



FAA Proposals for Safety Management Systems

DISCUSSION PAPER

I. Background

Safety Management Systems

The Federal Aviation Administration (FAA) defines a safety management system (SMS) as “a formalized approach to managing safety by developing an organization-wide safety policy, developing formal methods of identifying hazards, analyzing and mitigating risk, developing methods for ensuring continuous safety improvement, and creating organization-wide safety promotion strategies.”¹ SMS has four main elements: safety policy, safety risk management, safety assurance and safety promotion.

The FAA is pursuing several SMS initiatives simultaneously as part of an international effort to implement SMS throughout the aviation industry. The FAA has said that it will implement SMS for all aviation components that it oversees or regulates: airports, air carriers and air traffic. This paper discusses two distinct FAA SMS initiatives with direct consequences for airports and another FAA SMS initiative with indirect consequences for airports.

FAA’s Key SMS Initiatives

Airport SMS

On October 7, 2010, the FAA published a Notice of Proposed Rulemaking to amend FAR Part 139 to add the following requirement: “Each certificate holder, or applicant for an Airport Operating Certificate, must develop and

maintain an Airport Safety Management System that is approved by the Administrator.”²

The proposed rule has the following key features:

- “The scope of an Airport Safety Management System must encompass aircraft operation in the movement area, aircraft operation in the non-movement area, and other airport operations addressed in [Part 139].”³
- Certificated airports would be required to develop a Safety Management System Manual or add a new section to the Airport Certification Manual titled “Airport Safety Management System.”⁴
- An airport’s SMS would have to include a safety policy, safety risk management, safety assurance and safety promotion.⁵
- As part of safety promotion, the airport sponsor would be required to “[p]rovide formal safety training to each employee and tenant with access to airport areas regulated under this part that is appropriate to the individual’s role.”⁶
- Certificated airports would be required to submit an implementation plan by prescribed deadlines: within 6 months after the effective date of the final rule for Class I



airports, and within 9 months for Class II, Class III and Class IV airports.⁷

- Certificated airports would be required to submit the Safety Management System for FAA approval within 18 months for Class I airports, and within 24 months for all other certificated airports.⁸
- The FAA asserted in the proposed rule that it expects that airport sponsors will implement all components of an approved SMS simultaneously.⁹

The FAA solicited comments on the proposed rule, including seven specific questions.¹⁰ The FAA has extended the comment deadline until **July 5, 2011**.¹¹

The FAA is soliciting comments on the proposed SMS rule until July 5, 2011.

Agency SMS

The FAA issued Order 5200.11, *FAA Airports (ARP) Safety Management System*, on August 30, 2010. This Order requires that the FAA Airports program must conduct safety assessments for most airport actions, including ALP approvals, Part 77 hazard determinations, airspace approvals, construction project approvals, noise compatibility program approvals, and Modification of Standards. Although the FAA refers to this initiative as “internal SMS”, it directly affects all airport projects that are subject to FAA review and approval. The Order applies to all NPIAS airports, not just Part 139 certificated airports.

The Order lacks critical details on the mechanics of how these safety assessments will be conducted for each airport action and the role of the airport sponsor in this process. The Order states only that “airport sponsors will be expected to provide required planning data, to participate as requested in [Safety Risk Management] panels, to sign the associated documentation, and to comply with all risk mitigation measures that may fall within their purview.”¹² As examined below, the Order also fails

to explain how the Order will dovetail with proposed FAR Part 139 SMS and other FAA SMS initiatives.

Air Carrier SMS

Section 215 of the *Airline Safety and Federal Aviation Administration Extension Act of 2010*¹³ required the FAA to issue rules mandating that all air carriers certificated under FAR Part 121 must implement an SMS. On November 5, 2010, the FAA published a proposed rule to implement the statutory mandate.¹⁴ The proposal would create a new Part 5, Safety Management Systems, and would amend Part 119 to add the following new requirements:

Certificate holders authorized to conduct operations under Part 121 of this chapter must have a safety management system that meets the requirements of Part 5 of this chapter and is acceptable to the Administrator by [date 3 years after effective date of final rule].

Certificate holders required to have an SMS under this section must submit an SMS implementation plan in a form and manner prescribed by the Administrator to the certificate-holding district office for approval by [date 6 months after effective date of final rule].¹⁵

II. Issues Presented by FAA Proposed SMS Initiatives

Scope of SMS

The proposed SMS would address aircraft operations in the movement area and non-movement area¹⁶ and other airport operations addressed in Part 139. While there are several current requirements under FAR Part 139 that concern the non-movement area (e.g., standards for paved and unpaved areas and requirements for on-airport fuel farms), the FAA concedes that “the proposal extends the scope of Part 139 by including the non-movement areas . . .”¹⁷

The FAA further proposes to require that each certificated airport “[p]rovide formal safety training to each employee and tenant with access to airport areas regulated under this part that is appropriate to the individual’s role.”¹⁸ The FAA concedes that the existing training requirements under Part 139 “would be enhanced and extended to more individuals operating on the airport because everyone has a role in promoting safety.”¹⁹

The proposed expansion of Part 139 to include aircraft operations within the non-movement area and to require training of all employees and tenants with access to the movement and non-movement areas is certain to have practical and legal implications for airports. If implemented in its present form, airport sponsors would have to identify precisely what activities and hazards should be addressed as part of their SMS from among the numerous types of activities that occur in this area.

Not all such decisions will be easy. There are numerous activities within the non-movement area with indirect relationships to aircraft operations that conceivably might be included (e.g., the movement of ground vehicles and the operation of equipment). Moreover, many activities within the non-movement area are conducted by individuals other than airport employees, including air carriers and their contractors. While there is little doubt that the airport sponsor has the legal authority to regulate these activities, the airport sponsor may have little practical control over day-to-day activities. This may impede one of the central pillars of SMS – safety assurance – unless and until the airport sponsor can (i) amend its Airport Minimum Standards, Rules and Regulations, leases and permits to impose additional safety obligations upon airport tenants and users, and (ii) develop procedures to enforce compliance with these new requirements.

Airports should consider the following issues concerning the scope of SMS:

- 1. What activities not currently covered in the Airport Certification Manual might be included in the SMS Manual.**
- 2. What areas of the airport might be included in the SMS Manual and what level of access and operational control does the airport exercise over each such area.**
- 3. Is it practical to implement all components of SMS immediately and simultaneously. If not, consider commenting to the FAA on a phase-in schedule that might be practical.**
- 4. Would it be appropriate to develop an airport-wide SMS, and how would the airport sponsor distinguish between the SMS components required under Part 139 and those that are not.**
- 5. Consider whether the airport’s existing permitting and security badging policies and procedures could be changed to impose SMS responsibilities on airport tenants and users.**
- 6. What changes in primary regulatory documents (e.g., Rules and Regulations, Minimum Standards) and airport agreements (e.g., leases, permits) would be necessary to implement SMS.**
- 7. What changes in policies, procedures and regulatory documents would be needed to ensure that airport tenants and users implement mitigation measures identified in the safety risk management process, in addition to existing prescriptive requirements in, for example, Airport Rules and Regulations, Minimum Standards, leases and permits.**
- 8. What types of individuals would be affected by an obligation to train all individuals with access to the movement and non-movement areas.**
- 9. How would the airport develop and administer a training program. What would be the administrative and recordkeeping implications of the SMS training program.**
- 10. Are there issues concerning the relationship among FBOs, users, tenants, suppliers and others with airfield access that present practical concerns at this particular airport.**

FAA Enforcement

FAA explained in the proposal that it intends to monitor and enforce compliance with the SMS requirements as part of an airport's periodic inspection.²⁰ The FAA stated that it "intends this review as an evaluation of *whether* a certificate holder's SMS is functioning as it is intended to function rather than as a means for us to second-guess a certificate holder's decisions."²¹

Despite this statement, it is likely that the incorporation of SMS into the inspection process will increase the complexity, time and risk of inspection. While Part 139 contains discrete, prescriptive requirements, SMS involves subjective risk analysis, numerous ongoing responsibilities, and an open-ended goal of "continuous safety improvement." FAA inspectors may have wide discretion in the scope of their inspection and in the identification of violations.

Airports should consider the following issues regarding FAA enforcement of SMS obligations:

1. How might the SMS be structured and the SMS Manual prepared to create objective standards against which the airport can be measured in an inspection.
2. What types of problems have come up in prior inspections at this airport, and how could the SMS be developed to avoid similar problems.
3. Is it practical to develop guidelines for FAA inspectors evaluating compliance with the sponsor's SMS obligations. If so, it would be appropriate to comment on potential inspection guidelines that might be included in the final rule or as separate internal guidance.

Airport Liability, Recordkeeping and Disclosure

Although not discussed in the proposed rule, Part 139 can play an important role in defining the nature and extent of an airport sponsor's liability in the event of an accident causing personal injuries or property damage. In short, an airport sponsor may be found liable in the event that it failed to satisfy an obligation under Part 139, which failure caused or contributed to an accident.

This briefing paper does not discuss specific liability issues, and sponsors should consult with their counsel to identify issues specific to their state. Airports should consider the following issues regarding liability and recordkeeping:

1. What changes in internal practices and policies, if any, would be required to ensure that adequate attention, including funding and staff, will be dedicated to mitigate identified hazards.
2. How should the SMS be developed and implemented to ensure that the airport has the requisite control over identified hazards to be able to mitigate the perceived risk.
3. What changes in internal practices and policies, if any, would be required to ensure that reporting mechanisms are in place to address identified hazards.

Accountable Executive

The proposed rule would require that each certificated airport develop a "safety policy" to be signed by the "accountable executive," and further would require the reporting of pertinent safety information to the "accountable executive."²² The "accountable executive" would be defined to mean:

[A] single, identifiable person who, irrespective of other functions, has ultimate responsibility and accountability, on behalf of the certificate holder, for the implementation and mainten-

-ance of the Airport Safety Management System. The Accountable Executive has full control of the human and financial resources required to implement and maintain the Airport Safety Management System. The Accountable Executive has final authority over operations conducted under the Airport's Operating Certificate and has final responsibility for all safety issues.²³

For most small commercial service airports, the airport director would probably be designated as the accountable executive. Few, if any, airport employees below the director's level at small and medium hub airports could qualify under the proposed definition. However, it may be questionable whether even the airport director can satisfy the proposed conditions, since, for example, the director may not have unilateral authority over all financial obligations and the director may not have unilateral control of all activities in the non-movement area.

Interaction with other FAA SMS Initiatives

The FAA is pursuing SMS initiatives simultaneously for air carriers, air traffic and airports. Over the last few years, the FAA has issued multiple orders, advisory circulars and proposed rules on its various SMS initiatives. The list of sources at the end of this paper includes most of those initiatives.

In the proposed Part 139 rule, the FAA declared that it is "considering rulemaking that would establish SMS requirements for other segments of the aviation industry."²⁴ However, the proposed rule does not refer to the statutory requirement that FAA implement SMS for Part 121 air carriers. In the proposed airport SMS rule, the FAA stated somewhat generically that "future rulemaking may be required to capture safety developments, connect to related regulations, and avoid duplication of SMS requirements for various industry sectors."²⁵

The proposed air carrier SMS rule makes no mention of the proposed changes to Part 139.

Airports should consider the following issues concerning the requirement to designate an accountable executive:

1. Who would be the airport's "accountable executive" under the proposed definition.
2. Would the accountable executive have the time and ability to fulfill the obligations of the position, in addition to other existing responsibilities.
3. Would any changes in delegations and authorities to the accountable executive be necessary to ensure that the individual has the "full control" and "final authority" that would be required under the proposed rule.
4. Will the prospective accountable executive need additional training to fulfill the obligations to implement SMS.
5. Would airports have to identify an "SMS coordinator" or "safety officer" separate from the accountable executive.
6. Would the accountable executive need additional delegation of authority from the local elected body?
7. Would the airport have to amend the airport organizational chart, position descriptions, internal procedures manuals or other internal documents to account for these new responsibilities and reporting obligations, including providing "whistle-blower" protection for employees reporting hazards.

It also is important to keep in mind that these FAA SMS initiatives are in addition to other safety-related initiatives being pursued by the FAA, including for example the runway safety action planning requirements overseen by the FAA Air Traffic Organization.²⁶

There undoubtedly will be substantial overlap and potential conflict among these SMS and safety initiatives. The FAA has not explained, for example: (1) what role an air carrier's SMS should play in developing the airport's SMS Manual and implementing SMS at the airport, (2) which safety risk management process (the airport's, air carrier's or FAA's) should be used in evaluating various potential hazards, and (3) which document would control in a potential discrepancy among the FAA's SMS for a particular airport project and the airport sponsor's SMS required under Part 139.

Airports should consider the following SMS integration issues:

- 1. What projects and applications is the airport likely to present to the FAA over the next several years that would trigger the requirement for a safety assessment under Order 5200.11.**
- 2. Whether and how the airport SMS should be developed consistent with the airport's runway safety action plan.**
- 3. Whether and how the airport SMS should be developed to ensure that the Agency SMS, Airport SMS and runway safety action plan all support the same mitigation measures, including airport capital improvements.**
- 4. Whether and how the Airport SMS should be developed to account for development of SMS by air carriers serving the airport.**
- 5. Whether there is an opportunity to submit comments on Order 5200.11 that might reasonably relate to the interaction between Airport SMS and Agency SMS.**

III. Conclusion

Based on prior statements by senior FAA officials, the FAA almost certainly will promulgate a final rule requiring certificated airports to develop and implement SMS. Moreover, considering the high level of activity on other FAA SMS initiatives, it is likely that the FAA will adopt a final rule in the short term, and will not wait several years between the draft and final rule, as has happened with other FAA rulemakings.

While the proposed rule would only apply to Part 139 certificated airports, the FAA is also pursuing other SMS initiatives that will directly or indirectly affect all federalized airports, even those that will not be required to prepare their own SMS manuals.

No participant in the aviation industry ever wants to oppose reasonable safety efforts. Nevertheless, the FAA's SMS initiatives have the potential to pose considerable new administrative, recordkeeping and oversight obligations on certificated airports. Airports need to consider how to prepare for these possible new obligations and to identify funding and administrative structures in advance.

Although the precise SMS requirements may well change when the FAA considers comments on its proposed rule, it is almost certain that some new SMS requirements will be imposed. Past experience demonstrates that the airport industry has an opportunity to help shape the contours of the final rule to, for example, ease some of the burdens associated with the rule and correct some of the commonly-recognized deficiencies in the proposal.

Key Sources

Note: Many source documents are available on the FAA's SMS Initiatives web page:
www.faa.gov/about/initiatives/sms/

- FAA Advisory Circular 150/5200-37, *Introduction to Safety Management Systems (SMS) for Airport Operators* (Feb. 28, 2007).
- FAA Advisory Circular 120-92A, *Safety Management Systems for Aviation Service Providers* (Aug. 12, 2010).
- FAA Order VS 8000.367, *Aviation Safety (AVS) Safety Management System Requirements* (May 14, 2008).
- FAA Order 8000.369, *Safety Management System Guidance* (Sept. 30, 2008).
- FAA Order VS 8000.370, *Aviation Safety (AVS) Safety Policy* (Sept. 30, 2009).
- FAA Order 5200.11, *FAA Airports (ARP) Safety Management System* (Aug. 30, 2010).
- FAA, Notice of Proposed Rulemaking, *Safety Management System for Certificated Airports*, 75 Fed. Reg. 62,008 (Oct. 7, 2010).
- FAA, Notice of Proposed Rulemaking, *Safety Management Systems for Part 121 Certificate Holders*, 75 Fed. Reg. 68,224 (Nov. 5, 2010).
- Transportation Research Board, *Safety Management Systems for Airports (Vol. 1 and 2)* (2007)

Endnotes

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- ¹ FAA, Notice of Proposed Rulemaking, *Safety Management System for Certificated Airports*, 75 Fed. Reg. 62,008 (Oct. 7, 2010).
- ² 75 Fed. Reg. at 62,022 (proposed Section 139.401(a)).
- ³ *Id.* at 62,022 (proposed Section 139.401(b)).
- ⁴ *Id.* (proposed Section 139.401(c)).
- ⁵ *Id.* at 62,022 – 62,023 (proposed Section 139.402).
- ⁶ *Id.* (proposed Section 139.402(d)(1)).
- ⁷ *Id.* at 62,023 (proposed Section 139.403).
- ⁸ *Id.*
- ⁹ *Id.* at 62,017.
- ¹⁰ *Id.* at 62,020.
- ¹¹ FAA, Notice, *Safety Management System for Certificated Airports; Extension of Comment Period*, 76 Fed. Reg. 12,300 (Mar. 7, 2011).
- ¹² Order 5200.11 § 7-10(a).
- ¹³ Pub. L. 111-216 (Aug. 1, 2010).
- ¹⁴ FAA, Notice of Proposed Rulemaking, *Safety Management Systems for Part 121 Certificate Holders*, 75 Fed. Reg. 68,224 (Nov. 5, 2010).
- ¹⁵ 75 Fed. Reg. at 68,244 (proposed Section 119.8).
- ¹⁶ The proposed rule would define the “non-movement area” to mean “the area, other than that described as the movement area, used for the loading, unloading, parking, and movement of aircraft on the airside of the airport (including without limitation ramps, apron areas, and on-airport fuel farms).” *Id.* at 62,021 (proposed Section 139.5).
- ¹⁷ *Id.* at 62,011.
- ¹⁸ *Id.* at 62,023 (proposed Section 139.402(d)(1)).
- ¹⁹ *Id.* at 62,016.
- ²⁰ *Id.* at 62,017.
- ²¹ *Id.*
- ²² 75 Fed. Reg. at 62,022 (proposed Section 139.402(a) and Section 139.402(c)(3)).
- ²³ *Id.* at 62,021 (proposed Section 139.5).
- ²⁴ 75 Fed. Reg. at 62,017.
- ²⁵ *Id.*
- ²⁶ See FAA Order 7050.1A, *Runway Safety Program* (Sept. 16, 2010).

How Should I Prepare for SMS at My Airport?

- Review the FAA's SMS initiatives – the proposed rule, Order 5200.11 and other documents are available for review at the FAA's web page dedicated to its SMS initiatives or on our website, www.airportattorneys.com
- Consider submitting comments on the FAA's proposed new SMS rule for airports by the July 5 deadline.
- Consult with AAAE and ACI-NA staff, who are following SMS developments closely and are coordinating industry-wide responses to the FAA's proposals.
- SMS is coming – while the precise FAA requirements may change before the final rule is proposed, the FAA is clearly committed to SMS. Discuss with your staff, consultants and counsel what changes should be implemented to be prepared for SMS.

For more information about the legal implications of the FAA's SMS initiatives, please contact:

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KAPLAN KIRSCH & ROCKWELL's airports practice is one of the largest and most experienced in the country. The firm's lawyers have counseled clients on issues associated with complex airport development and master planning projects, land use, environmental review, rates and charges, finance, security, safety, airport proprietors' rights and compliance with federal requirements. The firm has represented clients throughout the nation in regulatory and legislative advocacy on a wide range of policy matters and in litigation related to airport operations and development. The firm's clients have included airport proprietors; local and state governments; airport tenants and users; and businesses who are affected by airport operations.

This discussion paper is intended for general information purposes for airport proprietors, staff and consultants. It does not contain legal advice applicable to any specific airport. The FAA's SMS initiatives could have potentially serious legal consequences that depend upon each airport's unique situation. Airports are encouraged to contact their counsel for legal advice.

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