



FLIGHT-WATCH



SPECIAL BULLETIN October 2009

**IT IS IMPORTANT TO NOTE THAT
COMMENTS ARE DUE ON OR
BEFORE OCTOBER 21, 2009.**

I. Introduction

On July 23, 2009, the FAA published in the Federal Register an Advance Notice of Proposed Rulemaking (ANPRM) concerning safety management systems which the FAA contemplates making a requirement for operators under Parts 21, 119, 121, 125, 135, 141, 142 and 145. According to the ANPRM: “The FAA is not proposing any specific regulatory changes in this ANPRM. The FAA intends to establish an Aviation Rulemaking Committee (ARC) to assess comments resulting from this ANPRM and to provide recommendations for any SMS rulemaking effort. After a review of all of the comments submitted in response to this ANPRM, and review of the ARC recommendations, the FAA may issue a Notice of Proposed Rulemaking (NPRM) proposing specific regulations or regulatory amendments to create an SMS rule. Interested persons will have the opportunity to comment on proposed changes prior to the adoption of any final rule regarding SMS.”

II. What is a Safety Management System?

According to the ANPRM, “[a] safety management system (SMS) is a structured, risk-

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based approach to managing safety. The International Civil Aviation Organization (ICAO) has defined SMS as a ‘systematic approach to managing safety, including the necessary organizational structures, accountabilities, policies and procedures.’ See ICAO *Safety Management Manual*, at 1.4.2, ICAO Doc. 9859-AM/460 (1st Ed. 2006). And SMS provides a set of decision-making processes and procedures that a product/service provider would use to plan, organize, direct, and control the physical activities in a manner that enhances safety and ensures compliance with regulatory standards. And SMS incorporates these procedures into normal, day-to-day business processes. SMS requires a proactive approach to discovering and correcting problems before there are safety consequences. And SMS also includes processes that seek to identify potential organizational breakdowns and necessary process improvements allowing management to address the safety issue before a noncompliant or unsafe condition results. However, using an SMS is not a substitute for compliance with FAA regulations or FAA oversight activities. Rather, an SMS would ensure compliance with safety-related statutory and regulatory requirements.”

III. The Four Elements of A Safety Management System

According to the FAA, a safety management system would include four separate elements: (1) safety policy, (2) safety risk management (SRM), (3) safety assurance (SA), and (4) safety promotion.

Safety policy is described in the ANPRM as: “Safety policy outlines the methods and processes the organization’s SMS will use to achieve the desired safety outcomes. The policy establishes senior management’s commitment on behalf of the organization to incorporate and continually improve safety in all respects of its business. Senior management would develop measurable and obtainable company-wide safety objectives, procedures, and processes. The safety policy establishes and promotes safety culture throughout all levels of an organization.”

According to the ANPRM, “SRM processes are used to assess system design and verify that the system adequately controls risk. A formal SRM process describes the system, identifies hazards, analyzes those hazards to identify risks, and establishes control to manage those risks.”

Safety assurance or SA is defined: “SA processes are used to ensure risk controls developed under SRM achieve their intended objectives throughout the life cycle of the system. The SA process may reveal hazards not previously identified during the SRM process. The SA process may also allow the product/service provider to identify or assess the need for new risk controls, as well as the need to eliminate or modify existing controls. These SA monitoring activities apply to an SMS whether the operations are accomplished internally or outsourced. The SA processes include: information acquisition, analysis, system assessment, and development of preventative/corrective action for non-conformance.”

Finally, there is the matter of safety promotion. According to the ANPRM, “Safety promotion requires creating an environment where safety objectives can be achieved. Safety promotion encourages a positive safety culture. A positive safety culture is

characterized by an adequate knowledge base, competency, implementation tools, effective communications, ongoing training, and information sharing. Senior management must provide the leadership to promote and ensure a positive safety culture throughout an organization. A positive safety culture is the product of individual and group values, attitudes and behavior, all committed to the organization’s safety program.”

IV. Motivations of the FAA in Publishing the ANPRM

The motivation for publishing the ANPRM dealing with a safety management system relates to the fact that ICAO member states, such as the United States, are required to initiate compliance with Annex 6 of ICAO by January 1, 2009. On December 7, 2007, ICAO proposed incorporating Annex 6 SMS requirements into Annex 1 dealing with medical licensing and Annex 8 dealing with airworthiness of aircraft, in particular aircraft and aircraft component manufacturers as well as maintenance facilities. The ICAO proposals, if adopted, would extend the compliance base for Annex 6 Amendments that were adopted in March of 2006 to November 19, 2009. All ICAO member states would be required to initiate compliance with Annex 1 and Annex 8 amendments by November 18, 2010.

In addition to the inevitable economic burdens that will flow from these new regulations, the ANPRM fails to address the legal implications of the envisioned new set of rules. If a small flight school outsources one or more SMS functions and unresolved problems are noted which ultimately lead to a catastrophic loss, will lawyers be able to subpoena these records and use them in evidence against the flight school to prove its own safety analysis demonstrated the firm had a problem?

V. Cost Versus Benefits Assessment and Economic Impact of a Safety Management System

While the FAA declares in the ANPRM that America's membership in ICAO is the impetus for the reality that the FAA is going to require safety management systems in various aviation activities in America, there is no indication anywhere in the ANPRM that the regulatory burdens or economic impact of this system have been considered by the FAA. While a major aircraft manufacturer or an air carrier will have little difficulty in funding one or more persons to fulfill the safety management system functions, a small Part 141 flight school may find this to be economically burdensome. The ANPRM indicates that the FAA is agreeable to safety assurance functions being outsourced. In other words, small operators may find themselves obligated to hire specialty firms that provide safety assurance and related activities in order to comply with any regulations the FAA will eventually promulgate in this area. If implemented, these regulations will come at a time when America is already in the throes of an economic recession. Visiting this level of regulatory burden on small aviation operators may sound the death knell of some small aviation businesses in America impacted by the safety management system regulations that appear to be inevitable.

While the myriad of functions the FAA will no doubt impose on small aviation operators, like flight schools, may be well-intended, existing aviation enterprises impacted by a host of new regulations will either have to increase the cost of doing business and pass those costs on to the ultimate consumer or contemplate withdrawal from the industry.

No one would quarrel with the need for safety, particularly in aviation. However, one must also contemplate the reality that small

aviation businesses must survive. If they no longer exist, then the FAA's safety concerns become a moot issue.

VI. Conclusion

The purpose of this Flightwatch Bulletin is to alert aircraft operators and aviation businesses that will be impacted by a regulation that the FAA will promulgate to the importance of responding to the ANPRM. Without a doubt, all of these safety initiatives and concerns are desirable if the FAA is to be in compliance with ICAO Regulations. However, it is suggested that those aviation operators and businesses that will be impacted by regulations the FAA will promulgate in this area should comment on the ANPRM to address any concerns they have, not the least of which is the economic burden of this indication by the FAA that it is going to create a host of safety management system regulations. Correspondence dispatched to the FAA should identify this ANPRM by Docket No. FAA-2009-0671 and maybe conveyed to the FAA by any one of four methods:

1. Federal eRulemaking Portal: go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
2. Comments may be dispatched by mail addressed to: Docket Operations, M-30, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building (Ground Floor), Room W12-140, Washington, DC 20590.
3. Comments may be faxed by referencing the Docket No. and faxing the communication to Docket Operations at (202) 493-2251.
4. Comments may be delivered by hand delivery to: Docket Operations in Room W12-140 of the West Building (Ground Floor) at 1200 New Jersey Avenue, SE, Washington, DC between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.



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