April 8, 2023

US Department of Transportation
Docket Operations, M-30
1200 New Jersey Avenue, SE
Room W12-140
West Building, Ground Floor
Washington, DC 20590-0001

RE: Comments to the Notice of Proposed Rulemaking *Safety Management Systems,* 88 FR 1932, Jan. 11, 2023 ("NPRM"), Docket No.: FAA–2021–0419; Notice No. 23–05

Dear Acting Administrator Nolen:

The Air Medical Operators Association (AMOA), whose members operate over 90 percent of the air medical transports across the United States, offers the following comments on the NPRM. Since our inception, AMOA has focused on a combined effort among our member operators to drive a zero-defect approach to aviation safety. Part of this effort has been advocacy for and investment in safety management systems ("SMS"). AMOA strongly supports FAA rulemaking to broaden implementation of SMS, but has concerns with some aspects of the NPRM and will center our comments on the elements of the NPRM that would govern part 135 operations.

The NPRM Does Not Meaningfully Address the Voluntary SMS Programs Experience and Transition.

AMOA members have been at the forefront of the FAA's voluntary SMS program. We are concerned the NPRM does not sufficiently acknowledge those efforts and the proposed fundamental changes to the voluntary program standards and additional costs required to implement them, nor addresses the transition from the voluntary SMS program to mandated SMS. The proposed changes to our members' existing SMS programs are not simply added elements, one highly ambiguous in scope, but will require reworking existing program elements. Further, our members' significant effort and investment have been made with less support from FAA than desired based, in part, on limited FAA resources to prioritize this program, including inadequate training for FAA inspectors. This experience has made our members particularly cautious about assumptions in the NPRM regarding FAA oversight. These concerns will be discussed more specifically below.

The NPRM's Approach to SMS Implementation and Compliance is Inconsistent with Part 5, the Voluntary SMS Program, the Just-Released Airport SMS Rule, and ICAO Standards.

The NPRM would require Part 135 operators to develop and implement an SMS that meets the requirements of the rule no later than 24 months after the effective date of the final rule.[1] It further would require them to submit to the FAA a statement of compliance "in a form and manner acceptable" to the FAA no later than 24 months after the effective date of the final rule.[2] We believe this plan is flawed in three respects.

1. *The NPRM's failure to provide phased in compliance for part 135 operations is discriminatory with no rational basis.*

There is no period of time between an operator's submission of its compliance program requirements to the FAA and the deadline for implementation of that program. There is no opportunity for consultation with the FAA and adjustment before an operator would be at risk of noncompliance with the rule, potentially exposing the operator to liability. This is contrary to the FAA's approach in the current part 5 applicable to Part 121 operators which allowed a 7-month period for FAA approval of the operator's implementation plan and then another 2 years for implementation. It also is contrary to the FAA's approach in the Airport SMS Rule , which involves the FAA in approval of an airport's implementation plan and then allows a three-year period for implementation. It is even contrary to the FAA's approach in this NPRM for manufacturers, which provides for FAA involvement through approval of an implementation plan and then one year for implementation. The FAA's approach for Part 121 operators, airports, and manufacturers is logical and consistent with the ICAO Safety Management Manual, which, provides "SMS implementations are generally conducted in three or four stages. Early collaboration between the service provider and the State authorities will likely lead to a smoother development and acceptance process."[3]

The FAA agreed in the Airport SMS rule that a staged approach will benefit industry implementation as well as FAA review and oversight. Are these benefits absent for operators, especially those now being required for the first time to have an SMS? The FAA recognizes in that rule the importance of a space in time between the submission of an "implementation plan", before the compliance date. It underscores "the need for early feedback from the FAA before it [an airport] may make significant capital improvements as part of its SMS development and implementation."[4] Why is the same logic not appliable to operators? We believe it is applicable.

[1] NPRM at 1969.
[2] *Id.*
[3] ICAO Safety Management Manual, *8.4.7.13.*
[4] Airport Safety Management System Final Rule ("Airport SMS Rule"), 88 Fed. Reg. 11624, 11669.

We realize the FAA has been directed by Congress to require certain manufacturers to implement a SMS by December 27, 2024,[5] but this directive does not apply to operators. It also does not provide a safety policy basis for treating Part 135 operators differently than other regulated entities, including manufacturers, the FAA has required or is proposing to require to have an SMS through a staged process. The NPRM would place operators at greater enforcement and liability risk for unintentional noncompliance than other regulated entities without a rational basis. We urge the FAA to reconsider and provide for a phase between submission of a compliance statement, the FAA's first inspection of the operator's SMS program, and the opportunity to make adjustments after that inspection before a compliance deadline.

2. *The NPRM's proposal for statement "form and manner" acceptability is not consistent with its approach for other regulated entities, the voluntary SMS program, and Annex 19.*

Further and unlike the current SMS voluntary program, part 5, the Airport SMS rule, and manufacturers under the NPRM, the NPRM provides that FAA would be "accepting" the *form and manner* of an operator's *statement of compliance*, not making a determination that the operator's SMS itself is acceptable.

In contrast, Annex 19, 4.1.4 requires that "[t]he *SMS* of a certified operator of aeroplanes or helicopters authorized to conduct international transport, in accordance with Annex 6, Part I or Part III, Section II, respectively, *shall be made acceptable to the State of the Operator*." (Emphasis supplied.) Annex 19 calls for the SMS program itself to be acceptable to the State of the Operator and this otherwise has been the FAA's approach.

Yet, the NPRM would only require a *statement* of compliance *in a form* acceptable to the administrator. This is not the same as the State of the Operator (the FAA) finding that an SMS is itself acceptable, as was the case with the voluntary program, part 5, the Airport SMS rule, and the proposal for manufacturers We question whether the proposed method of compliance for operators in consistent with ICAO standards.

Contrast, for example, the NPRM's approach with the FAA's approach for voluntary programs where the FAA actually inspects and validates the operator's program before "accepting" it as meeting international standards. As evidenced in a typical letter provided by the FAA to an operator successfully achieving compliance under the voluntary program:

> "Based on our review of [name of operator] planning, documentation, and activities, we have determined that your SMS implementation meets the expectations of the Flight Standards Service SMS Voluntary Program guidance for acknowledgment of a fully

[5] Aircraft Certification Safety and Accountability Act, (Pub. L. 116–260, 134 Stat. 2309, enacted December 27, 2020) ("ACSAA").

> functional SMS. Your FAA certificate management team (CMT) and the Flight Standards Service SMS Program Office validated this achievement with your cooperation.
>
> The FAA SMSPO and your CMT congratulate you on your company's significant accomplishment in implementing a fully functional SMS that is "accepted by the State" in accordance with international requirements."

Although the NPRM does not make this clear, a determination of compliance under the NPRM instead appears to depend on an SMS surviving the FAA's routine oversight of an operator. Is the FAA planning on issuing a letter after initial inspection attesting to its "acceptance" of the operator's SMS program? What evidence of "acceptability to the State of the Operator" will there be for international operations and when will it be provided?

The FAA states one of the purposes of the rule is to facilitate international operations of US operators:

> "With an SMS, a U.S. company would have an improved ability to operate internationally due to better alignment with ICAO standards and recommended practices. Furthermore, a U.S. company without an SMS could even be barred from doing business in a country where the civil aviation authority requires them to have an SMS."[6]

Yet, the NPRM makes no provisions to address the transition of those in the voluntary program to the proposed mandatory program. It also includes no provisions as to evidence of the FAA's acceptance of a mandatory program consistent with the requirements of Annex 19 to facilitate this "improved ability to operate internationally." It appears instead that the FAA's proposal will impair this current ability of those in the voluntary program which, consistent with Annex 19, is based on FAA "acceptance" of an SMS program itself and a letter of evidence of that acceptance.

It is important, in particular, that those operators who have succeeded in gaining FAA acceptance under the voluntary program not be penalized by an introducing a gap or otherwise invalidating FAA's written evidence of that acceptance. We urge the FAA to make provision for written evidence of its "acceptance" of an operator's SMS program during and after transition to a mandatory SMS program to facilitate international operations, consistent with its procedure under the voluntary program and with one of the stated purposes of the NPRM.

Further, the FAA should clarify under what circumstances changes to an operator's SMS program subsequent to submission of a statement of compliance or FAA inspection must be notified to the FAA for further "acceptance", if at all.

[6] NPRM at 1936.

3. The NPRM poses a great probability of inconsistency in FAA oversight of SMS programs, especially given a wide range of "scalability."

As discussed in the NPRM, it appears an operator must await routine surveillance by an FAA inspector to confirm FAA's judgment as to its compliance with the SMS rule:

> "Under this proposal, part 135 operators, and § 91.147 LOA holders would be required to develop an SMS and integrate that SMS into the existing operations of the certificate or LOA holder. The certificate or LOA holder would also be required to submit a statement of compliance in a form and manner acceptable to the Administrator no later than 24 months following the effective date of this proposed rule.
>
> The statement of compliance notifies the FAA that the organization has complied with part 5 and prompts the FAA to update its oversight tools to include SMS. Although these statements of compliance would not be subject to an approval process, the FAA would validate the part 135 operators' and § 91.147 LOA holders' compliance with part 5 and the accuracy of their statements of compliance under existing oversight processes. Because the certificate or LOA holder would be required to integrate the SMS into its existing operations processes during implementation, the FAA expects that existing oversight processes are sufficient to oversee and validate part 5 compliance. The FAA would review statements of compliance upon submission and would validate that the organization's SMS meets the part 5 requirements over the course of several inspections. If, during those inspections, the FAA finds that the SMS does not meet the requirements of the proposed rule, a notification in writing of the deficiencies would follow."[7]

The FAA explains its compliance approach to the proposed SMS requirement as follows:

> "In accordance with the FAA's compliance program, FAA personnel investigate apparent violations of FAA statutes and regulations and have a range of options available for addressing apparent violations, when appropriate, including compliance, administrative, and enforcement action. The FAA's goal is to use the most effective and appropriate means to ensure compliance with part 5 and prevent recurrence. The underlying principles and oversight processes that form the foundation of FAA's approach to compliance would not change under this proposed rule." [8]

This statement indicates that an inspector's judgement as to noncompliance with an SMS rule based on performance standards will have the same consequences as noncompliance findings with any other rule. Yet, this approach seems to contradict the FAA's stated policy in the Airport SMS rule, which suggests the FAA has a different approach to SMS compliance: "[t]he perception of using SMS as an enforcement tool, contradicts the non-punitive safety culture

[7] *Id*. at 1949-50.
[8] *Id.* at 1951.

critical to SMS."[9] How does the FAA account for this stated inconsistency in enforcement philosophy?

Further, the compliance approach outlined in the NPRM for scalable SMS based on performance standards is especially vulnerable to differences in interpretation among FAA inspectors. Those of our members participating in the voluntary SMS program can attest to vagaries among FAA inspectors, both as to their understanding of SMS and resources dedicated to this important safety function. Aside from our concern about lack of a phase between submission of a statement of compliance and a compliance deadline, we are concerned the NPRM does not meaningfully discuss whether the FAA will be implementing a dedicated training program for its inspectors to better assure consistency of review of these "performance based" SMS rules before the effective date of the final rule. Especially with the built-in expectation of scalability depending on size of the operator, this compliance approach, depending not on FAA approval of programs, but individual operator inspections by individual FAA inspectors will almost certainly be fraught with problems.

Just one illustration of our concern is highlighted in the NPRM itself. The NPRM mentions, as an example of SMS hazard identification, "analyzing the potential risk associated with crewmember fatigue, when compounded by variations in individual 135 operations, such as scheduling variances, frequency of operations, distance, and number of pilots."[10] The FAA refers, for support in including this potential risk, to the report from the Part 135 Pilot and Duty Rules Aviation Rulemaking Committee dated July 2, 2021. Yet, this report has not yet resulted in a rule. Does the FAA expect its inspectors to use an ARC report as to measure an operator's SMS? The concern, again, is that FAA inspectors will not review an operator's SMS program compliance according to standards based on the regulations and the FAA has not articulated a plan for consistency of oversight.

The importance of inspector training and industry involvement to achieve consistency and trust, in contrast, is appropriately recognized in the Airport SMS Rule. There, the FAA explains it plans to train current Part 139 inspectors "on overseeing compliance with this rule in the current inspection process, and on how to provide additional guidance to assist certificate holders with complying with the rule."[11] The FAA makes no such statement of intent in this NPRM. Further, it makes far more sense to achieve compliance by a phased in approach when guidance can be shared *before* the FAA places the regulated entity in the position of being in violation of the rule, not after that fact.

We appreciate the FAA's realistic acknowledgement in the Airport SMS rule that shifting to a performance-based regulation (let alone the great differences in scalability envisioned by the NPRM), "will take time and require educating and guiding both FAA inspectors and airport operators. The FAA will update FAA inspector guidance, provide training to the FAA inspectors

[9] Airports SMS Rule at 11648.
[10] NPRM at 1940.
[11] Airport SMS Rule at 11658.

on the requirements of this final rule, and provide outreach to the industry regarding the final rule requirements."[12] Further, the FAA states in that rule, "no SMS inspections will take place until inspectors have been trained; (c) cross train all part 121 and part 139 inspectors in the respective SMS requirements; and (d) invite airport industry representatives to participate in the training of FAA inspectors."[13] Also, the FAA makes this commitment in that rule: "The SMS final rule will not alter the responsibilities of the FAA's regional inspector staff. Like other part 139 related activities, the regional inspector staff is responsible for reviewing, approving, accepting, and inspecting the airport's SMS documents and program. As discussed in the SNPRM, FAA Headquarters staff will supplement these activities—by providing support and guidance to our regional inspection staff—to ensure national consistency and timely program implementation."[14]

In addition to addressing the other flaws in approach we have noted, we request the FAA to confirm in any final rule that it will invest the same time, attention, training, and resources for operators governed by this proposed rule and their inspectors as promised in the Airport SMS Rule. We ask that the FAA similarly provide outreach to the part 135 industry, in particular, those in the voluntary SMS program and invite participation in inspector training. We also ask the FAA to commit that no inspections will take place regarding SMS compliance until that training has been accomplished, with the same involvement of FAA Headquarters staff to better ensure uniformity and consistency of oversight.

The NPRM's New External Interface Requirement is Highly Ambiguous, Significantly Underestimates Its Cost Burden and Does Not Adequately Demonstrate Its Benefit.

As no other civil aviation authority has required the external interface element of an SMS, it appears this aspect of the NPRM, while understandable in theory, is not based on real world implementation data.[15] We therefore urge the FAA to provide far more clarity on the external interface obligation and a realistic estimation of how its benefits will outweigh its costs.

Pending that review, AMOA believes that the imposition of SMS across the spectrum of commercial operators is sufficiently challenging without also adding the external interface requirement at this juncture. There are too many ambiguities in the rule as proposed, including: whether identification of interfaces is based on risk priorities; how conflicts between interfaced parties should be addressed; how it will improve safety if notified parties are not required to take action; the accountability of the notified interfacing entity; the liability of the notifying interfacing entity if the notified entity fails to take action; the effectiveness of an interface network if key regulated entities, such as repair stations, are excluded from the rule; and the connection between interface communications and the FAA's voluntary reporting programs to enable identification of safety trends.

[12] *Id.* at 11662.
[13] *Id.*
[14] *Id.*
[15] NPRM at 1947.

Further, the NPRM assumes the external interface will not burdensome:

> "Therefore, the FAA does not believe it would be burdensome to document these existing interfaces and share information about hazards, when appropriate, leveraging existing contacts and channels of communication. The FAA anticipates that the organization would update and revise contact information for these interfaces as a normal part of day-to-day business, as they would even in the absence of this proposed rule."[16]

This is a big—and incorrect -- assumption, made without corresponding data. The ambiguities in this proposal make it impossible to properly assess actual costs of implementation.

Further, the NPRM anticipates that regulated entities may have to take steps to protect data shared with external interfacing entities:

> "The FAA does not control data shared by a person under proposed § 5.94 with other interfacing persons such as other governmental entities or private parties. Certain protections might be available under a private, legally-binding agreement to protect the information (*e.g.,* non-disclosure agreement) amongst the parties sharing the information, or under certain state or local laws or regulations.
>
> Persons that would be subject to § 5.94 may seek legal guidance to determine the most appropriate way to handle and protect data and information submitted to, or received from, interfacing persons. The FAA encourages these persons to assess applicable State legal frameworks to determine how to comply with data sharing, privacy laws, and reporting requirements, and how to best protect the data shared or received. These persons should evaluate whether states afford data sharing and information protection mechanisms through local statutes or regulations, or through other legal or contractual arrangements, such as confidential disclosure agreements."[17]

Engaging legal and lobbying assistance to determine and, if necessary, effect private and state law protections for data shared with interfacing entities will be time consuming and costly for operators. Has the NPRM's regulatory impact analysis has taken these significant costs into account?

On the issue of accountability, the NPRM gives the suggestion that the external interface requirement is a way for industry to self-police hazards resolution, but without actually requiring the controlling party to act. In one NPRM example:

> "Without applying this new [external interface notification]requirement, under the current process, the part 121 operator would report the incident to FAA flight standards

[16] *Id.*
[17] *Id.* at 1956.

> under § 121.703(c). Flight standards would evaluate the incident and, if determined to be an airworthiness concern, would report it to the appropriate Aircraft Certification Office. The Aircraft Certification Office would then complete a risk analysis per FAA Order 8110.107. If the risk assessment was determined to be unacceptable, the aircraft certification office would work the aircraft Original Equipment Manufacturer to develop corrective action. The proposed rule requires direct hazard communication between the operator and Original Equipment Manufacturer which will facilitate more timely resolution of the incident."[18]

Without FAA direction (and notification to the FAA), why does the FAA assume the manufacturer will act on the basis of a hazard notification by the operator? There may be real world data on such notification efforts by operators to manufacturers and their resolution. Has the FAA examined it? What does it demonstrate? Have such communications in the past by an operator resulted in responsive actions by the manufacturer without FAA intervention?

The NPRM does not require sharing identified hazards with the FAA unless the FAA is an interfacing entity in the best position to address the hazard. This would appear to remove the FAA from the information flow of safety hazards. We understand that to require inclusion of the FAA would expose these notifications to public release as no longer voluntary, but to exclude the FAA from this information creates the very real scenario of a shadow oversight network independent of the FAA. Leaving the unearthing of hazard information sharing data to the uncertainties of individual inspector oversight and not a centralized data sharing information center managed at the federal level, would deprive the FAA and the aviation sector of the ability to use the breadth of SMS data to identify trends. If, instead, the FAA envisions voluntary data sharing programs to fill this gap in FAA inclusion, then we request the FAA make this connection clear. Please see our further comment on this point below.

We also question the NPRM's exclusion of key aviation safety entities from its applicability, especially in light of the external interface requirement. The NPRM states the rule will be applicable to those "in the best position to prevent future incidents and accidents because they are closest to the hazards, and they know the most about their operations and products."[19] It further states "the FAA contends that expanding the implementation of SMS in the aviation industry would increase overall safety for each entity using an SMS, as well as requiring communication across the aviation industry with respect to identified hazards."[20] And further: "in this proposed rule the FAA is choosing to address the most impactful parts to which ICAO Annex 19 is applicable (part 135 [operators], part 21 [design and manufacturing], and § 91.147 [air tours]).[21] The FAA does not share its analysis to support this deviation from the scope of Annex 19 and why excluded regulated entities are not "most impactful". Without including

[18] *Id.* at 1948.
[19] *Id*. at 1933.
[20] *Id.* at 1935.
[21] *Id.* at 1937.

these interfacing parties in the SMS mandate, the envisioned safety network concept has a glaring break in logic and effectiveness.

Moreover, the FAA states:

> "By requiring entities that span the disparate sectors of aviation from manufacturing and design to operations to implement an SMS, the FAA seeks to create a network of organizations that speak the same language of safety management and can better communicate with one another and share information about any hazards they identify during the course of their business. Although some part 121 operators may communicate with one another voluntarily at this time, the FAA considers that there would be greater safety benefit if all aviation organizations, from the manufacturer to the operator, were to communicate hazard information to one another. The FAA considers that the benefits of safety management systems are derived from each of the components of an SMS and that the proposed changes to part 5 would assist in maximizing the potential of an SMS to increase safety across the aerospace system."[22]

This is a lofty and understandable goal in theory, but it is undermined by the exclusion in its application of key players, as well as the ambiguities as to data sharing effectiveness and incorrect costs assumptions in the proposal. For all these reasons, we urge that the external interfaces element of the NPRM be the subject of a separate or supplemental notice of proposed rulemaking to explore these issues.

The Safety Policy Code of Ethics Requirement Should be Clarified.

Every mature safety management system addresses the safety imperative and does so in context and in equal balance with the necessities of operation. We believe the NPRM approaches the safety imperative in an overly simplistic way and at odds with the longstanding statutory standard for air carriers.

The NPRM explains that this proposed requirement is due to Congressional mandate for certain manufacturers brought about by the 737 Max accidents :

> "The FAA acknowledges that section 102(f) of ACSAA only requires the FAA to apply the code of ethics requirement to certain part 21 certificate holders. However, to the greatest extent possible, the FAA seeks consistency in the SMS requirements. Furthermore, the FAA believes having a code of ethics, applicable to all employees of the organization, would influence the safety culture of the organization. If employees see their management engaged with safety as the highest priority, then that same safety attitude would likely prevail throughout the entire organization. Therefore, all persons required to have an SMS would benefit from having a code of ethics that confirms that safety is the organization's highest priority. For that reason, the FAA is

[22] *Id.* at 1939.

proposing to apply this requirement to all persons who would be required to have a part 5-compliant SMS."[23]

Yet, the FAA is not requiring airports to have a safety policy code of ethics, while at the same time requiring them to have an SMS. The FAA's approach, therefore, appears not doctrinaire and should allow for appropriate differences.

The FAA in explaining the concept of SMS, states: "An SMS is a management system integrated into an organization's operations that enforces the concept that safety should be managed with *as much* emphasis, commitment, and focus *as any other critical area of an organization."* (Emphasis supplied.)[24] This is a logical and correct description reflective of a mature SMS. We understand that the ACSAA congressional directive toward manufacturers and its impetus requires this wording for that sector, but urge that it should be more carefully worded for air carriers so as not to imply a different legal standard than the one that currently exists in statutory and common law. We believe it would be better phrased instead to acknowledge for air carriers the established legal obligation, referenced in 49 USC 44701(d), "to provide service with the highest possible degree of safety in the public interest".

The Impact on Small, Single Pilot Operators Requires Further Consideration.

Here again, the NPRM makes assumptions as to the cost impact on part 135 operators with one employee-pilot, which it proposes to include in a rule that has not had the gestation time part 5 or the Airport SMS Rule have had. If the FAA intends to include these small operators in the sweep of the rule, a realistic cost analysis should be done and additional guidance provided.

The NPRM, for example, assumes that third party consultants or trade associations would provide ready tools for compliance by a small operator. Yet, the NPRM does not appear to have examined the cost of these third-party resources. It references the possibility that these operators may have processes in place that meet part 5 requirements, but do they meet the newly proposed requirement of external interface identification and notification and what would those additional costs be? We note that the Airport SMS Rule includes a table specifically examining the costs for small airports of each SMS regulatory element. We urge the FAA to do the same for single pilot operators so as to provide a better foundation for cost benefit analysis.

Further, we recommend a phased approach to single pilot operators, as the FAA has done for small airports and as we propose for all part 135 operations. As the FAA reasoned there, "by being the last to implement, smaller, less complex operations gain the ability to learn and seek advice from larger, more complex airports that already underwent the process. They will also have more time to identify resources and program appropriate funding, where needed."[25] Comparable reasoning applies here, as well.

[23] *Id.* at 1944.
[24] *Id.* at 1935.
[25] Airport SMS Rule at 11650.

Finally, we urge the FAA to supply more detailed guidance to operators than is currently in the draft Advisory Circular 120-92, "Safety Management Systems for Aviation Service Providers," contained in the docket for this rulemaking. That draft does not provide the level of detail required for the complexity of the subject as proposed by the NRPM, which is important to all, and especially important to small operators with limited resources. We agree with this point in the NTSB's comment to the docket on this rulemaking:

> "more explicit guidance on strategies and methods for smaller operators to use to implement SMSs would reduce the burden on a wide range of operators in their efforts to comply with the proposed rules. The guidance is also needed by FAA inspectors performing oversight of smaller operators' compliance with the proposed regulations. The FAA is in the best position to create a detailed and usable inventory of strategies and methods used by operators of all sizes to help operators scale SMSs to the size of their operations. The FAA could compile this information based on its experience working with operators who adopted SMSs before the issuance of Part 5, overseeing Part 121 operators required to implement SMSs, and working with SMS Voluntary Program participants across Parts 135, 21, and 145. We encourage the FAA to consider creating such a resource on SMS scalability as this rulemaking concludes."[26]

Records Protection Requires Further Consideration.

We are concerned the NRPM does not adequately consider the complexities of records disclosure associated with communications among interfaced external entities. More specifically, it does not acknowledge the consequences to SMS efforts of hazard communications public release and also fails to address the implications for FAA's voluntary data reporting programs.

The NPRM does acknowledge hazard information shared among external interfacing entities may be vulnerable to public release absent state laws or private contracts to protect that information. It implies that protection of this information from public release may be antithetical to the goals of SMS, but does not grapple with the real possibility of public release of information. Is the FAA contemplating an industry effort to achieve such laws and renegotiate its contracts with all known external interfacing parties? Does the NPRM take into account the relative costs of this effort for the wide range of part 135 operators?

Further, the NPRM does not explain how the reporting of hazards to interfacing external parties relates to the FAA's voluntary safety data reporting programs, such as Flight Operational Quality Assurance (FOQA), Aviation Safety Action Program (ASAP) and Voluntary Disclosure Reporting Program (VDRP). In your speech at the InfoShare meeting on March 28, 2023, you impressed us with the importance of data and data sharing and stated "And with SMS recently

[26] March 10, 2023, Letter from NTSB Chair J. Homendy to the rulemaking docket.

expanded to more segments of the industry, we will have access to more data." Yet, how will the FAA have access to SMS data as the result of this rule? The NPRM does not specify.

And if the FAA requires a regulated entity to report hazard information to third parties, and the same data is reported to the FAA under one of its voluntary reporting programs, is it protected from public disclosure? If the information is publicly released by an interfacing entity due to no protections under state law or private contract, will that release compromise the policy underlying these voluntary disclosure programs?

These appear to us to be important matters that should be addressed before the FAA finalizes a rule with an external interface notification requirement which we again suggest might be the subject of supplemental rulemaking.

The Concept of Foreseeability in the Definition of "Hazard" Should be Maintained.

We oppose the proposed change in the definition of "hazard" to substitute the word "potential" for "foreseeably". That proposed change is inconsistent with the definition of "hazard" in the new Airport SMS rule and at odds with United States common law.

Specifically:

- The current part 5 definition of ''hazard'': ''*a condition that could foreseeably cause or contribute to an aircraft accident* as defined in 49 CFR 830.2.''

- NPRM part 5 definition: **''***a condition or an object with the potential to cause or contribute to an incident or aircraft accident***,** as defined in 49 CFR 830.2.''

- Airport SMS Rule definition of "hazard": "*a condition that could foreseeably cause or contribute to: (1) injury, illness, death, damage to or loss of system, equipment, or property, or (2) an aircraft accident* as defined in 49 CFR 830.2.

The FAA places an emphasis on consistency of approach in SMS. It states it is "pursuing an aviation-wide approach that would require the implementation of SMS by the organization in the best position to prevent future accidents."[27] The FAA states the Airport SMS Rule "follows a similar framework and harmonizes definitions and requirements with the SMS requirements established under part 5 SMS, when and if appropriate." [28] The FAA further states in the Airport SMS Rule:

> "To ensure consistent application and reporting across the airport-airline industry, as well as to ensure applicability to the non- movement area, the FAA amends the definition in this final rule. For this rule, we define the term ''hazard'' as ''a condition that could foreseeably cause or contribute to: (a) injury, illness, death, damage to or loss of system,

[27] Airport SMS Rule at 11642.
[28] *Id.* at 11646.

equipment, or property, or (b) an aircraft accident as defined in 49 CFR 830.2.''[29]

The FAA is correct that consistency in SMS application and reporting across aviation entities is vital and to that end consistency in definitions also is vital. It undermines that effort for the definition of hazard to be one thing for operators and manufacturers and another for airports, as is proposed here.

The identification of "hazard" is key to the concept of SMS, which at the highest level is about anticipating problems before they lead to accidents. The word "foreseeably," chosen by the FAA at the inception of its SMS rulemaking efforts, is the correct word; it is a fundamental concept in US common law and means able to be foreseen or predicted.[30] Anything can have the "potential" to become a problem. It is whether a reasonable person should have foreseen the risk that should be the standard.

The FAA further concludes In the Airport SMS Rule that its definition of "hazard", which maintains the important concept of "foreseeability", is consistent with Annex 19 and requires no filing of differences.[31] That also has been true for the longer standing definition in part 5, which includes that term and for which the United States has filed no difference.

For all these reasons, we urge that the word "foreseeably" be maintained in the definition of "hazard".

Conclusion.

AMOA members are highly supportive of SMS and the FAA's efforts eventually to achieve SMS across the aviation spectrum. We believe the NPRM is a step in that direction, but it at the same time introduces issues that require further thought and adjustment before any final rule is issued.

Thank you for the opportunity to comment.

Respectfully submitted,

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[29] *Id*. at 11660.
[30] See,e.g., *Palsgraf v. Long Island Railroad Co*., 248 N.Y. 339, 162 N.E. 99 (1928).
[31] See Airport SMS Rule at 11670.