

# Guidelines for Interchange Agreements

## I. Eligibility Checklist

- A. Determine whether parties are eligible to enter into an interchange agreement under FAR §91.501 (b)(6).
- B. Interchange Defined. An arrangement whereby a person leases his airplane to another person in exchange for equal time, when needed, on the other person's airplane, and no charge, assessment, or fee is made, except that a charge may be made not to exceed the difference between the cost of owning, operating, and maintaining the two airplanes.
- C. Is the aircraft a "large" aircraft (within FAA definition – i.e., more than 12,500 pounds maximum certificated takeoff weight)? Is the aircraft a multi-engine turbojet airplane.
- D. If the aircraft is a helicopter, or if it is "small," determine whether NBAA exemption applies (is the operator, a member of NBAA) which permits operation under FAR §91.501. If operations are not performed pursuant to the NBAA exemption, individual exemption from FAA is required.
- E. Is the aircraft registered in the U.S.? If not, aircraft is not eligible to engage in interchange operations.
- F. If the aircraft is U.S.-registered but is "owned, controlled or operated" by a company that is not a U.S. citizen under the relevant aviation statutes and regulations, such aircraft will be deemed a "foreign civil aircraft" which may result in additional regulation and licensing by the Department of Transportation. Consult experienced aviation counsel if aircraft is a U.S. registered foreign civil aircraft.
- G. The aircraft operations of the operator must be incidental to its other business – which rules out the so-called flight department company (i.e., a company whose only function is to own and operate the aircraft) from engaging in interchange.

## II. Terms and Conditions of Written Contracts

- A. Identity of the Parties. Name address, place of incorporation or organization, if not acting in individual capacity.
- B. Recitals
  1. The "Whereas" clauses at the beginning of the contract are traditionally used to describe what each party brings to the deal and their respective intentions. Echo the appropriate language from FAR §91.501.
  2. Include a description of the aircraft (the "Aircraft") by make, model, serial number of airframes and engine(s), and registration number.
- C. Subject Matter/Terms. Description of what is being provided by whom and to whom, on what basis, and for how long (e.g. Party A provides the Aircraft to Party B on an interchange basis under FAR §91.501(b)(6) and (c)(2) for the period
- D. Consideration
  1. Note what the regulation requires. The interchange must be for equal time (hour for hour), with only the difference in the cost of operating the two aircraft being paid.
  2. The parties may want to consider including a maximum usage differential, which would prohibit one party from getting too far ahead of the other in hourly use.
- E. Tax Issues
  1. Excise Taxes. Interchange flights are subject to the ten percent Federal excise tax as imposed under IRC §4261. It would be wise for the parties to address valuation of the interchanged flights. It is the responsibility of the entity providing the aircraft and crew to collect and remit the Federal excise tax on a particular flight.
  2. State Taxes. Normally the states do not apply the state sales and use taxes to a lease of an aircraft with crew. However, it would be wise

- to check the rules of the state in which the aircraft is based.
- F. Scheduling of Aircraft**
1. Specify how and when flights will be requested, confirmed, the form and content of such requests, and/or confirmations and the person (by name or title) or department from whom such requests will be accepted, and to whom confirmations should be sent. Provide similar information for the operator.
  2. Specify party (usually the operator) having final authority over scheduling the Aircraft.
- G. Maintenance Responsibility**
1. Identify the party (usually the operator) responsible for arranging and paying for maintenance, preventive maintenance and required or recommended inspections.
  2. Specify that aircraft maintenance and inspections takes precedence over aircraft scheduling unless such maintenance or inspections can be safely deferred in accordance with applicable laws and regulations and within the sound discretion of the Pilot-In-Command (PIC).
- H. Operational Control**
1. Identify party (the one providing the Aircraft and crew) as having operational control, i.e., responsibility for providing the crew and for the physical and technical operation of the Aircraft and safe performance of all flights.
  2. Reserve final authority in the PIC to initiate or terminate each flight, select the routing, determine the load to be carried, and otherwise decide all matters relating to the safety of such flight.
- I. Warranties and Representations**
1. Relating to title and right to enter into an interchange arrangement.
  2. Relating to each party's use of the Aircraft for its own account with prohibition against providing transportation of passengers or cargo for compensation and hire (for which specific Federal Aviation Administration and/or DOT licensing would be required).
  3. Relating to compliance with applicable laws, regulations, and insurance provisions
- J. Risk Allocation**
1. Insurance. Which party provides the insurance (usually the operator)? Scope of coverage? Limits of liability? Additional insured status for interchanger? Breach of warranty in favor of interchangee? Waiver of subrogation? 30 days' notice of cancellation for additional insured?
  2. Indemnification/Hold Harmless. Will operator indemnify interchangee for liability arising out of the operation of the Aircraft? If so, under what conditions and to what extent? Will each party indemnify the other for liability arising out of the indemnifying party's breach of contract?
  3. Limitations of Liability
    - a. For delays or cancellation
    - b. For loss of baggage
    - c. For consequential/punitive damages
    - d. In case of Force Majeure
- K. Flight Cancellations.** Specify whether and under what conditions a party may cancel a flight that has been requested and confirmed.
- L. Termination**
1. Will each party have a right to terminate before the end of the term? If so, under what circumstance (with or without cause, upon — days prior notice, etc.)?
  2. Will a different termination right apply in the case of a breach of contract (i.e., termination for cause).
- M. Boilerplate (standard) provisions relating to:**
1. Notices
  2. Further assurances/duty to cooperate
  3. Assignment
  4. Construction of terms/choice of law/forum selection
  5. Severability
  6. Force Majeure
  7. Compliance with laws
  8. Integration clause/amendment
  9. Arbitration as a means of resolving disputes.
- N. Home Base of Aircraft.** Identify the permanent base of the aircraft.

O. Truth-in-Leasing Provisions.

1. Determine whether FAR §91.23 is applicable.
2. Include required statements and certifications, if applicable, as concluding paragraph immediately preceding the signature blocks.

P. Signature Blocks. Ensure that they match the parties.

**III. Pre-Operation Checklist**

A. Comply with following notice and mailing requirements of Truth-in-Leasing provisions of FAR §91.23, if applicable (review and comply with similar provisions in the NBAA exemption #1637, if small aircraft or helicopters are being interchanged).

1. Mail to FAA in Oklahoma City within 24 hours of execution.
2. Carry agreement and NBAA exemption notice (if applicable) onboard the Aircraft
3. Notify nearest FSDO at least 48 hours before the first flight under the agreement.

B. Confirm with insurance backers or insurance company that existing coverage applies (or will have to be amended to apply) to the interchange arrangement which, by virtue of like-kind compensation could be viewed as “commercial”; also confirm that any contractual liability, (e.g., indemnity provisions mentioned in Part II(J)(2) of the Guidelines) are covered by the policy.

**Disclaimer**

*NBAA offers these guidelines as an aid to its Members who are considering entering into an interchange arrangement. They are based on FAA and IRS regulations and statutes, and are not to be considered as an opinion or an interpretation of these rules. No document can fully cover the possible variations that arise in individual circumstances. This guideline is not intended a substitute for the advice and counsel of an attorney experienced in aviation law.*

## Insurance Considerations – Interchange

<b>Company A (Owner/User)</b>	<b>Company B (Owner/User)</b>
Will carry the liability and physical damage (hull) coverage on Company A's aircraft on its own insurance.	Will carry the liability and physical damage (hull) coverage on Company A's aircraft on its own insurance.
Will need to have a "Purpose of Use" or "Approved Use" on the policy that allows for interchange use of the aircraft	Will need to have a "Purpose of Use" or "Approved Use" on the policy that allows for interchange use of the aircraft
Will want to be named as an Additional Insured with respect to liability coverage on Company B's insurance policy while Company A is using Company B's aircraft.	Will want to be named as an Additional Insured with respect to liability coverage on Company B's insurance policy while Company A is using Company B's aircraft.
Will want a waiver of subrogation with respect to physical damage on Company B's policy while Company A is using Company B's aircraft.	Will want a waiver of subrogation with respect to physical damage on Company A's policy while Company B is using Company A's aircraft.
Will want a clause in Company B's policy stating that the insurance provided by Company B's policy is primary while Company A is using Company B's aircraft.	Will want a clause in Company A's policy stating that the insurance provided by Company A's policy is primary while Company B is using Company A's aircraft.
Will want adequate liability coverage limits to ensure sufficient coverage if the liability coverage has to be shared with Company B.	Will want adequate liability coverage limits to ensure sufficient coverage if the liability coverage has to be shared with Company B.
Will want to determine whether, and the extent to which, any indemnification language in the interchange agreement will be covered by either policy.	Will want to determine whether, and the extent to which, any indemnification language in the interchange agreement will be covered by either policy.
Will want to receive advance notice of deletion, cancellation or material changes in coverage for Company B's aircraft on Company B's insurance policy.	Will want to receive advance notice of deletion, cancellation or material changes in coverage for Company A's aircraft on Company A's insurance policy.
Will want a Certificate of Insurance from Company B's insurer verifying coverages provided under Company B's policy.	Will want a Certificate of Insurance from Company A's insurer verifying coverages provided under Company A's policy.