

Avoiding Flight Schedule Disruption When Replacing the Owner Trustee of a Leased Aircraft Registered in the United States

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KEY POINTS

- Replacing the owner trustee of a US-registered aircraft that is on lease requires submitting a new application to register that aircraft.
- Submitting the application to reregister the aircraft restricts the operation of the aircraft by the lessee to domestic airspace, unless a temporary certificate of aircraft registration (a “flying time wire”) is applied for, based on a declaration of the owner of intended international operations by the lessee.
- Because a declaration of international operations requires a scheduled flight outside domestic airspace, some flight schedule planning by the lessee will have to be requested.
- The replacement of the owner trustee can be documented in one of two ways, with advantages and disadvantages depending on the circumstances.

Overview

The United States maintains an owner registry for civil aircraft, rather than an operator registry. Leased aircraft are therefore registered in the name of the lessor/owner. To facilitate compliance with US citizenship requirements for registration, more easily allow for the sale and purchase of leased aircraft, and protect the lessee and a secured lender from a bankruptcy of the owner, the aircraft-owning lessor is typically a bankruptcy-remote trust, the beneficiary of which is the economic owner of the aircraft. As part of their corporate trust services, several banks and other trust companies offer to act as the trustee of such trusts. The FAA Aircraft Registry allows the aircraft to be registered in the name of the trust (if it has been created as a business trust or statutory rather than common-law trust) or of the trustee. The owner trust agreement between the trustee and the beneficial owner of the aircraft that creates the trust that will hold title to the aircraft will provide a procedure for the replacement of the trustee. Replacement would occur if for example the trustee resigned as trustee as permitted by the trust agreement.

Replacing the owner trustee of an operating aircraft will give rise to an operating limit because under FAA rules, replacing an owner trustee requires filing a new Aircraft Registration Application (AC Form 8050-1) to register the aircraft. After an Aircraft Registration Application is filed, but before the Certificate of Aircraft Registration

(AC Form 8050-3) is issued, the aircraft will have temporary authority to operate domestically in the United States, provided a copy of the Aircraft Registration Application is held on the aircraft. This means that the aircraft may not operate over international waters or over the territory of another country. Depending on the airline's route network and the aircraft type, this could be a significant constraint on the right of the airline to use the aircraft under the lease for any operation for which the aircraft is suited. It is even arguably a breach of the lessor's covenant under the lease to give the lessee "quiet enjoyment" of the aircraft.

Application to Register Aircraft

It may take the FAA Aircraft Registry nine weeks or so (and this is not a deadline) to issue the Certificate of Aircraft Registration after an application to register an aircraft is filed.¹ If the aircraft might operate outside domestic airspace while the application for registration is pending, the FAA has a fast-track procedure to issue a temporary certificate of registration (known colloquially as a "flying time wire" or "fly wire"). The issuance of the temporary certificate of registration allows the aircraft to be operated in all airspace. The temporary certificate of registration expires after 30 days. The FAA in practice automatically issues the Certificate of Aircraft Registration at the end of the term of the temporary one (if the FAA has not by that time already issued the Certificate of Aircraft Registration). Alternately a replacement temporary certificate of registration can be requested to continue the effectiveness of the temporary registration. In order to obtain a temporary certificate of registration, the registrant must submit a Declaration of International Operations (Form REGAR-DIO-1). This is an affidavit by which the registrant certifies that the aircraft is scheduled for an upcoming flight that will take the aircraft outside domestic airspace. The FAA normally issues a temporary certificate of registration within one or two working days after the registrant files the declaration of international operations.

In order to minimize the time the aircraft is restricted to domestic airspace, typically the registrant files the Aircraft Registration Application and the Declaration of International Operations together. The Declaration of International Operations must list a scheduled flight, including date, origin, and destination, that will take the aircraft outside domestic airspace. This may become an issue if the aircraft's flight schedule changes at the last minute. For example, if another aircraft that is scheduled to fly on a route that takes the aircraft outside US airspace suffers a mechanical problem, the airline will want the ability to use any other operationally suitable aircraft in its fleet for that flight. The airline could not, however, immediately redeploy to that route an aircraft as to which a Certificate of Aircraft Registration was pending unless a Declaration of International Operations had been filed and the aircraft issued a temporary certificate of registration. Even if a Declaration of International Operations were filed immediately once the airline decided to put the aircraft on the route outside US airspace, it would still be one to two working days, at least under current FAA practice, to have a temporary certificate of registration issued before the aircraft could be used on that route.

It is, therefore, good practice to preemptively request that the airline refrain from scheduling a flight for the aircraft outside of the United States for the first week or so after the application for registration is filed. That will allow both the Aircraft Registration Application and the Declaration of International Operations to be filed at the same time, and allow the FAA what should be sufficient time before that flight to process the Declaration of International Operations and issue a temporary certificate of registration. Alternately the Declaration of International Operations can be filed after the Aircraft Registration Application is filed, once the flight over non-US airspace is scheduled. Once the temporary certificate of registration is issued, the scheduled flight, if it occurs, and any other flight in non-domestic airspace, may then take place under the temporary certificate of registration.

¹ Before the registrant files the application to register the aircraft, it will have obtained an opinion from the FAA Aeronautical Center Counsel's office that the registrant qualifies as a US citizen for registration of aircraft under the Federal Aviation Act. The opinion is typically issued approximately 20 working days after the application for the opinion is submitted. Obtaining the opinion is therefore a lead-time item that should be taken into account in the planning of any trustee replacement. Any timeframes set forth in this advisory are reasonable estimates based FAA practice at the time of writing of this advisory, and may change over time. The FAA website reports that the processing time for a permanent certificate of registration is 16 to 20 working days but 14 CFR Section 47.31 contemplates that temporary authority based on the application will last 90 days with mandatory renewals for up to 12 months following submission of the registration application.

Distinguish From a Name Change

By contrast, a name change by the bank or trust company acting as trustee does not require the filing of a new Aircraft Registration Application because the name change does not change the legal entity that holds title to the aircraft. There are alternate mechanisms in the regulations and the Registration Branch procedures to change the name of the registered owner of an aircraft upon the presentation of valid name change documents. The FAA simply changes the name, makes a note in the applicable aircraft record and issues an updated certificate of registration. Therefore a name change does not affect the operation of the aircraft.

Distinguish From a Merger that Results in a Change of Ownership

Over the years, a number of banks acting as owner trustee of US-registered aircraft have been acquired by other banks. The consummation of each merger resulted in the simultaneous change in the identity (not just the name) of the registered owner of the aircraft. The bank mergers required that any aircraft registered to the acquired entity receive a new aircraft registration in the name of the acquiring entity.² Airline mergers have been treated the same with respect to aircraft owned by and therefore registered in the name of the airline. Unlike name changes, these are transactions that – because a new registration application must be filed – affect the right to operate the aircraft in all airspace. In such situations, the FAA has undertaken to process the reregistration of all affected aircraft simultaneously on an accelerated timeframe in order to minimize disruption to operations.

By contrast, the resignation by an owner trustee occurs aircraft-by-aircraft, trust-agreement-by-trust-agreement. The replacement trustee is chosen by the counterparties to the lease transaction and is not necessarily the same for each aircraft. This does not lend itself to any expedited reregistration procedure.

When the Aircraft is Registered in the Name of the Trust

If the trust is a statutory trust (i.e., created pursuant to the terms of a specific state statute providing for the creation of trusts) rather than a common-law trust (i.e., created consistent with a state's case law on trusts), the trust agreement may give the trust a name (e.g., the "N12345 Owner Trust"). Whether a statutory trust may be formed often depends on whether the state in which the trustee has its principal place of business allows for statutory trusts. If the trust is a statutory trust, the aircraft may be registered in the name of the trust rather than in the name of the trustee (under the FAA rules permitting the registration of an aircraft in the name of an association). That suggests that the replacement of the trustee would not require that the aircraft be reregistered. However, the FAA treats the change in trustee of either a statutory trust or common law trust as a change in registration, which requires a new registration application.

How to Document the Change of Trustee

The change of owner trustee can be accomplished at the FAA either by filing an instrument of resignation and appointment or filing an FAA bill of sale and new trust agreement. The first way removes the existing trustee and appoints the successor trustee, but keeps the existing trust and trust agreement. The second way transfers title to another trustee under a new trust agreement. In either case, the registered owner will change and a registration application must be filed, with the effects on aircraft operation described above: either the aircraft may operate in domestic airspace or the declaration of international operations is filed to apply for permission to operate outside domestic airspace.

For the title transfer, the parties also would have to enter into and file a lease assignment or novation transferring the rights and obligations of the lessor to the new owner trustee, particularly if the lessor is recited as the trustee rather than a named trust. The lease and related documents are likely to require that the lessee's consent be

² If two banks consolidate such that a new entity is created and the consolidating entities dissolved, aircraft registered to either consolidating bank have to be reregistered. If upon an acquisition the acquiring bank changes its name to that of the acquired bank, aircraft registered in the name of the acquired bank have to be reregistered, even though the name of the registrant does not change. The reason is that following the acquisition, the aircraft owned by the acquired bank are owned by the acquiring bank, which is still a different entity than the existing registrant. In that example, the acquiring bank would file a name change for any aircraft registered to the acquiring bank itself before the acquisition.

obtained for any reregistration of the aircraft, replacement of the trustee or lease assignment or novation. A title transfer especially should be reviewed to ensure that the transfer does not trigger state sales tax in the state where the aircraft is located when the transfer occurs.

If the beneficial interest in the trust is being sold, the replacement of the trustee may be scheduled to occur at the same time for convenience. In such case, a title transfer would accomplish both the beneficial-interest transfer and the trustee replacement in one step. The new beneficial owner would simply be the first owner participant under a new trust agreement between itself and the new owner trustee. That trust agreement would contain whatever provisions the new owner participant, the new trust company and the new owner participant's lenders desired to have (subject to FAA requirements for trust agreements). On the other hand, if the replacement of the trustee were effected by a resignation instrument, the parties also would have to enter into and file a beneficial interest assignment to assign the owner participant's interest to the new owner participant and could have to amend or amend and restate the trust agreement. The latter route would avoid the lease assignment or novation.

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