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August 5, 2013

The Honorable Michael P. Huerta
Administrator
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Re: Request for Stay or Extension - Notice of Policy Clarification for the Registration of Aircraft

Dear Administrator Huerta:

We are writing on behalf of our client, the Aviation Working Group (“AWG”),¹ setting forth the views of the Industry Consultative Group (“ICG”),² to request that you rescind or postpone the effective date of the FAA’s recent Notice of Policy Clarification for the Registration of Aircraft to U.S. Citizen Trustees in Situations Involving Non-U.S. Citizen Trustors and Beneficiaries (the “NCT Final Policy”).³ Prior to any implementation, we respectfully request that the FAA clarify several important aspects of the new policy, which could adversely affect the aircraft leasing and financing markets in the U.S. and constrict an important source of capital for business and commercial aviation.

From a policy standpoint, we are concerned that the NCT Final Policy imposes regulatory responsibilities on financing parties and other passive (non-operating) owners, without full consideration of the resultant risks and burdens. We are also concerned that the impact of and uncertainty created by the NCT Final Policy could make it difficult for major U.S. companies

1 The AWG is a group comprised of the leading aviation manufacturers, financiers, and lessors. AWG’s purpose is to address policy matters impacting aviation financing. *See* www.awg.aero.

2 The ICG is a large, industry-wide group of banks, title companies, law firms, and others acting within a framework provided by the AWG. The ICG has been actively engaged with the FAA on the NCT Final Policy, including through participation in public meetings and through comprehensive submissions over the past two years. A list of ICG participants (including industry groups), which filed joint comments on the FAA’s NCT and support this letter is attached for your reference.

3 78 Fed. Reg. 36,412 (June 18, 2013). The current effective date of the new policy is September 16, 2013.

that technically do not qualify as U.S. citizens under the strict FAA definition of “citizen of the United States”⁴ from obtaining U.S. registration for needed aircraft.

From a legal standpoint, the NCT Final Policy does not appear to be based on substantial evidence that a documented problem exists, much less one unique to Non-U.S. Citizen Trusts (“NCTs”). In addition, agency “policy statements” are designed to set forth non-binding, internal agency procedures for exercising discretion, not to serve as vehicles to impose additional requirements or potential penalties on regulated entities.⁵ Yet, the provisions described as clarifications in the NCT Final Policy appear to do just that, imposing new filing and reporting responsibilities on banks and other parties serving as trustees of NCTs.

In essence, the NCT Final Policy blurs the longstanding distinction between regulatory obligations requiring compliance by “*owners or operators*,” a phrase long understood as imposing regulatory requirements on owner-operators or (if the owner is not also the operator) on the operator. The FAA has never required non-operator owners to have or make available upon demand detailed information about the operations of the aircraft (e.g. where it is normally based, location of maintenance information, information about the crew, etc.).

The FAA seeks to impose these requirements by asserting that these owners and all other passive or non-operator owners are and have always been responsible for complying with the regulatory requirements referenced by the FAA in the policy because these regulations speak to the responsibilities of the *owner or operator*. However, the pertinent text is disjunctive and does not impose these responsibilities on both the non-operating owner and operator. Indeed, in each of the cases cited by the FAA to establish non-operator owner responsibility, the owner either was assumed to know or did know of ongoing, egregious violations of the Federal Aviation Regulations—and none involved NCTs.

As a result, we respectfully request an immediate stay or postponement of the effective date of the NCT Final Policy, pending issuance of a further clarified policy statement or interpretive rule. In doing so, we ask that you consider whether:

4 49 USC § 40102(a)(15).

5 In examining whether an agency action is a legislative rule or policy statement, the relevant inquiry is if the action “has binding effects on private parties or on the agency.” *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). “A document will have practical binding effect before it is actually applied if the affected private parties are reasonably *led to believe* that failure to conform will bring adverse consequences, such as . . . denial of an application. If the document is couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced.” Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1328-29 (1992). *See also* Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30,101, 30,104 (July 8, 1992) (“[A]gencies should not attempt to bind affected persons through policy statements.”).

1. the NCT Final Policy accurately describes itself as a “restatement of existing obligations,” versus an attempt to impose new obligations on passive, non-operating, aircraft owners;
2. the NCT Final Policy’s statement that it imposes no new requirements on owner trustees is accurate in light of new two-day and five-day “expectations” (or sooner in some unspecified circumstances) for receipt of operator and aircraft information;
3. the FAA will take enforcement or other agency action, such as aircraft de-registration, upon noncompliance with such “expectations;”
4. the NCT Final Policy could impair the vital and free flow of capital to the commercial and business aviation communities of the U.S., and cause an exit from the market of banks and other reputable trustees who serve as registered owners;
5. the NCT Final Policy’s imposition of regulatory responsibility on trustees and other passive owners contradicts the legislative purposes of facilitating aircraft financing inherent in the statutory protection for lessors and other passive owners under 49 U.S.C. § 44112; and
6. the NCT Final policy will have retroactive effect on the thousands of NCTs in existence, or will only be applied prospectively.

These are among the substantial concerns and questions about the NCT Final Policy.

To be clear, the ICG fully supports the FAA’s need to have information and access to U.S. registered aircraft and records for safety purposes. The ICG’s prior submissions and remarks at the public meetings on this matter demonstrate its commitment to safety, and its willingness to address the FAA’s concerns in a manner consistent with the existing regulatory framework. The FAA has ample authority to compel the *operators* to provide the necessary information on maintenance, airworthiness, and operations of the aircraft.

In general, we maintain that the NCT Final Policy (and the OIG report on this subject)⁶ are not adequately justified and will likely have unintended effects. We also submit that the FAA’s

6 See Office of Inspector General, Audit Report, *FAA’s Civil Aviation Registry Lacks Information Needed for Aviation Safety and Security Measures*, Rep. No. FL-2013-101 (June 27, 2013) (“*OIG Report*”), at 3 (finding “incomplete registrations for about 5,600 aircraft, or 54 percent, owned under trusts for non-U.S. citizens.”). In the detailed discussions supporting these conclusions, the OIG report mentions that this number is an estimate based on a random sample of 68 out of 10,292 fixed wing and rotary aircraft registrations, with 37 having “incomplete registrations,” without any detailed explanation. The OIG report also mentions that these incomplete registrations are of particular concern due to the “numerous accidents, operational errors, and other incidents involving U.S. aircraft registered to trusts for non-U.S. citizen beneficiaries” brought to the FAA’s attention by foreign aviation authorities. Neither the FAA nor OIG have identified or quantified such incidents or communications.

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goal—to obtain information on the operation of U.S. registered aircraft to carry out its safety-related obligations—can be met through more narrowly tailored means that do not have the same far-reaching implications for U.S.-based businesses participating in the industry.

Operator and owner use of NCTs has served this nation and its aviation industry very well. Although well-intentioned, the likely effect of the NCT Final Policy will be to impede the flow of capital to aircraft transactions and adversely affect the sound legal and policy framework applicable to aircraft registration and financing. We urge you to rescind or postpone the effective date of the NCT Final Policy until such time as the FAA is able to review the above concerns and either issue a policy clarification or interpretive rule that allays our concerns and can be relied upon by the industry.

During this review, please know that we would be pleased to meet with you to discuss our concerns or answer any questions you may have. Thank you very much for your consideration.

Sincerely,



Kenneth P. Quinn
Counsel for the Aviation Working Group

cc: Jeffrey Wool, AWG Secretary General
Michael Whitaker, FAA Deputy Administrator
Kathryn B. Thompson, DOT General Counsel (Acting)
Marc L. Warren, FAA Chief Counsel (Acting)

Supporting Entities (Listed Alphabetically)

Associations:

Air Carrier Association of America	General Aviation Manufacturers Association
Airlines for America	National Air Transportation Association
Aircraft Owners and Pilots Association	National Aircraft Finance Association
Association of Aircraft Title Lawyers	National Business Aviation Association
Aviation Working Group	Pacific Northwest Business Aviation Association
Equipment Leasing and Finance Association	Regional Airline Association

Companies / Law Firms:

A&L Goodbody	GE Capital Aviation Services
Adams Aviation Services, Inc.	GE Capital Corporate Aircraft Finance
AerCap Holdings N.V.	Global Jet Delivery LLC
Airbus Financial Services	Greenberg Traurig, P.A.
Aircastle Limited	Harper Meyer Perez Hagen O'Connor Albert & Dribin LLP
Aircraft Guaranty Title & Trust	Hinckley, Allen & Snyder, LLP
Aircraft Title Insurance Agency	Hogan Lovells US LLP
AirFinance Co	Holland & Knight LLP
Alaska Airlines, Inc.	Horizon Air Industries, Inc.
Allen & Overy LLP	Hughes Hubbard & Reed LLP
Asset Finance Legal Counsel, LLP	Husch Blackwell LLP
Avcorp Registrations	International Lease Finance Corporation (ILFC)
Aviation Capital Group Corp.	Jackson Adams PC
Aviation Legal Group, P.A.	Jackson Square Aviation, LLC
AWAS	Jet RVSM Services
Bank of America	K&L Gates LLP
Banc of America Leasing & Capital	Katten Muchin Rosenman LLP
Bank of Utah	Kaye Scholer LLP
Barbera & Watkins, LLC	Lane Powell PC
Beechcraft Corporation	Law Offices of Paul A. Lange LLC
Bell Helicopter Textron Inc.	Lytle Soule & Curlee
Blake, Cassels & Graydon LLP	Matheson
Blank Rome LLP	McAfee & Taft, P.C.
BMO Harris Equipment Finance Company	Michael L. Dworkin and Associates
Boeing Capital Corporation	Milbank, Tweed, Hadley & McCloy LLP
Bombardier Aerospace Structured Finance	Morris James LLP
Cadwalader, Wickersham & Taft LLP	Norton Rose Fulbright (Fulbright & Jaworski LLP)
CenterPoint Aviation Law PLLC	Orix Aviation
Cessna Aircraft Company	Pillsbury Winthrop Shaw Pittman LLP
Cessna Finance Corporation	Pratt & Whitney
Cirrus Aircraft	Rapp & Krock, PC
CIT Aerospace	Ray Quinney & Nebeker P.C.
CIT Business Aircraft Finance	RESIDCO
Clifford Chance US LLP	Robert Wray PLLC
Cooling & Herbers, P.C.	RBS Asset Finance, Inc.
Crowe & Dunlevy	Sky Holding Company, LLC
Crowell & Moring LLP	SMBC Aviation Capital
Dassault Falcon Jet Corp.	Smith, Gambrell & Russell, LLP
Daugherty, Fowler, Peregrin, Haught & Jenson	Stewart H. Lapayowker, P.A.
DeBee Gilchrist, P.C.	Textron Financial Corporation
Dorr Aviation Credit Corp	Vedder Price P.C.
Embraer S.A.	Wells Fargo Bank Northwest, NA
Fafinski Mark & Johnson, P.A.	Wells Fargo Delaware Trust Company
Fellers Snider Blankenship Baily & Tippens, P.C.	Wilmington Trust Company
Flexjet	Wiley Rein LLP
Foley & Lardner LLP	White & Case LLP
Garofalo Goerlich Hainbach PC	Zuckert Scoutt & Rasenberger, L.L.P.