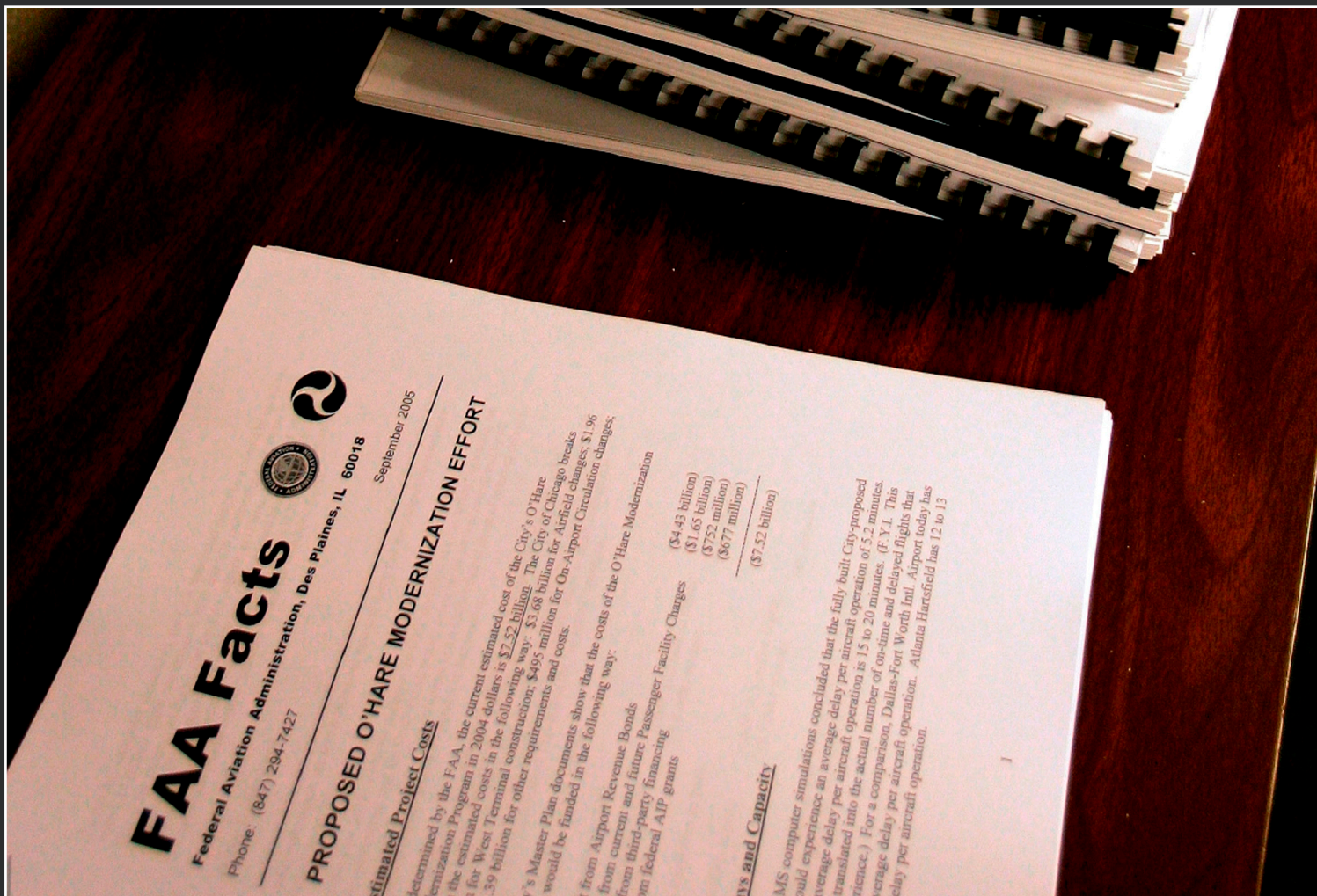


# COELUM

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Proposed Policy Clarification by the FAA regarding  
the use of Non-U.S.-Citizen Trusts.  
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COELUM Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

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# Proposed Policy Clarification by the FAA regarding the use of Non-U.S.-Citizen Trusts.

by *Alejandra Llopis\**.

Since the 1970s, the FAA has allowed non-US citizens and other parties to use Non Citizen Trusts (NCTs) to register an aircraft in the United States of America when the interested party does not meet the U.S. citizenship requirements established under the Federal Transportation Code<sup>1</sup>. For that reason the FAA has taken action over the past two years for the purpose of re-establishing the rules when using NCTs. The FAA has recently published a Proposed Policy Clarification (PPC)<sup>2</sup> which will be explained by the author in this article.

In previous articles the author has written about the issues regarding the concerns of the FAA in respect to the use of NCTs<sup>3</sup>, for the purpose of registering an aircraft in the FAA registry. In the year 2010, the FAA held meetings with members of the aviation industry, because the proposed changes by the FAA's Aeronautical Center Counsel regarding NCTs generated a great deal of reaction throughout the aviation industry, so the FAA considered it appropriate to take into consideration these thoughts and proposals. In 2011 the FAA initiated a process to create a new proposal regarding the matter, including the Aviation Working Group (AWG) Industry Consultative Group members and other members of the industry in order to make clear their position regarding NCTs concerns and issues. During this process it was clearly stated that the FAA's intention was not to invalidate the use of NCTs. On the contrary, the purpose was only to impose some conditions and create a new legal sphere intended to address these concerns but abstaining from imposing retroactive effects on aircraft already registered through the NCTs. After the meeting in 2011, the FAA agreed to review the comments, inquiries, questions, concerns and issues of the members of the aviation industry regarding this matter, and to issue a proposed policy, which will also be discussed with the industry.

“On February 9, 2012 the FAA published a PPC. If this PPC is adopted, it will definitely affect the rights and responsibilities of the owner trustees of registered aircraft and their related trustors, owner participants and trust beneficiaries.”

On February 9, 2012 the FAA published a PPC. If this PPC is adopted, it will definitely affect the rights and responsibilities of the owner trustees of registered aircraft and their related trustors, owner participants and trust beneficiaries. This PPC is the FAA's long awaited response following

\* IN COLABORATION WITH JESSI SABA.

1.- Title 49 of the US Code.

2.- The PPC is only a draft prepared by the FAA for public comment on proposed changes to the NCTs registration process.

3.- The articles referred were the following: United States Registration of Aircraft under Ownership Trust Agreement (June 15, 2011) and FAA Public Meeting Regarding Ownership Trusts Agreements and Aircraft Registration (August 15, 2011). The magazines can be downloaded through the Webpage [www.asyv.com](http://www.asyv.com) in the COELUM section.

the referred June 1st, 2011 public meeting held by the FAA in Oklahoma City where the discussion was about the use of NCTs and the FAA's concerns with their use. In this meeting it was established that the use of NCTs in commercial and general aviation include:

- ✈ Aircraft owned by non-US citizens that are leased to US citizen operators;
- ✈ Lenders and finance lessors requiring aircraft to be registered by the FAA despite the beneficial owners being non-US citizens;
- ✈ Aircraft in transition between operators that are owned by a non-US citizen and need to be on the US registry;
- ✈ US corporations or partnerships that do not technically satisfy the "citizen of the United States" requirement for registration under Title 49 of the US Code.
- ✈ Aircraft made in or brought to the US by non-US citizen manufacturers or distributors.

The FAA's review of NCTs initially began in response to the problems associated with obtaining operational and maintenance information from certain registered owners, creating difficulties in an effective safety oversight of aircraft maintained on the United States registry in compliance with US and International laws. For that reason the PPC establishes that the owner trustees of such trusts are obligated to comply with all FAA regulations imposed on owners and would require an owner trustee to provide the FAA with certain information about its registered aircraft. This basically means that trustees of NCTs must provide the following information<sup>4</sup> to the FAA:

The FAA expects that within 2 business days an owner trustee will be able to provide to the FAA:

- ✈ The identity of the person normally operating or managing the aircraft;
- ✈ Residence or principal place of business of that person;
- ✈ Location of maintenance and other records; and
- ✈ Where the aircraft is normally based and operated.

The FAA expects that within 5 business days, an owner trustee will be able to provide to the FAA:

- ✈ Information about the operator, crew and aircraft operations on specific dates;
- ✈ Maintenance and other aircraft records; and
- ✈ Current airworthiness status of the aircraft.

“With these requirements the FAA intends to verify information with respect to the identity of the actual operators of aircraft and the location of the operation so that the FAA may be able to request information in an emergency situation.”

4.- <http://www.regulations.gov/#!documentDetail;D=FAA-2012-0012-0001>

With these requirements the FAA intends to verify information with respect to the identity of actual operators of aircraft and the location of the operation so that the FAA can be able to request information in an emergency situation. The objective is to impose these obligations on the owner trustee; also the FAA has established its position regarding the documents to be filed with trusts agreements and has new requirements regarding to trustee removal or resignation.

The PPC thus establishes the intention of the FAA to focus on situations where an owner trustee has entered into an operating agreement that permits the use and operation of the aircraft by a non-US citizen, owner participant or trust beneficiary; the FAA is proposing as a requirement that the owner trustee registers all operating or similar agreements with the FAA. The intention of this registration process is that the FAA will be able to see all the documents affecting the relationship between the owner trustee and the trustor or beneficiary, including all the operating agreements and any side letters, which contain different terms and conditions from the terms of the trust agreement on file with the FAA. If none of these documents exist, an affidavit must be provided stating that no operating agreement or side letter exists.

One of the most important concerns of the FAA is that current trust agreements do not adequately limit the ability of non-US citizen to remove a trustee. This means that many current NCTs allow owner trustees to be removed for any cause. The FAA will now require that the trust agreement describes the reasons and causes that would justify the removal of an owner trustee. In that case, the trustor or beneficiary will not have the ability to remove the owner trustee without an explanation of the case or for negligence or misconduct. Also, non-US citizen partner in an NCT may not have more than 25% of the aggregate power<sup>5</sup> to direct or remove a trustee, in contrary to those cases where a non-US citizen appears to have 100%. The FAA needs to be assured in writing that a non-US citizen will be unable to exercise aggregate power in excess of 25%.

Regarding the termination of the trust and trustee resignation, the FAA expects that the aircraft will be re-registered in the United States if ownership is transferred to a person eligible to register it, whether under a NCT or some other mechanism recognized under the FAA's regulations.

The FAA summarized the requirements under existing US law, emphasizing that only an owner may register an aircraft, and that only citizens of the United States that are owners are eligible to register aircraft, for that reason the FAA Aircraft Registry is an ownership registry and not an operator registry.

5.- This requirement is a powerful limitation on the non-citizen's beneficiary control over the trustee when they are combined with the covenants and agreements made by the beneficiary in the owner trust agreement.

Under this PPC the FAA also discusses a proposal to require the non-US citizen operators of trust-owned aircraft used in general aviation operations outside the United States to submit reports to local Flight Standards District Offices<sup>6</sup> identifying themselves as operators of the subject aircraft. We can conclude that the PPC issued by the FAA definitely tries to highlight that due to the abuse by many users of the aviation industry of the structures of the NCTs, and that now the FAA will be taking some serious actions and will be definitely restricting the legal requirements and terms and conditions in order to regulate more accurately this figure.

The initial deadline for public comments to the PPC was March 31, 2012 but was extended to July 6, 2012 after a formal request to the FAA by the Steering Committee<sup>7</sup> to the Industry Consultative Group (“ICG”), working under the auspices of the Aviation Working Group. The Steering Committee requested and the FAA agreed to hold a public meeting in Oklahoma City on June 6, 2012 to discuss the PPC as well as proposed revisions in the trusts agreements submitted to the FAA regarding the registration of non-U.S. citizen aircraft.

6.- Regional offices of the FAA.

7.- The Steering Group is in the process of preparing a formal written response to the PPC.

### ASA: Seven airports do not meet security requirements.

Aeropuertos y Servicios Auxiliares (ASA) recognizes that seven airports are incurring security breaches based on the national and international security requirements. This is because they do not have a specific area for the takeoff and landing of helicopters. ASA listed several airports such as: Colima, Campeche, Loreto, Nuevo Laredo, Poza Rica and Tehuacan, which report 218 yearly flights, but that do not have the specific facilities for these operations. ASA will invest 12.5 million pesos for the construction of these helicopter facilities. *El Universal. 14/April/12.*

### Iberia's strike cancels 122 flights.

The Spanish airline Iberia canceled 122 flights because of a new strike caused by the Spanish Pilots Union. They are protesting about the creation of the low cost airline, Iberia Express which is subsidiary of Iberia Airlines. The Iberia advised that as in several strikes that took place between December and March, the return of money and change of flights has been made more flexible. The Union said that the reason for their strikes is that Iberia did not include their union labor conditions on the subsidiary Iberia Express that began operations on March 25. *Reforma. 16/April/12.*

### Ministry of Communications and Transport: No legal basis on Mexicana's transaction.

The Ministry of Communications and Transport (SCT) advised that they do not have a legal basis to intervene in the process of buying the shares of Mexicana Airlines by Tenedora K and Med Atlantica partnership. The SCT emphasized that with no legal basis they cannot intervene in private negotiations between the two companies. However, the judge in charge of the "concurso mercantil" advised that if he does not receive a resolution, he will ask to the Ministry to intervene in the negotiations. *Crónica. 17/April/12.*

### IATA optimistic.

In April, the CFO's of airlines around the world are certain that the results of this first quarter of this year are going to be better than the last quarter of last year, which is important for this market. This is according to the International Air Transport Association (IATA) which is optimistic that 2012 will be much better than 2011, even though there has not been a significant rise in the number of passengers. *Excelsior. 25/April/12.*

### Aviation Industry, in a crisis!

The cost of fuel now represents a big risk for the stability of the aviation industry worldwide. From January 2012 until today, the cost of fuel has increased by 25%. Airlines have made a great effort for this not impact ticket prices, but if fuel keeps rising, the airlines will have no other choice than to raise prices. The National Air Transportation Chamber (CANAERO) said that until today, the cost of fuel has not been an issue and have caused no impact on Mexican aviation industry. Most airlines disagreed with this statement. *El Universal. 27/April/12.*

In this month extract was prepared by Jessi Saba, Vera García, Samantha Garnica and Roberto Najera.

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