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Docket Operations, M-30,  
U.S. Department of Transportation  
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West Building Ground Floor  
Washington, DC 20590-0001

Office of Management and Budget  
Office of Information and Regulatory Affairs  
Attention: Desk Officer for FAA  
New Regulatory Building, Room 10202  
725 17th Street, NW  
Washington, DC 20053

Re: Docket Number FAA-2008-0188  
Notice No. 08-02

Notice of Proposed Rulemaking:  
Re-Registration and Renewal of Aircraft Registration

This letter summarizes the comments of the Equipment Leasing and Finance Association (“**ELFA**”)<sup>1</sup> with respect to the Notice of Proposed Rulemaking (“**NPRM**”) published by the FAA in the Federal Register on February 28, 2008 relating to the re-registration and renewal of aircraft registrations. The full comments of the ELFA are set forth in the attached memorandum.

ELFA represents lenders and lessors in the equipment finance industry, including many members who offer leasing and other financing products to commercial and general aviation owners and operators. ELFA agrees with the FAA that there is a need “to increase and maintain the accuracy of aircraft registration information in the Civil Aviation Registry.” However, ELFA is concerned about the risks, economic burdens and other adverse consequences that the re-registration and triennial renewal requirements proposed in the NPRM will have on aircraft financing providers. These burdens and other consequences are not addressed in the NPRM.

Notwithstanding the best intentions of the FAA and the various Registry users, it is inevitable that there will be a significant percentage of aircraft owners that will fail to comply with these proposed new registration requirements. Whether this non-compliance is unintentional, unavoidable or strategic, the consequences of this non-compliance will create unwarranted risks and hardships to lenders and lessors. Certain of these risks relate to rights and protections the reliability of which are essential to a lender or lessor’s willingness to finance the acquisition of an aircraft.

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<sup>1</sup> The Equipment Leasing and Finance Association is the trade association that represents companies in the \$600 billion equipment finance sector, which includes financial services companies and manufacturers engaged in financing the utilization and investment of and in capital goods. ELFA members are the driving force behind the growth in the commercial equipment finance market and contribute to capital formation in the U.S. and abroad.

Based in Washington, D.C., ELFA has over 700 members including independent and captive lease and finance companies, banks, financial services corporations, broker/packageers and investment banks, as well as manufacturers and service providers. For more information, please visit <<http://www.elfaonline.org>> ELFA is also the premier source for statistics and analyses covering the equipment finance sector. To access ELFA’s comprehensive industry information, please visit: <http://www.elfaonline.org/ind/research/>

Some examples of the essential financing party rights that could be jeopardized by the proposed re-registration and renewal requirements include:

(a) if the Certificate "expires" due to a customer's non-compliance with the proposed registration requirements, the enforceability and priority of the financing party's lien or other rights relating to the financed aircraft may be vulnerable to attack by competing creditors or in a bankruptcy;

(b) if the customer operates the aircraft after the Certificate expires it will be violating the law, and that violation could undermine the reliability of certain essential collateral and liability protections required by financing parties (especially the potential vulnerability of its rights to the proceeds and other protections under the related casualty and liability insurance policies), and will trigger defaults by the customer under the related loan and lease agreements; and

(c) if the Certificate expires and as a result the customer grounds the aircraft, the customer's revenue related activities, and other business use will be interrupted, impairing the customer's ability to pay and perform its financing obligations, and potentially resulting in material adverse consequences to its financial condition.

The attached Memorandum also includes a brief discussion of the likely burdens and risks to other Registry users and to the general public that could result from the proposed Registry requirements. Many respondents to the NPRM have already provided their comments regarding those burdens and risks, as well as their concerns regarding the impact of the proposed requirements on the systems and personnel at the FAA. Although ELFA agrees with many of the previous respondents, ELFA's focus is the impact of the proposed changes on lenders and lessors providing aircraft financing.

So as to avoid the harsh consequences of these new risks, aircraft lenders and lessors, especially those with large aircraft portfolios, will be forced to implement significant and costly changes to their closing and deal administration practices. Because the proposed registration changes contemplate an automatic expiration without the financing party's having a meaningful opportunity to avoid the harsh consequences of that expiration, aircraft financing parties will have to incur substantial costs to significantly enhance their deal monitoring capabilities. Disputes regarding the rights and protections made vulnerable by the proposed rule changes are likely to result in expensive and protracted litigation, and if not resolved in the financing party's favor, significant losses suffered by the banks, insurance companies and other financing providers in the aviation finance market. Accordingly, ELFA respectfully submits that the burdens and risks created by the NPRM, as presently drafted, outweigh the desired benefits.

ELFA believes that the FAA's good intentions can be accomplished without fundamentally changing the registration process and creating these resultant risks and burdens. ELFA suggests certain modest changes be made instead to the existing registration-related regulations and procedures as an alternative to the FAA's proposals. In the Memorandum, ELFA outlines proposed alternatives, including amending the current Triennial reporting process to make it more effective for the collection of accurate and reliable Registry information, but without creating undue burdens and risks for financing providers, other Registry users and the general public.

For all of the reasons stated above, and in the Memorandum, ELFA respectfully requests that the FAA consider the alternatives suggested in the Memorandum and echoed in other comments submitted to it by other respondents to the NPRM, and amend the current system rather than making the proposed fundamental changes to the registration system. We appreciate your consideration of our views in this matter. We are prepared to meet with you, if necessary, to discuss ELFA's concerns and answer any questions that you may have regarding our comments.

Sincerely,



Kenneth E. Bengsen, Jr.  
President

**COMMENTS OF**

**THE EQUIPMENT LEASING AND FINANCE ASSOCIATION**

**RE: NOTICE OF PROPOSED RULEMAKING 08-02**

**RE-REGISTRATION AND RENEWAL OF AIRCRAFT REGISTRATION**

**DOCKET NO. FAA-2008-0188**

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**RE: NOTICE OF PROPOSED RULEMAKING 08-02**

**RE-REGISTRATION AND RENEWAL OF AIRCRAFT REGISTRATION**

**DOCKET NO. FAA-2008-0188**

The following comments are submitted by the Equipment Leasing and Finance Association (“**ELFA**”) with respect to the Notice of Proposed Rulemaking (“**NPRM**”) published by the FAA in the Federal Register on February 28, 2008 relating to the re-registration and renewal of aircraft registrations.<sup>1</sup>

**I. The ELFA.**

Organized in 1961, ELFA is a non-profit trade association that represents companies involved in the equipment leasing and finance industry. ELFA's diverse membership consists of independent leasing companies, banks and bank-related lessors, financial services corporations, equipment manufacturers, broker/packagegers and investment banks; as well as a variety of other service providers. ELFA promotes the leasing and finance industry as a major source of funds for capital investment in the U.S. and other countries. ELFA's members provide significant value to the economy by offering leasing and financing products to both large and small companies. The industry facilitates the growth and expansion of commercial and general aviation in the U.S. by providing financing for aircraft and other aviation equipment, and with a unique understanding of aircraft and the business purposes and circumstances of aircraft owners and operators, industry member financing parties make capital investment more efficient in the commercial and general aviation markets.

**II. Summary of Comments.**

Pursuant to the NPRM, the FAA is proposing changes that would amend 14 CFR part 47, by requiring, among other things, re-registration of all presently issued Certificates of Aircraft Registration (“**Certificates**”), and renewal of each Certificate issued after adoption (whether issued pursuant to this re-registration or a new application, or previously renewed) every 36 months thereafter, as long as ownership is not transferred.

ELFA is of the opinion that the proposed re-registration and renewal requirements in the NPRM are inconsistent with Executive Order 12866 (“**Order**”), which Order directs each Federal agency to propose or adopt regulations only upon a reasoned determination that the benefits of the intended regulation justify its costs.<sup>2</sup> ELFA notes that other respondents to the NPRM (predominantly, aircraft owners, operators and pilots) have already provided comments addressing in very strong terms their objections to the proposed regulatory changes, especially with respect to what they fear could be the significantly greater fees and administrative burdens that will be imposed on aircraft owners by the contemplated changes. Certain of those respondents also expressed concerns that the related administrative burdens and expenses would overwhelm the FAA, including as to the staffing, automation, funding, time and other practicalities associated with implementing these proposals. ELFA supports the FAA's stated purpose in the NPR: the “need to increase and maintain the accuracy of aircraft registration information in the Civil Aviation Registry,”<sup>3</sup> in response to the concerns of law enforcement and other government agencies and to provide more accurate, up-to-date aircraft registration information to all users of the Civil Aviation Registry database. However, ELFA respectfully suggests that the systemic changes being proposed in the NPRM are likely to have harmful consequences to many existing users of the Registry, and that these consequences could be avoided by retaining the FAA's existing methods with modest changes to achieve the same end.

ELFA's comments relate to those proposed changes that are likely to create very significant burdens, expenses, risks and other harms for lenders and lessors that finance aircraft, none of which has been accounted for in the NPRM. ELFA suggests below some practical alternatives to the FAA's proposed changes, which alternatives, ELFA believes will further the FAA's purposes, but without resulting in the burdens, expenses, risks and harms to financing parties or other interested parties.

### **III. ELFA's Perspective.**

In 2008, the equipment leasing and finance industry is forecasting \$600 billion in new business volume, including the financing of new or used aircraft which, by rough guess by an industry participant could be about \$20 billion.<sup>4</sup> The EFLA estimates that of all U.S. registered aircraft, including general aviation and commercial aviation aircraft, over three quarters of those aircraft are financed.

Most of these financed aircraft are registered in the name of an aircraft owner who purchased or financed the aircraft with funds loaned by the financing party, or in the name of a trustee or other related party involved in that financing. In order to protect its rights under applicable commercial and bankruptcy law, the financing party is likely to have filed for recordation with the FAA security agreements or leases evidencing the financing party's security interest or other rights relating to the aircraft or other related collateral. As noted above, most U.S. registered aircraft have liens registered against them with the FAA. Also note that many financed aircraft are registered in the name of the financing party if the transaction is a true "lease" for commercial law purposes, and not as a "conditional sale" as determined by the FAA's Aeronautical Center Counsel. In finance lease transactions, all parties recognize that the financing party is a "passive" lessor (essentially acting as a lender)<sup>5</sup>, and will have appropriately allocated to its lessee/customer all responsibility for aviation-related and other legal compliance, including any of the same relating to the operation, maintenance and registration of the aircraft.

The willingness of the ELFA member lenders and lessors to provide financing or re-financing of U.S. registered aircraft is dependent upon practical and reliable lien and title registries in order to ensure the priority of their lien or other rights with respect to a financed aircraft. Further, financing parties will not extend credit if the cost and other burdens relating to the administering of the financing transaction are so significant that the financing party determines that the prospective transaction is no longer an attractive deployment of available funds. Lastly, financing parties are unwilling to provide financing if by doing so they are exposed to liability, as might be the case with respect to violations of legal or other requirements, or the inherent risks associated with transportation equipment, including if these risks relate to the acts of its customer.

ELFA contends that the registration and other changes proposed in the NPRM would, if promulgated, (a) create significant burdens, expenses and risks to its financing party members with respect to existing financings and (b) could also materially impact the willingness of these financing parties to provide aircraft financings in the future. Although the NPRM discusses the FAA's considered view of the impact of the proposed changes on aircraft owner/operators, manufacturers and the FAA and other government agencies, the NPRM does not address the impact of the proposed changes on lenders and lessors. In its comments below, ELFA discusses the likely, material adverse impact of these changes on financing parties, and suggests alternatives to these changes that are intended to effectuate the FAA's stated purposes without creating the burdens, expenses and risks noted above.

### **IV. ELFA's Comments.**

#### **A. ELFA Agrees that the Process for Updating the Registry, as Currently Administered, is Inadequate and that there is a Need to Increase and Maintain the Accuracy of the Registry.**

1. Over Time the Registry has become Inaccurate. According to the FAA, the number of aircraft on the Registry whose owner cannot be positively and verifiably identified in a timely manner is very significant and is increasing. Although over two thirds of the information on the Registry is estimated to be accurate, the FAA notes that "[o]f the more than 343,000 aircraft registered, an estimated 104,000, or about one-third, are possibly no longer eligible for registration." This estimate of "possibly" ineligible aircraft includes (all approximations): (i) 17,000 reported as sold by their former owners without the purchasers making application for registration; (ii) 4,700 with respect to which registration was started without completing the requirements; (iii) 30,100 known to have bad addresses; (iv) 14,700 with revoked Certificates but remaining in the Registry system (to prevent re-assignment of the U.S. registration number – the "N" number - until the FAA has certainty that the aircraft is not operating with that "N" number); and (v) "[u]p to 41,000 additional unidentified aircraft are estimated to be inactive or possibly no

longer eligible for registration.”<sup>6</sup> ELFA agrees with the FAA that any circumstances that significantly diminish the reliability of the Registry need to be addressed.

**2. Current methods of updating the Registry are Inadequate.** Presently, ownership information is updated either in connection with a sale of or other event relating to the aircraft, or by responses to update requests by the FAA Registry.

Upon a sale of the aircraft, or the occurrence of any other event specified in Sec. 47.41, the Certificate holder must return the Certificate, with the reverse side completed (or if unavailable, a certificate satisfying certain requirements), so the aircraft records can be updated. The purchaser must file an Aircraft Registration Application (Application) and evidence of ownership in compliance with part 47, if the owner intends to operate the aircraft. However, the FAA notes that “the Registry is frequently not notified of a change affecting registration and consequently, the aircraft registration records may not reflect accurate registration information.”<sup>7</sup>

The Registry is also updated based on responses to requests made by the FAA pursuant to the Triennial Aircraft Registration Report (the “**Triennial**”) which reporting requirements were implemented on April 30, 1980, by Amendment 47-21, adding 14 CFR 47.51. This regulation authorizes the FAA to make requests to registered owners for updated addresses and other changes, if any, to the pertinent Registry information, if there has been no activity with respect to such registration within the previous three years.<sup>8</sup> The owner’s Certificate may be suspended or revoked by the FAA if the owner fails or refuses to respond to the Triennial request within 60 days of receipt thereof.<sup>9</sup> If the registered owner fails or refuses to submit the Triennial request within the time required, the Certificate may be suspended or revoked in compliance with the procedures set out in 14 CFR part 13.<sup>10</sup> However, the FAA asserts that revoking an owner’s registration pursuant to 14 CFR part 13 enforcement procedures is not unilateral, does not cancel the assignment of the “N” number of the related aircraft, and “efforts to improve the effectiveness of the Triennial through enforcement have proven to be expensive, time-consuming and ineffective.”<sup>11</sup>

The FAA asserts that the Triennial has been ineffective in maintaining the accuracy and currency of the Registry’s database. The FAA notes as an example that although it can determine from mail returned as “undeliverable” that the registered owner’s address has changed, they “are unable to make a determination regarding how many Triennials are delivered to a registered owner’s (former) address of record and are simply discarded by the current occupant.”<sup>12</sup> However, the Triennial form itself contributes to the uncertainty regarding the owner’s address because the form instructs the recipient not to send the Triennial back to the FAA if there has been no change in the registrant’s information; *i.e.*, the FAA would not know whether the lack of response to the Triennial is attributable to an inaccurate address, or owner’s having nothing new to report.

## **B. FAA’s Proposed Solution will Impose Significant Burdens on the Agency, Aircraft Owners, and Aircraft Financiers.**

**1. NPRM proposes a massive re-registration and renewal process.** Currently Certificates do not expire. Under this proposal, each existing Certificate would have to be reissued during a three year period, and each Certificate issued after adoption of the final rule (including those issued following a re-registration) would have a 3-year expiration date. If registration is to continue, each aircraft owner must apply for renewal by completing and filing an Aircraft Registration Renewal form at least 90 days before the expiration date on the Certificate. By completing and filing that application, the owner would be required to verify the existing registration information and report any changes. Renewals of Certificates would be made upon completion and submission of a “brief” renewal request form and payment of the applicable fee. Other respondents to the NPRM have expressed concern about such fees and other related costs, perhaps because the FAA notes that the amount to be charged for renewed Certificates pursuant to the contemplated FAA reauthorization, could exceed the \$5.00 charge presently being charged by the FAA for the issuance of Certificates, consistent with the FAA’s becoming a “more cost-based organization.”<sup>13</sup>

If those Certificates are not re-registered or renewed, as applicable, within 90 days of the scheduled expiration date, registration of the aircraft would expire, and the registration number (the “N” number) assigned to the aircraft would be administratively cancelled. Registered owners would have to promptly satisfy the renewal requirements because there is no temporary operating authority (e.g., relying on the “pink copy” of the application) under 14 CFR 47.31(b) during the renewal process. Any operation of the aircraft after expiration would violate Federal law.<sup>14</sup> Further, the NPRM invalidates the “N” number for a period of five years<sup>15</sup>, which would require any registrant that misses the deadline and subsequently registers to obtain a new “N” number, repaint the aircraft, and amend the financing documents to reflect the new N number.

**2. The re-registration and renewal process will likely overwhelm the FAA.** Other respondents to the NPRM have suggested that the proposed changes should not be adopted because on a practical level the FAA will be overwhelmed by the workload resulting from those changes. Currently, it is the industry’s experience that the FAA recording section requires anywhere between 30 to 60 days to record sale and financing documentation. The NPRM indicates that the FAA expects re-registration of approximately 81,000 aircraft within a one-year period for three consecutive years<sup>16</sup> (an amount which could be considerably higher in certain three month periods). ELFA is concerned that the FAA lacks the capacity to process timely 81,000 registrations in addition to its ongoing processing requirements of sale and financing documentation.<sup>17</sup>

We also believe that the processing time estimated in the NPRM with respect to each re-registration or renewal (i.e., 20 to 30 minutes) is optimistic, and that any estimates regarding processing time must also take into account the burden of the new notice requirements on its staff. This is a significant concern because any processing delays could exacerbate the Certificate expiration and aircraft grounding risks. We note that the proposed rules only allow postponement of expiration in the re-registration context, if there are delays in the renewal process there will be an enormous demand for flywires/temporary authority to allow the continued operation of aircraft.

**3. The substantial costs for owners and financiers are unaccounted for in the NPRM.** Although the NPRM briefly addresses the impact on owners, it does not mention the significant increase in the cost and administrative burdens that financing parties will incur in connection with the proposed changes. ELFA contends that if the proposals are adopted, financing parties will need to consider and, perhaps, implement numerous expensive changes to their practices, including their willingness to continue to provide this financing to air carriers and other aircraft owners and operators.<sup>18</sup>

ELFA members include organizations that are both large and small aircraft finance providers. EFLA member organizations, together with other banks, finance companies, insurance companies and other financing providers finance most of the air carrier fleets, and general aviation aircraft, and by doing so, hold very significant “portfolios” of financed aircraft. For financing parties with large portfolios of aircraft (or large relative to the rest of their equipment finance portfolio), the burden and expense of complying with and/or monitoring the compliance of their customers with the NPRM’s re-registration and renewal requirements could be prohibitive. Although financing parties already have processes in place to monitor their aircraft finance portfolios, the proposed re-registration and renewal process subjects financing parties to much greater risks than are contemplated in their existing practices.

Also, in many transactions an owner trustee serves as the registered owner of aircraft. These transactions include, among others, both multi-party financings, especially those used in commercial aircraft financings, or where the transaction involves a non-U.S. citizen. As the registered owners of thousands of aircraft, tracking and servicing of aircraft re-registrations would require additions to staff and would result in potential liability for owner trustees should mistakes occur--especially errors or delays which result in the grounding of aircraft.<sup>19</sup>

The lien vulnerabilities and other risks mentioned in this Memorandum will require significantly greater monitoring and administration because financing parties are likely to be generally unaware of any non-compliance by their customers, so they will be unable to avoid the automatic invalidation of the registration of the aircraft securing the related loan or lease. For example, these financing providers



would need to consider buying (if available) or creating appropriate software, hiring staff with sufficient skills and experience to perform this dedicated monitoring function, revising or creating new financing documents and lending practices and paying the phone, mail, traveling, legal and other costs associated with this monitoring function. Although it is extremely difficult to estimate the initial and continuing costs to each financing provider relating to these proposals, ELFA estimates that it could be as high as the millions for certain financing parties holding very large aircraft portfolios.

Additionally, it is unclear as to how long it might take each financing party to establish a monitoring system that has the automation, staffing and procedures that are consistent with prudent industry standards. However, no such system is likely to be perfect, so many financing customers are likely to fail to comply with these new requirements, with harsh consequences to financing parties. Since the proposed re-registration submissions to the FAA will be signed under oath, ELFA members who are the registered owners of large fleets of aircraft will need to perform extensive due diligence outside of their normal procedures, to ensure that their submissions are true and correct.

### **C. The FAA's Proposed Solution Will Create Significant Financial Risk and Uncertainty for Aircraft Financiers.**

1. The NPRM did not address or consider the impact of the proposed changes on aircraft financiers. Although lenders and lessors are regular users of the Registry and rely on the lien protections by applicable aviation law embodied in the transportation code and 14 C.F.R. part 49, the NPRM does not address the impact of the proposals on these financing parties.

The NPRM does not take into account that a customer's non-compliance with the proposed registration requirements will cause significant losses to banks, insurance companies and other financing providers and investors, that are relied upon to finance aircraft. These losses will result from, among other things, the cost of litigating or otherwise resolving disputes arising out of any non-compliance. These disputes may involve the financing party's lien or other rights, and an insurer's responsibility for casualties to a financed aircraft or third party liability claims against the financing party or its financing customer.

Aircraft financing transactions often involve loans and leases under which the customer is expected to repay the financing party huge sums of money that would not have been advanced (whether due to prudent lending practices or regulatory constraints) without reasonable certainty regarding the financing party's lien and other rights against the aircraft collateral. By violating the proposed re-registration or renewal requirements, a borrower or lessee could, arguably, inadvertently or purposely cause a financing party's lien against aircraft collateral to become unperfected, denying a financing party of its essential and bargained for enforcement remedy and exit strategy.<sup>20</sup> If the U.S. registration expires without the knowledge of the lender or lessor (who would have received no notice of the need for re-registration or renewal), a devious aircraft borrower or lessee could also re-register the aircraft in another jurisdiction, without recording the financing party's lien or other interest in the aircraft.

Consider the exposure a financing party might have if it has financed multiple large jet aircraft for an air carrier, an operating lessor, fractional share or jet card provider, charter operator, air ambulance company, or other business users with a large fleet of aircraft, and that customer is in financial distress or files bankruptcy. If the FAA's proposed rule changes become law and a dispute arises regarding the financing party's lien rights due to its customer's non-compliance with the re-registration or renewal requirements, the ultimate loss suffered by that financing party could undermine the soundness of that institution.

2. Examples of Financial Risk and Uncertainty for Aircraft Financiers:

(a) **Example A. Failure to Re-Register Aircraft Results in Inadvertent Unlawful and Uninsured Operation, and Unperfected Lien.**

Bank has entered into a secured financing with Owner in order to finance Owner's purchase of an aircraft. Owner leases the aircraft to Operator. The aircraft was originally registered in January 2000 and, thus, needs to be re-registered between October 1, 2008 and December 31, 2008. Owner receives notice of the need to re-register 120 days prior to October 1. No notice is received by the Bank and the Operator. Owner fails to re-register the aircraft. Operator continues to operate the aircraft believing it has a valid certificate. This operation is now unlawful and (arguably) uninsured under the terms of the Operator's insurance policy. Bank's lien against the aircraft is now (arguably) unperfected, but Bank is also unaware of this vulnerability.

**(b) Example B. Bankrupt aircraft Owner's failure to re-register leads to dispute about priority of Bank's lien leading to protracted litigation.**

Owner suffers a material adverse change in its financial condition, fails to make the loan payments, defaults and is unable to pay the accelerated obligation and files a bankruptcy petition; and Bank is forced to defend its status as a secured creditor and, after incurring the time and considerable expense by reason of that litigation, either (i) is deemed unsecured and unable to collect any significant amount from the Owner, or (ii) is able to convince the court that Bank has retained its security interest, but its recovery is still diminished by the expense of the litigation, and any loss in market value or other circumstances suffered during the protracted litigation.

**(c) Example C. Aircraft is involved in an accident during unlawful operation due to failure to re-register or renew and insurer refuses to pay.**

The aircraft is involved in an accident and is a total loss. The insurer that issued the casualty and liability policies deems the insurance policy to have been violated by the Operator's unlawful operation of the aircraft, and refuses to pay the casualty proceeds to the Bank, and refuses to defend or afford the other liability policy protections to Operator, Owner and the Bank with respect to 3rd party claims for damages attributable to any injuries or fatalities.

**3. The NPRM will Lead to Contractual Disputes between Owners, Operators and Financiers.** In true lease transactions, the financing party will be the registered owner on the Registry, and will be obligated to comply with the FAA's proposed re-registration and renewal requirements. In the event that the financing party fails to timely comply with these requirements, by inadvertence or by circumstances beyond its control, and the lessee or another related operator subleasing the aircraft from the lessee is forced to ground the aircraft, the financing party could be exposed to liability under its lease with the lessee or under other related agreements. This liability might be based on the financing party's alleged breach of express or implied warranties to the lessee or sublessee of their respective quiet enjoyment of the aircraft.

Conversely, if the financing party's customer is the registered owner, the ultimate consequence to an aircraft financing party of its customer's non-compliance with these requirements could include disputes regarding the financing party's lien protection, and the liability and collateral protections under any required insurance policies. In each such case, the financing party will not have a reasonable opportunity under the proposed registration requirements to avoid this harsh result.

Mistakes will occur. Aircraft finance providers make aircraft loans and leases to a large number of small customers, including both business organizations and individual operators that will not have administrative processes in place to handle the proposed NPRM requirements. It is a certainty that, irrespective of the good intentions of most aircraft owners and operators, administrative errors will occur in the proposed re-registration and renewal process. Any such non-compliance will result in defaults by customers under their loans and leases. Because no "pink slips" or other temporary authority may be used to operate an aircraft while being renewed, there is no room for delay in the renewal process. However, the FAA's own statistics reflect that there will always be some "slippage" in compliance with registration requirements. Significant errors in compliance with these proposals seem inevitable because the proposed requirements are new, impose tight deadlines and require payments, and there is no

condition that a governmental warning first be received by financing parties well in advance of the scheduled deadline.

4. The availability of aircraft financing could be reduced. U.S. airlines are facing many recent challenges, especially fuel costs, shortages of experienced pilots, crew and maintenance professionals. The airlines are also experiencing a tighter credit market. That credit market's willingness to provide aircraft financing could be materially impacted by the proposed changes in the law. These changes, could (at best) significantly increase the cost of providing aircraft financing, and (at worst) undermine essential collateral and liability protections. Financing parties that remain willing to provide aircraft financing would likely pass the related costs on to its customers, and impose stricter financing terms on their aircraft finance customers. Additionally, the administrative burdens associated with the proposed changes, together with the uncertainties regarding the financing party's lien status and insurance protections, could result in a diminution in the availability of aircraft financing.

**D. The General Flying Public will be Adversely Affected by the NPRM.**

The increased costs that will be incurred by aircraft owners and operators as a result of the proposed changes are likely to be passed along to the general flying public, making air travel more costly and, perhaps, less accessible. Also, it seems likely that a significant percentage of the registered aircraft owners might, inadvertently or otherwise, fail to re-register or renew as and when required by the proposals. Given that any operation without having fully and timely complied with these re-registration and renewal requirements would constitute a violation of the applicable regulations, carriers would be forced to ground those aircraft, wreaking havoc on aircraft operations, including the associated costs of schedule disruption and passenger dislocation. Others might engage in inadvertent invalid operations, and face not only governmental sanctions, but disputes with financing parties and insurers if that operation is in violation of agreements with those parties.

It is conceivable than if an aircraft having an expired Certificate under the new proposed rules is involved in an accident, that the insurance companies may deny coverage due to the expired registration. In that event, the consequences to victims, as well as the owner, operator and involved financing parties, could be devastating. The economic impact on these owner/operators could be devastating if they default on credit agreements or are unable to rely on insurance policies due to defenses that could be raised by insurers. That impact would certainly extend to other members of the private sector, either directly or indirectly.

**E. The Burdens and Risks Created by the NPRM Outweigh the Desired Benefits.**

The ELFA respectfully argues, based on the burdens and risks described above that (i) the burdens (time and money) on the FAA, aircraft owners and financiers and (ii) the risks (inadvertent unlawful operation; grounded aircraft; uninsured operation; contractual disputes and litigation between owners, operators, secured parties and insurers; disruptions in service; financial losses; potential difficulty in obtaining financing for aircraft; etc.) outweigh the desired benefits that the FAA hopes to achieve by requiring the re-registration and triennial renewal of Certificates.

**F. The Desired Benefits of the NPRM can be Achieved by Modest Changes to the Existing System that do not Impose Significant Burdens and Risks on Aircraft Owners, Financiers and Operators.**

The FAA hopes to have a system in place that will allow it to determine the then current status of the ownership, existence, and susceptibility to valid U.S. registration of each registered aircraft, as well as the correct mailing address of the registered owner of that aircraft. The system being proposed in the NPRM might, if and when it is put in place by the FAA, generate the accurate and reliable information desired by the FAA. However, there is no certainty that the desired improvement will be realized by implementing these proposals, and, as discussed above, they will be costly and create risks for all involved.

Instead, ELFA and other commentators believe that this information may also be derived by modest changes to existing regulations and practices, and that these modest changes are less likely to result in the burdens, expenses, risks, and other harms to the users of the Registry. The alternatives below individually or collectively, together with certain existing requirements permit the FAA to focus its efforts on non-compliant owners and operators without prejudice to aircraft finance providers:

1. The Triennial Report requirement should be improved not eliminated. The FAA contends that the need for the proposed re-registration and renewal requirements are necessary because the current Triennial program is ineffective.<sup>21</sup> ELFA contends that the perceived ineffectiveness of the Triennial program has been, and could continue to be, addressed by more practical and less injurious means than the proposed re-registration and renewal requirements. In that regard, ELFA suggests the following:

(a) The FAA should send the Triennial request to the owner (or, if the owner is a lessor, then to the operator or such other party, if so designated in the related registration; the “**Applicable Respondent**”), in each case, requiring that the Applicable Respondent execute and return the Triennial request, confirming or correcting (as applicable) the information then on file with the Registry. This request must be accurately completed, executed, and returned to the FAA within a reasonable period after the request was mailed by the FAA.

(b) If there is no response to the first request, or if it is returned undelivered, the FAA should send a second request to the Applicable Respondent, with a concurrent copy to any lien holders or lessors of record (each, a “**Financing Party**”), requiring compliance within a reasonable period after the request was mailed by the FAA, together with a payment of a reasonable “update” fee.

(c) If no response to the second request, the FAA should follow-up by notice to Applicable Respondent, with a concurrent copy to each Financing Party, notifying them that the Certificate will automatically be deemed “**suspended**” (*i.e.*, deemed temporarily invalid) within a reasonable period after the notice was mailed unless the Applicable Respondent complies with the Triennial request within that period, and pays a reasonable “update” fee; except that (1) no follow-up notice needs to be sent if the second request is returned because the address is incorrect; and (2) any suspended Certificate may be reinstated, retroactive to the date of suspension, by full compliance with the reporting requirements of this provision and payment of a reasonable “reinstatement” fee.

(d) The FAA will post information on its website on a timely basis to allow interested parties to monitor any FAA actions relating to the continued registration of the aircraft (referencing its serial number, make, model, etc.), including the failure to respond to the first Triennial request, the mailing of a “suspension” notice and any suspension or expiration.

(e) The copies of the requests and notices to be provided by the FAA to a Financing Party as contemplated above will be delivered to the last address of record for that Financing Party. So as to facilitate this process, ELFA suggests that a process be implemented by the FAA, pursuant to which Financing Parties will submit contact information to the FAA, including any updates or corrections (whether by hard copy form and/or electronically), and placed into the FAA’s data systems used for the Triennial program. Any Financing Party submitting, updating or correcting this information will pay a reasonable fee to the FAA to have the information recorded in the FAA’s Triennial system.

(f) With respect to any aircraft having a suspended Certificate which is not reinstated within a reasonable period after the effective date of such suspension, the Certificate shall be deemed terminated, and the “N” number assigned to that aircraft may be reassigned by the FAA after a reasonable period.

2. Adopt Proposed Time Limits and Cancellation relating to the “Sale Reported” or “Application Pending” categories. Although ELFA is suggesting that the re-registration and renewal proposals in the NPRM not be adopted, and that the FAA not eliminate the Triennial program, it does endorse adoption of the time limits during which an aircraft may remain in the “sale reported” category or “application pending” category without an application being made or completed for registration, and cancellation of the “N” number of any aircraft registered under a Dealer’s Aircraft Registration Certificate, if that Certificate has

expired and the required application for registration has not been made, all as proposed in the NPRM.<sup>22</sup> The FAA could also consider applying the re-registration requirement solely to those aircraft known to the FAA to be improperly registered. A directive requiring re-registration should be provided to both the last registered owners of those aircraft, and any financing parties having a security agreement or lease recorded on the Registry. This directive should include a time limit for compliance, which if not met shall automatically result in a suspension and, ultimately, invalidation of the related Certificate, and re-assignment of the “N” number if not cured within the specified period.

**3. Enforce the Certificate Return Requirements.** The accuracy and reliability of the Registry should benefit significantly from the enactment of the new 21-day period in which aircraft owners must return Certificates upon transfer of ownership of the aircraft. Because the 21-day time frame for returning a Certificate is new, there is no statistical evidence yet of its positive impact on the information collection process, but the most likely result of this requirement is an improvement regarding the accuracy of the Registry as it relates to sold aircraft. This improvement is more likely to be realized if the FAA enforces this new requirement by collecting the \$25,000 per day penalty for any failure to comply.

**4. Enforce the Pilot Deviation Regulations.** Another existing program, if enforced, could also encourage owners to ensure the accuracy of the Registry records. This program was developed by FAA Strategic Operations Security with the Transportation Security Administration,<sup>23</sup> and uses aircraft registration status, along with other information, as a basis for granting or denying aircraft access to the national airspace system. If the Registry records reflect a questionable registration status (*i.e.*, because the owner failed to comply with the registration and information related requirements suggested above), the operator could be denied access to the national airspace.

## **V. Conclusion**

ELFA is of the opinion that the above-suggested changes in regulations and practices, would not only further the FAA’s purpose of improving the accuracy and reliability of the Registry, but would be far less burdensome and costly for the FAA and the private sector, including aircraft owner/operators, transportation customers and financing parties. By including the financing parties in the Triennial program, the FAA will gain a very useful ally in this information collection effort. Financing parties are very likely to cause their aircraft borrowers and lessees to fully and timely comply with the Triennial reporting requirements, because any failure by those customers would be an event of default under the related financing transaction, entitling the financing party to accelerate the payment obligations and recover possession of the aircraft.

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<sup>1</sup> *Re-Registration and Renewal of Aircraft Registration*, 73 Fed. Reg. 10701 (proposed Feb. 28, 2008) (to be codified at 14 C.F.R. pt. 47) (“NPRM”).

<sup>2</sup> Exec. Order No.12866, 58 Fed. Reg. 51,735 (October 4, 1993).

<sup>3</sup> NPRM at 10701.

<sup>4</sup> Source of the estimate is a phone reference with a representative of the National Aircraft Finance Association.

<sup>5</sup> 49 U.S.C. § 44112.

<sup>6</sup> NPRM at 10703. There is no explanation provided by the FAA in the NPRM regarding its determination of the inactive or possibly ineligible status of these 41,000 aircraft.

<sup>7</sup> NPRM at 10704.

<sup>8</sup> 14 C.F.R. § 47.51(a).

<sup>9</sup> 14 C.F.R. § 47.51(c).

<sup>10</sup> 14 C.F.R. § 47.51(d).

<sup>11</sup> NPRM at 10703.

<sup>12</sup> NPRM at 10703.

<sup>13</sup> NPRM at 10704.

<sup>14</sup> 49 U.S.C. § 44101(a) provides that a person may operate an aircraft only when it is registered under section 44103.

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<sup>15</sup> NPRM at 10707 – Proposed Section 47.17

<sup>16</sup> NPRM at 10710.

<sup>17</sup> Take for example the thousands of aircraft owned by owner trustees. To complete the re-registration of each aircraft for which they are the registered owner, they will need to file citizenship affidavits for each applicable owner participant. Over the years, a great many owner participants will have changed their names, merged with other entities, or otherwise ceased to be known by the names, or located at the addresses, listed in the transaction documents. Based on industry experience (with much smaller numbers of aircraft), the costs of investigating the status of owner participants, and the amount of documentation to be filed with the FAA will be significant. These burdens will be prohibitive with the re-registration of every U.S. registered aircraft.

<sup>18</sup> Some specific examples of the undertakings and costs each financing party would have to consider could include: (A) implementing a tracking system to monitor registration dates for re-registration and renewal purposes and adding additional internal staffing to implement the processes, or hiring third party tracking services to monitor the re-registration and renewals of aircraft in their portfolio of financing transactions; (B) hiring inspectors to verify the registration information required in the re-registration and renewal process, especially if the financing transaction is structured as a true “lease”, and the financing lessor/owner is required to certify as to information when completing and filing registration and renewal applications; (C) if the financing transaction is structured as a true “lease”, deploying a team of employees throughout the world to physically remove the old registration cards and place the new registration cards on aircraft that are leased to customers to ensure compliance (or incur fines up to \$25K per day per aircraft)<sup>18</sup>; and (D) coordinating the re-registration and renewal processes, especially when removing and replacing the Certificate on leased aircraft, and by doing so, facing disputes with customers regarding the availability and enjoyment of their aircraft, and related defaults or litigation.

<sup>19</sup> There is also a likelihood that although the owner trustee is the registered owner, the address on file with the FAA is that of the operator (for administrative ease) which could result in the owner trustee never receiving notice of the need for re-registration.

<sup>20</sup> See 14 C.F.R. § 49.33(d) (“a conveyance is eligible for recording under this subpart only if ... (d) it affects aircraft registered under 49 U.S.C. 44101-44104”). Secured parties file conveyances with the FAA to perfect their security interests in aircraft (and ensure the priority of their liens) as the transportation code preempts state law (the UCC) in regard to perfecting security interests in aircraft. See Article 9-109 of the Uniform Commercial Code stating: “[Article 9] does not apply to the extent that: a statute, regulation, or treaty of the United States preempts this Article”; *Philko Aviation, Inc. v. Shackel*, 562 U.S. 406 (1983) (finding that the transportation code preempted state law in regard to aircraft); 49 U.S.C. section 44108 (“until a conveyance, lease, or instrument executed for security purposes ... is filed for recording, [it] is valid only against (1) the person making the conveyance, lease, or instrument; (2) that person’s heirs and devisees; and (3) a person having actual notice of the conveyance, lease, or instrument.”). Also, the recordation of interests with the FAA is a prerequisite to the registering of an international interest in aircraft under Cape Town. See 49 U.S.C. section 44107(e). If the aircraft is no longer registered, then, arguably, the conveyances recorded by the FAA are no longer eligible for recordation and (1) the filings with the FAA will no longer perfect the secured party’s interest, and (2) the IR registrations will be simultaneously invalidated.

<sup>21</sup> NPRM at 10703.

<sup>22</sup> NPRM at 10712 – Proposed Section 47.15(i)(4).

<sup>23</sup> See 70 Fed. Reg. 73323, December 9, 2005.