



October 21, 2009

BY ELECTRONIC MAIL

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

Re: Comments on FAA’s ANPRM on Safety Management System

Dear Administrator Babbitt:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Federal Aviation Administration’s (FAA’s) *Advance Notice of Proposed Rulemaking (ANPRM) on Safety Management System*.¹ FAA’s ANPRM requests public comments on whether regulated entities in the aviation sector (e.g., manufacturers, airlines, repair stations, parts manufacturers, etc.) should be required to implement a Safety Management System (SMS) as a regulatory mandate.² SMS is defined by FAA as a comprehensive, process-oriented approach to safety throughout an organization, including an organization-wide safety policy, formal methods of identifying potential hazards, mitigating and continually assessing risk, and the promotion of a safety culture.³

Office of Advocacy

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

¹ 74 Fed. Reg. 36414 (July 23, 2009).

² *Id.*

³ *Id.*

⁴ 5 U.S.C. § 601 et seq.

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

less burdensome alternatives. Moreover, Executive Order 13272⁶ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

As discussed in the ANPRM, FAA is evaluating whether to require regulated entities in the aviation sector to adopt a SMS as a regulatory mandate. SMS is defined as a structured, risk-based approach to managing safety.⁷ A SMS provides a set of decision-making processes and procedures to plan, organize, direct, and control its business activities in a manner that enhances safety and ensures compliance with regulatory standards.⁸ The United States has endorsed various international agreements through the International Civil Aviation Organization (ICAO) to require airline operators and aviation service providers within member states to require the establishment of SMSs as regulatory requirements.⁹ The FAA indicates that it has reviewed extensive international literature and developed policy and guidance materials on SMS and now seeks public comment on how such requirements might be structured within the United States.¹⁰

Small Entities Have Expressed Serious Concerns About Mandating SMS

In response to the publication of the ANPRM, the SMS issue was discussed at Advocacy's regular small business aviation safety roundtable on September 22, 2009. Small business representatives at the meeting expressed concern about the open-ended nature of SMS as a regulatory requirement and worry that mandating SMS would lead to an expanding, self-perpetuating regulatory regime lacking administrative process – an outcome that would be especially challenging for small businesses trying to comply with their regulatory obligations. The following comments are reflective of the issues raised during the roundtable discussion and in subsequent conversations with small business representatives.

1. FAA should identify the specific safety hazard SMS is intended to address.

Attendees at the roundtable stated that because safety rates within the aviation industry are very high, it is becoming increasingly difficult for FAA to objectively identify specific safety hazards that warrant further regulation. Accordingly, the attendees are concerned that FAA will impose a SMS mandate because it “seems like a good idea” or that it is the “latest concept in safety.” Attendees stated that it is one

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

⁷ 74 Fed. Reg. 36415.

⁸ *Id.*

⁹ 74 Fed. Reg. 36416.

¹⁰ *Id.*

thing for companies to voluntarily choose to adopt a SMS and quite another for the government to mandate it. Part of the problem is that it is unclear exactly what a SMS mandate would entail. Is it intended to be an additional layer of regulation (on top of what is already in place) or is it supposed to be a transition to a new type of regulatory structure? And what are the risks of such a change from the status quo? The attendees believe FAA should clearly identify the specific safety concern it is trying to address with SMS and demonstrate how SMS would alleviate that particular hazard.

2. **FAA should not promulgate open-ended regulations.** Attendees at the roundtable felt strongly that FAA's jurisdiction is limited and that FAA should only promulgate regulations based on sound risk evaluation and that the regulations should be sufficiently specific so that regulated entities know what they have to do to comply. Since a SMS requires a continual assessment (and re-assessment) of "potential" or "perceived" risks, a SMS mandate would mean regulatory compliance could never be fully achieved (because there is always more that could be done). Attendees were concerned that SMS is too subjective and not based on objective criteria. Several stated that the industry routinely faces conflicting interpretations by aviation inspectors, which could be exacerbated under SMS (where individual inspectors would have to approve safety programs based on subjective criteria and could issue citations for not addressing perceived risks in a particular way).
3. **FAA should identify and mitigate specific hazards, not hypothetical risks.** Similar to the above comment, attendees believe that FAA regulations should address specific hazards, not hypothetical risks, and because SMS is too subjective, it would impose a standard on regulated entities that could never be achieved. Because of the subjective and open-ended nature of SMS, regulated entities (especially small businesses) could face onerous and costly requirements to address perceived safety risks that would drain resources from their core functions. One representative who was concerned about the impact of developing and maintaining complex and costly organizational structures stated, "[t]he system (SMS) becomes more important than the result (safety)." Attendees stated that FAA should evaluate the costs and benefits of any proposed rule (especially on small firms) and consider a regulatory approach whereby compliance with FAA regulations (de facto) meets any SMS requirements.
4. **If SMS requirements are adopted, they should be transparent, and incorporated into the Code of Federal Regulations.** Attendees were concerned that SMS is an open-ended "concept" that will be costly and difficult to implement in practice. Attendees stated that FAA should specify in its regulations what a regulated entity must do in response to a particular safety concern. One attendee was particularly concerned that FAA not adopt a generic "SMS requirement" without specifying exactly what such a program entails and what a regulated entity must do to achieve compliance with it. The attendee stated that the regulations should not even mention SMS by name, but should specify in regulatory language what a regulated entity must do in a particular situation. The attendees were especially wary of an unpredictable

- 5. SMS mandates should be integrated into existing quality programs.** Attendees stated that because the regulated entities that would be subject to a SMS mandate already have FAA-approved quality programs (i.e., quality manuals) in place, SMS requirements should be integrated into existing quality programs. The attendees were especially concerned that FAA not require an “additional” SMS manual beyond what they already have because it would be costly, redundant, and unwarranted. Attendees again stressed the high level of safety that has been achieved through existing quality programs.
- 6. SMS could be especially costly and burdensome for small businesses.** Attendees noted that the requirements of a SMS could be particularly burdensome for small firms, who lack the staff and resources to develop and implement complex organizational structures the way a large firm might. Further, attendees questioned whether a small firm with a fairly simple production process needs a safety structure akin to a SMS.¹² One attendee noted that a SMS is more suitable for large companies (e.g., commercial air carriers) with multiple components (or “silos”) that do not necessarily communicate with each other. Another representative noted that a small firm could face conflicting requirements from its customers because each small firm would have to be “incorporated into” each of its customer’s SMS (because every vender would have to be viewed as a potential safety risk). The representative noted that the small firm could be subject to contradictory safety requirements from each customer depending on how each customer evaluated a particular risk. Finally, attendees stated that the paperwork and recordkeeping requirements could be onerous for small firms if a SMS requires that all actions and decisions be recorded in daily diaries.

Advocacy recommends that FAA carefully consider the impacts SMS could have on small firms and evaluate alternative approaches that would reduce those impacts. Among those alternatives, FAA should consider a tiered approach that would be scalable to the size, scope, and complexity of the operation.

Conclusion

Thank you for the opportunity to comment on this Safety Management System ANPRM. One of Advocacy’s primary functions is to assist federal agencies in understanding the impact of their regulatory programs on small entities, so we hope these comments are useful and constructive. We would welcome the opportunity to assist FAA in its

¹¹ One attendee noted that one company might choose to respond to a perceived risk in a particular way while another company might respond differently, but there is no objective way to decide which is necessarily safer.

¹² Advocacy raised similar concerns about the “quality system” requirements in FAA’s proposed aviation “parts” rule. Specifically, Advocacy questioned whether the proposal to require small parts manufacturers to adopt complex quality systems akin to ISO 9001 was necessary and recommended that FAA consider more flexible approaches for small firms (see, http://www.sba.gov/advo/laws/comments/faa07_0330.html).

evaluation of any future regulatory proposals under the Regulatory Flexibility Act if that would be helpful. Please feel free contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Shawne C. McGibbon
Acting Chief Counsel for Advocacy

/s/

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

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