

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION
WASHINGTON D.C.

In the matter of the petition of the

DEPARTMENT OF DEFENSE

For an exemption from the provisions
25863
Of sections 91.65(b), 91.70(a) and (b),
91.73(a), 91.85(b), and 91.109(a) of the
Federal Aviation Regulations.

Regulatory Docket No.

PARTIAL GRANT OF EXEMPTION

On March 28, 1989, the Department of Defense (DOD) petitioned the Federal Aviation Administration (FAA) for relief from Sections 91.65(b), 91.70(a) and (b), 91.73(a) and (d), 91.85(b), and 91.109(a) of the Federal Aviation Regulations (FAR). At subsequent meetings between the FAA and representatives of the petitioner, the petitioner withdrew request for relief from Section 91.73(d) and provided other supportive information and clarification of the petition. In general, an exemption would permit the DOD to meet its legislative mandate by conducting airborne drug interdiction operations.

The regulations from which the DOD petitioned for relief are summarized, in pertinent part, below:

1. Section 91.65(b) requires arrangement by the pilot in command of each aircraft prior to conducting formation flight.
2. Section 91.70(a) sets the maximum airspeed at 250 knots for aircraft operations below 10,000 feet mean sea level (MSL).
3. Section 91.70(b) sets the maximum airspeed at 156 knots for aircraft operations within an airport traffic area for reciprocating engine aircraft and at 200 knots for turbine-powered aircraft.
4. Section 91.73(a) requires lighted aircraft position lights during operations conducted between sunset and sunrise.
5. Section 91.85(b) prohibits the operation of an aircraft within an airport traffic area except for the purpose of landing at or taking off from an airport within that area.

6. Section 91.109(a) requires aircraft to be operated at an altitude specified for the direction of flight during cruising operations conducted under visual flight rules (VFR).

Petition Summary

The DOD justified its petition, in part, by reference to the FY 1989 Defense Authorization Act which tasks the DOD with the detection and monitoring of aerial transit of illegal drugs into the United States. The DOD stated that performing the monitoring function may require its pilots to conduct flight: in proximity to a suspect aircraft; at speeds in excess of those prescribed by the regulations; at night, without having to operate the aircraft's position lights; in the vicinity of airports in an airport traffic area (ATA) for purposes other than landing or taking off at an airport; and at altitudes contrary to those prescribed for cruise flight under VFR. The DOD stated, however, that it would conduct such operations, to the maximum extent possible, in compliance with the regulations and would utilize air traffic control (ATC) services.

The DOD provided the following in support of its need for relief from the FAR:

1. Section 91.65(b). The DOD stated that it was concerned that its operation in proximity to other aircraft may be considered as formation flight. Therefore, the DOD requested relief from the requirement to obtain pilot concurrence to allow its aircraft, conducting airborne drug interdiction missions, to operate in proximity to a suspect aircraft.

2. Section 91.70. The DOD sought relief in order for its pilots to intercept and remain in proximity to aircraft suspected of participating in drug smuggling. The DOD contends that visual contact with a suspect aircraft cannot be maintained and the suspect aircraft cannot be overtaken by the interdiction aircraft without operating at speed in excess of the maximum speeds prescribed in the FAR.

3. Section 91.73(a). The DOD stated that in order to perform its detection and monitoring mission, it may be necessary to fly close to, and remain undetected by a suspect aircraft. The DOD asserts that the operation of position lights during this phase of the mission may increase the risk of its aircraft being detected by illegal elements.

4. Section 91.109(a). The DOD stated that, in order to meet his objectives, a pilot often will have to operate an aircraft at the wrong altitude for the direction of flight. According to DOD, such an operation is necessary to maintain the desired proximity to a suspect aircraft as well as to conduct delaying maneuvers when a suspect aircraft's speed is less than the minimum safe speed of the interdiction aircraft. Delaying maneuvers include periodic course reversals or 360 degree turns.

As an equivalent level of safety to that provided by Sections 91.70(a) and (b), 91.73(a), and 91.109(a), the DOD proposed to conduct operations: (1) in aircraft equipped with airborne radar, capable of providing the pilot with sufficient information concerning other aircraft, to allow the pilot to avoid other aircraft; (2) with trained and qualified observers, either in the interdiction aircraft or in spotter aircraft operating above the suspect and interdiction aircraft, who would alert the pilot to the presence of other aircraft in sufficient time for the interdiction

aircraft pilot to avoid them; or (3) in formation flight whereby the wingman would be utilized to alert the pilot of the lead aircraft to any potential conflicting aircraft.

5. Section 91185(b). The DOD stated that it may be necessary, depending on the suspect aircraft's track, to operate in an ATA for purposes other than landing or taking off at an airport in that ATA. Such an operation, DOD said, would be necessary when the suspect aircraft enters an ATA with or without an ATC authorization. As an equivalent level of safety, the DOD proposed to ensure that ATC is made aware of its aircraft's position and intentions either by direct pilot-to-controller, two-way radio communications or via telephone/interphone.

FAA Analysis

The FAA acknowledges that effective and efficient drug interdiction and law enforcement missions may necessitate undetected flight in proximity to suspect aircraft in order to identify and observe those involved in illegal activities. The FAA recognizes that drug law enforcement air support and interdiction operations are in the public interest. However, air safety regulations are similarly in the public interest, as they promote and ensure flight safety and the protection of life and property. Therefore, the factors pertinent to an exemption were examined in the light of the operational impact on safety and in consideration of suitable alternatives to regulations which would provide an equivalent level of safety.

Formation Flight. The FAA recognizes that in order to identify a suspect aircraft, flight in proximity to that aircraft may be necessary. However, the FAA questions the need for formation flight with suspect to accomplish these activities. Regulations require the pilots of aircraft operating in formation flight to prearrange such operations with each other. In order to ensure an acceptable level of safety during a given formation flight, such pre-arrangement would include a discussion of maneuvers that can be expected so that all the pilots involved with the formation flight agree on how such maneuvers will be conducted. While there are no regulations requiring minimum distances to be maintained between aircraft, each pilot is required by the regulations to see and avoid other aircraft.

Further, for many years, DOD pilots have been identifying and maintaining proximity to aircraft suspected of posing a threat to U.S. security without being considered to be in formation flight with the suspect aircraft. Therefore, the FAA is convinced that the DOD can safely conduct similar operations in conjunction with drug interdiction without exemption from formation flight requirements. Accordingly, the DOD's request for exemption from Section 91.65(b) is denied.

Aircraft position lights. The FAA recognizes that operation of aircraft position lights in accordance with Section 91.73 could compromise a drug interdiction operation. However, the operation of such lights is basic to the Section 91.67 requirement for pilots to see and avoid other aircraft. Nonetheless, the FAA agrees with the petitioner that an adequate level of safety may be afforded by requiring the petitioner's aircraft to utilize alternate methods of detecting the presence of other aircraft.

In other exemptions granted to law enforcement entities, the FAA has accepted the use of additional dedicated observers aboard the exempted aircraft as an acceptable means of detecting the presence of other aircraft. However, in the case of a military single-seat aircraft, such observers are not possible. Further, the FAA disagrees with petitioner that single-seat aircraft operated in formation flight provide a similar “observer” capability. This is because the pilot who is not designated as the formation leader is heavily occupied with visually maintaining formation proximity to the lead aircraft. However, the FAA agrees with petitioner that a single-seat aircraft typically used by DOD in drug interdiction is a tactical aircraft which can use its sophisticated electronic and radar systems capability to alert the pilot to another aircraft’s presence. Such systems, in the FAA’s view, can provide for a level of safety comparable to that afforded by a dedicated observer. In the case of single-seat aircraft without such electronic equipment, the use of a “spotter” aircraft, with a dedicated observer onboard, that is operated in a position to view the airspace around the exempted aircraft, can report the presence of other aircraft and provide an acceptable level of safety.

Operation in an ATA. The FAA recognizes that during an interdiction operation, a pilot may need to operate in noncompliance with Section 91.85(b); i.e., within or through an ATA with no intention of landing at an airport in that ATA. As a practical matter, a DOD pilot engaged in drug interdiction operations cannot fully anticipate the intentions of the suspect aircraft. Therefore, a DOD pilot, in following a suspect aircraft, may need to operate in an ATA without knowing if the suspect intends to land at an airport within that ATA. Additionally, the suspect aircraft may unexpectedly divert into an ATA without any prior indication and/or ATC authorization. The FAA believes that DOD pilots should not be hampered in their ability to conduct drug interdiction missions by the requirement for prior ATC authorization. However, the FAA believes that such an operation has the potential to create an unsafe environment when that operation is unknown to the air traffic control tower. Under normal conditions, ATC would receive a request from the pilot prior to entering the ATA and would likely require that the pilot maintain two-way radio communications with the tower as a condition that facilitates the issuance of traffic advisories to the aircraft. While there is no express regulatory requirement for an aircraft flying through an ATA to maintain two-way radio communications with ATC, FAA practice has been to require it.

Accordingly, the FAA believes that relief from the prior authorization provision of Section 91.85(b) can be granted provided that the tower is aware of the interdiction aircraft’s whereabouts and intentions and can issue instructions and/or clearances to the DOD aircraft to ensure an acceptable level of safety. Consequently, the FAA is requiring the pilot of an interdiction aircraft to establish and maintain two-way radio communications with the tower prior to entering the ATA and avoid any traffic pattern in the ATA, unless otherwise authorized by ATC.

High-speed operations. The FAA acknowledges that operations at speeds in excess of those prescribed in Section 91.70 may be essential to the success of an interdiction mission. For example, a DOD pilot may need to maintain visual contact with a suspect aircraft that is exceeding the prescribed speed limit. Therefore, based on the DOD’s proposed equivalent level of safety, the FAA is exempting the DOD from the general speed limit below 10,000 feet MSL

when conducting such an operation. However, there are unique circumstances that the FAA must consider with regard to similar high-speed operations in an ATA.

Specifically, the FAA is concerned with the safe operation of other uninvolved aircraft arriving at or departing an airport in an ATA. In most cases, these aircraft are being provided with ATC services which effectively establish a known and reasonably predictable environment for their operation. The presence of an unknown aircraft operating at speeds exceeding those specified for operation in the ATA could disrupt the orderly flow of traffic to and from the airport or create a safety hazard. However, when the air traffic control tower in two-way radio communication with the aircraft, such an operation can be readily facilitated without compromising the safety of other aircraft in the area. Further, the DOD must recognize that there may be operations at other airports within an ATA of which the tower may not be aware. Therefore, the FAA disagrees with the DOD assertion that simple notification to ATC would suffice as an equivalent level of safety to the speed limit provision for operation within an ATA. Accordingly, as in the case of the relief granted from Section 91.85, the FAA is requiring that DOD aircraft establish and maintain two-way radio communications with the tower prior to entering the ATA and, unless otherwise authorized by ATC, avoid the traffic patterns for any airport in an ATA.

Operations at wrong altitude for direction of flight. The FAA recognizes that drug interdiction aircraft may need to operate at altitudes contrary to those prescribed for direction of flight in Section 91.109 to identify a suspect aircraft and maintain visual contact with that aircraft. Although the designation of specific altitudes for direction of flight complements the Section 91.67 see-and-avoid requirement, the FAA agrees, in part, with the petitioner that its suggested safety provisions would provide an equivalent level of safety to that provided by Section 91.109. However, the FAA disagrees that an equivalent level of safety would exist during night operations. The FAA believes that operations, at night, at altitudes contrary to those prescribed for direction of flight, pose a higher potential collision hazard than those conducted during the day, especially when the petitioner's aircraft is operating at night without aircraft position lights. However, the FAA believes that such hazard potential can be mitigated by radar-derived information on other aircraft received by the pilot in a timely manner to enable the pilot to see and avoid other aircraft. According to the petitioner, such radar information may be derived from other high-flying aircraft or other resources of the petitioner. Air traffic control may also furnish such information to the pilot in areas of radar coverage.

With regard to operation at improper cruise altitudes within a terminal control area (TCA) or airport radar service area (ARSA), the FAA believes that further provisions are required to prevent a disruption in the orderly and safe flow of air traffic in these areas. These areas represent the most densely trafficked airspace in the ATC system. Therefore, the FAA is requiring that the pilot of an interdiction aircraft receive individual approvals from ATC to operate at improper altitudes in these areas. During conversations with DOD representatives, it was determined that interdiction aircraft could identify the suspect aircraft from as far away as 1,000 feet. The FAA, based on its own experience, also determined that a pilot should in most instances be capable of maintaining visual contact with another aircraft from an altitude of 2,000 feet above or below that aircraft. Therefore, the FAA believes that DOD aircraft should, for the most part, be able to maintain surveillance of a suspect aircraft from an altitude in

compliance with the regulations. Accordingly, the FAA is authorizing the DOD to operate its aircraft at altitudes in noncompliance with regulations only to the extent necessary to obtain positive identification of a suspect aircraft and maintain visual contact with that aircraft. Furthermore, all aircraft associated with an interdiction operation must be equipped with and operate a mode C transponder on the appropriate code or as assigned by ATC.

In consideration of the foregoing, I find that a partial grant of the exemptions is in the public interest. Additionally, because this exemption is critical to the success of the drug traffic interdiction mission, and because the reasons presented for the exemption are identical to other exemptions previously granted, I find that good cause exists to issue this partial grant of exemption without prior publication and public comment. Accordingly, pursuant to the authority contained in Section 307(e) of the Federal Aviation Act of 1958, as amended, which has been delegated to me under Section 11.53 of the FAR, the DOD is hereby granted an exemption from the provisions of Sections 91.70(a), 91.70(b), 91.73(a), 91.85(b), and 91.109(a) of the FAR to the extent necessary to conduct air operations in support of drug law enforcement and drug traffic interdiction, subject to the conditions and limitations below:

1. The pilot of an aircraft engaged in operation authorized herein is not relieved of the requirements of Section 91.67 to see and avoid other aircraft.
2. Operations under this exemption are only authorized to the extent necessary for the interdiction aircraft to obtain positive identification of, and maintain visual contact with, a suspect aircraft.
3. A dedicated observer in the petitioner's aircraft, in addition to the pilot, shall be used to assist the pilot in seeing and avoiding other traffic. When use of a dedicated observer in the interdiction aircraft is not possible due to aircraft configuration, the use of aircraft radar or other electronic means, or a dedicated spotter aircraft with a qualified observer on board, may be used to assist the pilot in seeing and avoiding other aircraft. In the case of the use of spotter aircraft, the aircraft must maintain two-way radio communication with the interdiction aircraft for the purpose of providing the pilot of the interdiction aircraft with the relative positions of other aircraft in the area.
4. The pilot of any aircraft operating in an ATA shall: (a) establish and maintain two-way radio communication with the control tower prior to entering the ATA; (b) avoid all airport traffic patterns, unless otherwise authorized by ATC; and (c) to the maximum extent possible, avoid ingress/egress routes established for aircraft operations conducted under VFR to airports in the ATA.
5. The pilot of an interdiction aircraft is authorized to operate without aircraft position lights only to the extent necessary to avoid compromising the interdiction aircraft's position to elements suspected of being involved with illegal drug transportation. Additionally, the pilot shall operate the aircraft position lights when directed by ATC.
6. A pilot of an interdiction aircraft may not operate contrary to the proper altitude for the aircraft's direction of flight: (a) within a TCA or ARSA unless specifically authorized by the

facility having jurisdiction over that area; (b) in any airspace at night unless the aircraft is under radar surveillance by ATC radar systems or other radar systems available to petitioner and the pilot is receiving traffic information derived from that radar concerning other aircraft in that airspace.

7. The petitioner shall ensure that all pilots and crewmembers who will conduct airborne drug interdiction operations are thoroughly briefed and have a complete understanding of the conditions and limitations of this exemption.

8. Petitioner shall ensure that all aircraft that are used to conduct operations under this exemption are equipped with a Mode C transponder and that the transponder is operated on the appropriate code or as assigned by ATC.

This exemption is effective immediately and expires on September 30, 1990 unless sooner superseded or rescinded by the undersigned.

DAVID J. HURLEY
Acting Director, Air Traffic
Operations Service

Issued in Washington, D.C., on September 18, 1989.