

# CONFUSION ABOUNDS! THE GROWING PROLIFERATION OF “AIRCRAFT DRY LEASING PROGRAMS” AND THE SPECTER OF ILLEGAL CHARTER

AVIATION LAW SECTION FALL CLE 2018:  
FRIDAY, NOVEMBER 10, 2018  
1:00 P.M.– 5:15 P.M.  
HOTEL VALENCIA, SAN ANTONIO



*David T. Norton, JD / MBA / ATP  
Shackelford, Bowen, McKinley & Norton, LLP  
9201 N. Central Expressway, Fourth Floor  
Dallas, Texas 75231  
Direct: (214) 780-1407 [dnorton@shackelford.law](mailto:dnorton@shackelford.law)*



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“If I had to choose, I would rather have birds  
than airplanes.”

— Charles A. Lindbergh (1902-1974)



# Overview

- ➔ Background – Where We are Coming From
- ➔ “Recent” Key Events and Changes – Where We are Now
- ➔ What’s Coming Next?
- ➔ Questions





# Background – Where We Are Coming From



# Background – Where We Are Coming From

➔ **Federal Aviation Act of 1958**  
➔ **49 U.S.C. §§ 40101, *et seq.***



# Background – Where We Are Coming From

- **Federal Aviation Act of 1958**
- **FAA: Focus on Safety Protections**
- **14 C.F.R. parts 1-199**



# Background – Where We Are Coming From

- **Federal Aviation Act of 1958**
- **DOT – Focus on Economic Protections**
- **14 C.F.R. parts 200-399**



## Background – Where We Are Coming From

### ➔ **Key FAA/FAR Promulgatory History:**

➔ **36 F.R. 19507, October 1, 1971**

➔ **37 F.R. 14758, July 18, 1972**

➔ **37 F.R. 22798, October 25, 1972**

➔ **38 F.R. 19024, July 16, 1973**

### ➔ **The “Genesis” of the Concept of “Flight Department Companies”**





## Background – Where We Are Coming From

### → Long History of Chief Counsel Interpretations

→ [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/regulations/interpretations/](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/regulations/interpretations/)





## Background – Where We Are Coming From

### → **Key Takeaways’:**

- Is “compensation” occurring?
- To whom?
- Fundamental Question: *Who is the Operator?*

### → **Key Provisions:**

- **Definitions – 14 C.F.R. § 1.1 (Plus Part 110)**
- **Non-Commercial Cost Sharing:**
  - **14 C.F.R. § 91.501 (originally § 91.181)**





“We have clearance, Clarence.  
Roger, Roger. What’s our vector,  
Victor?”

— Cockpit crew in movie *Airplane*.



# “Recent” Key Events and Changes



## **“Recent” Key Events and Changes**

- Part 125/135 Advisory Rulemaking Committee – circa 2003-06**
- Attempted to allow for compensated “family office use” – no go**
- “Saved” Part 125**
- Started DOT Charter Broker Discussions**



## **“Recent” Key Events and Changes**

- Part 125/135 Advisory Rulemaking Committee – circa 2003-06**
- The Teterboro Crash and Revised A008 – circa 2006**



## **“Recent” Key Events and Changes**

- ➔ **Part 125/135 Advisory Rulemaking Committee – circa 2003-06**
- ➔ **The Teterboro Crash and Revised A008 – circa 2006**
- ➔ **Revised Truth-in-Leasing – circa 2016 – AC 91-37B**
  - ➔ **Added some clarity, *but***
  - ➔ **Added some confusion on applicability**



## **“Recent” Key Events and Changes**

- ➔ **Part 125/135 Advisory Rulemaking Committee – circa 2003-06**
- ➔ **The Teterboro Crash and Revised A008 – circa 2006**
- ➔ **Revised Truth-in-Leasing – circa 2016 – AC 91.37B**
- ➔ **Revised Part 110**
  - ➔ **Moved definitions re air carrier operations into one place**
  - ➔ **Re “wet lease” – dropped presumption of transfer of operational control (*but see following slides re “dry leases”*)**





## **“Recent” Key Events and Changes**

- Part 125/135 Advisory Rulemaking Committee – circa 2003-06**
- The Teterboro Crash and Revised A008 – circa 2006**
- Revised Truth-in-Leasing – circa 2016 – AC 91.37B**
- Revised Part 110**
- FSIMS – Order 8900.1**
  - Vol. 3 – General Technical Information**
  - Ch. 13 – Lease and Interchange Agmts.**
  - Multiple Paragraphs re operational control – see Par. 3-4588 specifically . . .**



# **Quick Review of the Key Issue Regarding the Leasing of Aircraft:**



## What's Current?

→ **Remember:**

→ **Definition of “wet lease”**

→ **AC plus *any one crew member***



## What's Current?

### → Remember:

#### → Definition of “wet lease”

→ AC plus *any one crew member*

#### → Presumption:

→ *Operational Control Stays with Lessor*



## What's Current?

### ➔ Remember:

#### ➔ Definition of “wet lease”

➔ AC plus *any one crew member*

#### ➔ Presumption:

➔ *Operational Control Stays with Lessor*

#### ➔ Question:

➔ *Is that Lessor / Operator Receiving Compensation?*



# So What's Coming?



**What's Coming**

**→ Technology Changes?**



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# What's Coming

→ **Technology Changes?**  
→ *See, e.g., Revolution.aero*





# What's Coming

## → Technology Changes?

→ *See, e.g.,* [Revolution.aero](http://Revolution.aero)

→ *See, e.g.,* [flyblackbird.com](http://flyblackbird.com)



**What's Coming**

# **→ Regulatory and Statutory Changes**



## What's Coming

- ➔ **Regulatory and Statutory Changes**
- ➔ **Charter Broker Rules: 14 C.F.R. part 295**



# What's Coming

- ➔ **Regulatory and Statutory Changes**
  - ➔ **Charter Broker Rules – Part 295**
  - ➔ **FAA Reauthorization Act – H.R. 302 (115)**



## What's Coming

- ➔ **Regulatory and Statutory Changes**
  - ➔ **Charter Broker Rules – Part 295**
  - ➔ **FAA Reauthorization Act – H.R. 302 (115)**
  - ➔ **The Aviation Empowerment Act???**  
**(Sen. Mike Lee (R-Utah) – S.2650)**



## What's Coming

- ➔ **Regulatory Enforcement?**
- ➔ **It's already here!**



## What's Coming

→ **Regulatory Enforcement?**

→ **It's already here!**

→ **Hinman Co. – \$3.3M fine – DOJ action**



## What's Coming

### → Regulatory Enforcement?

→ It's already here!

→ **Hinman Co. – \$3.3M fine – Now a DOJ action**

→ **Word On the Street: Other Pending Investigations**





## What's Coming

### → **Regulatory Enforcement?**

#### → **It's already here!**

- **Hinman Co. – \$3.3M fine – Now a DOJ action**
- **Word On the Street: Other Pending Investigations**
- **NATA and NBAA Illegal Charter Committees / Activities**



# Parting Thoughts:

- **Increasing FAA Activity in Enforcing *Current* Rules**
- **Increasing DOT Activity in Enforcing *Current* Rules(?)**
- ***But:***
  - **Technology is pushing the envelope**
  - **Public perception may push the envelope**
  - **A public policy realignment is arguably immanent, possibly leading to additional new rules**
- ***So:***
  - **Don't let your clients violate the current rules now, *but***
  - **Be on the lookout for the coming changing landscape**





“Aviation in itself is not inherently dangerous.  
But to an even greater degree than the sea, it is  
terribly unforgiving of any carelessness,  
incapacity or neglect.”

— Captain A.G. Lamplugh,  
British Aviation Insurance Group,  
London, circa 1930

