

Policy Clarification for the Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustors and Beneficiaries

The Federal Aviation Administration (the “FAA”) recently clarified its policies regarding the registration of aircraft in the United States with the U.S. Registry by U.S. citizen trustees of trusts involving non-U.S. citizen trustors and beneficiaries. These arrangements are often called “non-citizen trusts” and they are often used when non-U.S. citizens want to own an aircraft registered with the U.S. Registry. As set forth in the Notice of FAA Policy Clarification reported in the Federal Register, Vol. 78, No. 117 on June 18, 2013 (the “Notice”), after the FAA’s review of these policies and practices, the FAA met with interested members of the public, reviewed comments and made its final decision to preserve the ability of U.S. citizen trustees of non-citizen trusts to register aircraft with the U.S. Registry. However, the FAA issued certain new requirements for owner trustees. The new policies are effective September 16, 2013.

Background Information

According to 49 U.S.C. 44102, an aircraft may only be registered with the FAA if it is owned by a citizen of the United States. However, 14 C.F.R. 47.7 has long permitted registration of an aircraft with the FAA if legal title to the aircraft is held by a trustee that is a U.S. citizen or resident alien and if the applicant submits with its application: (i) a copy of each document legally affecting a relationship under the trust, and (ii) if any beneficiary under the trust, including any person whose security interest in the aircraft is incorporated in the trust, is not a U.S. citizen or resident alien, an affidavit from each trustee stating that the trustee is not aware of any reason, situation, or relationship (involving beneficiaries or other persons who are not U.S. citizens or resident aliens) as a result of which those persons together would have more than 25 percent of the aggregate power to influence or limit the exercise of the trustee's authority. If persons who are neither U.S. citizens nor resident aliens have the power to direct or remove a trustee, either directly or indirectly through the control of another person, the trust instrument must provide that those persons together may not have more than 25 percent of the aggregate power to direct or remove a trustee. These requirements were not changed by the FAA in the recent Notice, but they were clarified.

The FAA began reviewing its policies because it was concerned about whether the trustees of non-citizen trusts fully understand and are prepared to comply with their regulatory obligations as owners of aircraft registered on the U.S. Registry. The owners of U.S. registered aircraft have numerous requirements under federal statutes and regulations regarding the safety of the aircraft. In some situations, the FAA found that the owner trustees were not fully informed regarding the aircraft or its operations. Policymakers at the FAA wanted to clarify their policies to make sure that the trustee owners of aircraft understood their role, were able to communicate critical safety information to the operators of the aircraft and were able to provide timely to the FAA information regarding the aircraft and its operation.

Policy Concerning Trustees as Aircraft Owners

The FAA determined that there is nothing inherent in the status of a trustee owner of a U.S. registered aircraft that would affect or limit its responsibilities for ensuring compliance with applicable laws and regulations. Therefore, all owner trustees have the same obligations to comply with FAA regulations as any other type of aircraft owner. While it is common practice for an owner trustee to include requirements in its contracts that the operator must fully comply with all applicable laws and regulations, the FAA clearly stated in the Notice that “(n)o owner of an aircraft on the U.S. registry can avoid a regulatory obligation imposed on it by the FAA simply by entering into a private contract with another party.”

Guidelines Regarding Responsiveness to the FAA with Information About the Aircraft and its Operations

Two Business Days: The FAA now expects an owner trustee of an aircraft registered on the U.S. Registry to be able to respond to a request by the FAA for the following information about the aircraft and its operation within 2 business days:

- The identity of the person normally operating, or managing the operations of, the aircraft;
- Where that person currently resides or has its principal place of business;
- The location of maintenance and other aircraft records; and
- Where the aircraft is normally based and operated.

Five Business Days: The FAA further expects an owner trustee of an aircraft registered on the U.S. Registry to be able to respond to a request by the FAA for the following more detailed information about the aircraft and its operation within 5 business days:

- Information about the operator, crew and aircraft operations on specific dates;
- Maintenance and other aircraft records; and
- The current airworthiness status of the aircraft.

The above timelines are guidelines and not mandatory. The FAA recognizes that under some circumstances, the requested information may not be available upon this timeline, but the FAA will expect that an owner trustee would let the FAA know if there is a problem with providing the information in a timely manner.

The FAA will Require Submission of Operating Agreements with a Registration Application

As noted above, 14 C.F.R. 47.7 requires an owner trustee applicant to submit with its application for registration with the FAA a copy of each document legally affecting a relationship under the trust. Generally, the applicant will just submit a copy of the trust agreement. The FAA now recognizes that this regulation is broad enough for the FAA to require submission of every document relevant to the trust relationship so it can determine whether a particular non-citizen trust provides an adequate basis for registering an aircraft with the U.S. Registry. For example, many operating agreements contain provisions that are not covered in the trust agreement and some of those agreements modify provisions in the trust agreement or contradict them. The FAA found that often an operating agreement expanded the control the non-U.S. citizen trustors and beneficiaries had over the U.S. owner trustee. Therefore, the FAA will now require that all operating agreements and other side agreements be submitted to the FAA along with the trust agreement.

The FAA did agree that the operating agreements do not have to be retained by the FAA as part of a trust registration application in the files of the U.S. Registry. Some commenters were concerned about confidentiality of their operating agreements. Therefore, if an applicant requests the return of the operating agreement submitted as part of the trust registration application at the time the application is submitted, in most cases the FAA will return the operating agreement to the applicant once its review of the application is finished. However, the FAA will not return the operating agreement if the FAA determines the operating agreement adversely affects the trust relationship and the FAA rejects the registration application. In that case, the FAA will retain the operating agreement in its administrative records.

Trustee Removal Provisions

14 C.F.R. 47.7(c)(3) provides that if persons who are neither U.S. citizens nor resident aliens have the power to direct or remove a trustee, either directly or indirectly through the control of another person, the trust instrument must provide that those persons together may not have more than 25 percent of the aggregate power to direct or remove a trustee. The purpose of these restrictions is to give the trust a more stable, permanent status. If non-U.S. citizens could remove the owner trustee at any time for little or no reason, then essentially, the non-U.S. citizens would effectively be in control of the trust. To avoid non-compliance with these requirements, the FAA will now review all registration applications that rely on non-citizen trusts for evidence of clear compliance with the requirements of 14 C.F.R. 47.7(c)(3). If it appears that non-U.S. citizens have greater than 25% of the power to direct or remove a trustee under a trust agreement or related document, the FAA may request additional information or it may reject the application. The FAA did acknowledge that non-U.S. citizens may have powers to direct the U.S. citizen trustee so long as they have no power to actually remove the U.S. citizen trustee. Also, the ability of non-citizens to remove a U.S. Trustee for “cause” will be permitted, but only if the trust agreement describes with some specificity the meaning of “cause.”

Termination of the Trust and Trustee Resignation

The FAA has acknowledged that none of the restrictions in 14 C.F.R. 47.7(c)(3) affect the ability of a non-U.S. citizen beneficiary or Non-U.S. citizen trustor to terminate a trust. If a trust is terminated, the registration of the aircraft on the U.S. Registry would terminate, but the aircraft could be re-registered if ownership were transferred to a person eligible to register the aircraft on the U.S. Registry – i.e. either another non-citizen trust complying with all of the requirements or a U.S. citizen.

Changes to Standard Trust Agreement

The FAA does not dictate the form of a trust agreement that must be used for a non-citizen trust, but attached to the Notice is an example of a trust agreement with FAA suggested changes incorporated. This form can be found on the FAA’s website at http://www.faa.gov/about/office_org/headquarters_offices/agc.

What Does all of this Mean to You?

- If you are an owner trustee, you must make sure that you adequately understand all of your obligations as an aircraft owner because you will not be able to delegate them to the aircraft operator through an operating agreement or other side agreement.
- If you are an owner trustee, you must have adequate means to obtain information about the aircraft and its operations from the aircraft operator at all times so you can be responsive to the FAA on a timely basis regarding inquiries about the aircraft and its operations.
- If you are an owner trustee, a non-U.S. citizen trustor or a non-U.S. citizen beneficiary of an owner trust, you will need to make sure that your trust agreement complies with these new FAA requirements and that there are no operating agreements or side agreements that qualify or contradict the provisions of the trust agreement.

Procopio’s Aviation Practice Group is knowledgeable, experienced and available to assist you with respect to all of these important issues.



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