

November 11, 2009

## Please RSVP to Attend the Annual GWBAA Holiday Reception (and Annual Meeting)

**GWBAA Annual Holiday Party – Friday, December 4th**



## YOUR OFFICIAL INVITATION TO GWBAA'S ANNUAL HOLIDAY RECEPTION

**WHEN?** Friday, December 4th starting at 5pm.

**WHERE?** Landmark Aviation @ IAD (note the new location this year!).

**WHAT?** Come and enjoy heavy hors d'oeuvres and wash them down with a glass of holiday cheer with your fellow GWBAA members. (This will also serve as the annual general meeting for GWBAA, with some quick updates on the past year's activities and the road ahead.)

**DOOR PRIZES?** Sure! We have a few things in GWBAA's closet to give away, but let us know (via email at [info@gwbaa.com](mailto:info@gwbaa.com)) if you or your company want to provide a door prize. We will give you all the credit!

Please RSVP to [info@gwbaa.com](mailto:info@gwbaa.com).

### **NTSB Finds that Controllers Contributed to Maryland Medevac Accident**

The NTSB has issued a report on the crash of a Maryland State Police helicopter on September 27, 2008, which killed the pilot and medical crew aboard, as well as one of the two patients aboard. Although the NTSB primarily faulted the pilot for the accident, it found that a lack of help from air traffic controllers as a contributing factor. In particular, the NTSB found that: "Air traffic services provided by the Reagan Washington Airport Tower and Potomac Consolidated Terminal Radar Approach Control controllers to the accident flight exhibited numerous procedural deficiencies, including unresponsiveness, inattention, and poor radar vectoring. These deficiencies were a distraction to the pilot and increased his workload by requiring him to compensate for the poor services provided." For a copy of the NTSB synopsis, please visit <http://ntsb.gov/Publictn/2009/AAR0907.htm>.

## FAA Invites Comments on Rosslyn Gateway Project

Part 77 of the FAA's rules establishes requirements for "objects affecting navigable airspace." Generally, notice must be filed at FAA prior to the construction of structures that will exceed 200 feet in height, to enable FAA to evaluate whether they would be aeronautical hazards. FAA recently has solicited public comment on the proposed construction of a 323-foot building in Rosslyn, approximately 3nm from National Airport. Comments are due on November 29. For more information, please visit <https://oeaaa.faa.gov/oeaaa/external/cr.jsp?ASN=2009-AEA-2735-OE&euid=kbiDYK8XxVu87dD2Cf35pg%3D%3D>.

## FAA General Aviation News



The current issue of FAA's bi-monthly publication for general aviation – simply titled "Aviation News" – is now available from the FAA website, at [http://www.faa.gov/news/aviation\\_news/](http://www.faa.gov/news/aviation_news/). The cover story is "On Thin Ice," which addresses the seasonally important subject of takeoffs in wintery conditions. The issue also includes other useful cold weather reminders, such as about how to avoid icing, the risks of carbon monoxide poisoning from heating systems, landings on snowy/icy runways, and how to safely store aircraft for the winter season.

## Regional News Round-Up

Delta Airport Consultants has been selected by the Carroll County Board of Commissioners to provide design and engineering services for the proposed new runway at **Carroll County Regional Airport**. The contract is for one year with four one-year options to follow. Delta was previously contracted by the county to perform the environmental assessment for the runway; the assessment was completed in the spring and found that the project would not have a significant impact on the environment.

A NOTAM has been issued for Runway 16/34 at **Essex Skypark**, due to personnel and equipment working near the runway, through November 30, 2010. For more information, visit <http://www.essexskyparkassn.org>.

## GUEST VIEWPOINT: *Selling an Aircraft Position*

*GWBAA is pleased to present the following discussion from Keith G. Swirsky of GKG Law, P.C.*

Prior to the economic downturn, the high demand for corporate aircraft created a large secondary, or gray, market for the sale of early aircraft positions. This high demand created an easy option for someone whose new aircraft needs had changed. The historic high demand also allowed these sellers to realize substantial

premiums over their original contract price. Since these economic conditions had continued for a sustained multi-year period, speculators also entered the market. Not surprisingly, manufacturers realized the "speculation" issue, and several have modified the language in their

contracts to attempt to prevent the “flipping” of their contracts.

The selling of aircraft positions remains an issue today in part because of the continued, albeit lesser, demand for large corporate aircraft, but mostly due to the economic downturn. Both aircraft owners and speculators want to shed themselves of continuing progress payments. In some cases, the liquidated damages are an acceptable sacrifice to terminate an OEM purchase agreement and in other cases, a buyer may still get out whole, because the market value of the aircraft equals or exceeds the contract price.

This article will focus on the various methods of selling an aircraft position. As will be seen, the process is more complex than is apparent and requires a thoughtful analysis.

#### *Assignment of Existing Contracts*

We have not come across an OEM agreement that permits an assignment to a third party buyer without the consent of the OEM. Although some OEM's have provided consent, and would even “encourage” you that they will favorably consider your request, it is more customary that the OEM will require significant financial inducement to approve a requested assignment. In today's challenging aircraft markets, however, an OEM should be more likely than in the past to favorably consider such a request if the result is that the contract stays in good standing. Still, some economic inducement may be required.

#### *Sale of LLC Membership Interest*

The first issue to consider in whether to purchase an unrelated party's LLC membership interest is the contract language regarding assignment to third parties. Assignment to third parties is most often prohibited but a complete analysis must not end at that cursory level of review. Most OEM agreements do not prohibit the purchase of LLC membership interest, and instead are silent on the issue. While one can argue that because such a sale is not prohibited, it is therefore no problem for the buyer. However, it can also be argued that a transfer of all of the LLC membership interests is a “defacto” assignment and contravenes the original intent of the parties. Suffice to say that in the event the seller is asking for money to be

paid at closing that will not be retained in escrow to secure a claim of default by the OEM, then the buyer is at risk that, in the event of a dispute with the OEM, money paid to the seller is no longer available to be returned to the buyer.

If the contract was not executed in the name of a newly formed LLC, but was transferred from an existing active business to a subsidiary (pursuant to the “permitted assignments” paragraph), then the original party to the OEM agreement will remain liable under the OEM agreement. This is true because when doing a “permitted assignment,” the original party to the OEM agreement remains jointly and severally liable with the assignee. This will force the assignor/seller to continue to be part of the transaction to insure protection of its interests, in the event that the buyer subsequently defaulted and the assignor/seller was called upon by the OEM to perform under the OEM agreement.

Assignment language is only one concern in purchasing LLC membership interest. Often pre-existing LLC's (or S corps) have had prior activity which may create unique problems. Aircraft positions are typically purchased in an active business with other assets, such as another aircraft. Or, the entity may have had a history of transactions or operations making the possibility of creditor or tax return issues surfacing in the future. Suddenly the buyer is faced with the added headache of due diligence to confirm that no financial surprises may arise that could attach to the ownership of the legal entity.

#### *Back- to- Back Title Transfers*

When purchasing the LLC membership interests is not practical due to the contract language, prior history of the LLC, or other various reasons such as the refusal of the seller to leave money in escrow to secure a potential claim of default under the OEM agreement, it will become necessary to engage in a back-to-back title transfer. A back to back title transfer occurs at the aircraft's closing, whereby the seller takes title to the aircraft as in a normal transaction, and immediately after taking title, a second FAA Bill of Sale is filed with the FAA which then transfers the aircraft to the buyer. The back to back title transfer allows the transaction to close without interference by the OEM.

The back to back title transfer is not without complications. Similar to the problems of assignment of the LLC, the seller may need to be actively involved in the transaction until title transfers. Progress payments, delivery location, and interior layout of the aircraft are among the many items that may need to be directed by the seller for the buyer. In particular with respect to progress payments, it is likely that the seller will want the buyer's money to pay future progress payments. The buyer will not find this approach ideal, as their only rights are to take ownership of an aircraft that is being constructed for the seller, and the buyer has no direct rights against the OEM to demand a credit for amounts paid, and, most importantly, the ultimate delivery of an aircraft.

In addition, the required involvement of the seller vis-à-vis the OEM, makes the back-to-back title transfer a less attractive option in situations where the aircraft delivery date is far into the future. A possible solution to reduce the seller's involvement includes designating a mutually agreed upon third party, such as an aircraft completion specialist, or the buyer itself, to act as agent for the buyer vis-à-vis the OEM.

#### *Bonus Depreciation*

Increased interest in the purchase and sale of aircraft positions may also be attributed to the revival of bonus depreciation. The recently passed American Recovery and Reinvestment Act of 2009 ("2009 Stimulus") contains provisions that appear to make it possible to receive bonus depreciation on an aircraft that has been transferred via the purchase of an aircraft position. The 2009 Stimulus extends the provisions of the Economic Stimulus Act of 2008 ("2008 Stimulus") which, in turn, resurrected bonus depreciation from the economic incentives Congress promulgated after September 11, 2001. A Treasury Regulation example indicates that where a taxpayer enters into a written binding contract prior to January 1, 2009 (September 11, 2001 in the example), and then subsequently transferred the rights to own and use the property to another unrelated taxpayer, the transferee taxpayer can qualify for bonus depreciation.

The use of the phrase "transferred the rights to own and use" in the Treasury Regulations is

ambiguous, and it is not clear whether the phrase implies an assignment of the original OEM agreement, or a back-to-back title transfer of a new aircraft without an assignment of the OEM agreement, or both. A buyer should understand the strengths and weaknesses of claiming bonus depreciations under each of the discussed structures and should engage experienced aviation tax counsel to provide advice. It is also worth pointing out that the purchase by the buyer of an LLC that is disregarded for federal income tax purposes, is tantamount to an assignment of the underlying contract itself (for bonus depreciation analysis purposes).

While the purchase of a seller's position seems at first blush a relatively straightforward and simple transaction, mainly due to the lack of a pre-purchase inspection as part of the process, this article demonstrates that it is far more complicated on the business issues associated with risks for each of the seller and the buyer. The attorneys at GKG Law have been involved, over the years, in over a hundred such structured transactions and can provide advice based on their expertise and practical experience.

*Keith G. Swirsky is President of GKG Law and is a tax specialist concentrating in the areas of corporate aircraft transactions and aviation taxation. The firm's business aircraft practice group, chaired by Mr. Swirsky, provides full-service tax and regulatory planning and counseling services to corporate aircraft owners, operators and managers. The group's services include Section 1031 tax-free exchanges, federal tax and regulatory planning, state sales and use tax planning, and negotiation and preparation of all manner of transactional documents commonly used in the business aviation industry, including aircraft purchase agreements, leases, joint-ownership and joint-use agreements, management and charter agreements, and fractional program documents. Mr. Swirsky may be reached at the firm's Washington, D.C. office, 1054 31<sup>st</sup> Street, NW, Suite 200, Washington, D.C. 20007, Telephone: (202)342-5251, Facsimile: (202)965-5725, E-mail: [kswirsky@gkglaw.com](mailto:kswirsky@gkglaw.com).*

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## Upcoming Aviation Events

- **November 14:** Potomac Consolidated TRACON "Operation Raincheck" tour. For more information, please visit [http://www.faa.gov/about/office\\_org/headquarters\\_offices/ato/tracon/pct/raincheck.htm](http://www.faa.gov/about/office_org/headquarters_offices/ato/tracon/pct/raincheck.htm).
- **November 19:** The Royal Aeronautical Society of Washington will host a lecture by Robert Birmingham, President of L-3 Communications' Simulation and Training Group, on "Warfighter Readiness Enhanced by Simulation Advancements" at the British Embassy. For more information, please visit <http://www.raeswashington.org>.
- **November 23:** Aero Club of Washington luncheon featuring Larry Kellner, Chairman and CEO of Continental Airlines. For more information, please visit <http://www.aeroclub.org/luncheons.htm>.
- **December 1:** International Aviation Club holiday reception, at the residence of the French Ambassador. For more information, please visit <http://www.iacwashington.org/events.html>.
- **December 1-3:** International FAA Runway Safety Summit, co-sponsored by the American Association of Airport Executives, at the Omni Shoreham. For more information, please visit [http://www.aaae.org/meetings/meetings\\_calendar/mtgdetails.cfm?MtgID=91107&RecID=754](http://www.aaae.org/meetings/meetings_calendar/mtgdetails.cfm?MtgID=91107&RecID=754).
- **December 3:** Airport Council International-North America international aviation issues seminar at the Fairfax Embassy Row. For more information, please visit <http://www.aci-na.org/conferences/detail?eventId=153>.
- **December 4:** GWBAA annual holiday party; for more information, see above.
- **December 9:** The FAA Safety Team will present a seminar on "What Went Wrong?" at the Sheraton Baltimore North in Towson, Maryland at 7 pm. For more information, please visit [http://www.faasafety.gov/SPANS/event\\_details.aspx?eid=27870](http://www.faasafety.gov/SPANS/event_details.aspx?eid=27870).
- **December 10-11:** Ninth Annual American Association of Airport Executives Aviation Security Summit at the Omni Shoreham. For more information, please visit [http://www.aaae.org/meetings/meetings\\_calendar/mtgdetails.cfm?MtgID=91205&RecID=683](http://www.aaae.org/meetings/meetings_calendar/mtgdetails.cfm?MtgID=91205&RecID=683).
- **December 11:** Aero Club of Washington Wright Memorial Dinner honoring Steven F. Udvar-Hazy. For information, please visit <http://www.aeroclub.org>.
- **January 26:** Aero Club of Washington luncheon featuring J. Randolph "Randy" Babbitt, FAA Administrator. For information, please visit <http://www.aeroclub.org/luncheons.htm>.



- **January 27:** ABA Forum on Air and Space Law Update Conference at the Ritz-Carlton. For more information, please visit <http://www.abanet.org/forums/airspace/home.html>.

## **GWBAA Offers Online Benefits**

We continue to add member information for GWBAA's electronic membership directory – <http://www.gwbaa.com/directory.html>. This service is available to GWBAA members at no cost. Please contact Jol Silversmith ([jasilversmith@zsrlaw.com](mailto:jasilversmith@zsrlaw.com)) if you want to post your company's information.

## **GWBAA Contacts**

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