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FEDERAL EXCISE TAXES GUIDE

Details on Air Transportation and Fuel Taxes

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Nov. 18, 2020

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This NBAA publication is intended to provide members with an introduction to the rules that relate to the topic of federal excise taxes on air transportation and fuel. Readers are cautioned that this publication is not intended to provide more than an illustrative introduction to the subject matter, and since the materials are necessarily general in nature, they are not substitute for the advice of legal and tax advisors addressing a specific set of facts that readers may face. Additionally, this version of the guide is dated Dec. 27, 2019, and does not incorporate any statutes, regulations or guidance released after that date.

Overview

This NBAA guide covering federal excise taxes (FET) imposed on air transportation and fuel is intended to provide business aircraft owners, flight departments and charter operators with a basic understanding of the federal excise taxes that apply to business aircraft activity. NBAA encourages aircraft owners and operators to consult their aviation tax advisors for detailed advice concerning excise tax issues.

Background

All business aircraft operators, private and commercial, pay FET on the transportation of persons or property by air. FET can be a percentage tax on the amounts paid for air transportation, a fuel tax, or a combination of both.

Charter transportation, operated under Federal Aviation Regulation (FAR) Part 135, private carriage under FAR Part 125 and airline operations under FAR Part 121 are generally subject to FET on air transportation and fuel. Non-commercial aircraft operations (FAR Part 91) are generally only subject to FET on fuel. However, certain Part 91 flight operations can also be subject to FET on air transportation.

Under the FAA Reauthorization Act of 2018, the current funding structure for the air transportation system in the United States will be maintained through 2023. NBAA strongly believes this structure is the most efficient and equitable funding system and will continue efforts to oppose per-flight user fees as an alternate funding mechanism.

Air Transportation Excise Tax on Persons

FET on air transportation of persons (called a “ticket tax” in the airline industry), is a tax that applies to each person on each flight. FET on air transportation includes (i) a percentage tax on domestic transportation and a domestic segment fee, or (ii) the international facilities fee (called a “head tax”).

AIR TRANSPORTATION

FET on air transportation of persons applies to Part 121 (airline) and Part 135 (charter) flights and generally does not

apply to Part 91 (private) flights. However, the FAA status of aircraft operations does not control the application of FET on air transportation by the Internal Revenue Service (IRS). IRS Revenue Ruling 78-75 states that “the status of an aircraft operator as a commercial operator under FAA regulations is not determinative in applying the aviation fuel and transportation taxes.” As described in detail below, FET on air transportation law treats certain Part 91 operations as commercial transportation and exempts certain Part 135 operations from FET on air transportation.

THE PERCENTAGE TAX ON DOMESTIC TRAVEL

FET on air transportation of persons is 7.5 percent of the “amount paid” for air transportation that (i) begins and ends in the United States or the “225-mile zone” (as defined below) and (ii) is directly or indirectly between two points in the United States, but only if the portion is not a part of uninterrupted international air transportation.

If the passenger makes payment for the trip outside of the United States, FET on air transportation will only apply to that portion of the trip that begins and ends in the United States.

Amount Paid

Generally, the amount paid for air transportation that is subject to FET includes only payments (made in cash or property) for air transportation services. The amount paid for air transportation services includes all costs, including other taxes, incurred to provide air transportation, including flight time expenses, such as deadhead/ repositioning time, wait charges, landing fees, local taxes, crew expenses and any other expense incurred in the movement of the aircraft. However, the amount paid for air transportation services does not include separately stated charges for “non-transportation items” such as catering and passenger ground transportation.

FET applies to the transportation of a “person,” which can include persons or individuals traveling on behalf of a corporation or partnership. However, in practice, FET applies to the transportation of an individual. Thus, where a single payment is made for the transportation of two or more individuals, the taxability of the payment and the amount of FET, if any, payable with respect to the air transportation is determined by allocating the total payment among each individual transported.

The 225-Mile Zone

FET on air transportation of persons applies to a flight that begins or ends in the 225-mile zone. The 225-mile zone is that portion of Canada and Mexico that is not more than 225 miles from the nearest point in the continental United States. Locations not in Canada or Mexico, such as Nassau, Bahamas, are not part of the 225-mile zone. The 225-mile zone can be visualized as an area that is 225 miles above the United States border in Canada or 225 miles below the United States border in Mexico. For example, Vancouver and Toronto, Canada and Monterrey, Mexico are in the

225-mile zone. However, Edmonton, Canada and Mexico City, Mexico are not in the 225-mile zone.

Uninterrupted International Air Transportation

FET on air transportation of persons does not apply to uninterrupted international air transportation. Transportation is uninterrupted international air transportation if there is not more than a 12-hour scheduled interval between arrival and departure at any point in the United States.

For example, a flight originating inside the United States that makes an interim stop to refuel and is on the ground for less than 12 hours with no passengers disembarking, before continuing on to its final destination outside the United States, would meet the definition of uninterrupted international air transportation.

Exclusion from FET for Portion of Air Transportation Outside U.S.

Where a flight exits the United States or the 225-mile zone and returns to the United States or the 225-mile zone, then that portion of the transportation over international waters or international land is nontaxable. A flight leaves or enters the United States when the flight passes over either the United States border (into Canada or Mexico) or a point three (3) nautical miles (3.45 statute miles) from low tide on the coastline.

Alaska and Hawaii

Transportation between the continental United States or the 225-mile zone and Alaska or Hawaii is partially exempt from FET on air transportation since there is a point where the flight will be outside of the United States or the 225-mile zone and over international waters or international land. For example, if a flight is from the continental United States to Alaska, and there are no stops within the 225-mile zone, then the FET exclusion will apply from the point where the flight leaves the United States to the point where the flight enters Alaska. If a stop is made within the 225-mile zone, then the FET exclusion will apply from the point of the last stop in the 225-mile zone to the point where the flight enters Alaska.

For air transportation between airports within Alaska or Hawaii, the regular percentage tax and domestic segment fee apply.

DOMESTIC SEGMENT FEE

In addition to the percentage tax on air transportation of persons, there is also a domestic segment fee. The domestic segment fee is a per passenger tax that applies to the domestic segments of a trip (including point to point flights within Alaska and Hawaii). A domestic segment is the portion of a trip involving a single takeoff and landing in the United States. For 2021, the domestic segment tax is \$4.30 per segment (see Appendix A for table of rates).

Domestic segments added to a flight due to mechanical problems, weather, or other conditions that are out of the passenger's control do not create additional domestic segment fees as long as there is no change to the flight's origin

and destination or the original amount charged to the passenger. However, operational necessities, such as fuel stops, do not qualify as a condition out of the passenger's control.

A flight can be subject to the domestic segment fee even when a portion of the route of flight temporarily leaves the United States.

The Rural Airports Exception

The domestic segment fee does not apply if the segment is to or from a rural airport. A rural airport is an airport that, during any calendar year, has less than 100,000 passengers departing on commercial flights. The rural airport must not be located within 75 miles of an airport that has 100,000 or more departing passengers or is receiving essential air service subsidies as of the date of enactment. Beginning in 2005, rural airports also include airports that are not connected by paved roads and had fewer than 100,000 commercial air passengers on flight segments of at least 100 miles during the second preceding calendar year. An updated listing of rural airports from the United States Department of Transportation is available on the NBAA website.

HEAD TAX ON INTERNATIONAL TRANSPORTATION

International transportation is subject to a per passenger head tax that applies to flights that either begin or end in the United States. For 2021, the head tax on international transportation is \$19.10 per passenger arrival or departure. For flights beginning or ending in Alaska or Hawaii, the head tax rate is \$9.60 and applies only to departures.

The head tax on international transportation does not apply to any flight that is entirely subject to the percentage tax on domestic transportation.

POSSESSION, COMMAND AND CONTROL

The amounts paid for a flight are subject to FET on air transportation when the flight is treated as "taxable air transportation." The IRS treats a flight as taxable air transportation based upon who has possession, command and control (PCC) over the aircraft.

The IRS does not use the FAA's "operational control" test or rely upon FAR Part 91 or 135 distinctions to determine if taxable transportation is being provided.

When determining which person has PCC, the IRS typically considers a number of factors, including who (1) owns the aircraft, (2) provides and pays the flight crew, (3) oversees and provides aircraft maintenance, (4) controls aircraft scheduling, (5) maintains liability and risk insurance, and (6) pays aircraft-related expenses.

In some rulings, the IRS equates operational control as defined by the FAA with PCC. However, in a few instances, most notably involving fractional aircraft programs and management arrangements for Part 91 operations, the person with operational control as defined by the FAA over

the aircraft may not have PCC over the aircraft for FET on air transportation.

Dry Leases and Wet Leases

The IRS and FAA treat dry and wet aircraft leases similarly. According to the IRS, a “dry lease” (lease of aircraft without crew) generally does not involve air transportation. However, according to the IRS, a “wet lease” (lease of an aircraft with crew) generally involves air transportation since the lessor has PCC of the aircraft.

Many FAR 91.501 cost-reimbursable flights also meet the definition of a wet lease and amounts paid under these arrangements can be subject FET. This includes demonstration, timeshare and interchange flights. With interchange agreements, the FET on air transportation is computed on the fair market value of the hourly flight time for each aircraft used in the interchange agreement, even if no compensation changes hands. However, as discussed in section 3(j) of this document, FET on air transportation does not apply to certain related company or affiliated group flights.

PCC for Single Member Limited Liability Companies and Qualified Subchapter S Subsidiaries

Under current IRS regulations, a single member limited liability company (SMLLC) or a Qualified Subchapter S Subsidiary (QSSS) is considered a separate entity for FET purposes; therefore a SMLLC or a QSSS can have PCC over an aircraft for FET purposes and is not treated as a disregarded entity as it is for Federal income tax purposes.

Joint Ownership

The IRS has ruled that flights by a joint owner of an aircraft, who owns an undivided interest in an aircraft, are not subject to FET on air transportation because where the joint owner retains PCC of the aircraft for its individual flights.

Aircraft Service and Pilot Service Agreements

Whether FET applies to aircraft and pilot service agreements is a complicated matter. Ordinarily, the aircraft owner does not relinquish PCC when the owner merely hires a service company to provide certain administrative and support services. However, the IRS has significant interest in the relationships between aircraft management/service companies and aircraft owners and lessees.

Since the release of Chief Counsel Advice Memorandum (CCA 2012-10026) and the 2008 Air Transportation Excise Tax Audit Technique Guide (neither can be used or cited as precedent), the IRS has become more aggressive in audits of aircraft management/service companies and charter operations. In particular, auditors have begun assessing FET on a wide variety of non-commercial flight operations, including operations conducted by aircraft owners under Part 91 where the aircraft is managed by an outside aircraft management/service company.

The position taken by the IRS in CCA 2012-10026 attempts to greatly expand the definition and scope of taxable air

transportation provided by aircraft management/service companies to aircraft owners. While the CCA cannot be cited as precedent, it does represent the opinion of the current IRS Chief Counsel and is used as a reference by IRS auditors. The position of the Chief Counsel as articulated in the CCA appears to redefine the PCC test. Certain management services provided to the aircraft owner may cause the IRS to determine that PCC has been transferred from the aircraft owner to the management/service company resulting in FET even when the owner uses its own aircraft under Part 91. Even before the CCA was issued, there were isolated instances where the IRS ruled that the owner relinquished PCC of its aircraft. However, these rulings were limited to situations where the owner allowed the management/service company to use the aircraft in a charter business and the owner relinquished the primary right to schedule aircraft use.

As part of the Tax Cuts and Jobs Act, passed into law in December 2017, the Internal Revenue Code was amended to make clear that owner flights on managed aircraft are not subject to the 7.5 percent ticket tax. This significant change clarifies the law and eliminates much of the confusion caused by the CCA.

This FET exception applies to payments by the aircraft owner (or lessee) for aircraft management services related to maintenance, support or flights on the aircraft. The exception does not actually require that the owner be on the flight or that the flight be on the business of the owner, but only that the owner (or lessee) pay for the aircraft management services.

NBAA is currently working with the IRS and Treasury Department to seek published guidance on the law change that addresses its application to common aircraft management structures.

FRACTIONAL AIRCRAFT OWNERSHIP PROGRAMS

Beginning in April 2012, fractional aircraft ownership program operations (under FAR 91, Subpart K) are exempt from FET on air transportation of persons and property, when the “fractional fuel tax” applies. This exemption expires after Sep. 30, 2023, unless renewed by Congress.

Upon expiration of the fractional fuel tax, FET on aircraft fractional program operations will be determined by looking to the person that has PCC over the aircraft. In CCA 2011-41018, the IRS took the position that a fractional aircraft program participant relinquished PCC of the aircraft to the fractional provider and both the monthly management fees and the occupied hourly fees were considered amounts paid for taxable transportation and, therefore, subject to FET on air transportation. In *Executive Jet Aviation Inc. v. U.S.*, 125 F3d 1463 (1997), the U.S. Court of Appeals (Federal Circuit) held that a fractional aircraft program was commercial transportation subject to FET on air transportation. However, the court held that FET applied only to the occupied

hourly fees that the fractional provider received from customers. Fractional providers and the IRS are currently engaged in litigation regarding possible past FET liabilities.

CARRIAGE OF ELECTED OFFICIALS

An aircraft operator who provides transportation to an elected official in compliance with the FARs is generally providing air transportation subject to FET because the operator retains PCC of the aircraft. Therefore, the operator must collect and apply the FET on air transportation to amounts paid by the elected official.

CHARTER BROKER OBLIGATIONS FOR AIR TRANSPORTATION EXCISE TAXES

Aircraft charter brokers acting as “agents” for aircraft charter operators are required to collect and remit FET on air transportation to the charter operator, and the charter operator is required to file IRS returns and remit the FET to the IRS. By contrast, independent charter brokers acting as principals are required to collect and remit FET on air transportation directly to the IRS. In this situation, the regulations require that the charter operator notify the charter broker of its FET obligation.

Where a charter broker is an independent, third-party intermediary unrelated to the charter operator, and the charter broker is itself not operating or chartering aircraft but merely acting as a conduit and simply facilitating the purchase of taxable transportation from a charter company, the charter company, and, not the intermediary charter broker, is responsible for collecting FET.

REIMBURSEMENT UNDER SCHWAB RE-INTERPRETATION

An aircraft operator who provides transportation to an applicable corporate executive when such executive reimburses the company under the FAA’s Schwab re-interpretation (also known as the Nichols interpretation) is generally providing air transportation subject to FET because the aircraft operator retains PCC of the aircraft. Visit www.nbaa.org/admin/taxes/personal-use/ to learn more about this issue.

EXCLUSIONS AND EXEMPTIONS FROM FET ON AIR TRANSPORTATION

Non-Transportation Services

Payments for certain items not related to aircraft movement may be exempt from FET on air transportation so long as such items are separately stated on the air carrier’s customer invoice. For example, payments for items such as catering expenses, passenger ground transportation, and aircraft broker commissions are not subject to FET if the amounts are separately stated on the invoice.

Small Aircraft Exemption

FET on air transportation does not apply to transportation by non-turbojet aircraft having a “maximum certificated

takeoff weight” of 6,000 pounds or less, except when such aircraft is operated on an “established line”. The term maximum certificated takeoff weight means the maximum weight contained in the type certificate or airworthiness certificate.

According to the IRS, an aircraft is operated on an established line when the aircraft operates with some degree of regularity between definite points.

Affiliated Group Exemption

FET on air transportation does not apply where one member of an “affiliated group” provides transportation to another member of the group, as long as the aircraft is not available for hire by persons who are not members of such group. The determination of whether an aircraft is available for hire by persons who are not members of an affiliated group is made on a flight-by-flight basis.

An affiliated group for this purpose is generally the same as a consolidated group for income tax purposes. A consolidated group includes the parent corporation and all subsidiary corporations in which the parent corporation owns at least 80 percent of the voting power and value of stock (other than preferred stock). An affiliated group for purposes of FET on air transportation includes all corporations including certain corporations that would not otherwise be in the consolidated group such as tax-exempt corporations, insurance corporations, foreign corporations, possession tax corporations, regulated investment companies, real estate investment trusts or former DISCs.

Ordinarily, a SMLLC or a QSSS are disregarded for federal tax purposes. However, recent changes to the Treasury Regulations provide that, for purposes of FET, a SMLLC and a QSSS are separate corporations. Therefore, a SMLLC could be eligible for the affiliated group exemption. Operators should consult their tax advisor for further information regarding this issue.

Other Exclusions and Exemptions

FET on air transportation does not apply to skydiving operations, sightseeing flights, forestry and logging flights, and landings on water. However, these exemptions usually apply to very specific factual situations. For a discussion on emergency medical flights and certain helicopter operations, see the section below on operations exempt from FET.

Air Transportation Excise Tax on Property

FET on air transportation of property applies on a property-by-property and flight-by-flight basis. For 2021, the tax rate is 6.25 percent of the amount paid. In most cases, all of the property on a flight will be subject to the same tax. However, the FET consequences may vary depending on specific factors such as the amount paid and whether the flight is part of an international trip.

TAXABLE TRANSPORTATION

FET on air transportation of property applies to the amounts paid for transportation of property that both begins and ends in the United States, as long as the transporter is a person “engaged in the business of transporting property by air for hire.”

ACCESSORIAL SERVICES

Charges for accessorial services for transported property provided by the air carrier (either directly or through an independent contractor) are subject to FET if (i) such services can be provided only by the air carrier directly or indirectly and (ii) the charge for the service is applicable to all those using it. The amount paid does not include separately stated charges for services that can be performed by a person other than the air carrier. For example, terminal handling and shipment packing accessorial services performed by the air carrier are services that can be performed by a party other than the air carrier. By contrast, “stopping in transit” accessorial service is a service that can be provided only by the carrier rendering the transportation service.

EXCLUSIONS AND EXEMPTIONS

FET on air transportation of property does not apply to: (i) transportation of property that either begins or ends outside of the United States, (ii) the domestic portion of an international cargo flight and (iii) transportation of property in the course of exportation (including shipment to a possession of the United States) by continuous movement, as evidenced by the execution of IRS Form 1363.

As in the case of FET on transportation of persons, where a flight leaves the United States or the 225-mile zone and returns to the United States or the 225-mile zone, then that portion of the transportation of property outside of the United States is nontaxable, as long as some portion of the flight is not within 225 miles of the United States.

The small aircraft and affiliated group exemptions from FET on air transportation also apply to transportation of property.

FET on Fuel

FET on fuel is charged per gallon of fuel purchased. In general, FET on fuel applies to both commercial and non-commercial air transportation, but at different rates.

RATE OF TAX

The FET on fuel rate is different for aviation gasoline (avgas) and jet fuel. For 2021, the FET rate on avgas is 19.4 cents per gallon, and the FET rate on jet fuel is 21.9 cents per gallon, when used in non-commercial operations. The FET rate on avgas or jet fuel used in commercial operations is 4.4 cents per gallon. Jet fuel delivered to an airport by truck will be taxed at 24.4 cents per gallon as diesel fuel.

In many cases, commercial operators will purchase fuel taxed at the 24.4-cents rate and will need to apply for a refund.

FRACTIONAL AIRCRAFT PROGRAM FUEL SURTAX

Aircraft operating in a fractional aircraft program are subject to 14.1 cents per gallon surtax on fuel considered used for transportation of a qualified fractional owner or on account of such owner.

EXCLUSIONS AND EXEMPTIONS

In general, only a partial fuel tax applies to air transportation that is subject to FET on air transportation of persons or property. Air transportation does not include transportation that is exempt from the transportation tax under the small aircraft exemption, the affiliated group exemption, sightseeing exemption or the skydiving exemption.

Avgas and jet fuel used in the following operations are exempt from FET on fuel:

Foreign Trade Operations

The term “used in foreign trade” means an aircraft that flies a person for hire between the United States and a foreign country.

Non-profit Educational Organization Operations

A nonprofit educational organization is an organization exempt from income tax under Section 501(a) of the Internal Revenue Code that meets both of the following tests: (i) has a regular faculty and curriculum, (ii) has a regular enrolled body of students who attend the place where the instruction normally occurs, and (iii) is a 501(c)(3) organization.

Aircraft Museum Operations

An aircraft museum must be: (i) Tax-exempt organization under 501(c)(3), (ii) Operated as a museum under a state charter, and (iii) Operated exclusively for acquiring, exhibiting and caring for aircraft of the type used for combat or transport in World War II.

State/Local Government Operations

State or local government refers to any state, any political subdivision thereof, or the District of Columbia.

United States Military Operations

A military aircraft is an aircraft owned by the United States or any foreign nation and constituting a part of its armed forces.

Air Transportation Operations Exempt From FET (Both Air Transportation and Fuel Taxes)

Certain aircraft operations are exempt from FET on both air transportation and fuel.

EMERGENCY MEDICAL SERVICES

The taxes do not apply to air transportation for emergency medical services: (i) by helicopter or (ii) by a fixed-wing aircraft equipped for and exclusively dedicated on that flight to acute care emergency medical services.

CERTAIN USES

The taxes do not apply to the following operations: (i) helicopter transportation of individuals, equipment, or supplies in the exploration for, or the development or removal of, hard minerals, oil, or gas or (ii) helicopter or fixed-wing aircraft transportation for the purposes of planting, cultivation, cutting, or transportation of, or caring for, trees (including logging operations).

The above exemptions only apply if the helicopter or fixed-wing aircraft do not take off from, or land at, a facility eligible for assistance under the Airport and Airway Development Act of 1970 or otherwise use Federal aviation services.

FET CREDITS AND REFUNDS FOR AIR TRANSPORTATION OF PERSONS AND PROPERTY

If the provider of air transportation to persons or property collects and remits FET in error, the provider may claim a credit or refund from the IRS if it has repaid the FET to the passenger/customer or obtained the consent of the passenger/customer to claim the tax credit or refund. Alternatively, the passenger/customer may directly claim a tax refund.

FUEL

For most fuel tax credits, the ultimate purchaser of fuel may claim a tax credit or refund on fuel used in a nontaxable use.

IRS Publication 510 discusses use of fuel giving rise to tax credits. IRS claim forms require the identification of the nontaxable fuel according to the "Type of Use" number found in the 'Definitions of Nontaxable Uses' in Publication 510 or the 'Type of Use' table in the instructions to Form 720 or Form 4136.

An aircraft used for charter flights will generally be eligible for a refund of the FET on fuel for fuel used in charter flights, less the 4.4 cents per gallon tax for commercial operations.

The credit for "Nonexempt Use in Non-commercial Aviation" may only be claimed by the ultimate vendor of the fuel. A seller registered with the IRS may claim a credit for the 2.5 cents per gallon tax (difference between the 24.4 cents and 21.9 cents rates) refunded to purchasers by providing a certificate of nonexempt use in non-commercial aviation (Model Certificate Q). There is no requirement that vendors register and therefore no requirement for the vendor to pass through the credit to purchasers.

Claims may be filed on Schedule C of Form 720 for each calendar quarter. Amounts not claimed on Form 720 may be claimed on Form 8849 if over \$750.00 for one or more quarters of a taxpayer's year. Any amounts not claimed on Form 720 or Form 8849 may be included with Form 4136 filed with an income tax return.

FET Collection and Liability

TRANSPORTATION OF PERSONS AND PROPERTY

Generally, the air transportation provider will collect FET from the passenger/customer and remit that tax to the government on a semi-monthly basis. The provider will report the collections and payments on a quarterly IRS Form 720.

If the FET is not paid, the passenger/customer is primarily liable for the unpaid FET. The provider is secondarily liable. This means that, if the passenger does not pay the FET, the IRS can force the transportation provider to remit FET to the IRS and seek reimbursement from the passenger.

This secondary liability gives the transportation provider an incentive to collect FET from the passenger/customer. A provider who takes an aggressive interpretation of the law and does not collect enough FET from the passenger/customer runs the risk of being financially responsible for the unpaid FET.

FUEL TAX

Generally, the fuel importer pays the FET on fuel when the fuel enters the United States and the fuel producer remits the tax upon removal from the terminal bulk system. Airlines are allowed to self-assess tax on fuel delivered directly into aircraft via airport hydrant systems. In most cases, business aircraft do not receive fuel directly from the airport hydrant system meaning that the fuel producer remits the tax.

This means that in the majority of cases, all jet fuel used in business aircraft operations is taxed at the 24.4 cents per gallon rate.

Recordkeeping

Maintaining well organized and contemporaneous records is critical in managing FET payments, refunds and preparing for potential audits. For example, operators should maintain flight logs and other documents used to define a flight as commercial or non-commercial. In addition, keeping records of all IRS forms and backup materials submitted for payment or refund of FET is critical.

Aircraft management/services companies and owners using these companies should keep records of all agreements between the parties and consult an experienced aviation attorney or advisor when developing these agreements.

Finally, charter operators that work with air charter brokers should keep detailed records about brokered flights to make sure that all FET is properly collected and remitted.

Generally, the IRS has the right to audit returns filed within the last three years. Additional years can be added if a substantial error is identified. However, if a substantial error is identified, the IRS will not go back more than the last six years.

Penalties and Interest

The IRS can impose penalties and interest for a variety of acts such as failing to pay and collect FET, filing returns late, failing to make deposits and making false statements related to taxes. There are criminal penalties for false or fraudulent refund claims and any person that files an excessive refund claim may be subject to penalties. Operators that are required to remit FET on behalf of customers/passengers and willfully evade the tax can be subject to a trust fund recovery penalty. The penalty equals 100 percent of the taxes not collected or remitted to the IRS.

The trust fund recovery penalty can be imposed on any person responsible for collecting or remitting FET. For example, paying other business expenses instead of paying the required FET would be construed as willful behavior and potentially be subject to the trust fund recovery penalty.

IRS Audits of FET

The IRS has recently increased its audit focus on FET related matters. Such audits generally involve complex legal and procedural issues and operators who are faced with such an audit are advised to seek advice from a tax professional knowledgeable in such matters.

An FET audit begins with the IRS contacting the taxpayer by letter setting an audit date and time at taxpayer's location. The IRS will also provide the taxpayer with an Information Document Request (IDR) with a list of records requested. Taxpayers should not ordinarily provide the IRS with any more documents than requested. In the initial contact, if the taxpayer is not represented by a tax professional, the taxpayer should answer the IRS's questions, but not elaborate. The IRS should be provided a work location and allowed time to go through the records provided. If the IRS requests additional records, they should be provided, but only those requested. When the agent completes the audit, the taxpayer will be provided with the audit findings.

The taxpayer has no obligation to agree or disagree with the IRS agent's conclusion. The taxpayer can ask questions as to how the IRS agent reached certain conclusions, but it is not advisable for the taxpayer to express its opinion at this point. The taxpayer should take time to digest the written and verbal information provided and determine if there is other information that will refute the IRS position taken. The agent should base his or her conclusion on the same law, regulations and rulings that that taxpayer uses, but the interpretation may be different.

If the taxpayer does not agree with the agent's conclusions, the taxpayer has the right to discuss the audit with the agent's supervisor. If there is disagreement regarding the agent's application of the law, Technical Advice from the IRS Chief Counsel can be sought. If the IRS agent makes the request, there is no cost and the Chief Counsel will

rule on the facts and circumstances presented. The IRS agent is required to get the taxpayer's approval of the facts being presented before they are sent to Chief Counsel. If the taxpayer disagrees with the facts as presented, the taxpayer can write its own narrative regarding any disagreement. If the Chief Counsel proposes to rule in favor of the IRS agent, the taxpayer has the right to make an in-person presentation to Chief Counsel. The ruling by Chief Counsel will not generally be overruled by the IRS Appeals Division. Thereafter, a taxpayer's recourse in the event of a disagreement is to go to court.

If Technical Advice from Chief Counsel is not sought, the taxpayer can appeal the agent's proposed tax assessment to the IRS Appeals Division, which is an independent department within the IRS. The taxpayer can argue its position to an Appeals Officer and if the ruling goes against the taxpayer it can be appealed in court.

Interest on the unpaid tax and any proposed penalties continue to accrue during any periods of delay before payment.

IRS Forms

FORM 720 – QUARTERLY FEDERAL EXCISE TAX RETURN

All persons collecting FET on behalf of the Federal government must file IRS Form 720 on a quarterly basis and depending on the amounts involved make deposits as often as semi-monthly. For further guidance, see Appendix B.

If the purchaser files a Form 720, the purchaser may claim a credit against the tax on Schedule C of the Form 720. A purchaser can claim a refund for any quarter of its income tax year, as long as the purchaser files the Form 720 on time.

The Form 720 statute expires three years after the original due date of the tax return, generally the last day of the month following the calendar quarter of the return, or the date actually filed if later. Form 720X may be filed within three years of the due date, or date filed, to increase or decrease tax liability, but not to change credits on Schedule C. Changes in credit may be reported on Form 4136.

Form 720X may be filed within two years of the payment of tax to recover excess tax paid due to audit or filing Form 720X.

FORM 8849 – CLAIM FOR REFUND OF EXCISE TAXES

Form 8849 enables a taxpayer to file FET refund claims on a quarterly basis in lieu of the annual Form 4136. For further guidance, see Appendix E.

The purchaser of fuel may make the claim for refund on Form 8849, "Claim for Refund of Excise Taxes, Schedule 1, Nontaxable Uses," and generally must make the claim by the last day of the quarter following the last quarter included in the claim. The amount of the claim must be more than \$750.

Form 8849 cannot be filed for a period of more than one tax year and must be filed by the end of the quarter following the end of the taxpayer's year.

FORM 4136 – CREDIT FOR FEDERAL TAX PAID ON FUELS

The purpose of Form 4136 is to claim a credit for the FET paid on fuels used for nontaxable purposes. Form 4136 is an attachment to a yearly tax return of an individual or corporation. The form is not available to informational return filers, such as partnerships or entities that do not file state and local government income tax returns. For further guidance, see Appendix D.

Amounts not claimed on Form 8849 or Form 720 may be included in an annual claim on Form 4136. The purchaser may claim an income tax credit for the excess fuel tax paid on a Form 4136, "Credit for Federal Tax Paid on Fuels" as an attachment to most income tax returns. If the entity using the fuel is a partnership, the information for the credit is provided on Form K-1 and the Form 4136 is included on each partner's return.

Form 4136 may be filed at any time up to three years after the extended due date of the taxpayers income tax return as part of an amendment to that tax return.

Additional Resources

NBAA WEBSITE RESOURCES

The NBAA website contains additional resources on FET including detailed articles, frequently asked questions and links to key IRS publications. Visit nbaa.org/admin/taxes/federal/fet.

IRS PUBLICATIONS

The IRS provides guidance on the air transportation and fuel taxes. These publications are available for download on the NBAA website.

Publication 510, "Excise Taxes"

IRS Publication 510 (Excise Taxes) is the primary IRS publication on excise taxes. The IRS generally updates this publication every year.

IRS Audit Technique Guide – Air Transportation Excise Tax

The "IRS Audit Technique Guide – Air Transportation Excise Tax" is an IRS publication used to train IRS agents for air transportation excise tax audits, although it cannot be used or cited as precedent. This guide was issued in 2008. This guide is an updated version of the IRS Market Segment Specialization Program (MSSP – Aviation Taxes).

Publication 509, "Tax Calendars"

IRS Publication 509 is a tax calendar divided into quarters. It provides specific due dates for filing tax forms, paying taxes and taking other actions required by federal tax law.

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 nbaa.org/join.

Acknowledgments

NBAA thanks the volunteers of NBAA's Tax Committee, who developed and reviewed this Association publication. Special appreciation is extended to the principal reviewers, Gary Horowitz of Wiley Rein LLP and Nel Stubbs of Conklin & de Decker, who volunteered their time and expertise on behalf of NBAA Members. For additional guidance on business aviation tax-related issues, visit the NBAA website at nbaa.org/taxes.

Appendix A: Tax Rates

FEDERAL TRANSPORTATION TAX RATES

| | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 |
|------------------------------------|---------|---------|---------|---------|---------|---------|
| Transportation of Persons: | | | | | | |
| Percentage Tax | 7.5% | 7.5% | 7.5% | 7.5% | 7.5% | 7.5% |
| Domestic Segment Fee | \$4.00 | \$4.10 | \$4.10 | \$4.20 | \$4.30 | \$4.30 |
| International Head Tax | \$17.80 | \$18.00 | \$18.30 | \$18.60 | \$18.90 | \$19.10 |
| Head Tax - Alaska/Hawaii | \$8.90 | \$9.00 | \$9.10 | \$9.30 | \$9.50 | \$9.60 |
| Transportation of Property: | | | | | | |
| Percentage Tax | 6.25% | 6.25% | 6.25% | 6.25% | 6.25% | 6.25% |

FEDERAL FUEL TAX RATES

| | 2021 |
|-----------------------------|-------|
| Aviation Gasoline (Avgas) | 19.4¢ |
| Jet Fuel: | |
| Non-commercial Aviation | 21.9¢ |
| Jet Fuel: | |
| Used in Commercial Aviation | 4.4¢ |
| Jet Fuel: | |
| Delivered by Truck | 24.4¢ |

COMPOSITION OF FEDERAL FUEL TAX RATES

The FET on fuel rate is composed of two elements:

1. The excise tax rate per IRC Section 4081(a)(2)(A), and
2. The LUST (Leaking Underground Storage Tank Trust Fund) Tax rate per IRC Section 4081(a)(2)(B)
 - The LUST tax of 0.1¢ per gallon is not refundable on any fuel for domestic use.

IRS REGISTRATION REQUIRED FOR COMMERCIAL AVIATION EXCISE TAX RATE:

IRC Sections 4081 and 4041 were amended in 2005 to require Form 637 "Y Registration" per IRC Section 4101 to qualify for purchase of fuel at the Commercial Aviation tax rate or to file a claim for refund.

DEFINITION OF COMMERCIAL AVIATION

The FET rate applicable to fuel depends upon if its use is in "commercial" or "non-commercial" aviation.

The term "commercial aviation" means any use of an aircraft in a business of transporting persons or property for compensation or hire by air, unless properly allocable to any transportation exempt from the taxes imposed by sections 4261 and 4271 by reason of section 4281 or 4282 or by reason of subsection (h) or (i) of section 4261.

Unless there is an exemption available to the user (e.g. certain fixed wing and helicopter uses), in most cases the FET on fuel applies if the activity is exempt from the FET on air transportation.

Appendix B: Guidance on Completing IRS Form 720 (Quarterly Federal Excise Tax Return)

All persons collecting Federal excise taxes on behalf of the federal government must file IRS Form 720 on a quarterly basis and, depending on the amounts involved, make deposits as often as semi-monthly.

The due date for IRS Form 720, Quarterly Federal Excise Tax Return, is the last day of the first month following the reporting quarter. For example, the return due for the 1st quarter ending March 31 must be filed by April 30. Forms 720, 8849 and 8849 Schedule 1 are sent to the Internal Revenue Service Center in Cincinnati, OH.

EMPLOYER IDENTIFICATION NUMBER (EIN)

The only acceptable reason to file Form 720 without an EIN is if you are a one-time filer. Check the appropriate box just below the address label.

NEW RULES EFFECTIVE OCTOBER 2001

There are two methods to calculate the amount owed: the regular method and the alternate method. Both the regular and alternate methods maintain the September rule, described in more detail below.

The IRS breaks the month into two distinct halves or semi-monthly periods. The first semi-monthly period is from the first of each month until the 15th. The second semi-monthly period is from the 16th through the last day of the month. Deposits using the 14-day rule are due on the 29th and 14th, respectively.

See the current IRS Publication 509 for the actual deposit dates under the Regular and Alternative methods.

CONTRASTING DEPOSIT PERIODS VS. TAX LIABILITY

You must complete Schedule A if you have a liability for any tax in Part 1 of Form 720, which includes taxes on transportation of persons; transportation of property; use of international air travel facilities; and the fractional ownership program aircraft tax. The liability for the period is the net of the tax owed less any credit allowed against the tax. Overpayments from a prior period are treated as deposits and do not change the tax liability.

For the alternate rule, the liability to be entered is the "Record of Taxes Considered as Collected." Under the 14-day rule, the amount to be entered is referred to as the "Record of Net Tax Liability". While the method selected, regular or alternate, will affect determination of the liability to be entered onto Schedule A, the deposit will not necessarily be the same amount. Schedule A delineates only excise tax liability by amount and time period. The net liability from Schedule A must match the net of Line 3 and Line 4 of Part III. The amounts deposited for the quarter are entered on Line 5, Part 3 of Form 720.

The regular method, 14-day rule, and the alternate method, three-day rule, each require six reporting periods. Note that the form depicts the two semi-monthly periods for each of the three monthly periods of each quarter. There is an additional (seventh) line for the yearly "accelerated liability" incurred under the September rule. As we contrast and compare the alternate and regular methods, keep in mind the difference between tax liability and the deposits due.

The main difference between the regular method and the alternate method is that under the regular method, excise tax is not due to be deposited until the tax is collected from the customer, whereas under the alternate method, the collector of the tax (the operator) is responsible to collect tax on a deemed collected date regardless of collection status.

Under the alternate method, regardless of collection status, taxes collected within the applicable period are deemed collected during a given seven-day period and must be deposited within three banking days. The use of the deemed collected period creates a shifting back of the months that would be considered a quarter. The alternate method deposit dates are generally due on the 10th and 25th of each month.

Examples of Determination of Liability for a Semi-monthly Period Under Regular and Alternate Methods

Under the regular method, the taxpayer must report and deposit the air transportation taxes actually collected during the semi-monthly period. For example, under the regular method, excise taxes collected in the first semi-monthly period of January would be due for deposit 14 days later on Jan. 29. Excise taxes collected in the second semi-monthly period would be due for deposit on Feb. 14. Note that payments due on a weekend or holiday are due the preceding banking day. See Publication 509 for specific dates.

Under the alternate method, amounts billed or tickets sold during a semi-monthly period are considered collected during the first seven days of the second following semi-monthly period. For example, amounts billed during the Dec. 1 to Dec. 15 semi-monthly period are considered collected after the next semi-monthly period of Dec. 16 to Dec. 31 and during the first seven days of the first semi-monthly period of January (Jan. 1 to Jan. 7). Amounts billed during the Dec. 16 to Dec. 31 semi-monthly period are considered collected during the first seven days of the second semi-monthly period of January (Jan. 16 to Jan. 22).

Alternate method taxpayers are required to deposit the air transportation taxes considered collected by the third banking day after the seventh day of that semi-monthly period. For most periods, this means the taxes must be deposited by the 10th for the first semi-monthly period of that month and 25th for the second semi-monthly period of that month. Referring to the previous example, amounts billed during the Dec. 1 to Dec. 15 semi-monthly period are considered collected during the first seven days of the first semi-monthly period of January (Jan. 1 to Jan. 7). These taxes

must be deposited by Jan. 10 or the third banking day if the 10th falls on a weekend or holiday. Amounts billed during the Dec. 16 to Dec. 31 semi-monthly period are considered collected during the first seven days of the second semi-monthly period of January (Jan. 16 to Jan. 22). These taxes must be deposited by Jan. 25 or the third banking day if the 25th falls on a weekend or holiday.

According to the instructions to Form 720 and Reg. Section 40.6302(c)-1(e)(3) no deposit is required for taxes listed in Part 1 of Form 720 if the net tax liability does not exceed \$2,500 for the quarter.

AMOUNT TO DEPOSIT AND SAFE HARBOR RULES

Deposit penalties will not be imposed if the taxpayer meets either of the following: The deposit of tax for each semi-monthly period is at least 95 percent of the amount of net tax liability incurred during the semi-monthly period. Or the amount deposited for each semi-monthly period meets the “look-back quarter liability safe harbor” rule.

Look-Back Safe Harbor Rule

The look-back quarter safe harbor allows taxpayers to use the second preceding calendar quarter as their basis for making current quarter deposits. For example, a taxpayer making deposits for the third quarter of a calendar year can base their deposits for that quarter on the net tax liability as reported in the first quarter of that year. The safe harbor will apply if:

- Each semi-monthly deposit is not less than 1/6 (six semi-monthly periods per quarter) of the net tax liability for the look-back quarter.
- Each deposit is made on time.
- Any underpayment for the quarter is paid by the due date of the Federal excise tax return.

The liability for the current taxes does not include a liability for a tax that was not imposed at all times during the look-back quarter. For alternate method taxpayers, the tax must have been imposed at all times during the look-back quarter and the month preceding the look-back quarter.

If there is an increase in the tax rate imposed between the look-back quarter and the current quarter, the taxpayer is required to deposit 1/6 of the tax liability that would have been imposed if the increased rate was imposed during the look-back quarter.

95 Percent Deposit Rule (Reg. 40.6302c-1(b)(1))

A taxpayer will not be penalized if the taxpayer timely deposits at least 95 percent of each semi-monthly period liability and pays any underpayment by the due date of its tax return. Under the previous rules, failure to meet the 95 percent safe harbor rule for one semi-monthly period would invalidate the 95 percent safe harbor rule for the entire quarter. Each semi-monthly period is a standalone period. Therefore, failure to deposit at least 95 percent of the cur-

rent semi-monthly period would not invalidate the safe harbor for the entire quarter, but the penalty for underpayment would apply only to the semi-monthly period that failed the 95 percent test.

SPECIAL SEPTEMBER RULE

IRC §6302 imposes a special deposit rule for September. The special September rule accelerates a portion of the deposit normally due in October to September.

Special September Rule for Regular Method Taxpayer

Regular method taxpayers must deposit the taxes collected during the period Sept. 16 to Sept. 26 by Sept. 29. The taxes collected during the remainder of that semi-monthly period (Sept. 27 to Sept. 30) must be deposited under the general deposit rules.

The special September deposit amount may be computed by determining the amount of the net tax liability for regular method taxes reasonably expected to be incurred during the second semi-monthly period of September and then depositing 11/15 of that amount by Sept. 29.

Taxpayers using the look-back quarter safe harbor also must make the special September rule deposit. These taxpayers must deposit not less than 11/90 of the look-back quarter net tax liability for regular taxes as their special September deposit.

Also, they must deposit not less than 1/6 of the look-back quarter net tax liability for regular taxes in total for the second September semi-monthly period.

If Sept. 29 is a Saturday, the special September deposit must be made by Sept. 28. If Sept. 29 is a Sunday, the special September deposit must be made by Sept. 30.

Special September Rule for Alternate Method Taxpayers

Alternate method taxpayers must deposit the taxes collected during the period Sept. 1 to Sept. 11 by Sept. 29. The taxes collected during the remainder of that semi-monthly period (Sept. 12 to Sept. 15) must be deposited under the general deposit rules. The special September deposit amount may be computed by determining the amount of the net tax liability for alternate method taxes incurred during the first semi-monthly period of September and then depositing 11/15 of that amount by Sept. 29.

Taxpayers using the look-back quarter safe harbor also must make the special September rule deposit. Taxpayers using the look-back quarter must deposit not less than 11/90 of the look-back quarter net tax liability for alternate taxes as their special September deposit.

Also, they must deposit not less than 1/6 of the look-back quarter net tax liability for alternate taxes in total for that semi-monthly period.

If Sept. 29 is a Saturday, the special September deposit must be made by Sept. 28. If Sept. 29 is a Sunday, the special September deposit must be made by Sept. 30.

In addition to transportation taxes, fractional program aircraft may owe the 14.1 cents per gallon fuel tax surcharge, as discussed previously. This tax is reported on Form 720 Line 13 is due on all gallons used in transportation for or on behalf of the fractional owners.

This tax must be reported on Schedule A Line 1 according to the semi-monthly period in which the tax was incurred. Note that the semi-monthly deposit rules apply based upon the Form 720 Part I tax liability, not the tax liability per Schedule A Line 1 or Line 2.

FORM 720 SCHEDULE C CLAIMS

This schedule may only be filed if tax is reported on any line of Part I or Part II. It is used to claim credit for the excise taxes paid on fuel purchased and used in commercial aviation or in foreign trade.

Any gallons claimed on Form 720 Schedule C may not be claimed again on Form 8849 or Form 4136.

Other than commercial aviation, the IRS has assigned Type of Use numbers which must be entered on the claim schedule. The number of gallons used in commercial aviation is entered and extended using the base rate on Lines 2a or 5a or 5b as appropriate for the tax rate on the fuel purchased.

If the fuel is used in Foreign Trade the gallons used are entered in Lines 2b and 2d or Lines 5c or 5d and Line 5e.

Line 16 of the Form 720 Schedule C instructs you to add all credits and enter the sum on Form 720 Part III Line 4.

Appendix C: Guidance on Completing IRS Form 8849 (Claim for Refund of Excise Taxes)

Form 8849 enables the taxpayer to file claims on a quarterly basis in lieu of claiming a credit on Form 720 or filling the annual Form 4136. It is useful for a number of reasons. If the taxpayer does not file Form 720 and claim the credit on Schedule C the taxpayer would be making an interest-free loan to the Federal government until the yearly Form 4136 could be filed. Further, Form 4136 is not available to entities that do not file income tax returns.

A taxpayer may file claims on Form 720 Schedule C, Form 8849 and Form 4136, but any gallon of fuel may only be included in one claim. For example Form 720 is filed on July 15 with a Schedule C claim for gallons used in commercial aviation in June. Form 8849 could be filed on Sept. 29 for fuel used in foreign trade in May. Form 4136 may be attached to the Form 1120 for the calendar year and include gallons of fuel used in commercial aviation in April that were not included in the Form 720 or Form 8849.

Refunds are available for the same types of use as those noted on Form 720 Schedule C and Form 4136. The IRS has established filing periods and dollar thresholds that must be met for Form 8849 to be available. There are three requirements to be aware of:

Dollar Threshold: Claims for refund may be filed for any quarter of the current tax year for which the operator can claim \$750 or more.

Filing Periods: Operators must claim by the last day of the first quarter following the last quarter included in the claim. If the operator does not file a timely refund claim for the fourth quarter of the taxpayer's tax year, it will have to claim a credit for that amount via Form 4136 on its income tax return.

Carry Forward: If the \$750 threshold in the first quarter of the tax year is not met, the operator must carry the amount forward to the second quarter. Assuming the threshold amount is then reached, the operator may file.

The Form 8849 quarter is determined by the claimant's tax year. For the purpose of this example, a calendar tax year is used, in which the first quarter is defined as January, February and March 2013.

In this scenario, the claimant must file the first quarter Form 8849 no later than June 2013. Should the claimant not reach the \$750 threshold in March 2013 (the end of the first quarter) but instead reach it in the second quarter, the claimant must file Form 8849 by the end of the third quarter in September 2013. If the claimant does not reach the \$750 threshold by the end of the calendar year in December 2013 and/or promptly file Form 8849 by March 2014, Form 8849

would not be available to the claimant; instead, Form 4136 must be filed with the claimant's income tax return.

Form 8849 only can be filed for the current tax year. If a claimant cannot claim at least \$750 by the last quarter of the tax year, Form 4136 must be used. If the operator is on a fiscal year, i.e., June 1 to May 31, it would substitute June, July and August for the first quarter, etc. The same rules above apply with the difference being the months for the end of your respective quarters. Fiscal year quarters and the \$750 rules also apply to fuel tax claims on schedule C on Form 720.

Any gallons claimed on Form 8849 may not be claimed again on Form 4136 or Form 720 Schedule C.

Other than commercial aviation, the IRS has assigned Type of Use numbers which must be entered on the claim schedule. The number of gallons used in commercial aviation is entered and extended using the base rate on Lines 2a or 5a or 5b as appropriate for the tax rate on the fuel purchased.

If the fuel is used in Foreign Trade the gallons used are entered in Lines 2b and 2d or Lines 5c or 5d and Line 5e.

Appendix D: Guidance on Completing IRS Form 4136 (Claim for Federal Tax Paid on Fuels)

The purpose of Form 4136 is to claim a credit for the federal excise tax on fuels used for nontaxable purposes. Form 4136 is an attachment to a yearly tax return of an individual or corporation. The form is not available to informational return filers, such as partnerships or entities that do not file state and local government income tax returns. To complete the form, you will need to know the type of use and the number of gallons of aviation gasoline (Line 2) and jet fuel (Line 5) used.

Any gallons claimed on Form 4136 must not have been claimed on Form 8849 or Form 720 Schedule C.

Other than commercial aviation, the IRS has assigned Type of Use numbers which must be entered on the claim schedule. The number of gallons used in commercial aviation is entered and extended using the base rate on Lines 2a or 5a or 5b as appropriate for the tax rate on the fuel purchased.

If the fuel is used in Foreign Trade the gallons used are entered in Lines 2b and 2d or Lines 5c or 5d and Line 5e.

Line 17 of the Form 4136 instructs you to add all credits and enter the sum. Then transfer the amount to:

- Line 70 on Form 1040, U.S. Personal Income Tax Return
- Line 19b; Schedule J; on Form 1120, U.S. Corporation Income Tax Return
- Line 23c on Form 1120S, U.S. Income Tax Return for an S Corporation
- Line 24g Form 1041, U.S. Income Tax Return for Estates and Trusts

Appendix E: FAA Information

BASIC REQUIREMENTS

All flights conducted in the United States are subject to the Federal Aviation Administration (FAA) rules, including the Federal Aviation Regulations (FARs). In general, the FARs distinguishes between airline operations (conducted under Part 121 of the FARs), charter operations (conducted under Part 135) and general aviation operations (conducted under Part 91).

Part 135 or 121 generally apply when the following conditions are met:

- One legal entity must provide transportation to another legal entity. For example, the rules do not apply where one division of a corporation provides transportation to another division. However, Part 135 can apply where a corporation provides transportation to the owner of the corporation.
- The operator must receive compensation for providing transportation. The compensation does not have to be in cash. For example, where a corporation provides transportation to the owner of the corporation, the compensation can take the form of a capital contribution.

OPERATIONAL CONTROL

The FAA rules also place great emphasis on the responsibility for “operational control” – FAR 1.1 provides that “operational control,” with respect to a flight, means the exercise of authority over initiating, conducting or terminating a flight. A person operating an aircraft under Part 91 generally must accept responsibility for operational control of the aircraft. In contrast, a person using an aircraft operated under Part 135 or Part 121 generally does not have to accept any responsibility for operational control of the aircraft. Instead the charter company or the airline accepts that responsibility.

AIRCRAFT SERVICE AND PILOT SERVICE AGREEMENTS

An aircraft operator who needs assistance in maintaining or piloting his aircraft may hire pilots who are independent contractors or may hire an aircraft management/service company to provide services to the aircraft and, sometimes, to provide the pilots. Under the FAA rules, the operator may conduct flights under Part 91 as long as it retains responsibility for operational control of the aircraft.

It is very important that an aircraft owner/operator understand which party is in operational control when an aircraft management/service company is involved. Under most aircraft management/services agreements, the owner is in operational control for Part 91 owner flights. Accordingly, an owner/operator must be fully aware of all aspects of the aircraft’s operation, including operating environment, maintenance status, and crew member qualification and currency.

Aircraft owners should carefully review aircraft management/services agreements with qualified legal counsel to make sure operational control is clearly defined and established.

DRY VS. WET LEASE

The FAA rules distinguish between a dry lease and a wet lease. A dry lease is a lease of an aircraft without the flight crew. A wet lease is a lease of an aircraft with “at least one crew member (FAR 119.3). A major difference between the two is that, in the case of a dry lease, the lessee generally has operational control of the aircraft while, in the case of a wet lease, the lessor generally has operational control of the aircraft. With limited exceptions, the FAA rules generally treat a wet lease as a charter operation which must be conducted under Part 135. In contrast, the owner of an aircraft can “dry lease” the aircraft to an aircraft operator, as long as the lease complies with the “truth in leasing rules” of FAR 91.23, if applicable. These rules do not limit the amount a lessor can charge for the use of the aircraft.

FAR 91.501 COST REIMBURSABLE FLIGHTS

FAR 91.501 allows a Part 91 operator to engage in certain cost reimbursable operations that may be similar to a wet lease. Common options under 91.501 include the following:

- Demonstration flights.
- Related company flights.
- Time share flights.
- Interchange flights.

FAR 91.501 generally limits the amount of compensation that the operator can charge. In the case of time sharing and demonstration flights, the amount is limited to the direct costs of the flight, as defined in FAR 91.501(d):

- Two times the cost of fuel, oil, lubricants and other additives
- Travel expenses of the crew, including food, lodging and ground transportation
- Hangar and tie-down costs away from the aircraft’s base of operation
- Insurance obtained for a specific flight
- Landing fees, airport taxes and similar assessments
- Customs, foreign permit and similar fees directly related to the flight
- In-flight food and beverages
- Passenger ground transportation
- Flight planning and weather contract services

Demonstration Flights

FAR 91.501(b) (3) allows flights for the demonstration of an airplane to prospective customers when no charge is made except for those specified FAR 91.501(d).

Related-Company Flights

FAR 91.501(b)(5) allows the carriage of officials, employees,

guests, and property of a company on an airplane operated by the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company.

Time Share Flights

FAR 91.501(b) (6) allows the carriage of company officials, employees and guests of the company on an airplane operated under a time sharing agreement. FAR 91.501(c)(1) defines a “time-sharing agreement” as an arrangement whereby a person leases his airplane with flight crew to another person, and no charge is made for the flights conducted under that arrangement other than those specified in FAR 91.501(d).

Interchange Flights

FAR 91.501(b)(6) allows the carriage of company officials, employees and guests of the company on an airplane operated under an interchange agreement FAR 91.501(c)(2) defines an “interchange agreement” as an 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.

Joint Ownership Flights

FAR 91.501(b) (6) allows the carriage of company officials, employees and guests of the company on an airplane operated under a joint ownership agreement. FAR 91.501(c)(3) defines a “joint ownership agreement” as an 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. Note that this is different from the traditional joint ownership agreement where each owner retains operational control of the aircraft on his own flights.

Carriage of Elected Officials

FAR 91.321 allows a Part 91 operator to receive compensation for providing transportation to certain federal and state elected officials.