

Aircraft Exports from the United States following the Aircraft Guaranty Corporation Trust Indictment: Avoiding Civil, Criminal Penalties and Aircraft Seizures

By David M. Hernandez

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The criminal prosecution of the owner¹ of Aircraft Guaranty Corporation (“**AGC**”) involving, in part, the failure to export aircraft from the United States as alleged in Count Five of the federal grand jury indictment² (the “**Indictment**”) by the United States Government (the “**Government**”) is unprecedented and alarming to the international aviation community. As alleged in the Indictment, the specified defendants failed to comply with federal laws applicable to the permanent export of aircraft. As background, aircraft are deemed to be permanently exported from, if not permanently returned to, the United States within one year (12 months) after the date of export.³ What was particularly alarming to many industry participants was the Government’s position as to what circumstances require compliance with the permanent export laws, and that a trust company is responsible, as registered owner, for compliance with these export laws.

The Indictment provides that the Government charged defendants with, among other things,⁴ conspiracy to commit export violations, *and the seizure of 12 aircraft*. According to various anecdotal accounts, the investigations that led to the Indictment were among a number of investigations by various agencies of the Government regarding the customs export practices of U.S.-based trust companies serving as trustees in aircraft ownership trusts with non-United States citizen beneficiaries. These trusts are commonly referred to as “**Non-Citizen Trusts**” or “**NCTs**.” As of May 2019, there were approximately 6,800 NCTs,⁵ and, again according to anecdotal accounts, the Government may be investigating as many as 15,000 NCT aircraft for export compliance, including aircraft that have exited NCT trusts in the last five years.

If these anecdotal reports are correct, the scope of these investigations is astonishing, and as a result, is quite unsettling for industry participants, almost all of whom frequently rely on NCTs for routine business or other purposes. This article focuses on both the laws and regulations pertaining to the export of U.S.-registered aircraft that were the subject of the charges in the Indictment, as well as the implications to industry participants who have become accustomed to relying on NCTs when registering aircraft on the United States “N” registry (“**FAA Registry**”).

¹ The Indictment names nine defendants involved in a multiple allegations, and the focus of this article is limited to the aircraft export violations described in Count Five of the Indictment. We understand from various sources with first-hand knowledge that the current owner is engaged in the sale of AGC, and this article is focused solely on the events, circumstances and defendants named in the Indictment on or prior to February 24, 2021.

² See *United States of America v. Debra Lynn Mercer-Erwin, Kayleigh Moffett, Guillermo Garcia Mendez, Federico Andres Machado, Carlos Rocha Villarrutia, Alban Gerardo Azofeifa-Chacon, Aaron Bello-Millan, Michael Assad Marcos, Third Superseding Indictment*, In the United States District Court for the Eastern District of Texas, Sherman Div., Docket No. 4:20-CR-212, Feb. 24, 2021.

³ The analysis of whether an aircraft is permanently exported is fact specific and based on the intent of the parties. Factors to consider are transactions documents, state sales tax exemption affidavits, existence of hangar lease agreements, management agreements, flight history and similar related documentation.

⁴ The scope of this article is limited to an analysis of Count Five of the Indictment (18 U.S.C. § 371, Conspiracy to Commit Export Violations).

⁵ U.S. Gov’t Accountability Off., GAO-20-164, FAA NEEDS TO BETTER PREVENT, DETECT, AND RESPOND TO FRAUD AND ABUSE RISKS IN AIRCRAFT REGISTRATION, Mar. 2020 (“**GAO Report**”).

How Did This Happen?

The Government's actions are alarming because, frankly, few people properly exported aircraft from the United States, particularly aircraft that remain on the United States registry by way of NCTs. The primary reason why many aircraft owners failed to properly export aircraft is that they simply did not realize they were required to do so if the aircraft remained on the United States registry. This view is based on the misunderstanding that because no Federal Aviation Administration ("FAA") export certificate of airworthiness was required, then no customs export reporting was required.

Second, many aircraft owners (i) were unaware of the Federal Trade Regulations' ("FTR") aircraft customs exporting requirements or (ii) simply believed that the customs exporting requirements were merely an administrative task that could be ignored without any penalties. Ironically, except for the custom broker's fee, it is free to file the required export data with the United States Census Bureau ("Census").

Third, few in the aviation industry stressed compliance with the customs export requirements in aircraft transactions because they viewed the customs export as the foreign buyer's concern, and sellers often endeavored to deliver the aircraft in the United States to avoid any export reporting obligations. Finally, it is conceivable that some intentionally ignored the customs export requirements to avoid the necessary disclosures to the Government required under the applicable regulations to remain anonymous or for other reasons.⁶

Non-U.S. citizens are able to register their aircraft on the FAA Registry because FAA regulations permit trustees to facilitate such registrations, and enjoy the benefits associated with coveted "N" registration, by establishing NCTs.⁷ FAA regulations ("FARs") permit trust companies to facilitate access to the FAA Registry, and it is a profitable business. In order to establish an NCT, an aircraft owner enters into a grantor trust agreement with a trustee that is a citizen of the United States,⁸ and transfers or otherwise causes the title to the aircraft to be held by the trust, with the effect of the trustee having legal title to the aircraft, and the owner retaining only a beneficial interest. The arrangement also requires a lease agreement to enable the beneficial owner to operate or manage the availability of the aircraft. The trust agreement and lease must be filed with the FAA.⁹ The trustee registers the aircraft in its name, and the trustor and the beneficiary are frequently the same person. The FAA does not monitor, regulate or require any customs export data whatsoever, nor does the FAA perform any due diligence on the trustor. All trust companies that we are aware of perform extensive financial "know your customer" and export control due diligence (e.g., Export Administration Regulations administered by the Bureau of Industry and Security¹⁰ ("BIS") and the Office of Foreign Assets Control¹¹ ("OFAC") compliance).¹²

⁶ See GAO Report.

⁷ 14 C.F.R. Part 47.7(c) Trustees, provides: An applicant for aircraft registration under 49 U.S.C. § 44102 that holds legal title to an aircraft in trust must comply with the following requirements: (1) Each trustee must be either a U.S. citizen or a resident alien. (2) The applicant must submit with the Aircraft Registration Application: (i) A copy of each document legally affecting a relationship under the trust; (ii) If each beneficiary under the trust, including each person whose security interest in the aircraft is incorporated in the trust, is either a U.S. citizen or a resident alien, an affidavit by the applicant to that effect; and (iii) If any beneficiary under the trust, including any person whose security interest in the aircraft is incorporated in the trust, is not a U.S. citizen or resident alien, an affidavit from each trustee stating that the trustee is not aware of any reason, situation, or relationship (involving beneficiaries or other persons who are not U.S. citizens or resident aliens) as a result of which those persons together would have more than 25 percent of the aggregate power to influence or limit the exercise of the trustee's authority. (3) If persons who are neither U.S. citizens nor resident aliens have the power to direct or remove a trustee, either directly or indirectly through the control of another person, the trust instrument must provide that those persons together may not have more than 25 percent of the aggregate power to direct or remove a trustee. Nothing in this paragraph prevents those persons from having more than 25 percent of the beneficial interest in the trust.

⁸ "Citizen of the United States" means (i) an individual who is a citizen of the United States; (ii) a partnership each of whose partners is an individual who is a citizen of the United States; or (iii) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States. 49 U.S.C. § 40102(a)(15).

⁹ 14 C.F.R. Parts 47.7 and 91.23.

¹⁰ The BIS is a bureau within the U.S. Department of Commerce ("Commerce") that is concerned with the advancement of U.S. national security, foreign policy, and economic interests. The BIS is responsible for

NCTs have been under scrutiny by the Government for years because of their concerns regarding transparency and oversight, so it should not be a surprise that the customs export investigations relate to the use of NCTs.¹³ Perhaps the bigger question is: why did it take so long for the Government to enforce the customs reporting requirements in the context of NCT aircraft exports? As discussed below, the Indictment makes clear that the Government believes trustees – acting as the registered owners of the aircraft – are responsible for customs export compliance. This would constitute an unanticipated and very significant reallocation to trustees of the risks associated with the use of NCTs to achieve FAA registration for aircraft that are exported well before, concurrently with or after registration.

The Regulatory Overview

As an initial matter, Census is responsible for collecting, compiling and publishing United States export trade statistics. Prior to July 2, 2008, a paper Shipper Export Declaration filed with the Automated Export System (“AES” or “AESDirect”) was the primary method for collecting export trade data, and Census used the data for statistical purposes only. On July 2, 2008, the requirements changed, and export trade data was required to be reported online to AES via an Electronic Export Information (“EEI”) if any parts and labor valued over \$2,500 were exported. The AES enables EEIs to be filed directly with the United States Customs and Border Protection and Census. The BIS also uses EEI data for export control purposes to detect and prevent the export of certain items by unauthorized parties or to unauthorized destinations or end users. Census delegates its regulatory enforcement in this area to the BIS, *and the BIS has subpoena authority*.

The EEI filing requirement also is a national security issue because the electronic filing strengthens the Government’s ability to prevent the export of certain items by unauthorized parties to unauthorized destinations and end users. The EEI filings aid in targeting and identifying suspicious shipments prior to export, and afford the Government the ability to significantly improve the quality, timeliness and coverage of export statistics.

EEI Filing Requirements¹⁴

EEI filing requirements are extremely complex and it is wise to hire a customs broker to ensure that the EEI is filed properly. The EEI must be filed through the AES by the United States Principal Party In Interest (“USPPI”), the USPPI’s authorized agent or the authorized United States agent of the Foreign Principal Party in Interest (“FPPI”). Generally, the foreign aircraft buyer should file the EEI, and typically hires a customs broker as its authorized agent to physically file the EEI.

The principal parties in a transaction, for the purpose of these export requirements, are the parties who receive the primary benefit, monetary or otherwise. Generally, the principal parties in interest in a transaction are the seller and buyer. In the context of a transaction, the USPPI is the person or legal entity in the United States that receives the primary benefit, monetary or otherwise, from that transaction. That person or entity is generally the United States seller, manufacturer, order party or a foreign entity if in the United States at the time goods are purchased or obtained for export (i.e., the foreign buyer taking delivery).

regulating the export of sensitive goods and technologies; enforcing export control, antiboycott and public safety laws; cooperating with and assisting other countries on export control and strategic trade issues; and assisting U.S. industry to comply with international arms control agreements. See 15 C.F.R. Parts 730-780 (Export Administration Regulations).

¹¹ The OFAC is an agency within the U.S. Department of the Treasury that administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. See 31 C.F.R. Parts 501-599 (Office of Foreign Assets Control).

¹² Export controls due diligence (aka BIS and OFAC due diligence) is completely different than customs export reporting requirements, and outside the scope of this article.

¹³ U.S. Dep’t of Transp. Office of Inspector General (“**DOT OIG**”), Rep. No. AV2019052, FAA Plans to Modernize Its Outdated Civil Aviation Registry System, but Key Decisions and Challenges Remain (May 8, 2019); DOT OIG, Management Advisory on Registration of Aircraft to United States Citizen Trustees in Situations Involving Non-United States Citizen Trustors and Beneficiaries (Jan. 31, 2014); Notice of Policy Clarification for the Registration of Aircraft to United States Citizen Trustees in Situations Involving Non-United States Citizen Trustors and Beneficiaries, 78 Fed. Reg. 36412 (June 18, 2013) (“**FAA NCT Policy Clarification**”); “Under Scrutiny: The New GAO Recommendations for FAA Aircraft Registration” *American Bar Association The Air & Space Lawyer* (vol. 33, no. 2, 2020), Edward K. Gross, Erich P. Dylus and Jonathan M. Rauch, Vedder Price P.C., <https://www.vedderprice.com/edward-gross-erich-dylus-jonathan-rauch-publish-article-in-aba-the-air-and-space-lawyer>

¹⁴ See 15 C.F.R. Part 30 (Foreign Trade Regulations).

The foreign entity must be listed as the USPPI if it is in the United States when the items are purchased or obtained for export, and follow the applicable provisions for filing the EEI pertaining to the USPPI. The allegations in the Indictment make clear the Government's position that these procedures should have been followed with the vast majority of aircraft exports (i.e., the foreign buyer should have filed the EEI with the assistance of a customs broker, acting as the foreign buyer's authorized agent and power of attorney).

Specific instructions also exist for filing EEI for aircraft when sold while outside the United States. In most cases, the EEI should be filed *prior to exportation* unless the USPPI has been approved to submit export data on a post-departure basis, which we understand to be an extraordinary circumstance. Aircraft sales requiring a license or license exemption may be filed post-departure only when the appropriate licensing agency has granted the USPPI authorization.

All EEI filings must be complete, correct, and based on personal knowledge of the facts stated or on information furnished by the parties to the export transaction. The filer must be physically located in the United States at the time of filing, have a federal Employee Identification Number ("EIN") or Data Universal Numbering System number ("DUNS"), and be certified to report in the AES. If the filer does not have an EIN or DUNS, the filer must obtain an EIN from the Internal Revenue Service. Importantly, the filer is responsible for the truth, accuracy and completeness of the EEI, except insofar as that party can demonstrate that it reasonably relied on information furnished by other responsible persons participating in the transaction. As noted above, the process is very challenging for any party endeavoring to export an aircraft and the referenced requirements for an EIN, DUNS and U.S. presence are often quite problematic for non-United States parties.

Finally, parties filing an EEI must ensure that: (i) the filing contains complete and accurate information, (ii) if applicable for a customs broker, that person obtain a power of attorney or written authorization to file the EEI, (iii) the required information is filed in a timely manner in accordance with FTR, (iv) they promptly respond to fatal errors, warning, verify and reminder messages, and compliance alerts, (v) they provide the exporting carrier with the required proof of filing citations or exemption legends in accordance with the EEI requirements and (vi) they promptly file corrections or cancellations to the EEI.¹⁵

Why You Should Care – the Penalties

Failure to file an EEI or submitting false or misleading information to the AES has significant criminal and civil penalties, including aircraft seizure and forfeiture.

Criminal Penalties¹⁶

Any person, including any USPPI, authorized agent or carrier, who knowingly fails to file or knowingly submits, directly or indirectly, to the Government, false or misleading export information through the AES, or who knowingly reports, directly or indirectly, to the Government any information through or otherwise uses the AES to further any illegal activity shall, with respect to any of these violations, be subject to a fine not to exceed \$10,000 or imprisonment for not more than five years, or both, for each violation. Finally, any person who is criminally convicted, faces the risk of forfeiture of their aircraft to the Government of any or all of that person's:¹⁷

interest in, security of, claim against, or property or contractual rights of any kind in the goods or tangible items that were the subject of the violation; and

interest in, security of, claim against, or property or contractual rights of any kind in tangible property that was used in the export or attempt to export that was the subject of the violation; and

property constituting, or derived from, any proceeds obtained directly or indirectly because of this violation.

False Statements

Not surprisingly, it is a crime under 18 U.S.C. § 1001 for any person to make a false statement to a federal agent either in response to an inquiry or made voluntarily. Certain false responses to questions propounded for administrative purposes, including statements to BIS agents regarding the circumstances related to the export of an aircraft during routine inquiries, are also prosecutable, as are untruthful "no's" if a party initiates contact with the Government in order to obtain a benefit

¹⁵ 15 C.F.R. § 30.3.

¹⁶ 15 C.F.R. § 30.71 (False or fraudulent reporting on or misuse of the Automated Export System. (a) Criminal penalties.)

¹⁷ 15 C.F.R. § 30.70(a)(3) (Forfeiture Penalties).

such as facilitating an aircraft sale. Section 1001 provides as follows:

Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully:

falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

makes any materially false, fictitious, or fraudulent statement or representation; or

makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

The false statement crime is particularly problematic for aircraft owners who by innocent mistake or with the intent to deceive assert that their aircraft were never exported, even though some or the related transaction, trust, financing and state sales tax exemption documents establish that the aircraft were “exported” for the purposes of the applicable export requirements, and that the owner should have filed an EEI.

Civil Penalties¹⁸

The most common export civil violation is referred to as a “**failure to file**” an EEI, and occurs if the Government discovers that no AES record exists for an export transaction, in the form of an EEI or Internal Transaction Number (“**ITN**”). Any AES record filed later than 10 calendar days after the due date is a failure to file, and the maximum penalty is \$10,000 for a failure to file violation. A late filing violation occurs when an AES record is filed after the required period prescribed, with a maximum penalty of \$1,100 per day, up to a maximum of \$10,000 per violation. Filing false or misleading information is subject to a maximum civil penalty of \$10,000 per violation, which may be in addition to any other penalty imposed.

Except for criminal penalties, civil forfeiture penalties are the biggest concern for most aircraft owners and lessors. The Government has the authority to seize any aircraft involved in an FTR violation, and the aircraft may be subject to a forfeiture sale under the FTR.¹⁹ As the Indictment details, the Government has seized several aircraft and has the authority to seize any aircraft that has not been exported properly in accordance with the applicable regulations.

The Export-Related Indictment Allegations

The Indictment illustrates the consequences of failing to properly export an aircraft – albeit a worst-case scenario – and should be a warning to any aircraft owner who is deemed to have exported an aircraft from the United States. Suffice to say, the days of ignoring EEI filings are over. Count Five²⁰ of the Indictment focuses on AGC’s actions in its capacity as trustee and alleges a conspiracy to commit aircraft export in furtherance of a criminal act. The widespread failure to file EEIs was discovered by the Commerce’s BIS Office of Export Enforcement (“OEE”) and Homeland Security Investigations,²¹ which initiated an investigation of defendants after noticing irregularities in aircraft filings and learning that several defendant-registered aircraft were seized or destroyed by the government in which such aircraft was located because an agency of that government believed that the aircraft was involved in smuggling drugs internationally. The OEE also discovered that no EEIs were filed for many of the aircraft under investigation.

The Government alleges that AGC, as the registered owner of the aircraft upon and after entering into a trust arrangement, was responsible for complying with aircraft export reporting obligations imposed on aircraft owners, and such obligations cannot be delegated to third parties. The Government relies upon the FAA’s NCT Policy Guidance, stating as follows:

The regulatory obligations of an owner trustee with regard to an aircraft registered in the U.S. using a non-citizen trust are, and always have been, the same as the regulatory obligations of all owners of U.S. registered aircraft. The FAA Registry is an “owner” registry; it is not an “operator” registry. Once the FAA completes the registration process, the registered owner is the owner for all purposes under the regulations. The FAA has determined that there is nothing

¹⁸ 15 C.F.R. § 30.71(b) (Civil Penalties).

¹⁹ 15 C.F.R. § 71(b)(4) (Forfeiture penalties).

²⁰ 18 U.S.C. § 371 (*Conspiracy to Commit Export Violations*); with a penalty of not more than 10 years imprisonment, a fine not to exceed \$250,000, or both. A term of supervised release of not more than three years.

²¹ Homeland Security Investigations (“**HSI**”), which is a sub-component of Immigration and Customs Enforcement, is the second largest criminal investigative agency in the United States. HSI is primarily concerned with transnational criminal organizations and focuses its authorities on issues such as human smuggling, drug trafficking organizations, violent street gangs, intellectual property rights, commercial fraud, child pornography, bulk cash smuggling and counter-proliferation.

inherent in the status of a trustee owner of a U.S.-registered aircraft that would affect or limit its responsibilities for ensuring compliance with applicable laws and regulations. Thus, an owner of an aircraft on the U.S. registry cannot avoid a regulatory obligation imposed on it by the FAA simply by entering into a private contract with another party.

The aircraft is subject to United States regulations and requirements, including those issued by the Department of Commerce. The Owner Trustee promised the FAA compliance. If the aircraft is exported, then the Trustee must insure the required Electronic Export Information is filed under 15 C.F.R. §§ 30.3, 758.1(b)(5), and 758.2. AGC refused to comply, even when confronted by United States authorities.²²

However, despite the position taken by the Government in the Indictment, we understand that many in the aviation industry firmly believe that if an aircraft is exported, it is not the trustee's responsibility to insure that the required EEI is filed.

The Indictment also describes a cautionary example of a seizure and forfeiture action related to the failure to file an EEI. On October 20, 2017, a Learjet 31A aircraft was placed into an AGC trust and lease. On January 31, 2020, the beneficial owner of the aircraft was scheduled to depart Brownsville, Texas to Monterrey, Mexico. The beneficial owner's pilots allegedly failed to provide CBP Automated Passenger Information System filings for each passenger at least one hour before departure, and the aircraft was seized.²³ Upon discovering that the aircraft has been outside of the United States for three years without any EEI filing, the Government is now pursuing a forfeiture action against the aircraft.

Ramifications for the Aviation Industry

The Indictment has fundamentally altered the risk dynamic for trust companies, the likely result of which includes, among other things, increased regulatory compliance costs, enhanced indemnifications in favor of the trustees, and a comprehensive re-evaluation of the entire NCT business model. We understand based on conversations with various Government representatives involved in the AGC matter, many in the Government view NCTs as merely selling access to the coveted FAA Registry with very little oversight or transparency. It is doubtful that the FAA has the resources or authority to conduct any meaningful safety oversight or surveillance of the thousands of United States registered aircraft based outside of the United States. It is possible that there are many aircraft being leased or subleased without the required notice to the FAA, and without the trustee's knowledge.

A recent example of a tragic circumstance exists relating to an NCT-registered aircraft being operated primarily outside of the United States, which resulted in renewed scrutiny of the use of NCTs. On January 21, 2019, a Piper Malibu (N264DB) – operated by a pilot not licensed to operate the flight – crashed in the English Channel resulting in the tragic death of Argentine football player Emiliano Sala.²⁴ That aircraft was registered to the Southern Aircraft Consultancy, a United States trustee, ironically, based in Bungay, Suffolk, United Kingdom.²⁵ FAA regulations permit a United States trustee to be based anywhere the world.²⁶

FAR 91.23 requires the registered owner, including an owner trustee, to comply with all of the applicable truth-in-leasing requirements.²⁷ Pursuant to these requirements, parties to a lease or contract of conditional sale involving a U.S.-registered large civil aircraft must: execute a written lease or conditional sale contract which includes a truth-in-leasing clause and file it with the FAA; notify the FAA of the first flight under the lease or conditional sale contract, to enable the FAA to perform a ramp check; and keep a copy of the lease on the aircraft at all times.²⁸ By way of example of the risk of non-compliance, consider the prosecution of an aircraft charter company in 2018 relating to

²² Indictment at 2-3, paragraph 3 (internal citations and quotes omitted; emphasis added).

²³ Indictment at paragraph 28.

²⁴ See <https://www.bbc.com/news/uk-wales-51870306> *Emiliano Sala crash: Pilot Ibbotson "not licensed for flight"* BBC News, March 13, 2020, retrieved Apr. 4, 2021; <https://www.gov.uk/government/news/aaib-investigation-into-the-loss-of-aircraft-n264db>, *United Kingdom Air Accidents Investigation Branch AAIB Bulletin S2/2019*, Aug. 14 2019.

²⁵ See <https://www.southernaircraft.co.uk/>; https://registry.faa.gov/aircraftinquiry/Search/NNumberResult_ retrieved Apr. 4, 2021.

²⁶ 14 C.F.R. § 47.7(c).

²⁷ 14 C.F.R. § 91.23(c).

²⁸ See 14 C.F.R. § 91.23.

such a violation, and that its owner pled guilty to failing to report a lease to the FAA.²⁹ As it was in that case, it seems unlikely that either a sublessor in Europe or Asia or the registered owner of an aircraft would even consider filing a first flight notice with the local FAA Flight Standard District Office. Consequences for failing to file are also unlikely to motivate a person to comply because it is virtually impossible for the FAA to ramp check the aircraft in Europe or Asia with 48 hours' notice of the first flight under the lease.

Significant risk and default concerns exist for parties with an interest in an aircraft facing Government seizure for failing to file an EEI. Among other things, aircraft that were not properly exported are subject to seizure, and such circumstances likely presents a very serious coverage problem for insurers, and may trigger policy cancellations. Lessors and lenders should also determine whether, with respect to any FAA-registered aircraft leased to or securing the repayment of a loan to a customer are being operated primarily outside of the United States, were properly exported and if not, immediately assess the potential risks.

Government concerns regarding and scrutiny of NCTs are not new; the OEE enforcement and subpoenas are the new development, and the aviation community is now taking this seriously to avoid being the owner of the next aircraft seized. It is unclear whether the Government realizes the tsunami it has caused throughout the industry or the potential ramifications. With each subpoena issued by the OEE, the Government is becoming more aware of the scope of the problem of widespread failure to file EEIs. Given that the requirement to file an EEI is based on United States national security interests, it is very doubtful that the Government will change its position regarding a trustee's responsibility to file the EEI merely because of the challenges associated with filing, or because the trustee contractually shifts EEI filing responsibility to the beneficial owner.

As is evident in the Indictment, the Government's position is that the registered owner of the United States-registered aircraft is responsible for filing the EEI. However, the FTR are ambiguous regarding whether a trust company is actually the party responsible to file the EEI. As a result, the ramifications for trusts, lessors, banks, financial institutions, foreign buyers, United States sellers and customs brokers are potentially enormous. All aircraft transactions will have to address which party is responsible for customs export compliance and an EEI ITN will become an industry standard requirement.

A common industry joke was that it was easier to find a leprechaun with a pot of gold than an aircraft customs broker, because the services of a customs broker were rarely required. Aircraft customs brokers will likely be a growth industry going forward. It is also unclear how trust companies that offer NCTs will survive without additional oversight and increased transparency. The beneficial owner's strong desire for privacy must be weighed against the Government's legitimate national security interests and the need for transparency.

At a minimum, the aviation industry must start mandating compliance with the requirement to file an EEI. Any such filing, if applicable, must be an aircraft transaction closing checklist item going forward. Most importantly, the parties to any related transactions, especially lessors and lenders, must monitor and enforce compliance with these requirements. But lenders, lessors and other transaction parties must be aware of the implications of the Government's investigations and position regarding export compliance on a going forward basis, but they should also be aware that there could be implications regarding aircraft in their portfolio which were previously held in trust and permanently exported in violation of the referenced export laws. In that regard, it is prudent that they seek advice of counsel regarding what might be a prudent course of action, including due diligence and any follow-up should they identify any potential non-compliance.

As is the case with most significant regulatory events, the industry will figure out how to file an EEI and will be better after the dust settles, but until then we will persevere, comply with the regulatory requirements and resolve the issues in accordance with the applicable law. Good luck all!

Vedder Price has created a Task Force to assist clients with the consequences associated with the AGC Indictment. Please contact **David M. Hernandez**, Shareholder, Vedder Price P.C. with any questions or comments, at dhernandez@vedderprice.com, +1 (202) 312-3340 or +1 (202) 403-1678. David M. Hernandez is a Shareholder at Vedder Price P.C. Mr. Hernandez has considerable experience assisting clients with aircraft transactions, operational issues, financing, leasing and regulatory matters, complex government investigations and enforcement matters. Mr. Hernandez, a graduate of Northwestern University School of Law, was an FAA prosecutor and a DOT Honors' Program Attorney. He also served in the Office of the Counsel to the President during the Clinton Administration, and was a Captain in the U.S. Air Force after graduating from the United States Air Force Academy (Class of 1988).

For Task Force Inquiries:

²⁹ <https://www.justice.gov/usao-wdok/pr/charter-aircraft-company-and-its-owner-plead-guilty-failing-report-leases-faa>.

David M. Hernandez
Shareholder
Vedder Price P.C.
M: +1 (202) 403-1678
T: +1 (202) 312-3340
dhernandez@vedderprice.com

vedderprice.com