



# Air & Transportation Law Reporter

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# President's Message

by  
Marc Warren

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I hope that everyone is staying safe and healthy, and enjoyed a great, if unique, Thanksgiving. We can all be thankful for our family and friends, and grateful to be connected with each other through IATSBA. Your Bar Association is committed to persevering through the COVID-19 pandemic and planning for the future. To that end, we are both realistic and hopeful.

We were realistic when, after receiving survey input from our members, the Board decided to postpone the April 2021 Washington, DC CLE conference to a date to be determined in the Fall of 2021. The public health concerns, and travel and gathering restrictions, caused by the pandemic made continuing to work toward holding a large in-person conference in April infeasible, if not irresponsible.

We are hopeful that we can hold an in-person conference in the Fall and are looking for ways to hold more limited, regional events in the interim.

For example, the Eastern Region is exploring holding a small event with FAA leaders in the Spring and offering remote access to the event in some fashion.

With confidence in the future, we are still planning on holding elections in the Winter. We are also concentrating on membership and I am pleased that, thanks to the work of Vince Lesch and Matt Robinson, we are seeing an increasing number of membership renewals. I know everyone is tired of me saying it, but, if each member recruited just one new member, we would double in size.

I would be remiss if I did not offer my sincere thanks to those members who have renewed. You have demonstrated your confidence in the Association and your actions are proof of the continued vitality of IATSBA.

I am grateful for each and every one of you, and wish you and yours a joyous and happy Holiday Season.



**MARC WARREN** is a partner and co-chair of the Aviation and Aerospace practice group at Jenner & Block, LLP. Prior to joining Jenner & Block, Marc chaired the Aviation practice group at Crowell & Moring, LLP. He served as acting chief counsel, deputy chief counsel, and deputy chief counsel for operations of the Federal Aviation Administration (FAA). Before joining the FAA, he retired after 26 years of service in U.S. Army Judge Advocate General's Corps.

# 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.

As the COVID pandemic lingers on, and the doom and gloom naysayers monopolize the headlines, it is imperative that we focus on the positive. Yes, these are interesting times, to say the least. And, yes, certain aspects of our lives have certainly become more challenging.

However, all of us have things for which we are, or should be, grateful. Take a minute or two and think about it. When you do, and I encourage you to try, I hope you will agree.

I definitely have things and people for which I am thankful. And I am especially thankful to be able to bring you the winter edition of the Air & Transportation Law Reporter. It is a good one.

Our President, Marc Warren, has spent that minute or two and expressed his gratitude for our Bar Association and all of its members. He has also highlighted the continued planning for events, both virtual and in person, that will once again bring us together for some much needed camaraderie and networking.

David Tochen, IATSBA board member and treasurer, provides us

with a summary of recent legislative activity involving various aspects of the aviation industry. And past president Tony Jobe discusses a case involving action taken by the FAA and Federal Air Surgeon in an airman medical certification situation that raises questions about the rights of an airman holding a special issuance medical certificate when the FAA decides to withdraw that authorization.

Finally, I have included an article discussing the FAA's new HIMS Step Down Plan and its impact on airmen with substance dependence who participate in the HIMS program and receive a special issuance medical certificate. The plan and the FAA guidance for the plan are also included in this edition for your reference.

To end on a thankful note, I want to express my gratitude for those of you who contribute articles for this publication. I could not do put the Reporter together without you. And thank you to our readers. I hope you enjoy this edition and, perhaps, consider becoming contributors as well.

Please stay safe and healthy. Happy Holidays.

# Elected Officers

Dear IATSBA Members,

I write to give you early notification of officer elections to be held in the winter of 2020 or early spring of 2021. The goal is to complete the elections in time to have the newly elected leadership in position at our 2021 CLE conference, to be held in Washington, D.C., on April 21-23, 2021. I am writing everyone now to encourage participation in the election, including by giving consideration to running for office. My hope is that interested members can use the months ahead to become more involved in IATSBA activities and enhance their qualifications for elected office.

I ask all of our current and prior officers and directors to encourage and assist members to become involved in the Bar Association's governance. In particular, I ask our present and past

officers and directors to teach, coach, and mentor members who have not previously served in leadership positions and who represent constituencies that have been underrepresented on our Board. As an organization, we are committed to promoting diversity and inclusion, and that includes diversity and inclusion in governance.

The 2021 election will be critical to the future of our Bar Association. Every single officer position, including all regional vice presidents, will be open for election. Look for announcements on the IATSBA website and in future newsletters about deadlines to express interest in running for office and election procedures. In the interim, please let me know if you have any questions or concerns.

v/r, Marc

## ***National Officers***

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# Actions of the 119th Congress

## Addressing Aviation

by:  
David Tochen

in the past, Air & Transportation Law Reporter has not devoted too much copy to addressing Congressional actions related to aviation. To address this, I would like to offer periodic summaries in the Reporter that briefly describe recent legislative proposals and their status, as well as related Congressional committee activities and House and Senate floor actions, if any, related to these proposals.

This non-exhaustive summary highlights numerous legislative proposals introduced in either the first or the second sessions of the current Congress (the 119th) and indicates the current status of each proposal. Please bear in mind, that with one exception, none of these proposals is broad in scope. With the enactment of the FAA Reauthorization Act of 2018 (Public Law 115-254) in October 2018, with an expiration date of September 30, 2023, it should not be surprising that most of the current aviation proposals do not address aviation matters in a comprehensive fashion. Also, it is important to point out that with the adjournment of the second session of the 116th Congress in late December 2020 or early January 2021, it is unlikely that any of the legislative proposals summarized below will be enacted into law. It is also possible that a number of these proposals will be reintroduced in the 117th Congress.

1. Aircraft Certification Reform and Accountability Act, H.R. 8408, introduced 9/29/2020, Rep. DeFazio (D-OR), reported by the Committee

on Transportation and Infrastructure, 11/16/2020, H. Rpt. 116-579, passed by the House of Representatives, 11/17/2020. See also, the Majority Staff of the Committee on Transportation and Infrastructure's Final Committee Report on The Design, Development & Certification of the Boeing 737 MAX, Sept. 2020.

This bill is the most significant legislative action taken by the 116th Congress. It (as well as S. 3969, discussed immediately below) addresses recommendations made as the result of the many reviews conducted of the design, development, and certification of the Boeing 737 MAX. Among other things, it:

- Reforms and improves the FAA's process for certifying new airplane designs;
- Requires US aircraft and aerospace industry manufacturers to adopt safety management systems, which include safety reporting programs for their employees;
- Requires an expert review panel to evaluate Boeing's safety culture and to make recommendations for improvements;
- Requires manufacturers to complete system safety assessments for significant design changes, to ensure that risk calculations are based on realistic assumptions of pilot response time, and to share risk assessments with the FAA;
- Requires the FAA to revise and improve the agency's process for amending type certificates of older



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# Congress Addresses Aviation

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airplane designs to add new derivatives and ensure harmonization with the processes of other international states of design;

- Creates a Call to Action on pilot training to assess, among other things, global pilots' manual flying skills and effectiveness in management automation to improve safety;

- Prohibits a transport-category aircraft manufacturer's failure to disclose to the FAA, airlines, and pilots, detailed information on systems such as MCAS that can alter an airplane's flightpath without pilot command and other augmentation and autoflight systems;

- Prohibits delivery of airplanes that do not conform to their FAA-approved type designs, except when the non-conformity was unintentional, does not erode safety by any measure, is fully disclosed to the FAA and customer, and corrected within a specified timeframe;

- Extends airline whistleblower protections to U.S. manufacturing employees to these employees can report safety concerns without fear of reprisal by their employers;

- Requires FAA approval of new Organization Designation Authorization (ODA) unit members beginning one year after enactment, and imposes a civil penalty against those individuals within a company who interfere with a unit member's performance of their FAA-authorized duties; and

- Authorizes more resource to recruit new and retain FAA certification-related personnel.

2. Aircraft Safety and Certification Reform Act of 2020,

S. 3969, introduced 6/16/20, Sen. Wicker (R-MS), reported by the Committee on Commerce, Science, and Transportation, 11/18/20, Press Release.

This bill would implement provisions that are also addressed in H.R. 8508 (above). In addition, the bill includes provisions added during the Committee's consideration of the bill. These provisions would:

- Require a Transportation Research Board (TRB) study of the Transport Airplane Risk Assessment Methodology (TARAM) process used by the FAA;

- Authorize appropriations to support international efforts to improve safety;

- Create a National Air Grant Fellowship Program;

- Require the FAA to review and revise the aviation regulation commonly known as the "changed product rule";

- Require the FAA to establish a Technical Certification Board to review new or novel technologies related to the certification of certain airplanes;

- Establish a TRB annual report that identifies, categorizes, and analyzes emerging safety trends in air transportation;

- Include a modified version of Chairman Wicker's "Federal Aviation Administration Accountability Enhancement Act" (S. 4565)'

- Require the FAA to develop guidance for procedures for document traceability and clarity of explanations for system safety assessment certification documents

# Congress Addresses Aviation

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and changes to aircraft type designs;

- Authorize appropriations for the FAA's Advance Materials Center of Excellence;

- Include the "Promote Aviation Regulations for Technical Training (PARTT) 147 Act of 2019" (S. 3043);

- Prohibit the FAA from delegating any finding of compliance or system safety assessment for any critical system design feature of a transport category airplane required for any certificate until the FAA has review and validated any underlying assumptions related to human factors;

- Require a TRB report on (1) the placement of time and other limits on type certificates and (2) requiring the FAA, when issuing an amended or supplemental type certificate for a design not in compliance with latest applicable airworthiness standards, to document any exemption or finding of equivalent level of safety.

3. Safe Aircraft Maintenance Standards Act, H.R. 5119, introduced 11/15/2019, Rep. DeFazio (D-OR), reported by the Committee on Transportation and Infrastructure, H. Rpt. 116-462, 7/29/2020.

The bill, among other things would:

- Require that all foreign aircraft repair stations be subject to at least one unannounced safety inspection each year;

- Require air carriers to submit monthly reports to the Federal Aviation Administration (FAA) with respect to maintenance, preventative maintenance, or alterations of an aircraft;

- Set forth minimum qualifications for mechanics and others working on U.S. registered aircraft at foreign repair stations; and

- Establish a moratorium on FAA certification on new foreign aircraft repair stations if certain regulations are not implemented within one year.

4. National Center for the Advancement of Aviation Act of 2020, H.R. 8532, introduced 10/6/2020, Rep. Carson (D-IN).

This bill would establish the National Center for the Advancement of Aviation as a federally chartered entity to serve as a national independent forum to facilitate collaboration and cooperation between aviation and aerospace stakeholders and to support and promote civil and military aviation and aerospace. Under the bill's provisions, the Center would be responsible for:

- The development and sustainability of a well-qualified, well-trained civil and military aviation and aerospace workforce;

- Conducting research and development of new aviation and aerospace training materials and products;

- Coordinating the dissemination of grants for the development of aviation and aerospace oriented high school STEM education curriculum;

- Facilitating collaboration between institutions of higher education or other research institutions engaged in aviation,

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aerospace or related research or technical development, including those institutions designated as Centers of Excellence or Test Centers of the Federal Aviation Administration and aviation and aerospace industry.

5. National Aviation Preparedness Plan Act of 2020, H.R. 8712, introduced on 10/30/2020, Rep. Larsen (D-WA).

The bill would require the U.S. Department of Transportation to collaborate with other government agencies to develop a national plan that would prepare the aviation industry for future communicable disease outbreaks. In addition to working with the Departments of Homeland Security and Health and Human Services, among others, the DOT would consult with the U.S. aviation industry, labor unions, and other key aviation stakeholders on the plan. Further, the bill would require a Government Accountability Office (GAO) assessment of the plan.

6. Amy and Jocelyn Gannon Helicopter Tour Safety Act, S. 4645, introduced 9/22/2020, Sen. Baldwin, (D-IL).

The bill would improve requirements for commercial air tours and commercial air tour operators. Among other things, it would require the FAA to:

- Develop a process to review and approve flight routes used by commercial air tour operators;
- Develop and implement, in consultation with the National Weather

Service:

- > a process to obtain and evaluate any flight route, or segment thereof, used by commercial air tour operators that is susceptible to rapidly changing events;

- > criteria to determine whether the frequency of rapidly changing weather events requires that a commercial air tour operator be prohibited from flying along any section of a flight route;

- Survey the number and placement of weather cameras installed through the agency's Aviation Weather Camera Program, or equivalent State-sponsored program, to determine whether there is sufficient weather camera coverage;

- Establish training requirements for commercial air tour operators to utilize real-time weather information made available through the agency's Aviation Weather Camera Program; and

- Implement NTSB recommendations to require all Part 135 operators to install flight data recording devices capable of supporting a flight data monitoring program.

7. Safe and Quiet Skies Act of 2019, H.R. 4547, Rep. Case (D-HI).

The bill would impose safety requirements on commercial air tour flights. The bill would:

- Preclude commercial air tour operators from operating under less restrictive General Operating and Flight Rules codified at 49 CFR part 91;

- Require the Federal Aviation Administration (FAA) to adopt and implement all recommendations



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issued by the National Transportation Safety Board (NTSB) concerning operators under 14 CFR part 135 (Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons On Board Such Aircraft) that the NTSB classifies the FAA response as "Open Unacceptable."

- Allow states, localities, and tribes to impose stricter regulation on commercial air tour flights in their respective jurisdictions. (Stricter regulation may include banning air tours; imposing day and time flight restrictions; regulating the total number of flights per day; regulating route requirements over residential, commercial, recreational, and tribal areas; prohibiting flights over state or local parks, ocean recreation, cemeteries, and other areas of state or tribal interest; and requiring commercial air tour operators to operate at lower decibels for purposes of noise requirements.)

- Prohibit commercial air tour operators from operating within a half mile of a military installation, national cemetery, national park, national wilderness area, and national wilderness preserver;

- Require that a commercial air tour flight operates, with certain limited exceptions (including takeoffs and landings), at an altitude of less than 1,500 feet;

- Preclude operation of commercial air tour flights over residential, commercial, and recreational areas to be no more than 55hbA;

- Require the FAA to issue a regulation applying the "sterile cockpit rule" to commercial air tour flights; and

- Require the FAA to revise 14 C.F.R. § 91.227 to require the use of ADS-B Out during the entire operation of a commercial air tour.

8. Safe Landings Act, H.R. 4166, introduced 8/6/2019, Rep. DeSaulnier (D-CA).

The bill would require:

- the FAA to implement systems that would alert both pilots and air traffic controllers if a plane is not properly aligned to a runway;

- the FAA to gather data and report on under what circumstances airlines require pilots to back up visual approaches with electronic guidance to verify they are landing on the correct runway, and issue guidance on the most effective techniques;

- the FAA to create a *Task Force on Human Factors in Aviation Safety* to review and provide recommendations;

- the NOTAM system to be harmonized with International Civil Aviation Organization (ICAO) standards; and

- the Government Accountability Office to do a study on the concerns some pilots have with cockpit voice recorders (CVRs), like inappropriate foreign government use, and provide recommendations to improve CVRs while protecting pilots.

9. Safe and Quiet Skies Act of 2019, H.R. 4547, Rep. Case (D-HI).

The bill would impose safety requirements on commercial air tour flights.

# An Airman's Statutory Rights

by  
Tony Jobe

## AN AIRMAN DOES NOT CHECK HIS OR HER CONSTITUTIONAL AND STATUTORY RIGHTS AT THE DOOR TO THE OFFICE OF THE FAA AND THE FEDERAL AIR SURGEON

*"Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."*<sup>2</sup>

### Procedural Due Process

The due process clause of the United States Constitution's Fifth Amendment ("Fifth Amendment") forbids the federal government from depriving any person "of life, liberty, or property without due process of law." The Fifth Amendment generally requires that an individual be afforded an opportunity for a hearing "before he is deprived of a protected interest."<sup>3</sup> An airman's right to constitutionally protected procedural due process does not stop at the FAA's door.

The Administrative Procedure Act ("APA") provides that a decision of the Federal Aviation Administration must be held unlawful and set aside if it is found to be "arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law."<sup>4</sup> A federal court does not "simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment."<sup>5</sup>

Nor does the court "supply a reasoned basis for the agency's action that the agency itself has not given."<sup>6</sup> Instead, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."<sup>7</sup>

In addition, the *Pilot's Bill of Rights I* requires that the FAA employ "an appropriate and fair evaluation" of a pilot's medical qualifications.<sup>8</sup> "Somebody told me so" can hardly be considered an evaluation at all, much less an appropriate and fair evaluation. An airman's statutorily guaranteed protections do not stop at the FAA's door.

\* The term "airman" and pronoun "his" throughout this article is intended to be gender-neutral.

2 *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

3 *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original).

4 5 U.S.C. § 706(2)(A).

5 *Fox v. Clinton*, 684 F. 3d 67, 75 (D.C. Cir. 2012) (internal citations omitted).

6 *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

7 *Fox v. Clinton*, 684 F. 3d 67, 75.

8 Pub. L. No. 112-153, §4(b), 126 Stat. 1159, 1163, Section 4(b)(4)(A).



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# An Airman's Statutory Rights

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These are some of the legal considerations applicable when the FAA's Federal Air Surgeon (1) withdraws an airman's authorization for a special issuance medical certificate, (2) fails to provide notice or opportunity for a hearing, (3) fails to appropriately and fairly evaluate the facts and circumstances, and ultimately (4) fails to demonstrate any reasoned decision-making. If that scenario sounds far-fetched, unfortunately, it is not.

## The Factual Scenario

An airman received a Letter of Investigation ("LOI"), notifying him that the FAA was investigating and could initiate enforcement action against the airman's pilot's certificate. Without the benefit of receiving a copy of the Enforcement Investigative Report ("EIR"), the airman received a decision from the Federal Air Surgeon's office that read something like this:

You were previously granted an Authorization for Special Issuance of a Medical Certificate under FAA regulations. We have received a report that you failed to submit to a drug test required by 49 C.F.R. Part 40 and 14 C.F.R. Part 121. Therefore, you are ineligible for airman medical certification and your special issuance medical certificate authorization. Your special issuance medical authorization is withdrawn, and you must surrender your medical

certificate immediately. If you have any questions, you may call a member of my staff.

The airman, through counsel, sent a letter to the Federal Air Surgeon requesting reconsideration of the decision. No response was received prior to the 60-day statutory deadline to file an appeal with the National Transportation Safety Board pursuant to the APA. The FAA agreed that the Federal Air Surgeon's decision is a final decision of the FAA appealable to the U.S. Court of Appeals.

It is indisputable that an airman's name and reputation are at stake when the FAA withdraws the airman's special issuance medical certificate due to a failed drug test. This is especially true when the special issuance addressed a totally unrelated medical condition. The U.S. Supreme Court's settled precedent says that in that circumstance "notice and an opportunity to be heard are essential."

The FAA did not dispute that an airman with authorization for a special issuance medical certificate has a constitutionally protected property interest in that medical certificate, a constitutionally protected liberty interest in his professional and personal reputation, and a constitutionally protected liberty interest in his chosen profession as a commercial pilot.

# An Airman's Statutory Rights

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## The Legal Arguments

The Fifth Amendment requires that the government respect all of the rights and protections guaranteed by the Constitution before the government can deprive any person of liberty or property. Thus, an airman has a constitutionally protected right to proper notice of the FAA's intent to deprive the airman of his or her medical certificate.

The FAA insisted in this case that the LOI provided constitutional notice because it put the airman on notice of possible enforcement action. However, at the same time, the FAA conceded that withdrawal of an authorization for special issuance medical certificate was not an enforcement action. An LOI noticing possible enforcement action does not get the job done when it comes to providing notice of proposed FAA action against a medical certificate.

The Supreme Court has also held that “[s]ome form of hearing is required before an individual is finally deprived of a property interest.”<sup>9</sup> Stuningly, the FAA posited that the Federal Air Surgeon was not required to provide the airman an opportunity to be heard prior to withdrawal of his medical certificate nor was the FAA “required to provide ‘a detailed explanation of the factual or legal basis for the agency’s action’” at all.

The FAA insisted that the offer to contact a member of the Federal Air  
<sup>9</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Surgeon's staff met the constitutional requirement for a hearing, even though subsequently the FAA conceded that the Federal Air Surgeon never answered a letter from the airman's attorney that sought redress. An unanswered request for reconsideration letter does not get the job done when it comes to providing a meaningful opportunity for the airman to be heard.

In effect, the FAA argued that airmen check their constitutional procedural due process rights for both notice and hearing at the FAA's door.

A final decision of the Federal Air Surgeon regarding the withdrawal of authorization of a special issuance medical certificate to an airman is also subject to judicial review pursuant to the Administrative Procedure Act (“APA”).<sup>10</sup> The APA's protections are particularly important to an airman whose daily life, ability to pursue his or her career as a commercial pilot, and earn a living are intertwined with the FAA's regulatory authority to issue and withdraw the airman's special issuance medical certificate.

To meet the APA's “arbitrary and capricious” standard, the FAA must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>11</sup>

<sup>10</sup> 5 U.S.C. §§ 701-706.

<sup>11</sup> *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quoting *Motor Vehicle Mfrs.*

# An Airman's Statutory Rights

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The APA requires that the FAA demonstrate that its final decision was evidence-based. The extent of the basis of the agency's determination as articulated in its final decision in this scenario was solely a report of a refusal to submit to a required drug test. When the FAA failed to disclose the basis of its decision, the Court could not "supply a reasoned basis for the agency's action that the agency itself has not given."<sup>12</sup>

Skirting around the Supreme Court's mandate that the FAA's decision must include "a rational connection between the facts found and the choice made", the FAA attempted to provide an ex post facto explanation in its briefing at the Fifth Circuit.<sup>13</sup> The Federal Air Surgeon, as the FAA argued, obviously would have relied on the investigation of the FAA's investigator. But, as the FAA admitted, the final decision did not say that. In fact, the FAA conceded that the Federal Air Surgeon's decision did not "expressly reference" the investigation as a basis for the agency's action giving rise to "some lack of perfection due to the absence of this reference."

Nonetheless, the FAA argued that the court should be able to "discern" the facts on which the Federal

Air Surgeon relied and how those facts were reasonably connected to his decision to withdraw the airman's medical certification. In other words, the FAA proposed that the onus should be on the court to intuitively perceive the Federal Air Surgeon's thinking. Thus, the FAA posited that it met the APA's arbitrary and capricious standard, not because the agency provided reasoned decision-making, but because the court should be able to figure it out. However, the APA's statutory protections do not stop at the FAA's door.

The provisions of 49 U.S.C. § 558(c) mandate that before the FAA takes action against a pilot's medical certificate that the airman receive both written notice of the proposed action and the facts that support its proposed action and an opportunity for the airman to demonstrate to the Federal Air Surgeon the airman's compliance with the FAA's regulations that govern the issuance/denial/withdrawal of a medical certificate. With no notice of the proposed action against an airman's medical certificate, no presentation of the facts supporting that action, and no meaningful opportunity to be heard, the FAA even violated its own statutory requirements.

Finally, in its trifecta of violative conduct, the FAA repudiated its obligation to provide the airman an "appropriate and fair evaluation" pursuant to the Pilot's Bill of Rights.<sup>14</sup>

*Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>12</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); see also *Friedman v. FAA*, 841 F.3d, 537, 544 (D.C. Cir. 2016).

<sup>13</sup> *Department of Commerce, et al. v. New York, et al.*, 139 S. Ct. 2551, (2019).

<sup>14</sup> Pub. L. No. 112-153, §4(b), 126 Stat. 1159,

# An Airman's Statutory Rights

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The FAA cited *Friedman v. FAA*, 890 F.3d 1029, 1099 (D.C. Cir. 2018) in support of the notion that the Pilot's Bill of Rights "creates no additional obligations" on the FAA. However, the FAA misinterpreted the instruction of the U.S. Court of Appeals for the D.C. Circuit in *Friedman* and ignored Fifth Circuit precedent.

In the Fifth Circuit, aspirational goal-setting statutory language, like that in the *Pilot's Bill of Rights*, while it does not bind the agency to a specific methodology, obligates the agency to establish policies and procedures consistent with the statutory language.<sup>15</sup> Although the *Pilot's Bill of Rights I*, then in the Fifth Circuit, does not tell the FAA how to provide an appropriate and fair evaluation, it does mandate that the FAA do so.

"Somebody told me so", the sole data upon which the Federal Air Surgeon informed the airman his final decision was based, can hardly be considered an evaluation at all, much less an "appropriate and fair evaluation." The FAA must learn that the protections provided by the Pilot's Bill of Rights do not stop at the door to the office of the Federal Air Surgeon.

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<sup>15</sup> See *Texas Ofc. Pub. Util. v. FCC*, 183 F.3d 393, 411 (5th Cir. 1999).

In light of the FAA's concession that (1) an airman with authorization for a special issuance medical certificate has a constitutionally protected property and liberty interests in his medical certificate and chosen profession, (2) an LOI does not provide substantive notice of proposed action against an airman's medical certificate, and (3) the Federal Air Surgeon's decision failed to inform the airman of the basis and reasons for the decision, we have argued that the FAA's process and decision violates the airman's constitutional and statutory protections for notice, hearing, appropriate evaluation, and reasoned decision-making.

## Conclusion

We await the decision of the Fifth Circuit in *Stevens v. FAA*, Case No.: 19-60934 with anticipation that the Court will also find that an airman's constitutional due process rights, protections of the APA, and obligations and protections of the Pilot's Bill of Rights do not stop at either the door of the FAA or the door of the Federal Air Surgeon. That decision will be provided when it is issued.

# HIMS Step Down Program

by:  
Greg Reigel

## Airmen Medical Certification And Substance Dependence

As you may know, an airman who has an alcohol or substance dependence does not qualify for issuance of an unrestricted airman medical certificate under 14 C.F.R. §§ 67.307(a)(4), 67.207(a)(4) and 67.107(a)(4). However, the Federal Air Surgeon may issue an Authorization for Special Issuance of Medical Certificate (“Special Issuance”) to an airman who does not qualify for an unrestricted medical certificate.<sup>1</sup>

The airman must convince the Federal Air Surgeon that he or she can perform the duties authorized by the applicable class of medical certificate without endangering public safety during the period in which the Special Issuance is in effect.<sup>2</sup> Whether to issue a Special Issuance is at the sole discretion of the Federal Air Surgeon.<sup>3</sup> And the Federal Air Surgeon’s decision whether to grant a Special Issuance is not subject to review by the National Transportation Safety Board.<sup>4</sup>

So, how does an airman find him or herself in a position where the FAA may consider the airman disqualified due to a substance dependence condition? The most common reasons are:

1 Under 14 C.F.R. §§ 67.115, 67.215 and 67.315, a person who does not meet applicable requirements may apply for the discretionary issuance of a certificate under §67.401.

2 14 C.F.R. §67.401(a).

3 *Id.*

4 49 U.S.C. § 44703(d). See also *Petition of Bartel*, NTSB Order No. EA-5622 (2012) (citing *Petition of Reder*, NTSB Order. No. EA-4438 at 4 (1996))

- The airman is arrested for driving while intoxicated (“DWI”) or driving under the influence (“DUI”) and his or her blood alcohol concentration is 0.15 or greater. The FAA views the .15 level as an indicium of tolerance which shows an ongoing alcohol problem, rather than a one-time event;
- The airman receives a second DWI/DUI; or
- The airman refuses to take a breath or blood test, which the FAA assumes means the airman was, in essence, pleading guilty to DWI/DUI (the “guilty until proven innocent” approach, which also brings to mind the colloquial reference about what we do when we “assume”).<sup>5</sup>

Once the FAA concludes that the airman has a substance dependence condition, then the airman is disqualified from being issued an unrestricted first, second, or third class medical certificate. However, the airman may still be able to qualify for a Special Issuance medical certificate, provided that the airman meets a multitude of conditions. This is where the HIMS program comes in.

## The HIMS Program

The Human Intervention Motivation Study (“HIMS”) is a program specific to aviation that coordinates the identification, treatment and return to the cockpit of airmen who suffer

5 Interestingly, while these events may be evidence of a substance dependence condition in some circumstances, the FAA’s perspective on these events isn’t necessarily consistent with the current Diagnostic and Statistical Manual (DSM-5) standards that are used by psychologists and psychiatrists to actually diagnose the condition.

# HIMS Step Down Program

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from alcoholism and other chemical dependencies.<sup>6</sup> The program is a balance between preserving the airmen's careers while still ensuring air safety.<sup>7</sup> The HIMS program provides a mechanism through which an airman with a disqualifying substance dependence condition may obtain a Special Issuance.

When an airman seeking a Special Issuance enters the HIMS program, he or she will be required to complete the following initial steps:

- The airman must submit to a substance abuse assessment;
- The airman must complete a 28-day (preferably in-patient) treatment program addressing his or her substance dependence;
- The airman must establish peer and company sponsorship
- Following the initial treatment program, the airman must complete 3 months of intensive outpatient follow up
- The airman must regularly attend peer group meetings;
- The airman must establish a regular aftercare regime; and
- The airman must submit to psychiatric and neuropsychological evaluations by HIMS-trained addiction specialists.

Once the airman has completed the initial steps and he or she is established in recovery, then the airman can apply for a special issuance medical certificate.<sup>8</sup> If the

<sup>6</sup> See [HIMS website](#).

<sup>7</sup> *Id.*

<sup>8</sup> See also *FAA Guide for Medical Examiners* for additional information on the FAA's requirements and the process for obtaining a Special Issuance

FAA is convinced the airman is, in fact, established in recovery, then the FAA may grant a Special Issuance of a limited duration (usually 12 months) that is conditioned upon the airman's continuing compliance with certain "after care" requirements.

The airman bears the cost of his or her after care. While some airmen have insurance that may provide coverage for some, or maybe even all, of the after care requirements, many airmen do not. And unfortunately, the costs of complying with the ongoing after care requirements is expensive.

In the past, an airman who established and maintained recovery would eventually be eligible to receive an unrestricted first, second, or third class medical certificate. This meant the cost of complying with the Special Issuance after care requirements, including the monitoring, could eventually be eliminated. That is no longer the case.

## The HIMS Step Down Plan

On August 17, 2020 when the Federal Air Surgeon released its "HIMS Step Down Plan" updating its after care requirements. Now, an airman who has obtained a special issuance medical certificate through the HIMS program is faced with lifetime monitoring by the FAA.

Under the new "HIMS Step Down Plan",<sup>9</sup> an airman with a history of

after a regulatory diagnosis of substance dependence [here](#).

<sup>9</sup> A copy of the full HIMS Step Down Plan and FAA guidance follows this article.



# HIMS Step Down Program

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substance dependence will be subject to the following after care requirements:

- Permanent abstinence from mind and mood altering substances is expected for the duration of the flying career.

Initial Phase (Year 1, beginning with initial special issuance)

- Aftercare weekly for 1 year;
- HIMS psychiatrist/addictions specialist one visit at end of year 1;
- Random testing 14 screens in 12 mos and/or mobile alcohol testing e.g. Soberlink;
- Attendance at peer support group e.g. AA twice weekly;
- Chief pilot/management assessment monthly;
- Peer pilot assessment monthly; and
- HIMS AME of record every 3 months (half the visits may be virtual).

Early Phase (Years 2-4)

- Random testing 14 screens in 12 mos and/or mobile alcohol testing e.g. Soberlink;
- Attendance at peer support group e.g. AA twice weekly;
- Chief pilot/management assessment monthly;
- Peer pilot assessment monthly; and
- HIMS AME of record every 3 months (half the visits may be virtual).

Advanced Phase (Years 5-7)

- Random PEth testing (plus drug screens if indicated) 4 times in 12 months;
- Attendance at peer support group e.g.

AA weekly; and

- HIMS AME of record every 6 months.

Maintenance Phase (Year 7 on)

- HIMS AME of airman's choice at each exam.

It is important to understand that each airman in the program is still evaluated on a case-by-case basis. Thus, the timing for progression through these phases may vary from airman to airman. Progression is not automatic.

Also, the testing frequencies are minimums. The airman's HIMS AME may increase the frequency as needed, in the HIMS AME's discretion.

## Conclusions

Unfortunately, as is often the case, the FAA's guidance is incomplete. It is not clear how or when the HIMS AME may exercise his or her discretion to increase the frequency of testing, and thereby increase the airman's cost of compliance.

Equally unfortunate is the lifetime monitoring requirement. Airmen who have obtained a Special Issuance through the HIMS program are now stuck with the program for the rest of their flying careers. Although the HIMS program has certainly saved many airmen's careers, for those in the program, and those who will enter the program in the future, the obligations and costs of participation are now a career-long commitment.

# HIMS Step Down Program

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U.S. Department  
of Transportation  
**Federal Aviation  
Administration**

Aviation Safety

Office of Aerospace Medicine  
800 Independence Ave  
Washington, DC 20591

September 8, 2020

Dear HIMS Program Supporters,

This has been a year of incredible change, mostly not of our own choosing. Enclosed are three policy and guidance updates I want to share with you:

HIMS Step Down Plan

HIMS Step Down Plan Implementation

Guidance for HIMS Airmen on Furlough/Extended Leave from the Airlines

Certainly, we have not covered all the possible scenarios, but hopefully you will find the 90% solution in these documents. We have worked with our staff, psychiatry consultants, AME consultants, and the HIMS Chairs in developing them. As always, if you have further questions, please feel free to contact me.

Finally, for those who have not heard, Dr. Mike Berry will be retiring from the FAA on September 30, 2020. I cannot begin to describe the void his departure will create, but those of us who remain are committed to maintaining our program as the gold standard for the world. Thank you for your support.

Sincerely,

PENNY M  
GIOVANETTI

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Penny M. Giovanetti, D.O.  
Director, Medical Specialties Division

3 Enclosures

# HIMS Step Down Program

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## Federal Aviation Administration

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### Memorandum

Date: August 17, 2020 (revised testing verbiage September 8, 2020)

To: AAM-200, AMCD, Regional Flight Surgeons

From: Penny M. Giovanetti, D.O. Director, Medical Specialties Division, AAM-200

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Date: 2020.09.08 15:29:00  
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Subject: HIMS Step Down Plan

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On April 1, 2020, the NTSB accepted an FAA proposal which met safety recommendation A-07-43, and extended follow up for airmen with a diagnosis of substance dependence. Subsequent to that decision, AAM reevaluated the minimum requirements of the HIMS recovery program, in consultation with the airline HIMS chairs and addiction psychiatry consultants. Note that the time course below is nominal and indicates usual, uncomplicated progression of recovery but may be modified on a case-by-case basis. The testing frequencies listed are minimums and may be increased at the discretion of the HIMS AME.

Effective immediately:

Permanent abstinence from mind and mood altering substances is expected for the duration of the flying career.

Initial phase (Year 1, beginning with initial special issuance)

Aftercare weekly for 1 year

HIMS psychiatrist/addictions specialist one visit at end of year 1

Random testing 14 screens in 12 mos and/or mobile alcohol testing e.g. Soberlink

Attendance at peer support group e.g. AA twice weekly

Chief pilot/management assessment monthly

Peer pilot assessment monthly

HIMS AME of record every 3 months (half the visits may be virtual)

Early phase (Years 2-4)

Random testing 14 screens in 12 mos and/or mobile alcohol testing e.g. Soberlink

Attendance at peer support group e.g. AA twice weekly

Chief pilot/management assessment monthly

Peer pilot assessment monthly

HIMS AME of record every 3 months (half the visits may be virtual)

# HIMS Step Down Program

...continued

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Advanced phase (Years 5-7)

Random PEth testing (plus drug screens if indicated) 4 times in 12 months

Attendance at peer support group e.g. AA weekly

HIMS AME of record every 6 months

Maintenance phase (Year 7 on) –

HIMS AME of airman's choice at each exam

## 2021 IATSBA Conference Survey Results

### Constant Contact Survey Results

**Survey Name:** 2021 IATSBA Conference Survey

**Response Status:** Partial & Completed

**Filter:** None

Oct 27, 2020 9:50:04 AM

1. The IATSBA Board would like your input as a member of our organization on whether and how to pro  
next IATSBA annual conference, presently scheduled for April 21-23, 2021. Please select from the follow  
presently under consideration or propose your own alternative.

|   | Number of Response(s) |
|---|-----------------------|
| 1.Proceed in April 2021 with an in-person conference in Washington DC | 8                     |
| 2.Switch to an entirely virtual conference for April 2021; or         | 13                    |
| 3.Postpone the conference until the fall of 2021                      | 20                    |
| Other   | 6                     |
| No Responses  | 0                     |
| <b>Total</b>  | <b>47</b>             |
| 17 Comment(s)   |                       |

# HIMS Step Down Program

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## Federal Aviation Administration

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### Memorandum

Date: September 8, 2020

To: AAM-200, AMCD, Regional Flight Surgeons, HIMS AMEs

From: Penny M. Giovanetti, D.O. Director, Medical Specialties Division, AAM-200

Subject: HIMS Step Down Plan Implementation

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This document provides administrative guidance for the implementation and transition to use of the HIMS Step Down Plan (attached). **Note: The Authorization Letter, not the Step Down Plan, is the binding document for the special issuance.**

- 1) There are no changes to the initial special issuance process.
- 2) All changes to Authorization Letters must be requested by the HIMS AME and approved by the FAA (Drug & Alcohol Team at AMCD).
- 3) Progression through the Step Down Plan is not automatic.
- 4) The HIMS AME should continue to follow up and issue 6-month time limited certificates in accordance with the existing Authorization Letter until a new letter is received.
- 5) Requests for “early” Step Down will not be considered.
- 6) During transition, HIMS AMEs may immediately request a new Authorization Letter to align with Step Down phases for pilots who are one to four years past their initial special issuance. Requests for new Authorization Letters for pilots more than four years past initial special issuance should be accomplished at the next routine visit.
- 7) During transition, AMCD may request an additional worksheet be completed by the HIMS AME to facilitate review for the new Authorization Letter.

# HIMS Step Down Program

...continued



## Federal Aviation Administration

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### Memorandum

Date: September 8, 2020

To: AAM-200, AMCD, Regional Flight Surgeons, HIMS AMEs

From: Penny M. Giovanetti, D.O. Director, Medical Specialties Division, AAM-200

Subject: Guidance for HIMS Airmen on Furlough/Extended Leave from the Airlines

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Ideally, furloughed pilots would continue their recovery programs unchanged. FAA recognizes the stress of being furloughed both increases the risk of relapse and may financially limit recovery activities. The following guidance is provided to help airmen make decisions which are best for them.

Option 1 – Pilots who choose to keep their Class 1 or 2 medical certificate current, must follow all the provisions in their existing authorization letter, except those which depend on the airline, such as Chief Pilot letter, group meetings, etc. Pilots who secure other commercial flying employment should work with their HIMS AME to determine what employer documentation is reasonable to obtain. New time limited certificates and authorization letters should be issued as usual.

Option 2 – Pilots who allow their time limited medical certificate to expire should continue with participation in peer support groups e.g. AA, Birds, and continue to work with their sponsor. Annual visits with HIMS AME of record is encouraged. Special issuance authorizations will not be withdrawn. Those pilots may reenter the HIMS program by reengaging with their HIMS AME of record who will assess their recovery, reinstitute testing, request additional evaluations, if indicated, and recommend to AMCD the most appropriate phase of reinstatement. In order to expedite return to flying, the HIMS AME may issue a new 6-month time limited certificate once he/she determines the pilot is in satisfactory recovery and is otherwise qualified. The HIMS AME must then submit appropriate documentation to AMCD for concurrence and a new authorization letter.

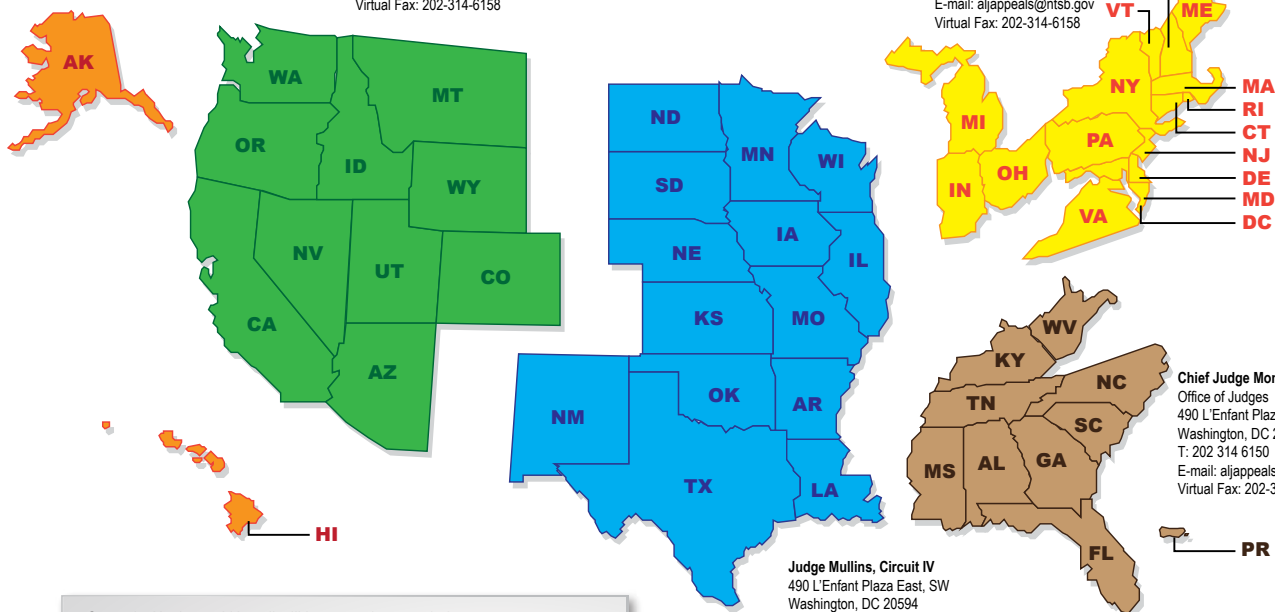
# Circuit Assignments



## NTSB LAW JUDGE CIRCUIT ASSIGNMENTS

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

**Judge Woody, Circuit I**  
 Office of Judges  
 490 L'Enfant Plaza East, SW  
 Washington, DC 20594  
 T: 202 314 6150  
 E-mail: [aljappeals@ntsb.gov](mailto:aljappeals@ntsb.gov)  
 Virtual Fax: 202-314-6158



**Chief Judge Montaño, Circuit II**  
 Office of Judges  
 490 L'Enfant Plaza East, SW  
 Washington, DC 20594  
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 Virtual Fax: 202-314-6158

**Judge Mullins, Circuit IV**  
 490 L'Enfant Plaza East, SW  
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 Virtual Fax: 202 314 6158

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

# IATSBA Membership

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Work Phone: \_\_\_\_\_ Fax Number: \_\_\_\_\_

Email: \_\_\_\_\_ Website: \_\_\_\_\_

Membership Directory Listing/Area of Practice:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## 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](http://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



International Air & Transportation Safety Bar Association

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