Part 375 Final Rule

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DOT Part 375 Developments—Relief at Last (with some limitations of course)

Since our last article regarding Part 375, *Additional Part 375 Developments – An Update,* published in January of this year, the DOT has issued its final rule regarding Part 375. For U.S.-registered foreign civil aircraft—i.e. aircraft that are "N" registered but are "owned, operated or controlled" by foreigners (i.e. persons or companies not meeting the statutory definition of "Citizen of the United States"), the news is welcome indeed—and certainly justifies NBAA's 3-year effort to bring about this rule change.

Henceforth, operators of U.S.-registered foreign civil aircraft will be able to engage in substantially the same type of reimbursable operations allowed by Subpart F to Part 91 for U.S. citizen operators without the need for a DOT Part 375 Permit and without such cost reimbursable operations being considered cabotage. In effect DOT has "exempted" from licensing (a Part 375 permit) substantially the same type of operations that FAA has "exempted" from licensing (a Part 135 certificate) in Subpart F to Part 91 thus harmonizing DOT and FAA regulations in this regard.

Why the qualification "substantially"? Because there are subtle differences between DOT and FAA's approach to this subject, which are highlighted below.[1]

Background

Part 375 defines and establishes restrictions upon the operations of "foreign civil aircraft," which includes not only the operation of foreign registered aircraft, but also U.S.-registered aircraft that are owned, controlled or operated by non-U.S. citizens. A company may be considered a non-U.S. citizen if it is incorporated outside of the U.S., if its president is a non-U.S. citizen, if more than one-third of its managers or directors are non-U.S. citizens, or if more than twenty-five percent of its voting interest is controlled by non-U.S. citizens. In addition, the "actual control" of the company must be in the hands of U.S. citizens to avoid a classification as a non-U.S. citizen.

By statute, there is a prohibition of cabotage operations by foreign civil aircraft, i.e. operation for remuneration or hire transporting passengers from one point in the U.S. to another point in the U.S. As a result, companies that are classified as non-U.S. citizens are prohibited from receiving remuneration for transporting passengers on their aircraft between points in the U.S. This prohibition has previously been interpreted to include even the limited remuneration otherwise permitted under Subpart F to Part 91 of the Federal Aviation Regulations ("FARs") such as charging back within their own

[1] These "highlights" are not intended to be an exhaustive list of DOT and FAA differences. Others may surface as operators attempt to take advantage of the opportunities afforded by DOT's rule change.

corporate families for transportation of executives and employees of related companies or that permitted under time sharing and interchange arrangements.

Operations to and from the U.S. for remuneration, while not prohibited, are limited. For these operations, non-citizen operators must apply for a Part 375 Permit, which generally limits the number of flights permitted to no more than six annually, although there have been exceptions where an unlimited number of flights has been permitted. However, even for those permits granting an unlimited number of flights, there are restrictions as to the passengers who may be carried.

As noted in our previous article, DOT had concluded in certain limited circumstances, such as demonstration flights and intra-company compensation among entities classified as non-U.S. citizens merely by virtue of the nationality of their president, that limited compensation permitted by FAR 91.501 without more would not be considered remuneration for purposes of Part 375.

DOT FINAL RULE

On February 7, 2005, in response to a petition by NBAA, DOT issued a notice of proposed rulemaking to modify Part 375 to permit the receipt of compensation for the operation of U.S.-registered foreign civil aircraft without reference to the corporate structure or citizenship make up, whenever the only compensation received is limited to that permitted by FAR 91. The final rule issued on March 28, 2006, amends the requirements governing the licensing and operations in the United States of U.S.-registered "foreign civil aircraft," which are not engaged in common carriage.

After the issuance of the NPRM, NBAA offered certain refining comments to the proposed final rule. In one comment, NBAA suggested that the reference in the proposed final rule to "intra-corporate" be changed to "intra-company" for consistency and to avoid inadvertently limiting its application to entities who have taken the corporate form. It was further suggested that, in addition to referencing a company's "parent" or "subsidiary," a reference to subsidiaries of the parent be added to reflect the broad structure of most companies and their aircraft usage. In a separate comment, NBAA also suggested that the proposed rule be expanded to permit operators of U.S.-registered foreign civil aircraft to receive remuneration for the transportation of candidates to the extent permitted under FAR Section 91.321.

DOT accepted NBAA's proposed wording clarifications. However, with respect to NBAA's request to amend the rulemaking to consider travel by political campaign travelers, DOT decided that the issue was too far removed to be addressed in the rulemaking and dismissed the NBAA's suggestion in that regard without prejudice to re-submitting the proposal.

The final rule added a new Section 375.37 to Part 375 that describes certain business activities using U.S.-registered foreign civil aircraft. To a very large extent, the

description of business activities follows those activities permitted and described in FAR Section 91.501 typically used by U.S. corporations. These activities would include intra-company operations involving charge-backs between related entities in a corporate family, interchange operations in which one entity provides transportation on its aircraft in exchange for equal transportation on the other entities aircraft, joint ownership operations, and time sharing operations in which a corporate entity provides transportation on its aircraft for limited compensation, approximately twice the cost of fuel for the flight.

By virtue of the fact that all of the foreign civil aircraft covered by new Section 375.37 will be U.S.-registered aircraft, their operations will be subject to the FARs and more specifically FAR 91.501. Thus, as a practical matter, the limitations of FAR 91.501 will apply. However, as noted above, there are certain subtle distinctions between the provisions of FAR 91.501 and new Section 375.37 that may further limit the operations of U.S.-registered foreign civil aircraft. With regard to intra-company operations, new Section 375.37(a), unlike FAR 91.501(b)(5), explicitly requires that the operator of the Aircraft must hold majority ownership in, be majority owned by, or have a common parent with the company for which it provides operations. FAR 91.501(b)(5) only references operations between parents and subsidiaries; it does not address whether a parent and subsidiary relationship necessarily requires majority ownership. Additionally, Section 375.37 provides relief to foreign operators of US-registered aircraft "when the carriage is within the scope of, and incidental to, the business of the company (other than transportation by air)." Thus DOT would apply the "incidentality" test and the "scope" test to all of the cost reimbursable operations now permitted by new Section 375.37 (intra-company, interchange, joint ownership and time sharing operations). While FAA, pursuant to Section 91.501(b), would also apply the incidentality test to these types of operations, the scope test only appears in intra-company operations permitted by paragraph (b)(5) of FAR Section 91.501. Thus the DOT rule appears to be more restrictive than the FAA rule in this regard.

Despite such incongruities with FAR Section 91.501 as above noted, the final rule and its amendment to Part 375 should permit foreign entities that have U.S.-registered aircraft a license-free opportunity to engage in the type of limited compensation business aviation activities that U.S. companies have traditionally enjoyed without obtaining commercial licensing from the FAA. NBAA should be applauded for taking another step forward in de-regulating and otherwise promoting business aviation activities.