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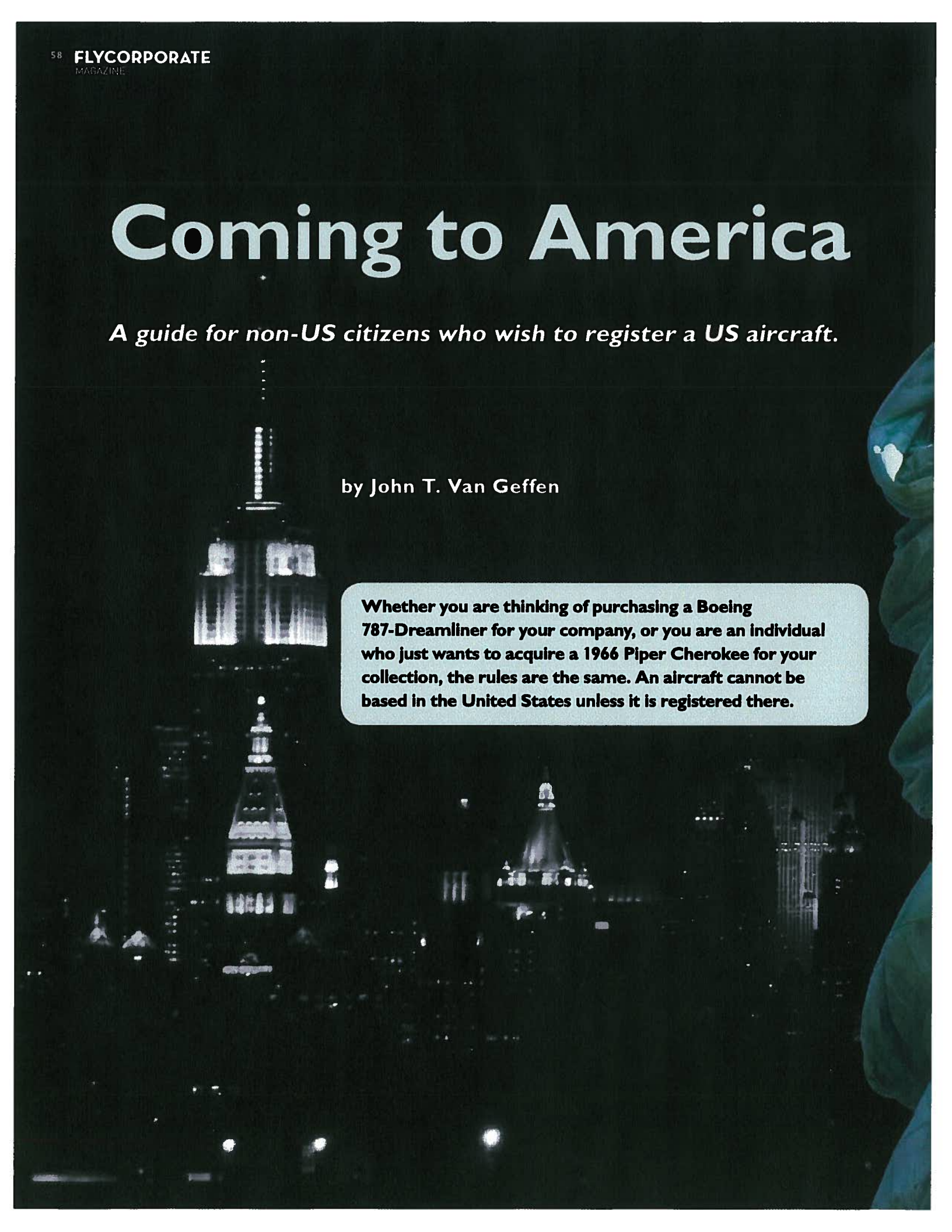
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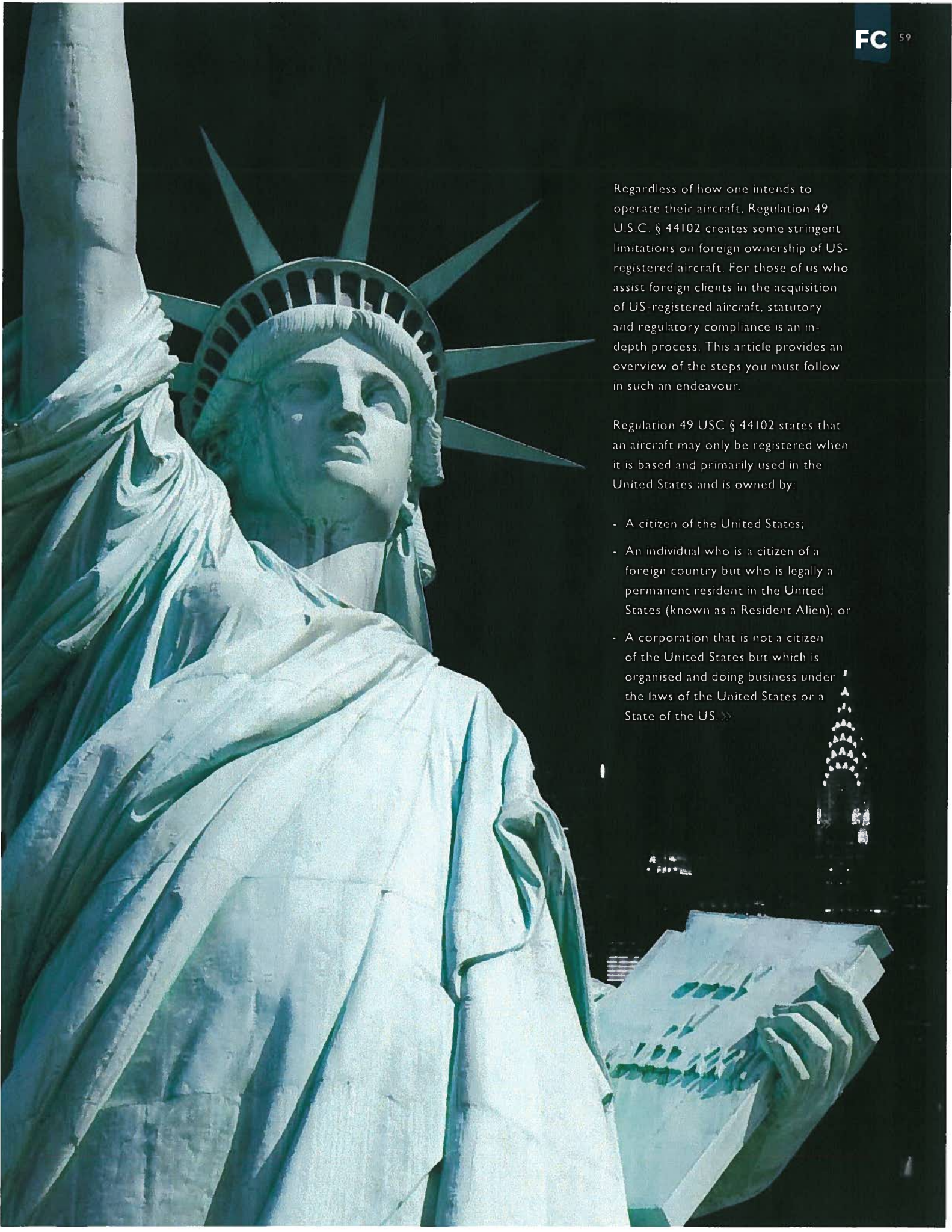
Coming to America

A guide for non-US citizens who wish to register a US aircraft.

by John T. Van Geffen

Whether you are thinking of purchasing a Boeing 787-Dreamliner for your company, or you are an individual who just wants to acquire a 1966 Piper Cherokee for your collection, the rules are the same. An aircraft cannot be based in the United States unless it is registered there.





Regardless of how one intends to operate their aircraft, Regulation 49 U.S.C. § 44102 creates some stringent limitations on foreign ownership of US-registered aircraft. For those of us who assist foreign clients in the acquisition of US-registered aircraft, statutory and regulatory compliance is an in-depth process. This article provides an overview of the steps you must follow in such an endeavour.

Regulation 49 USC § 44102 states that an aircraft may only be registered when it is based and primarily used in the United States and is owned by:

- A citizen of the United States;
- An individual who is a citizen of a foreign country but who is legally a permanent resident in the United States (known as a Resident Alien); or
- A corporation that is not a citizen of the United States but which is organised and doing business under the laws of the United States or a State of the US. »

What is a US Citizen?

Federal Aviation Regulation (FAR) 47.2 defines a US Citizen as:

1. An individual who is a citizen of the United States or one of its possessions.
2. A partnership where each member of the partnership is a citizen.
3. A corporation or association created or organised under the laws of the United States or of any State, Territory, or possession of the United States. The president of the organisation and at least two-thirds of the board of directors and other managing officers must be citizens, and at least 75% of the voting interest must be owned or controlled by persons who are citizens of the United States or of one of its possessions.

If your aircraft is going to be purchased by a non-citizen corporation, it may meet the criteria for US registration under FAR 47.9, provided the company is qualified to do business in one or more States and the aircraft will be based and primarily used in the United States. However, if your business structure is unique it may not qualify.

Thankfully, the statutory definitions of US Citizen refer to both corporations and associations that are properly created or organised under the laws of the US or any State. This means that the regulation applies to business entities other than corporations. For example, a limited liability company is treated as an unincorporated association.

Unincorporated associations must pass a citizenship test similar to corporations, but it is modified depending on the requirements of the State in which it is registered.

For the purposes of registration, an aircraft is based and primarily used in the United States if the flight hours accumulated within the United States amount to at least 60% of the aircraft's total flight hours. Qualifying flights must originate and end within the United States.

In Trusts We Trust

If your business is operating as a partnership, all partners must be US citizens. However, if one, several or all of the members are not citizens, then you must make a decision. Do you want to restructure the business to comply with the non-citizen corporation provision? Alternatively, will you attempt to transfer the non-citizen partner's interest to a trustee?

If you are not a US citizen (or the owner of a qualifying non-citizen corporation), the most common means of meeting the threshold requirements for US registration is through a trust. FAR 47.7 does not prevent foreign citizens from having a majority, if not all, of the beneficial interest in such a trust. The trust would then be considered the registered owner of the aircraft.

In addition to the requirements that the trustees be US citizens or resident aliens, the applicant must also submit all applicable trust documents. This

includes an affidavit verifying the beneficiary's citizenship, and, if any of the beneficiaries are foreign, an affidavit that the foreign beneficiaries would not have more than 25% of the aggregate power to influence or limit the exercise of the trustee's authority.

Roles and Responsibilities

The type of trust you utilise depends on the needs of the aircraft purchaser. Typically the title of the aircraft is held by either a US citizen owner trustee (FAR Part 47, §47.7 Owner Trust Agreements) or a corporate trust (FAR Part 47, §47.8 Voting Trust). To avoid potential headaches, I recommend shopping around for a bank you feel comfortable with as a trustee. A good working relationship with the US bank that holds the title on your behalf is very important.

My firm helps clients through this process fairly often. To start off we use a Trust Agreement which sets out each party's rights in and to the aircraft and their respective duties. It specifies the respective roles and responsibilities of the parties (that is, the trustor, known as the Owner Participant, and the trustee, known as the Owner Trustee) and clearly states that the Owner Participant has no legal title to the aircraft. In the event the Owner Participant wishes to sell or otherwise dispose of the aircraft, we include a means for the Owner Participant to direct the Owner Trustee to either distribute the aircraft or sell the beneficial interest in the trust.



About the Author:

John T. Van Geffen was admitted to the California Bar in 2006 after graduating from Santa Clara School of Law where he concentrated in International Law and Global policy. He currently serves as the Western-Pacific Regional VP of the National Transportation Safety Board Bar Association (NTSBBA) and is the Editor in Chief of the NTSBBA Newsletter. Michael Dworkin and Associates has more than 34 years of experience specialising in regulatory, commercial and civil aviation law.

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Since the FARs require that the trust agreement be filed with the FAA, we provide the FAA with advance copies. This ensures we obtain FAA approval of the applicable trust documents before the trust is initiated and before the closing of the purchase agreement and delivery of the aircraft. Moreover, we explicitly preface our trust agreements with:

“Trustor desires to create a trust and contribute the aircraft thereto in order to ensure the eligibility of the aircraft for the United States registration with the Federal Aviation Administration. It is the express intention and objective of Trustor that the provisions of this Trust Agreement comply with all requirements of US law and the Federal Aviation Regulations, including but not limited to such laws and regulations pertaining to the registration of aircraft and that the provisions of this Trust Agreement be construed to conform to this intention.”

Lease Terms

Together with the mechanism for ownership, we simultaneously prepare an operating lease between the Owner Participant and the Owner Trustee. The lease allows the Owner Participant to possess and utilize the aircraft as if it were their own. Of course, deciding the terms of the lease requires communication with the aircraft purchaser to understand their wants and needs. Of particular importance are issues concerning aircraft management, insurance and indemnification, tax liability, maintenance responsibility, subleases and assignments (to name a few).

If you have an aircraft in mind or are just starting the purchasing process and this article has not already scared you away, the joy of aircraft ownership is truly something amazing. Just make sure you contact a qualified aviation consultant to assist in this daunting procedure. ■

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