Hot Topics and Current Issues Related to Aircraft Ownership, Cost Sharing, and a Case in Point if the Law is Not Followed

Katherine Staton
Jackson Walker LLP

Recommended Citation
Katherine Staton, Hot Topics and Current Issues Related to Aircraft Ownership, Cost Sharing, and a Case in Point if the Law is Not Followed, 88 J. AIR L. & COM. 601 (2023)

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
HOT TOPICS AND CURRENT ISSUES RELATED TO AIRCRAFT OWNERSHIP, COST SHARING, AND A CASE IN POINT IF THE LAW IS NOT FOLLOWED

KATHERINE STATON*

ABSTRACT

This paper will explore the issues encountered when multiple users and/or entities purchase or sell an aircraft for business or personal use, which commonly involve the navigation of and compliance with Federal Aviation Administration (FAA) and Internal Revenue Service (IRS) regulations and accompanying federal statutes. This paper will also address the ownership of aircraft by multiple individuals and/or entities, and then operations under various ownership structures. Where multiple aircraft owners are involved, the utilization of dry leases, time sharing agreements, interchange agreements, and co-owner/joint-ownership agreements may be used to navigate FAA and IRS regulations and rules. Also, co-owning an aircraft, but not actually having “ownership” of the aircraft, through another company (an off balance sheet entity for example) will be addressed. Aircraft owned through an owner trust can also provide anonymity, ownership advantages, and can help navigate ownership registration issues. This paper will also address the U.S. Eastern District Federal Court Criminal Organized Crime and Drug Task Force Enforcement prosecution case against an aviation escrow, title, and trust company; along with the principals

DOI: https://doi.org/10.25172/jalc.8.3.3

* Katherine A. Staton is a law partner with Jackson Walker LLP in Dallas, Texas, and practices aviation transactional work assisting with the purchase, sale and operation of aircraft. Ms. Staton is a graduate of the SMU Dedman School of Law, and was a Citations Editor for the Journal of Air Law & Commerce when she attended SMU. Ms. Staton is also a Certified Public Accountant. Special thanks to my colleagues at Jackson Walker, Jim Struble and Ashley Withers, to Chris Broyhill at AirComp Calculator, LLC, to Kim Thompson at Insured Aircraft Title Service, LLC and to Jeffrey Towers at TVPX for their input and review of this paper.

601
of those companies, which involved aircraft registration, sale, and ownership issues.

TABLE OF CONTENTS

I. INTRODUCTION .................................. 603
II. AIRCRAFT CO-OWNERSHIP AND JOINT
OWNERSHIP OPTIONS AND STRUCTURES .... 604
   A. Aircraft Ownership ............................ 605
   B. Part 91 and Part 135 Operations ............ 607
   C. Operational Control ........................ 608
   D. Different Ways to Own Aircraft .......... 610
      1. Individual Ownership .................... 611
      2. Partnership .................................. 611
      3. Corporations (S Corp and C Corp) ....... 612
      4. Limited Liability Company (LLC) .......... 613
   E. Shared Aircraft Ownership Alternatives ... 615
      1. Co-Ownership vs. Joint Ownership of Aircraft .. 615
      2. Shared Aircraft .............................. 616
      3. Fractional Ownership ....................... 616
III. OPERATION OF CO-OWNED AIRCRAFT, COSTS,
     AND AGREEMENTS ............................... 617
   A. Shared Ownership ............................ 617
   B. Co-Ownership ................................. 618
   C. Exceptions to Part 91 Compensation Rules . 618
      1. Time Share .................................. 619
      2. Inter-Company Operations ................. 619
      3. Interchange ................................ 620
      4. Joint Ownership ............................. 621
      5. Dry Leases .................................. 621
IV. OWNERSHIP ALTERNATIVE ..................... 623
   A. Trusts ....................................... 623
      1. Off-Book Ownership ....................... 627
V. THE GUARANTY CORPORATION TRUST
   INDICTMENT AND THE IMPACT OF THIS
   INDICTMENT ..................................... 627
   A. The Facts and the Indictment ............... 628
   B. Aircraft Ownership, Registration, and
      Export Claims ................................ 629
   C. Aircraft Deregistering ....................... 630
   D. Aircraft Trust Issues ....................... 630
   E. The Ramifications and Changes to the
      Aviation Industry ............................ 630
VI. CONCLUSION ..................................... 631
I. INTRODUCTION

When multiple users and/or entities purchase an aircraft for business or personal use, there are numerous issues which need to be addressed. Among the most important of these include navigation of and compliance with Federal Aviation Administration (FAA) and Internal Revenue Service (IRS) regulations and accompanying federal statutes. Aircraft co-owners\(^1\) cannot simply share or charge one another for flight costs without careful observance of these regulations and statutes, and the ownership structures and the related agreements that must accompany the use of aircraft that are co-owned can be complex and involve multiple tradeoffs to ensure compliance.

This paper and presentation will address the ownership of aircraft by multiple individuals and/or entities, and then operations under various ownership structures.\(^2\) These structures include multiple personnel possessing aircraft as co-owners or joint owners in their individual or corporate capacities, and, at times, the utilization of corporate or entity structures for ownership such as special purpose entities like limited liability companies (LLCs). Where multiple aircraft owners are involved, the utilization of dry leases, time sharing agreements, interchange agreements, and co-owner/joint ownership agreements may be used to navigate FAA and IRS regulations and rules. Also, co-owning an aircraft, but not actually having “ownership” of the aircraft, through another company (an off balance sheet entity for example) may be attractive to companies and individuals who do not want the aircraft listed as an asset on their books, the management responsibility, or operational liability. Aircraft owned through an owner trust can also provide anonymity, ownership advantages, and can help navigate ownership registration issues. All of these structures and agreements will be explored.

This paper will end with a sobering analysis and discussion of the U.S. Eastern District Federal Court Criminal Organized Crime and Drug Task Force Enforcement prosecution case against aviation escrow, title and trust companies, along with the principals of those companies, which involve alleged illegal re-

---

\(^{1}\) The term co-owner is used generally in the paper to mean more than one aircraft owner; but as to aircraft cost sharing, the terms co-ownership and joint ownership have specific meanings. See infra Section II(E).

\(^{2}\) This paper and presentation will not address the Family Office or Family Structure ownership structure.
gistration, sale, and ownership of aircraft, along with claims of money laundering and drug sales. That case exemplifies what may happen, civilly and criminally, if laws are not followed as to the registration and ownership of aircraft. This case will likely be tried shortly after this presentation is given.

II. AIRCRAFT CO-OWNERSHIP AND JOINT OWNERSHIP OPTIONS AND STRUCTURES

Options for the shared ownership of aircraft are diverse. The analysis of how to own an aircraft is complicated, particularly when more than one person or entity has an ownership interest in the aircraft. Co- or joint ownership allows for the sharing of costs and may reduce the aircraft fixed costs, while allowing for the aircraft to be operated by others so that the aircraft is not underutilized. This is very attractive for many individuals and companies to defray costs while operating the aircraft. However, that co-ownership must comply with 14 C.F.R. Part 91 and its general rule that there is no compensation for Part 91 flights. It must also not infringe upon 14 C.F.R. Part 135, which regulates on-demand air carrier transportation.

While multiple aircraft ownership may allow for the owners to make charges or allow reimbursements of flight costs, there needs to be specific documentation related to that ownership and accompanying operations. Often, when individuals or companies buy an aircraft, they spend too little time consulting with a knowledgeable aviation attorney or Certified Public Accountant (CPA) to determine the best way in which to own it. Sometimes the seller, the broker, or the pilot involved in the transaction will be the source of counsel and advice, but these personnel rarely possess the depth of knowledge required to navigate all the complexities of that decision. It is crucial to structure the ownership correctly upfront to accomplish the goals of owners while complying with operational and accounting issues pre- and post-closing. Consulting with an attorney and accountant who specialize in aviation ownership and transac-

---

7 Id. See generally 49 U.S.C. §§ 44101–44103 (aircraft should be registered before operating in U.S.).
tions is essential to make sure all rules, statutes, regulations, and pitfalls are observed or avoided.

The ownership, liability, and cost sharing considerations must be balanced with a thorough analysis and investigation as to what insurance is available for the aircraft operations. The type of entity that will operate the aircraft can impact the type and amount of insurance available. If the aircraft will not be operated by a management company or Part 135 operation, then the available insurance may be limited or more expensive to secure.8 A general rule is to get as much liability insurance as possible for aircraft operations. An advantage of having a management company or Part 135 operator involved in the aircraft management and operations is that many times these entities have higher insurance coverage limits (for example $250,000,000 to $500,000,000 in coverage for general liability), which allows for some of the operational liability to be managed through the larger insurance coverage limits.9 Consulting with a skilled and reputable insurance broker or representative is advisable when considering aircraft ownership and the related insurance for the aircraft.

A. AIRCRAFT OWNERSHIP

First, an understanding of who may own an aircraft is necessary. If ownership is through an entity that does not comply with the United States Transportation Code, 49 U.S.C. § 44102, et seq. (U.S. citizenship), then the aircraft cannot be legally operated in the United States.10 An aircraft may be registered only in the name of an owner.11 An aircraft is eligible for U.S. registration if it is not already registered in another country and it is owned by:

- an individual who is a U.S. citizen;
- an individual who is a resident alien (citizen of a foreign country lawfully admitted to the U.S. for permanent residence);
- a partnership, whose partners, generally and limited, are individuals who are U.S. citizens;

---

9 See, e.g., id.
10 49 U.S.C. § 44105; see also 14 C.F.R. § 47.3 (2023).
• a corporation or association (including LLCs, business trusts, and statutory trusts):
  ° organized under the laws of the U.S. or a state, the District of Columbia, or a U.S. territory or possession of the U.S.;
  ° of which the President and at least two-thirds of the board of directors and other managing officers are U.S. citizens and under the actual control of U.S. Citizens; and
  ° in which at least 75% of the voting interest is owned or controlled by persons who are U.S. citizens;
• a U.S. government unit or subdivision; or
• a non-U.S. citizen corporation organized and doing business under the laws of the U.S. or one of the states as long as the aircraft is based and primarily used in the U.S. (60% of all flight hours must be from flights starting and ending within the U.S.).

Both corporations and LLCs face a three-pronged citizenship test, as outlined above, and in every instance, each Member and each Manager must be a U.S. citizen.

For corporations that fail the citizenship test of 49 U.S.C. 44102(a)(1)(C), but were formed and also operate in the U.S., there is another statutory alternative. That corporation may register the aircraft in the U.S. if the aircraft is based in the U.S. and at least 60% of the aircraft’s total flight hours in each six month period of ownership are in the U.S. This exception for corporations to the U.S. citizenship requirement is often referred to as “BAPU,” which refers to the “based and primarily used” requirement of the statute, but this exception has limitations which are notable and add complexity to the operation of the aircraft. Some of the limitations include: BAPU is available only to a corporation and not an LLC; at least 60% of the total flight hours for the aircraft for each six month period must be within the U.S.; these U.S. flights must be non-stop, point to point U.S. flights (except for emergencies or refueling); and

---

12 49 U.S.C. § 40102(a)(15); 49 U.S.C. § 44102(a)(1); see also 14 C.F.R. §§ 47.2, 47.9 (2023). Co-owners of aircraft may qualify to register an aircraft under § 44102(a) if each co-owner qualifies as to the ownership requirements of § 44102(a)(1).
14 See 14 C.F.R. §§ 47.9(b)–(c), (e), (f) (2023), for additional FAA reporting and compliance requirements; see also 49 U.S.C. § 44102(a)(1)(C) (2023).
15 14 C.F.R. §§ 47.9(a)–(c), (e), (f) (2023).
there is mandatory reporting that must be filed with the FAA every six months to maintain this BAPU exception.\textsuperscript{16}

Partnerships must also comply with 49 U.S.C. § 40102. All of the partners, general and limited, must be individual U.S. citizens.\textsuperscript{17} Sometimes aircraft owned by a partnership are illegally registered due to the misunderstanding of the requirements for ownership when the aircraft was registered. Often an entity is used as the general partner,\textsuperscript{18} which runs the partnership and has unlimited liability, but this general partner does not qualify as a U.S. citizen. If the aircraft registration is not valid or effective, that ownership may be subject to suspension or revocation, seizure, and potential civil and criminal penalties.\textsuperscript{19}

\section*{B. Part 91 and Part 135 Operations}

Before discussing co-ownership or joint ownership, a basic understanding of aircraft operations under 14 C.F.R. Parts 91 (General Flight Rules) and 135 (Commercial On-Demand Operations) is needed to frame the rules pertaining to both types of co-owners.\textsuperscript{20}

Generally, business aircraft are operated under Part 91 or Part 135. Under Part 91 operations (or non-commercial private air transportation), no air carrier certificate is required and these flight operations involve no compensation for the provision of the transportation.\textsuperscript{21} Part 91 operations have more operational flexibility as there are no specific crew time limits, no drug or alcohol testing required, less restrictive runway and weather requirements,\textsuperscript{22} and less FAA oversight.\textsuperscript{23} Part 91 also provides for fractional aircraft operations\textsuperscript{24} and for operation of large (greater than 12,500 pounds) fixed wing aircraft.\textsuperscript{25} Part 91 operations may, however, allow limited ability to recover costs associ-

\textsuperscript{16} Id.
\textsuperscript{17} 49 U.S.C. § 40102(a)(15).
\textsuperscript{18} All general partners must be listed on FAA AC Form 8050-1 Aircraft Registration.
\textsuperscript{19} 49 U.S.C. §§ 44105, 46301, 46304, 46306.
\textsuperscript{20} This paper will not address operations under 14 C.F.R. Part 121 (Scheduled Air Carrier Operations) or Part 125 (large aircraft, 20+ passenger operations).
\textsuperscript{21} In limited circumstances, there can be payment for fuel and limited operational expenses. 14 C.F.R. § 91.501(d) (2023); see discussion infra Section II(C).
\textsuperscript{22} See 14 C.F.R. §§ 91.155, 91.157, 91.169, 91.175, 91.177 (2023).
\textsuperscript{23} See generally 14 C.F.R. § 91, (C) (2023).
\textsuperscript{25} 14 C.F.R. § 91.501 (2023).
ated with aircraft use. Operational control rests with the owner, so there is potentially greater civil and regulatory liability under Part 91 operations.

Part 135 operations, on the other hand, provide for air carriage, transport for hire, and compensation. This type of air transportation requires an air carrier certificate. Part 135 operations are more regulated and have limits on crew duty times, drug and alcohol testing, runway length and weather reporting restrictions, visibility and ceiling requirements, and aircraft proving tests. The Part 135 operator is the entity which has operational control of the aircraft. Management companies often also possess air carrier certificates and operate individual and corporate aircraft under Part 135. This allows the management company to conduct flights for hire when the owner is not flying the aircraft and allows the owner to offset some costs with charter revenue. An owner may operate their own flights under Part 135, with a management company having operational control, thus shifting operational liability from the owner(s) to the management company for owner flights.

Compensation requiring Part 135 certification is broadly construed by the FAA. Favors, gratuities, and nominal charges have been interpreted by the FAA to be compensation for air travel, which puts the operation under Part 135 instead of Part 91 because the operator is engaged in the carriage of persons or property for compensation or hire.

C. Operational Control

Per the FAA, “[o]perational control, with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight.” This is an important definition, as the entity with operational control of the flight determines whether the flight is operated under 14 C.F.R. Part 91 or Part 135, and this is often a question of substance over form, especially when

26 See infra Section II(A). As to recovery of operating expenses, see 14 C.F.R. § 91.501(d) (2023).
29 Additionally, Part 135 operations in some states, like Texas, lead to more favorable annual property taxes. See, e.g., Tex. Tax Code Ann. § 21.05 (Vernon 1989).
30 FED. AVIATION ADMIN., ADVISORY CIRCULAR 120–12A, PRIVATE CARRIAGE VER- SUS COMMON CARRIAGE OF PERSONS OR PROPERTY (1986).
31 14 C.F.R. § 1.1 n. 4, 5.
an aircraft is held in a single purpose entity and operates for multiple owners. Hence, how aircraft are registered may impact operations under Part 91 and Part 135. Purchasers of aircraft often consider placing their aircraft in a separate single-purpose entity that would own and operate the aircraft, with no other business assets, as a structure to shield them from liability. But there is a significant issue here if these owners want to operate the aircraft under Part 91. To operate under Part 91, the entity operating the aircraft must have a “primary business” or “major enterprise” purpose other than the transportation by air, meaning the entity cannot have the sole purpose of holding the aircraft. So, the structure with two single or sole purpose LLC co-owners’s entities cannot look like the below diagram (or variations of the below diagram), as this would constitute “flight departments” per the FAA:

![Diagram of aircraft ownership structure]

The FAA asks “whether the carriage by air is merely incidental to the person’s other business or is, in itself, a major enterprise for profit.” There are some exceptions under Subpart F to Part 91 (Part 91.501, formerly known as 91.181), such as intra-corporate family operations are an exception to the general rule that commercial operations are not allowed under 14 C.F.R. § 91. Under 14 C.F.R. § 91.501(b)(5):

Carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any
porate family operations, joint ownership, timesharing, demonstration flights, and interchange agreements. If the single purpose entity (i.e., LLC or corporation) owns and operates the aircraft without having another business purpose, the FAA considers the operator a commercial operator or a Flight Department Company. And that entity would need to operate under an air carrier certificate. An entity which operates an aircraft commercially without a commercial certificate is subject to civil penalties. Additionally, other consequences of improper single-purpose entity operations may result in loss of insurance for the illegally operated flights, possible certificate action, and tax issues.

If an aircraft is placed into an entity whose primary purpose is the aircraft ownership, that entity may act as a leasing company and execute dry leases to those using the aircraft to avoid the flight department rule and associated fines and fees—these leases will be explored further in Section III(C)(5) below.

D. Different Ways to Own an Aircraft

Aircraft ownership with multiple owners can be held individually, in a sole proprietorship, corporation, partnership, or a limited liability company. There are benefits and risks to each way to own and hold an aircraft ownership interest. Presented below is a high-level summary of different ownership options that multiple owners of aircraft generally consider. These considerations are very important, as how the aircraft ownership is structured may have a decisive impact on whether any tax benefits are available related to the aircraft and how the aircraft may be operated and expenses allocated per the Federal Aviation Regulations (FARs).

kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company.

14 C.F.R. § 91.501(b)(5) (2023). This section does not apply when the sole purpose of the company is the ownership of the aircraft. The company owning the aircraft must have a primary business purpose other than the ownership of the aircraft for this exception to apply.

36 See infra Section III(C) for discussion of exceptions under 14 C.F.R. § 91.501(b) (2023).
38 Id.
1. **Individual ownership**

Individuals may choose to own part of an aircraft in his or her individual capacity for many reasons. For example, some individuals consider placing their aircraft interest in a single purpose LLC (with the individual as the sole member) in an attempt to shield themselves from liability; however, such individuals end up with operational control of the aircraft through the required dry lease of the aircraft from the single purpose LLC, thus subjecting that individual to the operational liability he or she was trying to avoid in the first place.\(^{40}\) When individuals own aircraft in their individual capacity, they cannot shift operational control and thus liability to another individual or entity.\(^{41}\) Each individual person who owns an interest in an aircraft must register his or her aircraft interest as an individual.\(^{42}\) Under this ownership structure, all income and expense is examined on an individual basis and flows through to that individual’s federal income tax return accordingly.\(^{43}\) If the aircraft flights are operated under Part 91 operations, and that individual is in operational control of the aircraft during operations, then that individual owner has liability for the aircraft’s flight operations. That individual may shift operational control of flights to a Part 135 air carrier, when the flights are under that Part 135 air carrier’s certificate.

2. **Partnership**

A partnership generally is a relationship between two or more people or entities to conduct a trade or business.\(^{44}\) A partnership must also register its ownership of an aircraft with the FAA,\(^{45}\) and all general partners must be listed on FAA AC Form 8050-1 Aircraft Registration.\(^{46}\) Partnerships are formed at the state level, have a single level of taxation, and provide partners a great deal of flexibility in operating the partnership and capital.

\(^{40}\) See *infra* Section III(C)(5) for a discussion of dry leases and liability consideration.

\(^{41}\) Part 135 operations are an alternative for an individual to operate an aircraft and shift liability to the Part 135 air carrier, but many individuals do not want to be limited by the Part 135 operational limitations.

\(^{42}\) *Fed. Aviation Admin.*, AC Form 8050-1 Aircraft Registration.

\(^{43}\) See generally I.R.C. subtitle A, ch.1, subchapter I, pt. I.

\(^{44}\) I.R.C. §§ 761(a), 7701(a)(2).

\(^{45}\) *Fed. Aviation Admin.*, AC Form 8050-1 Aircraft Registration.

\(^{46}\) 14 C.F.R. § 47.13(e) (2023).
structures.\textsuperscript{47} Also, the general partner runs the partnership, and all liability flows through the general partner.\textsuperscript{48} But, as mentioned before, all partners must be an individual who is a U.S. citizen, and this may limit a partnership from owning an aircraft interest.\textsuperscript{49}

3. Corporation (C Corp and S Corp)

A corporation is an organization incorporated in the state in which it is located. A corporation must also register its ownership with the FAA.\textsuperscript{50} A corporation must submit to the FAA a FAA AC Form 8050-1, a certified copy of its certificate of incorporation, a certification that it is lawfully qualified to do business in one or more state, a certification of where the aircraft will be primarily based and used in the U.S., and a location of the aircraft flight logs.\textsuperscript{51} Chapter C corporations (C corps) are subject to full double taxation, first at the corporate level (on its net income or loss (income less expenses)), and then at the individual shareholder level on any distributed dividends.\textsuperscript{52} Due to this two-level tax structure, shareholders cannot personally deduct any losses of the corporation. There are distribution of income requirements for C corps, but the tax rate of C corps is at a historically low 21%.\textsuperscript{53}

Chapter S corporations (S corps) (small business corporations) are corporations that elect to pass corporate income, losses, deductions, and credits through to shareholders. For federal income tax purposes, S corps are subject to a single level of taxation (taxation at the shareholder level at the shareholder’s individual tax rate) for many purposes (but not all), and there are strict eligibility requirements that make S corps inflexible in terms of the identity of owners and capital structure.\textsuperscript{54} The S corp election (the decision to operate as an S corp) must be made in a timely manner.\textsuperscript{55}

\textsuperscript{47} See generally I.R.C. subtitle A, ch.1, subchapter K.
\textsuperscript{48} See, e.g., Del. Code Ann. tit. 6, § 17-403 (West 2021).
\textsuperscript{49} 49 U.S.C. § 44102(a)(1).
\textsuperscript{50} 14 C.F.R. §§ 47.9, 47.13 (2023).
\textsuperscript{51} 14 C.F.R. § 47.9(a) (2023).
\textsuperscript{52} See generally I.R.C. § 311.
\textsuperscript{53} Note that a new 15\% book tax enacted under the Inflation Reduction Act can apply to certain C corps.
\textsuperscript{54} See generally I.R.C. subtitle A, ch.1, subchapter S.
\textsuperscript{55} I.R.C. § 1362.
Many times, a C corp is chosen for an entity to serve as a “blocker” so income can get blocked in that corporate entity and does not automatically flow through to owners (which may be an issue with foreign owners who are shareholders in the C corp). Sometimes a C corp is chosen for a large entity, which is run by a Board of Directors. The C corp shareholders, who invested in the C corp, do not run the company and have little say so in the Board’s operation and day-to-day running of the C corp. As to aircraft ownership, sometimes an aircraft is placed into a C or S corp that has another business purpose and may be a subsidiary of a larger parent corporation. The aircraft is then on the C or S corp’s balance sheet and since the corporation has another business purpose other than solely owning the aircraft, there is no need for a dry lease to operate the aircraft through the C corp, and the aircraft can be used as part of the corporate operations. However, aircraft may not be eligible to be owned by a C corp if the corporation cannot satisfy the citizenship test. In some cases, as discussed below, the corporation may own aircraft that are placed in a non-citizen trust (NCT) which solves the citizenship issue, makes FAA compliance easier for the corporation, or the trust may simply provide privacy as to the corporate aircraft operations.

4. Limited Liability Company (LLC)

An LLC limits liability exposure for its members by protecting each member’s personal assets from another LLC member’s claim. The LLC does not protect the LLC member from their acts or inactions as related to the flight operations of an aircraft placed in an LLC. The LLC must also register its ownership with the FAA. LLCs are formed at the state level; there are fewer compliance requirements and fewer restrictions as to who can participate as a member and the number of members; management of an LLC is easier compared to other corporate structures; and the members’ liability is limited to each member’s interest (each LLC member is insulated from the liability of another member), with the expenses and income flowing through to each member for federal income tax purposes. Often, an LLC is chosen for smaller entities and operations such as air-

---

57 See infra Section IV(A) for discussion of the use of NCT.
58 See, e.g., DEL. CODE ANN. tit. 6, § 18-303 (West 2023).
craft ownership and operations due to an LLC’s simplicity in operation and management. A state-level LLC is treated as a partnership for tax purposes if it has more than two owners and is treated as a disregarded entity if it has one owner. A disregarded entity is an entity that is not treated as separate from its owner for federal income tax purposes.

Analysis with tax/accounting and aviation counsel as to how to own the aircraft purchase must be accomplished, as this analysis may have significant impact on the aircraft ownership, income allocations, and availability of depreciation and deductible aircraft expenses. For example, if an aircraft is held in a single-purpose LLC (to limit liability of the aircraft usage) with two members to be operated under Part 91 for each owner’s business (each owner has a manufacturing business, one for the production of beauty cosmetic products and the other for the production of bowling balls), with the aircraft being the only asset of the LLC, the IRS treats the LLC (a tax partnership) as the taxpayer and all Qualified Business Use (QBU) must be that of the LLC’s (and not the individual members). If QBU at the LLC level is not established, (and QBU generally cannot be met when the aircraft is only dry leased to the LLC members) then the bonus depreciation deduction in the example noted above cannot be taken, and you will likely have some very unhappy LLC members.

60 Treas. Reg. § 301.7701-3(b). A domestic LLC with at least two members or a single-member LLC treated as a disregarded entity may file an IRS Form 8832 to elect to be treated as a corporation rather than a partnership or disregarded entity. Id.
61 See id.
62 Each owner would have a dry lease with the LLC. See generally Fed. Aviation Admin., Advisory Circular 91-37(B), Truth in Leasing, 1, 3–5 (2016).
63 QBU means the aircraft must be predominantly used in the generation of business income to allow depreciation and must meet very strict and certain requirements of QBU under Internal Revenue Code Section 280F. I.R.C. § 280F(b)(1)–(2).
64 QBU means the aircraft must be predominantly used in the generation of business income to allow depreciation and must meet very strict and certain requirements of QBU under Internal Revenue Code Section 280F. I.R.C. § 280F(b)(1)–(2).
65 The QBU analysis under I.R.C. § 280F(b)(1)–(2) can be complex, and it contains certain rules applicable to 5 percent owners or related persons. In addition, there are passive activity rules under I.R.C. § 469 which may limit the taking or offsetting of depreciation as to passive actives or income. This paper does not explore these concepts further as these concepts can be the subject of presentations unto themselves, but these concepts are raised to demonstrate the importance of analyzing all of the FAA and IRC consequences with legal and
E. Shared Aircraft Ownership Alternatives

After determining if an individual or entity owns the aircraft, then another decision as to operating the aircraft as co- or joint owners should take place (assuming the interest is not being held in another type of vehicle like a fractional ownership or an off-the-books ownership interest). A critical question to ask is: What is the purpose in owning the aircraft? If there are different purposes between owners in owning an aircraft, then the aircraft should be co-owned. If there are not different purposes for owning the aircraft, then the aircraft could be owned by joint owners.

1. Co-Ownership vs. Joint Ownership of Aircraft

Co-ownership generally means more than one individual or entity is the registered owner of the aircraft, with costs shared as to ownership, but each co-owner hires or provides its own pilots for the aircraft operation, and each co-owner cannot charge the other for operating the aircraft. Joint ownership also provides for more than one individual or entity owning the aircraft, with costs shared as to ownership and each joint owner paying for their operating costs, but the difference is that the FAA allows for one of the registered joint owners of the aircraft to employ and furnish the pilots for the aircraft, and each registered joint owner may pay its share of the charges for operation as set forth in the joint ownership agreement.66

Owning an aircraft as a co-owner or a joint owner is advantageous for many reasons. Co-owners, like joint owners, own their aircraft’s outright share, and register their share with the FAA as a registered owner. These co-owners, like joint owners, should have co-owner agreements, as discussed above.67 These owners must submit an FAA AC 8050-1, which must clearly identify their ownership interests, and they must sign this application.68 These owners generally have separate and distinct expense and operational accounting to document their ownership share, business use, and related expenses, especially bonus depreciation.69 Co-owners and joint owners are taxed at the taxpayer level, and

---

66 14 C.F.R. § 91.501(b)(6), (c)(3) (2023).
67 See infra Section III(A)–(B).
68 14 C.F.R. § 47.13(f) (2023).
69 See I.R.C. § 280F(b)(1)–(2) as to bonus depreciation and QBU.
there are no flow-through tax principles to comply with or to account for as to co-ownership.

2. **Shared Aircraft**

Shared ownership of aircraft occurs when there is a single entity that owns the aircraft and is the registered owner of the aircraft, and there are several owners who own the aircraft within the single entity. The shared owners can be individuals or entities; they agree to an entity accounting and how expenses are treated per IRS regulations, and this includes the choice of how the aircraft is depreciated.\(^{70}\) A common example of shared ownership would be family members owning an aircraft, or a company with a parent and subsidiaries owning the aircraft. Shared ownership allows owners to share in ownership costs, but not operational costs, which includes crew costs—each shared owner is responsible for hiring and supplying their own pilots and crew.

The shared ownership entity is taxed at the entity level, and income and expenses are also netted at the entity level. The shared ownership entity registers the aircraft with the FAA, and the members are not identified on the FAA AC 8010, just the shared ownership entity.

3. **Fractional Ownership**

Another way to own a part of an aircraft is through a fractional ownership program governed by FAR Part 91, Subpart K.\(^ {71}\) Fractional ownership has been around since 1986. As this type of ownership grew in size, complexity, and because it operated under Part 91 and not a more regulated part like a Part 135 operation, the FAA stepped in and made changes to the requirements for operating a fractional ownership program.\(^ {72}\) Generally, a fractional ownership program is one with a single program manager, two or more aircraft, one or more fractional owners with a minimum fractional ownership interest in an aircraft, dry leases for aircraft use, and multi-year contracts or program agreements for management services and dry lease use

---

\(^{70}\) See MCKEE, NELSON & WHITMIRE, FEDERAL TAXATION PARTNERSHIPS PARTNERS (2023).


\(^{72}\) FED. AVIATION ADMIN., ADVISORY CIRCULAR 91–84, FRACTIONAL OWNERSHIP PROGRAMS, at 2 (2009).
and exchanges. Fractional ownership programs also allow owners to operate their aircraft under Part 91 or 135, if the program manager has an air carrier certificate under Part 119 to operate Part 135 flights. This paper will not go into fractional ownership in any more depth, but this is an alternative some owners choose for aircraft ownership which has many conditions and requirements, but offers some flexibility as to use and operational control that is an attractive avenue for some owners.

III. OPERATION OF CO-OWNED AIRCRAFT, COSTS, AND AGREEMENTS

If the aircraft is operated under Part 91, then there are additional considerations. After determining how to own the aircraft and the type of ownership which is best for the use and operation of the aircraft, then consideration needs to be given to the agreements that will support the aircraft ownership and operation when more than one owner is involved.

A. Shared Ownership

When two or more individuals or entities own an aircraft in a single entity, it is important to have an agreement between the owners that outlines use of the aircraft and the handling of ownership costs. This is true where the use is under Part 91 or Part 135. For example, if the aircraft is owned by an LLC and there are then three members who have 1/3 ownership interest in that LLC and that LLC’s sole asset is the aircraft, then there would be a Company Agreement outlining the governance of the LLC. In that Company Agreement there would be a Member Cost and Operations Agreement that outlines the ownership costs, the division of those costs, the operation of the aircraft (for example where the aircraft can and cannot be operated), hangaring, scheduling, etc. It is important to document the agreements between shared owners, as this reduces confusion and disagreements down the road. Such agreements should be used in Part 91 and Part 135 operations, as shared owners should have a roadmap of the use and operation of their aircraft. If a management company is managing the aircraft, there also should be an Aircraft Management and Services Agreement. If that same management company is chartering the aircraft for the owners, then there would also be an Aircraft

73 Id. at 3.
74 Id. at 3–4.
Charter and Lease Agreement between the owners and the management company who would hold an air carrier certificate for the chartering of the aircraft.

B. **Co-Ownership**

Co-ownership and joint ownership generally signify more than one individual or entity owning the aircraft, with costs shared as to ownership; but with co-ownership, each co-owner hires or provides its own pilots for the aircraft operation, and each co-owner cannot charge the other for operating the aircraft. With joint ownership, one of the registered joint owners of the aircraft may hire and furnish the pilots for the aircraft, and each registered joint owner(s) may pay its share of the charges for operation as set forth in the joint ownership agreement.  

Again, an agreement as to aircraft ownership cost allocation, use, and operation (Co-Ownership Ownership Agreement or Joint Ownership Agreement) is necessary to clarify the costs, use, and operation of the aircraft. As mentioned above, if there is a management company involved with managing the aircraft and/or chartering the aircraft, then Aircraft Management and Aircraft Charter and Lease Agreements must be in place so that the required guidance is clearly defined.

C. **Exceptions to Part 91 Compensation Rules**

There are some limited exceptions to the general rule that aircraft owners cannot be compensated in any way for Part 91 flights. These include, but are not limited to, Section 91.501 exceptions for large aircraft operations (and the NBAA small operator exemption), dry leases, fractional ownership, private pilot reimbursement, and carriage of candidates for federal elections.

FAR Part 91.501 governs these exceptions and applies to large aircraft (over 12,500 pounds), multi-engine turbojet aircraft (regardless of weight or size), fractional ownership program aircraft not involving common carriage (regardless of size), and the NBAA’s small aircraft operator exemption.

---

75 See infra Section III(C)(4).
Section 91.501 provides for following main exemptions:

1. **Time Share**

   Time sharing is specifically provided for under Section 91.501(c)(1) and 91.501(b)(6) which is an “arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in paragraph (d) of Section 91.501.” The charges are generally limited to twice the costs of fuel and directly related trip expenses. The FAA does not view a time share arrangement as a “commercial” operation as it is included under Section 91.501, but the IRS does view time sharing arrangements as “commercial” operations, and such flights are subject to the 7.5% federal excise tax (FET). And time sharing arrangements are subject to the FAA’s truth in leasing provisions for large aircraft.

2. **Inter-company operations**

   Use of an aircraft among an affiliated group is permitted under Section 91.501(b)(5):

   Carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air) and no

---

78 14 C.F.R. § 91.501(c)(1).
79 14 C.F.R. § 91.501(d) provides for the following authorized expenses to be recouped by the aircraft lessor under a time sharing arrangement:
   (1) Fuel, oil, lubricants, and other additives; (2) Travel expenses of the crew, including food, lodging, and ground transportation; (3) Hangar and tie-down costs away from the aircraft’s base of operation; (4) Insurance obtained for the specific flight; (5) Landing fees, airport taxes, and similar assessments; (6) Customs, foreign permit, and similar fees directly related to the flight; (7) In flight food and beverages; (8) Passenger ground transportation; (9) Flight planning and weather contract services; (10) An additional charge equal to 100 percent of the expenses listed in paragraph (d)(1) of this section.
§ 91.501(d).
81 See 14 C.F.R. § 91.23 (c) (2023) (discussing reporting requirements to both the FAA Flight Standards office and the FAA Aircraft Registration Branch’s Technical Section for Part 91 operations).
charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane. . . .

Of importance is that “no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company.” Attention needs to be given to the provisions of corporate structure of the company using this exception, and the “incidental to the business of the company” language. The company, its parent, or a company subsidiary (subsidiary of the company or the parent) may use this exception. Additionally, the use must be incidental to the business of the company, and this has been the source of FAA scrutiny. If the purpose of the company is simply to own the aircraft, this exception would not apply. The inter-company or affiliated group operations exception allows a company owning an aircraft to charge certain costs, such as flight, operation costs, maintenance, and ownership costs, to another company whose relationship complies with Section 91.501(b)(6), without a lease or agreement. But documentation is the better course, and an agreement between companies as to the relationship and use, along with how any reimbursement or charges will be handled for aircraft use, is highly recommended so as to demonstrate to the FAA that the intra-company reimbursement is proper per FAA regulations. The FAA views the inter-company or affiliated group operations under Section 91.501(b)(5) as non-commercial, and the IRS views these operations as not subject to FET if the companies are connected by at least 80% voting stock ownership to a common parent entity. Otherwise, these operations may be subject to FET.

3. Interchange

Interchange arrangements are ones in which aircraft owners may exchange or swap their aircraft for “equal time”—meaning on an hour-by-hour equal basis. No charge/assessment/fee/cost may be made, except “that a charge may be made not to exceed the difference between the cost of owning, operating, and main-

83 Id.
84 Id.
85 Treas. Reg. §§ 1504, 4282; see also IRS, LTR-RUL, UIL NO. 4282.00-00, LETTER RULING 200123002, TRANSPORTATION BY AIR FOR OTHER MEMBERS OF AFFILIATED GROUP (Jan. 2, 2001).
taining the two airplanes.” That means an hourly fee may be made for the differential in operating costs of the aircraft. Although the FAA does not view this as a “commercial” operation, the IRS does, and FET applies to these arrangements. Also, truth in leasing for large aircraft also applies to these arrangements.

4. Joint Ownership

As outlined above, joint ownership of aircraft allows for co-owners of aircraft (who have an undivided interest in the aircraft and are registered owners of the aircraft with the FAA) to enter into a Joint Ownership Agreement whereby “one of the registered joint owners of an airplane employs and furnishes the flight crew for that airplane and each of the registered joint owners pays a share of the charge specified in the agreement.” This allows for the streamlined employment of pilots by one registered owner, and the reimbursement of flight costs by the other registered owners, and can be useful if there is a clear and defined Joint Ownership Agreement (the agreement is required under Section 91.501(c)(3)) as to how this system is designed and executed. If there are too many owners participating in a Joint Ownership Agreement, this agreement may become difficult and complicated to manage, and the optics may look like a common carrier operation to the FAA. These operations are not subject to FET, but if it appears that one owner has too much control over flight operations, the IRS may determine these operations are subject to FET.

5. Dry Leases

Dry leases, which do not fall under the Section 91.501 exceptions, are used to allow the aircraft to be leased and facilitate the transfer of operational control and some costs from lessor to lessee. Greg Reigel and David Norton recently presented a paper at the 2023 Air Law Symposium on illegal aircraft chartering and improper dry leasing. Their presentation encompassed illegal charter of aircraft and dry lease best practices. For the sake

---

87 See I.R.S. Priv. Ltr. Rul. 93-16-035 (Apr. 23, 1993) (FET should be assessed on the fair market value on operations, not the cash or charges, if any, that are exchanged between owners).
88 See 14 C.F.R. § 91.23 (2023).
89 14 C.F.R. § 91.501(c)(3) (2023); see also 14 C.F.R. § 91.501(b)(6) (2023).
of completeness, a short discussion of dry leases is presented here.

A “dry lease” of an aircraft is needed if, for example, single purpose LLCs own aircraft, as the LLCs cannot have operational control of the aircraft (flight department rule). The “operational control” would be with the lessee. The owner (single-purpose entity) as lessor is simply providing the aircraft to the lessee (as pictured below: two (2) LLCs), and the lessees are in “operational control” of the aircraft and provide their own flight crew.
Dry leasing may require truth in leasing statements, depending on the weight of the aircraft, but it is not a commercial operation from the FAA perspective, and is generally not subject to the FET. So long as the pilots do not have a financial or employment relationship with the lessor, the dry lease will not be viewed as a commercial operation. This can be subject to FAA scrutiny as the agency is focusing enforcement efforts on illegal charters and wet leases (lease of aircraft with pilots/crew).

IV. OWNERSHIP ALTERNATIVES

Sometimes, owners do not want to hold aircraft ownership in their name or entity. There are alternatives, as discussed below.

A. TRUSTS

A trust is a vehicle to own an aircraft, and trusts are used for a variety of reasons. One reason is privacy—individuals and companies want to keep their aircraft ownership and/or travel private, and the use of a trust may allow for that privacy. Another reason trusts are used is because the citizen requirements to own an aircraft for individuals and entities under 49 U.S.C. § 44101, et seq. cannot be met. If an aircraft is operated in a variety of jurisdictions, registering the aircraft in the United States through an owner trust may allow for more streamlined operations. Also, a trust may allow for the use of the coveted “N-Registry” if the aircraft could not have been owned in the U.S. under a U.S. N-Registry number. Lastly, some large corpora-
tions have complex ownership structures, and trusts are a good vehicle to own an aircraft so as to manage the uncertainty of the structure or changes in the ownership of the corporation.\textsuperscript{96}

An owner trust/non-citizen trust (NCT) allows for a “trustee” (U.S. Citizen)\textsuperscript{97} to hold legal title to the aircraft for the benefit of a third party, who is the “trustor” or “beneficiary/beneficial owner”—this trustor or beneficiary is usually the owner of the aircraft.\textsuperscript{98} The trustee then leases the aircraft back to the trustor/beneficiary or third party, and the trustee does not operate the aircraft.\textsuperscript{99} The trustor/beneficiary legally operates the aircraft under an operating agreement or operating lease with the trustee, and the beneficial owner/trustor hires the flight crew, pays all expenses, and maintains the aircraft.\textsuperscript{100} The trustor/beneficiary has power to direct the trustee to terminate the trust.\textsuperscript{101} For an NCT, the trustee must submit with the Aircraft Registration Application a copy of the trust agreement document that establishes the trust, a copy of the trust operating agreement (if applicable), and an affidavit as to the trust beneficiary’s U.S. citizenship status, and if trust beneficiary is not a U.S. citizen, a statement confirming the fitness of that beneficiary’s influence over the trustee.\textsuperscript{102} All trust documents must be submitted to the FAA Aeronautical Center-Central Region Counsel (ACCRC or commonly referred to as FAA counsel) for review and approval before such documents are filed for recording with the FAA.\textsuperscript{103} The review process with ACCRC generally takes up to ten business days (and in some cases more than ten

\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.; see also 14 C.F.R. § 47.7(c) (2) (i) (2023); Policy Statements: Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustees and Beneficiaries; Clarification, 78 Fed. Reg. 36412, 36415–16 (June 18, 2013). An operating agreement may be returned to a trust applicant, upon review and determination that the operating agreement does not adversely impact the trust agreement, if the trust applicant so requests return of this agreement. Policy Statements: Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustees and Beneficiaries; Clarification, 78 Fed. Reg. at 36415.
\textsuperscript{103} Policy Statements: Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustees and Beneficiaries; Clarification, 78 Fed. Reg. at 36416.
days), so aircraft closings have to take this review time into consideration.\footnote{McCready & Towers, supra note 95.}

In 2013, the FAA issued its “Notice of Policy Clarification for the Registration of Aircraft to US Citizen Trustees,” wherein the FAA clarified what it expects for an owner trust meeting to reach FAA requirements and for a valid trust aircraft registration so that trusts are in compliance with the FARs, and the FAA gave specific guidance and clarification as to a variety of trust issues.\footnote{Policy Statements: Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustors and Beneficiaries; Clarification, 78 Fed. Reg. Vol. 78 at 36412–24. For example, the FAA commented on the 25% of aggregate power rule in § 47.7(c)(3), which imposes limitations on the ability of non-U.S. citizens to direct or remove a trustee into agreements where this authority was previously granted. See id. at 36416.} The FAA made it clear that no trustee can avoid the FAA regulations as to owner obligations of aircraft registered through owner trusts or NCTs.\footnote{Id. at 36414–15; see also Jeffrey S. Towers, A Guide to Owner Trust, 2–3 (2018).} The FAA also provided an example of a standard trust agreement with suggested language, so that individuals or entities which adopt this suggested agreement’s language would have the agreement generally accepted by the FAA.

The FAA’s Notice of Policy Clarification also provided very specific trustee reporting “guidelines” (not directives, but guidelines) so that if asked, the trustee should provide the FAA with information as to the NCT aircraft operators and aircraft operations within two (2) business days of an FAA request as to identity and contact information of the operator or manager of the aircraft; the location of aircraft maintenance records and other aircraft records; and information as to where the aircraft is normally based or operated.\footnote{Policy Statements: Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustors and Beneficiaries; Clarification, 78 Fed. Reg. Vol. 78 at 36414.} The trustee may be requested by the FAA for further information as to aircraft operations on a specific date (to include operator, crew, and specific operational questions); the current airworthy status of the aircraft; and maintenance and other aircraft records, and if asked the trustee should provide the FAA this information within five (5) business days.\footnote{Id.}
Another trust alternative is the “voting trust” which is used when a domestic corporation fails the voting interest test under 14 C.F.R. Section 47.2(3), but otherwise, the corporation meets all other requirements of the U.S. citizenship test within Section 47.7.109 The voting trust consists of the applicant corporation owning the aircraft, the independent voting trustee, and the non-U.S. shareholder holding the voting stock in the applicant corporation owning the aircraft.110 The CFRs provide for the submission of the voting trust agreement, an affidavit from the voting trustee outlining four statutory areas for compliance with a voting trust, and other provisions governing the trust.111

In addition to the trust requirements outlined above, there are also export requirements if the trust-owned aircraft is based outside the U.S. for more than one year.112 The export requirements have become a focus for the U.S. government and the FAA in recent times, and the case referenced in Section V below outlines some of the reasons why complying with export laws and regulations is important, especially when trusts are involved.113 A whole presentation can be made as to the export requirements, but it is key to understand that the U.S. government requires that the principal parties in a transaction have filings to make, such as an Electronic Export Information (EEI) filing through a third-party customs broker or freight forwarder, if an aircraft is subject to export.114 Basically, aircraft purchased in the U.S. and permanently based overseas for a year or more are required to be exported, but many people have made the mistake of misinterpreting the customs and export laws for aircraft sold or leased to a foreign person or entity, and have wrongly assumed that U.S. registered aircraft that are based overseas do

109 14 C.F.R. § 47.8 (2023).
110 Id.
111 Id.
112 15 C.F.R. § 30.26 (2023) (covering mobile goods such as vessels, containers, and aircraft).
113 See infra Section V.
114 15 C.F.R. § 30.26; see also David M. Hernandez, Aircraft Exports from the United States following the Aircraft Guaranty Corporation Trust Indictment: Avoiding Civil, Criminal Penalties and Aircraft Seizure, VEDDERPRICE (Apr. 5, 2021) [hereinafter Aircraft Exports].
not need to be exported if they were bought in the U.S.\textsuperscript{115} This was such a problem that the government came out with guidance to make retroactive export filings for aircraft going all the way back to the year 2000, and prospective guidance so that purchasers, sellers, and trust companies may screen transactions for export compliance.\textsuperscript{116}

The takeaway when considering and using trusts for aircraft transactions, and complying with export regulations and laws, is to use an experienced trust provider, customs broker, and/or freight forwarder that will guide you and the transaction through the nuances of the trust and export rules and regulations. This is extremely important as there are civil and criminal penalties associated with non-compliance with these rules and regulations.\textsuperscript{117}

1. Off-Book Ownership

Another vehicle to consider for aircraft ownership is to utilize a structure where an entity (that is a service provider) owns the aircraft, and the individual or entity uses the aircraft similar to a lease, but with flexibility to be the only user for a fee, or to use the aircraft for a certain amount of hours. This allows the aircraft to be off the user’s books as an asset, and to use the aircraft without operational control. These types of arrangements are Part 135 operations and can provide flexibility and the advantage of not carrying an asset on the company books which may be advantageous for some individuals or entities.

V. THE GUARANTY CORPORATION TRUST INDICTMENT AND THE IMPACT OF THIS INDICTMENT

The United States of America vs. Debra Lynn Mercer-Erwin, Kayleigh Moffett, Guillermo Garcia Mendez, Federico Andres Machado, Carlos Rocha Villaurrutia, Alban Gerardo Azoffefa-Chacon, Aaron Bello-Millan and Michael Assad Marcos case, pending in the Eastern District of Texas, is an important case that touches on air-

\textsuperscript{115} NBAA GUIDE ON EXPORTING AIRCRAFT FROM THE UNITED STATES (2021) [hereinafter NBAA GUIDE ON EXPORTING].


\textsuperscript{117} Aircraft Exports, supra note 114.
craft ownership and trusts, and is an example of what can go wrong when the FARs and laws are not followed.

A. The Facts and the Indictment\textsuperscript{118}

The facts of this criminal prosecution are laid out in the Fifth Superseding Indictment.\textsuperscript{119} The Indictment outlines charges of conspiracy to manufacture and distribute cocaine, conspiracy to commit money laundering, conspiracy to commit export violations as to aircraft, and conspiracy to commit federal registration violations as to aircraft.\textsuperscript{120} This indictment names two individuals who own or owned a trust company and a title and escrow company in Oklahoma which facilitated aircraft sales and registry of aircraft, and also a host of foreign nationals who are alleged to be in the drug trafficking business.\textsuperscript{121} Nineteen defendants and corporate entities are named in the Indictment.\textsuperscript{122} Twenty-two aircraft are identified as involved in claimed illegal or irregular filings and registrations.\textsuperscript{123} And there are “Ponzi scheme” allegations, wherein the Government claims the defendant aircraft title company colluded with foreign nationals, individuals, and companies to defraud persons and financial institutions, with the Government listing approximately 218 transactions in a one-year period that the Government relates to these illegal activities subject to criminal prosecution.\textsuperscript{124}

What is stunning as to this indictment is that the “Introduction” section of the Indictment, consisting of the first three plus pages, pertains to claims of the improper and illegal registry of aircraft through the use of trusts, as governed by 14 C.F.R. Section 47.7(c). The Indictment notes that many of the true owners of the aircraft were in fact foreign nationals, but the trusts that facilitated the foreign national’s ownership contained fraudulent representations or filings which would violate federal law. The Indictment states:

\textsuperscript{118} An indictment should not be considered evidence of guilt, but that a person is given formal notice that they are believed to have committed a crime. \textit{Charging}, U.S. DEPT. JUST. OFF. U.S. ATT’Y, https://www.justice.gov/usaو/justice-101/charging.

\textsuperscript{119} Indictment, \textit{supra} note 3.

\textsuperscript{120} Indictment, \textit{supra} note 3, at 31–42.

\textsuperscript{121} Indictment, \textit{supra} note 3, at 4–6.

\textsuperscript{122} Id.

\textsuperscript{123} Id., \textit{supra} note 3, at 6–18.

\textsuperscript{124} Indictment, \textit{supra} note 3, at 23–30 (describing the transactions as involving “unsellable” aircraft or decommissioned aircraft).
The defendants circumvent United States laws and regulations by placing “N” number in the hands of drug traffickers and prohibited foreign nationals. Each named individual participated in the scheme. The defendants use their status as United States citizens with United States corporations to execute a three-part scheme furthering international drug trafficking activity. First, the defendants violate FAA and Department of Commerce regulations to register aircraft with the United States while concealing the aircraft’s true ownership and exportation. Second, when law enforcement seizes a registered aircraft laden with drugs, the defendants deregister or otherwise transfer ownership of the aircraft. Finally, the defendants participated in a series of bogus aircraft sales transactions in order to conceal the movement of illegally obtained funds.125

Listed below are a few of the Guaranty Corporation case issues that pertain to aircraft registration, ownership, and trust issues that relate to the general discussion outlined earlier in this article.

B. AIRCRAFT OWNERSHIP, REGISTRATION, AND EXPORT CLAIMS

The Indictment notes that the aircraft trust and escrow/title company defendants registered an aircraft while concealing the aircraft’s true ownership.126 This would be in opposition to 49 U.S.C. §§ 40102-44104 and 44103; 14 C.F.R. Part 47, and would mean that FAA forms, including but not limited to Forms 8050-1 8050-2, FAA Registration Application, and FAA Bill of Sale would have been falsely completed. Additionally, this could be a violation of 49 U.S.C. § 46306 and 18 U.S.C. § 1001.

The Indictment also notes that the aircraft trust defendant entered trust agreements with foreign citizens who were allegedly known criminals.127 This would be in opposition to 14 C.F.R. Section 47.7(c) and 18 U.S.C. § 1001.


126 See Indictment, supra note 3, at 7.

127 See Indictment, supra note 3, at 10.
C. Aircraft Deregistering

The Indictment also notes that when some aircraft identified in the indictment were seized by law enforcement due to the aircraft carrying or containing illegal drugs, or the aircraft were associated with drug trafficking, the escrow/title company defendants deregistered the aircraft or transferred the aircraft’s ownership.\(^{128}\) This could be a violation of 49 U.S.C. § 46306 and 18 U.S.C. § 1001.

D. Aircraft Trust Issues

The Indictment also goes into detail as to the proper way for aircraft to be held in trust.\(^{129}\) The Indictment states the trust agreement used by the aircraft trust defendant did not comply with the FAA’s “Notice of Policy Clarification for the Registration of Aircraft to US Citizen Trustees,” including, but not limited to the following:

- The defendant trust company agreements did not identify specific aircraft by “N” number;
- The trust agreements created the trust but did not transfer the aircraft to the trustee; and
- The trustee was not responsible to make sure the aircraft was operated in accordance with all laws and regulations relating to possession, use, and operation of the aircraft, especially the FARs.\(^{130}\)

E. The Ramifications and Changes to the Aviation Industry

The \textit{Guaranty Corporation} case has brought NCTs and export of aircraft under scrutiny. The FAA, the Department of Transportation, the United States Census Bureau, the Bureau of Industry and Security, and the Office of Foreign Asset Control, to name a few, are looking closely, retroactively and prospectively, at aircraft transactions, trust agreements, and export documents to make sure compliance with federal laws is being accomplished, as the \textit{Guaranty Corporation} case highlighted many deficiencies in the system.\(^{131}\) Also, the NBAA published a “Guide on Exporting Aircraft from the United States” which provides NBAA members with best practices as to exporting aircraft from


\(^{129}\) See Indictment, \textit{supra} note 3, at 2–3.

\(^{130}\) See Indictment, \textit{supra} note 3, at 18–21.

\(^{131}\) \textit{Aircraft Exports}, \textit{supra} note 114.
the United States. This guide also has a section wherein different export scenarios are presented, and the scenarios were submitted to the U.S. Census Bureau and the Department of Commerce’s Bureau of Industry and Security, in which regulators reviewed and validated the scenarios, with commentary from the Census Bureau.\textsuperscript{132}

VI. CONCLUSION

The preceding discussion has provided an overview of the options for multiple person/entity aircraft ownership and illustrated some of the advantages and disadvantages involved with each. Additionally, many of the complexities of each of the options has been examined. This discussion serves to illustrate that aircraft ownership by multiple persons/entities can be very complicated and if care is not taken, owners and operators can easily run afoul of the myriad regulations and statutes that govern these ownership structures. While brokers, operations personnel, and other owners can provide some perspective on these options, it is critical that potential owners involve skilled attorneys, CPAs, aircraft escrow agents, and title companies in the consideration and implementation of any multiple-owner structure.

\textsuperscript{132} NBAA GUIDE ON EXPORTING, supra note 115.