

# COELUM

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FAA Policy Clarification  
on Non-Citizen Trusts.

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## COELUM

Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

# FAA Policy Clarification on Non-Citizen Trusts.

by Jessi Saba

In the June 2011 - edition No. 2 of COELUM, the authors addressed the issue of U.S. registration of aircraft under Ownership Trust Agreements, and specifically, the Non-Citizen Trusts (NCT's). In this edition of COELUM the author will summarize the Policy Clarification issued by the FAA regarding NCT's on June 18, 2013, with effective date September 16, 2013 (the "Policy").

Throughout the Policy, the FAA is aiming to resolve certain concerns such as regulatory responsibility of trustees of NCTs, relation between trustees and owners, U.S. registration of aircraft, removal of a trustee, and the provision of information to the FAA.<sup>1</sup>

## A. Trustees as Aircraft Owners

The concern of the FAA is based on whether the trustees of NCTs are able to comply with the regulatory obligations in the same way as owners of the aircraft. From FAA's perspective, being an owner trustee is no different than being an owner of a U.S. registered aircraft; therefore they must comply with regulatory responsibilities in the same way. This means providing the FAA with the same operational and maintenance information.

Several players in the industry have commented on this, suggesting that an owner trustee could enter into a private agreement for purpose of transferring the aircraft to other parties for operating purposes by including in the agreement the obligation of fully complying with applicable law and regulations. The FAA disagrees, arguing that no owner can avoid obligations imposed by the FAA based on a private agreement. Other commenters have expressed their concern specifically regarding the increase of trustee's tort liability. The FAA takes no specific position regarding this concern, and argues that the Policy does not impose more obligations or changes the existing obligations for owner trustees, it simply does not differentiate between types of owners.

## B. Information about Aircraft and their Operations

Every owner of U.S. registered aircraft has important safety obligations imposed by the FAA to which they must comply and in order to be able to provide the FAA with all the information required, owners must have current information about the operators of an aircraft, the location of the aircraft and its operation. The FAA expects that the owner trustee will be able to provide requested information within two business days after the request has been made and within five business days when more detailed information is needed. The owner trustee will face no consequences if the timeframe is not met, given that the FAA understands that certain information will not be available in the given time period. The FAA only expects to be kept informed when the timeframe could not possibly be met.

*"...no owner can avoid obligations imposed by the FAA based on a private agreement."*

1.- <http://www.gpo.gov/fdsys/pkg/FR-2013-06-18/html/2013-14434.htm>

It is argued that it would be much easier and efficient for the FAA to obtain this information (i.e. maintenance, crew, aircraft operations, specific dates, etc.), directly from the operator. The FAA agrees, yet it reserves the right to request information from owner trustees. It was also proposed to include in certain agreement provisions for operators to maintain current information and provide all information to the FAA when requested. But as noted above, an obligation imposed by the FAA cannot be avoided through a private agreement; therefore, this measure is positive, given that it would keep the owner trustee informed in case the FAA requests the information directly from the trustee.

### **C. Registration of an Aircraft**

The Policy requires that any person applying to register an aircraft in the U.S., submit a copy of every document that affects the relationship existent under the trust. The purpose of this requirement is basically for the FAA to ensure access to all documents regarding NCTs and to determine if compliance with FAA regulations is met, and therefore subject to registration. This measure is a consequence of FAA's review of several NCT's, where side agreements could significantly affect the trust, mostly expanding the control of a non-U.S. citizen over the trustee. In any other cases where no side agreements exist, the trustee must submit an assurance to the FAA of this fact.

Some were concerned about the confidentiality of the agreements submitted. The FAA agreed to return any agreements to trustees after review, retaining only a brief summary – as long as registration proceeds. If registration is denied, the FAA will retain all documents in case of litigation.

### **D. Trustee Removal**

Restrictions regarding the ability of non-U.S. citizens to remove a trustee have been imposed by the FAA in order to ensure the independence of the owner trustee and protection of U.S. interests. Non U.S. citizens and non-resident aliens who have the power to direct or remove a trustee cannot have – according to regulations – more than 25% of the aggregate power to direct or remove the trustee<sup>2</sup>. In the FAA's review process, language in the trust agreements suggested that non U.S. Citizens and/or non-resident aliens had more than the allowed percentage. The FAA will now be reviewing the trusts to ensure compliance with the regulations in this matter, and as the case might be, they might reject registrations in the case of non-compliance.

*“...side agreements could significantly affect the trust, mostly expanding the control of a non-US citizen over the trustee.”*

It was also argued that strict compliance with Section 47.7 (c) (3) was impractical, given that it would only add bureaucracy as a consequence of the inclusion of U.S. citizens in the process. FAA rejects this position, arguing that the language of Section 47.7 (c) (3) is clear, and must be applied as written.

2.- Section 47.7 (c) (3) Regulations.

## **E. Termination of the Trust and Trustee Resignation**

None of the restrictions stated in section D above affect the ability of the beneficiary or the trustor to terminate a trust. The FAA expects that upon termination, deregistration of the aircraft takes place. Regarding the trustee resignation, there is no restriction on a trustee's ability to do so, even if there has been no appointment of a successor trustee. No comments were received by the FAA on this matter.

The Policy, which has been very controversial, will come into force on September 16, 2013 and certainly owner trustees will have to take the appropriate measures in order to be able to comply with the Policy.

## **Olivares and Molina join Sierra y Vazquez.**

Next Wednesday, the incorporation of two new partners will become official. The influential firm which specialized in aviation was founded by Carlos Sierra and Antonio Vazquez. The new partners are the former general counsel of Aeromexico, Edmundo Olivares Dufó, and a specialist in agribusiness and real estate, Mario Molina. With almost 20 years in the market, the firm is now considered as the most influential in these matters. Moreover, the British publication, Chamber's and Partners, has recognized the firm as the highest ranking firm for three consecutive years. With the addition of Olivares, the firm aims to get a total of 20 lawyers to respond to the expansion that the aviation market has shown in the past two years. With the arrival of Molina, the firm looks to new diversification into other areas. The firm, now called Sierra, Vazquez, Olivares, Molina will launch a new image, that will be presented to their clients next week. *El Universal. 23/08/2013.*

## **SCT publishes the NOM for aviation workshops.**

The Ministry of Communication and Transportation published today the project of the NOM (official Mexican norm for the acronym in Spanish) PROY-NOM-145/1-SCT3-2012, which includes the requirements and specifications for the establishment and operation of the aeronautic workshops. With the publication of the project of this Norm in the DOF (Federal Official Journal is the acronym in Spanish) people interested in submitting any comments to the National Regulation Committee of Air Transport have 60 days from today to detail their opinions. *The Economist. August 05, 2013.*

## **Boeing 787 arrives in Mexico.**

The first of 19 Boeing 787 aircraft landed yesterday at the Mexico City International Airport. The Boeing 787 also known as Dreamliner, must undergo 100 hours of test flights as required by the General Directorate of Civil Aviation (DGAC for its acronym in Spanish). Alexandro Argudín, head of the DGAC, explained that the inspections are made to ensure that the airline has the ability to operate the aircraft. *Reforma. August 17, 2013.*

## **U.S. and Canada "train" Mexico in civil aviation.**

Mexico is now receiving resources and training from the United States and Canada governments in civil aviation security, with special emphasis on the prevention of drug traffic and organized crime. On May 28, 2013, the AICM requested eight "portable units for the detection of explosives", which are now operational. Moreover, the General Directorate of Civil Aviation (DGAC) reached an agreement with the United States and Canada authorities, through the Transport Security Administration and Transport Canada to receive specialized training in civil aviation security. *El Universal. August 28, 2013.*

## **And aviation continues its course.**

Three years have passed since the close of operations of Mexicana de Aviacion (that operated its last flight today, in 2010). Meanwhile commercial aviation is enjoying its best moment in history. Airlines have committed to investments that exceed 20, 000 million dollars to buy new aircraft and conquer new markets. The National Chamber of Air Transportation (CANAERO for its acronym in Spanish) estimates that by the close of 2013, there will be an increase in operations to a total of 60 million of passengers, 9% more than last year and again reaching a new record. *The Economist. August 27, 2013.*

## **Texcoco, the most suited for the new airport.**

The FAA is sticking to a previously announced schedule and will end direct sales of paper charts on Oct. 1. After that date, all paper charts must be obtained from an authorized dealer. The agency stopped renewing chart subscriptions on July 1 although it will fulfill the subscriptions already on file until they run out. There are no plans to stop printing paper charts. In an online notice earlier this year, the FAA said it was stopping the direct sales to save money. As an alternative, it established a worldwide network of authorized dealers for the charts. *Aviation Week. August 29 2013.*

*In this month extract was prepared by Vera García, Mauricio Castillo and Diego García.*

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