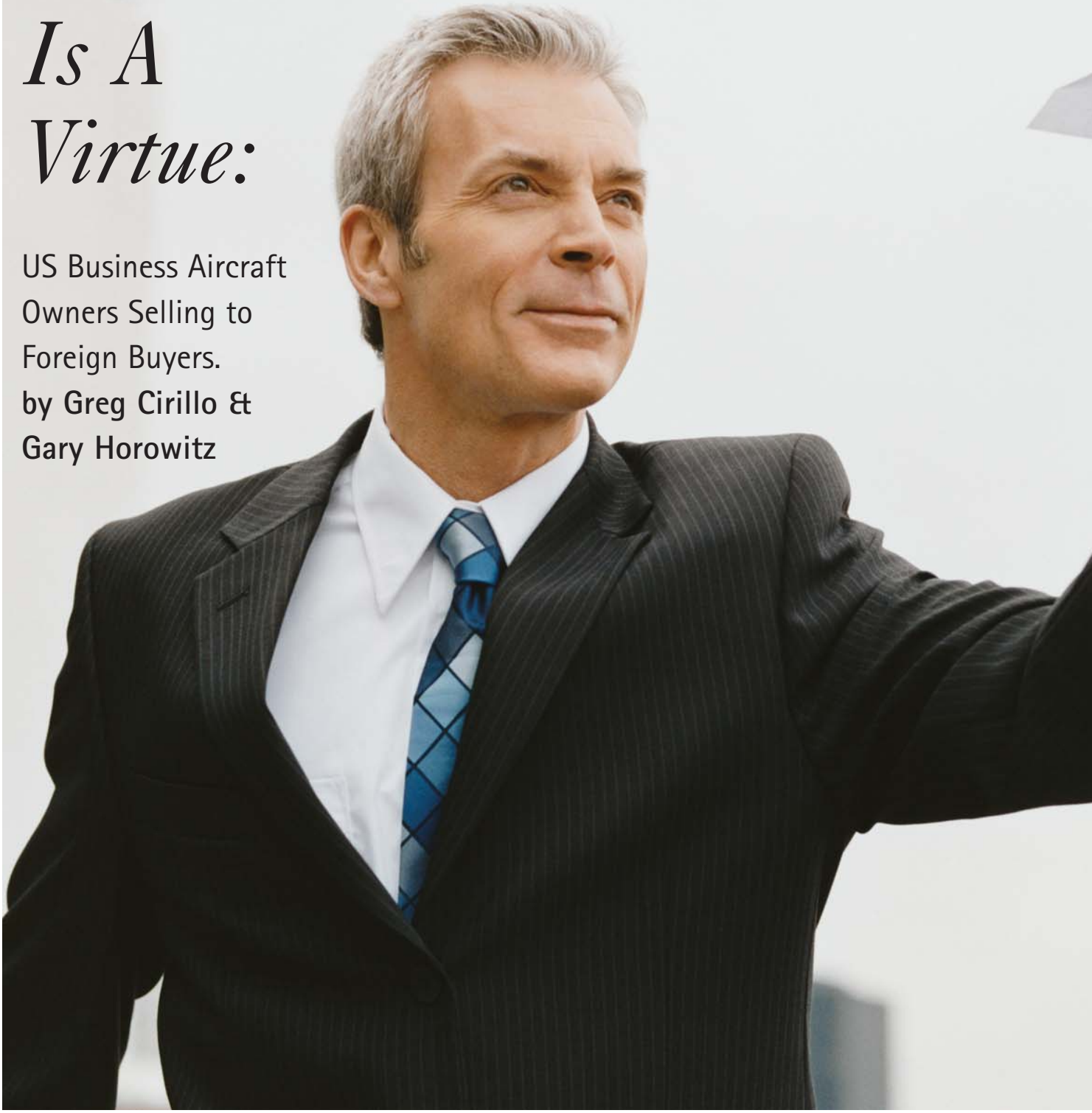
When Patience Is A Virtue:

US Business Aircraft Owners Selling to Foreign Buyers.

by Greg Cirillo & Gary Horowitz



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Aircraft sellers are in a great rush to close on their aircraft sale transactions, and for good reason: time kills deals. However, U.S. private aircraft sellers wanting access to foreign buyers will need to show some patience, given the added legal steps required and the time/culture differences.

Private aircraft ownership in Asia, the Middle East and India is rising and will continue to grow for the foreseeable future. These foreign buyers are (and will be) purchasing aircraft that are registered and based in the United States, due to the large U.S. business aircraft market and the perceived high U.S. standards for aircraft maintenance. Many foreign buyers plan to import the aircraft into their own country, but before they do, they need to export the aircraft out of the United States.

Neither the U.S. seller nor the foreign buyer will enjoy it, but there are some U.S. laws that the parties will need to suffer through in order to complete their aircraft transaction. These U.S. laws may be unfamiliar to the foreign buyer, and possibly invasive, so the U.S. seller must get these issues on the table early, and show some patience. Below is a summary of the main U.S. laws that a U.S. seller should be aware of when selling an aircraft to a foreign buyer that plans to export the aircraft out of the United States.

DE-REGISTRATION

In order to export an aircraft from the United States, the aircraft's U.S. registration must be canceled by filing a registration cancellation request with the Federal Aviation Administration (FAA). The request may be made by the aircraft's last registered owner, the last owner of record, the foreign purchaser (when supported by evidence of ownership), or by the authorized party under an Irrevocable De-Registration and Export Request Authorization (IDERA).

Requests to cancel a U.S. aircraft registration for export must include:

- A complete description of the aircraft;
- The reason for cancellation (export to foreign country);
- The name of the country to which the aircraft is being exported;
- The signature and appropriate title of the requester;
- Releases, discharges, or consents to export for all outstanding interests, security instruments and unexpired leases; and
- A copy of the International Registry Search Certificate if the aircraft is subject to the Cape Town Treaty.

If the foreign buyer is going to finance the aircraft purchase, the de-registration of the aircraft from the United States and re-registration in the buyer's country must be well coordinated. The lending bank will require a perfected lien (mortgage) on the aircraft, and this cannot occur until after the aircraft is de-registered in the United States and re-registered in the buyer's country.

A U.S. seller will not usually agree to allow its aircraft to be de-registered until the seller first receives payment for the aircraft, but the lender will not want to release those funds until after it files a lien on the aircraft under the buyer's home country registry. In many cases, the time difference between the selling and buying locations precludes a smooth, continuous de-registration and re-registration of the aircraft. In these cases, the careful use of independent escrows of money and registration documents is the best option for protecting the parties' interests.

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As discussed in the "Closing" section (below), the conduct of these transactions requires the use of an experienced escrow agent, coordinating filings in the U.S. and the nation of subsequent registration in order to address the concerns of buyer, seller and lender(s).

In addition to U.S. registration with the FAA, some states require that aircraft based in their state be registered or licensed in the state. State de-registration of aircraft is a minor concern, but a U.S. aircraft seller may be required to collect state sales tax from the buyer on the aircraft's sale unless there is a state sales tax exemption, which many states have.

CERTIFICATE OF AIRWORTHINESS FOR EXPORT

Under U.S. law, 'registration' and 'airworthiness' are separate issues administered by the FAA, and both need to be addressed to export an aircraft. Assuming the buyer follows the above procedure on de-registration, the buyer must also pursue airworthiness authority in the jurisdiction where the aircraft will be registered.

The new nation of registry must be comfortable that the aircraft is safe and suitable for use. The foreign buyer needs to engage the services of its equivalent of a "DAR" or Designated Airworthiness Representative, who will examine the aircraft and records on behalf of the buyer's aviation regulator. For an aircraft being exported from the U.S., a U.S. seller must normally obtain for the buyer a "Certificate of Airworthiness for Export" from the FAA. This document tells the subsequent nation of registration that the FAA finds the aircraft airworthy (conforming to the specific type certificate issued by the FAA).

In most cases, this FAA document will be sufficient for the issuance of a Certificate of Airworthiness in the resulting nation of registration. It is in the U.S. seller's interest to support the buyer's foreign registration activity by obtaining the "Certificate of Airworthiness for Export" from the FAA as quickly as possible.

CLOSING

It is important for a U.S. seller to establish, early in a transaction, where the aircraft will be when the various steps take place, and the order of steps. This may require coordination with the seller and buyer's banks, if applicable, and use of an experienced escrow agent. The escrow agent (as directed by the transaction documents) will govern the release of documents and funds, and the filing of lien releases, de-registration, re-registration and new liens.

It is not unusual for the entire transaction to occur while the aircraft remains in the U.S., in which case the purchaser would need to have a representative of the new nation of registration in the U.S. to perform any technical inspections required to issue the applicable Certificate of Airworthiness.

Transactions all vary, but a typical closing sequence, which is undertaken by joint instruction of seller, purchaser, lenders and other interested parties, and completed without interruption, is as follows:

- U.S. liens/leases terminated
- International Registry liens/leases terminated
- Title documents released
- U.S. de-registration
- New national registration
- New national liens/leases established
- New International Registry liens established
- Physical possession and control transferred to purchaser.

ANTI-MONEY-LAUNDERING LAWS

The U.S. seller of a private aircraft may have to perform a due diligence investigation of the foreign buyer of a U.S. aircraft in order to comply with U.S. anti-money-laundering (AML) laws and regulations. This could be a sensitive issue with the foreign buyer that the U.S. seller must carefully navigate.

The U.S. government is concerned about money-laundering (parties engaging in transactions with money obtained by illicit means). Therefore, U.S. AML controls require U.S. financial institutions to prevent, detect and report money-laundering activities by requiring financial institutions to identify their customers, establish risk-based controls, keep records, and report suspicious activities.

Under The USA PATRIOT Act, U.S. businesses engaged in aircraft sales are considered "financial institutions" that are subject to AML compliance. Therefore, any U.S.

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persons or entities engaged in the regular or recurring sale of aircraft will have some level of due diligence to comply with AML ("Know Your Customer"). At a minimum, the U.S. seller of an aircraft may evaluate each buyer (including entities known to be affiliated with the buyer) on a scale of low, medium or high risk for money-laundering abuse.

As part of AML compliance, the U.S. seller may check the "Specially Designated Nationals List" of the Office of Foreign Asset Control – Department of the Treasury (OFAC) and other U.S. Government lists. OFAC administers economic sanctions programs that apply to all U.S. persons, wherever located. OFAC's programs are either list-based or country-based. Country-based programs target a particular government and include complete trade embargos. Such programs include sanctions against Cuba, Iran and Sudan. List-based programs target persons (individuals or entities) involved in activities that threaten the national security, foreign policy or economy of the United States. Examples include sanctions targeting global terrorists and narcotics traffickers.

OFAC regulations do not require a U.S. person to maintain a compliance program – but OFAC's regulations are strict liability. OFAC will take into account certain mitigating factors (including the presence of a compliance program) when determining whether to impose penalties for a breach of the sanctions program. Additionally, although OFAC does not formally require U.S. persons to maintain a compliance program, OFAC has adopted the U.S. Bank Secrecy Act risk matrix. This matrix provides that a U.S. financial institution will gauge the potential for money-laundering abuse for each customer, product, service and geographic location – and establish corresponding policies and procedures to mitigate each such risk.

Accordingly, U.S. sellers of aircraft may have to evaluate and check-up on the foreign buyer for AML compliance. U.S. sellers should explain these U.S. legal requirements to their foreign buyers as an unavoidable consequence of purchasing a U.S. registered aircraft, and not an effort by the U.S. seller to investigate the buyer more than is necessary to complete the transaction.

EXPORT CONTROL LAWS

As mentioned, U.S. export control laws administered by the U.S. Department of Commerce (DOC) and U.S. Department of State (DOS) prevent the sale of certain technologies to certain foreign countries and end-users. Under these laws, U.S. sellers cannot sell aircraft to individuals or companies from prohibited nations (e.g. Cuba or Iran). Therefore, U.S. sellers will likely need to perform a "Know Your Customer" investigation of the foreign buyer for U.S. export control law compliance. If the buyer of the aircraft plans to resell the aircraft in a back-to-back transaction, U.S. export laws may treat this as a sale by the U.S. person directly to the aircraft's end-user. For example, if a U.S. person sells an aircraft to an Indian citizen who then sells the aircraft to an Iranian citizen, U.S. export laws may treat this as a sale by the U.S. person directly to the Iranian citizen. Therefore, the U.S. seller will want to investigate both the intermediate buyer and the end-user buyer to comply with U.S. export control and AML laws.

CONCLUSION

A U.S. owner selling an aircraft for export into a foreign country must comply with a bevy of U.S. laws and the requirements of several U.S. Governmental agencies. U.S. sellers just want to sell their aircraft, and do not particularly want to deal with all of these U.S. legal obligations, but nonetheless they must manage these matters or risk U.S. penalties and fines for non-compliance on the sale and export of aircraft. U.S. sellers must also manage their foreign buyers for whom these U.S. legal requirements are "foreign" and intrusive. For a U.S. seller in this situation, patience is the key.

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› **Do you have any questions or opinions on the above topic? Get them answered/published in World Aircraft Sales Magazine. Email feedback to: editorial@avbuyer.com**

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