

# INTERNATIONAL LAW OFFICE

## Aviation - USA Change in the Air: Civil Aircraft to Get Equal Treatment

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### **Introduction**

In the past all businesses operating US registered aircraft were not treated equally. Companies that the Department of Transportation classified as 'non-foreign', under certain circumstances, were able to allocate costs among parent and subsidiary corporations for the operation, maintenance and ownership of US registered aircraft (commonly referred to as 'charge-backs') when using the aircraft for business purposes.<sup>(1)</sup> However, companies that were classified as 'foreign' and which operated a US registered aircraft were required to obtain authorization from the department prior to each flight in order to receive the identical reimbursement. Due to the increasingly multinational character and structure of US businesses, increasing numbers of companies were unable to receive the benefit of charge-backs despite owning and operating a US registered aircraft.

In response, the department amended its rule concerning charge-backs in March 2006 by creating the new Federal Aviation Regulation Part 375.37,<sup>(2)</sup> which allows all US registered civil aircraft to receive charge-backs, regardless of classification as foreign or non-foreign.

### **Old Regulatory Framework for Accepting Charge-Backs**

Under the old regulatory framework of Part 375, the determinative factor in whether a business could receive charge-backs was whether the business's aircraft was classified as a 'foreign civil aircraft', which included any aircraft of foreign registry not part of the armed forces of the foreign nation or any US registered aircraft owned, controlled or operated by non-US citizens.<sup>(3)</sup> In order for a business to be classified as a US citizen under the latter definition - and thus not be precluded from receiving charge-backs - the following conditions had to be met:

- The business had to be organized in the United States;
- The president and two-thirds of the board of directors and other managing officers had to be US citizens; and
- Seventy-five percent of the voting interest had to be owned or controlled by US citizens.<sup>(4)</sup>

If a company was unable to satisfy the US citizenship requirements, its US registered aircraft would be classified as a foreign civil aircraft and the business would be required to secure authorization from the department each time it wished to receive payment as reimbursement.<sup>(5)</sup> This authorization was always required, even if payment came from another company within the same corporate family as the aircraft's operator.

Conversely, companies that were classified as 'non-foreign' could receive charge-backs without going through the cumbersome process of obtaining prior authorization from the department.<sup>(6)</sup> Federal Aviation Regulation Section 91.501 allowed domestic classified companies to receive charge-backs where one company in the same corporate family reimbursed the operator of the US registered aircraft, as well as in joint ownership, interchange and time-sharing agreement situations.<sup>(7)</sup>

### **Rationale and Implications of Rule Change**

In March 2006 the department amended Part 375 on the licensing and operation of US registered foreign civil aircraft in response to a petition by the National Business Aircraft Association.<sup>(8)</sup> By adding a new section to Part 375 entitled

“Certain business aviation activities using US-registered foreign civil aircraft”, the department decided to treat all US registered aircraft equally with regard to charge-backs, regardless of whether they are foreign.

In deciding to amend the old legal framework for US registered foreign civil aircraft, the department was primarily concerned with increasing efficiency in the global marketplace. The department argued that the:

*“kinds of intra-corporate, interchange, joint ownership and time-sharing operations involving transfer of funds to reimburse costs... have become a more and more necessary part of global commerce involving US business.”<sup>(9)</sup>*

Many of the largest businesses could not be classified ‘non-foreign’ under the applicable definition and therefore were required to go through unnecessary loopholes in order to receive charge-backs.<sup>(10)</sup> Requiring businesses using US registered foreign civil aircraft to acquire individual authorization each time they wish to receive charge-backs:

*“unnecessarily hampers the companies’ flexibility in structuring their corporate organizations and relationships and limits global business operations to the detriment of US interests.”<sup>(11)</sup>*

In addition, these types of business flights are a common practice in the business world and are often made in a time-sensitive manner, thus rendering a pre-flight requirement burdensome.<sup>(12)</sup> Ultimately, the department decided it was in the public interest to treat all businesses operating US registered aircraft in the same way, without regard to their classification.<sup>(13)</sup>

The department further reasoned that the new rule would have a beneficial economic effect on businesses because they would not have to pay the expenses associated with receiving department authority to conduct specified types of intra-corporate flight operations.<sup>(14)</sup> In addition, the department would save on the expense of having to process foreign air carrier permit applications.<sup>(15)</sup> Overall, the new rule eliminates the unnecessary requirement of obtaining approval for particular business operations, which increases efficiency and reduces the expense for both the relevant businesses and the department.

## **New Rule**

The new rule allows US registered foreign civil aircraft to receive charge-backs as long as they are operating civil aircraft within the scope of, and incidental to, the business of the company.<sup>(16)</sup> It expressly provides for the following situations in which a charge-back is allowed:

- intra-company operations, which involve charge-backs within the same corporate family (eg, the subsidiary reimbursing the parent);
- interchange operations, which involve a lease by one company of its US registered foreign civil aircraft to another company in exchange for equal time in the other company's US registered aircraft;
- joint-ownership operations, which allow a collection of costs from the other joint owners; and
- time-sharing operations, which include leasing the aircraft to another company.<sup>(17)</sup>

Under the new rule, as long as a company with a US registered aircraft is receiving charge-backs under the above-listed criteria, it does not have to seek department authorization, regardless of whether it is a domestic or foreign company.

Although the new Part 375.37 authorizes charge-backs for foreign civil aircraft, operators of US registered aircraft in foreign countries must still comply with the civil aviation regulations of the countries in which the aircraft operate. These regulations, despite the new department authorization, may still prevent charge-backs and should be consulted before any charge-backs are put into effect.

For further information on this topic please contact *Timothy Lynes* at Katten Muchin Rosenman LLP by telephone (+1 202 625 3500) or by fax (+1 202 298 7570) or by email (*timothy.lynes@kattenlaw.com*).

## Endnotes

- (1) 14 CFR Section 91.501 (2004).
- (2) 14 CFR Section 375.37 (2006).
- (3) 14 CFR Section 375.1 (2006).
- (4) 49 USC Section 40102(a)(15) (2006).
- (5) Certain Business Aviation Activities Using US-Registered Foreign Civil Aircraft, 71 Fed Reg 15326 (March 28 2006).
- (6) 14 CFR Section 91.501 (2004).
- (7) *Ibid.*
- (8) Certain Business Aviation Activities Using US-Registered Foreign Civil Aircraft, 71 Fed Reg 15325 (March 28 2006).
- (9) Certain Business Aviation Activities Using US-Registered Foreign Civil Aircraft, 71 Fed Reg 15326 (March 28 2006).
- (10) *Ibid.*
- (11) *Ibid.*
- (12) *Ibid.*
- (13) *Ibid.*
- (14) Certain Business Aviation Activities Using US-Registered Foreign Civil Aircraft, 71 Fed Reg 15327-28 (March 28 2006).
- (15) Certain Business Aviation Activities Using US-Registered Foreign Civil Aircraft, 71 Fed Reg 15328 (March 28 2006).
- (16) 14 CFR Section 375.37 (2006).
- (17) 14 CFR Section 375.37 (a) to (d) (2006).

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