



## Civil Aviation Authority of Botswana

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## PROCEDURE FOR ISSUING EXEMPTIONS

### 1.0 INTRODUCTION

#### 1.1 Policy Objective

The purpose of this document is to define the parameters on which the Civil Aviation Authority of Botswana's ("the Authority") criteria for granting or denying exemptions from regulatory requirements, so as to ensure the exemption process is equitable to those who apply for an exemption, while simultaneously ensuring that the best interests and the safety of the public are protected.

#### 1.2 Policy Statement

The Authority is legally obliged and committed to implement national standards and procedures for the consistent application of international standards and will apply its Policy in the processing of exemption requests.

#### 1.3 Applicability

This policy applies to all parties involved in the civil aviation exemption-granting process in Botswana.

#### 1.4 Definitions

Pursuant to Section 90(4) of the Civil Aviation Act, 2011 the following terms shall have the meanings below:

**Exemption** — An exemption entitles a person to act outside the normal regulatory requirements applied by the Authority including bye-laws, requirements, directives, notices or information (herein collectively referred to as "requirements"). Exemptions will be granted under Section 90(4) of the Civil Aviation Act, 2011 to accommodate unforeseen circumstances which are unlikely to be addressed when the requirements are being strictly applied or

whilst they are in the process of being amended.

**Aviation Safety** — An exemption issued under Section 90(4) of the Civil Aviation Act, 2011 must be such that it is not likely to adversely affect the level of aviation safety afforded by the requirements against which the exemption will apply. Exemptions are issued only in exceptional circumstances and may be granted only after a thorough analysis is conducted on the impact the granting of the exemption may have on aviation safety. An equivalent or acceptable level of safety is established through the development of terms and conditions that will provide alternate requirements or procedures designed to ensure any safety concerns are satisfied and that safety is not compromised. In this regard, consideration should be given to any pending amendments to the requirements as well as the terms and conditions of those previously issued or applied.

## **2.0 BACKGROUND**

### **2.1 Civil Aviation Act, 2011**

2.1.1 The Civil Aviation Act, 2011, section 90(4), gives the Authority the power to exempt any person or organization from the application of regulatory requirements made pursuant to the Act only in exceptional situations when a requirement cannot or ought not apply, and if certain conditions are met. Such exemptions are issued by the Authority and will state that terms and conditions are to be stipulated by authorized officers of the Authority, provided that they have been delegated such authority as part of their credentials.

2.1.2 It has long been recognized that, in certain situations governed by law, there may be occasions when a requirement cannot or ought not apply. In such cases, it may be appropriate to issue an “exemption” which excuses compliance from all or part of the regulatory requirement.

2.1.3 The legislation governing aviation safety in Botswana is the Civil Aviation Act, 2011, together with the Civil Aviation Regulations (CARs). Parliament has vested the authority for administering this legislation in the Minister for the time being responsible for civil aviation.

2.1.4 Whilst power to exempt from the provisions of Regulations is conferred only on the Minister, exemption from certain requirements other than Regulations has been conferred on the Authority according to subsection (4) of section 90 of the Act. The power to exempt by the Authority can be exercised by the Chief Executive Officer or any official provided such powers (of the Chief Executive Officer) have been transferred through a Letter of Delegated Authority (LODA) and such exemption does not have to be published in the Government Gazette.

### **3.0 PROCEDURE FOR ISSUING EXEMPTIONS**

#### **3.1 General**

The responsibility for the application and monitoring of this procedure has been assigned to the Flight Safety Directorate (FSD) of the Authority. FSD shall maintain a record of all exemptions issued by the Authority.

#### **3.2 Charges for Exemption**

The Letter of Exemption Request must also include the Exemption Request Form, and administrative fee in the amount specified in any Aeronautical Information Circular (AIC) currently in force.

### **4.0 BASIC STEPS TO EXEMPTION PROCESS**

#### **Step 1: Applicant's Exemption Request**

The applicant for exemption must make his/her own case sufficiently compelling to justify the exemption request being granted. The applicant shall:

1. Provide letter of Exemption Request.
2. Complete Exemption Request Form.
3. Make a compelling safety case as to why the exemption should be granted.
4. Do this by providing supporting arguments and evidence on the following criteria:
  - a. How the exemption would be reasonable and appropriate; and
  - b. How the exemption would be unlikely to affect aviation safety.
5. Propose conditions to which the exemption would be subject that could mitigate any potential risk from being exempt from any regulatory requirement, and ensure that aviation safety would not be adversely affected.
6. Include a fee in the amount required by the relevant AIC.

#### **Step 2: Exemption Request Assessment**

FSD shall assess whether the applicant was able to successfully argue his/her case against the criteria set out above. FSD shall:

1. Review exemption request material to ensure that all necessary documentation has been provided. If not provided, FSD shall demand its provision before or while proceeding with the assessment.
2. Follow the process outlined in this Exemption Process and any Assessment Guidelines.
3. Conduct the necessary investigations and technical evaluations and

assess whether the supporting arguments and evidence provided by the applicant for the exemption in fact demonstrates that the exemption should be granted.

### **Step 3: Exemption Disposition**

Decide on the basis of the assessment findings whether to grant or refuse the exemption request.

1. If the exemption request is refused, inform the applicant of the decision with supporting reasons.
2. If the exemption is granted, finalize the conditions to which the exemption would be subject and proceed with the remainder of the exemption-granting process as described in more detail in the Exemption process.

### **Step 4: Review of Exemption Documentation**

1. The Assessment Guidelines, Exemption Request Form, and draft exemption must first be signed off by a responsible officer of the Authority as appropriate.
2. The Assessment Guidelines, the Exemption Request Form and the draft exemption document, together with all of the supporting documentation must be forwarded to the Chief Executive Officer (CEO) or Director Flight Safety Directorate (DFSD) for review.
3. Once the CEO or DFSD has reviewed and finalized the exemption document, the same shall be signed and issued as appropriate.

## **APPENDIX A: EXEMPTION REQUEST FORM**

**(To be completed by the party making the request and attached to the "Assessment Guidelines" when forwarded to the CEO or DFSD)**

REQUEST MADE BY:

Name/Company

Address

Tel:

Fax:

E-mail:

Contact Person

REQUEST MADE TO:

DATE REQUEST MADE:

REQUIREMENTS AGAINST WHICH EXEMPTION REQUESTED:

RELATED SECTIONS OF THE REGULATIONS:

ISSUE:

BACKGROUND:

TEST:

(1) AVIATION SAFETY:

What factors were considered to ensure aviation safety is not affected? Identify criteria and formulate as conditions of the exemption:

- a) . . . . .
- b) . . . . .
- c) . . . . .

(2) PROPOSED CONDITIONS BY THE APPLICANT:

What factors were considered to ensure aviation safety is not affected? Identify criteria and formulate as conditions of the exemption:

- a) . . . . .
- b) . . . . .

ATTACHMENTS:

- (1) Letter of Request;
- (2) All pertinent documents in support of the application; and
- (3) Cheque made out to the Authority in the amount specified in the AIC currently in force.

**APPENDIX B: ASSESSMENT GUIDELINES**

**Purpose**

The purpose of these Assessment Guidelines is to summarize the case being put forward by the applicant for an exemption with a view to documenting both the exemption request process, and to justify the basis for the decision arrived at by the Authority either to grant or refuse the request. In this way, the official record will show that the Authority's discretion has been exercised in accordance with a solid process, having taken into consideration all of the relevant facts and the law in each case.

The Assessment Guidelines will reflect the Authority's consideration of the exemption request being made based on the facts, law and proposed conditions put before it; together with the results of the FSD's assessment of the applicant's arguments. The FSD will also have the opportunity within this document to provide a rationale for the decision based on the facts of the particular case to either grant or refuse the request.

## **Content**

The contents of the “Assessment Guidelines” are a response to the arguments being presented by the party making the exemption request and must include the following information:

1. Criteria to show that the exemption is in the public interest and not likely to affect aviation safety.
2. Conditions identified to mitigate any potential risk resulting from regulatory requirements being exempt.
3. Documented references of meetings, dates, attendees, issues addressed and decisions made.
4. Documented references that the necessary tests have been applied and the relevant technical evaluations conducted.
5. Documentation of the decision to grant or deny the request based on the findings.
6. Conditions of the Exemption.
7. Validity period.

## **APPENDIX C: FACTORS TO CONSIDER**

### **General factors to consider**

1. All factors relating to the Authority’s responsibilities respecting aeronautics found in the Act.
2. All factors relating to the general regulatory powers respecting aeronautics found in the Act.
3. All factors relating to the aviation record of an applicant for a Botswana aviation document.
4. All factors that support the basic legal principle that justice should always be done and be seen to be done.

### **Factors to consider with particular focus on exemptions**

1. The consequence of an exemption being granted or denied must be considered in terms of the needs of or benefits to the aviation public and the local community; consequences which may be of commercial or practical convenience, or necessity of the operation.
2. It is not sufficient that the exemption be merely considered “safe” and “commercially expedient” for the applicant.
3. All factors that examine the safety impact on the community at large. Including the adequacy of measures that are intended to provide a level of safety equivalent to that required by the requirements.
4. All factors that examine the economic impact on “non-exempt” operators given that an exemption must not result in any unjustified competitive advantage to one party over another.

## **APPENDIX D: PREPARING THE EXEMPTION DOCUMENT**

An exemption cannot be used to compel a person to do something the regulations themselves do not require. Note that if the beneficiary of the exemption does not comply with its conditions, the exemption becomes null and void and the person must then comply fully with the regulations and requirements.

Although it is understood that an exemption is not an appropriate instrument by which to regulate, in the circumstance where a specified population representing a particular segment of industry seeks voluntary compliance to standards that were omitted or need expansion due to technological development, an exemption may be appropriate for the interim period required until such time as amendment to the requirements and related standards complete the regulatory-change process.

### **Things to Remember**

1. An exemption cannot be dated retroactively and is effective only from the date on which it is signed by the appropriate person.
2. An exemption cannot be written against a provision that imposes a duty on the Authority.
3. Exemption fees made in accordance with the relevant AIC and can only be waived by the Authority.
4. The party being exempt has the choice to follow either the exemption, or the specified requirement.
5. However, once the choice is made to follow the exemption, the party must comply with its conditions.
6. If the party chooses not to follow the exemption, the specified requirement applies.
7. Enforcement can only be exercised against the regulation, not the exemption, save to the extent that any conditions attaching to it have been breached.
8. When an exemption is required from a standard that is incorporated by reference into a requirement, the exemption must be written against the requirement to the extent of its relationship to the standard.
9. If an exemption is being issued pursuant to a leasing arrangement, the lease should become an Appendix to the exemption document.
10. Never make promises to the party making the exemption request that (a) it will be granted, and/or (b) it will be granted by a certain time limit. The issuance of an exemption is a privilege and cannot be guaranteed, and the time required for the process to be completed will depend on factors over which an individual officer may have no control.
11. After the party making the exemption request provides to the Authority an exemption request form, together with all the necessary supporting documentation, subject to the complexity of the issues an allowance of approximately six (6) weeks should be made for the exemption request to

be processed and the exemption document duly completed.

### **Checklist of Questions to Ask**

1. What functional areas of responsibility are raised by the issues identified in the letter of exemption request?
2. Who are the parties involved in the request for an exemption?
3. Who is the appropriate official who has the authority to recommend for or against the issue of exemption to the Authority?
4. Why is the exemption necessary?
5. What is the requirement preventing the party making the request for an exemption from doing?
6. What specific regulatory provision and/or standard linked to what regulatory provision is the exemption being written against?
7. Has the correct regulatory provision been identified?
8. Is the regulatory provision against which the exemption is being written an “offence-creating” requirement; i.e. with such words present as “no person shall”, or “the air operator shall”, or does it impose a duty on the Authority?
9. Are there any conditions that must first be met before the exemption will even apply?
10. Has the test for assessing the merits of the exemption request under the circumstances of your particular case been applied?

The results of the test for assessing the merits of the exemption request and the criteria identified to support the arguments made by the party making the request then become the conditions of the exemption.

What time period do you want the exemption to be in effect? Or until what event or series of events occur?(The maximum time period is normally up to 12 months.)

If an exemption is considered further to a decision to change the requirement or associated standard, have you instituted steps towards generating an amendment to the pertinent requirement and/or standard?

Where the policy pertaining to the specific regulatory amendment is amended after the exemption has been granted, has a follow-up procedure been set up to formally cancel the exemption?

Once the amendment comes into effect, has a follow-up procedure been set up to formally cancel the exemption?

## **APPENDIX E: DOCUMENT FORMAT**

### **Introduction**

Note that an exemption as a legal document must contain certain essential elements of both substance and form to ensure its legal validity. By virtue of the fact that the exemption removes a party from complying with the

requirements of a particular regulation, the exemption then becomes the “new legal regime”. The document must stand on its own and withstand legal scrutiny should circumstances unfold that would place the exemption in the public eye, and/or necessitate its revocation by the Authority. The following general guidelines hopefully will give assistance in the drafting. However, depending upon the facts of any given situation or the legal nature of the issue, the Authority may have to make adjustments to the ultimate wording of the document.

### **General Structure**

The exemption must be a stand-alone document and written on an independent sheet of paper. It must not be incorporated into a letter or other correspondence, nor include any extraneous information such as ordinary business matters. The document must speak exclusively to the exemption, its purpose, to who it applies, the conditions that must be met in order for the exemption to come into effect, and the terms under which it will remain valid, and its expiry date.

### **Headings**

The exemption shall provide information under the following general headings, as appropriate:

1. **Introductory Paragraph** should identify the source of power to exempt under Section 90(4) of the Civil Aviation Act, 2011, or the specific provision number of the requirement on the part of a person or corporation (name and address), with a description of what is required by the exempted regulation.
2. **Purpose.** Explain why the exemption is necessary, and how the current regulatory structure is preventing the party from doing what is desired.
3. **Application.** The document must clearly indicate to whom or to what entity the exemption applies. All identifying particulars are to be included here; such as Botswana aviation document registration numbers, aircraft identification by manufacturer, type, model, serial number, registration marks, AOC number, etc. Also included under this heading would be any requirements that must first be satisfied before the exemption can take effect.
4. **Conditions:** The terms and conditions of any exemption will vary depending on the facts of the situation. The terms of the exemption are those criteria that were identified during the aviation safety tests, and can be included here. It must be clear that the exemption is in effect only if the conditions are satisfied throughout the validity period of the exemption.
5. **Validity:** The validity section defines the term of the exemption, as well as identifies grounds for cancellation setting out a chronology of potential triggering events which would allow for the revocation of the exemption should the circumstances require it.
6. **Cancellation:** There may be a number of circumstances which give rise

to the need to legally revoke the exemption. This must not be overlooked for there can be legal consequences if the document does not expire. For example, if an already-issued exemption requires some form of “amendment”, the exemption already in existence would need to be cancelled before the “revised” exemption could be reissued, otherwise two exemptions would have the same legal force and effect creating potential confusion should there be conflicting conditions. In addition, this could create a problematic effect should the Minister wish to revoke the exemption for breach of conditions where two exemptions and two sets of conditions co-exist.

This problem can be avoided by either including a cancellation clause at the bottom of the “amended” and reissued exemption, or issuing a stand-alone exemption cancellation document.

### **Signature of Delegated Authority**

The signature line must state the date and city where the exemption is issued, the delegated official who is signing the document on behalf of the Authority, as well as the official’s title.