

CJI INSIGHT: PRIVACY VERSUS SECRECY – THE FACTS BEHIND PRIVACY TRUSTS IN THE AVIATION INDUSTRY

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While owning an aircraft is an investment in one's brand that supports the people who execute an organisation's mission, others outside your organisation can perceive the importance of that investment differently than you, writes Shelley A. Svoren of Infinite Branches and Scott Nielsen of TVPX.

Many aircraft owners acquire their aircraft prior to understanding that anyone can obtain ownership information of any aircraft through the FAA's public records. The availability of aircraft ownership documentation can subject users of business aircraft to unwanted attention that includes public 'flygskam' or flight shaming and unwanted cold calls from marketers of luxury goods. Further complicating privacy of aircraft use is the ability for one's flight patterns to be tracked through ADS-B technology and publicly available FAA flight transponders information that can jeopardise personal safety and place confidential business transactions at risk.

In order to obtain some semblance of anonymity, many owners of business aircraft turn to the legitimate use of privacy trusts to discretely own and operate their assets. When using a privacy trust structure, all one sees in the public records with the FAA or in flight aware is the name of the trust that owns the aircraft and an opaque entity that is the beneficiary of that trust. Scott Nielsen, senior vice president and chief marketing officer for TVPX, which is an aviation service company that focuses on a multitude of unique issues in the aviation industry, recently discussed privacy trusts in his conversation with Women In Aircraft Sales. The privacy trust structure was first approved by the FAA's Aeronautical Center Council in late 2016 and the team at TVPX, with the support of Scott McCreary at McAfee & Taft, established TVPX's framework and documentation that was approved in 2017.

One issue TVPX highlights is the material difference between privacy and secrecy. The FAA accepts that aircraft owners require privacy, but expressly prohibits the creation of ownership structures that result in secrecy of who the beneficial owner is. Furthermore, no parties involved in the creation of privacy trust structures seek to create secrecy as most tend to be either financial institutions or fiduciaries (such as attorneys) that are subject to regulatory and/or industry oversight.

With privacy in mind, how does one create a privacy trust structure?

In a traditional aircraft ownership structure, Client X would create an Aviation LLC that would own and operate the aircraft. The ownership records for Aviation LLC would be available through the

FAA's public records. To create privacy, the following two elements must exist:

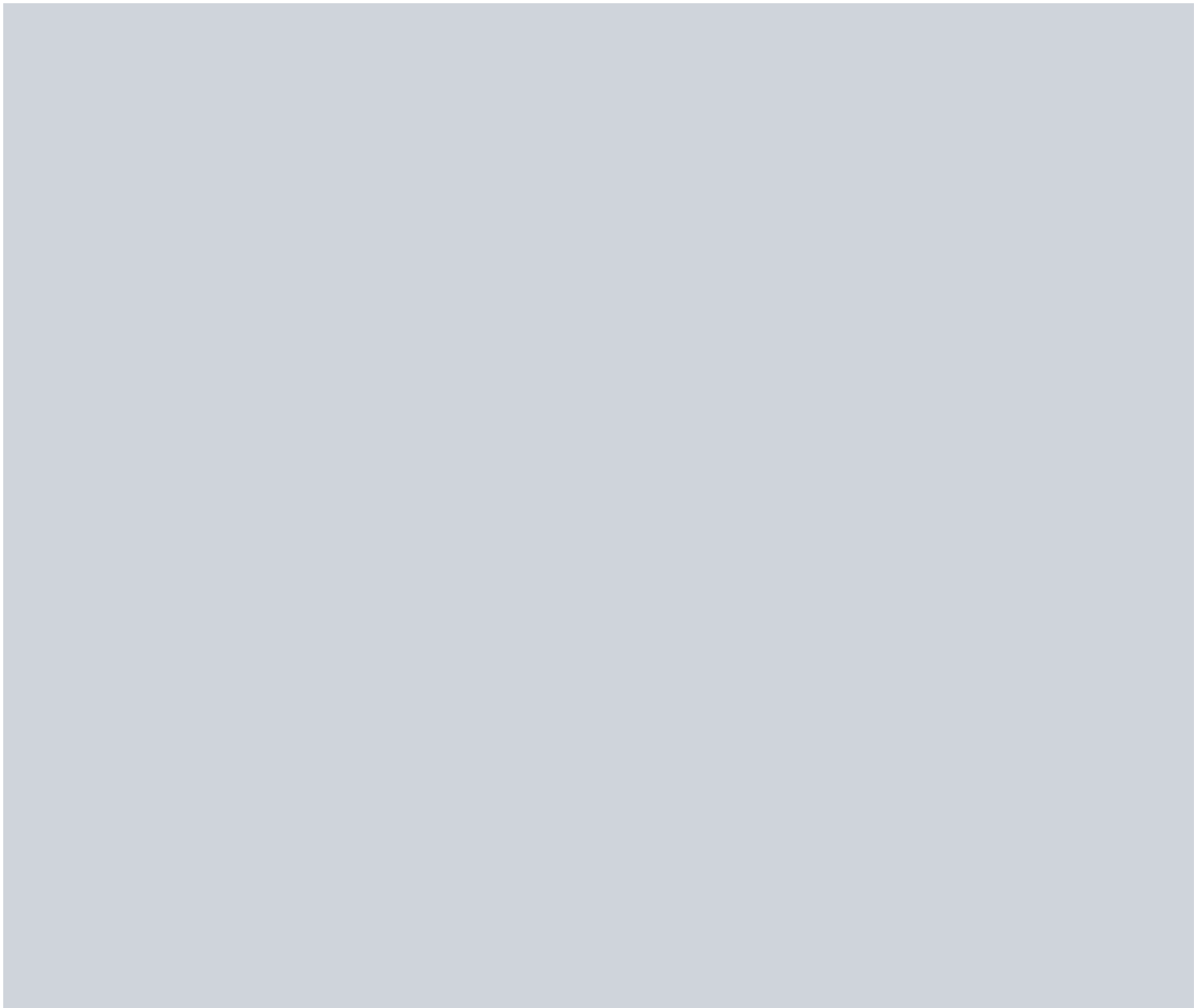
1. A statutory trust or an legally permitted 'opaque entity': Legally permitted opaque entities are organisations where the ultimate beneficial owner is not required to be detailed in public records. This could take the form of an offshore entity or an LLC where the ownership is undisclosed. TVPX utilises Wyoming Statutory Trusts as the state does not require the public disclosure of the parties involved. Typically, another entity, such as an aviation LLC, is the beneficiary of the opaque entity.

The opaque entity is a conduit by which the ownership and operational control of the aircraft flow between the beneficial owner and the entity that serves as the owner of aircraft for FAA purposes. This entity generates no income and is generally professionally managed to adhere to state requirements regarding its existence.

2. A Business Trust: TVPX uses a Utah Business Trust, which permits nonfinancial institutions to create a common law trust and it is limited in powers as it is prohibited from managing assets. The business trust is a passive, nonowner managed trust (similar to a grantor trust) files its documentation at the state level. The Wyoming Statutory Trust (or the opaque entity) would be the beneficiary of a Utah Business Trust and disclosed in the documentation filed that is available for public viewing.

Like the opaque entity, the Business Trust is a conduit by which the ownership and operational control of the aircraft flow between the beneficial owner and this entity, which serves as the owner of aircraft for FAA purposes. And like the opaque entity, this entity generates no income and is generally professionally managed to adhere to state requirements regarding its existence.

It is important to note that in the case of both the Statutory and Business Trusts in which the grantor is a US taxpayer, Tax Identification Numbers (TIN) are not requested in the normal course of business. Not obtaining a TIN is permitted as the ultimate taxpayer grantor can potentially utilise depreciation and the trusts are treated as disregarded entities for tax purposes. TINs may be required at the direction of a financier for one or both trusts. In any event, obtaining a TIN does not change the tax obligations or benefits for the ultimate taxpayer grantor.



The organisational chart reflects the elements of a privacy trust structure:

*Client X forms a limited liability corporation (or another corporation) that uses the aircraft;

*That legal entity (shown above as Aviation LLC) contributes the aircraft asset to the Wyoming Statutory Trust (or an opaque entity) and becomes the beneficiary of the opaque entity;

*The opaque entity in turn contributes that aircraft to the Utah Business Trust. The formation documents for the opaque entity are provided to the FAA concurrently with the documents for Utah Business Trust. However, the documents for the opaque entity are not filed in the Public Records section of the FAA or opined upon by the FAA's Aeronautical Center Council. The FAA always knows

who the beneficiary is. This creates privacy, but not secrecy; *The Utah Business Trust is the owner of record on all matters related to ownership and operational control with the FAA.

*The Utah Business Trust is reviewed and opined upon by the FAA's Aeronautical Center Council and the trust document for this entity is filed in the Public Records section of the FAA;

*To address operational control, a lease is created between the Utah Business Trust and the opaque entity, which is also filed in the Public Records section of the FAA;

*The opaque entity; however, is not the entity that operates the aircraft and operational control is further delegated through a sublease with the Aviation LLC. The sublease is submitted to the FAA to conform to Truth In Leasing requirements but it is not filed in the public documents section of the FAA. This also creates privacy but not secrecy.

Issues to consider when financing an aircraft that is owned by a privacy trust

Financiers regard privacy trusts as a conduit of convenience that create privacy, rather than secrecy. It is important to balance the wants and needs of one's client while also meeting mandated regulatory Know Your Customer due diligence requirements and ensuring the achievement of collateral perfection. One can expect the normal documentation to not only double, but potentially triple, given the needs to perfect an interest and create enforceability with the FAA. Understanding this aspect of financing a privacy trust will help one prepare for the negotiation and closing of financing for the aircraft:

***Borrower and Guarantors.** Legal consideration dictates who and what entities should serve as borrowers and guarantors for any financing. Financiers typically grant the loan to the Aviation LLC with the ultimate beneficial owner serving as a guarantor (along with any other parties that utilise the aircraft and meet the standards of consideration that would enable a financier to enforce its rights and remedies.)

Depending upon the financier, the Trust that owns the aircraft for FAA purposes **may** serve as a Co-Borrower. Each lender must take into account the uniqueness of the privacy trusts, where neither a statutory or business trust generates cash flow; does not own any assets other than the aircraft; and the powers of the professional trustees that are limited to the aircraft for FAA purposes, to

determine if including any of the trusts as a Co-Borrower or Co-Guarantor meets the requirements for consideration and enforceability beyond signing the FAA filed mortgage.

***Role of Trustees:** In the event of enforceability proceedings, a financier must be able to enforce its rights and remedies and must expressly understand that the trustee would act accordingly. All trustees must adhere to laws that govern their roles as fiduciaries, which subjects all trustees to disciplinary actions according to state and statutory requirements.

***Aircraft Mortgage Considerations:** The FAA filed mortgage is made between the owner of record of the aircraft (which in the diagram is the Utah Business Trust) and the financier. Financiers in turn, create a document that legally “joins” the aircraft mortgage, the Utah Business trust, and the ultimate beneficial owner to ensure not only enforceability is guaranteed through the aircraft mortgage, it also joins the ultimate beneficial owner to the legal documentation.

***Assignment of the Beneficial Interests in the Trust and/or Opaque entities:** Financiers acknowledge the chain of ownership of the aircraft that reflects the contribution of the aircraft and the consideration obtained between the ultimate beneficial owner to the owner on record. What must be acknowledged are the beneficial interest in each of the entities (trusts and/or opaque entities) and financiers will obtain an assignment of these beneficial interests.

***Assignment of the Lease and Sublease for Operational Control:** In addition to the aircraft collateral, an assignment of the lease and the sublease are obtained in order to ensure perfection and enforceability.

Gaining privacy beyond the privacy trust structure

Concerns over privacy should not stop once the privacy structure is formed. Best practices for those seeking privacy can include:

***Non-Disclosure Agreements:** While another legal expense, this ensures all parties associated with the aircraft (such as the seller and their related parties, title companies, brokers, management company, and members of an organisation that may use the aircraft) formally understand the need for privacy.

***Communication On and Off the Aircraft:** Formal and informal discussion with those who utilise the aircraft to ensure that all expressly understand the ultimate beneficial owners' need for privacy is critical. Implement acceptable and unacceptable practices to ensure privacy is maintained at all times, such as instituting a no photograph or social media posting rule for those who use the aircraft.

***Understatement is key:** If discretion is required, ensure that how your aircraft looks – its paint scheme including any logos, aviation entity name, and registration number – do not attract attention or lead one to associate the aircraft with the ultimate beneficial owner.

***Privacy in flight:** Owners and passengers often wish to protect their privacy and security while an aircraft is in flight. The FAA's Limited Aircraft Data Displayed (LADD) programme limits the flight tracking information that can be transmitted over the internet (faa.gov.) The PIA programme limits the availability of ADS-B position and identification information.

(www.faa.gov/nextgen/equipadsb/privacy.) For more information about these programs, please consult your aviation adviser.

For those in tune to how their brand is perceived by others when using their aircraft investment, privacy – and not secrecy – may be warranted to travel safely, efficiently, and support any confidential requirements associated with your operations. In addition to the upfront work to create a privacy trust, ongoing thoughtfulness and maintenance of the perception of one's brand is paramount in ensuring that you fully realise the value of your aircraft investment.

About the authors:

Shelley A. Svoren is the CEO and founder of Infinite Branches, a project-based business that supports the initial and ongoing needs of those who view their aircraft as an investment in their brand. She previously financed over 200 aircraft transactions worth over \$1bn during her tenure at a \$100bn plus financial institutions with no repossession or losses and credits transparency and mutual respect with her clients for the results. Svoren first financed a privacy trust in 2016 and financed several privacy trusts during her career. She previously worked as a federal banking regulator and in corporate finance for multinational corporations. Svoren serves as a board member of the International Aviation Womens Association and is a speaker on aviation industry and leadership issues.

Scott Nielsen is the senior vice president and chief marketing officer at TVPX and possesses more than 23 years of experience managing corporate trust sales. During his career at Bank of Utah, he helped build an industry recognised leading trust service business focused on the aviation industry's multifaceted and nuanced needs. Prior to Bank of Utah, Scott was employed at Wells Fargo in their Corporate Trust Service group. Nielsen has developed a broad understanding of trust services and issues. His experiences are in demand as a speaker for industry conferences and educational seminars.