



FAA Issues Safety Guidance Applicable to Airports

David Y. Bannard

The Federal Aviation Administration (FAA) recently issued Order 5200.11, which is of interest to airport operators and sponsors for several reasons. Beginning June 1, 2011, most significant new actions taken at small, medium or large hub airports must undergo a safety risk management (SRM) safety assessment process, as outlined in the order, and such reviews for all other airports within the National Plan of Integrated Airport Systems (NPIAS) will be phased in by June 1, 2014. Order 5200.11 also provides that airport sponsors will be required to certify that they have reviewed and understand the results of the SRM assessment and that they will implement the mitigation measures identified in the SRM process in a timely manner. Further, the order provides a preview of the upcoming rulemaking implementing Safety Management Systems (SMS) at all Part 139 certificated airports. Lastly, the issuance of Order 5200.11 continues an unsettling recent trend whereby the FAA has issued final guidance without providing an initial draft of such guidance for public review and comment.

Actions Requiring a Safety Risk Management Assessment

Order 5200.11 requires that, beginning June 1, 2011, airport standards and project-specific approvals that could impact aviation safety must undergo an SRM safety assessment. Although it appears that the FAA has already begun to require safety assessments for some large scale airport development projects, Order 5200.11 mandates, in general, that any matter that could affect aviation safety and that requires Office of Airports (ARP) approval will be required to undergo a defined safety review. Initially, this review will determine whether a full SRM process must be undertaken, and the order includes a list of matters that typically will not require further safety assessment. These matters generally consist of FAA approvals that will not affect the airfield or aircraft operations in any way—such as approval of grants for reimbursement of completed projects, sound insulation projects, or approval of projects depicted on an ALP that are not expected to be undertaken within 15 years.

If full SRM is required, however, then unless the action will not have an impact beyond ARP, an SRM panel—consisting of the airport sponsor, FAA staff from relevant areas (such as the local air traffic control tower manager), FAA air traffic organization or its flight standards district office, and other subject matter experts—must be convened to review the matter and document the hazards identified, the risks associated with such hazards and mitigation measures necessary to address any risks that are determined to be unacceptable.

Airport Sponsor Action

The SRM panel's findings will be documented for review and approval by all panel members and the airport sponsor's authorized representative for any review affecting a specific airport. For such matters, the airport sponsor's authorized representative will be required to sign the following

***GUIDANCE** continued on page 4*



Letter From the Editor

Thomas K. Lehrich

As I attended the national FBA Annual Meeting and Convention in New Orleans this fall, one lasting impression I took away from attending business meetings and discussing programs for the coming year is that the Transportation and Transportation Security section "is at the top of our game." We have such a dedicated

group working to improve the profession of transportation and transportation security law. Thank you to our chair Nancy Kessler for doing an amazing job this past year as she has contributed so much to our sector and made a huge impact to the transportation law profession.

This issue is loaded with energy!

Thanks to Dave Bannard of Foley & Lardner LLP for his wonderful article, in which he walks us through the fresh topic of FAA guidance on Safety Guidance Applicable to Airports under Order 5200.11. Enjoy this issue! ❖

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Chair's Corner

Nancy Kessler

My term as chair of the Transportation and Transportation Security Law Section expired in November, and I will miss the momentum we've experienced and the terrific commitment of the section's Governing Board to promote the mission of the section: to be a top provider of quality legal educational programs to lawyers practicing in the areas of transportation and transportation security law. We continue to grow our section membership. In the short period in which I've had the pleasure of serving as chair, 27 new people have joined.

Introductions to our revitalized Steering and Standing Committees are in order. These committees are chaired by top-notch legal talent and they await your ideas and assistance! The aviation buffs among us will enjoy participating in the Air Transportation Committee, chaired by David Rifkind. Those involved with motor carriers, rail, and highway should seek out our Surface Transportation Committee, chaired by Scott Mirelson. If you have a penchant for the integration of technology with transportation, please join the E-Commerce Committee, chaired by Patty Hahn. Nowadays, security issues touch all facets of transportation law, and the Transportation Security Law Committee is co-chaired by Stewart Simonson and David Ralston. The Steering Committee's chair is Francis J. "Frank" Duggan.

We have been successful in co-hosting the brown-bag Lawyers' Lunches—the "bread and butter" of our section's activities—with the U.S. Department of Transportation's Office of General Counsel. We launched our first event of the Lawyers' Lunch series in March, with a dialogue with DOT General Counsel Bob Rivkin. Seasoned Capitol Hill professionals—Jim Kolb of the U.S. House Subcommittee on Highways and Transit, Gael Sullivan of the U.S. Senate Committee on

Commerce, Science and Technology, and David Heymsfeld of the U.S. House Committee on Transportation and Infrastructure—informed us on legislative updates at the April Lawyer's Lunch. During June, we introduced our audience to one of Transportation Secretary LaHood's signature initiatives—Livability—featuring presentations by Beth Osborne, DOT Deputy Assistant Secretary for Transportation Policy, Gloria M. Shepherd, Federal Highway Administration Associate Administrator, and Kate Mattice, Federal Transit Administration Director of Policy. We lifted the summer doldrums in August by presenting "hot topics" currently facing Denise Krepp, Maritime Administration chief counsel, Alais Griffin, Federal Motor Carrier Safety Administration chief counsel, and Kathleen Silbaugh, representing the National Transportation Safety Board. Each of our presenters is to be commended for their thorough and conscientious presentations. I feel honored to have been able to moderate the sessions, to get to know the panelists, and to be educated on their important work!

And I want to convey special recognition to Hector Huevo, James Fisher, Monica Hargrove, and Amy Cassidy of the Governing Board for their "behind the scenes" help. We could not have offered these useful and durable sessions without them!

Thanks to Monica R. Hargrove, section treasurer, we effectively presented the section's first webinar for continuing legal education credit. Monica generously offered the support of the Airports Council International, NA for the webinar on regulatory issues facing disabled airline passengers. She assembled a wonderful and energetic panel: James Briggs, ACI-NA; Douglas Mullen, Air Transport Association; Mike Spollen, DOT; James Fisher, DOT; Supriya Raman, FAA; and Jennifer

Andrews, Eckert Seamans Cherin & Mellott, LLC. The webinar generated

much interest, and Monica moderated it with panache!

Amy Cassidy, chair elect, is to thank for handling our second Law School Students Networking evening event in September. There, we enjoyed introducing D.C. area law students to the Federal Bar Association and to transportation and transportation security law.

In October, the section held its premier event, the Counsels' Reception for the Transportation and Transportation Security Lawyers of the Year, on Capitol Hill. We honored Jason E. Schlosberg of the Federal Railroad Administration as the Transportation Lawyer of the Year, due to his significant contribution to safety rulemakings at the FRA and his founding of a transportation publication, *TQ: Transportation Quarterly*. Congratulations, Jason, on your commitment to advancing the transportation law profession and by your work both at the office and to the bar associations. For the first time, the section bestowed a Lifetime Achievement Award. The award was presented to Bernard F. Diederich upon his upcoming retirement from the Department of Transportation after 42 years of federal service and 39 years as an active and influential Federal Bar Association member and past official. Bern will continue his involvement with the section, and we appreciate his work as Nominating Committee chair. We also conveyed our appreciation to Denise Krepp, immediate past chair and chief counsel of the Maritime Administration,



CHAIR continued on page 6

GUIDANCE *continued from page 1*

acknowledgement:

As a duly authorized representative of the sponsor of the airport identified above, I hereby certify that I have reviewed and understand the hazards and mitigation measures identified in the attached documentation. I further certify that I understand that it is our legal duty, as sponsor, to ensure that any and all airport-related mitigation measures are fulfilled and documented in a timely manner. Any such commitments on our part represent an obligation under our Federal grant assurances, regardless of whether the FAA participates in the funding of any part of the Proposed Action. Nothing in the FAA's review may be deemed as relieving the sponsor of its legal obligations as owner and operator of the airport.

Airport sponsors will need to ensure that they comply fully with each of the airport-related mitigation measures required pursuant to an SRM review. The SRM panel review should enhance safety at airports by identifying risks associated with the contemplated action, and the mitigation measures that will address and reduce such risks. By undertaking the identified mitigation measures, an airport sponsor will both comply with its grant assurances, and demonstrate that it has taken reasonable actions to reduce the identified risks to acceptable levels. However, airports that fail to implement the identified mitigation measures risk not only suffering the penalties prescribed for violation of federal grant assurances but may also be open to significant legal exposure for tort claims should an accident related to the unmitigated risk occur.

Further, this SRM review process presents at least two problems for airports. The first is the language of the foregoing certification, which could be read to impose personal liability on

the signatory. The FAA should revise the required certification to ensure that the airport sponsor, not the individual signing the certificate, is clearly the party responsible for compliance with required mitigation measures. The second is that when a project is proposed to the FAA, there will be a level of uncertainty regarding the hazards and attendant risks that will be identified and the mitigation measures that will be required. For most actions that will require SRM analysis, airports should consider undertaking a preliminary SRM process prior to submitting a project to the FAA for approval in order to determine the range of risks that must be mitigated and their cost.

Preview of Part 139 SMS Rulemaking

Order 5200.11 also provides an indication of how the FAA will implement SMS with respect to Part 139 airports in its forthcoming rulemaking. The order states that the FAA is committed to an integrated approach to SMS across all of its lines of business, including common definitions and understanding of risk, consistent methods for analyzing and assessing safety risks, common safety risk management techniques, consistent safety assurance procedures and common approaches to defining acceptable levels of risk. Thus, for example, the SRM analytical methodology and requirements set forth in the order are likely to be replicated in the requirements for airports' SMS. The order provides an objective set of criteria for classifying the severity of hazards, determining the likelihood of their occurrence, and ranking risks as high, medium, or low. These objective criteria should help airports demonstrate the reasonableness of their actions in the event that an identified hazard that has been deemed to be an acceptable risk results in a personal injury or property damage. Furthermore, under Order 5200.11, the FAA states that it will provide additional resources for addressing safety issues by creating

the new Safety Management Division; set up a voluntary, confidential safety reporting system for FAA employees; emphasize management's obligation to establish a "positive safety culture"; and phase in implementation of SMS reviews. Taking a similar approach to drafting the rules applicable to Part 139 certificated airports will help the FAA achieve the goals of SMS, yet prevent unwarranted increased legal exposure for airport operators.

Promulgation of Order 5200.11 Without Public Input

Although Order 5200.11 primarily sets forth requirements for ARP and other FAA lines of business, the order will impose obligations on airport sponsors and operators. Where significant new obligations will be imposed on external parties—such as, in this case, all airports within the NPIAS—the FAA should undertake a public process that includes issuance of a draft or proposed order and request for comments, followed by issuance of a final order including responses to the comments raised. In the future, the FAA should take the time to seek and consider input from affected parties when undertaking significant rulemakings. ♦

Dave Bannard is a partner in the Boston office of Foley & Lardner LLP, where he represents airports in a wide variety of matters and practices public finance law. Prior to joining Foley, he was the deputy chief legal counsel at the Massachusetts Port Authority. Formerly a freelance musician, Bannard graduated from Boston College Law School in 1988, cum laude.

Forum on Pressing Legal Issues in Aviation Security

February 1, 2011 • 9:00 a.m.–12:30 p.m.

TSA Headquarters: 601 South 12th St. Arlington, VA (Pentagon City)

• CLE credit pending •

Free for government employees, \$5 for FBA members, \$10 for nonmembers

9:00-9:30 Welcoming Remarks

Francine Kerner, Chief Counsel, Transportation Security Administration

9:30-10:45 Advanced Imaging Technology (“AIT”) – Security vs. Privacy: Can we have both?

This panel will include representatives from TSA’s Office of Security Technology and TSA’s attorneys. Panelists will discuss the legal issues implicated by AIT screening, including recent litigation, data storage, and privacy issues. Further, panelists will discuss the advantages of AIT, alternatives to AIT screening, and safety issues.

11:00-11:15 Keynote Speaker: The Honorable Norman Mineta

11:15-12:30 International Aviation Security and Harmonization

Joram Bobasch, Executive Vice President, ICTS Europe Holdings, B.V.

International Airline Participant

TSA representatives from OGS, Global Policies & Programs

This panel of industry and government experts will discuss issues arising in the implementation of U.S. aviation security protocols internationally with respect to both cargo and passenger security. Panelists will also discuss lessons to be learned from other aviation security regimes including the Israeli and EU approaches as well as the deployment of explosive trace detection (EDT) machines worldwide.

To register, **please return this form by January 26** to Adrienne Woolley at awoolley@fedbar.org or fax to (571) 481-9090. Mail payment checks to Federal Bar Association, Attn: Transportation and Transportation Security Law Section, 1220 N. Fillmore St., Suite 444, Arlington, VA 22201.

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Registration Option: Government employee (free) FBA Members (\$5) Nonmembers (\$10)

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Section Presents Second Annual Forum for Law School Students

The Transportation & Transportation Security Law Section reaches out to law school students through free networking social events. The George Washington University was the site for the Section's second annual forum for law school students in the Washington, DC area. At the well-attended September 28, 2010 program, the Section members introduced the students to the many programs and activities offered by the Federal Bar Association and the Section, and explained the many facets of transportation and transportation security law they each practiced. The students had ample opportunity to ask questions and, of course, to enjoy refreshments.

Pictured at right are: Alais Griffin (Section member and chief counsel, DOT/Federal Motor Carrier Safety Administration (FMCSA)); Nancy Kessler, (Section Chair, senior attorney, DOT, Office of the General Counsel); Thomas Lehrich (Section Newsletter editor, Assistant chief counsel, TSA); Scott Mirelson (Section Surface Transportation Committee Chair; attorney, FMCSA); James Fisher (Section Deputy Chair, attorney, DOT, Office of the General Counsel); Amy Cassidy (Section Chair-Elect, attorney, DOT/Federal Aviation Administration); Hector Huezo (Section Secretary; attorney, DOT, Office of the General Counsel).



Above left: Amy Cassidy, chair-elect, speaks with students; Above right: Tom Lehrich, *TransLaw* editor, with law students.

CHAIR continued from page 3

for her dedication and commitment to the section while serving as the 2009 chair.

Last, but by no means least, I wanted to share with you two special awards the section received in September at the Federal Bar Association Annual Meeting and Convention in New Orleans. Tom Lehrich, *TransLaw* editor, won a Meritorious Newsletter Award for our section's newsletter.

This is a well-deserved recognition, Tom! Thanks for pulling together insightful and topical publications. Additionally, I was very pleased to receive the FBA's 2010 Section Chair Award, which recognizes "outstanding leadership, initiative and effective contributions in guiding the Federal Bar Association's Transportation & Transportation Security Law Section." The credit for the section's success this

past year goes to the Board and all of our active members—thank you!

The section has many opportunities for professional growth and leadership—whether on our committees, Governing Board, or as a program presenter. We hope you consider being an active member! ❖