

**BEFORE THE  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, D.C.**

**Safety Management System Data  
Docket No. FAA-2021-0733**

**COMMENTS OF THE CARGO AIRLINE ASSOCIATION**

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**November 29, 2021**

**BEFORE THE  
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**Notice of Availability and Request for Comments  
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**INTRODUCTION**

By publication in the October 29, 2021, edition of the Federal Register (86 Fed. Reg. 60,080 et seq. (Oct. 29, 2021)), the Federal Aviation Administration (“FAA” or “the Agency”) issued a Notice of Availability and Request for Comments (“Notice”) which outlines a proposal to designate certain reports, data and information created as part of Safety Management Systems (SMS) and voluntarily provided to the FAA as protected from public disclosure. As FAA notes, “[t]he designation is intended to encourage certificate holders to voluntarily share SMS-related data with the FAA and to protect the voluntarily provided information if the FAA has a need to share it with other Federal agencies....” 86 Fed. Reg at 60,800. With the issuance of this Notice and consistent with administrative procedures, FAA has solicited public comment. Following are the Comments of the Cargo Airline Association.

**THE CARGO AIRLINE ASSOCIATION AND ITS MEMBERS**

The Cargo Airline Association is the nationwide voice for members of the all-cargo air carrier industry, and others in the air cargo marketplace that depend on these services.

Association members operate worldwide aviation systems designed to meet the time-definite, scheduled and on-demand delivery needs of their customers around the globe.<sup>1</sup>

Our members serve over 220 countries and territories worldwide, operate over 1,400 aircraft and have over 1.5 million full-time equivalent employees across the globe. Although air cargo *volume* constitutes less than 1% of all cargo transported, fully 35% of the *value* of cargo transported is transported by air. These numbers translate into the fact that airlines transport over \$18.6 billion of goods every day.<sup>2</sup> Air cargo also accounts for over 10% of the U.S. GDP and annual revenues exceed \$100 billion. Customers rely on our services to transport high value, time sensitive, products such as medical equipment, health care products, pharmaceuticals, including COVID-19 vaccines, electronics, automobile parts and perishable food products.

Safety is our highest priority and the members of the all-cargo industry are fully committed to enhancing safety through a systems approach. Our all-cargo airline members are certificated by the FAA as Part 121 air carriers and thus are required by Part 5 to have an FAA-approved Safety Management Systems (SMS) program. 14 C.F.R. § 5.1 (2015). Each carrier works closely with its Certificate Management Office (“CMO”) and representatives within the FAA Office of Aviation Safety (AVS) to ensure ongoing compliance with the rules and regulations for Part 121 air carriers. As such, members of the Cargo Airline Association have a significant interest in the outcome of this proceeding.

### **SUPPORT FOR DATA PROTECTION OF SMS-RELATED DATA**

The Cargo Airline Association fully supports the FAA’s ongoing commitment to protect from public disclosure SMS-related data, information and reports that are voluntarily submitted

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<sup>1</sup> All-cargo certificated airline members of the Cargo Airline Association are ABX Air, Inc.; Atlas Air, Inc.; FedEx Express; Kalitta Air, Inc.; and United Parcel Service.

<sup>2</sup> Data courtesy of the International Air Transport Association (IATA).

to the agency. SMS is founded on the principle that by collecting and analyzing safety data, hazards can be identified, trends can be recognized, and the appropriate safety risk mitigations can be put into place. However, for this process to work, there must be a regular and robust flow of data into the system that fosters proactive and collaborative relationships among all the parties to the process. Protection from the disclosure of safety data is paramount to the persons and organizations that will report that data and we appreciate the agency's expansion of data protections as outlined in the proposed Notice.

At a high-level, it is important that the FAA take note of the nature of SMS data that carriers submit to the FAA. SMS data is technical, business-sensitive information not made public in the ordinary course. Carriers provide such SMS data to the FAA with the understanding that it will be used for certain, limited purposes. The U.S. Supreme Court has recognized such information as falling within the scope of FOIA Exemption 4, “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is “confidential” within the meaning of Exemption 4 [of the Freedom of Information (FOIA)]”.<sup>3</sup> *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019).

As referenced in the Notice, statutory data protection for voluntarily submitted information “for the purposes of developing and implementing a safety management system acceptable to the Administrator” is contained in 49 U.S.C. § 44735(b)(4). Section 44735(b)(5) extends the limitation on disclosure to “reports, analyses, and directed studies, based in whole or in part on reports, data or other information...” 86 Fed. Reg. at 60,081. A broader protection for information beyond SMS-related data is set forth by statute in 49 U.S.C. § 40123 and by

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<sup>3</sup> Under the Freedom of Information Act (FOIA), Exemption 4 shields from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

implementing regulation in 14 C.F.R. Part 193. Under Section 40123, “neither the FAA Administrator nor any agency receiving information from the Administrator shall disclose voluntarily-provided safety or security related information if the Administrator finds that the disclosure of the information would inhibit the voluntary provision of that type of information...” 86 Fed. Reg. at 60,081. FAA intends this designation not only to expand protection of data from public disclosure and encourage data-sharing, but also if the “FAA has a need to share it with other Federal agencies with safety and security responsibilities.” *Id.*<sup>4</sup>

As set forth in this Notice, FAA is proposing to designate voluntarily provided information associated with Part 5, including, but not limited to information provided in Appendix 1, which cites the processes and associated data requirements, as protected from disclosure in accordance with Part 193. 86 Fed. Reg at 60,082. This designation would protect from public disclosure data, information and reports voluntarily submitted by any certificate holder, not just Part 121 air carriers, to the agency in furtherance of an SMS program. Because of the success of Part 5 SMS in the Part 121 air carrier industry, the evolution and expansion of SMS programs continues into other aviation industry segments (i.e., aircraft manufacturers (OEMs), airports and Part 135 air carriers). The designation outlined in this Notice would further support that evolution and would encourage those entities not currently required by regulation to develop and implement an SMS program to explore the process knowing any information submitted voluntarily to the FAA would be protected.

It is against this backdrop that the Association supports the proposed Notice. At the same time, we have identified some potential for unintended consequences or misperceptions with the

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<sup>4</sup> The FAA should clarify the conditions under which it may share air carrier SMS data with other federal agencies and what notice carriers would receive if such data were shared.

issuance of this Notice. To avoid any confusion, we offer the following for the agency's consideration.

### **CONSIDERATIONS TO ENSURE CONTINUED AND FUTURE SUCCESS OF SMS**

While there are currently specific statutory protections for SMS-related data, the broader protections under Part 193 would be extended via this Notice to include SMS-related data voluntarily provided by any certificate holder that FAA stipulates. We agree that the FAA has a safety and security responsibility as a regulator to protect public safety, and further that the action proposed herein accomplishes that goal. FAA provides that expanding the Part 193 designation would aid it in fulfilling its safety and security responsibilities. FAA notes,

[b]ecause of its capacity to provide early identification of needed safety improvements, an SMS offers significant potential for incident and accident avoidance. For example, SMS data concerning technical or operational events could potentially identify common causal factors in producing such incidents. Receipt of this information provides the FAA with an improved basis for modifying procedures, policies, and regulations in order to improve safety and efficiency.

86 Fed. Reg. at 60,082. Certainly, broader data protection would encourage the expansion of voluntarily submitted information and FAA "finds that withholding SMS information provided to the FAA is consistent with the FAA's safety and security responsibilities." *Id.* In support of this conclusion, the agency points to 14 C.F.R. 5.73(b) which outlines the processes for corrective action, as well as the practice of disclosing "de-identified, summarized SMS information that identifies a systemic problem in the aviation system, when other persons need to be advised of the problem so that they can take corrective action."<sup>5</sup> The FAA may disclose de-identified aggregate statistical information concerning SMS activities." 86 Fed. Reg. at 60,082.

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<sup>5</sup> In the Notice publication, FAA should provide more detail on its process by which data is "de-identified".

Moreover, the “FAA may disclose independently obtained information relating to any event disclosed in SMS data.” *Id.* (emphasis added).

We respectfully encourage the agency to progress cautiously with the concept of disclosing de-identified data and *information independently obtained relating to any event disclosed in SMS data*. The success of SMS is founded upon trust among all parties, the open exchange of information, and the voluntary submission of data. Again, we fully support the expansion of data protection, however, the disclosure of independently obtained information even tangentially related to a certificate holder’s SMS program or SMS data has the potential to fracture the delicate trust that exists between those parties voluntarily disclosing data and the agency. There is a potential scenario where the FAA obtains proprietary information from an “independent” source such as a vendor or supplier. We recommend that any “independent source” be limited to information that is demonstrably in the public domain. At a minimum, if the FAA receives such information from any entity and not directly from the air carrier, it should work with the air carrier to ensure the protection of that data.

Moreover, the regulated certificated holder owns its SMS program and the Safety Risk Management (SRM) component. “SRM provides a decisionmaking process for identifying hazards and mitigating risk based on a thorough understanding of the organization’s systems and their operating environment. SRM includes decisionmaking regarding management acceptance of risk to operations. (FAA Advisory Circular No: 120-92B, Safety Management Systems for Aviation Service Providers). SRM is a highly data-driven, risk-based, approach that is continuously being modified, improved and expanded. The FAA is a key partner with the air carrier and we support collaboration to enhance aviation safety. At the same time, there must be trust that any data will be fully protected from public disclosure and that this Notice will not be

interpreted as an authorization to request more supporting information based on the submission of one piece of data.

It is paramount to avoid the perception that this expansion of data protection could lead to a continuous or uncontrollable escalation of data being requested by the FAA. In order to minimize this risk, we encourage continued support by all parties for the objectives of SMS. As outlined in AC 120-92B, “SMS is an organization-wide comprehensive and preventive approach to managing safety. An SMS includes a safety policy, formal methods for identifying hazards and mitigating risk, and promotion of a positive safety culture. An SMS also provides assurance of the overall safety performance of your organization. An SMS is intended to be designed and developed by your own people and should be integrated into your existing operations and business and decisionmaking processes”. Therefore, SMS is a program maintained and managed by the certificate holder, and while FAA is key partner, we urge that the agency ensure all parties understand the goals and objectives of SMS and data protection does not authorize the release of all data internal to an organization in support of its SMS program. In other words, while the proposed data protections further encourage carriers to share SMS data, such protections do not alter the regulatory language of Part 5 SMS requirements on a carrier, nor do they obligate the carrier to provide additional data to the FAA other than what they voluntarily choose to provide.


## **CONCLUSION**

The Cargo Airline Association supports the FAA’s Notice and its proposal to extend data protections under Part 193 to SMS-related data, information and reports submitted voluntarily by any certificate holder. We respectfully urge the agency to consider potential implications for persons to resist sharing information if it becomes perceived that information will be used for



corrective action or to support regulatory initiatives. Moreover, to the extent not inconsistent with the positions set forth herein, the Cargo Airline Association also supports and endorses the Comments filed in this proceeding by our member airlines, as well as Airlines for America (A4A) and the Regional Airline Association (RAA).

Respectfully submitted,



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