

Guide for Non-U.S. Citizens Registering Aircraft with the FAA

Registering Aircraft with the Federal Aviation Administration (the “FAA”) Civil Aviation Registry (the “FAA Registry”) is Desirable

The FAA Registry is a desirable place to register aircraft. It is located in a stable legal and political environment. It has high standards for safety. It provides high levels of service, is easily accessible and is generally known as a reliable high quality aviation registry. Upon registration, the aircraft is given the coveted “N” registration number. According to 46 U.S. C. 44103(a), an aircraft must be registered in the name of its owner. The owner of the aircraft will be the person or entity holding full legal title although there are exceptions for some conditional sales contracts and non-true leases with nominal purchase options. It is important to understand that any aircraft registered with the FAA Registry must be maintained and operated in accordance with U.S. laws and regulations even if the aircraft is based and operated outside of the U.S.

General Citizenship Requirement for Registering Aircraft with the FAA Registry

According to 49 U.S.C. 44102, an aircraft is eligible for U.S. Registration if it is not registered in another country and it is owned by:

- An individual who is a United States citizen,
- An individual citizen of a foreign country lawfully admitted for permanent residence in the U.S.,
- A non-U.S. citizen corporation organized and doing business under the laws of the U.S. or one of the States as long as the aircraft is based and primarily used in the U.S. (60% of all flight hours must be from flights starting and ending within the U.S.)
- The U.S. government;
- A State, the District of Columbia, a territory or possession of the United States or a political subdivision of a State, territory or possession

Also, Title 49, U.S.C. 40102(a)(15), provides as follows:

“Citizen of the United States” means (a) an individual who is a citizen of the United States, or (b) a partnership each of whose partners is an individual who is a citizen of the United States, or (c) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

Based on the definition of “Citizen of the United States,” an aircraft is also eligible for U.S. Registration if it is owned by:

- A partnership each of whose partners is an individual who is a U.S. citizen,
- A corporation or association:
 - organized under the laws of the U.S. or a State, the District of Columbia, or a U.S. territory or possession,
 - of which the president and at least two-thirds of the board of directors and other managing officers are U.S. citizens, and
 - in which at least 75% of the voting interest is owned or controlled by persons that are U.S. citizens

Non-Citizen Trusts

Notwithstanding the general rules requiring U.S. citizenship for U.S. Registration of aircraft, 14 C.F.R. 47.7 has long permitted registration of an aircraft with the FAA Registry if legal title to the aircraft is held by a trustee that is a U.S. citizen or resident alien. These arrangements are often called “non-citizen trusts” and they are used when non-U.S. citizens want to own an aircraft registered with the FAA Registry. A non-citizen trust is an agreement and a relationship where a U.S. citizen or resident alien trustee holds legal title to the aircraft on behalf of one or more individuals who are called “beneficiaries.”

The trust relationship is created by an agreement signed by (i) a non-citizen trustor/beneficiary who wants to create the trust and contribute an aircraft to the trust so the aircraft can be registered with the FAA Registry, and (ii) an owner-trustee who is willing, for a fee, to hold title to the aircraft and perform the required duties of an owner-trustee pursuant to the instructions of the trustor and the requirements of the FAA. The FAA has pre-approved forms of aircraft owner trust agreements and any other forms should be approved by the FAA prior to submission for filing with the FAA Registry.

Filing of the Non-Citizen Trust Agreement with the FAA Registry

The FAA Registry will know the identity of the trustor/beneficiary and the owner/trustee because the trust agreement will need to be filed with the FAA Registry before the aircraft can be registered with the FAA Registry.

A trustee applicant for registration of an aircraft with the FAA must submit with its application pursuant to 14 C.F.R. 47.7(c)(2):

- (i) a copy of each document legally affecting a relationship under the trust;
- (ii) if each beneficiary under the trust, including each person whose security interest in the aircraft is incorporated in the trust, is either a U.S. citizen or a resident alien, an affidavit by the applicant to that effect; and
- (iii) 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.

14 C.F.R. 47.7(c)(3) further provides “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.”

There are banks and other professional owner trustees who will act as owner/trustees for non U.S. citizens who wish to register their aircraft with the FAA Registry. We have worked with many of them and we can guide you through this process.

Frequently Asked Questions

Who is the owner of the aircraft when it is subject to a non-citizen trust? The owner-trustee will hold legal title to the aircraft for the benefit of the trustor/beneficiary pursuant to the terms of the trust agreement. The owner-trustee will register the aircraft in its name with the FAA Registry. However, while the trustor/beneficiary is not the legal owner of the aircraft, the trustor/beneficiary will have the right under the trust agreement to dissolve the trust at any time for any reason. When it is time to sell the aircraft, the trustor/beneficiary can dissolve the trust and then transfer title to the aircraft to a purchaser. The trust agreement will prohibit the trustee from selling the aircraft without the beneficiary's instructions.

FAA Communications. As the owner, the owner-trustee will receive all correspondence from the FAA and will forward such correspondence to the trustor/beneficiary. A good owner-trustee will have systems in place to provide notices quickly to the trustor/beneficiary. The owner-trustee will also need to respond quickly to questions from the FAA for information or documentation regarding the aircraft or its operations as discussed in more detail later in this article.

How will operations of the aircraft be structured? The owner-trustee will not operate the aircraft for itself or for the trustor/beneficiary. Owner-trustees are often banks or other professional organizations and they do not have pilots or maintenance facilities. An owner-trustee may enter into a dry lease of the aircraft back to the trustor/beneficiary to operate the aircraft. The dry lease between the owner participant and the owner-trustee will essentially allow the owner participant to possess and utilize the aircraft as if it were his/her/its own. An owner-trustee may enter into a management agreement or some other type of operating agreement with a third party who will operate the aircraft for the trustor/beneficiary. The owner-trustee will not maintain the aircraft in accordance with FAA requirements. All of those obligations and the expenses incurred with respect to those obligations will be passed along to the trustor/beneficiary in a dry lease or to an operator pursuant to a management agreement or other operating agreement. Each dry lease, management agreement or other operating agreement covering the aircraft must be filed with the FAA Registry so the FAA will know who has operational control of the aircraft at all times.

Who is entitled to tax benefits of owning the aircraft? The aircraft will be purchased by the trustor/beneficiary so any tax benefits related to the purchase of the aircraft will flow through to the trustor/beneficiary notwithstanding the fact that the trustor/beneficiary is contributing the aircraft to the owner trust. Similarly, all expenses for ownership and operation of the aircraft are paid by the trustor/beneficiary and can be deducted by the trustor/beneficiary in the same manner as they would be deducted without the owner trust in place.

Will a lender make a loan on an aircraft owned by an owner-trustee? Yes, lenders will still provide loans secured by an aircraft even if title to the aircraft is held by an owner-trustee.

Clarification of Rules Regarding Non-Citizen Trusts

In 2013, the requirements regarding non-citizen trusts were clarified. The FAA began reviewing its policies because it was concerned about whether the owner/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 a non-U.S. citizen, you can register an aircraft with the FAA Registry by using an owner-trust.
- 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 a dry lease, management agreement or other side agreement.
- If you are an owner trustee, you must have adequate means to obtain information from the trustor/beneficiary and/or the aircraft operator regarding the aircraft and its operations 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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