

United States Registration of Aircraft
Under Foreign Ownership

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Foreign ownership interest in U.S. registered aircraft is possible through one of several methods accepted by the Federal Aviation Administration. The parties to any aircraft transaction where United States registration is being considered must, however, understand the requirements of United States registration and the vehicles available to satisfy those requirements. As the issues comprising United States Citizenship can be somewhat complex, it is extremely important to research them early in the transaction to avoid insurmountable problems in later stages. The purpose of this article is to provide an overview of the legal issues involved in the United States registration of aircraft, paying particular attention to the ownership interests of individuals or business entities which are not citizens of the United States ("Non-Citizens").

Section 40102 and Section 44101 through Section 44112 of Title 49, United States Code, "Transportation" (the "Act") governs the registration of aircraft and the recording of mortgages, leases, conveyances and other instruments affecting title to or an interest in civil aircraft of the United States. The Federal Aviation Administration, Aircraft Registration Branch (the "FAA") is located in Oklahoma City, Oklahoma. The FAA is the central location in the United States where civil aircraft of the United States ("U.S. Aircraft") are registered. It is also the central filing location for conveyances and encumbrances against U.S. Aircraft, Engines, Propellers and Spare Parts. Federal Aviation Regulations¹ (the "Regulations") have been established by the FAA to carry out the provisions and requirements of the Act.

I. Requirements of U.S. Citizenship

The Act provides, in part, that "[a]n aircraft may be registered under section 44103 of this title only when the aircraft is -- (1) not registered under the laws of a foreign country and is owned by-- (A) a citizen of the United States; (B) an individual citizen of a foreign country lawfully admitted for permanent residence in the United States;"2

"[C]itizen of the United States" is defined under the Act as follows:

(A) an individual who is a citizen of the United States; or

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- (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.³

For the individual, partnership, corporation or association which meets the above definition of citizen of the United States ("U.S. Citizen"), U.S. registration of its aircraft is not overly complex. However, the Non-Citizen must pursue other acceptable methods of U.S. registration. It should be noted that, while the Act provides for U.S. registration of an aircraft in the name of a partnership, the Act limits such registration to partnerships comprised only of U.S. Citizen *individuals*. As a result, any partnership made up of one or more partners which is a corporation (even a U.S. Citizen corporation) fails this statutory test of U.S. Citizenship. Such partnerships cannot register aircraft in the name of the partnership, but must also pursue other acceptable methods of U.S. Registration.

II. Acceptable Methods for Meeting U.S. Citizenship Requirements

A. Ownership Trusts

One method for Non-Citizen individuals or corporations to register aircraft with the FAA is to transfer title to a U.S. Citizen to hold in trust for the benefit of the Non-Citizen. The Trustee can be either an individual or corporation, as long as it meets the Citizenship requirements of the Act. The FAA recognizes this arrangement, often referred to as an owner trust agreement ("Owner Trust Agreement"), as a legitimate vehicle to satisfy the U.S. Citizenship requirements of the Act.⁴

The Owner Trust Agreement creating a trust with one or more Non-Citizen beneficiaries must provide that such beneficiaries will not have more than 25 percent of the aggregate power to direct or remove the trustee; although they may have more than 25 percent of the beneficial interest in the trust. The Trustee must execute and submit to the FAA an Affidavit confirming that fact.⁵

The Trustee must be either a U.S. Citizen or a resident alien. The Trustee must submit with its Application: (i) A copy of each document legally affecting a relationship under the trust; and (ii) the necessary Affidavit regarding citizenship of the Trustee and the beneficiaries under the Owner Trust Agreement.⁶

B. Voting Trusts

One problem commonly faced is a transaction where it is proposed that an aircraft be owned by a United States corporation which meets all of the requirements of U.S. Citizenship under the Act, except that more than 25 percent of the stock of the corporation is owned by a foreign entity. U.S. Registration of an aircraft owned by such a corporation is still possible under the Act. The shareholders of the corporation can transfer at least 75% of the aggregate rights and powers to vote shares to a voting trustee who qualifies as a U.S. Citizen ("Voting Trustee").⁷

As with the Owner Trust Agreement, the executed Voting Trust Agreement must be submitted to the FAA along with the Aircraft Registration Application and evidence of ownership.⁸ In addition, an Affidavit must be executed by the Voting Trustee and submitted to the FAA which confirms, among other things, the Voting Trustee's independence from every other party to the Voting Trust Agreement.⁹

III. Non-Citizen United States Corporations

An aircraft owned by a Non-Citizen corporation which is lawfully organized and doing business under the laws of the United States is also eligible for U.S. registration.¹⁰ The Act provides, in part, that "[a]n aircraft may be registered under section 44103 of this title only when the aircraft is owned by . . . a corporation not a citizen of the United States when the corporation is organized and doing business under the laws of the United States or a State, and the aircraft is based and primarily used in the United States; . . ."¹¹

It should be noted that registration under this provision of the Act is quite restrictive in that the aircraft must be based and primarily used in the United States. According to the Regulations, an aircraft is based and primarily used in the United States if the flight hours accumulated within the United States amount to at least 60 percent of the total flight hours of the aircraft.¹² There is no requirement that the applicant under this provision of the Act meet any of the other requirements of U.S. Citizenship.¹³

A corporation applying for registration under the "based and primarily used" provision of the Act must submit to the FAA the following:

- (1) A certified copy of the Certificate of Incorporation;
- (2) A certification that it is lawfully qualified to do business in one or more states;
- (3) A certification that the aircraft will be based and primarily used in the United States; and
- (4) The address where the records are maintained which contain the total flight hours of the aircraft for three calendar years after the year in which the flight hours were accumulated.¹⁴

IV. Limited Liability Companies

Although not mentioned specifically in the Act, the FAA does allow U.S. registration of aircraft in the name of Limited Liability Companies ("LLC"). As a relatively new business entity in the United States, the FAA has had some difficulty in determining how to apply the U.S. Citizenship test to an LLC. FAA Counsel has stated that each LLC will be evaluated on an individual basis. At least a temporary conclusion has been reached to, as closely as possible, use the standard of U.S. Citizenship applied to corporations under the Act.¹⁵

V. U.S. Registration Procedures and Documentation

A. Evidence of Ownership

An aircraft can be validly registered in the United States only by and in the legal name of its owner.¹⁶ The applicant for U.S. registration of an aircraft must submit evidence of ownership, along with an Aircraft Registration Application. In most transactions, evidence of ownership will be in the form of a Bill of Sale.¹⁷ Under a finance lease, nominal purchase option lease or conditional sale agreement, the lessee or vendee is considered to be the owner for purposes of U.S. registration, and the instrument itself is filed with the FAA as evidence of ownership.¹⁸ Registration under the name of the lessor or vendor under such agreements would be invalid.

B. Application for Certificate of Aircraft Registration

Applying for registration of an aircraft with the FAA is accomplished by submitting to the FAA the required form Aircraft Registration Application (AC Form 8050-1) ("Application"). When the Application is accompanied by sufficient evidence of ownership, the FAA will issue a Certificate of Aircraft Registration (AC Form 8050-3) ("Certificate").

In the case of an aircraft last previously registered with the FAA, once the Application and evidence of ownership have been filed with the FAA, operation of the aircraft is lawful with merely the pink carbon copy of the Application on board.¹⁹ The copy of the Application serves as temporary authority to operate the aircraft without registration.²⁰ Registration of the aircraft is effective on the date and at the time the FAA receives the Application and evidence of ownership.²¹ It should be noted, however, that the pink copy of the Application is not valid for operation of the aircraft outside the United States. The Certificate itself, or its temporary counterpart as described below, is the only sufficient authority to operate a U.S. registered aircraft outside the United States.²²

With respect to aircraft being imported onto the United States Aircraft Registry (aircraft last previously registered in a foreign country) ("Import Aircraft"), registration only becomes effective on the date and at the time the FAA issues the Certificate. As a result, the aircraft cannot be lawfully operated from the time the instruments necessary for registration are filed with the FAA until the Certificate has been placed on board the aircraft. Normally, the applicant will not receive its Certificate for several weeks following the filing of the Application. This can present a burdensome circumstance for the purchaser or the purchaser's lessee if the aircraft is scheduled for revenue-generating flight, or any necessary flight, immediately following the closing.

The FAA recognizes this burden and has, in response, adopted procedures to accommodate the parties to transactions where Import Aircraft are concerned. First, the FAA handles instruments filed for the registration of Import Aircraft on a priority basis. Some additional priority is appointed to those instruments filed to affect the registration of aircraft which are to be operated outside the United States by certificated air carriers.

Secondly, the FAA has adopted a procedure for issuing temporary Certificates of Aircraft Registration ("Temporary Certificate").²³ Special requests can be filed with the FAA, along with the Application, for expedited handling and the issuance of a Temporary Certificate. The Temporary Certificate carries with it authority equivalent to the Certificate for operating the aircraft, but it is valid for a period of only 30 days from the date of issuance.

The most useful aspect of the Temporary Certificate is that a copy is all that need be placed on board the aircraft. Therefore, the Temporary Certificate can be telefaxed to the location of the aircraft immediately after it is issued by the FAA. The purchaser can often return the Import Aircraft to operation within 8 to 24 hours of filing with the FAA.

C. Cancellation of Foreign Registration

Before U.S. Registration of an imported aircraft can occur, the FAA requires evidence that the foreign registration has ended or is invalid.²⁴ In addition, if the country in which the aircraft was last registered has ratified the Convention on the International Recognition of Rights in Aircraft²⁵ (the "Mortgage Convention"), the FAA also requires confirmation from that country that each holder of a recorded right against the aircraft has been satisfied or has consented to the transfer, or that ownership in the country of export has been ended by a sale in execution under the terms of the Mortgage Convention.²⁶

Satisfactory evidence of termination of the foreign registration may be, among other things, a statement by the official having jurisdiction over the national aircraft registry of the foreign country that the registration has ended or is invalid. Such a statement by a foreign aircraft registry official must show that official's name and title and must describe the aircraft by make, model and serial number.²⁷

D. Completion and Execution of Registration Documents

The FAA requires that the Bill of Sale and the Application be signed in ink, with a description of the aircraft which includes manufacturer, model and serial number. The Application must be filled out in its entirety, and, effective January 1, 1995, may no longer contain merely a Post Office Box as the address of the applicant. The Application must also contain the applicant's complete street address.²⁸

Instruments executed on behalf of corporations must be executed by corporate officers, attorneys-in-fact or persons who hold managerial positions with the corporation.²⁹ Every signature

on an instrument submitted to the FAA on behalf of a corporation must indicate the title of the signatory.³⁰ Further details of the requirements of the FAA with respect to acceptable signatories and their supporting documentation are stated in Section 47.13 of Part 47 of the Regulations.

VI. Penalties and Consequences of Invalid Registration

Section 47.43 (a) of the Regulations describes those events which, if true at the time Application is made, render U.S. registration of an aircraft invalid:

- (a) The registration of an aircraft is invalid if, at the time it is made--
 - (1) The aircraft is registered in a foreign country;
 - (2) The applicant is not the owner;
 - (3) The applicant is not qualified to submit an application under this part; or
 - (4) The interest of the applicant in the aircraft was created by a transaction that was not entered into in good faith, but rather was made to avoid (with or without the owner's knowledge) compliance with Section 501 of the Federal Aviation Act of 1958 (49 U.S.C. 1401).³¹

The importance of reference here is to emphasize the need to understand and appropriately apply the statutory requirements of U.S. registration of an aircraft. Owners, lenders and lessees considering U.S. registration should question any proposal of even the slightest deviation from these requirements.

Execution of the Application is a certification that the applicant satisfies the requirements of ownership and citizenship as established by the Act and the Regulations.³² The Application itself states that "[a] false or dishonest answer to any question in this application may be grounds for punishment by fine and/or imprisonment (18 U.S.C. Section 1001)."

Operation of an aircraft in the U.S. under invalid registration is unlawful.³³ Such operation not only carries with it the possibility for civil penalties and action,³⁴ but may have the potential of rendering certain insurance policies invalid.

The perfection of security and other interests in U.S. registered aircraft is directly affected by the validity of such registration.³⁵ If the registration of an aircraft is invalid, the perfection of interests in that aircraft (perfection of which requires recordation under the Act) is in jeopardy.³⁶ Therefore, lenders and other parties in interest should be as concerned about the validity of U.S. registration as they are the recording of instruments establishing their interests.

VII. Aircraft Closing Procedures

A. Location of Closing Documents

In most aircraft transaction closings in the United States it is beneficial if not necessary to the success of the transaction that all of the documents be positioned in Oklahoma City prior to closing. Closing documents can be placed in escrow with law firms or title search companies in Oklahoma City to be released only on the authorization of the party delivering such documents.

In those instances where the parties are requesting the issuance of a Temporary Certificate, the process is expedited when all of the documents required by the FAA for registration of the aircraft have already been received by the FAA or are in position to be filed immediately upon the parties' instructions. Furthermore, the longer the delay between the time closing funds are transferred and the time instruments are filed with the FAA, the greater the exposure of the parties to intervening, adverse filings with the FAA against the equipment.

B. Title Examination, Title Reports and Title Opinions

A title report is the conclusion of an examination of the aircraft, engine, propeller or spare parts records maintained by the FAA under the Act. It is written by a non-lawyer, usually an employee of a title search company. It should state, among other things, the last or current owner of the aircraft and any unreleased interests in the equipment examined.

A title opinion is issued by an Oklahoma City lawyer familiar with the Act, the Regulations and the FAA practices and procedures related thereto. In addition to the information contained in a title report, a title opinion from Oklahoma City counsel can confirm at the time of closing the result of filing certain instruments with the FAA such as mortgages, leases, assignments, releases and title instruments. A lawyer can also give advice with respect to the legal instruments necessary to release and terminate existing encumbrances against the equipment.

It would be imprudent for any purchaser or mortgagee, and in many cases a lessee, to close a transaction concerning an aircraft, engines, propellers or spare parts without the benefit of a title report or title opinion. Reliance solely on the representations of the seller or other parties with respect to title and encumbrances is extremely risky.

C. Escrow of Closing Funds

Besides placing closing documents in escrow in Oklahoma City, another form of escrow agreement used in aircraft transactions involves the transfer of funds related to the transaction. In most transactions involving expensive aircraft funds are paid directly from one party to another by wire transfer. In some transactions, however, it is either necessary or desirable to place funds with a bank, law firm or other neutral entity who will act as escrow agent for the parties.³⁷

Parties entering an escrow arrangement with respect to funds should follow certain minimum safeguards. There should always be a written escrow agreement. The agreement should contain the

preconditions to the release of documents and funds from the escrow. The agreement should further provide that any instruction given to the escrow agent must be in writing and communicated to the escrow agent by telefax transmission with copies by telefax to the other parties to the escrow.

VIII. Conclusion

Foreign ownership interest in United States registered aircraft is possible through the use of Owner Trust Agreements, Voting Trust Agreements and Limited Liability Companies, and through Non-Citizen U.S. corporations when the aircraft will be based and primarily used in the U.S.

Nevertheless, a thorough understanding of the requirements of the Act and the Regulations with respect to U.S. registration is important to the success of any aircraft transaction in the United States. Improper registration in the United States has a potentially negative effect on every aspect of an aircraft transaction, from the perfection of mortgage and other interests to the effective coverage of insurance policies and the potential for fines and other legal action by the FAA.

FOOTNOTES

¹ As used herein, Federal Aviation Regulations, 14 CFR Part 45, 47 and 49, hereinafter cited as FAR.

² 49 U.S.C. 44102 (a)(1).

³ 49 U.S.C. 40102 (a)(15).

⁴ FAR, pt. 47, 47.7 (c).

⁵ FAR, pt. 47, 47.7 (c)(2)(iii) and 47.7 (c)(3). 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, the Trustee must execute and submit an Affidavit to that effect. (FAR, pt. 47, 47.7 (c)(2)(ii)).

⁶ FAR, pt. 47, 47.7 (c). It is unlawful for any person or entity to hold title for the benefit of, or as nominee or agent for, another individual or corporation, unless a written Trust Agreement exists, and that agreement has been submitted to the FAA for approval.

⁷ FAR, pt. 47, 47.8.

⁸ FAR, pt. 47, 47.8 (a)(1).

⁹ FAR, pt. 47, 47.8 (a)(2).

¹⁰ 49 U.S.C. 44102 (a)(1)(C).

¹¹ *Id.*

¹² FAR, pt. 47, 47.9 (b). The period used by the FAA to calculate 60 percent of flight hours is the remainder of the registration month and the succeeding 6 calendar months, and each 6 calendar month period thereafter.

¹³ 49 U.S.C. 44102 (a)(1)(C).

¹⁴ FAR, pt. 47, 47.9 (a) and 47.9 (e).

¹⁵ Although it is beyond the scope of this article, in the author's experience, parties are beginning to successfully utilize LLC's in aircraft transactions involving some Non-Citizen members. Legal consultation early in the transaction is advisable, in order to allow sufficient time to work with FAA Counsel in forming an LLC that works for purposes of U.S. registration within the provisions of the Act and the Regulations.

¹⁶ 49 U.S.C. 44103 (a). FAR, pt. 47, 47.5 (b).

¹⁷ While the FAA provides a form Bill of Sale (FAA AC Form 8050-2) it is not mandatory that the form be used. It is acceptable to file a long form or warranty Bill of Sale as evidence of ownership.

¹⁸ FAR, pt. 47, 47.11. For a thorough discussion of the position of FAA counsel with respect to these instruments, See 55 Fed. Reg. 40,502.

¹⁹ FAR, pt. 47, 47.31 (b).

²⁰ *Id.*

²¹ FAR, pt. 47, 47.39 (a).

²² See the Convention on International Civil Aviation ("The Chicago Convention"), signed at Chicago, December, 1944. It would be a violation of the Chicago Convention for the FAA to permit aircraft to engage in international navigation without a Certificate of Aircraft Registration on board. *Id. at Art 29 (a).*

²³ 53 Fed. Reg. 50,208.

²⁴ FAR, pt. 47, 47.37 (a)(3)(i).

²⁵ 4 U.S.T. 1830.

²⁶ FAR, pt. 47, 47.37 (a)(3)(ii).

²⁷ FAR, pt. 47, 47.37 (b)(1).

²⁸ 59 Fed. Reg., No. 202, p. 53,0XX.

²⁹ FAR pt. 47, 47.13. If the signatory on behalf of a corporation is a person in a managerial position, his or her title should contain the word "Manager." Otherwise, the author advises parties to have a corporate officer, director or attorney-in-fact execute the instrument.

³⁰ FAR, pt. 47, 47.13 (d)(2).

³¹ FAR, pt. 47, 47.43 (a). The citation to the Act in Section 47.43 (a)(4) is to the Act prior to the 1994 recodification. The equivalent cite is now 49 U.S.C. 44101 through 44106.

³² See FAA AC Form 8050-1 (12/90), Aircraft Registration Application.

³³ 49 U.S.C. 44101 (a).

³⁴ 49 U.S.C. Chapter 463, Penalties.

³⁵ Section 44107 of the Act provides authority to the Administrator of the FAA to establish a system for recording conveyances which affect an interest in "civil aircraft of the United States." 49 U.S.C. 44107. Section 40102 of the Act defines "civil aircraft of the United States" as an aircraft *registered under the Act*. 49 U.S.C. 40102 (17). Under this provision of the Act, lenders and other parties to instruments creating interests in U.S. registered aircraft perfect those interests by recording the instrument with the FAA.

³⁶ See Footnote 32.

³⁷ When using an escrow agent, parties often place closing funds and documents together with the same escrow agent in Oklahoma City. The escrow agent can then make the wire fund transfer simultaneously with the filing of closing documents with the FAA.