



March 4, 2011

BY ELECTRONIC MAIL

The Honorable J. Randolph Babbitt
Administrator, Federal Aviation Administration
U.S. Department of Transportation
800 Independence Avenue, SW
Washington, DC 20591
Electronic Address: <http://www.regulations.gov> (Docket No. FAA-2009-0671; Notice No.10-15; RIN 2120-AJ15)

Re: Comments on FAA’s Proposed Safety Management Systems for Part 121 Certificate Holders

Dear Administrator Babbitt:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Federal Aviation Administration’s (FAA’s) *Proposed Safety Management Systems for Part 121 Certificate Holders Rule*.¹ FAA’s proposed rule would require each Part 121 certificate holder (i.e., scheduled air carriers) to develop and implement a safety management system (SMS) to improve the safety of their aviation related activities.² SMS is defined by FAA as a comprehensive, process-oriented approach to safety throughout an organization, including an organization-wide safety policy, formal methods of identifying potential hazards, mitigating and continually assessing risk, and the promotion of a safety culture.³ A more detailed discussion of the rulemaking is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of SBA or the Administration. The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the

¹ 75 Fed. Reg. 68224 (November 5, 2010).

² *Id.*

³ *Id.*

⁴ 5 U.S.C. § 601 et seq.

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, Executive Order 13272⁶ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, both Executive Order 13272 and a recent amendment to the RFA, codified at 5 U.S.C. 604(a)(3), require the agency to include in any final rule the response of the agency to any comments filed by Advocacy, and a detailed statement of any change made to the proposed rule as a result of the comments.

Background

As discussed in the proposed rule, FAA is proposing to mandate that all Part 121 certificated air carriers develop and implement a SMS for their aviation safety-related activities.⁷ SMS is defined as an organization-wide approach to managing safety risk and assuring the effectiveness of safety risk controls.⁸ There are four essential components of a SMS. These include safety policy, safety risk management, safety assurance, and safety promotion.⁹ At essence, the goal of SMS is to involve the entire organization, including senior management, in the identification and mitigation of safety hazards and risks as the core organizational objective; however, regulated entities would still have an overriding obligation to comply with all FAA regulations.

The United States is committed by international treaty through the International Civil Aviation Organization (ICAO) to establish a SMS requirement for air carriers.¹⁰ The proposed rule is intended to meet that obligation; however, each ICAO member state is the judge of whether its national SMS rules provide an acceptable level of safety.¹¹ Further, both the National Transportation Safety Board (NTSB) and the FAA's SMS Aviation Rulemaking Committee (ARC) have recommended that FAA move forward with a SMS rule, although the ARC in particular has stressed the need to provide flexibility and to incorporate existing quality and safety programs into any SMS rule.¹² The preamble includes a detailed summary of many of the safety programs that Part 121 air carriers currently utilize.

On August 1, 2010, The Airline Safety and Federal Aviation Administration Extension Act of 2010, Public Law 111-216,¹³ was enacted. The law requires FAA to issue a final rule by July 30, 2011 requiring all Part 121 certificated air carriers to implement a SMS; however, the law provides FAA with considerable discretion over the scope of the final rule. Also, while the proposed rule would only apply to Part 121 certificated air carriers,

⁶ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

⁷ 74 Fed. Reg. 68225.

⁸ 75 Fed. Reg. 68226

⁹ Id.

¹⁰ 75. Fed. Reg. 68230

¹¹ Id.

¹² 75 Fed. Reg. 68231.

¹³ 75. Fed. Reg. 68228.

FAA makes clear that it 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.”¹⁴

FAA earlier published an advance notice of proposed rulemaking (ANPRM) on SMS on July 23, 2009 requesting public comment on whether regulated entities in the aviation sector should be required to implement SMS as a regulatory mandate.¹⁵ Advocacy filed public comments¹⁶ on the ANPRM raising a number of issues concerning SMS from a small business perspective; however, FAA did not reference or address Advocacy’s comments in the proposed rule. A copy of Advocacy’s earlier comment letter to FAA on the ANPRM is attached and incorporated herein.

Small Entities Have Expressed Serious Concerns About Mandating SMS

In response to the publication of the proposed rule, the SMS issue was discussed at Advocacy’s regular small business aviation safety roundtable on December 14, 2010 and again at a separate roundtable on January 7, 2011, that focused solely on the proposed rule. Small business representatives at the roundtables represented air carriers, aircraft and parts manufacturers, general aviation, aircraft repair stations, and others. Several of the attendees at the meetings were members of the FAA’s SMS ARC. Small business representatives at the meeting expressed concern about the open-ended nature of SMS as a regulatory requirement and worried that SMS could lead to ever-expanding regulatory requirements without the protection of rulemaking procedures. The following comments are reflective of the issues raised during the roundtable meetings and in subsequent discussions with small business representatives.¹⁷

- 1. FAA should clearly define the scope and objective of the proposed rule.** Small business representatives stated that SMS should be viewed as a “process” to help regulated entities achieve regulatory compliance, and not an “outcome” in and of itself.¹⁸ As such, they believe that FAA should limit the scope of the SMS rule to compliance with FAA regulations. That is, FAA should make FAA’s regulations SMS compliant. Attendees noted that FAA has historically imposed performance standards (i.e., regulations that set objective standards or goals that must be met, and permit industry to choose the method by which those goals are met) on the aviation industry, but the proposed SMS rule is intended more as a process standards (telling the industry how to accomplish the task, but failing to set an objective standard that

¹⁴ 75 Fed. Reg. 68232.

¹⁵ 74 Fed. Reg. 36414.

¹⁶ See, <http://www.sba.gov/content/letter-dated-102109-department-transportation-federal-aviation-administration-0>. (Docket Exhibit FAA-2009-0671-0031.1.)

¹⁷ It should be noted that much of the discussion at the meetings focused on SMS in general because most of the attendees were not representatives of Part 121 certificate holders, but represent other aspects of the aviation sector (e.g., parts manufacturing, repair stations, etc.) and are concerned that FAA will mandate SMS throughout the entire aviation sector.

¹⁸ Stated differently, attendees believe SMS should be a “tool” for regulatory compliance, not an end “product.”

would objectively show when a certificate holder has met the requirements of the regulations). While this is clearly intended to provide some flexibility, it will have the long term affect of limiting flexibility (because it precludes other approaches to, or advances in, safety management) and it also fails to provide an objective standard that can be tested to assess compliance.

Further, small business representatives noted SMS is more appropriate for large organizations with multiple silos (such as large air carriers) operating in complex and variable environments, but that it is too complex and costly for small, fixed operations, such as small parts manufacturers or repair stations. These small businesses representatives stated that small entities need to know what the rules are and what they have to do to comply. They also stated that it would be too costly to develop and defend their SMS programs as proposed. Further, as FAA makes clear, “[t]he SMS requirements, as described in this section, would not be considered a substitute for compliance with existing technical and performance standards.” Because the proposed rule includes regulatory mandates in addition to FAA’s standards, the benefits of SMS as a flexible system safety approach are undermined. This makes the purported scalability and flexibility for small entities illusory. Based on these comments, Advocacy recommends that FAA consider limiting the scope of its SMS rule to compliance with FAA regulations. Further, Advocacy recommends that FAA not extend an SMS mandate to other sectors of the aviation industry until SMS has been fully implemented with Part 121 air carriers over a period of years so that any unintended, negative effects can be identified and addressed.

- 2. FAA’s proposed rule is vague, open-ended, and subjective.** Small business representatives argued that FAA’s proposed rule is vague and open-ended because one cannot objectively measure when one has achieved compliance or whether any chosen mitigation is adequate. Further, the proposed rule is also subjective because regulated entities would be subject to the individual judgment of each FAA inspector (which may vary from inspector to inspector, region to region, and hazard to hazard) as to whether any particular action under SMS is acceptable. As one attendee noted, SMS as proposed is unlimited because it is not “properly bound” by the Code of Federal Regulations or any other limitation other than what FAA might at some future time deem acceptable.¹⁹ Small businesses are concerned that SMS will be used to extend regulatory requirements without FAA going through the normal rulemaking process, which could undermine the legal protections provided by the Administrative Procedure Act, RFA, and other requirements. Based on these comments, Advocacy recommends that FAA consider further defining and limiting the applicability of SMS and limiting an inspector’s ability to second-guess any analyses or decisions beyond FAA regulations.

¹⁹ One attendee raised the interesting question of what would happen if an organization determined that compliance with an FAA regulation itself was a hazard (because there was a new or alternative technology, process, or method that they determined provided a higher level of safety) and that their mitigation under SMS was to deviate from the regulation. Would FAA be prepared to provide a waiver or variance in this instance?

- 3. FAA should conduct a gap analysis of its regulations and fill any gaps.** Small business representatives are concerned that the proposed rule requires each and every company to conduct a gap analysis of all of its operations to identify and mitigate hazards. However, they believe this is a misallocation of resources because it requires redundant analyses by every company and could result in differing responses to similar risks, which could actually undermine safety because no consistent, objective standard is provided by FAA. Small business representatives stated that they support a SMS rule, but believe the rule should be limited to “incident management, strategic decision making, and notification of incidents to FAA.” Further, they expressed concern that the proposed rule would place a duty to mitigate hazards on third parties who do not control them.²⁰ For these reasons, the attendees recommended that FAA conduct a gap analysis of its rules to ensure that its rules are adequate to address known and foreseeable hazards and to close any gaps through appropriate regulatory action. Based on these comments, Advocacy recommends that FAA consider an alternative approach to SMS whereby FAA ensures that its regulations are SMS-compliant and judges compliance with its regulations to provide an acceptable level of safety for ICAO purposes.
- 4. The definition of “hazard” is overly broad.** FAA defines “hazard” in the proposed rule 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.*”²¹ Small business representatives were concerned that this definition is overly broad and would force regulated entities to consider conditions that have nothing to do with the safe operation of an aircraft. One attendee noted that the very operation of an aircraft is harmful to the environment because it emits carbon and air pollutants. As such, attendees suggested that FAA define “hazard” as “a condition that could foreseeably cause or contribute to an aircraft accident.” Based on these comments, Advocacy recommends that FAA limit the definition of hazard to aviation safety and not include extraneous environmental, health, and safety components.
- 5. FAA should provide strong data protection provisions.** Small business representatives stated that FAA should provide strong data protection provisions to any information collected as part of a SMS mandate. This issue was also identified as a concern by the SMS ARC. Because SMS requires that all safety-related decisions concerning hazard assessment and risk mitigation be documented and retained, regulated entities are concerned that they could face heightened litigation if the information was made public. As such, attendees recommended that FAA not require SMS data to be submitted to FAA because it would become subject to Freedom of Information Act disclosure by the agency. Attendees expressed support for FAA’s proposal that SMS data not be provided to FAA, but be made available to FAA

²⁰ One attendee provided the example that if a runway sign was confusing to pilots (and could cause them to taxi onto the wrong runway), the air carrier has no ability to improve the sign because the signs belong to the airport. The air carrier’s mitigation might be to issue a notice to its pilots, but that doesn’t address the overall hazard. By requiring entities to inform FAA of incidents, the air carrier would notify FAA of the hazard and FAA would address it by notifying all airlines of the hazard and requiring the airport to mitigate it.

²¹ 75 Fed. Reg. 68242.

inspectors upon request. Based on these comments, Advocacy recommends that FAA provide strong data protection provisions for SMS data in any final rule.

Conclusion

Thank you for the opportunity to comment on FAA's proposed SMS rule for Part 121 air carriers. One of the primary functions of the Office of Advocacy is to assist federal agencies in understanding the impact of their regulatory programs on small entities. In that regard, we hope these comments are both helpful and constructive to the agency's understanding of the industry, particularly the views of small business. Please feel free contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Attachment