

An introduction to aircraft registration in the US

According to Jeffrey Towers at TVPX and Scott McCreary at McAfee & Taft, the robust cross-border transaction activity and the approximately 300,000 aircraft already registered on the N-Registry clearly indicate that the N-Registry offers many benefits for aircraft owners.



MANY AIRCRAFT are regularly operated in multiple jurisdictions and aircraft owners have multiple choices as to where they will register their aircraft. Once the pros and cons of each registry are fully considered, owners often choose to register their aircraft on a different registry from the nationality of the jet owner. One of the most frequently chosen aircraft registries is the United States Federal Aviation Administration (FAA) Aircraft Registry, commonly referred to as the N-Registry.

The FAA is the primary US regulatory agency that governs and oversees aircraft registration, maintenance and operation. The N-Registry, located in Oklahoma City, Oklahoma, issues Certificates of Aircraft Registration for both commercial and general aviation aircraft. To register an aircraft on the N-Registry, the applicant for registration must file documents evidencing ownership of the aircraft in the name of the applicant, as well as an AC Form 8050-1 aircraft registration application. To perfect interests in most aircraft, the parties must also register the interest in accordance with the Cape Town Treaty. To perfect liens or encumbrances against aircraft registered on the N-Registry, parties must (i) file the documents creating security or leasehold interests with the N-Registry and (ii) comply with the registration requirements of the Cape Town Treaty, when applicable.

Why is the US a preferred jurisdiction for aircraft registration?

There are several advantages to registering an aircraft in the US. The N-Registry is widely respected for its easy, secure and inexpensive procedures for filing aircraft title transfer, registration and security documents. There is also a long history of court decisions and other legal precedents regarding the processes for registering with, and cancelling aircraft from, the N-Registry, as well as the validity, priority and enforceability of security and leasehold interests in aircraft. The US was also one of the first countries to adopt the Cape Town Treaty, thus providing the additional comfort and assurance that interests in aircraft properly created and registered under the Cape Town Treaty will be recognised in other Contracting States. The clarity of applicable law and long history of legal precedents for enforcing rights of owners and lenders for US-registered aircraft appeal to aircraft lenders, lessors and borrowers.

The N-Registry provides an efficient system for owners and lenders to file documents and now accepts documents bearing appropriate digital signatures, which simplifies and expedites the closing process. There is a large pool of internationally recognised aviation attorneys and other professionals in the US available to assist aircraft owners



and lenders. Many parties also take comfort in the fact that the FAA, as part of the US government, has the resources and wherewithal to properly oversee and enforce its rules and obligations as an aircraft registry. Finally, there is ample evidence that registration on the N-Registry helps to preserve the value of aircraft, both because the FAA's standards for aircraft operations and maintenance are among the highest in the world and because the US is the most active market for aircraft sales.

Who may register aircraft in the US?

To register an aircraft on the N-Registry, the owner must be a citizen of the United States, with few exceptions. The definition of a "citizen of the United States" (US citizen(s)) is provided in 49 U.S.C. §44102(a)(1)(A), and is limited to: (i) an individual who is a US citizen; (ii) a corporation or LLC formed in the US, but only if: (A) the president and at least two thirds of the board of directors or managing officers are US citizens, (B) the corporation or LLC is under the actual control of US citizens, and (C) at least 75% of voting interests are held or controlled by US citizens; and (iii) a partnership in which all of the partners are individual US citizens. This citizenship test applies to not only the applicant for registration, but also to its parent, and its parent's parent, etc., until one reaches the actual individual owners. Finally, individuals who are resident aliens (ie. permanent legal residents of the US) may register their aircraft on the N-Registry.

This means that all individuals who are not US citizens or resident aliens and many business entities that do not satisfy the definition of a US citizen may not register an aircraft on the N-Registry in their name. For example, non-US business entities, US corporations or LLCs that fail the management, control or voting interest tests, partnerships that include individuals who are not US citizens and partnerships that include corporations or other business entities as partners, will fail the citizenship tests. In addition, if the N-Registry registers an aircraft in the name of an entity that does not actually meet the citizenship test,

the registration is considered invalid, or if the entity later has a change in ownership or management such that it no longer meets the test, the registration will no longer be effective. Finally, the FAA has opined that an aircraft may not legally be registered in the name of a US citizen who is in effect merely serving as an agent or nominee.

What options are available to non-US Citizens who wish to register in the US?

Fortunately, there is a very common structure available to non-US citizens who wish to register their aircraft on the N-Registry. US law allows aircraft registration through an owner trust, often called a non-citizen trust or NCT. The terms of the NCT arrangement must comply with the Federal Aviation Regulations (the FARs) and published FAA requirements. The trustee must be a US citizen as defined by the FAA, but a non-US citizen may hold all the beneficial ownership in the trust. The non-US citizen trustor or beneficiary (Beneficiary) may legally operate the aircraft under an operating agreement or operating lease and will hire the flight crew, pay all expenses and be responsible for all maintenance. Additionally, the non-US citizen may base and operate the aircraft anywhere in the world, as freely as any other owner of a US-registered aircraft. All the tax attributes associated with the ownership and operations of the aircraft pass through to the non-US Citizen Beneficiary. Finally, the Beneficiary has power to direct the trustee to terminate the trust.

NCTs are commonly used by large companies that, because of their complex and diverse ownership and management structure, either can't determine with certainty that they qualify as a US citizen or where they often have changes in their ownership or management structure that might affect the analysis. NCTs are also helpful in transactions involving financing, as the registration of the aircraft is with an independent third-party trustee that is available to address questions or concerns of the lender or the FAA regarding the registration. Finally, NCTs can provide enhanced privacy for the aircraft owners and passengers when properly structured.



There are two other less common structures that a non-US citizen might utilise to register an aircraft on the N-Registry. First, a corporation that fails the voting interest test already described, but otherwise meets all the other elements of the citizenship test, may use a voting trust. The voting trust is entered into among the applicant corporation owning the aircraft, an independent voting trustee, and the non-US citizen shareholder holding the voting stock in the applicant corporation. In a voting trust, the voting trustee will hold the non-citizen's voting interest in the corporation in trust for the non-US citizen shareholder. The voting trust structure is less popular than the owner trust structure because many corporations owned by non-citizens do not meet the management elements of the citizenship test.

Second, a non-citizen corporation may register its aircraft on the N-Registry if the aircraft is based and primarily used in the US (ie. at least 60% of its flight hours every six months are within the US). However, the non-citizen must form a US corporation and base the aircraft in the US. The corporation would further need to report its flight operations to the FAA every six months upon request and would be in violation of the registration requirements if it were to operate the aircraft outside of the US for more than 40% of its total flight time in any six-month period. This exception only applies to corporations and does not apply to individuals or other business entities. For these reasons, the 'based and primarily used' exception is not frequently used.

What is the FAA's current position on owner trusts? The aviation industry has utilised NCTs for many years and the FAA has provided a great deal of guidance as to their validity and proper use. In June 2013, the FAA issued a Notice of Policy Clarification for the Registration of Aircraft to US Citizen Trustees in Situations Involving Non-US Citizen trustors and beneficiaries. The Policy Clarification confirms that a properly documented NCT

meets FAA regulatory requirements for valid registration of an aircraft. The Policy Clarification also provides a proforma NCT trust agreement acceptable to the FAA and further clarifies the FAA's expectations as to what sort of information and disclosures the FAA may request from parties utilising an NCT.

Of note in the Policy Clarification, the FAA confirms that any party utilising an NCT must file with the N-Registry all documents legally affecting a relationship under the trust, such as any aircraft operating agreement between the trustee and Beneficiary. The FAA has also confirmed that a beneficial interest security agreement, whereby the Non-US Citizen Beneficiary grants a security interest in their beneficial interest in the NCT, is a document legally affecting a relationship under the trust. All such documents must be reviewed and approved by the FAA Aeronautical Center-Central Region Counsel (ACCRC) prior to being filed for recording with the N-Registry. The Policy Clarification also provides that the FAA expects a trustee normally should be able to respond to a request by the FAA for the following information within two business days:

- The identity of the person normally operating, or managing the operations of, the aircraft
- Where that person currently resides or has its principal place of business
- The location of maintenance and other aircraft records
- Where the aircraft is normally based and operated.

The FAA further expects a trustee (and thus the trustor or end operator of the aircraft) normally should be able to respond to a request by the FAA for the following more detailed information within five business days:

- Information about the operator, crew and aircraft operations on specific dates
- Copies of maintenance and other aircraft records
- The current airworthiness status of the aircraft.



In the event of an emergency, the trustee must be able to respond to such inquiries more quickly than the timelines specified above.

The Policy Clarification recognises that the operator of an aircraft under a NCT is not the trustee and there may be instances where the trustee cannot provide the information within the proposed timelines. The Policy Clarification also recognises that the trustee may contractually require the Beneficiary and any other operator of the aircraft to provide the information to the trustee.

What are the operating requirements for US-registered business aircraft?

Initially, one must determine which of the FARs will govern the operation of the aircraft. The FARs applicable to operating a US-registered aircraft can be complex and parties should engage competent US counsel and technical advisors to be certain they comply with US law.

Generally, FAR Part 91 governs the non-commercial operation of aircraft with a passenger seating configuration of less than 20 seats and a maximum payload capacity of less than 6,000 pounds. In addition to complying with FAR Part 91, FAR Parts 121, 125, and 135 apply to commercial operations where there is some form of compensation, such as charter flights, or where the aircraft exceed a certain seating or payload capacity. FAA rules and interpretations as to which operations are considered commercial or for compensation are complex and often restrictive. For instance, the FAA has confirmed that a company formed solely to operate an aircraft, with no other business or purpose is, by definition, a charter company that may not legally operate under FAR Part 91.

FAR 91.501 provides a narrow set of exceptions under which a person may share the use of certain airplanes and receive compensation for that use yet continue to operate under Part 91. Unfortunately, the compensation allowed

under FAR 91.501 is limited and rarely equals the fully allocated cost of owning and operating the aircraft for the particular flights. The FAA strictly construes FAR 91.501 and will not permit its use in instances where a proposed operation should be conducted under one of the other FARs, such as 121 or 135, or if the proposed operation is not clearly covered under FAR 91.501. Therefore, any charges that a company makes or compensation a company receives for the use of its airplane must be carefully tailored to comply with Part 91.501.

The limitations of FAR 91.501 do not normally apply to those situations where a party properly 'dry leases' an airplane to another person for business or personal use. It is important, however, that the lessee independently obtains its pilot services. If an aircraft is leased and pilot services are provided by the lessor, the arrangement would likely violate FAR Part 91. The FAA has published an advisory circular, Truth in Leasing AC No: 91-37B, addressing the wet lease / dry lease concepts in more detail.

An aircraft owner / operator is also free to engage a third-party management company to provide aviation services for operations under FAR Part 91. Care should be taken to make certain the owner / operator, rather than the management company, remains in operational control of the aircraft and the flights are within the scope of the business of the owner / operator which is not air transportation.

Sometimes parties prefer to operate the aircraft under FAR Part 135 to avoid the legal and regulatory liability associated with operational control, or to allow third party use of the aircraft and payment for such use. This is often accomplished by placing the aircraft with, and dry leasing to, an existing Part 135 certificated operator. Proper consideration should be given to any potential tax or cabotage issues that may result from operating under Part 135.



The FAA provides safety oversight for all US registered civil aircraft and anyone providing air transportation must receive authorisation from the FAA in the form of Air Carrier Operating Certificates. In addition, anyone engaging in air transportation must obtain economic authority from the United States Department of Transportation (DOT) in the form of a certificate for interstate or foreign passengers or cargo and mail authority, a certificate for interstate or foreign all-cargo authority, or authorisation as a commuter air carrier. The DOT also protects consumers from unfair and deceptive trade practices involving the sale of air transportation.



What's new with owner trusts?

Before registering an aircraft under an NCT, the N-Registry requires the NCT, and all documents legally affecting a relationship under the NCT, be reviewed by the ACCRC. The ACCRC often needs 10 or more working days to review documentation and confirm if the NCT will support US Registration of the aircraft. The ACCRC has confirmed the following scenarios do not require its review of the trust documents in advance:

- Assignments of beneficial interest in a trust currently on file with the N-Registry to a new trustor / beneficiary
- Resignation and succession in which the trustee of a trust currently on file with the N-Registry resigns and a successor trustee is appointed
- Amendments and supplements that add / remove aircraft to / from the trust estate of a trust currently on file with the N-Registry, without changing the substantive terms or conditions of the underlying trust agreement
- Trust agreements in which the trustee and each beneficiary under the trust, including each person whose security interest in the aircraft is incorporated in the trust, is either a US citizen or a resident alien.

Trust documentation should be submitted to the ACCRC for review considering these timing considerations.

Parties registering aircraft should also be aware that aircraft operated outside the US, and aircraft that are imported onto the N-Registry, cannot be operated until the N-Registry has registered the aircraft and issued a Temporary Certificate of Aircraft Registration (aka Fly Wire) in the name of the applicant.

GATS

The Aviation Working Group (AWG) has developed a platform referred to as the Global Aircraft Trading System (GATS), which is described more fully at <https://e-gats.aero/>. The purpose of GATS and the GATS online platform (the GATS platform) is to create economic efficiencies by simplifying and streamlining the process of trading aircraft by using owner trust structures, using standardised form documents (eg. trust instruments, trust assignments, beneficial interest security agreements, etc.), and transferring the beneficial interest of a Beneficiary under the trust rather than conveying title of the aircraft. The GATS platform is a fully electronic system, with e-signatures, e-delivery of documents and use of a secure e-ledger to record and track transactions. The GATS platform went live on June 1st 2020.

GATS is a voluntary system open to all industry players and trustees who satisfy certain minimal requirements. Each trustee is vetted and approved by the AWG. The ACCRC has confirmed in a published opinion that the GATS form documents comply with applicable federal law, are in due form for filing, and will support aircraft registration in the name of the relevant GATS Trustee or GATS Trust, as applicable. In addition, the ACCRC has confirmed that when accompanied by the proper certification and representations, in certain instances the GATS Trust need not be reviewed by the ACCRC prior to registering the aircraft on the N-Registry. Currently this does not negate the need to have an aircraft operating lease agreement reviewed by the ACCRC prior to registration. The GATS Trust may provide a solution for those parties needing to close on a short timeline.



FAA Modernisation

The 2018 FAA Reauthorization Act requires that FAA modernise and upgrade current N-Registry systems by October 2021. The Act mandates the upgrades shall include (i) the digitisation of non-digital N-Registry information; (ii) the digitalisation of N-Registry manual and paper-based processes, business operations, and functions; (iii) implementation of systems allowing public to submit information and conduct any transactions electronically; and (iv) allowing more efficient, broader, and remote access to the N-Registry.

In addition, in March of 2020 the US Government Accountability Office (GAO) issued a report based on its audit of the N-Registry. The audit was extensive and ultimately provided 15 recommendations to the FAA. The GAO recommended, in part, that in order prevent fraud and abuse in aircraft registrations, which enable aircraft-related criminal, national security, or safety risks, the N-Registry should:

- Collect and record information on individual registrants, initially including name, address, date of birth, and driver's license or pilot's licence, or both, with subsequent PII elements informed by the risk assessment, once completed
- Collect and record information on legal entities not traded publicly – on each individual and entity that owns more than 25% of the aircraft; for individuals: name, date of birth, physical address, and driver's licence or pilot's licence, or both; and for entities: name, physical address, state of residence, and taxpayer identification number
- Verify aircraft registration applicants' and dealers' eligibility and information
- Increase aircraft registration and dealer fees to ensure the fees are sufficient to cover the costs of FAA efforts to collect and verify applicant information while keeping pace with inflation
- Ensure, as part of aircraft registry IT modernisation, that information currently collected in ancillary files or

in PDF format on (1) owners and related individuals and entities with potentially significant responsibilities for aircraft ownership (eg. beneficial owners, trustors, trustees, beneficiaries, stockholders, directors, and managers) and (2) declarations of international operations is recorded in an electronic format that facilitates data analytics by FAA and its stakeholders

- Link information on owners and related individuals and entities with significant responsibilities for aircraft ownership through a common identifier
- As part of IT modernisation, develop an approach to check OFAC sanctions data on owners and related individuals and entities with potentially significant responsibilities for aircraft ownership for coordination with OFAC and to flag sanctioned individuals and entities across aircraft registration and dealer systems
- Use data collected as part of IT modernisation as well as current data sources to identify and analyze patterns of activity indicative of fraud or abuse, based on information from declarations of international operations, postal addresses, sanctions listings, and other sources, and information on dealers, non citizen corporations and individuals and entities with significant responsibilities for aircraft ownership
- The Administrator of FAA, in coordination with relevant law-enforcement agencies, should develop a mechanism to provide declarations of international operations for law-enforcement purposes.

The FAA has verbally confirmed that the personal identification information collected will not be available to the general public. Although it is unlikely the N-Registry modernisations will be completed by the October 2021 deadline, the upgrades shall further enhance and streamline access to the N-Registry and should benefit all parties involved with the ownership, operation and financing of aircraft on the N-Registry.



US Customs enforcement activity

The US Department of Commerce’s Bureau of Industry and Security (BIS) promotes US national security, foreign policy, and economic objectives by ensuring an effective export control and treaty compliance system. BIS, and the US Census Bureau (Census), administer the Export Administration Regulations (EAR) and Foreign Trade Regulations governing the export of aircraft. Customs and Border Protection (CBP) is a US law enforcement agency tasked to enforce the US export and import laws. In the past, parties engaged in cross-border aircraft transactions have often overlooked or misunderstood the requirements for US imports and exports. A common area of confusion is the applicability of Electronic Export Information (EEI) filings for aircraft that are sold and subsequently based outside the US, even though the aircraft remain on the N-Registry. Another misconception is that obtaining a US Export Certificate of Airworthiness satisfies a requirement to make an EEI filing.

BIS, CBP and Census have increased their focus and enforcement activity on the aircraft industry’s compliance with applicable import and export regulations. It is important that parties involved in a cross-border aircraft transaction engage competent legal counsel and customs broker prior to (i) bringing an aircraft into the US for purposes such as a sale, lease, or refurbishment or to permanently base the aircraft in the US or (ii) removing an aircraft from the US to a foreign jurisdiction for sale, lease or to base the aircraft outside the US for a period of one year or longer.

Conclusion

There are many factors that should be considered when choosing an aircraft registry and no one registry is the perfect solution for every owner. As with most other aspects of aircraft ownership and operation, proper planning is the key to a successful outcome. In addition to thoroughly analysing the intended uses of the aircraft to ensure compliance with applicable laws and regulations, including those of the applicable aircraft registry, other issues such as taxes and rules for importing and exporting aircraft should always be assessed in advance.

For many years, the FAA has been considered the gold standard for aircraft registration by many owners, lessors and lenders. These parties take great comfort that their rights and interests in the aircraft are properly perfected and can reasonably predict how those rights and interests will be recognised if there is a dispute. NCT structures help parties comply with US registration requirements. The airworthiness and maintenance standards for operating and maintaining a US-registered aircraft are well defined and are considered by most to help maintain the value and promote the marketability of the aircraft.

For many reasons, after careful planning, the N-Registry is often the registry of choice for aircraft owners, lenders and lessors, and owner trusts are a simple and broadly accepted method for non-US Citizens to benefit from US aircraft registration.

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References

- 1 The FAA has issued a number of memorandum and notices confirming it will accept only documents executed with 'digital' signatures, rather than the broader 'electronic' signature methodology. See Notice of Policy Clarification for Acceptance of Documents With Digital Signatures (81 FR 23384).
- 2 A copy of the opinion can be obtained at <https://documents.e-gats.aero/GATS%20-%20FAA%20Aeronautical%20Center%20-%20Central%20Region%20Counsel%27s%20Opinion.pdf>.
- 3 The report can be found at <https://www.gao.gov/products/gao-20-164>.

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