

# Legal Implications of Proposed SMS Requirements

Peter J. Kirsch  
Kaplan Kirsch & Rockwell

AAAE Webinar

SMS: What Airports Need to Know *Now*

November 22, 2010



KAPLAN KIRSCH ROCKWELL

# Reality Check

- SMS is here
- Benefits are obvious; costs less so
- Proposal is just that – think productively how to make the requirements better, easier, more practical (*not how to oppose the proposal!*)
- Operational, not legal, issues should drive the obligations
- Legal comments by individual airports are critical
- **Be attentive to, and *begin now to mitigate, legal consequences***

# Restructured Legal Framework

- Regulation by objective vs. prescriptive regulation: new territory and approach for airports
- Beyond scope of existing Part 139 responsibilities
- Increased proprietor *proactive* responsibility on airfield
- Possible new *proactive* role for proprietor on leasehold property and non-movement areas (depending upon lease terms)
- (Perhaps) new standard of care for liability purposes

# Legal Issues to Consider - Liability

- Standard of care now varies state-to-state
  - Very little case law
- State law immunity unchanged
- SMS may create a new, uniform approach to standard of care
- Risk matrix (disclosure, ranking of risks)
- Liability for safety on leaseholds (proprietor acceptance of responsibility)
- Personal liability of “responsible official”
- Self reporting (no immunity?)
- Inconsistency among airports

# Legal Issues to Consider - Personnel

- Accountable executive: top-down approach to *“full control of the human and financial resources required to implement and maintain the [SMS]”*
  - Who
  - Fit into personnel and administrative structure
  - Compare to Japanese quality control model
  - Qualifications, liability
- Creation of safety function
  - Within existing organization or separate
- Enforcement hierarchy

# Legal Issues to Consider - Information

- Collect highly sensitive information
  - Not SSI under TSA regulations
  - Not protected under most existing laws
- Not proprietary so may not be able protect under open records laws, FOIA
- Documentation submitted to FAA; public record under FOIA
- Safety reports, scorecard as sources of public scrutiny
- Self reporting implications

# Legal Issues to Consider - Tenants

- Non-movement areas
- Responsibility to police leasehold property
- Authority to direct tenant to take action may change (depending upon leases)
- Need for revisions to standard leases, minimum standards, rules/regulations

# Possible Topics for Comments on NPRM

- Scope of SMS: non movement areas
- What authority does Accountable Executive need
- Contractual issues (tenants, users)
- Open records
- Legislative issues
  - Immunization/ lack of admissibility (see ASNA Part 150)
  - FOIA/ confidentiality
- Phasing of implementation
- Funding obligations