

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

Regulatory Docket No.

Of sections 91.117(a) and (b); 91.127(c);
91.159(a); and 91.209(a) of the
Federal Aviation Regulations.

GRANT OF EXEMPTION

By letter dated September 10, 1990, the DOD petitioned the Federal Aviation Administration (FAA) for an extension of its existing exemption (Exemption No. 5100) from the provisions of Sections 91.70(a) and (b), 91.73(a), 91.85(b), and 91.109(a) of the Federal Aviation Regulations (FAR).

The DOD's request for extension was received in the FAA Dockets Room on September 20, 1990, 10 days before the September 30, 1990, expiration date for Exemption No. 5100. The DOD states that exemption from these provisions has enhanced its ability to conduct airborne drug interdiction operations more effectively and efficiently.

Effective August 18, 1990, Part 91 was completely revised (54 FR 34284; August 18, 1989) and all of its sections renumbered. The new section numbers which correspond to those from which the DOD has petitioned for exemption are as follows:

former section number	current section number
s 91.70(a) and (b).....	s 91.117(a)
s 91.73(a).....	s 91.209(a)
s 91.85(b).....	s 91.127(c)
s 91.109(a).....	s 91.159(a)

Hereafter, references will be made to the current Part 91 Sections.

The following regulations from which the DOD seeks relief are summarized, in pertinent part:

Section 91.117(a). sets the maximum airspeed at 250 knots for aircraft operations below 10,000 feet mean sea level (MSL).

Section 91.117(b). sets the maximum airspeed for aircraft operations within an airport traffic area (ATA) at 200 knots.

Section 91.209(a). requires lighted aircraft position lights during operations conducted between sunset and sunrise.

Section 91.159(a). requires aircraft to be operated at an altitude specified for the direction of flight during cruising operations conducted under visual flight rules (VFR).

The DOD provided the following information in support of its petition:

Section 91.117(a) and (b). The DOD contends that pilots of DOD aircraft need to intercept and remain in proximity to aircraft suspected of participating in drug smuggling. Visual contact with a suspect aircraft cannot be maintained and the suspect aircraft cannot be overtaken by the interdiction aircraft without operation at speed in excess of the maximum speeds prescribed in the FAR.

Section 91.209(a). The DOD believes that lighted aircraft position lights may increase the risk of being detected by a suspect during an interdiction operation.

Section 91.127(c). The DOD contends that DOD aircraft may need to follow a suspect aircraft into an ATA without full knowledge of the intentions of the suspect or without intending to land at an airport within the ATA. As an equivalent level of safety, the DOD proposes to ensure that air traffic control (ATC) is made aware of any DOD aircraft positions and intentions either by direct pilot-to-controller, two-way radio communications or via telephone/interphone.

Section 91.159(a). The DOD asserts that DOD aircraft need to remain undetected while maintaining visual contact with a suspect aircraft, flight at other than the appropriate VFR cruising altitudes may be necessary.

As an equivalent level of safety to that provided by the FAR's, the DOD proposes to conduct operations: (1) in aircraft equipped with airborne radar, capable of providing the pilot with sufficient information concerning other aircraft; (2) with trained and qualified pilots and observers who would alert interdiction aircraft pilots to the presence of other aircraft in sufficient time to avoid them; these trained pilots and observers would be located either in the interdiction aircraft or in spotter aircraft operating at an altitude higher than the interdiction and suspect aircraft; or (3) in formation flight whereby the wingman would be used to alert the pilot of the lead aircraft to any potential conflicting aircraft.

The FAA has determined that the DOD's request is in the public interest and that good cause exists to waive the requirement for publication of the petition in the Federal Register for public comment.

The FAA's analysis is as follows:

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 further recognizes that drug law enforcement air support and interdiction operations are in the public interest. However, air safety regulation are similarly in the public interest, as they promote flight safety and the protection of life and property. Therefore, the granting of relief from provisions of the FAR will be limited to the extent necessary to conduct drug law enforcement operations and to the extent that alternate measures can be employed to provide a level of safety equivalent to the rule from which relief is granted.

Sections 91.117(a) and (b). The FAA acknowledges that aircraft operations at speed in excess of those prescribed in Sections 91.117(a) and (b) may be essential to the success of an interdiction mission. The FAA believes that, under certain conditions, potential collision hazards posed by operations in noncompliance with the maximum airspeed provisions of Sections 91.117(a) and (b) can be mitigated by the use of a dedicated on-board observer, in addition to the pilot, whose sole responsibility will be to watch for, and alert the pilot to, the presence of other aircraft in sufficient time to allow the pilot to maneuver the aircraft well clear. Additionally, radar systems which can detect the presence of other aircraft operating in the vicinity of a DOD aircraft along with the means to communicate that information to the DOD pilot in a timely manner, can provide supplementary traffic information to assist the pilot in seeing and avoiding other aircraft. Air traffic control (ATC) radar traffic advisory service or DOD resources may provide this supplemental information, and the utilization of ATC services is encouraged. However, in the case of ATC traffic advisories, adequate radar coverage may not be available in all areas nor will an ATC facility always have the resources available to provide those advisories.

There are unique circumstances that the FAA must consider with regard to operations in an ATA. The FAA believes that the ATA airspeed restriction of Section 91.117(b) enhances the ability of pilots to see and avoid traffic and affords a pilot more time to respond to an imminent traffic situation and maneuver the aircraft well clear. The FAA is concerned with the safe operation of uninvolved aircraft arriving at or departing from 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 unknown aircraft which may be operating at speeds in excess of those specified for operations in the ATA could disrupt the orderly flow of traffic to and from the airport or create a safety hazard. While the FAA acknowledges that operations at speeds in excess of those prescribed in Section 91.117(b) may be necessary for the success of an interdiction mission, the FAA believes that the tower must be made aware of the presence of a DOD aircraft within the ATA at all times, particularly if the potential exists for that aircraft to exceed the ATA speed limit.

The DOD stated that during an interdiction operation, a pilot may need to operate in an ATA without being sure if the operation will terminate by landing at an airport in that ATA. Accordingly, the DOD requested relief from the provision of Section 91.127(c) which requires prior authorization to enter an ATA unless landing at or taking off from an airport within the ATA. As a practical matter, a DOD pilot engage in drug interdiction operations cannot anticipate fully the intentions of the suspect aircraft. Consequently, a DOD pilot, in following a suspect aircraft, may need to enter an ATA without knowing if the suspect intends to land at an

airport within that ATA. Under normal conditions, if a pilot did not intend to land at an airport in the ATA, ATC would receive a request for authorization before entering the ATA and would likely require that the pilot maintain two-way radio communication with the tower as a condition of the authorization to enter the ATA. While acknowledging that the DOD pilot cannot fully anticipate the intentions of a suspect, the FAA believes that this circumstance does not warrant relief from the responsibility to advise the tower of the presence of the DOD aircraft before entering an ATA.

Accordingly, the FAA has determined that relief from the provisions of Section 91.117(a) may be granted provided a dedicated observer having the sole responsibility to assist the pilot in detecting and avoiding other aircraft is on board the aircraft. Further, the FAA has determined that relief from the provisions of Section 91.117(b) and Section 91.127(c) may be granted provided the DOD pilot establishes two-way radio communication with the appropriate ATC tower before entering the ATA, complies with any instructions or clearances from the tower controller, and maintains two-way communications with the tower for the duration of the operation within the ATA. Additionally, as in the case of relief from the provisions of Section 91.117(a), a dedicated observer must be on board the aircraft to watch for, and alert the pilot to, other aircraft. The use of ATC traffic advisory service, when available, is highly recommended. However, this grant of exemption should not be construed as obligating any ATC facility to provide traffic advisory service, nor does the receipt of ATC traffic advisory service relieve the DOD pilot from the sole responsibility to see and avoid other aircraft.

Section 91.209(a). The FAA believes that lighted aircraft position lights are basic to the Section 91.113 requirement for pilots to see and avoid other aircraft, and that an unlighted aircraft does not afford pilots of other aircraft with sufficient means to visually detect and avoid that aircraft. While the DOD maintains that it can employ certain tactics, such as operating behind and below a suspect aircraft to avoid detection by the suspect during daylight hours, the FAA reasons that other aircraft could approach the DOD aircraft in a similar fashion and be unobserved by the DOD pilot and observer. Such a circumstance is not unrealistic given the limited rear vision in an aircraft and the flightcrew's preoccupation with maintaining visual contact with the suspect. The FAA is concerned that a pilot of an aircraft approaching an unlighted DOD aircraft would not have sufficient opportunity to detect and avoid that aircraft, nor would the DOD pilot necessarily be able to detect and avoid that aircraft if it is unobserved by the DOD flightcrew. The FAA does not believe that reliance solely on the ability of the DOD pilot and observer to visually detect and avoid all other aircraft is sufficient to mitigate the collision hazard posed by the operation of an unlighted aircraft at night. Additionally, the FAA recognizes that certain DOD aircraft employed in interdiction operations may not be configured to accommodate an on-board observer.

Accordingly, relief will be granted from Section 91.209(a) provided the DOD supplements the visual detection of other aircraft provided by an on-board dedicated observer with an additional resource capable of detecting all aircraft operating in the vicinity of the DOD aircraft. Such a resource may be: (1) primary radar equipment capable of detecting all aircraft operating within the vicinity of the DOD aircraft; or (2) a spotter aircraft operating in a position to visually detect other aircraft in the vicinity of the DOD aircraft. Spotter aircraft and primary radar surveillance aircraft must be operated for the sole purpose of detecting other aircraft in the vicinity and

advising the pilot of the interdiction aircraft of potential collision hazards. The spotter aircraft and the primary radar surveillance aircraft must not be engaged in the interdiction operation. Further, there must be a dedicated and reliable means of relaying such supplemental traffic information to the DOD pilot in sufficient time to allow the pilot to maneuver clear of traffic. Only DOD interdiction aircraft will be authorized to operate without lighted position lights. Spotter aircraft, or primary radar surveillance aircraft, that is providing the interdiction aircraft with advisories regarding other proximate aircraft must be operated in compliance with Section 91.209(a). Additionally, pilots of DOD interdiction aircraft will be required to operate the aircraft's position lights to the maximum extent practicable, and DOD aircraft may operate without lights only when necessary to avoid detection by elements engaged in illegal drug activities.

Section 91.159(a). The FAA recognizes that a drug interdiction aircraft may need to operate at an altitude in noncompliance with Section 91.159(a) to identify a suspect aircraft and to maintain visual contact with that aircraft. In recognizing that there may be circumstances when operation at an altitude in noncompliance with Section 91.159(a) is necessary to the success of a drug interdiction mission, 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 91.159(a). The FAA also recognizes, however, that the designation of specific altitudes for direction of flight complements the Section 91.113 see-and-avoid requirement. Similar to the discussion regarding high-speed operations, the FAA believes that any potential collision hazard posed by an operation in noncompliance with the proper altitude for direction of flight can be mitigated by the use of a dedicated on-board observer, in addition to the pilot, to watch for, and alert the pilot to, the presence of other aircraft in sufficient time to allow the pilot to maneuver the aircraft well clear. When radar-derived information on other aircraft is available and can be relayed to the pilot in a timely manner, the FAA believes safety can be enhanced by providing the pilot with supplemental information regarding potential traffic. ATC radar advisory service, when available, or DOD resources can provide this supplemental information.

Accordingly, the FAA is authorizing the DOD to operate its aircraft at altitudes in noncompliance with Section 91-159(a): (1) Only to the extent necessary to obtain positive identification of a suspect aircraft and maintain visual contact with that aircraft; and (2) Provide a dedicated on-board observer will assist the pilot in seeing and avoiding other aircraft. Additionally, the DOD aircraft must be equipped with an operable transponder with automatic altitude reporting capability (Mode C) that is replying on the appropriate code or as assigned by ATC.

With regard to operations at altitudes in noncompliance with Section 91.159(a) within an airport radar service area (ARSA) or a terminal control area (TCA), the FAA believes that further provision are required to prevent disruption of the orderly and safe flow of traffic in more heavily used airspace. Therefore, the FAA is requiring that the pilot of an interdiction aircraft received individual authorizations from ATC to operate at an altitude in noncompliance with Section 91.159(a) within those areas.

In consideration of the foregoing, I find that a grant of exemption is in the public interest. Accordingly, pursuant to the authority contained in Section 307(e) of the Federal Aviation Act of

1958, delegated to me by the Administrator (14 CFR 11.53), the Department of Defense is hereby granted an exemption from the provision of Sections 91.117(a), 91.117(b), 91.127(c), 91.159(a), and 91.209(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 following conditions and limitations:

1. The pilot of an aircraft engaged in operations authorized herein is not relieved from the requirements of section 91.113 to see and avoid other aircraft.

2. Operations under this exemption are authorized only to the extent necessary for the interdiction aircraft to obtain positive identification of, and maintain visual contact with, a suspect aircraft.

3. The pilot shall ensure that a dedicated observer, in addition to the pilot, is on board the petitioner's aircraft. That observer's sole responsibility shall be 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 primary radar equipment that is capable of detecting all aircraft operating in the vicinity of the DOD aircraft, or a dedicated spotter aircraft with a qualified observer on board, may be used to assist the pilot of the interdiction aircraft in seeing and avoiding other aircraft. Spotter aircraft or aircraft having on-board primary radar equipment for the purpose of detecting other aircraft must maintain two-way radio communications with the interdiction aircraft to provide the pilot of the interdiction aircraft with advisories regarding the relative positions of other aircraft in the area. Spotter aircraft and primary radar surveillance aircraft shall be operated for the sole purpose of detecting other aircraft in the vicinity and advising the pilot of the interdiction aircraft of potential collision hazards, and shall not be engaged in the interdiction operation.

4. Operations in noncompliance with Section 91.209(a) are authorized only for those aircraft engaged in air interdiction operations and only when the following alternative means of deriving traffic information is used: (a) primary radar equipment capable of detecting all aircraft operating within the vicinity of the DOD interdiction aircraft; or (b) spotter aircraft operating in a position to visually detect other aircraft in the vicinity of the interdiction aircraft. Interdiction aircraft must maintain two-way radio communication with the spotter aircraft or the primary radar surveillance aircraft for the purpose of receiving traffic information regarding other aircraft operating in the vicinity. Only DOD interdiction aircraft are authorized to operate without lighted position lights. Any other aircraft used by the DOD as spotter aircraft or primary radar surveillance aircraft must be operated in compliance with Section 91.209(a). Interdiction aircraft shall operate the aircraft's position lights to the maximum extent practicable and may only operate without lights when necessary to avoid detection by elements engaged in illegal drug activities.

5. The pilot of an interdiction aircraft shall: (a) establish two-way radio communication with the appropriate ATC tower before entering an ATA; (b) comply with all instruction and clearances from the tower; and (c) maintain two-way radio communication with the tower while in the ATA.

6. 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.

7. The petitioner shall ensure that all aircraft 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.

8. A pilot of an interdiction aircraft may not operate at an altitude in noncompliance with Section 91.159(a) within an ARSA or TCA unless specifically authorized by the ATC facility having jurisdiction over that airspace.

This exemption supersedes Exemption No. 5100A. It is effective immediately and expires on September 30, 1993, unless sooner superseded or rescinded.

HAROLD W. BECKER
Acting Director, Air Traffic Rules
And Procedures Service

Issued in Washington, D.C., on October 19, 1990