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Improper Aircraft "Dry" Leasing and Other Illegal Charter

By David T. Norton

One of the most confusing issues facing business and general aviation aircraft operators is the question of whether they can operate their aircraft solely under the Federal Aviation Administration's (FAA) general, or noncommercial, operating rules, or whether they must also obtain certification as a commercial operator and operate their aircraft under the applicable commercial rules. This is especially complicated when their aircraft are leased to other parties. Although the FAA's position on this question has been consistent since the 1970s, its enforcement of these rules has been sporadic. This has recently begun to change, however, as the FAA has recognized that it needs to pay more attention to this industry segment to ensure that the appropriate regulations are being followed.

This article provides an analysis for determining whether an operator who is conducting flights under the noncommercial rules may face an FAA administrative or legal enforcement action because the FAA has determined that the operator should be complying with its commercial rules. The analysis primarily focuses on situations where an operator is conducting improper "dry" leasing but also touches upon other common forms of illegal charter.

Basic Regulatory Concepts and Requirements

Our Focus: Regulation of Smaller Aircraft

Our focus is on the FAA's federal aviation regulations (FAR, codified in Part 14 of the Code of Federal Regulations (C.F.R.), Parts 1–199)[1] that apply to the operations of aircraft ranging from small, single-engine pistons up through, but not including, piston and turbine or jet airplanes with a passenger seating configuration of 20 or more or a maximum payload capacity of 6,000 pounds or more. Think, for example, of a small Cessna 172 aircraft up through a Gulfstream G700 aircraft, but not a Boeing 737 or larger aircraft outfitted for maximum seating capacity.

Who Is the "Operator"?

When assessing which operational rules must be followed, the first step is to determine exactly who is the "operator" of the aircraft. The starting presumption is that the registered owner of the aircraft is the operator, but, as this article points out, the operator can become a different party through an agreement, such as a lease or operating agreement, with the owner. A third party such as an aircraft manager may also effectively become the operator when a lease is not involved.

Although the FAR does not define the term "operator" directly, it does provide that "*Operate*, with respect to aircraft, means use, cause to use or authorize to use aircraft, for the purpose . . . of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise)."[2] The FAR further provides that "*Operational control*, with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight."[3] Thus, the "operator" of an aircraft is the person, be it a natural person or some form of corporate entity, exercising operational control over the aircraft in order to operate it in the national airspace. The tests that the FAA applies in determining who actually has operational control of the aircraft are discussed in more detail below, but suffice it to say that the person who is determining where

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From the Immediate Past Chair

By Jennifer Trock

It has been an honor and privilege to serve as Chair of this Forum over the past two years. When we last met in person in February of 2020, few of us could have imagined that it would be the last time we saw each other in person for nearly two years. Nor could we have imagined the challenges before us and our industry with the onset of the global pandemic. Yet, as always, our community persevered, adapted, and thrived in new and unexpected ways.

I hope you share my pride in our collective accomplishments, as each of you played a critical role in our success. In the last two years, we added three new committees: Cargo; Sustainability; and Diversity, Equity, and Inclusion (DEI). We incorporated DEI sessions into our conferences, hosted DEI webinars, and increased diversity of all kinds in our programs. We launched the implementation of our strategic plan. We were able to produce outstanding virtual content, both for our conferences and our committees. *The Air & Space Lawyer* continued to publish timely and topical insights from thought leaders in air and space law. When the industry was reeling from the impacts of COVID, we provided a free conference to our members. Our Young Lawyers Division held virtual social events. We increased committee engagement through more regular committee meetings and thought provoking webinars. Just to name a few! Throughout it all, we maintained our sense of community, belonging, and professionalism.

I am grateful to you, our readers and members, for your support and contributions. Please also join me in expressing our deep appreciation to our Officers, Governing Committee, Committee Chairs, Liaisons, Editors of and contributors to this esteemed publication, Program Chairs and Coordinators, and of course, to our professional team at the ABA, Dawn Holiday and David Israel, who went above and beyond to ensure that we remained connected and engaged with each other.

As I officially turn over the reins to my friend and colleague, Marc Warren, I look forward to continuing to be a part of the Forum and to connecting with you in person in 2022. In the meantime, I encourage you to continue your involvement with the Forum, and as always, please reach out with questions or comments or just to say hello! I can be reached at jennifer.trock@bakermckenzie.com.

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Chair's Message

By Marc L. Warren

I am honored and humbled to assume the duties of Chair of the Forum, and I look forward to serving you over the next two years. We all owe a debt of gratitude to our outgoing Chair Jennifer Trock, who led the Forum through the tough times of the COVID-19 pandemic and downturn in the aviation and aerospace industry. Thanks to Jennifer's enthusiastic and dedicated leadership, the Forum maintained its role as a thought, education, and scholarship leader. We retained our membership, held our (virtual) conferences, and served as a social and professional focus for the aviation and aerospace bar. Imagine what we can do when we can actually get together in person!

Our 2021 Annual Conference will be held on September 30 and October 1. Co-chaired by Rachel Welford and Steve Seiden, its theme perfectly summarizes the state and course of our industry: "Ready for Takeoff: Charting the Path for Recovery, Resurgence, and Sustainable Growth." Rachel and Steve have organized a superb event that features outstanding speakers and panels, including the always popular General Counsel, Ethics, and Diversity and Inclusion presentations. We are privileged to have Annie Petsonk, DOT Principal Deputy Assistant Secretary for Aviation and International Affairs, as the Conference keynote speaker.

We intend the 2021 Annual Conference to be the Forum's final virtual conference and assume that the return of good health and sociability will set the conditions for the "best ever" Washington Update Conference at the "W" Hotel on February 25, 2022. Planning is proceeding on an in-person 2022 Annual Conference to be held in Montreal next September. I encourage everyone to attend the in-person events and consider being a sponsor.

I don't think I need to offer much encouragement for our members to get together. Over the past few months, I've served as a member of the ABA Working Group on Sections, Divisions, and Forums. Among the tasks given to the Working Group was to identify how ABA components like the Forum attract and retain members. My simple answer for the Forum was that we work together, share common interests and values, and genuinely like each other. Have you ever noticed how hard it is to get our members seated on time after a break in a conference program? That's not because we are undisciplined or disinterested. It is because we get great value from extracurricular activities such as catching up on social and professional events, coaching and mentoring each other, and investing the time to build a diverse and inclusive Bar for the future.

However, the Forum doesn't exist only as a networking platform. As anyone who has had to serve as a program chair, moderator, panelist, or speaker knows well, the Forum is also dedicated to professional education and scholarship, and one of the toughest jobs in the Forum is the editor in chief of *The Air & Space Lawyer*. This issue marks a change to the editorial team. Dave Berg has passed the editor-in-chief reins to Jonathon Foglia, and I thank Dave for his long service to the Forum in many capacities, from chair to editor in chief. I thank Jonathon for volunteering to serve and Kathy Yodice, our Managing Editor, for continuing in that role, and I ask everyone to consider writing an article or two for *The Air & Space Lawyer*. It is a great way to contribute to professional scholarship and proficiency—and to be recognized as a thought leader.

As of this writing, the slate has not yet been approved by our membership at the Annual Meeting, and it would be premature for me to congratulate new members of the Governing Committee in this column. But I do want to recognize those members who are rotating off the Governing Committee and thank them for a job well done: Stella Belvisi, David Hernandez, Doug Mullen, Jeremy Ross, and William Stallings. I also want to thank Dawn Holiday for her unwavering support of the Forum. I look forward to working for and with all of our members over the next two years, and I can't wait to see you all in person rather than on the Zoom Box!

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Editor's Column

By Jonathon H. Foglia

I am happy to be sharing my first column as the Editor-in-Chief for *The Air & Space Lawyer* with you. I follow in the footsteps of Dave Berg, who, for the last two years, expertly guided the publication, working closely with the *A&SL* editorial board, contributing authors, and ABA publications team to produce cutting-edge features of the highest caliber. We owe Dave our gratitude for his commitment to the publication. As I have quickly learned, preparing an issue for prime time is no easy task, and Dave did so in an exemplary fashion, bringing his usual selflessness and generosity to the role. I am humbled to follow in his steps.

Thus, it seems only fitting that our interview series should once again involve Dave's close involvement—but this time with the tables turned and Dave as the interviewee. Read about how Dave got started in the field of aviation law, the mentors who influenced him along his career path, his advice for new lawyers, and what he has been binge watching in "retirement." The answers may surprise you.

We also are delighted to feature an article by David Norton of Shackelford, Bowen, McKinley & Norton that examines flights conducted under the FAA's general operating rules (Part 91) for which the aircraft leasing and crew arrangements may place the operation at risk of being construed by the FAA as commercial in nature—triggering potential enforcement action. David's article describes, in a practical and accessible manner, the analysis used by the FAA when reviewing such operations, and it offers tips for structuring flight arrangements to comport with the applicable regulatory requirements.

Next, we have an article by Barbara Marrin of KMA Zuckert that provides an expert overview of administrative agency litigation involving the DOT third-party complaint system. Barbara's article analyzes the dramatic growth of such litigation during the COVID-19 pandemic and offers a number of thoughtful recommendations for specific actions that DOT can take to streamline the process and more promptly adjudicate claims, benefiting passengers with meritorious claims and airlines alike.

Last but not least is a timely piece by David Hernandez of Vedder Price that summarizes U.S. laws applicable to the permanent export of civil aircraft and provides an update on criminal charges brought earlier this year against the owner of Aircraft Guaranty Corporation, a U.S.-based trustee for aircraft ownership trusts with non-U.S. citizen beneficiaries. David's article explains why the criminal indictments and related investigations are relevant to industry participants who use non-citizen trusts for routine business purposes.

I would like to thank Kathy Yodice, our Managing Editor, for her insight and partnership as we worked to produce this issue. Kathy has been a steady guiding presence for countless issues, and I could not be more fortunate to have her by my side as I embark upon this new role. I also am deeply grateful to Lisa Comforty of ABA Publishing for her patience, encouragement, and support during the transitional phase.

It feels like a lifetime ago that many of us gathered in Washington, D.C., in late February 2020 for the Forum's Update Conference. At that time, unease hung over conference attendees. We all recognized that the growing COVID-19 outbreak would challenge the aviation industry, but we had little to no insight into just how extensive the impacts would be.

Now, about 18 months later, that unease has given way to guarded optimism. Government financial assistance allowed many airlines to move beyond an existential event and stabilize their operations. Moreover, a number of airlines have recently announced orders for aircraft and, in addition to recalling personnel on voluntary leave, now plan to hire new employees. To be sure, profound challenges remain. The largest U.S. passenger airlines borrowed heavily to offset nearly $46 billion in pre-tax losses for 2020, and it will take years to retire

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An Interview with David Berg

Retired Senior VP, General Counsel, and Secretary for Airlines for America

David Berg retired in 2018 after serving for 15 years as senior vice president, general counsel, and secretary of Airlines for America (A4A), the trade association of the leading U.S. airlines. He began working at the Association as an attorney in 1985, when it was known as Air Transport Association of America (ATA). In all, his career at ATA/A4A spanned 33 years. He is a past Chair of the ABA Forum on Air & Space Law and from 2019 to 2021, he was the Editor in Chief of The Air and Space Lawyer.

A&SL: You recently retired from your role as general counsel to Airlines for America (A4A), and from your role as Editor in Chief of *The Air and Space Lawyer*. Congratulations! Tell us a bit about how you got into this field and about your career as a lawyer in aviation.

DB: During law school at American University, I clerked for a small, local firm; after graduating I focused on commercial and bankruptcy matters, which also gave me some litigation experience. When I decided to do something different, I connected with Jim Landry, general counsel of A4A (then known as the Air Transport Association, or ATA) through someone I knew at United Airlines. This was in 1985, just after deregulation occurred, and while ATA's legal team had plenty of Civil Aeronautics Board experience, I believe Jim recognized that a different perspective would be needed going forward. As it turned out, I had the skill set and experience Jim was looking for, and we hit it off personally. Jim was confident that I would pick up the necessary aviation and regulatory law principles along the way. Fortunately, I was part of a very experienced and talented team, and I benefited from their advice and mentoring.

My A4A career was truly fantastic—far more interesting and rewarding than I ever imagined it might be. Early on, I was tasked with managing litigation the Association brought on behalf of its members, and I quickly realized that I enjoyed the legal challenges and the opportunity to work with many talented lawyers from our member airlines and the law firms we retained. As a young lawyer, that experience was invaluable.

The substantive issues in these "industry" cases frequently involved federal preemption or the validity of federal or local regulations, but often in a high-profile social context, making them even more interesting. For example, one of my first projects was to write an amicus brief to the U.S. Supreme Court supporting DOT's view of its limited authority, under section 504 of the Rehabilitation Act, to regulate services the airlines provided to persons with disabilities—not a popular public position. In another case in the 1990s, ATA challenged an ordinance passed by the City and County of San Francisco requiring businesses doing business with the City to provide domestic partner benefits. Challenging those requirements on preemption grounds was controversial and brought with it significant media attention, requiring both a litigation strategy and a detailed communications plan. I also worked on comments on a number of challenging rulemakings, such as drug and alcohol testing, the initial Air Carrier Access Act regulations, who can sit in emergency exit rows, and pilot flight time rules—again working closely with our member airlines to formulate consensus policy positions that still preserved their competitive or operational differences.

I was fortunate to gain deep experience in a wide variety of legal issues affecting aviation. I learned quickly that the airline industry is not monolithic and that I needed to pay careful attention to the competitive concerns of our members. Finding common ground in litigation and rulemaking was not always easy. Over time, I earned their trust and developed strong relationships with many attorneys serving our members, and, in part, because of that I was appointed ATA's general counsel in 2003.

A&SL: Follow-on question: Would that be a way of becoming an aviation lawyer that would work today for a young lawyer interested in getting into this exciting field?

DB: As you can see, I landed at the Association through serendipity—knowing someone who knew someone, a classic D.C. story. But it illustrates how important it is for young lawyers to make, develop, and use their contacts, however remote, to uncover opportunities and to keep an open mind about what they may find interesting. I wasn't looking for an aviation job—aviation found me. The work captured my interest and imagination; it led to a wonderful career.

A&SL: Looking back on your career, what do you consider was the most challenging?

DB: The most challenging aspect, over time, was finding ways to articulate industry positions when our members had differing views on a particular issue. This could occur in almost any context—proposed regulations or legislation, local ordinances, litigation, or airport development projects. Different airlines could have different perspectives or levels of interest in any one issue, and at times it could be a challenge to find a position, or a way to state a position, that could satisfy everyone's concerns. Reaching "yes" sometimes took extensive negotiation and the goodwill of our members, who realized that they would want the support of their colleagues on a different issue at some point in the future. There is a lot of truth in the old adage "What goes around comes around." Even so, in rare instances, the members remained so divided on an issue that A4A ultimately would have to stand down.

In terms of assignments, I would say serving on the DOT Advisory Committee for Aviation Consumer Protection was the most challenging activity. There were virtually no limits on what the Committee could look into, and its composition, naturally, was oriented toward consumers airing complaints against airlines and the nature of airline services in a deregulated market. Even in 2012, when Congress authorized the Committee, the goal of some consumer advocates was to reimpose service regulation, and the Committee provided a forum for those advocates. In nine meetings over three years, we covered a lot of consumer grievances, and I was responsible for ensuring the Committee received the facts, economic analyses, and academic studies to support balanced reports to the DOT Secretary, as well as advocating for the industry at public meetings and in conversations with Committee members.

A&SL: Looking back on your career, what do you consider was the most fulfilling?

DB: I would say the personal relationships I developed were the most rewarding aspect of my career. I got to know and develop close professional relationships with many good people at our member airlines. I worked with some terrific attorneys who mentored me along the way and who I considered to be both colleagues and friends. The personal relationships are what really made the job enjoyable. Similarly, I worked with several extraordinary attorneys at firms in D.C. and around the country—and even in other countries—who I admired tremendously. Earning their respect was very rewarding. Finally, developing solid professional relationships with several DOT general counsel and their teams across both Democratic and Republican administrations was very rewarding because I was trusted to convey our positions and concerns professionally and engage honestly on sometimes contentious topics.

A&SL: Looking back on your career, what do you consider was the most fun?

DB: Winning some cases was fun! I would put in that category convincing the Second Circuit to hold New York's Passenger Bill of Rights preempted by the Airline Deregulation Act, convincing the D.C. Circuit that the FAA violated the APA when it adopted new civil penalty rules without an opportunity for notice and comment, and invalidating a GSA rule requiring airlines to automatically refund unused tickets.

A&SL: Is there someone in aviation law who has had particular influence over you during your career?

DB: This is a tough question because it's hard to point to just one or two people.

Especially during my early years at A4A, there were several people who I would describe as influential. First, I would say Jim Landry. He opened my eyes to the aviation legal world, especially international aviation, and helped set me on my career path by putting me in a position where I could work hard and succeed. Second: a former Delta lawyer, Gerry Mayo. Gerry was a gifted trial attorney who helped school me about how airlines work and the preeminent importance of safety. He also excelled at working with his colleagues from other airlines to achieve consensus industry positions. Finally, I was privileged to work with Carl Vogt for a period of time when he was at Fulbright & Jaworski. As you know, Carl had been chairman of the NTSB. Carl exemplified professionalism, integrity, and grace. Being around Carl always made me a better lawyer and a better person.

I could go on naming people who influenced me, including many of the general counsel I worked with both before and after I became A4A's general counsel—but I'll stop there.

A&SL: If you had control over a crystal ball, what would you put in that ball as something that you would like to see happen in aviation law in the future?

DB: One area concerns use of airport revenue. Often, there is pressure on airports to use revenues for projects that aren't truly for airports but instead support a general governmental purpose, such as transit or road construction. Clearer law from Congress on this point would benefit airports by ensuring revenues are kept for airports and not diverted. It would also benefit the FAA by shielding it from local government pressure to allow use of money for such projects.

Another area concerns DOT consumer protection

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Taming the Beast: Reforming DOT's Third-Party Complaint Procedures Can Help Consumers and Airlines

By Barbara M. Marrin

Until recently, the U.S. Department of Transportation's (DOT) procedural regulations at 14 C.F.R. Part 302 for handling formal complaints filed by third parties (third-party complaints)[1] were little known and sparsely used by the general public. Although passenger rights advocates would initiate third-party complaints to strategically advance desired policy or regulatory changes[2]—sometimes alleging an airline violation of a DOT aviation consumer protection or disability accommodation requirement[3] and sometimes not—the third-party complaint system was a largely esoteric area of administrative law.

This all changed in March 2020 as the COVID-19 pandemic forced airlines to cancel thousands of flights, pushing them into an unprecedented financial crisis. In an attempt to staunch the tide of massive economic losses, several carriers were unable to meet regulatory obligations to provide timely refunds for canceled flights.[4] Unhappy with how informal complaints were being handled by DOT's Office of Aviation Consumer Protection, including DOT's processing time given the sheer number of informal complaints received, consumers turned to Part 302. In 2020 alone, almost 150 third-party complaints, mostly related to refunds, were filed with DOT, representing a significant increase from the previous eight years, when DOT averaged barely six such complaints annually.

Amidst this avalanche of complaints, it became apparent that the third-party complaint system, which has essentially not been substantively updated for more than 35 years, is ill-equipped to filter meritorious claims and adjudicate decisions in a timely manner. Now that this system is more widely known, consumers can reasonably be expected to turn to it more often, with a large number of pending third-party complaints potentially becoming the new normal at any given time, notwithstanding significant shortcomings in the procedures applied under Part 302.[5] This article provides suggestions to improve and reform the third-party complaint system under Part 302, thereby providing consumers and carriers with a more efficient process for the resolution of DOT complaints.

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Background

When DOT took over enforcement functions from the Civil Aeronautics Board (CAB) in 1985, it adopted the CAB's procedural regulations for enforcement proceedings, then found at 14 C.F.R. § 302.200 et seq. Although Part 302 has been reorganized several times since then, there has been little in the way of substantive updates addressing third-party complaints.

Filing of Complaints

Part 302 addresses the filing of both informal complaints and third-party complaints (referred to as "formal complaints" in the regulation). Through these mechanisms, consumers can seek DOT enforcement action against airlines for alleged violations of DOT's aviation consumer protection statutes, regulations, orders, and "other requirements."[6] As a consequence, the potential scope and subject of complaints, which any person may file, are far-reaching.

Additionally, DOT has made it easy to file informal complaints, including via an online complaint form that gathers details for review by an analyst in DOT's Office of Aviation Consumer Protection, and thus the informal process has proven to be very popular with consumers.[7] Informal complaints are handled by DOT analysts who facilitate communication directly between the consumer and the airline. These complaints are not made public, except when DOT publishes aggregate complaint data in the monthly *Air Travel Consumer Report*. For consumers with specific problems, seeking DOT involvement through the informal process is often more expedient than the formal process for the airline to review and substantively address its problems. However, the DOT informal complaint system was overwhelmed by refund complaints during the first several months of the COVID-19 pandemic.[8]

Answers

Unlike informal complaints filed through DOT's Aviation Consumer Protection website, third-party complaints are filed in a public docket, and thus practically all matters at issue are developed as a matter of agency record. Airline respondents generally are obligated to file detailed responses (answers) by established deadlines or else potentially suffer a

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default judgment—regardless of whether the complainant has actually articulated a claim within DOT's jurisdiction or suffered any cognizable harm.

From the complainant's perspective, one perceived benefit of third-party complaints is Part 302's requirement that carriers file an answer in the DOT docket within 15 days of the service of the complaint, which is public and, depending on the allegations, potentially newsworthy.[9] The answer must specifically admit or deny each and every allegation in the third-party complaint, as is the case with litigation in most civil courts.[10]

Although DOT will extend the deadline for the filing of an answer upon "good cause shown," the preparation of an answer is often time-consuming given the necessity for the carrier to conduct a thorough internal investigation in order to comply with Part 302's requirement to properly answer each and every allegation. Oftentimes, carrier employees must be interviewed, and phone recordings and electronic records must be reviewed. And although DOT regulations do not permit further rounds of pleadings after the filing of an answer,[11] complainants will often file their own reply to a carrier's answer (without seeking appropriate leave from DOT to do so), for which the carrier is often compelled to file a sur-reply to ensure that the administrative record is accurate and complete.

During the first half of 2020, customers faced increased difficulties in obtaining refunds for canceled flights and were not successful using the DOT informal complaint process.

Required Action

Once the pleadings have been filed, Part 302 requires DOT to take one of the following actions: (i) institute a formal enforcement proceeding before an administrative law judge (ALJ); (ii) pursue other enforcement action through a negotiated settlement with the respondent; or (iii) dismiss the third-party complaint.[12]

Although DOT must do so within a "reasonable time,"[13] no specific timeline is specified in Part 302. Over the last eight years, the average time for DOT to reach a decision (in cases where the parties have not voluntarily withdrawn the matter) has run about 21 months.[14] Moreover, if (i) DOT on the basis of a third-party complaint initiates enforcement, (ii) the respondent carrier and DOT fail to reach settlement through a negotiated consent order, and (iii) DOT files its own complaint before an ALJ, complainants face further delay in receiving a determination in their case.[15] Therefore, from the consumer perspective, informal complaints—not docketed third-party complaints—are often the best way to have an issue addressed expeditiously.[16]

In informal complaints, while DOT will often require the airline to respond directly to the passenger, the passenger rarely will receive an official determination from DOT as to whether the airline violated an aviation consumer protection regulation. Thus, for complainants seeking to strategically litigate an issue, such as by arguing in favor of a novel agency interpretation or position, which some third-party complaints have done, the third-party complaint system is the more attractive of the two mechanisms.

Despite the advantage of being able to obtain a response on the record from an airline and an official determination from DOT, third-party complaints at DOT were for many years relatively infrequent. Passengers often found that specific personal concerns were more expeditiously resolved through the informal complaint process. From the carrier perspective, informal complaints were and continue to be the preferred mechanism because the carrier may communicate directly with the complainant to resolve an issue. Although parties can discuss settlement of third-party complaints, most substantive issues are resolved through filings in the public docket. There is no doubt, though, that filing a third-party complaint gets the attention of both the respondent carrier and DOT in a way that informal complaints do not.

The COVID Crisis Drives Up Third-Party Complaints

The procedural and investigative tasks necessary to prepare responses to third-party complaints became even more burdensome during the challenging COVID-19 economic environment for carriers.

During the first half of 2020, customers faced increased difficulties in obtaining refunds for canceled flights and were not successful using the DOT informal complaint process. DOT reports that it received 87,629 informal complaints in 2020 against U.S. and foreign carriers, of which 75,543 concerned refunds.[17] Not surprisingly, DOT could not keep up with this volume of informal complaints, especially when DOT would normally only receive an average of about 16,000 complaints concerning carriers in a given year, of which only about 1,400 concerned refunds.

Because customers have been desperate to find other alternatives, especially against carriers that had taken aggressive positions regarding the availability of refunds, the number of third-party complaints increased dramatically, reaching nearly 150 by the end of the year, 89 of which were filed against one carrier. In some cases, though, it could not be determined from the initial pleadings whether the complainant was a U.S. resident (the category of consumer that DOT regulations are intended to protect)[18] or whether

the itinerary involved a flight to, from, or within the U.S. (the only air travel over which DOT has jurisdiction). Despite the potential lack of DOT subject matter jurisdiction, airlines devoted considerable resources to answering these third-party complaints on the record.

Substantive Updates Would Improve Efficiency for DOT and Provide Consumers with Swiftly Adjudicated Complaints

The last arguably substantive update to Part 302 was made 20 years ago,[19] and since then the landscape for seeking enforcement has changed. Pleadings can be filed with DOT electronically via www.regulations.gov, greatly simplifying the process for filing and serving.[20] The third-party complaint mechanism is now widely publicized on internet blogs and forums related to commercial air travel issues. A frequent complainant has posted a template for formal complaints on his personal website.[21] And using that template, along with assistance from another consumer rights advocate, one company has established a "DOT Complaint Generator."[22] It is easier than ever for individuals to file third-party complaints with DOT.

Providing an administrative mechanism for individuals to seek agency enforcement action is, of course, necessary and appropriate. However, the inescapable fact remains that some third-party complaints either allege conduct that is not a violation of any DOT requirement (including matters not within the jurisdiction of DOT); contain inaccurate, misleading, or woefully incomplete information (including the omission of key material facts that would undercut the claim or take the claim outside of DOT's jurisdiction); or do not conform to DOT's rules of practice (including, for example, service on the respondent carrier and the inclusion in the complaint of a verification made under Title 18 of the U.S. Code affirming the truthfulness of the filing). Yet carriers must devote the same resources to answering complaints that merit dismissal as to those complaints that are legitimately before DOT to resolve.

Against this backdrop, the time has come for DOT to give serious attention to streamlining the third-party complaint procedures—and in the process strike the right balance of interests to ensure that (i) complainants receive a fair opportunity to be heard; (ii) respondents are not required to file answers unless and until DOT determines that a legitimate complaint has been properly filed and thus accepted by DOT; and (iii) the parties are provided with prompt adjudication.

Although some streamlining measures may require amendments to Part 302, many are already covered by existing regulations or are inherently within DOT's prosecutorial discretion. For example:

- Before requiring an answer, DOT should screen third-party complaints to ensure that the complainant has stated a claim within the jurisdiction of DOT and alleged sufficient facts in support of that claim. As most complainants proceed pro se, DOT can always construe the third-party complaint in the light most favorable to the complainant, accepting—purely for purposes of deciding whether to continue the proceeding—the allegations as true.
- If no cognizable claim is asserted, DOT should dismiss the claim or, in the alternative, stay the proceeding to allow a finite period of time for the complainant to amend the third-party complaint. DOT also can (and should) *sua sponte* dismiss claims based on a novel interpretation of a regulation unsupported by any DOT guidance or seeking a change in agency enforcement position. The third-party complaint system is not the proper venue to request rule changes[23] or the adoption of new enforcement policies.

The regulations, of course, allow DOT to review the sufficiency of the complaint of its own initiative.[24] However, a review of recent third-party complaints shows that DOT rarely, if ever, does so before an answer has been filed, and then only in response to a deficiency (such as a lack of subject matter jurisdiction) that the airline raised in its answer. Indeed, out of approximately 150 third-party complaints filed last year, DOT dismissed four on such deficiency grounds, but not without the airline first having to develop an answer fully addressing each and every allegation.[25] These four complaints were dismissed on various grounds, including those arising when (1) a complainant canceled his own transportation and was therefore not entitled to a refund under any DOT statute or regulation and (2) a complainant was impacted by the cancellation of a flight over which DOT does not have jurisdiction. In each case, the complaints were improperly before DOT, and the respondent carrier was forced to file an answer.

The time has come for DOT to give serious attention to streamlining the third-party complaint procedures—and in the process strike the right balance of interests.

If a complaint, on its face, does not present a prima facie case properly before DOT, DOT should require the filing of an amended complaint

with more specificity before carriers are forced to respond to a potentially frivolous filing.

Dismissing a complaint prior to the filing of a formal answer is a common practice in other administrative adjudicatory contexts. For example, under 14 C.F.R. Part 16,[26] the Federal Aviation Administration (FAA) may dismiss a complaint if (i) the complaint, on its face, appears outside the jurisdiction of a Part 16 proceeding; (ii) the complaint, on its face, does not warrant further investigation or action by the FAA; or (iii) the complainant lacks standing.[27]

- Before requiring an answer, DOT should ensure that the complaint has met Part 302's rules of practice, including the requirement that third-party complaints are properly served on the respondent carrier and verified under Title 18 of the U.S. Code as to their truthfulness. Given that many complainants proceed pro se, DOT can always grant the complainant leave to amend or otherwise "cure" the procedural defect without dismissing the complaint.[28] Ensuring, however, that all pleadings filed in a formal complaint proceeding are properly prepared and served is an important matter of due process, and requiring them to be verified as to their truthfulness is an important step to maintain the integrity of the process.
- Some third-party complaints allege a violation of only 49 U.S.C. § 41712, which is a general statute prohibiting unfair and deceptive practices in air transportation or the sale of air transportation and which DOT relies upon when promulgating specific discretionary aviation consumer protection regulations. DOT should require that any claim based solely on section 41712 invoke an established DOT decisional or guidance document that has placed the industry on notice regarding DOT's enforcement position. A third-party complaint proceeding is not the appropriate venue for DOT to advance a novel interpretation of 49 U.S.C. § 41712.[29]
- DOT should not require answers unless and until the respondent is directed by DOT to provide one; this will allow DOT sufficient time to assess the third-party complaint to determine whether (i) an actionable claim has been stated and (ii) the complainant has satisfied the procedural requirements.
- Under DOT's regulations, DOT may consolidate cases involving issues that are the same or closely related.[30] DOT has used this mechanism in the past to consolidate third-party complaints that arise out of the same set of operative facts.[31] Upon request from a carrier respondent, such as, for example, a request to provide one consolidated answer as opposed to many answers covering the same set of facts, DOT should use this mechanism to promote greater efficiency in reviewing and responding to third-party complaints.
- DOT should update Part 302 to establish a set time frame for its resolution of third-party complaints following the submission of an answer. Complainants and respondents alike deserve to have pending matters expeditiously resolved—rather than waiting nearly two years (as noted above). Although DOT rejected the inclusion of a decisional deadline when last updating the applicable regulations 20 years ago, the landscape today is much different for filing third-party complaints than it was then.

Conclusion

While having a formal complaint process in place is an important feature of government consumer protection, the third-party complaint mechanism in its current form presents quandaries for DOT, carriers, and, ultimately, consumers with potentially meritorious claims. There are nearly 150 third-party complaints now pending before DOT (though several have been combined into one enforcement proceeding by DOT).[32] Not all are related to the COVID-19 pandemic, however, and the continued propagation of third-party complaints as a means of addressing matters better suited for resolution through the informal process is almost assured. Given the finite resources of DOT, streamlining the third-party complaint procedures will allow DOT to better ensure that both complainants and respondents receive a fair, expeditious review of cognizable claims.

Endnotes

1. 14 C.F.R. § 302.400 et seq.

2. *See, e.g.*, Order Denying Petition and Dismissing Complaint in the Matter of Petition for Rulemaking and Third-Party Complaint of Donald Pevsner, Esq., Order No. 2012-11-4 (Dep't of Transp., issued on Nov. 6, 2012) (declining to take enforcement action and open an investigation concerning the refund practices of a carrier).

3. *See, e.g.*, Order of Dismissal in the Matter of Benjamin Edelman v. American Airlines, Order No. 2018-5-30 (Dep't of Transp., served May 22, 2018) (dismissing a complaint that, although involving a technical violation of the baggage disclosure rule, did not warrant enforcement action based on the "totality of the circumstances").

4. *See* Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel (Dep't of Transp., issued Apr. 3, 2020), https://www.transportation.gov/sites/dot.gov/files/2020-04/Enforcement%20Notice%20Final%20April%203%202020.pdf.

5. As of this writing, eight complaints have been filed in 2021.

6. The DOT regulation providing for the filing of third-party complaints is 14 C.F.R. § 302.404(a).

7. *See* U.S. Dep't of Transp., Air Travel Service Complaint or Comment Form, https://airconsumer.dot.gov/escomplaint/ConsumerForm.cfm (last visited July 21, 2021).

8. For example, in 2019, 14,694 informal complaints were filed with DOT against U.S. and foreign air carriers. *See* Off. of Aviation Enf't & Proc., U.S. Dep't of Transp., Air Travel Consumer Report (Feb. 2020), https://www.transportation.gov/sites/dot.gov/files/2020-02/February%202020%20ATCR.pdf. In contrast, zero formal complaints (third-party complaints) were filed with DOT.

9. 14 C.F.R. § 302.405(a). The requirement is 15 days from the date when the third-party complaint is served on the respondent.

10. *Id*. § 302.408(b).

11. *Id*. § 302.408(c).

12. *Id*. § 302.406(a).

13. *Id*. The prior version of DOT's procedural requirements required DOT to process a formal complaint within 60 days of receipt. DOT, in adopting the "reasonable time" standard, stated that "[o]ur experience is that the 60 days set forth in the existing rule rarely, if ever, permits enough time to conduct an investigation and satisfactorily resolve issues that may be raised." Rules of Practice in Proceedings, 65 Fed. Reg. 6446, 6452 (Feb. 9, 2000) (final rule).

14. A review of DOT third-party complaint dockets shows four complaints pending from 2018, one from 2017, one from 2016, and one from 2015. As for the complaints filed in 2020, DOT recently issued a Notice of Administrative Action closing 85 of 89 complaints filed against a single carrier as DOT has decided to pursue enforcement action related to those claims. *See* Notice of Administrative Action *in re* Air Canada Formal Complaints, Docket No. DOT-OST-2020-0055 et seq. (Dep't of Transp., served June 15, 2021). DOT decided to dismiss the remaining four complaints. *See* Order of Dismissal in the Matter of the Complaints of Simon Cyr, David Chain, Lindsay Miles, and Lana Harrison, Order No. 2021-6-11 (Dep't of Transp., served June 15, 2021).

15. Although not initiated through a third-party complaint by a passenger, an enforcement proceeding was instituted by DOT against Delta Air Lines before an ALJ in December 2014. Delta filed a motion to dismiss in January 2015. The ALJ issued an order granting Delta's motion to dismiss in January 2018. *See* Order Granting Respondent's Rule 12(b)(6) Motion to Dismiss, Docket No. DOT-OST-2014-0229 (Dep't of Transp., served Jan. 12, 2018).

16. Under 14 C.F.R. § 259.7(c), carriers must acknowledge receipt of a written complaint within 30 days and provide a substantive answer within 60 days of receipt.

17. *See* Off. of Aviation Enf't & Proc., U.S. Dep't of Transp., Air Travel Consumer Report (Feb. 2021), https://www.transportation.gov/sites/dot.gov/files/2021-02/February_%202021%20ATCR.pdf.

18. Although DOT procedural regulations require complainants to provide a mailing address on the initial filing, many complainants do not do so. 14 C.F.R. § 302.4(a)(2)(i)(d).

19. 65 Fed. Reg. 6446 (Feb. 9, 2000).

20. Prior to the establishment of www.regulations.gov, third-party complaints were required to be filed either by mail with DOT's Documentary Services Division or on DOT's little-known Document Management System website.

21. *How to File and Pursue a Consumer Complaint Against an Airline—and the DOT "Formal Complaint" Process*, benedelman.org (Nov. 16, 2016), http://www.benedelman.org/dot-complaints. At the time of this article, all of the refund-related third-party complaints filed due to COVID-19 cancellations follow this template.

22. *Law Students Create Free Airline Refund Complaint Generator for Covid-19 Related Cancellations for Flights to, from or Connecting in the USA*, Canadian Aviation News (Aug. 7, 2020), https://canadianaviationnews.wordpress.com/2020/08/07/law-students-create-free-airline-refund-complaint-generator-for-covid-19-related-cancellations-for-flights-to-from-or-connecting-in-the-usa.

23. 14 C.F.R. § 302.16 allows for petitions for rulemaking.

24. 14 C.F.R. § 302.404(c).

25. Order of Dismissal in the Matter of the Complaints of Simon Cyr et al., *supra* note 14.

26. Part 16 governs the rules of proceeding for enforcement actions related to federally-assisted airports.

27. 14 C.F.R. § 16.25.

28. 14 C.F.R. § 302.404(a) (requiring formal complaints to meet the procedural requirements of §§ 302.3 and 302.4, which specify the form of the document as well that all documents must be verified); 14 C.F.R. § 302.7(d) (specifying on whom service should be made).

29. *See generally* 14 C.F.R. § 399.75 (setting forth procedures for issuing a regulation declaring a practice to be unfair or deceptive when the regulation is not required by statute); 14 C.F.R. § 399.79 (setting forth definitions for *unfair practice* and *deceptive practice*).

30. 14 C.F.R. § 302.13.

31. *See* Notice of Consolidation of Proceedings, Docket No. DOT-OST-2018-0137 (Dep't of Transp., served Oct. 18, 2018) (consolidating several formal complaints that arose out of the same incident).

32. *See* Notice of Administrative Action, *supra* note 14.

U.S. Aircraft Exports and the AGC Indictment: Avoiding Penalties and Aircraft Seizures

By David M. Hernandez

The U.S. government's recent criminal prosecution of the owner of Aircraft Guaranty Corporation (AGC) for, in part failure to export aircraft lawfully from the United States, as alleged in Count Five of a federal grand jury indictment (the Indictment or AGC Indictment) is unprecedented and alarming to the international aviation community.[1] As alleged in the Indictment, the specified defendants failed to comply with federal laws applicable to the permanent export of aircraft. Under such laws, aircraft are deemed to be permanently exported from, if not permanently returned to, the United States within one year (12 months) after the date of export.[2] What was particularly alarming to many industry participants was the government's position regarding what circumstances require compliance with the permanent export laws and its position that a trust company is responsible, as the registered owner, for compliance with these export laws.

The AGC Indictment charged defendants with, among other things,[3] conspiracy to commit export violations, and *seized 12 aircraft*. According to various anecdotal accounts, the investigations that led to the Indictment were among a number of investigations by various agencies of the government regarding the export practices of U.S.-based trust companies serving as trustees in aircraft ownership trusts with non–U.S. citizen beneficiaries. These trusts are commonly referred to as "non-citizen trusts" (NCTs). As of May 2019, there were approximately 6,800 NCTs.[4] Again according to anecdotal accounts, the government has issued multiple administrative subpoenas and, at the time of this article, may be investigating as many as 15,000 NCT aircraft for export compliance, including aircraft that have exited NCT trusts in the last five years. If these anecdotal reports are correct, the scope of these investigations is astonishing and, as a result, quite unsettling for industry participants, almost all of whom frequently utilize NCTs for routine business or other purposes.

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This article focuses on both the laws and regulations pertaining to the export of U.S.-registered aircraft that were the subject of the charges in the AGC Indictment, as well as the implications for industry participants who have become accustomed to relying on NCTs when registering aircraft on the United States "N" registry (FAA Registry).

Export Requirements: Overlooked or Observed in the Breach

Few people properly export aircraft from the United States, particularly aircraft that remain on the FAA Registry by way of NCTs. The primary reason many aircraft owners fail to properly export aircraft is that they simply do not realize they are required to do so if the aircraft remains on the FAA Registry. This view is based on the erroneous assumption that because no Federal Aviation Administration FAA Export Certificate of Airworthiness Form 8130-4, is required, no export declaration is required.

Additionally, many aircraft owners (i) are unaware of the Foreign Trade Regulations' (FTRs') reporting requirements for certain exports, including aircraft, or (ii) they have taken the view that the export-reporting requirements are merely an administrative task that can be ignored without the risk of penalties. Ironically, except for the customs broker's fee where such a broker is used, owners are free to file the required export data with the U.S. Census Bureau (Census).

To compound the problem, few in the aviation industry stress compliance with customs export requirements in aircraft transactions because they view the customs export as the foreign buyer's concern, and sellers often endeavor to deliver the aircraft in the United States to avoid any export-reporting obligations. Finally, some may intentionally ignore customs export disclosure requirements in order to remain anonymous or for other reasons.[5]

Non–U.S. citizens are able to register their aircraft on the FAA Registry and enjoy the benefits associated with coveted "N" registrations because the Federal Aviation Regulations (FARs)[6] permit trustees to facilitate such registrations by establishing NCTs.[7] Given this facilitation under the FARs, serving as an aircraft trustee is a profitable business.

In order to establish an NCT, an aircraft owner simply enters into a grantor trust agreement with a

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trustee who is a citizen of the United States[8] and transfers or otherwise causes the title to the aircraft to be held by the trust. The effect is that the trustee holds legal title to the aircraft and the foreign owner retains a beneficial interest.

The arrangement also requires an aircraft lease agreement to enable the beneficial owner to operate the aircraft. The trust agreement and lease must be filed with the FAA.[9] The trustee registers the aircraft in its name, and the trustor and the beneficiary are frequently the same person. The FAA does not monitor, regulate, or require any export declaration whatsoever, nor does the FAA perform any due diligence on the trustor. That said, all reputable trust companies perform extensive financial "know-your-customer" and export-control due diligence as recommended by the Bureau of Industry and Security (BIS),[10] which enforces the Export Administration Regulations, and the Office of Foreign Assets Control (OFAC),[11] which enforces the economic sanctions regulations.

NCTs have been under scrutiny by the government for years due to concerns regarding lack of transparency and oversight. Thus, it should not be a surprise that recent customs export investigations relate to the use of NCTs.[12] Perhaps the bigger question is: Why did it take so long for the government to enforce the customs-reporting requirements in the context of NCT aircraft exports?

As discussed below, the AGC Indictment makes clear that the government believes that trustees—acting as the registered owners of the aircraft—are responsible for customs export compliance. This would constitute an unanticipated and very significant reallocation to trustees of the risks associated with use of NCTs to achieve FAA registration for aircraft that are exported well before, concurrently with, or after registration.

The Regulatory Overview

As an initial matter, Census is responsible for collecting, compiling, and publishing U.S. export trade statistics. Prior to July 2, 2008, a paper Shipper's Export Declaration form filed through the Automated Export System (AES or AESDirect) was the primary method for collecting export trade data, and Census used the data for statistical purposes only. On July 2, 2008, the requirements changed, and export trade data became required to be reported online through the AES as Electronic Export Information (EEI) if any parts and labor valued over $2,500 are exported or if the parts or service are subject to export license requirements.

The AES enables EEI to be filed directly with the U.S. Customs and Border Protection (CBP) and Census. CBP enforces the EEI filing requirements. The BIS also uses EEI data for export control enforcement purposes to detect and prevent the export of certain items by unauthorized parties or to unauthorized destinations or end users. Census thus delegates its regulatory enforcement in this area to the BIS and CBP, each of which has administrative subpoena authority.

The EEI filing requirement also serves national security purposes because the electronic filing strengthens the government's ability to prevent the export of certain items by unauthorized parties, such as BIS- and OFAC-sanctioned entities, to unauthorized destinations and end users. The EEI filings aid in targeting and identifying suspicious shipments prior to export and afford the government the ability to significantly improve the quality, timeliness, and coverage of export statistics.

EEI Filing Requirements

EEI filing requirements[13] are extremely complex, and it is wise to hire a customs broker to ensure that the EEI is filed properly. The EEI must be filed through the AES by the U.S. principal party in interest (USPPI), the USPPI's authorized agent, or the authorized U.S. agent of the foreign principal party in interest (FPPI). Generally, the foreign aircraft buyer should file the EEI, and it typically hires a customs broker as its authorized agent to physically file the EEI.

The principal parties in a transaction, for the purpose of these export requirements, are the parties who receive the primary benefit, monetary or otherwise. Generally, the principal parties in interest in a transaction are the seller and the buyer. In the context of a transaction, the USPPI is the person or legal entity in the United States that receives the primary benefit, monetary or otherwise, from that transaction. That person or entity is generally the U.S. seller, manufacturer, order party, or a foreign entity if it is in the United States at the time goods are purchased or obtained for export (i.e., if the foreign buyer is taking delivery).

The foreign entity must be listed as the USPPI if it is in the United States when the items are purchased or obtained for export and follow the applicable provisions for filing the EEI pertaining to the USPPI.[14] The allegations in the AGC Indictment make clear the government's position that these procedures should have been followed for the vast majority of aircraft exports (i.e., the foreign buyer should have filed the EEI with the assistance of a customs broker acting as the foreign buyer's authorized agent and power of attorney).

Specific instructions also exist for filing EEI for aircraft when sold while outside the United States. In most cases, the EEI should be filed prior to exportation unless the USPPI has been approved to submit export data on a post-departure basis, which should not ordinarily be the case. Aircraft sales requiring a license or license exemption may be filed post-departure only when the appropriate licensing agency has granted the USPPI authorization.

All EEI filings must be "complete, correct, and based on personal knowledge of the facts stated or on information furnished by the parties to the export transaction. The filer . . . [must] be physically located in the

United States at the time of filing, have an EIN [federal Employee Identification Number] or DUNS [Data Universal Numbering System number], and be certified to report in the AES. In the event that the filer does not have an EIN or DUNS, the filer must obtain an EIN from the Internal Revenue Service."[15] Importantly, the "filer is responsible for the truth, accuracy, and completeness of the EEI, except insofar as that party can demonstrate that it reasonably relied on information furnished by other responsible persons participating in the transaction."[16] As noted above, the process is very challenging for any party endeavoring to export an aircraft, and the referenced requirements for an EIN, DUNS, and U.S. presence are often problematic for non-U.S. parties.

Finally, parties filing an EEI must ensure that (i) the filing contains complete and accurate information; (ii) any customs broker or other agent filing on behalf of the USPPI or FPPI has a power of attorney or written authorization to file the EEI; (iii) the required information is filed in a timely manner in accordance with the FTRs; (iv) fatal errors, warning, verify, and reminder messages, as well as compliance alerts where applicable, are promptly responded to; (v) the exporting carrier is provided with the required proof-of-filing citations or exemption legends in accordance with the EEI requirements; and (vi) corrections or cancellations to the EEI are promptly filed.[17]

Why Regulated Parties Should Care: The Penalties

Failure to file an EEI or submitting false or misleading information to the AES has significant criminal and civil penalties, including aircraft seizure and forfeiture.

Criminal Penalties

Criminal penalties are substantial.18 "Any person, including any USPPI, authorized agents or carriers, who knowingly fails to file or knowingly submits, directly or indirectly, to the U.S. Government, false or misleading export information through the AES" or "who knowingly reports, directly or indirectly, to the U.S. Government any information through or otherwise uses the AES to further any illegal activity" shall, with respect to any of these violations, "be subject to a fine not to exceed $10,000 or imprisonment for not more than five years, or both, for each violation."19 Additionally, any person who is criminally convicted faces the risk of forfeiture of their aircraft to the government of any or all of that person's

- "interest in, security of, claim against, or property or contractual rights of any kind in the goods or tangible items that were the subject of the violation";
- "interest in, security of, claim against, or property or contractual rights of any kind in tangible property that was used in the export or attempt to export that was the subject of the violation"; and
- "property constituting, or derived from, any proceeds obtained directly or indirectly [because] of this violation."[20]

False Statements

Not surprisingly, it is a crime under 18 U.S.C. § 1001 for any person to make a false statement to a federal agent either in response to an inquiry or voluntarily. Certain false responses to questions propounded for administrative purposes, including statements to BIS agents regarding the circumstances related to the export of an aircraft during routine inquiries, are also prosecutable, as are untruthful "nos" if a party initiates contact with the government in order to obtain a benefit such as facilitation of an aircraft sale.

The false statement crime is particularly problematic for aircraft owners who by innocent mistake or with the intent to deceive assert that their aircraft were never exported, even though some of the related transaction, trust, financing, and state sales tax exemption documents may establish that the aircraft were "exported" for the purposes of the applicable export requirements and that the owner should have filed an EEI.

Civil Penalties

The most common export violation is referred to as a "failure to file" an EEI, which results in civil penalties[21] and occurs if the government discovers that no AES record exists for an export transaction in the form of an EEI Internal Transaction Number (ITN). Any AES record filed later than 10 calendar days after the due date is a failure to file, and the maximum penalty is $10,000 for a failure-to-file violation. A late-filing violation occurs when an AES record is filed after the required period prescribed, with a maximum penalty of $1,100 per day, up to a maximum of $10,000 per violation. Filing false or misleading information is subject to a maximum civil penalty of $10,000 per violation, which may be in addition to any other penalty imposed.

Next to criminal penalties, civil forfeiture penalties are the biggest concern for most aircraft owners and lessors. The government has the authority to seize any aircraft involved in a civil or criminal violation of the FTRs, and the aircraft may be subject to a forfeiture sale under the FTRs.[22] As the AGC Indictment details, the government seized several aircraft and has the authority to seize any aircraft that has not been exported properly in accordance with the applicable regulations.

The Export-Related Indictment Allegations

The AGC Indictment illustrates the consequences of failing to properly export an aircraft—albeit a worst-case scenario—and should be a warning to any aircraft owner who is deemed to have exported an aircraft from the United States. Suffice it to say, the days of ignoring EEI filings are over.

Count Five[23] of the Indictment focuses on AGC's actions in its capacity as trustee and alleges a conspiracy to commit aircraft export in furtherance of a criminal act. AGC's widespread failure to file an EEI was discovered by the BIS's Office of Export Enforcement (OEE) and Homeland Security Investigations,[24] which initiated an investigation into defendants after noticing irregularities in aircraft filings and learning that several defendant-registered aircraft were seized or destroyed by the government of a foreign country in which such aircraft were located because an agency of that government believed that the aircraft were involved in smuggling drugs internationally. The OEE also discovered that no EEI was filed for many of the aircraft under investigation.

The U.S. government alleges in the Indictment that AGC, as the registered owner of the aircraft upon and after entering into a trust arrangement, was responsible for complying with aircraft export-reporting obligations imposed on aircraft owners, and states that such obligations cannot be delegated to third parties. To support its position, the government relies upon the FAA's NCT Policy Guidance, stating as follows:

> The regulatory obligations of an owner trustee with regard to an aircraft registered in the U.S. using a non-citizen trust are, and always have been, the same as the regulatory obligations of all owners of U.S. registered aircraft. The FAA Registry is an "owner" registry; it is not an "operator" registry. Once the FAA completes the registration process, the registered owner is the owner for all purposes under the regulations. The FAA has determined that there is nothing inherent in the status of a trustee owner of a U.S.-registered aircraft that would affect or limit its responsibilities for ensuring compliance with applicable laws and regulations. Thus, an owner of an aircraft on the U.S. registry cannot avoid a regulatory obligation imposed on it by the FAA simply by entering into a private contract with another party.
>
> The aircraft is subject to United States regulations and requirements, including those issued by the Department of Commerce. The Owner Trustee promised the FAA compliance. If the aircraft is exported, then the Trustee must insure the required Electronic Export Information is filed under 15 C.F.R. §§ 30.3, 758.1(b)(5), and 758.2. *AGC refused to comply, even when confronted by United States authorities*.[25]

However, despite the position taken by the government in the Indictment, many in aviation industry businesses continue to believe that if an aircraft is exported, it is not the trustee's responsibility to ensure that the required EEI is filed.

The AGC Indictment also describes a cautionary example of a seizure and forfeiture action related to the failure to file an EEI. On October 20, 2017, a Learjet 31A aircraft (N260RC) was placed into an AGC trust and lease. On January 31, 2020, the beneficial owner of the aircraft was scheduled to depart Brownsville, Texas, for Monterrey, Mexico. The beneficial owner's pilots allegedly failed to provide CBP Advance Passenger Information System filings for each passenger at least one hour before departure, and the aircraft was seized.[26] Upon discovering that the aircraft had been outside of the United States for three years without any EEI filing, the government is now pursuing a forfeiture action against the aircraft.

Ramifications for the Aviation Industry

The AGC Indictment has fundamentally altered the risk dynamic for trust companies, the likely result of which includes, among other things, increased regulatory compliance costs, enhanced indemnifications in favor of the trustees, and a comprehensive reevaluation of the entire NCT business model.

Many in the government apparently view NCTs as merely selling access to the coveted FAA Registry with very little oversight or transparency. It is doubtful whether the FAA has the resources or authority to conduct any meaningful safety oversight or surveillance of the thousands of U.S.-registered aircraft based outside of the United States, and it is possible that there are many aircraft being leased or subleased without the required notice to the FAA, and without the trustee's knowledge.

Adding to the increased scrutiny of NCTs is a tragic accident involving an NCT-registered aircraft that operated primarily outside of the United States. On January 21, 2019, a Piper Malibu (N264DB)—operated by a pilot not licensed to operate the flight—crashed in the English Channel, resulting in the death of Argentine football player Emiliano Sala.[27] That aircraft was registered to the Southern Aircraft Consultancy, a U.S. trustee based, ironically, in Bungay, Suffolk, United Kingdom.[28] FAA regulations permit a U.S. trustee to be based anywhere in the world.[29]

Significant risk and default concerns exist for parties with an interest in an aircraft facing Government seizure for failing to file an EEI. Among other things, aircraft that were not properly exported are subject to seizure, and such circumstances likely present a very serious coverage problem for insurers and may trigger policy cancellations. Lessors and lenders should also determine whether, with respect to any FAA-registered aircraft leased to or securing the repayment of a loan to a customer that are being operated primarily outside of the United States, the aircraft were properly exported and, if not, immediately assess the potential risks.

As the AGC Indictment makes clear, the government's

position is that "[i]f the aircraft is exported, then the Trustee must insure the required Electronic Export Information is filed under 15 C.F.R. § 30.3, 758.1(b)(5), and 758.2."[30] However, the FTRs are ambiguous regarding whether a trust company is actually the party responsible for filing the EEI. As a result, the ramifications for trusts, lessors, banks, financial institutions, foreign buyers, U.S. sellers, and customs brokers are potentially enormous. All aircraft transactions will have to address which party is responsible for customs export compliance, and an EEI ITN will become an industry standard requirement. A common industry joke was that it has been easier to find a leprechaun with a pot of gold than an aircraft customs broker because the services of a customs broker were rarely required—until now. Aircraft customs brokers will likely be a growth industry going forward.

It is also unclear how trust companies that offer NCTs will survive without additional oversight and increased transparency. The beneficial owner's strong desire for privacy must be weighed against the government's legitimate national security interests and the need for transparency. At a minimum, the aviation industry must start mandating compliance with the requirement to file an EEI. Any such filing, if applicable, must be an aircraft transaction closing checklist item going forward. Most importantly, the parties to any related transactions, especially lessors and lenders, must monitor and enforce compliance with these requirements. Lenders, lessors, and other transaction parties must also be aware of the implications of the government's investigations and position regarding export compliance on a going-forward basis, and they should also be aware that there could be implications regarding aircraft in their portfolio that were previously held in trust and permanently exported in violation of the referenced export laws. In that regard, it is critical that they seek advice of counsel regarding what might be a prudent course of action, including due diligence and any follow-up should they identify any potential noncompliance.

Government concerns regarding, and scrutiny of, NCTs are not new; the OEE enforcement and subpoenas are the new development, and the aviation community is now taking the applicable reporting obligations more seriously to avoid being swept up in the next aircraft seizure. It is unclear whether the government realizes the tsunami it has caused throughout the industry or the potential ramifications. However, with each subpoena issued by the OEE, the government is becoming more aware of the scope of the problem of widespread failure to file an EEI. And given that the requirement to file an EEI is based on U.S. national security interests, it is very doubtful that the government will change its position regarding a trustee's responsibility to file the EEI merely because of the challenges associated with filing or because the trustee contractually shifts EEI filing responsibility to the beneficial owner.

As is the case with most significant regulatory events, the industry will figure out how to deal with the increased regulatory scrutiny pertaining to the export of NCT aircraft. In particular, those in the industry will learn to file EEIs, and the situation will be better after the dust settles. Until then, we will persevere, comply with the regulatory requirements, and resolve the issues in accordance with the applicable law. Good luck to all!

Endnotes

1. *See* Third Superseding Indictment, United States v. Debra Lynn Mercer-Erwin et al., Docket No. 4:20-CR-212 (E.D. Tex., Sherman Div., Feb. 24, 2021) [hereinafter Indictment]. The Indictment names nine defendants involved in multiple allegations, and the focus of this article is limited to the aircraft export violations described in Count Five of the Indictment. This article is focused solely on the events, circumstances, and defendants named in the Indictment on or prior to February 24, 2021.

2. The analysis of whether an aircraft is permanently exported is fact specific and based on the intent of the parties. Factors to consider are transaction documents, state sales tax exemption affidavits, existence of hangar lease agreements, management agreements, flight history, and similar related documentation.

3. The scope of this article is limited to an analysis of Count Five of the Indictment, which is based on 18 U.S.C. § 371, "Conspiracy to Commit Export Violations" in the Indictment).]

4. U.S. Gov't Accountability Off., GAO-20-164, FAA Needs to Better Prevent, Detect, and Respond to Fraud and Abuse Risks in Aircraft Registration (Mar. 2020).

5. *See id.*

6. 14 C.F.R. ch. I.

7. 14 C.F.R. Part 47.7(c), "Trustees," provides:

> An applicant for aircraft registration under 49 U.S.C. § 44102 that holds legal title to an aircraft in trust must comply with the following requirements:
>
> (1) Each trustee must be either a U.S. citizen or a resident alien.
>
> (2) The applicant must submit with the Aircraft Registration Application—
>
> (i) A copy of each document legally affecting a relationship under the trust;
>
> (ii) If each beneficiary under the trust, including each person whose security interest in the aircraft is incorporated in the trust, is either a U.S. citizen or a resident alien, an affidavit by the applicant to that effect; and
>
> (iii) If any beneficiary under the trust, including any person whose security interest in the aircraft is incorporated in the trust, is not a U.S. citizen or resident

alien, an affidavit from each trustee stating that the trustee is not aware of any reason, situation, or relationship (involving beneficiaries or other persons who are not U.S. citizens or resident aliens) as a result of which those persons together would have more than 25 percent of the aggregate power to influence or limit the exercise of the trustee's authority.

(3) If persons who are neither U.S. citizens nor resident aliens have the power to direct or remove a trustee, either directly or indirectly through the control of another person, the trust instrument must provide that those persons together may not have more than 25 percent of the aggregate power to direct or remove a trustee. Nothing in this paragraph prevents those persons from having more than 25 percent of the beneficial interest in the trust.

8. 49 U.S.C. § 40102(a)(15) provides:

"citizen of the United States" means—

(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, which is under the actual control of 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.

9. 14 C.F.R. pts. 47.7, 91.23. Section 91.23 only applies to aircraft with a maximum certificated takeoff weight of more than 12,500 pounds.

10. The BIS is a bureau within the U.S. Department of Commerce that is concerned with the advancement of U.S. national security, foreign policy, and economic interests. The BIS is responsible for regulating the export of sensitive goods and technologies; enforcing export control, antiboycott, and public safety laws; cooperating with and assisting other countries on export control and strategic trade issues; and assisting U.S. industry to comply with international arms control agreements. *See* 15 C.F.R. pts. 730–80 ("Export Administration Regulations").

11. The OFAC is an agency within the U.S. Department of the Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. *See* 31 C.F.R. pts. 501–99 ("Office of Foreign Assets Control").

12. U.S. Dep't of Transp. Office of Inspector General (DOT OIG), Rep. No. AV2019052, FAA Plans to Modernize Its Outdated Civil Aviation Registry System, but Key Decisions and Challenges Remain (May 8, 2019); DOT OIG, Management Advisory on Registration of Aircraft to United States Citizen Trustees in Situations Involving Non–United States Citizen Trustors and Beneficiaries (Jan. 31, 2014); Notice of Policy Clarification for the Registration of Aircraft to United States Citizen Trustees in Situations Involving Non–United States Citizen Trustors and Beneficiaries, 78 Fed. Reg. 36,412 (June 18, 2013); Edward K. Gross, Erich P. Dylus & Jonathan M. Rauch, *Under Scrutiny: The New GAO Recommendations for FAA Aircraft Registration*, 33 Air & Space Law., no. 2 (2020).

13. *See* 15 C.F.R. pt. 30 ("Foreign Trade Regulations").

14. *See* 15 C.F.R. § 30.1(c) (FTRs' definition of *USPPI*).

15. 15 C.F.R. § 30.3(a).

16. *Id*.

17. *Id*. § 30.3, 758.1(b)(5), 758.2.

18. *Id*. § 30.71(a) ("Criminal penalties") (§ 30.71 is entitled "False or fraudulent reporting on or misuse of the Automated Export System").

19. *Id*. § 30.71(a)(1)–(2).

20. *Id*. § 30.71(a)(3)(i)–(iii) ("Forfeiture penalties").

21. 13 U.S.C. § 305 ("Penalties for unlawful export information activities"); 15 C.F.R. § 30.71(b) ("Civil penalties").

22. 15 C.F.R. § 30.71(b)(4) ("Forfeiture penalties").

23. 18 U.S.C. § 371 (imposing a penalty of not more than 10 years' imprisonment, a fine not to exceed $250,000, or both, and a term of supervised release of not more than three years).

24. Homeland Security Investigations (HSI), which is a subcomponent of Immigration and Customs Enforcement, is the second-largest criminal investigative agency in the United States. HSI is primarily concerned with transnational criminal organizations and focuses its authorities on issues such as human smuggling, drug trafficking organizations, violent street gangs, intellectual property rights, commercial fraud, child pornography, bulk cash smuggling, and counterproliferation.

25. Indictment, *supra* note 1, at 2–3 ¶¶ 3, 4 (emphasis added) (internal citations and quotations omitted).

26. *Id*. ¶ 28.

27. *See* Jenny Johnson & Kayley Thomas, *Emiliano Sala Crash: Pilot Ibbotson "Not Licensed for Flight,"* BBC News, Mar. 13, 2020, https://www.bbc.com/news/uk-wales-51870306; *United* Kingdom Air Accidents Investigation Branch, AAIB Bull. S2/2019 (Aug. 14, 2019), https://www.gov.uk/government/news/aaib-investigation-into-the-loss-of-aircraft-n264db.

28. *See* Southern Aircraft Consultancy, https://www.southernaircraft.co.uk (last visited Aug. 8, 2021); FAA Registry: N-Number Inquiry, https://registry.faa.gov/aircraftinquiry/Search/NNumberResult (last visited Apr. 4, 2021).

29. 14 C.F.R. § 47.7(c).

30. Indictment, *supra* note 1, ¶ 4.

continued from page 1

the airplane is going and has assumed the ultimate responsibility for the safe conduct of that flight is the party who has assumed operational control and is the operator.

Which Operational Rules Apply?
Once the actual operator is identified, the analysis continues as to which rules that operator must follow. FAR Part 119 provides the "gateway" set of rules that instruct an aircraft operator as to whether that operator may simply comply with the noncommercial rules—the general operating rules found at FAR Part 91—or whether it must seek certification for, and then operate under, the applicable commercial rules. In this instance, those rules would be the rules applicable to commuter and on-demand (generally referred to as air charter or air taxi) operators found at FAR Part 135.

Definitions

FAR Part 119, however, can only be understood and applied if the operator first understands certain key regulatory definitions that are primarily found in FAR Parts 1 and 110.

The pertinent provisions of the following definitions, presented in "building block" order rather than alphabetically, are found in FAR Part 1 (with special emphasis supplied to certain key terms) and create the concept of a "commercial operator":

> "*Air commerce* means ***interstate*** . . . ***air commerce*** . . . within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, . . . air commerce."
>
> "*Interstate air commerce* means the carriage by aircraft of persons or property ***for compensation or hire, . . . or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation***, in commerce between a place in any State of the United States . . . and a place in any other State of the United States. . . ."
>
> "***Commercial operator*** means a person who, ***for compensation or hire***, engages in the carriage by aircraft in ***air commerce*** of persons or property, ***other than as an air carrier***. . . . Where it is doubtful that an operation is for "compensation or hire", the test applied is whether the carriage by air i***s merely incidental to the person's other business or is, in itself, a major enterprise f or profit.***"[4]

The pertinent provisions of the following definitions, again presented in "building block" order rather than alphabetically and as found in FAR Parts 1 and 110 (and again with special emphasis supplied to certain key terms), take the concept of a commercial operator one step further and create the concept of a "direct air carrier":

> "*Air transportation* means ***interstate*** . . . ***air transportation*** . . . by aircraft."
>
> "*Interstate air transportation* means the carriage by aircraft of persons or property as ***a common carrier*** *for compensation or hire* . . . Between a place in a State . . . and another place in another State. . . ."
>
> "*Air carrier* means a person who undertakes directly by lease, or other arrangement, to engage in ***air transportation***."
>
> "*Direct air carrier* means a person who provides or offers to provide ***air transportation*** *and* ***who has control over the operational functions*** *performed in providing that transportation*."[5]

In summary, the fundamental test for when a person is acting as a commercial operator is met when that operator is carrying persons or property for compensation or hire. Moreover, although both commercial operators and direct air carriers conduct commercial operations, direct air carriers go one step further by operating in common carriage, i.e., by holding themselves out to the public for hire, whereas "mere" commercial operators who are conducting flights in noncommon or private carriage do not hold themselves out to the public for hire.

Finally, as is discussed in more detail below, two concepts are key to understanding whether an operator is a commercial operator or a direct air carrier. First, the FAA does not recognize the federal income tax concept of a "disregarded entity."[6] For example, just because a limited liability company, for which a person is the sole member, owns an aircraft and is treated as a "disregarded entity" by the Internal Revenue Service does not mean that the person owns the aircraft

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from the standpoint of the FAA—the person owns a company that in turn owns an aircraft, and the person and company cannot be merged for the purpose of analyzing who has operational control or whether compensation is occurring under the FAA's rules. Second any form of value in any amount flowing from one person to another in order to help pay for the costs of a flight constitutes compensation.[7] A profit motive is not required, and sharing costs or even simply infusing capital into a company is compensation under the FAA's rules.

Analysis Under FAR Part 119

With these key definitions in mind, the next step in the analysis is to turn back to FAR Part 119. A summary of the proper flow through FAR Part 119 is to ask the following questions and then apply the analyses below.

1. Is the operator acting as a commercial operator in common carriage, i.e., holding out to the public for the purpose of carrying persons or property for hire?
   - If yes, the operator is acting as a direct air carrier and must first obtain an air carrier certificate and then comply with the operational rules found under FAR Part 135.[8]
   - If no, see step 2.
2. Is the operator acting as a commercial operator *not* in common carriage, i.e., is the operator not holding out to the public but nevertheless collecting some amount of compensation in exchange for carrying persons or property?
   - If yes, see step 3.
   - If no, see step 4.
3. Do any of the exceptions found in FAR sections 91.501, 91.312, or 119.1(e) apply (as discussed in more detail below) such that the operator can act as a commercial operator but without the requirement to first obtain an operating certificate?
   - If yes, the operator can conduct its operations under FAR Part 91 so long as it stays within the limits prescribed by the applicable exception.
   - If no, the operator must first obtain an operating certificate and then comply with the operational rules found under FAR Part 135.[9]
4. Finally, after going through these steps, if the operator is not acting as a direct air carrier or mere commercial operator in that it is not holding out to the public or receiving any compensation related to carrying persons or property, then it is acting as a noncommercial operator and must simply comply with the basic operating rules found at FAR Part 91. Under these operations, no certificate is required as there is no such thing as a "FAR Part 91 certificate," although the operator may need to obtain certain "letters of authorization" (LOAs) for specific types of operations, such as an LOA permitting operations in "reduced vertical separation minimum airspace" outside of the continental United States.[10]

Improper Dry Leasing and Other Flavors of Illegal Charter

Each time the wheels roll on an airplane for the purpose of flight, the aircraft operator should walk through the flowchart described above to determine which operating rules it is obligated to comply with. Nevertheless, a significant number of operators fail to do so and end up conducting what amounts to illegal charter, i.e., they are flying uncertificated and under FAR Part 91 when, based on what they are doing, they should both have an appropriate certificate and be operating under FAR Part 135.

Improper, or "Sham," Aircraft Dry Leasing

One of the largest areas of noncompliance with these rules is the improper use of aircraft "dry" leases—sometimes referred to as "sham dry leases"—to raise revenue from the use of the airplane.

In general, a lease is any agreement by a person to furnish an aircraft to another person for compensation, regardless of the size or type of aircraft.[11] Once an aircraft lease has been created, the FAA will then characterize that lease as either a "wet" lease or a "dry" lease.

Fundamentally, a "wet lease" is specifically defined in FAR Part 110 as a lease of an aircraft with at least one crew member.[12] The FAA will assume that the wet lessor retains operational control and therefore acts as a commercial operator, requiring certification and operations under FAR Part 135 (unless a valid exception as noted above applies).[13] The prototypical example of an appropriate wet lease is the charter of an aircraft to a passenger by a properly certificated charter operator under FAR Part 135. Under a wet lease, the compensation being paid for the lease is the charter payment for the air transportation service being provided, similar to paying for riding in a taxicab.

Conversely, a "dry lease" is the lease of an aircraft without any crew member and under which operational control of the aircraft has transferred from the lessor to the lessee. Types of dry leases include traditional small-aircraft rental agreements to private pilots and, in aircraft trust arrangements, aircraft operating agreements. Under a dry lease, the compensation being paid is typically in the form of a rental payment in exchange for the lessee's use of the equipment being rented (whether the lessee is a pilot or a passenger who has separately hired a pilot) and is analogous to obtaining a rental car for one's own ground transportation needs. The determination that a lease is a dry lease does not automatically mean that the flight can be operated under FAR Part 91; rather, all it does is push the analysis down one rung of the ladder to then ask if the lessee operator is in turn conducting

a wet lease or in fact is acting as a legal FAR Part 91 operator in the operator's own right as described in the four-step analysis provided above.

The fundamental distinction between a dry lease and a wet lease is the answer to one question: Who is the operator? Put another way, who is exercising operational control? This analysis must be conducted by looking to various standards and background information that authorities, including Congress, the FAA, and applicable case law, have developed over the years. Examples of these standards are (a) the basic regulatory definition of "wet lease," i.e., whether the lease provides both an aircraft and flight crew; (b) the basic regulatory definitions for terms such as "operational control" as found in FAR § 1.1 (as discussed above); (c) the requirements regarding who must hold what types of air carrier or operating certificates as found in FAR Part 119 (as discussed above); (d) fundamental FAA guidance to safety inspectors on whether a lease is a wet lease or a dry lease as set forth in various parts of the Flight Standards Information Management System (FSIMS);[14] and (e) various FAA advisory circulars and other FAA guidance materials such as policy statements and FAA chief counsel interpretation letters that have been published over many years.[15]

To summarize all of the law and guidance material available from these sources, whether a lease is in fact a dry lease and operational control has been properly transferred to the lessee boils down to (1) determining who is providing the flight crew and (2) then assessing certain other factors that the FAA has enumerated over time to assist in making this determination.

With respect to the question of the flight crew, if the terms on the face of the lease clearly provide that the lessor will either provide flight crew or that the lessee is obligated to utilize some specific flight crew (beyond the crew being properly trained and qualified), then the lease is a wet lease. As noted above, in such a case, the FAA will automatically presume that operational control has been retained by the lessor, and the lessor must either be able to comply with one of the exceptions noted above, or it must operate under FAR Part 135.

Where the lease is silent on which party is to provide the crew, or where the lease indicates that the lessee will provide the flight crew, then making a final determination as to whether the lessee is in fact independently obtaining its own flight crew as opposed to the lessor actually providing crew requires consideration of numerous factors beyond the language in the lease itself. Consideration must also be given as to whether the crew is truly independent or if, for example, there is an identicality of interest between the lessor and the entity providing the pilots.[16] If the result of this analysis is that the aircraft and crew are in fact being furnished as a package, then it is a wet lease and the results noted above will apply.

However, even if it appears that the lessee is actually obtaining its own flight crew, the analysis is not over. In addition to the crew analysis, numerous other factors have been identified by the FAA that might lead it to determine that a purported dry lease is actually a "wet lease in disguise."[17] These factors are essentially an operational control analysis and can include questions such as:[18]

- Who makes the decision with respect to accepting flight requests and initiating, conducting, and terminating flights?
- Who ensures that the crew members are trained and qualified in accordance with the applicable regulations?
- Who specifies the conditions under which a flight may be operated?
- Who determines weather and fuel requirements, and who directly pays for the fuel?
- Who directly pays for the airport fees, parking and hangar costs, food service, and rental cars?
- Prior to departure, who ensures that the flight, aircraft, and crew comply with regulations?
- Who ensures that the aircraft is airworthy and in compliance with applicable regulations?
- Who maintains the aircraft, and where is it maintained?
- Who decides when/where maintenance is accomplished, and who directly pays for the maintenance?

The FAA also notes that the lease should state that functions such as flight following, dispatch, communications, weather, and fueling are to be performed by the lessee.[19]

It is important to note that a key question in reviewing these factors is not necessarily who physically performs each function but who is ultimately responsible for ensuring that the functions have been properly performed. For example, the executives of companies that are proper FAR Part 91 operators are not expected to do the maintenance, check the weather, and fly the airplane themselves, but they are expected to conduct enough appropriate due diligence to ensure that all of those things are properly done.

It is also important to note that once the source of the air crew is identified, the factors listed above are not regulatory and binding on operators. They evolved from FAA advisory circulars and orders, which, of course, do not carry the same authoritative weight as regulations but do provide clear insight as to how the FAA will apply regulations that are binding. (Keep in mind that adjudicators such as the National Transportation Safety Board (NTSB) and the federal courts will give great weight to the FAA's interpretation of its own rules.)

Additionally, note that no single factor listed above is dispositive. It is possible that all of the factors listed above could appear on paper to align as a proper dry

lease while the actions of the parties clearly indicate that it is not. Conversely, it is also possible that all of the factors noted above could appear to align as what would be considered, at first blush, a wet lease when, in fact, the lease is a true dry lease where operational control has been transferred to and maintained by an appropriate and legal FAR Part 91 operator.[20]

Once a full analysis of all of the requirements and factors noted above are complete, where (1) a lease that purports to be a dry lease is in fact a wet lease, (2) the operations do not comply with an exception under the FAR, and (3) the parties are operating under FAR Part 91 instead of obtaining the appropriate certification and operating under FAR Part 135, then illegal charter is occurring. Under these circumstances, the operator is subject to a range of significant civil penalties by the FAA, in addition to confronting other civil risk management issues and potentially even criminal sanctions that could arguably arise from such activity.[21]

Additional Flavors of Illegal Charter

In addition to improper dry leasing, the FAA has also recently focused on several other areas of problematic illegal charter. Arguably, one of the most common, least understood, and hardest to discern is the use of "flight department companies" to own and operate aircraft for the benefit of their parent companies or individual members. While not specifically defined in the FAR, this type of entity is indirectly recognized in FAR § 91.501(b)(5), in conjunction with the FAR definition of a "commercial operator."[22] As noted above, that definition (and multiple FAA chief counsel interpretations discussing that definition) provides that a company whose "major enterprise for profit" is the operation of aircraft cannot receive compensation, even in the form of the occasional capital contribution, with respect to flights operated under FAR Part 91 for its owners or other affiliates.[23] Such flight department companies are per se commercial operators and must obtain an appropriate certificate and operate under FAR Part 135. The inappropriate use of such a structure under FAR Part 91 constitutes illegal charter.[24]

Related to this failure to comply with the FAR § 91.501(b)(5) exception are failures to stay within the confines of the other exceptions found in FAR §§ 91.501, 91.321, and 119.2(e). For example, one such exception is a "time sharing agreement" under FAR § 91.501(b)(6). When the narrow guidelines for the exceptions are not followed, the FAA can enforce, and recently has very aggressively enforced, the certificate requirement against operators that misuse such exceptions and essentially conduct illegal charter.[25]

Another form of illegal charter arises when an aircraft management company or individual manager effectively coordinates all aspects of the flight of an aircraft for the benefit of both the owner or lessor of the aircraft, on the one hand, and the lessee (or effective charter customer) of the aircraft, on the other. Even if it appears on the surface to be set up with appropriate documentation, if the facts and circumstances establish that the aircraft manager is exercising operational control of the aircraft and getting paid to provide that service, then the FAA will enforce the certificate requirement and Part 135 operating rules against that pilot or manager accordingly.[26]

Finally, perhaps the most commonly addressed form of illegal charter—largely because it tends to be the easiest for the FAA to find—occurs where an existing FAR Part 135 air carrier certificate holder is conducting operations outside the scope of that operator's FAA-issued operations specifications. An example might be where the air carrier has certain aircraft listed as authorized aircraft under its operations specifications but is also utilizing aircraft that have not been conformed and added to its certificate for the purpose of conducting passenger-carrying revenue flights. In those situations, the certificate holder is very likely facing a suspension or even revocation of its hard-earned air carrier certificate.[27]

Conclusion

Improper dry leasing and the other forms of illegal charter occurring within the business and general aviation community are difficult to detect. Perhaps this is largely due to the fact that there are so few routine interactions between the FAA and operators who are conducting their flights under FAR Part 91 only. In any event, it is an issue that the FAA is making a concerted effort to address. Hopefully, the information and steps outlined above will provide some useful tools for practitioners who wants to help their clients stay within the proper lane for FAR Part 91 operations.

Endnotes

1. "FAR" is the term frequently used by practitioners, but formal citation is to 14 C.F.R. pts. 1–199. Generally, the parts and section numbers of the FAR and 14 C.F.R. are interchangeable. This article will use "FAR" in its main text but, where helpful, provide further specification in endnotes to particular parts and sections of 14 C.F.R.

2. 14 C.F.R. § 1.1.

3. *Id*. (emphasis in original).

4. 14 C.F.R. § 1.1.

5. *See id*.; *see also* 14 C.F.R. § 110.2.

6. *See, e.g*., Legal Interpretation from Lorelei Peter, Assistant Chief Counsel for Regulations, AGC-200, to James E. Cooling (Mar. 22, 2017).

7. *See, e.g*., Legal Interpretation from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, AGC-200, to Joseph A. Kirwan (May 27, 2005); *see also* Interpretation 1996-1, 5 Fed. Av. Dec. I-109 (Mar. 25, 1996) (Clark Boardman Callaghan); Interpretation 1985-24, 2 Fed. Av. Dec. I-82 (Dec. 12, 1985) (Clark Boardman Callaghan) (simply sharing flight expenses constitutes compensation).

8. 14 C.F.R. § 119.5(a); 14 C.F.R. § 119.21(a)(5). An "air

carrier certificate" is the actual, one-page license issued to a direct air carrier, which, when combined with the detailed Operations Specifications that are issued to the air carrier together with that license, provide the full description of the scope of operations that the air carrier can conduct. *See, e.g.*, 14 C.F.R. pt. 135 (Air Carrier and Operator Certification), https://www.faa.gov/licenses_certificates/airline_certification/135_certification.

9. 14 C.F.R. § 119.5(b)–(c); 14 C.F.R. § 119.21(a)(5). An "operating certificate" is the actual, one-page license issued to a commercial operator that is not holding out and acting as a direct air carrier, which, when combined with the Operations Specifications issued to that operator, define the scope of the operations it may conduct. With respect to operations conducted with the type of aircraft being discussed here (as distinct from Part 125, for example), in practice there is essentially no distinction between receiving a direct air carrier certificate and receiving an operating certificate because both must receive Operations Specifications and follow the same rules and procedures set forth in Part 135.

10. *See, e.g.*, 14 C.F.R. pt. 91 app. G (Operations in Reduced Vertical Separation Minimum Airspace).

11. The truth-in-leasing regulations define a "lease" as "any agreement by a person to furnish an aircraft to another person for compensation or hire, with or without flightcrew members, that is not a contract of conditional sale. The person furnishing the aircraft is referred to as the lessor and the person to whom it is furnished is referred to as the lessee." *See* 14 C.F.R. § 91.23(e); s*ee also* FAA Advisory Circular AC 91-37B: Truth in Leasing (Feb. 10, 2016).

12. 14 C.F.R. § 110.2.

13. *See, e.g.*, Legal Memorandum from Mark W. Bury, Acting Assistant Chief Counsel, International Law, Legislation & Regulations Div., AGC-200, to Larry Richards, Manager, Flight Standards Div., ACE-200 (Feb. 20, 2013); *see also* Legal Interpretation from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, AGC-200, to George C. Douglas Jr., Esq. (July 31, 2009); Legal Interpretation from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, AGC-200, to Mr. Fred Meier, Winstead PC (June 12, 2009).

14. *See, e.g.*, FAA Order 8900.1—Flight Standards Information Management System, vol. 3, ch. 13 (Lease and Interchange Agreements), sec. 3-498 (B) (Definitions), change 703 (Apr. 28, 2020) [hereinafter Apr. 28 FSIMS]; FAA Order 8900.1—Flight Standards Information Management System, vol. 3, ch. 25 (Operational Control for Air Carriers), change 589 (Apr. 12, 2018).

15. *See, e.g.*, FAA Advisory Circular AC 61-142: Sharing Aircraft Expenses in Accordance with 14 C.F.R. § 61.113(c) (Feb. 25, 2020); FAA Advisory Circular AC 91-37B, *supra* note 11; FAA Advisory Circular AC 120-12A: Private Carriage Versus Common Carriage of Persons or Property (Apr. 24, 1986).

16. *See, e.g.*, Legal Memorandum from Mark W. Bury, *supra* note 13 (Feb. 20, 2013) (due to ownership of the aircraft and crew companies by the same individual and uniform use of same crew, the parties were acting in concert, resulting in a wet lease); Legal Interpretation from Rebecca B. MacPherson, Assistant Chief Counsel for Regulations, AGC-200, to Eric L. Johnson, Esq., Eric L. Johnson, PLLC (Aug. 11, 2011) (use of same management company may indicate a "wet lease in disguise").

17. Legal Interpretation from Rebecca B. MacPherson, *supra* note 16.

18. *See* Apr. 28 FSMIS, *supra* note 14, at vol. 3, ch. 13, sec. 3-507, C. 5 & 6, change 703, and related notes; *see also* Legal Interpretation from Mark W. Bury, Assistant Chief Counsel for International Law, Legislation & Regulations, AGC-200, to David M. Kroontje (June 19, 2014) (requirements that particular maintenance or crew providers be used by the lessee may cause the agreement to be a wet lease).

19. *See* Apr. 28 FSIMS, *supra* note 14, at vol. 3, ch. 13, sec. 3-507C (Review [of] Lease), change 703, and related notes.

20. *See, e.g.*, Legal Interpretation from Rebecca B. MacPherson, *supra* note 16.

21. For example, simply operating as an air carrier without holding an appropriate air carrier certificate can trigger a civil penalty of up to $32,000 per violation, i.e., per flight. On top of that, if the person who is conducting what should be a part 135 operation does not hold the appropriate pilot license and all required ratings and authorizations, that person probably also is violating various provisions of 14.C.F.R. Part 135 that a certificate holder is supposed to follow, such as using appropriately trained pilots on board appropriately maintained aircraft, all of which can lead to additional penalties on top of the basic penalty for failure to have the air carrier certificate in the first place. *See* 14 C.F.R. § 13.16; FAA Order 2150.3C: FAA Compliance and Enforcement Program (2018). In addition to these regulatory violations, most operators could also likely face issues with respect to violations of certain covenants requiring compliance with the FAR in their insurance policies (potentially leading to denial of coverage actions) and in their loan documents (potentially leading to events of default). Finally, if the violations are egregious enough, the underlying actors may find themselves spending time in a federal penitentiary. *See, e.g.*, CNN Wire Staff, *Federal Jury Convicts Brothers in Illegal Charter Jet Operation*, CNN (Nov. 16, 2010), http://www.cnn.com/2010/CRIME/11/16/new.jersey.charter.conviction/index.html.

22. The "Intra-Corporate" or "affiliated groups" exemption, 14 C.F.R. § 91.501(b)(5), states that an exemption from Part 135 operations applies for

> [the] [c]arriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, *when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air)* and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any kind may be made for the carriage of a guest of a company, when

carriage is not within the scope of, and incidental to, the business of that company.

14 C.F.R. § 91.501(b)(5) (emphasis added).

23. *See, e.g.*, Legal Interpretation from Donald P. Byrne, Assistant Chief Counsel, Regulations Div., to Mr. Atwood (Nov. 8, 1993); Legal Interpretation from Lorelei Peter, Assistant Chief Counsel for Regulations, AGC-200, to Lawrence Williams (Dec. 4, 2017); Legal Interpretation from Mark W. Bury, Assistant Chief Counsel for International Law, Legislation & Regulations, to Rebecca B. MacPherson (Aug. 13, 2014); Legal Interpretation from Lorelei Peter, *supra* note 6.

24. *See, e.g.*, Interpretation 199242, 3 Fed. Av. Dec. I-273 (June 10, 1992) (Clark Boardman Callaghan) (strictly construing § 91.501; the FAA will resolve any doubt as to whether it should apply by ruling that it does not, thus requiring the operator to obtain a Part 121 or 135 operating certificate); Interpretation 1993-27, 4 Fed. Av. Dec. 1-65 (Nov. 8, 1993) (Clark Boardman Callaghan) (finding that when the transportation-by-air function of the company is disregarded and there are no operations remaining that are being performed by that company, then the transportation by air is a major enterprise for profit and is thus a commercial operation); Interpretation 1989-22, 2 Fed. Av. Dec. I-241 (Aug. 8, 1989) (Clark Boardman Callaghan) (finding that company organized solely for the purpose of owning and operating aircraft to provide transportation to affiliated companies — a "flight department company" —does not fall under section 91.501); Interpretation 1982-1, 1 Fed. Av. Dec. I-583 (Feb. 4, 1982) (Clark Boardman Callaghan) (finding that section 91.501 does not apply in those situations where the primary business of the operator of the aircraft is the operation of that aircraft; when such carriage is a major enterprise in itself, it must be conducted under part 121 or 135).

25. *See, e.g.*, United States of America v. Hinman Co., No. 1:18-cv-01140-PLM-PJG (W.D. Mich. filed Oct. 4, 2018) (initial proposed penalty of $3 million for improper use of time-sharing agreements).

26. *See, e.g.*, Administrator v. Reid A. Phillips, NTSB Order No. EA-5877 (July 14, 2020) (aircraft pilot and manager found to be acting as illegal charter operator); Kerry Lynch, *FAA Proposes Penalty Against Steele for Illegal Charter*, Bus. Aviation News (Dec. 10, 2018), https://www.ainonline.com/aviation-news/business-aviation/2018-12-10/faa-proposes-penalty-against-steele-illegal-charter.

27. *See, e.g.*, Legal Interpretation Memorandum from Timothy C. Titus, Assistant Chief Counsel, ACE-7, to Manager, Wichita Flight Standards Office via Gen. Aviation/Air Carrier Branch, ACE-250 (July 1, 1992) (finding air carrier to be acting improperly by conducting certain flights under 14 C.F.R. part 91).

Editor's Column

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that debt. COVID-19 variants are continuing to circulate, and the highly transmittable Delta variant currently accounts for more than about 90 percent of new U.S. infections. The full opening of international air service markets will be sporadic. And as I write this column, the Biden Administration continues to maintain prohibitions on the entry of persons who have been present in numerous foreign countries, and the European Union has recently removed the United States from its "safe list," opening the door for member states to impose quarantine and testing requirements on U.S. travelers. U.S. airline passenger volumes, although bolstered by long pent-up leisure demand, still are down from pre-pandemic levels by about 14 percent (domestic) and 40 percent (international) for the week ending September 7, based on A4A data.

Aviation and other aerospace professionals are, however, fundamentally optimistic individuals, having chosen to work in a field where boundaries are routinely pushed, old assumptions are questioned, and feats that seemed impossible only a few years ago now are the norm (one need look no further than the recent successful Blue Origin and Virgin Galactic crewed missions). The airline industry will recover with resiliency and, in the process, emerge stronger and more adaptable than it was before the arrival of COVID-19.

Finally, I thank Jennifer Trock for outstanding leadership of the Forum and welcome Marc Warren as our new Chair. While these are trying times for many and a number of us are continuing to work remotely, the Forum has remained incredibly active with Jennifer at the helm and will remain so under Marc's direction.

In a similar vein, I encourage readers to consider writing for *The Air & Space Lawyer*. This publication is only as good as the willingness of contributors to put pen to paper and share their unique voices and expertise. The depth and diversity of subject matters covered by articles over the years is remarkable, and we need your support to keep the publication strong. As many on the Editorial Board (both past and present) have quite properly observed, one of the biggest challenges the publication faces is ensuring that a sufficient number of draft articles remains in the pipeline. If you are interested in contributing or would like to discuss your ideas for aviation- or space-related articles, please do not hesitate to contact me or Kathy.

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David Berg Interview

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enforcement. In general, DOT does a good job and should remain the exclusive consumer protection enforcement agency. However, a point sometimes overlooked that I believe merits formal recognition is that airlines have decentralized workforces. The consumer-facing employees, especially flight attendants, have attenuated contact with headquarters and senior supervisory personnel, and they operate in a time-sensitive environment. In consumer enforcement cases, DOT should recognize and consider this context when evaluating whether noncompliance with a regulatory standard merits a sanction or, if so, the severity of the sanction.

A&SL: What do you look forward to doing in retirement?

DB: Over the past year, with COVID-related quarantine, I have checked one box already—bingeing TV shows I missed out on, like *The Sopranos* and *Westworld*. Now I am looking forward to traveling (hopefully soon) to new places, seeing family and old friends, and experiencing some bucket-list golf courses here and abroad (there is little hope for actually improving my game). I'm also catching up on my reading list. So far, I have enjoyed David McCullough's biography of Harry Truman; Ron Chernow's biography of Alexander Hamilton; and Erik Larson's book, *The Splendid and the Vile*, about Winston Churchill and the Blitz. I've also found I enjoy the creativity of authors David Mitchell, Neil Gaiman, and Haruki Murakami.