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WHEN LESS CAN BE MORE: FRACTIONAL OWNERSHIP OF AIRCRAFT—THE WINGS OF THE FUTURE

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I. INTRODUCTION

BUSINESS AVIATION has grown substantially over the last several years and is expected to continue growing. One of the fastest growing segments of the industry is fractional ownership. In fact, fractional ownership programs have grown at the

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2 See R. Randall Padfield, Commentary: Fractions Ain't Easy, AVIATION INT'L, News, May 1999, at 2 (Rolls Royce estimates that between 1999 and 2017, 3500 business jets representing 36% of new corporate aircraft will be delivered to fractional ownership programs); Gordon A. Gilbert, Fractional Sales Will Spur Market Growth, Bus. & Com. Aviation, Nov. 1, 1998, at 30 (fractional ownership programs will
rate of fifty percent per year and are still growing. In spite of their youth, fractional ownership programs are perhaps the single largest customer of new aircraft and have acquired billions of dollars of aircraft in the last two years.

In general terms, fractional ownership programs are multi-year programs covering a pool of aircraft, each of which is owned by more than one party and all of which are placed in a
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dry lease\(^6\) exchange pool to be made available to any program participant when the aircraft in which such participant owns an interest is not available. As an integral part of these multi-year programs, a single management company provides the management services to support the operation of the aircraft by the owners,\(^7\) and administers the aircraft exchange program\(^8\) on behalf of all of the participants. By purchasing an interest in an aircraft that is part of the program, an owner gains round-the-clock access to a private jet at a fraction of the cost. In addition to access to the aircraft in which it owns an interest, it also has access to all other aircraft in the program, as well as the support of a management company that will handle all arrangements relating to maintenance, crew hiring, and all administrative details relating to the operation of a private aircraft.\(^9\)

Because fractional ownership allows parties to purchase the percentage of an aircraft reflecting their actual needs, these programs meet the needs of divergent groups, including newcomers to business aviation who do not require full-time use of business aircraft\(^10\) as well as companies seeking to supplement

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\(^6\) A dry lease is the lease of an aircraft where the crew is provided by the lessee. See Interpretation 1991-53, 3 Fed. Av. Dec. I-126 (Sept. 28, 1991) (Clark Boardman Callaghan).


\(^8\) The fractional ownership programs typically refer to the dry lease exchange as an “interchange.” The “interchange” component of a fractional ownership program is not an “interchange” as defined by the Federal Aviation Regulations [hereinafter FARs], but rather contemplates that each of the aircraft will be operated by the party using it at the time. See 14 C.F.R. §§ 91.501 (b)(6), (c)(2) (1998); infra notes 105-106 and accompanying text. Although not specifically stated, an FAA-defined “interchange” contemplates that each party will continue to operate its own aircraft regardless of who is using the aircraft at a particular time. See id.


\(^10\) See Paul Berner, Market Outlook Remains Solid, Aviation Maintenance, Dec. 1998, at 16-17 (more than 70% of the participants in fractional ownership programs have never owned an aircraft); Velocci, Growth of Fractional Ownership Assured Despite Turbulence Ahead, supra note 1, at 58 (70-80% of the participants in fractional ownership programs are new to business aviation); The CIT Group Predicts Continued Near-Term Growth for Business Aircraft in '98-'99, supra note 1, at 51 (CIT estimates 80% of fractional ownership participants are first-time aircraft buyers); SRI Fractional Conference, supra note 1, Fractional & Joint Ownership:
their own fleet of business aircraft without the expense of hav-
ing to purchase or lease additional aircraft.\textsuperscript{11} By offering a solu-
tion to a wide spectrum of entities, the number of participants
in these programs has grown significantly during the twelve
years that the programs have been in existence.\textsuperscript{12}

This popularity, however, has also attracted a significant
amount of controversy in the aviation industry.\textsuperscript{13} This article
will address the development, growth and regulatory framework
of fractional ownership programs as well as the controversy sur-
rounding these programs and their likely future.

II. THE GROWTH OF FRACTIONAL
OWNERSHIP PROGRAMS

Historically, as business aircraft became more complex, the
cost of acquiring, owning, operating and maintaining the air-
craft greatly increased. Recognizing that business aviation dif-
fered significantly from commercial aviation and that business
aircraft were becoming more sophisticated, the FAA in 1972
adopted a new subpart in Part 91 that governed large and multi-

\textit{Corporate Jet Manufacturers and Operators Perspective}, Presentation of Raytheon
Travel Air (80\% of the participants are concept buyers who are new to business
aviation), Presentation of Executive Jet NetJets (70\% of the participants are new
to aircraft ownership and 50\% never chartered business aircraft). According to
AlliedSignal, fractional ownership plans for business aircraft "continue to grow
dramatically at double-digit annual rates, expanding the pool of aircraft owners
well beyond the historical operator population." \textit{AlliedSignal Forecast Predicts Busi-
tess Jet Market Will Stay Hot Through 2009}, supra note 1, at 171 (citing Allied-
Signal's Business Aviation Market Outlook).

\textsuperscript{11} See generally, Kate Sarsfield, \textit{Fractional Surgery}, \textit{Flight Int'l}, 6-12 Oct. 1999, at
53; Paul Lowe, \textit{Ire in the Ranks Leads NBAA to Poll Its Members on Frax}, \textit{Aviation
\textit{Millionaire Mag.}, Sept. 1999, at 220; David Esler, \textit{Using Fractionally Owned Air-
craft for Supplemental Airlift}, \textit{Bus. & Com. Aviation}, Nov. 1, 1998, at 66. See also
Bradley, supra note 9, at 79-80. As a trade off for the elimination of many of the
administrative headaches associated with acquiring and operating business air-
craft, fractional owners frequently pay a premium. This stems from the fact that
although the program manager (or its affiliate) usually gets a discount and other
concessions when purchasing aircraft due to the potential size of the order, it
sells the share based on the list price which even the purchaser of a single aircraft
rarely pays. The impact of this somewhat inflated price is generally not apparent
until the share is sold by the fractional owner, since the price will then be based
on fair market value. \textit{See Norris, supra note 5, at 98-99}.

\textsuperscript{12} \textit{See infra} notes 19-80 and accompanying text.

\textsuperscript{13} \textit{See infra} notes 165-180 and 232-246 and accompanying text.
engine turbine-powered aircraft. These rules imposed additional requirements on the operators of such aircraft in order to ensure a higher level of safety, and at the same time, eliminated many of the administrative, financial and organizational requirements imposed on commercial operators that were purely economic in nature.

Among other things, the FAA adopted rules that expanded the types of operations that could be performed for compensation without requiring the operator to obtain air carrier or commercial operator operating certificates. The FAA recognized that the heightened safety standards then being adopted adequately addressed safety concerns, and that with such a level of safety, additional operating flexibility could be provided to corporate operators. In the FAA’s own words,

the decision to proceed with the upgrading of Part 91 for large and turbine-powered multiengine airplanes is an important threshold step in the FAA policy to remove, to the extent possible, those differences in safety standards that are primarily economic in nature and result in unnecessary restrictions or limitations on aircraft operators. In accordance with that policy, the need for different or additional safety standards for corporate operations should be resolved on the basis of safety, rather than economics or juristic semantics.

Because this approach afforded aircraft owners the potential to recoup a portion of their investment by spreading the cost of the aircraft, business aircraft became available to entities that did not need full time use of aircraft. From the FAA’s perspective, as long as common carriage was not involved, cost sharing would be permitted.

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15 In recognition of the increasing sophistication of these aircraft and to ensure safety, the FAA applied certain operating rules to these aircraft that did not apply to smaller, less complex aircraft. For example, among other things, the FAA required large and multi-engine turbine aircraft to be equipped with instruments that previously were required only for commercial operators and to carry certain emergency and survival equipment. See 37 Fed. Reg. 14,758, 14,760-62 (1972); see also 36 Fed. Reg. 19,507, 19,509-11 (1971).


18 Several types of operations were permitted by the new rules, such as timesharing, joint ownership, and interchange arrangements. Each authorize an operator of an aircraft to share the usage of aircraft on a limited basis with third parties. See Corporate Aircraft Operations, supra note 7, at 997-1003. Even though
As the cost of business aircraft continued to increase, however, these cost-sharing alternatives did not always meet the needs of businesses. Many businesses wanted ready access to aircraft and were willing to pay the fully allocated cost of owning and operating the aircraft but did not need to use the aircraft a sufficient number of hours to justify such an expenditure. In an effort to address the needs of those businesses that wanted to acquire business aircraft but could not justify the purchase of a whole aircraft, Executive Jet Aviation (EJA) in 1986 introduced NetJets, the first fractional ownership program, by offering interests in a fleet of eight Cessna Citation II aircraft. The NetJets program allows a party to purchase an interest in an aircraft, while at the same time have access to other aircraft in the program by way of an interchange arrangement in case the aircraft in which it owns an interest is not available. Under the NetJets program, the owners also contract for the services of a common management company that administers the interchange and provides the support necessary to facilitate the operation of the aircraft by an owner, whether the aircraft is the one in which the owner had an interest or is obtained under the interchange arrangement. The creation of this alternative method of acquiring aircraft enabled many more parties to enjoy the benefits and flexibility of operating business aircraft under Part 91 of the FARs.


NetJets' success\textsuperscript{21} confirmed the viability of the concept of fractional aircraft ownership.\textsuperscript{22} Not surprisingly, this success caused competition in the area of fractional ownership programs to increase. In June 1995, Business JetSolutions, a company jointly owned by aircraft manufacturer Bombardier, Inc. and AMR Combs Inc., American Airlines' charter affiliate, began the FlexJet program with fourteen aircraft\textsuperscript{23} and became the second major participant in the burgeoning fractional ownership market.\textsuperscript{24}

Two years later, the NetJets program had 95 aircraft and 700 owners,\textsuperscript{25} and the FlexJet program had 24 aircraft and 120 owners.\textsuperscript{26} With such obvious success in the fractional ownership business, a third major competitor appeared. Specifically, in June 1997, Raytheon Aircraft Company announced that it, too, would be entering the fractional ownership market though its subsidiary, Travel Air, by offering shares in Raytheon-manufactured aircraft, namely, the Hawker 800XP mid-size jet, the Beechjet 400A light jet and the Beech King Air B200 twin turboprop.\textsuperscript{27} Travel Air was the first of the big three fractional ownership program managers to offer turboprop aircraft.\textsuperscript{28} In

\textsuperscript{21} In the early stages of its development, NetJets was faced with a recession in the United States, which substantially and adversely impacted its development and placed the future of fractional ownership programs in question. As the economy improved, the sale of fractional shares also improved and EJA offered additional and larger aircraft in the NetJets program. See Bianco, supra note 19, at 58.

\textsuperscript{22} See Anthony L. Velocci, Jr., Executive Jet Poised to Take NetJets Abroad, AVIATION WK. & SPACE TECH., June 19, 1995, at 47. By mid-1995, there were 255 owners in the NetJets program. See id.

\textsuperscript{23} As a result of Bombardier's ownership interest in Business JetSolutions, FlexJet offered interests only in aircraft manufactured by Bombardier, such as the LearJet and Challenger. In 1998 AMR sold its interest in the FlexJet program to Bombardier and withdrew from the FlexJet program. See Bombardier Will Take Over FlexJet From AMR Combs, BUS. & COM. AVIATION, Jan. 1998, at 17.

\textsuperscript{24} See Velocci, supra note 22, at 47.

\textsuperscript{25} See Linda Martin, NetJets Spends Big With Raytheon, BUS. & COM. AVIATION, July 1, 1997, at 36.

\textsuperscript{26} See Business JetSolutions: Two and Counting, BUS. & COM. AVIATION, July 1997, at 27. Flex Jet's growth has continued bringing its fleet to seventy aircraft supporting 365 owners. This gives FlexJets a 25% share of the fractional ownership market. See Maintaining a Constant Flow of New Aircraft is Goal for FlexJet Fractionals, AVIATION WK. SHOW NEWS, Oct. 13, 1999, at 107.

\textsuperscript{27} See Raytheon to Begin Fractional Aircraft Ownership Flight Operations in August, WKLY. BUS. AVIATION, June 9, 1997, at 254; see also Raytheon Aircraft Press Release, Raytheon Aircraft Reveals Raytheon Travel Air Fractional Ownership Plan, June 4, 1997.

\textsuperscript{28} See Raytheon to Begin Fractional Aircraft Ownership Flight Operations in August, supra note 27, at 254. Because, unlike the jet aircraft, the King Air turboprop
addition, Travel Air was the first program that would offer the same aircraft being made available by one of its major competitors. By September 1999, Travel Air had three hundred owners and forty-seven aircraft in its program.

Although EJA’s relationship with manufacturers had traditionally been that of customer and supplier, in 1995 an affiliate of EJA, Executive Jet, Inc. (EJI) created Gulfstream Shares which offered Gulfstream GIV-SP aircraft in conjunction with Gulfstream Aerospace Corporation. Gulfstream Shares currently has over one hundred customers and a fleet of thirty-four aircraft. In October 1997, EJI and Boeing Business Jet announced the formation of a joint venture to introduce the Boeing Business Jet into NetJets. Despite its development of specialized programs with Gulfstream and Boeing, however, the NetJets program continues to rely upon the products of various manufacturers, including Cessna, Raytheon and Falcon.

Based on its success in the United States and the increasing globalization of business, EJA expanded overseas through the creation of NetJets Europe in 1996 as a partnership among EJA, aircraft is geared to short-haul flights, Travel Air bases the turboprop aircraft at six locations throughout the United States. See id; see also Paul Seidenman & David Spanovich, Raytheon Travel Air’s First Year Includes Explosive Growth, FLYING CAREERS, Oct. 1998, at 10.

29 See Raytheon to Begin Fractional Aircraft Ownership Flight Operations in August, supra note 27, at 254. Because the NetJets program, unlike FlexJets and Travel Air, was not tied to a particular manufacturer, it not only offered the Hawker 800XP to its customers, it purchased twenty such aircraft less than a month before Travel Air’s announcement.

30 See Kirby Harrison, Travel Air Tops 300 Frax Share Owners, AVIATION INT’L News, Sept. 1999, at 10. Raytheon has also implemented a lease option for the Travel Air program. See id.

31 See Gulfstream Shares (visited Oct. 2, 1998) <http://www.gulfstreamaircraft.com/prod/shares.htm>. As the Gulfstream GV aircraft are manufactured, they, too, will be added to the program. See id.


34 See Executive Jet, promotional material, Netjets is a Unique Program of Fractional Aircraft Ownership from Executive Jet, Inc. Among other aircraft, NetJets offers shares in the Citation VII, Hawker 800XP, Citation X, Gulfstream G-IV, Gulfstream G-V, Falcon 2000 and Boeing Business Jet.

Swiss-based Zimex Aviation and Air Luxor in Portugal. The program, which was launched with three Citation SII aircraft, has added four Citation VII aircraft and now supports over thirty owners. This program allows participants in the NetJets program in the U.S. to take the U.S.-based aircraft to Europe and then use the NetJets Europe aircraft within Europe and allows participants in NetJets Europe to do the reverse. Based on the importance and potential of the European market, Business Jet-Solutions is also expanding its FlexJets program to Europe.


37 See Charles Alcock, EJA Adapts Fractional Ops to Fit European Realities, AVIATION INT’L NEWS, Dec. 1, 1998, at 44. Because of the airport access restrictions at the major European hubs and other limitations on the ability to support the network and ensure the availability of aircraft, NetJets Europe is not growing at the same rate as its U.S. counterpart. Nevertheless, EJA believes that in five years NetJets Europe will support a fleet of fifty aircraft. See id; see also Charles Alcock, NetJets Strengthens Euro Fleet, AVIATION INT’L NEWS, May 1999, at 28; Sarsfield, Richard Santulli, supra note 2, at 28; Edward Phillips, Economic Growth Fuels Rise in European Business Flying, AVIATION Wk. & SPACE TECH., Sept. 22, 1997, at 69; Sarsfield, Fractional Progress, supra note 1, at 64.

38 See supra note 37, at 69; see also NetJets Europe Fractional Jet Ownership Program Finding Success on European Continent, supra note 36. Because of operating restrictions imposed by the governing regulations in Europe and the higher cost associated with operating in Europe, EJA’s ability to intermingle aircraft between the U.S.-based and the European-based programs is limited. In addition, the monthly and hourly charges are higher for NetJets Europe than in the U.S. program because of the higher operating costs in Europe. In order to accommodate the more restrictive and costly operating environment which exists in Europe for business aircraft, Europe was divided into two zones and guarantees availability only in one of the zones which encompasses Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Gibraltar, Greece, Budapest, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Warsaw, Portugal, Slovakia (Bratislava only), Spain, Sweden, Switzerland, and the United Kingdom. See Alcock, EJA Adapts Fractional Ops to Fit European Realities, supra note 37, at 44.

39 In the first phase of its expansion, North American FlexJet owners are using aircraft within Europe. In the second phase, a structure will be set up in Europe to support European travelers. See FlexJet’s Program Expands to Europe, WINGS Mag., Issue 5, 1999, at 20. Raytheon Travel Air is also studying an international expansion that would likely start in Europe or South and Central America with possible future expansion in the Pacific Rim and the Middle East. See Raytheon Eyes International Expansion for Travel Air, AVIATION INT’L NEWS, Feb. 1, 1999, at 10. Initially, the expansion would serve North American customers visiting international destinations. By mid-2000, Travel Air expects to extend its program to
Fractional ownership has been introduced in the Middle East through an expansion of the Gulfstream Shares program.\textsuperscript{40} The NetJets Middle East program, which started in June 1999, is a coordinated effort of Gulfstream Shares and National Company for Air Services, a Saudi Arabian company, which shares the risk in the program and acts as the operating partner.\textsuperscript{41} The NetJets Middle East program is expected to involve the purchase and delivery of twelve GIV-SP aircraft between 1999 and 2003 and the provision by Gulfstream of two core fleet aircraft and technical and sales and marketing support.\textsuperscript{42} EJA has also announced plans to expand to the Far East and South America.\textsuperscript{43}

In addition to the growth and global expansion by the major fractional ownership program managers, numerous fractional ownership programs have developed throughout the United States and abroad. The development of programs abroad has been somewhat hampered by the regulatory constraints of the countries involved. One of the earliest programs in Europe was developed by the UK-based London Jet Share (LJS) Company in Europe, South America or Asia. See Raytheon Travel Air Looks Abroad for New Fractional Owners, BUS. & COM. AVIATION, Mar. 1999, at 20.

\textsuperscript{40} Executive Jet is not the first company offering fractional ownership of aircraft to seek inroads in the Middle East. In 1997, CoreJet was expected to operate three Citation VII aircraft in its Dubai-based Jet Partners program and expected to add additional aircraft. See R. Randall Padfield, The Fractional Aircraft Industry: A Brief Overview, AVIATION INT'L NEWS, Fall 1997. After the loss of expected financing, CoreJet's plans were put on hold. Upon receiving financing and assistance from the South African KBH Group, CoreJet has ordered four Cessna Citation Xs which are expected to enter service from a Dubai base in the first quarter of 2000. See Charles Alcock, CoreJet Tries to Get Frax Program Airborne, AVIATION INT'L NEWS, Mar. 1999, at 48.


\textsuperscript{42} See Gulfstream Says Middle East Fractional Ownership Deal is Worth $335 Million, WKLY. BUS. AVIATION, Apr. 6, 1998, at 153. The core fleet in a fractional ownership program consists of aircraft owned or leased by the program manager or its affiliate which are placed in the interchange pool in order to assure that aircraft are available to satisfy the needs of the fractional owners. It may also include aircraft in which all of the interests have not yet been sold. See Norris, supra note 5, at 96-98.

\textsuperscript{43} See Bill Davis, The Pleasures of Private Aircraft: Alternatives to the Airlines, MILLIONAIRE MAG., Nov. 1999, at 240, 248; Taverna, supra note 5, at 65. In 1995, AvShares, a program offering partial ownership of used business aircraft to Latin American operators, was offered by Avlease & Finance Group of Florida. See Graham Warwick, Corporate Competition, FLIGHT INT’L, Oct. 11, 1995. It does not appear that the AvShares program was successfully implemented.
late 1994. At the time the program was developed, shared ownership of an aircraft on the British civil aircraft register was not permitted. In 1995, the Corpavia Club was created to facilitate the time-sharing of aircraft for the benefit of its members. By limiting the use of the club aircraft exclusively to the club members and their guests, the aircraft were operated on the private registry. Since it was developed as a structure for private as opposed to commercial use, both Corpavia and LJS were able to avoid the restrictions placed on commercial operations in Europe.

More recently, Airshare, a UK-based fractional ownership program, indicated that it would be entering the market in early 1999 with one used and one new Cessna CitationJet. As is the case with NetJets Europe, the Airshare program would be operated under a commercial air operator’s certificate, charge a monthly management fee and an occupied hour rate, and

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44 See Gunter Endres, How to Join the Jet Set in a High-Flying Timeshare (Sharing Corporate Jets), The European, Feb. 10, 1995, at 30. London Jet Share Company offered three shares per aircraft to facilitate the availability of aircraft to the owners. It also made back-up aircraft available to ensure it could meet its contractual obligations. The sale of the aircraft was accomplished by the recordation of a lien against the aircraft in favor of each of the owners. The agreements prohibited the use of the aircraft as security for any individual owner and required unanimous consent for the aircraft to be sold. Despite this restriction on sale, however, an owner could sell its share as long as the transferee assumed all financial responsibility. See id.


46 The program was based on a five year membership with the ability to exit the club after two years. As with other programs, there was a fixed charge and an hourly charge. See id. There was also guaranteed availability using backup Jet Aviation aircraft. See Corpavia Club Promotional Material, at Operations (on file with author).


48 See Corpavia Club Promotional Material, “Club Description” (on file with author).

49 See How to Join the Jet Set in a High-Flying Timeshare (Sharing Corporate Jets), supra note 44, at 30. See also Corpavia Promotional Material, “Club Description” (on file with author). Corpavia, however, does not appear to have attracted sufficient interest. As a result, Jet Aviation, the operating entity in the Corpavia Club has discontinued its participation in the program.

would distinguish between flights within the primary area of western Europe and the more outlying areas.\textsuperscript{51} Fractional ownership of single and twin engined helicopters maintained to UK Civil Aviation Authority Public Transport standards was also offered by First Heli-Network (FHN) located in England followed by a fractional ownership and lease program offered by Skyhopper in the United Kingdom with two Sikorsky S-76 and one Bell 430 helicopter and an Agusta A109E to be added in the near future.\textsuperscript{52}

Another variation of a fractional ownership program is being offered in Europe by Share Plane, a Swiss-based program using single engine Pilatus PC-12 turboprop aircraft. In this program, the participants do not acquire any equity interest in the aircraft. Instead, their membership entitles them to 125 flight hours per year under a five-year contract. At the expiration of the term, the participant has the option to walk away or to renew.\textsuperscript{53}

Although fractional ownership programs are developing in Europe and the Middle East, the programs have not caught on in Canada largely because of the unfavorable regulatory environment.\textsuperscript{54} Although fractional ownership programs in the U.S. have not been considered commercial for FAA regulatory purposes,\textsuperscript{55} Transport Canada classifies such programs as commercial.\textsuperscript{56} Transport Canada has taken such a position because under Canadian law, legal responsibility is vested in the party

\textsuperscript{51} See id. In Airshares' case, the operator would be Ad Astra. Unlike NetJets Europe, Airshares would not agree to repurchase the fractional owner's interest, but rather, would simply endeavor to do so. See id.; see also Charles Alcock, Airshare Frax Venture Prepared for Takeoff, AVIATION INT'L NEWS, May 1999, at 40. In addition to the sale of fractional interests, Airshare has also introduced a fractional leasing option. See Charles Alcock, UK's Airshare Launches Frax Leasing Program, AVIATION INT'L NEWS, Oct. 1999, at 100.

\textsuperscript{52} See First Heli-Network (last modified Dec. 4, 1998) <http://www.first-heli-network.co.uk/intro.htm>. FHN indicated that fractional ownership could lower an owner's cost by approximately eighty percent. See id.; see also Mike Vines, First U.K. Fractional Ready to Hover, BUS. & COM. AVIATION, Oct. 1999, at 70.


\textsuperscript{55} See infra notes 168 and 182-184 and accompanying text.

\textsuperscript{56} See Newman, supra note 54. Out of concern for the unfair competitive advantage that a U.S. fractional ownership program operated under non-commercial rules would have over a Canadian program operated under commercial rules, the Canadian aviation authorities and trade associations are awaiting the results of the FAA's review of fractional ownership. See Harry Weisberger, Can-
actually flying and maintaining the aircraft. As a result, the fractional owners would merely be viewed as clients of the commercial operator. In addition to the aviation regulatory issues, Canadian securities laws would require those offering to sell shares of aircraft in fractional ownership programs to file prospectuses and comply with the securities laws governing limited partnerships. Legal constraints aside, the economics of fractional ownership in Canada are not as favorable as in the U.S. The major cities in Canada are far more dispersed than in the U.S. or in Europe. Such distances would substantially increase costs to account for the ferry flights making a fractional ownership program less attractive.

Both in the U.S. and abroad, not all programs have fared well. Some companies have announced but never implemented or have started but discontinued the programs. The reasons for the discontinuation or decision not to implement the program vary. Some did not attract sufficient interest. Others backed


57 See Newman, _supra_ note 54.
58 See _id._
59 See _id._
60 See _id._
61 See _id._

62 For example, Prime Fleet was a proposed fractional ownership program, which would have utilized used aircraft of various types through the joint auspices of Prime Airborne, which would provide the management services, and Fleet Capital Leasing, which would provide the financing. Under this program, at the end of five years, there would be no restrictions on the owners' disposition of its interest. See Al Levin, _Prime Fleet Plans for Fifteen Planes and 150 Employees in Pre-owned Aircraft Venture, Syracuse Bus._, Feb. 15, 1997, at 1; Dzikowski, _supra_ note 5, at 1; Gordon A. Gilbert, _Fleet Capital and Prime Airborne Enter Fractional Industry, Bus. & COM. AVIATION_, Dec. 1, 1996, at 30. The Prime Fleet program, however, was not implemented. See Padfield, _supra_ note 40. In addition, HeliShare, a fractional ownership program developed to offer shares in Eurocopter AS-355 helicopters with backup provided by comparable twin engine helicopters, was not implemented. See _id._; see also Helishare Debuts Fractional Ownership of Helicopters, _Helicopter News_, Feb. 14, 1997. In part due to the different regulatory, geographic and economic environments, certain of the programs based overseas have also failed. For example, the Jet Time program offered by the National Airways Corporation in Johannesburg, was unable to sign up any customers. See Gordon A. Gilbert, _Shared Owner Program in Africa is Having a Slow Start, Bus. & COM. AVIATION_, Oct. 1, 1997, at 26. The Jet Network program developed by Air London was also unable to implement a successful program. See Sarsfield, _Fractional Progress, supra_ note 1, at 64.

63 See _The Fractional Aircraft Industry: A Brief Overview, supra_ note 40 (HeliShare was not finding sufficient demand for its shared helicopter program); Gilbert, _Shared Owner Program in Africa is Having a Slow Start, supra_ note 62, at 26 (of the 8
away when the magnitude of the capital investment for a successful program became clear. In spite of some of the unsuccessful programs, new companies continue to enter this burgeoning market and others are growing. These smaller and newer programs provide potential business aircraft owners with a host of choices. For example, unlike the three primary fractional ownership programs, some of these programs offer pre-owned as opposed to new aircraft or are regional in scope as opposed to national. Programs have also been developed

aircraft ordered from Raytheon, National Airways Corporation was only able to sell one aircraft in its Jet Time program, and that sale was to a single owner).

See The Fractional Aircraft Industry: A Brief Overview, supra note 40 ($40-$50 million worth of the core fleet aircraft would be required to support the Prime Fleet program); Sarsfield, Fractional Progress, supra note 31, at 64 (the manager of Jet Network determined that at least four aircraft were required to implement the program).

PowerFlite Incorporated has proposed a program emphasizing primarily piston engine and turboprop aircraft and both fixed-wing aircraft and helicopters. This Texas-based program would limit the upgrades in aircraft type although downgrades would be unlimited. See PowerFlite website (last modified Nov. 16, 1998) <http://www.powerflite.com>. American Business Charter has also developed a program at Addison Airport near Fort Worth, Texas. Unlike many of the other fractional programs, American Business Charter will charge for return trips even if the aircraft is flying back to the base empty. See Bill Davis, American Business Charter: Leading the Way in Business Aviation, MILLIONAIRE MAG., Nov. 1999, at 238.


The PlaneSense fractional program managed by Alpha Flying has operations based in the Northeast region using Pilatus PC-12 single engine turboprop aircraft. See The Fractional Aircraft Industry: A Brief Overview, supra note 40. VIPShair has a prime service area covering a 1500 mile radius of Chicago. See Alcock, supra note 66, at 11. Aviation One, an eastern Massachusetts-based company is offering shares in Piper Saratogas for its Flight Shares fractional program serving points in the Boston area. See Fractional Leasing of New Piper Saratogas, FLYING, Apr. 1999, at 36; see also Aviation One (visited Apr. 30, 1999) <http://www.aviationone.com>. Direct Air offers a program for both regional and national use with Beech Barons for regional and Pilatus PC-12 aircraft for national use. See Direct Air (visited Sept. 29, 1999) <http://www.flydirectair.com>. Carina Star Shares has introduced a regional fractional ownership program based in Hilton Head, South Carolina, using Beech Barons and Bonanzas. The aircraft in the Carina Stars program are scheduled through its website on a first come, first served basis. See Baron/Bonanza Fractional Program Off the Ground, AVIATION INT’L NEWS, Apr. 1999, at 10. HeliFlite Shares, a Texas-based entity, offers Bell 430 intermediate twin-engine helicopters for its fractional ownership program, which will be initially target customers based in Texas, with further regional expansion planned for a later date. See Texas Firm Rolls Out Innovative Regional Executive Transportation
using helicopters, some exclusively and others in conjunction with fixed-wing aircraft.  

Of the newer programs entering the fractional ownership market, two stand out based on their growth and prominence. First, Flight Options, a company owned by Corporate Wings, offers a fractional program using pre-owned aircraft which operate on a national basis from Flight Options’ Cleveland, Ohio base. Although Flight Options is only one year old, it has signed one hundred fifty participants, having broken the one hundred participant mark nine months after beginning the program. To support these participants, Flight Options’ fleet has grown to forty-three aircraft.

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68 AirShare, a program being developed by Pro Aircraft Management, will offer fractional interests in Sikorsky helicopters. It will also offer fractional owners the ability to obtain blocks of time on Pro Aircraft’s fleet of fixed wing aircraft. See R. Randall Padfield, AirShare Spools Up S-76 Helicopter Frax Program, AVIATION INT’L NEWS, Apr. 1999, at 75. Following its acquisition of Associated Aircraft Group, a helicopter operator, Sikorsky Aircraft implemented a Manhattan-based fractional ownership program for helicopters. See Gordon Gilbert, Sikorsky Gives Frax Helo Program a Whirl, AVIATION INT’L NEWS, Mar. 1999, at 8. Unlike many other fractional programs, the helicopters will be operated under Part 135 and usage will be allocated based on flight units – a concept which combines time aloft and distance traveled. See Bill Wagstaff, Sikorsky Factory Backs Northeast Fractional Plan, AVIATION INT’L NEWS, Aug. 1999, at 70. This program is the only helicopter fractional program offered by a helicopter manufacturer. See John Morris, Sikorsky Expands Fractional Program as It Aims to Stimulate Helicopter Use, AVIATION WK. SHOW NEWS, Oct. 13, 1999, at 57.


70 See Paul Lowe, Flight Options Shows Startling Growth, NBAA CONVENTION NEWS, Oct. 12, 1999, at 149.

The other major player to enter the fractional ownership market is Wayfarer Aviation, which introduced the StarShares program.\textsuperscript{72} The StarShares program offers shares in turboprop aircraft with the response time varying based on the proximity of the origin and destination to New York City.\textsuperscript{73} Participants in this program are also entitled to upgrade a portion of their allocated hours to jet aircraft that are in Wayfarer's fleet of managed aircraft.\textsuperscript{74}

The acceptance of fractional ownership as a segment of business aviation is reflected not only by the continued increase of companies offering fractional ownership but also by the fact that an average of thirty owners have acquired fractional interests each month\textsuperscript{75} and forty to forty-five aircraft are being added to the NetJets fleet alone per year.\textsuperscript{76} This rate of growth caused the number of owners in the program to reach 1100 and the number of aircraft to reach 170 by October 1998.\textsuperscript{77} When the number of aircraft in the second and third largest programs, Business JetSolutions’ FlexJet program and Raytheon Travel Air, respectively, are added, the number of aircraft in these programs in late 1998 exceeded 225.\textsuperscript{78} As 1999 draws to a close, fractional ownership is a multi-billion dollar industry with more than 1500 owners and 300 aircraft.\textsuperscript{79} In spite of its size, Allied-

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\textsuperscript{74} See Richfield supra note 72, at 35.

\textsuperscript{75} See Velocci, \textit{Growth of Fractional Ownership Assured Despite Turbulence Ahead}, supra note 5, at 58.


\textsuperscript{77} See Velocci, \textit{Growth of Fractional Ownership Assured Despite Turbulence Ahead}, supra note 5, at 58. By September 1999, NetJets had 218 business jets in its fleet. See Wagstaff, supra note 11, at 225.


\textsuperscript{79} See Sarsfield, supra note 11, at 56 (the five major programs – Executive Jets’ NetJets, Bombardier’s FlexJets, Raytheon’s Travel Air, Flight Options and Wayfarer’s StarShares – have 329 aircraft and 1567 shareholders). According to Aviation Data Service of Wichita, there were only 24 aircraft and 89 fractional
Signal estimates that "[o]nly a small fraction of [the] total potential [fractional ownership] market has been developed to date."

III. PARTICIPATION IN FRACTIONAL OWNERSHIP PROGRAMS

Although the programs vary somewhat, the structure of all of the programs are fundamentally similar. Virtually all of the programs involve the acquisition of an interest in an aircraft, the execution of a management agreement with the program manager, the execution of an agreement with the other co-owners of the aircraft and the execution of an interchange agreement with all program participants whereby the interest is placed in a pool of aircraft consisting of all aircraft in the program. The term of the agreements is typically five years during which time the participant pays the manager a fixed monthly management fee and an hourly fee for each hour the participant flies in its aircraft or any aircraft from the interchange shareholders in 1993 and 165 aircraft with 743 fractional shareholders in 1997. See Phil Rose, NBAA and the Fractional Issue: An Early Verdict, PROF. PILOT, Oct. 1999, at 30; Barry Rosenberg, Fractionals: Love Them or Hate Them But They Are Fueling the Bizjet Boom, AVIATION WK. SHOW NEWS, Oct. 12, 1999, at 76.

Gordon A. Gilbert, Fractional Strength Drives Continued Bizav Growth, NBAA CONVENTION NEWS, Oct. 12, 1999, at 88; AlliedSignal Forecast Predicts Business Jet Market Will Stay Hot Through 2009, supra note 1, at 171; see also Gilbert, AlliedSignal Forecasts Big Bizjet Boom; Sees $78 Billion Sales Over 10 Years, supra note 1, at 16.

Certain of the differences stem from the different regulatory environments in the jurisdictions where the programs are based. See supra notes 44-61 and accompanying text.

See SRI FRACTIONAL CONFERENCE, Fractional & Joint Ownership: Corporate Jet Manufacturers and Operators Perspective, supra note 1; Sarsfield, Fractional Progress, supra note 1, at 64. See also David Field, Jet Time Sharing Gains Altitude: Rival Companies Expand Fleets, USA TODAY, Nov. 26, 1996, at B5; Bradley, supra note 9, at 76.

Although the vast majority of participants in fractional ownership programs own an interest in an aircraft, certain parties participate in these programs by virtue of aircraft lease agreements. These leases typically arise in one of two ways. First, a participant may lease an interest from a third party, such as a financing institution, pursuant to an operating or a finance lease. Second, a party may lease an interest from the program manager or an affiliate of the program manager until the aircraft in which such party has contracted to purchase an interest becomes available. In either case, the lessee is treated as an owner for purposes of its participation in the day-to-day aspects of the program. For purposes of this article, unless the context requires otherwise, all references to interest owners or program participants shall include parties who are owners or lessees of the interests.

See infra notes 105-106 and accompanying text for description of the interchange aspect of fractional ownership programs.
pool, and there is no charge for deadhead time. The number of hours allocated to the participant is based on the percentage of its interest in the aircraft. The programs generally allow the participant to require the program manager or its affiliate to repurchase the aircraft after a specified period of time. Although an interest in a specific aircraft is acquired, the participant, through the interchange agreement, has access to the other aircraft in the program if the aircraft in which it owns an interest is not available. The participant may also trade up to a more expensive aircraft or down to a less expensive one with the number of hours deducted from the participant's total allocation being adjusted to reflect the difference in the aircraft.

Some of the smaller programs have slight variations in their structure although they all generally contemplate the purchase or lease of an interest, the execution of a management agreement and the availability of an alternate aircraft if the aircraft in which the participant acquired an interest is not available. At least one program, Skyshare, offers shared aircraft ownership for owners/pilots and smaller companies in local markets with piston and turbine powered aircraft through a franchise arrangement with fixed base operators at various locations throughout the United States.

85 The deadhead portion of a flight is that portion required to bring the aircraft to the location where the participant will originate its flight or to return the aircraft to its base. See Robert Searles, Fractionals Can Fracture Deadheads, BUS. & COM. AVIATION, Oct. 1998, at 62. Many fractional owners experience cost savings because the programs allow a company to control the deadhead expenses. See David Esler, Using Fractionally Owned Aircraft For Supplemental Airlift, BUS. & COM. AVIATION, Nov. 1998, at 66; See also Bradley, supra note 9, Nov. 1996, at 82. Because the cost of the deadhead segments is built into the various fees paid to the manager, an owner whose travel involves little deadhead will be subsidizing an owner with substantial deadhead needs. See Norris, Pitfalls of Fractional Ownership, supra note 5, at 100. There are, however, certain programs that charge participants for deadhead segments. See supra note 65.

86 See SRI FRACTIONAL CONFERENCE, Fractional & Joint Ownership: Corporate Jet Manufacturers and Operators Perspective, supra note 1, and Developing a Used Aircraft Fractional Ownership Program. But see Alcock, supra note 50, at 42 and accompanying text; Alcock, supra note 53 and accompanying text.

87 See Firm Offers Fractional Ownership Franchises to FBOs, BUS. & COM. AVIATION, June 1998, at 28. The Skyshare program allocates aircraft usage based on the number of days and not the number of hours as is done by most of the other programs. Although access to other aircraft in the program is provided, access is not guaranteed as aircraft are provided on a first-come, first-served basis. In addition, the program is based on the assumption that the participant will leave from its home base. As such, deadheading expenses would be attributable to the particular owner. See Skyshare International (last visited June 13, 1999) <http://www.skyshare.com>; see also Skyshare likes Multi, NBAA CONVENTION NEWS, Oct. 20,
For the programs that guarantee aircraft availability, the program manager generally relies on a combination of core fleet and outside charter capacity. The need for core fleet to ensure that there are an adequate number of aircraft available for the participants is particularly important in the early stages of a program when the number of aircraft in the interchange pool is quite limited and in national programs where the aircraft could be located in geographically distant locations. For example, when NetJets Europe was started, a core fleet of aircraft was already in place so that the participants could be assured the availability of aircraft. Although the relative percentage of core fleet aircraft may decline over the course of the program, the need for such aircraft does not disappear if the program manager wishes to guarantee the availability of aircraft to the participants.


88 See Perry Bradley, Flight Options Opt for Used Aircraft That Cost Less But Are More Readily Available, Bus. & Com. Aviation Show News, Oct. 20, 1998, at 106 ("Flight Options plans to maintain a 50% core fleet-owned aircraft ratio to limit the amount of flying that is sold off to outside charter operators to about five percent . . ."); Anthony L. Velocci, Jr., Executive Jet Attempts to Defy Odds With European Venture, Aviation Wk. & Space Tech., Aug. 26, 1996; Jacobs, supra note 9, (a program manager must have a "critical mass of aircraft in order to operate nationwide . . ." requiring a substantial investment of capital); see also Graham Warwick, Two Ways to Time Share (Part-Ownership of Corporate Aircraft), Flight Int'l, Sept. 28, 1994; SRI Fractional Conference, Developing a Used Aircraft Fractional Ownership Program, supra note 1.


90 EJA itself acknowledged relatively early in its program that it has had to be conservative in its expansion because of the investment required in obtaining core fleet aircraft when introducing a new aircraft type into the program. See Anthony L. Velocci, Jr., Industry Debates Value of Fractional Shares, Aviation Wk. & Space Tech., Aug. 29, 1994; see also Warwick, supra note 88.

91 See Velocci, supra note 90.


93 See Norris, supra note 5, at 98 (the growth of the total fleet reduces a program manager's dependency on core fleet and charter); see also Warwick, supra note 88.
IV. THE OPERATION OF AIRCRAFT IN FRACTIONAL OWNERSHIP PROGRAMS

A. THE REGISTRATION OF FRACTIONALLY OWNED AIRCRAFT

EJA’s NetJets program was developed using concepts that the FAA had already blessed in Part 91 of the FARs.\textsuperscript{94} Many of these concepts require the aircraft to be U.S. registered.\textsuperscript{95} As a result, the first responsibility of an owner is to cause its interest in the aircraft to be registered at the FAA. In order to be registered at the FAA, the aircraft must be owned by citizens of the United States\textsuperscript{96} or owned by a corporation organized and doing business under the laws of the United States or one of the states, provided that the aircraft will be based and primarily used in the United States.\textsuperscript{97}

\textsuperscript{95} See 14 C.F.R. § 91.501(a) (1998).
\textsuperscript{96} A citizen of the United States is defined as
(A) an individual who is a citizen of the United States;
(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.
\textsuperscript{97} 49 U.S.C. § 40102(a)(15).
\textsuperscript{98} See 14 C.F.R. § 47.3(b)(1) (A)(ii) (1998). The FAA considers an aircraft to be based and primarily used in the United States if at least 60% of the flight hours are accumulated on flights between two points in the United States during each six month period following the registration of the aircraft at the FAA with the first six month also including the remaining portion of the month in which the aircraft is registered. See 14 C.F.R. § 47.9(b) (1998). Registration under this option requires the submission of certain corporate documentation, certifications and information in addition to evidence of ownership. See 14 C.F.R. § 47.9(a) (1998). If any of the co-owners rely upon this option for registration, the ability of that party to be compensated in any fashion for the operation of aircraft would be limited because any aircraft operated by such party would be defined as a foreign civil aircraft under economic-based regulations administered by the U.S. Department of Transportation. See 14 C.F.R. § 375.1 (1998). See Corporate Aircraft Operations, supra note 7, at 1006-07, and Beware Part 375: A Trap for the Unwary, NBAA Digest, July 1998, at 4, for a more detailed discussion of the implications of being classified as a foreign civil aircraft. The aircraft itself would not likely be treated as a foreign civil aircraft when it is operated by the U.S. citizen owners. There are, however, no DOT interpretations addressing this issue.
In order to register the aircraft with all of the co-owners identified, an application for registration must be filed each time a party is added or removed from the ownership of the aircraft. Because the change of even one party results in a change of ownership, all of the co-owners must sign the registration application, even the ones that were already listed as registered owners. Given the relatively frequent addition of participants to fractional ownership programs and the logistical difficulty associated with securing all of the required signatures, the program managers have developed a practice under which the program manager signs the application for each of the co-owners pursuant to a power of attorney granted by each of the co-owners to the program manager authorizing such execution.

B. The Regulatory Framework for Operating Fractionally Owned Aircraft

Since their implementation in 1986, fractional ownership programs have been operated under Part 91. Despite the prominence and phenomenal growth of these programs, however, the term “fractional ownership” is not defined or even mentioned by name in Part 91 or anywhere else in the FARs. Nevertheless, the concept is based on three key Part 91 concepts—all of which are long-accepted parts of business aviation.

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99 The FARs contain very specific requirements for the execution of documents being filed with the FAA. Among other things, these regulations identify the parties who are authorized to execute documents on behalf of an applicant or registered owner. See 14 C.F.R. §§ 47.13(c), (d), (e) and (f) (1998).
100 The FAA will accept documents signed pursuant to powers of attorney only if the originally signed power of attorney (or a certified copy thereof) is submitted with the application. See 14 C.F.R. § 47.13(c)(3) (1998). In the case of a corporation, a certified copy of the resolution of the board of directors authorizing the grant of the power of attorney must also be filed. See 14 C.F.R. § 47.13(d) (1998). As is the case with all documents filed with the FAA, each signature must be an original. See 14 C.F.R. § 47.13(a) (1998).
101 There is at least one program which holds itself out as a fractional ownership program where the aircraft are operated by the manager under Part 135 if the aircraft being used by the participant is not the aircraft in which the participant owns an interest. See SRI FRACTIONAL CONFERENCE, Developing a Used Aircraft Fractional Ownership Program, supra note 1; see also supra note 68.
102 Due to the differences in the regulatory environments, however, the structure of NetJets Europe is somewhat different than the structure of the U.S.-based program. See Alcock, EJA Adapts Fractional Ops to Fit European Realities, supra note 37, at 44. For example, the ownership interests of the participants in the NetJets Europe program are registered with the Civil Aviation Authority in Portugal, the jurisdiction in which the aircraft are registered. See Fractional Ownership Takes Off
The first is joint ownership. The FAA defines joint ownership as "an arrangement 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."103 Under the FAR definition, there is an operating joint owner and one or more non-operating joint owners and the non-operating joint owner(s) compensate(s) the operating joint owner for the cost of such operations. By contrast, the agreement among the fractional owners does not contemplate that one owner will operate for the other. Instead, each owner is operating for itself. Thus, the concept of owning a share of an airplane in a fractional program is not a joint ownership as defined by the FAA, but rather is more in the nature of a co-ownership which itself is a well recognized and accepted FAA concept.104

The second is the interchange. The interchange is the mechanism by which owners have use of aircraft when the aircraft in which it purchased an interested is not available. The FARs define an interchange agreement as "an arrangement whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person's airplane, and no charge, assessment or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating and maintaining the two airplanes."105 This definition contemplates an exchange of wet leases (i.e., aircraft with crew) between two parties, each of which has its own aircraft.106


104 In addition to the Part 91 definition of joint ownership, the FAA recognizes the existence of co-owners in its regulations governing aircraft registration. In fact, the Application for Aircraft Registration which is required by the FAA to be submitted by an applicant for aircraft registration lists "Co-owner" as one of the types of registration. See 14 C.F.R. §§ 47.31, 47.7(d)(1) (1998), and AC Form 8050-1.


106 Although the definition of interchange does not refer to the crew, it is clear that the FAA contemplated that interchanges would involve the provision of air-
In a fractional ownership program, however, the owners are not exchanging aircraft and crew. Rather, they are agreeing to place their respective airplanes in a pool with all of the other fractionally owned airplanes and to allow all of the owners in the program to have access to the aircraft. As a result, while the interchange in a fractional ownership program is styled after the interchange as defined in the FARs, it is more akin to an exchange of dry leases where each owner is considered the operator of any aircraft it is using regardless of whether the aircraft is owned by such owner or is part of the interchange pool. With a dry lease exchange, operations can still be conducted under Part 91 since the fractional owner, in its capacity as lessee, is operating for itself.

The final Part 91 concept found in fractional ownership programs is the management company. As is the case with fractional ownership, management company is not defined in Part 91 or any other provision in the FARs. Yet management companies have successfully served corporate aviation for decades. In a fractional ownership program, the management company provides the ancillary services that enable each of the owners to operate the aircraft in the program and administers the interchange program for all of the participants to ensure that an aircraft is made available to a participant if the aircraft in which it has an interest is not available. In essence, the management company is the glue that holds together the pieces of the fractional ownership program.

Although all of the owners contract with the same manager, each of these owners has a one-on-one contractual relationship with that manager—similar to traditional management arrangements for individually owned aircraft.\textsuperscript{107} In each case, the management company provides the necessary support services to enable the owner to operate an aircraft.\textsuperscript{108} For example, the

\textsuperscript{107} For purposes of this Article, traditional management companies will be considered those that manage wholly-owned or leased aircraft.

\textsuperscript{108} See Corporate Aircraft Operations, supra note 7, at 1007-09.
management company will arrange for the crew who will be under the exclusive direction and control of the owner. The management company will also arrange for maintenance and insurance coverage, prepare reports, maintain whatever other documentation is required, and provide a variety of other services. Fractional program managers have the additional responsibility of administering the interchange program, which involves coordinating the owners' access to the aircraft in the dry lease pool. With the support services provided by the manager, the owner is able to exercise operational control of the aircraft it is using regardless of whether it has an ownership interest in the aircraft or has obtained the aircraft from the interchange pool.

The reliance on these three concepts as the building blocks for fractional ownership programs reflects the non-commercial nature of the operation of the fractionally owned aircraft and supports the operation of these aircraft under Part 91 of the FARs.

C. The Significance of Part 91

The vesting of operational control in the owner is critical to the operation of the aircraft under Part 91—the regulatory framework under which the programs were developed and approved by the FAA. By operating under Part 91, fractional aircraft owners enjoy the flexibility that is the hallmark of business aviation. In fact, as many businesses have located facilities in more rural parts of the United States, the flexibility offered by Part 91 becomes more and more critical. If, however, the program manager is deemed to be in operational control of the aircraft, the program manager, as operator, would be carrying passengers—namely the owners or the owners' employees, officers and guests—and receiving compensation in the form of the hourly operating cost plus the management fee. Such operations would require the program manager to be certificated by the FAA and to operate under the more stringent operating rules of FAR Part 135.

If the rules contained in Part 135, which govern commercial operators were to apply, restrictions would be imposed that would impair, if not preclude, certain operations that are con-

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109 See supra notes 101-108 and accompanying text.
110 In the case of the Boeing Business Jet, compliance with Part 121 would be required since the aircraft are too large to be operated under Part 135. See 14 C.F.R. § 135.2(a)(1)(iii) (1998).
ducted safely under Part 91. The restrictions imposed by Part 135 apply to numerous aspects of the operations. Among other things, under Part 135 restrictions apply to the types of airports that can be used, the use and hiring of flight crews, and the exterior and interior of the aircraft. In the case of airport restrictions, Part 91 permits the operator to land on any runway that meets the length requirements specified in the flight manual applicable to that aircraft. Part 135, on the other hand, requires the operator to be able to land the aircraft within 60% of the runway length. The application of this restriction could impact as many as 2,400 airports throughout the United States.

Operations at many airports would also be precluded if the weather reporting facilities were required to be located at the airport. Under Part 91, an operator may begin an instrument approach to an airport that has no weather reporting facility and determine when it approaches the airport whether the weather is good enough to land the aircraft safely. Under Part 135, however, the airport must have a weather reporting facility operated by the U.S. National Weather Service or an otherwise approved weather reporting facility. In addition to the runway and weather reporting restrictions, pilots operating under Part 91 are given more flexibility in choosing when and whether to depart than are their counterparts operating under Part 135. Specifically, Part 91 allows a pilot to depart without being required to meet specific visibility and ceiling minimums. As a corollary, because a pilot can make the determination of whether a landing can be made during the approach phase of

111 See John Olcott, Corporate Aviation Safety: Still the Best, WALL ST. J., May 12, 1997; Gordon A. Gilbert, Safety, BUS. & COM. AVIATION, May 1997, at 32.
114 Part 91 requires only that the runway be long enough for the aircraft to land when taking into consideration aircraft performance, elevation, runway slope, aircraft gross weight, wind and temperature. See 14 C.F.R. § 91.103 (1998).
116 See Sarsfield, Fractional Divide, supra note 78, at 47. The actual number of affected airports would depend upon the particular aircraft type; see also WKLY. BUS. AVIATION, supra note 112; Arnold Lewis, Air Charter or Fractional Ownership, BUS. & COM. AVIATION, Apr. 1, 1998, at 86.
the landing, the pilot can depart for an airport even though at the time of departure, ground visibility is below that required to complete the approach.\textsuperscript{119}

In addition to the airport and flight related issues, Parts 91 and 135 differ substantially in terms of crew rest and duty requirements. Under Part 135, the FAA places significant limits on the number of hours that a crew member may fly.\textsuperscript{120} The FAA also limits the number of hours that a pilot may be on duty.\textsuperscript{121} The FAA defines a duty period as the "period of elapsed time between reporting for an assignment involving flight time and release from that assignment by the certificate holder."\textsuperscript{122}

Based on the definition and FAA interpretations, duty time includes time when a crewmember is available by beeper even though the crewmember may never be called to operate the aircraft, and may in fact be sleeping and free to go about his or her personal business.\textsuperscript{123} These flight and duty time restrictions may foreclose operations that could be safely conducted in business aircraft, especially long international operations of the type for which many aircraft are specifically designed.

In general terms, far more regulatory requirements apply to the hiring and retention of personnel employed by companies operating under Part 135 than apply to personnel employed by companies operating under Part 91. For example, under Part 135, businesses would have to comply with the Pilot Records Improvement Act of 1996 under which crewmembers cannot serve as pilots until certain records and information are obtained regarding the person's background.\textsuperscript{124} Not only does this process


\textsuperscript{120} See 14 C.F.R. §§ 135.261-135.273 (1998). For example, § 135.267(b) imposes a ten hour flight time and twelve hour duty time within any consecutive 24 hour period. § 135.267(b) (1998).


\textsuperscript{122} See 14 C.F.R. § 135.273(a) (1998).


\textsuperscript{124} See 49 U.S.C. § 44936 (f). In addition to aviation related records, the hiring carrier must request the pilot's motor vehicle driving record through the national driver register records. See 49 U.S.C. § 30305(b)(8). Prior to the adoption of this Act, carriers were already required to conduct employment investigations, including a criminal history record check of employees with access to the aircraft of an air carrier or foreign air carrier or a secured area in an airport. See 49 U.S.C. § 44936. Initially, the Act prohibited a company from hiring a prospective crewmember for the purpose of commencing training until the required information and records were obtained. Because of the burdens this created, § 44936(f) of the Act was amended to permit a carrier to hire and train the
create delays,\textsuperscript{125} it also requires companies to disclose personnel records after a crewmember leaves.\textsuperscript{126} Compliance with Part 135 also requires the development of a drug and alcohol testing program in accordance with standards specified by the FAA—the same standards that apply to the major airlines.\textsuperscript{127}

Because aircraft operations conducted under Part 91 are deemed to be non-commercial, U.S. operators are (or should be) able to conduct business within foreign countries without being hampered in their ability to transport their own personnel. If Part 135 were to apply to fractional ownership programs, the operations conducted with those aircraft would be viewed as commercial. As a result of restrictions imposed on commercial operators by other countries, the application of Part 135 to the operation of aircraft in fractional ownership programs would adversely impact the operation of such aircraft in foreign countries.\textsuperscript{128} For example, additional fees and regulations would be imposed on the operator, and operators may be prohibited from picking up their own personnel at one point in a foreign

\textsuperscript{125} In fact, it can take months before all of the records and information is obtained for a pilot. \textit{See Moll, supra} note 112, at 78.

\textsuperscript{126} The Pilot Records Improvement Act of 1996 not only requires the carrier to provide information with regard to its pilots, it also requires that the individual whose records are being requested be provided with "a reasonable opportunity to submit written comments to correct any inaccuracies contained in the records . . . ." \textit{See} 49 U.S.C. § 44936(f)(9); \textit{see also} 14 C.F.R. § 135.63(a)(4) (1998). The Act does provide protection from suit for the carriers involved in that it prohibits suits brought on behalf of applicant pilots for defamation, invasion of privacy, negligence, interference with contract or otherwise with respect to the furnishing or use of the records. The Act also explicitly preempts any state or local law which would prohibit, penalize or impose liability for furnishing or using the records outlined in the Act. The prohibition and preemption, however, is limited to furnishing or using records "in accordance" with the Act. Under the Act, a carrier also may require an applicant pilot to sign "a release from liability for any claim arising from the furnishing of such records to or the use of such records by such air carrier" regardless of whether there are any laws or agreements to the contrary.


\textsuperscript{128} \textit{See} Perry Bradley, \textit{Running the Customs Gauntlet}, \textit{BUS. & COM. AVIATION}, Dec. 1995, at 56. Similarly, because the NetJets Europe program is operated under a commercial certificate, the flexibility that might otherwise exist when aircraft are operated from the U.S. to Europe is limited. For example, if an aircraft arrives from the United States carrying a NetJets participant, that aircraft cannot be used for the NetJets Europe participants although it can be used to provide capacity for U.S. NetJets participants throughout Europe. \textit{See} Alcock, \textit{EJA Adapts Fractional Ops to Fit European Realities, supra} note 37, at 44.
country and dropping them in a second point in that country since such operations would be considered to be cabotage.\footnote{129}{See Newman, supra note 54, at 37.}

As is obvious, compliance with Part 135 would change the fundamental nature of the operation of aircraft in fractional ownership programs. Fractional ownership programs should be viewed simply as another form of business aviation. The application of Part 135 to such programs would be fundamentally at odds with that purpose.\footnote{130}{See NBAA Responds to Criticism From Members on Fractional Ownership Stance, Wkly. Bus. Aviation, Nov. 23, 1998, at 229.}

V. THE NETJETS EXCISE TAX DECISION

In structuring fractional ownership programs, consideration had to be given not only to FAA issues but also to IRS excise tax issues.\footnote{131}{The transportation excise tax was renewed for a ten year period by the Taxpayer Relief Act of 1997. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788. The statute provided for an annual change to the percentage of the tax and in the amount of the segment fee. See I.R.C. § 4261(a), (e)(5), (1989) (for transportation beginning after September 30, 1997, and before October 1, 1998, the excise tax is 9%; for transportation beginning after September 30, 1998, and before October 1, 1999, the excise tax is 8%; for transportation beginning after September 30, 1999, the excise tax is 7.5%). See I.R.C. § 4261(b)(1) (for segments beginning after September 30, 1997, and before October 1, 1998, a tax in the amount of $1 will be imposed for each domestic segment; for segments beginning after September 30, 1998, and before October 1, 1999, a tax in the amount of $2 will be imposed for each domestic segment; for segments beginning after September 30, 1999, and before January 1, 2000, a tax in the amount of $2.25 will be imposed for each domestic segment; for segments during 2000, a tax in the amount of $2.50 will be imposed for each domestic segment; for segments during 2001, a tax in the amount of $2.75 will be imposed for each domestic segment; for segments during 2002 and thereafter, a tax in the amount of $3 will be imposed for each domestic segment). In the case of transportation to and from rural airports, there is no segment fee and the excise tax is 7.5%. See I.R.C. § 4261(a)(e)(1)(A). For purposes of the excise tax and segment fee, a rural airport is determined by examining the number of annual departing passengers, the proximity to other airports and whether the airport was receiving essential air service subsidies on August 5, 1997, the date the statute was enacted. See I.R.C. § 4261(e)(1)(B).}

\footnote{132}{Taxable transportation is defined as transportation by air which begins and ends in the United States or in the 225-mile zone. The 225-mile zone includes only the portions of Canada and Mexico that are no more than 225 miles from the nearest point in the continental United States. See I.R.C. §§ 4262(a), (c)(2), 4272 (1989). Even if the transportation begins and ends at the same point, the tax will apply. See Treas. Reg. § 49.4261-1(c) (1996); see also Prv. Ltr. Rul. 95-24-}
ment fee. Although the FAA definition of a commercial operator as a "person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property," is similar to the IRS definition, the emphasis by each of the agencies differs substantially leading to what appear to be inconsistent determinations. In making its determination, the IRS focuses on which party has "possession, command and control" of the aircraft. In the IRS' view, a party that leases an aircraft to another but retains the elements of possession, command and control and performs all services in connection with the operation of the aircraft is providing a taxable transportation service.\textsuperscript{134}

As noted earlier, fractional ownership programs are based on the Part 91 concepts of management companies, joint ownership and interchange arrangements.\textsuperscript{135} In the tax area, EJA evaluated the applicability of the transportation excise tax based on the IRS positions in the areas of management companies and co-ownership arrangements. Under EJA's analysis, since the operation of the aircraft was non-commercial,\textsuperscript{136} the excise tax was not collected; instead the fuel tax was paid.\textsuperscript{137}

In the case of the management company aspect of the program, EJA relied upon the IRS interpretations which viewed an aircraft manager as an agent of the owner and did not apply the

\textsuperscript{003} (Mar. 2, 1995). The tax, however, does not apply to transportation performed by aircraft with a maximum certificated takeoff weight of 6,000 pounds or less, which are not operated on an established line. See I.R.C. § 4281 (1989).

\textsuperscript{134} See Rev. Rul. 60-311, 1960-2 C.B. 341 (if owner leases aircraft with pilots to others, performs all services in connection with the operation of the aircraft, and retains possession, command and control, taxable transportation is being provided).\textsuperscript{135} See supra notes 101-108 and accompanying text.

\textsuperscript{136} The IRS defines noncommercial aviation as "any use of an aircraft, other than use in a business of transporting persons or property for compensation or hire by air." I.R.C. § 4041(c) (West Supp. 1996).

transportation excise tax.\textsuperscript{138} With respect to the joint ownership aspect of the fractional ownership program, EJA relied on the general rule applied by the IRS wherein the transportation tax does not apply since the payment is not for the use of someone else's aircraft but rather covers the cost of operating one's own aircraft which remains under its possession, command and control.\textsuperscript{139}

When first confronted with the use of the aircraft by the fractional owners, the IRS concluded that the owners had transferred possession, command and control to the management company and were being provided with a taxable transportation service.\textsuperscript{140} Because the manager controlled all aspects of the operation of the aircraft including whether the owner would travel on its own aircraft, the IRS took the position that the fractional interest was indistinguishable from all other aircraft in the program and effectively formed a charter fleet for the program manager.\textsuperscript{141} As such, the fractional owner would be required to pay the transportation tax on all amounts paid to the manager.\textsuperscript{142}

\textsuperscript{138} See Rev. Rul. 58-215, 1958-1 C.B. 439 (no tax applies where management company furnishes pilots approved by the owner to be based at owner's facility and owner maintains insurance and pays an hourly fee to cover costs of fuel and other items since management company is merely an agent of owner); Tech. Adv. Mem. 93-47-007 (Aug. 12, 1993) (where owner pays the operational expenses, retains and exercises substantial operational control and assumes risk of loss for the aircraft, possession, command and control remains with the owner); Tech. Adv. Mem. 93-43-002 (where company operates, maintains and insures owner’s aircraft for owner, subject to reimbursement by owner for all costs including crew salary, standby charges, fuel, insurance and overnight fees, and company has right to charter the aircraft to third parties when owner is not using it, taxable transportation is not being provided to owner).

\textsuperscript{139} See, e.g., Prv. Ltr. Rul 81-48-032 (Sept. 1, 1981) (where owners of undivided interests in aircraft have equal rights of possession and use and will not rent or lease the aircraft to others, amounts paid to the operating co-owner are not subject to transportation tax since the payments are for use of own aircraft); Prv. Ltr. Rul. 80-52-082 (Sept. 30, 1980) (tax not applicable to co-tenants who have right to possession and use as an incident of ownership). This is to be distinguished from the use of an aircraft by the shareholders of the corporation even where the cost structure among the shareholders is similar to that used by the co-tenants. In the case of the shareholders, the corporation retains possession, command and control subjecting amounts paid by the shareholders to the transportation tax. See Rev. Rul. 76-431, 1976-2 C.B. 328.


\textsuperscript{141} See id.

\textsuperscript{142} See id. The IRS, however, never clearly identified the specific amounts against which the tax would apply.
The IRS distinguished the fractional ownership program from the management company interpretations and the general rule applicable to co-owners and determined that the transportation tax applies to amounts paid under fractional ownership programs.\textsuperscript{145} The IRS reasoned that the program is more in the nature of a transportation service than a co-tenancy. Specifically, the fractional owners, as part of the purchase of an interest, execute certain other agreements relating to the management and use of the aircraft. While the ownership agreement governs the rights among the owners of the specific aircraft, each of the owners is required to execute a management agreement and an interchange agreement. Pursuant to these agreements, the aircraft in which the owner has an interest is included in an interchange arrangement with all other aircraft participating in the fractional ownership program. Under this program, each owner would be entitled to a certain number of hours of aircraft use based upon the percentage of its ownership interest and would have access to other aircraft in the program if the aircraft in which it owns an interest was not available. The management company would provide and assign the crew, maintenance, insurance and all other matters relating to the operation of the aircraft, and it had the right to use the aircraft for its own purposes.\textsuperscript{144} Based on this structure, the IRS determined that EJA could treat the aircraft as part of its fleet and that possession, command and control of the aircraft was vested in EJA thereby triggering the transportation excise tax as opposed to the fuel tax.\textsuperscript{145}

\textsuperscript{145} See id.

\textsuperscript{144} Based on the role played by the management company, the IRS used an analysis similar to that which it applied in finding that management companies were not agents. See, e.g., Rev. Rul. 74-123, 1974-1 C.B. 318 (tax applies where government agency pays management company which provides crews, fuel, maintenance, inspection, repairs, storage and indemnifies the government agency for any claims resulting from the performance of its services); Rev. Rul. 60-311, 1960-2 C.B. 341 (tax applies to rental amount and fuel provided by lessee when lessor provides crew and maintenance for helicopter leased even though helicopter is used exclusively by lessee and based at lessee's camp); Rev. Rul. 57-545, 1957-2 C.B. 749 (when lessor maintains aircraft insurance and leases aircraft with crew to lessee for lessee's exclusive use and all operating expenses including crew salaries are reimbursed by lessee, lessor is providing a taxable transportation service).

\textsuperscript{145} See Tech. Adv. Mem. 93-14-002 (Dec. 22, 1992). In response to the IRS's initial position, EJA requested that the IRS apply the rule prospectively and not retroactively. In response to this request, the IRS issued a second Technical Advice Memorandum in which it advised that the application of its interpretation would be retroactive. See Tech. Adv. Mem. 94-04-006 (Oct. 12, 1993).
In response to this ruling, EJA filed for summary judgment in the United States Court of Federal Claims seeking a refund of the difference between the air transportation excise tax paid under section 4261 of the Internal Revenue Code and the amount that would be due if the fuel tax was assessed under section 4041 of the Internal Revenue Code. Although EJA, among other things, sought to challenge the applicability of the transportation excise tax based on the participant's ownership of an interest in the aircraft, the court ruled that ownership of the aircraft by EJA was not required to trigger the transportation excise tax. In fact, the court took the position that the ownership interest in the aircraft was so highly circumscribed that Texaco, the fractional owner, could not have possession, command and control of the aircraft. In upholding the IRS' position, the Court of Federal Claims stated that it "detects negligible differences between the NetJets aircraft interchange program and the operation of a commercial air charter business." The court distinguished typical management arrangements from the arrangement between Texaco and EJA. Specifically, it noted that Texaco purchased the interest in part to reduce deadhead time where it is incurring the costs associated with aircraft flying empty, to keep down the number of company owned aircraft while having access to extra capacity when needed and to gain access to larger aircraft. The court stated that "[t]hese objectives could not be met through ownership of a fractional interest in a single 'managed' aircraft, but only through use of a provider of transportation services that has access to multiple aircraft. . . ."

In determining the amount of the tax to be paid, the court noted that the IRS had agreed to calculate the tax on the hourly rate alone. In reaching this agreement, the IRS did not consider the monthly management fee or the value of the use of the aircraft in assessing the tax based on data submitted by EJA re-

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146 EJA proceeded with the litigation on behalf of Texaco Air, a fractional owner, pursuant to its agreement with Texaco. See Appellant's Brief at i, Executive Jet Aviation, Inc. v. United States, 125 F.3d 1463 (D.C. Cir. 1997).
147 See Executive Jet Aviation, Inc. v. U.S., No. 95-7T, slip op. at 1-2 (Fed Cl. 1996).
148 See id. at 8.
149 See id. at 15-20.
150 Id. at 9.
151 See id. at 10.
152 Id.
153 See id. at 5.
garding comparable charter rates. The basis for such a position by the IRS remains a mystery since the IRS has repeatedly stated that the management fee and the value of the aircraft provided by the owner to the management company would be included in calculating the excise tax.

EJA appealed the ruling of the Court of Federal Claims to the United States Court of Appeals for the Federal Circuit. In upholding the lower court’s ruling, the court stated its belief that participants in the program were “interested in acquiring flight time, not an ownership or a leasehold interest in a corporate aircraft.” The court, however, did not offer any support for this position. With respect to the operation of the aircraft, the court also thought that the fact that the owner might never actually fly the aircraft in which it purchased an interest and that EJA was obligated to pay all ancillary costs associated with the operation and maintenance of the aircraft, including crew salaries and expenses and insurance, was significant for tax purposes. The court failed, however, to acknowledge that the management and hourly fees were intended to cover the costs incurred by the manager on behalf of the owners.

Based on the court’s understanding of the program, it determined that the “highly circumscribed ownership interest . . . simply was the vehicle through which [the owner] entered into, and was allowed to participate in, an arrangement pursuant to which it obtained from EJA transportation from one airport to another.” As a result, the court believed that “EJA was in the

\[154\] See id.
\[155\] See, e.g., Rev. Rul. 74-123, 1974-1 C.B. 318 (tax applies where government agency pays management company which provides crews, fuel, maintenance, inspection, repairs, storage and indemnifies the government agency for any claims resulting from the performance of its services); Priv. Ltr. Rul. 93-22-002 (Feb. 9, 1993) (the availability of the aircraft for third party charters resulted in a transfer of possession, command and control to the management company which requires the owner to pay the transportation excise tax on all amounts paid to the management company with respect to the management services for that aircraft); Rev. Rul. 57-545, 1957-2 C.B. 749 (when lessor maintains aircraft insurance and leases aircraft with crew to lessee for lessee’s exclusive use and all operating expenses including crew salaries are reimbursed by lessee, lessor is providing a taxable transportation service).
\[156\] See Executive Jet Aviation, Inc. v. United States, 125 F.3d 1463 (D.C. Cir. 1997).
\[157\] Id. at 1469.
\[158\] See id.
\[159\] Id.
business of transporting persons or property for hire by air."

Once such a determination was made, the court had no choice but to rule the hourly fee was a charge for air travel and, therefore, subject to the transportation excise tax.

The appellate court noted that the IRS computed the tax based on the hourly rate paid for each hour of flight time. In discussing this calculation, the lower court acknowledged that the parties had agreed to calculate the tax only on the hourly charge. In the absence of a detailed analysis in the record regarding the reasoning behind such a position, the court stated that "whether this stipulation is as to the historical agreement only, or whether it represents the government's current stipulation as to the proper measure of the tax "is unclear." In the absence of an explanation, the lower court assumed that it reflects the government's current position.

The decision in the NetJets case has far reaching implications. Not only does it resolve the issue relating to the applicability of the excise tax on the hourly fees paid in the fractional ownership program, it is also contains a description of fractional ownership programs which casts a commercial light on the programs. Such a description has not gone unnoticed by the FAA. Although neither the IRS nor the FAA is bound to accept the determination of the other agency regarding the classification of an operation as commercial or non-commercial, the FAA and the industry have taken notice of the court's description of fractional ownership programs.

VI. THE CONTROVERSY

Fractional ownership programs are perhaps the most controversial segment of business aviation. The controversy falls

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160 Id.
161 See id. at 1467.
162 See Executive Jet Aviation, Inc. v. United States, No. 95-7T, slip. op. at 5-6 (Fed. Cl. 1996); see also Muddied by Internal Revenue Service Policies, Bus. & COM. AVIATION, Apr. 1998, at 24.
163 See Executive Jet Aviation, Inc. v. United States, No. 95-7T, slip. op. at 6 (Fed. Cl. 1996).
164 See Rev. Rul. 78-75, 1978-1 C.B. 340 (the FAA's classification is not controlling for purposes of determining whether the transportation or fuel tax applies); Interpretation 1999-17, 4 Fed. Av. Dec. I-41, I-42 (1993) (the interpretation and application of the FARs is not affected by tax considerations or interpretations).
165 See, e.g., Business Aviation Prospering Despite Frax Controversy, AVIATION INT’L News, Jan. 11, 1999 (the regulation of fractional ownership programs was perhaps the most highly debated topic at the NBAA and NATA conventions); Frac-
into two general categories. The first general category involves flight departments that fear that fractional ownership programs are a threat or will render them obsolete.\textsuperscript{166} The second general area of controversy involves air taxi operators which believe that fractional ownership programs are stealing their charter business.\textsuperscript{167} The concern underlying both of these areas is the fact

\textit{Fractional Ownership and FAR Part 91}, NBAA Digest, Nov. 1998, at 2 (fractional ownership is one of the most controversial issues in business aviation); \textit{Comments From the Convention Floor}, NBAA Convention News, Oct. 21, 1998, at 9 (there is concern regarding the influence of fractional ownership); Wayfarer President Christiansen Decries Record Sharing Delays, supra note 112, at 80 (arguments continue over whether fractional ownership programs should be operated under Part 91 or Part 135).

\textsuperscript{166} See, e.g., Esler, supra note 85, at 74 (many corporate flight departments see fractional ownership as a threat to their survival); \textit{Fractional Ownership and FAR Part 91}, supra note 165, at 2 (some flight department managers perceive fractional ownership as a threat to their jobs); Sarsfield, Richard Santulli, supra note 2, at 28; (from its inception, there were concerns that fractional ownership would replace flight departments); Bianco, supra note 19, at 58 (when NetJets first began it was accused by flight department managers of trying to take their jobs away). Originally, manufacturers also felt threatened by fractional ownership programs fearing that they would lose their customers to these programs. See \textit{id.} As history reflects, however, the manufacturers have benefited substantially from these programs as a result of the volume of aircraft purchases directly attributable to the fractional ownership programs. See supra notes 1-5 and accompanying text. In spite of the fears of flight departments that fractional ownership will cause their demise, it appears that very few flight departments have been replaced by fractional ownership programs. See, e.g., Jim Proulx \textit{Fractionals Threat? No There is No Threat}, supra note 166, at 105 (AvData’s research shows that 23 corporate flight departments shut down solely to change to fractional ownership); \textit{Most NBAA Members Want Fractionals Under Separate FAA Rules}, Aviation Daily, Sept. 23, 1999, at 4 (18 companies have shut down flight departments in favor of fractional); see also \textit{Calls and Letters: Fractionals, Yea or Nay?}, Aviation Int’l News, Sept. 1, 1997, at 132. Although many flight departments see fractional ownership programs as threats to their survival, there are many unrelated reasons for flight departments being closed. For example, some flight departments close because of budget cuts or the acquisition of the company by a bigger company that already has a flight department or by a company that doesn’t believe in corporate aviation. In addition flight departments close because of corporate restructuring, changes in high level personnel, low utilization, high deadhead costs and many other reasons. See \textit{Fractionals Threat? No There is No Threat}, supra, at 105; Mark Phelps, \textit{Fractionals Aren’t the Only Demon Facing Traditional Flight Departments}, Aviation Int’l News, Apr. 1999, at 29.

\textsuperscript{167} See, e.g., NATA Seeking Part 135 Changes, Helping Formulate Fractional Ownership Guidelines, Wkly. Bus. Aviation, Nov. 9, 1998, at 207 (charter providers complain that they are at an operational disadvantage because fractional providers can operate to more airports); \textit{Fractional Ownership and FAR Part 91}, supra note 165, at 2 (some Part 135 operators believe that fractional ownership benefits from operating under Part 91 while competing with Part 135 operators); Roger Smith, \textit{FAA Intensely Lobbied to Decide Fractional Ownership Issue: Part 91 or 135?},
that aircraft in fractional ownership programs are operated under Part 91 as opposed to Part 135 of the FARs. As will be described below, this issue is at the center of a review of fractional ownership programs by the FAA.

A. THE FAA REVIEW

1. FAA's Historical View of Fractional Programs

When the NetJets program began over 12 years ago, FAA regional officials reviewed the program and concluded that it could operate under Part 91. Several years later a second FAA region reached the same conclusion with respect to the FlexJet program. Over three years ago a third FAA region raised certain questions in the course of reviewing a new program involving small aircraft. These questions sparked a regulatory review at FAA headquarters. Although the review was initiated in the FAA Office of General Counsel, high level FAA policy and Flight Standards officials later became involved. Given the increasingly important role of fractional ownership in business aviation and the interest expressed by industry groups, and several members of Congress, the ultimate decision in this case will need to be made by the FAA Administrator herself.

INSIDE FAA, May 29, 1998, at 1-2 (air taxi operators believe fractional ownership programs create unfair competition); FAA Eyeing Rapid Growth of Fractional-Ownership Aircraft Business, INSIDE FAA, June 27, 1997 (some air charter companies feel their business is threatened by fractional ownership programs); Velocci, supra note 22, at 47 (according to one charter operator, fractional sales are in direct competition with the "legitimate aircraft charter market" and because the aircraft are operated under FAR Part 91, passengers receive none of the protection that they receive from charter companies operating under FAR Part 135). Despite the vociferous complaints, charter business has been growing significantly in spite of, and partially in support of, fractional ownership programs. See R. Randall Padfield, Opposing Factions Seek High Road in Part 91/135 Frax Controversy, AVIATION INT'L NEWS, Dec. 1, 1998, at 63; Sarsfield, supra note 78, at 46.

168 See Bradley, supra note 9, at 82; see also FAA Eyeing Rapid Growth of Fractional-Ownership Aircraft Business, supra note 167, at 6.

169 See Garvey Forms Fractional Ownership Committee, Closes Sessions to the Public, WKLY. BUS. AVIATION, Oct. 11, 1999, at 161; Lewis, supra note 116, at 86; see also Sarsfield, supra note 78, at 46.

170 See Padfield, supra note 167, at 1; see also WKLY. BUS. AVIATION, Apr. 13, 1998, at 161.

171 The Office of General Counsel has made clear that they do not believe fractional ownership programs are properly operated under Part 91. This view is based, in part, on the size of the programs. See Lewis, supra note 116, at 86; see also infra note 180 and accompanying text.

172 See Smith, FAA Intensely Lobbyed to Decide Fractional Ownership Issue: Part 91 or 135?, supra note 167, at 1; Moll, supra note 112, at 80.
2. What Are The Issues Being Examined by the FAA?

The broad focus of the FAA's regulatory review is on "operational control." Does each fractional owner retain operational control of flights on that owner's aircraft? Is the result the same when the owner is using an interchange aircraft? Or is operational control of owned and interchanged aircraft vested in the management company administering the program? Of course, if the program manager is viewed as having operational control, the fractional programs will have to be performed as Part 135 operations subject to the regulatory restrictions and requirements discussed earlier. The FAA, however, has not expressed concern over whether the programs have been operating safely under Part 91, nor is there any basis for raising this question.

In examining operational control, some of the specific questions being asked by the FAA are (1) whether the person in operational control of each flight is readily identifiable, (2) whether that person is aware—and understands—what it means to have operational control of an aircraft, and (3) whether that person or company has the capability to exercise operational control. By raising the third question, the FAA seems to be equating aviation expertise with operational control. Prior to the FAA's review of fractional ownership, the FAA has not, implicitly or explicitly, raised the question of whether a party must possess aviation expertise in order to have operational control.

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176 The FAA's Chief Counsel has referred to the recent Net Jets excise tax court decision as possible support for the proposition that fractional ownership programs may be "commercial operations" for FAA regulatory purposes. See supra notes 131-164 and accompanying text. It is clear that the Office of Chief Counsel does not believe that fractional ownership programs can operate under Part 91. See Smith, FAA Intensely Lobbied to Decide Fractional Ownership Issue: Part 91 or 135?, supra note 167, at 2.

177 See supra notes 109-130 and accompanying text.

178 See Fractional Ownership and FAR Part 91, supra note 165, at 2.

179 See Sarsfield, supra note 78, at 45. In fact, the level of safety for fractionally owned aircraft is equivalent to that of the U.S. airlines. See Paul Lowe, Frax Safety Level Close to Part 121, NBAA Convention News, Oct. 12, 1999, at 31. Another study suggests that over the last five years Part 135 business jet operators have experienced over ten times the accident rate as have Part 91 business jet operators. See John Morris, To Fractional or Not to Fractional: A Big Question Has Mixed Answer, Aviation Wk.'s Show News, Oct. 12, 1999, at 78.

180 See Sarsfield, supra note 78, at 45.

181 See id.
of an aircraft. In fact, if such a requirement were imposed, the only parties that could have operational control would be pilots or entities with their own flight departments. Such a position would undermine the use of not only fractional ownership programs, but also traditional management companies and possibly other business aircraft operations structures under Part 91, even though they have safely and successfully operated under Part 91 for decades. Certainly the FAA cannot be taking such an extreme position.

Another subsidiary issue which overhangs this debate is whether the fractional programs are so large that they have exceeded the bounds of Part 91.\textsuperscript{180} There is, however, no legal basis or support for classifying fractional ownership programs as Part 135 simply because of their size.

\section*{B. Industry Response}

1. The Shared Aircraft Committee

The initial response to the FAA regulatory review came from the leading fractional program managers which formed an ad hoc committee called the “Shared Aircraft Committee” (SAC) to address the regulatory issues and concerns raised by FAA. During the course of SAC’s meetings with the Chief Counsel’s staff, it became apparent that the issues involved were not strictly “legal” in nature and included significant policy and political issues. As a result, SAC expanded its efforts to include FAA policy and Flight Standards officials, members of Congress, and the trade associations which had a stake in this matter—namely National Business Aviation Association (NBAA), National Air Transportation Association (NATA) and General Aviation Manufacturers Association (GAMA).\textsuperscript{181}

In addressing the FAA’s concerns about operational control, SAC explained the regulatory elements of fractional ownership\textsuperscript{182} and pointed out that the transactional documents for these programs—which are sophisticated agreements entered into by sophisticated business people—identify the owner as the

\textsuperscript{180} See Gevalt, \textit{supra} note 89 (speech given by Fred Gevalt at the 1998 NBAA Schedulers & Dispatcher’s Convention) (Part 91 was not designed for large, collective entities with commercial interests). \textit{See also} Sarsfield, \textit{supra} note 78, at 46; FAA Eyeing Rapid Growth of Fractional-Ownership Aircraft Business, \textit{supra} note 167.

\textsuperscript{181} NBAA and GAMA are making great efforts to convince the FAA that fractional ownership should remain under Part 91. \textit{See} Sarsfield, \textit{supra} note 78, at 46; \textit{see also infra} notes 185-210 and accompanying text.

\textsuperscript{182} See \textit{supra} notes 101-108 and accompanying text.
party with operational control regardless of whether the owner is operating the aircraft in which it has an interest or an aircraft from the interchange pool. In the case of the interchange agreement, the truth-in-leasing provision makes it clear that the owner has operational control of any aircraft that the owner is using.\textsuperscript{183} The management agreement also provides that the owner has operational control of whatever aircraft it is using, whether it has an ownership interest in the aircraft or not. The fact that the owner has contracted with the program manager for the support services necessary to exercise such control does not detract from the owner’s responsibilities or operational control.

In response to the notion that size alone takes these programs out of Part 91, SAC emphasized that, from a regulatory perspective, the number of co-owners of a particular airplane—or the number of airplanes in the interchange pool—is not a relevant concern under the regulations. In the final analysis, there is a one-on-one relationship between each fractional owner and the management company—similar to the relationship between an individual owner and a management company.\textsuperscript{184} In each case the owner retains operational control.

2. Other Industry Input

Because of the impact that the regulatory review could have on business and general aviation as a whole, more parties, including NATA, NBAA, and a group of traditional management companies, began to express their views.\textsuperscript{185} The traditional management companies reportedly have approached the FAA in an effort to distinguish between their management services and those provided by fractional program managers. The efforts made by the traditional management companies stemmed from their desire to ensure that they remain under Part 91 even

\textsuperscript{183} As a lease, the interchange agreement is generally required to contain a truth-in-leasing clause. See 14 C.F.R. §§ 91.23(a) (truth-in-leasing) and 91.501(c)(2) (1998). If the interchange covers an aircraft other than a large aircraft (i.e., over 12,500 pounds maximum certificated takeoff weight), truth-in-leasing does not apply. See 14 C.F.R. §§ 91.25(a) (applicability of truth-in-leasing) and § 1.1 (1998) (definition of large aircraft).

\textsuperscript{184} NATA also warned its membership that the FAA’s evaluation of whether fractional ownership programs should be governed under Part 91 or Part 135 could affect management arrangements which are currently under Part 91. See WRLY. BUS. AVIATION, June 8, 1998, at 247.

\textsuperscript{185} In fact, the FAA sought the views of these groups on the safety-related issues of fractional ownership. See Padfield, supra note 167, at 1.
if fractional ownership programs are forced to comply with Part 135.

In addition to the effect the FAA's decision could have on traditional management companies, many air charter companies and flight departments could also be affected. As a result, the trade associations that are intimately involved with business aviation have devoted considerable time and effort toward reaching a consensus both within their own membership and between their respective organizations, on what has turned out to be a highly sensitive and controversial issue.  

\textit{a. National Air Transportation Association}

NATA is the Washington-based trade association for air charter companies. NATA's membership also includes traditional management companies and fractional program managers. The reaction to fractional ownership has been mixed among the NATA membership. Many Part 135 air charter companies regard fractional ownership as a competitive threat which benefits from the ability to fly under the less stringent rules in Part 91. On the other hand, other Part 135 operators indicate that their businesses have benefited from chartering to the fractional program providers to enable them to meet their aircraft commitments to the owners if the owner's airplane or an interchange airplane is unavailable.

Initially, as an association, NATA took no position on the "91 vs. 135" issues. However, in May 1998, as the debate heated up, NATA conducted a survey of its membership "to determine how best to respond to initiatives on the FAA's regulation of fractional aircraft ownership." That survey revealed that while fractional ownership programs impacted the majority of NATA

\textsuperscript{186} See NBAA Responds to Criticism From Members on Fractional Ownership Stance, \textit{supra} note 130, at 229; Olcott Defends Board's View on Fractional Regs, NBAA CONVENTION NEWS, Oct. 21, 1998, at 1; Charles Alcock, Survey: Board is Wrong on FAR Switch, NBAA CONVENTION NEWS, Oct. 20, 1998, at 31; Fraz Still the Black Sheep, NBAA CONVENTION NEWS, Oct. 20, 1998, at 53; Sarsfield, \textit{supra} note 78, at 46; WKLY. BUS. AVIATION, Sept. 21, 1998, at 125 (noting that NBAA is attempting to get fact-based rather than emotional responses from its members in order to respond to the FAA on fractional ownership).

\textsuperscript{187} See NATA Announces Action of Fractional Ownership Following Membership Analysis, NATA NEWS RELEASE, July 28, 1998.

\textsuperscript{188} See id.

\textsuperscript{189} See id.

\textsuperscript{190} Id; see also NATA Asks Members About Fractional Ownership, AVIATION DAILY, May 6, 1998, at 220; WKLY. BUS. AVIATION, June 8, 1998, at 247.
members, the views of the members ranged from a desire to maintain the status quo to a desire for strict regulation of the programs.  

Following the survey, NATA formed a working group composed of companies conducting air charter, aircraft management and fractional operations to analyze the concept of operational control and aircraft interchange under Part 91. The working group concluded that fractional ownership programs, particularly the extensive interchange feature, constituted a new form of air transportation and should be regulated under Part 135, rather than Part 91. At the same time, the working group recommended that NATA seize the opportunity to request the FAA to consider modifying or eliminating the Part 135 runway restriction and Part 135 weather reporting restrictions.

In November 1998, NATA's board of directors took a more diplomatic, and perhaps realistic, approach. Rather than endorse its committee's recommendation to subject fractional ownership to Part 135 regulation, NATA's board opted for joining an industry-wide self-regulation initiative which, among other things, would define fractional ownership and develop safety guidelines. At the same time, NATA's board endorsed

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191 See NATA Members Split on Regulation of Fractionals, Bus. & Com. Aviation, Sept. 1998, at 17. Of the members that responded to the survey, 60% said they were affected by fractional ownership; 41% favored a "hands off" approach to more regulation and would leave fractional ownership under Part 91; 32% wanted fractional ownership programs regulated under Part 135; 14% supported Part 135 regulation of fractional ownership programs, but only if traditional management companies would continue to be regulated under Part 91; and 13% wanted fractional ownership regulated under a new FAR "Part"—somewhere between Parts 91 and 135. See id.


193 See NATA Seeking Part 135 Changes, Helping Formulate Fractional Ownership Guidelines, supra note 167, at 207-08.

194 See supra notes 114-119 and accompanying text for a discussion of runway restrictions and weather reporting requirements.

195 See NATA Board Acts to Modernize Air Charter Regulations, NATA News Release, Nov. 3, 1998. Specifically the NATA Board raised concerns regarding the arcane nature of the weather reporting and runway length requirements in Part 135. See also NATA Seeking Part 135 Changes, Helping Formulate Fractional Ownership Guidelines, supra note 167, at 207; NATA Board Outlines Response on Fractional Own-
the committee's recommendations to remove some of the archaic regulations burdening Part 135 operations.\textsuperscript{196}

b. National Business Aviation Association

NBAA's membership consists mainly of corporate flight departments, but also includes traditional management companies, fractional program managers and some Part 135 air taxis. The reaction to fractional ownership among the NBAA membership has been mixed.\textsuperscript{197} Some flight department managers believe that the concept poses a threat to in-house flight departments\textsuperscript{198} - and admittedly there have been reports of several flight departments being replaced by fractional operations.\textsuperscript{199} Other NBAA members believe that fractional ownership is simply another business aviation resource to be understood and used.\textsuperscript{200} They point to the fact that many more flight departments have been created during the period that certain flight departments succumbed to fractional programs.\textsuperscript{201}

In an effort to evaluate all of the information relating to fractional ownership, the positions of its members and the potential impact that the FAA's review of fractional ownership could have on other areas of business aviation, NBAA began an exhaustive project which included internal research and analysis, special meetings of NBAA's Industry Affairs Committee, solicitation and consideration of member companies' comments and keeping the membership fully informed of developments as they unfolded.\textsuperscript{202} On October 2, 1998, NBAA's board of directors

\textsuperscript{196} See id.

\textsuperscript{197} See Olcott Defends Board's View on Fractional Regs, supra note 186, at 1.

\textsuperscript{198} See Alcock, Survey: Board is Wrong on FAR Switch, supra note 186, at 31. Fractional ownership is not the first issue in business aviation to create controversy. For example, when management companies and contract charters were first introduced, flight departments were critical and expressed concern that these new entities and types of operations threatened the continued existence of the in-house flight department. See Olcott Finds Frax Fight Cooler Now, AVIATION INT'L NEWS/ONLINE, Oct. 14, 1999.

\textsuperscript{199} See supra note 166 and accompanying text.

\textsuperscript{200} See Esler, supra note 85, at 67; Comments From the Convention Floor, NBAA CONVENTION NEWS, Oct. 21, 1998, at 9; see also Bradley, supra note 9, at 79-80.

\textsuperscript{201} In fact, between 1993 and 1999, the number of flight departments increased by 32%. See Mary Silitch, Garvey Answers Bizav's Questions in Keynote Speech, NBAA CONVENTION NEWS, Oct. 13, 1999, at 121.

adopted the position that fractional ownership is another form of business aviation which fills a niche between chartering and full aircraft ownership\(^{209}\) and that fractional programs should continue to be governed by Part 91.\(^{204}\)

Put simply, the position of NBAA's board of directors is that Part 91 is the appropriate regulation for business aviation, including fractional owners, aircraft management, timesharing, joint ownership and interchange arrangements.\(^{205}\) NBAA's basic position was communicated to the FAA in response to the agency's request for NBAA's views on issues raised by the FAA regulatory review.\(^{206}\) At the same time NBAA advised FAA that it would host an industry forum to develop safety and operational guidelines for fractional program managers and similar guidelines for exercising operational control by fractional owners.\(^{207}\) NBAA's hope was that the FAA would accept the Guidelines as an appropriate method of encouraging compliance with the best practices found in business aviation that operate under Part 91.\(^{208}\)

In November 1998, NBAA convened an industry working group composed of representatives of SAC, NATA, GAMA and other interested parties.\(^{209}\) After several meetings and ex-


\(^{206}\) See Padfield, supra note 202, at 21; *see also Fractionals Provide Momentum for Industry*, NBAA '98 SHOW NEWS, Oct. 19, 1998.

\(^{207}\) See supra note 204. In fact, FAA Administrator Garvey indicated that she was receptive to NBAA's proposal to regulate fractional ownership through the existing regulatory framework. *See Garvey Will Give NBAA Time to Wrestle With Frax & FARs*, NBAA CONVENTION NEWS, Oct. 21, 1998, at 1; *Business Aviation Prospers Despite Frax Controversy*, supra note 205.


\(^{209}\) See, e.g., Padfield, supra note 185, at 63 (NBAA sponsored an industry forum to establish guidelines for owners of fractional interests and program managers); *NATA Seeking Part 135 Changes, Helping Formulate Fractional Ownership Guidelines*,
changes of comments, the working group produced a set of Guidelines and Responsibilities\textsuperscript{210} for fractional ownership owners and program managers that, if followed, would provide a "safe harbor" for complying fractional ownership programs to operate under Part 91.

c. The Guidelines and Responsibilities for Fractional Ownership Programs

In the introduction to the Guidelines, the NBAA-convened working group clearly stated that Part 91 already contains adequate means by which the FAA can monitor safety issues such as aircraft airworthiness, pilot qualifications, operational control, and compliance with the FARs and ample authority to ensure compliance by grounding aircraft, denying pilot privileges, and suspending operations, if necessary.\textsuperscript{211}

As a first step, the Guidelines defined fractional ownership\textsuperscript{212} as

Any system of aircraft exchange involving two or more airworthy aircraft that consists of all of the following elements:

a. The provision for Fractional Program Management Services\textsuperscript{213}

\textsuperscript{210} See Safety Guidelines & Responsibilities for Fractional Aircraft Owners and Fractional Aircraft Program Managers, developed by National Business Aviation Association, National Air Transportation Association and General Aviation Manufacturers Association, dated Jan. 1999 [hereinafter the Guidelines].

\textsuperscript{211} See Guidelines, supra note 210 at I; see also Letter from John W. Olcott, President, National Business Aviation Association to The Honorable Jane F. Garvey, Administrator, FAA, dated Jan. 11, 1999; Lowe, supra note 208, at 18; NBAA Publishes Safety Guidelines and Responsibilities, NBAA Digest, Jan. 1999, at 5.

\textsuperscript{212} See Guidelines, supra note 210, at III.A; see also Lowe, supra note 208, at 18.

\textsuperscript{213} Fractional Program Management Services are defined as "[a]dministrative and aviation support services offered by the Program Manager to, and on behalf of, the Fractional Owners, including, at a minimum, the establishment and implementation of Program safety guidelines, and the coordination of (a) the scheduling of the Program Aircraft and crews, (b) Program Aircraft maintenance, (c) crew training for crews employed or contracted by the Program Manager or the Fractional Owner, (d) satisfaction of record keeping requirements, and (e) development and use of a Program operations manual and maintenance program manual." Guidelines, supra note 210 at III.H.
by a single Program Manager on behalf of the Fractional Owners.\textsuperscript{214}

b. One or more Fractional Owners per Program Aircraft, with at least one Program Aircraft having more than one Owner.

c. Possession of at least a Minimum Fractional Ownership Interest\textsuperscript{215} in one or more Program Aircraft by each Fractional Owner.

d. A Dry-Lease Aircraft Exchange arrangement among all of the Fractional Owners and the Program Manager.\textsuperscript{216}

e. Multi-year Program agreements covering the Fractional Ownership, Fractional Program Management Services, and Dry-Lease Aircraft Exchange aspects of the Program.

In addition to providing a definition of fractional ownership, the Guidelines establish safety and operational practices for the fractional program managers, including (i) manual requirements,\textsuperscript{217} (ii) flight crew staffing experience, training, scheduling and record-keeping requirements,\textsuperscript{218} (iii) flight, duty, and

\textsuperscript{214} A Fractional Owner is defined as "[a]n individual or entity that possesses a Minimum Fractional Ownership Interest in a Program Aircraft and which has entered into the applicable Program agreements." \textit{Guidelines, supra} note 210, at III.D. Only fractional ownership programs using fixed wing, subsonic aircraft with one or more turbine engines or at least two internal combustion engines are included within the Guidelines. \textit{See Guidelines, supra} note 210, at III.C. and III.G.

\textsuperscript{215} A Minimum Fractional Ownership Interest is defined as a "Fractional Ownership Interest equal to, or greater than, one-sixteenth (1/16) of at least one subsonic, fixed-wing Program Aircraft, or [t]he right to use a fixed-wing subsonic Program Aircraft at least fifty (50) occupied flight hours per year assuming a reasonable and achievable utilization rate." \textit{Guidelines, supra} note 210, at III.C. A Fractional Ownership Interest is defined as "[t]he ownership of an interest or holding of a multi-year leasehold interest and/or a leasehold interest that is convertible into an ownership interest in a Program Aircraft." \textit{Id.} at III.E.

\textsuperscript{216} A Dry-Lease Aircraft Exchange is defined as "[a]n arrangement documented by the written Program agreements, under which the Program Aircraft are available on an as needed basis, and subject to specified conditions, without crew, to each Fractional Owner." \textit{Guidelines, supra} note 210, at III.B.

\textsuperscript{217} Specifically, the Guidelines require the program manager to have an operations manual and a maintenance manual covering all program aircraft and personnel which is made available for inspection by the FAA and the fractional owners or their representatives. \textit{See Guidelines, supra} note 210, at V.B.1; \textit{see also} Lowe, \textit{supra} note 208, at 18.

\textsuperscript{218} The Guidelines require the managers to ensure that all flight crew personnel meet certain minimum experience criteria. A pilot in command must have an airline transport rating and at least 1,500 hours of total flight time and 250 hours of instrument flight time. The second in command must have a commercial pilot license and instrument ratings with 750 hours total time and fifty hours of instrument flight time. \textit{See Guidelines, supra} note 210, at V.D.; \textit{see also} NBAA \textit{Publishes Safety Guidelines and Responsibilities, supra} note 211, at 5. In addition to ensuring these minimum criteria, the program manager must employ at least 3 pilots per program aircraft with such additional crewmembers as are necessary
rest time guidelines for flight crews,\textsuperscript{219} and (iv) standard operating procedures.\textsuperscript{220}

Perhaps the most significant aspect of these Guidelines—and one specifically designed to address and alleviate the FAA’s concerns about operational control—is the requirement that the program manager brief the fractional owner on operational control responsibilities,\textsuperscript{221} and the owner review and sign an “Acknowledgment of Fractional Owner’s Operational Control Responsibilities.”\textsuperscript{222} This acknowledgment makes it clear that when the owner has operational control\textsuperscript{223} of the aircraft, the

when taking into account the number of aircraft in the program, flight duty and rest requirements, vacations, operational deficiencies and training. \textit{See id.} at V.C.2. Finally, the program manager is required to publish schedules sufficiently in advance to ensure that the flight, duty and rest requirements can be met. \textit{See id.} at V.C.3.; \textit{see also} Lowe, \textit{supra} note 208, at 18.

\textsuperscript{219} The Guidelines limit duty time on two pilot domestic flights to 14 hours, 10 of which may be flight time with a minimum rest time of 10 hours. If necessary, duty time may be extended to 16 hours with up to 12 hours flight time and 12 hours of rest. In the case of international flights, the minimum rest must be increased by 4 hours if the flight crosses 5 or more time zones. The Guidelines, however, also permit duty time to be increased to 18 hours, up to 14 of which can be flight time along with a minimum rest period of 18 hours, or 24 hours if five or more time zones are crossed. \textit{See Guidelines, supra} note 210 at V.I.; \textit{see also} Lowe, \textit{supra} note 208, at 18; \textit{NBAA Publishes Safety Guidelines and Responsibilities, supra} note 211, at 5. Unlike the FARs, the Guidelines allow exceptions to the flight and duty time limitations to be made as long as they are approved by the senior flight operations supervisor on duty and are agreed to by the flight crew in question. \textit{See id. Cf} 14 C.F.R. §§ 135.261-135.273 (1998). \textit{See also supra} notes 120-123 and accompanying text.

\textsuperscript{220} \textit{See Lowe, supra} note 208, at 18. The Guidelines also require the program managers to have a procedure in place for owners to notify the program manager of concerns about noncompliance, for the program manager to investigate the concerns and advise the owner of the remedial measures taken. \textit{See Guidelines, supra} note 210, at IV.C, D, and V.J.; \textit{see also} NBAA Publishes Safety Guidelines and Responsibilities, \textit{supra} note 211, at 5.

\textsuperscript{221} \textit{See Guidelines, supra} note 210, at V.O.; \textit{see also} NBAA Publishes Safety Guidelines and Responsibilities, \textit{supra} note 211, at 5.

\textsuperscript{222} \textit{See Guidelines, supra} note 210 at IV.G. The Guidelines also require a pre-flight passenger briefing that advises the passengers which party has operational control and whether the flight is being conducted as a private operation under Part 91 or as a commercial operation under Part 135 or 121. \textit{See id.} at V.Q. In order to ensure that the FAA can identify the party having operational control, the Guidelines also require the issuance of a written document specifying which party has operational control and under which FAR part the flight is being conducted. \textit{See id.} at V.P. This document must be carried in the cockpit during the flight and must be retained for 30 days after the flight. \textit{See id.; see also} Lowe, \textit{supra} note 208, at 33.

\textsuperscript{223} Operational Control is defined by the Guidelines as “the exercise of authority over initiating, conducting or terminating a flight.” \textit{See Guidelines, supra} note
flight will be conducted as a private operation under Part 91, and the owner, as the person having operational control, has responsibility for regulatory compliance, exposure to FAA enforcement for non-compliance, and potential liability for personal injury or property damage resulting from flight-related incidents.

The Guidelines also describe instances when the owner will not have operational control. Specifically, the owner does not have operational control when the aircraft being used is not a program aircraft. A program aircraft is used for administrative purposes such as demonstration, positioning, ferrying, maintenance, or crew training, and when no passengers or property designated by an owner are being carried or when the aircraft being used for the flight is chartered and is being operated under FAR Part 135 or Part 121.

Because the Guidelines are intended to create a safe harbor, the failure of either the program manager or the fractional owner to comply with the Guidelines “may result in an FAA determination that the program fractional owners do not have sufficient operational control to satisfy the requirements for operational control under FAR Part 91, or that the requirements of FAR Part 135 or 121 should be applied to the program in order to ensure that it operates at an appropriate safety level.” The Guidelines developed by the NBAA-convened working group were submitted to FAA on January 11, 1999 for review and comment.
Although a formal response to the Guidelines has not been received, meetings have been held between the FAA and members of SAC, the NBAA, NATA, and GAMA to discuss the issues regarding the fractional ownership programs that are of concern to the FAA. When the FAA initially indicated a desire to adopt the Guidelines as regulations, it was advised by the industry that such an approach would not only destroy the consensus through which the Guidelines were developed and submitted, but also would require compliance with the rulemaking provisions of the Administrative Procedure Act, resulting in delay and a reduced ability to adapt the provisions to an ever-changing industry. The FAA has since moved away from the idea of adopting the Guidelines as regulations although members of the coalition that developed the Guidelines have suggested that the Guidelines be endorsed as a matter of policy by the FAA and distributed to FAA personnel to provide guidance pending a final determination of the manner in which fractional ownership programs will be monitored and regulated by the FAA. The FAA, however, has taken no steps to implement such a proposal. Although the FAA has previously issued a statement creating a safe harbor in another area, it appears to be reluctant to do so in the area of fractional ownership. The basis for the FAA's reluctance is not clear.

See 64 Fed. Reg. 44,777 (Aug. 17, 1999). In 1991, the FAA was given authority to approve the assessment and collection of passenger facility charges (PFCs) by local authorities in connection for use on certain local projects. See 49 U.S.C. § 40117. In connection with that authority, the FAA issued regulations establishing the policies and procedures associated with the collection, remittance and reporting of such PFCs. See 14 C.F.R. pt. 158. Among other things, the FAA's regulations require that certain carriers have audits performed by independent public accountants. In connection with such audits, the FAA issued guidelines that could be used as a safe harbor. The FAA stated that it "will not have the same level of confidence with an air carrier whose auditors have not used the procedures outlined in [the] guide." See 64 Fed. Reg. at 44,778. As such, that carrier could face additional FAA monitoring, audits or reporting. See id. If an audit is conducted with procedures outside the safe harbor, such procedures are not necessarily unacceptable; instead, the FAA retains the authority to examine such procedures in more detail to determine whether or not they were acceptable. See id.

In a letter to FAA Administrator Garvey regarding the Guidelines, Sen. John McCain (R-Ariz) chairman of the Senate Commerce Committee, stated that it "is important to find creative approaches to ensuring safety while also providing the needed flexibility to encourage the development and implementation of beneficial emerging industry concepts." See FAA Appears to be Leaning Toward New Regulations on Fractional Ownership, WRLY. BUS. AVIATION, July 19, 1999, at 25-26 (referring to letter to Administrator Garvey). Sen. McCain complimented the
3. The Continuing Controversy

Notwithstanding the consensus reached by widely divergent groups when developing the Guidelines, the controversy regarding fractional ownership has not subsided. Instead, it has grown fiercer, especially within the NBAA.\footnote{See Paul Lowe, \textit{NBAA Member Poll: Regulate Frax Under FAR Part 135, Not 91}, \textit{Aviation Int’l News}, Oct. 1999, at 1, 24.} Although in October 1998 NBAA had made its position known supporting the retention of fractional ownership within Part 91, it was not until the Guidelines were developed and submitted that the firestorm began.\footnote{See id.} NBAA members were not only distressed by the substance of the NBAA’s position, but also by the fact that NBAA did not conduct a formal poll of every member when the board of directors decided on its position.\footnote{See Gordon A. Gilbert, \textit{Will Frax Controversy Split NBAA Members?}, \textit{Aviation Int’l News}, Apr. 1999 at 28.} On many occasions, NBAA sought to explain the basis for its position that fractional ownership should continue to be governed by Part 91. Specifically, the NBAA advised its members that when the FAA asked NBAA to take a position, the FAA made clear that fractional ownership could not be surgically removed from Part 91 and that all of the operations authorized by Subpart F of Part 91 would be subject to review.\footnote{See David Collogan, \textit{NBAA Members Support Part 135 for Fractionals, Part 91 for Flight Departments}, \textit{Wkly. Bus. Aviation}, Sept 27, 1999, at 144; Gilbert, \textit{supra} note 234, at 28.} As the NBAA explained, prior to that time, the NBAA board of directors was evenly divided over whether fractional ownership properly belonged under Part 91 or Part 135.\footnote{See R. Randall Padfield, \textit{NBAA’s Olcott Faces the Fractional Challenge, Head-On}, \textit{NBAA Convention News}, Oct. 12, 1999, at 9.} However, due to the potential threat to the continued viability of the Subpart F operations that would be posed by shifting the governing regulations for fractional ownership to Part 135, and, based on its belief that fractional ownership programs are simply another form of business aviation, the NBAA board of directors advised the FAA that it supported the continued operation of fractional ownership programs under Part FAA for considering the acceptance of the “industry-developed consensus self-regulatory approach rather than the imposition of additional federal regulations.” \textit{Id.} He further indicated his support for approaching the fractional ownership issue in a way that would “protect the safety of business aircraft operations without adding regulations that might stifle the development of new and potentially beneficial industry concepts.” \textit{Id.}
In the course of its analysis, the board recognized that fractional ownership is intertwined with the use of management companies and the concept of operational control, both of which are of vital importance to business aviation. As a result, the regulation of fractional ownership could have an adverse effect on business aviation as a whole. The NBAA board, therefore, determined that it was best not to open Pandora’s box, but rather to leave fractional ownership under Part 91. In part, in an effort to address some of the concerns that were expressed and in response to demands by its members, the NBAA in August 1999, conducted a survey of the entire membership regarding business aviation in general and fractional ownership in particular. The survey identified four primary choices for fractional ownership:

1. The FAA should adopt the Guidelines as policy and keep fractional ownership programs under Part 91;
2. The FAA should adopt the Guidelines as policy pending a decision as to the appropriate method of regulating fractional ownership programs;
3. The FAA should leave fractional ownership programs under Part 91 and take no other action; and
4. The FAA should do whatever is necessary to move fractionals into Part 135 regardless of the Guidelines and the consequences to Part 91.

As part of this analysis, the NBAA specifically asked its members to consider how fractional ownership programs should be regulated if a change in the treatment of fractional ownership by the FAA would result in revisions to portions of Part 91 involving timesharing, interchange and joint ownership or would result in changes affecting traditional flight departments’ use of management companies or the concept of operational control on a

238 To distinguish between traditional management companies and management companies involved in fractional ownership programs would not only be difficult, it would be dangerous. It has been aptly noted that “separating fractionals from other managed aircraft [is] a legal Gordian knot. The danger of untangling this knot from the point of view of business aviation is that all managed aircraft, and perhaps even un-managed aircraft with several part-owners, could be drawn into Part 135 along with the fractionals.” See R. Randall Padfield, Commentary: Safety Guidelines for Fractionals Have Economic Consequences, Aviation Int’l News, Mar. 1999, at 2.
239 See Lowe, supra note 11, at 1, 26.
company owned but professionally flown aircraft. By early September 1999, after examining the responses of approximately 20% of NBAA’s members, it was apparent that the NBAA members wanted the FAA to adopt the Guidelines as a matter of policy pending a decision by the FAA as to the regulations that are appropriate for fractional ownership. The second most popular position was that the FAA should do whatever is necessary to move fractionals into Part 135 notwithstanding the Guidelines and the consequences to Part 91. In fact, approximately 60% of the respondents want fractional ownership programs surgically removed from Part 91 and placed under Part 135 while retaining Part 91 for flight departments. The least favored alternative involved the continued regulation of fractional ownership programs under Part 91 regardless of whether the Guidelines are adopted as a policy.

The controversy regarding the regulation of fractional ownership programs under Part 91 also resulted in the creation of Aviators for Safe and Fairer Regulation (ASFR), an association whose expressed purpose is to cause the FAA to regulate fractional ownership programs under Part 135 or a new regulation, but not under Part 91. When soliciting members, the founder of AFSR advised that the purpose of the association was to cause the FAA to treat certificated operators more fairly and to eliminate what it perceived to be “chronic discrimination

See id.
See Sarsfield, supra note 11, at 53; Most NBAA Members Want Fractionals Under Separate FAA Rules, supra note 166, at 4. In fact 8 of 10 respondents prefer that the FAA accept the Guidelines pending a final decision by the FAA regarding the appropriate regulation of fractional ownership programs. See id.
See Sarsfield, supra note 11, at 53; see also Most NBAA Members Want Fractionals Under Separate FAA Rules, supra note 166, at 4 (63% of the respondents want fractional ownership programs regulated under Part 135).
See Padfield, supra note 236, at 10. Only 20% of the respondents supported the regulation of fractional ownership programs under Part 91. See Most NBAA Members Want Fractionals Under Separate FAA Rules, supra note 166, at 4. Although not specifically included as an option, 16% of the respondents urged that a new part be approved for a new part to cover fractionals. See id.
See Gordon A. Gilbert, New Group Willing to Sue FAA Over Fractional Regs, AVIATION INT’L NEWS, May 1999. In fact, the founder of the group advised that ASFR would take the FAA to court if necessary to create a level playing field. See id. Such a position, however, ignores the fact that the FAA’s mandate has nothing to do with competitive issues; instead, the FAA is charged with ensuring the safety of air transportation. It has been reported that AFSR has filed formal complaint with the FAA asking it to investigate certain flights in fractional ownership programs that have failed to comply with Part 135 standards. See Still No Word From FAA on Fractional Regulations, BUS. & COM. AVIATION, July 1999, at 15.
VI. THE FUTURE OF FRACTIONAL OWNERSHIP

There are several possible outcomes for the future of fractional ownership. The FAA can maintain the status quo by allowing fractional ownership to continue to operate under Part 91—without more. After its lengthy examination of fractional ownership programs, however, it is unlikely that the FAA would take a complete hands-off approach as a long range solution. As a second alternative, the FAA could subject fractional ownership programs to regulation under Part 135. Given the extreme impact such a position would have, the fact that the FAA regions previously reviewed and accepted the Part 91 nature of the programs, and that no issue has been raised questioning the safety of these programs, such an extreme position would appear to be overkill and therefore unlikely.

A third alternative involves the creation of a new set of regulations for fractional ownership that falls somewhere between Part 91 and Part 135—a new Part 91\(\frac{1}{2}\). Based on the length of time involved in developing proposed regulations, soliciting and reviewing public comment as required by the Administrative Procedure Act and issuing final regulations, this would be a cumbersome resolution to the ongoing review.

The fourth alternative involves the maintenance of the status quo (i.e. continued operation under Part 91) subject to adherence by the fractional owners and program managers to the Guidelines developed by the industry. This alternative would appear to be the most reasonable and least cumbersome course of action for the FAA to follow. The Guidelines specifically ad-

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246 See id. For a discussion of the IRS position, see supra notes 131-163 and accompanying text.
dress and alleviate the principal problem that the FAA perceives—namely, the allocation of operational control to the fractional owner and ensuring that the owner understands the concept and has the means to exercise operational control. Moreover, no one—not even the most ardent opponents of fractional ownership—has raised any safety concerns that would warrant additional regulation under Part 135 or new Part 91 1/2. Consequently, based on the familiar principle “if it ain’t broke, don’t fix it,” there is no reason for the FAA to embark upon a costly and time-consuming rulemaking proceeding. The Guidelines option provides adequate self-regulation and enjoys broad industry support.

The FAA, however, appears to have backed away from the Guidelines as even an interim resolution. Although the FAA has been urged to disseminate the Guidelines to the FAA inspectors in the field pending a determination of whether additional regulation of fractional ownership is required, and if so, what such regulation should encompass, it has been reluctant to do so. Of great concern to the FAA is the ability to have a mechanism that will enable it to ensure that any safety concerns are promptly and appropriately acted upon by the party in the best position to ensure the continued safety of operation and that the FAA have a primary relationship with that entity. The FAA indicated that it intends to issue some form of regulation and that it is possible that such regulation will be addressed to the fractional program manager—the party that the FAA believes is in the best position to ensure and enforce the safety of operation.247

In order evaluate the alternatives, the FAA Administrator established a Fractional Ownership Aviation Rulemaking Committee (ARC)248 effective October 6, 1999 which will “serve as a forum for interaction among FAA, the fractional owners, fractional and traditional management companies, and charter operators.”249 According to the Order issued by the Administrator,
"[t]he committee's primary task is to propose such revisions to the Federal Aviation Regulations and associated guidance material as may be appropriate with respect to fractional ownership programs."\textsuperscript{250} The recommendations of the committee will serve as the basis for any rulemaking which is then implemented by the FAA to address the issue of fractional ownership. In any case, regardless of the outcome of the FAA review or the ARC, fractional ownership is here to stay. Given the very grey lines of demarcation in the area of corporate aircraft ownership, however, the question is whether any regulations adopted by the FAA will destroy the flexibility that is the heart of business aviation and the driving factor behind the fractional ownership programs. A related and equally vexing question is whether the outcome of the regulatory review of fractional ownership will spill over into traditional management company activities which have made a substantial contribution to business aviation and, since their implementation several decades ago, have not undergone a critical review.

In any case, the status of the review and the impact on business aviation in general, and the fractional ownership programs in particular, is not yet certain and close attention must be paid to this increasing important business aviation market.

\textsuperscript{250} Order, Subj: Fractional Ownership Aviation Rulemaking Committee, supra note 249.