

# **AWG Industry Consultative Group on NCTs**

## **AWG Summary of Submission**

**FAA Public Meeting on Proposed Policy Clarification for the  
Registration of Aircraft to U.S. Citizen Trustees in Situations  
Involving Non-U.S. Citizen Trustors and Beneficiaries  
Oklahoma City, June 6, 2012**

## **Non-Citizen Trust – AWG ICG Approach**

- **We share the FAA’s goal of settling the NCT items through policy clarification rather than rule-making**
  - **Clarifications rather than changes in policy – measured against the FAA’s interpretation and practice over the last 30 years**
  - **Changes in policy would require a different procedure**
- **We have provided specific, concrete and constructive proposals to address the issues and concerns of the FAA**
- **These comments are in respect of NCTs only. We assume that FAA interpretation and practice regarding other trusts and leasing generally are not under review, and will remain unaffected**

## **NCTs used extensively for over 25 years in a variety of circumstances**

- **Aircraft in Transition**
  - **modifications**
  - **ferry flights**
  - **prior to type certification in that country**
- **Aircraft Leased by Non-U.S. Citizens**
  - **Operating lessors and passive investors**
  - **large amounts of lease financing to U.S. and non U.S. operators**
  - **NCTs permit leases to air carriers, business and general aviation users**
  - **NCTs foster more competitive cost effective financing**
- **Repossessed or stored aircraft**
  - **broad scope of planning, storage, maintenance, repair, modification and re-marketing**
- **U.S. corporations with technical non-compliance**
  - **officers or directors are not U.S. citizens**
  - **no means to determine shareholder status**
- **U.S. partnerships with technical non-compliance**
  - **Only individual partners fit the U.S. citizenship definition**

## **NCTs used extensively for over 25 years in a variety of circumstances**

- **Aircraft Made in or Brought to the U.S. by Non-U.S. Citizen Manufacturers or Distributors**
  - **FAA registration for aircraft to be demonstrated and marketed with FAA certified airworthiness**
- **Lenders and finance lessors required FAA aircraft registration**
  - **High quality maintenance and maintenance facility**
  - **Predictable lien recordation system**
  - **Well-developed case law and judicial system**
- **Operational flexibility and cost effectiveness**
  - **Operators not engaged in common carriage may share costs under part 91 of FARs**
  - **NCTs permit such cost sharing by many operators of business aircraft**
- **Cape Town Convention connecting factor of FAA aircraft registration**
  - **CTC expressly made aircraft registration a basis for application of the Convention**
  - **FAA registration ensures the benefits and certainty of the Convention will be available**

## **NCTs used extensively for over 25 years in a variety of circumstances**

- **FAA NCT policies have encouraged air commerce and resulted in creation and retention of jobs at all levels of involvement in aviation in the United States**
- **We commend the FAA for having recognized the needs of aviation industry and its part in the ever changing global economy**
- **These policies evolved over 25 years to respond to changes in the way aircraft are financed and to increases in sales at all levels of aircraft commercial, business and general aviation**
- **Any reduction or loss of the NCT would become a crucial aviation manufacturer jobs issue, as well as having other adverse consequences**
- **Several uses of NCTs provide demonstrable safety benefits**

## **Non-Citizen Trust (NCT) - Topics**

- **I. Background of Citizenship and NCT Aircraft Registration**
- **II. FAA Practice and Proposed Change in Policy**
- **III. Process of AWG Submissions & Supporting Entities**
- **IV. Comments on Proposed Policy Clarification**
- **V. Trust Agreement Revisions**

## **I. Background of Citizenship and NCT Aircraft Registration**

- **FAA Aircraft Registry based on and in name of owner not operator**
- **Owner began with U.S. Citizen Individuals and U.S. Citizen controlled Companies**
- **Owner progressed to Resident Aliens, Citizen Partnerships (using Citizen Trustees when partners are corporate) and Foreign owned U.S. Companies owning aircraft that are primarily used in U.S.**
- **Further developed to Foreign Owned U.S. Companies with Citizen Voting Share Trustees who must act in the best interests of the U.S.**
- **Further developed as Citizen title holding Owner Trusts controlled by Citizens often used in Leveraged Leases of 70's and 80's**

## **I. Background of Citizenship and NCT Aircraft Registration**

- **Next came Owner in name of Citizen title holding Trustees controlled by Citizen Voting Powers Trustees with Foreign beneficiaries in 80's**
- **FAA continued to adapt with the Non-Citizen Trust (NCT) using a discretionary Citizen Owner Trustee in 80's and 90's that became commonly approved by FAA and used in all forms of transactions**
- **NCT: Owner Trustee has discretionary power to control Trusts which have Foreign trustors or beneficiaries and to take actions with respect to ownership and operation of the aircraft in the best interests of the U.S.**
- **FAA adapted to add Owner LLCs as Citizen controlled and later with Citizen Trustees for Foreign owned U.S. LLCs in 2000's**

## **II. FAA Practice and Proposed Change in Policy**

- **FAA has exhibited substantial support for aviation industry needs in developing U.S. registration within Citizenship boundaries**
- **Constructive practice of FAA Aeronautical Center Counsel Legal Opinions (ACC Legal Opinions)**
- **ACC Legal Opinions issued based on specific evidence and review of ownership structures of all types**
- **ACC Legal Opinions give FAA examiners basis of legal review**
- **ACC Legal Opinions give parties basis for planning transactions – parties rely on the opinions**
- **Parties have relied on the NCT for over 25 years and the Industry has thrived based on its flexibility**

## **II. FAA Practice and Proposed Change in Policy**

- In 2010, the FAA announced a change in policy as to NCTs**
- The FAA concerns arose due to certain accidents and incidents in which NCT Owner Trusts, among others, were the registered owners**
- Immediate and concerted industry reaction came when the FAA AC negatively changed its policy of issuing legal opinions on NCTs**
- As a temporary measure, the FAA returned to normal practice**
- After much debate and a meeting here in Oklahoma City, an FAA plan emerged to review FAA NCT policy in a more measured manner**
- In February 2012, the FAA issued a draft clarification to NCT policy that adapted to FAA needs and still recognized industry needs**

### **III. Process of AWG Submissions & Supporting Entities**

- **The Aviation Working Group (AWG) and the large industry-wide group have worked together as the AWG Industry Consultative Group (ICG)**
- **Since 2010 when FAA first issued a policy change as to NCTs**
- **In February when FAA issued its Proposed Policy Clarification (PPC)**
- **The comment of the industry-wide group in 2011 and in 2012 came from:**
  - **Large scale meetings and conference calls conducted in several formats to solicit comments and buy-in from participants in the industry**
  - **Draft submissions that were prepared by an assigned drafting group of six or seven different interests who synthesized all points to reach agreement**
  - **The drafts were submitted to all participants and all industry associations in the AWG Submission before you today and finalized with their comments**

## **IV. Comments on Proposed Policy Clarification**

- **AWG Industry Consultative Group (ICG) Submission on NCTs has three legs:**
  - 1. Comments on the Proposed Policy Clarification (PPC)**
  - 2. Detailed Explanation of Revisions to the NCT Trust Provisions**
  - 3. Actual Text of Revised NCT Trust Provisions**
- **We will review in summary the comments on the PPC, the explanation of the revisions and then the actual text of the NCT Trust Provisions**

## **IV. Comments on Proposed Policy Clarification**

- **The PPC describes its State of Registry Responsibilities**
- **Next the PPC describes at length the Aircraft Owner Responsibilities which were not necessary to support the FAA positions on the NCT**
- **Delete Paras 1 to 4 of Aircraft Owner Responsibilities and to keep Para 5 FAA Policy Clarification: Information Requirements**
- **The Information Requirement Section has a succinct description of why the information is needed and is tied directly into the State of Registry Responsibilities**
- **The Information Requirements are a key part of Revised Trust Provisions discussed in later slides**

## **IV. Comments on Proposed Policy Clarification**

- **We ask that only FAA-pertinent provisions of the NCT Trust Agreement provisions be supplied as a “form”**
- **This will permit normal non-FAA specific Trust Agreement language to be used without fear of not meeting an “FAA required language” that is not of concern to the FAA**
- **These FAA-pertinent provisions are:**
  - **Definitions of Lease, Lessee and Operating Agreement**
  - **Removal of Trustee**
  - **Information Requirements**
  - **Limitations on Control Provisions**

## **V. Trust Agreement Revisions**

### **The Trust Agreement Definitions**

- **Lessee:** is changed to be any party to a Lease with an Owner Trustee other than the Trustor
- **Lease:** is any agreement, including an operating agreement, that transfers the right to possess, use and operate to a Lessee who is not the Trustor
- **Operating Agreement:** is any agreement that transfers the right to possess, use and operate to the Trustor – this includes a lease, but not as defined in the Trust Agreement

## **V. Trust Agreement Revisions**

### **Removal 3.02**

- **Following the PPC, we have suggested a specific cause and said other specific causes could be added subject to FAA review**
- **We also added a list of what would NOT be sufficient or permitted reasons for removal**
- **We have not included the limitation on removal to 25% as suggested in the PPC because specific cause for removal is sufficient proxy for such aggregate power limitation and strengthens the FAAs protections**
- **The limit does not make sense here where the removal for specific cause is mandated for a Non-Citizen Trust for 100% foreign interests**

## **V. Trust Agreement Revisions**

### **Resignation 3.03**

- **The FAA Policy confirmed that Trustees could resign without replacement**
- **This can be a useful tool that some Trustees in NCTs may use as leverage with some kinds of Trustors**
- **We added that as a footnote, but left 3.03 with the usual replacement requirement**

## **V. Trust Agreement Revisions**

### **Operating Agreements 4.01(b)(v)**

- **The PPC asked that all operating agreements and similar side agreements involving transfer of possession and use to a Trustor be submitted to the FAA**
- **We made the definition of Operating Agreement to work with this requirement**
- **We understand that FAA ACC use the Operating Agreement for review to determine eligibility for registration using an NCT**
- **FAA current practice of not causing Operating Agreements to be filed in the trust files should be continued given the risk of liens and clouds on title**
- **The parties can if they wish file the Operating Agreement on the record**

## **V. Trust Agreement Revisions**

### **Affidavit of NCT Trustee 4.01(b)(ii)**

- **The Trustee is required by PPC to provide sufficient assurances that no Operating Agreement (as now defined) exists**
- **This is only required if no Operating Agreement is submitted to FAA ACC for review**
- **The PPC leaves this open as to what might suffice, but we believe that an agreed approach or standard would be best**
- **We proposed text for the Affidavit where no Operating Agreement is being submitted to the FAA ACC that would simply say:**
  - **No Operating Agreement as defined in the Trust has been entered into between the Trustee and the Trustor**

## **V. Trust Agreement Revisions**

### **FAA Requests for Information 4.01(e)**

- **The PPC proposed that an Owner Trustee provide information about the operator, maintenance provider, location of records, and normal base and operations of the aircraft within 2 business days**
- **The PPC proposed that an Owner Trustee provide information about the operator crew, aircraft operations on specific dates and future route schedules, actual maintenance and other records within 5 business days**
- **This proposal generated much discussion about practicalities and what is realistic to expect given the contractual legal position of trustees**
- **We propose a single standard for all requests that would be a standard that Trustees can meet and that is tighter as it gives standards of behavior**

## **V. Trust Agreement Revisions**

### **FAA Requests for Information 4.01(e)**

- **That standard is to respond as expeditiously as reasonably practicable to any request by the FAA for information related to the aircraft that the FAA is legally entitled to receive and to provide the FAA with such information that the Trustee has obtained**
- **The same standard is imposed on the Trustor in a new 4.04 which describes the types of information in detail**
  - **This new requirement on the Trustor will give teeth to the rights of the Trustee to resign if a Trustor does not cooperate**
  - **Importantly, this gives the Trustee an immediate agreement by the Trustor to provide this information on request**
  - **The language also provides Trustee and any non-operating Trustor protection from liability if operator fails to provide accurate information in a timely manner or at all**

## **V. Trust Agreement Revisions**

### **Notification by FAA of Emergency ADs 4.01(g)**

- **The proposal for the FAA policy on AD notifications now has the same standard of acting as expeditiously as reasonably practicable when forwarding the ADs to operators**
- **The proposal also relieves the Owner Trustee from doing so if it knows that the Trustor or operator receives such ADs directly from the FAA**

### **Notification to FAA of Resignations 4.01(h)**

- **The same standard of responsiveness is applied to this obligation of Trustee so that the FAA is aware of the resignation at the earliest possible time**

## **V. Trust Agreement Revisions**

### **Inspection of the Aircraft 4.01(i)**

- **The FAA has asked for authorization to inspect the aircraft**
- **We have changed the text to provide that the Owner Trustee who is not the operator or in possession of the aircraft will not prohibit or exclude the FAA from inspecting the aircraft**
- **Insert contractual provision to allow FAA to inspect**

## **V. Trust Agreement Revisions**

### **Limitations on Control 9.01(a)**

- **The core element of Non-Citizen Trusts is that there be Citizen control regarding ownership and operation**
- **We have deleted the PPC new text “including” before the text “matters involving the ownership and operation of the Aircraft”**
- **The reason for our deletion is that the FAA text would broaden the scope of influence to ALL duties under the NCT TA, many of which are not relevant to ownership or operation of the aircraft**
- **The previous language allows the Trustee to be able to act “in connection with matters involving the ownership and operation” in the best interests of the United States if it should become necessary**
- **The second sentence of 9.01(a) appears duplicative of the first and third sentences and we note that it could be deleted**

## **V. Trust Agreement Revisions**

### **Certain Exceptions 9.01(b)**

- **Our revisions to this section deleted the obligation of the Trustee not to amend a Lease without the consent of the Trustor**
- **Leases are with third parties as opposed to the Trustor**
- **A commitment not to amend a Lease with a third party would only be an issue if the amendment were being used to circumvent control by Citizen Trustee**
- **We have provided for an exception to ensure that the Trustee retains Section 9.01(a) discretion to amend a Lease without the Trustor's consent in order to meet the best interests of the United States**

## **V. Trust Agreement Revisions**

### **Priority 9.03**

- **We have added additional language to strengthen the NCT TA and to make void any attempt by NCT TA parties to circumvent control by the Citizen Trustee through other agreements or documents**
- **This helps to address the FAA's concerns about unknown agreements**

### **Purpose 9.01(c) and General 9.02**

- **The revisions made to these two sections were for clarity**

## **Conclusion**

- **Transition:**
  - **New NCT Policy should apply prospectively after the Effective Date**
  - **For existing NCTs, good faith cooperation toward new policy consistent with existing contractual commitments**
- **The AWG Industry Consultative Group stands ready to assist and cooperate in further revising and refining the NCT Trust Agreement and the NCT Policy Clarification**
- **Thank you for permitting us to participate in this meeting process**