

# Legal Updates in Aviation Finance

New FAA Re-Registration and Renewal Rule Becomes Final

Effective October 1, 2010, aircraft registration, which had previously been a one-time, nonexpiring event, will have a three-year duration and will require that the registered owner effect re-registration in order to retain U.S. civil aircraft status.<sup>1</sup>

## Background

On February 28, 2008 a Notice of Proposed Rulemaking was published in the Federal Register<sup>2</sup> (the “NPRM”) detailing the FAA’s proposal requiring both re-registration of all presently issued Certificates of Aircraft Registration (“Certificates”) within a specified period following the effective date of the rule and renewal of each re-registered and newly issued Certificate every three years thereafter. If a Certificate is not renewed within 90 days of the scheduled expiration date, then registration of the aircraft would expire and the registration number would be administratively cancelled.

There were 94 public comments submitted regarding this proposed rule during the comment period, including from financiers, law firms, associations and other industry participants objecting to these proposed requirements and in some cases suggesting alternative approaches to effect the same goals.<sup>3</sup> Many concerns were raised in the comments and other direct advocacy efforts by industry members in meetings with the FAA, DOT and OMB. The main focus of these concerns was that by imposing these new procedures, some owners would miss the applicable re-registration or renewal deadlines, and their aircraft would be de-registered and potentially grounded. Should that happen, financing parties could face lien, insurance, liability and other risks, and bear the costs and burdens of implementing related risk-avoidance measures. The NPRM did not address the implications to financing parties of these potential risks or costs.<sup>4</sup>

## The Final Rule

Despite the many objections raised in the comments and the other advocacy initiatives, the FAA and TSA continued to actively pursue the implementation of a final rule imposing these re-registration and renewal requirements. The Final Rule implementing much of what was provided in the NPRM was published in the Federal Register on July 20, 2010, and it will become effective on October 1, 2010 (the “Effective Date”). Over a three-year period, the FAA will terminate the U.S. registration of all aircraft registered before the

<sup>1</sup> Re-Registration and Renewal of Aircraft Registration, 75 Federal Register 41968 (July 20, 2010) (the “Final Rule”). The Final Rule was designed to improve the accuracy of the FAA Registry’s database. Prior to the implementation of the new rule, it was generally thought by the FAA that the registration particulars of up to one-third of the total registered aircraft at the FAA contained erroneous information. The Final Rule was designed to improve this accuracy by forcing registered owners of aircraft to provide timely updates of registration information.

<sup>2</sup> 73 Federal Register 10701 (February 28, 2008).

<sup>3</sup> See Final Rule §III.

<sup>4</sup> See Final Rule §IV(A) and §V(A) and (B).

Effective Date, and it will require the re-registration of each aircraft to retain U.S. civil aircraft status, on scheduled dates based upon the month in which the aircraft was originally registered with the FAA.<sup>5</sup> New aircraft registrations and aircraft re-registrations will be valid for three years,<sup>6</sup> and Certificates issued after the Effective Date will include an expiration date.

As part of the renewal process, the FAA Registry will send registered owners two reminder notices in respect of their re-registration requirements. The first reminder notice will be sent 180 days before a registration is scheduled to expire.<sup>7</sup> The reminder will provide basic instructions and identify the aircraft, the expiration date of its registration, and the filing window (three months) during which a registration renewal application should be submitted.<sup>8</sup> Filing the application within the designated filing window is intended to ensure that the new Certificate will arrive before the old Certificate expires.<sup>9</sup> The second reminder notice will be sent at the end of the filing window to registered owners who have not yet re-registered. The filing window will close

two months prior to the scheduled expiration date to allow for processing the applications and mailing the new Certificates.<sup>10</sup> Applications submitted after the filing window closes will still be processed, but the FAA will provide no assurances that the new Certificates will be received before the old Certificates are to expire.

The FAA will cancel the registration of aircraft that are not properly re-registered or renewed, which would cause, among other things, a grounding of the aircraft until the new Certificate is placed on board and, in some cases, the unavailability for some period thereafter of the existing “N” number.

### *Analysis*

**NPRM vs. Final Rule.** There are only a few meaningful improvements when comparing the NPRM to the Final Rule. Among the improvements are the two advance notices and publicly available online tracking of the registration status of an aircraft.

The NPRM proposed a single, 120 day advance notice be provided by the FAA Registry to owners, alerting them to the pending expiration date, together with a possible extension beyond the expiration date if either the FAA or owner were unable to complete the renewal process by the expiration date. As noted above, the Final Rule provides that the FAA Registry will send owners two reminder notices, the first to be sent 180 days before the expiration date. The FAA deemed this to be a better alternative to what had been proposed in the NPRM because it “will reduce the uncertainty about registration certificate arrival and the potential burden of coordinating extensions that the proposed process would have created.”<sup>11</sup>

Among the comments submitted regarding the NPRM were requests for an online resource for use to track the registration status of an aircraft. The Final Rule contemplates the creation of a website on which the FAA Registry will post the

<sup>5</sup> 14 C.F.R. § 47.40(a)(1) (2010). A schedule providing the dates by which such re-registration will be required accompanies the Final Rule. For aircraft initially registered before October 1, 2010, re-registration during the initial three-year period is accomplished using AC Form 8050-1A. 14 C.F.R. § 47.40(a)(2) (2010). As of the time of this writing, such form had yet to be published.

<sup>6</sup> 14 C.F.R. § 47.40(b) (2010). For aircraft first registered after October 1, 2010, re-registration is accomplished using AC Form 8050-1B. 14 C.F.R. § 47.40(c) (2010). As of the time of this writing, such form had yet to be published.

<sup>7</sup> See Final Rule §IV(B).

<sup>8</sup> *Id.*

<sup>9</sup> The Final Rule expressly contemplates online registration and electronic processing, but only when there are no changes to be made to the current registration information. Accordingly, the rule provides for both online re-registration and renewal applications through direct written submission to the FAA Registry. The paper-based method must be used if changes are to be made to the current registration information (although this may change in the future).

<sup>10</sup> *Id.*

<sup>11</sup> See Final Rule §IV(B).

re-registration and renewal status of listed aircraft. Assuming that the FAA Registry continuously maintains the availability of the website and the “real time” accuracy of the posted information, owners, operators and financing parties should be able to rely on this resource to monitor the registration status of an aircraft.

### *Risks Posed by the Final Rule*

Compliance with the various requirements in the Final Rule will require that owners, financing parties, airline operators and the FAA all adapt to procedures the mechanics of which have not been tested. The Effective Date of the Final Rule is less than 90 days after its publication, and although the NPRM was published in 2008, the provisions of the Final Rule were not disclosed prior to publication. The forms, website and other procedural elements the FAA intends to have the various participants utilize and rely upon are still in development. We are unaware of any training or other guidance planned by the FAA to “rollout” the procedural aspects of the Final Rule.

Presently, it is not extraordinary for parties to have to revise or resubmit a Form 8050-1 Registration Application to correct mistakes or make a change in available information. Not having seen the proposed 8050-1A/B forms, we find it difficult to determine whether such forms are more or less likely to lead to errors than the 8050-1. Once an online registration has been submitted by an owner, a financing party will be unable to determine whether it was accurately completed. It is unclear as to whether the online tracking system would afford notice of any rejected application sufficiently in advance of the “window” being closed.

Further, there does not appear to be any protection afforded an owner (or a lienholder) in the Final Rule should the FAA Registry either reject an application in error or fail to process prior to expiration an application that was timely submitted (*i.e.*, before the window expires). Should there be a greater than anticipated volume

of paper applications, or an uneven filing volume, the FAA Registry could find it challenging to process the applications on a timely basis.

The Final Rule creates a greater probability of having aircraft with expired registrations, especially during the first few years while the participants are implementing and adjusting to the various procedures. The implications of expired registration on an aircraft are significant. Most importantly, such aircraft would be grounded until the registration is effected properly and the applicable Certificate is placed on board the aircraft. The Final Rule provides that operation by use of the “pink copy” of the registration application (which, in the context of a new registration, would provide temporary authority to operate the aircraft in the United States) would not be permissible in the context of re-registration or renewal, and therefore a U.S.-registered aircraft would need the new Certificate on board the aircraft in order to fly.

Further, financing parties have expressed concerns regarding the impact that the de-registration or expired registration of an aircraft might have on the continuing validity and priority of aircraft liens securing financing obligations, reliability of insurance policies covering casualty and liability risks and liability relating to being involved in the process (e.g., as a lessor/owner). Financing parties have also made it known to the FAA and other government agencies that the cost and burdens of establishing the processes necessary to monitor and enforce the registration process so as to avoid these risks will be substantial and were unaccounted for in the NPRM.

Parties involved in aircraft financings must be extremely diligent to be certain that each re-registration application and renewal is accurately completed and timely submitted during the filing window to ensure that the new Certificate is received before the applicable expiration date. Legal staffs, document specialists and portfolio managers must familiarize themselves with the

various aspects of the Final Rule and develop monitoring procedures, documentation and closing mechanics that promote adherence to these new requirements.

If you have any questions regarding these issues, please contact **Edward K. Gross** (202-312-3330), **Dean N. Gerber** (312-609-7638) or **Geoffrey R. Kass** (312-609-7553).

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