

FAA Finishes Its Evaluation of Non-U.S. Citizen Trusts for Aircraft Ownership

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The Federal Aviation Administration (FAA) has made a final decision that preserves (with modest and predictable conditions) the ability to use ownership trusts to establish U.S. citizenship when registering an aircraft with the U.S. Civil Aviation Registry (U.S. Registry). Among other things, the FAA's "Notice of Policy Clarification" highlights the uniqueness of the U.S. owner-registry regime in contrast to the more common operator-registry regime used by other countries.

Background—Use of Trusts by Foreign Owner-Operators

In order to be listed in the U.S. Registry (and bear the coveted "N" registration), an aircraft must be owned by a "Citizen of the United States" (49 USC 44102). Aircraft owners who are not U.S. citizens seeking to secure the advantages of the U.S. Registry (including perceived safety and ease of financing) have long employed ownership trusts where the trust itself is a U.S. citizen and the non-U.S. owner is the trust beneficiary. For the trust to remain a U.S. citizen, it must itself be a U.S. entity and the trustee must have a high degree of independence from non-U.S. influence or control. Once the citizenship of the trust is established, U.S. registration is permitted and the trust beneficiary is free to operate the U.S.-registered aircraft regardless of the trust beneficiary's nationality. The U.S. owner registry system has no concern over the citizenship of the operator of an aircraft, in stark contrast to most national registries, which focus on the operator. The trustee's role as owner of the U.S.-registered aircraft is ministerial—passing correspondence to the trust beneficiary, entering into documents relating to ownership, leasing and financing and interfacing as necessary with the trust beneficiary and financiers.

The FAA's decision to re-examine its policy on ownership trusts was the result of an incident where the FAA, in exercising its role as safety regulator, was unable to determine from an owner-trustee the specifics of an aircraft's operator or the aircraft's location or condition. This was not a surprise to most professionals familiar with aircraft trust operations because, as noted, owner-trustees are not actively involved in the aircraft's operations. The FAA saw this as a significant impairment of its ability to monitor the operations, control and maintenance status of the U.S.-registered fleet of aircraft. In April 2011, the FAA initiated a formal process to resolve this problem.

The FAA's examination of policy impacted two major constituencies: Foreign owners of business aircraft and foreign lessors of commercial aircraft. The business aircraft community was concerned that it might lose the ability to use the U.S. registration system, and the commercial aircraft community was concerned that the efficient and well-established trust structure would be made less efficient. The resulting policy clarification achieved the FAA's objective of greater access to operator information without adversely affecting the existing uses of trusts.

New Requirements—Remaining Questions

The policy clarification requires that the trustee maintain current information about the identity of the operator of its aircraft, the address of the operator, the location of the aircraft records, the base of operations and the nature of its operations. As a guideline (and not a requirement), the owner-trustee should be able to provide the FAA with this information within two business days. Again, as a guideline and not a requirement, the FAA expects that the owner-trustee be able to provide more details, including specific information on aircraft operations, crew, maintenance and other records and its airworthiness status, within five business days. The FAA stresses that these requirements are flexible, and in circumstances where this information is otherwise readily available (*e.g.*, aircraft operated by commercial airlines, or managed by a fractional ownership company), the requirements will be adapted to the situation.

The practical impact of the above changes is that trust agreements are going to put very specific and detailed reporting obligations on the trust beneficiary to keep the trustee informed proactively, and will require beneficiaries to be responsive to factual inquiries from the trustee. Even with these contractual backstops, the FAA has put a spotlight on the trustee as having direct responsibility and liability for the aircraft's operation and maintenance. This additional risk will be addressed with a greater focus on insurance requirements in the trust documents (trustees being named as direct or additional insureds under liability policies, with proof of insurance being required at trust inception).

The FAA's policy clarification states that to qualify a trust as a U.S. citizen, the trust must file with the FAA not only the trust agreement, but also any document "legally affecting a relationship under the trust." In effect, any ancillary document between the beneficiary and the trustee will need to be filed. The intent of this requirement is to prevent the trustee and the beneficiary from varying the control provisions of the trust agreement in a separate document, thus giving the beneficiary excessive control of the trust. Any agreement relating to the control and use of the aircraft (including any aircraft operating agreement, lease or side letters) would need to be filed. Previously, the FAA would consider the trust agreement alone and determine citizenship on that basis.

In an unusual move (and a concession to the business aviation industry), the FAA has agreed to return to the applicant any ancillary documents that are submitted with the trust agreement, after they have been reviewed and provided that the trust is approved by the FAA as a U.S. citizen. The FAA will retain only a "brief summary of the review." It is not stated in the policy clarification whether this summary includes the identity of the beneficiary. This may prove troubling to beneficiaries that wish to remain anonymous because it is likely that this summary of the review can be obtained by the public through a Freedom of Information Act request.

Notably, if the FAA determines that the trust does not meet legal requirements for citizenship, it will then retain the ancillary documents in order to deal with potential litigation arising from an appeal of a rejected application. Again, the policy clarification is not clear on whether the applicant can re-file revised documents and subsequently clear the file of identifying information.

If you have any questions about the use of trusts, or alternate means of registering an aircraft under the U.S. Registry, please contact the undersigned.