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PHOTO BY BRYSON JOBE

President's Message

by
Marc Warren

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When we were together in Pensacola for our Blue Angels Legal Conference, who could have imagined that 2020 would bring a pandemic and economic tumult? We can't foresee the future, but we can take charge of the present and try to shape it as best we can. And now is the time for us to take charge of our Association and build it to endure in the decades ahead.

We started to build for the future by broadening the scope of the Association to include not only attorneys practicing before the NTSB, but every attorney with an interest in aviation and transportation safety. Our membership ranges from regulators to respondents' counsel; from in-house and outside counsel for airlines, manufacturers, and insurance and financial companies to plaintiffs' counsel; and from those with a scholarly devotion to aviation and transportation law to others with a zeal for being in the company of lawyer-pilots and airplanes. One of the reasons our name changed from the NTSB Bar Association to IATSBA was to be more inclusive, more approachable, and more relevant.

That journey is not complete. We have far to go to fulfill the aspiration of our name. We have few "international" members and few members who

practice outside traditional aviation jurisprudence. I call upon us to recruit attorneys we've met in other countries and to deepen and broaden our membership to include attorneys who practice in areas such as unmanned and autonomous vehicles, space and satellites, urban mobility, general aviation, airports and infrastructure, airspace and multi-modal traffic management, pipelines, and other transportation modes like road, rail, maritime, and hyperdrive.

We offer a tremendous CLE curriculum and opportunities to socialize with a great group of truly outstanding people. Our Pensacola conference is the most recent example of a superbly executed training event that was a lot of fun to boot! Presenting the Nall Award to Peggy Gillian at the awesome and inspiring Naval Aviation Museum was the high point of the conference for me. Thanks again to Greg Winton, Vince Lesch, and all of our sponsors for making Pensacola such a success. A special debt of gratitude goes to Tony and Nancy Jobe, who worked tirelessly to make Pensacola our "best ever" conference.

The conference was also noteworthy because it included the type of content we will need to sustain

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Editor's Column

by
Greg Reigel



GREG REIGEL is a partner with the law firm of Shackelford, Bowen, McKinley and Norton, LLP in Dallas, Texas. He has more than two decades of experience working with airlines, charter companies, fixed base operators, airports, repair stations, pilots, mechanics, and other aviation businesses in aircraft purchase and sale transactions, regulatory compliance including hazmat and drug and alcohol testing, contract negotiation, airport grant assurances, airport leasing, aircraft related agreements, wet leasing, dry leasing, FAA certificate and civil penalty actions and general aviation and business law matters. Greg also has extensive experience teaching the next generation of aviation and legal professionals including in such courses as aviation law, aviation transactions, aviation security, business law and trial advocacy. Greg holds a commercial pilot certificate (single-engine land, single-sea and multi-engine land) with an instrument rating.

“May you live in interesting times.” If I had a quarter for every time someone has used this apocryphal phrase in connection with COVID-19 I would have a nice sack of change. But, in all fairness, our current circumstances have presented us with both interesting, and challenging, times.

The media headlines continually paint the terrible impact this virus has had on individuals, businesses, and our economy in general. Sickness. Death. Loss of employment. Economic uncertainty. And the list goes on.

However, amidst all of these adverse impacts, it is possible to find some silver linings to the crisis. (After all, it is certainly better to try and be optimistic about your circumstances than to sit and complain). Some of these positive impacts may only be temporary. Others may result in lasting changes for how we work and live.

People have pulled together. They seem more willing to help others. We have rediscovered the importance of connection, gratitude, and not taking either for granted. All of these things are as they should be (even though they have not necessarily been that way in the recent past). Hopefully, they will continue as we slowly but surely escape our current quarantine/confinement and return to our new “normal.”

Also, the legal profession (albeit not all members of the profession) has

embraced ability to work remotely. Although by necessity, existing tools such as Zoom and Microsoft Teams videoconferencing are being used to continue work on behalf of our clients. We have conducted depositions and mediations with success. And even NTSB hearings and other court proceedings have been held remotely.

Although not perfect, I think we will see continuing use of these tools even when things start to open back up. In many situations the benefits of these alternatives will outweigh the time and expense of travel and in-person appearance. And through necessity, we now know these options are available to get the job done for our clients at, perhaps, less cost.

In the midst of this current chaos, we bring you the latest, and belated, issue of the IATSBA Reporter. In this edition, our President Marc Warren looks to the future of IATSBA and encourages our members' participation and help to strengthen and grow our organization. Michael Dworkin, former IATSBA president, explains some of the nuts and bolts to starting an airline.

Our Treasurer, David Tochen, discusses a controversial research study recommended by the NTSB and proposed by the FAA to assess the prevalence of use of licit and illicit drugs by airmen. To round out our offerings, I have included two COVID-19 related articles discussing the impact of COVID-19 on FAA drug and alcohol testing policy and also

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whether COVID-19 presents a force majeure event in the context of an aircraft purchase agreement.

As always, if you would like to submit an article but you have questions regarding topic, availability etc., please feel free to contact me. I will be happy to answer questions and help you through the process. Also, if you are

aware of an upcoming event that may be of interest to our members, please send me the details so we can include the information in the newsletter.

I hope you enjoy this edition of the Reporter, stay safe and healthy, and I look forward to seeing you at the next IATSBA conference in spring of 2021.

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Safety Recommendation

A-14-95

by
David Tochen

FAA PROPOSED RESEARCH STUDY TO ASSESS THE PREVALENCE OF AIRMEN'S USE OF LICIT AND ILLICIT DRUGS: A CONTROVERSIAL APPROACH

A strongly negative reaction to the FAA study by numerous pilot and general aviation organizations and attorneys brings to mind Thomas A. Edison's cautionary advice that "a good intention, with a bad approach, often leads to a poor result."

I. Background: Drug Use in Transportation

The serious safety implications of drug use in transportation is well-established. Widespread and intensive governmental and private sector efforts to ameliorate the safety risks posed by the use of over-the-counter, licit, and illicit drug use, have resulted in impressive – albeit insufficient – successes over the course of many decades. In general and despite the availability of data resulting from mandatory urine specimen testing throughout the transportation sector to detect operators' use of a limited class of illegal drugs, there is insufficient data to determine the usage of a broader range of drugs in this sector.²

II. The NTSB Safety Study on Drug Use Trends in Aviation

The author would like to thank Elizabeth Vasseur-Brown, IATSBA Regional Vice President, Central Region, for her assistance in the preparation of this article.

2 The FAA, however, does perform extensive postaccident toxicology testing on fatally injured testing.

A. Approach

To better analyze drug use in the aviation sector, the National Transportation Safety Board (NTSB) performed a safety study to determine the prevalence of over-the-counter, licit, and illicit drug use by fatally injured pilots. Released in September 2014, the study [Drug Use Trends in Aviation, Assessing the Risk of Pilot Impairment](#), examined data from the FAA Civil Aerospace Medical Institute's (CAMI) toxicology database and the NTSB's aviation accident database. The study included only toxicology results from pilots' blood and tissue specimens because "a drug present in urine but no longer found in the rest of the body no longer has any potential for impairment or general effect on the body."³

It assessed "the prevalence and trends in evidence of recent drug use among pilots who died in aviation accidents [between 1990 and 2012]; it did not reassess the likelihood of a pilot's impairment in any of these accidents."⁴

The study examined 6,575 domestic civil aviation accidents within

3 NTSB, *Drug Use Trends in Aviation, Assessing the Risk of Pilot Impairment*, at 9.

4 *Id.* at 1.



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that 13-year timeframe that resulted in a pilot fatality for which records were available in the CAMI and NTSB databases. Most of the pilots in the study (87%) were performing general aviation operations and nearly 98% of these pilots were male, with an average age of 50 years.⁵ Although the study did not reassess the likelihood of pilot impairment, the agency pointed out that in previous aviation accidents since 1990, it determined that “pilot impairment due to drugs was a cause or contributing factor in 3% and impairment or incapacitation from a medical condition in 1.8% of fatal US civil aviation accidents.”⁶

B. Findings

The NTSB study included nine findings. Among the most disturbing findings are the following:

- The percentage of study pilots with positive toxicology findings for all drugs, including potentially impairing drugs, drugs used to treat potentially impairing conditions, and controlled substances increased from just less than 10% of study pilots in 1990 to 40% in 2011.

- The percentages of study pilots with positive toxicology findings for multiple drugs, multiple potentially impairing drugs, and multiple controlled

substances also increased during the study period.

- The patterns of increasing prevalence of drug use and use of multiple drugs identified in study pilots’ toxicology test results are consistent with observed trends of increasing drug use by the US population in general.

- Sedating antihistamines were the most commonly identified drug category in toxicology test results of study pilots.

- The percentage of study pilots testing positive for marijuana use increased over the study period, primarily in the last decade.

- Study pilots who did not have a medical certificate or whose medical certificate had expired were more likely to have positive toxicology findings for all drugs, potentially impairing drugs, drugs used to treat potentially impairing conditions, controlled substances, and illicit drugs.⁷

The NTSB also concluded that its study’s “findings of increasing drug use and increasing use of multiple drugs by fatally injured study pilots are indicative of similar trends in drug use by the US pilot population in general.”⁸

C. Study Recommendations

The study’s discussion of future research needs pointed out that:

[t]he next step in understanding the relationships between drug use and accidents is to compare the prevalence of drug use among

⁵ *Id.* at 13.

⁶ *Id.* at 1. Two final reports issued by CAMI in April 2008 and August 2015 include similar findings. See [Drug Usage in Pilots Involved in Aviation Accidents Compared With Drug Usage in the General Population: From 1990 to 2005](#), and [Prevalence of Ethanol and Drugs in Civil Aviation Accident Pilot Fatalities, 2009–2013](#).

⁷ *Id.* at 29.

⁸ *Id.*

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fatally injured pilots with the prevalence in pilots flying without having an accident. Further research may identify increased accident risk associated with some drugs or combinations of drugs, which would support improved guidance or limitations on use of those drugs while flying. Conversely, some drugs believed to be “potentially impairing” may not be correlated with accident risk and concerns about their specific effects may be reduced.⁹

As a result of the study, the NTSB issued six recommendations—four to the FAA and two to the 50 states, the District of Columbia, and the Commonwealth of Puerto Rico. One of the recommendations addresses to the FAA urged the agency to:

Conduct a study to assess the prevalence of over-the-counter, prescription, and illicit drug use among flying pilots not involved in accidents, and compare those results with findings from pilots who have died from aviation accidents to assess the safety risks of using those drugs while flying. (A-14-95).¹⁰

D. The FAA’s Response to NTSB Recommendation A-14-95.

In a December 1, 2014, interim response to the NTSB concerning its recommendation for the FAA to conduct a study of pilots’ drug use, from

⁹ *Id.* at 38.

¹⁰ *Id.* at 40. The study’s recommendations were officially transmitted by the NTSB in a [September 23, 2014, letter to the FAA Administrator](#).

the FAA Administration indicated that his agency “is working to determine the appropriate actions necessary to address this recommendation.”¹¹ The NTSB, in turn, acknowledged that “the recommended study poses significant study design challenges in how to obtain the data for pilots not involved in accidents.” In a February 12, 2016, updated response, the FAA Administrator reported that the “FAA’s Civil Aerospace Medical Institute Institutional Review Board and the Federal Air Surgeon have approved a research study for this safety recommendation. They are preparing a formal research proposal” and further reported on April 7, 2017, that the agency’s “Institutional Review Board¹²

¹¹ https://www.nts.gov/safety/safety-recs/_layouts/ntsb.research/Recommendation.aspx?Rec=A-14-095

¹² The use of Institutional Review Boards in federal agencies was officially implemented based on a Model Federal Policy, which applied to research involving human subjects that is conducted, supported, or regulated by the federal agencies. The Model Federal Policy, in turn, was based on regulations for the protection of human subjects first issued by the Department of Health, Education, and Welfare [now the Department of Health and Human Services (HHS)] in 1974. (The HHS regulations for the protection of human subjects are codified at 45 CFR part 46). The U.S. Department of Transportation (DOT) formally implemented the Model Federal Policy by participating in the codification of a common rule by 16 federal agencies. 56 Fed. Reg. 28023, June 18, 1991. The DOT rulemaking was codified at 49 CFR part 11, *Federal Policy for the Protection of Human Subjects*. DOT and other federal agencies revised the 1991 *Federal Policy* in 2005 and more recently in 2017. 82 Fed. Reg. 7149, January 17, 2017. The FAA, in turn, established its own standardized policies and procedures for conducting research involving human test subjects and established the FAA IRB. [Protection of Human Research Subjects, FAA Order 9500.25A, effective October 8, 2014](#).

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approved the research project[,] The Prevalence of Drug Use in the Pilot Population. This research project will meet the intent of this recommendation to determine the prevalence of certain drugs in the pilot population.¹³ The research effort has completed internal review and coordination, including senior management approval. Preparatory activities to brief pilot unions are underway.”¹⁴

III. The Revised FAA Protocol on Toxicology Testing of Urine Specimens from FAA Medical Exams

A. Description of the Protocol

On September 21, 2017, the Acting Chair of the FAA IRB approved Protocol #17023, Toxicology Testing of Urine Specimens from FAA Medical Exams, “so long as the rules for exempt approval under 45 CFR 46.101(b) apply, specifically, that pathological or diagnostic specimens are collected in a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.”¹⁵

([FAA Order 9500.25B](#), effective October 8, 2019, cancelled FAA Order 2500.25A).

13 After further refinement of the study protocols by the FAA, the study is now titled “Toxicology Testing of Urine Specimens from FAA Medical Exams.”

14 *Id.*

15 The *Federal Policy for the Protection of Human Subjects* exempts certain specified research from its requirements. Somewhat curiously, the IRB approval memorandum refers to the HHS *Policy* rather than the DOT *Policy* and cites to an outdated regulatory section. The applicable and identical HHS and DOT exemption language (45 CFR §46.104(d)(4)(ii) for HHS and 49 CFR §11.104(d)(4)(ii) for DOT) states:

Except as described in paragraph (a) of

The IRB’s approval was effective for one year and the investigative team subsequently sought an extension after pointing out the project “has been on hold pending briefings for pilot organizations (AOPA [Aircraft Owners and Pilots Association], ALPA [Air Line Pilots Association], EAA [Experimental Aircraft Association]) and FAA Officials (AM-1) [Federal Air Surgeon], AM-2 [Deputy Federal Air Surgeon], Regional Flight Surgeons).” In a memorandum dated August 22, 2018, the Chair of the FAA IRB determined that the revised protocol continued to satisfy the criteria for exempt research and noted that further annual extensions of the research would not be required.

The FAA study design states that its results will “be used for appropriate evidence-based actions by the FAA that establish new, or improve existing, regulations and standards regarding the approval of drugs for use by pilots and to educate pilots about the risks associated with these medications.”

this section, the following categories of human subjects research are exempt from this policy:

(4) Secondary research for which consent is not required: Secondary research uses of identifiable private information or identifiable biospecimens, if at least one of the following criteria is met:

(ii) Information, which may include information about biospecimens, is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers linked to the subjects, the investigator does not contact the subjects, and the investigator will not re-identify subjects.

Even more curiously, the CAMI investigative team’s IRB Research Application Form’s exemption justification statement cites obsolete provisions from the June 1991 version of the HHS *Federal Policy*.

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The testing will cover prescription, over-the-counter, and illicit drugs, including “approximately 180 drugs of interest to the Office of Aviation Medicine.” The study design also indicates that Aviation Medical Examiners (AMEs) in all nine FAA regions will be selected to obtain a random sample of approximately 7,500 urine specimens over the three-year study period and approximately 2,500 samples will be analyzed per year. (This sample size is based on an estimated total population of 400,000 pilot medical examinations per year.) The FAA will target larger AME offices to participate in the study, partially in order to better protect the confidentiality of airmen during their medical certification examination. Collection of urine samples will be take place at the AME’s office. The specimen portions reserved for analysis under the study will be shipped to CAMI for analysis using routine CAMI testing procedures. The study design further states that the “confidentiality of the airmen is of paramount concern and will be maintained throughout the study” and all FAA employees and contractors participating in the study will undergo confidentiality training and execute a confidentiality agreement.

B. Pilot Unions’ and Aviation Organizations’ Concerns with the FAA Protocol

On February 27, 2018, CAMI medical staff briefed AOPA representatives on the proposed FAA study. Shortly thereafter, AOPA and eight other aviation organizations¹⁶

¹⁶ In addition to AOPA, eight other organizations signed an April 3, 2019, letter to the FAA

sent a letter to the FAA stating “its object[ion], in the strongest possible terms, to the FAA’s proposal to proceed with the ... urine testing study.” The letter’s signatories recommended that “the study be immediately shelved and the FAA and the NTSB work with industry stakeholders on mitigations focused on prevention through outreach, communication, and education.” The signatories also urged the NTSB “to rescind its impractical safety recommendation A-14-95.”

The particular flaws identified by the nine organizations are summarized as follows:

- A urine specimen that tests positive for a drug merely indicates the presence of one or more drug metabolites but does not reflect current drug use or impairment.

- Pilots typically schedule their FAA medical examinations based on personal convenience. They frequently do not intend to fly the day of their examination, and consequently, may have ingested over-the-counter or prescription medication that day or the previous day. Even though these pilots appropriately self-report the medication being taken, they run the risk of being

Associate Administrator for Aviation Safety: the Coalition of Airline Pilots Associations, EAA, Helicopter Association International, National Air Transportation Association, National Business Aviation Association, NetJets Association of Shared Aircraft Pilots, and Southwest Airlines Pilots Association. According to the letter, the members of the nine organizations “comprise the vast majority of pilots certificated by the FAA who regularly undergo [FAA] medical Examinations. The letter is available on the [AOPA website](#).

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identified as actively flying pilots with positive urine drug test results.

- CAMI personnel may be able to identify the region and specific AME office where the urine specimen cup originated, thus violating the privacy principles for exempt research under the Federal Policy. In addition, the study protocol directs AMEs to collect information pertaining to a pilot subject to the medical examination and test protocol and provide the information on the urine specimen collection label. This process constitutes a “collection of information” subject to the approval of the Office of Management and Budget.

- The FAA should better focus its resources on implementing another recommendation proffered by the NTSB as part of its September 2014 Safety Study, A-14-92.¹⁷

- The FAA needs to do a better job of developing and making available to pilots a comprehensive list of medications that could pose a risk to aviation safety.

- The FAA study risks further erosion of trust between pilots and the Office of Aviation Medicine and AMEs.

C. The FAA’s Response to the Pilot Unions and Aviation Organizations

In a letter dated July 30, 2019, the FAA Associate Administrator for Aviation Safety responded to the pilot unions’ and aviation organizations’ April 3, 2019, letter. The reply stated that

¹⁷ “Develop, publicize, and periodically update information to educate pilots about the potentially impairing drugs identified in your toxicology test results of fatally injured pilots, and make pilots aware of less impairing alternative drugs if they are available.”

the FAA study “will provide meaningful data” and indicated that before proceeding further with the study, the agency scheduled a meeting with the NTSB “to discern whether there are any alternatives to conducting the NTSB’s called-for study.” In an attachment to its reply letter, the FAA also provided a detailed discussion addressing the study’s flaws identified above. Specifically:

- The FAA agrees that “the presence of drugs in urine does not indicate impairment. The study, however, seeks to document population prevalence of over-the-counter and prescription medication, and illicit substances used among the applicant population. This would serve as a base rate for comparison to results from fatal cases. We are not attempting to determine impairment in an individual pilot. Valid comparisons are possible with the fatal case findings. ... We concur that the subjects are not actively flying on the day of the exam. We accept the limitation of using applicants and intend to acknowledge this in the study report. We note, however, that less than 1% of applicants are ultimately denied by the Federal Air Surgeon.”

- “The proposed study does not meet the definitions of 5 CFR 1320 [Controlling Paperwork Burdens on the Public] concerning information requests. No new burden on the public is created — airmen submit urine samples as part of their routine exam, required by regulation. AMEs, designees of the FAA, accomplish the work of transferring samples to a de-identified sample cup and marking the label with class of medical certificate

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applied for, age range, and highest airman certificate held.”

•“AME practices have been selected to be representative of the pilot population. Each selected AME will forward a small number of samples over a limited number of days. Selected AMEs will transfer urine samples remaining after diabetes testing into de-identified collection cups and will forward them to CAMI via Federal Express. Pilot identity **will not be linked** to the forwarded sample. The labels stipulate only class of medical applied for, age range, and highest certificate obtained. CAMI will not make any attempt to re-identify pilots and no action can be taken against any airman for any findings.” (Emphasis in original).

•“We estimate the total cost of the study at \$300,000. This is a mid-range cost estimate for a study at the FAA Civil Aerospace Medical Institute (CAMI). We selected a length of three years to accommodate anomalies or artifacts that may occur in shorter periods of time (e.g., changing drug use trends, differences in period of certification validity). We also wanted to maintain timely and routine operations of the toxicology laboratory, which analyzes samples from accidents throughout each year. What we have proposed will produce the most valid estimates of prevalence without overwhelming CAMI’s capacity to process specimens. We are open to suggestions for a better study methodology that is valid for documenting population prevalence of over-the-counter and prescription medication, and illicit substances among the living applicant population and comparison with that of aviators

involved in fatal accidents.”

•“The FAA’s goal is to be honest and forthright about this study. We have reached out to pilot organizations to inform them of the study plan and to get feedback on its design. We have found the discussions productive and have removed some of the demographic data points from the sample label to further ensure anonymity. We have designed the study to protect the trust of ... AMEs and pilots by de-identifying the urine samples to such an extent (prior to shipment to CAMI) that the results cannot be linked back to them. In addition, medical examinations and certification decisions will in no way be impacted by findings from the drug analyses. The urine specimen will only be tested for glucose for the certification exam, as is routine. The remaining specimen will be de-identified and sent to CAMI for the study.”

IV. Current Status of the FAA Study

In the attachment to its July 30, 2019, letter, the FAA did indicate it “will do additional work to further address concerns about informing pilots and AMEs about the study. We propose to add a statement on MedExpress and AMCS that provides information about the study, emphasizes the anonymity of the samples, and states that the results will not be used in any disciplinary or legal action against any airman. Legal or disciplinary action based upon the study would not be possible, as the submitted samples are not linked to the airmen and lack the chain of custody necessary to such actions.”¹⁸

¹⁸ The FAA’s draft of the message for

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On February 10 of this year, the FAA Administrator informed the NTSB of the following:

The FAA has obtained its first shipment of necessary supplies to conduct the research project and is finalizing the mechanisms needed for transporting these supplies to and from Aviation Medical Examiners (AME).

MedExpress would read:

Between [Start Date] and [End Date], the Civil Aerospace Medical Institute will be conducting secondary research on urine samples collected during medical certification examinations. This study is being conducted in response to an NTSB recommendation to establish the prevalence of over-the-counter, prescription, and illicit drugs among applicants for airman medical certificates. This recommendation was made in the context of increasing findings of over-the-counter and prescription medication, and illicit substance use among fatally injured airmen over the past 10 years. Individual airmen cannot be identified from the samples. This is a research project and no action will be taken against any airman due to study findings — at the most practical level, the study provides no chain of custody information necessary to such actions.

AME practices have been selected to be representative of the pilot population. Each selected AME will forward a small number of samples over a limited number of days. Selected AMEs will transfer urine samples remaining after diabetes testing into de-identified collection cups and will forward them to CAMI via Federal Express. Pilot identity **will not be linked** to the forwarded sample. The labels stipulate only class of medical applied for, age range, and highest certificate obtained. CAMI will not make any attempt to re-identify pilots and no action can be taken against any airman for any findings. (Emphasis in original).

Currently, we are deciding which AMEs from each region to invite to participate in the project. Pilot organizations such as the Aircraft Owners and Pilots Association, the Air Line Pilots Association, and the Experimental Aircraft Association, in addition to FAA Regional Flight Surgeons and executives, have all been briefed on this developing project. Feedback from these groups have resulted in more discussion between researchers, senior management at the Civil Aerospace Medical Institute, and FAA executives regarding the status of the project, which has delayed implementation. Consequently, the FAA updated NTSB staff at a meeting on August 7, 2019, and discussed the scope of the project. As a result of the above activities, the FAA anticipates completion of this project by the end of Fiscal Year 2022. I will keep the Board informed of the FAA's progress on these recommendations and provide an update by October 2020.

In its response to the FAA Administrator, dated March 10, 2020, the NTSB referenced its recently issued Safety Research Report, *2013-2017 Update to Drug Use Trends in Aviation*, SS-20-01, PB2020-100106, published March 10, 2020. This report is available on the [NTSB website](#). The NTSB pointed out that:

The results documented in this report highlight evidence of increasing use of potentially

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impairing drugs among pilots fatally injured in accidents who were mostly flying GA operations. These results mimic findings in the general US population where accidental poisonings and overdoses of alcohol and other drugs killed 70,237 Americans in 2017, up 9.6% from 2016 (CDC 2018). ... Among those pilots in this report who tested positive for drugs indicating a potentially impairing condition, an opioid was the most common (hydrocodone) and a benzodiazepine (diazepam) was the third most common. ... Like the NTSB's 2014 study, the results presented in this research update indicate that fatally injured pilots are increasingly showing evidence of having used a wide variety of drugs, which suggests a potentially serious aviation safety problem. However, as with the 2014 study, this update found

no reliable relationship between the evidence of drug use and the circumstances of the fatal accidents. Further research may identify increased accident risk associated with some drugs or combinations of drugs, which would support improved guidance or limitations on use of those drugs while flying. ... The NTSB concludes that the continuing increase in the prevalence of potentially impairing drug use by fatally injured pilots further supports the need for research to better understand the relationship between drug use and accident risk. Therefore, the NTSB reiterates Safety Recommendation A-14-95 to the FAA.

We will report on new developments in future issues of the *IATSB Reporter*.

COVID-19: Drug & Alcohol Testing

by
Greg Reigel

DOT AND FAA PROVIDE GUIDANCE, BUT NO RELIEF, TO AVIATION EMPLOYERS FACING COVID-19 DRUG AND ALCOHOL TESTING ISSUES

DOT drug and alcohol testing is still required during the COVID-19 pandemic. However, both the DOT and the FAA recently issued guidance to aviation employers who are required to conduct testing. In both cases, the guidance indicates that it is sympathetic to the drug and alcohol testing challenges faced by aviation employers as a result of COVID-19. Unfortunately, their guidance isn't particularly helpful, nor does it appear to provide any relief to employers.

ODAPC Guidance

As aviation employers should be aware, DOT has issued regulations governing how to conduct testing is found in 49 CFR Part 40. The DOT's Office of Drug and Alcohol Program Compliance ("ODAPC") issued its "DOT Guidance on Compliance with DOT Drug and Alcohol Testing Regulations."

ODAPC's guidance recognizes that compliance may be difficult, or even impossible, due to the unavailability of collection sites, Breath Alcohol Technicians (BAT), Medical Review Officers (MRO) or Substance Abuse Professionals (SAP). Although employers must make a reasonable

effort to locate the necessary resources, the guidance states

[i]f you are unable to conduct DOT drug or alcohol training or testing due to COVID-19-related supply shortages, facility closures, State or locally imposed quarantine requirements, or other impediments, you are to continue to comply with existing applicable DOT Agency requirements to document why a test was not completed.

ODAPC also suggests that employers should determine whether flexibilities allow for collection and testing at a later date, provided that this can be done in compliance with the regulations.

In the context of a potential refusal, ODAPC asks employers "to be sensitive to employees who indicate they are not comfortable or are afraid to go to clinics or collection sites." And as we know, employers are ultimately responsible for determining whether an employee has refused to be tested. As a result, perhaps a refusal situation presents a limited opportunity for the employer to take into consideration the impact of the current crisis?

COVID-19: Drug & Alcohol Testing

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But ODAPC is also clear that if an employer is unable to conduct testing, it must still comply with the applicable regulations relating to the testing to be conducted. And as with most regulatory guidance, ODAPC concludes

[t]his guidance document does not have the force and effect of law and is not meant to bind the public in anyway. This guidance is intended only to provide clarity regarding existing requirements under the law.

So, while ODAPC appears to be somewhat sympathetic to the drug and alcohol testing complications caused by the COVID-19 pandemic, at the end of the day aviation employers are still required to comply with the drug and alcohol testing regulations.

FAA Guidance

In addition to DOT regulations, employers are also bound by FAA regulations in 14 CFR Part 120. These regulations explain who gets tested and when, along with drug and alcohol-related training requirements.

The FAA has issued guidance addressing Disruptions to Drug and Alcohol Testing Due to COVID-19. While this guidance more specifically addresses aviation employers, it is only a little more helpful than ODAPC's guidance.

The FAA initially notes that it "is committed to maintaining aviation safety while providing maximum flexibility to allow the aviation industry to conduct operations safely and efficiently during the national emergency related to COVID-19." The guidance then addresses several specific aspects of drug and alcohol testing for FAA regulated employers.

•Random Testing. Employers should still try to perform random selections and testing on at least a quarterly basis. However, if an employer is unable to perform random tests during the current testing cycle, the employer should make up the tests by the end of the year to achieve the required testing percentages. **VERY IMPORTANT:** An employer in this situation should document in writing (1) what actions the employer took to locate an alternative collection site or other testing resources, and (2) the specific reasons why the employer was unable to conduct tests on employees who were selected. If the employer is later audited, this documentation will give the employer a basis to argue that it made good faith efforts to comply and could, perhaps, mitigate any potential violation and/or sanction.

•Pre-Employment Testing. No changes or exceptions here. If an employer is unable to conduct a pre-employment drug test and obtain a negative result, then the employer may not hire or transfer an individual into a safety-sensitive position. If an employee is furloughed and

COVID-19: Drug & Alcohol Testing

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removed from the random testing pool, the employer may conduct a pre-employment drug test of the employee prior to returning the employee to the random pool.

•Return-to-Duty Testing. No changes or exceptions here. An employer may not allow a safety-sensitive employee to return to perform any safety-sensitive functions until the return-to-duty test is conducted and a negative result is received.

•Follow-Up Testing. If follow-up drug or alcohol testing cannot be completed due to an employee being furloughed, his or her follow-up testing plan stops during the extended absence. The follow-up testing plan would restart when the employee returns to work, either for the employer or for a subsequent employer

•Employee Refusal. Similar to the ODAPC guidance, the FAA suggests that employers should be “sensitive to employees who indicate they are not comfortable or are afraid to go to clinics or collection sites.” Unfortunately, this doesn’t really provide any guidance for an employer who is responsible for determining whether an employee has refused testing. However, perhaps employers may take this suggestion into consideration. But at the end of the day, the FAA reminds employers that a refusal is still a violation of FAA regulations.

And, not surprisingly, the FAA also makes it a point to remind aviation employers that its guidance

is not legally binding in its own right and will not be relied upon by the FAA as a separate basis for affirmative enforcement action or other administrative penalty. Conformity with this guidance, as distinct from existing statutes, regulations, and grant assurances, is voluntary only, and nonconformity will not affect existing rights and obligations.

As a result, aviation employers will still be held responsible for compliance with the regulations.

Conclusion

While the ODAPC and FAA appears to be intended to assist aviation employers with their drug and alcohol testing obligations, their guidance fails to provide concrete answers. The two take-aways for aviation employers are (1) document in detail any circumstances that result in an inability to comply with the regulations, and (2) even in the midst of a pandemic, aviation employers are still responsible for compliance with the drug and alcohol testing regulations.

Airline Startups

by:
Michael L. Dworkin

A NUTS AND BOLTS APPROACH TO AIR CARRIER CERTIFICATION

Prologue

Question: How do you make a million dollars in the aviation business?

Answer: Start with a billion!

I. Introduction

Guiding Principle:

Air carriers owe the highest duty of care:

49 United States Code (USC) Sec. 44702: “When issuing a certificate under this part, the Administrator shall consider the duty of an air carrier to provide service with the highest possible degree of safety in the public interest...”

49 USC Sec. 44705: “The Administrator... shall issue an air carrier operating certificate to a person desiring to operate as an air carrier when the Administrator finds, after investigation, that the person properly and adequately is equipped and able to operate safely under this part and regulations and standards prescribed under this part.”

Definitions:

Air transportation:

The transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, in interstate or foreign air transportation (49 USC Sec 40102(a)(5)).

Interstate air transportation:

Operations between points in the United States, as well as between points in the United States, on the one hand, and points in U.S. territories or possessions, on the other, or between points in U.S. territories or possessions (Sec. 40102(a)(25)).

Foreign air transportation:

Operations between a place in the United States and a place outside the United States when any part of the transportation is by aircraft (Sec. 40102(a)(23)).

Small Aircraft:

1. For FAA purposes (i.e., distinguish between FAR’s 135 and 121—30 seats or less and a payload capacity of up to 7,500 pounds);
2. For DOT purposes: those with an original design capacity of 60 or fewer seats and/or less than 18,000 pounds payload capacity).

What do you want to do?

Avoidance of “Flight Department Company” issues and problems?

Large or small aircraft?

Regardless of whether small or large aircraft, all air carriers must meet the highest level of safety.

On-demand charter?

Departure time/location and arrival location specifically



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negotiated with customer. Moreover, Part 135 (small aircraft) operator can operate up to 4 round trips per week in the same city pair market using 9 seat or fewer turbojet aircraft or any size rotorcraft when departure time/location and arrival location are held out to the public.

Air taxi operations?

Scheduled all-cargo or mail service or on-demand passenger service or scheduled passenger service in small aircraft of less than five round trips a week in a single market. Such operations are considered to be “air taxi operations.”

Scheduled service?

More than 4 round trips per week in a single market:
-commuter air carrier with small aircraft
-intrastate with large aircraft;
-interstate with large aircraft;
-foreign with large aircraft.

Commuter air carrier?

An air carrier which (1) operates “small aircraft (60 seats or less and payload no greater than 18,000 pounds), and (2) carries passengers on at least five round-trip flights per week on at least one route between two or more points according to published flight schedules which specify the times, days of the week, and places between which they are performed (14 CFR Sec. 298.2(e)). 49 USC Sec. 41738 14 CFR Sec. 298.21(d) require that anyone operating or proposing to operate

scheduled passenger service as a commuter air carrier must first be found “fit, willing, and able” to provide such service.

This “fitness” requirement is in addition to the registration, insurance, and reporting requirements for commuters contained in Parts 298 and 205 of the Department’s Regulations. New commuter air carriers may not hold out or conduct scheduled passenger service unless and until they have been found fit by the Department.

Scheduled passenger air transportation?

Dual certification required--
Anyone who wants to engage in scheduled passenger air transportation as an air carrier must first obtain two separate authorizations from the Department of Transportation: “safety” authority in the form of an Air Carrier Certificate from the Federal Aviation Administration (FAA),³ and “economic” authority from the Office of the Secretary of Transportation (the Department) in the form of either a Certificate of Public Convenience and Necessity or a Commuter Air Carrier Authorization. (Limited Exception: The fitness requirement does not apply to air taxi operations.)

FAA Certification—See FAR Part 119 (14 C.F.R. Part 119):

- exclusive use of aircraft
- aircraft conformity
- training program

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- maintenance program
- GOM/GMM
- policies and procedures
- management organization
- US citizenship
- small aircraft (30 seats or under and payload up to 7,500 pounds): FAR Part 135
- large aircraft: FAR Part 121

DOT Certification—See 14 CFR Parts 200, 201, 203, 204, 205, 206, 215, 243, 298 and 302. Also see Aviation Disaster Family Assistance Act.

II. FAA Certification

FAR 135 Certification

Scope of Certificates and Operations Specifications

1. 135 Single Pilot:

Limited to using only one pilot for all part 135 operations. That specific pilot is listed by name and certificate number on the FAA-issued Operations Specification (OpSpec) A040. No other pilots are authorized. In general, the regulations do not require a single-pilot operator to develop and maintain manuals or training programs, designate a Director of Operations, Chief Pilot, or a Director of Maintenance. However, the operator must designate the management officials responsible for operational control and to provide a Hazardous Materials (HazMat) training program.

2. 135 Single Pilot in Command:

Limited to using only one PIC and up to a maximum of 3 Second In Command (SIC) pilots. The PIC and

the SIC(s) are listed by name and certificate number on FAA-issued OpSpec A039. The certificate holder is only authorized to use those pilots in the specific duty positions listed in OpSpec A039. The certificate holder is not authorized to use any other pilots, nor are any pilots allowed to serve in a duty position (PIC or SIC), unless they are listed in that duty position in OpSpec A039. Single PIC certificate holders have limitations on the size of aircraft and the scope of operations that are allowed, which include:

- Aircraft are limited to those type certificated with 9 passenger seats or less;
- Operations are limited to the US, Canada, Mexico, and the Caribbean;
- No Category II or Category III instrument approach operations are allowed;

Deviations can be granted for a required manual, training programs, and certain management positions.

3. Part 135 Basic:

Limited in size/scope of operations:

- Maximum of five pilots, including SIC's;
- Maximum of 5 aircraft can be used in their operation;
- Maximum of 3 different types of aircraft can be used;
- Aircraft are limited to those type certificated with 9 passenger seats or less;
- Operations limited to US, Canada, Mexico and Caribbean; and

vi. No Category II or Category III instrument approach operations are allowed.

Part 135 Basic operators are required to develop and maintain manuals, training programs, and have required management positions. However, due to the limited size and scope of these certificate holders, specific limited deviations to those requirements may be authorized by the FAA.

4. Standard Part 135:

A standard Part 135 operator does not have pre-set limits on the available size or scope of its operations. The applicant must apply, qualify, and be granted FAA authorization thru OpSpecs for each type of operation it wishes to conduct. Standard Part 135 operators are required to develop and maintain manuals, training programs, and have the required management positions.

5. Change in Scope of Operations:

As a certificate holder's business evolves, it may decide to change the scope of their operation. Should the operator decide to request authority for a change in the scope of their operations, an abbreviated certification process may be required.

General Requirements for FAA Part 135 Certification:

Unless not required by the specific scope of a Part 135 certificate being sought, the following items are required:

Company Ownership:

An applicant must be a citizen of the United States. If the proposed certificate holder will be owned by a partnership, each member of the partnership must be a US citizen; if owned by a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the US, the president and two-thirds or more of the board of directors and other managing officers thereof must be citizens of the US and at least 75 percent of the voting interest must be owned or controlled by persons who are citizens of the United States or of one of its possessions. (Note Open Skies: 51%)

Principal Base of Operation:

At the time of application, the applicant must demonstrate via either documentation of ownership, lease agreement, or a letter of intent that it has established a physical location for its principal base of operation.

Aircraft:

An applicant/operator must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation. The applicant must either own or have a lease agreement for a period of 6 continuous months from the time of certification to satisfy the exclusive use requirement. The applicant may begin the certification process with a letter

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of intent showing that an aircraft will be purchased or leased, but in no circumstance will the certification process be completed until the applicant provides a suitable aircraft.

The aircraft and its equipment must conform to the requirements of 14 CFR 135.25, including registration, current airworthiness certification, identification, and current airworthy condition, is required. The certificate holder must also show that the aircraft meets the requirements for all its intended operations.

Maintenance Requirements: (More stringent than for Part 91 operations)

Aircraft that are type certificated for a passenger seating configuration, excluding any pilot seat, of nine seats or less, shall be maintained under FAR parts 91 and 43 and §135.415, §135.417, §135.421 and §135.422. An approved aircraft inspection program may be used under §135.419. This can include annual inspections, 100 hour inspections, and an approved aircraft inspection programs (AAIP).

Aircraft that are type certificated for a passenger seating configuration, excluding any pilot seat, of ten seats or more, shall be maintained under a maintenance program in §135.415, §135.417, §135.423 through §135.443. This includes a continuous airworthiness maintenance program (CAMP).

In addition, the aircraft and all its components with manufacturer recommended Time Between Overhauls (TBO's) must be complied with. Any time or cycle limited components that have an incomplete maintenance record must be brought back to a zero time status. To ensure that the aircraft and maintenance records are in compliance with the requirements of Part 135, the FAA will conduct a Conformity Check on the aircraft.

Insurance:

There are specific requirements for the amount of insurance coverage a Part 135 certificate holder must carry. Prior to being authorized to commence Part 135 operations, the applicant must have the required insurance coverage and file the required forms with the FAA's Air Transportation Division, AFS-260. See OST Forms 6410 and 4507. The limits set forth in Form 6410 are also applicable to Part 121 carriers.

Economic Authority:

Applicants who are applying to conduct interstate commuter operations are required to obtain DOT economic authority—i.e., a determination that an applicant is “fit, willing, and able” to conduct operations.

Management Personnel:

In order to become certificated as a Standard Part 135

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certificate holder, an applicant must designate by name the individuals who will serve as the Director of Operations, Chief Pilot, and Director of Maintenance. FAR Sec. 119.71 prescribes specific experience requirements required to serve in these positions. If applying for certification as either a Basic or Single PIC certificate holder, an applicant may request a deviation for certain management positions.

Manuals:

At the time of formal application, company manuals must be submitted to the FAA.

General Operations Manual (GOM):

Contains the certificate holder's operations policies, methods, and procedures. Crewmembers are required to comply with the operations policies, methods, and procedures contained in the manual. §135.23 contains a list of the items that are required to be included in the GOM. Certificate holders that operate aircraft with 9 or less passenger seats generally include their maintenance procedures in the GOM.

General Maintenance Manual (GMM):

Required for certificate holders operating aircraft with 10 or more passenger seats and must include:

- Administrative policies and procedures;
- Detailed instructions for administration, management and accomplishment of the maintenance program;
- Technical data describing maintenance standards, methods, techniques and procedures.

Aircraft Flight Manual:

FAR Sec. 135.81(c) requires that operators maintain a current flight manual (or the equivalent information for certain aircraft certified without a flight manual) for each aircraft used in their air transportation operations. To satisfy the Part 135 requirements, operators may use the approved Airplane Flight Manual (AFM) or the approved Rotorcraft Flight Manual (RFM), as applicable, or they may develop, obtain approval for, and use a Company Flight Manual (CFM).

HazMat Manual:

Will or Will-Not Carry Program. Certificate holders are required to submit, for FAA approval, a Hazardous Materials Training Program, even if they do not intend to carry hazardous materials. Also see 49 CFR Parts 171 and 172.

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Training Programs:

An applicant, other than one who only uses one pilot in their operation, is required to submit a training program for their pilot crewmembers and, if applicable, flight attendants.

Initial Company Training Curriculum:

The training curriculum (completed to the extent possible) must be attached to the formal application letter. Training curriculums must include for each crewmember position:

- Basic Indoctrination Training
- Emergency Training
- Crew Resource Management (CRM) Training
- Initial Ground and Flight Training
- Upgrade Ground and Flight Training
- Recurrent Ground and Flight Training
- Requalification Training
- Differences Ground and Flight Training
- Transition Ground and Flight Training
- Hazardous Materials (hazmat)

Drug and Alcohol Program Requirements:

DOT Regulation Part 40 (49 CFR Part 40), describes required procedures for conducting workplace drug and alcohol testing for the federally regulated transportation industry. All air carriers and operators requiring certification by 14 CFR Part 119 and authorized to conduct Part 135 operations shall have a

drug and alcohol program. See 14 CFR Part 120. This program is administered by the Office of Aerospace Medicine, Drug Abatement Division AAM-820.

Transportation Administration (TSA) Security Program Requirements:

Applicants may be required to adopt and implement a TSA-approved security program. The size and scope of the security program required will be based on several factors including, but not limited to, kind of operations conducted, maximum certificated take-off weight of the aircraft, aircraft seating capacity, and whether or not they will enplane or deplane passengers within a sterile area of an airport.

Minimum Equipment List (MEL):

In the absence of an approved MEL and an appropriate Operations Specification authorization, any aircraft listed on a Part 135 Operations Specification, which has inoperative instruments or equipment, may not be operated. Although not an absolute requirement, it is highly recommended that all certificate holders submit an MEL for each type of aircraft they will be operating.

Proving Runs and Validation Testing:

Part 135 states that no certificate holder may operate a turbojet aircraft, or an aircraft

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for which two pilots are required for operations under VFR, if it has not previously operated such an aircraft in Part 135 operations in at least 25 hours of proving tests acceptable to the Administrator. Aircraft proving tests are essentially a full-scale simulation of revenue operations to demonstrate the ability to operate independently, safely, and in compliance with the applicable CFR's.

Pilots Records Improvement Act (PRIA) of 1996:

PRIA was enacted to ensure that air carriers adequately investigate a pilot's background before allowing that pilot to conduct air carrier flights. Under PRIA, an air carrier cannot place a pilot into service until after it obtains and reviews the last 5 years of the pilot's records as specified in PRIA.

General Requirements for FAR 121 Certification:

Most of the requirements for FAR 135 certification are applicable to FAR 121 certification. However, FAR 121 certification requirements are far more stringent, requirements for management personnel:

- Director of Operations;
- Director of Maintenance;
- Director of Safety;
- Chief Pilot;
- Chief Inspector;

requirements for the implementation of quality control systems and safety management systems; and providing evidence of application for (1) economic authority, (2) leases and ownership of

assets and (3) contractual relationships for the provision of aeronautical and other services.

The FAA requires that at least 60 calendar days prior to the formal application meeting, the applicant submit:

- Formal Application Letter (FAA Form 8400-6);
- Updated Pre-application Statement of Intent (PASI);
- Proposed Schedule of Events;
- Management Personnel Qualification Summary Forms;
- Quality Audit Forms;
- Proposed OpSpecs; and
- Safety Management System Accountable Executive designation letter;

and at least 30 calendar days prior to formal application meeting, the applicant submit:

- Updated Pre-application Statement of Intent (PASI);
- Evidence of Economic Authority Request; Corporate Documents;
- Deviation or Exemption Requests;
- Initial Cadre Check Airman (ICCA) Training Plan;
- Facility Lease Agreements or Proof of Ownership for aircraft, facilities and services necessary to conduct the proposed operations;
- Contract training or facilities;
- Outsourcing Contractual Agreements;
- Aircraft Lease(s) or Proof of Ownership;
- Aircraft Equipment List;
- Aircraft Interior Configuration Document;
- Aircraft Information Form (necessary to conformity

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inspection);

- Status of Drug and Alcohol Testing Program;
- Security Program; and
- HazMat Program.

The FAA will need time to evaluate all of the foregoing. Although FAA publications suggest that the FAA will review the formal application within 30 days to see if it sufficiently complies with its checklist requirements so that it can schedule the formal application meeting, this 30-day requirement is at best optimistic.

Be prepared for a certification process that will take some 18-24 months.

The FAA Air Carrier Certification Process:

Purpose: To determine whether an applicant is able to conduct business in a manner that complies with all applicable regulations and safety standards, managing the hazard-related risks in its operating systems and environment. See FAA Order 8900.1. The process utilizes a phase and gate system that has 5 distinct phases and 3 gates. All items in a phase must be successfully completed prior to continuing past a gate and into the next phase of the process. An applicant will not be certificated until the FAA is confident that the prospective certificate holder is capable of fulfilling the required responsibilities and will comply with all applicable FAR requirements in an appropriate and continuing manner.

Phase 1 – Pre-application:

This phase starts when a prospective applicant first inquires about or requests an application for an air carrier or air operator certificate. This phase can be initiated by individuals or organizations and may be in writing, or in the form of informal meetings with district office personnel. In Phase 1, the applicant will request access to the FAA Safety Assurance System (SAS) External Portal; submit a FAA Form 8400-6 Pre-application Statement of Intent (PASI) to the local Flight Standards District Office via the FAA's Safety Assurance System (SAS) External Portal and when the PASI is accepted by the FAA, the office manager will initiate the Certification Service Oversight Process (CSOP). The applicant and its key management personnel will attend a Pre-application Meeting with the Certification Team that was assigned to the certification project.

The completion of the Pre-application Phase also completes Gate 1 of the certification process.

Phase 2 – Formal Application:

Phase 2 begins when the formal application and all the required documents are received by the FAA certification team:

- Formal Application Letter
- Schedule of Events
- Compliance Statement

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- Company Manuals (GOM & GMM) (if required by the Scope of Operation)
- Training Curricula (if required by the Scope of Operation)
- Management Qualification Attachments (Resumes)
- Documents of purchase, contracts, and/or lease attachments.
- SAS Element Design Assessment Tools (ED-DCT's)
- Proposed Operations Specifications
- Flight Attendant Materials (if required)

The Formal Application Phase is concluded with the Formal Application Meeting. This meeting gives the FAA and the applicant an opportunity to address any questions and resolve minor issues encountered in the certification process to this point.

The completion of the Formal Application Phase also completes Gate 2 of the certification process.

Phase 3 — Design Assessment:

In the Design Assessment (DA) Phase the FAA will perform an in-depth review of the applicant's manuals and other documents to ensure compliance with applicable regulations and conformity to safe operating practices.

Phase 4 — Performance Assessment:

The FAA certification team determines that the applicant's proposed procedures and

programs for training and directing personnel in the performance of their duties are effective. In this phase, the emphasis is on compliance with regulations and the operating procedures contained in the applicant's manuals, as applicable.

Phase 5 — Administrative Functions:

The FAA will issue the certificate and OpSpecs to the applicant, completing the certification process.

III. DOT Certification (Economic Authority)

Applicants for an air carrier certificate authorizing scheduled service will not for any reason be issued an FAA certificate or OpSpecs until they have presented a copy of the DOT economic authority to the FAA certifying office. Proving Tests will not begin until the Department of Transportation issued the Show Cause Order, or in the case of a CFR part 135 applicant applying for 121 authority, the Final Order.

So what is entailed in DOT certification? Think of the most difficult job application that you have ever completed and multiply by a factor of 1000!

Contents of Application:

The application for economic authority (i.e., a certificate of public convenience and necessity) sets forth the service which the applicant seeks to provide—i.e., scheduled interstate

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and/or foreign transportation of persons, property or cargo. The key elements of the application are listed in DOT Regulation 204.3 (14 CFR Sec. 204.3) and include:

- name, address and telephone number of the applicant;
- form of organization/fictitious business names (including certifications from the state of incorporation);
- citizenship;
- directors and other key management personnel (with organizational chart and detailed CV's of each director and key managers).
- persons owning a substantial interest in the applicant;
- subsidiaries and affiliated companies;
- other relationships;
- pending actions and outstanding judgments;
- current aircraft and acquisition plans;
- pending investigations, enforcements actions and complaints;
- unfair, deceptive or anti-competitive business practices;
- aircraft accidents and incidents;
- narrative history of applicant and founders;
- FAA point of contact;
- service plan, financial information, revenue and traffic forecasts;
- passenger manifest information;
- waiver of Warsaw Liability Limits (OST Form 4523);
- insurance; and
- accident and victim assistance plan, all of which are set forth in numerous exhibits appended

to and made a part of the application.

Confidential Treatment:

Should the applicant wish to seek confidential treatment for any portion of the fitness information submitted, it should use the procedures set forth in DOT Regulation 302.12. Information for which confidential treatment will generally be granted includes the specific fares to be charged, estimated revenue passenger miles, available seat miles, and projected load factor, as well as aircraft leases, loan agreements, and financial statements of individuals or entities (other than parent and/or sister companies) providing funding to the applicant. Conversely, absent a clear and justifiable reason for doing so, confidential treatment generally will not be granted for an applicant's current or historical financial statements, expense forecasts or the identity of and resumes for key personnel. Applicants should bear in mind that requesting confidential treatment of documents may significantly slow the processing of the application while the Department reviews the confidentiality request. Therefore, applicants should carefully review the need for such treatment and submit for the public record redacted versions of the documents at issue that reflect all information but that which the company considers to be particularly proprietary or otherwise commercially or financially sensitive.

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DOT Proceeding:

Submission of the application will not guaranty certification. Applicant's should expect further inquiries from DOT to assist staff in making the fitness determination.

Moreover, the certification proceeding is a matter of public record. Do not be surprised if potential marketplace competitors (or even communities which own and operate the airports that will or will not be served) file oppositions to the application. Each opposition will require that the applicant file a responsive submission.

Prior to granting certification, the Department will issue an Order to Show Cause, essentially a tentative decision essentially giving the applicant or potential adverse and/or aggrieved parties the right to object to the Department's tentative decision. The certification will generally follow some 120 days later.

IV. Voluntary Safety Programs

VDRP: Voluntary Self Disclosure Safety Reporting Program (See FAA Notice 8900.511, April 25, 2019 and FAA Advisory Circular 00-58B):

VDRP provides incentives for an air carrier (or for that matter, repair station, qualified fractional ownership program, or other eligible FAA-regulated entity) to voluntarily identify, report, and correct instances of regulatory noncompliance. The program allows the FAA to oversee and participate in the root-case analysis of the events leading to the violations. The FAA reviews, approves, and oversees

corrective actions and conducts follow-up surveillance. The agency accepts the voluntary disclosure, foregoes legal enforcement action, and protects the public release of qualifying disclosures and corrective actions when all of the following criteria are met:

- The certificate holder notifies the FAA of the apparent violation immediately after detecting it and before the agency learns of it by other means.
- The apparent violation is inadvertent.
- The apparent violation does not indicate a lack, or reasonable question, of qualification of the certificate holder;
- Immediate action, satisfactory to the FAA, is taken upon discovery to terminate the conduct that resulted in the apparent violation.
- The certificate holder has developed or is developing a comprehensive fix and schedule of implementation that is satisfactory to the FAA. The fix must include a follow-up self-audit, in addition to any FAA audits.

Also see FAA Advisory Circulars (AC) 120-117 (Drug and Alcohol Program Self Disclosure) and 121-37A (HazMat Self Disclosure).

ASAP: Aviation Safety Action Program (See FAA AC 120-66):

Purpose: Prevention of accidents and incidents by encouraging employees of certificate

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holders to voluntarily report safety issues and events. ASAP's provide for education of appropriate parties and the analysis and correction of safety concerns that are identified in the program. ASAP's are intended to create a nonthreatening environment that encourage the employee to voluntarily report safety issues even though they may involve violation the FAR's. ASAP is based on a safety partnership between the FAA and the certificate holder and may include any third party such as an employee labor organization. These programs are intended to generate safety information that may not otherwise be obtainable.

Objective: Encourage air carrier and repair station employees to voluntarily report safety information that may be critical to identifying potential precursors to accidents. Under an ASAP, safety issues are resolved through corrective action rather than through punishment or discipline. The ASAP provides for the collection, analysis, and retention of the safety data that is obtained. ASAP safety data, much of which would otherwise be unobtainable, is used to develop corrective actions for identified safety concerns, and to educate the appropriate parties to prevent a reoccurrence of the same type of safety event.

An ASAP provides a vehicle whereby employees of participating air carriers and repair station certificate holders can identify and report safety issues to management and to the FAA for resolution, without fear that the FAA will use reports accepted under the

program to take legal enforcement action against them, or that companies will use such information to take disciplinary action. These programs are designed to encourage participation from various employee groups, such as flight crewmembers, mechanics, flight attendants, and dispatchers.

FOQA: Flight Operational Quality Assurance (See FAA AC 120-82):

Purpose: Voluntary safety program designed to improve aviation safety through the routine collection, analysis and proactive use of flight-recorded data. Operators will use these data to identify and correct deficiencies in all areas of flight operations. FOQA data is unique because it can provide objective information that is not available through other methods. A FOQA program can identify operational situations in which there is increased risk, allowing the operator to take early corrective action before that risk results in an incident or accident.

Objective: FOQA data can reduce or eliminate safety risks, as well as minimize deviations from regulations. Through access to de-identified aggregate FOQA data, the FAA can identify and analyze national trends and target resources to reduce operational risks in the National Airspace System (NAS), Air Traffic Control (ATC), flight operations, and airport operations. FOQA should interface and be coordinated with the operator's other safety programs, such as the ASAP, Advanced

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Qualification Program (AQP), pilot reporting systems, and Voluntary Disclosure Reporting Program (VDRP).

V. Air Carrier Certification— CAVEAT

US FAA and DOT Certification does not immunize a carrier against state and local regulation.

Aside from entering into airport use agreements and leases with airport operators/proprietors, carriers will be subject to state and local laws, including but not limited to employment laws, corporate formation and registration and trade practices—all of which are beyond the scope of this paper.

Under the Airline Deregulation Act (Pub L. 95-504, 49 USC Sec. 1371), state and local governments cannot regulate a carrier's routes, rates or services.

Carriers are also subject to the regulations of other federal departments and agencies, including but not limited to the Department of Labor (Occupational Safety and Health Administration, in particular) and Transportation Security Administration (including TSA and Customs and Border Protection).

VI. Alternatives to Air Carrier Certification

Indirect Air Carrier:

See DOT Regulation 380—Public Charter;

See DOT Regulation 295—Indirect Air Carrier.

Air Travel Club:

Membership organization, having little or no aviation assets. Flight operations provided by certificated air carrier under contract.

Uber-type Flight Sharing:

Legality is questionable at the present time.

VII. Conclusion

Are you really sure that you want to do this? The financial and human resources investment and asset and facilities acquisition are substantial, if not overwhelming. The certification process is time consuming and expensive. Once certificated, you will be operating in a highly competitive and highly regulated environment. Be careful what you ask for....

COVID-19 & Force Majeure

by
Greg Reigel

WILL COVID-19 BE A FORCE MAJEURE EVENT EXCUSING PERFORMANCE UNDER AN AIRCRAFT PURCHASE AGREEMENT?

Between stockpiling toilet paper and filling the liquor cabinet, a client recently asked me whether parties to aircraft purchase agreements or other contracts will be able to use COVID-19 (the “coronavirus”) as a “force majeure” event to excuse performance. Of course, my lawyerly answer is, “it depends.”

What Is A Force Majeure Clause?

A “force-majeure clause” is a term in an agreement that allocates the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not control or anticipate. The clause allows a party to suspend or terminate that party’s performance when a force majeure event makes performance impractical or impossible.

Oftentimes the parties will protect themselves by specifying a variety of force majeure events that would excuse performance. For example, a typical clause may excuse performance in the event of

“causes beyond a party’s reasonable control, acts of God, acts of government or military authority, acts of terrorism, mechanical difficulty (except as otherwise provided herein), war, civil commotion, strikes or labor

disputes, weather conditions, delays in transportation or shortages, or inability due to causes beyond its reasonable control to obtain necessary labor, materials, utilities components or manufacturing facilities”

When a force majeure clause includes specific events, it is usually unnecessary that the event be unforeseeable. However, when an alleged force majeure event is not specifically listed, but rather falls into the general terms of a catch-all provision (e.g. beyond a party’s reasonable control), then it is usually necessary to show that the event was unforeseeable when the parties entered into their agreement.

How Do Courts View Force Majeure Clauses?

In Texas, as in many states, whether something is a force majeure event is a factual issue determined on a case-by-case basis. The party whose performance is to be excused bears the burden of proving both the occurrence of a force majeure event and that the event has prevented the party from performing.

And it isn’t necessary for that party to prove that it acted with due diligence. But a party will generally,

COVID-19 & Force Majeure

...continued

and sometimes specifically, have a duty of good faith requiring the party to make a bona fide effort to resolve the restraint that is preventing the party from performing.

Once a court has determined that a force majeure event has occurred, the court must then analyze whether the force majeure event excuses a party's performance. To do that, the court will generally look at:

The language in the clause, including the events the parties have agreed are force majeure events;

Whether the event was foreseeable if the clause does not contain specific events, or if the alleged force majeure event falls within the "catch-all" language of the clause; and

Whether alleged force majeure event actually prevented performance or made performance impractical. The occurrence of a force majeure event alone does not excuse performance. It must actually cause a party to be unable to perform.

Is COVID-19 A Force Majeure Event?

Although the coronavirus is certainly making headlines and impacting everyone's lives, the virus itself may not actually be a force majeure event. However, actions taken or experienced as a result of the coronavirus or the government's attempts to deal with the virus may qualify. As a result, a party to an

aircraft purchase agreement may be able to argue that its performance is excused due to the coronavirus.

For example, if the parties agreed that an aircraft was to be relocated for delivery, a national travel ban intended to curb the spread of the virus would prevent this flight. And since the ban was beyond the control of the parties, it would likely be considered a force majeure event.

However, depending upon the language in the agreement, this event may only delay performance rather than terminating a party's obligation to perform. It is possible, though, that a temporary legal ban on performance could completely excuse performance depending upon the circumstances.

A similar situation could arise when a pre-purchase inspection of an aircraft discloses a discrepancy requiring replacement of a part or component. If the part or component is unavailable due to disruptions in the supply chain directly resulting from the coronavirus, that could be considered a force majeure event. Lack of qualified personnel to repair the aircraft due to illness or self-confinement as a result of the coronavirus could, depending upon the circumstances, also qualify as a force majeure event.

On the other hand, an economic downturn in the aircraft sale market would likely not be considered an unforeseeable occurrence that would justify application of the force majeure clause, even if the market downturn

COVID-19 & Force Majeure

...continued

resulted from the coronavirus. A force majeure provision will not excuse performance simply because performance has become more economically burdensome than a party anticipated or if the financial terms of the transaction are not consistent with the changed market.

Conclusion

We are certainly living in interesting times. The coronavirus is

impacting all of us in our daily lives. Its impact may also directly impact parties buying and selling aircraft. The virus's impact on these transactions will depend upon the facts and circumstances of each transaction and the applicable state law. And the full extent of that impact remains to be seen. Aircraft buyers and sellers impacted by the coronavirus will need to carefully analyze their situations to determine their rights and obligations.

President's Message

...continued from
page 2

in order to offer value and service to our members. Not only did we have a wide range of interesting aviation law topics, we offered instruction on ethics, technology, and diversity and inclusion. Planning is already underway for our next major conference in spring 2021 in Washington, DC. Between now and then, keep an eye out for regional events.

Building a broader member base and offering a wider range of training are parts of a strategic shift toward diversity and inclusion. I am so proud of Vice President Jamie Rodriguez and Regional Vice President Elizabeth Vasseur-Browne for agreeing to lead us through implementation of a diversity and inclusion policy that will benefit our Association in the years ahead. It is directly related to membership growth, so it will be a powerful vehicle to recruit

and retain members who represent diversity in every respect. It is also the right thing to do.

In closing, I urge you not to think of us as a niche Bar Association. Our future vitality depends upon growth in scope and growth in membership. If each of us recruited just one new member, IATSBA would double in size. As the coronavirus reminds us, we can't predict the future, but we can take actions that help shape the future. For our Association, that means renewed commitment in furtherance of expansion, relevance, diversity, inclusion, quality, value, and camaraderie.

Thanks for your continued membership and support, and I hope that each of you and your families are doing well and staying healthy.

IATSBA Meetings



IATSBA Social at NBAA 2019 in Las Vegas, NV.



LEFT: President Marc Warren and Board Member A.L. Haizlip presenting the Joseph T. Nall Safety Award to Peggy Gillian
RIGHT: Present Marc Warren and Board Member A.L. Haizlip

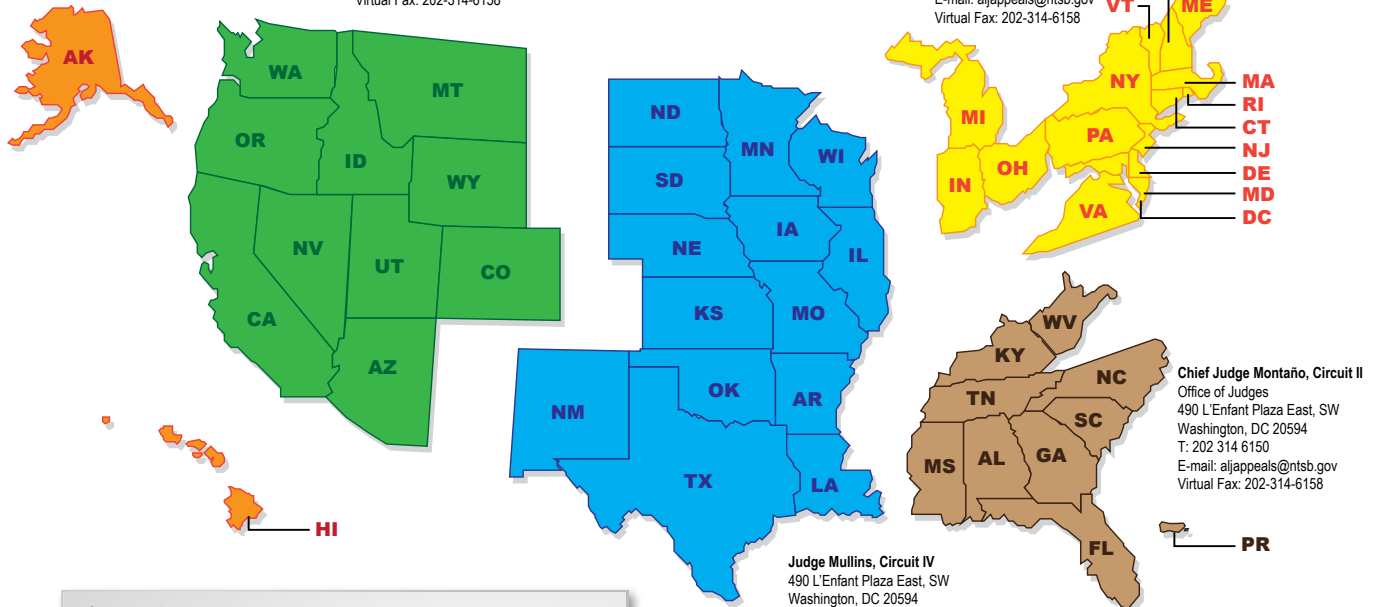
Circuit Assignments



NTSB LAW JUDGE CIRCUIT ASSIGNMENTS

Judge Schumacher, Circuit III
 4760 Oakland Street
 Denver, CO 80239
 T: 202-314-6150
 E-mail: aljappeals@ntsb.gov
 Virtual Fax: 202-314-6158

Judge Woody, Circuit I
 Office of Judges
 490 L'Enfant Plaza East, SW
 Washington, DC 20594
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 E-mail: aljappeals@ntsb.gov
 Virtual Fax: 202-314-6158



- Cases in Alaska and Hawaii will be rotated among judges.
- Emergencies will be assigned across circuits based on availability.

Judge Mullins, Circuit IV
 490 L'Enfant Plaza East, SW
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 490 L'Enfant Plaza East, SW
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IATSBA Membership

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PLEASE CIRCLE MEMBERSHIP TYPE

Checks are to be made payable to "IATSBA" and sent to the mailing address below.
Online application and payment by credit card at www.IATSBA.org.

Regular/Full Annual Membership: ----- \$119.00

Federal Government Annual Membership: ----- \$59.00

Recent Law School Graduate Annual Membership:

(Within two years of graduation from law school) ----- \$49.00

Law School Student Annual Membership: ----- NO CHARGE

Associate Annual Membership

(Associate Membership is for those not eligible for a Regular/Full Membership.)

Associate Membership is non-voting. There are two types of Associate Membership.)

Associate with listing: ----- \$129.00

(May list credentials in Membership Directory - use the lines provided above.)

Associate without listing: ----- \$119.00

