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AIRCRAFT OPERATING AND LEASING GUIDE

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These guidelines are based on FAA and IRS regulations and statutes and are not to be considered as an opinion or an interpretation of these rules. No document can fully cover all of the possible variations that arise in individual circumstances. These guidelines are not intended to be a substitute for the advice and counsel of an attorney experienced in aviation law.

Introduction

NBAA offers these guidelines as an aid to its members who are considering entering into arrangements such as aircraft support services agreement, dry lease agreements, interchange agreements, joint ownership agreements and time sharing agreements.

The *NBAA Aircraft Operating and Leasing Guide* contains guidelines for aircraft support services agreements, dry lease agreements, interchange agreements, joint ownership agreements and time sharing agreements.

Of these arrangements, interchange, joint ownership and time sharing agreements are all regulated under Federal Aviation Regulations (“FAR”) Part 91 Subpart F. This subpart provides operating rules, in addition to those prescribed in other subparts of Part 91, governing the operation of large airplanes of U.S. registry, turbojet-powered multiengine civil airplanes of U.S. registry, and fractional ownership program aircraft of U.S. registry that are operating under subpart K of Part 91 in operations not involving common carriage. The operating rules in Subpart F do not apply to those aircraft when they are required to be operated under parts 121, 125, 129, 135, and 137 of the FAR. FAR § 91.501(a) states that the inspection program in §91.409 applies to large airplanes, turbine multi-engine airplanes and turbine helicopters. There are many other regulations in Subpart F that will need to be complied with (i.e., §§ 91.503 – 91.535).

For NBAA members who are operators of small civil airplanes and helicopters of U.S. registry not covered under FAR Part 91, Subpart F, interchange, joint ownership and time sharing agreements are available under the NBAA

Small Aircraft Exemption (Exemption No. 7897). There are conditions and requirements associated with operations under the exemption. For more information, visit www.nbaa.org/exemption.

Please note that if an aircraft operator is not a “citizen of the United States” as defined in 49 USC §40102(a)(15), then additional Department of Transportation rules apply for interchange, joint ownership and time sharing arrangements.

Guidelines for Aircraft Support Services Agreements

TYPES OF SUPPORT SERVICES AGREEMENTS¹

Part 91 Only: The aircraft owner, or an entity that dry leases the aircraft from the owner, operates the aircraft under Federal Aviation Regulations (“FAR”) Part 91 (non-commercial) and the aircraft is not also operated by an air carrier under FAR Part 135. The aircraft owner, or the dry lessee, enters into an agreement with a third party to provide support services (e.g., flight crew, maintenance, scheduling, etc.) to the owner or dry lessee for their operation of the aircraft.

- FAR Part 91 operations generally do not permit a party to obtain reimbursement from other parties for their use of an aircraft with flight crew. FAR § 91.501 provides aircraft owners some limited exceptions to this general rule, including time sharing, interchange and joint ownership arrangements. If one of these arrangements is contemplated, refer to the applicable NBAA guideline below that discusses this specific type of agreement.

Part 91 and 135: The aircraft owner, or an entity that dry leases the aircraft from the owner, operates the aircraft under FAR Part 91 (non-commercial) and the aircraft is also operated by a licensed air carrier under FAR Part 135 (commercial) for other passenger- and cargo-carrying flights. The air carrier also provides support services to the owner or dry lessee for the operation of the aircraft by the owner or dry lessee under FAR Part 91.

- Contracting to allow the aircraft to be placed on an air carrier’s FAR Part 135 charter certificate allows the air carrier to exercise operational control over certain

¹ Previous versions of these Guidelines have referred to these types of agreements as Aircraft Management Agreements.

flights and provide revenue-generating charter flights to the air carrier's customers. Generally the air carrier pays the owner, or the dry lessee of the aircraft, either a fixed fee or a percentage of the charter revenue for this use, which helps to offset some of the fixed costs associated with owning the aircraft. In addition, there may be positive tax implications or other reasons for the aircraft to be engaged in charter activity.

Part 135 Only: The aircraft is operated exclusively by the air carrier under FAR Part 135 for passenger- and cargo-carrying flights.

TERMS AND CONDITIONS FOR SUPPORT SERVICES AGREEMENTS

Identity of the Parties:

- Include each party's name and address and, if the party is not acting in an individual capacity, its place of incorporation or organization. Generally there is a "Provider," which provides the support services, and a "Customer," which may be the aircraft owner or a dry lessee of the aircraft. A Customer may also be referred to in the agreement as an owner, client, operator, lessee or lessor, depending on the circumstances of the structure. The Provider must be an air carrier if the support services agreement calls for the aircraft to be operated under Part 135.
- Ensure that the parties understand the different regulatory and tax consequences of their choice of entity.
- Ensure that the correct entity is listed as the Customer. If the aircraft owner is dry leasing the aircraft to a lessee who will conduct Part 91 operations, that lessee may be the proper party to the support services agreement instead of the aircraft owner.

Recitals:

- The "Whereas" clauses at the beginning of the support services agreement are traditionally used to describe what each party brings to the deal and its intention.
- The "Whereas" clauses, as well as the remainder of the support services agreement, should emphasize that the Provider is simply providing aircraft services and not commercial air transportation to the Customer. There can be substantial adverse FAA and IRS consequences if the Provider is determined to be providing commercial transportation services to the Customer, as opposed to services in support of the Customer's operation of the aircraft and preservation of the value of the aircraft.
- Include a description of the aircraft by make, model and serial number of the airframe and engine(s) as well as the aircraft's FAA registration number.

Subject Matter/Terms: Describe what is being provided by whom and to whom, on what basis and for how long (e.g., the third party support services provider is providing certain services to the aircraft owner or dry lessee of the aircraft for the period defined in the support services agreement).

Provider Support Services: Each of the support services to be provided should be noted in the support services agreement. The Provider may provide some or all of the following services:

- Flight Crew
 - Employment, training and administration of the flight personnel.
 - Delineate the rights of both the Provider and the Customer for hiring, reviewing and assigning flight personnel to the different types of flights.
 - Specify experience and training requirements.
 - Indicate whether or not the personnel are exclusively assigned to the Customer's aircraft and what procedures are used for assigning substitute crew members.

Note: If the Provider will operate the aircraft under Part 135, the Provider must have the authority to select and assign flight crew to those flights in its sole discretion. If the Customer will operate the aircraft under Part 91, the Customer should also have the authority to select and assign flight crew to those flights in its sole discretion and should acknowledge that the flight crew members are the Customer's agents during those Part 91 flights. How flight crew is addressed in the support services agreement will impact how the relationship is viewed for the purposes of Federal Excise Tax ("FET").

- Maintenance and Authorizations.
 - Employment, training and administration of the maintenance personnel.
 - Delineate the rights of both the Provider and the Customer for hiring and reviewing maintenance personnel.
 - Specify experience and training requirements.
 - Indicate whether or not the personnel are exclusively assigned to the Customer's aircraft and what procedures are used for assigning substitute maintenance personnel.
 - If the support services agreement relates to an aircraft operated under both Part 91 and 135, the procedures relating to maintenance control should be addressed.

- Enrollment of the aircraft in an FAA-approved inspection program.
- Responsibility for obtaining and administering any necessary Letters of Authorization for an FAA-approved Minimum Equipment List, RVSM, MNPS and other authorizations.
- Responsibility for proper maintenance of aircraft records and for providing access to those records to the appropriate parties.
- Aircraft Insurance – Support services agreements may require that the Provider obtain the liability and physical damage (hull) insurance coverage on the aircraft by adding the aircraft to the Provider’s fleet insurance policy.
- Hangar – The Customer may use hangar space provided by the Provider.
- Recordkeeping – With regard to aircraft recordkeeping, budgeting and reporting, indicate the types of reports the Customer will receive.
- Scheduling – Generally the Provider will administer the schedule for the aircraft and flight crew, however the Customer will have input and some control. The FAA operational control requirements relating to scheduling should be balanced with goals relating to FET.

Economics: Specify how the Provider is compensated for its services and how aircraft-related expenses are handled.

- The FAA prohibits the Provider from franchising out its charter certificate, as this is viewed as an indicator of a loss of operational control. Any fixed fee the Provider receives should be specifically related to support services being provided under the support services agreement, ideally asset preservation services.
- The Customer can directly pay or reimburse the Provider for aircraft expenses.

“Operational Control” and “Possession, Command, and Control”:

- FAA Operational Control. The support services agreement should clearly identify each type of flight contemplated and which party is in operational control: Customer Part 91 (Customer), Provider Part 135 (Provider) and Provider Part 91 (Provider). The support services agreement should also contain a section where each party acknowledges the responsibilities associated with operational control. The parties should also consider the process of communicating to the flight crew which entity has operational control for each flight.

Note: The Provider may NOT exercise operational control of a passenger- or cargo-carrying flight under FAR Part 91 for

compensation or hire, which would include any such flight for the Customer under Part 91. If the Customer wants its flights to be operated under Part 91, the Customer must be eligible and willing to exercise operational control of that flight. The Customer is not eligible to exercise operational control of a passenger- or cargo-carrying Part 91 flight if the Customer is a “sole purpose flight department company” (i.e., the Customer’s primary business is interpreted by the FAA as providing transportation by air, in which case the Customer must get an air carrier or operating certificate).

- IRS Possession, Command, and Control/Agency for FET Purposes – Commercial air transportation is subject to the 7.5 percent, plus segment fees, FET. While the FAA deems all Part 91 flights to be non-commercial, the IRS does not. The IRS looks at which party has “possession, command, and control” of the aircraft on a flight-by-flight basis and the nature of the provision of the services by the Provider. Factors such as who employs and/or controls the pilots, who controls the scheduling and availability of the aircraft and who procures the aircraft maintenance and insurance, are all relevant². The goal of characterizing the arrangement as non-commercial for IRS purposes should be balanced with the FAA requirements relating to operational control.

Taxes:

- Federal Excise Tax – The 7.5 percent, plus segment fees, FET on commercial air transportation imposed under Internal Revenue Code § 4261 is generally applicable to all Part 135 flights³ and may be applicable to certain Part 91 flights⁴. Responsibilities for collection and remittance should be addressed.
- State and Local Taxes and Fees – The Customer is typically responsible for paying the appropriate state taxes such as: state sales and use taxes, aircraft registration fees and local personal property taxes. State sales and use tax may apply to the support services agreement.

Insurance and Risk Allocation:

- Insurance – State which party will provide liability and physical damage (hull) insurance on the aircraft. State the amounts of insurance to be carried, along with any

² The application of FET with respect to aircraft support services arrangements is an area of tax policy discussion and enforcement concern. See www.nbaa.org/taxes/federal/fet/ for more information.

³ FET is not applicable to Part 135 flights when a specific exemption applies such as small non-jet aircraft not on an established line. See the NBAA Federal Excise Taxes Guide at www.nbaa.org/admin/taxes/federal/fet/2015-federal-excise-tax-guide.pdf for more information.

⁴ FET is generally applicable to certain Part 91 flights where the aircraft is leased with crew such as time sharing, interchange and demonstration flights. See the NBAA Federal Excise Taxes Guide at www.nbaa.org/admin/taxes/federal/fet/2015-federal-excise-tax-guide.pdf for more information.

other required insurance provisions. Address whether other types of insurance will be required (e.g., hangarkeepers liability coverage). (See “Insurance Considerations – Support Services Agreements” section below for additional information.)

- Indemnification – Address any mutually agreed upon indemnifications in the support services agreement. Generally support services agreements provide for a mutual indemnification with certain exclusions. The parties will want to determine the extent to which any indemnification language in the support services agreement will be covered by the insurance policy.

Note: Ensure that the indemnification clause does not violate FAA operational control requirements by shifting the primary responsibility and liability associated with a flight to a party that is not in operational control.

- Limitation of Liability – Providers generally seek to include certain limitations of liability in support services agreements (e.g., for certain direct damage to the aircraft and indirect, consequential, punitive and special damages), which can be one of the most highly negotiated portions of the support services agreement.

Miscellaneous Provisions: Support services agreements may include some or all of these provisions:

- Notices.
- Further assurances/duty to cooperate.
- Assignment.
- Construction of terms/choice of law/forum selection.
- Severability.
- Force Majeure.
- Compliance with laws.
- Term and termination.
- Confidentiality.
- Default and breach.
- Counterparts.
- Subrogation where the aircraft is subject to financing agreements.

FAR Part 135 Specific Provisions: In addition to the terms noted above, if the aircraft is to be operated by the Provider under FAR Part 135, then the following should be addressed:

- Provider Responsibilities.
 - Performing the conformity inspection and obtaining the necessary certifications and approvals to operate the aircraft under FAR Part 135. The

Customer normally pays for the inspection and any repair costs.

- Providing the Customer with notice and the option to consent to the Provider’s use of the Aircraft.
- Supervising training, certification, checking and other matters for Part 135 operations for the flight and maintenance crew.
- Advertising and billing relating to charter flights and collecting and remitting FET relating to all Part 135 flights.
- Customer Responsibilities.
 - Making the aircraft available for certification and training flights.
 - Paying the cost of any aircraft modifications that may be required to qualify the aircraft for certification under FAR Part 135.
- Additional Considerations.
 - Payment to the Customer for lease/rental/use of the aircraft by the Provider for Part 135 flights. This is normally either a percentage of the charter revenue or a fixed fee per hour.
 - Allocation of risk of non-payment by the Provider’s charter customers on the various types of Part 135 flights.

INSURANCE CONSIDERATIONS – SUPPORT SERVICES AGREEMENTS

Who is Providing the Policy for the Aircraft?: An insurance policy for the aircraft can be obtained either by the aircraft owner/dry lessor or the Provider. When the Provider will be using the aircraft for operations under FAR Part 135, it is customary for the aircraft to be added to the Provider’s fleet insurance policy. Regardless of who obtains the insurance policy, the party obtaining the policy should be required to provide a Certificate of Insurance to the other party upon execution of the support services agreement and at each renewal of the policy. The party obtaining the policy should also be required to provide a certified copy of the relevant portions of the policy (including all necessary endorsements) to the other party as soon as possible after execution of the support services agreement and at each renewal of the policy.

Liability and Physical Damage (Hull) Insurance: The support services agreement should state the minimum liability and physical damage (hull) coverage amounts to be carried on the policy insuring the aircraft, including whether or not war risks liability and hull insurance is required. If there is a deductible, the agreement should address which party is responsible for paying it. The parties will want the policy to have an adequate liability coverage limit to ensure

a sufficient amount if the coverage has to be shared by the parties. If international travel is contemplated, the parties will want adequate liability coverage to comply with international requirements (e.g., the EU).

Other Insurance: At a minimum, the following types of other insurance should be addressed: workers compensation, employer's liability insurance and hangarkeepers liability coverage.

Customer:

- If the insurance is obtained by adding the aircraft onto the Provider's fleet insurance policy, the Customer will want the following:
 - To be a Named Insured on the policy. If the Customer is a dry lessee, the registered owner will also want to be named as an insured for both liability and physical damage (hull) coverage.
 - Coverage for all uses of the aircraft by both the Provider and the Customer.
 - With respect to liability coverage, an invalidation of interest clause in the Customer's favor as to the Provider's acts or omissions.
 - To be named as a loss payee with respect to physical damage (hull) coverage. If the Customer is a dry lessee, typically the owner will be named as a loss payee.
 - A breach of warranty endorsement with respect to physical damage (hull) coverage as to the Provider's acts or omissions. If the Customer is a dry lessee, the registered owner will also want to have a breach of warranty endorsement.
 - If the aircraft is financed, any endorsements (e.g., loss payee, breach of warranty) required by the financing company.
 - A severability of interest provision in the policy.
 - To be provided with prior written notice by the insurer in the event of cancellation of, or adverse material change in, the policy.
- If the Customer deems the limit of liability coverage carried on the Provider's policy to be insufficient to protect the interests of both the Customer and the Provider, the Customer may want to ask for a higher limit of liability coverage for itself only or, if such higher limit is not available, consider purchasing excess aircraft liability coverage from the Provider's insurer.

Provider:

- If the insurance is provided by adding the aircraft onto the Provider's fleet insurance policy, the Provider will want the following:

- Coverage for all uses of the aircraft by both the Provider and the Customer.
- With respect to liability coverage, an invalidation of interest clause in the Provider's favor as to the Customer's acts or omissions.

Note: Prior to signing a support services agreement, the party who is to obtain the insurance should submit a copy of the agreement to its insurance provider and request that the insurer confirm that the contemplated agreement and its insurance provisions will be covered under the policy.

Guidelines for Dry Lease Agreements

ELIGIBILITY CHECKLIST

Dry Lease Defined: An arrangement whereby an aircraft is leased to a lessee without crew (i.e., no pilot in command, second in command, flight attendant, etc.) and the lessee exercises operational control of the aircraft. (See FAA Advisory Circular No. 91-37A for additional discussion of dry leases.)

Without Crew: The aircraft and the crew absolutely must be separate and distinct. This means that the aircraft lessor should not employ, or own/control the entity that employs, the crew members for the lessee's flights. The aircraft lessor may not direct or require the lessee to use certain crew members, but the lessor may impose certain general requirements (e.g., that any pilot used has all required FAA certificates and experience for the type of flights contemplated and meets the minimum requirements in the insurance policy). Situations involving multiple lessees of an aircraft using the same source of crew should be approached with caution, as the FAA has routinely stated that it can disregard what is said in the leases and look at the totality of the circumstances to determine whether the leases are truly "dry."

TERMS AND CONDITIONS FOR DRY LEASE AGREEMENTS

Identity of the Parties: Include each party's name and address and, if the party is not acting in an individual capacity, the party's place of incorporation or organization. The parties are generally identified as the "lessor" (i.e., the entity that is providing the aircraft) and the "lessee" (i.e., the entity that is receiving use of the aircraft).

Recitals:

- The "Whereas" clauses at the beginning of the dry lease are traditionally used to describe what each party brings to the deal and its intention.
- Include a description of the leased aircraft by make, model and serial number of the airframe and engine(s) as well as the aircraft's FAA registration number.

Subject Matter/Terms: Describe what is being provided by whom and to whom, on what basis and for how long (e.g., the lessor is dry leasing its aircraft to the lessee, on an exclusive or non-exclusive basis, for the period defined in the lease).

Consideration:

- Rent or Lease Payments – Terms of the rent or lease payments may vary considerably. The payments may be a fixed amount per month/quarter/year or specified on an hourly basis.
- Other Payments – The parties may attempt to treat other payments/reimbursements as something other than rent, but beware that state taxing authorities may not agree with this approach and may tax all amounts paid by the lessee to the lessor.

Expenses: The lessee must pay for its own crew members directly, but which party pays for all other aircraft expenses is subject to negotiation.

Taxes:

- Federal Excise Tax – Ideally, dry leases are subject to fuel taxes rather than the 7.5 percent, plus segment fees, Federal Excise Tax (“FET”) on commercial air transportation imposed under Internal Revenue Code § 4261. However, if the lessor is found by the IRS to have retained “possession, command and control” of the aircraft, the lease payments may be subject to FET.
- State and Local Sales/Use/Excise Taxes – In states and municipalities that have sales/use or excise taxes, dry leases of aircraft are typically viewed as sales subject to the tax unless otherwise exempt. The lessor typically has the statutory responsibility to collect the tax from the lessee and remit it to the appropriate taxing authority. Sales tax is typically due on all amounts paid under a lease regardless of how they are characterized.
- Personal Property Taxes/Ad Valorem Taxes/State Aircraft Registration Fees – Aircraft are typically subject to personal property or ad valorem tax unless otherwise exempt. In some cases, aircraft are assigned special rates or are subject to a state aircraft registration requirement similar to motor vehicles instead of the normal personal property tax. The lessor is typically responsible for paying personal property/ad valorem/state registration tax or fee.

Delivery/Return: Specify the time and place of delivery and return of the aircraft to the lessor. With exclusive dry leases, typically the aircraft is not returned until the end of the lease term and there may be return conditions with which the aircraft must conform. These return conditions can be very specific and the subject of a great deal of negotiation. With non-exclusive dry leases, the aircraft may

be returned to the lessor after each flight or series of flights and then redelivered to the lessee prior to the next flight. The process for this return and redelivery should be addressed in the lease. Typically the condition of the aircraft at return is also addressed (e.g., in as good condition as when it was delivered, normal wear and tear excepted).

Operational Control: Identify the lessee as the party exercising operational control (as defined in FAR § 1.1) of each of its flights and include a statement in which the lessee acknowledges its responsibility and potential liability associated with exercising operational control. If the aircraft is used by both the lessor and the lessee or by more than one lessee, the parties should also consider the process of communicating to the flight crew which entity has operational control for each flight.

Representations and Warranties Regarding the Aircraft: Specify the condition of the aircraft at the lease’s commencement and what warranties and representations are made by the lessor to the lessee, if any.

Title to the Aircraft:

- Include a statement regarding the fact that title to, and ownership of, the aircraft will remain with the registered owner. If this is a sublease, name the registered owner and include a representation by the lessor that it has a dry lease in place with the registered owner allowing it to sublease the aircraft to the lessee.
- The lessee should represent and warrant that it will do nothing that will encumber, interfere with or otherwise dilute the registered owner’s unrestricted title to, and ownership of, the aircraft.

Right to Inspect: The lessor, registered owner and/or a lien holder may reserve the right to inspect the aircraft at any reasonable time upon reasonable advance notice to the lessee. If the lessee is not responsible for maintaining the aircraft records under the lease, the lessee will want to reserve the right to review the aircraft records.

Lawful Use of the Aircraft:

- The lessee should agree that the aircraft is not to be maintained, used, operated or stored in violation of any law, rule or regulation of any state or governmental authority (i.e., the lawful use provision). If the lessor is arranging for maintenance of the aircraft, the lessor should also make this representation regarding those services.
- Normally a breach of the lawful use provision is specified as a default under the lease, often without a cure period.

Aircraft Location:

- Include restrictions on operating the aircraft in any location that may be excluded from the terms of any

applicable insurance policy. If applicable, include a statement that the predominant use of the aircraft is typically within the United States and, if the aircraft is temporarily operated outside the United States, it will be operated only in those territories where it is not threatened by risk of hostilities or by seizure.

- The home base of the aircraft is also normally identified, as that is one of the primary factors in determining situs for state and local tax purposes.

Maintenance Responsibility: Identify which party is responsible for securing maintenance, preventive maintenance and required or recommended inspections of the aircraft. That party should warrant that it will keep and maintain the aircraft in an airworthy condition in compliance with all applicable Federal Aviation Regulations (“FARs”).

Additional Equipment and Modification:

- Restrictions regarding the removal, substitution or replacement of any instruments, components or avionics without the lessor’s prior consent should be included in the lease.
- Ownership of any modifications, additions or upgrades should also be addressed in the lease.

Pilot Qualifications: Under a dry lease, the lessor cannot provide crew to the lessee or require the lessee to use specific crew members. However, the lessor may include certain provisions regarding pilot qualifications, such as:

- Pilots must meet the minimum certification, experience and training standards outlined in the aircraft insurance policy.
- Pilots must meet the FAA minimum certification, experience and training standards for the operations contemplated in the lease.

Logbooks and Records:

- Typically the party that is responsible for procuring maintenance for the aircraft is also responsible for maintaining the aircraft records. That party should agree that it will keep and maintain all logbooks and other records pertaining to the operation of the aircraft and its engines in compliance with all applicable FARs.
- The location of the logbooks and records should be stated along with the applicable party’s right to inspect them.

Risk Allocation:

- Insurance – State which party will provide liability and physical damage (hull) insurance on the aircraft. State the amounts of insurance to be carried, along with any other required insurance provisions. If there is a deductible, the agreement should address which party is responsible for paying it. (See “Insurance Consid-

erations – Dry Lease Agreements” section below for additional information.)

- Indemnification/Limitation of Liability – Address any mutually agreed upon indemnifications and limitations of liability in the lease. Typically this includes a mutual indemnification and waiver of liability with respect to indirect, consequential, punitive and special damages. The parties will want to determine the extent to which any indemnification language in the lease will be covered by the insurance policy.

Term and Termination of Lease: Outline the term (time period) of the lease. Generally leases are for specified periods of time, but in some states they can be perpetual (until terminated). Specify any rights of either party to terminate the lease prior to its stated expiration. Termination rights may be with cause (e.g., upon default or breach of contract) or without cause (e.g., upon ___ days prior written notice). Caution: The term of the lease may affect the tax treatment of the lease payments (rent).

Assignment, Sublease and Encumbrance:

- Any rights of assignment that the parties agree to grant one another should be addressed. All other assignments should either require the consent of the other party or be prohibited.
- Generally the lessee is restricted from subleasing, mortgaging, pledging or otherwise encumbering the aircraft. If appropriate, any rights of subordination granted to the lessor’s lender should be addressed. Note that most aircraft loan agreements require the borrower to provide prior written notice and to receive consent from the lender for each lease.
- The parties should discuss with experienced aviation counsel and address whether the lease will be recorded with the FAA Aircraft Registry (which is different from the Truth-in-Leasing requirements discussed in “Truth-in-Leasing Provisions” sections below) and the International Registry.

Default and Breach: Provisions should be made regarding the defaults and breaches of the lease. These typically include:

- Either party files a petition in bankruptcy or becomes insolvent;
- Either party is involved in involuntary proceedings under the bankruptcy laws;
- Rents and other sums due and payable remain unpaid for more than fifteen (15) days after notice to the lessee;
- Either party fails to perform the terms and conditions of the lease after it has been notified of a deficiency;

- The lessee attempts to assign or transfer its interest in the aircraft in violation of the lease; and
- The party required to maintain insurance fails to do so.

Remedies:

- Typically, in the event of default by the lessee, the lessor will have the right to terminate the lease and immediately retake possession of the aircraft. In the event of default by the lessor, generally the lessee is still required to turn over possession of the aircraft and records to the lessor.
- Typically the parties agree that their respective remedies are cumulative.

Waiver: Typically the parties agree that a waiver of one or more parts of any requirement or performance by either party will not be deemed a continuing one and that all the other terms and conditions will remain in force.

Truth-in-Leasing Provisions:

- Determine whether the Truth-in-Leasing provisions of FAR § 91.23 are applicable.
 - If FAR § 91.23 is applicable, include the required statements and certifications as a concluding paragraph immediately preceding the signature blocks.
 - If FAR § 91.23 is not applicable, include a clear statement regarding the fact that the lessee will exercise operational control and that the lessee acknowledges and understands its responsibilities with respect to the exercise of operational control.

Miscellaneous Provisions: Leases may include some or all of these provisions:

- Notices.
- Further assurances/duty to cooperate.
- Construction of terms/choice of law/forum selection.
- Severability.
- Force Majeure.
- Compliance with laws.
- Confidentiality.
- Counterparts.
- Certificates of delivery and redelivery.

PRE-OPERATION CHECKLIST

Truth-in-Leasing: If the Truth-in-Leasing provisions are applicable, comply with the following regulatory notice and mailing requirements:

- Mail the lease to the FAA in Oklahoma City (see FAR § 91.23 for the address) within 24 hours after the lease's execution.
- Carry the lease aboard the aircraft.
- Notify the nearest FSDO at least 48 hours before the aircraft's first flight under the lease. Note that the nearest FSDO is determined based on the location of the aircraft immediately before its first flight under the lease.

Insurance: Confirm that the appropriate insurance is in effect by either obtaining a Certificate of Insurance or a certified copy of the policy.

INSURANCE CONSIDERATIONS - DRY LEASE AGREEMENTS

Who is providing the policy for the aircraft?: Generally, if the dry lease is exclusive, the lessee obtains and maintains the insurance policy for the interests of both the lessee and the lessor. If the lease is non-exclusive (i.e., both the lessor and the lessee use the aircraft), either the lessor or the lessee may obtain the policy depending on the circumstances. If there is a deductible, the lease should address which party is responsible for paying it. The party obtaining the policy should be required to provide a Certificate of Insurance to the other party upon execution of the lease and at each renewal of the policy. The party obtaining the policy should also be required to provide a certified copy of the policy to the other party as soon as possible after execution of the lease and at each renewal of the policy.

Lessor:

- Regardless of who obtains the insurance policy, the lessor will want the following:
 - To be a Named Insured on the policy.
 - Coverage for all uses of the aircraft by both the lessor and lessee.
 - With respect to liability coverage, an invalidation of interest clause in the lessor's favor as to the lessee's acts or omissions (if the lease is exclusive).
- If the lessee obtains the insurance policy, the lessor also will want:
 - A waiver of subrogation in the lessor's favor with respect to physical damage (hull) coverage.
 - To be named as a loss payee with respect to physical damage (hull) coverage. If the lessor is not the registered owner of the aircraft, typically the owner will be named as the loss payee.
 - A breach of warranty endorsement with respect to physical damage (hull) coverage as to the lessee's acts or omissions.

- If the aircraft is financed, any endorsements (e.g., loss payee, breach of warranty) required by the financing company.
- A severability of interest provision in the policy.
- To be provided with prior written notice by the insurer in the event of cancellation of, or adverse material change in, the policy.

Lessee:

- Regardless of who obtains the insurance policy, the lessee will want the following:
 - To be a Named Insured on the policy.
 - Coverage for all uses of the aircraft by both the lessor and lessee.
 - With respect to liability coverage, an invalidation of interest clause in the lessee’s favor with respect to the lessor’s acts or omissions (if the lease is exclusive).
- If the lessor obtains the insurance policy, the lessee also will want:
 - A waiver of subrogation in the lessee’s favor with respect to physical damage (hull) coverage.
 - A severability of interest provision in the policy.
 - To be provided with prior written notice by the insurer in the event of cancellation of, or adverse material change in, the policy.

Note: Prior to signing a dry lease agreement, the party who is to obtain the insurance should submit a copy of the agreement to its insurance provider and request that the insurer confirm that the contemplated lease and its insurance provisions will be covered under the policy.

Guidelines for Interchange Agreements

ELIGIBILITY CHECKLIST

Interchange Defined: “[A]n arrangement whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person’s airplane, and no charge, assessment, or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating, and maintaining the two airplanes.” Federal Aviation Regulations (“FAR”) § 91.501(c)(2).

Eligibility: Determine whether the parties are eligible to enter into an interchange agreement under FAR § 91.501(b)(6).

- Are the aircraft “large” airplanes within the FAA definition (i.e., more than 12,500 pounds maximum certificated takeoff weight)? Are the aircraft multi-engine turbojet airplanes? Are the aircraft fractional ownership program aircraft operating under FAR Part 91, Subpart K?
- If the aircraft are helicopters, or if they are “small” and not multi-engine turbojet airplanes, determine whether Exemption 7897, also known as the NBAA Exemption, applies (i.e., the aircraft’s operator is a member of NBAA), which permits operations under FAR § 91.501. If operations are not performed pursuant to the NBAA Exemption, individual exemption from the FAA is required.
- Are the aircraft registered in a foreign country or “owned, controlled or operated by persons [either individuals or entities] who are not citizens or permanent residents of the United States”? If so, then 14 C.F.R. Part 375 applies, and this part or applicable foreign law may limit the ability to operate under FAR § 91.501. Consult experienced aviation counsel if either of the aircraft is foreign-registered or a U.S.-registered foreign civil aircraft.
- Each aircraft operator under an interchange agreement must have a major enterprise unrelated to the ownership and operation of the aircraft. “Sole purpose flight department companies” (i.e., companies whose primary business is interpreted by the FAA as providing transportation by air) are not eligible to exercise operational control (as defined in FAR § 1.1) of aircraft involved in interchange agreements.

Note: Avoid a proliferation of interchanges, which may be construed as a “holding out” constituting “common carriage” and is not authorized under FAR § 91.501(b).

TERMS AND CONDITIONS FOR INTERCHANGE AGREEMENTS

Identity of the Parties: Include each party’s name and address and the place of incorporation or organization.

Recitals:

- The “Whereas” clauses at the beginning of the interchange agreement are traditionally used to describe what each party brings to the deal and its intention. Echo the appropriate language from FAR § 91.501.
- Include a description of each aircraft by make, model and serial number of the airframe and engine(s) as well as the aircraft’s FAA registration number.

Subject Matter/Terms: Describe what is being provided by whom and to whom, on what basis and for how long (e.g., Party A provides its aircraft to Party B, and Party B provides its aircraft to Party A, on an interchange basis).

under FAR § 91.501(b)(6) and (c)(2) for the period defined in the agreement).

Consideration:

- Hour for Hour – The interchange use of the two aircraft must be for equal time (hour for hour), with only the difference in the hourly operational costs of the two aircraft being paid.
- Maximum Usage Differential – The parties may want to consider including a maximum usage differential, which would prohibit one party from getting too far ahead of the other in hourly use of the other’s aircraft. Note that if one party is ahead of the other in hours used at the end of the term of the interchange agreement, it may not pay or provide any other form of consideration to the other party to account for such overuse.
- Fractional Ownership Program Aircraft – For fractional ownership program aircraft flights under an interchange agreement, the exchange of equal time for the operation must be properly accounted for as part of the total hours associated with the fractional owner’s share of ownership. FAR § 91.501(b)(10)(ii).

Taxes:

- Federal Excise Tax – Interchange flights are subject to the 7.5 percent, plus segment fees, Federal Excise Tax (“FET”) on commercial air transportation imposed under Internal Revenue Code § 4261. It would be wise for the parties to address valuation of the interchanged flights prior to the commencement of the arrangement to ensure the appropriate amount of tax will be collected. It is the responsibility of the entity providing the aircraft and crew to collect and remit the appropriate amount of FET on a particular flight.
- State Sales/Use Taxes – Normally states do not apply state sales and use taxes to a lease of an aircraft with crew. However, it would be wise to check the rules of the state in which the aircraft is based, and those where it will be extensively used, to confirm.

Aircraft Scheduling:

- Procedures – Specify how and when a party will request and confirm flights on the other party’s aircraft, the form and content of such requests and/or confirmations, the person (by name or title) or department from whom such requests will be accepted and to whom confirmations should be sent.
- Conflicts – State how scheduling conflicts will be addressed and which party (usually the owner/operator) will have final authority over scheduling each aircraft involved in the interchange.
- Cancellation – Address how flight cancellations will be handled.

- Home Base – Identify the home base of each aircraft and identify how any repositioning hours will be addressed.
- Extension – Consider an automatic extension of the interchange agreement for a specified period to give the “light” interchange party an opportunity to achieve parity.

Maintenance Responsibility:

- Identify the party (usually the owner/operator) responsible for arranging and paying for maintenance, preventive maintenance and required or recommended inspections for each aircraft.
- Specify how maintenance will be scheduled (e.g., to minimize conflicts) and how each party will be notified of scheduled and unscheduled maintenance on the other party’s aircraft.

Operational Control: Identify the party exercising operational control (as defined in FAR § 1.1) of each flight. This will be the party providing the aircraft and crew for the flight. The parties should also consider the process of communicating to the flight crew which entity has operational control for each flight.

Warranties and Representations: Consider adding the following types of warranties and representations:

- Title to the aircraft and right to enter into an interchange arrangement.
- Each party’s use of the aircraft for its own account, with prohibition against providing transportation of passengers or cargo for compensation or hire.
- Compliance with applicable laws, regulations and insurance provisions.

Risk Allocation:

- Insurance – State which party will provide liability and physical damage (hull) insurance on the aircraft. Usually, each owner/operator will provide insurance on its own aircraft. State the amounts of insurance to be carried, along with any other required insurance provisions. (See “Insurance Considerations – Interchange Agreement” section below for additional information.)
- Indemnification/Limitation of Liability – Address any mutually agreed upon indemnifications in the interchange agreement. Parties often agree to a mutual indemnification with exceptions for the gross negligence or willful misconduct of the indemnitee. Parties also often agree to mutually limit liability to direct damages and to exclude indirect, consequential, punitive and special damages. The parties will want to determine the extent to which any indemnification language in the

interchange agreement will be covered by their insurance policies.

Term and Termination: Outline the term (time period) of the interchange agreement. Specify any rights of either party to terminate the agreement prior to its stated expiration. Termination rights may be with cause (e.g., upon default or breach of contract) or without cause (e.g., upon ___ days prior written notice). Specify any limits on terminating the interchange agreement when there is a use differential. Remember that parties may NOT pay one another to “true-up” any hourly use differential.

Miscellaneous Provisions: Interchange agreements may include some or all of these provisions:

- Notices.
- Further assurances/duty to cooperate.
- Assignment.
- Construction of terms/choice of law/forum selection.
- Severability.
- Force Majeure.
- Compliance with laws.
- Confidentiality.
- Default and breach.
- Counterparts.
- Subrogation where either aircraft is subject to financing agreements.

Truth-in-Leasing Provisions:

- Determine whether the Truth-in-Leasing provisions of FAR § 91.23 are applicable.
 - If FAR § 91.23 is applicable, include the required statements and certifications as a concluding paragraph immediately preceding the signature blocks.
 - If FAR § 91.23 is not applicable, include a clear statement regarding the fact that each aircraft and crew provider will exercise operational control over its aircraft on all flights, and that each operator acknowledges and understands its responsibilities with respect to the exercise of operational control.

PRE-OPERATION CHECKLIST

Truth-in-Leasing: If the Truth-in-Leasing provisions are applicable, comply with the following regulatory notice and mailing requirements:

- Mail the interchange agreement to the FAA in Oklahoma City (see FAR § 91.23 for the address) within 24 hours after the interchange agreement’s execution.

- Carry the interchange agreement aboard both aircraft.
- Notify the nearest FSDO at least 48 hours before the first flight under the interchange agreement for each aircraft. Note that the nearest FSDO is determined based on the location of the aircraft immediately before its first flight under the interchange agreement.

NBAA Exemption: If helicopters or small airplanes that are not multi-engine turbojets are being interchanged under the NBAA Exemption (see “Eligibility Checklist” section above), review and comply with similar provisions in the NBAA Exemption.

Insurance: Confirm that the appropriate insurance is in effect for both parties’ aircraft by either obtaining Certificates of Insurance or certified copies of the policies.

INSURANCE CONSIDERATIONS – INTERCHANGE AGREEMENTS

Who is providing the policy for each aircraft?: Normally each operator obtains the insurance policy for its own aircraft. Each operator should be required to provide a certificate of insurance to the other party (the aircraft user) upon execution of the interchange agreement and at each renewal of the policy. Each operator should also be required to provide a certified copy of the relevant portions of its policy (including all necessary endorsements) to the other party (the aircraft user) as soon as possible after execution of the interchange agreement and at each renewal of the policy.

Aircraft Operators: Each aircraft operator will want the following provisions included in the policy on its aircraft:

- A “Purpose of Use” or “Approved Use” provision that allows use of the aircraft under an interchange agreement.

Aircraft Users: Each aircraft user will want the following provisions included in the policy covering the aircraft that it is not operating, but on which it has passengers (i.e., the operator’s policy):

- To be named as an Additional Insured with respect to liability coverage.
- With respect to liability coverage, an invalidation of interest clause in the user’s favor as to the operator’s acts or omissions.
- With respect to liability coverage, a provision that the coverage will be primary and non-contributory as to any other insurance carried by the user.
- With respect to physical damage (hull) coverage, a waiver of subrogation in the user’s favor.
- A severability of interest provision.

- Prior written notice by the insurer in the event of cancellation of, or adverse material change in, the policy.

Note: Prior to signing an interchange agreement, each party to the agreement should submit a copy of the agreement to its insurance provider and request that the insurer confirm that the contemplated interchange agreement and its insurance provisions will be covered under the policy

Guidelines for Joint Ownership Agreements

ELIGIBILITY CHECKLIST

Joint Ownership Defined: “[A]n arrangement whereby one of the registered joint owners of an airplane employs and furnishes the flight crew for that airplane and each of the registered joint owners pays a share of the charge specified in the agreement.” Federal Aviation Regulations (“FAR”) § 91.501(c)(3).

Why Joint Ownership?:

- Joint ownership gives parties enormous flexibility to structure aircraft ownership and operations to meet usage needs.
- Joint ownership allows a single joint owner to arrange for crew and other services and bill other joint owners for their share(s) up to the fully allocated costs of their operations.

Eligibility: Determine whether the parties are eligible to enter into a joint ownership agreement under FAR § 91.501(b)(6).

- Is the aircraft a “large” airplane within the FAA definition (i.e., more than 12,500 pounds maximum certificated takeoff weight)? Is the aircraft a multi-engine turbojet airplane?
- If the aircraft is a helicopter, or if it is “small” and not multi-engine turbojet airplane, determine whether Exemption 7897, also known as the NBAA Exemption, applies (i.e., each aircraft operator is a member of NBAA), which permits operations under FAR § 91.501. If operations are not performed pursuant to the NBAA Exemption, individual exemption from the FAA is required.
- Is the aircraft registered in a foreign country or “owned, controlled or operated by persons [either individuals or entities] who are not citizens or permanent residents of the United States”? If so, then 14 C.F.R. Part 375 applies, and this part or applicable foreign law may limit the ability to operate under FAR § 91.501. Consult experienced aviation counsel if the aircraft is foreign-registered or a U.S.-registered foreign civil aircraft.
- Each joint owner under a joint ownership agreement must have a major enterprise unrelated to the own-

ership and operation of the aircraft. “Sole purpose flight department companies” (i.e., companies whose primary business is interpreted by the FAA as providing transportation by air) are not eligible to exercise operational control (as defined in FAR § 1.1) of aircraft involved in joint ownership agreements. Individuals are not eligible to be operating “joint owners.”

- If any co-owner of the aircraft is an individual or is an entity not eligible for “joint ownership” under FAR § 91.501, the co-owners may still consider registered co-ownership of their aircraft instead of joint ownership. Any group of U.S. citizens (as defined in FAR § 47.2) can co-own an aircraft, but a co-ownership arrangement will not be eligible to make use of the managing joint owner concept under FAR § 91.501, which allows a single joint owner to arrange for crew and other services and bill other joint owners for their share. Consult experienced aviation counsel if considering a co-ownership arrangement.

TERMS AND CONDITIONS FOR JOINT OWNERSHIP AGREEMENTS

Identity of the Parties: Include each party’s name, address and place of incorporation or organization. Each registered joint owner of the aircraft should be a party to the joint ownership agreement.

Recitals:

- The “Whereas” clauses at the beginning of the joint ownership agreement are traditionally used to describe what each party brings to the deal and its intention. Echo the appropriate language from FAR § 91.501.
- Include a description of the aircraft by make, model and serial number of the airframe and engine(s) as well as the aircraft’s FAA registration number.

Ownership and Use of the Aircraft:

- State the percentage ownership held by each joint owner and whether the ownership interests will be held as tenants in common. Note that each joint owner’s interest must be more than de minimis. The FAA has not defined a specific minimum interest for joint ownership, but the minimum interest for fractional airplane owners under FAR Part 91, Subpart K is 6.25 percent and for fractional helicopter owners is 3.125 percent. Consult experienced aviation counsel if considering ownership interests smaller than 6.25 percent.
- Any restrictions on sales of interests, rights of first refusal or other such matters regarding the disposition of the aircraft or any interest therein should be addressed.
- There should be a reasonable relationship between percentage ownership and percentage utilization, e.g., if the operating joint owner owns 96 percent of jointly

owned aircraft and uses it 4 percent of the time with four non-operating joint owners owning 1 percent each and utilizing the aircraft 96 percent of the time, the FAA may ignore the contract itself and conclude that the operating joint owner is really providing a commercial service requiring Part 135 certification.

Taxes:

- Allocation of Depreciation – Ideally, the relative percentages for ownership, depreciation and usage should all correspond.
- Federal Excise Tax – Ideally, joint ownership is subject to fuel taxes rather than the 7.5 percent, plus segment fees, Federal Excise Tax (“FET”) on commercial air transportation imposed under Internal Revenue Code § 4261. However, if an owner or third-party service provider is deemed to have possession, command and control for all operations of the aircraft, the IRS may view the operations as commercial and subject to FET. If the managing joint owner elects to exercise operational control of all flights with passengers, as permitted in the preamble to FAR § 91.501, then FET generally applies to all amounts paid for such flights for the other joint owners.
- State and Local Sales/Use Taxes and Fees – State sales and use taxes, aircraft registration fees and local personal property taxes vary considerably from state to state. Typically each joint owner agrees to be responsible for all such taxes relating to the ownership of its interest in the aircraft and its use of the aircraft.

Operational Control:

- Generally under FAR Part 91, each Part 91 user must exercise operational control over its own flights. However, in a joint ownership arrangement, if one of the joint owners elects to serve as the managing owner employing and providing the crew to the other owners, then that managing owner is presumed to be in operational control of all flights unless otherwise agreed in the joint ownership agreement. This means that such managing owner would have the primary responsibility for safety and regulatory compliance on all flights. Where none of the joint owners wants to assume this responsibility for flights by the other joint owner(s), the parties should specifically state that each joint owner will be in operational control of its own flights and include a statement in which each operating joint owner acknowledges its responsibilities and potential liability associated with exercising operational control. The parties should also consider the process of communicating to the flight crew which joint owner has operational control for each flight.

Risk Allocation:

- Insurance – State which party will provide liability and physical damage (hull) insurance on the aircraft. State the amounts of insurance to be carried, along with any other required insurance provisions. (See “Insurance Considerations – Joint Ownership Agreements” section below for additional information.)
- Indemnification/Limitation of Liability – Address any mutually agreed upon indemnifications in the joint ownership agreement. Parties often agree to a mutual indemnification with exceptions for the gross negligence or willful misconduct of the indemnitee. Parties also often agree to mutually limit liability to direct damages and to exclude indirect, consequential, punitive and special damages.

Operation/Management:

- Expenses and Accounting – Consider and address all standard aircraft-related expenses and how they will be allocated among the joint owners. Will there be a managing joint owner that arranges for all services, receives the invoices and allocates expenses among the owners? Or will this be handled by a third-party service provider? What happens if a joint owner is late or delinquent in paying?
- Will use be allocated/limited? – Will the joint owners limit their use of the aircraft based on their percentage ownership/number of hours?
- Compliance – Include provisions requiring compliance with all applicable laws during operations, including a statement that each joint owner shall use the aircraft for and on account of its own business only and will not use the aircraft for the purposes of providing transportation of passengers or cargo in air commerce for compensation or hire.
- Limitations – The FAA has opined that a non-operating joint owner may not also engage in interchange or time sharing operations of the aircraft.

Aircraft Scheduling:

- Procedure – Determine how the schedule for aircraft use will be managed. Will it be an online schedule to which all joint owners have access? Will there be someone actively managing the scheduling? Identify the steps a joint owner must take to schedule use of the aircraft and when that use will be deemed to be booked and accepted by the group.
- Priority – Identify scheduling priority (e.g., first-come-first-served, order of priority, etc.) and any limits on advance scheduling. Include provisions on multi-day use and instances where conflicting use can be accommodated with extra repositioning flights.

Maintenance Responsibility:

- Identify who will be responsible for securing maintenance, preventive maintenance and required or recommended inspections. Typically this is the managing joint owner or a third-party service provider with whom the joint owners have entered into a separate services agreement.
- Specify how maintenance will be scheduled in relation to requested use and how joint owners will be made aware of scheduled and unscheduled maintenance that may affect previously scheduled flights.

Upgrades and Refurbishments: Provisions should be made for how the joint owners will agree upon incorporating non-required upgrades and refurbishments and for how the cost for both required and agreed upon upgrades or refurbishments will be shared among the joint owners.

Term and Termination: Specify the term of the joint ownership agreement. Generally the term of a joint ownership agreement lasts with respect to each joint owner until such joint owner no longer owns an interest in the aircraft. Consider early termination options in light of any restrictions on the sale of interests in the aircraft.

Miscellaneous Provisions: Joint ownership agreements may include some or all of these provisions:

- Notices.
- Further assurances/duty to cooperate.
- Assignment.
- Construction of terms/choice of law/forum selection.
- Severability.
- Force Majeure.
- Compliance with laws.
- Confidentiality.
- Default and breach.
- Counterparts.
- Subrogation where the aircraft is subject to financing agreements.

PRE-OPERATION CHECKLIST

NBAA Exemption: If you are relying on the NBAA Exemption (see “Eligibility Checklist” section above), review and comply with the provisions of that exemption.

Insurance: Confirm that the appropriate insurance is in effect by either obtaining a Certificate of Insurance or a certified copy of the policy.

INSURANCE CONSIDERATIONS – JOINT OWNERSHIP AGREEMENTS

Who is providing the policy for the Aircraft?: Normally there is one insurance policy on the aircraft, which is obtained by the managing owner or, if there is a third-party support services provider, that provider. The premium cost is allocated among the joint owners. The party who obtains the insurance should be required to provide a Certificate of Insurance to all of the joint owners upon execution of the joint ownership agreement and at each renewal of the policy. The party obtaining the insurance should also be required to provide a certified copy of the policy to all of the joint owners as soon as possible after execution of the joint ownership agreement and at each renewal of the policy.

Joint Owner:

- Regardless of who obtains the insurance policy, each joint owner will want the following:
 - To be a Named Insured on the policy.
 - If possible, an invalidation of interest clause in the joint owner’s favor as to the other joint owners’ acts or omissions with respect to liability coverage. [Note: this may not be available, depending on the insurer.]
 - If possible, a breach of warranty clause in the joint owner’s favor as to the other owners’ acts or omissions with respect to physical damage (hull) coverage.
- If a third-party support services provider obtains the insurance policy, each joint owner will also want:
 - With respect to liability coverage, an invalidation of interest clause in the joint owner’s favor as to the third-party services provider’s acts or omissions.
 - With respect to physical damage (hull) coverage, a waiver of subrogation in the joint owner’s favor.
 - With respect to physical damage (hull) coverage, identification as a loss payee with a breach of warranty endorsement as to the third-party services provider’s acts or omissions.
 - If the aircraft is financed, any endorsements (e.g., loss payee, breach of warranty) required by the financing company.
 - A severability of interest provision in the policy.
 - To be provided with prior written notice by the insurer in the event of cancellation of, or adverse material change in, the policy.

Note: Prior to signing a joint ownership agreement, the parties should submit a copy of the agreement to the

insurance provider and request that the insurer confirm that the contemplated joint ownership agreement and its insurance provisions will be covered under the policy.

Guidelines for Time Sharing Agreements

ELIGIBILITY CHECKLIST

Time Sharing Defined: “[A]n arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that agreement other than those specified in paragraph (d) of this section.” Federal Aviation Regulations (“FAR”) § 91.501(c)(1).

Allowable Charge: Per FAR § 91.501(d), the following may be charged by the time share lessor, as expenses of a specific flight, for transportation as authorized under a time sharing agreement: “(1) Fuel, oil, lubricants, and other additives. (2) Travel expenses of the crew, including food, lodging, and ground transportation. (3) Hangar and tie-down costs away from the aircraft’s base of operation. (4) Insurance obtained for the specific flight. (5) Landing fees, airport taxes, and similar assessments. (6) Customs, foreign permit, and similar fees directly related to the flight. (7) In flight food and beverages. (8) Passenger ground transportation. (9) Flight planning and weather contract services. (10) An additional charge equal to 100 percent of the expenses listed in (1) above].”

Eligibility: Determine whether the parties are eligible to enter into a time sharing agreement under FAR § 91.501(b)(6).

- Is the aircraft a “large” airplane within the FAA definition (i.e., more than 12,500 pounds maximum certificated takeoff weight)? Is the aircraft a multi-engine turbojet airplane? Is the aircraft a fractional ownership program aircraft operating under FAR Part 91, Subpart K?
- If the aircraft is a helicopter, or if it is a “small” and not multi-engine turbojet airplane, determine whether Exemption 7897, also known as the NBAA Exemption, applies (i.e., the time share lessor/operator is a member of NBAA), which permits operation under FAR § 91.501. If operations are not performed pursuant to the NBAA Exemption, individual exemption from the FAA is required.
- Is the aircraft registered in a foreign country or “owned, controlled or operated by persons [either individuals or entities] who are not citizens or permanent residents of the United States”? If so, then 14 C.F.R. Part 375 applies, and this part or applicable foreign law may limit your ability to operate under FAR § 91.501. Consult

experienced aviation counsel if the aircraft is foreign-registered or a U.S.-registered foreign civil aircraft.

- The time share lessor (i.e., the party who provides the aircraft and crew) must be an entity which has a major enterprise unrelated to the ownership and operation of the aircraft. “Sole purpose flight department companies” (i.e., companies whose primary business is interpreted by the FAA as providing transportation by air) are not eligible to be time share lessors under FAR § 91.501. Individuals may be time share lessees (i.e., passengers who are provided use of the aircraft), but are not eligible to be time share lessors under FAR § 91.501.

Note: Avoid a proliferation of time sharing, which may be construed as a “holding out” constituting “common carriage” and is not authorized under FAR § 91.501(b).

TERMS AND CONDITIONS FOR TIME SHARING AGREEMENTS

Identity of the Parties: Include each party’s name and address and, if the party is not acting in an individual capacity, its place of incorporation or organization. The parties are generally referred to as the “time share lessor” (i.e., the entity that is providing the aircraft and crew) and the “time share lessee” (i.e., the entity that is receiving use of the aircraft).

Recitals:

- The “Whereas” clauses at the beginning of the time sharing agreement are traditionally used to describe what each party brings to the deal and its intention. Echo the appropriate language from FAR § 91.501.
- Include a description of the aircraft by make, model and serial number of the airframe and engine(s) as well as the aircraft’s FAA registration number.

Subject Matter/Terms: Describe what is being provided by whom and to whom, on what basis and for how long (e.g., the time share lessor provides the aircraft to the time share lessee on a time sharing basis under FAR Part 91.501(b)(6) and (c)(1) for the period defined in the time sharing agreement).

Consideration:

- Amount – The time share lessee may pay no more than the actual expenses for the items listed in FAR § 91.501(d), but it may pay less than this amount if mutually agreed. Note that these are actual expenses for the specific flight, not estimated or average expenses per hour for the aircraft.
- Payment – Identify how and when expenses will be charged and the deadline for and method of payment.

Taxes:

- Federal Excise Tax – The amounts paid under FAR § 91.501(d) for a time sharing flight are generally subject to the 7.5 percent, plus segment fees, Federal Excise Tax (“FET”) on commercial air transportation imposed under Internal Revenue Code § 4261. It is the responsibility of the time share lessor to collect and remit the appropriate amount of FET on a particular flight.
- State Sales/Use Taxes – Normally states do not apply state sales and use taxes to a lease of an aircraft with crew, as this is viewed as providing a service instead of leasing personal property. However, it would be wise to check the rules of the state in which the aircraft is based, and those where it will be extensively used, to confirm.

Aircraft Scheduling:

- Procedures – Describe how the schedule for use of the aircraft by the time share lessee will be managed. Will it be an online schedule to which all time share lessees have access? Will there be someone actively managing the scheduling? Identify the steps a time share lessee must take to schedule use of the aircraft and when that use will be deemed to be booked and accepted by the group.
- Priority – Identify scheduling priority (e.g., first-come-first-served, order of priority, etc.) and any limits on advance scheduling. Include provisions on multi-day use and instances where conflicting use can be accommodated with extra repositioning flights.
- Cancellations – Specify under what conditions a time share lessee may cancel a flight that has been requested and confirmed.

Maintenance Responsibility:

- Identify the party (usually the time share lessor) responsible for arranging and paying for aircraft maintenance, preventive maintenance and required or recommended inspections.
- Describe how maintenance will be scheduled (e.g., to minimize conflicts) and how the time share lessee will be notified of scheduled and unscheduled maintenance.

Operational Control: Identify the time share lessor (i.e., the one providing the aircraft and crew) as the party exercising operational control (as defined in FAR § 1.1) of each flight, and include a statement in which the time share lessor acknowledges its responsibilities and potential liability associated with exercising operational control. The parties should also consider the process of communicating to the flight crew that the time share lessor has operational control over each flight for a time share lessee.

Warranties and Representations: Consider adding the following types of warranties and representations:

- Title to the aircraft and right to enter into a time sharing agreement.
- Each party’s use of the aircraft for its own account, with prohibition against providing transportation of passengers or cargo for compensation or hire.
- Compliance with applicable laws, regulations and insurance provisions.

Risk Allocation:

- Insurance – Normally, the time share lessor should provide the primary liability and physical damage (hull) insurance. State the amounts of insurance to be carried, along with any other required insurance provisions. (See “Insurance Considerations – Time sharing Agreements” section below for additional information.)
- Indemnification/Limitation of Liability – Address any mutually agreed upon indemnifications in the time sharing agreement. Parties often agree to a mutual indemnification with exceptions for the gross negligence or willful misconduct of the indemnitee. Parties also often agree to mutually limit liability to direct damages and to exclude indirect, consequential, punitive and special damages. The parties will want to determine the extent to which any indemnification language in the time sharing agreement will be covered by the insurance policy.

Term and Termination of Agreement: Outline the term (time period) of the time sharing agreement. Specify any rights of either party to terminate the agreement prior to its stated expiration. Termination rights may be with cause (e.g., upon default or breach of contract) or without cause (e.g., upon ___ days prior written notice).

Miscellaneous Provisions: Time sharing agreements may include some or all of these provisions:

- Notices.
- Further assurances/duty to cooperate.
- Assignment.
- Construction of terms/choice of law/forum selection.
- Severability.
- Force Majeure.
- Compliance with laws.
- Confidentiality.
- Default and breach.
- Counterparts.

- Subrogation where the aircraft is subject to financing agreements.

Truth-in-Leasing Provisions:

- Determine whether the Truth-in-Leasing provisions of FAR § 91.23 are applicable.
 - If FAR § 91.23 is applicable, include the required statements and certifications as a concluding paragraph immediately preceding the signature blocks.
 - If FAR § 91.23 is not applicable, include a clear statement regarding the fact that the time share lessor will exercise operational control over all flights, and that it acknowledges and understands its responsibilities with respect to the exercise of operational control.

PRE-OPERATION CHECKLIST

Truth-in-Leasing: If the Truth-in-Leasing provisions are applicable, comply with the following regulatory notice and mailing requirements:

- Mail the time sharing agreement to the FAA in Oklahoma City (see FAR § 91.23 for the address) within 24 hours after the time sharing agreement’s execution.
- Carry the time sharing agreement aboard the aircraft.
- Notify the nearest FSDO at least 48 hours before the first flight under the time sharing agreement. Note that the nearest FSDO is determined based on the location of the aircraft immediately before its first flight under the time sharing agreement.

Insurance: Confirm with the time share lessor’s insurance broker or insurance company that existing coverage applies to the time sharing arrangement. The time share lessee should either obtain a Certificate of Insurance or certified copy of the policy.

INSURANCE CONSIDERATIONS – TIME SHARING AGREEMENTS

Who is providing the policy for the Aircraft?: Normally the time share lessor provides the primary liability and physical damage (hull) insurance policy as the operator of the aircraft. The time share lessor should be required to provide a Certificate of Insurance to the time share lessee upon execution of the time sharing agreement and at each renewal of the policy. The time share lessor should also be required to provide a certified copy of all relevant portions

of the policy to the time share lessee as soon as possible after execution of the time sharing agreement and at each renewal of the policy.

Time Share Lessor: The time share lessor will want the following insurance provisions in its insurance policy:

- A “Purpose of Use” or “Approved Use” provision that allows use of the aircraft under a time sharing agreement.

Time Share Lessee:

- The time share lessee will want the following provisions included in the time share lessor’s policy:
 - To be named as an Additional Insured with respect to liability coverage.
 - With respect to liability coverage, an invalidation of interest clause in the time share lessee’s favor as to the time share lessor’s acts or omissions.
 - With respect to liability coverage, a provision that the coverage will be primary and non-contributory as to any other insurance carried by the time share lessee.
 - A severability of interest provision.
 - With respect to physical damage (hull) coverage, a waiver of subrogation in the time share lessee’s favor.
 - Prior written notice by the insurer in the event of cancellation of, or adverse material change in, the policy.
- The time share lessee may want to consider purchasing excess non-owned aircraft liability coverage from its own insurance provider for its use of the time share lessor’s aircraft if the time share lessee deems the limit of liability coverage carried by the time share lessor to be insufficient to protect the interests of both the time share lessee and time share lessor.

Note: Prior to signing a time sharing agreement, the time share lessor should submit a copy of the agreement to its insurance provider and request that the insurer confirm that the contemplated time sharing arrangement and its insurance provisions will be covered under the policy. Likewise, if the time share lessee desires to obtain excess liability coverage, it should submit a copy of the time sharing agreement to its insurance provider prior to signing the agreement.

About NBAA

Founded in 1947 and based in Washington, DC, the National Business Aviation Association (NBAA) is the leading organization for companies that rely on general aviation aircraft to help make their businesses more efficient, productive and successful. Contact NBAA at (800) FYI-NBAA or info@nbaa.org. Not a Member? Join today by visiting www.nbaa.org/join.

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