

March 7, 2011

Docket Operations, M-30
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

**RE: DOCKET NUMBER FAA-2009-0671, NOTICE OF PROPOSED RULEMAKING,
SAFETY MANAGEMENT SYSTEMS FOR PART 121 CERTIFICATE HOLDERS**

The National Air Transportation Association (NATA), the voice of aviation business, is the public policy group representing the interests of aviation businesses before the Congress, federal agencies and state governments. NATA's over 2,000 member companies own, operate and service aircraft and provide for the needs of the traveling public by offering services and products to aircraft operators and others such as fuel sales, aircraft maintenance, parts sales, storage, rental, airline servicing, flight training, Part 135 on-demand air charter, fractional aircraft program management and scheduled commuter operations in smaller aircraft. NATA members are a vital link in the aviation industry providing services to the general public, airlines, general aviation and the military.

With this rulemaking, the Federal Aviation Administration (FAA) proposes creating a new Part 5 in Title 14 of the Code of Federal Regulations (14 CFR) that will establish the requirements for an air carrier safety management system (SMS). Additionally, this rulemaking contains changes to 14 CFR Part 119 that will require all certificated Part 121 air carriers to comply with the provisions of the proposed Part 5 as well as require any prospective Part 121 air carriers to demonstrate compliance with Part 5 prior to certification.

NATA INTEREST IN THIS RULEMAKING

While this rulemaking specifically targets certificated air carriers operating under Part 121, the FAA clearly indicates in the preamble that its intent is to apply, at a later date, the requirements of the proposed Part 5 to other certificated entities: *"Although this proposal extends only to part 121 operators, the FAA has developed these general requirements with the intent that in the future, they could be applied to other FAA-regulated entities, such as part 135 operators, part 145 repair stations, and part 21 aircraft design and manufacturing organizations and approval holders."*

With regard to this rulemaking, NATA offers both general comments on the FAA's approach to implementing an SMS regulatory standard and comments that address the differences between Part 121 air carriers and other certificated entities.

NATA believes that the FAA should approach this rulemaking from a generalized standpoint that creates a regulatory SMS structure that could be effectively implemented by other certificated entities. This approach will offer multiple benefits to both the agency and industry in general. Taking a generalized approach to rule structure and a narrow approach to immediate application would in theory reduce the scope of future rulemaking intended to broaden its application. By implementing a generalized rule into the usually larger and more administratively complex Part 121 operational environment, the agency and industry would be better able to identify unintended issues that, if otherwise left unidentified and applied to the smaller, less administratively complex remainder of the industry, could create extreme burdens. Additionally, this approach reduces the likelihood that changes needed to extend, at a later date, the applicability of Part 5 to other certificated entities would not be compatible with the existing Part 121 application. In short, structuring the rule properly before any implementation will help ensure that a phased implementation is possible without drastic changes at any specific phase while also creating harmonization between phases.

DEFINITION OF A HAZARD

NATA believes that the FAA has inadvertently expanded the scope of SMS. The proposed Part 5 defines *hazard* as:

“a condition that can lead to injury, illness or death to people; damage to or loss of a system, equipment, or property; or damage to the environment”(emphasis added)

The current wording would be interpreted to mean that a Part 121 air carrier would need to assess and mitigate its environmental impact as part of its SMS. NATA believes this was not intended by the FAA as the remainder of this rulemaking, both preamble and regulatory language, repeatedly refers to “operational environment,” a concern that falls squarely within the purview of an SMS.

NATA recommends that Part 5.5 be modified to read:

§ 5.5 Definitions.

Hazard means a condition that can lead to injury, illness or death to people; damage to or loss of a system, equipment, or property; or damage to the operational environment.

In the event that the FAA intends to include “a condition that can lead to...damage to the environment” as part of the definition of a hazard, NATA believes the agency has improperly enlarged the scope of SMS. Some may argue that the very operation of an aircraft, since it involves the combustion of a petroleum fuel, is damaging to the environment. Under this vision of SMS, each individual operator would be required to evaluate the potential damage to the environment and implement steps to mitigate that possible damage.

This type of expansion of scope of SMS is both harmful to the successful implementation of SMS and overly burdensome to operators, as the wide scope envisioned by the FAA will require significant resource allocations to hazards that do not have a concrete connection to safety.

MULTIPLE RULEMAKING

Currently, the FAA has two separate and distinct SMS rulemaking projects underway — this rulemaking that proposes to apply SMS to Part 121 air carriers, and other certificated entities such as Part 135 and Part 145 at a later date, and a rulemaking to apply an SMS standard to airports certificated under 14 CFR Part 139¹. The objective and purpose of these separate rulemaking projects is nearly identical: to create an International Civil Aviation Organization-compliant SMS regulatory standard and apply that standard to a certificated entity. The only difference in the objective and purpose of these two separate rulemaking projects is the certificated entities to which they are applied. FAA acknowledges in both rulemakings that the SMS regulatory standard must be scalable and adaptable enough to account for the many differences in the certificated entities’ operations.

In this rulemaking, the FAA is attempting, to its credit, to create a standard that would be adaptable across operational lines (i.e., possible future application to areas beyond Part 121 operations). NATA agrees with this approach and believes that the very nature of SMS as an operational process supports this approach. Therefore, NATA questions the agency’s decision to pursue two distinctly separate regulatory SMS standards. If this approach is carried through to the conclusions envisioned in the rulemakings, all certificated entities will be subject to the Part 5 SMS standard except airports certificated under Part 139, which will be subject to the SMS standard found in 14 CFR Part 139. The interconnected nature of aviation operations does not support this approach, nor does the nature of SMS as an operational process support the idea of multiple standards.

¹ Docket # FAA-2010-0997

NATA strongly recommends that these separate SMS rulemakings be suspended, combined and reissued as a new single SMS regulatory standard. NATA does, however, support the idea of a phased implementation approach led by Part 121 operation. As outlined earlier in these comments, creating a single, generalized regulatory standard and utilizing a phased implementation approach will provide the greatest benefits for both the FAA and industry while creating a harmonized SMS standard across the aviation industry.

SCOPE AND EFFECT OF REGULATION

Current regulation sets forth a minimum standard of safety that is applicable to certificated entities. This rulemaking significantly broadens the FAA's regulatory authority and reach. The structure of this proposed rule provides the FAA with a new, unchecked authority to require compliance with standards not existent in current regulations or promulgated through the rulemaking process.

Under the structure proposed in the new Part 5, a regulated entity would be required to mitigate "deficiencies" identified by their SMS program even if those mitigations were not required by the minimum standard of safety set forth by the balance of existing federal regulation. This creates an ever-moving, poorly defined and non-uniform regulatory standard that would vary between each regulated entity.

Additionally, this structure will allow the FAA to create new mandates simply by pronouncement, devoid of any of the statutory protections afforded in the rulemaking process. On page 68227 of this rulemaking, the FAA offers an example of how this rulemaking may have prevented an aircraft accident. In the example, the FAA makes the assumption that an air carrier's utilization of a Part 65 maintenance facility represents a safety risk that may need to be mitigated through additional air carrier oversight processes. This assumption is found nowhere in existing federal regulation but rather is simply a pronouncement made by the FAA with no supporting facts or evidence. Under the existing structure of Part 5, the FAA could issue an air carrier a violation for either not discovering and analyzing this "safety hazard" or not implementing steps to mitigate it. The end result would be that the FAA would have issued new requirements for air carriers utilizing Part 65 maintenance facilities without having to undertake rulemaking.

Whether this hypothesized example occurs or not is irrelevant, the very fact that the FAA chose an example that would require air carriers to comply with requirements above and beyond those found in federal regulations shows that this rulemaking bestows a nearly unlimited and

unchecked authority on the agency. This unchecked authority goes beyond the power delegated to the FAA by the Congress and most certainly violates provisions of the Administrative Procedures Act (APA) and the Regulatory Flexibility Act. There are numerous methods by which the FAA could modify this proposal to remedy this unchecked power, including limiting mandatory mitigation to compliance with federal regulation or by utilizing SMS output data as input to new rulemaking

NATA requests that the FAA modify this rulemaking by expressly limiting mandatory mitigation to only those items not in compliance with existing federal regulation. Under no circumstances should a certificate holder be required to take any mitigation action that is in excess of the regulatory minimum standard.

SMS COMPLIANCE AND ENFORCEMENT

This rulemaking is void of the FAA vision of SMS compliance and enforcement and, therefore, is wholly insufficient to offer to industry for comment. Without a full picture, including regulatory intent, proposed regulatory language and the agency's plan for compliance and enforcement, it is impossible to provide comprehensive comments. Perfectly structured regulatory language can quickly be frustrated by a poor plan for compliance and enforcement and still lead to many of the problems that the agency attempted to avoid in construction of that regulatory language. The guidance proposed in parallel with this rulemaking is not a compliance plan (see later comments on proposed guidance).

NATA requests that the FAA provide to industry for comment a compliance plan that sets forth the agency's vision for SMS compliance and enforcement. Such questions as who will perform SMS compliance inspections, how these inspections will be structured, and how inspectors will be trained to evaluate compliance could be answered in this plan. Many of the issues industry has today with regulations issued by the FAA relate not to the regulatory language but rather to how compliance is evaluated. The FAA has the opportunity with this rulemaking to address this issue before the SMS rule is finalized. Offering a comprehensive compliance plan for comment would be a proactive, cooperative method to ensuring the long-term success of this rulemaking.

RECORDKEEPING

This rulemaking imposes several distinct record keeping requirements:

- Outputs of safety risk management processes must be retained for as long as the control remains relevant to the operation
- Outputs of safety assurance processes must be retained for 5 years

- Training records must be retained for a minimum of 24 consecutive calendar months after completion of the training
- Certain communications must be maintained for a minimum of 24 consecutive calendar months

NATA requests that clarification on the types of documents that must be maintained under these standards be included in the preamble to the final rule. We ask that this clarification include specific examples of documents that would and would not be subject to retention requirements.

Additionally, NATA is concerned that the FAA has required that documents relating to an SMS implementation be retained without providing protection of those proprietary documents from Freedom of Information Act (FOIA) disclosure or legal discovery.

NATA requests that protections against FOIA access for company's SMS documents be included in the final rule.

FAA COST BENEFIT ANALYSIS

The cost benefit analysis presented with this rulemaking is deeply flawed. From the benefits standpoint, the FAA predicts that this rule would provide \$1.1 billion in savings from "averted casualties, aircraft damage, and accident investigation costs" over 20 years. The FAA derives the costs by calculating the initial and ongoing compliance cost to air carriers over 20 years to arrive at a figure of \$710 million.

The FAA's flaw in analysis arises from its failure to account for mitigation implementation costs over that 20-year period. Simply having an SMS program in place that identifies hazards and calculates risk will do little to prevent accidents without implementing mitigation steps. Without considering the cost of mitigating safety risks, the FAA is unable to perform the full analysis required under federal law. Additionally, NATA has seen no evidence that the FAA incorporated the costs of indefinitely retaining documents required under § 5.97.

NATA requests the FAA analyze the cost-benefits of this rulemaking, including estimated mitigation and indefinite document retention costs.

PROPOSED FAA ORDER 8900 GUIDANCE

Along with proposed regulatory changes, the FAA has offered proposed changes to FAA Order 8900. This proposed guidance appears to be heavily based upon the proposed SMS Advisory

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Circular. This creates a guidance which is greatly slanted towards a single method of compliance. The purpose of the Advisory Circular is to provide one method of compliance with the regulatory standard; therefore, inclusion of its material in the FAA's guidance to its inspector workforce limits the ability of regulated parties to utilize other means of compliance.

Additionally, the sheer volume of information provided in the proposed guidance creates a very confusing path to compliance that will reduce the ability to adapt or scale SMS to varying operations. Under the FAA's current vision, SMS will be an accepted, not approved, document (a determination with which NATA agrees). The final guidance issued in FAA Order 8900 should reflect this determination, not just in words but also in content. Overly detailed guidance on an accepted document, when provided to inspectors, will create confusion in enforcement.

NATA requests that the FAA rescind the proposed changes to FAA Order 8900 and reissue simplified guidance. NATA believes that this new guidance should be simplified to recognize that SMS is an "accepted" document and should clearly indicate that an inspector has no authority to approve or disapprove of the methods used to comply with the regulations, only to verify that compliance is achieved. Additionally, NATA requests that this revised guidance be open to public comment prior to finalization.

CLOSING

In general, NATA supports this rulemaking. However, there are significant challenges to implementing SMS as a regulatory standard that must be addressed. Specifically, the ability of the rule to create near unlimited ability for the FAA to issue new standards on industry with little or no procedural safeguards must be addressed. Due to the number and nature of the changes that must be made to this proposed rule, we believe that the FAA must rescind the current rule and issue a revised notice of proposed rulemaking for public comment.



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