



PURSUANT to Sections 28, 29 and 30 of the Civil Aviation Act 1990

I, GERRY BROWNLEE, Minister of Transport,

HEREBY MAKE the following ordinary rules.

SIGNED AT Wellington

This *12th* day of *November* 2012

by **Hon GERRY BROWNLEE**

Minister of Transport

A handwritten signature in blue ink, appearing to read 'Gerry Brownlee', is written over the printed name. The signature is fluid and cursive, with a long horizontal stroke at the end.

Civil Aviation Rules

Part 115, Amendment 1

Adventure Aviation - Certification and Operations

Docket 13/CAR/2

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Rule objective

The objective of amendment 1 to Part 115 is to reduce the potential for serious harm and fatalities arising from adventure aviation providers impaired by drugs and/or alcohol.

Extent of consultation

A Notice of Proposed Rulemaking, NPRM 13-01, containing the proposed amendment to Part 115 was issued for public consultation under Docket 13/CAR/2 on 5 October 2012.

The publication of this NPRM was advertised in the daily newspapers in the five main provincial centres on 5 October 2012. The NPRM was published on the CAA web site and e-mailed to identified stakeholders including existing adventure aviation operator certificate holders and representative organisations who were considered likely to have an interest in the proposal.

A period of 14 days was allowed for comment on the proposed rule.

Summary of submissions

Three written submissions were received on the NPRM. These submissions and comments have been considered and as a result no significant changes were made to the final rules in this Part.

Editorial changes were made as follows:

115.53(a)(1) – changed ‘certificate holder’ to ‘applicant’ to be consistent with paragraph (a).

115.79(a)(8)(ii) – Clarified the applicable persons by referring to rule 115.62, and changed ‘operator’ to ‘applicant’ to clarify where the responsibility lies.

115.201(a)(3) - delete the semi-colon and the disjunction ‘or’ at the end of the paragraph and replace with a full stop.

115.231 – changed ‘operator’ to ‘holder’ to clarify where the responsibility lies.

115.311(2)(iv) - delete the full stop at the end of the paragraph and replace with a semi-colon and the conjunction 'and'.

Examination of submissions

Submissions may be examined by application to the Docket Clerk at the Civil Aviation Authority between 8:30 am and 4:30 pm on weekdays, except statutory holidays.

Insertion of Amendments

The amendments to the rules in this Part are reflected by amending existing rules 115.21, 115.53, 115.79, 115.109, 115.201, 115.205, and 115.311; and inserting new rules 115.62 and 115.231.

Effective date of rule

Amendment 1 to Part 115 comes into force on 15 December 2012.

Availability of rules

Civil Aviation Rules are available from–

CAA web site: <http://www.caa.govt.nz/>

Freephone: 0800 GET RULES (0800 438 785)

Part 115 Adventure Aviation – Certification and Operations

Subpart A — General

Rule 115.21 is revoked and replaced by the following rule:

115.21 Transitional arrangements

(a) Despite rule 115.5, and except for operations using an aircraft issued with a special category airworthiness certificate, a person conducting an adventure aviation operation in a glider immediately before 10 November 2011 is not required to comply with this Part until 1 May 2013.

(b) Despite rule 115.101(b)(3)(ii), a holder of an adventure aviation operator certificate that was in force on 15 December 2012 is not required to amend their exposition to include the details required by rule 115.79(a)(8) until 15 March 2013, provided that the certificate holder makes available, at each location specified in their exposition, the details required by rule 115.79(a)(8).

Subpart B — Adventure Aviation Operator Certification Requirements

Rule 115.53 is revoked and replaced by the following rule:

115.53 Personnel competency requirements

(a) An applicant for the grant of an adventure aviation operator certificate must establish procedures for the planning, performance, supervision, inspection and certification of adventure aviation operations listed in the applicant's exposition, including—

- (1) initial assessment and maintenance of the competence of the personnel authorised by the applicant to plan, perform, supervise, inspect, or certify the adventure aviation operations listed in the applicant's exposition; and
- (2) providing written authorisation to the personnel referred to in paragraph (1), which includes the scope of the authorisation.

(b) An applicant may contract with an aviation training organisation certificated under Part 141, or an appropriate aviation recreation organisation certificated under Part 149, that is appropriately authorised under that certificate to perform the functions of checking to assess, or training to maintain, the competence of the applicant's personnel under paragraph (a)(1).

(c) An applicant that contracts with an organisation under paragraph (b) must include in its exposition details of—

- (1) the functions to be contracted to the organisation; and
- (2) the scope of the checking or training to be carried out by the organisation; and
- (3) the authority of the organisation in respect of the checking and training functions to be carried out.

Insert the following new rule after rule 115.61:

115.62 Drug and alcohol programme

An applicant for an adventure aviation operator certificate must establish a drug and alcohol programme for monitoring and managing the risks relating to the use of any drug, or consumption of alcohol by—

- (1) any crew member:
- (2) a tandem master:
- (3) a ground crew member:
- (4) any other person whose work directly affects the safety of an adventure aviation operation.

Rule 115.79 is revoked and replaced by the following rule:

115.79 Adventure aviation operator exposition

(a) An applicant for the grant of an adventure aviation operator certificate must provide the Director with an exposition that contains—

- (1) a statement signed by the chief executive on behalf of the applicant's organisation confirming that the exposition and any included manuals—
 - (i) define the adventure aviation organisation and demonstrate its means and methods for ensuring ongoing compliance with the requirements prescribed in this Part and any other applicable Part; and
 - (ii) are required to be complied with by the organisation's personnel at all times; and
- (2) the titles and names of the senior persons required by rules 115.51(a)(1) and (2); and
- (3) the duties and responsibilities of the senior persons referred to in paragraph (2) including matters for which they have responsibility to deal directly with the Director on behalf of the applicant's organisation; and
- (4) if appropriate, an organisation chart showing lines of responsibility of the senior persons referred to in paragraph (2) and extending to each location referred to in paragraph (5); and
- (5) details of the principal place of operation and the main maintenance base; and
- (6) details of the applicant's procedures required by this Part; and
- (7) details of—
 - (i) the maintenance procedures required by rule 115.59 and rule 115.61; and
 - (ii) the maintenance programme required by rule 115.61; and
 - (iii) every maintenance organisation that performs maintenance on the applicant's aircraft; and

- (8) details of—
 - (i) the drug and alcohol programme required by rule 115.62; and
 - (ii) the means by which the applicant will ensure that, as required by rule 115.231, an adventure aviation operation does not take place if, in the opinion of the applicant, any of the persons referred to in rule 115.62 is impaired; and
 - (9) details of—
 - (i) the scheme for regulation and recording of flight and duty times required by Subpart G; and
 - (ii) the briefing or training to be provided to each passenger in the safety and emergency procedures applicable to the type of adventure aviation operation to be performed; and
 - (iii) the emergency situation action plans required by rule 115.209; and
 - (iv) the flight crew and ground crew training programme required by Subpart E; and
 - (v) the crew member and ground crew competency assessment programme required by Subpart F; and
 - (10) details of the programmes required, as appropriate, by this Part; and
 - (11) procedures for controlling, amending, and distributing the exposition.
- (b) The exposition must remain acceptable to the Director.

Subpart C — Operating Limitations and Requirements

Rule 115.109 is revoked and replaced by the following rule:

115.109 Changes to certificate holder's organisation

(a) Subject to paragraph (b), a holder of an adventure aviation operator certificate must—

- (1) ensure that the exposition required by rule 115.79 is amended—
 - (i) so as to remain a current description of the certificate holder's organisation; and
 - (ii) to ensure continued compliance with the applicable requirements prescribed in the Part or any other Part; and
- (2) ensure that any amendments made to its exposition meet the applicable requirements of this Part or any other Part and comply with the amendment procedures contained in its exposition; and
- (3) forward to the Director for retention a copy of each amendment to its exposition as soon as practicable after the amendment is incorporated into its exposition; and
- (4) amend its exposition as the Director considers necessary in the interests of aviation safety.

(b) If the holder of an adventure aviation operator certificate changes or proposes to change, any of the following, the certificate holder must notify the Director prior to the change or as soon as practicable if prior notification is not possible, and the change must be accepted by the Director, including applicable fit and proper person criteria under section 10 of the Act, before being incorporated into the certificate holder's exposition:

- (1) the person identified as the chief executive;
- (2) the title or name of any senior person specified in the exposition as required by rule 115.79;
- (3) the locations referred to in rule 115.79(a)(5), from which the certificate holder conducts adventure aviation operations:

- (4) the scope of the certificate holder's certificate:
 - (5) the overall scope or intent of the organisation's management system required by rule 115.77:
 - (6) the maintenance programme required by rule 115.61:
 - (7) any contractor carrying out the certificate holder's maintenance:
 - (8) the scheme for regulation of flight and duty time required by rule 115.401:
- (c) The Director may specify conditions on an adventure aviation operator certificate during or following any of the changes specified in paragraph (b).
- (d) The certificate holder must comply with any conditions specified by the Director under paragraph (c).
- (e) If any of the changes referred to in paragraphs (b) require an amendment to the certificate or the operations specifications, the certificate holder must forward the certificate or the operations specifications to the Director as soon as practicable.

Subpart D — Flight Operations

Rule 115.201 is revoked and replaced by the following rule:

115.201 Restriction or suspension of operations

- (a) A holder of an adventure aviation operator certificate must ensure that an adventure aviation operation conducted under the authority of the holder's certificate is—
- (1) conducted under day VFR; and
 - (2) conducted within the approved radius from the point of departure as specified in the certificate holder's operations specifications; and
 - (3) for a tandem parachute operation, is conducted from the launch site(s) and landing area(s) authorised in the certificate

holder's operations specifications, unless the tandem master, determines that in the immediate interest of safety, it is safer to conduct the landing at a location other than the location authorised in the operations specifications.

(b) A holder of an adventure aviation operator certificate must not conduct an adventure aviation operation over a congested area of a city, town, or settlement, or over an open-air assembly of persons, unless the certificate holder's operations specifications authorise the specific type of adventure aviation operation to be conducted over a specified area of a city town, or settlement, or open-air assembly of persons.

(c) A holder of an adventure aviation operator certificate must, on becoming aware of any condition that is a hazard to safe operations, restrict or suspend operations as necessary until the hazard is removed.

Rule 115.205 is revoked and replaced by the following rule:

115.205 Passenger training and briefing

In addition to the applicable requirements of rule 91.211, a holder of an adventure aviation operator certificate must ensure that, before conducting an adventure aviation operation, each passenger receives appropriate briefing or training in the safety and emergency procedures under the procedures required by rule 115.79(a)(9)(ii).

Insert the following new rule after rule 115.229:

115.231 Impairment of personnel affecting flight safety

A holder of an adventure aviation operator certificate must ensure that an adventure aviation operation does not take place if the holder has reason to believe that any of the following persons is impaired—

- (1) any crew member:
- (2) a tandem master:
- (3) a ground crew member:
- (4) any other person whose work directly affects the safety of an adventure aviation operation.

Subpart E — Training

Rule 115.311 is revoked and replaced by the following rule:

115.311 Flight crew member instructor qualifications

A holder of an adventure aviation operator certificate must ensure that a person carrying out the functions of an instructor in its flight crew member training programme under this Part—

- (1) has satisfactorily completed the training required by this Part to serve as a pilot-in-command or tandem master, as applicable, in the adventure aviation operations conducted under the authority of the certificate; and
- (2) holds—
 - (i) an appropriate current instructor rating issued by the Director under the Act and Part 61; or
 - (ii) for a hang glider or paraglider operation, a current hang glider instructor certificate issued by a hang gliding organisation; or
 - (iii) for a tandem parachute operation, a current tandem instructor/examiner certificate issued by a parachute organisation; or
 - (iv) for a glider operation, a current glider instructor certificate issued by a glider organisation; and
- (3) completes initial and recurrent training applicable to the instruction carried out.

Consultation Details

(This statement does not form part of the rules contained in Part 115. It provides details of the consultation undertaken in making the rules.)

A Notice of Proposed Rulemaking, NPRM 13-01 Part 115 Drug and Alcohol Impairment, containing the proposed rules was issued for public consultation under Docket 13/CAR/2 on 5 October 2012.

Three responses to the NPRM were received.

The submission relevant to Part 115 was as follows:

Form of the proposed rule

One submission was received regarding the form of the proposed rule:

We fully support a regulatory regime for drugs and alcohol but feel that the regime provided for here on the one hand is so non prescriptive that it does little to assist with the development of an appropriate programme and on the other because of its non-prescriptive nature imposes an unfair regulatory burden on operators to justify actions when it comes to determining whether an employee is impaired or not.

The submitter's position was then detailed as follows—

Our view is the mixing of the non-prescriptive nature of the HSE Act with our own very prescriptive CAA rule environment needs to be carefully thought through.

We question whether it is possible to extend the jurisdiction of the Civil Aviation Act to persons who are not document holders. This is the effect when persons referred to in [proposed rule] 115.62(4) are included. The question then arises as to who makes the decision and judgement about the extent of coverage under this clause – is it the operator or the CAA who determines and is such a determination possible. We note in Australia the restriction is to safety sensitive roles and the regulator has determined the extent of coverage. In New Zealand we are aware that other operators have determined that all employees hold safety sensitive roles and this is a matter

that has been consulted through with employees and their unions where appropriate.

In our view it is also important to distinguish between the consumption of alcohol away from work premises – it is not the intent of the clause that there be prohibition on the consumption of alcohol as this would be an infringement of a person's human rights. Similarly it is possible to consume some drugs as these may be a requirement of holding a license or a particular role – these drugs of course are designed to remove possible impairment so it is possible the consumption of particular drugs may reduce or mitigate the risks i.e. not all drugs are bad. However because of the generic statement in the rule it appears to imply all drugs are bad, however what we are attempting to discourage is the use of mind altering type drugs which we all agree should not be consumed at work irrespective of the particular type of work.

We appreciate that the definition of impairment is derived from the Maritime Sector and we always encourage CAA to use definitions which has some prior standing however we think that defining impairment in this way could potentially be confusing and in the aviation environment it is about diminished effectiveness and not attributing the diminished effectiveness to any specific set of circumstances. We are concerned for example that a medical condition could be quite acceptable within an aviation environment; i.e. acknowledged on a license but in the particular circumstances on the day may be the cause of diminished effectiveness. This would mean that the Operator would have to override the judgement of the CAA's own medical examiner who has said the person is acceptable. We think this is a very significant call for an operator to make and could result in employment related claims for lost earnings. It may also cause the operator to think the CAA doctor knows better and not to exercise his/her judgement in the particular circumstances. Our preference is to keep the definition simple and say Impaired means diminished effectiveness.

CAA Response

The CAA acknowledges the submitter's desire for a more prescriptive proposal as a means to clarify operator compliance expectations, and to ensure a robust regime for addressing drugs and alcohol.

There are three factors that influence the CAA to retain the non-prescriptive nature of the proposed rule:

- The wider policy that deals with this issue for the entire adventure tourism industry obliges agencies to require operators to manage, monitor for, and respond to situations where a worker or other person providing an adventure activity is affected by drugs or alcohol. At the same time the proposal must be flexible enough to take account of the level of risk of an activity and the size of the operation. This means providing for the ability for operators to choose the approach that is right for their business; which will also help to address cases where the owner-operator is also the activity provider, avoiding any conflict created from self-monitoring.*
- That same policy states that there will be no mandatory rule requirement for random testing; so the type of testing available to operators will be in line with current law.*
- The current form of the proposed requirement is consistent with other CAA rule requirements with regard to organisational matters – for example Part 115's fatigue rule.*

The CAA is aware that non-prescriptive rules must be supported and is developing guidance for that purpose. In addition, the CAA is already engaging operators during HSE audit visits to promote compliance considerations.

With regard to the other points raised by the submitter:

- The jurisdiction of the Civil Aviation Act is unaffected. The proposed requirement is of the operator, in the same manner as other rules that require an outcome which is, in practice, delivered by an employee of, or contractor to, a certificate holder. For example, control of maintenance is a requirement*

which is often the function of a person who does not hold an aviation document; but the responsibility for the control of maintenance is the operator's, as is the responsibility that the person can properly perform the function.

- *Regarding the determination of whose work directly affects flight safety – the submitter is correct in saying that the Australians have listed¹ “safety sensitive aviation activities” as they are termed in their rule. However, they have a separate rule part to deal with drug and alcohol management, and it applies to the entire aviation industry. The CAA has resisted making a list since the contents of a list may change, and the resource burden of amending rules overshadows the outcome. The CAA feels that the determination of whose work directly affects the safety of an adventure aviation operation is well within the capabilities of the affected document holders.*
- *The CAA disagrees that there is an implication that all drugs are bad. The proposed rule is requiring the monitoring and management of the risks of impairment, which would not include, say, benign medication.*
- *The CAA would note that in the context of the proposed requirements, impairment is addressing transient conditions*

¹ “any activity undertaken by a person, other than as a passenger, in an aerodrome [drug] testing area; calculation of the position of freight, baggage, passengers and fuel on aircraft; the manufacture or maintenance of aircraft, aeronautical products, aviation radio navigation products, aviation telecommunication products; the certification of maintenance of the aforementioned kind; the fuelling and maintenance of vehicles that will be used to fuel aircraft on aerodrome testing areas; activities undertaken by an airport security guard or a screening officer in the course of the person's duties as a guard or officer, activities undertaken by a member of the crew of an aircraft in the course of the person's duties as a crew member; the loading and unloading of trolleys containing baggage for loading onto aircraft and the driving of such trolleys; activities undertaken by a holder of an air traffic controller licence in the course of the person's duties as a controller; activities undertaken by the supervisor of a holder of an air traffic controller licence in the course of the person's duties as such a supervisor; providing flight information and search and rescue alert services to a pilot or operator of an aircraft immediately before the flight of the aircraft, or to a pilot or operator of an aircraft, during the flight of the aircraft, or as an intermediary for communications between a pilot or operator of the aircraft, and an air traffic controller; providing aviation fire fighting services.”

affecting the pilot (who, it should be noted, has a personal responsibility for fitness to perform his or her duties), rather than suggesting that an operator may be influenced a medical examiner's assessment.

The CAA has not amended the proposed rules in light of this submission.