DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

Interpretation of the Regulations Regarding the Transition to an All Stage 3 Fleet Operating in the Contiguous United States

AGENCY: Federal Aviation Administration, DOT.

ACTION: Interpretation of rules.

SUMMARY: This document presents a compilation of requests for interpretation of the regulations regarding the transition to an all Stage 3 fleet operating in the contiguous United States. These requests have been submitted to the Federal Aviation Administration (FAA) since the regulations became effective on September 25, 1991. The FAA is aware that significant public interest in these opinions exists, and this document is being published to give notice of the issuance of these interpretations to all interested parties.

ADDRESSES: Further requests for interpretation of these regulations may be addressed to: Federal Aviation Administration, Office of the Chief Counsel, ATTN: Assistant Chief Counsel for Regulations, AGC-200, 800 Independence Ave., SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Karen L. Petronis, Airworthiness Law Branch, AGC-210, Office of the Chief Counsel, FAA, 800 Independence Ave., SW., Washington, DC, 20591; telephone (202) 267-8018.

SUPPLEMENTARY INFORMATION: On September 25, 1991, the Federal Aviation Administration (FAA) published regulations governing the operation of large Stage 2 airplanes in the contiguous United States. These regulations codified into the Federal Aviation Regulations the provisions of sections 9308 and 9309 of the Airport Noise and Capacity Act of 1990 (ANCA) (49 U.S.C. App. 2157, 2158).

Since that time, the FAA has received many requests for interpretations of the regulations. Because of the broad scope of the regulations, many persons have expressed an interest in these interpretations and have requested that they be made available generally. To facilitate the dissemination of the information contained in these interpretations, the questions and responses are being published here. The questions are presented by topic area. Individual topic areas may include questions from several requesters, and individual requesters are not identified.

Return of Foreign-leased Airplanes

1. *Question:* If a U.S.-owned Stage 2 airplane is leased to a non-U.S. operator, must it physically return to the United States within six months after expiration of the lease before being re-leased to qualify under the return rule of § 91.855(f)?

Response: No. Nothing in the language or legislative history of ANCA § 9309 suggests that physical contact with U.S. soil is necessary to make a leased airplane returnable, nor does any practical argument exist for such a requirement. This applies to any number of successive leases to the same or other non-U.S. airline so long as no more than six months elapses between the end of one lease period and the beginning of the next.

The FAA cautions that the eligibility of a Stage 2 airplane to return after a foreign lease in no way confers any operational status as far as the phased transition requirements of part 91 are concerned. Any operator that chooses to use a returned Stage 2 airplane to conduct operations in the contiguous United States must ensure that the airplane fits in the operator's fleet requirements under § 91.865 or § 91.867.

Alaskan Operations

2. *Question:* Since operations in the state of Alaska are not affected by either the nonaddition rule or the phased transition, are operators that operate exclusively in Alaska exempt from §§ 91.851 through 91.875?

Response: No. Each operator of a large Stage 2 airplane is subject to the transition rules, including the nonaddition rule and the reporting requirements of § 91.875. Each operator of a covered airplane must establish its base level and report its compliance. Section 91.801(c) indicates that the operating noise limits and related requirements codified in §§ 91.851 through 91.875 apply to:

> Any civil subsonic turbojet airplane with a maximum certificated weight of more than 75,000 pounds operating to or from an airport in the 48 contiguous United State and the District of Columbia under this part [part 91], part 121, 125, 129, or 135 of this chapter on and after September 25, 1991.

The fact that an operator restricts operation of its airplanes to Alaska is not relevant to coverage. It is true, however, that the operation of Stage 2 airplanes in Alaska is not affected by the statutory prohibition or the interim compliance requirements. At this time, the FAA foresees allowing operators of affected airplanes that operate solely outside the contiguous United States to amend their operations specifications to remove these airplanes from operation in the contiguous United States. Any airplane that is restricted to operation outside the noncontiguous United States may be used to achieve compliance with the statutorily mandated restriction on the operation of Stage 2 airplanes.

The FAA realizes that operators that operate airplanes solely in Alaska (or other locations outside the contiguous United States) fall into a special category as far as the transition to an all Stage 3 fleet. While these operators must be treated the same as other domestic operators, they nonetheless present a special case since their Stage 2 airplanes are not restricted from their usual flight areas. For this reason, all operators are required to establish a base level and phase into an all Stage 3 fleet of airplanes operating in the contiguous United States. Any operator may comply with the transition requirements by removing its Stage 2 airplanes from operation in the contiguous United States.

While § 91.857 addresses the operation of Stage 2 airplanes that are "imported" into the noncontiguous United States, these same provisions would apply to any currently operated airplane that an operator wishes to remove from operation in the contiguous United States. Thus, an operator may take advantage of § 91.857(a) to change its operations specifications to meet the interim compliance dates, as necessary, and may use § 91.857(b) to obtain a special flight authorization to operate a restricted Stage 2 airplane into the contiguous United States for the purpose of maintenance.

Dual-Certificated 747-100 Aircraft

3. *Question:* Since a number of Boeing 747-100 airplanes were originally certificated to operate as either Stage 2 or Stage 3 airplanes, what is the status of these airplanes under the phased transition rules?

Response: Until notified, the FAA considers all dual-certificated Boeing 747-100 airplanes to be Stage 2 airplanes for noise compliance purposes. Each operator of these airplanes may choose to permanently reclassify these airplanes as Stage 3 to count them toward compliance with the Stage 3 transition rules.

This reclassification involves changes in the airplane flight manual to delete the parameters that describe Stage 2 operation, and the addition of a placard in the affected airplane indicating that the airplane may not be flown in a Stage 2 configuration. In addition, the FAA

will require each operator to submit a written statement identifying the reclassified airplane and certifying that the airplane will not afterward be flown as a Stage 2 airplane to or from a point in the contiguous United States.

The only exception to this permanent reclassification is in the case of leased airplanes. The lessee of a dual-certificated 747 will be allowed to make the Stage 3 reclassification election effective for the length of the airplane lease. This exception provides that no lessor/owner of a dual certificated 747 is bound irrevocably by the action of its lessee, while the lessee retains the flexibility to continue operation of the airplane in a configuration that is compatible with its needs under the Stage 3 transition.

While notice to the FAA must be made in writing, there is no precise form in which the owner or operator must declare its actions to reclassify an individual airplane. The FAA is looking into the development of an optional form for this purpose. The FAA anticipates that operators would file these certifications at the time it submits its annual report, but they may be filed at any time. This form, or any such written certification from an owner or operator, will not fulfill any other recordkeeping requirement made necessary by changes to the airplane flight manual or the airplane itself.

Airplanes Leased From Non-U.S. Entities

4. *Question:* Section 91.855(c) allows for the operation of Stage 2 airplanes that were leased by non-U.S. owners to U.S. operators before September 25, 1991. May a wholly-owned U.S. subsidiary of a non-U.S. corporation take advantage of this provision?

Response: If the wholly-owned U.S. subsidiary has established a voting trust to register its airplanes in the United States, it may not claim that it leased the airplane as a non-U.S. entity under § 91.855(c). The voting trust means that the subsidiary's airplanes are considered U.S.-owned. If the trust acquired a Stage 2 airplane before November 5, 1990, it may lease the airplane to another U.S. entity to operate in the contiguous United States without restriction. If a Stage 2 airplane was acquired after November 5, 1990, by a subsidiary, the airplane could not be leased to a U.S. operator for operation in the contiguous United States because of the nonaddition rule.

5. *Question:* For a Stage 2 airplane operating under the leasing provisions of § 91.855(c), may that airplane be sold to another non-U.S. entity and continue to operate subject to that lease? May it be sold to a U.S. entity and continue to operate subject to the lease?

Response: If a Stage 2 airplane is owned by a non-U.S. entity and transferred to another non-U.S. entity subject to a lease to a U.S. operator, the airplane may continue to operate under § 91.855(c). The FAA will not view the continuation of the lease as a violation of § 91.855(c), as though a new lease from a non-U.S. entity were occurring.

This allowance presumes that the airplane is sold subject to the express terms of the existing lease. Any change in the terms of the lease at the time of the sale would be considered a new lease from a foreign entity. Any extensions of that a lease would be limited to the terms in the original lease. Once the lease expires, the airplane may not be operated in the contiguous United States by a U.S. operator.

Conversely, a non-U.S. owned Stage 2 airplane that is currently leased by a U.S. operator may not continue to operate if the airplane is sold to a U.S. entity. Stage 2 airplanes purchased by a U.S. entity after November 4, 1990, are prohibited from operating in the contiguous United States. To allow a newly purchased airplane to continue operation based on the original lease from the non-U.S. entity is clearly prohibited by the terms of the statutory nonaddition rule. If the airplane is allowed to transfer to a U.S. entity and is allowed to continue operating subject to the lease, the transfer would serve as a means around the nonaddition rule. By protecting the lease, the receiving U.S. entity would be purchasing an airplane that, without the lease, would be prohibited from operation in the contiguous United States.

The continued operation of this airplane, if sold to a U.S. entity, could be viewed as consistent with the nonaddition rule since it does not increase the amount of Stage 2 noise in the United States—the airplane is already operating here. However, a change to U.S. ownership thwarts the very intent of Congress in codifying the nonaddition rule—to limit the liability of all U.S. owners of Stage 2 airplanes to that which existed on November 5, 1990. While it may be argued that limiting operation to the length of the lease would not effect any change as far as operation of Stage 2 airplanes, the new U.S. owner would enjoy a benefit unavailable to most others, and that benefit would have been gained by a means that clearly violates the nonaddition rule.

The anomaly that arises from this situation was recognized by the FAA at the time the regulations were promulgated, and is caused by the difference between the statutory cutoff for importation of Stage 2 airplanes and the regulatory cutoff for leasing non-U.S. airplanes. The anomaly resulted when the FAA "closed the loophole" of leased non-U.S. airplanes. The FAA concluded that the September 25, 1991, cutoff date was the only viable alternative to declaring those leases void retroactively, since they were expressly limited by the ANCA.

The FAA will not now interpret the rule in a manner that would, in effect, violate the spirit of the legislation by allowing the continued operation of these leased airplanes should they become U.S.-owned. Allowing this operation could easily lead to numerous sales of leased non-U.S. Stage 2 airplanes, effectively foiling the purposes of the nonaddition rule and unfairly favoring those who already have the advantage of a previously-leased Stage 2 airplane. Further, allowing these operations would place upon the FAA the burden of monitoring leases to which it is not a party and over which it exercises no control.

Base Level

6. *Question:* Can base level be held by anyone other than an operator of Stage 2 airplanes?

Response: Yes. Base level is created by operators (or others in certain other circumstances) because it is based on the number of Stage 2 airplanes on their operations specifications as of a chosen day. Base level is thus held by an operator until the operator decides to transfer it.

Section 91.863 does not specify either who may hold base level, or who makes the decision whether base level will transfer in a given transaction. Because base level may be transferred to non-operators, the FAA has no way of knowing the parties involved in any individual transfer. Once an operator establishes its base level, it holds that base level until it decides to transfer all or part of it with the corresponding airplanes. The FAA's statement in the preamble to the final rule establishes the starting point by saying that base level established with leased airplanes stays with the operator.

The decision on whether the base level will transfer thus belongs to the party that holds the base level and airplanes before the transaction. In a chain of airplane transfers together with base level, any party may choose to transfer the airplanes and retain the base level.

7. *Question:* May a transfer of base level be made now for an airplane

transfer that occurred before the issuance of § 91.863?

Response: Yes. Since the establishment of base level was a "look back," the FAA currently allows the transfer of base level for airplane sales or lease returns made *after* the transferring owner/operator established its base level. These transactions are to be negotiated by the parties to the airplane transfer and are to be reported pursuant to § 91.863(c).

The transferring parties must report the original date of the airplane transfer. The related base level transfer will be valid only if the airplane transfer occurred after the date established by the transferring party as its base level date. Airplane transfers that predate the establishment of the transferring party's base level would be invalid since no base level had yet been established to transfer.

The FAA anticipates that this "look back" procedure may not exist indefinitely. After gaining more experience with base level transfers and the complexity of tracking base level, the agency may decide that after a certain date, no further "look back" transactions will be approved. If made, the FAA will publish a notice of this decision before the cutoff date.

8. *Question:* If an airplane is returned by a lessee to the lessor without base level, and the airplane is subsequently re-leased without base level, may the subsequent lessee obtain the base level from the original lessee without the involvement of the lessor under § 91.863(a)?

Response: No. This transfer is prohibited under § 91.863. Base level may only transfer with a Stage 2 airplane and cannot "leapfrog" an intervening transferee of the Stage 2 airplane. Base level does not attach to an individual airplane and follow wherever the airplane goes. Base level may be transferred only with a Stage 2 airplane, and may be either (1) retransferred with the subject airplane, (2) retained by the receiving party, or (3) transferred with another Stage 2 airplane of the receiver's choosing. Base level may transfer only at the discretion of the parties to individual Stage 2 airplane transfers.

In the situation described in the question, the original lessor may choose to hold onto its base level from the transferred airplanes, transfer the base level with other Stage 2 airplanes, or transfer the base level to the recipient of the subject Stage 2 airplanes, its lessor. The subsequent transferee of the airplanes is not eligible to receive base level directly from the original lessee because it did not obtain the airplanes from the original lessee.

9. *Question:* Can a bankrupt operator hold base level even through it has no valid use for it? Does base level automatically transfer to the lessor of an aircraft when the operator/lessee has declared bankruptcy and returned the airplane to the lessor?

Response: A bankrupt operator may validly hold base level. The transition rule makes no provision for the FAA to decide that base level may only be held by operators that have a "valid" use for it. If that were true, then a logical extension of that premise would allow base level to be held only by viable operators, since no one else will ever "need" it for compliance purposes. When the FAA decided to make base level transferable, it did so to facilitate the trade in Stage 2 airplanes and with the intent that these transfers would be negotiated between the parties to the transfer. At no time did the FAA anticipate having any decisionmaking authority over whether base level would transfer in an individual transaction. The FAA reserved only the right to approve transfers pursuant to its policies and deny the use of base level for compliance if the transfers involved compromise the transition goals.

The creation of base level is unrelated to the provisions of the Bankruptcy Code that deal with the disposition of the original lease of an airplane. Unless that original lease included the airplane's base level in its provisions, the lessor has no right to demand its transfer. The FAA does not view the retention of base level by any party validly holding it to diminish the value of any airplane when the base level was not part of the original transaction, and the base level is validly in the possession of the holder.

Base level is established by the fact that an airplane appeared on an operator's operations specification on the date the operator chose to establish its base level. Base level is otherwise severable at the discretion of the holder. Section 1110 of the Bankruptcy Code appears irrelevant to the discussion of base level since base level does not "attach" to the airplane itself, nor become part of the leased property.

Accordingly, the FAA will not interpret the rule to require the "automatic" transfer of base level from an operator that has ceased operations to the lessor of its airplanes. To do so would violate the policy established in the final rule that the decision to transfer base level remains with the party holding it at the time an airplane is transferred. To require transfers in the case of operators that have filed for bankruptcy would further involve the FAA in a matter over which it has no control. The transfer of base level may well be viewed by a bankruptcy court as a disposition of an operator's assets, a matter in which the FAA will play no role.

Base level, as a concept, was created by the Federal Aviation Administration (FAA) as a means to tract the compliance of operators in their transition to an all Stage 3 fleet. This is the reason that base level is presumed to remain with the operator when a leased airplane is returned to a lessor, unless the parties otherwise agree and inform the FAA of the transfer. Compliance is required by the operators, not by the lessor of the airplanes. If an operator chooses the phaseout method of compliance, it demonstrates its compliance by the base level it holds. The FAA will not interpret any of the transition regulations to take away base level from an operator without its consent.

10. *Question:* If an aircraft is held "in reserve" by one operator for another operator's occasional use, may it be counted in the base level of the operator for who it is held in reserve?

Response: Section 91.861 allows each operator to choose the date on which it establishes its base level. Only airplanes that appeared on an operator's operations specifications on the date chosen may be counted. A Stage 2 airplane that was on an operator's operations specifications on the day the operator chooses its base level may be included, even if the airplane was returned subsequently to the lessor.

Airplanes that are held in reserve for use but that did not appear on operations specifications on the date chosen to establish base level may not be counted in establishing base level. The right to count those airplanes and the responsibility for them under the transition rule belong to another entity. The reserved airplane may continue to be used after the first interim compliance date provided that the operator otherwise meets the criteria of the transition rules as to the number of Stage 2 airplanes eligible for operation in the contiguous United States.

11. *Question:* Can base level be leased?

Response: Yes. Section 91.863(a) states that base level may be transferred only with a corresponding number of Stage 2 airplanes. By choosing the word "transfer," the FAA intended that all airplane transactions be included. The FAA specifically foresaw the inclusion of base level in the lease of Stage 2

airplanes, with the base level "leased" as part of the deal.

The FAA anticipated that the final disposition of the base level would appear in the lease agreement—whether it would be returned to the lessor or retained by the lessee. The regulation was written so as not to preclude any transaction involving the transfer of the airplane from including a disposition of the base level that is available to transfer with it.

12. *Question:* Does leased base level return automatically to the lessor at the end of a lease?

Response: No. While return of base level may be a term of the lease, there is no automatic transfer in FAA records.

At present, if a Stage 2 airplane was leased to an operator at the time the operator established its base level (between January 1, 1990 and July 1, 1991), then the base level is presumed to stay with the operator at the termination of the lease. This may be changed by an amendment to the lease concerning base level as negotiated by the parties.

For any other airplane that was the subject of a lease agreement dated after July 1, 1991, if the lease agreement is silent as to the base level, it is assumed that no base level was transferred as part of the lease; there is no presumption that the lessor had any base level to transfer. Again, this may be amended at the agreement of the parties to the lease.

The FAA has determined that this disposition of "leased" base level is the most consistent with other base level concepts and is the fairest to all parties. Operators need to be able to rely on their base level, which they were allowed to establish based on their individual circumstances. After the period for choosing the base level date closed, however, operators can have no such expectation and the forces of the market take over.

Further, this interpretation addresses the possibility that a lessee might refuse to sign a recordation of transfer of base level. Either the lessee created the base level itself, in which case it is presumed retained, or base level must be a subject of the lease itself. If a lessee refuses to honor the terms of a lease agreement, the FAA presumes that the lessor would pursue its legal remedies under the contract, a situation that does not involve the FAA.

Moreover, no "automatic" statute will be presumed for reporting purposes. The FAA will not assume the responsibility for tracking the expiration of leases that would transfer base level back to the lessor. There are several circumstances under which a lease agreement might end. The FAA is not a party to these agreements and presumes no knowledge of them, nor will the FAA assume the responsibility to monitor individual leases.

As to the terms and conditions of the lease, the FAA has no expectations. The FAA considers the transfer of base level at the inception of the lease to be covered under § 91.863(c), a transfer that must be reported to the FAA. At present, the FAA expects only the information required by that section, plus the fact that the reported base level is part of a lease transaction. Accordingly, the transfer back to the lessor at the termination of the lease must also be reported as a transfer of base level under § 91.863(c). During the term of the lease, the base level will appear as being held by the lessee.

The FAA will take no other action under the lease, including enforcement of the terms of the lease regarding the base level. The parties to the transaction are expected to protect themselves. At no time will the FAA accept the lease document as a report of base level transfer, nor accept any responsibility for staying abreast of the terms of a lease over which it has no interest or control. For this reason, the original transfer and return of leased base level are considered separate base level transactions for FAA reporting purposes.

Further, since base level can only be "transferred" with a Stage 2 airplane, base level alone cannot be leased or sold, and the transaction in base level must be coincident with the transfer of airplane, whether by lease or sale. The terms of the lease or sale cannot provide for the base level to transfer before or after the lease begins or ends or the sale is consummated by transfer of the airplane. The only exception is the FAA's current policy of allowing transfers of base level to "look back" to airplane transfers made before the regulations were promulgated.

13. *Question:* Can a lessee of an airplane with base level sublease the base level?

Response: As indicated previously, the FAA presumes that the terms of any lease of base level would establish the rights of the lessee with regard to the use of the leased base level. The regulation does not specifically restrict any transfer of base level, as long as it accompanies the transfer of a Stage 2 airplane.

14. *Question:* Does § 91.861 allow every U.S.-owned Stage 2 airplane that was leased to a foreign entity to increase a U.S. operator's base level when it returns, regardless of when the airplane was leased to the non-U.S. entity?

Response: No. The FAA interprets § 91.861 as allowing a U.S.-owned Stage 2 airplane to increase the base level of a U.S. operator when the airplane returns from a foreign lease within six months of the expiration of that lease. However, the limiting factor on this rule is not when the airplane was leased to the non-U.S. entity, but whether the airplane had previously been used by a U.S. operator to establish base level.

For example, if a Stage 2 airplane was originally leased to a non-U.S. entity before January 1, 1990, then it may return to the United States and increase the base level of the operator that buys or leases it. However, for airplanes leased to non-U.S. entities after January 1, 1990, further base level may only be established if the airplane was not used to establish base level before it left the United States, i.e., was not on the operations specifications of a U.S. operator at the time that operator established its base level.

This limitation is essential to the integrity of the base level concept. If the airplane had already been used to establish base level domestically, it will not be allowed to generate base level domestically again. Were this permitted, the FAA anticipates that a steady market in short-term leases to non-U.S. entities would arise solely to create new base level upon return of the airplanes. This overcreation of base level directly contradicts both the goals of the legislation and the purposes behind the creation of the base level concept.

The statutory allowance in 49 U.S.C. 2158(c) is not rendered meaningless by this interpretation. The legislation states that a U.S.-owned airplane returning from a non-U.S. lessee within six months of the end of that lease shall not be considered an imported airplane for purposes of the nonaddition rule. This provision allows these airplanes to escape the operating limitation imposed by the nonaddition rule, in case there was any question as to their status. The status of those airplanes in connection with the regulatory base level system is a separate consideration. In creating the base level system, the FAA was well aware that the mere ability to operate domestically is meaningless without the right to do so. Accordingly, a returning airplane is allowed to increase the base level of the U.S. operator that subsequently operates it, as long as it was not used in the prior establishment of base level.

This interpretation is not inconsistent with the FAA's statement that an airplane may be leased at any time and still return if it does so within six months of the end of the lease. In

drafting this statement, the FAA was aware that the statutory ability to return as a U.S.-owned airplane did not guarantee the unconditional right to fly the airplane until the 1999 statutory deadline. For that reason, the actual right to return is presented in § 91.855 and the establishment of base level is presented in § 91.861. The Congress left the FAA to establish the method by which Stage 2 airplanes would be phased out of operation. To interpret section 2158 of the Airport Noise and Capacity Act of 1990 as an unrestricted right to operate at every return would result in returned airplanes having a higher status than those that stayed in the United States, an interpretation that the FAA is confident was not the intent of Congress in its inclusion of the import limitation in 49 U.S.C. 2158(c).

Nor does the FAA consider this interpretation inconsistent with the fact that one airplane may have been used to establish base level for two or more operators by virtue of its appearance on the operations specifications of two or more operators. The FAA knew this situation could occur, and accounted for it when the rule was written. However, the FAA recognizes that the number of these occurrences is limited and that they cannot occur again. Further, the transfers that occurred during the base level establishment period were done without knowledge of the base level system, and therefore cannot be interpreted as an attempt to manipulate that system. Finally, instances of base level being created by two U.S. operators does not carry the possibility of constant overcreation, since the situation can no longer occur.

The FAA will not allow an expansion of this concept that results in the unlimited creation of base level by the manipulation of short-term foreign leases by persons familiar with the system. If the airplane already created base level by its presence on a U.S. operator's operations specifications, its ability to create base level is exhausted. The underlying theme of the base level system is one-per-Stage-2-airplane. The exception noted above prevents U.S. operators from being harmed by a system they did not know would exist later. This harm is not imposed on a U.S. owner whose airplane was used to establish base level and now has full knowledge of the system.

15. *Question:* Will the FAA establish a "safe harbor" of base level that results from bankruptcy or liquidation transfers, with these transfers free from the review function established in § 91.863(d)?

Response: The FAA will not make these types of decisions on individual transfers, whether in the context of an interpretation or at the time of an individual transfer. The FAA views this as the equivalent of a request for a "no action" statement as is sometimes issued by other federal agencies, but which the FAA does not use.

As indicated in the preamble to the final rule and reiterated in the question, the FAA has reserved the right to review any transaction or series of transactions that appear to have been made to avoid compliance with the regulations. That series of transactions may take place over time, and the FAA will not make individual determinations that insulate a transaction from any later transfers.

The FAA understands that this review function may cause some transferring parties to lack a sense of finality in a transfer. However, the FAA has intention of scrutinizing every simple transaction or imputing bad intent upon the parties to every transaction. While several ways of circumventing the base level rules were foreseen, the agency is sure that not every permutation was considered. Accordingly, § 91.863 was inserted to give the agency the ultimate right of review when abuse is suspected.

For these same reasons, the FAA will not create a "safe harbor" of base level transactions that result from transfers made pursuant to bankruptcy or liquidation actions. It appears that the concern is if one "bad" transfer is identified, all related transfers of base level will be invalidated for compliance purposes. The FAA does not anticipate that, in the case of a suspect transaction, every related transaction would be found tainted. While it is impossible to judge every possible future transaction in a vacuum, parties may presume that a transfer mandated by a bankruptcy court would be difficult to challenge retroactively.

16. *Question:* Is the beneficiary of a trust able to acquire base level in a transaction although the airplane actually transfers between the owner trustee and a lessee?

Response: For several reasons, these transfers will not be allowed. Acceptance of these circumstances would require that an entity not even party to the transfer of the airplane be designated as the transferee of base level. This is expressly denied by the language of the regulation that indicates that base level transfers must accompany the transfer of a Stage 2 airplane. To allow this transfer would be to deny the right of the owner-trustee that is expressed in the regulation.

Second, by allowing this transaction, the FAA would be responsible for determining the identity of the trust beneficiary in an arrangement to which the FAA is not a party. The FAA will not assume this liability. Further, the FAA must be able to easily track the ownership of the base level and the subject airplane. Presumable, a transfer of base level to the beneficiary would result in another transfer by the beneficiary, although at neither time would the beneficiary transfer a Stage 2 airplane. The FAA will not allow a third party uninvolved in the transfer of Stage 2 airplanes to trade in base level; to do so would violate the reasons for the prohibition that was built into the regulation.

Finally, allowing the transfer of base level to a beneficiary would be in direct opposition to the interpretation concerning leased base level. Transactions in base level are not allowed to skip over any transferee of the subject airplane, regardless of the financing circumstances of an individual airplane.

The FAA does not consider the problem faced in the transfer of a Stage 2 aircraft held in trust to be insurmountable. As we have indicated previously, any person may hold or transfer base level as long as it is transferred with a Stage 2 airplane. Although the transfer process may involve more pieces of paper than would otherwise be desired, the FAA will consider any unique multiparty transfer documentation as long as the transfer does not violate the basic policies expressed here and in the regulations.

17. *Question:* Must an airplane be on a transferring party's operations specifications for the transfer to include base level?

Response: No. The transferring party need only have the legal right to transfer a Stage 2 airplane (and actually accomplish the transfer) to transfer base level with that airplane. Anyone is allowed to hold base level, or transfer it with a Stage 2 airplane, but only operators have operations specifications. The only use of operations specifications with regard to base level is the initial establishment of base level by an operator. Base level is created only by an airplane's appearance on an operator's operations specifications (or other limited circumstances under § 91.855) on the date chosen by the operator. The subsequent transfer of an airplane with base level is unrelated to its appearance on any operator's operations specifications at the time of the transfer.

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