Structuring Personal Use of Corporate Aircraft

Within the Framework of FAA Rules and Regulations

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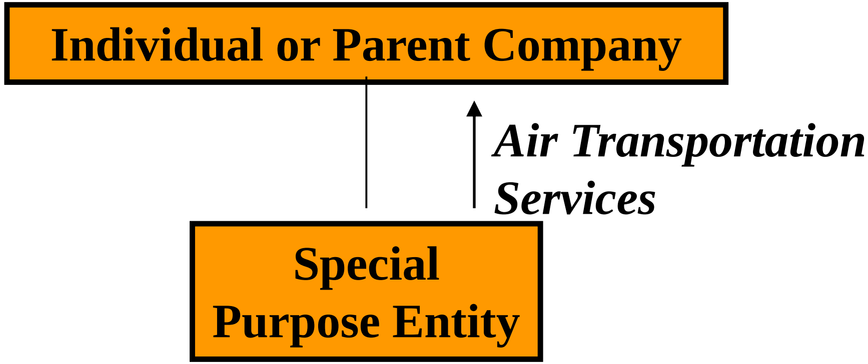
Planning an Ownership Structure

- FAA Compliance and Liability Protection Planning
  - Corporate Attorneys, Risk Managers, and CFO’s who lack corporate aviation expertise often consider liability protection planning first and conclude (incorrectly) that a Flight Department Company is required to minimize risk.

Typical Flight Department Company Structure



- Primary business operated by Parent Company
- Special Purpose Entity employs (or contracts for) pilots
- Aircraft owned (or leased) and operated by Special Purpose Entity ; Special Purpose Entity incurs all expenses for operations
- Special Purpose Entity has no other business operations

Internal Flight Departments vs. External Flight Department Companies

- Aircraft operator (if it is a business entity) must have a primary business purpose <u>other than</u> air transportation
- Aircraft operations must support the primary business purpose (i.e., be *within the scope of, and incidental to* such primary purpose)
- Must look solely within the four walls of the company (operations by sole-purpose subsidiaries prohibited)
- This is an operations rule, not an ownership rule (special-purpose subsidiaries may own and lease, but not operate)
- Flight department companies may subject transportation to FET, and may violate insurance/loan covenants

14 C.F.R. Part 91 (FAR Part 91)

- General Operating and Flight Rules common to all aircraft operations
- General Rule: no compensation allowed for provision of <u>air transportation</u> (but several exceptions exist)

14 C.F.R. Part 135 (FAR Part 135)

- Governs commuter and on-demand (a.k.a. charter or wet lease) Operations
- Requires Air Carrier Certificate issued under FAR Part 119

FAR Part 91 vs. Part 135

- What is air transportation?
- Wet lease vs. dry lease
- No compensation limits for dry leases

Part 91

- Advantages:
  - Greater Operational Flexibility (runway length, weather reporting, flight/duty time limits, etc.)
  - Reduced Administrative Requirements (no mandated drug/alcohol testing, pilot record keeping/sharing requirements)

Part 91

- Disadvantages:
  - Limited ability to obtain compensation for services
  - Liability exposure of operating company

Part 135

- Advantages:
  - Operations need not be incidental to, or within the scope of another business
  - Unfettered ability to charge for services
  - Shift liability to air carrier
  - Possible sales/use tax benefits (depending on state law)

Part 135

- Disadvantages:
  - Time consuming and expensive to obtain your own air carrier certificate (third-party usually required)
  - Increased regulatory requirements (operational restrictions, pilot record keeping/sharing. Drug/alcohol testing, etc.)
  - Extends depreciation schedule

Exceptions to No Compensation Rule Under Part 91

- Demonstration Flights - 91.501(b)(3)
- Affiliated Groups - 91.501(b)(5)
- Time Sharing - 91.501(b)(6) & (c)(1)
- Interchange (Wet) - 91.501(b)(6) & (c)(2)
- Joint Ownership - 91.501(b)(6) & (c)(3)

Compensation Under Part 91

- Applies to aircraft that are U.S. registered, and either large (i.e., over 12,500lbs), or multi-engine turbo jet
- Other Aircraft per NBAA Small Aircraft Exemption

Time Sharing - 91.501(b)(6) & (c)(1)

- An arrangement whereby a person leases an aircraft, with a flight crew, to another person (i.e., a wet lease)
- Lessor must be a company, not an individual
- Compensation limited to 200% of fuel cost, plus 100% of certain other itemized out-of-pocket expenses specified in 91-501(d)

Affiliated Groups - 91.501(b)(5)

- Permits carriage of officials, employees, guests and property of a company on an aircraft operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is <u>within the scope of an incidental to</u> the business of the company <u>(other than transportation by air)</u>; and

Affiliated Groups - 91.501(b)(5)

. . . no charge is made for the carriage in excess of the cost of owning, operating and maintaining the aircraft; and

- no charge is made for the carriage of a guest when the transportation is not incidental to or within the scope of the company's business

Affiliated Groups - 91.501(b)(5)

- Flight department companies <u>DO NOT</u> qualify!

Schwab Opinion

- FAA Chief Counsel Interpretation Aug. 2, 1993 (“a.k.a. “Schwab Opinion”): employees are considered “guests” when traveling for personal, non-business purposes, and therefore may not be charged.
- FAA Chief Counsel Interpretation Dec. 30, 2010 (“a.k.a. “Revised Schwab Opinion”): may charge high-level employees for those personal flights that could readily be altered or cancelled for compelling business reasons.
  - board of directors must determine which high-level employees hold positions that would subject them to being recalled from personal trips on short notice
  - company must maintain list of those high-level employees who meet such criteria
  - must determine reimbursement eligibility on a flight-by-flight basis

Interchange (Wet) - 91.501(b)(6) & (c)(2)

- An arrangement whereby a person leases an aircraft, with a flight crew, to another person in exchange for equal time on the other person's aircraft
- Charge permitted only to offset differences in the cost of owning, operating and maintaining the two aircraft
- Contrast "dry" interchange

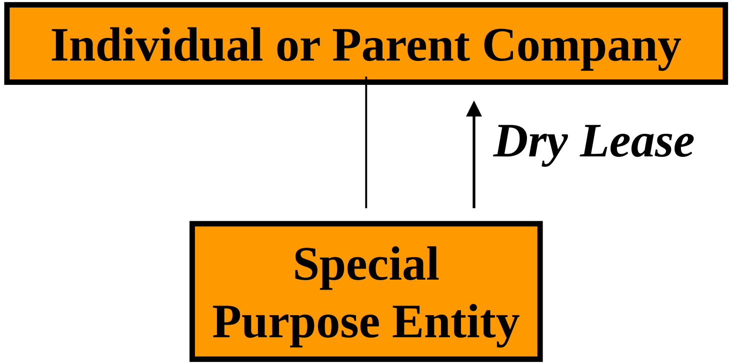
Joint Ownership - 91.501(b)(6) & (c)(3)

- One of the registered joint owners employs and furnishes the flight crew for the aircraft, and
- Each of the joint owners pays a share of the charges specified in the agreement
- Arguably does not constitute air transportation

Demonstration Flights - 91.501(b)(3)

- Flights for the demonstration of aircraft to prospective customers
- Compensation limited to 200% of fuel cost, plus certain itemized out-of-pocket expenses specified in 91-501(d)

Typical LeasingStructure



- Primary business operated by Parent
- Special Purpose Entity owns and leases aircraft upstream
- Individual/Parent Company employs (or contracts for) pilots
- Individual/Parent Company incurs all expenses for operations
- Individual/Parent Company is the operator of the aircraft

Truth-in-Leasing

- FAR 91.23
- Does not apply to 135 lessors/lessees
- Lease must be in writing
- Provide copy of lease to FAA within 24 hours
- Carry copy of lease on-board aircraft
- Notify FSDO at least 48 hours prior to first flight

Third-Party Aircraft Management

- May be Part 91 or 135
- Manager provides many or all services necessary to operate and maintain the aircraft (pilots, maintenance, hangar, insurance, recordkeeping)
- Operational Control:
  - Manager is “operator” of all Part 135 flights
  - Manager is <u>NOT</u> “operator” of its own Part 91 flights
  - Manager <u>may</u> be “operator” of Part 91 maintenance/training/ferrying flights

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