Seattle-Tacoma International Airport

Non-Punitive Program and Legal Authority

Prepared For: Federal Aviation Administration
Office of Airports
Airport Safety and Operations Division

Prepared By: Landry Consultants LLC, on behalf of Seattle-Tacoma International Airport and Operations Senior Manager, Mark Coates

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MEMORANDUM

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FROM: David Y. Bannard & Cheryl Wagonhurst

CC: Mark Coates & Paul Bintinger,
Port of Seattle

DATE: May 22, 2009

RE: Review of Legal Issues Relating to Implementation of an Airport Safety Management System and Recommendations

Introduction

We have been engaged by Landry Consultants LLC ("Landry Consultants") to review the legal issues associated with implementation of an airport safety management system and make recommendations regarding minimizing any legal risks identified with implementation of such a safety management system. Landry Consultants has been engaged to conduct research and develop proof of concept deliverables for a Federal Aviation Administration-sponsored SMS pilot study at Seattle-Tacoma International Airport ("SEA" or the "Airport").

This memorandum begins with an introduction to Safety Management Systems ("SMS"), followed by an executive summary of the primary issues addressed by the memo and our conclusions. After the executive summary, the memo sets forth an in-depth legal analysis of the three primary legal areas that are the subject of this memo: (1) legal issues relating to maintaining confidentiality of data collected pursuant to SMS, (2) potential liability issues arising from adoption of a SMS, and (3) issues relating to extension of SMS to tenants and others doing business at an airport. This is followed by a brief discussion of the concept of a "just culture" and how such an organizational concept affects SMS. Finally, the memo includes recommendations relating to the regulations implementing SMS that the Federal Aviation Administration ("FAA") is expected to promulgate within the next 12 to 18 months. Although we have attempted to include an in-depth legal analysis of the issues raised by implementation of

SMS at an airport, the legal issues presented by SMS is a very broad and evolving subject. Further, the FAA has yet to promulgate its notice of proposed rulemaking for SMS. It is likely that additional legal issues will be raised, and additional legal advice may be required, as the regulatory process unfolds and airports begin to fully implement SMS programs.

Introduction to SMS

The FAA defines a SMS as "a systematic, proactive, and well-defined safety program" that allows an airport (or other organization) "to strike a realistic and efficient balance between safety and operations."[1] According to the FAA, a SMS is "[t]he formal, top-down business-like approach to managing safety risk. It includes systematic procedures, practices, and policies for the management of safety (including safety risk management, safety policy, safety assurance and safety promotion)."[2] Use of SMS is expected to increase the likelihood that airport operators will detect and correct safety problems before those problems result in an incident or an accident.

Why Implement a Safety Management System?

The International Civil Aviation Organization ("ICAO") has adopted an amendment to its International Standards and Recommended Practices that requires member states of ICAO, which include the United States, to require that operators of international airports implement a SMS.[3] ICAO has adopted similar requirements applicable to operators of commercial aircraft, aircraft maintenance organizations and air traffic services.[4] According to ICAO, a SMS is "a systematic approach to managing safety, including the necessary organizational structure, accountabilities, policies and procedures."[5] A SMS, at a minimum, must: (a) identify actual and potential safety hazards; (b) ensure that remedial action necessary to maintain an acceptable level of safety is implemented; and (c) provide for continuous monitoring and regular assessment of the safety level achieved.[6] An approved SMS must clearly define the lines of safety accountability throughout the airport operator's organization, including a direct accountability for safety on the part of senior management.[7] ICAO has provided guidance on

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1 FAA website: www.faa.gov/airports_airtraffic/airport_safety/safety_management_systems

2 FAA Advisory Circular ("AC") No. AC 150/5200-37, Feb. 28, 2007, Introduction to Safety Management Systems (SMS) for Airport Operators ("AC 150/5200-37").

3 *See* Annex 14 to the Convention on International Civil Aviation ("CICA"), § 1.4 (Certification of aerodromes).

4 *See* Annex 6, Part I, chapter 3 (aircraft), chapter 8 (aeroplane maintenance), Part III, chapter 1 (commercial air transport), and Annex 11 (air traffic services) to the CICA.

5 CICA, Annex 14, Vol. I, § 1.1.

6 *Id*. at § 1.5.3.

7 *Id*. at § 1.5.4.

safety management systems in the *ICAO Safety Management Manual* (Doc. 9859)[8] and in the *Manual on Certification of Aerodromes* (Doc. 9774).[9]

The FAA has issued an Advisory Circular stating that the FAA intends to implement a rulemaking that will require the use of SMS at U.S. airports to meet the intent of the ICAO standard in a way that complements existing airport safety regulations in 14 CFR Part 139 ("Part 139").[10] Part 139 prescribes rules governing the certification and operation of almost all airport within the United States that have scheduled or unscheduled passenger service.[11] Among other things, Part 139 requires that each certificated airport develop, maintain and update an Airport Certification Manual ("ACM") that addresses a wide variety of issues, including specific safety-related issues, such as procedures for protecting persons and property during storage, dispensing and handling of fuel or procedures for airport condition reporting, as required under Part 139.[12] Part 139 also addresses numerous, specific safety-related matters in Subpart D – Operations.[13] However, Part 139 does not directly address a proactive, forward looking approach to hazard identification, risk analysis and mitigation that are the hallmark of a SMS program. Accordingly, the FAA has opened a rulemaking project to consider a formal requirement for SMS at airports that are certificated under Part 139.[14] There are approximately 570 Part 139 certificated airports in the United States.

In preparation for the rulemaking process, the FAA sponsored a pilot SMS program at 25 airports, as well as a second pilot phase SMS program currently underway at a number of smaller airports, and a SMS proof of concept study at three U.S. airports that participated in the first pilot SMS study. In addition, the FAA provided a grant to the Mitre Corporation to produce a white paper on SMS, and the Airport Cooperative Research Program of the Transportation Research Board of the National Academies ("ACRP") has approved a grant project for development of a SMS user guidebook for airport operators that is nearly completed.

One of the conclusions of the initial airport SMS pilot studies was that, although Part 139 addresses safety at airports in many areas, the existing safety regulations at Part 139 are not a comprehensive SMS.[15] Part 139 does not cover all areas of a commercial airport, or even

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[8] The second edition of the ICAO Safety Management Manual has been released in draft form, but as of the date of this memo, the ICAO Safety Management Manual has not been finalized.

[9] *See* Annex 14 to the Convention on International Civil Aviation ("CICA"), § 1.5 (Certification of aerodromes).

[10] *See* AC 150/5200-37.

[11] 14 CFR § 139.1 (applicability)

[12] *See, e.g.*, 14 CFR §§ 139.201 (general requirements), 139.203 (contents of ACM), 139.205 (amendment of ACM).

[13] *See* 14 CFR § 139.301, *et seq*.

[14] *Id*.

[15] *See* FAA summary of initial pilot SMS studies, concluding that it is "[a]pparent that [Part] 139 is not SMS in and of itself…. Evidence that SMS is something larger, more comprehensive, than is currently found in

all sterile areas (e.g., beyond the security checkpoints, where only passengers or appropriately badged employees are permitted) of a commercial airport or all aspects of safety management. In addition, Part 139 does not provide for comprehensively collecting and analyzing safety data, acting on the trends identified and conducting regular, follow up audits and monitoring of results achieved.

How Does a SMS Work?

SMS is intended to be a forward-looking proactive program, rather than an analysis of past incidents. SMS comprises the following four "Elements":

1. Development and implementation of ***safety policy*** and objectives, including staff responsibilities.

2. Development of a ***safety risk management*** process, which describes each system or activity at an airport, identifies hazards associated with such system or activity, determines and analyzes the risk associated with each such hazard, and treats or mitigates and monitors the risk.

3. Assurance of safety through ***oversight and auditing*** to ensure that the safety programs are implemented and effective.

4. Promotion of safety through the development of a positive ***safety culture***, including training, within the organization.[16]

Thus, an airport that adopts SMS will generally designate a senior level safety manager who reports to senior management and is charged under the safety policy developed by the airport with overseeing implementation of the SMS. The second elemnt of SMS will require most airports to undertake a significant program to describe the systems and activities at the airport and the hazards associated with such systems and activities, determine the level of risk associated with such hazards and then mitigate the risks that are found to be unacceptable under standards included in the airport's SMS. Airports may choose to undertake this task in phases, for example, undertaking this with respect to the apron first, and then extending it to the bagwell, and then to other areas of the airport. As part of this process, as well as the monitoring component of this element and the auditing component of the third element, data will be gathered and analyzed. Initially, an airport will need to design and populate this database with the systems and activities, the hazards identified, the degree of risk identified for each such hazard, and the mitigation activities undertaken, if any. Following the initial development of this

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the act of complying with 139 requirements. Evidence that 139 compliance may eventually become part of airport SMS program … contrary to the idea that SMS would eventually become part of 139. Reference made to the idea that SMS could be used to ensure 139 compliance … but that 139 by itself could not ensure that SMS was functioning." Presentation at joint FAA/Airports Council International – North America ("ACI-NA")/American Association of Airport Executives ("AAAE") SMS Conference, Baltimore, MD, October, 2008.

[16] *See* AC 150/5200-37, Ch. 2 (Elements of a Safety Management System).

database, an airport will need to continue to gather data on new activities, newly identified hazards, changes in the degree of risk assigned to such hazards, and the results of mitigation activities. As is discussed in detail below, it is the act of gathering and maintaining this critical database that presents many of the legal issues that are associated with SMS.

Among the critical elements of a SMS that have been identified are the ability to gather and analyze data from many different sources regarding hazards at an airport. SMS is predicated upon the belief that the analysis of data concerning hazards can be applied to determine the causes leading to accidents and, thus, to mitigate the personal injury and property damage resulting from such accidents by avoiding them. The more data that can be included in such an analysis, the better the likelihood that hazards can be identified and mitigated, and accidents avoided.

SMS in Other Contexts

Other industries, notably the health care industry and the nuclear energy and oil and gas industries, have adopted practices similar to SMS. Best practices from these industries have shown that more and better data are provided where data can be held in confidence, where there is a non-punitive reporting policy, and where information can be reported anonymously.[17] For example, the report on a roundtable co-sponsored by Kaiser Permanente Institute for Health Policy, NASA Aviation Safety Reporting System and The National Quality Forum in August of 2000, concluded that proposed voluntary patient safety improvement reporting systems would build on design elements from the Aviation Safety Reporting System and include the following key design elements:[18]

- Voluntary reporting to a non-regulatory entity.
- Strong confidentiality protections.
- Complement existing reporting systems.
- Public access to a de-identified database (i.e., de-identified patient, provider, institution, and person reporting).
- Expert analysis of the reports is essential.
- Enable the system through federal authorizing and funding.
- Individuals and institutions should be instructed to report complaints of criminal activity, gross negligence or professional

[17] *See, e.g.*, *CRS Report for Congress*, Health Care Quality: Improving Patient Safety by Promoting Medical Errors Reporting, updated March 24, 2005.

[18] *See* "Design Considerations for a Patient Safety Improvement Reporting System", sponsored by Kaiser Permanente Institute for Health Policy, NASA Aviation Safety Reporting System and The National Quality Forum, held at NASA Ames Research Center, Moffitt Field, California, August 28 - 29, 2000.

misconduct to the appropriate regulatory agency and not to the voluntary reporting system.

- Individuals or institutions reporting to the system should be guaranteed confidentiality, but should not be anonymous. Follow up may be necessary.

Health care, in particular, has been able to demonstrate tangible and significant reductions in medical errors, thereby improving safety. As discussed in this document, research has shown that where an "ethical culture" is developed and encouraged, reporting of incidents increases and costs are reduced.[19]

SMS Operational Characteristics and Issues

As noted above, ICAO has recommended that SMS be implemented by all participants in the international air transportation system, including airport operators, aircraft operators, aircraft maintenance organizations and air traffic control providers. The FAA has begun to implement SMS for air carriers, for its air traffic controllers and for airport operators. Inevitably, there will be overlap between the functions of SMS adopted by each of these participants. As discussed below, we recommend that the FAA issue rules that help clarify the responsibilities of the various participants for various functions. In all events, however, it is likely that in order to implement SMS effectively, each airport operator will be faced with the necessity of working with the air carriers, ground handlers, and air traffic control at that airport to coordinate SMS among them and ensure that all areas are covered adequately by SMS implemented by one or more of the organizations operating at the airport.

Thus, the proper scope of a SMS is an issue that both the FAA, through its rulemaking process, and the airports must address; should the SMS program apply only to the airport's staff and areas within the control of the airport, or should it be applied more broadly, for example, to cover all of the airside other than the areas under the air traffic control tower's direct control, or all areas of the airport, including landside. Although, depending on the content of the final rule, to a certain extent, this issue may not be a legal one, if an airport operator determines to extend the scope of its SMS to areas and operations not directly within the airport operator's control, then additional legal issues relating to the conflict between a tenant's rights to control its employees and actions within its leased space and an airport operator's desire to enhance safety at the airport, are likely to arise, as noted below.

In many ways, SMS is similar to a traditional cost-benefit analysis. SMS is intended to identify hazards, quantify the risk – both in terms of likelihood and in terms of severity – of the hazard occurring, and then mitigate those risks found to lie within an unacceptable range of severity and/or likelihood. SMS recognizes that risk cannot be eliminated, and that the costs of mitigating certain risks cannot be justified, either because the risk is so remote or because the cost to mitigate certain risks is unreasonable. But by moving from a

[19] *CRS Report for Congress*, Health Care Quality: Improving Patient Safety by Promoting Medical Errors Reporting, updated March 24, 2005.

reactive mode of managing safety in which safety advances typically follow accident investigations and toward the more predictive mode of managing safety in which data collection and analysis enable risks to be identified and addressed before they cause an accident, SMS has the potential for leading to a major improvement in aviation safety.[20]

Executive Summary

Set forth below is a summary of the legal issues that we have identified to date arising from the proposed promulgation of regulations mandating adoption of SMS at Part 139-certificated airports, and a summary of recommendations arising from our analysis. For example, the data-driven nature of SMS and the fact that studies have demonstrated that maintaining confidentiality of information and those reporting such information can be a critical factor in development of safety systems conflicts with the fact that the vast majority of U.S. airports are subject to freedom of information laws that require disclosure of most information gathered by such airports. Thus, several of our recommendations relate to means and methods to protect SMS data from disclosure. In summary, we find or recommend that:

- The implementation of SMS has the potential to be a significant step forward in promotion of aviation safety and is likely to result in lives saved, fewer personal injuries and reduced property damage. However, SMS also has the potential for increasing legal liability exposure for those entities forced to adopt SMS.

- Careful consideration should be given to the design and implementation of the regulations and related systems that will comprise the FAA's integrated SMS for airport operators, air carriers and air traffic control, so that the objectives of SMS can be achieved while minimizing additional legal liability exposure and unnecessary costs.

- SMS will be most beneficial when a wide range of information and data are reported and made available, so that all applicable hazards are identified, risks analyzed and appropriate corrective action is taken so as to mitigate future risk.

- In order to encourage identification of potential safety issues and proper reporting, the FAA should implement regulations that protect data from disclosure, to the greatest extent possible, and permit data to be de-identified and aggregated in a manner that allows airports as well as other participants in the national aviation system, including air carriers, air traffic control, the FAA and ground service providers, to access such data for appropriate analysis. 49 U.S.C. Section 40123 should be amended to protect SMS information from disclosure under state and federal FOIA.

- Because implementation of SMS programs will heighten awareness of certain risks related to aviation safety, those entities participating in SMS programs will likely face increased legal liability exposure for negligence claims, or even claims

[20] *See Aerosafety World*, "Into the Mainstream", January 2009, p. 25.

arising under related theories, such as recklessness, in the event of an accident. Failure to adhere to SMS regulatory requirements could also give rise to "whistleblower" actions arising under the federal False Claims Act.

- The FAA should adopt comprehensive SMS regulations addressing all participants in the national aviation system that, among other things, clearly divide responsibilities among the various SMS participants; air carriers, air traffic control and airport operators.

- The FAA should provide clear guidance for risk analysis and standards for requisite undertaking of mitigation. Where SMS participants carefully adhere to the FAA's guidance, such participants should be able to establish the reasonableness of the actions taken or not taken.

- Rather than require airport operators to assert control over third parties operating at airports in order to undertake a SMS program applicable to the entire airport, The FAA should issue guidance requiring all parties operating at an airport to participate in or undertake SMS, and clearly divide SMS responsibility among them.

- Airports should be permitted to implement SMS in a phased approach, so that the operational and financial consequences of adoption of a SMS program do not impact airport operators (and rates) all at once, and the airport operators have the opportunity to develop an SMS program rationally.

- To the extent possible, FAA should expand the permitted uses of AIP grant funds and PFCs through regulation to cover mitigation of risks identified in SMS analyses, and FAA should work with Congress to amend AIP and PFC eligibility requirements under current law to permit use of such funds to mitigate risks identified in SMS analyses.

- FAA should work with Congress to provide additional funding throught the AIP (and, if necessary, PFC) programs for mitigation of risks identified through SMS analyses.

Discussion

A. Legal Issues

Based on our review to date of the legal issues presented by SMS, we have identified three primary areas: (1) the ability to maintain confidentiality of information; (2) potential for a heightened duty of care for airport operators; and (3) depending on the scope of the FAA's final rulemaking, constraints upon an airport operator's ability to require its tenants and others doing business at the airport to comply with the SMS program adopted at the airport.

1. Maintaining Confidentiality

It has been demonstrated that where data provided is held in confidence, reporting is improved.[21] The United States Congress recognized this when it enacted legislation that protects certain voluntarily submitted aviation safety or security related information from disclosure.[22] The FAA has implemented Section 40123 through regulations[23] and under those regulations, FAA has adopted several safety programs, notably including the Aviation Safety Action Program ("ASAP")[24] for air carriers and their employees, as discussed below.

ICAO has clearly noted the distinction between what it terms "error reporting" and "hazard reporting", stating that "error reporting is self-incriminatory and may thus lead to blame and punishment, while hazard reporting is objective and neutral.[25] ICAO goes on to note that because of the early emphasis on error reporting as opposed to hazard reporting, the protection of reporters has been a hot topic since the inception of reporting systems.[26] ICAO distinguishes between records relating to accidents and serious incidents, where there may be overriding considerations that require disclosure of the records for judicial investigations, and records related to voluntary hazard reporting, where there is strong justification for protection.[27] ICAO concludes that a consequence of effective safety reporting "… is that key data is properly safeguarded, and the promotion of a system of checks and balances that ensures that reporters of hazards feel confident that hazard reporting will not be put to uses other than for which it was implemented, operational personnel are encouraged (and rewarded) for providing essential safety information related to hazards. However, there is a clear line that differentiates between acceptable and unacceptable operational performance."[28]

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21 *See, e.g., Aerosafety World*, "Rebuilding ASAP", Feb. 2009, at 42 ("the majority of the information on which such [safety] enhancements now depend would not surface at all if not voluntarily disclosed." *Quoting* Independent Review Team, *Managing Risks in Civil Aviation: A Review of the FAA's Approach to Safety*. Sept. 2, 2008); *Id*. at 43 ("The [Flight Safety] Foundation and others have estimated that about 98 percent of the safety information obtained from voluntary disclosure programs would no longer be available if participants were subject to prosecution and penalties.")

22 *See* 49 U.S.C. § 40123(a) ("Notwithstanding any other provision of law, neither the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, shall disclose voluntarily-provided safety or security related information if the Administrator finds that – (1) the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and (2) withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities.") ("Section 40123")

23 *See* 14 CFR Part 193 (Protection of Voluntarily Submitted Information) ("Part 193").

24 *See* FAA Order 8000.82 Designation of Aviation Safety Action Program (ASAP) Information as Protected from Public Disclosure Under 14 CFR Part 193 ("Order 8000.82")

25 ICAO Safety Management Manual ("SMM"), 2d ed. (draft), § 2.8.23.

26 *Id*.

27 *Id*. at 2.8.24 – 2.8.26.

28 *Id*. at § 2.8.15(e).

It is important to note that there are several different types of disclosure of information that may be mandated. As discussed below, state and the federal freedom of information acts ("FOIA") generally mandate that all information, data, documents and other materials (collectively, "information") held by a governmental entity be disclosed upon request, unless such information falls within one of a very few statutorily enumerated exceptions.[29] The other is the legal discovery process. The ASAP program appears to be exempt from disclosure under both the federal FOIA and through discovery, although a federal court in a case involving the August 27, 2006, crash during an attempted takeoff from a taxiway at Blue Grass Airport in Lexington, Kentucky, has passed until trial the question of whether ASAP data submitted before the crash may be admitted at trial.[30] In that case, a federal district court judge deferred until trial a motion calling for the release of the airline's ASAP reports.[31]

In addition, the controversy over the recently initiated FAA action to protect its Wildlife Strike Database[32] from disclosure pursuant to Section 40123 points out the very real difficulties that lie ahead for any effort to exempt aviation safety information from disclosure.[33] The FAA initially sought to make the information submitted to the Wildlife Strike Database confidential, but in the face of significant media and public attention, the FAA elected to make such information public.[34] In its comments on the proposal, Airports Council International concluded that it could not take a position either supporting or opposing the FAA's proposed order, but it noted that if such data are made public, the FAA should "… provide explanatory information to assist the public and media to use the data responsibly…."[35] Interestingly, one reason that many ACI-NA member airports were ambivalent regarding the proposed order was

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[29] *See, e.g.*, 5 U.S.C. § 552(a)(3)(A) "… except as provided in subparagraph (E), [relating to intelligence agencies] ***each agency***, upon request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, ***shall make the records available to any person***." (emphasis added). Section 552(b) goes on to state that section 552 does not apply to matters that are listed under 9 separate listed exceptions, most of which are narrowly drawn, including matters that are "specifically exempted from disclosure by statute … provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." (§ 552(b)(3).) Safety information in general is not a specific exception to the federal FOIA, but Section 40123 provides for exceptions to FOIA.

[30] *See In re: Air Crash at Lexington, KY*, Slip Opinion at 12, July 17, 2008 (E.D. KY) (granting motion to exclude all reference or evidence concerning ASAP reports filed after the crash of Flight No. 5191; passing until trial Comair's request to exclude all ASAP reports, both before and after the crash.)

[31] *See Aerosafety World*, "Rebuilding ASAP". Feb. 2009 at 40, 43.

[32] *See* 74 Fed. Reg. at 11698, March 19, 2009.

[33] *See, e.g., USA Today* editorial, April 3, 2009; *USA Today*, "Aircraft hit birds 62% more strikes since '90's", April 7, 2009.

[34] *See* The Washington Post, April 23, 2009, "LaHood Snubs Plan to Keep Data on Bird Strikes Secret".

[35] Comments of Airports Council International – North America ("ACI-NA") -- In the Matter of Notice of Proposed Order Designating Information as Protected from Disclosure, Docket FAA-2009-0245, at p. 7, April 20, 2009.

that such airports "… are subject to state and local sunshine laws that require them to provide their locally-collected wildlife strike reports to the public already."[36] This example demonstrates both the difficulty in protecting safety data from disclosure and the need for a solution that addresses both federal and state FOIAs. In order to protect any such safety information from disclosure, it is likely that the FAA and other stakeholders, such as airports, air carriers and ground handlers, will need to make a compelling case for such treatment.

The vast majority of commercial service airports in the United States must disclose most information (including safety information) held by those airports upon request. Almost all commercial service airports in the United States, including SEA, are owned and operated by municipal or state governmental entities, including independent authorities, that are subject to their state's FOIA. Furthermore, the FAA is subject to the federal FOIA.[37] State FOIAs are modeled on the federal FOIA, although each state's act differs in certain particulars. In general, aviation safety information is not an exception to disclosure under state and federal FOIAs, other than the statutorily created exception noted above for voluntarily disclosed information under Section 40123.

The requirement that public airport operators provide information on request pursuant to FOIA significantly inhibits most private entities from participation in a voluntary program of self-reporting safety-related information. In a draft report prepared for the Airport concerning ramp procedure reporting, it was noted that both the majority of the airlines and service vendors/ramp operators indicated that they had concerns that "any incident that is reported to the Port immediately becomes a matters of public record."[38] The purpose of this section is to consider legal means that may be used to report and record information in ways that may help protect it from disclosure.

a. Federal Preemption. The ideal resolution of this issue would be for Congress to extend the ambit of Section 40123 to exempt all information gathered under an FAA-approved SMS from disclosure under the federal FOIA, and through preemption, protect SMS data from disclosure under state FOIAs as well. Where a federal statute or regulation is intended to preempt state law and the agency that promulgated that regulation acted within the scope of its delegated authority in doing so, a federal statute or regulation can preempt a state's laws on the same subject. If the FAA is granted the authority to adopt regulations protecting certain information from disclosure in order to promote safety, and the FAA adopts a regulation that designates SMS data as exempt from disclosure because of the concern that public disclosure may inhibit the provision of important safety-related information, such regulation likely would preempt a contrary state FOIA requirement to disclose that information.

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36 *Id*. at 4.

37 *See* 5 U.S.C. § 552 (federal FOIA)

38 *See* Seattle International Airport Ramp Procedure Reporting prepared by Harold N. Handke, Airport Design & Operations, at Appendix 1.

The information that is made confidential under Section 40123 is exempt from disclosure under federal FOIA because it constitutes matters that are "specifically exempted from disclosure by a statute that requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue," and Section 40123 "establishes particular criteria for withholding or refers to particular types of matters to be withheld." As Section 40123 only applies to information voluntarily provided to the FAA, however, it is not of much utility to an airport seeking to establish a SMS that is exempt from the requirements of its state's FOIA. Similarly, if FAA adopts a requirement that all Part 139 airports implement SMS, as FAA is expected to do, it may not be possible to withhold SMS data under a state FOIA under Section 40123, as the information arguably is not "voluntarily" provided if it is mandated by federal regulation.

We recommend that airports seek action from Congress to amend Section 40123 to eliminate the requirement that such information be voluntarily provided and to expressly limit the information that is subject to disclosure through discovery. Further, we recommend that when the FAA subsequently adopts regulations promulgating the requirement that airports certificated under Part 139 implement an SMS, that such regulations expressly exempt SMS data, other than certain narrowly defined data demonstrating violations of law or regulation similar to the ASAP, from disclosure under all state and federal FOIAs. However, we are also quite aware that this approach is likely to be met with resistance from several sectors, including the media. In order for such an exemption from disclosure to be approved, it will take strong efforts by multiple stakeholders, demonstrating the tangible safety benefits that should accrue from a robust SMS program, to convince policy makers that the benefits of nondisclosure outweigh the desire for transparency. In such an event, there is a strong argument that such federal action would preempt all state laws, including state FOIAs, and protect SMS data from disclosure.

The FAA is expressly charged by Congress with overseeing aviation safety within the United States.[39] If the FAA adopts regulations protecting certain information from disclosure in order to promote safety because of the concern that public disclosure may inhibit the provision of important safety-related information, such regulations likely would preempt a contrary state FOIA requirement to disclose that information.

For example, under Section 40123 and Part 193, the FAA has adopted Order 8000.82 exempting ASAP data from disclosure. The FAA found that "disclosure of the information would inhibit the voluntary provision of that type of information. Certificate holders and their employees are reluctant to share sensitive safety information with the FAA, including employee self-reports of alleged violations, if such submissions might be subject to public disclosure."[40] Order 8000.82 continues "A significant impediment to the sharing of ASAP information with the FAA is the aviation industry's concern over public disclosure of the

[39] *See, e.g.*, 49 U.S.C. § 40101(a) ("… the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity: (1) assigning and maintaining safety as the highest priority in air commerce….")

[40] Order 8000.82 at ¶ 6(c).

information and, if disclosed, the potential for it to be used for other than the safety enhancement purposes for which the ASAP was created."[41] Thus, with the exception of reports involving possible criminal activity, substance abuse, controlled substances, alcohol, or intentional falsification, the FAA withholds significant amounts of information provided under ASAP, including the employee's ASAP report and the content of that report and the identity of the certificate holder associated with such report.[42]

In determining whether a federal regulation preempts conflicting state law, courts must determine (1) whether the federal regulation was intended to preempt state law and (2) whether the agency that promulgated the rule acted within the scope of its delegated authority in doing so. Where a clear conflict between state law and federal regulation exists, such that compliance with both is impossible, courts will analyze the nature and scope of the authority granted to the agency to determine whether preemption is appropriate. In *ACLU of New Jersey v. Hudson*, a court ruled that an Immigration and Nationalization Service ("INS") regulation preempted a conflicting New Jersey sunshine law because the INS Commissioner was acting under properly delegated authority in promulgating the rule based on Congress' plenary power over matters concerning immigration.[43] The same result occurred in *Brady-Lunny v. Massey*, where the delegated authority to promulgate the rule at issue was based on a less clear mandate.[44] There, the court ruled that the federal FOIA and two exemptions thereunder, coupled

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41 *Id*. at ¶ 6(c)(1).

42 *Id*. at ¶ 5(b).

43 *ACLU of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629, 635 (N.J. Super. Ct. App. Div. 2002). This case involved the United States, who acted as an intervener and appealed a trial court's order requiring two counties to disclose pedigree data and other specified information pertaining to certain inmates, including those in county care pursuant to contracts with the INS. The plaintiffs sued alleging that the counties unlawfully refused to make available public records as required by New Jersey's Right-to-Know Law. *Id*. The United States argued that an INS "interim rule" barring the disclosure of the information sought preempts state law and forbids the disclosure of the requested information. *Id.* at 638-39. In overturning the trial court's decision, the court noted that "federal regulations have the same pre-emptive effect as federal statutes as long as the agency (1) intended to preempt state law and (2) acted within the scope of its delegated authority." *Id.* at 646 (internal citations and quotations omitted). The court found a clear conflict between state laws that mandated disclosure of the information and the federal regulation that prohibited its disclosure, warranting a preemption analysis. *Id.* at 646-47. The court next noted that "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." *Id.* at 647. To make this determination, courts must "examine the nature and scope of the authority granted by Congress." *Id.* "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Id.* (internal quotations and citations omitted). Using these principles, the court found that Congress has exclusive jurisdiction over immigration and that the regulation was promulgated by the Commissioner of the INS under appropriately delegated authority. *Id.* at 650. The court concluded that none of the arguments advanced by the plaintiffs detracted from the validity of the regulation, and it accordingly ruled that the federal regulation must preempt state law. *Id.* at 655.

44 *Brady-Lunny v. Massey*, 185 F.Supp.2d 928, 929-30 (C.D. Ill. 2002). In this case, a reporter from an Illinois newspaper sent an Illinois Freedom of Information Act ("Illinois FOIA") request to the county sheriff asking for various information about prisoners in the sheriff's custody. The sheriff provided the information with respect to state inmates, but not as to federal inmates. *Id*. at 930. The United States then intervened and also refused to accede to the Illinois FOIA request because the Federal Bureau of Prisons has a prohibition on disclosing lists of federal inmates. *Id.* The court noted that the Illinois FOIA specifically exempts from disclosure information

with a regulation validly promulgated by the Federal Bureau of Prisons prohibiting disclosure of certain information, preempted an Illinois sunshine law. Like the INS and Bureau of Prisons regulations, an FAA regulation prohibiting the disclosure of certain safety and security information collected by airport operators in connection with a mandatory safety program should be deemed to be a valid exercise of authority.

b. Working Within FOIA. Without obtaining statutory authority that protects SMS data from disclosure under federal and state FOIAs, there are steps that an airport that adopts a SMS can take to encourage reporting and protect certain information from disclosure. Generally, these steps are taken in the way that information is reported, and in the way that information is recorded. Each airport should develop clear standards for both reporting and recording SMS data in a manner that will protect such data from disclosure to the greatest extent possible.

i. Reporting. The manner in which information is gathered for an airport's SMS database can be established both to minimize the information gathered – so that certain information that parties would prefer not be disclosed is not gathered and thus cannot be subject to disclosure – as well as to encourage reporting. We recommend that reporting of safety-related information under an airport's SMS be standardized pursuant to policies and procedures adopted by the airport operator as part of its SMS program. Those standards can address both the types of information that should be provided and the manner in which the information is provided. Just as importantly, the policies and procedures should clearly state the types of information that should not be reported.

One method of reporting that serves to reduce disclosure is providing for anonymous reporting. Another is to set up reporting processes that do not require that certain types of identifying data be provided. The crucial issue is that under FOIA, it is only the information held by the governmental entity that must be disclosed. Thus, if certain information is intentionally not obtained, it will not be available for disclosure.

(1) *Anonymous Reporting*. A system that permits information to be reported anonymously, such as through a telephone "tip line" or by other anonymous communication, can lead both to increased participation and will avoid identification of the reporting person. It has been shown, as discussed below, that where a reporting program is non-punitive, participants are more likely to provide more and better information. Similarly, where persons are concerned about protecting their identity, an anonymous tip line can provide the ability to report safety-related information, without the identity of the reporter being disclosable.

One drawback to anonymous reporting is that it can be difficult to investigate the issue and follow up with those submitting reports. However, many health care institutions have implemented anonymous reporting systems that have been integrated within the institution's

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prohibited from disclosure by federal or state law or rules and regulations. *Id.* at 931. The court's analysis then turned on the validity of the Bureau's regulation that prohibits disclosure of federal inmates. *Id.* Without much analysis, the court ruled that the federal FOIA and two exemptions thereunder applied to the information and that the Bureau's regulation was valid; therefore, the information was protected from disclosure. *Id.* at 932.

ethics and compliance program structure, thus creating a framework for improved reporting and accountability.

(2) *De-Identification of Information*. Another method of reporting and recording information that avoids FOIA requirements is to "de-identify" certain information when it is reported. For example, rather than requiring that the name of an airline whose aircraft was involved in an incident be reported, the SMS program would simply require that the incident be described, without specifying names of participants. A drawback to such a system is that it is harder to develop trend analyses tied to a specific identifier, such as the name of an airline or fixed base operator. As a compromise, certain neutral identifiers can be used, such as the area of the airport the incident occurred (either on a grid basis or by gate or other similar basis), but these identifiers are themselves disclosable and can lead to identifying the parties involved in at least some incidents.

ii. Recording. As noted above, not only can the manner in which information is reported be set up so as to protect certain information from disclosure, the way information is recorded can also be established in such a manner as to protect information. As described above, "de-identification" of information when it is reported or when it is recorded will prevent collection of and maintaining certain identifying information. Similarly, it may be possible to arrange for information to be held by a third party not subject under the applicable FOIA. Such third party hosting of information is often performed for health care institutions, not because of FOIA concerns, but to maximize efficiency. In the airport context, however, if data is provided directly to a third party not subject to FOIA, in certain cases it may be possible to prevent the disclosure of that information under FOIA. There are several drawbacks to this approach, however. The first is that the federal FOIA was recently amended to include information gathered on behalf of a federal agency by a third party as information subject to FOIA.[45] It is likely that many, if not all, state FOIAs will follow this lead at some point, thereby mooting this potential means for avoiding disclosure. Second, once the airport accesses the third party's database, the information that is delivered to the airport becomes subject to applicable FOIA. Thus, it may be desirable to establish de-identification protocols for all data provided to or drawn from such a third party host.

iii. Privilege. A final source of confidentiality is privileges and other legal requirements prohibiting disclosure. For example, materials subject to the attorney-client privilege are generally not subject to disclosure under state and federal FOIA. Similarly, security sensitive information, or "SSI," as defined in 49 U.S.C. § 1500, *et seq*., may not be disseminated except to those with a need to know without permission of the Transportation Security Administration ("TSA"). However, these sources of confidentiality will apply only to a limited

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45 *See* 5 U.S.C. § 552(f)(2) (" 'record' and any other term used in this section in reference to information includes – (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.") added by Pub. L. 110-175, Sec. 9 (Dec. 31, 2007).

range of data, and courts often read these exceptions narrowly in favor of disclosing materials, with privileged or prohibited materials redacted.

c. Alternatives to Reporting. Instead of gathering data from third parties such as airlines and fixed base operators ("FBOs"), we recommend that the FAA instead require that these third parties also be required to undertake SMS programs (or that airline programs include third party providers of service to the airlines). In such an event, the data reported by such other parties ideally would be de-identified, aggregated, and made available to all participants in the FAA's SMS programs, so that airport operators, among others, could access safety hazard data relating to their airport, as well as generally, to assist in risk analysis and mitigation.

In the alternative, another option may be to rely on programs established by others, such as the International Air Transport Association ("IATA"), which has established the International Air Transport Association Operational Safety Audit ("IOSA") program for member airlines and the ICAO Safety Audit Guidelines ("ISAGO") for FBOs and other ground handlers. While all air carriers and third party handlers are not required to comply with IOSA or ISAGO, respectively, it would likely be reasonable for airport operators to require FBOs to comply with ISAGO as part of the minimum standards for operation at an airport, and to provide certain benefits, such as reduced fees or other "carrots" for airlines that are IOSA certified.[46]

2. Potential Liability Issues.

Airports that implement a SMS may heighten their risk of liability. Through the process of developing a gap analysis and ranking potential safety threats, airports may be increasing their risk of liability for negligence – or even recklessness - where a threat to safety is identified, but not promptly mitigated. This issue is of lesser concern to an airport operator where a substantial safety threat is located within an area not subject to the control of the airport operator, but even in that case, there may be a duty to warn the entity controlling such space and, as landlord, the airport operator may have a duty to attempt to mitigate any such identified threats. Further, failure to comply with the SMS regulations, when promulgated by FAA, could give rise to a federal Tort Claims Act whistleblower action.

a. Negligence. Liability for negligence arises when a party owes others a duty to conform to a standard of conduct for the protection of others from unreasonable risk, and that party breaches that duty, resulting in injury or damage to another.[47] In addition, negligence has been found where a risk has been identified and where there is an unreasonably great risk of causing damage or injury, and the identified risk is not mitigated.[48] In such cases, the general

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[46] Note that under FAA regulations, it is unlikely that an airport may prevent an air carrier from operating at the airport without a SMS in place. However, an airport may justly discriminate between those carriers with SMS and those without by providing certain incentives.

[47] *See Prosser & Keeton on Torts*, 5th ed., § 30, pp. 164-165 (1984).

[48] *Id*. at § 31, pp. 169.

legal standard is whether a reasonable person would have mitigated the identified risk.[49] If a reasonable person, as determined by the fact finder (generally, the jury) would have undertaken steps to mitigate the identified risk, then the party that failed to mitigate such a risk will generally be found liable to the person injured.

Thus, implementation of SMS could lead to increased likelihood of liability because the process identifies otherwise unknown risks and quantifies the potential impact of such incidents. By being on notice of these risks through a SMS analysis, an airport operator arguably has a duty to persons at the airport (including, for example, airport tenants, those doing business at the airport and travelers) to take all reasonable steps to mitigate the identified risk. If the SMS analysis had not been performed, the lack of knowledge of a risk, and thus failure to mitigate it, could be a defense.

The obvious response to this concern is for airports to mitigate risks as they are identified through SMS, and that is certainly one of the goals of SMS. However, inherent in the SMS process is judgment regarding the likelihood that a given risk will result in an incident and regarding the potential seriousness of the consequences of such an incident. Further, many mitigation alternatives will require a cost-benefit analysis. If the risk is remote, the potential for injury low and/or the cost to mitigate the risk is high, an airport may choose not to mitigate a given risk. In such a case, in the unfortunate event that the identified risk leads to an accident, there will inevitably be second guessing of the decision not to mitigate that risk, and evidence will exist that the airport was both aware of the risk and chose not to correct it.

As noted above, the simple solution is for an airport operator to mitigate all risks that are identified. However, that alternative will not always be possible. It is also likely that over time, the identified risks that have not been mitigated will become fewer as the airport operator undertakes mitigation measures. Accordingly, it is likely that the greatest costs associated with undertaking mitigation measures will be in the early years of implementation of a SMS (or application of a SMS to a new area of an airport, if the program is phased in). Thus, airports that adopt SMS (and once FAA requires implementation of SMS, this will be universal) will need to commit adequate resources not only to undertake the SMS program itself, but to mitigate the more significant risks that are identified.

To the extent that the FAA provides guidance regarding which risks must be mitigated and which risks may be addressed through other means, the FAA's standards will provide strong evidence of reasonableness. Furthermore, to the extent that the FAA develops consistent standards for rating risks and quantifying those risks that must be mitigated versus those risks that are acceptable, airports will be able to obtain some protection from liability where the airport acts consistently in accord with the FAA's guidance. As noted above, SMS is not intended to lead to mitigation of all identified risks, it is intended to be used in a manner similar to a cost – benefit analysis. Risk cannot be eliminated, only managed. Accordingly, ICAO defines "safety" as "… *the state in which the possibility of harm to persons or of property*

[49] *Id.*

damage is reduced to, and maintained at or below, an acceptable level through a continuing process of hazard identification and safety risk management."[50]

With respect to risks that are determined to be remote or that present low risk of harm, airports will need to be rigorous in their analysis and maintain careful records regarding their analysis and any changes in the determination that may be warranted, in order to demonstrate the reasonableness of the decision not to undertake mitigation measures. In addition, to the extent that the airport's SMS includes a clear process for categorizing risks and the airport operator demonstrates a clear practice of mitigating risks determined to be above the threshold established in the SMS, the airport operator will help demonstrate its reasonableness. Conversely, where an airport operator demonstrably fails to mitigate identified risks in accordance with its SMS or otherwise fails to adhere to the policies and provisions adopted in its implemented SMS, it is much more likely that such an operator will be found to have acted unreasonably and be held liable where an identified risk results in injury.

Mitigation of hazards in areas not subject to an airport operator's direct control can be addressed through strong lease (or other agreement) provisions that mandate that if a hazard is identified by the airport operator or through SMS within an area subject to a tenant's control, the tenant must promptly mitigate that hazard if directed to do so by the airport operator. Such an agreement should also contain a strong self-help provision permitting the airport operator to take such steps as may be necessary in the judgment of the operator to mitigate any such hazard if the tenant does not do so in a reasonable period of time, and allowing the airport operator to charge the cost of such measures back to the tenant.

b. Recklessness. A heightened form of liability for negligent acts is so-called "reckless" or "willful or wanton" conduct, which is action that "is so far from a proper state of mind that it is treated in many respects as if it were so intended."[51] The usual meaning of these terms is that an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, usually coupled with a conscious indifference to the consequences.[52] This can also be stated as an extreme departure from ordinary care in a situation where a high degree of danger is apparent.[53]

One of the hallmarks of the commercial aviation industry is that, despite the potential dangers of flight, the industry has adopted a safety culture that has resulted in an outstanding safety record. Nevertheless, the consequences of failure to maintain a safe environment at an airport can be catastrophic. By adopting a SMS program, claims for recklessness could arise where a risk analysis demonstrates that a hazard had a significant potential for occurring and for causing serious injury or death, and the airport operator chooses

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50 *See* ICAO SMM (draft), § 2.2.4.

51 *Prosser & Keeton on Torts*, 5th ed., § 34, p. 213.

52 *Id*.

53 *Id*. at 214.

not to undertake measures to remedy such hazard, or potentially, where the operator postpones taking remedial action, and the foreseen hazard occurs, resulting in serious injury or death. To the extent that failure to remedy such a hazard was an extreme departure from ordinary care and the risk analysis demonstrated that it was highly probable that harm would follow from such a hazard, an airport operator could be faced with an action alleging reckless conduct. Where a fact-finder finds that such conduct was, in fact, reckless, the consequences to the airport operator can much more severe, resulting in higher financial judgments and, depending on the terms of the policy, lack of insurance coverage. As suggested above, airports will need to closely monitor the SMS risk analysis process and, when significant risks are identified, airports will need to act promptly to mitigate those risks.

c. False Claims Act Actions. The vast majority of U.S. airports receive federal grant funding under the Airport Improvement Program ("AIP"). All recipients of AIP grant funds must enter into a grant agreement with the FAA that includes a long list of grant assurances, including assurance numbers 19 (operation and maintenance) and 20 (hazard removal and mitigation). If an airport operator fails to undertake a SMS program or otherwise comply with the regulations promulgated by FAA relating to SMS, it is possible, especially where an incident or accident gives rise to personal injury, death or property damage, that a claim could be asserted against the airport operator under the federal False Claims Act for breach of the AIP grant agreement through failure to comply with the airport's grant assurances. In contrast, demonstrated compliance with the FAA's regulatory requirements and adherence to an airport's adopted SMS should help an airport operator demonstrate full compliance with these assurances.

3. Regulation of Tenants and Others Doing Business at the Airport.

As is discussed briefly above, one of the fundamental issues that will confront an airport implementing an SMS is how broad its scope will be. If the FAA implements regulations requiring that all participants in the commercial aviation system, including airlines, air traffic control and airport operators, undertake separate, integrated SMS programs, and if the FAA also provides concrete guidance that identifies the boundaries of each of the participants' responsibilities, it is likely that it will be significantly simpler for airport operators to regulate their tenants and others engaged in operations at their airport. However, absent such a comprehensive approach to SMS or the FAA's failure to adequately separate SMS responsibilities, airport operators will have to determine the proper scope of their SMS program, including determining whether to require that tenants and others participate in some way. Thus, the breadth of an airport's SMS may include both its geographic reach (i.e., whether or not to include landside as well as airside operations, and with respect to airside, whether all operations or only selected areas will be included within the ambit of the SMS), and the scope of those persons and entities that will be expect or encouraged to provide information for inclusion in the airport's SMS database. This section of the memorandum considers issues related to an airport operator's decision to extend its SMS to include its tenants and their operations, and the legal issues presented by such a decision.

In general, the airport operator owns and controls the airport and thus has the ability to order its relationship with its tenants and others permitted to operate on the airport

through several different means, including agreements voluntarily entered into between the operator and its tenants and service providers, as well as through adoption of minimum standards and/or airport-wide rules, regulations and directives. However, there are certain legal limits to the requirements that an airport operator may impose upon such entities. These include constitutional limits on the impairment of existing contracts, limitations on the ability of a third party to regulate labor arrangements, and FAA requirements that prohibit unjust discrimination.

a. Agreements. In general, two parties are free to enter into a contract that would include all of the terms of a SMS, such as analyzing systems or activities of the tenant, identifying hazards and risks relating to such systems and activities, including requiring reporting by airline employees, and mitigating the risks identified. Thus, use of agreements, such as an airport use and lease agreement or standardized agreements with ground handlers, is likely the best way to achieve consistent and full compliance with an airport's SMS as it relates to third parties. In addition, an agreement can provide for the recurring follow up reporting and analysis that is necessarily a significant part of SMS. Only where an agreement breaches a provision of law could it be voided. A final benefit of using agreements for establishing the terms of SMS interactions with third parties is the ability to use incentives as well as penalties to encourage cooperation with contractual provisions. As long as such incentives are offered in a not unjustly discriminatory manner, airports may use "carrots", such as reduced fees or more liberal terms, in conjunction with traditional "sticks", such as events of default or monetary penalties, to encourage tenants and other third parties to comply with contractual terms or to achieve other goals, such as become IOSA or ISAGO-certified.

Nevertheless, certain provisions of an agreement may not be easily enforced or monitored, such as requiring reporting of hazards or incidents that occur only between tenant employees within a tenant's leasehold. There are several additional drawbacks to the use of agreements as the primary way to implement a wide-ranging SMS program, however. The first is that many, if not most, airports enter into agreements with a term of years. Thus, at any given time, the airport may be in a position to negotiate a new agreement with certain of its tenants, but it is often difficult to negotiate all of the relevant agreements within a short period of time. The second is that agreements are generally the subject of negotiation, rather than imposed upon, the counterparty. Thus, achieving consistent terms can often be difficult, especially in the context of an issue that can be as sensitive as SMS, as different parties will have different concerns, and leverage, and likely seek to address certain key issues in different ways.

b. Minimum Standards. The FAA recommends that all airport operators adopt minimum standards that set a threshold for the requirements for operating at the subject airport. Often, different minimum standards are adopted that apply to different types of operations, such as commercial service air carriers, all-cargo carriers, FBOs, limited service providers and the like. Generally, minimum standards are applied either as a regulation adopted by the airport operator, or as a pre-condition to operation at the airport. For parties other than airlines, minimum standards can be an effective way to provide for a uniform set of requirements and standards that must be met in order to be granted the privilege of operating at an airport. Where, however, a pre-existing agreement incorporates minimum standards, as modified from time to time, into the agreement, problems can arise if such minimum standards seek to impose requirements that may interfere with a third party's other obligations, such as the terms of a

collective bargaining agreement. Thus, minimum standards are often most effectively used as a floor, with which a service provider must comply in order to commence operations at an airport. Application of minimum standards to an entity already operating at an airport can create problems, either where the current operating agreement does not expressly incorporate amendments to the minimum standards in effect at the time the agreement was entered into, or where, even if incorporated, such amendments conflict with other requirements binding upon the operator. In addition, it can be difficult, if not impossible, under federal aviation law and regulations to justify application of minimum standards to exclude an air carrier from operating at an airport, although the manner in which a carrier operates may be regulated though minimum standards.

c. Regulations. The third common means of regulating tenants and others operating at an airport is the adoption of regulations. The primary advantages of the use of regulations to order behavior are that the terms and conditions will be uniform among all regulated entities, and the airport operator, which is a generally a governmental entity, often has punitive power to enforce such regulations, such as the imposition of fines or, in some cases, even criminal penalties for violations. The disadvantages to the use of regulations are that the process for adopting a regulation can often be cumbersome and time-consuming (although negotiating multiple agreements can be even more difficult), and the prohibition under the United States Constitution of the adoption of laws and regulations that would abrogate an existing contract. Thus, regulations may not be enforced which would retroactively seek to alter certain contractual provisions already in force between an airport tenant or service provider and another party, such as collective bargaining provisions. One way to avoid the time-consuming regulatory process may be for an airport to issue an "airport directive", which is often a short term mandate issued by the airport's Director of Aviation to address an operational, safety or security issue.

B. **Just Culture and Safety Management Systems**.

1. Nonpunitive Environment and a Just Culture

A critical and fundamental component of any safety plan is the expectation that errors will be reported so that the organization can compile information, analyze data, communicate trends, and develop tools for resolving events and ultimately implement procedural and systematic change. It is therefore imperative to the success of any safety program that the organization's management style in dealing with error ensures that there are no reprisals and no impediments to information flowing freely to management and leadership.[54] Reporting will not occur if staff believes they will be punished for doing so. In fact, punishing employees for making a mistake emanates from the misconception that the individual is to "blame" for his or her mistake and that punishment will lead both to improved performance in that individual and serve as a deterrent to error in others. Abundant evidence in human factors and cognitive

[54] *See, e.g.*, M. Meaney, *Error Reduction, Patient Safety and Institutional Ethics Committees*, 32 Jour. of Law, Medicine & Ethics, No. 2, pp. 358 – 362 (comparing "Safety Culture" to a Culture of Blame").

psychology literature recognizes that most human errors are symptoms of underlying system failures, not personal failures.

The healthcare industry looked to aviation safety models in order to improve patient safety and found that aviation industry leaders "consider safety to be the dominant characteristic of organizational culture".[55] Over the past decade, the healthcare industry has diligently worked to transform its organizational culture to shift toward a patient safety culture. Just as the healthcare industry studied the aviation and energy industries to improve patient safety, airports and other participants in the aviation industry can learn from the great strides that the healthcare industry has made in successfully adopting a widespread patient safety culture.

In the healthcare industry, patient safety necessitates that organizations attain a "just culture," which is an atmosphere of trust where people are encouraged and even rewarded for providing safety-related information, but which is also clear about where the line must be drawn between acceptable and unacceptable behavior.[56]

With the significant emphasis on patient safety, the healthcare industry can now provide models for the aviation industry. In order to develop an effective patient safety culture, healthcare organizations strive to achieve the following characteristics of a blame-free environment, wherein the organization:

- embraces the concept that those under its employ or who practice in its facility do not purposely seek to create errors, rather, that most errors occur as a result of ineffective, improperly designed, or flawed systems;
- seeks to develop human resource policies and procedures that support the realization that most errors are not the result of individual failure, but system failure;
- develops ways to reward, rather than discourage, reporting of errors or patient-safety concerns;
- celebrates success at improvement in the reporting of patient-safety concerns and errors, as well as how such disclosure has been used to make improvements in systems to prevent the future possibility of error;
- purposely works to alter its mindset about errors and its behavior with respect to errors, possibly by changing the language it uses to talk about patient safety and errors;
- seeks to engender an environment where reporting about errors and patient safety is the norm, by actively creating an environment where practitioners

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55 *Id*. at 361.

56 J. Reason, *Managing the Risks of Organizational Accidents* (Ashgate Publishing Ltd., 1997).

and employees do not fear retribution for raising concerns or reporting errors; and

- implements methods of feedback to learn from error.

In the healthcare industry, it is ideal that error reporting takes place through an established reporting system supported by policies and procedures that are endorsed by the governing board and communicated to staff. The reporting system adopted should be clearly articulated to staff and include a description of which events are reportable, the time frame within which they are to be reported, and a readily available, easy-to-use format/form that is universal throughout the organization. The reporting system also should allow for feedback to clinicians and staff on the risk-reduction efforts made by the organization in response to reported events.

JCAHO, the hospital accreditation agency, expressly recognizes that the leaders of an organization are responsible for setting the tone such that internal reporting occurs within a system where there is "minimalization of individual blame or retribution for involvement in a medical/health care error."[57] While JCAHO does not require an amnesty policy for accredited providers, many patient-safety experts recommend a policy that allows staff to come forward and report errors as required by the organization and face no direct impact on their employment for doing so.

This is not to say that an organization that adopts a just culture eliminates individual or organizational accountability. Organizations can and should adopt a disciplinary model that centers on accountability and integrates the notions of individual and organizational culpability (e.g., human error, negligence, recklessness, and intentional acts) with the type of error (e.g., rule-based, skill-based, or knowledge-based).[58] To determine whether a particular behavior is culpable enough to involve disciplinary action, the disciplinary policy should require that each safety event be assessed individually. The disciplinary decision-making model many healthcare providers select is based on staff risk-based behavior that incorporates the concepts of the civil tort liability system (i.e., negligence, gross negligence or recklessness). The threshold for discipline is generally determined to be negligence where the staff member had no conscious disregard of a known risk; instead, the staff member should have known, but was unaware, of the risk he or she was taking. Gross negligence or recklessness should result in disciplinary action to deter intentionally unsafe acts. *(*Excerpt taken from *Patient Safety Handbook*, June M. Sullivan, JD, Med OT/L, MT (ASCP) and Renee H. Martin, JD, RN, MSN).

It is widely recognized that implementing a just culture necessitates the full involvement of all levels of the organization, as well as education and training of all levels of

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[57] *Revisions to Joint Commission Standards in Support of Patient Safety and Medical/Health Care Error Reduction* (JCAHO 2002).

[58] *See generally* D. Marx, *Patient Safety and the "Just Culture": A Primer for Health Care Executives* (Columbia University 2001); J. Reason, *Managing the Risks of Organizational Accidents* (Ashgate Publishing Ltd. 1997).

management and leadership. Counsel must work closely with human resources to ensure that applicable personnel policies address corrective and remedial actions that address individual and organizational process weaknesses.

2. Safety Management Systems: Patient Safety and Quality Improvement Systems in Healthcare

The Patient Safety and Quality Improvement Act ("PSQIA") became effective on January 19, 2009.[59] Congress' goal in enacting PSQIA was to create opportunities for providers to share patient safety information with independent entities, called patient safety organizations ("PSOs"), which can analyze and aggregate patient safety data from multiple providers and use it to identify patterns that suggest underlying causes of patient risks and hazards. To encourage providers of healthcare services to share potentially sensitive information, PSQIA made particular information shared with PSOs, known as patient safety work product ("PSWP"), both privileged and confidential. The final Rule enacts the framework by which the government will certify PSOs, clarifies the scope of privilege and confidentiality granted to PSWP, and describes how the government will enforce compliance with these provisions.[60] PSQIA and the concepts it embodies could serve as a template for the collection, protection, aggregation, and analysis of sensitive SMS data.

[59] Pub. L. 109-41, 42 U.S.C. §§ 299b-21 – 299b-26

[60] 42 CFR Part 3.

C. Recommendations for FAA's Proposed Regulations.

1. Recognize Need to Protect SMS Data. As discussed above, if information collected as part of a SMS is protected from disclosure, it is likely that there will be more and better reporting of safety-related information. Ideally, Section 40123 will be amended, perhaps as part of the next FAA reauthorization legislation, to permit SMS information to be maintained in confidence, expressly not subject to either state or federal FOIAs. However, absent such an amendment, it may be possible for FAA to adopt regulations protecting SMS data from disclosure and for airports to develop systems that adequately protect SMS information from disclosure. For the reasons stated above, we recommend that the FAA seek to develop its SMS regulations to permit such protection.

Absent Congressional action, such a system likely would have several parts. First, we urge the FAA to adopt regulations which would protect sensitive SMS information from disclosure to the greatest extent possible. Second, the FAA's rulemaking should divide the responsibility for developing and providing SMS information among the various parties subject to the FAA's regulatory authority: air carriers, air traffic control and airport operators. SMS information should be de-identified, to the greatest extent possible, before transmittal to the FAA. Rather than providing SMS data directly to the FAA, it may be better for a private, third party to hold such data and to aggregate it. Thus, the FAA and all participants in the SMS programs would be able to access and analyze a rich store of national data. In addition, the participants would be able to use the SMS data collected from their own operations for analysis and trending. Although it is probable that most airports will not be able to protect the SMS information that they gather from disclosure under their state's FOIA, if SMS responsibilities are divided among the various entities operating at an airport, the private entities will be able to preserve the confidentiality of their SMS data, while the public entities should be able to establish a SMS data-collection process that de-identifies that data before it is entered into the database.

2. Make SMS Reports to FAA Non-Punitive. Similar to the ASAP program, we recommend that SMS information provided to FAA not result in punitive action unless such information demonstrates that certain identified laws or regulations have been violated. As discussed above, non-punitive reporting programs have been shown to lead to better and more complete reporting. The goal of SMS should be to encourage the development of a robust system for reporting and analyzing safety-related information and the mitigation of identified risks. Thus, to encourage all participants in the SMS programs to undertake these programs fully, the reported SMS information should not be used to penalize airport operators, or other participants in SMS.

3. Allow SMS Data to be Aggregated. As noted above, we recommend that all SMS information provided by various parties, including airport operators, air carriers and air traffic control, be provided to a single source and aggregated and that all SMS participants be given access to and the ability to analyze the data. This will likely require that the FAA's rulemaking also specify a format for reporting such data so that it will be reported in a consistent manner and can be accessed and analyzed by multiple participating parties.

4. Establish Criteria for Risk Analysis and Mitigation. To assist airport operators (and others required to undertake SMS programs) in developing consistent methods for risk analysis and approaches for mitigation, we recommend that the FAA provide clear guidance setting forth the criteria for ranking the risks associated with identified hazards and specifying the minimum rating when risks must be mitigated and ratings below which mitigation is either not required or is at the discretion of the airport operator. Although such criteria will not eliminate the risk to airport operators posed by an action for negligence arising from an accident caused by an identified but unmitigated risk, such a consistent approach should provide a standard of reasonableness so that, if such standards are adhered to by airport operators, should provide significant protection from negligence actions.

5. Allow for Phased Implementation. We recommend that SMS be phased in three ways: first, as to the areas of each airport which must be subject to SMS, second, with respect to the airports themselves, and third, with respect to the elements of SMS itself. Thus, we would recommend a different, more aggressive, schedule to implement SMS for large hub airports that have more resources, and pose greater risks simply due to more operations, than for small hub airports. We also recommend that the rulemaking permit airports to adopt SMS in phases, beginning with the safety statement and identification of the senior safety staff person, and proceeding through the other steps necessary to establish a complete SMS. Finally, we recommend that airport operators be permitted to undertake the SMS hazard and risk analysis for one aspect of the airport prior to undertaking this process for the full airport.

6. Coordinate Airport SMS with Other Programs. As noted above, we recommend that the FAA issue simultaneous SMS regulations for all participants in the commercial aviation system regulated by the FAA and that these regulations provide very clear guidance with respect to the boundaries among each of these participants' responsibilities. Thus, for example, an airport operator's SMS program could cover the operations on common apron areas up to the point where aircraft are handed off to the airport's control tower, while the control tower's SMS would cover operations on the portions of the airport over which the control tower exercises control, including taxiways and runways, and air carriers' SMS would apply to operations within the ramp areas controlled by the carrier. Of course, there will be overlap between the areas covered; for example, an airport operator likely should be responsible for hazard identification, risk analysis and mitigation relating to matters under its control, such as pavement condition, while air traffic control may be responsible for hazard identification, risk analysis and mitigation of operational matters on the same pavement areas. Further, mitigation of risks likely will require cooperation and coordination among the various entities. For example, an operational risk identified by air traffic control may require the airport operator to undertake a capital project to mitigate the risk. We strongly recommend that the FAA engage in a dialog regarding the proper allocations of responsibility and means of coordination with the affected entities during the rulemaking process.

7. Make Funds and Guidance Available. As noted in the discussion above, through the process of hazard identification and risk analysis that are at the heart of SMS, it is very likely that following the initial adoption of SMS, there will be risks identified that require mitigation, and at least some of these mitigation actions will require an infusion of capital, either to construct or reconstruct facilities required to mitigate identified risks or to undertake programs

and develop processes to mitigate identified risks. We recommend that, to the greatest extent possible, the FAA's rulemaking make such mitigation measures eligible for funding with Airport Improvement Program ("AIP") grants and with passenger facility charges ("PFCs") and, further, we recommend that FAA seek significant additional AIP funding from Congress for such programs, especially in the early years after adoption of SMS, when it is likely that the most active mitigation measures will be undertaken.

Finally, we recommend that the FAA continue to provide guidance, through seminars, studies and outreach, on the development and implementation of SMS. Given the wide variety of configurations of airports, of the types of operations at airports and of the airports themselves, there can be no "one size fits all" approach to SMS. Thus, each airport operator will have to develop a SMS that fits the needs of its airport. As it has to date, FAA can provide guidance and help disseminate information regarding all elements of SMS as well as continue to sponsor research projects to further develop a variety of "best practices" for use at the wide variety of airports in the United States.

Conclusions

Implementation of SMS has the potential to be a significant step forward in promotion of aviation safety and is likely to result in lives saved, fewer personal injuries and reduced property damage. However, SMS also has the potential for increasing exposure for those entities forced to adopt SMS. Thus, careful consideration should be given to the design and implementation of the regulations and related systems that will comprise the FAA's integrated SMS for airport operators, air carriers and air traffic control, so that the objectives of SMS can be achieved while minimizing additional exposure and unnecessary costs. Airports and other participants in the aviation industry should closely monitor and become involved in the FAA's rulemaking process for SMS, and airports should exercise care in development of their SMS programs in order to address the legal issues described above.

SMS will be most beneficial when a wide range of information and data are reported and made available, so that all applicable hazards are identified, risks analyzed and, if appropriate, mitigated. In order to encourage reporting, data gathered under SMS should be protected from disclosure, to the greatest extent possible, and de-identified and aggregated in a manner that allows multiple parties involved in the air transportation system to access such data for appropriate analysis and action. Ideally, Congress will amend 49 U.S.C. § 40123 to permit FAA to exempt from all disclosure under state and federal FOIA data provided under an SMS, except where there has been a breach of law or regulation. We believe that airports and other members of the aviation industry should advocate for legal protection of SMS data from disclosure.

Because implementation of SMS programs will heighten awareness of certain risks related to aviation safety, those entities participating in the SMS programs will face increased exposure for negligence (and potentially, other) claims in the event of an accident. To appropriately minimize such exposure, FAA can and should take several steps. First, FAA should clearly divide responsibilities among the various SMS participants; air carriers, air traffic control and airport operators. Second, FAA should provide clear guidance for risk analysis and

for the requisite undertaking of mitigation, versus elective mitigation. Airport operators should establish compliance programs and carefully adhere to the FAA's guidance. Through compliance with the FAA's guidance, airports should be able to establish the reasonableness of the actions taken. Accordingly, when incidents do occur that were foreseen through the hazard identification as being possible but were determined through properly undertaken risk analysis as being either unlikely to occur or if occurring, unlikely to result in serious injury or property damage, it can be demonstrated that is was also reasonable not to take action to mitigate such identified hazards. Finally, Airports should strongly advocate that Congress and the FAA expand the permitted uses of AIP grant funds and PFCs to cover mitigation of risks identified in SMS analyses, and that they increase funding available through the AIP and PFC programs for such purposes.

Rather than require airport operators to assert control over third parties operating at airports in order to undertake a SMS program applicable to the entire airport, airports and other aviation stakeholders should urge FAA to issue guidance for all parties operating at an airport, and to clearly divide SMS responsibilities among them. Further, airports should be permitted to implement SMS in a phased approach, so that the operational and financial consequences of adoption of a SMS program do not impact airport operators (and rates) all at once, and airport operators have the opportunity to develop a program rationally.