



Fox Rothschild LLP
ATTORNEYS AT LAW

2023 Aviation Private Roundtable

Voluntary Aviation Safety Disclosures and NTSB Petitions for Reconsideration

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Agenda

- Statutory and Regulatory Authorities for Voluntary Aviation Safety Disclosures
- Different Types of Voluntary Aviation Reporting Programs
- Aviation Safety Information Analysis and Sharing (ASIAS) Program
- Voluntary Safety Submissions to the NTSB
- NTSB Petitions for Reconsideration

Statutory Authorities

FAA – 49 U.S.C. § 40123 – Protection of voluntarily submitted information

(a) IN GENERAL.—Notwithstanding any other provision of law, neither the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, shall disclose voluntarily-provided safety or security related information if the Administrator finds that—

- (1)** the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator’s safety and security responsibilities; and
- (2)** withholding such information from disclosure would be consistent with the Administrator’s safety and security responsibilities.

NTSB – 49 U.S.C. § 1114(b)(3) – Disclosure, availability, and use of information

(3) Protection of Voluntary Submission of Information.—

Notwithstanding any other provision of law, neither the Board, nor any agency receiving information from the Board, shall disclose voluntarily provided safety-related information if that information is not related to the exercise of the Board’s accident or incident investigation authority under this chapter and if the Board finds that the disclosure of the information would inhibit the voluntary provision of that type of information.

Regulatory Authorities

FAA – 14 CFR Part 193, Protection of Voluntarily Submitted Information

The FAA does not disclose information that is designated as protected under this part in response to a FOIA request.

Only information received under a program under this part is protected from disclosure under this part. Information obtained by the FAA through another means is not protected under this part.

NTSB – 49 CFR § 831.6(d), Voluntarily provided safety information

The NTSB will not disclose safety-related information voluntarily submitted to the NTSB if the information is not related to the exercise of the NTSB's investigation authority, and if the NTSB finds disclosure of the information might inhibit the voluntary provision of that type of information.

The NTSB will review voluntarily provided safety information for confidential content, and will de-identify or anonymize any confidential content referenced in its products.

Different Types of Voluntary Aviation Reporting Programs

- Aviation Safety Reporting System (ASRS)
- Voluntary Disclosure Reporting Program (VDRP)
- Aviation Safety Action Program (ASAP)
- Flight Operational Quality Assurance (FOQA)
- Line Operations Safety Audit (LOSA)

Questions

- How many different types of Voluntary Aviation Reporting Programs are you aware of?
- Do you have internal policies for any of these programs?
- Do you know which voluntary aviation reporting system to use?
- How often do you provide training on these programs to pilots, flight attendants, maintenance operations and related employees?

Aviation Safety Reporting System (ASRS)

- **What:** ASRS is a “voluntary, confidential and non-punitive” incident reporting system
- **Who:** Pilots, air traffic controllers, flight attendants, maintenance technicians, ground personnel and others involved in aviation operations can voluntarily submit incident reports
- **Purpose:** ASRS aims to identify deficiencies in the airspace system to improve the current and future national airspace system
- **Example of Captain’s Report:**
 - *“We were heading for a hotel and we were way too close. We made an immediate left turn. The GPWS alarm sounded as we were turning away from the obstacle. Once headed toward the runway, we...were able to stabilize the approach and land normally.... All the points on this approach are so close together, it makes it difficult to analyze where you are, where you should be, and if necessary, how to get to where you should be. All this happens...when you are configuring the aircraft and communicating with your flying partner and...ATC.... Eliminate or simplify this procedure.” See Callback from NASA’s Aviation Safety Reporting System, Issue 522 (July 2023)*

Aviation Safety Reporting System (ASRS)

2022 Top Ten ASRS Database Report Sets from NASA's ASRS Program Briefing (July 2023)

Report Set Topic	Total Downloads
Unmanned Aerial Vehicle (UAV) Reports	2,192
Passenger Electronic Devices	1,440
Runway Incursions	1,438
Maintenance Reports	1,276
Flight Attendant Reports	1,263
Air Carrier (FAR 121) Flight Crew Fatigue Reports	1,064
Wake Turbulence Encounters	1,045
Cabin Smoke, Fire, Fumes, or Odor Incidents	899
CRM Issues	877
Altitude Deviations	862

Voluntary Disclosure Reporting Program (VDRP)

- **What:** The Federal Aviation Administration's (FAA) Voluntary Disclosure Reporting Program (VDRP) provides an opportunity to report and correct areas of non-compliance without civil penalty. For example, categories of reporting include maintenance or operations errors.
- **Who:** Air carriers and other regulated entities can report to VDRP. Specifically, entities that can participate in the program include: (1) any U.S. air carrier certificated under 14 C.F.R. Parts 119, 121, 125 and 135; (2) foreign air carriers operating in the U.S. with operations specifications issued under 14 C.F.R. Part 129; and (3) other regulated entities including fractional ownership programs, Production Approval Holders
- **Purpose:** To promote and achieve compliance with FAA regulations

Voluntary Disclosure Reporting Program (VDRP)

- If the FAA accepts the disclosure, the regulated entity will receive a Letter of Correction in lieu of a civil penalty action. Prior violations of the same or similar nature will not be investigated unless the regulated entity failed to comply with all the elements of a comprehensive fix agreed upon by the FAA and the entity
- The disclosure must meet five (5) conditions
 - 1) The regulated entity has notified the FAA of the apparent violation immediately upon after detecting it and before the agency has learned of it by other means
 - 2) The apparent violation was inadvertent, i.e., not the result of purposeful choice
 - 3) The apparent violation does not indicate a lack, or reasonable question, of qualification of the regulated entity
 - 4) Immediate action, satisfactory to the FAA was taken upon discovery to terminate the conduct that resulted in the apparent violation
 - 5) The regulated entity has developed or is developing a comprehensive fix and schedule of implementation satisfactory to the FAA. This must include a self-audit to ensure correction of the noncompliance

Aviation Safety Action Program (ASAP)

- **What:** Similar to the VDRP, ASAP provides an opportunity to voluntarily report safety information that identifies potential precursors to accidents, and to take corrective action without punishment or discipline. The following examples will be protected from the disclosure under the ASAP program:
 - “(1) [e]mployee’s ASAP report, and the content of that report; (2) [t]he identity of the eligible entity associated with an accepted ASAP report; (3) [t]he name of the employee who submits an accepted ASAP report(s)...” See *FAA Order 8000.82A*
- **Who:** Unlike the VDRP, ASAP allows the “employees of air carriers, repair stations, or other entities” to voluntarily report safety information
- **Purpose:** To prevent aviation related incidents by hearing directly from the maintenance professionals

Aviation Safety Action Program (ASAP) Questions

- **Do you have the ASAP Program?**
(Eligible entities can participate the program by executing an ASAP Memorandum of Understanding with the FAA)
- **Do you have the internal resources for the ASAP?**
(Internal resources include ASAP Program Manager, ASAP Administrative Support, ASAP Analyst, and Event Review Committee Members)
- **Do you have a standardized ASAP Training Program?**

Flight Operational Quality Assurance (FOQA)

- **What:** FOQA allows an opportunity to share “de-identified aggregate information” with FAA. See *FAA AC No. 120-82*
 - De-identified Data means “[d]ata from which any identifying elements that could be used to associate them with a particular flight, date, or flightcrew has been removed.”
 - Aggregate Data means “[t]he summary statistical indices that are associated with FOQA event categories, based on an analysis of FOQA data from multiple aircraft operations.”
- **Who:** Commercial airlines and pilots can share the information
- **Purpose:** Purpose of FOQA is to allow FAA/ commercial airlines / pilots to “identify and reduce or eliminate safety risks, as well as minimize deviations from the regulations.” See *FAA AC No. 120-82*

Line Operations Safety Audit (LOSA)

- **What:** LOSA is a voluntary safety program that does not require FAA approval, acceptance or monitoring. “Observers” collect data by riding the scheduled flights through the LOSA program, securing confidential data and non-jeopardy assurance for pilots. LOSA is different from other Voluntary Aviation Safety Disclosures:
 - “For FOQA, it is flight parameter exceedances; for ASAP, it is adverse events that crews report. By contrast, LOSA samples all activities in normal operations.” See *FAA AC No. 120-90*
 - FOQA provides the “airplane perspective,” ASAP provides the “pilot perspective” and LOSA provides a “neutral, third-party perspective.” See *FAA AC No. 120-90*
 - While FOQA and ASAP is set up to collect data continuously, LOSA is set up to collect data in a project-based. See *FAA AC No. 120-90*
- **Who:** Airlines can voluntarily conduct LOSA programs
- **Purpose:** LOSA complements other voluntary disclosure programs, like FOQA and ASAP, by providing unique data collected by “observers.”

Comparison Chart

	ASRS	VDRP	ASAP	FOQA	LOSA
Who can participate	Pilots, air traffic controllers, flight attendants, maintenance technicians, ground personnel and others involved in aviation operations	Air carriers and other regulated entities	Employees of air carriers, repair stations, or other entities	Airlines and Pilots	Airlines

Aviation Safety Information Analysis and Sharing (ASIAS) Program

- In 2007, the FAA and the aviation industry launched a collaborative safety analysis and data sharing initiative known as the Aviation Safety Information Analysis and Sharing (ASIAS) program
- Designed to advance aviation safety by leveraging safety data from across the aviation industry to:
 - Identify emerging risks
 - Help evaluate the effectiveness of deployed mitigations
- ASIAS incorporates voluntarily provided safety data from operators representing a vast majority of U.S. air carrier operations in the National Airspace System

Aviation Safety Information Analysis and Sharing (ASIAS) Program

- ASIAS includes participation from corporate and business operators with over 100 participating aviation companies, as well as labor associations, flight training entities, government agencies and trade associations
- General aviation and flight training operators alone have contributed over one million flight hours of digital flight data

Aviation Safety Information Analysis and Sharing (ASIAS) Program

- ASIAS Guiding Principles:
 - Information is used solely for the identification, monitoring and mitigation of systemic safety issues
 - Submitted data is not used punitively
 - ASIAS stakeholders voluntarily submit safety-sensitive data
 - Data are de-identified to preserve anonymity
 - Roles and responsibilities of ASIAS stakeholders are developed collaboratively
 - ASIAS data use is transparent to all stakeholders and supporting organizations

Voluntary Safety Submissions to the NTSB

- 49 U.S.C. § 1114 – Disclosure, availability, and use of information
 - Subsection 1114(b)(3) – Protection of voluntary submission of information:
 - “Neither the [NTSB], nor any agency receiving information from the [NTSB], shall disclose voluntarily provided safety-related information if that information is not related to the exercise of the [NTSB’s] accident or incident investigation authority ... and if the [NTSB] finds that the disclosure of the information would inhibit the voluntary provision of that type of information.”

Voluntary Safety Submissions to the NTSB

- Legislative History of § 1114(b)(3):
 - The Committee [on Transportation and Infrastructure] is aware that the FAA, NTSB, and the aviation community are beginning to develop data sharing programs. These programs could help improve air safety by helping safety officials identify trends before they cause accidents. One such program is the flight operations quality assurance (FOQA) program under which in-flight data is collected during normal flights. Analysis of this data could help spot problems that now are uncovered only after an accident.”

House Report 104-682, July 17, 1996, p. 5.

NTSB Petitions for Reconsideration

49 Code of Federal Regulations § 845.33 -- Investigation to remain open.

The Board never officially closes an investigation, but provides for the submission of new and pertinent evidence by any interested person. If the Board finds such evidence is relevant and probative, the evidence shall be made a part of the public docket and, where appropriate, the Board will provide parties an opportunity to examine such evidence and to comment thereon.

NTSB Petitions for Reconsideration

- Examples of Petitions filed long after an accident report has been issued:
 - An entity entitled The TWA Project filed a petition for reconsideration and modification of the NTSB's findings and determination of probable cause for the crash of TWA Flight 800. The crash occurred in July 1996 and the petition was filed in June 2013. See [NTSB Docket](#)
 - The NTSB received a petition for reconsideration in 2015 for the investigation of the February 4, 1959, plane crash that killed Buddy Holly. The Civil Aeronautics Board (NTSB's predecessor agency) issued its Aircraft Accident Report on September 23, 1959. See [NTSB Docket](#)

NTSB Petitions for Reconsideration

49 Code of Federal Regulations § 845.32 -- Petitions for reconsideration or modification of report.

- The NTSB will only consider petitions for reconsideration or modification of findings and determination of probable cause from a party or other person having a direct interest in an investigation
- Petitions must be based on the discovery of new evidence or on a showing that the Board's findings are erroneous

NTSB Petitions for Reconsideration

- Petitions based on the discovery of new matter shall: Identify the new matter; contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to the NTSB's adoption of its findings
- Petitions based on a claim of erroneous findings shall set forth in detail the grounds upon which the claim is based
- Any party served with a copy of the petition may file comments no later than 90 days after service of the petition
- The NTSB may permit an oral presentation where a party or interested person specifically shows the written petition for reconsideration or modification is an insufficient means by which to present the party's or person's position

NTSB Petitions for Reconsideration

- NTSB's responses to petitions for reconsideration are not subject to judicial review
 - Appellate courts have determined that they do not have jurisdiction to review NTSB denials of petitions for reconsideration because they are not considered to be final agency orders
 - See *Joshi v. National Transportation Safety Board*, 791 F.3d 8 (D.C. Cir. 2015, cert. denied, 577 U.S. 1120 (2016)); *Helicopters, Inc. v. National Transportation Safety Board*, 803 F.3d 844 (7th Cir. 2015)

NTSB Petitions for Reconsideration

- NTSB's internal procedures for processing petitions for reconsideration ensure that staff members tasked with lead responsibility for reviewing and preparing the NTSB's response was not actively involved in participating in the underlining NTSB accident investigation
- Unfortunately, due primarily to staffing constraints, the NTSB places a low priority on responding to petitions for reconsideration, especially where the agency does not consider the accident to involve a major loss of life or one in which there is substantial public interest

NTSB Petitions for Reconsideration

- Examples:
 - Fox Rothschild submitted a September 2019 petition for reconsideration to the NTSB in a pipeline accident investigation. The petition is still pending despite the firm's repeated contacts with the agency seeking a response.
 - Fox Rothschild submitted a January 2022 petition for reconsideration to the NTSB in an aviation accident investigation. The petition is still pending.

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