

## Aviation - USA

### FAA issues new guidance on non-citizen trusts

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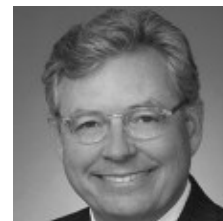
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#### Introduction

On June 18 2013 the Federal Aviation Administration (FAA) issued a policy clarification for the registration of aircraft involving US citizen trustees and non-US citizen trustors and beneficiaries (collectively, 'non-citizen trusts') (see 78 FR 36412). The new guidelines will be effective from September 16 2013. The FAA initiated its review after citing problems with obtaining important operational and maintenance information regarding non-citizen trusts, which affected its ability to effectively oversee such aircraft in international operations and provide foreign civil aviation authorities with information on such operations.<sup>(1)</sup> According to the FAA, this policy clarification will:

- facilitate the FAA's ability to determine eligibility for registering aircraft under non-citizen trusts;
- enable the FAA to provide critical information to aircraft operators and access critical information from aircraft operators or trustees of non-citizen trusts to satisfy its oversight obligations under US and international law; and
- allow trustees of non-citizen trusts to understand and comply fully with their obligations as owners of aircraft on the US registry.

The FAA focuses on five areas in its policy clarification:

- trustees as aircraft owners;
- disclosure of information about the aircraft and its operations;
- disclosure of operating agreements with a registration application;
- trustee removal; and
- termination of the trust and trustee resignation.

Each area of clarification is discussed below.

#### Trustees as aircraft owners

The FAA's objective is for trustees of non-citizen trusts to understand fully their obligations as owners of the aircraft on the US registry. Existing regulations require owners of aircraft on the US registry to communicate safety-critical information to aircraft operators and, when requested by the FAA, to provide information on the aircraft and its operations. As these laws and regulations do not distinguish between types of aircraft owner, the registered owner is the owner for all purposes, not just regulatory compliance. Noting that this designation does not change the obligations of owner trustees under the existing law, the FAA concluded that owners of aircraft on the US registry cannot avoid regulatory obligations by transferring such obligations to the actual aircraft operator by way of a private contract.

#### Maintaining and disclosing information about aircraft and their operations

In order to keep aircraft operators advised of safety-critical information and respond to FAA inquiries, US aircraft owners must maintain up-to-date information about the location and identity of aircraft operators and the location and nature of the operation on an ongoing basis. To ensure compliance with the owner trustee's duties as the owner

of the aircraft, the FAA has issued new guidelines for the owner trustee to follow. The FAA now expects an owner trustee to, within two business days of an FAA request, to provide:

- the identity of the aircraft operator;
- where the aircraft operator currently resides or maintains its principal place of business;
- the location of maintenance and other aircraft records; and
- where the aircraft is normally based and operated.

Moreover, the FAA expects owner trustees to respond within five business days to a more detailed request about the aircraft and its operations, including:

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

These deadlines are advisory only, and the FAA expects owner trustees to communicate promptly with it about the nature of delays or difficulties in obtaining the requested information.

In responding to comments regarding the availability of information to owners of US-registered aircraft, the FAA has advised that it will go directly to the air carrier in most cases. However, in the case of aircraft registered under non-citizen trusts, noting difficulties in obtaining information about the aircraft and given that the aircraft operators are frequently unavailable in FAA records, the FAA will look to the owner trustee for such information. The FAA further noted that while contractual provisions requiring aircraft operators to provide up-to-date contact information on request would not alleviate the regulatory obligations of the owner trustee, such contractual controls would be considered favourably by the FAA. Other examples of such contractual controls would be to:

- require the operator of the aircraft to issue notices to the owner trustee regarding transfers of control of the aircraft;
- provide expeditiously updated information in response to FAA requests; and
- give access to the FAA to inspect the aircraft and its records.

#### **Submission of aircraft operating agreements to FAA**

A person holding legal title to an aircraft in trust must submit a "copy of each document legally affecting a relationship under the trustee" when registering that aircraft in the United States (14 CFR 47.7(c)(2)(i)). An essential element of the registration process for aircraft held in trust, according to the FAA, is determining whether the underlying agreements satisfy the applicable requirements and are therefore sufficient to establish the trustee's eligibility to register the aircraft. Omitting an operating agreement frustrates this objective. In its policy statement, the FAA concluded that a relationship established under a trust agreement is necessarily affected by an operating agreement, the trust agreement and operating agreement being "so intertwined that the operating could affect the relationship under the trust" (78 FR 36412, at 36416). The FAA thus will require all operating agreements (or similar side agreements) in which the trustee transfers custody and use of the aircraft held in trust to be submitted to the FAA, along with other documents that affect the relationship under the trust. Where no operating agreement exists, the FAA will expect the registration applicant to provide sufficient assurances that no such operating agreement exists between the trustee and trustor.<sup>(2)</sup>

Many in the aviation industry submitted comments expressing concern regarding the permanent retention of aircraft operating agreements. In response, the FAA agreed and concluded that aircraft operating agreements need not be retained as part of a trust registration application in the files of the FAA registry. The FAA will return the agreement to the applicant once its review of the application package is complete, but only if the applicant requests such a return. However, if the review of the operating agreement establishes that it affects the trust relationship adversely, resulting in rejection of the registration application, the FAA will retain the operating agreement for inclusion in the administrative record. Likewise, in the event that an applicant fails to request return of an aircraft operating agreement at the time that a registration application is submitted, the FAA will retain the operating agreement in the FAA registry files. Once an operating agreement is in the FAA registry files, it cannot be removed. The requirement to submit the operating agreement to the FAA when registering an aircraft using non-citizen trusts is in addition to the obligations of non-US citizens that are not foreign air carriers or certificate holders to file such agreement with the technical section of the FAA Aircraft Registration Branch in accordance with 14 CFR 91.23(c).

#### **Trustee removal**

At present, the FAA restricts the ability of a non-US citizen to remove the trustee in a non-citizen trust (14 CFR 47.7(c)(3)). In its policy clarification, the FAA advises that it will review all registration applications that rely on non-citizen trusts for evidence of clear compliance with the trustee removal restrictions. Where trust agreements provide for removal for cause, the FAA now requires that agreements define what constitutes sufficient 'cause' for removal of a trustee. The FAA believes that agreements lacking such specificity in a removal-for-cause provision gives trustors virtually unconditional power to remove a trustee. Thus, at a minimum, the FAA will expect to see specific examples of specific causes for removal. Such grounds may include gross negligence or wilful misconduct by the trustee.

### Termination of trust and trustee resignation

The restrictions on removal of a trustee by a non-US citizen do not affect the ability of the non-US citizen otherwise to terminate a trust in accordance with its own terms. Likewise, there are no regulatory restrictions on the ability of a trustee to resign without first being replaced by a successor trustee. In both events, the likely effect of a termination or resignation would be to end registration or render the registration ineffective.

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### Endnotes

(1) For a detailed legal analysis of the policy clarification, see 77 FR 6694 (February 9 2012).

(2) This might take the form of a declaration by the trustee in an affidavit submitted in support of a non-citizen trust registration that no such operating agreement has been entered into by the trustee and trustor.

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