingold, Docket No. FAA-2001-10047-16 (Aug. 21, 2001). Others simply wish to state their concern about "potentially onerous requirements [being] inadvertently applied to other forms of aircraft sharing, specifically, aircraft partnerships." Comments of Louis J. Francz, Docket No. FAA-2001-10047-19 (Aug. 21, 2001). See also Comments of Eclipse Aviation Corp., Docket No. FAA-2001-10047-203 (Nov. 16, 2001).
gram manager. Other parties were concerned that a small fractional ownership program covered Subpart K could suddenly become ineligible because at least two airworthy aircraft may not be available at all times. For example, if a small program has two aircraft and one of them is down for maintenance, the program would technically not fall within the definition of a fractional ownership program, thereby threatening the manner in which the program functions. To avoid that, the commenter suggested that the FAA clarify its intent in the preamble by noting that such "brief and routine occurrences" not affect the ability of the program to remain under Subpart K.

In addition to the concerns expressed regarding the scope and application of Subpart K, some parties object to the basic idea of regulating fractional ownership believing that the programs are adequately regulated under existing regulations. Other parties, including the major fractional ownership program managers, believe that the regulatory structure appropriately balanced the FAA's concerns with the owners' need for flexibility. Not surprisingly, several parties vehemently ob-

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257 Comments of Small Aircraft Mfrs Ass'n ("SAMA"), Docket No. FAA-2001-10047-199 (Oct. 12, 2001). SAMA was concerned that if such program were drawn into Subpart K, there would be an adverse effect on safety because these programs offered pilots "better aircraft and maintenance, additional initial and recurrent training, and standard operating procedures and risk assessment tools to increase safety margins in operations." Id. at 2. Although there may be circumstances where the owner-pilots obtain flight crew from entities affiliated with the program manager, such circumstances would be the exception and not the rule. Id. at 7. Other parties supported a clarification that would preserve the ability of the owner-pilot programs to remain under the general provisions of Part 91 and outside the purview of Subpart K. See, e.g., Comments of Nat'l Bus. Aviation Ass'n, Docket No. FAA-2001-10047-211 (Nov. 16, 2001); Comments of Aircraft Owners & Pilots Ass'n, Docket No. FAA-2001-10047-208 (Nov. 16, 2001); Comments of Lawyer Pilot Bar Association, Docket No. FAA-2001-10047-205 (Nov. 16, 2001); Comments of Nat'l Air Transp. Ass'n, supra note 250, at 45-46; Comments of Bombardier Bus. Jet Solutions, Inc., supra note 250, at 42-43.


259 Comments of Anonymous, Docket No. FAA-2001-10047-179 (Oct. 14, 2001); Comments of Mike Jones, Docket No. FAA-2001-10047-146 (Oct 16, 2001). Even if regulation is required, these parties believe that regulating the staffing required for program managers goes too far. Id.

260 See, e.g., Comments of Executive Jet Aviation, Inc., supra note 15, at 2; Comments of Bombardier Bus. Jet Solutions, Inc., supra note 250, at 23. Although the program managers were in accord with the overall regulatory structure, including the issuance of management specifications, they were concerned that the FAA may use the management specifications as a means of regulating the program managers beyond the provisions of the rules themselves. See Comments of Nat'l
jected to the regulation of fractional ownership programs under Part 91, believing that these programs are commercial and, in keeping with the FAA's desire for one level of safety, should be regulated under Parts 135 or 121, as appropriate. In fact, some of these parties view Subpart K and the associated changes to Part 135 as a "dumbing down" of Part 135 and not as a strengthening of safety rules for fractional programs.

A great deal of concern was raised regarding the issue of operational control. Several parties strongly suggested that frac-

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Air Transp. Ass'n, supra note 250, at 8; Comments of Bombardier Bus. Jet Solutions, Inc., supra note 250.


262 Comments of Teamsters, supra note 253, at 6.

263 See supra notes 72-76 and accompanying text for discussion of the importance of operational control on the regulatory classification of fractional ownership. Notwithstanding the detailed discussion of operational control in the proposed rule, controversy continues with respect to the issue of operational control, the nature of fractional ownership and the fact that fractional ownership programs were not placed under Parts 135 or 121, as appropriate. See, e.g., Comments of John A. O'Connor, Docket No. FAA-2001-10047-30 (Sept. 10, 2001) (fractional ownership operations should be governed by FAR Part 121 for the safety of the passengers and others flying near them); Comments of Kpakpo Acquaye, Docket No. FAA-2001-10047-42 (Sept. 28, 2001) (fractional ownership programs are "essentially airlines" and should be required to follow the same rules as airlines); Comments of Andre Baumgardt, Docket No. FAA-2001-10047-48 (Oct. 4, 2001) (fractional ownership was intended to permit owners to share the costs of owning and operating an aircraft and companies should not be permitted to "circumnavigate existing regulations which govern 'for hire' operations where professional flight crews are employed"); Comments of Richard M. Duxburry, Docket No. FAA-2001-10047-59 (Oct. 9, 2001) (fractional ownership programs operate and, in large part, are scheduled like an airline); Comments of Charles E. Doering, supra note 248 ("fractional ownership of jets are clearly business arrangements, in competition with commercial services and, as such, should be regulated in the same manner"); Comments of E.W. Kutner, Docket No. FAA-2001-10047-66 (Oct. 9, 2001) (fractional ownership programs have fleet structures and operations similar to charter operators and "should be governed by the existing FAR Part 135 and [not] considered as strictly privately owned and operated aircraft"); Comments of Chris Watts, Docket No. FAA-2001-10047-68 (Oct. 9, 2001) (fractional ownership should be governed by Part 135 and not Part 91 "which should be strictly individually owned and operated aircraft"); Comments of Gregg L. Scott, Docket No. FAA-2001-10047-71 (Oct. 9, 2001) (fractional ownership companies carry enough passengers to be considered a Part 121 air carrier
tional owners were incapable of having operational control, in large part because they did not understand the technical issues relating to the operation of aircraft.\textsuperscript{264} Such a position, however, ignores the decades-long practice of hiring aviation expertise, a practice that is clearly accepted by the FAA.\textsuperscript{265}

Although the hiring of outside aviation expertise is accepted by the FAA, such an arrangement is not necessarily acceptable abroad. For example, the Civil Aviation Authority of the United Kingdom ("UK CAA") advised that in the context of fractional ownership programs, the degree of the owners' involvement did not justify distinguishing them from airline passengers.\textsuperscript{266} It went on to state that it did not believe the fractional owner could share the responsibility for the operation of the aircraft since the owner has no substantive involvement in the day-to-day operation of the aircraft.\textsuperscript{267} In fact, the UK CAA believes that Subpart K may be inconsistent with the Chicago Convention in light of the definition of "commercial air transport operation" in Annex 6 of the International Civil Aviation Organization ("ICAO") and the requirement that such operations be conducted only by entities that hold air operators certificates.\textsuperscript{268}
Based on its belief that the fractional owner cannot be the operator due to its lack of or minimal involvement in the day-to-day operations, it has no other choice but to designate the program manager as the operator. As such, in its view, fractional ownership flights are commercial operations that require prior approval under the U.K.'s governing law. After examining fractional ownership programs, the Canadian Transportation Agency stated that “an air service offered via a fractional ownership program by a management company using program aircraft generally does not appear to be a publicly available air service . . .”

Concern was also raised that the minimum fractional interest of one-sixteenth, which is contained in the NPRM, is not an adequate interest to prevent parties from circumventing the charter rules. For example, one commenter suggests that the FAA require not only a minimum interest but also a minimum capital investment, with the minimum determined in part by the overall value of the aircraft. Another party believes that the determination of the minimum interest size was arbitrary. Similarly, comments were submitted addressing the manner in which the FAA should handle programs that do not meet all of the requirements. For example, if a program offers one-seventeenth interests in aircraft, it would not meet one of the elements of the definition of fractional ownership and should not be permitted to operate under Subpart K. The proposed rule, however, did

269 Id. The French civil aviation authority submitted comments taking a position similar to that proffered by the UK CAA. See Comments of Service de la Formation Aéronautique et du Contrôle Technique, Docket No. FAA 2001-10047-226 (Nov. 26, 2001).

270 See Canadian Transportation Agency, Fractional Ownership – Is a License Required From the Agency?, at http://www.cta-otc.gc.ca/air-aerien/licensing/fractional_e.html (last visited June 30, 2002). The Agency did, however, suggest that due to the wide variety of programs, an Agency ruling should be requested before implementing the program. Id.

271 Under its analysis, the Professional Airways Systems Specialists believes that while an aircraft valued at over $2 million could have a 1/16 minimum share, an aircraft under $2 million would require a 1/8 interest as the minimum. To the extent an aircraft’s value is less than $1 million, the minimum interest would be one-quarter. Comments of Prof’l Airways Sys. Specialists, Docket No. FAA-2001-10047-189 (Nov. 1, 2001).

272 Specifically, the commenter has suggested that the 1/16 and 1/32 interest were, in essence, pulled out of thin air, and that the Administrator needed the authority to waive the minimum share requirement or such minimum share size would “not withstand an arbitrary and capricious challenge.” See Comments of Anonymous, supra note 264, at 7.

273 Id.
not make clear that such a program would need to be operated under Part 135, something that will likely be rectified in the final rule.

Some parties raised an issue regarding the ability to use aircraft in fractional ownership programs under both Part 91 and Part 135. From the program manager’s perspective, there is no reason to restrict an aircraft to operations under one part of the regulations only (i.e., Part 91 or Part 135). In fact, such a mix of operations is common with aircraft that are managed by companies holding Part 135 certificates. For example, the aircraft may be operated by the owner for its own flights under Part 91 and by the management company for charter flights under Part 135. As long as the aircraft is equipped and maintained in a manner that satisfies the requirements of Part 135, the aircraft can shift back and forth in terms of the applicable operating rules. On the other hand, certain parties believe that the aircraft should be operated either under Part 91 or Part 135, but should not be able to switch between the two sets of rules.

Concern was also expressed regarding the manner in which affiliated programs would be handled. Recognizing that programs by affiliated companies are already in existence, the FAA proposed that owners be permitted to operate aircraft in affiliated programs as long as the programs are related closely enough to ensure that there is “sufficient common influence in the related programs to ensure that the programs adhere to similar safety practices.” Although there was a great deal of

274 See, e.g., Comments of Executive Jet Aviation, Inc., supra note 15, at 5; Comments of Anonymous, supra note 264, at 7.
275 The ability to have the aircraft operated by the owners under Part 91 and by the management company under Part 135 proved invaluable in the aftermath of September 11, when Part 91 operations were banned. Some of the commenters pointed to that fact as evidence that fractional programs could operate under Part 135. See, e.g., Paul Lowe, Fractional Ownership, Aviation Int’l News, Nov. 2001 at 34; Comments of Peter Britt, supra note 248; Comments of R.L. Kramer, Docket No. FAA-2001-10047-70 (Oct. 4, 2001). In fact, because of the potential for restrictions being imposed on general aviation aircraft, Flexjet has decided to convert at least a portion of its program to Part 135. See Intelligence, Wkly. Bus. Aviation, Dec. 17, 2001, at 277. Flight Options is also considering such a shift. See Lowe, supra, at 34, 36. Its decision stems in part from its view that the “differences in the [proposed] Part 91 Subpart K and Part 135 are few.” Fractional Operator Plans to Go Part 135, Aviation Int’l News, Nov. 2001, at 8.
276 Corporate Aircraft Operations, supra note 11, at 1007.
277 Comments of Prof’l Airways Sys. Specialists, supra note 271.
278 See supra notes 221-228 and accompanying text.
support for such affiliated programs,\textsuperscript{279} there were also objections.\textsuperscript{280} The objections, however, related primarily to the issue of the potential difficulty for FAA oversight and surveillance.\textsuperscript{281}

Another major area of contention related to the flight and duty rules that had been recommended by the FOARC. Although the FAA did not endorse the FOARC's recommendation in this area, it presented it as one of several proposed methods of addressing this issue.\textsuperscript{282} In general terms, comments filed by pilots opposed the flight and duty rules contained in the NPRM.\textsuperscript{283} Some of these commenters pointed to the fact that given the nature of business aviation, crew schedules could vary widely and often result in fatigue. In terms of the concept of reserve, these pilots believe that it must be counted as duty time since any other classification could result in a pilot being called for duty at the end of the reserve period resulting in a lengthy duty day.\textsuperscript{284} On the other hand, comments filed by certain program managers and the NATA not only supported the flight and duty rules as presented,\textsuperscript{285} but also requested that the FAA clarify the rule to ensure that the flight and duty time provisions would reflect the stage-length capabilities of long-range aircraft.\textsuperscript{286}

\textsuperscript{279} See, e.g., Comments of Nat'l Air Transp. Ass'n, supra note 250, at 9-13; Comments of Bombardier Bus. Jet Solutions Inc., supra note 250, at 7-12.

\textsuperscript{280} See Comments of Prof'l Airways Sys. Specialists, supra note 271, at 2; Comments of Anonymous, supra note 264, at 7; Comments of Teamsters, supra note 253, at 4-5.

\textsuperscript{281} See Comments of Prof'l Airways Sys. Specialists, supra note 271.

\textsuperscript{282} See NPRM, supra note 22, at 37,533.

\textsuperscript{283} See, e.g., Kelly Lynch, Labor, Other Fractional Rule Foes Call For More Stringent Requirements, WKLY. BUS. AVIATION, Nov. 19, 2001, at 236-37; Comments of Todd S. Edgar, supra note 261; Comments of David E. Pyshora, supra note 264; Comments of Richard J. Smith, supra note 247; Comments of IBT, supra note 261. IBT recommends that a duty period be no longer than fourteen hours and that two person crews be limited to eight hours of flight time. \textit{Id. See also} John A. Pope, Commentary: Duty and Flight Time Limitation, AVIATION INT'L NEWS, Aug. 2001, at 2; Paul Lowe, Duty, Rest Limits Top Agenda at Airline-Sponsored Seminar, AVIATION INT'L NEWS, July 2001, at 80. Flight and duty time rules were last revised in 1985. See FAA Flight Time Limitations, 50 Fed. Reg. 29,306, 29,320-21.


\textsuperscript{286} See Comments of Executive Jet Aviation, Inc., supra note 15.
In other areas where Subpart K varied from the restrictions in Part 135, numerous comments were received. For example, there were concerns expressed regarding the proposed changes to the balanced field length requirement, which mandates that an aircraft operated under Part 135 be capable of landing within 60% of a runway. Although statistics show that it is not essential to safety, as evidenced by the fact that many Part 91 operators of the same equipment have as good if not a better safety record than Part 135 operators, numerous parties objected to the 85% runway length requirement contained in Subpart K and the proposed relaxation of Part 135 on the grounds that it did not provide an adequate level of safety. Parties with substantial experience in such operating environments, however, strongly believe that given the current state of aircraft technology and operating information, an 85% rule provides the appropriate level of safety. Other parties were concerned that the relaxation of the interpretation of the overwater equipment requirements was inappropriate. Numerous parties expressed

288 See also Comments of Robert E. Breiling Associates, Docket No. FAA-2001-10047-17 (Aug. 16, 2001) (accident data shows that "the more restrictive FAR 135 requirements had little effect on the accident involvement rate as the 135 operators accident rate was continuously worse than that of the 91 operators who comply with far less restrictive requirements").
289 Some parties filed comments objecting to the provision that would permit exceptions to the proposed 85% rule, while others objected even to the proposed 85% rule itself. See, e.g., Comments of E.W. Kutner, supra note 263; Comments of Chris Milk, Docket No. FAA-2001-10047-69 (Oct. 9, 2001); Comments of Joshua Doxsee, supra note 248; Comments of Paul and Doris Holmes, supra note 248; Comments of Robert Gorelick, Docket No. FAA-2001-10047-77 (Oct. 11, 2001); Comments of Mark L. Crosby, Docket No. FAA-2001-10047-78 (Oct. 11, 2001); Comments of Gary W. Tongate, Docket No. FAA-2001-10047-79 (Oct. 11, 2001); Comments of Karen Anderson, Docket No. FAA-2001-10047-84, (Oct. 12, 2001). The fact that certain criteria must be met before a Part 135 operator may take advantage of the relaxed runway requirement was irrelevant to certain parties which believed that no conditions would support a relaxation of the 60% runway length requirement. See Comments of Teamsters, supra note 253, at 6-7.
291 For the most part, these comments expressed concern that if another emergency were to happen, the pilot could be required to reduce altitude quickly, thereby undercutting the basis on which the proposal was made. See, e.g., Comments of Rob McKenna, supra note 253; Comments of Jack R. Butler, supra note 253; Comments of Mark Waldon, supra note 253. One commenter wanted to ensure that the rule not be interpreted to permit such operations by single-en-
great concern with the fact that fractional ownership programs would not be required to use licensed dispatchers.292 These parties believed that given the size of the fractional fleet and the different types of aircraft, the additional level of safety provided by a dispatcher was essential.

Several parties urged the FAA to apply the same drug and alcohol testing requirements to fractional program managers that apply to Part 135 operators.293 In addition, certain parties suggested that the FAA require the same type of background check for crew members that is required for Part 135 operators and noted that they would support legislation that would authorize such background checks.294 With respect to both the drug and alcohol testing as well as the pilot background checks, the current law creates certain hurdles. For example, an entity that is not covered by the federally mandated drug and alcohol testing requirements295 may not hold itself out as testing under the au-


292 See, e.g., Comments of Steven Mineck, Docket No. FAA-2001-10047-26 (Sept. 7, 2001) (recognizing the expertise and additional surveillance provided by licensed dispatchers, Executive Jet uses them in its NetJets program); Comments of William D. Grizzard, Docket No. FAA-2001-10047-28 (Sept. 10, 2001) (a dispatcher is an “absolute necessity” to monitor the safety aspects of the flight); Comments of Mark T. Pacyna, Docket No. FAA-2001-10047-35 (Sept. 17, 2001) (the flying public and the FAA should demand the level of safety and regulatory compliance that certified dispatchers provide); Comments of Giles O’Keeffe, National President, Airline Dispatchers Federation, Docket No. FAA-2001-10047-50 (Sept. 7, 2001) (the FAA should require “positive operational control through the joint responsibility of the Aircraft Dispatcher and Pilot-in-Command”); Comments of Raymond P. Rothenbucher, Docket No. FAA-2001-10047-67 (Oct. 9, 2001) (a fractional ownership program with a fleet of often mixed types of aircraft should be required to have a dispatcher).

293 See Comments of Prof’1 Airways Sys. Specialists, supra note 271; Comments of Robert F. Marinace, supra note 250. Comments were also submitted regarding the meaning of “available maintenance personnel” for purposes of the emergency maintenance exception. Specifically, the question was raised as to whether available maintenance personnel means someone on duty, on the airfield and with proper qualifications, and the impact if someone who is “available” refuses to do the work. See Comments of Gavin M. Hill, Docket No. FAA-2001-10047-2 (July 13, 2001).


295 The employers that are covered by the FAA required drug and alcohol testing program are Part 121 and Part 135 air carriers, operators providing sightseeing flights and air traffic control facilities that are not operated by the FAA or by or under contract to the U.S. military. See FAA Operating Requirements – Domestic, Flag & Supplemental Operations, 14 C.F.R. pt. 121, app. I, J. (2001).
tority of that program. Similarly, the ability to obtain and release background information on pilots is based on the statutory authority granted by the Pilot Records Improvement Act. Without such statutory authority and the immunity granted thereunder, there would be difficulty obtaining or releasing such information due to the potential liability associated therewith.

Although program managers generally support the proposed regulatory structure, they expressed concern about the manner in which the rules would be applied and enforced. Because the program managers’ management specifications, which are based on air carrier operations specifications, are essential to the existence of the fractional programs, the program managers also want the benefit of the procedural protections and other enforcement related programs that are available to air carriers. One of the greatest concerns raised by the managers is that there be adequate procedural safeguards to ensure that the FAA cannot take precipitous action that would interfere with the manager’s ability to operate the fractional ownership program. The managers believe that such protection would exist only if they have the right to appeal any action taken by the FAA that would deprive them of their ability to operate their fractional ownership programs. In fact, some of the program managers made clear that without such due process protections

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296 In addition to being prohibited from advising parties that the drug and alcohol testing is mandated by federal law, these entities would also be prohibited from using federal drug and alcohol custody control forms. See NPRM, supra note 22, at 37,552.
300 In response to the FAA’s request for comments on the appeal issue, several parties took the position that such due process protections are required because of the vital importance of management specifications to a company’s ability to engage in business. See, e.g., Comments of Robert F. Marinace, supra note 250; Comments of New World Jet Corporation, Docket No. FAA-2001-10047-52 (Oct. 1, 2001); Comments of Gregory L. Wilcox, Docket No. FAA-2001-10047-81, (Oct. 11, 2001). One commenter went even further to recommend that not only should legislative authority be obtained to ensure the due process rights of the program manager, but also that owners should be provided with notice of any suspension or revocation action taken against a program manager. See Com-
they could not support the proposed rule.\textsuperscript{301} Recognizing that the statutory authority for such appeal rights does not currently exist, the FAA has been urged to take such steps as are necessary to ensure that authorizing legislation is passed.\textsuperscript{302} Another area of concern is the manner in which the FAA will determine whether a program manager’s contracts comply with the regulations. Obviously, program managers want the flexibility to handle the negotiation of contracts in a normal business fashion without the FAA having to review and approve each contract. While part of the concern is timing, there are also concerns regarding the confidentiality of the information that may be contained in the documents between the program manager and its customers.\textsuperscript{303} Although the NPRM did not address the manner in which this would be handled, there is precedent supporting the use of a certification that the contracts comply with the requirements or allowing the regulatory requirements to stand on their own with enforcement action being pursued when necessary.\textsuperscript{304}


\textsuperscript{302} See 49 U.S.C. § 46110 (2001). See also FAA Investigative & Enforcement Procedures, 14 C.F.R. pt. 13 (2001). In addition to the appeal rights, program managers suggested that they be permitted to make voluntary disclosures under the same type of program that is available to air carriers. See Comments of Executive Jet Aviation, Inc., \textit{supra} note 15, at 49-50; Comments of Bombardier Bus. Jet Solutions, Inc., \textit{supra} note 250, at 46-47. Under the voluntary disclosure program, air carriers are able to disclose a violation of the FARs, which, under certain circumstances, eliminates the assessment of civil penalties for such violation. In order for a disclosure to be covered by this program, the violation must (i) have been inadvertent, (ii) have been disclosed to the FAA immediately after detection and before the FAA has learned about it, and (iii) not be indicative of a lack of qualification. In addition, the certificate holder must have taken immediate action to terminate the conduct that gave rise to the violation and developed a comprehensive fix to avoid future violations of that nature. If these prerequisites are met, the certificate holder receives a letter of correction in lieu of legal enforcement action being taken. See FAA Advisory Circular 00-58 (May 4, 1998).


\textsuperscript{304} The Department of Transportation requires a certification by air carriers and public charter operators that their contracts comply with the regulations. See DOT Public Charters, 14 C.F.R. § 380.28 (2001). Although certain provisions are required to be included in the contract between the charter operator and the passenger, however, no certification as to the contract is required to be submitted to the DOT. \textit{Id.} §§ 380.31-32.
In addition to the concerns raised regarding the rights that the program manager would have vis-à-vis the FAA, concern was also expressed regarding the manner in which the rules would apply to the owners. While fractional ownership programs would continue to be governed by Part 91, the proposed rules require that the owners be given a specific briefing regarding the consequences of their operational control of the aircraft and that the owner execute an acknowledgment of its responsibilities. One commenter was concerned that the requirement to include language regarding the liability risk is inappropriate, unnecessary and potentially harmful. Other parties were concerned that because of a direct relationship between the FAA and the program manager, the owner would be unaware of any issues raised by the FAA. Obviously, given the hundreds of owners that may be in a program, dealing with the program manager would streamline the handling of any concerns raised by the FAA. However, since the owners could also be liable if the fractional program is not in compliance with the regulations, they should have the ability to be aware of and entitled to participate in the resolution of any concerns raised by the FAA. Another party suggested that the fractional owners

305 See supra notes 300-304 and accompanying text.
306 See NPRM, supra note 22, at § 91.1013.
307 See Comments of Douglas C. Griffith, Docket No. FAA-2001-10047-22 (Aug. 27, 2001). Specifically, the commenter notes that the inclusion in the FARs of language regarding the tort ramifications and the exposure to civil liability for a particular activity is inappropriate and is not found in any other area governed by the FARs. Id. It also states that an aircraft owner’s liability under tort law typically relates to the degree of control actually exercised by that owner and not an acknowledgment signed by the owner. Finally, the commenter notes that such a provision may create confusion in the courts, which already struggle with the allocation of liability when an aircraft owner delegates operation and maintenance functions to a third party. By including the language in the rule, additional confusion will result. Questions may be raised regarding whether the FAA intends to impose civil liability on a party simply by virtue of the fact that it is a fractional interest owner, or whether the language will be interpreted by a program manager as evidence that it is relieved of certain of its civil obligations. Id. Another commenter believed that the concept of operational control by the fractional owner is simply a “magnet for tort actions.” See Comments of Anonymous, supra note 264, at 5.
308 See Comments of Nat’l Bus. Aviation Ass’n, supra note 257, at 3. To ensure that this would not happen, the NBAA simply wanted it to be clear that while the FAA could deal directly with the program manager, it would not be required to do so. Id.
309 Id.
should be given notice whenever FAA action is taken against the program manager.\footnote{See generally Comments of Anonymous, supra note 264.}

Other concerns were also raised regarding the owners. Specifically, one commenter raised the possibility that the fractional owners themselves may engage in commercial operations using their fractional shares.\footnote{See Comments of Marc Fruchter Aviation, Inc., Docket No. FAA-2001-10047-21 (Aug. 20, 2001).} To address this concern, it was suggested that Subpart K require all solicitation material to define illegal commercial operations and contain “explicit warnings about the legal and economic consequences of illegal commercial use of fractional share flights” and that Subpart K should obligate the program manager to police its owners and should include significant penalties that would apply to the fractional owners and program managers if the owners engage in illegal operations.\footnote{Id. It was suggested that the solicitation materials also note that there is a possibility that the insurance may be cancelled if such illegal flights are conducted. \textit{Id.}} It is unlikely that such provisions will be included in the rule. The rule makes clear that the owner stands on the same footing as an owner of a whole aircraft.\footnote{See supra notes 229-232 and accompanying text.} As such, the fractional owner would already be subject to the same penalties as any other operator if it engages in unlawful operations.

In addition to the comments regarding the scope of the program and the rights of the owners and the program manager, many comments focused on the details of the rule. For example, while the proposed rules require that fractional ownership program managers have management specifications and address the circumstances that require amendments to the management specifications,\footnote{See \textit{NPRM}, supra note 22, at §§ 91.1015, 91.1017.} they do not set forth the application requirement and process.\footnote{Comments of Nat’l Air Transp. Ass’n, supra note 250, at 14-15.} Given that management specifications are modeled after air carrier operations specifications,\footnote{See supra note 103 and accompanying text.} it is likely that the application process will follow the same example. Similarly, the FAA may establish certain criteria that must be met by the program manager’s management personnel. Although proposed Subpart K contains no such requirements, specific management personnel standards are contained in Part 119.\footnote{Comments of Robert F. Marinace, supra note 250. \textit{See also} FAA Certification, 14 C.F.R. §§ 119.65, 119.67, 119.69, 119.72 (2001).}
Numerous commenters also requested that the FAA make clear that if the manager of a program that contains the elements of a fractional ownership program does not hold management specifications, that manager will nevertheless be bound to comply with Subpart K.\footnote{See Comments of Bombardier Bus. Jet Solutions, Inc., supra note 250, at 31-32; Comments of Nat'l Air Transp. Ass'n, supra note 250, at 33-34. Such a provision is also contained in Parts 121 and 135. See FAA Operating Requirements, 14 C.F.R. §§ 121.14, 135.7 (2001).}

Other comments were submitted in response to specific areas for which the FAA sought comment. For example, the FAA requested comments on the proposed fifteen-month transition schedule.\footnote{See NPRM supra note 22, at 37,523. The FAA has previously used a transition period to accommodate existing operations. For example, when the FAA issued new certification rules in Part 119, it phased in such provisions by requiring compliance with the new provisions by new applicants while permitting existing operators to continue to use the certification rules contained in SFAR 38-2 for a period of fourteen months. FAA Certification, 14 C.F.R. § 119.2 (2001). In addition, when the FAA implemented its one level of safety policy, many carriers operating under Part 135 needed to transition to the rules of Part 121. To accomplish this in an orderly fashion and with the least disruption to existing operations, the FAA permitted the affected carriers to implement the change over a period of fourteen months. 14 C.F.R. § 135.2. See also 14 C.F.R. § 119.2.}

Nevertheless, concerns were raised regarding the increased workload that will result from Subpart K and the ability of the FAA to meet the necessary staffing requirements without undermining other areas.\footnote{Comments of Mike Jones, supra note 259. One inspector raised a question regarding the manner in which these operations will be evaluated in the field and suggested that fractional program aircraft be identified as such in the database to facilitate their oversight. See Comments of Anonymous, supra note 264, at 6; Comments of Mike Jones, supra note 259; Comments of Larry A. Decosta, Docket No. FAA-2001-10047-138 (Oct. 16, 2001).}

Several comments were submitted addressing issues that were not covered by the NPRM or, in fact, even considered when the NPRM was being developed. Most significantly, concerns were raised about the security of fractional ownership programs.\footnote{See, e.g., Comments of Airplane Operators Pilots Ass'n, supra note 257; Comments of Nat'l Bus. Aviation Ass'n, supra note 257; Comments of Lealand Dean, Jr., supra note 264; Comments of Richard J. Smith, supra note 247.}
Needless to say, these concerns arose as a result of the events of September 11. The NBAA expressed concern that the FAA not apply security rules in a fashion that does not distinguish the different types of aircraft operations. Although the NBAA wholeheartedly supports security background checks of program management personnel and ground security programs that restrict access to aircraft, it believes that air carrier security program should not be applied to fractional ownership programs without a thorough analysis of the differences in the types of operations. For example, only the fractional owner or its guests will board these aircraft, making it extremely unlikely that fractional ownership would be used as the tool of a terrorism.  

Another issue that was raised in the comments but not addressed in the NPRM relates to the registration process for fractional aircraft and the ability to operate the aircraft internationally pending the formal re-registration of the aircraft. Although the programs managers may execute the registration applications pursuant to powers of attorney granted by the owners, delays are nevertheless inherent in the process. This delay stems from the fact that, pending the FAA's review and processing of the documents in support of registration, the aircraft are technically not registered. Although the FAA grants temporary authority to the registrant, that authority does not extend beyond the borders of the continental United States.

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323 Comments of Nat'l Bus. Aviation Ass'n, supra note 257, at 4. Despite the relatively limited pool of passengers that fly on fractionally owned aircraft, fractional ownership programs have taken steps to ensure the security of the operation. For example, Flight Options does background checks on its prospective owners and personality profiles and background checks on its crew. It has also tightened the security and identification of passengers and baggage. See Qualifying the Customer: Charter and Fractional Ownership, BUS. & COM. AVIATION, at http://www.aircraftbuyer.com/featured/customer.htm (last visited June 30, 2002).

324 See Comments of Bombardier Bus. Jet Solutions, Inc., supra note 250, at 45; Comments of Nat'l Air Transp. Ass'n, supra note 250, at 48-49. Because of the change in ownership of the aircraft that results every time an owner is added or removed from a fractionally owned aircraft, the aircraft must be re-registered at the FAA. See Wings of the Future, supra note 7, at 998-99.

325 Wings of the Future, supra note 7, at 998-99.

326 The temporary authority to operate is contained in the "pink slip," which is a duplicate copy of the application for registration that is retained and placed on board the aircraft. Once the papers have been filed at the FAA, the pink slip becomes effective and will support domestic operations. See FAA Revision of General Operating & Flight Rules, 50 Fed. Reg. 11,292 (Mar. 20, 1985). However, the FAA has ruled that such temporary authority does not extend outside the territory of the United States because the Convention on International Civil Aviation requires that the aircraft be registered in order to operate outside the
Comments were also submitted addressing the application of
the truth-in-leasing requirements to fractional ownership.\(^{327}\) Specifically, these parties have requested that the FAA include
an additional exception to the truth-in-leasing requirements.
Since Subpart K includes detailed requirements regarding the
information to be provided to the fractional owners with respect
to the responsibilities of the fractional owners and program
managers,\(^ {328} \) requires the owner to sign an acknowledgment
confirming its understanding of the responsibilities,\(^ {329} \) and pro-
vides that a complete listing of all aircraft in the fractional pro-
gram be contained in the manager’s management
specifications,\(^ {330} \) the information required to be disclosed by the
truth-in-leasing provision is already provided. In fact, it is pro-
vided in far greater detail than the truth-in-leasing requirements
would mandate.

Although the detailed requirements will not be known until
the final rule is issued, the NPRM provides existing and poten-
tial program managers with an idea of the environment in
which they will conduct their business. It also provides frac-
tional owners and potential owners with a better understanding
of their rights and responsibilities. Despite the fact that there
are still many unknowns, the industry continues to change.

V. WHERE IS THE FRACTIONAL OWNERSHIP
MARKET GOING?

A. THE ONGOING DEVELOPMENT OF THE FRACTIONAL
OWNERSHIP MARKET

As the highly anticipated proposed rule works its way through
the rulemaking process and both the FAA and the fractional
ownership industry are gearing up to conduct business under a
new regulated environment, the industry continues to develop.
For example, in the spring of 2001, business aviation in general
and fractional ownership in particular awoke to a major change
in the industry when UAL Corp., the parent company of United
Air Lines, announced that it had formed a new subsidiary that

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\(^ {328} \) NPRM, \textit{supra} note 22, §§ 91.1009, 91.1011, 91.1014.
\(^ {329} \) \textit{Id.} § 91.1013.
\(^ {330} \) \textit{Id.}, § 91.1015(a)(1).

would be dedicated to business aviation. The subsidiary, United BizJet Holdings, Inc., doing business under the trade name Avolar, was developed to offer a fractional ownership program, fleet management, charter flights and corporate shuttle services and expected to have a fleet of 200 business jets by 2006. While a range of business aviation services were to be

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334 UAL Divides Biz Jet Firm into Three, Places Orders, supra note 331, at 1. Initially, it was estimated that a fleet of that size would require an investment of at least $2 billion. Id. Avolar further increased the potential size of its fleet by ordering an additional eighty-two aircraft (twenty-five Learjet 45s and Learjet 60s and options for an additional thirty-two aircraft as well as fifteen Beechjet 400As with options for ten more) bringing the total number of aircraft on firm order or option to 309. See UAL’s Avolar Orders 82 Biz Jets, Says It Is ‘Open for Business,’ AVIATION DAILY, Dec. 13, 2001 at 1. Avolar also tentatively agreed with Airbus to sell fractional interests in up to 15 Airbus Corporate Jetliners. See Avolar Plans To Add Airbus Corporate Jets To Portfolio, AVIATION DAILY, Nov. 20, 2001 at 1.
offered, Avolar anticipated that the fractional ownership business would be the heart of its growth and would follow the general structure that had been established by NetJets which would include the acquisition of an aircraft share, a monthly management fee and a set rate per flight hour. Avolar’s proposed service did not, however, come without controversy. In particular, following the tragic events of September 11, the company was strongly criticized for proceeding with the purchase of the business aircraft it ordered when its sister company, United, received funds from the government as part of the financial assistance package for the airline industry which was adopted in response to the tremendous financial losses that followed September 11.

Despite Avolar’s plans and the significant strides made in implementing them, on March 22, 2002, UAL Corp. announced that it had shut Avolar down. According to UAL, the attempts to obtain outside financing had been unsuccessful and UAL believed that there were no financially viable options for Avolar in the current environment. Under such circumstances, UAL believed that “closing Avolar was ‘the most prudent move possi-


ble’” and would enable UAL to focus on its core business. This move did not come as a complete surprise. In fact, UAL’s Chief Executive Officer stated earlier in the year that UAL was prepared to close Avolar if it could not find an outside investor. A stronger signal came in early March when UAL announced that it was no longer seeking outside investment and would pursue a new business plan for Avolar. When the final announcement was made that Avolar was being shut down, UAL acknowledged that it had already begun “an orderly shutdown of the operation.”

Although UAL Corp. blurred the distinction between business and commercial aviation when it announced its plans for Avolar, none of the other major airlines or affiliates has taken a plunge of such magnitude. That is not to say, however, that none of the other airlines is involved in business aviation. In fact, Delta Air Lines, as a result of its January 2000 acquisition of Comair, a regional airline, inherited a business aircraft operation involving charters, management services and fixed based operations that have been in place since 1984. Although this operation had for years been known as Comair Jet Express, it was recently given the Delta brand and is now referred to as Delta AirElite Business Jets. In marketing the service, Delta has touted its airline experience and leveraged “its resources and purchasing power to develop Delta AirElite Business Jets.”

Other airlines have also dabbled in business aviation ventures. For example, British Airways launched a business aviation ser-

339 See Dave Carpenter, United Shuts Down Avolar Unit, ASSOCIATED PRESS, Mar. 22, 2002.
341 See Press Release, United Airlines, Statement by UAL Corporation Regarding Avolar (Mar. 8, 2002).
344 Delta Puts Own Branding on Comair Charter Unit, WKLY. BUS. AVIATION, Oct. 22, 2001, at 188; Delta Brands Corporate Jet Charter Delta AirElite Business Jets, AVIATION DAILY, Oct. 16, 2001, at I. Although Delta has indicated that it does not intend to enter the fractional ownership arena, it recently added another Challenger aircraft to its AirElite Business Jets division. See also Delta AirElite Adds Fourth Bombardier Challenger To Fleet, AVIATION DAILY, Nov. 28, 2001, at 6.
vice using charters in conjunction with Air Partner International. This service, which did not include fractional ownership, was discontinued in the fall of 2001. Similarly, Air Canada and Sky Shares forged a "strategic partnership" that would include a business aviation division. Other U.S. airlines made it clear that they had no intention of pursuing fractional ownership, although they noted that the operation of business jets may be increased.

Another twist on fractional ownership was launched by Marquis Jet Partners. Under its program, Marquis acquires interests in aircraft from Net Jets and through the use of a "Private Jet Card" subleases shares in aircraft in the Net Jets program to the Marquis customers in blocks of twenty-five hours. Marquis not only acquires the shares from Net Jets, it also pays the typical monthly fees for management and hourly usage. This program expands the potential market for participants in fractional ownership programs since it will serve customers who want less than fifty hours, the smallest interest sold by existing fractional ownership programs. However, because such an interest falls

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349 In fact, Comair Jet Express, a Delta Air Lines subsidiary which has operated corporate aircraft for over 16 years is the only corporate jet charter operator owned by a major airline. See Comair Jet Express Grows Charter Fleet But Remains Out of Fractional Market, AviationNow.com, Bus. Aviation, available at http://www.aviationnow.com (July 31, 2001). Delta Air Lines, however, made clear that it had no plans to enter the business aviation arena in the manner in which UAL did. Id. Similarly, American Airlines advised that it did not intend to invest substantially in business aviation equipment to be operated by it or its affiliates. Id.


351 Id. For a discussion of the typical fractional ownership program arrangements, see Wings of the Future, supra note 7, at 995-97.

352 Id. The program managers typically require a minimum interest to control the number of parties who want to use an aircraft at any point in time. Because
below the minimum that will be permitted under Subpart K, the program provides for all interests of less than fifty hours to be operated by NetJets Aviation under its Part 135 certificate. To the extent a party acquires fifty or more hours, it would have the option of operating its flights under Part 91 or having NetJets, Inc., operate them under Part 135.\footnote{See Statement by Executive Jet, Inc. and Marquis Jet Partners, Inc. Regarding The Marquis Program, at http://www.marquisjet.com/ (Nov. 8, 2001). See also NetJets to Operate Block-Charter Aircraft, AVIATION INT’L NEWS, Nov. 2001, at 3.} Travel cards are also offered by eBizJets as an alternative to fractional ownership. Under the eBizJets program, participants purchase travel cards in denominations of $100,000, $250,000 or $500,000.\footnote{See eBizJets, at http://www.ebizjets.com (last visited June 10, 2002).} With the card, a participant travels on one of more than 1,400 aircraft flown by Part 135 air taxi operators in the eBizJets network and, other than purchasing the card, incurs no acquisition cost, no monthly management fee, no membership fee and has no long-term financial commitment.\footnote{Id.}

Some of the newer "fractional" programs involve the sale of flight hours and not the sale of interests in aircraft. For example, ShAirForce LLC is offering shares of flight hours on one or more city pairs flown on 36-seat Boeing Business Jets under Pace Airlines’ Part 121 air carrier operating authority.\footnote{See ShAirForce Launches Low-Cost Fractional Service Program, AVIATION DAILY, June 18, 2002, at 6. See also ShAirForce Launches Marketing Program, WKLY. BUS. AVIATION, June 17, 2002, at 280.} Under this program, ShAirForce is essentially running a corporate shuttle whereby participants pay only for the flight hours for each passenger it has on the particular flight and not for the cost of operating the entire aircraft.\footnote{See Press Release, ShAirForce, ShAirForce Launches ShAirForceOne: New Shared Aircraft Ownership Program (Mar. 26, 2002) (on file with author).} Destination Air Partners which is proposed by Worldwide Aviation, Inc. will offer interests in 200-seat Boeing 747SP aircraft to "500 exclusive, ‘fractional owners’" pursuant to three-year management contracts under which the owners will be provided with operational, management and

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Marquis will serve as the "gatekeeper" the fractional program manager will not face any additional burden. \textit{Id.} See also Kuczynski, \textit{supra} note 5, at 6.
scheduling services. In addition to the $40,000 purchase price for the interest in the aircraft, each owner will pay a pro-rata share of the fixed operating costs for the aircraft and the direct operating costs for the flights on which the owner travels. In essence, Destination Air Partners will function as a travel club. Other programs, such as Executive Aircraft Solutions, offers customers various options for sharing aircraft, all of which will be operated under Part 135. For example, Executive Aircraft Solutions will sell an owner an interest in a limited liability company that owns an aircraft, interest in an aircraft itself or it will lease an interest. Even within these options, an owner may choose to purchase the interest in the limited liability company and prepay all operating costs or it may use marginable asset portfolios or restricted preferred stock created exclusively for participation in the aircraft.

In addition to the developments on the fractional program side, other industry players continue to tailor their products to serve the growing fractional ownership market. For example, AIG Aviation Inc. developed a Fractional Aircraft Ownership Program insurance program to provide insurance coverage for companies that own or lease aircraft interests in fractional ownership programs. The program offers four insurance policies that can be individually priced and purchased: excess liability, non-owned aircraft liability, contingent aircraft physical damages and liability, and diminution of value coverage. The excess liability coverage is provided in excess of the coverage offered as part of the fractional ownership program for aircraft liability and non-owned aircraft liability. The non-owned aircraft liability insurance coverage is provided for exposure outside the program manager’s policy. The contingent physical damage and liability coverage protects the fractional participant in cases where the primary policy either does not provide coverage or the management company has voided the provided

358 See Worldwide Aviation, Inc., at http://www.wwaviation.com (last visited June 10, 2002). Each “owner” will have the right to book two seats on each flight itinerary, which starting in the second year will be chosen by a vote of the owners.
359 Id.
360 See Executive Aircraft Solutions, at http://www.easjets.com (last visited June 10, 2002).
361 AIG Aviation Fashions Insurance for Fractional Ownership, WKLY. BUS. AVIATION, Jan. 5, 2001, at 64.
363 Id.
coverage.\textsuperscript{364} The diminution in value coverage protects the fractional owner from a reduction in the resale value of the aircraft resulting from physical damage to the airframe.\textsuperscript{365}

B. What Does the Future Hold?

Subpart K will clearly have a significant impact on the manner in which the fractional ownership market develops. Although the major fractional ownership programs are unlikely to feel much of an impact,\textsuperscript{366} some tweaking of the programs will be required and agreements will need to be revised to include or emphasize the Subpart K requirements.\textsuperscript{367} Other parties may need to make substantial changes in their programs to meet the requirements of Subpart K.\textsuperscript{368} Some programs may elect to operate under Part 135 rather than comply with the new set of requirements.

In addition to the way the programs are run, the Subpart K requirements will likely have an effect on the manner in which programs are developed and marketed. Given the success of the fractional ownership segment of the industry, many companies have marketed their programs as "fractional ownership" when, in fact, they would not meet the definition in Subpart K.\textsuperscript{369} With the significant increase in regulatory obligations that will result following the adoption of Subpart K, these companies may do an about face and attempt to distance themselves from fractional ownership in an effort to avoid the application of Subpart K. In certain cases, this will be successful because the programs lack some of the elements that constitute fractional ownership. They may not provide pilots, or there may be no sharing of aircraft among owners of different aircraft. Some aircraft sharing programs may actually be covered by the alternatives provided

\textsuperscript{364} Id.

\textsuperscript{365} Id.

\textsuperscript{366} Since most of the major fractional ownership programs participated in the FOARC, the Recommendation that formed the basis of the NPRM reflects many of their existing business practices. See Lowe, Frax Regulations, supra note 46, at 56.

\textsuperscript{367} NPRM, supra note 22, at 37,526-27, § 91.1003.

\textsuperscript{368} For example, a program may not have enough pilots for the number of aircraft in the program, the pilots may not have enough experience or the aircraft may not have the equipment required under Subpart K. See supra notes 181 and 183 and accompanying text. These program managers, however, will have a transition period to achieve compliance. See supra notes 240-245 and accompanying text.

\textsuperscript{369} See supra note 18.
for in Part 91, Subpart F.\textsuperscript{370} Others may be more in the nature of flying clubs or other types of aircraft partnerships which fall neither under Subpart F nor Subpart K. In any event, a great deal of care must be exercised to ensure that the program as structured is accomplishing its objectives and operating under the correct set of rules.

As with any newly regulated area, it will take time for all concerned parties to understand not only what the rules themselves say, but also how they are interpreted and applied. The implementation process will certainly take a lot of resources both from the FAA and the industry. In fact, during the comment period the FAA and industry worked together to develop guidance material for the inspectors.\textsuperscript{371} Of course, the guidance material cannot be finalized until a final rule is issued, but it is likely that the general structure of Subpart K will survive although most assuredly, changes will be made. While some of these changes will serve to clarify the existing proposal, fill in areas which were not addressed and respond to comments, others will likely be of a more substantive nature.

The areas of greatest scrutiny will likely include flight and duty time and runway length. As a result of the lifting of the stay relating to the enforcement of the Whitlow Letter dealing with flight and duty time,\textsuperscript{372} and the controversy that has surrounded this issue for years, the FAA may decide to apply the same set of flight and duty time rules to fractional ownership programs under Subpart K as are applied to air carriers under Part 121 and Part 135. From an operational perspective, the FAA may not be comfortable with a balanced field length of 85\%\textsuperscript{373} instead of the 60\% requirement applicable to Part 135 operators or the lifting of equipment restrictions for certain overwater operations under a revised interpretation of the requirements.\textsuperscript{374}

Although the proposed rules were based on the data presented

\textsuperscript{370} See supra note 173 and accompanying text. See also Corporate Aircraft Operations, supra note 11, at 997-1006.

\textsuperscript{371} The FAA noted in the NPRM that it intended to invite industry to participate in the development of the documentation and implementation of the rule. See NPRM, supra note 22, at 37,523. This concept was also heartily endorsed by one of the commenters. See Comments of Gregory L. Wilcox, supra note 300 ("It is of paramount importance that the people that worked to develop this Rule be actively involved with the FAA in developing Handbook guidance for compliance with [Subpart K], . . . ").

\textsuperscript{372} See supra note 209.

\textsuperscript{373} See supra notes 187-189 and accompanying text.

\textsuperscript{374} See supra note 141.
in the course of the FOARC and the rulemaking process, the FAA may retreat from a blanket authorization in favor of case-by-case determinations. For example, the FAA could issue a deviation, a letter of authorization or approve manual provisions that allow such operations. In this manner it can make an independent determination of whether a particular operator under particular circumstances can operate safely under more flexible rules. If the final rule does not include a method of maintaining the flexibility that is a critical component of business aviation, there will be little distinction between Subpart K and Part 135. In fact, in certain respects, Subpart K will have stricter requirements.

Although the efforts devoted to the implementation process both through the joint industry/FAA efforts during the comment period and the FAA’s independent efforts are intended to ensure that a training program and guidance material will be available to inspectors and the public, human nature will always control. Undoubtedly, situations will arise and structures will be developed that do not fit neatly in the definition of fractional ownership or are viewed differently by different parties resulting in disagreements as to the appropriate rules to apply. In an effort to minimize this concern, the FOARC recommended that the FAA establish a “national point of contact for fractional ownership operational and airworthiness issues to ensure standardization of the implementation process and policy application.”

The designation of such a point person would be helpful not only during the implementation process, but also on an ongoing basis. This would enable both the FAA and the industry to have a consistent approach to different types of aircraft sharing programs. History has shown that the business aviation industry adapts to the needs of the marketplace. It is, in fact, this ability to adapt established concepts that gave birth to fractional ownership in the first instance. Without the designation of a single contact point for interpretation and policy implementation, the industry may find itself several years down the road examining another type of aviation program that is not specifically identified in the FARs and that has been accepted by some regions and challenged by others. The FAA’s examination of fractional ownership, which ultimately led to proposed Subpart K, began in the mid- to late-1990s. The substantial amount of time,

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375 See NPRM supra note 22, at 37,523.
376 Wings of the Future, supra note 7, at 999-1002.
effort and money that was invested in this process by industry
and government has produced what this author believes to be a
well reasoned and balanced approach for the regulation of frac-
tional ownership. However, had a coordinated approach to
fractional ownership or a single point of contact been used in its
infancy, much of the time and controversy may have been
unnecessary.

Obviously, the impact of the rule cannot be known at this
point. Nevertheless, a few things are apparent—most signifi-
cantly, the manner in which this proposed rule was developed.
Given the diversity of opinion on fractional ownership both in
the industry and in government, the process by which Subpart K
was developed was a model of efficiency. By bringing the indus-
try and the government together, the parties could address the
various concerns and deal with substantive issues in a way that
resolves the issues raised by the various factions of the industry
and the FAA.\(^\text{377}\) While some parties believe the process unfairly
excluded certain segments of the public\(^\text{378}\) or went beyond the
scope of its authorization,\(^\text{379}\) most parties, even those that may
disagree with portions of the proposed rule, have recognized
that the process was an efficient and productive one. The pro-
cess gave the parties, including the government, an opportunity
to air their concerns and, through a collective effort, develop a
proposed solution. Although each party obviously had its own
set of priorities, posturing gave way to practicality as the mem-
bers of the FOARC joined forces to achieve a common objective,
namely the creation of a set of rules that would work for every-
one. Once the representatives of fractional programs put aside
their insistence that no rules were required other than those
that already existed, and the representatives of the Part 135 op-
erators put aside their insistence that fractional ownership pro-
grams be governed by no less than Part 135 or 121, as

\(^{377}\) Many of the comments submitted address the process used for the develop-
ment of proposed Subpart K. Some of the commenters support the process by
which the proposed was developed. See, e.g., Comments of Thomas E. Ciotti, supra
note 250 ("the process used in [the development of the proposed rule] was not
only fair and impartial but was a remarkable example of accomplishment
through cooperation between industry and government); Comments of Robert F.
Marinace, supra note 250 ("by including the industry through the FOARC pro-
cess, the interests of all parties have been served).

\(^{378}\) See supra notes 247-248 and accompanying text.

\(^{379}\) See supra notes 251-253 and accompanying text.
appropriate, significant headway was made toward a practical solution that would satisfy each of them and the FAA as well.\textsuperscript{380}

Although the process was not easy, it produced dramatic results in a very short period of time, far shorter than the typical time frame for the development and issuance of a proposed rule.\textsuperscript{381} It is clearly a process that should be used with more frequency to address issues where the agency and different segments of the industry have well developed substantive positions and expertise that facilitate the development of a practical solution. With the benefit of input from parties who have lived through the school of hard knocks, the rule was not developed in an ivory tower; instead it was developed with the practicalities of the real world. The FAA should view the results of this process with great pride and use it again to streamline rulemaking projects in other areas.

With the issuance of proposed Subpart K, fractional ownership has been accepted by the FAA as an important part of business aviation. Although there will likely be a bumpy road ahead, the development of this proposal is clear evidence that the industry and the FAA, by working together and considering all of the positions, can resolve difficult issues and achieve results that take into account the business practicalities of the industry without undermining legitimate safety concerns.

\textsuperscript{380} See Wings of the Future, supra note 7, at 1016-22 for a discussion of the longstanding position of various segments of the industry.

\textsuperscript{381} Throughout the process, both industry and government alike commented on the speed with which the development of this rule progressed. See also Perry Bradley, Breaking Logjams in Washington, BUS. & COM. AVIATION, Apr. 2000, at 9 (the FOARC was a watershed process); Olcott Says FOARC Is a 'Model for Future Rulemaking, AIN WEEKLY, Feb. 25, 2000 (FOARC's work was a "more cost- and time-efficient process than any other . . . and a model for future rulemaking.").