FLIGHT-WATCH

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EXEMPTION NUMBER 7897 GRANTED TO THE NBAA

I.

INTRODUCTION

For all practical purposes, fractional ownerships are on the way out. The clients I represent who have examined Subpart K, which is the new rule promulgated by the FAA to regulate fractional ownerships have decided that it is simply easier to operate under a Part 135 certificate. However, it is not uncommon for owners of light piston twin aircraft and turbo-prop aircraft to wish to make their aircraft available to friends and business associates in the context of a time-sharing agreement, an interchange agreement, or a joint ownership agreement. This issue of Flightwatch will discuss those three methods of operation as well as FAA Exemption Number 7897 issued to the National Business Aircraft Association ("NBAA").

II.

AGREEMENTS PERMITTED UNDER SUBPART F OF THE FARS DEALING WITH LARGE AND TURBINE-POWERED MULTI-ENGINE AIRPLANES

Owners of large, turbine-powered multi-engine aircraft may make their aircraft available with flight crew in terms of a lease and charge ten items which are specified in FAR §91.501 (d)(1) through (10). These items are essentially are twice the cost of fuel, travel expenses of the crew, hangar and tie-down expenses, insurance for the specific flight, landing fees, airport taxes, custom and foreign permit fees, in-flight food and beverages, passenger ground transportation and weather briefing contract services. In essence, this is a "wet lease," since the aircraft is provided with the flight crew. This is a "time-sharing agreement" that is defined in FAR §91.501(c)(1).

The time-sharing agreement or wet lease must satisfy the requirements of FAR §91.23 in terms of truth-in-leasing language and other conditions. For example, the time-sharing agreement or lease must be mailed for recording with the FAA within 24 hours of execution. FAR §91.23(c)(1). Before the aircraft is operated pursuant to the lease, notice must be given 48 hours in advance to the nearest Flight Standards District Office ("FSDO") by telephone, indicating the airport of departure, the departure time, and the registration number of the aircraft. See FAR §91.23(c)(3)(i)(ii),(iii). Also, the time sharing agreement or lease must have language in it consistent with the requirements of FAA Advisory Circular 91-37A dated January 16, 1978.

Based upon my experience with representatives of the FAA, it is important for any person who desires to lease your aircraft to understand that he, she, or it has "operational control" of the aircraft during the time the lessee operates the airplane. This means that the lessee must appreciate and understand that it is responsible for ensuring that the aircraft is safe for flight. In many instances, the FAA may want attached as an exhibit to the lease a document making the lessee aware of the condition of the aircraft. This might include information concerning the status of the annual inspection or progressive or periodic inspections, the status of the aircraft's transponder and static system, the emergency locator battery expiration date, and various airworthiness directives that may require a repetitive inspection at specified intervals. If the aircraft owner retains control over these items while the aircraft is leased to the lessee, the FAA may take the position that the document is not really a lease and that the owner, himself, retained operation control over the aircraft. If that takes place, the FAA may take the position that the aircraft lease is not a lease but is an illegal 135 operation.

If two aircraft owners have an agreement to swap time on their aircraft when one aircraft is down for maintenance or similar issues, this may be an interchange agreement under FAR §91.501(c)(2). When swapping time in your aircraft for time in the other aircraft owner's aircraft, "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." FAR §91.501(c)(2).

While a time-sharing agreement is a lease which is very restrictive in terms of the charges the owner may exact from the lessee, a joint-ownership agreement is far more flexible in relation to charges one owner may collect from another joint owner. A joint-ownership agreement is defined in FAR §91.501(c)(3) and allows one of the registered joint owners to furnish his aircraft with flight crew to one of the other registered joint owners who "pays a share of the charge specified in the agreement." Please note that there are no limitations on the charges to be exacted in a joint-ownership agreement as those set forth in

FAR §91.501 (d)(1) through (10).

must be made in the aircraft's log-book showing the provisions under Subpart F of Part 91 whereby the aircraft will be operated.

III.

EXEMP-TION NUM-BER 7897

On September 27, 1972, the National Business Aircraft Association ("NBAA") was granted Exemption Number 1637 by the FAA. This exemption essentially allows aircraft owners who own small aircraft to operate them under FAR §91.501 as if they were large and turbine-powered, multi-engine airplanes. The exemption has been in effect for 34 years. However, as the exemption number would collect an alphabetical suffix at the end with each year it was continued, it was finally determined that the NBAA would receive a new exemption number, which is 7897.

For operators of aircraft which do not meet the criteria of large and turbine-powered, multi-engine airplanes, if there is a desire to make the aircraft available to business associates under the auspices of a time-sharing agreement, an interchange agreement, or a joint ownership agreement, then the aircraft owner may join the NBAA, and take the following steps:

1. The aircraft's maintenance program must have been submitted to and approved by the appropriate FSDO.

2. Before operating the aircraft under Subpart F, an entry must be made in the aircraft's log-book showing the provisions under Subpart F of Part 91 whereby the aircraft will be operated.

3. The appropriate FSDO must be notified that operations of the aircraft will be conducted under the terms of the NBAA exemption.

4. The appropriate FSDO must be provided with a copy of the time-sharing, interchange, or joint-ownership agreement under which the aircraft is to be operated; each agreement must include the aircraft registration number of the aircraft to be so operated.

5. In my experience, the lease must be carried aboard the aircraft, and the operations must be conducted in strict compliance with the terms of the particular document. In speaking with Agency personnel, it has been my experience that if you deviate from the terms of the agreement by charging more than allowed or doing things of that nature, the FAA will take the position that it was a 135 operation.

6. Finally, and most importantly, the FAA takes the position that if anything you do would actually require a Part 135 certificate, then the exemption does not apply.

In addition to the steps outlined above, it is obviously necessary to draft and execute the appropriate time-sharing agreement, interchange agreement, or joint ownership agreement. Further, the procedures outlined above must be followed in terms of recording any appropriate document and ensuring that the document has truth-in-leasing language as required by FAR §91.23.

IV.

CONCLUSION

For those owners who wish to recoup some of the operating costs of their aircraft or who wish to make their aircraft available to other corporations or individuals, joining the National Business Aircraft Association and availing oneself of the NBAA exemption may be a desirable course of action to follow. It is important, however, to seek the advice of experienced counsel. This area of aircraft operations and document production and drafting is not a place for an inexperienced lawyer to obtain on-the-job-training.

Alan Armstrong is engaged in the general practice of law with an emphasis in the following areas:

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