



421 Aviation Way
Frederick, Maryland 21701

T. 301-695-2000
F. 301-695-2375

www.aopa.org

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Docket Operations

M-30

U.S. Department of Transportation

1200 New Jersey Avenue S.E.

West Building Ground Floor

Room W12-140

Washington, DC 20590

Re: Docket No. FAA-2009-0671, Safety Management Systems for Part 121 Certificate Holders

The Aircraft Owners and Pilots Association (AOPA) is a not-for-profit individual membership organization of more than 400,000 pilots. AOPA's mission is to effectively serve the interests and needs of its members as aircraft owners and pilots and establish, maintain, and articulate positions of leadership to promote the economy, safety, utility, and popularity of flight in general aviation aircraft. Representing two-thirds of all pilots in the United States, AOPA is the largest civil aviation organization in the world. AOPA submits the following comments and concerns in response to the Federal Aviation Administration's (FAA) Proposal: Safety Management System (SMS) for Part 121 Certificate Holders.

Significant Concerns with SMS Proposal's Impact on General Aviation

While AOPA supports appropriate measures to promote an industry wide safety culture, we have significant concerns about the pending impacts of the implementation of SMS beyond that of the 121 air carrier certificate holders as planned by the FAA. AOPA is especially concerned about the potential impact of this proposed rule to general aviation air agency certificate holders, including part 135 (charter), part 141/142 (flight schools) and part 145 (repair stations) as well as aircraft design and manufacturing organizations. The FAA states in the NPRM that, "[a]lthough 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 consistent with ICAO requirements" The FAA has been clear that the same requirements outlined in this NPRM are likely to be imposed on these certificate holders in the future, expanding the impact to include the general aviation industry.

AOPA strongly urges the FAA to not consider expanding SMS beyond the currently proposed and congressionally mandated part 121 certificate holders until it has been fully implemented and the industry and FAA have gained substantial (at a minimum 5 years) operational experience with SMS practices. After this period of time and before the FAA considers further implementation, the FAA should fully evaluate the operational experience gained to determine if further implementation is warranted. Our concern is that the FAA is ill prepared for the host of issues that will arise from the implementation of this rule as outlined in following comments.

AOPA recognizes that many of our comments fall outside of the scope of this particular rulemaking. However this proposal sets the framework for the SMS that could potentially be expanded beyond part 121 Air Carriers. Therefore, AOPA submits the following comments regarding this framework as the FAA considers future rulemaking to expand SMS beyond part 121.

FAA's SMS Proposal

In November, the FAA published a Notice of Proposed Rulemaking (NPRM) entitled "Safety Management Systems for Part 121 Certificate holders. The FAA proposes to create a new part 5, "Safety Management Systems" of the 14 Certified Federal Regulations (CFR). The proposed part 5 would require each certificate holder operating under 14 CFR part 121 to develop and implement a safety management system (SMS) in an effort to improve the safety of their aviation-related systems.

Lack of Boundaries on Risk Mitigation and Poor Definition of "Hazard"

We are concerned that, there are no boundaries on risk mitigation outlined in the proposed new part 5 to allow for an objective measurement of whether or not a mitigation strategy is adequate to address identified hazards. SMS is open-ended in the proposed regulations leaving the door open for a widely varying degree of implementation of the rule. Adequacy of a company's mitigation strategy is determined solely by the judgment of the individual FAA inspector when conducting a SMS evaluation. Because this determination is purely subjective, a mitigation strategy that is deemed adequate to one inspector would likely not be adequate to another. Likewise, implementation of a mitigation strategy will vary from one hazard to another. Evaluation of this implementation will vary exponentially with each individual conducting the evaluation whether they are with the FAA or the aircraft operator.

Additionally, there are too many conflicting concepts regarding the definition of a "hazard" to adequately describe it in regulation. AOPA understands that the FAA is attempting to harmonize with International Civil Aviation Organization (ICAO) Annex 6 part I. However, the definition of "hazard" as presented in multiple references is unclear. AOPA suggests the FAA reconsider the currently proposed

definition of “hazard” and pursue further development and discussion of the term before finalizing this regulation.

Significant Concerns Surrounding FAA’s Ability to Standardize Implementation in the Widely Varying World of General Aviation

SMS concepts are very abstract in nature. The evaluation of an operator’s SMS would be very subjective and leaves room for broad interpretation by FAA field inspectors. The FAA will need to conduct thorough training for its inspectors. The FAA has over 45,000 employees. While we recognize that not all would be involved in the implementation of SMS, we are concerned that many within the agency will. The agency already has difficulty standardizing field inspector interpretations of much simpler regulations. Today, we see a significant difference in the “interpretation” of existing regulations by FAA staff that oversees general aviation operations. It will be virtually impossible to standardize inspectors to the level necessary to evaluate a company’s SMS processes. Numerous examples of current or recent discrepancies in FAA interpretations of clear cut regulations indicate the agency is not prepared to standardize its workforce on matter as subjective as SMS.

Reliance on Advisory Circular (AC 120-92A), “Introduction to Safety Management Systems for Air Operators” in FAA Orders

AOPA is particularly concerned with the applicability of AC 120-92A should the FAA expand the SMS regulations to general aviation. The AC includes requirements far too burdensome for small businesses, which make up the majority of the general aviation industry. For this reason, AOPA strongly recommends the FAA reconsider the inclusion of the AC in the inspector guidance material. Advisory Circulars (ACs) are meant to provide suggestions and safety-related recommendations to various regulatory parties. ACs must not indirectly establish regulation.

The FAA quotes AC 120-92A extensively in proposed FAA Order 8900.10 material. The Order is meant to be a tool for inspectors in the surveillance of part 121 SMS implementation. By quoting the AC in the inspector guidance, the FAA is essentially *requiring* part 121 Air Agencies affected by this rule to implement their SMS according to the AC. Referencing the AC in inspector guidance so comprehensively makes the AC de facto regulation, as FAA field inspectors will expect each certificate holder to follow the letter of the AC instead of the intent of the NPRM preamble. The preamble of the NPRM states the certificate holder’s SMS would have to be accepted, not approved, by the FAA due to “the dynamic nature of a certificate holder’s operating environment”. If the FAA retains the details of the AC in the inspector guidance, the agency is essentially negating its stated desire to provide certificate holders with flexibility and scalability by forcing a single method of compliance on all certificate holders. The FAA should remove from the FAA order 8900.10 detailed references to the AC,

especially Table 2 “Cross Reference Matrix ICAO to AC 120-92 NPRM to part 5 NPRM Draft”, and instead include the AC in the list of “Related Reading Material”.

Potential for SMS to bypass the Administrative Procedures Act and Regulatory Flexibility Acts

The FAA must also be aware that the SMS process could easily lead the FAA to violate the requirements of the Administration Procedure Act (APA), which establishes rulemaking standards for federal agencies, and the Regulatory Flexibility Act (RFA), which requires the government to consider the projected costs of proposed regulations to smaller enterprises. An SMS, by definition, is a continuous cycle of problem identification and resolution. Risk management involves identifying a hazard; analyzing the probability and severity of the risk associated with that hazard; and assessing that risk to determine if it is acceptable to the certificate holder or should be mitigated in some way.

The acceptable level of risk or method of risk mitigation could vary from one certificate holder to another. If a certificate holder is in compliance with applicable regulations but an FAA inspector believes the carrier’s acceptable level of risk is too low, the inspector may not require the certificate holder to take action to mitigate a risk identified by the SMS risk management process. If the inspector did so, the mandate would be in violation of the APA. Further, if the method of mitigation requires the certificate holder to expend resources, the inspector’s determination could violate the RFA. The likelihood of violating the requirements of the RFA greatly increases if the FAA extends the proposed part 5 to part 135 certificate holders, most of which are defined as small businesses.

A federal agency cannot add, remove, or change a rule or regulation without engaging in the formal rulemaking process. If the FAA responds to the SMS risk management process by imposing additional or new requirements on a certificate holder, the agency will be violating necessary rulemaking processes, including the standards of the APA and cost analysis of the RFA. AOPA urges the FAA to be cognizant of the potential snowball effect of this SMS regulation. Field inspectors must be educated in the effective evaluation of an SMS without overstepping the limitations set forth in the APA and RFA. It must be clear that the certificate holder “owns” the SMS and it is an FAA accepted, not approved, program.

Future Scalability a Significant Concern for General Aviation

While in the NPRM the FAA attempts to address the need for SMS to be scalable to fit the various sizes of potentially regulated entities, we are concerned that the actual implementation and practice of such a program will be, difficult to impossible for the FAA to administer. While the FAA anticipates the SMS program of a large airline to be much more complex than that of a certificate holder with only a few aircraft, we wonder if they have considered what the SMS program for a small flight school or charter operator may look like. The NPRM itself attempts to allow for scalability and for flexibility in the

methods of developing and implementing an SMS, however the related guidance materials are far too prescriptive. For example, AC 120-92A, "Introduction to Safety Management Systems for Air Operators", may provide reasonable suggestions and recommendations for 121 air carrier certificate holders, but it remains to be seen if they can also be used by other certificate holders who represent small businesses with limited resources.

Industry and FAA Resources Limited and Must Be Considered in Future Implementation Plans

The FAA has proposed an effective date 60 days following the publication of the final rule in the Federal Register. Part 121 certificate holders would then have six months to submit an SMS implementation plan for approval. Full implementation would be required within three years of the effective date. This timeline seems unrealistic even for the air carrier world with significant resources. General aviation businesses that might be affected by this rule in the future will likely be unable to meet this timeline. These businesses typically have a small number of employees who are directly involved in the day-to-day operation and management of the business. Tasking these individuals with the development and implementation of an SMS in addition to their usual functions could be excessive. These businesses often do not have financial resources to hire outside assistance.

If SMS were ever to be extended as a requirement for general aviation, the implementation schedule set forth for the part 121 air carriers in this NPRM would be entirely unrealistic. There already exists a significant backlog of issues related to obtaining and maintaining existing air agency certificates at FSDOs nationwide. A great number of prospective new small business owners looking to obtain an air agency certificate are currently awaiting attention from the FAA and have been given no prediction as to when their request will be evaluated. To set broad-reaching new requirements for FSDO inspectors at a time when they cannot handle current workload would be irresponsible and a disservice to the small business owners and aviation community as a whole.

Trickle Down Affect of NPRM Leading to Increased Cost in all Aspects of Aviation

The FAA sought comment on the potential trickle down effect of the NPRM on contractors or subcontractors, or entities not directly regulated by the FAA. The agency does not believe this proposed regulation would expand a certificate holder's existing requirements to ensure the businesses with which they contract have conducted adequate training and that they have the necessary equipment and facilities to conduct the relevant work. AOPA strongly disagrees with this assessment and believes the FAA has greatly underestimated the trickle down implications for contractors and subcontractors of regulated certificate holders. The more functions a certificate holder contracts out, such as fueling, deicing, and pilot training, the more critical it is that the certificate holder include its contractors in its SMS process. Although the FAA is not seeking regulation of these contracted entities, the agency should not so quickly discount the potential effects of this proposed regulation on these entities. The ripple

effect of the SMS requirement will become even more apparent when the regulation is expanded to part 135 certificate holders. Many of these providers also contract services to the general aviation industry. Even if these regulations do not apply directly to general aviation, they will undoubtedly pay a portion of the costs associated with contractors that must meet a regulated party's SMS requirements.

Future Data Protection Concerns for General Aviation Operators

Active participation from the employees of a certificate holder is a necessary part of an effective SMS. A form of employee participation is proactive data collection, which is often achieved through non-punitive hazard or event reporting systems.

Hazard or event reports, whether the product of voluntary reporting or automated data collection, could leave a pilot or certificate holder at risk of regulatory enforcement action and civil lawsuits. If the pilot or certificate holder is involved in an event outside of the United States, the pilot or carrier could even be at risk of criminal charges. The FAA recognizes in the preamble of the NPRM the importance of protecting data submitted via an SMS but does little to address this concern in the actual regulations put forth in this NPRM. The FAA points out that data obtained through "current voluntary programs", such as Aviation Safety Action Programs (ASAP) and Flight Operational Quality Assurance (FOQA) are protected by existing part 193. However, it is critical to note that these programs are not common outside of part 121, and not all part 121 carriers have implemented these programs. If the FAA extends part 5 to other air agency certificate holders – such as part 135, 141, 142 and 145 certificate holders – these protections would not apply, as those certificate holders do not often have an ASAP or FOQA.

The FAA states it would not require the certificate holder to submit any SMS-related data; "rather, the certificate holder must make its documentation available for inspection to determine whether the certificate holder has implemented and is maintaining an SMS that meets the requirements of part 5." This is really no solution to AOPA's concerns about data protection. The part 121 certificate holder will still need to collect data to implement the SMS, exposing its pilots, mechanics, and other individuals participating in the SMS to liability. The FAA must include language in the new part 5 or in the existing part 193 to protect all data voluntarily reported as part of an SMS. Reporting parties must be exempt from regulatory enforcement action and the data must be protected from litigation discovery and Freedom of Information Act (FOIA) requests, as existing programs are currently covered in part 193. Pilots who actively participate in their certificate holder's SMS by reporting hazards or events should not be exposed to certificate action, civil liability, or criminal charges.

Effective Safety Programs are often best implemented as Voluntary Programs

Although many of the concepts of SMS have merit, those safety culture concepts are best implemented voluntarily and internally at an air agency not through regulation. Other safety programs that have had

proven success in the industry include the Aviation Safety Action Program (ASAP), Flight Operational Quality Assurance (FOQA), Line Operations Safety Audit (LOSA), and Advanced Qualification Program (AQP). The FAA should consider utilizing voluntary safety program methods for incorporating SMS for other air agency certificate holders and develop a means to obtain FAA acceptance of the program. If the FAA implemented a method of formal acceptance of a voluntary SMS program, general aviation air agencies with a need for an SMS program could prove compliance.

Summary

AOPA strongly urges the FAA to not consider expanding SMS beyond the currently proposed and congressionally mandated part 121 certificate holders until it has been fully implemented and the industry and FAA have gained substantial (at a minimum 5 years) operational experience with SMS practices. There are too many serious questions that remain unanswered regarding the boundaries and repercussions of implementing this proposal to even consider expansion of the regulations to include general aviation certificate holders.

- SMS concepts are extremely subjective and leave room for broad interpretation by operators and FAA field inspectors.
- Numerous examples of current or recent discrepancies in FAA interpretations of clear cut regulations indicate the agency is not prepared to standardize its workforce on matter as subjective as SMS.
- SMS processes are ambiguous, relying heavily on guidance material that could easily lead the FAA to violate the requirements of the Administration Procedure Act (APA) and the Regulatory Flexibility Act (RFA).
- The overly prescriptive guidance material related to this proposal does not lend itself to scalability.
- Federal and industry resources are not available to meet the requirements of this regulation. To set broad-reaching new requirements for FSDO inspectors at a time when they cannot handle current workload would be irresponsible and a disservice to the small business owners and aviation community as a whole.
- The trickle down implications for contractors and subcontractors of part 121 certificate holders has been greatly underestimated. Even if these regulations do not apply directly to general aviation, they will undoubtedly pay a portion of the costs associated with contractors that must meet a regulated party's SMS requirements.
- The data collection from SMS has no protection in the current proposal exposing pilots, mechanics, and other individuals participating in the SMS to liability.

The FAA should consider utilizing voluntary safety program methods for incorporating SMS for other air agency certificate holders and develop a means to obtain FAA acceptance of the program. If the

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FAA implemented a method of formal acceptance of a voluntary SMS program, general aviation air agencies with a need for an SMS program could prove compliance.

Sincerely,

A handwritten signature in black ink, appearing to read 'RE Hackman', with a long horizontal flourish extending to the right.

Robert E. Hackman

Vice President, Regulatory Affairs

Aircraft Owners and Pilots Association